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Editorial

Fundamental equality principles in changing and challenging times

The developing and challenging nature of discrimination law is set out clearly in this edition of *Briefings*. In *Ashers* the SC held that the reason why a service was refused was because of the message the customer wanted on his cake, not because of his sexual orientation. The degree of separation required to exist between the man and the message before they converge is always going to be a tricky area for judges to decide. Having been persuaded that the bakery owners discriminated, in part, against the customer on the grounds of his political opinion, the SC held that there was no justification for a consequent interference with the owners' rights to freedom of religion and expression by being required to ice a cake with a message with which they profoundly disagreed.

Michael Potter argues that the SC judgment has radically reinterpreted the Fair Employment (NI) Act 1998 and thrown doubt on the relevance of conscious or subconscious mental processes in making actions discriminatory. By concluding that, as the motive of the discriminator is irrelevant, political opinion discrimination cannot take place on the grounds of the discriminator's religious belief and political opinion, the SC has *'attenuated the scope of protection'* and undermined the legislation. The SC has also overturned established case law in relation to associative discrimination.

The Equality Commission for Northern Ireland which supported the case, has expressed concern that the *Ashers* judgment has created uncertainty about the application of equality law in the commercial sphere and the extent to which the beliefs of business owners may take precedence over a customer's equality rights. Michael Potter goes further and argues that the judgment has legitimised political and religious discrimination by service providers, and potentially employers, thereby creating a charter for discrimination by pretext.

In their article on artificial intelligence, Dee Masters and Robin Allen QC, set out their concerns about inequality and discrimination resulting from the ever-increasing use by service providers or employers of algorithms or code which can become tainted by the biased assumptions of its human creators. They offer timely guidance on challenging such decision-making and on managing exposure to discrimination or harassment claims.

Significant judgments are reported in this edition which touch on the changing nature of personal relationships and how the state's systems are not in tune with these. *MB* concerns the application of the Gender Recognition Act 2004 which requires an applicant's marriage to be annulled before she can be granted a gender recognition certificate. As a result MB was unable to claim full state pension from age 60 and this, the CJEU said, amounted to direct sex discrimination. In *Steinfeld & Keidan* the SC held that the denial of a civil partnership to a heterosexual couple is unjustifiable sexual orientation discrimination. And in *McLaughlin* the SC ruled that to deny bereavement benefit to unmarried partners with children breaches human rights law which has established the principle that children should not be disadvantaged because their parents are not married. To leave four children impoverished because the state treats their unmarried parents' relationship differently from married parents is wrong, and, the SC held, is in breach of the Human Rights Act 1998.

Three interesting and significant county court cases are reported addressing, in turn, service providers' responsibilities in relation to customers with diabetes, the duty of landlords to make reasonable adjustments in relation to their provision of adaptions for a disabled tenant, and finally the incompatibility of the EA disability regulations with the European Convention on Human Rights insofar as the regulations exclude children *'with a tendency towards physical abuse'* from the disability definition.

Despite the SC's interpretation of the law in *Ashers*, it is important to note that the fundamentals remain the same – the law has not changed – it is still unlawful to discriminate in the provision of goods and services on the grounds of sexual orientation. The development of both progressive and regressive case law, and the sweeping power of artificial intelligence in all aspects of life, highlights the demands and challenges facing discrimination practitioners and the need to stay focused on fundamental equality principles in changing times.

Geraldine Scullion
Editor

Please see page 33 for list of abbreviations

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The Ashers judgment: has the Supreme Court provided both a sword and a shield for discriminators?

Michael Potter, Bar Library, Belfast and Cloisters Chambers, London, examines the implications of the SC's judgment in *Gareth Lee (Respondent) v Ashers Baking Company Limited and others (Appellants)* [2018] UKSC 49 which upheld the right of a supplier of goods and services to refuse to provide a product with a political slogan supportive of same-sex marriage with which the owners disagreed, finding they were protected by articles 9 and 10 of the European Convention on Human Rights. He argues that this is a controversial judgment which overturns established case law in relation to associative sexual orientation discrimination and indeed associative discrimination generally, and radically re-interprets the Northern Ireland legislation on protection from discrimination on grounds of political opinion and religious belief. He questions whether the SC has opened the floodgates for litigation in relation to the competing rights of customers and the rights and obligations of commercial operators, has legitimised political and religious discrimination by service providers, and potentially employers, and, has created a charter for discrimination by pretext.

Facts

Gareth Lee (GL) is a gay activist on lesbian, gay, bisexual and transgender rights with Queerspace, an organisation campaigning to legalise same-sex marriage in Northern Ireland. He placed an order with Ashers Baking Company Ltd (AB) for a cake with a picture of '*Bert and Ernie*' (the organisation's logo) and the caption '*support gay marriage*'. AB subsequently cancelled the order because the cake's message conflicted with the Christian beliefs of its owners (Mr and Mrs McArthur), which include opposing gay marriage. AB's owners took exception to the message on the cake, not to GL or his sexual orientation.

GL claimed discrimination on the grounds of sexual orientation in the provision of goods and services contrary to the Equality Act (Sexual Orientation) Regulations NI 2006 (the 2006 Regulations), and on the grounds of political opinion and religious belief, contrary to the Fair Employment and Treatment (NI) Order 1998 (FETO).

County Court & Court of Appeal

The District Judge in the county court found that GL had been subjected to discrimination on the grounds of sexual orientation, political opinion and religious belief. The CA upheld the lower court's decision on the ground of sexual orientation discrimination (see Briefings 757 and 819). Following the issuance of its decision, but prior to drawing up its order, the CA refused an application by the Attorney General for Northern Ireland (AG) to make a reference to the SC under paragraph 33 of Schedule 10 of the Northern Ireland Act 1998 (NIA 1998), holding it had no power to do so as the proceedings had ended.

Supreme Court

AB subsequently sought leave to appeal to the SC under s42(6) of the Judicature (Northern Ireland) Act 1978. The AG referred the CA's decision to the SC pursuant to paragraph 34 of Schedule 10 NIA 1998 on the ground that the decision raised devolution issues.

Jurisdiction

The SC granted AB permission to appeal and held the CA had erred in refusing to make a reference under the NIA 1998. It found it had jurisdiction to hear an appeal against all aspects of the judgment.

SC judgment

The SC allowed the appeal and held that under FETO and the 2006 Regulations there was no discrimination on the grounds of religious belief or sexual orientation. Whilst acknowledging GL had arguably been subjected to political opinion discrimination, the court accepted AB's owners' rights to freedom of thought, conscience, and religion, and freedom of expression protected under articles 9 and 10 of the European Convention on Human Rights (ECHR) were engaged; as justification had not been shown for an interference with those rights, FETO could not be read or given effect to require them to supply a cake iced with a message with which they profoundly disagreed because it was contrary to their Christian beliefs.

The sexual orientation claim

Before considering the SC's reasoning, it is worth reviewing why the CA reached its finding of sexual orientation discrimination. The CA addressed the issue of direct discrimination in three ways.

1. **Discrimination on the grounds of sexual orientation**: applying *Shamoon v The Chief Constable* [2003] UKHL 11 the legislation essentially contained a single question – the 'why question': did the claimant on the prescribed ground receive less favourable treatment as compared to others? The comparator was a person who wanted a cake which was not supportive of gay marriage.*
2. **Indissociability**: direct discrimination occurs where the difference in treatment is based on a criterion, which is either explicitly sexual orientation or necessarily linked to a characteristic indissociable from sexual orientation. In the case of *Bull v Hall* [2013] UKSC 73; Briefing 626, the SC found that the marriage criterion applied by the hotel proprietors was indissociable or indistinguishable from sexual orientation. This finding was based on the distinction that persons of heterosexual orientation could marry and persons of homosexual orientation could not.**
3. **Associative discrimination**: the principle of associative direct discrimination extends the protection of the legislation to cases in which a person can suffer unlawful discrimination on protected grounds, without actually having the protected characteristic. In the case of *English v Thomas Sanderson Blinds Ltd* [2008] EWCA Civ 1421; Briefing 491, Mr English was subjected to unlawful homophobic discrimination, despite the fact that he was not gay, and his work colleagues did not believe him to be gay.***

In his judgment the NICA's Lord Chief Justice relied on the above findings in the jurisprudence, stating that:

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

Overturning the CA's reasoning on all three points, the SC reasoned:

1. **Discrimination on the grounds of sexual orientation**: AB refused to supply the cake because of the message on the cake, not the characteristics of the person to whom it would have been supplied. Its refusal was not based on GL's sexual orientation. On this basis the SC found no discrimination. Lady Hale stated: '*The objection was to the message, not the messenger... Anyone who wanted that message would have been treated in the same way.*' (paras 22 & 23) She found there was no less favourable treatment because no comparator would have been treated more favourably. A heterosexual comparator wanting the same cake would have been treated no differently. AB would have refused to supply such a cake to a person of any sexual orientation.
2. **Indissociability**: the SC found there was not an exact correspondence or identity between support for same sex marriage and sexual orientation. Lady Hale stated: '*People of all sexual orientations, gay, straight or bisexual, can and do support gay marriage. Support for gay marriage is not a proxy for any particular sexual orientation.*' (para 25)
3. **Associative direct discrimination**: the SC accepted that a person may be less favourably treated, not only because of his or her sexual orientation, but because of another person's sexual orientation. It referenced the case of *Coleman v Attridge Law* [2008] ICR 1128; Briefing 547, where there was a specifically identified person whose disability (the protected characteristic) was the reason for the less favourable treatment. The SC asked how far associative discrimination could extend? Without offering a clear rationale in response to that question, the SC nonetheless reached two important findings:
   - *English v Thomas Sanderson Blinds Ltd* [2009] ICR 543 was wrongly decided; and,
   - the treatment of GL by AB was not a case of associative discrimination.

In relation to the associative discrimination point Lady Hale reasoned:

> *32. It is of some interest, although not a guide to interpretation, that the Explanatory Notes to the Equality Act (Sexual Orientation) Regulations 2007 (SI 2007/1263), which applied in Great Britain,*

go further than the Memorandum to the Northern Ireland [Sexual Orientation Regulations]. Para 7.3 states that direct discrimination is "when a person treats another person less favourably on the grounds of his/her sexual orientation, or what is believed to be his/her sexual orientation, or the sexual orientation/perceived sexual orientation of another person with whom they associate".

33. That is very far from saying that, because the reason for the less favourable treatment has something to do with the sexual orientation of some people, the less favourable treatment is "on grounds of" sexual orientation. There must, in my view, be a closer connection than that. Nor would I agree with the Court of Appeal that "the benefit from the message or slogan on the cake could only accrue to gay or bisexual people" It could also accrue to the benefit of the children, the parents, the families and friends of gay people who wished to show their commitment to one another in marriage, as well as to the wider community who recognise the social benefits which such commitment can bring.

34. This was a case of associative discrimination or it was nothing. It would be unwise in the context of this particular case to attempt to define the closeness of the association which justifies such a finding. Not only did the District Judge not make such a finding in this case, the association would not have been close enough for her to do so. In a nutshell, the objection was to the message and not to any particular person or persons.

The political opinion and religious belief claim

The SC addressed two main issues in relation to these claims: 1. Did AB discriminate against GL on the grounds of his political opinion or religious belief by refusing to supply him with a cake iced with this particular message? 2. If AB did, is FETO invalid or should it be read down under s3(1) of the Human Rights Act 1998 (HRA) as incompatible with the rights of freedom of religion and freedom of expression, protected by articles 9 and 10 of the ECHR?

Lady Hale considered the definition of political opinion stating:

Political opinion is not defined in the legislation, but in McKay v Northern Ireland Public Service Alliance [1994] NI 103, it was defined as "an opinion relating to the policy of government and matters touching the government of the state" (Kelly LJ at p 117) and in Ryder v Northern Ireland Policing Board [2007] NICA 43, it was said that "the type of political opinion must be one relating to the conduct of the government of the state or matters of public policy"(Kerr LCJ, at para 15). There is no need for an association with a particular political party or ideology, although no doubt that would also count. I see no reason to doubt that support for gay marriage is indeed a political opinion for this purpose. (para 41)

The SC posed the question: does direct discrimination on the grounds of political opinion or religious belief under FETO encompass discrimination by reason of the political opinion or religious beliefs of the alleged discriminator or does it only relate to the political opinion or religious beliefs of someone other than the person meting out that treatment? The SC's answer restricts such protection to the political opinion or religious beliefs of others. In reaching this conclusion the SC acknowledged that it was adopting an interpretation contrary to a line of Northern Irish authorities dating back to 1987, most notably *Ryder v Northern Ireland Policing Board* [2007] NICA 43 (para 44).

It was dismissive of the religious belief claim in this appeal and the District Judge's findings on this ground.

However the court placed weight on the District Judge's finding that GL was treated less favourably in part because of his political opinion. Given this finding, the SC accepted that there was a valid argument that GL had been subjected to less favourable treatment on the ground of his political opinion by reason of the indissociability as between his political opinion and the message on the cake.

47. It may well be that the answer to this question is the same as the answer to the claim based on sexual orientation. There was no less favourable treatment on this ground because anyone else would have been treated in the same way. The objection was not to Mr Lee because he, or anyone with whom he associated, held a political opinion supporting gay marriage. The objection was to being required to promote the message on the cake. The less favourable treatment was afforded to the message not to the man. It was not as if he were being refused a job, or accommodation, or baked goods in general, because of his political opinion, as for example, was alleged to have happened in Ryder v Northern Ireland Policing Board. The evidence was that they were quite prepared to serve him in other ways. The situation is not comparable to people being refused jobs, accommodation or business simply because of their religious faith. It is more akin to a Christian printing business being required to print leaflets promoting an atheist message.

