ISSN 1759-2925

Discrimination Law Association

Briefings 799-812

Volume 59

November 2016

Editorial *Challenging times*

International and European issues dominate in this edition of *Briefings* – throwing into sharp relief the gulf between the current Brexit/political agenda and the UK's continuing need to solve problems collectively across EU and international borders.

The issues range through tackling global political conflict, the rights of EU nationals to social security, and rising levels of pregnancy and maternity discrimination caused, in part, by the global trend towards a deregulated 'gig' economy.

Successive governments' approaches to countering terrorism have, according to the Home Affairs Select Committee, in some circumstances, *'created suspicion and alienation amongst the very people they need to reach'*. In her analysis of the current government strategy to prevent people from being drawn into 'terrorism', Lena Mohamed from the Islamic Human Rights Commission goes much further arguing that the policy has wreaked havoc on Muslim communities across England and Wales. Given that the overwhelming proportion of people referred under the Prevent policy are Muslim and approximately one-third are children, the Commission has serious concerns about the alienation of entire communities as well as the wider impact on our rights to freedom of expression and freedom of religion.

While government must take action to counter threats to national security and protect the public, it must also ensure that such actions are effective and do not undermine fundamental freedoms which are the foundations of our safety. In addition, we must do everything we can to counter fear and perceptions of minorities as sources of danger. If we allow our politicians to use such perceptions to influence decision-making it will permit the development of policies and laws which are based on security principles, rather than on the human rights and fundamental freedoms which keep us safe. As the Council of Europe has said: *'while the State has the right to employ to the full its arsenal of legal weapons to repress and prevent terrorist activities, it may not use indiscriminate measures which would only undermine the fundamental values they seek to protect. For a State to react in such a way would be to fall into the trap set by terrorism for democracy and the rule of law'.*

Reviewing the Women and Equalities Select Committee's report following the EHRC/BIS research into the prevalence and nature of pregnancy discrimination and disadvantage in the workplace, Catherine Rayner highlights evidence of the widespread poor treatment of pregnant women and new mothers in the work place, coupled with a lack of awareness about the basic rights of pregnant women, such as health and safety rights, all of which has serious consequences for them and, presumably, for the economy. As most rights to employment protection depend on a contract which has subsisted for at least two years, the growth of part-time work, zero-hours and short-term contracts poses particular threats for some pregnant women. The Committee's recommendations to improve enforcement – for example, by reducing fees and increasing time limits – have been rejected by the government.

The briefing on *Blackwood* summarises the CA's approach to a gap in the EA for students on work placements. In order to address the need to protect a student from sex discrimination on her work placement, the CA reinterpreted the EA using the *Marleasing* principle. The case is an interesting example of how the UK courts can use the broad and purposive approach of the CJEU to ensure protection from discrimination. The influence of CJEU jurisprudence in the UK courts post Brexit is one area of serious concern for discrimination lawyers and advisers.

In the *European Commission v United Kingdom*, the tension between the core EU principle of workers' freedom of movement and the ability of member states to restrict social security benefit in certain circumstances is evident. This case confirms, contrary to much talked about 'loss of sovereignty' arising from the UK's EU membership, that it is for national governments to apply their own right-to-reside conditions on benefit eligibility even though these may disadvantage non-UK citizens.

In its international conference on *Litigating for Social Change* in October, the Law Centre NI hosted lawyers and activists from South Africa to the USA to Northern Ireland, all arguing for the importance of strategies for litigation, in partnership with communities, to challenge rights abuses and work for social change. Never, given Brexit and the issues discussed in *Briefings*, has the development of such strategies and partnerships been more important.

Geraldine Scullion
Editor

Please see page 35 for list of abbreviations

Briefings is published by the Discrimination Law Association. Sent to members three times a year. Enquiries about membership to Discrimination Law Association, PO Box 63576, London, N6 9BB. Telephone 0845 4786375. E-mail info@discriminationlaw.org.uk.
Editor: Geraldine Scullion geraldinescullion@hotmail.co.uk. Designed by Alison Beanland. Printed by The Russell Press.

Fears mount over detrimental Prevent strategy

Lena Mohamed, Caseworker and Researcher with the Islamic Human Rights Commission[1] (IHRC), argues that the government's policy to prevent people from being drawn into terrorism has wreaked havoc on Muslim communities across England and Wales. She argues that its implementation, particularly in the education system, has resulted in unlawful discrimination and interference with the right to freedom of religion and freedom of expression. But, far more than these legal breaches, she argues that the insidious nature of this policy has criminalised entire communities and resulted in collective and individual trauma at the hands of the state. She calls for repeal of, not only the statutory Prevent duty, but the entire apparatus of its implementation.

Background

The Prevent duty was introduced in 2006 as part of the government's wider counter-extremism policy, and is also one of the four-pronged counter-terrorism CONTEST strategies (the others being Prepare, Protect, and Pursue).[2]

Despite fervent criticisms of the policy because of its huge expenditure and small returns,[3] this duty became a legal one under s26 of the Counter-Terrorism and Security Act 2015 (the CTS Act). S26 imposes an obligation on specified authorities, in the exercise of their functions, to have due regard to the need to prevent people from being drawn into terrorism (the Prevent duty). The duty came into force in Scotland on March 25, 2015, and in England and Wales on July 1, 2015. It was extended to apply to higher and further educational institutions on September 18, 2015.

The specified authorities are listed in schedule 6 of the CTS Act and include those agencies concerned with local government, criminal justice, education, childcare, health and social care, and policing.

The statutory guidance[4] accompanying the CTS Act sets out the legal requirement for every public service provider – doctors, teachers, nurses, social workers, child minders, among others – to identify those who are at risk of engaging in extremism.

The guidance defines extremism as *'vocal or active opposition to fundamental British values, including democracy, the rule of law, individual liberty and mutual respect and tolerance of different faiths and beliefs. We also include in our definition of extremism calls for the death of members of our armed forces'*.[5]

Apart from these problematic and non-specific conceptions of nationhood *('British values')*, the definition is expansive and leaves room for additions (*'including'* indicating that this is not a definitive list).[6] The argument is that if one opposes these concepts then one is an extremist. According to the guidance, this extremism can lead to terrorism.[7]

Terrorism is defined in the Terrorism Act 2000 to mean the use or threat of action where:

S1 (1) (a) the action falls within subsection (2),

(b) the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and

(c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.

(2) Action falls within this subsection if it:

(a) involves serious violence against a person,

(b) involves serious damage to property,

(c) endangers a person's life, other than that of the person committing the action,

(d) creates a serious risk to the health or safety of the public or a section of the public, or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

1. The Islamic Human Rights Commission was set up in 1997. It is an independent, not-for-profit, campaign, research and advocacy organisation based in London. It works with different organisations from Muslim and non-Muslim backgrounds, to campaign for justice for all peoples regardless of their racial, confessional or political background. See http://www.ihrc.org.uk

2. See https://www.gov.uk/government/collections/contest

3. See http://www.bbc.co.uk/news/uk-28939555 for some of these arguments.

4. See for example: Revised Prevent Duty Guidance: for England and Wales Guidance for specified authorities in England and Wales on the duty in the Counter-Terrorism and Security Act 2015 to have due regard to the need to prevent people from being drawn into terrorism. Originally issued on 12th March 2015 and revised on 16th July 2015, Crown Copyright.

5. ibid, p.2

6. It means that suggestions from MPs on what constitutes 'extremism' are given additional weight. For example, David Cameron's July 2015 speech on extremism made reference to silence in the face of terrorist acts being a sign of extremism. While not written into the guidance, this obviously gives a very wide scope in interpreting this vague set of criteria.

7. Ibid, p.3

Conveyor-belt theory

The conveyor belt theory was coined by the academic Marc Sageman; it argues that people who hold non-violent extremist ideas will become radicalised, leading to them committing acts of terrorism. This continues to be pushed by the government despite experts continually calling it into question due to the lack of evidence to support such a claim.[8] It is because of this theory that schools (as well as universities, doctors' surgeries, hospitals) are being recruited to identify these would-be terrorists in their midst.

Channel programme

The local authorities have a duty under ss36 - 41 of the CTS Act to refer those who they have identified as being 'at risk' into the Channel programme in order for that individual to be protected and to receive support at an early stage.

S36 of the CTS Act requires all local authorities to establish panels which assess the extent to which the individual is vulnerable to being drawn into terrorism and to provide them with support. Panel members must include the responsible local authority and the police; they may also include children and adults' social care services, representatives from the NHS, schools, universities and colleges, among others.[9]

Each panel has a Prevent Officer (who may come from within the local authority or the police) who assesses whether the individual must be referred into the Channel programme. This programme has been widely referred to as a 'deradicalisation programme' by noted academics in the field, often to recruit individuals to intelligence services. As we will see later, Muslim communities in particular are harassed by this process due to the numbers referred to Channel.[10] This is in keeping with general practice, as other pieces of legislation have also been used to recruit Muslims as informants, such as Schedule 7 of the Terrorism Act 2000.[11] The intention here is to have Muslims identify individuals within their communities who are potential extremists and report them to intelligence agencies. Being Muslim and from these communities means they have potential unfettered access to and can gain the trust of individuals within these communities. This is further evidence that Muslims are identified as a problem and that Muslim communities are believed to be harbouring would-be terrorists.

Pre-criminal space

The government perceives Prevent to exist in the 'pre-criminal space'.[12] This is not clearly defined, but is meant to establish a distinction between Prevent – which is supposed to identify those in danger of engaging in criminal activity – and the criminal justice system.

This is hugely problematic however; the IHRC is aware that Prevent Officers overlap in their work between their local council and local police force. Furthermore, the guidance makes reference to the integral role of the police in the implementation of Prevent.[13] The IHRC has also had clients who have been questioned by police officers following a Prevent referral. Finally, it is aware that statistics of referrals to Channel are held by the National Police Chiefs' Council.[14] This idea then that Prevent sits in the 'pre-criminal space' is arguably to paint a more benign picture then the reality, which is actually that Prevent is an insidious policy of over-policing already marginalised communities in Britain.

Targeting Muslims

The Prevent guidance highlights in particular the threat from Muslims, and mentions 'Islamist extremists' explicitly without definition.[15] By comparison, extreme right-wing groups get a passing mention.[16] This imbalance trickles down to the Prevent policies which many local councils have created following the guidance. There are 50 local authorities that have been identified within the guidance as at risk of accommodating extremists. All 50 of these 'Priority Areas'[17] bar four (Brighton & Hove, Dudley, Liverpool, and Portsmouth) have Muslim populations significantly greater than the

8. See for example, Claystone's submission of evidence to the Home Affairs Committee inquiry on Counter Terrorism, 2014, pp.2-3 (http://www.claystone.org.uk/wp-content/uploads/2014/06/Claystone-Associates-Evidence_CounterTerrorism-Inquiry.pdf)

9. Channel Duty Guidance: Protecting vulnerable people from being drawn into terrorism - Statutory guidance for Channel panel members and partners of local panels, Crown Copyright, 2015.

10. See for example, Kundnani, Arun, *Spooked! How not to prevent violent extremism*, Institute of Race Relations, 2009; see also the Muslim Council of Britain, *The Impact of Prevent on Muslim Communities* February 2016.

11. *Beghal v DPP* [2016] AC 88.

12. For example, see Westminster City Council's webpage: https://www.westminster.gov.uk/about-prevent-strategy [accessed 16:50, October 17, 2016]

13. Revised Prevent Duty Guidance: for England and Wales, p.4

14. See http://www.npcc.police.uk/FreedomofInformation/NationalChannelReferralFigures.aspx [accessed 16:50, October 17, 2016]

15. Revised Prevent Duty Guidance: for England and Wales, p.3

16. Ibid.

17. Ibid. paragraph 25, p.5. The guidance mentions the priority areas but does not list them. The IHRC has accessed this list through its research and a series of Freedom of Information requests.

national average. Many of these in particular are keen to identify Muslims as 'problem communities', singling out Pakistanis, Bengalis, Afghanis and Somalis as those to target, and make reference to ISIS and Al Qaeda.[18] Typically these are poorer communities with limited access to resources and with language barriers. Some schools, universities, and doctors' surgeries, etc. develop their own prevent policies (as stand alone policies or incorporated into existing policy documents), which are even more explicit in their references to Muslims.

That this is enshrined in policy documents only gives further legitimacy to the anti-Muslim rhetoric from the media and politicians alike. The IHRC understands that of the more than 8000 people referred to the Channel programme since its inception in 2007, approximately one-third of these were under the age of 18. The Home Office has confirmed that from 2007 to 2012 over 90% of referrals were Muslim.[19] As Muslims make up 4.9 per cent of the total population living in England and Wales, it is clear that the rhetoric and policy crafted around Muslims as a 'problem group' has been successfully enforced.

To add to this, Muslim advocacy groups across the country (the IHRC included) have been inundated with cases and anecdotal stories from within their respective communities detailing fears of referrals. With increasing frequency these are becoming stories of profiling and harassment from police and Prevent Officers demanding to know their opinions on, for example, ISIS and Israel. The IHRC considers that policies such as 'stop and search', the now repealed s44 of the Terrorism Act 2000, and Schedule 7 of the Terrorism Act 2000 have resulted in such harassment for many years, but this has become more pronounced since the CTS Act came into force last year.

In schools

The government has provided numerous documents advising local authorities, particularly schools, how Prevent should operate in practice – teachers have received more guidance than for any other profession. The number of referrals of young people (one-third of the total) demonstrate the government's desire for extremism to be 'caught' early.

In practice, the Prevent policy should be implemented through:

- staff-wide training from the Home Office administered by the local council's Prevent Officer or an accredited third party (Workshop to Raise Awareness of Prevent training)[20]
- a Prevent liaison officer being appointed within the school (often the Head or Deputy Head Teacher)
- guidelines and reports produced within the school to set out intentions and results relating to Prevent
- using materials provided by the local authority or Home Office to determine whether children need to be referred to Channel (in the form of workshops, questionnaires, Physical and Sexual Health Education classes).[21]

Referrals

Based on cases handled by the IHRC, if a child is identified by their teacher or a member of the school staff as being at risk of extremism, the Prevent liaison officer in the school is notified. They pass this information onto the local authority's Prevent Officer (depending on the area there may be multiple officers). This Prevent Officer (who may be a police officer) will likely visit the school to question the child.

