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Editorial

Impact of government policies brings serious concerns

Despite the existence of strong anti-discrimination laws in the UK, the government has managed to push through increasingly draconian and potentially racist measures in respect of immigration and asylum, by exempting these matters from the Equality Act 2010.

The exposure of the Windrush scandal demonstrates the harsh and tragic consequences of the Home Office's policy to create a 'hostile environment for illegal immigrants', highlighting the dire consequences for people who lacked documentation to prove that they are lawfully in the UK.

In their article *What is the Windrush 'scandal*? Barbara Cohen & Razia Karim set out the relevant immigration legislation and explore the operation of the 'hostile environment' – a policy adopted in 2012, intended to deter people from coming to the UK and to stop those who do come from overstaying. They highlight the extent of the problem and the severe consequences for individuals who lack the paperwork to prove their right to be in the country. Some have lost their jobs and homes, while others have reportedly been denied critical medical treatment and been deported.

The authors question whether the 'hostile environment' policy is compliant with the Equality Act 2010's public sector equality duty or with the Human Rights Act 1998 in relation to the mandatory sharing of data without the individual's consent.

They highlight a key part of the 'hostile environment' policy which has been to introduce a growing body of law and regulations putting the burden of checking immigration status on ordinary citizens. As reported in previous issues of *Briefings*, employers, landlords, staff in the NHS, banks and building societies all have legal obligations to ensure that employees, tenants, patients, and bank customers are lawfully entitled to work or access lettings or services.

The experience of many of the Windrush descendants has exposed a system which, if applied to the estimated 3.5 million EEA nationals resident in the UK who will be required on Brexit to apply to the Home Office for 'settled status', will increase a culture of suspicion and discrimination based on perceptions around nationality, colour or accent which could result in human misery on an even bigger scale.

In their analysis of the impact of sentences of imprisonment on women, Kate Lill and Paramjit Ahluwalia highlight the particular disadvantage women prisoners experience in a system designed by men for men. Women in prison face considerable disadvantage, many with backgrounds of mental ill health, addiction and experiences of domestic and sexual abuse. Prison can be hugely damaging for these women and their families. The authors will give a cautious welcome to the MoJ's announcement on June 27th of a new Female Offender Strategy which recognises women's victimisation as a driver to their offending and plans to focus on 'residential centres' rather than on building new women's prisons. However, without adequate investment and funding, it is questionable whether the government is serious about achieving its aim of reducing the number of female offenders serving short jail terms. Existing women's community services, which have been proven to be effective in both preventing women entering prison and in rehabilitating those who do, have had to close because of funding pressures. For the strategy to be effective, modelling suggests that an investment of at least £20m in community services is required. As it is estimated that female offenders currently cost £1.7bn, investment from across government in preventing offending and reoffending through community provision could yield significant savings.

The DLA continues to work with its members and other organisations to lobby for positive change in relation to women's imprisonment, and to challenge potentially discriminatory immigration rules, among other things. Current concerns include awareness that Brexit has the potential to take away the rights of over 3 million EEA nationals to live, work and access services in the UK, and, like the Windrush generation, that they too will be subject to immigration checks before they will be allowed to access their social and economic rights.

Whilst we continue to publicise the challenges and lobby where possible to ensure that the legal basis of protection of all citizens' rights will not be diminished further, the context of austerity and increasing pressure on equality and diversity provisions and those who work with, and for, the victims of discrimination, make for worrying times.

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Editor

Please see page 35 for list of abbreviations

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What is the Windrush 'scandal'?

Barbara Cohen and Razia Karim, former legal policy officers at the Commission for Racial Equality, set out the background to the issues this scandal has exposed. They consider whether the Home Office's 'hostile environment' policy is compliant with the Human Rights Act 1998 and the Equality Act 2010's public sector equality duty and whether any benefits of the policy can justify its financial and societal costs. They call for the policy to be objectively and thoroughly evaluated.

What is the Windrush 'scandal'?

The Windrush scandal engulfed the news this Spring and continues to run as a major news story.[1] But why have the personal histories of elderly black men and women, who arrived in the UK from the Caribbean between 1948 and 1973, dominated the media? It is because their personal and sometimes tragic testimonies have exposed the hidden inhumanity of the government's 'hostile environment' policy. At the heart of this exposure lies a falsehood: that the primary concern of government is that people lawfully in the UK should be safe, healthy, free to move about, to work, to study or be supported by the welfare state in times of need. But this was not true for men and women who are part of the Windrush generation.

Who are the Windrush generation?

From 1948, thousands of men and women from the Caribbean and other parts of the Commonwealth answered the call for workers to help rebuild Britain, arriving on a UK and Colonies passport or on a passport from a Commonwealth member state. Before 1962 they could enter the UK without restriction. No record of arrivals was kept and no immigration status documents were issued.

Responding to growing public demand to restrict (non-white) immigration, parliament passed legislation in 1962 and 1968 imposing immigration controls on Commonwealth citizens; Commonwealth children were allowed to continue to enter on their parents' passports.

The Immigration Act 1971 introduced a broad framework of immigration control for all nationalities. Those who were present and settled in the UK on January 1, 1973 when the Act came into force were automatically given indefinite leave to enter or remain (ILR). But no documentation was issued to confirm this. Commonwealth citizens who acquired ILR in this way would not lose their status by leaving the UK until this protection was repealed by the Immigration Act 1988.

A person born in the UK before January 1, 1983 will be a British citizen today;[2] a person born in the UK on or after January 1, 1983 will be a British citizen today if at least one of their parents was British or settled in the UK (with ILR) at the time of their birth.

Some of the Windrush generation and their children may never have applied for a document to prove their right to live and work in the UK. The lack of documentation proving status was to have disastrous consequences.

What is the 'hostile environment'?

The 'hostile environment' is a Home Office (HO) policy adopted in 2012 intended to deter people from coming to the UK and to stop those who do come from overstaying. Theresa May, as Home Secretary, announced:

> *The aim is to create a really 'hostile environment' for illegal migrants … What we don't want is a situation where people think that they can come here and overstay because they're able to access everything they need.*[3]

A main feature of the 'hostile environment' is the major role in immigration control assigned to persons other than immigration officers. Private citizens - employers or landlords, bank staff and public servants now carry out routine immigration checks and can deny jobs, housing and essential services to undocumented migrants.[4] This 'outsourcing ' of immigration control is a deeply worrying matter since the individuals involved are not qualified or trained to check immigration status, yet they face civil or criminal penalties if they fail to do so.

Another feature of the 'hostile environment' is the expansion of mandatory data sharing, turning public servants and service providers into informants, under

1. The information and figures used in this article were up-to-date at June 21, 2018.

2. Unless their father was a foreign diplomat when they were born.

3. The Telegraph, Theresa May interview, May 25, 2012

4. This article uses the term 'undocumented migrant' as the more accurate description of the persons who, in practice, are the victims of the various elements of the 'hostile environment'.

arrangements between the HO and other departments or agencies. The result is data sharing on a near industrial scale with limited parliamentary oversight. Other main elements of the 'hostile environment' policy are set out as follows:

a) Preventing illegal working

Well before a comprehensive 'hostile environment' policy was in place, employers were enrolled into immigration control. S8 of the Asylum and Immigration Act 1996 (1996 Act) made it a criminal offence to employ a person not entitled to live and work in the UK. To avoid prosecution, employers needed to check specified immigration status documents of prospective employees before giving them a job. Concerns were raised at the time that suitable job-seekers lawfully in the UK might not have documents to prove their status. This was not regarded as a major barrier but one that the job seeker could easily resolve.

Many warned of the risk that employers would *'go white'*[5] i.e. choosing not to recruit anyone who looked or sounded foreign; or only checking documents of those whose name or colour might suggest an immigration issue. Three years later,[6] the government amended the 1996 Act[7] to require a statutory code of practice on how to avoid unlawful race discrimination while avoiding committing this criminal offence.

The Immigration, Asylum and Nationality Act 2006 (2006 Act) maintains the prohibition[8] but introduced a new civil penalty regime. An employer may escape liability for a financial penalty[9] by demonstrating it has checked and copied certain specified documents before the employment begins. An employer who passes information about an 'illegal' worker can secure a reduced penalty. The risk of race discrimination was unchanged, and s23 of the 2006 Act required the Home Secretary to issue a code of practice providing guidance to employers on how to avoid a civil penalty in a way that avoids unlawful race discrimination.[10] A separate criminal offence[11] of knowingly employing an illegal worker carried an unlimited fine and/or up to two years' imprisonment.

The 'hostile environment' includes measures to incentivise employers to exclude and dismiss undocumented migrants. In May 2014, the maximum civil penalty was increased by Order to £20,000 per 'illegal' worker. The Immigration Act 2016 (2016 Act) made it easier to prosecute employers of 'illegal' workers by amending the criminal offence to having *'reasonable cause to believe that the employee is disqualified from employment by reason of the employee's immigration status'*, adding a power of arrest and increasing the maximum sentence to 5 years.[12]

b) Right to rent

To have a place to live is a basic necessity for everyone, irrespective of nationality. Parliament has legislated in the past to prescribe who is eligible to apply for social housing: non-UK citizens must have ILR. The Immigration Act 2014 (2014 Act) prescribes who is entitled to rent private residential property. The Act prohibits a landlord or their agent from agreeing to rent a house or flat to anyone who is disqualified by immigration status. A landlord or agent can be excused from a civil penalty of up to £3,000 per tenant if, before granting a tenancy, they have followed the prescribed requirements in checking, copying and retaining specified documents disclosing immigration status of prospective tenants

Needless to say, when this policy was first proposed it was popular with no one. Landlords' organisations opposed the unwanted burden imposed on their members. Migrants' and anti-racism organisations, discrimination lawyers including the DLA, immigration lawyers, and parliamentarians all raised concerns about the strong likelihood of race discrimination in lettings. At almost the same time this policy was announced, a BBC undercover investigation exposed how letting agents in London were prepared to discriminate against black would-be tenants if asked by landlords to do this.[13] In pre-legislative consultation, 58% of respondents said this policy was likely to lead to race discrimination and 40% said it was likely to discriminate against older people who could be denied housing because they lacked relevant immigration status documents. Concern within parliament was sufficient to agree that the 'right to rent' scheme should be piloted in one part of the country before it was in force across the UK.[14] To date it is only in force in England.

The policy remains unpopular and the Joint Council for the Welfare of Immigrants (JCWI) and others

5. Heard during the Lords' debate
6. Section 22, Immigration and Asylum Act 1999
7. Section 8A
8. Section 15
9. Initially £10,000 per undocumented worker
10. *Guidance for employers on the avoidance of unlawful discrimination in employment practice while seeking to prevent illegal working*, February 2008. This was replaced in May 2014 by Code of practice for employers – *Avoiding unlawful discrimination while preventing illegal working.*
11. Section 21
12. Section 21
13. http://www.bbc.co.uk/news/uk-england-london-24372509
14. The Immigration Act 2014 (Commencement No. 3, Transitional and Saving Provisions) Order 2014

continue to expose evidence of actual or potential discrimination (landlords indicating how they would respond to prospective tenants of different ethnicities). At the time of writing, JCWI has leave to judicially review the decision of the Home Secretary to extend the 'right to rent' scheme to Scotland, Wales and Northern Ireland before undertaking an evaluation of the operation of the scheme in England.[15] As required under the 2014 Act[16] the HO has issued a code of practice for landlords on avoiding discrimination.[17]

The 2016 Act tightened this scheme by the introduction of a criminal offence of renting to a person knowing or having reasonable grounds to believe that person is disqualified punishable by up to five years imprisonment or a fine or both. The Act provides a system of accelerated evictions of disqualified persons, including eviction without a court order where the HO notifies the landlord that all adult tenants of a property are disqualified.

c) The role of the NHS

Members of the Windrush generation, despite working and paying tax in the UK for decades, have been denied free NHS treatment when they could not produce a document to show they had ILR. While initially introduced more than 10 years ago to combat 'health tourism',[18] immigration checks for second tier medical services are now a key element of the 'hostile environment'. These checks deprive undocumented migrants of vital medical treatment,[19] and give the NHS details of undocumented migrants which, under a data-sharing agreement, could be provided to the HO.

Regulations introduced in 2015[20] require NHS bodies to carry out immigration checks to verify whether patients are eligible for free NHS treatment, and if not to require upfront payment in full for non-urgent care.

The BMA warned that to avoid discrimination, it will be necessary for all patients to have their eligibility for free NHS healthcare assessed, placing an administrative burden on stretched health services. It also warned of the potential difficulties for those who are entitled to free NHS care but who cannot provide the necessary paperwork to prove their eligibility.[21]

Under a memorandum of understanding[22] on data sharing, NHS Digital is expected to provide from its records non-clinical information relating to immigration offenders when this is requested by the HO.[23] Health professionals warned that this arrangement would deter seriously ill people from seeking medical treatment for fear of being deported and undermine the doctor-patient relationship.[24]

The Department of Health and Social Care has produced guidance reminding NHS bodies of their obligations under the Equality Act 2010 and the Human Rights Act 1998 (HRA) alongside guidance on immigration checks.

d) The role of banks and building societies

The 'hostile environment' also extends to the provision of accounts by banks and building societies. The 2014 Act prohibits them from opening current accounts for a 'disqualified person'. The definition of a disqualified person includes a person who does not have ILR.[25]

The 2016 Act introduced a further duty on banks to conduct quarterly immigration checks from January 1, 2018 for existing current accounts operated by a disqualified person, and, if required, to close them.

The purpose behind these measures is to make it extremely difficult for undocumented migrants to build up a credit history and establish a life in the UK. Banks and building societies must carry out their immigration checks through a specified anti-fraud organisation (Cifas). Worryingly, an inspection by the Independent Chief Inspector of Borders and Immigration found that 10% of the individuals on the Cifas database should never have been listed as 'disqualified persons'.[26]

It is not known how many people from the Windrush generation were registered on Cifas or had their bank accounts frozen or closed, but the Home Secretary has said the HO is putting in place safeguards to reduce the

15. https://www.theguardian.com/uk-news/2018/jun/06/government-faces-high-court-challenge-right-rent-scheme

16. Section 3

17. Code of practice for landlords – *Avoiding unlawful discrimination while preventing illegal immigrants accessing private rented accommodation*. HO 2014

18. 0.3% of the annual health spend: https://fullfact.org/health/health-tourism-whats-cost/

19. For example when Albert Thompson, who had worked in the UK for 44 years and paid 3 decades of taxes, was unable to prove his right to live in the UK he could only receive treatment for his cancer if he paid upfront the full £54,000. The Guardian, March 10, 2018

20. The NHS (Charges to Overseas Visitors) Regulations 2015

21. https://www.bma.org.uk/-/.../bma-briefing-national-health-service-charges-to-overseas.

