ISSN 1759-2925

Discrimination Law Association

Briefings 884-896

Volume 66

March 2019

Editorial

Time for reimagining

It is of huge concern to discrimination lawyers and policy-makers alike that decision-making on the allocation of resources is having a differential impact among groups of people protected by equality legislation.

Drawing on evidence from a range of independent sources Professor Philip Alston, United Nations Special Rapporteur on extreme poverty and human rights, identifies appalling levels of poverty and disadvantage in the UK. The report of his investigation in November 2018 highlights the disproportionate and devastating impact austerity has had on the women, racial and ethnic minorities, children, people with disabilities, single parents and migrants. As reported in their article *Urgent action demanded on disproportionate impact of austerity on protected groups to enable their access to justice* Catherine Rayner and Michael Newman describe how these groups have borne the brunt of austerity policies which have reduced services and dismantled social security benefits originally designed to protect and support them.

The DLA took the opportunity to engage with Professor Alston's investigation and put forward the case for access to justice. While the differential adverse impact of social and economic decisions on groups with protected characteristics has been legally challenged, successfully overturning the government's wide margin of discretion and proving that such decisions are manifestly unreasonable can be difficult. Professor Alston's report provides statistics and information which could be an evidential starting point for claims of unlawful discrimination; it challenges us to find ways to continue the fight against social and economic decision-making which has a disproportionate adverse impact and could amount to unlawful discrimination.

The DLA has consistently argued that it is increasingly more difficult is for those hardest hit by austerity to access advice on discrimination law or to fight for legal redress. The EHRC has highlighted how the funding cuts to legal aid following the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) in 2013 has meant that fewer people could access legal advice and representation for problems in areas such as family, employment and welfare benefits law. Its evidence suggests that, following the introduction of the Legal Aid Agency's mandatory telephone gateway, provision of initial legal aid for discrimination cases dropped by nearly 60%. The reduced availability of legal advice post-LASPO has also reduced the awareness that such a claim could be made in the first place.

Without information or knowledge that an issue is a legal problem with a potential remedy under the anti-discrimination legislation, people endure; and without free legal aid and access to expertise to challenge unlawful decision-making, those without resources are effectively deprived of their human right to a remedy.

That government denies the extent of poverty in the UK as described in the report and expressed its disappointment at '*the extraordinary political nature of [Alston's] language'* saying it was *'wholly inappropriate and actually discredited a lot of what he was saying'*, is alarming. Alston calls on the UK government to provide a legal framework for recognising and enforcing social rights. The DLA has long argued for the implementation of the s1 EA public sector duty designed to reduce inequalities of outcome which result from socio-economic disadvantage. It adds its voice to Professor Alston's recommendations and in addition will continue to demand free, accessible, expert legal advice on discrimination law for those who cannot afford it. It will contribute to the EHRC's ongoing inquiry into whether legal aid enables people who raise a discrimination complaint in England and Wales to get justice which is examining, among other topics, whether improvements could be made to reduce barriers and improve access to justice.

We note that the Ministry of Justice's February 2019 Legal Support Action Plan *'to deliver quicker and easier access to legal support services'* states that, by spring 2020, it will remove the mandatory requirement for individuals to seek advice over the telephone in the first instance in discrimination cases, and will reinstate immediate access to face-to-face advice in this area. Such a move would be welcome but it needs to be resourced adequately if the impact of LASPO cuts on specialist advice services and the creation of 'advice deserts' across the UK is to be overturned.

Professor Alston's positive words in these negative, uncertain times about reimagining what the UK should represent are worth repeating: *'The negotiations surrounding Brexit present an opportunity to take stock of the current situation and reimagine what this country should represent and how it protects its people. The legislative recognition of social rights should be a central part of that reimagining. And social inclusion, rather than increasing marginalization of the working poor and those unable to work, should be the guiding principle of social policy.'*

There could be no better time for reimagining than now.

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Editor

Please see page 34 for list of abbreviations

Briefings is published by the Discrimination Law Association. Sent to members three times a year. Enquiries about membership to Discrimination Law Association, PO Box 63576, London, N6 9BB. Telephone 0845 4786375. E-mail info@discriminationlaw.org.uk.
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Challenging assumptions and bias

Leila Moran and Kiran Daurka, solicitors with Leigh Day, argue that unconscious bias and stereotyped assumptions are the most important issues to challenge when tackling discrimination today. They review how such bias and assumptions in discrimination cases have been interpreted by the tribunals and courts and consider what representatives need to be cognisant of in trying to progress cases for individuals who rely on these assumptions as being evidence from which an inference of discrimination should be drawn.

Within discrimination law, there is an ever-growing acceptance of psychology theory demonstrating the existence and prevalence of unconscious bias in today's society. Recent press interest,[1] specifically on unconscious racial bias, reported statistics which some claimed to be shocking but to those ethnic groups affected, there was a collective shrug of the shoulders as it was merely portraying an everyday lived experience.

What are stereotypes or stereotyped assumptions?

The human mind has often been described by psychologists as a 'cognitive miser' because, regardless of intelligence, people tend to use mental short cuts to solve problems or interpret information in more simplistic, more economically prudent ways. Of relevance to this article, is how individuals tend to process incoming information about people and situations by relying on these cognitive shortcuts – essentially creating stereotypes or making other general assumptions without conscious thought.

Stereotypes are defined as '*a widely held but fixed and oversimplified image or idea of a particular type of person or thing*'.[2] A stereotype and other forms of general assumptions are formed when we have seen or heard a description numerous times before and, whether or not it has any factual basis, it becomes our truth. Creating 'rules of thumb' are both an advantage and a disadvantage. We could not process the sheer volume of stimuli and information we receive and need were it not for these cognitive shortcuts. But the advantages of this more efficient processing of information doesn't come without a cost; we must sacrifice accuracy and fairness to benefit from the speed and sense of effortlessness that stereotypes provide. The result, unless consciously questioned, is a view of the world defined not necessarily by reality but by a conditioned view with historical and cultural influences. This then influences our behaviour and how we treat others.

Biases therefore begin to occur at the point when new information is processed by an individual. Furthermore, we also instinctively validate our stereotypes and assumptions when we perceive evidence which confirms them and tend to ignore evidence which doesn't confirm them.[3] As a result, many assumptions will go unchallenged throughout our lifetimes. Most of us, especially discrimination lawyers, would be uncomfortable to acknowledge our unconscious reliance on assumptions about groups of people. However, research has shown that it is entirely possible and perhaps commonplace to hold egalitarian views about social equality while we still use and rely on assumptions unconsciously. This is neatly summarised by one psychological model as '*adoption of non-prejudiced beliefs or values does not immediately eliminate automatic prejudiced responses*'.[4]

Relying on assumptive biases in discrimination claims

If these kinds of assumptions are so inherent and pervasive as suggested by social science research, one might expect to be able to rely on them as reasoning or at least as the basis for drawing an inference for people's behaviour, discriminatory or otherwise.

The use of stereotypes is often used to describe discriminatory treatment. Harvey on Industrial Relations and Employment Law explains that '*direct discrimination will cover the situation, where less favourable treatment occurs as a consequence of a racial, sexual or other stereotype, even where that stereotype has a factual basis and may be true*'. Yet we have seen relatively few cases confirming widespread unconscious bias and cases that do emerge tend to focus on individual stereotyping assumptions. It is useful to review some of the cases that have emerged over the decades which assist practitioners in identifying assumptions and arguing

1. https://www.theguardian.com/uk-news/series/bias-in-britain
2. https://en.oxforddictionaries.com/definition/stereotype
3. Johnson, J. T. & Judd, C. M. *Overlooking the incongruent: Categorization biases in the identification of political statements* Journal of Personality and Social Psychology: 45 p978–996 (1983)
4. Devine, P. G et al. *Prejudice with and without compunction: Allport's inner conflict revisited* Journal of Personality and Social Psychology: 60, 6 p817-830 (1991)

that they have caused discrimination. A trend that seems to be emerging from jurisprudence in this area is that these cases tend to succeed where the tribunal is aware and accepting of an assumption as an undisputed fact – this may well depend on the experiences of a judge in a particular case.

As far back as 1989, the courts have been alive to the fact that the real reason for detrimental outcomes for a particular racial group may be a '*conscious or unconscious racial attitude which involves stereotyped assumptions*'.[5] In *James v Eastleigh Borough Council* [1990] IRLR 288 HL, Lord Harwich stated that *'it is perfectly possible to envisage cases where the defendant had no such motive, and yet did in fact discriminate'* [para 292] and the court confirmed that the motive or intention behind discriminatory acts is essentially irrelevant to whether the discrimination has occurred; the irrelevancy of motives and intentions being distinguished from the importance of discovering the subjective reason for the alleged discriminatory behavior.

This principle of unconscious bias and assumptions and associated problems of proving such claims was highlighted in *Zafar v Glasgow City Council* [1998] IRLR 36 in which the House of Lords recognised that discrimination claims present special problems of proof, since those who discriminate *'do not in general advertise their prejudices: indeed they may not even be aware of them'.*

Despite the court's recognition of this special problem associated with proving an unconscious assumption by the putative discriminator even for the most grievously mishandled termination process, there still needs to be *something* to justify the conclusion that it could have been discriminatory. Could this *'something'* not then be a generalised stereotyped assumption which is widely recognised as a prevalent assumption?