The IHRC has been informed on several occasions of this happening without a parent present, raising issues around consent. Police officers, social workers and/or a Prevent Officer can then visit the child's home to question the family.

School staff are given guidance on what to look out for when assessing whether they should refer a child to their Prevent Officer. Examples of this can be seen in the manual *Learning Together to be Safe: a toolkit to help schools contribute to the prevention of violent extremism* from the Department for Children, Schools and Families. Here it states the following five indicators that children are in the process of engaging with extremism:

- *may begin with a search for answers to questions about identity, faith and belonging*
- *may be driven by the desire for 'adventure' and excitement*
- *may be driven by a desire to enhance the self esteem of the individual and promote their 'street cred'*

18. http://ihrc.org.uk/activities/projects/11495-the-prevent-diaries#chapter6

19. '*Building Distrust: Ethnic Profiling in Primary Schools*', Claystone, 2015, p.7

20. See Cage's links to leaked videos: http://cage.ngo/press-release/cage-publishes-leaked-prevent-training-dvd/ [accessed 17:20; October 17, 2016]

21. These are often developed by third party companies and charities, which are hired to produce this material. See Hilary Aked's recent piece dissecting the Prevent industry: *Prevent profiteers: Companies exploit climate of fear* The New Arab, October 12, 2016. (https://www.alaraby.co.uk/english/comment/2016/10/12/prevent-profiteers-companies-exploit-climate-of-fear) [accessed 15:20; October 16, 2016]

- *is likely to involve identification with a charismatic individual and attraction to a group which can offer identity, social network and support*
- *is likely to be fuelled by a sense of grievance that can be triggered by personal experiences of racism or discrimination.*[22]

This list is lacking in clarity, and can in fact refer to any child's development rather than being indicative of any actual signs of extremism. Furthermore, the IHRC is aware that specific local authorities interpret these indicators to create their own checklist for identifying who to refer under the Prevent duty; for example, Derbyshire Safeguarding Children Board's Prevent – Risk Indicator Checklist lists the following indicators:

Access to Extremism/Extremist influences	Yes/No
Changes in faith/ideology	
Sudden name change linked to a different faith/ideology	
Significant changes in appearance	
Secrecy on the internet & access to websites with a social networking element	
Narrow/limited religious or political view	
Attendance at certain meetings e.g. rallies and articulating support for groups with links to extremist activity but not illegal/illicit e.g. fundraising, propaganda distribution, attendance at meetings	
'Them' and 'us' language/rhetoric	
Justifying the use of violence to solve societal issues[23]	

Interpretation

The vagueness of these criteria is in keeping with the vague nature of the Prevent guidance itself and the expansive definition of extremism. This gives space for teachers to make decisions based on their instincts about children. However, what happens when this intuition has been formulated within an environment of racism and Islamophobia, where members of the public are told repeatedly that Muslims with a hijab or with a beard could be more 'extreme' members of our society? Inevitably that rhetoric will seep into the thinking of school staff in order to ensure their compliance with the duty. There is an added dimension when this is portrayed as a matter of safeguarding and the child's safety is at stake. This of course is deeply worrying given that safeguarding is supposed to centre on the child's welfare, when in fact, at best Prevent has wider national security concerns, and at worst it seeks to gather data on and explicitly discriminate against Muslims.

The IHRC has already seen such biased interpretation happen with cases such as that of the student in Islington who was interviewed by police officers after his French teacher raised the alarm about him using the word 'l'ecoterrorisme' in his class on environmental activism, or the primary aged child who was referred under Prevent for wearing a t-shirt saying 'I love Abu Bakr' (the close companion of Prophet Muhammed) which was ludicrously interpreted as expressing love for the leader of ISIS.

This of course has serious implication for all children in schools across the country. Any action, item of clothing or word spoken could fit the criteria which establishes them as would-be extremists and there appears to be no barrier between this and their details eventually finding their way to the police. This raises issues of breaches of Article 9 of the Human Rights Act 1998 (HRA) rights to freedom of thought, conscience or religion, as it attempts to monitor and restrict outward expressions of the Muslim faith.

The argument that this is in the name of national security of course cannot hold when entire communities are being stripped of this right enshrined in law.

Furthermore, it has an inevitable impact on the Article 10 HRA's right to freedom of expression, given that at risk of being referred under this programme, one is encouraged to stay silent. This is something the IHRC is told constantly, especially by parents and young people. Many parents are nervous about speaking freely in their home, especially about politics and the news, in case their children repeat it outside and is misconstrued. Children also express fear of speaking with ease in their classroom in the event that their teachers are watching their every move. In Muslim communities this is not a new thing; Prevent has been present in their lives since 2006, when the policy was first introduced (albeit in a different form). Many of the children in schools now have grown up knowing that they must be cautious of what they say because any misinterpretation could cause them and their family serious harm.

As an additional factor, Muslim teachers experience huge pressures under the Prevent duty, as they find themselves under scrutiny. Fellow teachers are not simply encouraged to identify children at risk of extremism, but staff too. Failure to comply with the duty

22. *Learning Together to be Safe: A toolkit to help schools contribute to the prevention of violent extremism*, Department for Children, Schools and Families, 2012, pp.17-18.

23. *Prevent – Risk Indicator Checklist, version 1 – December 2015*, Derbyshire Safeguarding Children Board, p.6

will further call attention to this, and could jeopardise their jobs given that this duty is now a legal requirement. Teachers who do not wish to participate and share the National Union of Teacher's fears about the oppressive nature of Prevent[24], are at risk of losing their jobs.

Conclusion

It is clear from the legislation, the wording of the guidance, its implementation and the cases the IHRC has dealt with, that Prevent is hugely detrimental in the way it specifically targets Muslims. It has huge implications for freedom of religion and expression.

Given the pervasive nature of duty and the damaging impact it has had on communities, many are fearful of reporting cases to organisations like the IHRC in the event of reprisals. This means that the implementation of the Prevent policy in education is yet to be challenged in the courts (although permission was recently granted to Dr Salman Butt to challenge the Prevent guidance following government's characterisation of him as an 'extremist' and 'hate preacher'[25]).

There is an increasingly powerful call for the government to scrap the Prevent duty because it is discriminatory, ineffective, and may be counter-productive.

On the international level, the UN Committee on the Elimination of Racial Discrimination concluded in August 2016 that the Prevent duty has *'created an atmosphere of suspicion towards members of Muslim communities'.*

The Committee was particularly concerned about:

a) the ambiguity of terms such as terrorism and extremism, creating a wide scope of interpretation and leading to increased profiling of individuals based on ethnicity and/or religion;

b) the negative impact on the rights to freedom of expression, education and freedom of religion, given the uncertainty as to what can be legitimately discussed and worn in academic settings;

c) the collection, retention and sharing of information on individuals, particularly children, without their consent or the consent of their parents/guardians'.[26]

The UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association also stated at the conclusion of his visit to the UK in April 2016: *'it appears that Prevent is having the opposite of its intended effect: by dividing, stigmatizing and alienating segments of the population, Prevent could end up promoting extremism, rather than countering it'.*[27] This makes the argument that in fact Prevent is so detrimental that it has the potential to create the very conditions it is purporting to fight.

Should the government heed such warnings and amend – or even repeal – the legislation, significant concerns remain. The Prevent duty existed prior to it being enshrined in the CTS Act, and therefore its apparatus within local authorities and schools has existed in various forms prior to 2015. Any amendment or repeal of the CTS Act would not necessarily eliminate this apparatus and the policies which have created a culture of reporting Muslims.

It is important to think critically and holistically about what the government is doing to alienate young people; its surveillance of Muslim communities under the government's counter terrorism strategy must cease in order for Muslims to feel at peace in this country. The IHRC believes that the first step to achieving this is to repeal the legislation and for local authorities to dismantle their Prevent policies. This is in recognition of the fact that the apparatus that has allowed for the successful implementation of Prevent will still very much be in place even if the legislation is not. Whether or not repeal of the legislation alone without addressing this apparatus will have a tangible impact on the lives most detrimentally affected by this policy is yet to be seen.

24. The National Union of Teachers voted overwhelming to reject the Prevent duty, calling for the government to scrap it at their national conference earlier this year. The University and College Union has called on the government for similar action, as has the National Union of Students. That these unions represent those in education is indicative of the impact of Prevent.

25. R on the application of *Dr Salman Butt v Secretary of State for the Home Department*, CO/6361/2015 (see the Bindmans press release here: https://www.bindmans.com/news/r-on-the-application-of-dr-salman-butt-v-secretary-of-state-for-the-home-de

26. 'Concluding observations on the twenty-first to twenty-third periodic reports of United Kingdom', Committee on the Elimination of Racial Discrimination, United Nations International Convention on the Elimination of All Forms of Racial Discrimination, CERD/C/GBR/CO/21-23, paragraph 18 (https://www.equalityhumanrights.com/sites/default/files/icerd-_concluding_observations.pdf) [Accessed 8:45, October 26,2016]

27. See http://freeassembly.net/news/statement-united-kingdom-follow-up/ [Accessed 8:45, October 26,2016]

Discrimination and financial services: the role of the Financial Ombudsman Service

Anthony Robinson, consultant solicitor with Excello Law, describes how the Financial Ombudsman Service provides an invaluable service to the public given society's reliance on financial services in a wide range of areas. Not only does it provide free, alternative dispute resolution for consumers, but in its interpretation of its powers, the service is developing an important new source of law.

Financial services are now an integral part of our daily lives.

Most of us have a bank or building society account, a pension and a credit agreement – be it for a credit card or a finance agreement on our cars and mobile phones. Some of us have or will need mortgages, savings or investments or life insurance. In some situations, a financial product is compulsory, for example, car or home buildings insurance.

And it is not just the more affluent who use financial services: people on lower incomes might use 'payday' loans for unexpected expenses; or hire purchase agreements for domestic appliances; or home shopping credit agreements. Students will also have a financial relationship with a student loan company; and even state benefits are now paid directly into a bank/building society or a credit union account.

We probably take these services for granted; but the refusal of a financial service or product, or its withdrawal, can be disruptive and worrying for a consumer and, where the refusal is because of a protected characteristic, offensive.

Equality Act and the provision of financial services

The Equality Act 2010 (EA) prohibits discrimination, harassment and victimisation because of a protected characteristic in the provision of services. S29(2) states that a service provider must not, in providing the service, discriminate against a person:

a) as to the *terms* on which the service is provided
b)by *terminating* the provision of the service
c) by subjecting the person to any other *detriment*.

The EA does not define 'services' for the purposes of s29 but states that a service is something provided to the public, or a section of the public, whether for payment or not.[1] 'Services' includes the provision of goods and facilities.[2] Financial services are exempt from the prohibition on age discrimination. Financial services are defined in the EA as including those of a banking, credit, insurance, personal pension, investment or payment nature.[3]

The Statutory Code of Practice on Services, Public Functions and Associations states that a wide range of services is covered by the EA including financial services.[4]

The EA allows the civil courts to hear cases concerning discrimination in the provision of services. But, in August 2016, The Travellers' Times reported on a decision by the Financial Ombudsman Service (FOS) involving a Gypsy woman who was refused credit by a financial service provider. It seems the FOS is also resolving discrimination complaints by consumers.

What is the Financial Ombudsman Service?

The FOS is a free, independent and impartial alternative dispute resolution service. It was set up under the Financial Services and Markets Act 2000 (FMSA) to resolve individual disputes between consumers and financial businesses fairly, reasonably, quickly and informally.[5] According to its 2015/2016 Annual Review, the FOS received 1.6million enquiries in that year and took on 340,899 new complaints for further investigation. It resolved 438,802 complaints.[6]

A consumer may complain directly to the FOS if the business hasn't been able to resolve the complaint first. There is no need for a lawyer or claims management company.

1. s29(1)
2. s31(2)
3. Sch. 3, Part 5 para. 20A (3)
4. para 11.3
5. FMSA 2000 s225 provides that disputes may be resolved quickly and with minimum formality by an independent person. S228 provides that a complaint is to be determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case.
6. http://www.financial-ombudsman.org.uk/publications/annual-review-2016/index.html#A2

Time limits

FOS cannot consider a complaint if it was made:-

1. more than six months after the date on which the respondent sent the complainant its final response, redress determination or summary resolution communication; or
2. more than:
   a) six years after the event complained of; or (if later)
   b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint; unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received; unless in the view of the Ombudsman, the failure to comply with the time limits was as a result of exceptional circumstances or the respondent has consented to the Ombudsman considering the complaint where the time limits have expired.[7]

Decision-making powers

The FOS will look carefully at both sides of a complaint and weigh up all the facts. If an ombudsman decides the business has treated the customer fairly s/he will explain why. But if s/he decides the business has acted wrongly, s/he can ask it to put matters right.

A decision in favour of a consumer may include an award against the business of such amount as the ombudsman considers fair compensation for financial loss or other damage, (such as pain and suffering, damage to reputation or distress and inconvenience).

The maximum award an ombudsman may make is £150,000.

An award may also include a direction that the business take such steps in relation to the complainant as the ombudsman considers just and appropriate (whether or not a court could order those steps to be taken). For example, in a disability discrimination complaint this might be asking a business to make a reasonable adjustment for the consumer.

But an ombudsman cannot direct a business to change its terms and conditions, practices or procedures.

Consumers do not have to accept a decision but if they accept an ombudsman's decision then it is binding on both parties.[8]

The ombudsman has no power under the FMSA to make a finding of discrimination – that remains a matter for the civil courts. But, in all cases, the ombudsman will ask if the business treated the consumer *'fairly and reasonably in all the circumstances of the case'.*

The 'fair and reasonable' test

S228 (2) FMSA provides that a complaint is to be determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case.