22. Between Health and Social Care Information Centre (NHS Digital) the Home Office and the Department of Health, January 2017 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/585928/MOU_v3.pdf

23. Health and Social Care Information Centre, referred to as NHS digital

24. On May 9, 2018 the government announced it would be amending the MoU. Data sharing will only be used to trace an individual who is being considered for deportation having been investigated for or convicted of a *serious* criminal offence; see Data Protection Bill HL Report Stage, May 9, 2018 col 756 - 757

25. Ss40 - 43

26. An inspection of the 'hostile environment' measures relating to driving licences and bank accounts January to July 2016 David Bolt Independent Chief Inspector of Borders and Immigration

risk to the Windrush generation.[27]

He has revealed that the HO has sent thousands of letters to banks asking them to close accounts of individuals whom they believe are undocumented migrants. He has asked officials to stop until he is comfortable that the HO has got it right. The HO has since confirmed that immigration checks by banks and building societies have been suspended temporarily.[28]

e) Driving licences

The government seeks to remove from anyone not lawfully in the UK the 'privilege' of holding a driving licence. Holding a driving licence is seen as a means of accessing services which could help the individual *'to establish a settled lifestyle in the UK, even though they have no right to be here.'*

The 2014 Act enables revocation of a driving licence held by a person not lawfully in the UK. Where HO data indicates that a person no longer has ILR, the HO will serve a notice that their licence is to be revoked. It will then request the DVLA to revoke the licence.

The 2016 Act gave new powers of entry, search, personal search and seizure to immigration officers and police constables to obtain a driving licence held by a person not lawfully in the UK. At the time of writing these search and seizure powers are only exercisable by police forces in Kent and West Yorkshire.

Under the 2016 Act a new summary offence, punishable by imprisonment or a fine or both, occurs when a person who is not lawfully in the UK drives a motor vehicle on a public road knowing or having reasonable grounds to believe that they are not lawfully in the UK. On arrest the vehicle can be seized, and forfeited if the driver is convicted. Having regard to the consistent disproportionality in stops and searches of BME drivers, their vehicles or passengers, there is legitimate concern regarding the race equality impact of this provision and its potential harm to community relations. No commencement date has been announced for this offence.

There is also a MoU between the HO and DVLA establishing two-way information sharing. Where the DVLA is uncertain whether an applicant meets the statutory residence requirements, it submits their details to the HO seeking verification that they are lawfully resident in the UK. Where this is the case the DVLA will issue the licence. Where it is not, the HO can use the personal details for immigration enforcement.

f) The Police – Operation Nexus

Operation Nexus is a joint initiative between HO Immigration Enforcement and the Police Service. It aims to *'more effectively tackle offending by foreign nationals, through close working and smarter use of police and immigration interventions'.*

Under the initiative, immigration officers may be placed in police stations and carry out immigration checks on everyone arrested or 'encountered' by the police. A police officer may question foreign nationals in custody about their work history, family, what they are doing in the UK and their right to reside in the UK. Initially, the aim was to target 'high harm' offenders – a term left to individual forces to define. Human rights organisations have raised concerns that it is being used to identify individuals, who could be deported even if they have committed no criminal offence. A Freedom of Information request by the AIRE Centre revealed that since 2012 over 3,000 people have been removed under Operation Nexus.[29]

Experience of the Windrush generation

The personal histories of members of the Windrush generation record how, as the government intended, once a person is caught by one element of the 'hostile environment' then they will be caught by other parts of this web and, to mix metaphors, find themselves in a disastrous downward spiral.

This scenario, drawn from real cases, begins when a Windrush migrant is dismissed from a job they've held for many years when they are unable to provide a document proving their right to live and work in the UK. They will not be able to get another job since, to avoid paying a penalty, a next employer would ask for that same type of document before taking them on. Unable to prove a right to be in the UK, the person will not be entitled to benefits or public services. Without money they could lose their home; and if, still undocumented, they fall ill, the NHS could refuse free treatment. Their details and undocumented status will become known to the HO through one or more of HO data sharing arrangements, including arrangements with homelessness charities. Next could be a HO letter stating that they are in the UK illegally and, in the worst cases, then to face – without legal aid – arrest, detention and deportation.

The Home Secretary has not yet provided the number of Windrush generation people whom, as he now accepts, were wrongly held in immigration detention.

27. Oral evidence taken before the Health and Social Care Select Committee on May 15, 2018 HC 990 Q.231

28. https://www.theguardian.com/uk-news/2018/may/17/home-office-suspends-immigration-checks-on-uk-bank-accounts

29. http://www.airecentre.org/news.php/301/new-challenge-to-theresa-mays-hostile-environment-and-the-unlawful-deportation-of-eu-nationals. Judicial review proceedings by the AIRE Centre were unsuccessful. There is an appeal before the Court of Appeal.

He has confirmed[30] that a review of the records of 8,000 Caribbean migrants who had been removed or deported since 2002 found 63 cases where the individuals could have entered the UK before 1973: 32 foreign national offenders and 31 administrative removals (most of whom ultimately left voluntarily). For most of the Windrush people, after a full life in the UK, deportation would be to a country where they had lost any connections they may ever have had.

Their stories are also evidence of how employers or landlords, to protect themselves from increasingly severe sanctions, may exclude undocumented migrants when they have no obligation to do so. In some cases this may be because an employer or landlord has not correctly understood the law; in many cases it may be because an employer or landlord deliberately takes for themselves the safer course, making certain that no one who might be 'illegal is their employee or their tenant. The EAT decision in *Baker v Abellio London Ltd*.[31] illustrates what is likely to have happened to many of the undocumented Windrush generation who lost their jobs. In this case the employer AL agreed that the employee B had the right to live and work in the UK. Therefore to employ him was not unlawful and no checks were needed. AL was therefore wrong to dismiss B because he was not able to provide a document to prove his right to remain. AL wrongly believed that it was required to have an immigration status document for each of its employees. This is unlikely to be an isolated case, and other dismissals for lack of an immigration status document may also have been unfair. Is this not the nub of the Windrush experience, that being undocumented has been treated as being illegal?

Government response

a) The Home Office Taskforce

On the first day[32] the Prime Minister and the Home Secretary apologised for the Windrush scandal, the Home Secretary announced a new HO team. Within two days there was a dedicated freephone number[33] and an email address to help Windrush migrants find evidence to support their claims and get 'No Time Limit' permits. In its first five weeks this hotline had identified some 5,000 Windrush migrants with immigration status issues[34] and by June 20th 2,104 people had received documentation.[35]

By May 30th the Windrush Scheme was in place to help people navigate the immigration system. Commonwealth citizens from a list of 65 countries (including those living abroad), children of Commonwealth citizens and persons of any nationality with different migration histories may apply to have their immigration status considered. They will be issued with a document confirming their status – whether British citizen, right to be naturalised as a British citizen, Right of Abode or ILR. The Taskforce will look at records kept by the HO and other government departments in making its decisions.

There is no fee to apply and other related fees, other than to apply for a British passport, will be waived. Also waived will be the requirement to pass the UK knowledge and language tests when applying for naturalisation.

There is no right of appeal against a refusal to issue a document; any formal challenge will be by judicial review.[36]

b) Compensation

A compensation scheme will be put in place for those of the Windrush generation who have suffered loss as a result of the difficulties they faced in establishing their immigration status. A first stage consultation concluded on June 8th. By asking simple questions about people's experiences, it should have been a useful exercise to test degrees of interest. A second stage consultation on the depth and breadth of a proposed scheme is awaited.

Martin Forde QC, the barrister appointed to advise the HO on the compensation scheme, has emphasised the importance of ensuring that victims will be compensated not only for loss of wages, pensions, homes or denial of medical care, which can be more easily be calculated, but also for the psychological impact of broken relationships, missing funerals, being held in detention or wrongly denied re-entry to the UK for years. He is hoping to devise a scheme simple enough for people to apply without the need for legal advice.

In the meantime solicitors already have numerous clients from the Windrush generation, or others with parallel experiences, who are considering a group claim for compensation.

c) Modifications of the 'hostile environment'

While leaving the legislation untouched, the HO has issued advice to employers regarding the right to work

30. Rt.Hon. Sajid Javid MP, Home Secretary, Oral Evidence to the Home Affairs Committee, May 15, 2018, Question 237

31. See Briefing 857, March 2018

32. April 16th

33. From June 8th rather than taking details by phone, an application should be submitted with copies of relevant documents.

34. Financial Times, May 24, 2018

35. The Guardian, June 21, 2018

36. The Windrush Scheme Guidance

of people who have lived in the UK since 1973 or since 1988.[37] As noted above, it has temporarily suspended immigration checks by banks and building societies, and has amended the MoU between the HO and NHS Digital to restrict its ambit.[38]

A closer scrutiny of the 'hostile environment'[39]

Where are we now? How much more is known about the impact of the 'hostile environment' than in 2012 when Theresa May as Home Secretary called for *'a really 'hostile environment''*?[40] We know:

- Windrush generation women and men have suffered greatly under the operation of the 'hostile environment';
- the sharing of inaccurate personal data between the HO and public and private sector bodies has resulted in wrongful enforcement measures being taken, causing unjustifiable hardship;
- there has been no evaluation of the effectiveness of the 'hostile environment' in terms of meeting its stated aims[41]
  - the rate of voluntary returns has gone down since 2014 and the numbers of enforced removals in 2015 was half the 2004 number;
  - there has been no measurement of the deterrent effect of the 'hostile environment' on would-be illegal migrants;
  - there has been no monitoring or assessment of the reliability, consistency, accuracy and/or resultant fairness of immigration control actions which are outsourced to private citizens and public sector workers, despite concerns expressed by a range of stakeholders.

Compliance with the PSED

Three HO Policy Equality Statements[42] signed off by a senior official which the writers have seen confirm HO recognition that it is subject to the public sector equality duty (PSED) in developing and implementing the 'hostile environment':

> *I have read the available evidence and I am satisfied that this demonstrates compliance, where relevant, with Section 149 of the Equality Act and that due regard has been made to the need to: eliminate unlawful discrimination; advance equality of opportunity; and foster good relations.*

Equality law practitioners would be far from satisfied that these statements amount to valid equality impact assessments. There is little to indicate that HO officials themselves gave any real consideration to potential differential impact of any proposed measures. They appeared able to satisfy themselves that the measures would be compliant with the PSED provided the persons outside the HO to whom implementation of the 'hostile environment' was assigned carried out their roles correctly. In response to evidence regarding the likelihood of race discrimination under the 'right to rent' scheme, the HO was satisfied that it could mitigate this risk by the code of practice on avoiding discrimination and by providing guidance for landlords and tenants. It was surprising that no use was made of evidence of discrimination or disproportionality held by other parts of the HO when this was relevant to 'hostile environment' measures; for example where police would be engaged under the 2016 Act in carrying out search and seizure or arresting undocumented drivers.

Only in the 2015 equality statement did the HO refer to the PSED exception[43] for *'immigration and nationality functions'* – disapplying s149(1)(b) *'advance equality of opportunity'* for age, religion or belief or race. However no reliance was placed on this exception, perhaps because the HO was aware that the measures in the 2016 Act specified civil and criminal offences, not immigration functions.

The HO view that its 'hostile environment' measures are compliant with the PSED is not widely shared, and the experiences of the Windrush generation have given a clearer basis for general unease. The Windrush scandal has shown that the 'hostile environment' is more than the sum of its constituent parts. It was not only that it caused incredible suffering for undocumented Windrush women and men but also that the government, so assured that the policy was right, could opt not to see or hear the warnings and the reality of its impact on the Windrush generation. Add that virtually all of the victims were black, many were old, most were poor, and there is a group of individuals which, it seems, the government found easy to ignore. And, for so long as the government felt able to ignore their treatment, it continued.

Discrimination can occur in failing to act as well as in taking particular action. Reflecting on the Macpherson

37. https://lawmostly.com/2018/04/30/windrush-scandal-deepens-as-home-office-issues-guidance-to-employers-on-right-to-work-checks-commonwealth-caribbean-west-indies-immigration-amber-rudd-government-theresa-may/

38. Data Protection Bill HL Report Stage, May 9, 2018 col 756 - 757

39. While the government now has chosen 'compliant environment' as their preferred term, in the writers' view, whatever the name, this web of divisive measures is unchanged and remains hostile.

40. Telegraph op. cit.

41. Independent Chief Inspector of Borders and Immigration, January to June 2016 report.

42. September 2013 re 'right to rent'; October 2013 re 'illegal working' and 2015 re Immigration Bill 2015 – access to services.

43. Schedule 18 para 2 Equality Act 2010

definition of 'institutional racism'[44] is that not what the 'hostile environment' has been for the Windrush generation? There was no clear intention to apply differential treatment because they are black. What the government did was allow to continue, with enhanced severity, without scrutiny or monitoring, a scheme of linked exclusions which caused suffering to a group of black people of Caribbean origin to a disproportionate extent.

Compliance with the Human Rights Act 1998 (HRA)

Immigration control and coercion powers engage Convention rights, most commonly Articles 3, 5, 8 and 14. The restrictions on access to services generally affect the enjoyment of socio-economic rights. There is no general right to accommodation, healthcare or a minimum standard of living under the HRA.

However, in its memoranda on the 2014 and 2016 Acts, the HO recognised that Convention rights may nonetheless be engaged by the measures introduced by these two Acts, in particular Articles 3 (freedom from inhuman and degrading treatment), 8 (privacy and family life) and 14 (protection from non-discrimination) and Article 1 of Protocol 1 (right to property).

With regard to Article 8, the 2014 Act amends the Nationality, Immigration and Asylum Act 2002 so that a court or tribunal when considering Article 8 in an immigration case shall have particular regard to the 'public interest'. The section lists the public interest considerations which are applicable in all cases. The new 'public interest' test also contains assumptions which can only be described as racist and harmful to good relations; for example, that persons who can speak English are less of a burden on taxpayers and are better able to integrate into society.