In *Nagarajan v London Regional Transport* [1999] IRLR 572 the House of Lords clarified the legal position in respect of subconscious motivation in victimisation claims and overturned the EAT and CA which had held that victimisation could only ever be conscious. Before reason prevailed in the Lords, the result was a worrying state of affairs whereby it would be much harder for victimisation claims to succeed. Lord Nicholls opined that *'Members of racial groups need protection from conduct driven by unrecognised prejudice as much as from conscious and deliberate discrimination.'* In the majority decision, the Lords confirmed that what matters in victimisation cases, in the same way as in discrimination cases, is not the intention or motive of the decision made – whether it is unconscious or conscious is immaterial.

Although the courts have recognised for some time that unconscious assumptions will often influence decision-making, the acceptance of and reliance on recognised stereotyped assumptions in discrimination cases is only slowly emerging in case law.

In *R v Immigration officer at Prague Airport ex parte European Roma Rights Centre* [2004] UKHL 55 (the *Roma Rights* case) Lady Hale emphasised that it can be direct discrimination to stereotype people. An '*individual should not be assumed to hold the characteristics which the supplier associates with the group, whether or not most members of the group do indeed have such characteristics, a process sometimes referred to as stereotyping*'. [para 74] This must be correct even if there is some truth to the stereotype.

Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336; Briefing 535 is an example of a case where the existence of a stereotype was accepted by the tribunal. The claimant, a female of Indian ethnic origin, had handed in her notice but in a subsequent meeting her manager criticised her performance in her notice period and then made the following comment: '*we will probably bump into each other in future, unless you are married off in India'.* [para 18] The claimant was successful in her claims for harassment and the tribunal found that it was *'reasonable for her to make a connection between what was said and stereotypical views of Indian women and for her to find that offensive'.* In considering the appeal, the EAT confirmed the ET's finding that the comment 'married off' evoked a racial stereotype and one which it was reasonable for the claimant to find offensive.

In *Aylott v Stockton on Tees Borough Council* [2010] EWCA Civ 910, the ET found that discriminatory treatment of the claimant who suffered from a mental health illness was based on a '*stereotypical view of mental illness*'. This was overturned in the EAT but the CA restored the tribunal's findings on direct discrimination. As with the *Roma Rights* case, *Aylott* confirmed the principle that direct discrimination can occur when assumptions are made that a claimant has characteristics associated with a group to which he or she belongs, irrespective of whether or not the claimant, or most members of the group, share those characteristics.

In *Royal Bank of Scotland Plc v Morris* UKEAT/2012/0436, the existence of a stereotype was also accepted and was found to have influenced the decision-maker. The claimant, a black man, raised a complaint against his manager. The manager (Mr A) to whom he made the complaint assumed (wrongly), and

5. *West Midlands Passenger Transport Executive v Singh* [1988] IRLR 186 CA

suggested, that the claimant was alleging his manager's treatment of him was racially motivated. The claimant raised a grievance setting out that he was offended by the accusation that he was *'playing the race card'*. His grievance was dismissed and he eventually resigned. He was successful in his claims for unfair dismissal, race and disability discrimination.

In the EAT, Underhill P (as he then was) found that the manager had made an assumption that the claimant was making allegations of racism and was *'playing the race card'*. Underhill stated that:

> *It must follow that [Mr A] said what he did as a result of an assumption – or to use another word, the application of a stereotype: "he is a black employee complaining about his treatment by a white colleague – he must, or at least may, be alleging race discrimination" ... it is a matter of common experience that it is members of ethnic minorities who are generally regarded as principle victims of, and therefore complainants about, racial discrimination. Of course, white employees may sometimes be the victims of racial discrimination by black colleagues but there is no stereotype to that effect.* [paras 33 & 34]

The EAT rejected the respondent's argument that the *'playing the race card'* comment would have been made regardless of the claimant's race, just so long as he was a different race to the manager complained of. Underhill stated: '*We accept that there is no direct evidence to this effect. But it is an inference of a kind which we believe that an employment tribunal could properly draw and which we think it right to draw in this case.'* [para 35]

The EAT accepted the existence of the stereotype of *'playing the race card'* and the tribunal decided that, on the facts of the case, this stereotype had influenced the discriminatory remark and decision. But why is it that this stereotyped assumption was accepted as a '*matter of common experience*' whereas other types of stereotype examples are less readily so accepted?

In the more recent age discrimination case of *CLFIS (UK) Ltd v Reynolds* [2015] EWCA Civ 439; Briefing 749, the claimant's consultancy contract was terminated. Before the termination, she had been subjected to criticisms about her ways of working including her inability to change and she brought claims for discrimination on the basis of age. Although the tribunal found that the termination of her contract was not age-related, it was alive to the stereotype being asserted by the claimant – namely that, as an older person the claimant would be '*unable to change*'. [para 19] The tribunal considered this against the particular facts of the case and seemed to accept that the stereotype exists; but it did not accept that the decision-maker in this case had been influenced by the stereotyped assumptions in his decision to terminate her contract. This point was considered briefly when the case reached the CA and it was held that the ET had not been unreasonable in finding that, although not inconsistent with a stereotypical assumption of older age, the decision-maker's belief of the claimant's inability to change was based on his personal knowledge of her. [para 56]

In *Geller and another v Yeshurun Hebrew congregation* UKEAT/0190/15/JOJ; Briefing 808, a case involving a husband and wife who worked for the same respondent and who were made redundant, Mrs Geller brought claims for direct sex discrimination. Although the factual matrix was far from gender neutral she was unsuccessful at first instance. The EAT overturned this decision and considered that, despite facts from which the discrimination could be inferred, the tribunal had failed to consider unconscious bias. It was held that a court or tribunal should not assume that, just because it genuinely believed the individual was acting for non-discriminatory reasons, an individual's actions were free from unconscious bias.

However, notably, it has been held that a tribunal can err in law if it concludes that liability for direct discrimination has been established by relying on an unproven assertion of stereotyping. There must be evidence from which the tribunal could properly infer that a stereotypical assumption was made and that this operated in the mind of the decision-maker, consciously or otherwise. This principle was set out in *Effa v Alexandra Healthcare NHS Trust and another* [1999] All ER (D) 1229 and confirmed more recently in the EAT case of *The Chief Constable of Kent Constabulary v Bowler* UKEAT/0214/16/RN.

In *Effa,* Mummery LJ held that '*in the absence of direct evidence on an issue of less favourable treatment on racial grounds, the tribunal may make inferences from other facts which are undisputed or are established by evidence*.' It is often the case that a claim based on generalised assumptions about groups of people tend to succeed where a tribunal is aware of that particular assumption, but the case of *Effa* suggests that claimants must provide some evidence that it does indeed exist and is undisputed.

Cases like *Effa* need to be considered when we go back to principles established in *James v Eastleigh* that where the protected characteristic is not the overt reason for discrimination, it can still be direct discrimination where the overt reason is a proxy for the protected characteristic.

However, looking for an explanation as to why the

existence of some assumptions is more readily accepted than others was a point raised by Gloster LJ in her dissenting judgment in *HM Chief Inspector of Education, Children's Services and Skills v Interim Executive Board of Al-Hijrah School* [2017] EWCA Civ 1426; Briefing 854. In this case all three judges took judicial notice that women are the group with minority power in society. However, they were not willing to infer without further evidence that girls were disadvantaged as a result of segregation in the school as this would have been a 'disputed gloss' as opposed to undisputed fact taken on judicial notice.

In her dissenting judgment, Lady Gloster stated that she was willing to accept, on the facts of the case and as self-evident, the disproportionate adverse impact of segregation on girls, stating:

One does not need to have been educated at a women's college at a coeducational university, at a time when women were still prohibited from being members of all-male colleges, to take judicial notice of the career opportunities which women are even today denied, simply because they are prevented from participating in hierarchical male networking groups... [para 145]

Lady Gloster also commented that one does not need to be an *'educationalist, a sociologist or a psychiatrist'* [para 141] to draw this kind of 'objective inference'. It can be inferred that Lady Gloster did not need expert evidence to take judicial notice of facts she considered to be self-evident. It may even be suggested that she is hinting at the near absurdity of requiring minority groups to prove facts which are arguably self-evident, although arguably this self-evidence is dependent on your background and life experience.

The relevance and existence of assumptions are similarly likely to need objective evidence in some cases where a judge may not consider it to be undisputed fact, but the question remains as to when a stereotype is undisputed and when it is not.

The problem with evidencing stereotypes and assumptions

Stereotype and assumption-based cases are clearly uncertain grounds upon which to bring a claim. Claimants are now increasingly being required to prove that the stereotype does in fact exist. This appears to be a regressive approach to discrimination law and one that is more likely to infect race claims. Assumptions about race (and religion) are probably the most controversial as claimants are often relying on their own perceptions of how society evaluates them based on race/religion. Many people find the idea of racism appalling, so by naming and identifying a stereotype or assumption it creates discomfort – this poses a real hurdle for claimants as they are faced with an element of denial and defensiveness.

By way of example, a black employee is dismissed on grounds of misconduct because of her insubordination. She complains that this is race discrimination and she has been wrongly perceived on the basis of an assumption that black women are angry or aggressive. In this case, regardless of her own experience, there is a question as to whether the tribunal will require her to firstly prove that such an assumption about black women exists in the first instance – if she proves the assumption as a general proposition, then she gets past the first hurdle that her claim is indeed one based on race. Only then would she move towards causation.