The Financial Conduct Authority's Dispute Rules further state that in considering what is fair and reasonable in all the circumstances of the case, the ombudsman will take into account:

1. relevant:
   a) law and regulations;
   b) regulators' rules, guidance and standards;
   c) codes of practice; and
2. (where appropriate) what s/he considers to have been good industry practice at the relevant time.[9]

Conversely, the FOS is not bound by the law alone and the ombudsman may depart from the legal position where it is fair and reasonable in the circumstances to do so. Provided the ombudsman's decision is not perverse or irrational then the court will not interfere with it.[10]

Thus, it appears that the rules allow the FOS to take into account the EA case law, the statutory codes of practice and other guidance but it need not adhere strictly to the law.

So, where the consumer's protected characteristic was the reason for less favourable treatment the ombudsman will generally decide whether the business's action or decision was unfair and unreasonable in the circumstances

The FOS publishes its final decisions on its website http://www.financial-ombudsman.org.uk/

Here is a selection of some of its decisions where the consumer's protected characteristic featured in the complaint.

Age criterion

The EA permits financial service providers to use a person's age as a criterion in designing, pricing and

7. https://www.handbook.fca.org.uk/handbook/DISP.pdf rule 2.8.2

8. s228(5)

9. https://www.handbook.fca.org.uk/handbook/DISP.pdf Dispute Rule 3.6.4

10. See *R (on application of IFG Financial Services Ltd) v FOS* [2005] EWHC 1153 and *R (on the application of Heather Moor and Edgecomb Ltd) v FOS and Simon Lodge* (Interested Party) [2008] EWCA Civ 642

offering financial services products. This means that it is not necessary for a financial service provider to objectively justify any age discrimination in the context of financial services provision.

However, where the provider conducts a risk assessment for the purpose of providing the financial service, the risk assessment, so far as it involves a consideration of the customer's age, must be carried out by reference to information which is both relevant and from a source on which it is reasonable to rely.[11]

In its briefing on age complaints *'Just a number: age, complaints and the Ombudsman'*[12] the FOS found different levels of understanding about the law on age discrimination. It also found examples of stereotypical assumptions about age. And businesses didn't always share the reasons behind their pricing or lending decisions with customers.

Even though there's an exemption for financial services, the FOS can still consider whether a decision based on age is unfair and unreasonable.

Older consumer denied free car insurance[13]

Mr A, in his early eighties, bought a new car. He was attracted by an offer which said that he'd receive one year's free motor insurance with his purchase. But when he bought the car he was told that the insurance was only available to people aged between 21 and 80.

Mr A queried this and the insurer explained that it was a business decision to put this age limit on the free insurance to 'minimise potential losses'. The insurer also provided Mr A with a separate quote for insurance but Mr A was able to find more competitively priced cover with a different insurer.

Mr A thought this was unfair age discrimination and referred the case to the FOS. The ombudsman asked the insurer to provide the information it relied on to make the decision to restrict free insurance to people within these age bands.

The industry data the insurer used showed that drivers aged 21-25 were a higher risk than drivers in Mr A's age group of 81-85 and that there wasn't a significant additional risk for older drivers until the age of 86.

The ombudsman decided that Mr A had been unfairly disadvantaged and ordered the insurer to pay for the alternative insurance which he had taken out. The insurer was also asked to make a further payment to Mr A for the trouble they'd caused him.

Young driver charged excess for 'act of God' [14]

Mr F, in his early twenties, was insured as a named driver on his parents' car. He parked the car outside a friend's house, where strong winds caused a tree to fall on top of the vehicle. The car had to be written off.

When Mr F put in a claim for the loss of the vehicle, the insurer charged a 'young driver excess' despite the damage having been caused by something outside of his control. After the case came to the FOS, the insurer said that Mr F had been the last person to drive the car and so it was his fault that it was parked where it was.

The FOS disagreed. It said there wasn't any reason for the excess to be applied as the age of the last person to drive the car had no bearing on the likelihood of a tree falling on it. It ordered the insurer to repay the young driver's excess with interest.

Consumers facing financial hardship due to lack of flexibility on interest-only mortgage[15]

Mr and Mrs L were both made redundant from their jobs and had two mortgages on their home. The first mortgage was paid through Pension Credit payments but, because they'd lost their jobs, they couldn't afford to make payments on the second mortgage.

The second mortgage was an interest-only deal and, because the lender didn't offer this product to consumers over the age of 65, the lender insisted that it had to be repaid in full before Mr L reached his 65th birthday. This meant that the couple's monthly mortgage repayments doubled, and arrears quickly built up. But they couldn't sell the property to pay off the loan as house prices remained low in their area.

The FOS worked with both the lender and Mr and Mrs L to put a repayment plan in place. The lender agreed to extend the loan past Mr L's 65th birthday if he was fully retired and on a guaranteed income which enabled repayments to be made at the existing level.

Mr and Mrs L were relieved to be able to stay in their home while they found a way to improve their financial situation.

11. Sch.3 Part 5 para 20

12. Financial Ombudsman Service insight briefing November 2015

13. See footnote 11

14. See footnote 11

15. ibid

Reasonable adjustment for consumer with post-traumatic stress disorder[16]

Mr B suffers from post-traumatic stress order. His bank initially referred his account to a specialist department. It asked Mr B to complete some forms to provide evidence of his disability. Mr B said because of the nature of his disability and the treatment he was receiving, he was unable to complete the forms. When it did not receive the completed forms, it returned Mr B's account to its collections department and resumed its usual collections activity.

Mr B said he explained his circumstances to the business on a number of occasions and asked it to communicate with him by email and have one member of staff as a point of contact but it refused.

The ombudsman instructed the business to make the adjustments that Mr B requested in any future contact – i.e. to refer his account to its specialist department, deal with him by email and have one primary point of contact. It was explained to Mr B that it might not always be practicable for the same person to deal with him on every occasion – and the primary point of contact may have to change from time to time. But, if a different member of staff were to deal with Mr B, the business should have a process in place so that the member of staff would understand the history of Mr B's account and his personal circumstances.

The ombudsman awarded Mr B £2,500 for the significant distress over time this matter has caused to him.

Refusal of credit facilities for living on a Traveller site[17]

Ms B lives on a council-owned Gypsy and Traveller site. A business (X) refused her a credit agreement because she didn't have a permanent address, even though it told her she satisfied its credit checks.

X said it had stopped taking customers from Ms B's site because of several incidents a couple of years ago, when its staff had been verbally abused and threatened with violence at the site. It pointed out its hire purchase terms and conditions say it must have access to the goods if it needs to service, repair or repossess them but customers living on the site had blocked its access, abused its staff and threatened them with violence when they tried to repossess goods. Consequently, it had to write off the debts and the goods.

The ombudsman agreed protecting staff and property was a legitimate business objective. But X couldn't demonstrate that Ms B would miss repayments, obstruct access to goods, abuse or threaten staff or otherwise present a risk to their safety.

Also, X hadn't demonstrated there was a real risk of abuse or violence from other residents at the site. It had been two years since the last incident but it hadn't reviewed safety at the site.

Since Ms B was told in front of customers she couldn't have credit because she was a Gypsy, the ombudsman awarded her £500 compensation for the humiliation she felt, distress and inconvenience.

Conclusion

The FOS cannot make findings of discrimination and its decisions are not binding on the courts. But its decisions may be persuasive. Legal advisers and practitioners might find it helpful to refer to the FOS decisions when advising on a discrimination claim or negotiating with a business. Alternatively, they might want to refer consumers to the FOS instead of bringing legal proceedings. Even where the consumer has issued legal proceedings, the consumer may ask the court to stay proceedings so that the FOS may consider the complaint.

Inevitably, there will still be cases where a court judgment is necessary for example, on the lawfulness of industry policy or practice or other regulation which conflicts with the EA.

In the meantime, and as observed by LJ Rix in Heather Moor and Edgecomb Ltd:[18]

> *'…it is possible to see in the "fair and reasonable" jurisdiction of the ombudsman the source not merely of an alternative dispute resolution service but of an important new source of law'.*

16. http://www.ombudsman-decisions.org.uk/#SEARCH/Decision Reference DRN2161082

17. http://www.ombudsman-decisions.org.uk/#SEARCH Decision Reference DRN7682815

18. Footnote 10, para 87

Action urged on workplace pregnancy and maternity discrimination

Catherine Rayner, chair of the DLA's executive committee, and barrister at 7 Bedford Row Chambers, describes increasing levels of pregnancy and maternity discrimination, and poor health and safety/risk assessments in the workplace following a report from the Women and Equalities Select Committee. She criticises the government's inadequate response to the report and highlights the Committee's recommendations for improving enforcement and protecting women's rights.

On August 31, 2016 the Women and Equalities Committee published its report on pregnancy and maternity discrimination. The Select Committee, which is chaired by Maria Millar, Conservative MP for Basingstoke, is appointed by the House of Commons to examine the expenditure, administration and policy of the Government Equalities Office. The report was a response to research carried out by the EHRC in partnership with the Department for Business Innovation & Skills (BIS) into the experience of employers and mothers of pregnancy and maternity-related discrimination and disadvantage.

Whilst there is much to applaud in the report itself, and whilst the recommendations contain changes and initiatives that policy and legal organisations have long lobbied for, the level and widespread nature of pregnancy and maternity discrimination reported and its apparent prevalence in many workplaces is profoundly depressing.

The report comes at a time when there is great uncertainty about the future of the development of equality rights which will follow an exit from the European Union; it also follows a period of austerity which has resulted in cuts to legal aid, loss of specialist practice, the introduction of huge employment tribunal fees, and a loss of employment protections because of insecure employment and short-term contracts. If the position of women in the workplace is to improve at all, government needs to listen to its select committees, and start taking the actions recommended. There is no indication that this will happen.

The research

The research exercise interviewed women employees and managers in large and small businesses across Great Britain. The survey interviewed people from all sectors and the results demonstrate a significant level of engagement.

Whilst government has accepted many of the report's recommendations, these do not, in the view of the Select Committee go far enough to address the problem:

> *Shockingly, pregnant women and mothers report more discrimination and poor treatment at work now than they did a decade ago. With record numbers of women in work in 2016, the situation is likely to decline further unless it is tackled effectively now. Urgent action and leadership is needed, but the approach that the Government is taking forward lacks urgency and bite.*

Increasing levels of discrimination

So what, according to the research, is the problem? The answer is that discrimination against pregnant women, new mothers and those taking or seeking maternity leave has increased significantly in the last 10 years. In 2005 research suggested that as many as 30,000 women a year had lost their jobs as a result of pregnancy discrimination. By the time the research was conducted in 2015 that figure had risen to a potential 54,000 women each year losing their job, because of their pregnancy or maternity.

Health and safety

The poor treatment reported around health and safety during pregnancy gives an insight into the wider problem.

Women reported that when they first told their employer that they were pregnant, 38% of employers did not raise health and safety issues with them. Even when employers did consider possible health and safety risks, and carried out a risk assessment, in 10% of cases the employer took no action despite identifying a risk.

One consequence of this is that 4% of the women interviewed reported leaving their jobs because of this failure by their employers to address pregnancy and maternity health and safety issues. If this is scaled up to the whole population, it would represent as many as 21,000 women leaving their jobs each year because of a failure by an employer to make sure the workplace is safe for them.

A further 41% of women felt that there was a risk to them, or some impact on their health and safety at work whilst pregnant. Maternity Action[1] told the Select Committee that this was entirely consistent with the concerns it records on its telephone help line. Unsurprisingly the impact was greater on women with mental or physical long-term health conditions, those on zero-hours contracts and part-time workers, and among workers in the hotel and restaurant sector, and in health and social care.

The current legal provisions only require an employer to carry out a general risk assessment of its workforce, considering whether there may be any risks to pregnant or nursing mothers in general. There is no obligation to carry out an individual risk assessment for each woman who becomes pregnant.

Stronger protections required

That a combination of fractured work, low pay, ill health and work in particular sectors are common factors when pregnant women are failed in respect of health and safety at work is no great surprise to those who work in discrimination advice and policy work. What is shocking is the response of government and the EHRC that the answer is to focus on education and the provision of better information.

The Select Committee disagrees in trenchant terms. It states that what is required is not simply more information about health and safety, but a specific and enforceable duty on employers to carry out a specific and individual risk assessment in respect of every women who tells them she is pregnant.

The unlawful and discriminatory dismissal of pregnant women, those on maternity leave and new mothers returning to work is not a new problem, and is one which gender discrimination laws exist to prevent. However, the legislation as it currently stands is not providing sufficient levels of protection, both because the laws are easily circumvented, and because women do not challenge their treatment.

The Select Committee heard evidence about employers who wait until a woman has returned to work and is out of the protected period before taking action to dismiss her or make her redundant. The timing is deliberate and whilst the Select Committee did not speculate about why a business would behave in this way, the experience of many advisers is that the root cause of such behaviour is gender based prejudice against new mothers, and a determination not to deal with the simple issues of flexibility or family friendly working. Whilst the EHRC/BIS recommendation of working to change attitudes and educate employers is of key importance, the Select Committee again recommends immediate action through an increase in legal protection from redundancy for pregnant women or women who had recently given birth. It recommends the introduction of a protected period lasting until 6 months after the woman's return to work. The legal effect would be that to prohibit an employer from making the woman redundant except in limited and specific circumstances.

Unfair treatment goes unchallenged

The proposals for stronger protections for women are welcomed as sensible and practical measures, which are likely to have an impact. However, such measures, and indeed the existing protections could be used to much greater effect by women, if there was better information and advice available to pregnant women at an early stage, and the realistic ability to bring a claim to the ET. At present this is simply not happening.

Overall, 77% of women reported that they had had a negative or potentially discriminatory experience at work whilst pregnant, during leave or on returning from maternity leave. That means that only 22 % – just under a 5th of all women who become pregnant at work – are happy with how they are treated in the workplace. The negative treatment reported included harassment, inappropriate work, poor health and safety as set out above, changes to work, work allocation and, of course, dismissal and redundancy. With such a high incidence of dissatisfaction and bad treatment, complaints, grievances and legal action might be expected. This is not the case.