The HO considers that the public interest considerations simply reflect the principles which have developed under Article 8. In particular, that immigration control is a legitimate aim if it protects the economic well-being of a country and that the prevention of disorder and crime can be a justification for the expulsion of foreign criminals. However, these principles were developed in expulsion cases, where considerations about public safety and the prevention of disorder and crime may carry greater weight. The HO believes the principles have read across effect and can justify measures which restrict access to services in order to protect the economic well-being of the country. It further relies on the principle that states enjoy a certain margin of appreciation when balancing the competing interests of the individual and of the community as a whole.

It is surely questionable whether the UK can rely on these principles when detaining or expelling undocumented migrants who are lawfully present in the UK and who are wrongly detained and/or wrongly deported. Such treatment must engage Articles 3, 5 and 8 and, in the Windrush generation cases, Article 14.

The HO did not seek to justify its immigration control powers under Article 14. It simply denied that Article 14 could be engaged as there is no direct comparator for those subject to immigration control. With regard to access to services, it says a wide margin of appreciation is given to differential treatment based on immigration status which involves an element of choice, and the issue is a socio-economic one.

The HO failed to acknowledge the potential for any discriminatory impact of its measures on race, gender, disability, age or vulnerabilities (e.g. victims of trafficking). As set out, the Windrush generation didn't lack immigration status, they lacked documents to prove it. The class of people in this unique situation may equally be described by reference to their race and ethnicity.

The HO's memoranda do not consider the human rights implications of the elements of the 'hostile environment' which are not prescribed in the 2014 or 2016 Acts; for example, the mandatory sharing of data without the individual's consent. These measures engage Article 8; they may pursue the legitimate aim of immigration control but their expansive use might well be disproportionate.

What next for the 'hostile environment'

The Windrush scandal has raised fundamental questions regarding the implementation and impact of the 'hostile environment' to which government and the public need answers:

- are the restrictions and exclusions and data-sharing described above compliant with equality and human rights law?
- is any element of the 'hostile environment' having a discriminatory impact? If so, what changes are needed to prevent such impact?
- are the financial costs and costs to society and to communities within society, including migrant and black and ethnic minority communities, outweighed by true benefits which society and its constituent communities value and wish to share? If not, then what changes are required to reduce not

44. *'The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.'*

859

only the societal costs, but also the costs to migrant communities or to BME communities?
- is there a proven need for the 'hostile environment' in its present form?
- how ingrained already is the culture of suspicion which almost inevitably becomes part of the outsourcing of immigration control, and can it be reversed?

Some answers may, over time, come from different sources.

The forthcoming judicial review proceedings between JCWI and the Home Secretary will explore potential breaches of both human rights and equality law and highlight the need for evaluation of the impact of the 'right to rent'. The proposed compensation scheme for Windrush victims of the 'hostile environment' may provide answers to some of the questions about impact and costs to individuals, which will be further explored in any individual legal claims. Further legal challenges are likely to follow.

JCWI and Liberty are jointly calling for an independent commission to investigate the HO and its 'hostile environment' policies

The authors note that, before the Windrush scandal, the Chief Inspector of Borders and Immigration was told that one major aim of the HO Interventions and Sanctions Directorate was *'to develop their range of partners and increase the scope of sanctions to the extent that illegal migrants will come into contact with Immigration Enforcement, either directly or indirectly, each time they try to access any benefit or service….'*[45]

Drawing on all of the above, the authors consider that, as a matter of some urgency, good governance now calls for the 'hostile environment' to be objectively, openly and thoroughly evaluated through suitable government and/or external mechanisms; only with the results of such evaluation should the government even consider taking any further steps to extend or tighten the web which comprises the 'hostile environment'.

45. *An Inspection of the 'hostile environment' measures relating to driving licences and bank accounts*, January to June 2016, Independent Chief Inspector of Borders and Immigration, 2016, para 7.19

860 Briefing 860

The impact of sentences of imprisonment upon women

Kate Lill, barrister and Prisoner Advice Service's women prisoners' caseworker and Paramjit Ahluwalia, barrister, Lamb Building Chambers specialising in criminal law, examine the facts around the imprisonment of women and the impact of imposing a custodial sentence on them. They argue that women are currently gravely disadvantaged by a system largely designed by men for men. The sentencing of women needs, and deserves, a gender specific approach.

Introduction

This article addresses key themes on the impact of prison sentences on women:
- why does gender even matter when it comes to sentencing?
- how sentencing decisions impact on a woman's experience of prison
  - IPP sentences
  - early release
  - mothers in custody.

Women are one of the most vulnerable groups in prison; they have wholly different experiences and needs to their male counterparts.

Although women may only comprise five per cent of the overall prison population, this amounts to nearly 4,000 women in prison at any given time,[1] and in fact 10 per cent of prison receptions.

Many women prisoners have been victims of crime, domestic violence and sexual abuse before imprisonment. More than 80 per cent of women prisoners in England and Wales are imprisoned for non-violent offences. The impact of imprisonment is severe in comparison to male counterparts. Women tend to be sentenced to short periods in custody with nearly two-thirds being jailed for six months or less.[2] But such sentences are long enough to result in them losing employment, housing and their children.

Our current penal system was originally designed for men, from the layout of prisons, to the education and training it provides, to medical care, to visits, and security procedures. Little adaptation has taken place to reflect the specific needs of women. Whilst there

1. On June 15, 2018, there were 3,867 women in prison in England and Wales.

2. https://news.sky.com/story/more-women-to-be-spared-jail-under-new-justice-system-strategy-11386673; May 2018

is a specific Prison Service Order (a type of rule that governs prison procedure) for Women Prisoners (PSO 4800), it only came into force in 2008, and has not been substantively updated since, despite the adoption of the Bangkok Rules[3] in 2010.

Why should gender even matter when it comes to sentencing?

The Sentencing Guidelines Council currently issues offence specific guidelines and there is a definitive guideline in relation to the sentencing of children and young people.

A sentencing code is currently being proposed by the Law Commission, with the aim of providing a comprehensive source of sentencing law, simplifying complex provisions, rewriting the law in modern language and providing one single source of information.

However there is no specific guideline (or proposed guideline) in relation to women. There is no requirement for sentencers to really consider the long-term impacts upon women of imprisonment and the gender specific needs of women.

Some may ask why should that even be necessary, and why a distinct consideration of the impact of imprisonment upon women ought to be considered in sentencing decisions and policy.

Firstly, the statistical facts faced by our current criminal justice system in the UK (taken from Women in Prison[4] website):

- 57% of women in custody have been victims of domestic violence
- 79% of women whom Women in Prison have assisted have reported experiencing domestic violence or sexual abuse
- 53% of women in custody have experienced emotional, physical or sexual abuse as a child
- 26% of all women in custody have no previous convictions
- 46% of women in prison report having attempted suicide at some point in their lifetime; twice the rate of men (21%) and more than seven times higher than the general population
- 30% of women have previous psychiatric admission prior to prison
- Women in custody are five times more likely to have a mental health issue than women in the general population
- On release, around one-third of women prisoners have lost their homes and often their possessions whilst in prison
- For 85% of mothers, prison was the first time they had been separated from their children for any significant period of time.

Bangkok Rules – a tool that ought to be used far more often in sentencing decisions?

The Bangkok Rules, to which the UK is a signatory, although not binding, provide soft law which has been referred to within sentencing appeals, such as *R v NR* [2017] 1 Cr App R (S) 42.

Rules 60 and 61 are most critical and highlight that:

> *Appropriate resources shall be made available to devise suitable alternatives to women offenders in order to combine non-custodial measures with interventions to address the most common problems leading to women's contact with the criminal justice system. These may include therapeutic courses and counselling for victims of domestic violence and sexual abuse; suitable treatment for those with mental disability; and educational and training programmes to improve employment prospects. Such programmes shall take account of the need to provide care for children and women-only services.* [Rule 60]

> *When sentencing women offenders, courts shall have the power to consider mitigating factors such as lack of criminal history and relative non-severity and nature of criminal conduct, in the light of women's caretaking responsibilities and typical backgrounds. [Rule 61]*

Why do sentencing decisions even matter?

Domestic abuse – key example

To ignore the statistic that 57% of women in custody have faced domestic abuse is illogical and renders the value of rehabilitation in sentencing decisions to nil – instead, exacerbating the cycle of violence, victimisation and at the same time damaging positive efforts made within key areas of policing and legislative reform to combat domestic abuse.

Baroness Corston recognised back in 2007[5] that

3. United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders – 70 Rules which provide guidance to any person or body working in criminal justice to assist the reduction in imprisonment of women and how to meet their specific needs when imprisonment is unavoidable.

4. Women in Prison is a campaigning charity which providing services for women and supports them to avoid and exit the criminal justice system; http://www.womeninprison.org.uk/

5. Baroness Corston conducted a review of women in the criminal justice system in 2007. The Home Secretary commissioned this review following the tragic death of six women at HMP Styal. The Corston Report *A review of women with particular vulnerabilities in the criminal justice system* made recommendations for women-specific criminal justice reform; however many of these recommendations have not been implemented, or only partially so. http://webarchive.nationalarchives.gov.uk/+/http://www.homeoffice.gov.uk/documents/corston-report/

'women with histories of violence and abuse are over represented in the criminal justice system and can be described as victims as well as offenders'.

The Prison Reform Trust published a report in December 2017 *There's a reason we're in trouble*[6] which investigated the ramifications of domestic abuse as a driver to women's offending. Two key aspects came out through the report:

- There is a need for police, prosecuting authorities, probation services and the courts to adopt the practice of appropriate, routine enquiry into women's histories of domestic and sexual violence at each stage of the criminal justice process to ensure informed decision-making and proportionate responses.
- There is a lack of any effective defence for women victims/survivors of domestic abuse whose offences arise from coercion or duress as part of an abusive relationship.

Currently there is no statutory definition of domestic abuse but it is hoped this will be introduced through the Domestic Violence and Abuse Bill.[7] The current proposed statutory definition is '*any incident or pattern of incidents of controlling, coercive, threatening behaviour, violence or abuse between those aged 16 or over who are, or have been intimate partners or family members regardless of gender or sexual orientation but is not limited to:*

- *psychological*
- *physical*
- *sexual*
- *economic*
- *emotional'.*

The co-existence of victimisation and offending is now better recognised (for example see impact of the statutory defence in s45 Modern Slavery Act 2015 in relation to victims of modern slavery and trafficking). However, important work in this area is needed to really have an impact on the ground.

Some of the suggested recommendations by the 2017 Prison Reform Trust report were:

- better and earlier identification of individuals within the criminal justice system who have suffered from domestic abuse
- investment into early diversion and community based solutions for women offenders affected by domestic and sexual violence, including out-of-court disposals and women's centres
- Ministry of Justice to work with local authorities and the voluntary sector to ensure women leaving custody are provided with safe accommodation, including specialist refuge accommodation.

Early interventions, increased use of diversion and out-of-court disposals and the holistic support and work of women's centres are crucial. Not only is it more cost efficient but it actually works. Working not merely in the sense of recidivism, but also in relation to the aim of seeking to identify and reduce domestic abuse.

Custodial sentencing

Despite the above, women are still receiving custodial sentences. It is noteworthy that the Justice Secretary David Gauke has highlighted concerns in an interview with Sky News on May 27th this year:

> *A lot of female offenders, for example, are themselves victims of crime, quite a high proportion are victims of domestic abuse themselves … a lot of them are non-violent, a lot of them [have] complex mental health issues we need to address … I think there is a very good point in saying that of the 4,000 or so female offenders who are in custody, how many of them can be dealt with through other means? … Non-custodial sentences [and] … more support in the community rather than within prisons is something we have to look at.*

Perhaps the shift sought is in understanding the impact of specific types of sentences upon women and how they affect their every day life – from all agencies within the criminal justice system.

Sentences of Imprisonment for Public Protection (IPP)

Despite their abolition in 2012, many women are still in prison serving IPP sentences and some are many years over their term.[8] It is not uncommon for a woman to have received a low minimum term (e.g. 18 months) to find herself ten years over her minimum term still languishing in prison. This is clearly not what was intended by either the sentencing judge or parliament – which eventually abolished the sentence because of its inherent unfairness – but the disconnect between the courts, prisons and the Parole Board has resulted in a system in dire disrepair.

The resources needed to help a woman 'reduce her risk' are gravely limited within prison. Women are therefore left with little support to help them progress

6. http://www.prisonreformtrust.org.uk/Portals/0/Documents/Domestic_abuse_report_final_lo.pdf

7. The consultation process on this Bill was completed at May 31, 2018.

8. Women sentenced to an IPP were given a minimum tariff (term) which is the number of years they must spend in prison before they are eligible to be considered for release. The Parole Board will only direct an individual's release if they are satisfied that their detention is no longer necessary for the protection of the public.

through their sentence and ultimately be released from custody. Even when the Parole Board accept that a woman's risk can be managed in the community, release is being delayed, or in some cases prevented, due to the lack of adequate available housing required by women with specific needs. This very issue was considered only last year by the Supreme Court in the case of *R (on the application of Coll) v Secretary of State for Justice* [2017] UKSC 40.

Even when women are released they are subject to a very long licence which could ultimately run indefinitely[9], constraining them significantly in living their lives post release. Women can be recalled to prison for even minor breaches of their licence conditions. With a standard condition to '*be of good behaviour and not behave in a way which undermines the purpose of the licence period*', it is relatively easy to slip up. Women could ultimately remain in prison forever following their recall, as the Parole Board are even more risk adverse once a woman has been tested in the community and deemed to have 'failed'.

The Parole Board recognise the urgent need to view IPP prisoners differently and make efforts to assist them to progress through their sentence, and aimed to have the majority of IPP prisoners safely released by the end of 2017. This has not happened, and this approach has yet to be adopted routinely by panel members.

Early release

Home Detention Curfew (HDC), most commonly known as tag, is the way in which women serving shorter sentences can be released into the community early. Women serving sentences of less than four years qualify for HDC, although there are numerous exemptions. This procedure is not widely known by the sentencing courts, and numerous women are finding themselves ineligible for early release simply because they are serving one day more than the law allows (a determinate sentence of four years). A sentence of three years and 364 days could mean an extra 135 days in the community, providing a woman with vital time to re-engage with community life, including housing and family ties.