If this is the correct approach, then we are in similar place to that in which the claimants in *Essop and others v Home Office (UK Border Agency); Naeem v Secretary of State for Justice* [2017] UKSC 27; Briefings 830 & 840, found themselves. The case concerned a group of civil service employees who could not be promoted beyond a certain grade as they had failed to pass a core skills assessment test. A report by an occupational psychologist confirmed that BAME and older candidates had a much lower pass rate than younger, white candidates but no explanation for this disparity could be identified. The claimants claimed that the requirement to pass the test was a relevant provision, criterion or practice (PCP) which was indirectly discriminatory. The question arose as to whether the claimants had to prove the reason for the lower pass rate.

While that case dealt with indirect discrimination, the SC looked at the hurdle faced by individuals seeking to explain the reason why a PCP put a group at a particular disadvantage.

Lady Hale considered the difficulty in applying a 'reason why' test in indirect cases:

There is no requirement in the Equality Act 2010 that the claimant show why the PCP puts one group sharing a particular protected characteristic at a particular disadvantage when compared with others. It is enough that it does. Sometimes, perhaps usually, the reason will be obvious: women are on average shorter than men, so a tall minimum height requirement will disadvantage women whereas a short maximum will disadvantage men. But sometimes it will not be obvious: there is no generally accepted explanation for why women have on average achieved lower grades as chess players than men, but a requirement to hold a high chess grade will put them at a disadvantage. [para 24]

The same applies, in our view, when looking at

assumptions made about people with a particular protected characteristic in a direct discrimination case. It is not always obvious, and sometimes it may not be clear why that assumption exists. But, it is increasingly important that claimants at least provide some evidence that the assumption does in fact exist to ensure that it moves from the realm of disputed fact to one that is undisputed – no matter how uncomfortable (or wrong) that assumption is. The question is, what evidence do we need to provide?

What can we learn from the US?

The Federal Courts in America have shown less reluctance in accepting the evidence of experts, psychologists or social scientists on stereotypes, or so called 'soft disciplines'.

The case of *Price Waterhouse v Hopkins* 490 U.S. 228 (1989) set an early precedent in the US courts of acceptance of expert evidence in this area. The case was a sex discrimination case involving a female lawyer who alleged that she was repeatedly told that she was too aggressive and needed to *'walk more femininely, talk more femininely and dress more femininely'* in order to secure the promotion that by all measures of merit, she deserved. The evidence of an expert psychologist who testified that the evaluations made of the claimant were based on unconscious stereotypes was allowed and relied on and she was successful in her claims.

In *Tuli v Brigham Women's Hospital and Day* [2009] Inc. 592 F. Supp. 2d 208 (D. Mass. 2009) the claimant, who was the only female neurosurgeon at the hospital at the time, alleged sex discrimination over a significant period of time. The court admitted the evidence of a social psychology professor whose testimony was based on the testing of stereotyping and discrimination over 30 years. The court stated that the strength of the testimony was in part that the expert did not give an opinion on the specific facts of the case but set out the framework and demonstrated settings in which discrimination may typically occur and provided testimony on whether the allegations were consistent with observed patterns. The court opined that admitting such evidence *'does not tell the jury what to decide in any given case; it only tells them what to consider'.*

The matter of similar expert evidence was considered in *Wal-Mart Stores Inc. v Dukes et al.* 564 U.S. 338 (2011), a US Supreme Court case which involved female claimants attempting to bring a group sex discrimination claim against Wal-Mart. The first hurdle they faced was certification of their 'class' to be allowed to bring the group claim. On behalf of the claimants, evidence from a social framework analysis expert was provided alleging that the corporate culture and employment policies fostered gender stereotyping. The expert described general research about gender stereotypes in the workplace and then drew specific conclusions based on Wal-Mart's personnel policies and identified factors which allowed stereotypes to infect choices and made *'decisions about compensation and promotion vulnerable to gender bias.'*

The expert's work and testimony was criticised as unreliable by Wal-Mart and by other academics who argued that it was improper to apply the framework to a matter without conducting first-hand research. Ultimately, the court was not persuaded by this evidence and the claimants were unsuccessful in achieving the necessary certification of their group in order to bring their claims. The court held that the case was 'technically flawed' because they had failed to prove that the women in the group had enough issues of law or fact in common. Interestingly, Justice Ruth Bader Ginsburg dissented in respect of this evidence and said the decision had gone too far in obstructing the Wal-Mart workers' case and it was her belief that the statistics presented by the claimants had showed that *'gender bias suffused Wal-Mart's corporate culture'.*

Conclusion

Overt discrimination has perhaps waned in response to evolving laws and social pressures and therefore the discrimination underpinned by unconscious bias and assumption is arguably the most important form of bias we face in tackling discrimination today.

In all discrimination cases, but more so in those that involve unconscious bias, it is important for tribunals to draw inferences from the conduct of the discriminator and the surrounding circumstances. Part of our role as representatives is to assist the tribunal in drawing these inferences.

As can be seen from cases such as *Morris* and *Dhaliwal,* there are times when the court and tribunals are willing to accept the existence of particular stereotyped assumptions on the basis of evidence from the claimant, and in part, perhaps from the judge's own lived experience. However, the acceptance of these assumptions is seemingly unpredictable and it would be difficult to foresee a situation in which representatives would feel comfortable to advise claimants whether the judge in their particular case will accept the existence of the particular stereotyped assumption on which they rely. Perhaps the safest option would be a move towards the use of expert evidence or published research on social attitudes to assist the tribunal to understand the prevalence of particular assumptions and how these

884 operate in practice.

It is as yet unknown how accepting a tribunal may be of such evidence and, as can be seen from the US cases, it will inevitably be difficult to predict their willingness to rely on this kind of evidence. Furthermore, in considering the benefits of such expert evidence in assisting a claimant to prove their case we must also consider the cost implications on often already impecunious claimants. Moreover, given their greater financial resources, respondents may then commission their own expert analysis and report, making findings unsupportive of the claimant's position. The result may be a wholly unsatisfactory progression towards an overreliance on this kind of evidence, without which a tribunal will be unwilling to draw inferences that, dependent on the facts, they may have previously felt comfortable to do so.

However, what is likely to be of most importance is persuading the tribunal of the validity of the claimant's own first-hand, lived experience such as of micro-aggression or subtle behaviour to which they have been subjected which may well arise out of assumptions made about them because of their relevant protected characteristic. It is also worth noting and referring to the Equal Treatment Bench Book which sets out the types of disadvantage and stereotypes to which protected groups may be subjected as this may be relevant to your client's case.

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Urgent action demanded on disproportionate impact of poverty and austerity in the UK on protected groups

The DLA met with Professor Philip Alston, United Nations Special Rapporteur on extreme poverty and human rights, in November 2018 to highlight its concerns about the unequal and devastating impact of austerity on people who face barriers which make it almost impossible to enforce their rights. Catherine Rayner, barrister, 7br, and Michael Newman, partner at Leigh Day, (DLA chair (2014-18) and vice chair (2012-2018) respectively) outline some of the shocking statistics which reveal the disproportionate impact on those who should be protected from discrimination.

DLA *Briefings* regularly reports on cases and campaigns which concern not just inequality of opportunity, but inequality arising from the way resources are distributed in society, whether concerning the allocation of benefits such as Universal Credit, or restrictions on public assistance and support to migrants. Gender, race, disability, being or having a child and, of course, poverty are increasingly common factors shared by those who are denied access to the wider societal benefits of work, home, health and public financial support.

Whether poverty is a cause of disadvantage or a result of it is always a subject for debate, but where the impact of resourcing decisions, or actions, or lack of action, disadvantages people who share characteristics which are protected from discrimination in national and international law, and where those people are already more likely to be poor, the issue becomes one of key importance to politicians, policy-makers and discrimination lawyers.

The United Nations Special Rapporteur on extreme poverty and human rights, Professor Philip Alston reported at the end of last year following an investigation into poverty in the UK in 2018. His report confirms that the decisions on the distribution of resources, particularly those made under austerity measures, are having just such an impact in the UK in 2018. He stresses in his report the need not just for concern amongst decision-makers, but also for urgent action. The report as a whole is essential reading for any one concerned with social justice and equality in the UK. It identifies appalling levels of poverty and disadvantage, examines causes, and highlights the disproportionate effect and devastating impact of austerity cuts to services and changes to benefits on women, children, people with disabilities and migrants. More than that, the report also provides much food for thought for any discrimination lawyer considering future legal challenges to the measures described, and arguably provides an evidential starting point for claims of unlawful discrimination.

Poverty in the midst of wealth

Despite the huge wealth of the UK, the report states that:

> *14 million people, a fifth of the population, live in poverty. Four million of these are more than 50% below the poverty line, and 1.5 million are destitute, unable to afford basic essentials. The widely respected Institute for Fiscal Studies predicts a 7% rise in child poverty between 2015 and 2022, and various sources predict child poverty rates of as high as 40%. For almost one in every two children to be poor in twenty-first century Britain is not just a disgrace, but a social calamity and an economic disaster, all rolled into one.*

Homelessness has increased: up 60% since 2010. Rough sleeping has increased: up by 134% according to the National Audit office statement of 2017. Yet despite 1.2 million people waiting on the social housing list, less than 6,000 homes were built in the last year.