Despite the huge number reporting problems, only 28% had discussed their concerns with their employer and only 3% went as far as raising a grievance. Reasons for doing nothing ranged from fear of reprisals, lack of knowledge of their rights, or of the mechanism for raising a concern, to sheer fatigue and lack of confidence that anything would change.

Whilst 1% did take their concerns about treatment to an ET, the reasons why 99% of women who had concerns about pregnancy-related adverse treatment did not were – cost, fear of losing their job, and fatigue and a changed focus because they had or were about to have a baby.

1. Maternity Action is the UK's leading charity committed to ending inequality and improving the health and well-being of pregnant women, partners and young children – from conception through to the child's early years. See www.maternityaction.org.uk

The lack of awareness of rights and the lack of action by women in the workplace is of key concern to organisations such as the DLA and the EHRC, and the campaign to reduce or remove the fees imposed on claimants who wish to bring a claim before the ET was raised again both in the research report recommendations and by the Select Committee.

Inadequate government response

The government's response to the EHRC/BIS research report is to reject the recommendation to review fees or reduce fees, but the Select Committee none the less recommended that it should reconsider, and echoed the views of many of the organisations giving evidence, as well as the Justice Select Committee in calling for a fees reduction.

The Select Committee noted that:

> *Since the introduction of fees, the number of sex discrimination and pregnancy related tribunal claims has dropped significantly, as highlighted by the EHRC. It has outlined that the number of sex discrimination claims dropped from 18,814 in 2012/13 to 4,471 in 2014/15 (a 76% decrease) and that the number of pregnancy-related cases dropped from 1,589 in 2012/13 to 790 in 2014/15 (a 50% decrease).*

The Select Committee continued:

> *We have concerns about the Government's approach of placing all its hopes in a campaign to persuade employers to comply with the law. It is clear that women are not taking action in large enough numbers to ensure compliance from employers, and yet this type of action is the main source of enforcement for discrimination law. This enforcement gap leaves it open to rogue employers to flout the law, and the actions set out by the Government do not deal with this. The Government has a clear responsibility to ensure that pregnancy and maternity discrimination laws and protections are better enforced. We join the Justice Committee in calling for a substantial reduction in tribunal fees for discrimination cases. The Government should publish the findings from its review of the impact of the introduction of tribunal fees as a matter of urgency and should set out in its response to this Report the action it will take to reverse the adverse effect of tribunal fees.*

Increase in time limits

However, the issue of fees is not the only enforcement issue tackled by the Select Committee. It also recommended an increase in the time limit for pregnancy cases, from three to six months. This recommendation takes account of the evidence before it that new mothers with a new focus, probable sleep loss and concerns about work, may find it harder to comply with a three month time limit. It said:

> *There is clear evidence of a need to extend the limit for new and expectant mothers. We therefore endorse the Justice Committee's recommendation that the Government review the three-month time limit for bringing a claim in maternity and pregnancy discrimination cases. We suggest that six months would be a more suitable time limit.*

The growth of part-time work, zero-hours and the so-called 'gig economy'[2] poses particular issues for pregnant women, as recognised by the committee. Rights to many employment protections arise from the fact of a contract of employment which has subsisted for at least two years.

Whilst all workers have the right not to be discriminated against, in practice women on zero-hours contracts are unlikely to be able to challenge the failure to allocate work, or the failure to deal with health and safety issues, or the denial of paid time off for ante-natal appointments. The Select Committee was concerned by the evidence that new and expectant mothers who are casual, agency and zero-hours workers are more likely to report a risk or impact to their health and welfare than other types of worker; more likely to leave their employer as a result of health and safety risks not being resolved; and less likely to feel confident about challenging discriminatory behaviour. The committee considers that additional rights and protections are required and recommends that *'the right to paid time off for antenatal appointments should be extended to workers. The Government should review the pregnancy and maternity-related rights available to workers and legislate to give greater parity between workers and employees'.*

Serious consequences for women

The evidence of widespread poor treatment of pregnant women and new mothers in the work place, coupled with a lack of awareness and action on health and safety, and lack of awareness of the basic rights of pregnant women at work, has serious consequences for women. The research comes at a time when specialist advice on discrimination is increasingly hard to source, with advisers and lawyers in voluntary organisations, specialist legal departments and law centres seeing their funding

2. A 'gig economy' is an environment in which temporary positions are common and organisations contract with independent workers for short-term engagements.

cut and the small amount of public funding abolished. Instead, the government advice service dealing with discrimination has been removed from the EHRC and placed with Serco.

Women lose out on an immediate income, maternity pay, and the right to return and the possibility of future work with longer-term rights including pension rights. Such consequences require concerted action by government both to address the problems now, and to secure improvements for the future. Action is clearly needed.

The recommendations made by the Select Committee are workable and affordable. The report demonstrates that it is not the lack of good ideas and workable solutions that perpetuates discrimination against women, nor is it a lack of cross party political will, as demonstrated by the Women and Equalities Committee. Whether government will act to protect the rights of a significant section of the population remains to be seen, but the Select Committee is clear about the urgent need for action; it expresses this frustration:

> *The Government must make changes in laws and protections to ensure a safe working environment for new and expectant mothers, to prevent discriminatory redundancies and to increase protection for casual, agency and zero-hours workers. It must also provide incentives and ensure better enforcement to encourage better employer practice. Currently, the burden of enforcement rests with the individual experiencing discrimination, but the number of women taking enforcement action is low. The Government must take urgent action to remove barriers to justice and should seek ways of reducing the burden on women and making it easier for them to take action. It must also set out how it will monitor whether outcomes are improving for women.*

Briefing 802

UK can restrict social security benefit eligibility for economically inactive EU nationals

European Commission v United Kingdom of Great Britain and Northern Ireland
C-308/14 CJEU (First Chamber), June 14, 2016

Implications for practitioners

In this case the Court of Justice for the European Union (CJEU) found the UK's disputed statutory eligibility requirement for child benefit and child tax credit lawful, despite its disparate impact on other member states' citizens. The CJEU reasoned that the requirement was a necessary and proportionate measure to protect the state's finances, and therefore was justifiable in law.

The European Commission's challenge

To qualify for both child benefit and child tax credit in the UK, a claimant must be 'ordinarily resident' in the UK, as defined by prevailing child benefit and tax credit regulations. The European Commission (the Commission) brought this legal challenge following its receipt of many complaints from nationals from other member states who live in the UK. The EC sought a declaration that the disputed requirement breached European Union (EU) law, specifically Regulation No 883/2004 [on the coordination of social security systems] (the Regulation).

Articles 1(j) and 11(3)(e) of the Regulation define residence as: *'the place where a person habitually resides'.*

In relation to equal treatment Article 4 of the Regulation states:

> *Unless otherwise provided for by this Regulation persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member state as the nationals thereof.*

The Commission took issue with the position advanced by the UK in pre-action correspondence which asserted that economically inactive persons should not become an unreasonable burden on the host member state's welfare system, unless those persons have a sufficient connection with that state. The Commission contended that the 'habitual residence' criterion provided a sufficient link or nexus; and it was impermissible for the UK to couple the regulation with additional requirements.

The Commission argued that the disputed requirement places an additional condition on persons who are habitually resident as defined by the Regulation: and creates a more onerous eligibility requirement for EU citizens from other member states, which undermines the regulation's purpose, i.e to ensure equal protection under prevailing social security legislation for such people.

In particular the Commission argued that

a) the 'place of habitual residence' is '*the place where the habitual centre of interests of the person concerned is to be found'.* [para 30]
b) it is to be determined '*in the light of the factual circumstances and the situation of the persons concerned regardless of their legal status in the host member state and of whether they have a right to reside in its territory'.* [para 31]
c) the habitual residence test was more inclusive than the ordinary residence requirement, making it consistent with the regulation's underlying rationale, as well as Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of member states, i.e. to ensure people who have relocated to another state are not deprived of social security cover.
d) the ordinary resident test was unduly restrictive and in contravention of the regulations; and,
e) the disputed requirement was discriminatory. Contrary to Article 4, it constituted direct discrimination on nationality grounds given its sole application to foreign nationals. Further or in the alternative, the disputed requirement was indirectly discriminatory by reason of its disparate impact on foreign nationals; and the UK had not put forward a robust justification defence.

The UK government's defence

In its defence, the UK relied on the CJEU decision in *Pensionsversicherungsanstalt (the Pensions Insurance Institution) v Brey* (C-140/12). That decision upheld a member state's right to make benefit provision available to EU nationals who are not economically active if they meet the state's residence requirements, assuming the decision-making is not arbitrary. The UK asserted that the direct discrimination complaint was inadmissible. Whilst acknowledging the indirect and disadvantageous impact of the disputed requirement provisions on foreign nationals, the UK maintained that those provisions were justified by the need to protect public finances.

Court of Justice of the European Union

The CJEU rejected the Commission's challenge holding that the disputed requirement was not discriminatory or otherwise unlawful.

It reasoned that the Regulation does not set up a common social security scheme; rather it allows different national social security schemes to exist. It maintained that the regulation seeks to ensure the coordination of social security schemes to guarantee in part the effective exercise of freedom of movement; but the Regulation does not preclude national legislation applying a right to reside condition on benefit eligibility. It stated that the legality of a claimant's UK residence is a substantive condition that economically inactive persons must meet to be eligible for the social benefits at issue. The CJEU found that member states can impose such a social benefit eligibility requirement on the nationals of other member states.

Addressing the discrimination issue, the court stated that a national law provision must be regarded as indirectly discriminatory if it is liable to affect other member states' nationals more than the host state's nationals, and creates a risk of placing the former at a particular disadvantage. [para 77]

The CJEU accepted that the disputed requirements indirectly gave rise to unequal treatment between UK nationals and other member states' nationals. The lawfulness of the requirement depended on whether it was justified in law. The court reasoned:

a) the need to protect a member state's finances can justify residence right checking measures when processing a social security benefit application;
b) systematic residence right checking is impermissible under Article 14 of the Regulation; however checking a claimant's residence right in individual cases, to ensure social security benefit eligibility compliance, is not systematic because it is carried out only in the event of doubt;
c) protecting a state's finances justified residence right checking when paying benefits given the amount of assistance that could be payable to that group, i.e. non-economically active foreign nationals; and,
d) the requirement was proportionate:
   i. it was appropriate for securing the protecting of the public finances objective, and
   ii. it did not go beyond what was necessary.

The court therefore found that the UK was not in breach of Article 4.

Comment

In summary this decision addresses the tension between the core EU precept of freedom of movement of workers and the ability of member states to restrict social security benefit eligibility for EU foreign nationals who are not economically active.

Regulation 883/2004 does not establish a common social security scheme amongst member states. Rather, it allows for disparate national social security schemes. The UK could impose a residence eligibility requirement on benefit claimants to protect the public purse, regardless of its disparate impact on other member states' nationals.

The decision shows how the CJEU strikes a balance between the EU's supra-national project and member states' sovereign interests when addressing controversial political issues such as social security provision for economically inactive migrants. It might be interesting to see how this decision impacts on the way the 27 EU states treat economically inactive UK citizens seeking social security benefits in the post-Brexit future.

Michael Potter
Bar Library, Belfast
Cloisters, London

Briefing 803

Discrimination by a work placement-provider – ET or county court?

Blackwood v Birmingham & Solihull Mental Health NHS Foundation Trust [2016] ICR 903; June 23, 2016

Implications for practitioners

A claim against the provider of a work placement in respect of discrimination by that provider in the course of the placement may be brought in the employment tribunal, notwithstanding that the placement is one to which a higher or further education institution has 'power to afford access'. An attempt to bring such a claim in the county court, seeking to fix the placement-provider with indirect liability by way of the agency or inducing, aiding etc provisions of the Equality Act 2010 (EA) is unlikely to succeed.

Facts

B was enrolled on a course leading to a Diploma for Higher Education in mental health nursing at Birmingham City University. She was required, as part of her course, to undertake work placements. In November 2012, she was allocated a place at a unit operated by the Birmingham and Solihull Mental Health NHS Foundation Trust. On the first day of the placement, she explained to her manager that she would have difficulty working nights and weekends because of her childcare responsibilities. Initial indications were that this would not be a problem, but a few days later she was told that the placement was withdrawn because the Trust believed that she was not prepared to work nights.

B presented a complaint of sex discrimination by the Trust to the employment tribunal. She founded her claim on s55 (in part 5) of the EA, which prohibits discrimination by 'employment service-providers.'

Employment Tribunal and Employment Appeal Tribunal

The ET and the EAT both held that the claim fell under part 6 of the EA (which deals with discrimination in education) and not under the employment provisions of part 5; the tribunal therefore lacked jurisdiction and the claim could only be brought in the county court. B appealed to the Court of Appeal.

Court of Appeal

The CA disagreed. The reasoning of the ET and the EAT was based on the provisions of the EA intended to prevent overlap between the jurisdiction of the ET and the county court. S56 (and with it, by implication, s55) is stated at s56(5) not to apply *'in relation to training or guidance for students of an institution to which s91 applies in so far as it is training or guidance to which the governing body of the institution has power to afford access'.*

S91 falls under part 6 of the EA, relating to the treatment of students in further and higher education. The ET and the EAT held that the University had power to afford access to the placement, with the result

803

that s56(5) excluded the operation of s55.

The CA accepted B's argument that this interpretation would result in a lacuna in protection from discrimination by a work placement provider where an educational institution governed by s91 had power to 'afford access' to the placement. The placement-provider could not itself be sued under s91, because it would not normally be an education institution of the kind governed by s91. It could not be sued under the 'instructing,' 'causing', 'inducing' or 'aiding' provisions of ss111 and 112, because those only apply where there is a primary liability in the body 'instructed,' etc. And it could not be sued under the 'agency' provision of s109 unless (which was unlikely) the act of discrimination was done with the authority of the educational institution.

Lacuna notwithstanding, that was the correct interpretation of s56(5) on the ordinary rules of construction. The CA went on to consider whether the *Marleasing* principle gave rise to a different construction.