48. However, there is here a much closer association between the political opinions of the man and the

message that he wishes to promote, such that it could be argued that they are "indissociable" for the purpose of direct discrimination on the ground of political opinion. This would not always be the case, because the person ordering a particular message may in fact be indifferent to it. But in this case Mr Lee was perceived as holding the opinion in question. It becomes appropriate, therefore, to consider the impact of the McArthurs' Convention rights upon the meaning and effect of FETO.

ECHR Articles 9 and 10

Given the finding of political discrimination, the SC then addressed whether FETO should be read down under s3(1) HRA as incompatible with the owners' rights to freedom of religion and freedom of expression as protected by articles 9 and 10 ECHR.

The SC held that both articles were clearly engaged. AB and its owners were required, on pain of liability in damages, to supply a product which actively promoted the cause of same-sex marriage, a cause in which many believe, but a cause in which the owners most definitely and sincerely did not. What mattered was that by being required to produce the cake the owners were being required to express a message with which they deeply disagreed. The SC's reasoning continues:

55. Articles 9 and 10 are, of course, qualified rights which may be limited or restricted in accordance with the law and insofar as this is necessary in a democratic society in pursuit of a legitimate aim. It is, of course, the case that businesses offering services to the public are not entitled to discriminate on certain grounds. The bakery could not refuse to provide a cake – or any other of their products – to Mr Lee because he was a gay man or because he supported gay marriage. But that important fact does not amount to a justification for something completely different – obliging them to supply a cake iced with a message with which they profoundly disagreed. In my view they would be entitled to refuse to do that whatever the message conveyed by the icing on the cake – support for living in sin, support for a particular political party, support for a particular religious denomination. The fact that this particular message had to do with sexual orientation is irrelevant to the FETO claim.

56. Under section 3(1) of the Human Rights Act 1998, all legislation is, so far as it is possible to do so, to be read and given effect in a way which is compatible with the Convention rights. I have already indicated my doubts about whether this was discrimination against Mr Lee on the grounds of his political opinions, but have acknowledged the possibility that it might be. But in my view, FETO should not be read or given effect in such a way as to compel providers of goods, facilities and services to express a message with which they disagree, unless justification is shown for doing so.

57. As the courts below reached a different conclusion on this issue, they did not have to consider the position of the company separately from that of Mr and Mrs McArthur. It is the case that in X v Switzerland (Application No 7865/77), Decision of 27 February 1979, and in Kustannus Oy Vapaa Ajattelija Ab v Finland (Application No 20471/92), Decision of 15 April 1996, the European Commission of Human Rights held that limited companies could not rely upon article 9(1) to resist paying church taxes. In this case, however, to hold the company liable when the McArthurs are not would effectively negate their convention rights. In holding that the company is not liable, this court is not holding that the company has rights under article 9; rather, it is upholding the rights of the McArthurs under that article.

Finally the SC noted the decision of the United States Supreme Court in *Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission*, June 4, 2018. In that case, a Christian baker refused to create a wedding cake for a gay couple because of his opposition to same-sex marriage. The Colorado Civil Rights Commission found the bakery had violated discrimination law, but the US Supreme Court overturned that decision on the ground that the Commission had not acted in a religiously neutral manner thereby violating the baker's constitutional right to free exercise of religion.

Lady Hale considered the different positions adopted by the US Supreme Court justices before concluding her judgment with the following paragraph:

62. The important message from the Masterpiece Bakery case is that there is a clear distinction between refusing to produce a cake conveying a particular message, for any customer who wants such a cake, and refusing to produce a cake for the particular customer who wants it because of that customer's characteristics. One can debate which side of the line particular factual scenarios fall. But in our case there can be no doubt. The bakery would have refused to supply this particular cake to anyone, whatever their personal characteristics. So there was no discrimination on grounds of sexual orientation. If and to the extent that there was discrimination on grounds of political opinion, no justification has been shown for the compelled speech which would be entailed for imposing civil liability for refusing to fulfil the order.

Discussion

This SC decision is controversial for a number of reasons.

1. The SC found that GL had not been subjected to associative sexual orientation discrimination, overturning *English v Thomas Sanderson Blinds Ltd*. In that case the CA had adopted a purposive construction of the legislation, refusing to accept the claimant had lost the legislation's protection despite his concession that his tormentors did not believe him to be gay. In *English,* as in the present case, there was an obvious and compelling 'association' between the victim and people who are gay. Although the SC has reduced the scope of associative discrimination, it has failed to explain the 'correct' parameters for associative discrimination, leaving the law unclear. Its decision is also at odds with the CJEU decision in *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* 2015 IRLR 746; Briefing 762, which adopted a comparable approach to the CA in the *English* case. (This may be a foretaste of post Brexit jurisprudence.)

2. In finding that GL had not been subjected to discrimination under FETO on the grounds of religious belief or political opinion, the SC has radically re-interpreted the law. Previously the political opinion or religious belief of the alleged discriminator was relevant when determining whether a victim had been subjected to discrimination on these grounds. For example, in *Ryder v Northern Ireland Policing Board* [2007] NICA 43 Kerr LCJ stated as follows:

   11. [It was] suggested that for discrimination on the ground of political opinion to occur, it was necessary to show that the victim held political views that prompted the less favourable treatment. I do not accept that argument. It appears to me to be clear that discrimination on political grounds can equally be based on the political opinion of the discriminator. If on the grounds of his own political opinion a prospective employer chooses a candidate on the basis that the candidate's political views are believed to coincide with his own and rejects a candidate whose political views are unknown, that unfavourable treatment can constitute discrimination. I agree with the analysis of this issue in Girvan LJ's judgment at paragraphs [1] and [2].

   In his concurring opinion Girvan LJ explained that: *Where a person claims to have been the victim of discrimination by a person in, for example, refusing or omitting to offer him employment for which he applies what must be examined is the motivation and thought processes of the alleged discriminator. Discrimination … is something which may be subtle, insidious or hidden. It is for this reason that a tribunal's task has an inquisitorial nature. Since what is central to the inquiry is the working and thought processes of the alleged discriminator, what is to be examined is whether that person acted in the way he did on grounds of political opinion. That may be the opinion of the respondent discriminator or the opinion of the claimant or it may be based on the respondent's perception of the claimant's political opinions or lack of them (which may not even represent the actual position).*

   He continued:

   In totalitarian systems the state authorities may perceive any action or comment by an individual as revealing a political stance or a political threat to the system. Mere lack of enthusiasm for the regime or its policies may be interpreted as the espousal of a political viewpoint. Where the state discriminates against the individual in consequence that discrimination would be on the grounds of political opinion. The discrimination would be motivated by the state's political viewpoint about the individual concerned and/or by the state's interpretation of the individual actions as revealing an unacceptable political viewpoint, even if the individual may be entirely apolitical. This extreme example demonstrates how discrimination on grounds of political opinion may be motivated by the political opinion of the discriminator rather than by the opinion of the victim or by the discriminator's perception of the political views of the victim. Even in a free and democratic society such as our own discrimination on the grounds of political opinion may arise in different ways. Such discrimination may (inter alia) arise because –

   a) the discriminator does not approve of the actual political views or activities of an individual; or
   b) the discriminator wants to advance a political viewpoint of his own;
   c) the discriminator misinterprets or misunderstands the political viewpoint of the individual and does not like that misunderstood viewpoint;
   d) the discriminator wants to favour others whose political opinions or perceived political opinions is more in tune with his own viewpoint.

   In *Ryder* the CA found that the political opinions of an alleged discriminator appeared integral to the concept of political discrimination, and

centrally relevant to the determination of the 'why question'. In the present case, the SC's reasoning excludes the political opinions or religious beliefs of the discriminator, removing part of the relevant factual considerations from the statutory test used to determine political discrimination or religious discrimination.

The SC approach is contrary to the purpose and effect of the harassment provisions, i.e. article 3A of FETO states:

A person ('A') subjects another person ('B') to harassment in any circumstances relevant for the purposes of any provision referred to in Article 3(2B) where, on the ground of religious belief or political opinion, A engages in unwanted conduct which has the purpose or effect of— (a) violating B's dignity, or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B. (2) Conduct shall be regarded as having the effect specified in sub-paragraphs (a) and (b) of paragraph (1) only if, having regard to all the circumstances, including, in particular, the perception of B, it should reasonably be considered as having that effect.

The legal framework, as declared by the SC, seems artificial and illogical. It also appears dis-consonant with the burden of proof provisions. The SC has attenuated the scope of protection against political and religious discrimination, undermining legislation that has been and remains of vital importance to combat sectarianism in Northern Ireland.

3. Whilst intention or motivation is not a necessary condition for liability in direct discrimination, the SC references *'a well established principle of equality law that the motive of the alleged discriminator is irrelevant'* (para 43). Seemingly given the context of paragraphs 42 and 43 of the judgment, the court was seeking to explain a discrete point that discrimination involves less favourable treatment on the ground of the victim's protected characteristic, not the discriminator's. However the broad phrase used, at best an over-enthusiastic mode of expression, is unquestionably misleading in relation to the relevance of motivation in establishing liability in direct discrimination law. See for example the CA's recent decision in *Unite the Union v Nailard* [2018] EWCA Civ 1203 (Briefing 878 in this edition) where Underhill LJ re-stated the correct position that an act might be rendered discriminatory by the conscious or subconscious mental processes or motivation of the alleged discriminator. (See also *Amnesty International v Ahmed* [2009] IRLR 884.)

4. It is interesting to ask whether the SC could have read down the 2006 Regulations to defeat a finding of less favourable treatment in the same way as it did for FETO. One possible explanation for overturning *English* is that the higher ranking of sexual orientation in the 'hierarchy of rights', could have justified an interference with AB's owners' rights under ECHR articles 9 and 10? This is also relevant as the SC's reasoning on sexual orientation discrimination appears to treat the case as an indirect discrimination case rather than a direct discrimination case, even though (at this point in the proceedings) the indirect discrimination claims had been abandoned.

5. There has been much debate and disagreement on how the law should negotiate the tension between the rights of customers and the rights and obligations of commercial operators, and whether commercial operators should be permitted to discriminate on the grounds of their religious beliefs and political opinions. However in reaching this decision has the SC opened the floodgates for litigation in respect of a myriad of factual matrices with competing rights and obligations, legitimised political and religious discrimination by service providers and potentially employers, and, created a charter for discrimination by pretext?

6. A corporate entity such as a bakery is not a beneficiary of human rights protection under articles 9 or 10. The SC found the McArthurs could rely upon the Convention but their bakery was also a co-defendant. To ensure the owners could enjoy ECHR protection the SC pierced the veil of incorporation finding the company was also not liable. Presumably if GL had sued AB only, and not joined the owners as co-defendants, the ECHR would have been inapplicable, as a bakery does not enjoy ECHR rights.

While the outcome appears correct to some and is regarded as a victory for 'commercial speech', for others it constitutes regressive undermining of progressive social legislation. In his judgment in *Northern Securities Co. v United States* 193 U.S. 197 (1904), Justice Oliver Wendell Holmes Jr stated: *'Great cases like hard cases make bad law. For great cases are called great, not by reason of their importance .... but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.'*

Algorithms, apps and artificial intelligence: the next frontier in discrimination law

Robin Allen QC and Dee Masters, Cloisters Chambers, examine the liability of service providers and employers using technology which discriminates against customers and employees. They explore how such discrimination could give rise to complaints under the Equality Act 2010 (EA) and how these could be challenged using the data protection legislation. Concluding that this will increasingly be an area where advice is required on using the EA to challenge decision-making undertaken or supported by artificial intelligence, they also suggest some practical ways in which organisations can manage their exposure to claims of discrimination or harassment.

Introduction

How often does the media depict the relentless increase in technology as a danger to our health, our children and our security? More recently, commentators have started to identify the ways in which technology discriminates against users because of their race, disability, gender or sexual orientation. Indeed, in the open letter[1] on artificial intelligence (AI) in *The Guardian* on June 18, 2018, experts[2] in this field set out their concerns about inequality as a result of the ever-increasing use of AI as follows:

> *According to the [World Economic Forum][3] 'Global Gender Gap' report,[4] it will take 100 years to unlock the potential of gender equality in terms of health, education, and policies, and 217 years to reach economic parity. Without these commitments and standards, AI will not improve – and could in fact make worse the biases of our societies.*
>
> *The internet today is inherently unequal, largely because it was created by organizations dominated by men. As we enter the AI revolution that will define our future, women make up less than 30% of research positions worldwide. Across the four largest tech companies – Apple, Google, Microsoft and Facebook – fewer than 20% of technical roles are held by women.*
>
> *At the same time machines are teaching themselves from data sets that reflect or even amplify society's past and present biases: 'Homemaker' is to 'woman' as 'programmer' is to 'man'; 'mother' is to 'nurse' as 'father' is to 'doctor.' Committing to diversity in AI leadership and defining the standards by which we will hold all AI accountable will take a society-wide effort – across government and industry.*
>
> *We are signing this letter to call for a set of standards for AI to make sure it is a force for progress, not an impediment to it. Who's with us?*

In this article, we examine the ways in which service providers and employers could be liable under the Equality Act 2010 (EA) when they use technology which operates in a discriminatory way, and we explore some practical ways in which organisations can manage their exposure.