Food bank use has increased: up almost fourfold since 2012 and there are now about 2,000 food banks in the UK, up from just 29 at the height of the financial crisis of 2008/9. As the report notes, the government does not measure food poverty and appears not to be engaged with the issue, citing one of its Ministers who dismissed the significance of food bank use as 'only occasional' and being something that also existed in other western countries.

What remains shocking, and of particular concern to claimant discrimination lawyers, is the key areas described in the report where austerity and specific policies are impacting more adversely on people sharing characteristics protected by the Equality Act 2010 (EA). The report echoes an increasingly large body of research supporting the conclusion that the cost of austerity has fallen disproportionately upon the poor, women, racial and ethnic minorities, children, single parents and people with disabilities.

Professor Alston states:

> *The changes to taxes and benefits since 2010 have been highly regressive, and the policies have taken the highest toll on those least able to bear it. The government says everyone's hard work has paid off, but according to the Equalities and Human Rights Commission, while the bottom 20% of earners will have lost on average 10% of their income by 2021/22 as a result of these changes, top earners have actually come out ahead. According to 2017 research by the Runnymede Trust and Women's Budget Group, as a result of changes to taxes, benefits, and public spending from 2010 through 2020, Black and Asian households in the lowest fifth of incomes will experience largest average drop in living standards, about 20%.*

As discrimination lawyers, we are often concerned with formal inequality of opportunity in the workplace or in access to goods and services, but Professor Alston's report, along with reports from EHRC and the Women's Budget group amongst others, continues to underline the need for further work and examination of the equalities impact of resourcing decisions and the realities of distributive inequality.

The concept of distributive equality is described by Kok-Chor Tan, Professor of Philosophy at the University of Pennsylvania as:

> *…vital when looking at the way that a society's resources are distributed, and requires that there is some mechanism for redressing the inequalities in resourcing that arise because of factors over which a person has no control. A departure from the benchmark of equal distribution is acceptable when it is due to a person's efforts and choices, but not when it is due to contingencies over which they have no control …*

This philosophical analysis is reflected to some extent in national and international anti-discrimination measures aimed at protecting the human rights and dignity of individuals and ensuring that rights and property can be enjoyed free from discrimination. Where decisions or policy measures of governments discriminate on grounds such as race, sex or disability either directly or indirectly, they will be unlawful in national and international law and can be challenged in the UK both in national courts, but also, at the time of writing, in the CJEU.

For example, under Article 51 the UK must respect the Charter of Fundamental Rights of the European Union when implementing EU law. Article 21.1 provides that:

> *Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.*

The policies considered by Professor Alston may or may not be intended to impact more adversely on women or people with disabilities, or on single parents, than others, but where it becomes obvious that this is the reality, legal challenge to those policies ought to be possible.

Challenge to government policies on grounds of discrimination is not without difficulty, and there is an understandable judicial reluctance to interfere with the chosen economic policies of a democratically elected government except in extreme cases. A claimant raising a judicial review must be able to show *manifest*

unreasonableness in a policy or a decision made, not just unfairness on a personal level. As reported cases demonstrate, individuals who suffer gross injustice may well find that the courts cannot assist in single cases. (See for example, the House of Lords in *R (on the application of RJM) v Secretary of State for Work and Pensions* 2008 UKHL 63).

However, claims brought over issues of group discrimination, based on sustained and persistent disadvantage, which can be demonstrated to be linked to a protected characteristic of race, sex or disability for example, may have greater chance of success. Significant and sustained discrimination, known about and unaddressed by government is surely manifestly unreasonable unless justified as being a proportionate way of achieving a legitimate objective.

A key reason then, why this report is more than just another damming report about poverty in one of the world's richest nations, is that it is an independent assessment of evidence from a wide range of sources, setting out the way that government policies are affecting and impacting on society and groups within society.

The government may have stated that it aimed for policies which shared the burden of austerity but, as reported by Professor Alston, it has demonstrably failed to do that, instead focusing its cuts on the poorest, on women, and on disabled people.

Access to justice – knowledge of discrimination and availability of advice

Litigation and judicial review may not always be the most effective tools for challenging the discriminatory impact of government policy, but in some cases it is the only option, and it is one which must be open and accessible to all.

Michael Newman, DLA vice chair, raised the DLA's ongoing concerns over access to justice when he met with Professor Alston during the roundtable consultations with groups and individuals which were held in preparation for the report. We know that one of the results of government cuts is that those hit hardest by austerity, and potential victims of discrimination, continue to find it almost impossible to enforce legal rights, or challenge unlawful discrimination in housing, benefits, service provision or in decisions about cuts to services. Michael highlighted the DLA's concerns about the cuts to legal aid and the impact of the failed telephone advice line for discrimination cases, focusing on two key points.

First, if an individual is to bring a claim for discrimination, they must have the means of finding out whether the treatment they faced amounted to discrimination. Second, once they are aware of potential discrimination, either as an individual or as a group, they must be able to enforce their rights or challenge the treatment.

The obligation on nation states to ensure that nationals and others can access justice is fundamental. Ayesh Kadwani Dias and Gita Honwana Welch (UN Development Programme Country Directors 2009) explain it thus:

> *Access to justice has grown to become part of good governance and is a central building block for economic and social reform and the promotion and protection of human rights. It is inseparable from the struggle for social and economic justice and the struggle for economic survival. All these are linked to the concept of respect for the dignity of the human person an acceptance that everyone possesses inherent worth and that it is not diminished by poverty and lack of resources, be they physical economic or social.*[1]

Lord Reed made the following point, in *R (on the application of UNISON) v the Lord Chancellor* [2017] UKSC 5; Briefing 838:

> *Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade...* [para 67]

The concern of the DLA and many other groups is that the poorest in society have no real prospect of ever accessing justice. The DLA pointed out that the EHRC's inquiry into legal aid for victims of discrimination[2] found that there was a significant reduction in the provision of publicly funded advice on discrimination law issues, and that the telephone gateway service was not fit for purpose.

1. *Justice for the Poor: Perspectives on Accelerating Access* Edited by Ayesha Kadwani Dias and Gita Honwana Welch; OUP India 2012
2. *The Impact of LASPO on Routes to Justice* https://www.equalityhumanrights.com/en/publication-download/impact-laspo-routes-justice

The EHRC inquiry highlighted that initial legal aid for discrimination cases dropped by nearly 60% after the telephone service was introduced. Despite the telephone service dealing with over 18,000 discrimination cases since 2013, only 16 people were referred for face-to-face advice between 2013 and 2016 and no-one was referred for face-to-face advice between 2016 and 2017. There is a clear failure to both identify discrimination and provide assistance.

The difficulty of identifying discrimination, particularly where it impacts on a group not just an individual, is a continuing concern for the DLA. The importance of individually tailored, expert advice, free at the point of use cannot be over stated, yet it is in reality unavailable to most people who need it.

The DLA also emphasised that the telephone service may not always be accessible for disabled people and those with limited English language skills. It pointed out that, that despite over 6,000 calls to the service in 2013 to 2014, only four cases were recorded as receiving an award from a court or tribunal and that very few cases receive legal aid to go to court.

Professor Alston addressed these points in his report:

> *There have been dramatic reductions in the availability of legal aid in England and Wales since 2012 and these have overwhelmingly affected the poor and people with disabilities, many of whom cannot otherwise afford to challenge benefit denials or reductions and are thus effectively deprived of their human right to a remedy. The LASPO Act (Legal Aid, Sentencing and Punishment of Offenders Act) gutted the scope of cases that are handled, ratcheted up the level of means-tested eligibility criteria, and substituted telephonic for many previously face-to-face advice services.*

Concerns about over-reliance on digitisation

Looking forward, investigations into how computerised systems and digitisation could benefit users and improve access to justice are to be welcomed. However, a continuing concern for the DLA has been the risk that a complete reliance on digitisation, or a requirement that service users access benefits or assistance purely by digital means, will exclude some groups and individuals altogether.

The digitisation of benefit claims relies upon claimants having easy access to a computer and the internet, and the ability to use them. If claimants cannot and do not have easy and immediate access to a computer, or are not computer literate, then digitisation of the benefits system will be an obstacle to their ability to claim, and to engage with the process. Professor Alston also flags his concerns about the negative impact that the growth in digitisation has had on claimants:

> *Only 42% of those who are unemployed and 43% of those on low income do their banking online. According to the Lloyds Bank UK Consumer Digital Index 2018, 21% of the UK population do not have five basic digital skills and 16% of the population is not able to fill out an online application form.*

The introduction of Universal Credit has been roundly criticised by many commentators both for the draconian sanctioning system, but also for the lack of resources put into it, the waiting time, and the level of benefit provision, amongst other things. Professor Alston states:

> *Universal Credit has built a digital barrier that effectively obstructs many individuals' access to their entitlements. Women, older people, people who do not speak English and the disabled are more likely to be unable to overcome this hurdle. According to a 2017 Citizens Advice survey, 52% of its clients in 'full service' Universal Credit areas found the online application process difficult. According to DWP's own survey from June 2018, only 54% of all claimants were able to apply online independently, without assistance.*

One cause of the barrier is the lack of available help, and the significant reduction in the public availability of computers. One significant impact of austerity, and cuts to local authority budgets has been the closure of libraries and cuts in opening hours, with associated loss of access to public computers.