Mothers in custody

About two-thirds of women in prison are mothers of children under the age of 18. It is estimated that 17,000 children a year are directly affected by their mothers being imprisoned, and only 1,000 of them remain in their family home after their mothers have been sentenced. Not only does this separation have a negative impact on the maternal/child relationship, it can permeate every area of the children's lives and, for some, it has long lasting effects. The impact of maternal imprisonment is far more severe than the impact of a father being sent to prison.

Gender based approach

Sentencing a woman with children to a custodial term for a first offence of a non-violent nature calls out for a distinct and gender based approach.

Although the sentencing courts may believe it is easy to maintain contact with children when in prison, this is far from the reality. With only 12 women's prisons across England and Wales, mothers can be imprisoned hundreds of miles away from their children, making visits near impossible. It is possible to be granted temporary release from prison purely to maintain and develop a parenting bond, however Childcare Resettlement Licences[10] are routinely being denied or misapplied to women who qualify.

Long sentences can also interfere with a pregnant or new mother's hope of being granted a place on a Mother and Baby Unit (MBU). As babies are only able to remain on a MBU for approximately 18 months, sentences of more than three years (as only half of the determinate term is served) generally preclude a woman from keeping her child in prison so they will have to be separated at some point in the future. Community disposals are clearly the most appropriate sentence for nearly all women as they allow them to maintain their maternal relationships.

Many areas of a woman's life in prison, and her release, are affected by the type or length of sentence she is serving; however with little knowledge of the system themselves, and the absence of legal aid for most areas of prison law, they are unable to navigate through the system successfully. Even when they are aware of their rights, it should be noted that women – unlike men – avoid confrontation and often avoid complaining. Many women would rather keep their head down than seek help.

Both sentencing decision-makers and policy-makers need to consider the factual reality of the consequences of sentencing practices in order for women to be treated equally and fairly within the criminal justice system. They are currently gravely disadvantaged and

9. An IPP prisoner can apply to have their licence removed after ten years.

10. If a prisoner can show s/he had sole caring responsibility for a child under 16 prior to custody and would still if not in prison, s/he is eligible to apply for temporary release under a Childcare Resettlement Licence. This enables a woman to spend time with her children in the community for a maximum of three nights every two months. The purpose of the licence is to encourage the maintenance of the parent/child tie and to help prepare the parent for the resumption of their parental duties on release.

860 are in need of, and deserve, a gender specific approach. Those who work with women in this area are trying their best to achieve this aim.[11]

To go back to the words of Baroness Corston in 2007:

It is time to *'bring about a radical change in the way we treat women throughout the whole of the criminal justice system and this must include not just those who offend but also those at risk of offending. This will require a radical new approach, treating women both holistically and individually- a woman centered approach … Women have been marginalized within a system largely designed by men for men for far too long …'*

11. The Prison Reform Trust has a programme on reducing women's imprisonment; see *Why focus on reducing women's imprisonment* (a revised version of this briefing is planned for July 2017)

On June 27th, the government announced a new Female Offender Strategy under which it will shelve its plans for five new women's community prisons and instead set up at least five women's residential centres in a pilot scheme. See news on page 33.

861 Briefing 861

Landmark decision on workers' rights

Pimlico Plumbers Ltd and another v Smith [2018] UKSC 29; June 13, 2018

Implications for practitioners

The SC has dismissed Pimlico Plumber's appeal and upheld the judgment of both the ET, the EAT and the CA, that Mr Smith (S), a plumber, is a worker within the meaning of s230(3) Employment Rights Act 1996 ERA, a worker within the meaning of Regulation 2(1) Working Time Regulations 1998 (WTR) and was 'within employment' for the purposes of s82(a) Equality Act 2010 (EA). S can now proceed with his claim for disability discrimination and a failure to make reasonable adjustments.

The facts and background to this case were reported in Briefing 833, July 2017. Whilst the judgment does not make any new or unexpected statement about the law, it does provide a very thorough analysis of the key principles which influence the courts in making decisions about worker status, and is recommended reading for anyone advising on, or concerned about their own, employment status.

Supreme Court

In giving the SC's judgment Lord Wilson focused on the central question in this case, which is where do the boundaries lie between a right to substitute and the requirement of personal service for worker status? When, he asks, does a substitution become inconsistent with that status?

Lord Wilson explained that the lower courts had been entitled to find that S did provide personal service, despite an informal right for him to substitute another worker from Pimlico if he could not do a job he was booked for. The SC accepted the analysis and findings of fact of Judge Corrigan in the ET that, in reality, the substitution, which was not provided for contractually, was akin to swapping a shift with another worker. The informal arrangements were not covered by S's contract with P and applied only to other Pimlico plumbers who were already acceptable to the company.

Distinguishing this set of facts from those in other cases, the SC held that the limited substitution, or shift swapping, did not negate the obligation of personal service necessary for worker status.

The SC also considered whether or not the relationship between the parties was one of a client and customer and agreed with the lower courts that it was not.

Comment

This case is a paradigm example of an organisation seeking, and failing, to arrange its affairs so that the people who do the work are self-employed individuals. The analysis of the contractual position, and the findings of fact regarding how work was done and how control was exercised, satisfied all the judges who heard this case that the reality of the legal situation was that S was a worker and protected under the EA as well as the WTR.

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7 BR Chambers

Expectation that an employee would work long hours was a 'PCP'

United First Partners Research v Carreras [2018] EWCA Civ 323; February 28, 2018

Implications for practitioners

The duty to make reasonable adjustments under s20(3) of the Equality Act 2010 (EA) is triggered where a provision, criterion or practice (PCP) puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled.

The EA does not define 'PCP'. In *Lamb v The Business Academy Bexley* UKEAT/0226/15, however, the EAT held that the phrase:

> *must be construed broadly, having regard to the statute's purpose of eliminating discrimination against those who suffer disadvantage from a disability. It includes formal and informal practices, policies and arrangements…*

The above principle is reflected in the Equality and Human Rights Commission's Employment Statutory Code of Practice (EHRC Code) which provides (at paragraph 4.5) that the meaning of PCP should be:

> *construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions.*

Case law has tended to give a wide meaning to PCP. In *Aylott v Stockton-on-Tees Borough Council* EWCA Civ 910; Briefing 573, November 2010, for example, the CA held that a dismissal can be the application of a PCP.

The key question in *United First Partners Research v Carreras* was whether an expectation for a disabled employee to work long hours amounted to a PCP.

Facts

Mr Carreras (C) worked as an analyst for United First Partners Research (U) between October 2011 and February 2014. Initially, he worked very long hours, typically from around 08.00 or 09.00 in the morning to around 21.00 or 23.00 in the evening.

In July 2012, C was involved in a cycling accident in which he was seriously injured. He returned to work within a few weeks of the accident but continued to experience symptoms of dizziness, fatigue, headaches and difficulties in concentrating. Consequently, he was not able to work the same hours as before.

For the first six months following his return, C worked a maximum of eight hours a day. After that he began to work longer hours, from 08.00 in the morning to around 19.00 in the evening. From October 2013, C came under pressure to work even longer hours. Initially, he began to be asked to work later in the evenings and, when he agreed, an expectation developed that he would do so.

On February 14, 2014, C sent an email objecting to working late in the evenings. Later that day, one of U's owners raised his voice to C, reprimanded him in front of his colleagues and told him that he could leave if he did not like it. C subsequently resigned and brought an ET claim alleging failure to make reasonable adjustments in relation to his hours of work.

Employment Tribunal

The ET dismissed C's claim on the basis that U had not imposed a PCP because C had never been *'required'* to work in the evenings: there had been an expectation at most that he would do so. C appealed to the EAT.

Employment Appeal Tribunal

The EAT upheld C's appeal on the basis that the ET had adopted an unduly narrow approach to the question whether he had been *'required'* to work long hours and that it should have found that the expectation that he would do so amounted to a PCP. U appealed to the CA.

Court of Appeal

The CA dismissed the appeal. It decided that the EAT was right to hold that the ET's approach was too narrow. It found that the ET's findings of fact established the pleaded PCP, namely that C was expected to work long hours and this created pressure on him to do so.

Comment

As mentioned above, case law and the EHRC Code make it clear that PCP has a broad meaning and, to amount to a PCP, something not need be a *'requirement'* in the narrow sense. Consequently, the CA's judgment in *Carreras* is not ground-breaking in the sense of establishing a new legal principle.

Nevertheless, it is significant to have a CA decision that recognises the reality of workplace culture (in which various factors can make employees feel under pressure to work unduly long hours) and acknowledges that an employer's expectation can amount to a PCP.

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CA considers employer's knowledge of disability

Donelien v Liberata Ltd [2018] EWCA Civ 129; February 8, 2018

Implications for practitioners

In this case the CA gives a useful analysis of circumstances in which an employer may, or may not, be regarded as having constructive knowledge of an employee's disability. Of particular interest is its commentary on the extent to which an employer can rely on advice from occupational health (OH) in forming a view as to whether an employee's ill health meets the criteria for disability. Where an employer actively engages with OH, for example asking relevant questions, seeking clarifications and so on, it is more likely to avoid a charge of impermissible 'rubber-stamping' if it relies on that advice in its approach to the question of whether the employee is disabled.

Facts

Ms Donelien (D) started working for the respondent (L), a company providing business services, in 1999. In 2008 D began arriving late for work, leaving early and taking days off, telling her managers that this was due to symptoms of high blood pressure including fatigue, dizziness and breathing problems. In November 2008 she told her managers that her illness was work-related and that she felt at risk of long-term stress. Her sick notes mostly recorded either hypertension or a viral illness. Her GP wrote to L in January 2009 stating that he had been treating D for *'uncontrolled hypertension, stress, low energy levels and tiredness'* and recommending a phased return to work three days a week to which L agreed.

D's ill health continued and L proposed a referral to OH to which she objected. Her GP wrote again in April 2009 following a further period of absence, this time stating that she had recovered from a stomach upset but was suffering from *'…a feeling of generally unwell along with … wrist pain'* (sic) but that there was no underlying wrist problem.

The GP provided a further letter in June 2009 saying *'…the treatment of hypertension and stress is ongoing'* and that despite some progress, D was not well enough to return to full duties. D invited L to contact her GP if it was not happy with the information provided, however L declined to do this and instead referred her to OH which provided a report on June 18, 2009.

This covered D's hypertension and also referred to a number of *'underlying employment issues'* (for example relating to salary) which were causing distress and contributing to the hypertension, and said that 'full resolution' was unlikely until those issues were resolved. The report also made clear that D had refused consent for OH to obtain further information from her GP. L sought further information from OH and a second report was provided in July 2009 which stated that there was no evidence that D had a psychiatric condition, that hypertension was unlikely to explain her absences and reduced hours, and that there was no reason to conclude that she had a disability.

Relations between D and her managers continued to be difficult and further periods of absence occurred. L instigated a disciplinary process which ultimately resulted in D's dismissal for failing to work her contracted hours and to comply with the procedure for notifying absence.

Employment Tribunal

D brought various claims including under the Disability Discrimination Act 1995 (DDA) for failure to make reasonable adjustments. L's position was that D was not disabled at the material times. At a preliminary hearing, the ET found that the claimant was in fact disabled from the end of August 2009, her symptoms (which had already been found to have a substantial effect on her day-to-day activities) by that stage having lasted 12 months. However at the final hearing, the ET found that L did not have, and could not reasonably have been expected to have, knowledge of D's disability and her DDA claim accordingly failed.

Employment Appeal Tribunal

The issue in the appeal was whether this conclusion as to L's lack of knowledge was available to the ET on the evidence. The EAT dismissed the appeal, as did the CA. It is understood that the claimant has applied for permission to appeal to the Supreme Court.

Court of Appeal

The duty to make reasonable adjustments is set out in s4A DDA and is subject to the exception in s4A(3):

> *Nothing in this section imposes any duty on an employer in relation to a disabled person if the employer does not know, and could not reasonably be expected to know*
> …
> *(b) in any case, that that person has a disability and is likely to be affected in the way mentioned in subsection (1) [i.e. be placed at a substantial disadvantage by an employer's provision, criterion or practice, or by a physical feature of their premises, compared to persons who are not disabled].*

(Similar wording as to employers' knowledge of disability appears at paragraph 20 Schedule 8 of the Equality Act 2010.)

In *Donelien*, the CA begins by stressing that the test is *'what the respondent could reasonably have been expected to know'*, and that:

> *Tribunals frequently have to make assessments of reasonableness of that kind, and it is well established that that the exercise is factual in character and cannot be challenged on appeal only on the basis that the appellate tribunal might have made a different judgment.* [para 27]

D's appeal was broadly based on the following points:

1. that it should have been clear to L from her GP's correspondence that she was disabled;
2. that L had failed to take up her offer of contacting her GP if it needed more information; and
3. that the decision in the case of *Gallop v Newport City Council* [2013] EWCA Civ. 1583; Briefing 698, March 2014, applied. In *Gallop*, the CA held that the ET was wrong to conclude that the respondent could deny knowledge of the claimant's disability on the basis of an unreasoned view from OH which made no reference to the factors relevant to disability status, rather than forming its own judgment.

In relation to the first argument, the CA found two features to be of particular relevance. First, the GP letters *'do not give a clear and consistent picture'* and they *'refer to a wide range of further symptoms and conditions. It is hard for a layman to know what to make of all that.'*

Secondly L also had the view of OH which suggested that D's problems were managerial rather than medical, and that she did not have a condition meeting the definition of disability.

Addressing D's second argument, the CA found that L's position that communications with the claimant's GP should be via OH (for which the ET found D had withheld consent) was 'plainly reasonable'.

As to D's final argument, the CA distinguished *Gallop* on the basis that unlike in that case, L had not 'rubber-stamped' the OH view but had used this as part of reaching its own conclusion that D was not disabled. The CA emphasised that *Gallop* does not mean that employers cannot place significant weight on OH (or presumably other medical) opinion; simply that this must not be followed uncritically or as a substitute for the employer's own consideration as to whether the factual circumstances of the claimant's ill health correspond with the elements required for a disability.