We will also explore a new angle to this debate which is the possibility of using data protection laws, specifically the General Data Protection Regulation (GDPR) and the Data Protection Act 2018 (DPA 2018), to stop and expose biased algorithms, machine learning and the tainted data which can give rise to breaches of the EA.

On this final topic, we conclude that for the most part these new legislative initiatives may not be as effective as might be expected when it comes to tackling discriminatory algorithms and machine learning since they do not expressly create a meaningful requirement for transparency in relation to the algorithms themselves thereby allowing discriminatory technology to remain hidden. Ironically, potential claimants may find that the lack of transparency itself takes centre stage in any litigation, relying on case law such as C-109/88 *Danfoss* [1991] ICR 74 to argue that the burden of proof under the EA shifts to organisations which use algorithms and machine learning to demonstrate that they are not discriminatory.

Fortunately, the DPA 2018 and the GPDR are more helpful in relation to the data sets used by algorithms and as part of machine learning since the data subject has a right to access personal data that is being processed about them. This may allow potential claimants to understand if discriminatory data sets are being utilised which could in turn be used to bring claims under the EA.

1. Equal AI: an open letter, The Guardian print edition, June 18, 2018.
2. Robert LoCascio (Founder and CEO LivePerson), Ariana Huffington (Founder and CEO Thrive Global), Baroness Lane Fox (Founder Doteveryone), Dr Justine Casell (Associate Dean for Technology Strategy and Impact in the School of Computer Science, Carnegie Mellon University) and Jimmy Wales (Founder Wikipedia).
3. https://www.weforum.org
4. https://www.weforum.org/reports/the-global-gender-gap-report-2017

Algorithms and their hidden dangers

At the heart of AI is the 'algorithm'. Algorithms are a set of steps created by programmers. They usually perform repetitive and tedious tasks in lieu of human actors. For example, when LinkedIn informs a user that someone within her network is also connected to five people who are her contacts, it is an algorithm – and not a human – that has quickly compared the two networks to find common contacts.

The power of an algorithm is often linked to 'machine learning' which is a means of refining algorithms and making them more 'intelligent'. Here is an extract from *The privacy pro's guide to explainability in machine learning*[5] published by the International Association of Privacy Professionals which explains more.

Algorithms are, of course, code written by humans for human purposes, and algorithms can discriminate on the grounds of protected characteristics when they become tainted by the unconscious assumptions and attitudes of their creators.

What is machine learning?

Machine learning is a technique that allows algorithms to extract correlations from data with minimal supervision. The goals of machine learning can be quite varied, but they often involve trying to maximize the accuracy of an algorithm's prediction. In machine learning parlance, a particular algorithm is often called a 'model,' and these models take data as input and output a particular prediction. For example, the input data could be a customer's shopping history and the output could be products that customer is likely to buy in the future.

The model makes accurate predictions by attempting to change its internal parameters – the various ways it combines the input data – to maximize its predictive accuracy. These models may have relatively few parameters, or they may have millions that interact in complex, unanticipated ways.

As computing power has increased over the last few decades, data scientists have discovered new ways to quickly train these models. As a result, the number – and power – of complex models with thousands or millions of parameters has vastly increased.

These types of models are becoming easier to use, even for non-data scientists, and as a result, they might be coming to an organization near you.

5. With thanks to John Higgins CBE, previously Director – General of Digital Europe for suggesting this site. https://iapp.org/news/a/the-privacy-pros-guide-to-explainability-in-machine-learning/

Direct discrimination

One algorithm with biased assumptions must have been used by Etsy, an online retailer for unique gifts. It contacted users on Valentine's Day with a view to encouraging purchases from its site. It appears to have used an algorithm which assumed female users of its website were in a relationship with a man: one customer, Maggie Delano, received the message '*Move over, Cupid! We've got what he wants. Shop Valentine's Day gifts for him.*'

The problem was that Maggie Delano is a lesbian and any Valentine's gift she might buy would most likely be for a woman.[6]

At a stroke of a line of code, Etsy had thus alienated its homosexual client base. Indeed all homosexual clients were at risk of being offended by this ill-considered message and as such there was arguably direct discrimination on the grounds of sexual orientation. In the UK, where discrimination on the grounds of sexual orientation in relation to the provision of a service is forbidden under the EA, this would be direct discrimination and a claim could theoretically be made.

Another algorithm was utilised by a chain of gyms in Britain called Puregym.[7] In 2015, Louise Selby, a paediatrician, was unable to use her gym swipe card to access the locker rooms. It transpired that the gym was using third party software which used a member's title to determine which changing room (male or female) they could access. The software contained an algorithm that the title 'Doctor' was coded as 'male'. As a female doctor, she was not permitted to enter the women's changing rooms.[8] This is of course unlawful. Puregym was not aware that it had been acting in this discriminatory way but it is irrelevant to the question of liability that the gym did not know and did not intend to discriminate against women. They will normally be fixed with the discriminatory consequences of technology which they use.

The liability of the code provider

However the problem does not stop there as in most cases the service provider will not have written the relevant code itself but will have bought it from an outside source. Service providers need to manage their exposure. The least they can do is carefully quiz their technology providers to ensure that products have been 'equality proofed'. Service providers should also insist

6. Sara Wachter-Boettcher *Technically Wrong: Sexist Apps, Biased Algorithms and other Threats of Toxic Tech*, pages 32-33.

7. https://www.informationsociety.co.uk/pure-gym-in-cambridge-sexist-computer-assumed-this-woman-dr-louise-selby-was-a-man-because-she-is-a-doctor/

8. Sara Wachter-Boettcher, ibid, page 6.

that the undertaking providing the code indemnifies them against any discriminatory effects which it may have.

Harassment

AI based technology can also easily lead to harassment. One example concerns Snapchat which in August 2016 introduced a face-morphing filter which was 'inspired by anime'. In fact, the filter turned its users' faces into offensive caricatures of Asian stereotypes.[9] Equally, smart phone assistants in 2017 nearly all have default female voices e.g. Apple's Siri, Google Now and Microsoft's Cortana. Commentators have said that this echoes the dangerous gender stereotype that women, rather than men, are expected to be helpful and subservient.[10] A well-know example of technology harassing users relates to Google Photos which introduced a feature which tagged photos with descriptors, for example, 'graduation'. In 2015, a black user noticed that over 50 photos depicting her and a black friend were tagged 'gorillas'.[11] Of course, Google Photos had not been programmed to tag some black people as 'gorillas' but this was the conclusion which the AI at the heart of the technology had independently reached. It is not hard to imagine the degree of offence that this must have caused.

In the UK, users who are offended by this type of technology might be able to bring harassment claims against service providers under the EA.[12] Although the compensation for injury to feelings in discrimination claims against service providers is often low,[13] it is obvious that a claim brought by a large group of people affected by any such harassment could lead to considerable financial exposure as well as creating a PR disaster.

Indirect discrimination

Indirect discrimination usually is less of a reputational disaster, but it can be serious. We are clear that the creators of apps (and service providers who purchase them) could also unwittingly expose themselves to indirect discrimination claims by failing to think inclusively about their client base.

Many services require users to enter their real names. In order to decrease the likelihood of people using false names, algorithms have been developed to 'test' entries. This creates barriers for people who have names that are deemed 'invalid' by algorithms which have been constructed so as to recognise mostly 'western' names. One example relates to Facebook and a would-be user called Shane Creepingbear who is a member of the Kiowa tribe of Oklahoma.[14] When he tried to register in 2014 he was informed that his name violated Facebook's policy. Again the algorithm used by Facebook at this point could have been used as the basis of an indirect discrimination claim. Companies will only be able to avoid these risks by thinking broadly about who will use their products and testing products vigorously, with a view to avoiding discrimination, before launching them.

Duty to make reasonable adjustments

We are accustomed to thinking about the duty to make reasonable adjustments in the context of technology. A common example is the feature on many taxi apps whereby a user can ask for a wheelchair-adapted car. But there are more subtle ways in which technology can discriminate against disabled users by making assumptions about customer behaviour. Smart weighing scales are an interesting case in point. One set of scales which tracks basic data about the user which is then stored and used to create personalised 'motivational' messages like '*Congratulations! You've hit a new low weight*'. The difficultly is that these scales only understood that users would have one goal – weight loss. A user recovering from an eating disorder or in the throes of degenerative disease would likely find these messages counterproductive. Similarly, if they succeed in putting weight on they receive an insensitive message like '*Your hard work will pay off [name]! Don't be discouraged by last week's results. We believe in you! Let's set a weight goal to help inspire you to shed those extra pounds*'. A simple adjustment like being able to choose your goal would avoid the risk of the manufacturer being in breach of the duty to make reasonable adjustments contained in the EA.

Maternity discrimination

Systems using forms of machine learning can also be part of decisions concerning dismissals. The so-called Bradford Formula or Factor[15] for calculating the significance of staff absence has been around for

9. Sara Wachter-Boettcher, ibid, page 7.
10. Sara Wachter-Boettcher, ibid, pages 37 – 38.
11. Sara Wachter-Boettcher, ibid, pages 129 – 132.
12. And perhaps GDPR claims as well.
13. For example, in *Campbell v Thomas Cook Tour Operations Ltd* [2013] EqLR 658, Briefing 682, a disabled woman was awarded £7,500.00 when the defendant did not make reasonable adjustments at an airport so as to alleviate the difficulties she experienced waiting and queuing over a significant period of time.
14. Sara Wachter-Boettcher, ibid, pages 54 - 55.
15. Developed by the Bradford University School of Management in the 1980s.

some time and is now being sold by many providers as a personnel management tool.

There are various formulations of this offered by commercial providers. One – Active Absence[16] – describes the product it offers as:

> *Calculating an employee's Bradford Factor is an automated absence management tool already built into Activ Absence. Whether you are in HR or an employee's Line Manager, you can monitor Bradford Factor scores automatically using configurable absence trigger alerts and management reports.*

In *Gibbs v Westcroft Health Centre,* ET case number: 3400583/2014,[17] the employer rated a pregnant employee unfavourably using the Bradford Factor/Formula because she had required time away from work for pregnancy related illnesses. The ET concluded that a mechanistic application of the Bradford Factor/Formula amounted to unfavourable treatment contrary to s18 EA. This case highlights how AI systems can serve, but must not be allowed to determine, human resource management decisions, if discrimination is to be avoided.

Discouraging diversity through pattern recognition

Technology could also have a worrying impact on diversity as AI becomes more prevalent. As explained, machine learning is based on recognising patterns and 'learning' from existing historical data. This was addressed by the House of Commons, Science and Technology Committee as part of its *Inquiry into Algorithms in Decision Making*[18]. It explained in its Fourth Report on May 15, 2018 that:

> *A well-recognised example … is where algorithms are used for recruitment. As Mark Gardiner put it, if historical recruitment data are fed into a company's algorithm, the company will "continue hiring in that manner, as it will assume that male candidates are better equipped. The bias is then built and reinforced with each decision." This is equivalent, Hetan Shah from the Royal Statistical Society noted, to telling the algorithm: "Here are all my best people right now, and can you get me more of those?" (footnotes omitted)*

In such a scenario, an applicant who was rejected because they were 'different' to existing employees might be able to bring an indirect or direct discrimination claim.

Identifying discriminatory technology

Whilst there are many documented examples of discriminatory technology, a good deal of these incidences have been exposed due to painstaking and no doubt expensive research. By way of example, journalists at Propublica had to analyse 7,000 'risk scores' in the US to identify that a machine learning tool deployed in some states was nearly twice as likely to falsely predict that black defendants would be criminals in the future in comparison to white defendants.[19] Most claimants will not have access to this level of resource.

CHALLENGING DISCRIMINATORY AI

In the rest of this article, we look at the extent to which the GDPR and the DPA 2018 could be used to access material which could, at least, support challenges to discriminatory algorithms and the machine learning which underpins them, as well as exposing tainted data sets.

Principle of transparency

At first blush, invoking the principle of transparency created by the DPA 2018 and the GDPR in relation to algorithms and machine learning looks promising. In theory, forcing creators and buyers of algorithms to be transparent should create an opportunity to scrutinise technology and identify discrimination.

In broad terms, the relevant provisions are as follows:

i) *Personal data shall be … (a) processed lawfully, fairly and in a transparent manner in relation to the data subject. (GDPR, article 5(1)).*

ii) When personal data is collated, there is a duty to inform the data subject in *'a concise, transparent, intelligible and easily accessible form' (GDPR, article 12 (1))) 'the purpose of the processing' (GDPR, article 12(1)(c))* and *'the existence of any automated decision-making, including profiling … and, at least in those cases [i.e. profiling cases], meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject' (GDPR, article 13(2)(f)).*

However, the GDPR does *not* go so far as to say that the algorithm or basis for the machine learning must be disclosed. Indeed, the ICO guidance on automated decision-making and profiling suggests that the principle of transparency is fairly limited:

16. http://www.activabsence.co.uk/bradford-factor-calculator2/

17. The judgment is available on Westlaw; see para 5.16.

18. The House of Commons Science and Technology Committee, Report on Algorithms in decision making, the Fourth Report of Session 2017–19, is available here: https://publications.parliament.uk/pa/cm201719/cmselect/cmsctech/351/351.pdf

19. https://www.nytimes.com/2016/08/01/opinion/make-algorithms-accountable.html

How can we explain complicated processes in a way that people will understand?