This is not only a dreadful abuse of the rights of claimants, but is also a real missed opportunity. The move to greater digitisation could be really positive, since electronic systems can and should be capable of being designed to assist and enable members of all communities to access and enforce rights. However, to ensure that this is the outcome, investment and engagement of service users is required. Citizens must be included in processes and the aim of digitisation should be to make services more accessible – whether benefits, advice on rights, or justice and the courts. Whether the assistance is in the form of short-term legal aid, or long-term physical assistance, digitisation could help link people who are marginalised and those who cannot travel easily to meet with advisers and support networks for example.

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Recommendations

Professor Alston makes a number of important recommendations for government including that the UK government should:

- introduce a single measure of poverty and measure food security
- initiate an expert assessment of the cumulative impact of tax and spending decisions since 2010 and prioritise the reversal of particularly regressive measures, including the benefit freeze, the two-child limit, the benefit cap, and the reduction of the housing benefit for under-occupied social rented housing
- ensure local governments have the funds needed to tackle poverty at the community level, and take varying needs and tax bases into account in the ongoing Fair Funding Review
- Department of Work and Pensions should conduct an independent review of the effectiveness of reforms to welfare conditionality and sanctions introduced since 2012, and should immediately instruct its staff to explore more constructive and less punitive approaches to encouraging compliance
- Eliminate the five-week delay in receiving benefits under Universal Credit, enable separate payments to be made to different household members, and facilitate weekly or fortnightly payments.

To this we add a plea for free, accessible and expert legal advice on discrimination law for those who cannot afford to pay. We will continue to argue for a return of legal help, as well as better funding for advice on discrimination either though the EHRC or other specialist organisations.

The DLA will also continue to lobby for the immediate implementation of s1 EA, the public sector duty regarding socio-economic inequalities. This section states:

> *An authority to which this section applies must when making decisions of a strategic nature about how to exercise its functions have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage.*

The idea is simple: concepts of equality should apply to how and where economic resources are distributed. The duty is not onerous. Due regard requires consideration of impacts but is not prescriptive as to what action must be taken. The benefit is in the obligation to consider whether or not there is a discriminatory impact from economic measures, and if so whether such measures are justified.

Professor Alston is clear about one fundamental change required and that is to the approach to poverty taken by politicians in the UK. He recommends:

> *The negotiations surrounding Brexit present an opportunity to take stock of the current situation and reimagine what this country should represent and how it protects its people. The legislative recognition of social rights should be a central part of that reimagining. And social inclusion, rather than increasing marginalization of the working poor and those unable to work, should be the guiding principle of social policy.*

We agree.

Establishing a valid comparator in equal pay claims

Daphne Romney, QC Cloisters,[1] examines the CA judgment in *ASDA Stores Ltd v Brierley* [2019] EWCA Civ 44 in which the court considered the vexed question of comparability – if a claimant works in one establishment, and her intended comparator works elsewhere, what does she have to show other than that they have the same employer or an associated employer?

Background to the case

Thousands of claimants who work in a variety of roles in the ASDA stores are bringing equal pay claims against their employers. The comparators work in distribution depots which are entirely different establishments. This is a common theme to all the various supermarket claims because, in a classic case of occupational gender segregation, retail workers are predominantly female and distribution workers are overwhelmingly male.

So far, the ASDA cases have been held up by the question of whether the claimants are entitled to compare themselves to the comparators at all, given that they work in separate establishments, under s1(6) Equal Pay Act 1970 (EqPA) and s79 Equality Act 2010 (EA).

At a preliminary hearing Employment Judge Ryan found that the retail and distribution divisions were run separately, with different terms and negotiating mechanisms and had a different history. However, he held that:

- ultimate control lay with the ASDA Board of Directors so that there was a single source
- the claimants and the comparators shared common terms of employment, and
- the *North hypothetical* (of which much more below) survived the change of wording from s1(6) EqPA to s79(4)(c) EA.

The EAT dismissed the appeal.

The principles of comparison where comparators work at different establishments

Where a claimant and her comparator work in the same establishment, it does not matter what employment terms each has – a comparison can be made between them. However, it becomes more complicated where the comparator works at a different establishment. S1(6) EqPA held that they would be treated as working in the same establishment as the claimant:

> *… if they are men employed by her employer or any associated employer at the same establishment or at establishments in Great Britain which include that one and at which common terms of employment are observed either generally or for employees of the relevant classes.*

How common do those terms have to be and in common with whom? In *Leverton v Clwyd CC* [1989] AC 706 the claimant and her comparators worked under the same collective agreement but had varying terms. Lord Bridge, applying a purposive construction, held: '*The concept of common terms of employment observed generally at different establishments necessarily contemplates terms applicable to a wide range of employees whose individual terms will vary greatly inter se.*' [para 745]

Were it otherwise, the whole purpose of the EqPA could be circumvented by simply placing groups of employees in different establishments on slightly different terms. The paradigm example, as Lord Bridge put it, was where there was a single collective agreement, applicable to both establishments. Underhill LJ distilled the *Leverton* test as follows: '*in other words, are the terms applicable to the relevant jobs irrespective of the establishment at which the employees work'?* The comparison is not between the claimant's terms and the comparator's terms; it is between the terms applicable to each job, whether claimant or comparator, at the various establishments where people doing that job work. Underhill LJ observed, the comparison between employees approach should have been dead since *Leverton* but, '*as the history of the present case shows, it refuses to lie down'.* [para 35]

In *British Coal Corporation v Smith* [1996] ICR 515 the claimants across multiple collieries enjoyed the same terms but their comparators, surface workers, did not; concessionary coal and bonuses varied from pit to pit. The employer therefore argued that a claimant in establishment A could not claim common terms with a comparator in establishment B. This argument was rejected. In the House of Lords, Lord Slynn held that the appropriate test was whether the

1. *Briefings* is grateful to Daphne Romney for her permission to reprint her article, a fuller version of which appeared on Cloisters' employment blog on February 1, 2019; see: https://www.cloisters.com/all-roads-lead-north-asda-stores-ltd-v-brierley-the-arc-of-comparison/

surface miners' terms were *'broadly similar'* between the various establishments. Underhill LJ held that this was the *ratio* of the case, but observed that Lord Slynn had indicated that a man doing the same job as a comparator did not actually have to work at the claimant's establishment – it was enough that had such a man worked there, he *'would have'* enjoyed common terms with a comparator who worked at the comparator's establishment. In other words, it was permissible to create a hypothetical comparator for the purpose only of answering the question posed by s1(6) EqPA. (It is of course quintessential to establishing equal work, whether it be like work, work rated as equivalent or work of equal value, that the claimant must have an actual comparator and not a hypothetical one, save in the very limited circumstances of s71 EA).

As Underhill LJ explained in paragraph 43, *Smith* follows naturally from *Leverton* – the comparison is between establishments, not claimants and comparators.

The *'North hypothetical'*

Which brings us to *North v Dumfries & Galloway Council,* [2013] ICR 993 where the EAT and Court of Session worked themselves into a tizzy because they focused on the wrong issue. School staff wished to compare themselves with manual workers at other establishments. Much time was spent in the ET, EAT and CA debating the degree of likelihood required for a hypothetical manual worker to work at a school. In the SC, Baroness Hale held that Lord Slynn's test in *Smith* had said nothing about any degree of likelihood. The purpose of the legislation was to compare different jobs done by people who worked in different establishments. '*The hypothesis is that the comparators are transferred to do their present jobs in a different location. The question is whether in that event, however unlikely, they would remain employed on the same or broadly similar terms to those applicable in their current place of work.*' [para 30] This has become known as the '*North hypothetical'* although, as Underhill LJ points out, its origins are in fact to be found in *Leverton* and *Smith.*

Lady Hale gave five reasons for her conclusion, set out in paragraphs 33-41 of her judgment. In particular, reason three had regard to the purposes of the equal pay provisions; reason four distinguished between the comparison necessary to bring a case at all i.e. a comparison of terms observed at different establishments, and the comparison required to establish equal value; and reason five was that such a construction was in accordance with EU law and the concept of the single source, namely a person or body who can rectify the inequality between claimant and comparator. She noted that there was not a single EU case which held that no single source existed between employees working for the same employer.

These three mighty cases laid down the principles of comparison – it was now for the CA to apply them to the ASDA appeal.

Is same employer enough?

On the issue of common terms, counsel for ASDA submitted that Lady Hale in *North* had only understood comparability to be possible where an employer agrees to collective agreements applying across its workforce and *'is not operating separate businesses in separate locations'.* Underhill LJ roundly rejected that submission:

> *I do not believe that Lady Hale meant any such thing. She was doing no more than acknowledging the role of the "same employment" test as a filter, while emphasising its limited purpose. The passage is not directed at defining the circumstances in which common terms apply across establishments. It is in fact clear from the passages quoted at paras. 49 and 57 above that she envisaged cross-establishment comparisons being possible between very different kinds of operation of the same employer.* [para 53]

In paragraph 59, he added '*In short, North is in my view binding authority that the fact that claimant and comparator have the same employer will in the ordinary case mean that the terms have a single source and thus that EU law permits comparison between them for equal pay purposes.*' Although the passages in Lady Hale's judgment are very short, Underhill LJ said that they are binding so '*there is nothing more to be said'.* [para 61] If ASDA does appeal, it had better hope that the SC will hear the case after Lady Hale has retired.

Common terms

The next point was whether common terms applied. Underhill LJ summarised the authorities above, and emphasised that the comparison is that between establishment and establishment, not between claimant and comparator. [para 67] Indeed, any similarity between the claimants' terms and the comparators' terms is irrelevant. [para 73] '*The question is whether the terms for cleaners are (or would be) the same (or broadly so) whether they are employed at (establishment) X or at (establishment) Y and likewise as regards the terms for manual workers.'*

Would it be different under s79(4)(c) EA?