Comment

This case provides a succinct and helpful review of the issue of employers' constructive knowledge of disability. It seems clear that particularly in cases where the employee's ill health is attributed to a variety of causes over time and where there is limited and/or conflicting information available, an employer may be able to avoid a finding that it had constructive knowledge of disability, including by reference to OH advice that the employee is not disabled. However while significant weight may appropriately be placed on OH advice, this should be part of a wider consideration by the employer and not rubber stamped as a substitute for the employer's own assessment. Employers seeking advice from OH as to whether an employee has a disability are more likely to be able to rely on that advice in the context of knowledge, if detailed and relevant questions are asked and followed up as necessary.

It is also clear that the CA took a dim view of D's un-cooperative attitude including not giving consent for OH to contact her GP, and that this may have contributed to the conclusion that the information available to L was insufficient to result in constructive knowledge that D was disabled. Employees would therefore be well-advised to be as open as possible to requests for information about their health.

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Age discrimination – legitimate aim

Air Products Plc v Cockram [2018] EWCA Civ 346; March 2, 2018

Facts

Mr Cockram (C) worked for Air Products as Director of Business Information. He had a number of long-term incentive plans (LTIPs), which gave employees stock options. Air Products had a general rule that all unvested LTIPS are forfeited on termination of employment. However, there was an exception to the general rule, that employees ending their employment *'on or after a customary retirement age for the Participant's location'* are permitted to retain their unvested LTIPs. The customary retirement age for Air Products' employees in the UK is 55. C was a member of Air Products' defined benefit pension scheme, and as a result had a protected pension age of 50.

The LTIPs had two purposes: to provide long-term incentives for those with high potential to assume greater levels of responsibility or who have demonstrated their critical importance to the business; and, to assist in attracting and retaining employees with experience and ability.

C resigned aged 50 and since he did not fall within the 'customary retirement age' exception, he forfeited his unvested LTIP awards. He brought claims for unfair constructive dismissal and direct age discrimination. (This note will only focus on the age discrimination claim.)

Employment Tribunal

C argued that the retirement exception should have applied to him aged 50. Air Products stated that the exception was set at 55 as it wished to achieve fairness between generations. It also stated that it wanted to have consistency between its different pension schemes (C was a member of a defined benefit scheme, whereas members of the defined contribution scheme had a retirement age of 55). Air Products argued that a retirement exception aged 50 would be too low to achieve its retention objectives.

Air Products accepted that the retirement exception for the LTIPs was direct discrimination, but argued that it was objectively justified. The ET accepted that argument.

The ET noted that intergenerational fairness is in principle a legitimate aim. It held that it is not a necessary feature of intergenerational fairness that there be the division of resources between different age groups (that members of the defined benefit scheme take their LTIP benefits at below age 55, does not affect the resource or financial benefit available to the members of the defined contribution scheme, for example).

The ET also held that *Seldon v Clarkson, Wright and Jakes* [2012] ICR 716; Briefing 636, July 2012, does not outlaw rewarding loyalty as a legitimate aim. The retirement exception in the LTIPs achieved Air Products' aims, as it ensured that all employees were treated in the same way, regardless of what pension scheme they were in.

Employment Appeal Tribunal

C appealed and the EAT upheld his appeal. The EAT criticised the ET for accepting that the aim of the exception was intergenerational fairness, saying that although witnesses had stated this to be the case, it needed to explain why this assertion had been accepted in the face of other contradictory evidence. The EAT also criticised the ET for not sufficiently explaining its reasoning on proportionality.

Court of Appeal

Air Products appealed and the CA upheld that appeal, restoring the ET's original decision that the age discrimination claim failed.

The three grounds of appeal were that the EAT had:

1. erred in holding that the ET's decision was insufficiently reasoned
2. substituted its own view for that of the ET
3. acted perversely in remitting the matter to a different tribunal.

LJ Bean, with whom LJ Leggatt agreed, stated that the ET was entitled to accept that the aim of the LTIP policy was to strike a balance between encouraging retention up to the age of 55, and then providing some incentive to retire in order to create opportunities for younger employees. The ET was also entitled to accept that there was a rational basis for choosing age 55, namely that it was the minimum pension age laid down in law in the UK in 2010.

LJ Bean also found that there was sufficient evidence of the ET's findings, namely the two witnesses from the company. Intergenerational fairness could be

a legitimate aim even if it was a step taken in the employer's best interests – it could still be a social policy aim. Part of this consideration was that defined benefit pension scheme members were already getting a better pension, and so removing a further benefit from them compared to their defined contribution scheme member colleagues was justified.

Further, Air Products had achieved its aim proportionately – 'bright line' distinctions are common in relation to retirement benefits (why does the retiring employee aged 54 get nothing, and the retiring employee aged 55 get the full benefit), but this does not render it disproportionate.

Analysis

This case demonstrates the ease with which companies can supply legitimate aims when it comes to retirement benefits, and how contradictory written documents do not necessarily assist an individual if the judge feels that the policy is fair. Many employers had decided to remove any mention of retirement from long-term incentive plans, but this caution has not been rewarded. Instead, an individual wanting to bring a direct age discrimination claim in relation to such benefits is going to have to show that either the legitimate aims are not present (difficult, given that intergenerational fairness and aiding retention are almost universal features of all businesses with reasonably large workforces), or that they were pursued proportionately.

The bar for this later hurdle has now been set relatively low, especially as the CA did not require any evidence that the retirement exception policy had actually led to high retention. The fact that a company can include its own best interests in showing that a legitimate social policy aim has been aimed for means that advisers will have to work very hard to show that the employer has not achieved their legitimate aim proportionately.

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Briefing 865

Unfavourable treatment and the employer's belief in a link with disability: the correct legal test considered

City of York Council v Grosset [2018] EWCA Civ 1105; May 15, 2018

Implications for practitioners

As any claimant adviser knows, reasonable adjustments in the workplace for disabled employees and workers are often key to a good working life and successful career and the lack of them is often a contributing factor to job loss. As advisers also know, many employers and organisations are poor at making adjustments and sustaining them. Disabled workers may have to renegotiate adjustments if there are changes in working style or workplace arrangements; or may face significant difficulties where there is a change in management, leading to the adjustments being overlooked, not recorded or simply forgotten about.

The failure of Mr Grosset's (G) employer to properly record the adjustments made for him, or to ensure that they were communicated to new managers, was one cause of him suffering significant increases in stress, leading to serious mistakes at work, and being dismissed for gross misconduct.

The CA has now determined that G was discriminated against on grounds of disability because of something arising in consequence of his disability contrary to s15 Equality Act 2010 (EA) and that the discrimination was not justified. In giving judgment the CA revisits s15 discrimination and clarifies the legal test to be applied, and, in particular, rules that the subjective state of mind of the employer is not relevant to the test of whether A (the employer) treats B (the disabled worker) unfavourably.

Facts

G was head of English at the respondent's school. He has cystic fibrosis. His employers were well aware of his disability when he was employed in 2011 and reasonable adjustments were put in place for him. However, no record was kept of the agreed reasonable adjustments by the employer and by the time a new head teacher, Mr Crane, (C) was appointed in 2013, the adjustments had been 'lost sight of'.

G self-managed his disability partly by following a lengthy daily exercise regime, and it was accepted that this placed heavy demands on him.

C's appointment as head teacher coincided with a change in the performance management standards

applied to schools, moving away from GCSE results and on to individual progression for pupils.

G's department was perceived to be struggling under the new standards and measures were put in place to address this. Whilst G supported the proposals, they placed additional pressures on him, and after some weeks he wrote to C complaining about unreasonable deadlines and referring to his condition as a reason why he was raising his concerns at this point.

C referred G to occupational health (OH) but did not accept his account of his workload pressures. No regular break in work was agreed. Whilst G had passed his annual work appraisal in October 2013, by the end of the month his lung function had dropped to an all time low. He was concerned that he may require a double lung transplant which, unsurprisingly, caused him significant stress. In November his department was selected for a 'Focus Fortnight', which required further significant extra work from him.

On November 8th G showed his students the 18-rated horror film *Halloween* as a vehicle for discussion. Towards the end of November, and following a meeting with C, at which G explained the impact of the extra work on his health, G's health had deteriorated so much that he was signed off work.

Whilst G was on sick leave, C discovered that the 18-rated film had been shown to students of 15 years of age without authority or parental consent. Disciplinary charges were brought against G.

The OH meeting which had been delayed finally took place in December by which time G was off work with stress.

Following the disciplinary hearing, G was dismissed for gross misconduct. His appeal was unsuccessful as the panel did not accept or believe his case that the showing of the film was a result of an error of judgment on his part brought on by stress resulting from the increased workload and his cystic fibrosis. His grievance was also rejected.

Employment Tribunal

G claimed unfair dismissal and disability discrimination under s15 EA. He argued that his dismissal was for a reason arising in consequence of his disability and was not justified. The ET found that he had been subjected to unreasonable treatment for something arising in consequence of his disability and the dismissal was not justified in the circumstances of this case. He had been subjected to unlawful discrimination contrary to s15. However, the ET did not find ordinary unfair dismissal proved. It ruled by a majority that his employers had been entitled to find that the conduct was gross misconduct and that dismissal was within the range of reasonable responses open to them.

Court of Appeal

Following the EAT's dismissal of the appeals against both findings from the parties, the respondent appealed to the CA against the finding of discrimination contrary to s15 EA. The key argument was that in order for a s15 claim to succeed, the employer must have accepted that G's behaviour in showing the film was something arising in consequence of his disability. In this case, the respondents did not believe that G had shown the film as a result of an error of judgment arising as a result of his disability.

The CA summarised the ET's key findings of fact:

> *… by reason of his disability, the claimant was required to spend up to three hours a day in a punishing regime of physical exercise to clear his lungs. That severely restricted the time and energy available to enable him to adapt to sudden or significant increases in workload, which is what had happened in this case. In turn, the additional stress exacerbated the claimant's medical condition and, as a result, he had been unable to cope with the very significant additional workload over the autumn term. That amounted to unfavourable treatment because of something arising in consequence of his disability, which the respondent was unable to justify on an objective basis. Before the EAT there was no longer any issue about those findings.*
>
> *As for the claimant's dismissal, that was plainly an act of unfavourable treatment. Having regard to the evidence given at trial by the claimant and also to the medical evidence before it, which was fuller and more relevant than that before the respondent when making its decision, the ET further found that the claimant had shown the film when suffering from an impaired mental state due to stress at such a high level that errors of judgment might be expected to arise as a result. The claimant had never previously made a comparable error and there had been no prior concerns about his safeguarding responsibilities. Specifically, the ET found that it was more likely than not that the claimant had made an error of judgment in selecting Halloween as a result of the stress he was under; showing this film was not an error he would otherwise have made; and, in very large part, that stress arose from his disability.* [paras 26-7 per Sales LJ]

The CA had to determine whether an employer who knows of the disability but does not accept that the action which leads to dismissal arises from that disability was protected from a s15 claim, if an ET subsequently finds to the contrary as a matter of fact. Can the employer rely upon it's own subjective belief at the time, to defeat the discrimination claim?

The CA said no. The state of mind or belief of the employer that the 'something' has arisen in consequence of the disability, whilst relevant to a question of fair or unfair dismissal, is not a relevant factor in determining whether or not there has been s15 discrimination. Sales LJ stated as follows

> *… it is not possible to spell out of section 15(1)(a) a further requirement, that A must be shown to have been aware when choosing to subject B to the unfavourable treatment in question that the relevant 'something' arose in consequence of B's disability;* [para 39]

This was, he explained, because, first and foremost, such a requirement is not compatible with the natural meaning of the language of s15(1)(a). Secondly, if A was required to be aware of B's disability and that the relevant 'something' has arisen in consequence of it, there would no need for the defence in s15(2). The presence of s15(2) within the scheme showed that the drafter could not have intended that s5(1)(a) should be read in this way.

S15(1)(a) requires an investigation of two distinct causative issues:

1. did A treat B unfavourably because of an (identified) 'something'? and
2. did that 'something' arise in consequence of B's disability.

The CA dismissed the argument that the word 'treats' in the phrase, 'A treats B unfavourably', focuses upon A's subjective state of mind in relation to both issues 1 and 2. Sales LJ noted that all that word is doing is referring to the treatment of B by A which has to be unfavourable if the subsection is going to apply. It points to an objective matter (that is, how A has treated B) and does not say anything about A's state of mind in relation to issues 1 and 2.

Sales LJ also accepted the utility of the code of practice as a guide to the legislation and as supporting the judgment of the court.

Comment

The case provides an important clarification that the belief of the employer that there is no link between a worker's disability and their actions or behaviour which are considered as misconduct is not relevant to a s15 claim. What matters is whether, as a matter of fact, there is a link between the two. If the behaviour arises from the disability, then any unfavourable treatment by the employer because of it must be justified.

This raises the question of how to satisfy an internal disciplinary panel that there is a link in order to avoid dismissal, or even disciplinary action, in the first place. Whilst proper record keeping and an ongoing commitment to supporting disabled staff is vital, robust medical evidence about the impact of the disability on the particular claimant must be one answer. In this case, the ET had much better medical evidence before them than the internal disciplinary or appeal panel had about the claimant's disability and its impact upon him.

The real concern highlighted by this case, however must be the context in which it occurred. It is highly likely that the growing pressure within schools resulting from cuts across the board will continue to seriously affect the health and well-being of staff, particularly for a teacher with a disability. There is a real concern, constantly highlighted by teaching unions, that unlawful discriminatory treatment of disabled staff will continue to be an indirect result of cuts, and pressure on resources, coupled with a discredited inspection system.

Catherine Rayner
7 BR Chambers

Schedule 9 EA religious requirements' defence found not to apply to harassment claim

Pemberton v Inwood, Bishop of Southwell and Nottingham [2018] EWCA Civ 564; March 22, 2018

Facts

The Reverend Canon Pemberton (P) is an ordained priest of the Church of England. In 2013 he married his husband. As a result his Permission to Officiate in the Diocese of Southwell and Nottingham was revoked by the Bishop who also declined to grant an Extra Parochial Ministry Licence.

The lack of the Extra Parochial Ministry Licence also meant that P was not appointed as a chaplain at the Kingsmill Hospital.

Employment Tribunal

P brought a claim for direct discrimination on the grounds of sexual orientation. This was on the basis that the Bishop was a qualifications body for the purposes of the Equality Act 2010 (EA), that both the Permission to Officiate and the Extra Parochial Ministry Licence were qualifications and that there had been direct discrimination in the revocation and refusal to grant respectively.