Providing 'meaningful information about the logic' and 'the significance and envisaged consequences' of a process doesn't mean you have to confuse people with over-complex explanations of algorithms. You should focus on describing:

- the type of information you collect or use in creating the profile or making the automated decision;
- why this information is relevant; and
- what the likely impact is going to be / how it's likely to affect them.

EXAMPLE

An on-line retailer uses automated processes to decide whether or not to offer credit terms for purchases. These processes use information about previous purchase history with the same retailer and information held by the credit reference agencies, to provide a credit score for an online buyer.

The retailer explains that the buyer's past behaviour and account transaction indicates the most appropriate payment mechanism for the individual and the retailer.

Depending upon the score customers may be offered credit terms or have to pay upfront for their purchases.

If the principle of transparency enshrined within the GDPR means simply that organisations are under an obligation to provide rather superficial and trite explanations, it is highly unlikely that they will give rise to meaningful scrutiny of technology. Certainly it seems unlikely that an organisation would provide sufficient information so as to allow a potential claimant to demonstrate that a particular algorithm was discriminatory.

Using an inability to explain to shift the burden of proof

Ironically, it may be that the *lack of transparency* in relation to technology takes centre stage. Discrimination practitioners will be very familiar with the line of European authorities, such as *Danfoss*, which establish that a lack of transparency in a pay system can give rise to *prima facie* discrimination. The principle would equally translate to challenges to discriminatory technology. If, as some commentators have suggested, it is not possible to explain how an algorithm is operating due to the prevalence of machine learning, there is a real risk of a successful discrimination claim as the user of the technology will not be able to provide a non-discriminatory explanation for the treatment of the claimant.

Exposing tainted data under article 15 GDPR

Fortunately, the DPA 2018 and the GDPR are more helpful in relation to *the data used* by algorithms and as part of machine learning. Specifically, the data subject has a right to be told if personal data is being processed and if so, have access to that data and the categories of personal data concerned (GDPR, article 15). This may allow potential claimants to understand if information concerning protected characteristics is being used by an algorithm or as part of machine learning, for example, race or gender. Similarly, data subjects may be able to see if indirect discrimination is occurring if data is being used which is linked to particular protected characteristics, for example, part-time working. Inevitably, group litigation where a number of claimants pool resources and share personal data might well be even more effective at demonstrating that data sets are discriminatory.

Conclusion

Discriminatory technology and the march of AI is now a hot topic. There are a multitude of ways in which discriminatory technology could breach the EA. We predict that discrimination lawyers will be increasingly asked to advise on using the EA as a means of challenging decision-making which is undertaken by or supported by AI. The DPA 2018 and the GDPR are limited in scope but the ability to access data sets may well assist claimants formulate and pursue claims against employers and service providers.

Practice and procedure update

Participation at remedy stage by a defaulting party

Office Equipment Systems v Hughes [2018] EWCA Civ 1942; August 1, 2018

Outcome

The ET was wrong to refuse R's request to participate in the case at remedy stage. There was no reason why R should have been precluded from making submissions on the quantum of the claimant's claim, notwithstanding that it had failed to submit a response to the claim in time and was debarred from contesting liability.

Brief facts

The claimant (H) alleged, amongst other things, unfair dismissal and sex discrimination. The respondent (OES) failed to submit a response in time and its application for an extension of time was refused. Judgment was entered for H.

OES subsequently made a request for permission to participate at the remedy stage. That request was declined by the ET. An appeal to the EAT on this point was unsuccessful.

The CA overturned that decision. Applying the approach of the civil courts, the court held that, whilst there is no absolute rule that a respondent who has been debarred from defending a claim on liability is always entitled to participate in the determination of remedy, it would generally be wrong for the ET to refuse such a request in any but the most straightforward of cases.

Even in routine cases for small liquidated sums, where liability and remedy are dealt with in a single hearing, it would generally be wrong for the ET to refuse to read any written submissions sent in by the defaulting respondent in good time.

Implications for practitioners

- A respondent who is debarred from contesting liability should make written representations on remedy as soon as possible; seeking, if necessary, an oral hearing.
- The ET should, in most cases, invite R to make such submissions by a specific date and then consider whether an oral hearing is necessary.
- In sufficiently substantial or complex hearings requiring a separate assessment of remedy, only an exceptional case would justify excluding R from participating in an oral hearing.

Meaning of 'sent to the parties' for appeal time limits

Rana v London Borough of Ealing and another; Bonnie v Department for Work and Pensions [2018] EWCA Civ 2074; September 25, 2018

Outcome

The EAT's decisions in both cases to refuse to extend time to lodge the appeals, were overturned (*Carroll v Mayor's Office for Policing and Crime* [2015] UKEAT 203/14; [2015] ICR 835, approved (with some amendments to the reasoning)).

The time limit for appeals to the EAT under rule 3(3) of the Employment Appeal Tribunal Rules 1993 starts to run when the judgment is sent to the parties, even if the ET sends it to the wrong person by mistake.

Brief facts

The appellants in both appeals sought to appeal ET decisions more than 42 days (the period within which an appeal to the EAT may be instituted, rule 3(2)) after the decisions had been sent out to the parties. In both cases, the ET had mistakenly sent the decisions to previous legal representatives who were no longer acting.

The appellants argued that time had not started to run, because the decisions had not been *'sent to the parties'*. The CA rejected this argument (McCombe LJ dissenting) holding that *'sent to the parties'* referred to the formal act of promulgation, so that it mattered not that the decision was in fact sent to an entirely different person.

The court acknowledged the potential unfairness in this interpretation of the rule but held that any such unfairness could, and should, be remedied by the EAT exercising its discretion to extend time under rule 37. The party affected by a mistake should not be placed in a worse position than it would have been in had the ET done its job properly. Accordingly, discretion should in general be exercised so as to allow the victim

of the mistake the same period of 42 days from the date that they are eventually sent a copy of the judgment (whether that be from the ET or another source), as if they had been correctly sent it in the first place. That general rule is subject to the proviso, however, that the party must have taken reasonable steps to obtain the judgment.

The CA noted that cases in which the ET fails to send the judgment to the correct party or the correct address, are different to cases in which a party asks the EAT to exercise its discretion to extend time under rule 37 as a result of some failure on their part; this judgment should not be taken to cover both eventualities.

Implications for practitioners

- In general, where the ET mistakenly sends a judgment to the wrong person or wrong address, the victim of that mis-sending can expect the time limit for an appeal to be extended so as to provide them with the same 42 days limit they would have had if the mistake had not been made.
- Parties must provide the EAT with the evidence necessary to justify the exercise of discretion. They should state that the judgment was mis-sent and that it was not received when it should have been, and explain the circumstances in which it was eventually received, together with any steps taken in the meantime to try and obtain it.
- Parties who come to know that a judgment has been sent out erroneously and do not receive a copy from elsewhere, cannot expect to be granted an extension if they have not taken reasonable steps promptly to obtain a copy of the judgment by some other means.
- Where a significant period of time has passed since the end of a hearing, parties ought to make enquiries of the ET to check that the judgment has not been sent out; if they do not do so, they risk an extension of time being refused.

Extension of time

Haydar v Pennine Acute NHS Trust [2018] EWCA Civ 1435; March 6, 2018

Outcome

The EAT's decision to refuse to extend time for appealing was upheld. The appellant did not have a reasonable excuse for failing to institute his appeal earlier, notwithstanding that his notice of appeal got lost in the post.

Brief facts

The appellant (H) appealed against the EAT's refusal to extend time to appeal against an ET decision. It was accepted that H posted a valid notice of appeal with the required accompanying documents more than two weeks before the expiry of the time limit for appeal. The package, however, never reached the EAT.

Over six weeks after posting the notice of appeal (and over five weeks after the expiry of the time limit for appealing) H contacted the EAT and discovered that the appeal had not been received. He then sent a further copy of the package. The EAT treated the appeal as having been made 42 days out of time and invited him to apply for an extension. The application for an extension was subsequently refused by the registrar and upheld by the judge.

Reliance was placed on the fact that, in light of previous CA guidance, the ET practice (which was followed in this case) was to send a letter to the parties with its judgment explaining the process for appeal. That letter referenced a booklet, available online and elsewhere, which parties were told must be read. Within that booklet the parties are told *'If you have not received an acknowledgment from the EAT within seven days of posting the notice of appeal, you should contact the EAT to confirm they have received your appeal'*. H accepted that he had not read the booklet.

The court found that there was no good reason for the overall delay. The loss of the package in the post was a good reason for the initial delay but, in light of the guidance available in the booklet (which H ought to have read), he ought to have taken the initiative to check earlier whether the package had been received by the EAT.

Implications for practitioners

- If a notice of appeal is sent and acknowledgment from the EAT not received within seven days, the party appealing should contact the EAT to confirm that the appeal has been received.
- If they do not, they risk an extension of time to appeal being refused.

- The case considered *(obiter)* the relationship between the *Abdelghafar* guidance (principles re extension of time in the tribunal) and the *Mitchell/ Denton* approach (principles re relief from sanction in the civil courts). The court noted that that relationship was under consideration in a different case (*Green v Mears Ltd*) and declined to depart from *Abdelghafar*. The CA decision in that case is now available – *Green v Mears Ltd* [2018] EWCA Civ 751 – and the *Abdelghafar* principles endorsed.

Extent of the tribunal's case management discretion

Tarn v Hughes and others UKEAT/0064/18/DM; June 7, 2018

Outcome

The appeal against the ET's decision to limit the scope of the appellant's claim was allowed.

Brief facts

The appellant (T) brought a claim alleging extensive acts of sex and pregnancy discrimination, harassment and victimisation. Thirty separate acts of discrimination were identified in an agreed list of issues. At a case management hearing, the ET ordered that T limit her claim for the substantive hearing to whatever she considered to be the 10 most recent and serious events. The remainder of the allegations relied upon were to be background or context only, or alternatively pursued as separate claims at a later hearing. The ET relied on the decision in *HSBC Asia Holdings BV and another v Gillespie* [2010] UKEAT 0417, which suggested the use of samples where a claimant complaints of a very large number of discrete incidents.

T appealed to the EAT arguing, inter alia, that the ET's order effectively amounted to a strike out of parts of her claim and that the ET had erred in relying on *HSBC v Gillespie.*

The EAT allowed the appeal and in so doing set out some guidance for the appropriate case management of a discrimination claim. It noted that, whilst there will be some cases in which it will be appropriate for the ET to strike out claims that have no reasonable prospect of success, it is not open to the ET to otherwise limit the claims a complainant can pursue. Selecting sample cases, to be heard in advance of the remaining allegations, may be useful in some cases, but only where it is clear that this would not endanger the just determination of the case. The court considered that this will rarely be appropriate in discrimination claims.

Implications for practitioners

- In cases involving extensive allegations of discrimination, parties should ensure that each incident relied upon is properly identified in a list of issues. A case management order requiring a claimant to rely on a sample of cases will be much harder to justify where this is done.
- In discrimination claims in particular, it will rarely be proportionate to limit a claimant to sample claims, given that the evidence will need to be heard on the background and context in any event.
- The fact that there may be a large number of questions for the tribunal hearing the claim to address, does not, of itself, require that it should do so in a series of separate hearings.

Limitation period

Miah v Axis Security Service Ltd UKEAT/0290/17/LA; March 23, 2018

Outcome

The appellant's appeal against the ET's decision that his claim had been brought one day out of time was dismissed. The ET Rules of Procedure 2013 (the Procedure Rules) had to be read subject to the Employment Rights Act 1996 (the ERA 1996).

Brief facts

The appellant (M) lodged a claim with the ET for unfair dismissal on Monday January 30, 2017. The 3-month time limit expired on Sunday January 29th. His claim was rejected on the basis that it had been brought one day out of time.

The ET did not feel able to conclude that the claim had been posted on either the Thursday

or Friday, and so was unable to assume that delivery, in the ordinary course of things, would have been over the weekend (had that been physically possible).

M appealed to the EAT, arguing that by rule 4(2) of the Procedure Rules (*if the time specified by these Rules … ends on a day other than a working day, the act is done in time if it is done on the next working day*), the time limit was automatically extended so as to expire on the first working day thereafter, i.e. the claim had been brought in time.

The EAT rejected that argument. The Procedure Rules refer to time *'specified in these Rules'*. Accordingly, the 3-month time limit, which is contained within s111 of the ERA 1996, is unaffected by that rule.

Implications for practitioners

- If limitation expires on a non-working day, to avoid the risk of the claim being rejected as out of time, parties should attempt to ensure that the claim is lodged on the last working day before limitation expires.
- If that is not possible to do, parties should retain evidence of posting to demonstrate that, had the ET been open and able to receive post, the claim would have been received in time (i.e. situations where the claim is posted no later than Thursday by first class post).
- The case helpfully rehearses in full the guidance for cases in which limitation expires on a non-working day.

Jessica Smeaton
No 5 Chambers

Briefing 875

Disconnect between Gender Recognition Act 2004 and anti-discrimination provisions

MB v SS Work and Pensions Case C-451/16; June 26, 2018

Transgender rights are increasingly to the fore at present, particularly with the completion on October 19 of the government's consultation on the Gender Recognition Act 2004 (GRA) (see news item on p32). This report concerns a long running case regarding state retirement pension and gender reassignment. The request for a reference to the CJEU had been made in proceedings between MB and the Secretary of State for Work and Pensions (SSWP) concerning the refusal to grant MB a state retirement pension dated from the statutory pensionable age for persons of the gender she had acquired as a result of a change of gender.