The phrase in s1(6) EqPA – *'establishments … at which common terms of employment are observed either generally or for employees of the relevant classes'* – was replaced in s79(4)(c) EA by the phrase *'common terms apply at the establishments (either generally or as between A and B)'.*

As a result, ASDA argued that the *North hypothetical* no longer applied – the section, as redrafted, clearly called for a comparison between the terms of the establishments generally or between claimant and comparator, and the removal of the phrase '*relevant classes'* negated the function of the hypothetical man working at the claimant's establishment. This argument failed. Underhill LJ said that there was nothing to indicate that the government had intended to reduce the breadth of comparison available to claimants and it was in line with the case law under s1(6) EqPA. Nevertheless, Underhill LJ acknowledged that the wording in s79(4) could suggest that the comparison was to be made, but it was not the only possible meaning and he did not think that it had been the draftsman's intention to change the law; ASDA's interpretation was contrary to *Leverton, Smith* and *North*.

> *In my view it is quite clear that the draftsman has unthinkingly deployed the technique, used throughout the 2010 Act, of referring to claimants and other parties by letters of the alphabet and has failed to appreciate that it could be read as effecting a substantive change.*

He did not mince his words. '*The new drafting may perhaps be inept but in context its meaning is clear. There have, regrettably, been several other instances of re-drafting effected by the 2010 Act unintentionally unsettling the previous law',* a reference to *Jessemey v Rowstock Ltd* [2014] ICR 550, and *Blackwood v Birmingham & Solihull Mental Health NHS Foundation Trust* [2016] ICR 903. [paras 78-79]

As a result, the *North hypothetical* survives to be wielded by claimants in other cases.

Comparison of terms

The ET had painstakingly analysed the differences and similarities between the terms applicable to retail and distribution. However, in paragraph 88, Underhill LJ pointed out that this was entirely the wrong exercise, based upon a misapplication of the test in *Smith.*

Misapplication of *the North hypothetical* test

ASDA placed emphasis on the evidence of the comparators' manager, who said that if men transferred from depots to stores, they would not have remained on the same terms as the comparators remaining at the depots. Again, however, this was not the relevant question; and the relevant question could *'only be answered by inference based on how terms for actual workers in the relevant class(es) are applied, and what a lay witness says about that is of limited, if any, value: it is a matter on which the tribunal has to reach its own conclusion'.* [para 106]

Single source

The case could therefore be resolved on domestic law and without any recourse to EU law. Nevertheless, Underhill LJ agreed with EJ Ryan and Kerr J that there was clearly a single source here. A company with a board of directors was wholly distinguishable from the situation in *Robertson v DEFRA,* [2005] ICR 750 where the government devolved power by (revocable) statutory instrument to set salaries for each department. Whether or not *Robertson* was correctly decided, a matter of much debate, it turned on its own particular facts. Here, the Board could set the terms as it chose. [para 111] It remains to be seen whether the doctrine of single source will survive Brexit, and if so, for how long.

Direct applicability

Article 157 Treaty on the Functioning of the European Union, 2012 provides that: *'Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.'* It was common ground that in claims of like work, Article 157 (and its predecessors) had direct effect – see *Defrenne v Sabena* [1976] ICR 567 and *Macarthys v Smith* [1980] ICR 672. However, ASDA contended that the same was not true of claims for equal value unless there had been a prior concession to that effect or a job evaluation scheme had rated the work as equivalent. Although *Worringham v Lloyds Bank* [1981] ICR 592 suggested that the principle applied to equal value claims, ASDA argued that the language in the judgment, namely *'discrimination that can be judicially identified'* precluded equal value claims because the ET could not make a determination without expert evidence, so that there was no clear identification of equality.

ASDA further argued that several senior judges had (albeit obiter) cast judicial doubt on the principle of direct effectiveness in such cases, namely Lord Oliver in *Pickstone v Freeman* [1989] AC 66 at 124B-F, Balcombe LJ in *Leverton v Clwyd* [1989] AC 706 at 723H – 724D and Lord Eason in *City of Edinburgh v Wilkinson* [1981] IRLR 202, paras 40-42. It further relied on *Van Gend en Loos* [1973] CMLR 105 where the ECJ said that in order to be directly effective, the measure in question had to be unconditional and

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sufficiently precise.

In *ASDA v Brierley* the ET held that it determined equal value, and further pointed out that it was not obliged to accept expert evidence and could make its own decision. Kerr J found the decision to be a difficult one and that it was not *acte clair*. The question was whether the language in Article 157 was sufficiently precise as posed in *Van Gend*. [paras 17/18] On balance, Kerr J held that were the CJEU to hear the case today, it would hold that there was direct effectiveness [para 31]. Whilst he would have *'enthusiastically'* referred the matter to the CJEU, he left it to the CA to decide whether a reference was necessary. [para 37]

The CA declined to do so as it was unnecessary for the disposal of the case; Underhill LJ was inclined to agree with Kerr J, Sales LJ was less sure about it and Peter Jackson LJ declined to express a view. [paras 116, 118, 119]

Comment

The clarity of Underhill's judgment is to be welcomed. Ever since *Leverton*, there has been confusion about whether and with whom comparisons should be made for the purposes of getting over the hurdle of s1(6) EqPA / s79(4) EA. As a result, a lot of time has been wasted drawing intricate comparisons of the respective terms of claimant and comparator, which is a red herring. Matters were made even more complicated by the rewording found in s79(4)(c) EA, which, however unintentionally, appeared to close the door on the *North hypothetical* by expelling the hypothetical man working at the claimant's establishment and substituting a straight comparison of the respective terms of claimant and comparator. Some might think that Underhill's explanation is a little too neat, but it is certainly right that it would be extraordinary if, as ASDA argued, the law had suddenly changed with no prior warning, explanation, consultation or debate. As Kerr J pointed out in the EAT, there is no example of a court narrowing the effect of domestic discrimination law.

It is worth emphasising that a purposive reading of the EqPA and EA is necessary to allow equal pay claims to take place. Otherwise, an employer or associated employer would be able to shift men and women into separate establishments, and have a small difference in their employment terms, in order to prevent equal pay claims from getting off the ground. In large employers, like local authorities, health trusts, and supermarkets, where men and women tend to work in gender-segregated jobs, the woman and her comparator may well not work in the same establishment and never will. This means that it would be too easy for the larger employer to minimise its equal pay liabilities. It also goes without saying that if the terms of claimant and comparator were or had to be the same, there would be no need to bring an equal pay claim at all.

ASDA may appeal. If it does not, the case brought by the retail workers can finally reach the equal value process.

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Moral and economic imperatives for ethnicity pay reporting

Mohini Bharania, solicitor Slater and Gordon, who wrote the DLA's response to government's consultation on ethnicity pay reporting, makes the case for a legal requirement on employers with 50+ employees to collect ethnicity pay data, report on pay gaps and provide an action plan on closing these. She addresses the issues involved in collecting robust data, without which it will be impossible to measure and improve upon racial inclusivity and bring about change.

Introduction

The Prime Minister in launching the Race Disparity Audit and Ethnicity Facts and Figures website in October 2017 was clear: *'If disparities between the treatment of ethnic groups, whether in the case of health, education, employment, housing, criminal justice or work, cannot be explained, then it must be changed.'*

A year later, on October 11, 2018, the government opened a consultation on ethnicity pay reporting. The DLA filed a 10-page response to the eleven questions asked in the consultation which closed on January 11, 2019.

Diversity as a commercial imperative

The first question was about the main benefits for employers in reporting their ethnicity pay information.

The key issue is having proper transparency about an individual's pay and progression in organisations.

While a number of employers are likely to have policies which seek to support and promote equal opportunities in the workplace, the detail behind the publicised good intentions can often be opaque or non-existent.

Baroness McGregor-Smith CBE in her 2017 report 'Race in the workplace'[1] commented: '*Until we know where we stand and how we are performing today, it is impossible to define and deliver real progress. No company's commitment to diversity and inclusion can be taken seriously until it collects, scrutinises, and is transparent with its workforce data. This means being honest with themselves about where they are and where they need to get to as well as being honest with the people they employ.*'

The potential benefit to the UK economy from full representation of BME individuals across the labour market, through improved participation and progression, is estimated to be £24 billion a year, which represents 1.3% of gross domestic product. Employers with diverse workforces perform better and are more profitable. They embrace and tap into the widest pool of talent.

A study on the effect of diversity on business outcomes was conducted by McKinsey and Company in 2015 which reported that (i) companies in the top quartile for ethnic diversity are 35% more likely to have financial returns above their respective national industry medians; and (ii) companies in the bottom quartile for both gender and ethnicity are statistically less likely to achieve above-average financial returns. Diversity is a competitive differentiator.[2]

The financial case is clear but there is also a moral case. Organisations need to reflect the face of the modern United Kingdom.

How many organisations can you think of that have a truly diverse workforce from top to bottom? How many BME individuals do we see at breakfast meetings in the boardroom compared to the number we see cleaning our offices and emptying the bins in the evening?

By collating and publishing data, employers can properly make informed decisions about ethnicity pay gaps in their organisation.