The court approved (at para 29) the EAT decision in *Fletcher v Blackpool Fylde & Wyre Hospitals NHS Trust* [2005] IRLR 689 that the Equal Treatment Directive required vocational trainees in the workplace to be afforded protection from discrimination; *Marleasing* (Case C-106/89 [1990] ECR 1-4135]) was accordingly engaged. The court was willing to rewrite s56(5) to read:

> *This section does not apply to discrimination in relation to training or guidance for students of an institution to which section 91 applies to the extent that the student is entitled under that section to make a claim as regards that discrimination.*

The result of that rewriting was that s56(5) did not disapply ss55 and 56 in B's case, because she was not entitled to make a claim in relation to the discrimination in question under s91. Accordingly the appeal was allowed and the case remitted to the employment tribunal for determination on the merits.

Comment

The judgment represents a fairly tortuous route – involving a radical rewriting of s56(5) – to a common sense conclusion. The intention behind the provisions at issue was clear enough: to ensure that any given claim fell within the jurisdiction of the ET or the county court, but not both. But the drafting left something to be desired: instead of doing the obvious, and excluding a remedy under part 5 where – and only where – one was available under part 6, s56(5) relied on a criterion framed in terms of whether an educational institution had power to afford access to the training. The CA was prepared to make liberal use of the blue pencil provided by *Marleasing* to restore the status quo; as 'interpreted' on *Marleasing* lines, s56(5) bears a striking resemblance to its more sensibly-drafted predecessor provisions, for example s14(2) of the Sex Discrimination Act.

Naomi Cunningham
Barrister, Outer Temple Chambers
naomi.cunningham@outertemple.com

804

Briefing 804

Ensuring equal and effective access to justice: fair hearings and disability

Galo v Bombardier Aerospace UK [2016] NICA 25; [2016] IRLR 703; June 2, 2016

Facts

Patrick Galo (PG) was employed in Northern Ireland. Following alleged incidents including throwing an item of work equipment behind him and shouting rudely at an occupational health doctor, he was suspended. His internal complaints of victimisation and discrimination were investigated and found to be without foundation. Following a disciplinary hearing, he was dismissed for gross misconduct. That was upheld on appeal.

During the appeal process PG's employer, BA, obtained the report of a clinical psychologist which said he had Asperger's Syndrome and that the way he thought, communicated and behaved socially was significantly different from that of most people. He had great difficulty with open questions. His verbal reasoning abilities were in the low average range and above those of only 16% of his peers.

Industrial Tribunal

PG brought complaints of, among others, unfair dismissal and disability discrimination in the Northern Ireland Industrial Tribunal. The tribunal hearing was preceded by six case management hearings. At the second, BA had conceded disability but, despite the expert report, the precise nature of PG's disability was not made clear. At the third, PG was represented by a solicitor but no application was made for any reasonable adjustments. Following failure to comply with an 'unless order' to produce a witness statement, BA applied to strike out the claim. PG produced a short medical report that 'inexplicably' did not refer to his Asperger's Syndrome. The tribunal refused strike-out and dispensed with the need to provide written witness statements.

However, despite commenting on its desire to 'alleviate pressure' on PG, there were no specific signs that the tribunal considered, or made, any adjustments to discovery or the process towards trial to accommodate his condition.

Having requested and been refused adjournments, PG applied again on the first day of the hearing. This time he also produced the report of a consultant psychiatrist. That report failed to mention Asperger's Syndrome and (from the judgment) said nothing obviously relevant to his ability to cope with the hearing process.

Although having been given a short postponement to enable PG to comply with various orders, he had not done so and also failed to appear. This time the tribunal proceeded in his absence and stuck out all but the unfair dismissal claims. Later that day PG submitted a further medical report stating he was not medically fit to attend a tribunal for the foreseeable future and that he *'may need specialist medical assessment organized by the tribunal to ensure that he is medically fit to attend'*. In the afternoon, PG attended with written submissions giving further grounds for postponement. By this time, the hearing had been completed. His unfair dismissal claim had also been dismissed.

Northern Ireland Court of Appeal

PG appealed to the NICA on a point of law, namely that he was not given a fair hearing before the tribunal which had failed to take his disability properly into account and, among other things, failed to make any reasonable adjustments.

NICA approached the issues from the obligation of every tribunal and court to act fairly. It began with Lord Reed's analysis in *R (Osborn) v Parole Board* [2014] AC 1115 of the common law duty of fairness and the relationship between English law and the European Convention on Human Rights. The key points are:

- the protection of human rights permeates our legal system, it is not a distinct area of law
- on appeal, a court must determine *for itself* whether a fair procedure was followed: its role is not just to review the reasonableness of the decision-maker's judgment of what fairness requires
- the purpose of procedural fairness is to ensure better decisions.

NICA added that in this type of case, the common law duty of fairness is fed by the increased emphasis on fairness arising out of, in substance:

- the right to a fair hearing and the positive obligation on states to ensure no discrimination under Articles 6 and 14 of the Human Rights Act 1998
- the Framework Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation
- the UN Convention on the Rights of Persons with Disabilities and the Article 13 requirement to ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age appropriate accommodation to facilitate their effective role as direct and indirect participants in all legal proceedings, including at investigative and other preliminary stages
- the Disability Discrimination Act 1995
- the EU Charter on Fundamental Rights; and
- the Equality Act 2010.

NICA reviewed recent authorities, including *Rackham v NHS Professionals Ltd* [2015] All ER (D) 264. From these authorities it discerned the following principles:

- it is a fundamental right of a person with a disability to enjoy a fair hearing and to have been able to participate effectively in the hearing
- courts should focus on the impact of a mental health disability on litigation, including that it may have influenced the ability to conduct proceedings rationally
- courts and tribunals should pay particular attention to the *Equal Treatment Benchbook* (ETBB[1]) when the question of disability, including mental disability, arises.

NICA recommended that the ETBB become part of the culture of Industrial Tribunal hearings. Ground rules hearings, as indicated in the ETBB, would address the

804 procedure the tribunal or court should follow, tailored to the particular circumstances of the individual. That includes whether the tribunal itself should obtain an expert report to identify what steps are required in order to ensure a fair procedure.

Turning to PG's circumstances, NICA observed that it is not a sufficient argument to state that even when he was represented, no requests for adjustments were made. The duty is on the tribunal. It has to make its own decision. In this case *'there were clear indiciae of observed agitation and frustration on the part of the appellant. These should have put the tribunal on notice of the need to investigate the precise nature and diagnosis of his condition'.* [para 59]

NICA held that the requirements of procedural fairness were not met. The detailed expert report obtained by BA should have prompted enquiries as to whether reasonable adjustments to the process were necessary. Although it says nothing about whether the employer should have alerted the tribunal to the content of that report, the implication is clear.

NICA emphasised that issues of procedural fairness go wider than a narrow issue of failing to adjourn. In a rare case, it would not of itself be unlawful for a tribunal to take a view on a litigant's fitness based on seeing and hearing from him in person and without obtaining a medical report.

NICA held that PG did not benefit from a fair procedural hearing and allowed his appeal. It referred his case back to a differently constituted tribunal.

Comment

NICA, like the EAT in *Rackham*, use the common and readily understandable language of 'reasonable adjustments' as part of its consideration of procedural fairness in this mental disability case. It locates the court or tribunal's role within an existing and familiar framework. That is helpful.

NICA's observation that the *Galo* case highlights the need for there to be better training of both judiciary and the legal profession in the needs of the disabled is underlined by an earlier decision of the Upper Tribunal. The headline to the report of *LO'L v Secretary of State for Work and Pensions* [2016] AACR 31 may be literally accurate but would tend to mislead. The headline reads *'Tribunal procedure and practice – fair hearing – tribunal not subject to the duty to make reasonable adjustments under the Equality Act 2010'*. As explained by NICA, securing basic and equal fairness may require adjustments. The court or tribunal has to make its own decision and is not limited to reviewing the reasonableness or lawfulness of the decision under appeal. It is suggested that the Upper Tribunal and First-tier Tribunals review their practice in light of *Galo*.

Sally Robertson
Cloisters

1. The ETBB is available online at https://www.judiciary.gov.uk/wp-content/uploads/2013/11/equal-treatment-bench-book-2013-with-2015-amendment.pdf

805 Briefing 805

Age discrimination – public sector equality duty

Elizabeth Hunter v Student Awards Agency for Scotland (1) The Scottish Ministers (2) The Advocate General for Scotland (3) The Lord Advocate (4) [2016] ScotCS CSOH_71; May 20, 2016

Facts

In 2014 Elizabeth Hunter (H), aged 55, applied for a student loan in Scotland. This was refused on the basis of her age – the Education (Student Loans)(Scotland) Regulations 2007 (the 2007 Regulations) restrict eligibility for student loans to individuals under the age of 55.

Regulation 3(2)(b)(ii) of the 2007 Regulations provides that a person shall be eligible for a loan in connection with their undertaking a designated course if that person is:

> *aged 50 or over and under the age of 55 on that day and Scottish Ministers are satisfied that person intends to enter employment after completion of the course.*

H left school at 16 with two O-levels. Before 2011, she had been out of work for around 30 years. In 2011 she enrolled on a cookery course with the aim of establishing her own catering business. She completed the NC Professional Cookery courses at bronze and silver levels,

and then the City & Guilds Professional Cookery Diploma. Throughout these courses, H had been supported by a college bursary which assisted with, but did not cover, her living and travel expenses. She then enrolled on a HNC in Hospitality Management and applied for the student loan to cover her living expenses while undertaking her studies.

H brought a judicial review of the decision to refuse her the student loan, on two grounds:

1. the 2007 Regulations unlawfully discriminated against her in violation of Article 14 of the European Convention on Human Rights in connection with her right to education; and
2. Scottish Ministers failed to assess the discriminatory effects of the 2007 Regulations with regards to age, and breached the public sector equality duty (PSED) imposed by s149 of the Equality Act 2010 (EA).

This note will confine itself to consideration of the PSED aspect of the claim.

Outer House, Court of Session

Lady Scott held that both of H's grounds were successful; in particular, the Scottish Ministers failed to comply with the PSED.

It was found that there was no distinction *'in principle between a loan to pay fees in order to access education and a loan to pay living costs in order to access education'.* Both were designed to enable access to education. Lady Scott also dismissed the notion that H might not be able to repay the loan because of her age: '*the circumstances of [H] suggest repayment is a realistic prospect'.*

In relation to the PSED, Lady Scott was clear that it did not matter that the policy came into being before the PSED: *'[the duty] arises not only into the 'formulation' of policies or changes made, but also to their implementation. The duty being a continuing one must also arise in the exercise of such policies'.*

The triggers for the PSED were held to be threefold:

1. the increase in the pensionable age under s13 of the Pensions Act 2007;
2. the equivalent to the 2007 Regulations in England and Wales which had raised the age limit to 60;
3. the 2007 Regulations being amended in 2012 to include an exception to the discriminatory age limit for vocational courses leading to a Postgraduate Diploma or to a Postgraduate masters degree.

When the 2007 Regulations were amended to include loans without age limitation for some courses, Lady Scott held that the Ministers ought to have realised that there was an issue about imposing *'such a stark age cut off'* in the 2007 Regulations. It did not matter that the amendment was to a part of the loans that did not involve living expenses – the PSED was still triggered.

Lady Scott also held that the fact that a review of the 2007 Regulations was currently underway under the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 did not mean the PSED was not breached. The court had not seen the results of any review, and without *'close examination by the court'* it could not be said that an order (declaring the PSED to have been breached) was unnecessary.

The court found that the second respondents had not undertaken any assessment as to the impact of the 2007 Regulations on the protected characteristics and had failed in their s149 EA public sector equality duty.

Analysis

Despite reports to the contrary it would appear that the PSED is still alive, at least north of the border. The approach of the Court of Session is in contrast to some of the more restrained judgments by the courts in England and Wales, which seem hesitant to find breaches of the PSED. The key factor seems to be that the 2007 Regulations simply hadn't been considered at all from an age perspective. A cut-off age had been set, on the basis of a number of assumptions and stereotypes about the age of people who would be applying for student loans, but the Scottish Ministers could not show that any consideration had been given to why an age cut off was needed; or, if it was necessary, why it should be 55.

The case also shows the importance of choosing test cases wisely – the court was clearly sympathetic to H's situation, who had gone to great efforts in order to improve her lot through enrolling on the catering courses. As Lady Hale says in *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213:

> *Society benefits when each individual realises his or her potential [in further education and employment] and thus this process should not be impeded by unlawful discrimination.*

Michael Newman
Solicitor, Leigh Day
mnewman@leighday.co.uk

Duty to make reasonable adjustments may include pay protection

G4S Cash Solutions (UK) Ltd v Powell UKEAT/0243/15/RN; August 26, 2016

Facts

Mr Powell (P) began working for G4S in 1997. He worked in a number of roles, most relating to the maintenance of cash machines. Unfortunately he developed lower back problems. By 2012 he was unable to do work involving heavy lifting or work in confined spaces.

G4S shifted him to a new 'key runner' role. This involved driving between G4S locations bringing engineers keys and parts.

In May 2013 G4S was considering removing the key runner positions. At this point, it became clear that it viewed the posting as temporary, while P believed it had been permanent. Following discussion, G4S agreed to maintain him in that post. But, since the job did not require equivalent engineering skills to P's previous work, it intended to reduce his salary.

P refused to accept this and was dismissed.

Employment Tribunal

The ET concluded that there had not been a variation of contract. Rather, G4S had made a reasonable adjustment to P's disability. This did not, without more, amount to a variation of contract. And an employer was entitled, where appropriate, to impose a reasonable adjustment on an employee without a contractual variation. This meant that P did not have a contractual right to remain employed as a key runner on his old salary.

However, the tribunal concluded that there was an ongoing duty to make reasonable adjustments for P which required his employer to maintain his previous salary.

Employment Appeal Tribunal

The EAT disagreed in relation to the contractual findings. The duty to make reasonable adjustments might lead an employer to offer a variation of contract. But it in no way overrode the employee's right to refuse it. Where such an offer was made and accepted, there would be a variation in contract in the usual way; which either side could rely on in the future. The tribunal erred in law by failing to appreciate this and by failing to make clear findings as to what variation had been agreed.