Facts

MB was born a male in 1948 and married in 1974. She began to live as a woman in 1991 and underwent sex reassignment surgery in 1995. MB does not, however, hold a full certificate of recognition of her change of gender, since, pursuant to the GRA, in order for that certificate to be granted, her marriage had to be annulled. She and her wife wish to remain married for religious reasons.

In 2008 MB reached 60 years of age – the age at which women born before April 6, 1950 may, under national law, receive a 'Category A' retirement pension from the state. She applied for such a pension from that age by virtue of the contributions paid into the state pension scheme while she was working.

Her application was rejected by a decision of September 2, 2008 on the ground that, in the absence of a full gender recognition certificate, MB could not be treated as a woman for the purposes of determining her statutory pensionable age.

Supreme Court

MB brought proceedings in the First Tier Tribunal which were rejected, as were her appeals to the Upper Tribunal and the CA. She appealed to the SC claiming that the GRA was discriminatory on grounds of sex (as prohibited by article 4(1) of Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security (the Directive)).

The SSWP submitted that, according to the CJEU case-law resulting from the judgments in *K. B.* (C-

117/01, EU: C:2004:7, January 7, 2004, paragraph 35) and *Richards* (C-423/04, EU:C:2006:256, April 27, 2006, paragraph 21), it is for the member states to determine the conditions under which a person's change of gender may be legally recognised; that criteria may include marital status; and that the European Court of Human Rights has recognised that a change of gender may be made conditional on the annulment of that person's marriage (*Hämäläinen v Finland*, CE:ECHR:2014:0716JUD003735909, July 16, 2014).

The SC made a reference to the CJEU for a preliminary ruling on the following point:

> *Does Council Directive 79/7/EEC preclude the imposition in national law of a requirement that, in addition to satisfying the physical, social and psychological criteria for recognising a change of gender, a person who has changed gender must also be unmarried in order to qualify for a State retirement pension?*

It was accepted that MB satisfied the physical, social and psychological criteria for recognising a change of gender.

Court of Justice of the European Union

The CJEU made it clear at the outset of its decision that it was not being asked to consider, generally, whether the legal recognition of a change of gender may be conditional on the annulment of a marriage entered into before that change of gender.

The court re-stated at paragraph 29 that, although EU law does not detract from the competence of the member states in matters of civil status and legal recognition of the change of a person's gender, member states must, when exercising that competence, comply with EU law and, in particular, with the provisions relating to the principle of non-discrimination (see, to that effect, inter alia, judgments of *Richards*, paragraphs 21 to 24; *Maruko*, C-267/06, EU: C:2008:179, April 1, 2008, paragraph 59; and *Coman and Others*, C-673/16, EU: C:2018:385, June 5, 2018, paragraphs 37 and 38, and the case-law cited).

It therefore followed that article 4(1) of the Directive, which implements the principle of non-discrimination on grounds of sex as regards social security, must be complied with by the member states when they exercise their powers in the area of civil status. In particular, the first indent of article 4(1), read in conjunction with the third indent of article 3(1)(a) of the Directive, prohibits all discrimination on grounds of sex as regards, inter alia, the conditions for access to statutory schemes ensuring protection against the risks of old age.

It was not disputed by the parties to the main proceedings that the state retirement pension scheme at issue is such a scheme; and it is clear from article 2(1)(a) of Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, there is direct discrimination based on sex if one person is treated less favourably on grounds of sex than another person is, has been or would be treated in a comparable situation. That concept must be understood in the same way in the context of Directive 79/7. The court re-iterated the application of this to discrimination arising from gender reassignment (see, to that effect, *Richards,* paragraphs 23 and 24). For the purposes of the application of the Directive, those who have lived for a significant period as persons of a gender other than their birth gender and who have undergone a gender reassignment operation must be considered to have changed gender.

The CJEU concluded that the GRA treats less favourably a person who has changed gender after marrying than it treats a person who has retained his or her birth gender and is married. This is based on sex and may constitute direct discrimination within the meaning of article 4(1) of the Directive.

In considering whether the situation of a person who changed gender after marrying and the situation of a person who has retained his or her birth gender and is married are comparable, the court noted that the requirement relating to the comparability of situations does not require those situations to be identical, but only similar. It noted that the comparability of situations must be assessed, not in a global and abstract manner, but in a specific and concrete manner having regard to all the elements which characterise them, and came to the conclusion that because the retirement pension scheme protects against old age irrespective of marital status, the situation of a person who changed gender after marrying and that of a person who has kept his or her birth gender and is married are comparable. The government's argument as to derogation (avoiding marriage between persons of the same gender) was rejected, as it did not fit within the permitted derogations.

Comment

As same sex marriage is now permissible, the decision may have limited application in the UK. However, it does emphasise the disconnect between the rights afforded as a result of the acquisition of a gender recognition certificate and those afforded as a result of the anti-discrimination provisions.

Catherine Casserley
Cloisters Chambers

Exclusion of unmarried partner from widowed parent's allowance held to be unlawful

McLaughlin, Judicial Review (Northern Ireland) [2018] UKSC 48; August 30, 2018

Implications for practitioners

The SC has declared that the law which prevents unmarried people from claiming widowed parent's allowance (WPA), is incompatible with article 14 of the European Convention on Human Rights (ECHR), read with article 8. While holding that the exclusion of all unmarried couples from WPA will not always be incompatible, the SC held that the proportionality considerations relevant to refusal would be a fact specific question in all the circumstances.

This case concerned a non-means tested benefit, WPA, payable only to married couples with the purported aim of promoting the institution of marriage. However, the SC was of the view that the allowance exists because of the responsibility of the deceased and the appellant towards her children, which were the same whether or not they were married or in a civil partnership.

From a discrimination practitioner's perspective, this case is also important as the SC held that WPA fell within the ambit of article 1 of the First Protocol and article 8 ECHR, while criticising English courts for making *'rather heavy weather of the ambit point, particularly in connection with article 8'* (para 20).

This case is also instructive in that the SC referenced and was clearly influenced by international obligations and human rights instruments, most especially the obligations pertaining to children. The appellant was assisted in this regard by interventions from both the Child Poverty Action Group and the National Children's Bureau.

Facts

Ms McLaughlin (McL) lived with her partner for 23 years until he died in January 2014. McL's partner had made a promise to his first wife prior to her death that he would not remarry. He subsequently met McL after his wife's death and they had four children together, who at his death were aged 19, 17, 13 and 11 years old. After the death of her partner, McL made an application for WPA. Her partner had made enough national insurance contributions before his death for such a claim to be made. McL was refused WPA solely on the basis that she was not married to her deceased partner.

High Court

Treacy, J (as then) at first instance made a declaration under s4(2) of the Human Rights Act 1998 that s39A(1) of the Social Security Contributions and Benefits (NI) Act 1992 is incompatible with article 8 ECHR in conjunction with article 14 '*insofar as it restricts eligibility for Widowed Parent's Allowance by reference to the marital status of the applicant and the deceased*': [2016] NIQB 11.

Court of Appeal

The CA unanimously overturned Treacy J's decision holding that the legislation was not incompatible with article 14, read either with article 8 or with A1P1: [2016] NICA 53.

Supreme Court

Unlike the CA in Northern Ireland, the SC recognised that WPA is only paid because the survivor is responsible for the care of the children who were, at the date of death, the responsibility of one or both of them. Therefore, the SC accepted that the purpose of WPA must be to benefit the children, as their situation is an essential part of the comparison. That situation is the same whether or not the couple were married to each other.

In referencing the nexus between the parents and the dependency of the children, the SC could see no reason to accept that the aim of promoting marriage was advanced by a benefit designed to mitigate against the financial loss caused by the death of a parent. That loss was the same whether or not the parents are married to or in a civil partnership with one another.

This case is also of note as the SC declined to follow an earlier decision of the European Court of Human Rights which had rejected the argument that WPA was unlawfully discriminatory against a survivor and her children on the grounds of her unmarried status and the children's 'illegitimacy': *Shackell v UK* (Application No. 45851/99, April 27, 2000).

The court ruled by a 4-1 majority in McL's favour, Baroness Hale writing the lead judgment. Lord Hodge would have dismissed the appeal.

Laura McMahon BL

Bar Library, Belfast *(Counsel for Ms McLaughlin)*

‘Wait and evaluate’ justification for continuing discrimination rejected in different-sex civil partnership challenge

R (Steinfeld & Keidan) v Secretary of State for International Development [2018] UKSC 32; June 27, 2018

On June 27, 2018, the SC handed down judgment in a case brought by a heterosexual couple who had argued that it was a breach of their rights under the European Convention on Human Rights (ECHR) that they were prohibited from entering into a civil partnership. The claim succeeded with the SC unanimously finding that there was a breach of the Human Rights Act 1998 (HRA) and making a declaration of incompatibility. The appellants had been discriminated against on the grounds of sexual orientation without justification – a breach of article 14 ECHR read with article 8.

Facts

This was the culmination of a legal battle lasting three and a half years. The couple had attempted to register an application for a civil partnership ceremony at their local Registry in early October 2014. Their application was refused and they launched a judicial review in the run-up to Christmas that year against both the local authority responsible for the Registry, and against the Secretary of State for Culture, Media and Sport, who at that time held the equalities brief. (As explained below the defendant/respondent changed several times during the lifetime of the case.)

Permission was refused in relation to the local authority, but granted in relation to the Secretary of State. The latter claim was based on grounds challenging the failure to comply with the Equality Act 2010 public sector equality duty – on which permission was also refused – and breaches of the HRA, on which permission was granted.

High Court

The judicial review was heard in January 2016 before Mrs Justice Andrews. The key legal arguments which unfolded were whether the different treatment the claimants faced was within the ambit of article 8 at all, and if it was, whether the Secretary of State could justify the discriminatory treatment. Somewhat surprisingly, the claimants lost both arguments, but the trial judge immediately granted them permission to appeal to the CA. The main justification argument run by the defendant at this stage was that it was a proportionate means of achieving a legitimate aim to ‘wait-and-see’ what happened to civil partnerships generally once marriage was made available to same-sex couples.

Court of Appeal

The appeal was heard in November 2016 before Lady Justice Arden and Lords Justice Beatson and Briggs, and judgment handed down in February 2017. The court split along gender lines, although all agreed that the issue did fall within the ambit of article 8.

Lady Justice Arden held that the Secretary of State (now for Education) had had enough time to consider and investigate resolving the differential treatment, whereas the two Lords Justice found that she should be allowed a little more time to get her house in order. The majority did indicate though that time was running out: *‘I do however, note that as time passes it will become increasingly difficult to persuade the court that there is still a need to “wait and see” or that an approach to civil partnership primarily based on the demand for that status by same-sex couples alone is justifiable.’* (Beatson LJ, para 162).

Supreme Court

The appellants applied to the SC for permission to appeal which was granted and the final hearing took place on May 14, 2018, judgment being handed down less than seven weeks later. The couple were successful with the SC giving short shrift to the respondent’s[1] key argument which by this stage have been finessed into ‘wait and evaluate’.

Lord Kerr, giving judgment on behalf of the whole court, stated: *‘I should make it unequivocally clear that the government had to eliminate the inequality of treatment* ***immediately****’*. He continued, *‘But this [the availability of other options] does not derogate from the central finding that taking time to evaluate whether to abolish or extend could never amount to a legitimate aim* ***for the continuance of the discrimination.****’* (para 50; emphasis in the original)

There were two points worthy of note in terms of the wider impact here and the approach of the SC at various stages. Firstly, there was never any real opposition to the

1. The respondent had changed again – twice: the Home Secretary stepped into the Secretary of State for Education’s shoes for a brief period, and was then replaced by the Secretary of State for International Development.

reasonableness of the couple's conscientious objection to marriage. They were feminists, wanted a truly equal partnership and rejected the patriarchal baggage that they saw as an inevitable part of marriage. They also saw equality in civil partnerships as an extension of equality in marriage for same-sex couples, a campaign which they had actively supported previously. Similarly their own campaign was widely supported by the gay community, including Peter Tatchell, the well-known gay rights advocate.

Secondly, between the judgment being handed down in the CA, and the hearing in the SC, a case was brought on behalf of a bereaved cohabitee who could not secure bereavement damages because of her marital status. In the case of *R (Smith) v Lancashire Teaching Hospitals NHS Foundation Trust & Others* [2017] EWCA Civ 1916, the CA relied heavily on the *Steinfeld* CA judgment, holding that the bereavement damages claim was within the ambit of article 8, so as to engage article 14; the discriminatory treatment was not justified and the CA made a declaration of incompatibility.

Lastly, just over three months after judgment was handed down in the SC, the government announced, in the middle of the Conservative party conference, that it would indeed extend civil partnerships to different-sex couples. No date has yet been set but Tim Loughton MP's Private Member's Bill covering the proposed extension looks like a potential vehicle for a change in the law in the relatively near future.

Louise Whitfield
Deighton Pierce Glynn

Briefing 878

Court of Appeal rules on employer liability for third party harassment

Unite the Union and Sally Nailard [2018] EWCA Civ 1203; May 24, 2018

Legal issues

The CA was asked to consider whether (1) lay officials could be 'agents' of a trade union for the purposes of establishing liability under the Equality Act 2010 (EA) and (2) whether employed officials could be liable for failing to prevent discrimination by third party branch officials.

The CA found that lay officials could not be employees of Unite but could be considered its agents and, as a result, Unite was liable for their conduct.