Further, he argued that the refusals amounted to harassment on the basis of his sexual orientation.

The ET rejected these claims. It concluded that the Permission to Officiate was not a relevant qualification, but the Extra Parochial Ministry Licence was. This meant that the Bishop was a qualifications body for the purposes of the EA. It followed that it was unlawful for him to discriminate in relation to the Licence.

But the Bishop was entitled to benefit from the religious requirements' defence in Schedule 9 of the EA. This entitled him to apply a requirement that a candidate not be married to person of the same sex, provided this was done to comply with the doctrines of the Church of England. The ET concluded that this was the case in relation to the Licence and therefore rejected the direct discrimination claim.

The Schedule 9 defence does not, however, apply to a harassment claim. The ET accepted that the refusal to grant the Licence was unwanted conduct that had caused P distress and was humiliating for him. Nonetheless, it concluded that it would be an affront to justice to find that a decision that was made lawful by Schedule 9 was nonetheless harassment. In that context, and in the absence of any aggravating factor relating to the decision or the way it was communicated, the tribunal also dismissed the harassment claim.

Employment Appeal Tribunal

Both parties appealed. HHJ Eady QC upheld the ET's conclusions and reasoning, leaving the claims still dismissed.

Court of Appeal

P then appealed to the CA. The CA concluded that the ET and EAT had been correct to find that the Permission to Officiate was not a relevant qualification. It did not, in and of itself, lead to any remuneration and the parties had agreed that such remuneration was essential. If the revocation of the Permission had itself determined the availability of the Licence, this might have been sufficient. But the ET and EAT had found that it did not. There was no 'interdependence' as such; rather both decisions stemmed from the Bishop's view that P's marriage meant he was not longer in 'good standing'.

At the same time, the CA upheld the previous decisions that the Licence was a relevant qualification. It was clear that it amounted to a condition of being appointed as the chaplain.

P also argued that the Schedule 9 defence should not have been applied to the Licence, since it related to employment at an NHS trust, not with the Church of England. Further he argued that there was no Church of England doctrine against same-sex marriage.

Both of these arguments were rejected. The CA found that the defence was wide enough to encompass roles outside the Church itself, provided it was for the purpose of an organised religion. In this case the employment was on the basis of being a minister of religion who was able to conduct services.

In relation to the doctrine point the CA found it was not necessary to have an express rule against same-sex marriage in the documents traditionally considered to set out Church doctrine (the Canons, Thirty-Nine Articles, the Book of Common Prayer and ordinals). 'Doctrine' for the purposes of the EA

did not have the same meaning as it did within Church of England theology. It was sufficient that the Bishop was complying with the wider teaching of the Church, which did define marriage as being between a man and a woman.

Finally, P argued that the ET had erred by, in effect, applying the Schedule 9 defence to harassment by the back door. Given that it was common ground that it did not apply to harassment, the tribunal was wrong to require some additional aggravating factor. Rather it should simply apply the harassment test: had there been unwanted conduct related to a relevant protected characteristic that had the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment?

The CA rejected this argument on the same basis as the tribunal and the EAT. Lord Justice Underhill went further finding that, the application of known and lawful rules by an institution someone has joined, would not create any violation of dignity or reasonable offence. For a harassment claim to succeed, therefore, there would have to be an additional factor, beyond simply communicating that decision.

Comment

Pemberton clarifies a number of points in relation to relevant qualifications and qualifying bodies for the purposes of the EA – points which are under-explored in case law. It also confirms that the Schedule 9 religious requirements' defence has application outside direct employment by a church or similar religious organisation.

It could be argued, however, that the approach to harassment in this case is flawed. There is undoubtedly tension between a single action being protected for the purposes of direct discrimination, but not harassment. It is not clear, however, why this should be resolved in favour of the employer/qualifications body rather than the claimant.

The most detailed explanation is given by LJ Underhill; yet this is largely circular. He concludes that an action that is kept outside direct discrimination by virtue of Schedule 9 is therefore lawful. He then uses that finding to decide that the same action cannot be harassment, because a lawful action will not violate dignity or cause reasonable offence. But harassment itself is something that will make a decision unlawful. It cannot be said that the decision is lawful until it has been decided that it is not harassment. Simply finding that it is not direct discrimination is not a complete answer.

It could also be argued that the idea that applying well known rules will not violate dignity or cause offence is simply wrong. Many people have joined organisations with well known rules that discriminate against them, causing substantial and quite reasonable distress. The fact that someone has joined an organisation with particular rule or views might be relevant to questions of harassment, but certainly should not be determinative.

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Briefing 867

Injury to feelings awards are not taxable (age discrimination)

Moorthy v HMRC [2018] EWCA Civ 847; April 20, 2018

Facts

Mr Moorthy (M) had been made redundant by Jacobs Engineering (UK) Ltd (Jacobs) and received a statutory redundancy payment of £10,640. Following a mediation in January 2011, M agreed to compromise claims for unfair dismissal and unlawful age discrimination brought in the ET against his former employer. The agreed terms were contained within a compromise agreement under which M agreed to accept payment of '*an ex gratia sum of £200,000 by way of compensation for loss of office and employment*' without any admission of liability by Jacobs, in '*full and final settlement*' of his existing claims and any other claims arising out of or connected with his employment or its termination, whether or not such claims fell within the ET's jurisdiction. M was then paid the settlement sum in two instalments in the 2010/11 tax year.

On his tax return, M claimed that the payment was non-taxable as it had been paid to settle a discrimination claim. The commissioners concluded that the payment was taxable as a termination payment under s401 of the Income Tax (Earnings and Pensions) Act 2003 (the Act), except for £30,000 which was exempt under s403 of the Act and a further £30,000 which represented

a payment for injury to feelings. The commissioners issued a closure notice and amended M's return to include the payment, less £60,000, as taxable income. M appealed but the reviewing officer confirmed the commissioner's decision.

First Tier Tribunal

The issues for the FTT were whether (i) the payment fell within s401 of the Act and (ii) M had paid the correct amount of tax on the sum.

M's appeal was dismissed, and it was held that the £200,000 payment was made '*directly or indirectly in consideration or in consequence of, or otherwise in connection with'* the termination of his employment. A clear connection was found between M's termination and the redundancy selection process, and his compensation payment and the discrimination which he alleged took place during that selection process. The payment therefore fell within s401 and was taxable income subject to the usual exemption in s403. However, there was no basis for excluding from the wide scope of s401 payments which were in connection with the termination of employment because they were compensation for the breach of an employee's rights.

Upper Tier Tribunal (Tax and Chancery)

M appealed to the UTT, which upheld the decision of the FTT; see Briefing 798, July 2016. The whole of the settlement sum fell within the scope of s401 and was taxable. The language of that section was clear and had a wide scope. It applied to payments and other benefits received directly or indirectly in consideration, in consequence of, or otherwise in connection with the termination of a person's employment. It applied to payments made even where the termination was fair and lawful; it was not restricted to payments made under a contractual entitlement; and it applied to non-pecuniary awards, such as damages for injury to feelings. The fact that the sum paid might exceed the statutory maximum that could be awarded for unfair dismissal did not mean that the excess was unconnected with the termination of the employment. The tribunal in *Oti-Obihara v Revenue and Customs Commissioners* [2011] IRLR 386 was wrong in concluding that compensation paid on the termination of employment for discrimination was taxable only to the extent that compensated for financial loss suffered by reason of the termination, and that compensation for the infringement of the right not to be discriminated against was not taxable.

The settlement sum was not removed from the charge to tax by s406(b) and was not a payment on account of injury to an employee within the meaning of that subsection. The meaning of 'injury' was context-specific and as used in s406 it did not include injury to feelings. The decisions in *Vince-Cain v Orthet Ltd* [2005] ICR 374 and *Timothy James Consulting Ltd v Wilton* [2015] ICR 764 which held that 'injury' in s406 included injury to feelings, were wrongly decided.

The absence of any discussion in *Vento v Chief Constable of West Yorkshire* [2003] ICR 318 about the tax treatment of awards for injury to feelings did not mean that such awards fell within s406, and the fact that the CA regarded damages for injury to feelings as being analogous to awards for pain, suffering and loss of amenity in personal injury claims did not support the view that 'injury' in s406 included injury to feelings. While 'injury' in s406 included personal injury, that did not mean that it included injury to feelings. Further, s406 was not a general exemption from tax for payments made on account of injury to an employee. M appealed further.

Court of Appeal

The main issues which arose before the CA were 'the taxability issue' and 'the exemption issue' respectively:

a) whether the settlement sum was in principle subject to income tax as M's employment income under Chapter 3 of Part 3 of the Act which treats as earnings, and thus as taxable employment income, '*payments and other benefits which are received [by the relevant person] directly or indirectly in consideration or in consequence of, or otherwise in connection with- (a) the termination of a person's employment*'; and, if so:

b) whether the settlement sum (or any part of it) was taken out of charge to tax by the exemption in s406 of the Act, which states that Chapter 3 does not apply to a payment or other benefit provided '*on account of injury to... an employee*', the alleged injury being the injury to M's feelings sustained in the context of his age discrimination claim.

M had a prima facie case of unlawful age discrimination, and the relief he sought in the ET expressly included an award for injury to feelings. Such awards were expressly authorised by parliament in the Equality Act 2010 s119(4). The settlement sum had not been apportioned between the appellant's claims, and the upper limit for compensation for injury to feelings potentially applicable to the appellant was £30,000, *Vento v Chief Constable of West Yorkshire* [2003] ICR 318 followed and *Da'Bell v National Society for the*

Prevention of Cruelty to Children (NSPCC) [2010] IRLR 19 applied.

Had M received that sum for discrimination while his employment continued, it would have been tax free as s401 of the Act would not have applied. However, since it formed part of a payment made on termination of employment, it was prima facie taxable under s401, unless the s406 exemption applied.

The CA found that s406 should be interpreted as exempting payments on account of any injury to an employee which constituted a recognisable form of personal injury, in accordance with developing medical science, or any other form of injury, which was recognised by parliament as providing a basis for the payment of compensation. Accordingly, an award of damages for injury to feelings to a successful claimant for age discrimination fell within the ambit of s406 and was properly exempted. That corresponded to the natural meaning of the language of s406 and provided parity of treatment with similar awards made in a continuing employment relationship. That reasoning applied to the appropriate proportion of a global sum paid by an employer in settlement of such a claim, even where made without admission of liability, *Vince-Cain v Orthet Ltd* [2005] ICR 374 and *Timothy James Consulting Ltd v Wilton* [2015] ICR 764. Further following amendment to s406, the exemption would exclude payments for injury to feelings from the 2018/19 tax year onwards.

Implications for practitioners

The vexed issue as to whether compensation payments for injury to feelings are taxable under S401 or are exempted by virtue of S406(b) of the Act has now been resolved by the CA. This decision has now laid this issue to rest and together with the signalled amendment to legislation, allows tax efficient settlements to proceed soundly on the basis of proportionate injury to feelings payments being non-taxable.

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Briefing 868

EAT holds that failure to pay enhanced shared parental pay to a male employee was not sex discrimination

Capita Customer Management Ltd v Ali and Working Families (Intervenor)
UKEAT/0161/17; April 11, 2018

Introduction

The Shared Parental Leave Regulations 2014 introduced an entitlement for employees to take shared parental leave in the first year of their child's life (or in the first year after the child's placement for adoption). The regulations were made in exercise of powers inserted into Part 8 of the Employment Rights Act 1996 (ERA) by the Children and Families Act 2014. It gives eligible parents the right to share up to fifty weeks of leave to care for their child.

The right to shared parental pay is derived from the Shared Parental Pay (General) Regulations 2014, and gives eligible parents the right to share up to thirty-seven weeks of shared parental pay. The pay is set at the same rate as statutory maternity pay.

In simple terms, the regime works by the mother curtailing her maternity leave after the initial compulsory leave of two weeks, meaning that the amount of shared parental leave and pay available is reduced by any time spent by the mother on maternity leave.

The compulsory period of two weeks is set out in s72(1) ERA, and is a right derived from the Pregnant Workers Directive 92/85/EC (the Directive), which establishes the measures required to be implemented for the protection of pregnant workers who have recently given birth or who are breastfeeding. It requires that member states provide women with at least fourteen consecutive weeks maternity leave (which includes the two weeks compulsory leave).

It is not uncommon for employers to pay enhanced maternity pay to mothers on maternity leave over and above the statutory amounts. It is however less common for employers to pay enhanced shared parental pay for parents on shared parental leave. In this case the EAT considered whether the ET was correct to hold that a male employee, Mr M Ali (MA) was directly discriminated against on the grounds of his sex due to failure of his employer Capita Customer Management Limited (CC) to pay enhanced shared parental leave in circumstances where it paid enhanced pay to women

on maternity leave.

Direct sex discrimination is defined in s13(1) of the Equality Act 2010 (EA), as, because of their sex, a person (A) treats another person (B) less favourably than they would treat others. However the legislation does highlight the special treatment afforded to women who are pregnant or on maternity leave: '*If the protected characteristic is sex … in the case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.*' S13(6)(b) EA.

Facts

MA was employed by CC as a business customs adviser. CC had a contractual policy which entitled female employees to fourteen weeks full pay following the birth of their child. Male employees were entitled to two weeks full pay following the birth of their child. CC's shared parental leave policy entitled those who took it to two weeks full pay followed by pay at the statutory level.

Immediately after the birth of his child, MA took two weeks paternity leave for which he was paid in full by CC in line with its paternity leave policy. MA's wife, who worked for a different employer, was later diagnosed with post-natal depression and as a result, she was medically advised to return to work. MA requested to take shared parental leave as he wanted to care for their baby. He claimed that he was dissuaded from taking this leave as he was told he would only receive statutory shared parental pay. He claimed this was directly discriminatory on the grounds of sex as women on maternity leave would receive their full pay for a period of fourteen weeks.

MA accepted that the first two weeks of compulsory maternity leave could be considered as '*special treatment in connection with pregnancy or childbirth*' under s13(6)(b) EA. Thereafter however, MA argued that men taking shared parental leave should be entitled to receive twelve weeks' full pay.