The EAT agreed, however, that pay protection could be a reasonable adjustment, particularly where an employee is moved to another role because of their disability or where it features as part of a package of adjustments to keep an employee in work.

Comment

Although it noted that pay protection will not be 'an everyday event' this is a welcome finding from the EAT. The focus on pay protection as part of a package of reasonable adjustments highlights the importance of the duty and its value in keeping disabled employees in the workplace.

Equally important, however, is the EAT's discussion of contractual variation. It is easy to lose sight of the contractual position during discussions about reasonable adjustments. But, as this case demonstrates, such confusion can create problems for both employers and employees.

Michael Reed
Free Representation Unit

Challenging injury to feeling awards

AA Solicitors Ltd (t/a AA Solicitors)(1) & Ali (2) v Majid UKEAT/0217/15; June 23, 2016

Implications for practitioners

The Judicial College guidelines for awards in personal injury cases have no relevance when calculating injury to feelings awards. The guidance issued in *Vento v Chief Constable of West Yorkshire Police* [2003] ICR 318 represents bespoke guidance for ETs.

Awards for injury to feelings will only be interfered with if the amount is manifestly excessive or it is clear that the wrong band of the Vento guidance has been applied.

There is no need for ETs to await guidance before adjusting the *Vento* bands to take account of inflation. Practitioners should be alert to this and take into account the effect of inflation when assessing the sum to be claimed in respect of an injury to feelings award.

Facts

Miss Majid (M) was a legal practice course student and aspiring lawyer. She sought work with AA Solicitors, a firm of solicitors in Bolton. Mr Ali (A) was the principal of AA Solicitors.

M met A at the offices of AA Solicitors and began working for the firm until A purported to make her redundant about six weeks later. M brought a claim for sex discrimination against A and AA Solicitors. She alleged that A committed around 40 acts of sexual harassment against her. These included asking her to go out to the cinema, talking about installing a bed at the office, attempting to hug her and touching her arms.

Employment Tribunal

M was successful in her sex discrimination claim. In a lengthy and quite detailed remedy judgment the ET found in favour of M on not all but quite a large number of her allegations. The tribunal recommended that A attend equal opportunities training and it also awarded compensation, on a joint and several basis, against both A and AA Solicitors. Part of this compensation comprised an award for injury to feelings of £14,000.

In terms of the injury to feelings award, the ET concluded that the case fell within the middle band of the guidance issued in *Vento v Chief Constable of West Yorkshire Police* [2003] ICR 318. In *Da'Bell v NSPCC* [2010] IRLR 19 HHJ McMullen QC pointed out that the three bands established in *Vento* should be uplifted to take account of inflation. The tribunal also noted the requirement for a ten per cent uplift for personal injury damages ordained by the CA in *Simmons v Castle* [2012] EWCA Civ 1039 which means that the middle band now ranges from £6,600 to £19,800.

In reaching the figure of £14,000 the ET decided that M was a young woman at the start of her professional career and that A was an older man in position of power and authority. The ET noted that there was evidence of visits by M to her GP resulting from stress and anxiety because of the harassment and an exacerbation of her irritable bowel syndrome. The tribunal also took into account that M always politely rejected the advances made by A and the fact that the duration of her unemployment after losing her job was relatively short.

Employment Appeal Tribunal

A and AA Solicitors appealed on the basis that the award for injury to feelings of £14,000 was manifestly excessive. It was submitted that A's conduct was *'of its type, no more than modestly obnoxious and might properly be characterised as gauche and insinuating rather than aggressive, and was of brief duration'* (para 14).

Reference was also made to the Judicial College guidelines for awards in personal injury cases where awards are made in respect of psychiatric damage. It was submitted that a reasonable person in the street would consider the award of £14,000 here excessive when compared with awards calculated by reference to the Judicial College guidelines. It was also submitted that an award at the bottom end of the band would have been unimpeachable and that the sum of £10,000 was the upper limit of a permissible award in the case.

After reviewing the relevant authorities on awards for damages to injury to feelings, the EAT commented that in future cases there is no need for ETs to await guidance from the EAT or any higher court so far as adjusting the bands to take account of inflation is concerned. The EAT came to the conclusion that: *'If there is cogent evidence before an Employment Tribunal of the rate of change in the value of money (which could, in principle go down as well as up), then a reasonable Tribunal acting on*

807 *that evidence would be entitled without error of law to act on that evidence by adjusting the band ranges and any award for injury to feelings accordingly'.* (para 23)

Turning to the award, the EAT noted HHJ McMullen QC's comment in *Da'Bell* that *'appeals on the basis of inadequate or excessive compensation were more likely to succeed if the wrong band were chosen…In our judgment disputes about the placement within a band of an award are likely to be about fact and impression. They are more likely to raise questions of law if they are about placement in the wrong band or at the extremes'.*

The EAT disagreed with the respondents' submission that this was a case merely of persistent unwanted attentions that was no worse than gauche and insinuating. The second respondent treated M in a demeaning and disrespectful manner as a woman because she was not willing to play a sexually charged role allotted to her by her employer. It was also a very bad start to her career.

The EAT recognised that another ET might have made a lower award within the middle *Vento* band and would not have been wrong to do so. Yet given the recognition by the respondents that the award fell within the correct band the EAT was of the opinion that whilst the award could be characterised as on the high side, it was not manifestly excessive so as to justify it interfering.

The EAT also did not accept the analogy drawn with personal injury awards applying the Judicial College guidelines. The *Vento* guidelines were the correct authority for cases of this nature and '*represent bespoke guidance tailored to this jurisdiction and this particular type of statutory tort, which is normally, as in this case, committed by the doing of deliberate rather than merely negligent acts'.*

Comment

The case demonstrates the difficulty of challenging an award for injury to feelings. An award will only be interfered with if the amount is manifestly excessive or it is clear that wrong band of the *Vento* guidance has been applied. This will obviously be extremely difficult to prove.

Whilst happy to apply the ten per cent uplift for personal injury cases following *Simmons*, the EAT was not prepared to accept any application of the Judicial College guidelines to injury to feelings cases. The EAT was unequivocal that *Vento* represents the correct guidance for cases of this nature.

Also of note is the fact that there is now no need for ETs to await guidance from the EAT or any higher court before adjusting the *Vento* bands to take account of inflation. Practitioners should be alert to this point and take into account any possible increase, or decrease, in inflation and its effect on the sum to be claimed in respect of an injury to feelings award.

Peter McTigue
Senior Lecturer, Nottingham Law School
peter.mctigue@ntu.ac.uk

808 Briefing 808

Tribunal needs to consider subconscious motivation for possible discriminatory acts

Mrs I Geller, Mr A Geller v Yeshurun Hebrew Congregation UKEAT/0190/15/JOJ; March 23, 2016

Facts

Mrs Geller (IG) began working for Yeshurun Hebrew Congregation (YHC) in January 2013. Her husband, who had started work with YHC in 2011, was considered a regular employee, but IG was not. IG worked on a timesheet basis for non-fixed hours while Mr Geller worked fixed hours and was not required to provide timesheets. In July 2013 YHC commenced a redundancy process. Initially IG was not included as YHC did not consider her to be an employee.

Following advice, YHC subsequently concluded that IG was an employee and included her within the redundancy process.

IG lodged a claim of direct sex discrimination claim arguing that YHC had discriminated against her by failing to acknowledge her as an employee from the start of her employment and by making unlawful deductions from her wages.

Employment Tribunal

The ET accepted the evidence of YHC's witnesses who stated that in not acknowledging IG as an employee, they had not done so because of her gender. They genuinely believed that she was an atypical worker because of her ad hoc working and submission of time sheets.

The ET concluded, broadly on the basis of this genuine belief, that IG had not been treated less favourably because of her sex. In fact the tribunal found that IG had been treated more favourably than her husband as she had not been required to compete for her role which was awarded by virtue of her relationship with her husband.

Employment Appeal Tribunal

On appeal IG argued that the ET had erred in not investigating the possibility that YHC's witnesses had been motivated by some unconscious or subconscious stereotype or prejudice. Examples offered included the potential subconscious belief that women were not the main family breadwinners. Crucially, the factual background was not gender-neutral. The ET had made gender specific references to IG being treated more favourably than her husband in being awarded the post. These included specific references to IG being the wife of Mr Geller and that this was something that influenced, or may have influenced, the respondent's paying her, and that at one point IG and her husband had been offered a joint salary.

The EAT found that it was not sufficient for the tribunal simply to take a view on the veracity of YHC's genuine belief. The tribunal was required to explore whether inferences may be drawn from findings of fact.

While it is good practice for an ET to require the claimant to establish a prima facie case of discrimination before looking to adequacy of the respondent's explanation for the offending treatment, it is not necessary to rigidly follow this two-stage test. A tribunal should however explore all avenues of discrimination, be it conscious or subconscious, when faced with objective findings that suggest the circumstances of the case may not be neutral to that relevant protected characteristic, as was the case here.

The EAT upheld IG's appeal and remitted her case to the ET.

Comment

Mr Justice Kerr's succinct and helpful judgment is well worth reading for junior practitioners or those looking for a recap of some of the important direct discrimination decisions. Discrimination without knowledge or intent to discriminate is not a new principle. He cited Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572 on the conceptual validity of non-intentional discrimination:

> *I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did.* [para 17]

An intention to discriminate is not required to establish liability (although it is likely to be relevant to remedy). Discrimination law is designed to cut through the possible motive of the discriminator to catch cases in which the discriminator may have been led by a preconception or stereotype, whether they were aware of it or not.

This is done by identifying whether inferences can be drawn from objective facts which may then require the respondent to show that its conduct was not discriminatory. The ET in this case conducted the requisite investigation of conscious discrimination, but if they did the same of subconscious discrimination, it was not reflected within their reasons.

While not establishing a new principle, this case does offer a timely reminder to practitioners that it is not sufficient to rely on a witness's denial. As stated by Lord Nicholls, all human beings have prejudices and preconceptions. With the development of a more tolerant society, discrimination cases involving subconscious, or even well-intentioned, motives may become more prevalent than those in which there is a conscious intention to discriminate.

Robert Maddox
Trainee Solicitor
Bindmans LLP
r.maddox@bindmans.com

‘Particular disadvantage’ arose from the claimant’s crisis of conscience stemming from her religious belief

Pendleton v Derbyshire County Council and The Governing Body of Glebe Junior School UKEAT/0238/15/LA; March 29, 2016

Background

Indirect discrimination is defined by s19 EA as arising where A applies to B and to those not sharing B’s protected characteristic *‘a provision, criterion or practice’* (PCP), which *‘puts or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it’* and *‘it puts or would put B at that disadvantage’*, unless A can establish justification.

Implications for practitioners

In this case, the EAT took a broad view of the concepts of a ‘PCP’ and ‘particular disadvantage’ in upholding an indirect discrimination claim. The court’s approach to identifying a PCP is helpful and in keeping with earlier authorities; the analysis of ‘particular disadvantage’ may be more controversial, as discussed below.

Facts

The claimant (P) taught for over 10 years at the second respondent’s school. She had an exemplary record as a teacher and was highly regarded by colleagues and parents. She is a committed Anglican Christian. P’s husband was convicted of making indecent images of children and voyeurism, for which he received a sentence of imprisonment. P did not know about these matters before her husband’s arrest. She decided she would stay with him, consistent with the commitment she made to God in her marriage vows.

The second respondent summarily dismissed P on the basis that in choosing to maintain a relationship with her husband, her suitability to carry out the safeguarding responsibilities of her role had been eroded.

P brought claims for unfair dismissal and indirect discrimination on grounds of religion or belief.

Employment Tribunal

The unfair dismissal claim succeeded and this was not appealed. The ET found that no prescribed reason for the dismissal had been shown and that the decision had been pre-determined, a woeful investigation undertaken and insufficient account given to P’s unblemished career.

The ET accepted P had a genuine belief for the purposes of s10 EA that her marriage was sacrosanct, having been made before God.

The ET found the respondents had applied a ‘PCP’, namely a policy of dismissing those who chose not to end a relationship with a person convicted of making indecent images of children and voyeurism. However, the discrimination claim failed as the ET concluded that no ‘particular disadvantage’ had been shown as P would have been dismissed for standing by her partner irrespective of whether she held a religious belief in the sanctity of her marriage vows. Justification would not have been made out as the respondents had failed to adduce evidence establishing that dismissal had been a proportionate means of achieving the legitimate aim of safeguarding school children.

Employment Appeal Tribunal

P appealed the ET’s conclusion on ‘particular disadvantage’, contending that the wrong question had been asked. The respondents cross appealed the finding in respect of the PCP, submitting the ET erred in deciding this was made out by the identified ‘policy’, when the pleaded claim had been of a ‘practice’, which in turn connoted repetition, rather than a highly unusual situation, as in the present case. They also cross appealed the conclusion on justification.

The EAT upheld P’s appeal and dismissed the cross appeal, substituting a finding that P had suffered indirect discrimination.

As regards the PCP, the EAT noted that ‘policy’ was not part of the statutory definition in s19 EA; however, the concept should be construed broadly and the ET’s finding was capable of encompassing the ‘practice’ relied upon by the claimant. The element of recurrence, (identified as necessary in *Nottingham City Transport Ltd v Harvey* UKEAT/0032/12), was present as the decision-maker had given evidence that this was how they would have treated anyone in the circumstances; it did not matter that the situation would rarely arise.

Particular disadvantage

The EAT found that the ET had asked the wrong question in relation to 'particular disadvantage'; the fact that the PCP was applied to those in the claimant's group and those in the comparator group was a pre-requisite for showing indirect discrimination; but it did not address the comparative impact test. 'Particular disadvantage' did not require any particular level or threshold of disadvantage. In this instance, the comparison between those whose circumstances were not materially different, involved comparing two groups of people involved in loving relationships. Subjection to the PCP would present real difficulties for both groups, but there would be an additional, particular disadvantage for those in the claimant's group over and above the generic disadvantage, namely the crisis of conscience, stemming from their religious belief in the sanctity of marriage, which the ET had accepted P experienced. As the PCP was intrinsically liable to disadvantage a group sharing P's belief, the question could only be answered in her favour.