The CA also found that employed officials could only be liable for the discrimination if their actions and omissions were themselves motivated by Ms Nailard's sex.

Facts

Ms Nailard (N) was employed by Unite as a Regional Officer in respect of Heathrow Airports Ltd (HAL). N's immediate line manager was Mr Wayne King; senior to him were Mr Kavanagh (K) and Mr Murray (the employed officials).

Unite's rule book provided for shop stewards and workplace representatives to be elected within a workplace. Two such officials within Heathrow were Mr Saini (S) and Mr Coxhill (C) (the lay officials). By agreement between Unite and HAL they carried out union duties full-time while remaining employed by HAL. Whilst undertaking their duties for Unite as lay officials it was alleged S and C bullied and sexually harassed N.

N complained to Unite about the lay officials' conduct, eventually presenting a formal grievance. In a meeting on August 1, 2014 K offered to transfer N to Southampton or alternatively to offices in the London area. N protested and resigned with immediate effect.

Employment Tribunal

N lodged tribunal claims against Unite alleging sex discrimination and harassment related to her sex. She alleged that both the lay officials' and employed officials' conduct constituted direct discrimination because of her sex contrary to s39(2) EA and unlawful harassment related to her sex contrary to s40 EA.

She further alleged that Unite was liable for the acts of the various individuals under s109 EA, which governs the liability of employers and principal for the acts of their employees and agents. N alleged the lay officials were Unite employees within the extended definition in s83 EA; alternatively, they were agents and so fell within s109 (2).

Liability for acts of employees and agents

S109 of the EA:

1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done

by the principal.

3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A –

(a) from doing that thing, or

(b) from doing anything of that description.

N further alleged that her resignation was in response to the conduct of both the lay and employed officials which amounted to a repudiatory breach of contract, and accordingly she had been constructively dismissed. She also claimed that her resignation amounted to a constructive dismissal and that this was a distinct act of sex discrimination.

Harassment

The ET found that the lay officials had harassed N within the meaning of s26 EA. Unite was liable for that harassment because the lay officials were employed by the union within the meaning of the extended definition; the tribunal also found in the alternative that they were Unite's agents within the meaning of s109(2).

The employed officials' failure to deal firmly or decisively with N's complaint followed by the decision to transfer her also amounted to harassment. Both the lay officials' and employed officials' conduct constituted unlawful sex discrimination contrary to s39(2)(d) EA.

Employment Appeal Tribunal

Unite appealed challenging the finding that it was liable for the conduct of the lay officials whether on the basis that they were its employees or its agents. The EAT overturned the ET finding that the lay officials were employees but it upheld the finding that Unite was liable for their conduct as its agents.

Unite also challenged the finding that the conduct of the employed officials constituted harassment and the finding that N was able to rely on her dismissal as a distinct act of sex discrimination. The EAT allowed the appeal in relation to the conduct of the employed officials; it found that the ET had misdirected itself as to the necessary ingredients for liability and remitted this part of the claim for re-hearing.

Court of Appeal

Both parties appealed.

N appealed against the EAT's decision in relation to the employed officials. Unite argued that it was not liable for the acts of the lay officials because it was insufficient that the acts of the lay official were done in the course of functions which they were authorised by Unite to perform. The acts in question had to be acts *'towards third parties'* because it was only in relation to such acts that they could be said to be acting with the authority of the principal or on behalf of the principal.

The ET and EAT had ignored the essential distinction between the lay officials' dealings with HAL and their dealings with N. N was not a third party but rather a union representative to whom the lay officials required no authority to act. Therefore, Unite could not be liable for the acts of the lay officials towards N, its employee.

LJ Underhill rejected Unite's argument and agreed with N that it was enough that the lay officials did the acts in question in the course of performing their roles as union representatives in relation to its members and third parties, even if the discriminatory acts were done towards someone who was a fellow employee and not themselves a relevant third party. N was not a relevant person as, like the lay officials, she was a representative of Unite.

The CA held that the officials could not be considered employees of Unite but could nevertheless be considered to be its agents. As a result Unite was liable for their conduct pursuant to this alternative strand.

The CA went on to consider whether the employed officials' failure to prevent harassment by lay officials was actionable by reviewing the legal basis for third party liability under both s13 and s26 EA.

LJ Underhill concluded that the EAT had been correct to find the reasoning of the ET was flawed. The ET had found Unite liable on the basis of the acts and omissions of the employed officials without making any findings about whether N's sex formed part of their motivation. The EAT had found that the employed officials were not themselves influenced by the protected characteristic of sex. If the employed officials were to be liable for discrimination, it would have to be shown that they had a discriminatory motivation based on N's gender, i.e. their 'mental processes' or 'motivation' (whether conscious or unconscious) led them to act as they did.

Final comment

LJ Underhill provided helpful guidance and clarity on the extent of the 'agency' relationship under the EA and liability under s13 and s26 EA. This case serves as a useful cautious reminder to employers that they will usually be vicariously liable for discriminatory acts carried out both by their employees and any agents, where the employee or agent is carrying out activities for the benefit of the employer or principal.

Shazia Khan & Tariro Nyoka
Irwin Mitchell LLP

Only one decision possible: no disability discrimination

Dunn v Secretary of State for Justice [2018] EWCA Civ 1998; September 4, 2018

Facts

Dr Peter Dunn (D) worked as a prison inspector from late 2010. From 2012 he suffered from a depressive illness and in 2015 a serious heart condition was diagnosed. He took early retirement on grounds of ill health in 2016.

D's line manager was supportive but the handling of his case was beset by systemic failures, unnecessary bureaucratic processes and delay.

D claimed disability discrimination and harassment. The ET allowed part of his claim. On appeal by the Secretary of State for Justice (SSJ), the EAT found the ET had erred but that only one answer was possible: no discrimination, so no remission.

Employment Tribunal

The ET dismissed 13 of D's complaints but allowed three complaints of detriment:

1. a failure to react adequately to occupational health recommendations;
2. a failure to put support mechanisms in place at a return to work interview; and
3. unreasonably delaying his application for early retirement.

The ET found all three acts constituted s15 Equality Act 2010 (EA) discrimination, but only numbers two and three amounted also to direct discrimination.

The tribunal held that the burden of proof had shifted to SSJ and that it had failed to provide adequate explanations. D was awarded compensation of around £100,000.

Employment Appeal Tribunal

The core flaw identified by the EAT in the direct discrimination claim was the failure to consider the reason for the actions of the relevant decision-makers: whether it was D's disability that had caused them to act, or fail to act, in the manner complained of. Nor had the ET made any findings about how a hypothetical comparator would have been treated. As the notes of cross-examination showed, the line-manager's reasons for treating D in the way she did were '*barely, if at all, challenged*'. The EAT found that a case of antipathy towards disability and the cost of ill health retirement had not been put to the three alleged discriminators.

The EAT identified a similar flaw in the s15 EA claims. Beyond finding the line manager '*incompetent*', the ET had not examined her conscious or unconscious thought processes. It had to identify her reason for the treatment and then consider the link between that reason and the disability.

On D being pressed to identify any evidence which might have led the ET to find a prima facie case, the EAT found the suggested factors had either been rejected by the ET, were not sensibly referable to D's disability, or had not been part of his case.

Accordingly, the EAT came to the '*reluctant conclusion that this is a case where there is nothing in the findings of fact or in the evidence drawn to our attention that could lead a properly directed tribunal to reach the conclusion that a prima facie case of less favourable treatment on disability grounds or unfavourable treatment caused by something arising in consequence of disability has been established*.'

The EAT refused to remit and substituted findings of no unlawful discrimination.

Court of Appeal

The CA dismissed D's further appeal, upholding the EAT's reasoning.

Additionally, it rejected D's submission that had the case been remitted it would have been open to the ET to find that the inherent deficiencies of the system for handling ill health retirement applications were sufficient to satisfy a claim under s15. Underhill LJ pointed out in an obiter passage that if the process had been inherently defective in the ways found by the ET, it did not follow that it was inherently discriminatory, emphasising that 'but for' causation is not seen as enough to constitute direct discrimination. However, as the argument had not been raised previously and it was not in the interests of justice to allow a further hearing to consider a new point which could have been put forward first time round, it was rejected on the basis that it had not been raised in the lower courts.

Comment

As a cautionary tale, both the EAT and CA decisions are worth reading, but care should be taken over the use of the word '*motivation*' as it may lead to error. As Simler J observed in *Pnaiser v NHS England* [2016]

879 IRLR 170, para 31, Briefing 779, in her summary of the *'proper approach'* to s15: *'motives are irrelevant'*. The focus is on the reason or the cause of the impugned treatment. As Underhill LJ commented in *Dunn*, he could not see why the differences between s13 and s15 justified any different approach to the meaning of 'because of', common to both provisions. That phrase requires consideration of the 'reason why'; that applies to both direct and discrimination arising cases.

However, as explained in *Pnaiser* at para 31, the focus of the s15 test is different. S15 has two stages. The first looks at the reason for the act complained of. Although the alleged discriminator must have actual or constructive knowledge of the disability, in the first stage 'reason why' test, disability itself does not have to play a part in the alleged discriminator's thinking. It is at the second stage that disability becomes relevant as part of the causation test. As a question of causation, one looks at the link, or links, between the reason identified and the disability.

Implications for practitioners

- Make sure the pleaded case reflects the actual case
- Put your case to the witnesses in cross examination
- Address the alleged discriminator's reason, conscious or unconscious, for the act complained of
- Help an ET avoid error: don't take short cuts or gloss over any elements of the legal tests
- If you think there is a risk your ET erred in law, consider your answer to an appeal carefully: address remission; additional arguments for upholding the ET decision; and whether you need a cross appeal.

Sally Robertson
Cloisters Chambers

880 Briefing 880

No legal advice privilege for advice 'cloaking' discrimination

X v Y Ltd UKEAT/0261/17; August 9, 2018

Facts

The claimant/appellant, X, was a lawyer employed by the respondent solicitors' firm, Y, from January 30, 1990 until January 31, 2017. He suffers from type 2 diabetes and obstructive sleep apnoea. From 2011, Y had on-going concerns about X's performance. X claimed that the measures taken amounted to disability discrimination and the failure to make reasonable adjustments.

In August 2015 he submitted his first ET1. Five months later, on January 2, 2016, he raised an internal grievance. Both complained of disability discrimination.

Separately, starting in April 2016, Y began a redundancy exercise. X was placed in a redundancy consultation exercise.

In May 2016, X overheard a conversation in the Old Bank of England pub on Fleet Street. Y claimed the conversation was subject to legal professional privilege. X gave evidence, which the ET believed, that one of the women in the group mentioned that a lawyer at Y had brought a disability discrimination complaint. Further, that she had said there was a good opportunity to manage X out by severance or redundancy as a big reorganisation was underway.

X relied on that conversation to interpret an email, a print-out of which he was sent anonymously in October 2016, as advice on how to commit unlawful victimisation by seeking to use (and ultimately using) the redundancy/restructuring programme as a cloak to dismiss him. The email was marked legally privileged and confidential. The anonymous sender included a handwritten note to X at the bottom of the email.

X's employment was terminated with three month's notice, ending on January 31, 2017 by reason of redundancy. He lodged a second ET1 complaining of further disability discrimination, victimisation and unfair dismissal.

Employment Tribunal

At the ET, the email and the conversation were both held to be protected by legal advice privilege.

In deciding the claim to privilege, the employment judge (EJ) decided two questions: first, the meaning of the email and second, whether the advice in the email amounted to a strong prima facie case of iniquity.

The EJ accepted Y's interpretation of the email,

finding it was advice on how to handle a possible redundancy of X as part of a UK wide exercise. The EJ accordingly struck out the relevant paragraphs of the ET1.

Employment Appeal Tribunal

At the EAT, Slade J disagreed with the EJ. She held that the email, properly interpreted, gave advice on how to cloak as dismissal for redundancy, a dismissal for making complaints of disability discrimination and for asking for reasonable adjustments.

Slade J pointed out that in a genuine redundancy exercise there would be no need to write that '*there is at least a wider reorganisation and process at play that we could put this into the context of*'. Nor would there be a need to say '*otherwise we risk impasse and proceedings with on-going employment with no obvious resolution*'. Slade J held that the EJ's interpretation was perverse.

The answer to the second issue, whether it crossed the high bar of showing a strong prima facie case of iniquity, turned on the proper interpretation of the email.

Slade J accepted that advice to commit discrimination might, depending on the facts, be different in degree from advice on how to commit fraud or breach of fiduciary duty. '*However, depending on the facts, the discrimination advised may be so unconscionable as to bring it into the category of conduct which is entirely contrary to public policy.*'

In this case she identified what had been advised as '*not only an attempted deception of the Claimant but also, if persisted in, deception of an ET in likely and anticipated legal proceedings*'. That reached the high threshold of '*something of an underhand nature which is entirely contrary to public policy*'.

Slade J relied on the interpretation of the email alone. She did not depend on reading it in the light of the pub conversation. But to avoid doubt, Slade J also held that legal advice privilege could not be claimed in respect of the overheard pub conversation.

Comment

As Slade J emphasises, each case depends on its own facts. In this case, part of that evaluation depended on putting the email in context. What would have been expected in the redundancy exercise, so far as it concerned X, if the exercise had been genuine? How would the email have been likely to differ had using the redundancy exercise as a cloak to dismiss X not been in the writer's mind?