Employment Tribunal

The ET agreed with MA. It found that CC's treatment of him amounted to direct sex discrimination. It was accepted by both parties that the compulsory maternity leave period of two weeks was specifically associated with recovery after childbirth and it was therefore unique and 'special treatment' afforded to the mother. The ET considered, however, that after this initial two week period, MA could compare his treatment with that of a hypothetical female colleague on maternity leave. This female colleague would be entitled to full pay for fourteen weeks, while he was only entitled to statutory pay for that period.

The ET rejected CC's argument that the full fourteen weeks of maternity leave were 'special treatment' in connection with childbirth. It did not accept that this exclusivity should continue after the initial two weeks, stating at paragraph 5.41 that:

> *… men are being encouraged to play a greater role in caring for their babies. Whether that happens in practice is a matter of choice for the parents depending on their personal circumstances but the choice made should be free of generalised assumptions that the mother is always best placed to undertake that role.*

The ET concluded that MA wanted to perform a caring role, a role that was not exclusive to the mother, and therefore was not special treatment in connection with pregnancy and childbirth but was special treatment in caring for a new born baby.

CC appealed to the EAT.

Employment Appeal Tribunal

The EAT upheld the appeal. It found that the ET was incorrect in finding that the purpose of the maternity leave is to provide care for the child.

The EAT summarised domestic and European legislation, and found that they draw a clear distinction between the rights given to the pregnant workers and those who have given birth or are breastfeeding, compared with the rights of the parents of either sex to take parental leave to care for the child. The EAT found that the purpose of the two sets of rights are different, as are the circumstances of those to whom they are given.

The primary aim of the Directive is the health and well-being of the pregnant and birth mother, which is clearly stated in Article 1. It requires member states to introduce legislation to enable a woman to take maternity leave with adequate remuneration for a minimum of fourteen weeks. It makes it clear that the maternity leave and pay associated with it are for the health of the mother.

In contrast, the ET accepted that the purpose of the regulations is for the parents or adopters to care for their child.

The EAT held that the ET was wrong to determine that the comparator for MA was a woman on maternity leave who had recently given birth, because that failed to have regard to the purpose of maternity leave and pay. It decided that after the two weeks' compulsory leave the subsequent twelve weeks of maternity leave are given to and taken by a woman for the care of her

child. It stated at paragraph 72 that *'Whilst a woman on maternity leave will no doubt take care of the baby, that is not the expressed or primary purpose of such leave. By contrast, the purpose or reason of shared parental leave is for the care of the beneficiaries.'*

As MA had sought shared parental leave for the purposes of caring for the child, the EAT concluded that he could compare himself to a woman on maternity leave.

Comment

The decision has meant that the 'special treatment' given for pregnant women and new mothers has been maintained. Men on shared parental leave cannot simply compare themselves to pregnant women. The two types of leave are different and the EAT considered it important that the distinction is maintained in order to ensure the protection of the women's health and well-being during and after pregnancy.

However it might be seen as a backward step when it comes to encouraging men to become more involved in caring for their children. A more balanced approach by employers to fathers taking leave following the birth of a child may well go some way to addressing the employment, mobility and equality issues faced by women in the workforce, who are still perceived by many employers as financial risks due to the fact that they might become pregnant. Fathers, like MA, may be discouraged from taking shared parental leave if it makes more financial sense for the mother to take her full maternity leave allowance.

Having said that, whilst employers can and should be encouraged to enhance shared parental pay in line with any contractual maternity pay, it may be difficult to add some legislative clout behind this without watering down the important protections afforded to mothers.

Leave has been given for an appeal to the CA.

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Briefing 869

Dismissal and the date of employer's knowledge of employee's pregnancy

Really Easy Car Credit Limited v Thompson UKEAT/0197/17/DA; January 3, 2018

Introduction

The appeal concerned the ET's approach to a case of pregnancy discrimination and automatic unfair dismissal, in circumstances where the decision to dismiss was taken before the employer had knowledge of the pregnancy but the dismissal itself took place after.

Facts

Really Easy Car Credit Limited (R) is a small family-owned company selling second-hand cars. Ms Thompson (T) began working for R on June 20, 2016 as a telesales operator.

T discovered she was pregnant during the week beginning July 25, 2016 and began experiencing pains over the weekend of July 30–31. T was due to work on Tuesday, August 2nd but called in sick saying she had to go to the hospital. R was unaware at the time that in fact T attended hospital for a pregnancy scan and one of the owner's of the company reassured T that it was not a problem she was off sick.

Another owner, Mr Crawford, felt this was the 'last straw' and that T could have gone to hospital while not due to work. R had previous problems with T's performance and conduct. Mr Crawford wanted to terminate T's contract immediately but was talked out of it by other owners.

When T returned to work on August 3rd there was an incident between T and a customer. A manager, Mr Fullerton, spoke with T, who became upset, and went home shortly after. That afternoon R decided T should be dismissed due to her 'emotional volatility', poor conduct and performance. Mr Fullerton drafted a letter that same day to T confirming the decision; however, rather than post it, R decided to hold a meeting with T to hand over the letter.

Mr Fullerton spoke with T on August 4th, during which T informed him she was pregnant. On August 5th, T duly returned to work. Mr Fullerton handed T the letter and explained the reasons for dismissal, emphasising that it had nothing to do with her pregnancy.

869

Employment Tribunal

T brought claims for unfair dismissal and pregnancy discrimination, alleging the real reason for her dismissal was pregnancy. T contended that the letter provided on August 5th was falsely backdated and that the decision had only been made once R had learned of her pregnancy on August 4th.

The ET did not accept this aspect of T's case. It was satisfied that R took the decision to dismiss T on August 3rd but did not communicate it until August 5th. The ET further accepted that the reasons for T's dismissal were her emotional volatility and performance. It accepted the events of August 2nd and 3rd as being the final straw.

Although not pleaded by T, the ET considered that it must have been obvious to R that T's attendance at hospital and her emotional state were both pregnancy related and it ought not to have gone ahead with the dismissal. On this basis the ET was satisfied that T had proven facts sufficient to reverse the burden of proof and R failed to satisfy it that the dismissal was in no sense whatsoever related to T's pregnancy. The ET found for T despite this not being her pleaded case.

Employment Appeal Tribunal

R appealed the decision on five grounds:

1. The ET had misapplied the law in finding the decision to dismiss on August 3rd was not discriminatory but the failure to reverse that decision on August 4th or 5th amounted to unfair dismissal and/or discriminatory dismissal.
2. The ET had erred in law in failing to apply the correct legal test.
3. The ET erred in law in finding for T on a case not pleaded by her.
4. The ET failed to make further findings of fact such as would give rise to a prima facie case. The ET further erred in failing to make any findings as to R's explanation that the company did not know of T's pregnancy when the decision to dismiss was made.
5. The ET had failed to make sufficient findings of fact generally or provide adequate reasons for its decision.

In essence, T contended that the ET was entitled to make the findings it did and the ET's conclusions were open to it on its own findings of fact, even if not following the case specifically pleaded by T.

The ET had accepted that R made the decision to dismiss on August 3rd and that if R had posted the letter to T on August 3rd then it would have succeeded in its defence. The ET did not make any findings that any further decision was taken once R was informed of T's pregnancy. So the decision was untainted by knowledge of T's pregnancy.

However, the ET had found R liable by omission. It appeared that the ET considered R ought to have taken positive steps in revisiting its decision following August 4th and that the reason for T's prior pregnancy related behaviour would have become obvious to R.

The EAT considered the correct test to be applied however was whether T's pregnancy had been the reason/primary reason for her dismissal (automatic unfair dismissal) or whether her dismissal had been because of her pregnancy (s18(2) EA). For the latter the ET would have needed to be satisfied there was a prima facie case, following which the burden of proof would shift to R. The test required R to have knowledge of T's pregnancy when it took the relevant decision, and did not impose an obligation on R to revisit its decision after acquiring knowledge.

The EAT therefore agreed with R's objection to the ET's application of an incorrect legal test. The ET did not make findings sufficient to support a prima facie case, indeed its only finding was that the decision to dismiss was taken on August 3rd and was not tainted by discrimination.

The EAT went on to state that the ET had misapplied the burden of proof by imposing a positive obligation on R to take a further decision once it had acquired knowledge of T's pregnancy. This was not the correct approach as a matter of law. Further, T herself had not advanced this case and it was unsupported by the ET's own findings.

The EAT further stated that the ET is bound to determine the case as put to it and not some other. T's case was that she was dismissed because she informed R that she was pregnant. However the ET found for T on the basis that R failed to make a new/different decision after discovering T was pregnant.

The EAT therefore allowed the appeal, set aside the ET's findings and remitted the case for reconsideration by a differently constituted ET.

Implications for practitioners

Practitioners should be live to circumstances where the ET's findings depart from the pleaded case before it, as these may be challengeable.

Further, once a decision to dismiss has been taken it is often advisable to communicate this to the employee as soon as possible. Knowledge of pregnancy obtained after the decision to dismiss has been taken will not necessarily taint the decision, even if communicated after knowledge is acquired.

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Employer's knowledge of disability

Toy v Chief Constable of Leicestershire Police UKEAT/0124/17/LA; March 9, 2018

The EAT found that the ET had correctly concluded the claimant/appellant had not been subjected to disability discrimination contrary to ss15 and 20 of the Equality Act 2010 (EA) and the respondent had neither actual nor constructive knowledge of the claimant's disability.

Facts

Mr Toy (T) worked for the respondent (CC) as a Police Community Support Officer from 2006, and was appointed a probationary Police Officer in November 2013. Having completed the initial academic module, he moved to 'on the job' training which involved trainees working alongside tutor constables and demonstrating some 37 skills contained in a police action checklist.

In the course of two placements T struggled to demonstrate these skills. An Inspector put an enhanced support plan in place, a professional development review was held and he was assigned a new tutor constable. In a report the third tutor raised concerns as to T's ability to discharge the role of a Police Officer. At this point the CC initiated the process that can end with dismissal. Under regulation 13 of the Police Regulations 2003 a probationer constable can be dismissed if the CC considers he or she is not fit to perform the duties of his office, or that he is not likely to become an efficient or well conducted constable. Where dismissal is contemplated there is a three stage procedure: a management guidance meeting, a regulation 13 meeting and, ultimately, a meeting with the CC.

A Chief Inspector conducted the initial management guidance meeting; concluding that T was not cut out for the job, he was referred to the second stage. At the regulation 13 meeting T was represented by a Police Federation representative, DC Mills. At this hearing and for the first time the issue of T having a disability – dyslexia – was raised. DC Mills informed the panel that he had asked T to complete a dyslexia test, the result indicating he had the potential to be dyslexic.

At the same hearing T informed the panel that he had a 'strong belief' that he was suffering from dyslexia. The regulation 13 panel found that even if he had dyslexia, that did not explain the poor performance. (At the time of the hearing best employment practice should have dictated that a report was obtained addressing disability and potential disadvantage arising therefrom. This did not happen.) The CC also considered whether dyslexia was relevant to his failure to demonstrate the required skills. He was sceptical about T having dyslexia and discounted it as a reason for the poor performance.

Employment Tribunal

T brought clams of race and disability discrimination including discrimination arising from disability and failure to comply with the duty to make adjustments (ss15 & 20 EA respectively). The ET had two expert reports evidencing that T has dyslexia.

In respect of the reasonable adjustment duty, paragraph 20 of Schedule 8 EA contains the knowledge requirements:

> *A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know — (b)[in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.*

The ET dismissed all of T's claims. On disability the tribunal found that the respondent had neither actual nor constructive knowledge of disability. The CC's impugned action was not causally connected to disability and there was no reasonable adjustment failure.

The ET stated: '*At the very end of the submissions DC Mills opined that in respect of clerical skills there was a possibility that the claimant may be suffering from dyslexia.*' (para 42) It concluded:

> *In the circumstances we conclude that the respondent did not and could not reasonably have had the relevant knowledge of disability for the following reasons: [para 67.1] The claimant himself was not clear or certain that he was dyslexic, The highest he ever put it in the Regulation 13 meeting was that it was possible that he may be dyslexic. In circumstances where the claimant himself does not know, nor is certain of the condition, in our judgement it is unreasonable to expect that the respondent ought to know. Of course it is quite conceivable that there may be conditions (such as*

depression for example) where an employee does not recognise he has a disability but others might, but this case is not one of them…. (para 67)

Employment Appeal Tribunal

T appealed. The EAT rejected his argument that the ET had erred in law by misconstruing the statutory provisions and failing to properly take into account the evidence on disability. It appears that the most salient arguable error is found at paragraph 67.1 concerning CC's knowledge of disability.

On the failure to make reasonable adjustments, the EAT upheld the ET's finding that T had failed to evidentially establish that he had been put at a substantial disadvantage and there was no reasonable adjustment failure. The EAT noted the apparent failure to address the substantive issue of disadvantage in both expert reports which may suggest a lacuna in the case presented to the tribunal.

Of interest is the manner in which the EAT addressed the ET's findings on knowledge. Paragraph 30 states as follows:

It is well established that one should not subject an ET's judgment to minute scrutiny…. The distinction between the claimant having a strong belief that he had dyslexia and the ET's wording that he was 'not clear or certain that he was dyslexic' is in my judgment a distinction without a difference. The same applies to his representative's view which referred to the 'potential' for dyslexia. The ET could not have found, in my judgment, other than that the Chief Constable did not and could not reasonably have known of the disability.

In these cases Parliament has expressly left the determination of all questions of fact to the [employment] tribunals themselves ... It is not right that points of fact should be dressed up as points of law so as to encourage appeals. It is not right to go through the reasoning of these tribunals with a toothcomb to see if some error can be found here or there — to see if one can find some little cryptic sentence.' (See also Elias LJ in *ASLEF v Brady* [2006] IRLR 576, at para. 55, and Mummery LJ in *Fuller v London Borough of Brent* [2011] ICR 806, at para 30)

The avoidance of minute scrutiny is not a charter to airbrush errors of law. The ET's broad-brush dismissal of the evidence forms the basis of its legal reasoning i.e. '*In circumstances where the claimant himself does not know, nor is certain of the condition, in our judgement it is unreasonable to expect that the respondent ought to know.*'

Without adequately scrutinising the nature and import of said anomalies in the ET's fact-finding, the EAT held they are of no significance and no other finding was permissible. Absent is any satisfactory consideration of the import of the circumstances in which the issue of disability was raised (i.e. half way through the process) on the issue of constructive knowledge, and the apparent failure to adequately address the matter between the second and third hearings.