The EAT rejected the cross appeal on the justification issue; the ET had rightly found that there was no evidence showing that dismissal was a proportionate course.

Comment

P could have pleaded the alleged discrimination as a PCP, rather than specifically characterising it as a 'practice'. Langstaff J has suggested that using this composite phrase avoids the need to show the repetition/anticipated repetition required to establish a 'practice' and avoids overly technical arguments being raised as to whether the measure in question is correctly described as a 'practice', 'provision' or 'criterion': see *Bethnal Green and Shoreditch Education Trust v Dippenaar* UKEAT/0064/15 [see Briefing 782] and *Chief Constable of West Midlands Police v Harrod* [2015] IRLR 790 [see Briefing 767]. It does not seem that these authorities were cited in the instant case, but nonetheless the court's broad approach is in keeping with them.

In most instances at least, group disadvantage for those sharing the claimant's protected characteristic has been based on the proposition that numerically fewer in that group will be able to attain the benefit/numerically more will face the disadvantage in question. Here the argument which the EAT accepted was not that more employees of a Christian belief would stand by their partners in equivalent circumstances and thus face dismissal than those in the comparator group, but rather that they would face an additional disadvantage, to the non-Christian employees who stuck by their partners, namely the crisis of conscience which the claimant had undergone. The statutory concept of 'a particular disadvantage' may well be elastic enough to encompass this kind of disadvantage. However, it may be argued further down the line that this will, in turn, limit the recoverable compensation for indirect discrimination to the angst arising from the claimant's religious belief rather than encompassing the dismissal itself. For now, the respondents have appealed the conclusion on liability to the Court of Appeal.

Heather Williams QC
Doughty Street Chambers
h.williams@doughtystreet.co.uk

Direct discrimination and insurance payments in age cases

Smith v Gartner UK Ltd UKEAT/0279/15/LA; March 8, 2016

Introduction

As with any direct discrimination claim brought under the Equality Act 2010 (EA), a claimant alleging age discrimination must prove on the balance of probabilities that he or she has been treated less favourably than a comparator on grounds of age by the respondent. It is only in these circumstances that a respondent, whether an employer or service provider or other, will be required to demonstrate objective justification for the discrimination.

Where age is the protected characteristic, direct discrimination can be justified where the claimant is able to show that the treatment was a proportionate means of achieving a legitimate aim. The test of objective justification in s13(1) EA uses the same language as the predecessor Employment Equality (Age) Regulations 2006, SI 2006/1031 at Regulation 3(a):

> *…and A cannot show the treatment or, as the case may be, provision, criterion or practice to be a proportionate means of achieving a legitimate aim.*

Whilst the original legislation set a default retirement of 65, regulation 30 of the Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011 phased out the designated retirement age so that there was no longer any self-justifying retirement age for employees.

In *Smith v Gartner*, the EAT was asked to consider an appeal against a strike-out of the claimant's claim. The claimant (S) had alleged a breach of contract leading to unlawful deduction of wages and age discrimination. The question for the ET and the EAT, in respect of age discrimination, was whether or not the respondent (G) had done the acts alleged to be discriminatory, and secondly, whether or not the cause of the alleged less favourable treatment was age or some other factor.

Facts

S had been an employee of G, but became permanently disabled in 2003 and had not returned to work. She reached the age of 60 in 2014. The claim for discrimination and unlawful deductions arose from her entitlement to receive payments under a workplace permanent health insurance scheme, which paid out an income replacement benefit to her whilst she was permanently disabled and unable to work. Under the rules of the insurance scheme her benefits would end on the termination of her employment or upon her reaching the usual retirement age of 60, which ever was earlier.

S had been off work with illness and receiving income replacement from May 2003 until September 2014 when she reached 60. In October 2006 the Employment Equality (Age) Regulations 2006 had come into force, making it unlawful to discriminate against a person on grounds of age, and introducing a default retirement age of 65. By 2013, the EA was in force and the default retirement age had been abolished. In addition, a new permanent health insurance scheme was introduced for G's employees which provided benefits for new claimants until the age of 65.

Employment Tribunal

S alleged that the only reason why her benefits ceased whilst others were paid until age 65 was because she was deemed to be at retirement age; this was prima facie age discrimination, which would be unlawful unless it was justified by her employer. She argued that G was responsible because it had contracted with her to make payments to her to replace her income, and the cessation of them, because of age, was an unlawful deduction in breach of that contract, as well as unlawful age discrimination.

The ET rejected the claim primarily because of its analysis of S's contract claim, from which its conclusion on discrimination followed.

Employment Appeal Tribunal

The EAT upheld the ET's decision and rejected S's appeal. It held that the benefit paid to S was paid as a result of her contract of employment and the first question for the courts to consider was the construction of the contract to determine the employer's obligations. Had it contracted to make the payments itself or, as G argued, had it contracted to make arrangements for payments to be made from another source?

The ET and EAT agreed with G that although it had entered into a contract with S by which it agreed to ensure that she received income replacement in the event of permanent disablement, G did not contract with her to make the payments itself. Instead, G contracted to arrange an insurance scheme for employees. Payments would then be made under the scheme to the employees

directly, and all such payments would be governed by and administered according to the rules of the insurance scheme. The EAT agreed with the ET that S could not, on the facts of her contract, bring a claim against her employer, since her employer was not responsible for making the payments, or the date of their termination.

Whilst other employees who also claimed under the scheme may receive benefits until a later retirement date, in this case, S was already in receipt of the benefits under a particular set of rules, at the time that the new scheme was introduced. The EAT dealt with the age discrimination claim against G by referring to its analysis of the contract and the responsibility for it.

The EAT also considered whether or not the non-payment of the benefit linked to a retirement age was because of retirement age. The EAT found that the reason for the non-payment of the benefit was that the rules of the scheme itself placed a limit on the receipt of the benefit, and that the employer therefore, being bound by the rules, was not doing an act based on age; its actions were based on the rules of the scheme. Judge Eady said:

> *Taking the other nuance of the Claimant's case on this point, the Respondent equally did not directly discriminate against the Claimant because of age in not extending to her the benefits under the new Unum policy. She did not benefit from the new Scheme because she was already the recipient of benefits under the old, and did not meet the conditions of the new Scheme because she was not working in the period immediately before any potential claim under it. That was not direct discrimination because of the Claimant's age but simply a distinction between those employees who were already receiving benefits and not in work and those who were not in that position. (para 49)*

The EAT held that despite there being a set retirement age which triggered the termination of payments, it was not S's age which caused her to cease receiving benefits, but the point at which she had begun receiving benefits under the older scheme. Any employee who had received benefits under the old scheme would have been subject to the same rules, just as any employee who became eligible under the new scheme, regardless of age, would benefit under the new scheme.

Comment

When introducing the EA, the type of potential discrimination raised in this case was considered by policy-makers with the result that schedule 9 paragraph 14 EA provides a specific exemption for age related provisions in insurance schemes and similar benefits, where payment terms may be linked to retirement age.

> *14 (1)* ***It is not an age contravention for an employer to make arrangements for,*** *or afford access to,* ***the provision of insurance or a related financial service to or in respect of an employee for a period ending when the employee attains whichever is the greater of***
>
> ***(a) the age of 65, and***
>
> ***(b) the state pensionable age.***
>
> *(2) It is not an age contravention for an employer to make arrangements for, or afford access to, the provision of insurance or a related financial service to or in respect of only such employees as have not attained whichever is the greater of*
>
> *(a) the age of 65, and*
>
> *(b) the state pensionable age.*
>
> ***(3) Sub-paragraphs (1) and (2) apply only where the insurance or related financial service is, or is to be, provided to the employer's employees or a class of those employees***
>
> ***(a) in pursuance of an arrangement between the employer and another person, or***
>
> *(b) where the employer's business includes the provision of insurance or financial services of the description in question, by the employer.*
>
> *(4) The state pensionable age is the pensionable age determined in accordance with the rules in paragraph 1 of Schedule 4 to the Pensions Act 1995.*

The objective was to ensure that there was no disincentive to insurance companies continuing to offer products such as permanent health insurance schemes to companies, or to companies continuing to use them to provide significant benefits to their employees, partly because of the protection from the risk of age discrimination litigation.

Implications for practitioners

Advisers should note that whilst the exception will only apply in circumstances which fit precisely, many employers will be able to successfully rely upon this clause to close down discrimination claims. This will not always be the case with contract claims, where the contract is for the provision of pay replacement, rather than provision of an insurance scheme to make the replacement payments.

Catherine Rayner
7 Bedford Row

A direct causal link between disability and conduct to establish a claim for discrimination arising out of disability is not required

Risby v London Borough of Waltham Forest UKEAT/0318/15/DM; March 18, 2016

Introduction

The appeal concerned whether the ET, in requiring there to be a direct connection established between disability and conduct which led to dismissal, had misinterpreted s15 Equality Act 2010 (EA), and so had erred in concluding that the dismissal was not unfair.

Facts

Mr Risby (R) had been employed by the London Borough of Waltham Forest (WF) as a deputy risk and insurance manager since 1990. R was dismissed without notice on August 29, 2013. R had been paraplegic since 1981 and is a wheelchair user. R was known to have a short temper, which was not related to his disability. R also claimed he had depression since the death of his father in 2009.

In 2013 WF decided to organise a series of workshops for its managers, including R, to take place at a private venue which had wheelchair access. On around June 11, 2013, WF's chief executive decided that external venues would no longer be used and the venue for the workshop was therefore changed to the basement of WF's assembly hall in Walthamstow, which was not wheelchair accessible.

On June 18, 2013, R and other managers were invited by John Turnbull (JT) to a workshop in the basement of the assembly hall. R confirmed the venue was not wheelchair accessible when he passed the venue on his way home that day. This angered R and the next day he went to speak to Lisa Scott (LS), JT's personal assistant, to protest. R exhibited quite aggressive and hostile behaviour and shouted at LS who came close to tears.

LS sought the assistance of Ray Gard (RG). During the altercation with RG, R said loudly '*the Council would not get away with this if they said that no fucking niggers were allowed to attend.'* Unknown to R, LS was mixed raced and believed the comment was directed at her.

After lunch, R was heard by another employee to comment that he was being treated *'like a nigger in the woodpile'*. This too was reported to JT who subsequently informed R that he was suspended.

Denise Humphrey (DH) was appointed to carry out a disciplinary investigation. DH recommended that R be dismissed for his use of the word 'nigger'. Ms Terry Borkett (TB) conducted a disciplinary hearing, concluding that R had used offensive, racist language, had behaved unacceptably towards various managers and colleagues and had behaved in a harassing manner towards LS in particular. She decided R should be summarily dismissed.

R appealed the decision, which was heard by Keith Hanshaw (KH). The focus of the appeal was the severity of the sanction. The appeal was dismissed as, in KH's view, R knew his conduct would not be tolerated by WF. KH did not accept that there was no risk of repetition.

Employment Tribunal

R brought claims for unfair dismissal and disability discrimination. In particular, R brought a claim pursuant to s15 EA for discrimination arising from his disability.

S15(1)(a)&(b) of the EA provides protection to individuals who have been discriminated against for something arising in consequence of their disability and where the employer cannot justify the discrimination as a proportionate means to achieve a legitimate aim.

The ET accepted that R was physically disabled by reason of paraplegia. The ET did not accept that R was also disabled by reason of depression, a claim R raised late in the proceedings. The ET considered this late claim to be a *'bid to make some logical connection between [R's] behaviour on 19 June and the fact that he is wheelchair bound'*. The ET also found that R's short temper was a personality trait not an illness.

The ET found that there were two effective causes of the conduct to have caused the dismissal. The first was R's disability by paraplegia, in that R's conduct was the product of indignation caused by WF's decision. R's disability was an effective cause of that indignation, and so of his conduct. The second was R's temper which did not arise from his disability.

However the ET found no '*direct linkage between the physical disability and [R's] behaviour on 19 June, for which he was dismissed';* it found that R's behaviour and conduct (the 'something arising') was not in consequence of his disability and so he failed to satisfy s15(1)(a).

The ET's reasoning for coming to this conclusion was that if R's conduct could not be explained in some way by a mental impairment qualifying as a disability, then there could be no claim for disability discrimination and subsequently unfair dismissal. It rejected his complaint.

Employment Appeal Tribunal

R appealed the decision on several grounds, which the EAT catagorised into three broad grounds, with the first and third being relevant to discrimination:

- Ground 1: did the ET err in law in requiring *'direct linkage'* between disability and conduct in order to make a finding of disability discrimination contrary to s15 EA?
- Ground 3: failure to make reasonable adjustments contrary to s20 EA, in that the workshop should have been relocated to a venue with wheelchair access.

With respect to the first substantive ground of appeal, R contended that the ET's reasoning demonstrated a *'clear error of approach and so of law'.*

In its judgment the EAT referred to Laing J's comments in *Hall v Chief Constable of West Yorkshire* [2015] IRLR 893, who stated that it was an error of law for the ET, in that case, to have found that disability had to be the cause of the respondent's action and not merely the background circumstance.

Laing J further stated that the intention behind s15 EA was to loosen the causal link between disability and unfavourable treatment. In *Pnaiser v NHS England & Anor* UKEAT/0137/15/LA [see Briefing 779], the EAT again also found that no direct link was necessary; it said: *'the "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.'* Therefore s15 EA does not require a direct causal link and the ET had erred in requiring one.

In R's case, disability was not simply the context for the misconduct; if R's disability of paraplegia was removed, there would have been no misconduct and therefore no dismissal. The ET's finding that one of the effective causes arose in consequence of R's disability was sufficient to satisfy s15 EA.

The EAT further found that the ET failed to go on to consider whether R's dismissal was a proportionate means to achieve a legitimate aim under s15(1)(b) EA. This question had been included in the various separate grounds of appeal which had been 'grouped' by the EAT, and dismissal was part of R's claim under s15 EA.