Implications for practitioners

- Be careful what you say about a case in public, or in writing
- Think before you write
- Legal advice privilege gives way to public policy
- Whether advice on how to commit discrimination surmounts the high bar of 'iniquity' is a matter of fact and degree
- Consider how the facts of the case engage public policy and make it unjust for the other side to hide iniquity under the cloak of privilege
- Always consider the contextual setting: don't separate what is said and done from the wider context.

Sally Robertson
Cloisters Chambers

Briefing 881

Reminder of need to train employees in equal opportunities policies

Hanna v Eventsec Limited; Northern Ireland County Court; June 18, 2018

Introduction

This is a disability discrimination case where the Northern Ireland County Court found that a service provider had acted unlawfully in the provision of services to a customer.

Facts

Ms Hanna (H) is a disabled person. She has lived with type 1 diabetes since she was five years of age and carefully manages her diabetes through regular testing of her blood sugar levels and appropriate intake of insulin. She has a tattoo of the medical symbol for diabetes on her wrist. H has been advised by her medical team to carry Lucozade with her at all times. Drinking the Lucozade can help her to control her blood sugar levels if they drop, and prevent her suffering a hypoglycaemic episode.

Eventsec Limited is Northern Ireland's largest specialised security consultants which provide security and crowd management at events.

881

In August 2016 H attended a Red Hot Chilli Peppers concert at an outdoor venue in Belfast. Eventsec Limited were providing the security and crowd management services at the concert. Everyone attending the concert was prevented from bringing drinks into the venue for security, health and safety reasons.

H had an unopened plastic bottle of Lucozade in her rucksack. An Eventsec Limited security guard removed the bottle from H's bag and told her she could not take it into the concert. H told the guard that she had diabetes and she needed the Lucozade. The guard again told H that she could not take in the bottle. H showed the guard her tattoo and the guard replied that anyone could have that. H then showed the guard her insulin materials which comprised of her meter, which is used to measure her blood sugar, and her insulin pack. The guard called over another security guard who said that the same thing had happened earlier, but they had a strict policy and H could not be allowed to take the drink inside. The bottle of Lucozade was thrown in a bin. H was told that she could buy drink inside.

H described feeling that the guards did not believe that she lived with diabetes. She was very shocked at this treatment as she has attended many concerts in the past and had always been allowed to bring in a bottle of Lucozade. Whilst H attended the concert she was unable to fully enjoy it as she did not have access to the Lucozade which is an essential tool to allow her to manage her blood sugar levels. She felt anxious and was upset and stood at the edge of the concert area.

H's mother contacted Eventsec Limited on the day following the concert to complain about her daughter's treatment. H's solicitors wrote to Eventsec Limited but did not receive a response.

County Court

The judge held that H was a disabled person within the meaning of the disability legislation in Northern Ireland.

The judge ruled that there was a clear legal obligation on Eventsec Limited to make reasonable adjustments to take account of H's disability and that it had failed to do so. H had been placed at a substantial disadvantage because of the company's actions.

In documents provided during the case, Eventsec Limited stated that concert users were informed in advance of the admission policy, including the prohibition on alcohol, food, glass or cans which would be confiscated and disposed of. The company also stated that if a person had to bring in food for medical reasons, the person should contact the promoter directly.

The wording of Eventsec Limited's policy did not refer to non-alcoholic drinks required by concert goers for medical reasons.

Eventsec Limited also gave evidence about the medical care facilities available inside the concert venue which included a stock of Lucozade or glucose gels and that, if H's situation had been referred to supervisors and/or managers, they would have been able to arrange for a replacement bottle of Lucozade to be provided to her inside the venue.

The judge was satisfied that Eventsec Limited employees did not follow the company's own policy and procedures and had failed in their duty to make reasonable adjustments. H had not been informed that she could obtain a replacement bottle of Lucozade inside the venue.

H was awarded compensation of £1,500 for injury to feelings and £500 compensation for loss of amenity.

Comment

This case is a reminder of the need for all service providers to ensure that all employees are trained in relation to their equal opportunities polices and procedures. The judge referred to the need for service providers to adopt sensible policies and recognise the needs of customers with diabetes.

Mary Kitson
Equality Commission for Northern Ireland

Court highlights landlords' Equality Act duties in respect of physical features

Plummer v Royal Herbert Freehold Ltd Central London County Court, Case No: B01CL659; June 6, 2018

In discrimination cases brought outside the employment field, few produce such a lengthy judgment as the 106 pages in *Plummer v Royal Herbert.*[1] It is a very significant judgment however for a number of reasons. The county court found that the management company, Royal Herbert Freehold Ltd (RHF), had breached its duty to make reasonable adjustments under the services provisions of the Equality Act 2010 (EA) and that it had indirectly discriminated against Mr Plummer (P) in respect of what works it undertook. P was awarded £9,000 in damages for injury to feelings, thought to be the highest award of its kind for such a claim.

Facts

RHF is the management company of a block of 228 luxury apartments developed through the restoration of what used to be the Royal Herbert Hospital in Woolwich. It also owns the Royal Herbert Leisure Club, which houses the swimming pool within the estate. P, who has MS, bought a flat at the Royal Herbert Pavilions with his wife in 2010. The main reason that P and his wife were drawn to the flat was because of the swimming pool, which would be good for his MS. Soon after P moved in, he realised that access to the swimming pool was very difficult because of a very long flight of stairs, a very deep pile carpet which was very difficult for him to walk across because his feet drag, and very heavy doors.

P made requests for alterations to the leisure centre to the management company – which was made up of residents of the building – but it rejected Mr and Mrs Plummer's requests for a stair lift and handrails, to allow P better, safer access.

An access audit in July 2014 estimated the cost of the adaptations at approximately £5,000. Despite receiving in the same month a refund of £78,500 in overpaid business rates, RHF circulated a survey to other residents on the costs of adaptations identified in the access audit, resulting in a very negative attitude from them.

County Court

P brought a claim of disability discrimination contrary to the EA. He claimed that in managing the leisure centre, RHF was providing a service or facility to the public or a section of the public; and that it had failed to make reasonable adjustments. If the company were held not to be service providers, it would have no anticipatory duty to make adjustments nor would it have an obligation to alter physical features i.e. to provide a stair lift and, potentially, to provide handrails. He argued in the alternative that RHF were premises providers i.e. landlords.

P also claimed that RHF had subjected him to indirect discrimination in that it would carry out works that were of benefit to everyone but not those which were beneficial to disabled people.

Significantly, the court held that RHF was a service provider in respect of its management of the leisure centre, rather than acting as a landlord. This means it had an anticipatory duty under Part 3 EA to consider adjustments for disabled people. Landlords have no such duty under Part 4.

The court also found that there had been indirect discrimination within the meaning of s19 EA.

District Judge Avent had some particular observations on disability equality:

> *Those who are disabled have no choice in the matter and I am afraid that, in large part, the human condition is that those persons are labelled, stereotyped and discriminated against. Through a lack of understanding or empathy people can be inherently, and subconsciously, selfish and uncaring and do not conceive that their behaviour, in consequence, can have a detrimental effect.*

In relation to the survey sent to residents, the judge continued:

> *The Residents Survey was a humiliating example of this because it simply reinforced existing prejudices and, in my view, should never have been circulated. It was used by the Board to justify its unreasonable stance in circumstances where it knew very well what the outcome was likely to be.*

1. Judgment available at https://www.equalityhumanrights.com/sites/default/files/judgment-mr-james-plummer-v-royal-herbert-freehold-ltd.docx

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In summary, the judge concluded:

At every step of the way it has been Mr Plummer who has had to initiate matters and, as far as I can see, he really has had no meaningful assistance from Royal Herbert whatsoever. … there was no proactivity on their [Royal Herbert Freehold Ltd] part but simply reaction which was generally in the negative; they gave the impression of wanting to assist from time to time without actually then doing anything to do so… It seems to me clear that there needs to be a sea change in attitude by Royal Herbert towards disabled persons.

I conclude that the process has been humiliating and demeaning for Mr Plummer and his worth and self-esteem will have been diminished. I also conclude that he placed considerable reliance on his ability to swim which was part of his fight against the encroachment of his MS. It is an unhappy fact that it is a fight which will ultimately be lost but I am not sure that Mr Plummer (or, indeed, his wife) could have done more to protect his position and it is right that I acknowledge his tenacity and determination in dealing with this matter over a considerable period of time.

Comment

This case is particularly important given the limited scope of the premises provisions and the number of residential properties with leisure facilities which are now being built. It indicates that landlords can no longer assume that they have limited responsibilities under the EA but that they should be considering their duties in particular in respect of physical features.

Catherine Casserley
Cloisters Chambers

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EA disability regulations found incompatible with ECHR right to education

C & C v The Governing Body of a School (The Secretary of State for Education) First Interested Party and (the National Autistic Society) Second Interested Party [2018] UKUT 269; August 8, 2018

There are a number of exemptions from the Equality Act 2010's (EA) definition of disability contained in the Equality Act (Disability) Regulations 2010 (the 2010 regulations). One of these – a tendency towards physical abuse – has had a significant impact upon children with autistic spectrum disorders who have been excluded from school and whose parents attempt to challenge the exclusion under the EA. *C & C* has significant implications for these cases – as well as providing an indication of how other challenges to the 2010 regulations might be brought.

First and Upper Tier Tribunal

L, the appellant (by his mother), has autism anxiety and pathological demand avoidance. A discrimination claim concerning three incidents was brought on his behalf in the First Tier Tribunal.

L appealed against a determination in respect of only one incident i.e. a fixed term exclusion for 1.5 days as a result of aggressive behaviour, including when he had hit a teaching assistant with a ruler, pulled her hair, punched her, and another time when he hit her with a book.

The First Tier Tribunal found that L generally met the definition in s6 EA; it found however that he had a tendency to physical abuse and as a result of the 2010 regulations he was not to be treated as a disabled person because of that tendency.

L appealed against that finding, on the basis that the regulations are in breach of article 2 protocol 1 (right to education) in conjunction with article 14 of the European Convention on Human Rights (ECHR). L's appeal was upheld on this basis.

The parties agreed between them the approach to be adopted to article 14, as taken from *Mathieson v Secretary of State from Work and Pensions* [2015] UKSC 47:

1. is the issue within the scope or status of another ambit of another Convention right
2. does L have a relevant status
3. is there differential treatment
4. is the differential treatment justified?

On question 1, there was no dispute about the issue falling within the ambit of article 2 protocol 1.

As to the second question on status, the tribunal judge adopted the description of status as being a child

with a recognised condition that is more likely to result in a tendency to physical abuse.

The comparator group for the purposes of status was disabled children whose condition or impairment does not give rise to an enhanced tendency to physical abuse. The judge accepted L's arguments that there was differential treatment because children in this group were analogous – the behaviour of the comparator would also give rise to discriminatory treatment in the same way as those in L's group, they would simply not reach the level of physical aggression. Holding otherwise would mean that the claim would fall at the first hurdle.

So far as the fourth question on justification was concerned, the parties' submissions were based on *R (on the application of Tigere) v Secretary of State for Business Innovation and Skills* [2015] UKSC 57 – in particular:

- does the measure have a legitimate aim sufficient to justify the limitation of a fundamental right
- is the measure rationally connected to the aim
- could a less intrusive measure have been used
- bearing in mind the severity of consequences, the importance of the aim, the extent to which the measure will contribute to the aim, and, has a fair balance been struck between the rights of the individual and the interests of the community?

The judge determined that she would consider only the first and fourth of those, as she would proceed on the basis that the other two were satisfied. It was common ground that the '*manifestly without reasonable foundation*' test did not apply to the 4th element of the justification test (see *R (A) v Secretary of State for Health (Alliance for Choice) and Ors Intervening* [2017] UKSC 41).

The tribunal rejected L's submission that the '*manifestly without reasonable foundation*' test did not apply to the other stages. It also held that discrimination on the grounds of disability did not fall within the core grounds, such as sex, such as to require 'weighty' reasons for the purposes of justification (see *Burnip v Birmingham City Council and Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening*); *Trengove v Walsall Metropolitan Borough Council and another (Same intervening)*; *Gorry v Wiltshire County Council and another (Same intervening)* [2012] EWCA Civ 629; [2012] WLR (D) 150; Briefing 655; at para 28).

Further, the tribunal held that a normal proportionality test was applicable to education – not a narrower focus as contended for by L; and that the issue with which the appeal was concerned was one of social policy (see *Swift v Secretary of State for Justice* [2018] EWCA Civ 193).

In summary, when considering the 3-stage test, manifestly without reasonable foundation was the appropriate test, suitably adjusted insofar as the Secretary of State (SoS) sought to put forward a post-hoc foundation.

What had to be justified were not the measures per se but the difference in treatment between one person or the group and another (Lord Bingham in *A v Secretary of State for the Home Department* [2004] UKHL 56).

Turning to legitimate aim, the SoS put forward as legitimate aim a generic policy to ensure that the EA does not provide protection for people where the effect of their condition involves anti-social or criminal action which has an impact on others whether by actual or potential harm to those other's safety or their property. It extends to protecting the health and welfare of students and staff in schools. Reference was made to paragraph 7.5 of the explanatory memorandum of the 2010 regulations.

L contended that this was not the legitimate aim – rather it had only been intended to cover free-standing conditions.

The tribunal accepted the legitimate aim contended for by the SoS. It was assumed for present purposes that the other two aspects of justification were met.

The question then was one of fair balance, giving appropriate weight to the SoS's decision. There was a dispute as to the weight to be attached to this, and this was dependent upon the extent to which the SoS had carried out a proper balancing exercise.