The legal requirement on employers to collect and publish data to report on the gender pay gap has resulted in action. Legislation to make it mandatory for employers to collate and publish their workforce ethnicity pay data is essential.

1. www.gov.uk/government/publications/race-in-the-workplace-the-mcgregor-smith-review

2. McKinsey (2015) 'Why diversity matters' available at: http://www.mckinsey.com/business-functions/organisation/ourinsights/why-diversity-matters

Reporting ethnicity pay information

Careful consideration needs to be given to how ethnicity pay information should be reported**.** A balance needs to be struck between placing undue burdens on businesses which will deter compliance but at the same time allowing for meaningful action to be taken.

Ethnicity pay information could be reported in different ways which will have implications for how nuanced the consideration of data can be.

A sensible approach could be to use one pay gap figure comparing average hourly earnings of ethnic minority employees as a percentage of white employees. Any overtime and bonus payments should be excluded from the exercise. This approach has the benefit of the gender pay gap methodology (with which large employers are already familiar).

It provides one headline figure which arguably is easier to communicate. The process involves rolling classifications of ethnic minority groups into one, losing the differentiation in outcomes for different groups. A more granular level of detail could result in figures not being reported due to risks of disclosure of individual personal information which would defeat the exercise.

Another way would be to report ethnicity pay gap figures using the NHS model[3] with six categories: Asian; Black; Mixed; White; Other and Unknown Ethnic Groups. This model is attractive as it is simple and goes a step further. The drawback is that variations of outcomes within the groups will not be highlighted.

At this stage, it is imperative for employers to review their methodology/internal systems and start reporting data. The methodology and detail of ethnicity pay reporting could be reviewed after a five year period with consideration given to whether there needs to be a breakdown in reporting within different ethnic groups. If employers can see a stark pay differential within their organisation then this should force them to address it in the round.

Baroness McGregor-Smith recommended publishing ethnicity data by a £20,000 pay band. Her argument was that this provided an '*at-a-glance view*' of an organisation's ethnic minority representation in its hierarchy. However, given that many women experiencing the largest ethnic gender pay gaps are working in some of the lowest paid jobs,[4] this banding would overlook a significant number of relevant workers. It would also overlook the contextual factor that a significant proportion of people from ethnic minorities are concentrated in London where pay is comparatively higher for all jobs.

3. https://www.ethnicity-facts-figures.service.gov.uk/workforce-and-business/public-sector-pay/nhs-basic-pay/latest

4. Fawcett Society, Gender pay gap by ethnicity in Britain – *Briefings* March 2017

Other contextual factors

Supporting or contextual data is relevant to providing a true and fair picture. To understand how geographical location in Britain impacts on pay, the data needs to be arranged to show regional variations.

The age profile of those from ethnic minority groups would need to be compared with those from a white background to identify if age, which can be used as a proxy for labour market experience, assists in explaining any pay and progression differences.

Given that pay and progression tend to work together, length of service should also be a factor. This may assist in shining a much-needed light on the question of whether ethnic minorities with greater length of service and/or experience are paid less than those with a white background in the same organisation.

There is no evidence to suggest that BME employees lack ambition or motivation in the workplace. BME individuals struggle to achieve the same progression opportunities as their counterparts and are underrepresented at managerial and senior positions. Research in 2015 by Business in the Community found that 1 in 8 of the working age population are from a BME background, yet only 1 in 16 top management positions are held by an ethnic minority person.[5]

Additionally, employers could then also examine (separately if need be) if, and how, ethnicity makes a difference to men and women's pay. This would provide a fuller picture of the intersectional nature of pay differences.

To encourage reporting, it needs to be kept as simple as possible. However, this additional information could help employers understand the disparities and more importantly, provide a context for change and an impetus to have discussions about their workforce's pay.

Addressing disparities and action plans

Although not mandatory, under the gender pay gap reporting regulations, employers were strongly encouraged to publish a narrative to explain their results. If ethnicity pay reporting is to drive any meaningful change, then it should be mandatory for employers to provide a narrative explaining the results and an action plan which sets out what they intend to do to close the pay gap. Civil penalties for non-compliance should also be introduced and enforced by the HMRC in the same way it has been given powers given to enforce the national minimum wage. The employer would then have a choice: either improve the pay of their workers and, in turn, morale and productivity, or pay a percentage of their profits to the HMRC.

5. Business in the Community 2015: Report on Race at Work 2015

Improving self-reporting and declaration rates

There is no legal obligation on individuals to identify or disclose their ethnic group or on employers to collect this information. The fact that some people may choose not to take part or disclose this information is not a reason not to start collating data.

If ethnicity pay reporting is to drive any meaningful action, ethnicity reporting rates by individuals would need to be improved.

Fear, lack of trust or even ambiguity may deter individuals to volunteer this information. However, employers already hold a significant amount of sensitive information (gender, age, disability, health questionnaires and immigration status, to name a few).

The key is likely to be in explaining to employees why the data is being collected and how it will be used and stored. EHRC research found this was the most significant factor in overcoming reporting barriers.[6]

The case study in the government's consultation reports that the Nationwide Building Society increased its diversity declaration rates from just over 26% at the beginning of 2015 to 97% by December 2016. The Society's campaign was simple and open. It appears that honesty and simplicity works; this model should not be difficult for other employers to adopt.

The consultation refers to data collection not being 'burdensome' and 'costly.' What if employers put themselves in the shoes of their ethnic minorities employees, who carry the burden of knowledge and/or reasonable suspicion day in day out that, because of their ethnicity, there is a very strong possibility that they are paid less than their white colleagues because of their ethnicity? Pay is personal. It is how we are rewarded by our employers. The real cost for employers will be in having to justify differentials in pay and make pay adjustments once the data is collated and published.

Should a standardised approach to classifications of ethnicity be used?

Individuals may define their ethnic group differently and may associate themselves with more than one group or none of the categories provided.

Most employers are likely to have ethnicity classifications built into their human resource and IT infrastructures. If they don't, there will be some cost in changing them.

A standardised approach to ethnicity classifications across industry will be helpful for consistency and objective evaluation.

The options appear to be twofold:

6. www.equalityhumanrights.com/en/publication-measuring-and-reporting-disability-and-ethnicity-pay-gaps

- 5 broad classifications in the 2001 Census of White, Asian, Black, Mixed and Other, or
- the 18 detailed ethnic groups used in the 2011 Office of National Statistics Census: English/Welsh/Scottish/Northern Irish/British/Irish/Gypsy/Irish Traveller/White and Black Caribbean/White and Black African/White and Asian/Any Other Mixed/multiple ethnicbackground/Indian/Pakistani/Bangladeshi/Chinese/Any Other Asian/Asian British.

A person's ethnicity can be multifaceted and therefore it would be prudent to use the 2011 ONS classification. It is widely used by employers and it provides for a more nuanced classification than the 2001 classification.

Gender should also be captured so that a proper evaluation can take place about the effects of gender and ethnicity on pay.

Preserving confidentiality of individuals

Safeguarding the anonymity of individuals who provide data will be paramount as any information about an individual's racial or ethnic origin is classified as a special category of personal data. Although no longer classified as *'sensitive personal data'* most people will view it as such.

The data could simply capture details about pay, ethnicity and gender. The Civil Service's method of suppressing values based on five or fewer responses could be adopted. This is where figures are not included in data to protect confidentiality and the numbers involved are too small to draw any reliable conclusions.

To encourage greater participation, the use of data in an anonymised format should be made clear at the outset.

Mandatory ethnicity pay reporting – who should be caught?

The choices are:

- all employers
- employers with 50+ employees (as recommended by the McGregor-Smith Review)
- employers with 250+ employees (as for the gender pay gap reporting)
- employers with 500+ employees
- other threshold.

The threshold of 50 employees was originally recommended by Baroness McGregor-Smith's review[7]. The government suggests that this threshold risks too great a burden on business but is silent on why it would. This threshold is large enough to preserve anonymity of individuals and most organisations of this size will have some form of human resource or IT infrastructure in place to collate the data.

A threshold of over 250 employees would mirror the gender pay gap reporting methodology but there is no reason why this figure should also be accepted for the ethnicity pay gap reporting.

BME employees are more likely to be lowest paid within their job type, and in the lowest paid types of job[8]; evidence also suggests a double disadvantage for some ethnic minority women when it comes to pay. It is therefore important that no-one is excluded from the exercise.

In fact, there is no reason, say in five years' time, why employers cannot produce a single pay gap report including information about gender and ethnicity. This is likely to be more cost effective and informative.

A voluntary approach?

A business-led voluntary approach to reporting is unlikely to bring about lasting change. No doubt, some businesses may want to comply but the vast majority won't. What would be the incentive to do so? How many businesses 'voluntarily' disclosed gender pay gap data with action plans to reduce the pay gap before it was mandatory to do so? Why would any business risk reputational damage by highlighting any disparities with reference to diversity and pay in its organisation?

The Civil Service already publishes information on ethnicity and pay. NHS England has also released information on its ethnicity gap. The government can learn from these 'early adopters' and from some of the FTSE 100 companies which collect, use and store ethnicity data before mandatory reporting is introduced in 12 month's time.

Drawing attention to brilliantly worded inclusion policies and talking about the benefits of greater diversity in the workplace is not enough. If the government is genuinely committed to ensuring that the UK is a country of opportunity where everyone regardless of race, religion or gender can fulfil their potential, then reporting must be made mandatory. We all knew that wearing a seat belt was the right thing to do but how many of us actually did it before we were required to by law?