None of this is reassuring. T had dyslexia which may have caused a substantial disadvantage. The issue was raised at the second (regulation 13) hearing and was not satisfactorily investigated by CC at the relevant time. Whether or not the evidence on knowledge of disability was sufficient to meet the knowledge test in Schedule 8 para 20 as it would have applied at the relevant time, depends upon the application of the law to the evidence adduced.

Arguably the knowledge issue was not properly addressed in this case. The failure of both tribunals to accurately fact-find can lead to errors in legal reasoning. And EATs must give due consideration to submissions identifying errors in legal reasoning before labelling them 'pernickety critiques'. The tribunals skated over a key issue: can an employer avoid being fixed with knowledge of disability by reason of a failure to investigate the issue once raised? Given that T had a disability (as evidenced by the expert reports before the tribunal and the respondent's concession), once the issue of disability had been raised at the second hearing, did the employer avoid being fixed with knowledge of disability by reason of its failure to take investigative steps? (Refer here to cases such as *Prison Service v*

Comment

A few points can be made. First it is questionable whether the ET's findings on knowledge of disability accurately reflected the evidence. T had a strong belief that he was dyslexic which seems incongruous with the finding that he was 'not clear or certain' about his dyslexia – a strong belief evidenced clarity in his own mind about his dyslexia. Similarly portraying DC Mills as merely raising the 'possibility' that T had dyslexia doesn't reflect the substance of the submission at the regulation 13 hearing (i.e. at the second of three hearings) that, following the taking of a test, there was the potential that T had dyslexia. The subsequent failure to interrogate the substance of DC Mill's submissions casts doubt on the adequacy of the CC's findings at the final hearing.

Second, in para 30 the EAT recalled the principle identified by Lord Denning MR in *Hollister v National Farmers' Union* [1979] ICR 542 at 552 - 553:

Johnson [2007] IRLR 951 and *Project Management Institute v Latif* [2007] IRLR 579.) Arguably an expert report should have been commissioned by the employer after the second hearing; and, such a report might have led to a different outcome in the internal process.

In circumstances where the disability issue has been substantively raised by the employee, this case could have brought greater clarity to the law on the nature and extent of an employer's positive obligations in the determination of actual or constructive knowledge. However, as neither report before the ET grappled with the issue of reasonable adjustments relating to the claimant's day job, whether the final outcome would have been different is another matter.

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Briefing 871

Disciplinary processes form a continuing act

Hale v Brighton and Sussex University Hospitals NHS Trust UKEAT/0342/16/LA; December 8, 2017

Implications for practitioners

The EAT's decision provides welcome clarification that where a claimant complains that the bringing of disciplinary proceedings is in breach of the Equality Act 2010 (EA), the disciplinary proceedings are to be treated as a continuing act when determining whether the complaint is presented in time. The individual constituent elements of the disciplinary process are not to be treated as isolated acts when applying s123 EA.

Facts

The facts are somewhat convoluted, borne out by widespread animus in the respondent's Digestive Diseases Unit (DDU). The claimant (H) is a consultant in general surgery and was the clinical director of the DDU. In that role, he had line management responsibility for several junior doctors, including three from India and one from Pakistan. Those four junior doctors lodged a grievance against H on widespread matters, not initially including any allegations of discrimination. An investigation was carried out into the grievance.

Whilst that investigation was ongoing, H chaired a departmental meeting about a new rota. The four junior doctors were in attendance, and used the opportunity to air various grievances against the hospital, blame for which they attributed to H. They covertly recorded the meeting. After the four left the room, there was an impromptu post-meeting discussion between those remaining. This discussion was also recorded and the four junior doctors considered H to have made a number of racially offensive remarks. They made further complaint about these remarks and the terms of reference of the investigation were duly extended. H then made his own counter-complaint alleging the four junior doctors had themselves been racially offensive against him in the departmental meeting. The comments are immaterial to this case note. The investigating officer was asked to consider these complaints as well.

The investigating officer produced a number of reports, the upshot of which was that he held H to have a case to answer in respect of the allegations of race discrimination against him, but found no case to answer on the original complaints against H nor the allegations H made against the junior doctors.

The reports were produced on September 9, 2014. On November 6, 2014, H was invited to attend a disciplinary hearing, which was held on December 16, 2014. He was dismissed. He appealed and the appeal was heard on April 15, 2015. His ET1 was lodged on May 22, 2015.

One of the issues for determination was whether the respondent discriminated against H by subjecting him to disciplinary procedures and ultimately dismissing him. H's case was that the distinction between his treatment and that of the junior doctors was because he was white.

Employment Tribunal

The ET considered the commencement of disciplinary proceedings (by opening the investigation) against H to be influenced by his race. Using the junior doctors – who had no disciplinary proceedings brought

against them on H's complaints – as comparators, the tribunal concluded that the subjective opinions of the respondent's officers were influenced by the fact that H is white British and hence not the typical racial profile of someone harassed on grounds of their race. The ET relied on this conclusion in finding the respondent failed to discharge the burden of proving the decision to investigate complaints against H was not because of his race. The tribunal dismissed H's complaints that the respondent discriminated against him by continuing with the rest of the disciplinary process.

That decision rendered important the jurisdictional question about whether the claim was brought in time. The ET regarded the commencement of the investigation as a one-off act and not part of an act extending over a period. It declined to exercise the discretion to extend time on a just and equitable basis.

Employment Appeal Tribunal

H appealed against the tribunal's decision on 11 grounds. This case note concentrates solely on the grounds concerned with time limits, as it is on that issue that this case is of interest. H complained that the ET had been wrong to treat the decision to instigate the investigation as a one-off act rather than to treat that decision as part of an act extending over a period coupled with inviting H to attend a disciplinary hearing and the ultimate decision to dismiss.

The EAT agreed. Taking the decision to instigate disciplinary procedures amounted to the creation of a state of affairs which would continue until the conclusion of the disciplinary process. The individual constituent parts of that process cannot be characterised for s123 EA purposes as *'a succession of unconnected or isolated specific acts'* – the phrase used by Mummery LJ in *Hendricks v Commissioner of Police for the Metropolis* [2003] IRLR 96 at para 52. Were that not the case, an employee may have to bring a discrimination claim after each stage of a lengthy disciplinary process to be confident that his claims were brought in time – that would impose an unnecessary burden on claimants.

Comment

This is a common-sense and welcome ruling, clarifying that an employee who considers that the decision to institute disciplinary proceedings against him or her has been made for discriminatory reasons needs not rush to bring the claim but can wait to see how the proceedings pan out and await the result of the process before deciding whether to take the serious and often destabilising step of bringing discrimination proceedings.

It is important, however, to recognise the limits of this judgment. Its focus is solely on time limits. It does not require a tribunal dealing with an EA complaint to consider the disciplinary process holistically when determining whether the employer has discriminated during the process. It remains appropriate for a tribunal to consider whether each individual aspect of the process was discriminatory. Moreover, arguably the decision only assists when the complaint is that the act of instituting disciplinary proceedings at all is discriminatory rather than when the true focus of the complaint is on some specific act occurring during the course of the proceedings.

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New MoJ strategy for dealing with female offenders

On June 27th, the government announced a new Female Offender Strategy under which it will shelve its plans for five new women's community prisons and instead set up at least five women's residential centres in a pilot scheme in England and Wales. The move is part of plans to try to reduce the number of female offenders serving short jail terms.

Justice Secretary David Gauke said:

> *There is persuasive evidence that short custodial sentences are less effective in reducing re-offending than community orders. Short sentences ... do not provide sufficient time for rehabilitative activity. The impact on women, many of whom are sentenced for non-violent, low-level but persistent offences, often for short periods of time, is particularly significant. The prevalence of anxiety and self-harm incidents is greater than for male prisoners. As more female offenders are primary carers than their male counterparts, these sentences lead to a disproportionate impact on children and families and a failure to halt the intergenerational cycle of offending.*

The strategy proposes greater use of community punishments for women rather than short jail terms, and a review will be carried out looking at how they can spend more time with their children.

The Advisory Board on Female Offenders has welcomed the general direction of the strategy and its emphasis on community support but it is concerned that the allocation of £5 million for community provision is inadequate. It calls for the £50 million earmarked for the prison building to be used on the new strategy.

Kate Paradine, Chief Executive, Women in Prison said:

> *We do not know any of the detail of the government's proposed plans for five new residential women's centres, including how these will be paid for and how they will work. There are already women's centres providing alternatives to custody and community-based support for women that are proven to work in reducing reoffending. The problem is that these centres face a serious and deepening funding crisis. If the government is serious about reducing the women's prison population and ending the 'revolving door' of short sentences then this crisis needs to be addressed as a matter of urgency.*

[See Briefing 860, page 10 above 'The impact of sentences of imprisonment on women']

Law Centres win challenge on legal aid to prevent home loss

The High Court has upheld a challenge brought by the Law Centres Network (LCN) to aspects of the government's legal aid reforms. It upheld the LCN's challenge to the MoJ's decision to proceed with a controversial new tender for housing possession court duty schemes offering on-the-day face-to-face advice and advocacy at court to people facing possession proceedings. The court ruled that the MoJ decision, to contract for fewer, much larger housing solicitor duty desk schemes, was *'one that no reasonable decision-maker could reach'*. It ordered that the new contracts, already tendered for, be quashed.

In the *Law Centres Federation Limited v the Lord Chancellor* [2018] EWHC 1588 (Admin), June 22, 2018, the court found that the government had failed to demonstrate that any minister considered the impact of the changes on equality. The proposal will now be remitted to the MoJ for reconsideration.

Review of Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)

Five years after the implementation of LASPO, the government is reviewing the act. This review gives the government an important opportunity to take stock of the damage caused by the unprecedented cuts to legal aid that LASPO introduced and to re-assess the value of justice to citizens. The original aim of the legislation, as set out by the Coalition Government in its 2010 consultation *Proposals for the Reform of Legal Aid in England and Wale*s, was:

- to discourage unnecessary and adversarial litigation at public expense
- to target legal aid at those who need it most
- to make significant savings to the cost of the scheme, and
- to deliver better overall value for money for the taxpayer.

The review will be evidence-based and aims to consider the policy changes made by Part 1 of LASPO against the objectives and estimates outlined prior to LASPO's implementation.

Consultative groups have been set up to provide evidence and data for the review. The first meetings took place in April 2018 and further consultative group meetings have been scheduled later in the year.

If you wish to engage with MoJ or make a submission of evidence for the consideration of the review team, please email **lasporeviewmoj@justice.gsi.gov.uk.** The deadline for submissions of evidence is the end of September.

Mitigating the negative effect of government tax and welfare reforms

The EHRC has reported on the impact tax and welfare reforms from 2010 to 2018 will have on various groups across society in 2021 to 2022. It has found that, overall, changes to taxes, benefits, tax credits and Universal Credit announced since 2010 are regressive, with a disproportionately negative impact on Bangladeshi, Pakistani and Black households.

The report suggests that children will be hit the hardest as:

- an extra 1.5 million will be in poverty
- the child poverty rate for those in lone parent households will increase from 37% to over 62%
- households with three or more children will see particularly large losses of around £5,600.

The report also finds:

- households with at least one disabled adult and a disabled child will lose over £6,500 a year, over 13% of their annual income
- Bangladeshi households will lose around £4,400 a year, in comparison to 'White' households, or households with adults of differing ethnicity, which will only lose between £500 and £600 on average
- lone parents will lose an average of £5,250 a year, almost one-fifth of their annual income
- women will lose about £400 per year on average, while men will only lose £30.

The negative impacts are largely driven by changes to the benefit system, in particular the freeze in working-age benefit rates, changes to disability benefits, and reductions in Universal Credit rates.

The EHRC is working with lawyers and others to develop a set of policy recommendations for the groups hit hardest by welfare reform, including some BME groups, in order to mitigate the disproportionate impact of the government's welfare reforms.

Women and Equalities Committee (WEC) inquiry

The WEC has published its inquiry into the government's Race Equality Audit (the Audit). The WEC inquiry concluded that:

- if the inequalities revealed in the Audit are to be tackled, government departments must have clear and measurable plans for improving the consistency and robustness of the data and turning it into a set of cross-government priorities for action.
- the ability of the Audit to lead to tangible change is put at risk by a lack of consistency in how data is collected across government.
- urgent action is needed to improve the collection of ethnicity data.
- the Cabinet Office must build on its good work on the Audit by becoming the central driver in ensuring that each department delivers on its responsibilities.

Save the date: Discrimination Law Association's annual conference

Tuesday, November 27, 2018; hosted by Allen & Overy LLP, One Bishops Square, London E1 6AD (near Liverpool Street Station)

Abbreviations

AC	Appeal Cases
BME	Black and Minority Ethnic
CA	Court of Appeal
Cr App R	Criminal Appeal Reports (Sentencing)
DDA	Disability Discrimination Act 1995
DLA	Discrimination Law Association
DVLA	Driver Vehicle Licensing Agency
EA	Equality Act 2010
EAT	Employment Appeal Tribunal
EHRC	Equality and Human Rights Commission
EJ	Employment Judge
ERA	Employment Rights Act 1996
ET	Employment Tribunal
ET1	Employment Tribunal claim form
EU	European Union
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
FOI	Freedom of Information Act 2000
FTT	First Tier Tribunal
GCSE	General Certificate of Secondary Education
HC	High Court
HDC	Home Detention Curfew
HHJ	His/Her Honour Judge
HO	Home Office
HRA	Human Rights Act 1998
ICR	Industrial Case Reports
ILJ	Industrial Law Journal
IPP	Imprisonment for Public Protection
ILR	Indefinite leave to remain
IRLR	Industrial Relations Law Report
J	Judge
JCWI	Joint Council for the Welfare of Immigrants
LASPO	Legal Aid, Sentencing and Punishment of Offenders Act 2012
LCN	Law Centres' Network
LJ	Lord Justice
LLP	Legal liability partnership
MoJ	Ministry of Justice
MoU	Memorandum of Understanding
NHS	National Health Service
OH	Occupational Health
PCP	Provision, criterion or practice
PSED	Public sector equality duty
QC	Queen's Counsel
SC	Supreme Court
UKSC	United Kingdom Supreme Court
UTT	Upper Tier Tribunal
WLR	Weekly Law Reports
WTR	Working Time Regulations 1998

Briefings