The tribunal took into account a number of factors in this regard including the following:

- the 2010 regulations had been subject to the negative procedure – there was no reference to compatibility with the ECHR
- the House of Lord's report on disability and the EA had made recommendations as to the exclusion in the 2010 regulations, and
- the government had responded, committing to consult on the issue. This was documented in a witness statement from the civil servant with responsibility for these issues.

However, the tribunal accepted L's submission that there had not been full or proper consultation – despite a commitment by the SoS to consider how the exemption applies to those under 18 years of age in July 2016 which had not yet been fulfilled. This suggested that the SoS had not carried out a detailed evaluation.

The tribunal rejected a suggestion that the SoS's appearance at the hearing, and arguments put forward,

could be taken as evidence that the SoS had carefully weighed all of the competing considerations, carried out the requisite balancing exercise or come to a properly considered conclusion. There was nothing before the judge to indicate the extent of the SoS's consideration of the various issues nor to explain how the conclusion was reached – in effect no evidence of the issues of justification. There was evidence of some consideration of the issues but no evidence of the consideration of the opinion of the SoS. No proper consultation, no scrutiny or endorsement by parliament on the issue of fair balance, no impact assessment of the regulations nor were the regulations considered and approved by affirmative resolution. The tribunal was forced to conclude that it could attach only very little weight to the SoS's opinion.

The tribunal identified the detriment to the group of children affected (their exclusion from school, as evidenced by the National Autistic society and the appellant); it went on to consider whether this was justified by reference to the countervailing community interest. It found that schools could exclude children without having to explain or be held accountable for any reasonable adjustments they may or may not have made in respect of what may be loosely be described as physical aggression. It was said to be hard to overstate the impact on this particularly vulnerable cohort of children. Aggressive behaviour is not a choice for autistic children. An autistic meltdown is not the same as a temper tantrum [para 81].

The tribunal rejected an argument that judicial review provides a practical effective remedy for testing the propriety of the exclusion in cases such as these; and that it should consider the broader scope of the 2010 regulations i.e. in respect of other parts of the EA and the impact that its decision could have on these.

The tribunal concluded that regulation 4(c) comes nowhere near striking a fair balance – the requirements for the protection of the status group's fundamental rights completely outweigh the arguments put forward for the protection of the interests of others. In a strongly worded conclusion it was said that it is 'repugnant' to define as criminal or anti-social the effect of the behaviour of children whose condition through no fault of their own manifests itself in particular ways as to justify treating them differently from children whose condition has other manifestations.

As to remedy, the tribunal held that it was permissible to read and give effect to regulation 4(c) in a way that makes it ECHR compliant. When construed in accordance with s3 Human Rights Act 1998 it does not apply to children in education who have a recognised condition which is more likely to result in a tendency to physical abuse.

Comment

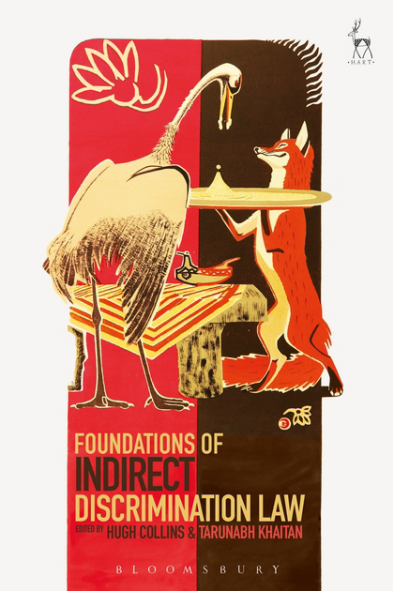
The government is not, it is understood, appealing this decision. Whilst its affect is limited to children in the First Tier Tribunal, it nevertheless is likely to pave the way for others to challenge aspects of the 2010 regulations which may have an effect on those whose access to justice is infringed as a result of those regulations – watch this space!

Catherine Casserley
Cloisters Chambers

Foundations of Indirect Discrimination Law

Edited by Hugh Collins and Tarunabh Khaitan; Hart Publishing, 2018; £65

As described in its dust jacket this book contains a series of essays in which *'leading scholars from North America and Europe explore the various facets of the law on indirect discrimination, interrogating its foundations, history, legitimacy, purpose, structure, and relationship with other legal concepts.'* It is described as the first international work devoted to this vital area of the law.



It is an unabashedly academic book, exploring in a series of 12 chapters or essays, rival theories about the general aim of the law of indirect discrimination; for instance whether it is to address a moral wrong, social exclusion or other perceived ill and how that then relates to understanding the role of justification.

In the opening chapter the editors set out some of the competing theories and pose a series of critical questions. The series of essays that follow explore aspects of the different moral, philosophical and jurisprudential approaches to indirect discrimination, questioning whether and how those approaches differ from the approach to direct discrimination.

In the final chapter Hugh Collins draws together some of the different strands and sets out his own analysis of the concept of justification in indirect discrimination, which he argues must be understood in the context of *'the competing values at stake are the classic liberal values of equality … embraced by the laws against discrimination and of liberty that provides the foundation for the ever-present justification element in the law of discrimination.'* He concludes by acknowledging that indirect discrimination law seeks both to prevent unfair treatment and to transform societies.

In between, the authors cover in nine separate chapters concepts such as the overlap between direct and indirect discrimination; judicial scepticism at the European Court of Human Rights (ECtHR); the duty to avoid compounding injustice; the moral questions underpinning concepts of direct and indirect discrimination; affirmative action; freedom of religion or religious belief and its link to identity and to issues of group rights and how that produces tension between the focus of the ECtHR on the individual's right to expression of their belief and the more collective approach of EU legislation in relation to indirect discrimination; an exploration of the legitimacy of indirect discrimination comparing the tortious approach to liability, the absence of culpability in indirect discrimination and the broader aim of reducing group disadvantage.

In a chapter comparing the ECtHR and US Supreme Court's differing approaches to the question of segregation in schools, the authors examine the courts' treatment of segregation policies as intentional discrimination in *Brown v Board of Education* and as indirect discrimination in *DH and Others v Czech Republic* – segregation in national educational practices in respect of Roma children.

The reader may not agree with every argument put forward in the separate essays, indeed the contributors do not necessarily agree with each other's analysis, however it is an erudite collection of essays which at times is thought provoking. Whilst the focus of the book is theoretical and it is not necessarily aimed at practitioners, it is a useful tool in understanding how others analyse the concept of indirect discrimination; it explores some of the factors which may consciously or subconsciously influence the thinking of, and arguments of, opponents and judges in their approach to some of the more difficult issues thrown up by indirect discrimination claims.

Catrin Lewis
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Reform of the Gender Recognition Act 2004 – the government asks questions

Christl Hughes, secretary of the Gender Identity Research & Education Society (GIRES) sets out the background to the government's consultation on reform of the Gender Recognition Act 2004 (GRA) which closed on October 19, 2018. A further item on the outcome and the consultation responses will appear in a future issue of *Briefings*.

The government sought views on how best to reform the GRA. As it does not propose to amend the Equality Act 2010 (EA), the statutory definition of the protected category of gender reassignment under s7 EA will remain as it is:

> *A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.*

The consultation referred only to the legal recognition process and there was no suggestion of removing the need for a diagnosis of gender dysphoria in order to access appropriate medical treatment.

The consultation sought to obtain suggestions and proposals on how the existing GRA application process could be improved. Contrary to much of the media commentary, the 84 page consultation document did not make any specific recommendations and devoted just a couple of pages to asking whether respondents thought there should be a requirement for the gender recognition panel (GRP) to see a medical diagnosis of gender dysphoria and details of treatment received before granting a gender recognition certificate (GRC).

GRA application process

Currently the GRA requirements, utilised by 95% of applicants, are that they;

- are 18 years or over
- submit a statutory declaration that the applicant intends to live permanently in their acquired gender
- submit two medical reports confirming that the applicant has, or has had, a diagnosis of gender dysphoria (or earlier diagnostic terms such as transsexualism), including details of any treatment the applicant has had such as hormone treatment or surgery
- provide evidence that the applicant has lived full-time in their acquired gender for at least two years
- if married, the spouse must issue a statutory declaration of consent
- if in a civil partnership, both applicant and partner must get legal recognition on the same day
- pay a fee of up to £140 (in addition to costs already incurred for the other documents).

Once the application has been lodged, the GRP will assess the evidence provided. Invariably the applicant will not appear before the panel in person but the panel may ask follow-up questions in writing. If an application is unsuccessful, reasons will be provided; with the exception of an appeal based on a point of law, there is no further right of appeal

If the application is successful the applicant will receive a GRC plus, if their birth was registered in the UK, a new birth certificate. Thereafter the applicant's gender becomes the acquired gender for all purposes. The only possible exceptions would be in circumstances involving assessment on the basis of different factors, such as hormone profile in determining gender category for a sports competition, or, if serving a prison sentence, risk assessment for imprisonment in a gendered estate.

Since the provisions of the GRA came into force, 4,910 GRCs have been issued. The government stated in the consultation that it believed that the existing GRA procedure is underused.

For example, of the trans respondents to the 2017 government lesbian, gay, bisexual and transgender survey who were aware of the GRC process but had never applied for one, only 7% said they would not be interested in getting one. This suggests that there is interest in using the GRA system to obtain legal recognition but only after a review of the procedure. The current process is perceived to be overly expensive, intrusive, humiliating and administratively burdensome. Having to pay a fee and submit a range of personal documentation to strangers who then decide about one's gender identity is seen as an additional burden that trans people have to face in addition to other barriers to full and respected acceptance in wider society.

Respondents also argued that the requirement for a diagnostic psychiatric report perpetuates the outdated and false assumption that being trans is a mental illness. GIRES hopes that the government is persuaded by these arguments following the consultation that sought views on how the government might make it easier for trans people to achieve legal recognition.

Women and Equalities Committee inquiry into enforcing the Equality Act

On October 31, 2018 the Women and Equalities Committee heard evidence from three experts including Catherine Rayner, DLA chair, in the course of its inquiry into *Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission.* The DLA had submitted written responses to the Committee earlier in October which highlighted the main concerns of DLA members.

At the hearing, Catherine reinforced these main points and spoke about the most significant barriers to enforcement; there is not only a lack of awareness about the EA among people who experience discrimination, but also a lack of knowledge and understanding which means that many do not identify as discrimination the treatment to which they have been subjected.

Catherine emphasised that lack of access to justice is a fundamental issue. The massive reduction in funding for legal aid and for organisations which could provide support has meant that there are 'advice deserts' in many areas. While there is evidence about the widespread nature of, for example, race and pregnancy discrimination, complaints are not coming forward which indicates a clear shortfall in access to justice.

The experts agreed that the burden of legal action by individuals was not proportionate to the benefit equality and non-discrimination brings to society; the balance between the individual having to take action to enforce their rights, and society's responsibility to reduce inequality, is 'out of kilter'. Taking action places enormous stress on individuals and requires finance. There are other mechanisms which could be developed to more proportionately balance this burden – gender pay gap reporting is one model which could be developed to other areas. Others include increasing the Ombudsman's investigation powers; ensuring equality compliance in government contracts; more use of EHRC powers of investigation and representative action on behalf of individuals by the EHRC; legislation to increase responsibilities of local government bodies to take action and to record, monitor and report on equality matters were all mentioned. Implementing s14 (combined discrimination: dual characteristics) and s1 EA (duty on public authorities to take into account socio economic inequalities), as well as reinstating the powers of Employment Tribunals to make recommendations were other suggestions which could assist in eliminating discrimination which destroys lives, impacts on health and has long-lasting, devastating effects for the individual.

The DLA's written response to the Committee is available here: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/enforcing-the-equality-act-the-law-and-the-role-of-the-equality-and-human-rights-commission/written/91488.html
The link to an audio-visual recording of the proceedings is available here: https://www.parliamentlive.tv/Event/Index/050d3e1e-3fe0-404c-91db-ad0a48580aa4

Abbreviations

AC	Appeal Cases
AI	Artificial Intelligence
CA	Court of Appeal
CJEU	Court of Justice of the European Union
DLA	Discrimination Law Association
DPA	Data Protection Act 2018
EA	Equality Act 2010
EAT	Employment Appeal Tribunal
ECHR	European Convention on Human Rights 1950
ECtHR	European Court of Human Rights
EHRC	Equality and Human Rights Commission
EJ	Employment Judge
EqLR	Equality Law Review
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
FETO	Fair Employment and Treatment (NI) Order 1998
GDPR	General Data Protection Regulation
GIRES	Gender Identity Research & Education Society
GRA	Gender Recognition Act 2004
GRC	Gender Recognition Certificate
GRP	Gender Recognition Panel
HRA	Human Rights Act 1998
ICO	Information Commissioner's Office
ICR	Industrial Case Reports
ILJ	Industrial Law Journal
IRLR	Industrial Relations Law Report
J	Judge
LCJ/LJ	Lord Chief Justice/ Lord Justice
LLP	Legal liability partnership
NIA	Northern Ireland Act 1998
NICA	Northern Ireland Court of Appeal
NIQB	Northern Ireland Queen's Bench
QC	Queen's Counsel
SC	Supreme Court
UKEAT	United Kingdom Employment Appeal Tribunal
UKHL	United Kingdom House of Lords
UKSC	United Kingdom Supreme Court
UKUT	United Kingdom Upper Tribunal
WLR	Weekly Law Reports
WPA	Widowed Parents Allowance

Briefings