Both the ET and WF had been mistaken as to causation; they saw R's conduct as unconnected with his disability, and so discounted disability in their decision-making. The EAT also noted that KH's position was that there was nothing R could do to explain his conduct in a manner which would have led to a different outcome following the internal appeal. The ET had also acknowledged that, had WF accepted R's conduct arose out of his disability in the sense mentioned above, there would have been an alternative to summary dismissal open to WF – such as a final written warning. The EAT therefore considered that KH's belief that there was nothing R could do to affect the outcome was not a reasonable response.

The question of whether the dismissal was a proportionate means to achieve a legitimate aim was therefore tied up with the question of reasonableness under s98(4) Employment Rights Act 1996 (ERA). The EAT decided that the ET had to consider what effect its error regarding s15 EA had on its decision as to reasonableness under s98(4) ERA.

With respect to the failure to make reasonable adjustments appeal, the EAT found that WF had not refused to move the workshop to an accessible venue, but that R's conduct had overtaken his request to relocate it.

The EAT remitted R's case back to the ET for redetermination of the s15 EA claim and the effect its error had on its decision as to reasonableness under s98(4) ERA.

Implications for practitioners

The case is useful for claimants bringing claims under s15 EA, particularly where the claimant's disability is physical rather than psychiatric. Employers must be live to the EAT's loose interpretation of the language of s15, in that a claimant's disability need not be the main or sole cause of the unfavourable treatment. The claimant merely needs to show that their disability was a more than trivial influence on the treatment.

The case highlights the importance of maintaining a proper balance between the interests of all parties in these types of circumstances, particularly for vulnerable employees, and to ensure that reasonableness and proportionality prevails.

Daniel Zona
Trainee solicitor
Bindmans LLP
d.zona@bindmans.com

A requirement to work at weekends may indirectly discriminate against women

XC Trains Ltd v CD, ASLEF and others UKEAT0331/15/LA [2016] IRLR 748; July 28, 2016

Implications for practitioners

This case provides authority for the proposition that a requirement to work at weekends, or very early mornings/late nights, may indirectly discriminate against women if it is found not to be a proportionate means of achieving a legitimate aim.

It also confirms that when establishing whether a provision, criterion or practice (PCP) puts female members of the workforce at a particular disadvantage, it is appropriate for the ET to compare the percentage of the female workforce who are unable to comply with the PCP with the percentage of the male workforce unable to comply.

Facts

The claimant, CD, was employed by the respondent train company, XC, as a train driver. She was one of only four women out of 21 train drivers based at Newcastle train station, and one of only 17 women train drivers employed by XC out of a total of 559.

All the train drivers at the Newcastle depot were required to work shift patterns which rotated through the week and included weekends. The majority of the shifts required work that either started very early in the morning or ended late at night. Only two shifts provided 'family friendly' hours, defined as starting and finishing between the hours of 8am and 6pm Monday-Friday. The shift rota was agreed following collective bargaining with the ASLEF union, the second respondent.

CD had three children under the age of five and, after separating from her partner, was experiencing difficulties managing childcare and the requirement to work the full range of shifts. CD made various requests for flexible working which were all refused as they would *'unfairly deny other Newcastle drivers the same access to the only two family friendly [shifts] as this would obviously be a long term requirement.'*

Instead, she was granted a series of short-term *'accommodations'* which provided for her to have Saturday rest days and to work the two family friendly shifts. However, these *'accommodations'* were brought to an end after XC received complaints from other drivers, who eventually refused to continue to work on weekends to accommodate CD's request. This, said XC, made it impossible to reorganise work requirements in order to meet customer needs.

CD complained of indirect sex discrimination contrary to s19 of the Equality Act 2010 (EA), alleging that XC applied a PCP which was *'a requirement to be able to work over 50% of rosters and on Saturdays'.*

Employment Tribunal

The ET found that the PCP complained of was applied and concluded that it did disadvantage women. The tribunal observed the disproportionate number of men in the workforce and stated that: *'On the face of it, there is no reason why women should not be as well represented in the work-force as men. We are entitled to wonder and enquire why the position is as it is… We have considered whether this PCP intrinsically disadvantages women and we conclude that it must given the stark statistics to which we refer above. Why is this so? We conclude that women are deterred from applying for driving roles because their caring responsibilities mean that they cannot comply with the PCP linked as it is to the shift system.'*

The tribunal further observed that 11.76% of the female workforce had applied for accommodations as they were unable to comply with the PCP, against 0.75% of the male workforce. The tribunal had no difficulty in finding that CD was herself disadvantaged by the PCP.

Justification

XC raised a justification defence, relying on the provision of the rail service required by the franchise agreement and the needs of the remainder of the workforce as legitimate aims. The tribunal rejected the justification defence finding the refusal of flexible working to be disproportionate, and placing considerable emphasis on the fact that the request had been refused because of the complaints of a male dominated work force. The tribunal said: *'Unless something is done to break the circle, one of the last male work bastions will be perpetuated'.* Observing that in the past the police and fire brigade had used the same

arguments to justify similar arguments, the tribunal noted that these had given way over the last 20 years to permitting shift patterns resulting *'in workforces much more reflective of the society which those services serve'*.

Employment Appeal Tribunal

XC complained that the ET had erred in identifying the pool appropriate to the complaint about the PCP, asserting that the pool applied by the tribunal (the entire workforce), was more appropriate to a complaint about the PCP as a bar to recruitment, which was not the issue in the case. Relying on the judgment of the *House of Lords in Secretary of State for Trade and Industry v Rutherford* (No. 2) [2006] IRLR 551, XC argued that those with no interest in flexible working should not have been included in the comparative exercise at all, and that the correct pool was only those workers who had sought accommodations not to work to the requirements of the PCP.

Mrs Justice Slade rejected XC's submission. She observed that considering the base number of each sex who could not comply with the PCP would not assist in determining whether it puts members of one sex at a particular disadvantage. If there were ten women drivers in the workforce of whom five applied for accommodations and two hundred male drivers of whom 10 applied for accommodation, the ratio of five to ten would give an erroneous impression of the comparative effect of the PCP on women drivers and male drivers. The correct comparison was the proportion of women drivers in the workforce who could and could not comply, compared with the proportion of male drivers who could and could not comply.

However Mrs Justice Slade allowed XC's appeal on a separate ground of challenge, namely that the ET had erred in failing to properly consider the second legitimate aim proposed by the employer, namely the wider needs of the workforce. The ET had focused on the importance of a gender-balanced workforce and had suggested work patterns that would achieve that objective, rather than undertaking the balancing exercise required by s19(2)(d) EA, that is balancing the discriminatory effect of the PCP against XC's legitimate aims. The claim was remitted to a fresh tribunal for consideration.

Comment

This case serves as a useful reminder that employees who are refused flexible working requests may have protection under the EA as well as under the statutory scheme for flexible working. Given that women continue to disproportionately shoulder the responsibility for child care, requirements to work anti-social hours may give rise to liability for indirect discrimination unless the employer can prove that the requirement is a proportionate means of achieving a legitimate aim.

Eirwen-Jane Pierrot
Barrister, Field Court Chambers
eirwen.pierrot@fieldcourt.co.uk

CASE UPDATE
Lee v Ashers Baking Company Ltd and others

In a judgment published on October 24, 2016, the Northern Ireland Court of Appeal (NICA) has found that Ashers Baking Company is liable for unlawful discrimination by refusing to bake a cake iced with a 'Support Gay Marriage' message, for a gay customer, Mr Lee. Tom Gillie, barrister with Cloisters Chambers, considers the wide-reaching implications of this significant ruling.

The case may arise from a cake, but it deals with a fundamental question in our democratic society: how much should religious beliefs be protected when they conflict with other people's protected rights?

Background

Mr Lee (L) is a gay man who believes in the right to same-sex marriage and placed an order with Ashers Baking Company (ABC) for a cake decorated with the slogan 'Support Gay Marriage'. ABC rejected the order 48 hours after it had been made on the basis that it would offend the owners' Christian beliefs. L successfully brought claims for direct and indirect discrimination in the county court on the grounds of (1) sexual orientation, and (2) his political belief [see Briefing 757].

Analysis

NICA's judgment is the latest in a line of significant court decisions which have tended to protect religious freedom only to the extent that it does not impinge on the basic rights of others. For instance, in 2013 the UK Supreme Court found in favour of a gay couple who had been refused their reservation at a bed & breakfast run by Christians (see *Bull and another v Hall and another* [2013] UKSC 73, Briefings 626 & 697). Such cases make a crucial distinction between the right to *hold* a belief, which is absolute, and the freedom to *manifest* a belief, which is qualified.

Some critics of L's position argue that the judgment in this case will force people to express a political message at odds with their own views. In the view of this author, that concern is misplaced: this judgment deals with the actions of businesses in the public sphere, not the rights of private individuals in the private sphere. There is no requirement that businesses have to agree publicly or privately with the views of their customers, nor associate with or promote such views. During the EU referendum, for instance, the *Evening Standard* carried 'Vote Leave' adverts; the paper's editorial position strongly backed 'remain'. Companies are not faith groups. They are non-religious bodies which operate in the public sphere to provide services and goods for profit. NICA's judgment in this case underlines that businesses cannot refuse to supply goods on the grounds that they do not agree with a particular social opinion.

Is the law dictating how those with religious and political convictions can act in public? Perhaps. But that is not necessarily a bad thing in the context of LGBT rights, which for too long have lagged behind the protections afforded to other groups. Only 35 years ago, homosexuality was a crime in Northern Ireland. Only 14 years ago, local authorities in Northern Ireland were banned from any action which might 'promote' homosexual relationships in schools. And only a few weeks ago, the House of Commons failed to pass a bill pardoning men, still alive today, for criminal convictions for having gay relationships. Today, civil marriage for same sex couples is still unlawful in Northern Ireland. NICA's judgment exemplifies the power of the courts to secure the rights of minorities and engender a more tolerant society, even in the face of pressure to the contrary. Tolerance, after all, means *'showing willingness to allow the existence of opinions or behaviour that one does not necessarily agree with'.* The law agrees: it is not for L to find a bakery prepared to bake a 'gay cake', but for businesses to be willing to provide services to customers, even if they disagree with legitimately protected views or sexual identity.

A copy of the judgment is available here: http://www.equalityni.org/ECNI/media/ECNI/Cases%20and%20Settlements/2016/AshersFullJudgement-Appeal.pdf. A full report on this case will be published in the next edition of *Briefings.*

David Lammy review of black, Asian and minority ethnic representation in the criminal justice system

The consultation period of the government's independent review into the over-representation of black, Asian and minority ethnic (BAME) people in the criminal justice system concluded on June 30, 2016.

The review is being led by David Lammy MP, at the invitation of the then Prime Minister David Cameron in January 2016. Mr Lammy was asked to investigate over-representation of, and possible bias against, BAME individuals in the criminal justice system. The review has cross-party support, and is wide-ranging, intending to investigate issues arising from the point of arrest, within the court system and through rehabilitation.

The 'call for evidence' attracted over 300 responses from a wide range of individuals and organisations, including the judiciary. Whilst the review is still ongoing, Mr Lammy has indicated that a key issue being investigated are the suggestions that the London Metropolitan Police are mistakenly labelling a large proportion of BAME youths as gang members, a label which leads to harsher treatment by the criminal justice system from the outset and throughout. The DLA understands that the full review is expected in May 2017 and will include recommendations to tackle any bias or prejudice found within the criminal justice system.

Nina Khuffash, Bindmans LLP

Women and Equalities Committee inquiries

In addition to its inquiry into pregnancy and maternity discrimination [see Briefing 801], the House of Common's Women & Equalities Committee has recently examined transgender equality, sexual harassment and violence in schools, and employment opportunities for Muslims in the UK.

The government's response to the transgender equality inquiry was published on July 11, 2016. The Committee's chair commented that although some of the commitments announced – such as a review of the Gender Recognition Act 2004 – were very welcome, other parts of the government's response were disappointing in that, for example, there is no plan to change the confusing and inadequate language concerning the gender reassignment category in the EA. Further discussions on the response are continuing within both parliament and the LGBT community.

The evidence the Committee gathered on the impact of Brexit on the equalities agenda was published on September 16th; this report contains much useful and thought-provoking material on the potential impact of Brexit on equality law.

The Committee will conduct an inquiry the implications of leaving the EU on equalities legislation and policy. The DLA has been invited give evidence to this inquiry. The Committee will be taking written evidence until Wednesday November 9, 2016.

Full details of this inquiry, and copies of all its reports and responses to them are available on the Committee's website: www.parliament.uk/business/committees/committees-a-z/commons-select/women-and-equalities-committee/

Abbreviations

AACR	Administrative Appeals Chamber reports
AC	Appeal Cases
BAME	Black, Asian and Minority Ethnic
BIS	Department for Business, Innovation & Skills (now the Department for Business, Energy & Industrial Strategy)
CA	Court of Appeal
CJEU	Court of Justice of the European Union
CSOH	Court of Session Outer House
CTS Act	Counter-Terrorism and Security Act 2015
DLA	Discrimination Law Association
EA	Equality Act 2010
EAT	Employment Appeal Tribunal
ECR	European Court Reports
EHRC	Equality and Human Rights Commission
ERA	Employment Rights Act 1996
ET	Employment Tribunal
ETBB	Equal Treatment Bench Book
EU	European Union
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
FMSA	Financial Services and Markets Act 2000
FOS	Financial Ombudsman Service
HHJ	His/Her Honour Judge
HNC	Higher National Certificate
HRA	Human Rights Act 1998
ICR	Industrial Case Reports
IHRC	Islamic Human Rights Commission
IRLR	Industrial Relations Law Report
IT	Industrial Tribunal
LGBT	Lesbian, gay, bisexual and transgender
LJ	Lord Justice
LLP	Legal liability partnership
NC	National Certificate
NHS	National Health Service
NICA	Northern Ireland Court of Appeal
PCP	Provision, criterion or practice
PSED	Public sector equality duty
QC	Queen's Counsel
SC	Supreme Court
ScotSC	Scottish Court of Session
WLR	Weekly Law Reports

Briefings