Employers have to be held responsible and accountable. Without transparent and robust data

7. The Fawcett Society recommended a 50 employee threshold for gender pay gap reporting (see Gender pay gap reporting deadline briefing April 2018) as did the Runnymede Trust. https://www.runnymedetrust.org/blog/runnymedes-director-on-governments-race-equality-announcement.

8. Department for Business Energy and Industrial Society analysis of ONS Labour Force Survey 2016 Quarter 1.

887 it will be impossible to measure and improve upon inclusivity and bring about change. The government should legislate to introduce mandatory reporting of ethnicity pay data for employers with 50 or more employees.

Not only should reporting be mandatory but there must be civil penalties (as set out above) for non-compliance. This is not about '*naming and shaming*' companies; unless financial penalties are enforced, businesses are unlikely to give this exercise the time, attention and detail it requires.

Support measures for employers

In the case of gender pay gap reporting, the government provided a package of support to help employers calculate and address their gender pay gap. Guidance and fact sheets were developed by the Government Equalities Office and the Advisory, Conciliation and Arbitration Service including training courses and support for communication with employees.

Similar assistance will be helpful and needed on ethnicity pay reporting. The EHRC could also be tasked to assist in this exercise by providing on-line training modules and fact sheets.

There should be a mandatory requirement for all staff at all levels to undertake unconscious bias training. The government can assist businesses by setting up free accessible on-line training.

Those with less than 250 employees who have not participated in the gender pay gap reporting, will have to do a lot of groundwork to be in a position to publish data. Some may be starting from scratch in collecting this data from employees. The government could set up a dedicated team to assist such employers, offering hands on advice. Given that the benefit to the economy of fully utilising BME talent is £24 billion, the government may want to consider offering tax incentives for the first year of reporting as this could assist with the initial cost of learning and setting up a system to collate data and provide a financial incentive to do so.

888 Briefing 888

SC dismisses EA s15 'unfavourable treatment' claim

Williams v Trustees of Swansea University Pension & Assurance Scheme & Ors; [2018] UKSC 65; December 17, 2018

This case saw the SC consider for the second time (the first having been Akerman-Livingstone [2015] UKSC 15; Briefing 747 – a housing case) the provisions of s15 of the Equality Act 2010 (EA). The court considered a relatively narrow point however – the meaning of 'unfavourable', on which there had been no previous case law. The appeal by the claimant failed.

Facts

The claimant (W) has Tourette's syndrome and other conditions which satisfied the definition of 'disability' under the EA. He was employed by the second respondent, the university. For the first ten years of his employment W had worked full-time. The affects of his disabilities increased and, though he had surgery to attempt to reduce their impact, this was unsuccessful and thus, due to his disabilities, he reduced his hours to half-time.

W took retirement for ill-health reasons at the age of 38. He had been an active member of the university's pension scheme. Under the ill-health early retirement provisions of the scheme he was entitled to a lump sum and annuity, payable immediately. There was also an enhanced element to both his lump sum and his annuity payable immediately and without any actuarial reduction for early receipt, calculated on the basis of his actual salary at retirement.

Employment Tribunal

W brought a s15 EA discrimination claim on the basis that in respect solely of the 'enhanced element', calculating the enhanced element by reference to his part-time rather than full-time salary constituted 'unfavourable' treatment – he had been treated unfavourably because of something arising as a consequence of his disability i.e. the fact that he had to work part-time because of his disability. That contention was upheld by the ET, but rejected by the EAT and CA. [See Briefing 843 for a report on the EAT and CA judgments.]

Supreme Court

W appealed to the SC submitting that it was 'unfavourable' to calculate the enhanced element of his pension using his final salary (lower part-time salary) given that he had been working part-time only because of his disabilities: had he not been disabled he would have continued to work full-time.

The SC dismissed W's appeal. It held that what must be identified in a s15 case firstly is the relevant 'treatment' to which the section is to be applied. In this case it was the award of a pension. Secondly, was it unfavourable? There was nothing intrinsically 'unfavourable' or disadvantageous about that. Had W been able to work full-time, the consequence would have been, not an enhanced entitlement, but no immediate right to a pension at all. It is unnecessary to say whether or not the award of the pension of that amount and in those circumstances was 'immensely favourable' (in Langstaff J's words). It is enough that it was not in any sense 'unfavourable', nor (applying the approach of the Equality and Human Rights Commission's 2011 Code of Practice) could it reasonably have been so regarded.

Comment

S15 is a very broad type of discrimination intended to capture the barriers that disabled people face on an individual (as opposed to collective) basis and which indirect discrimination or failure to make reasonable adjustments does not necessarily deal with. This judgment gives short shrift to the arguments made on W's behalf and whilst this was a very particular factual situation and thus its ramifications can be confined to such situations, it may nevertheless be used to narrow the scope of the provision; previously it has always been assumed that justification was the aspect of this discrimination which put the 'brakes' on its reach.

Nevertheless the SC made some useful comments in respect of disadvantage and detriment, as follows:

> *In most cases (including the present) little is likely to be gained by seeking to draw narrow distinctions between the word 'unfavourably' in s15 and analogous concepts such as 'disadvantage' or 'detriment' found in other provisions, nor between an objective and a 'subjective/objective' approach. While the passages in the Code of Practice … cannot replace the statutory words, they do in my view provide helpful advice as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under this section.* [para 27]

Catherine Casserley
Cloisters

Briefing 889

Judges' and firefighters' pensions directly and indirectly discriminate

Lord Chancellor & Ors v McCloud & Ors; SS for the Home Dept & Ors v Sargeant & Ors [2018] EWCA Civ 2844; December 20, 2018

Introduction

These cases concern the legality of the transitional provisions in the Judicial Pensions Regulations 2015 and the Firefighters Pensions Scheme 2015 (FPS). The claimants (respectively, *McCloud & Ors* and *Sargeant & Ors*) challenged these transitional provisions as constituting direct age discrimination, unequal pay and indirect race discrimination. The CA agreed, holding that the differential treatment of younger judges and firefighters constituted unlawful direct age discrimination and, although then a moot point, certainly (*McCloud)* or likely (*Sargeant)*, indirect race discrimination and unequal pay.

Facts

Following reforms enacted via the Public Service Pensions Act 2013, a New Judicial Pension Scheme (NJPS) was established for judges in England and Wales. The terms of the NJPS were significantly less attractive to judges than under the previous Judicial Pensions Scheme (JPS), both in respect of benefits accrued and taxation. Whilst some judges, born before April 1, 1957, were entitled to remain a part of the JPS, others were entitled to tapering protection (those born between April 1, 1957 and September 1, 1960) or excluded from JPS membership altogether. Materially similar reforms affected members of the fire services, only some of whom would be entitled to remain a part

of the more advantageous FPS, dependent on their age and active membership. Both sets of claimants challenged the legality of the transitional provisions, arguing that the differential age criterion was directly discriminatory. Further claims concerning equal pay and indirect race discrimination were also advanced.

Employment Tribunal

In *McCloud*, the ET considered that there was no rational explanation for the differential age criterion in view of the government's purported aims. Although consistency in pension reform between sectors could, 'in principle', serve a broader social policy – an area in which the government enjoys wide discretion – no evidence was put forward indicating that such consistency could be achieved. The ET found the success of the equal pay and indirect race discrimination claims followed, although no formal order was made.

In *Sargeant*, on age discrimination, holding that the government had a broad margin of discretion in matters of social policy, the ET found that the transitional firefighter pension scheme provisions did meet a legitimate aim, and, moreover, that the measures adopted were proportionate.

The ET dismissed both the equal pay and indirect discrimination claims. It found no group disadvantage and lack of a causal connection between the claimants' relevant protected characteristics and the disadvantage suffered.

Employment Appeal Tribunal

The EAT considered both appeals, one immediately after the other, and issued separate judgments on each.

McCloud

The EAT disagreed with the ET's age discrimination analysis in *McCloud*. It held that the ET had not dealt adequately with the material evidencing the moral and political judgments made nor the difficulty of producing evidence to support such considerations. However, as the ET had correctly considered the measures disproportionate, its finding stood: the claimants had been subjected to unlawful age discrimination. The EAT therefore held that consideration of the equal pay and indirect race discrimination claims was unnecessary.

Sargeant

In *Sargeant,* the EAT disagreed with the ET's age discrimination finding only in respect of the proportionality analysis, holding that the ET had failed to adequately scrutinise the adopted measures, and assess the availability of alternative, less discriminatory means to achieving the government's objectives. The ET's judgment was therefore reversed, and the claimants' appeals in respect of age discrimination upheld.

On equal pay, the EAT held that a material factor defence had been established in respect of the equal pay claims, giving particular emphasis to the differing construction of the 'sex equality rule' and 'sex equality clause' under ss66 and 67 EA. The question of indirect race discrimination was remitted back to the ET on the point of justification.

Court of Appeal

The government appealed both cases; the firefighters (who had achieved limited success at the EAT) cross-appealed; the CA heard all the appeals together.

1. Age discrimination

The CA rejected a submission by McCloud that there was conflict between European and domestic authorities on age discrimination and that the EA placed a higher burden of scrutiny on tribunals than European law. The government has a margin of discretion in respect of both the aims and means of disparate treatment. However, it is for the tribunal to determine the appropriate margin. The tribunal must decide whether the aim pursued is indeed legitimate in the individual case, with a minimum requirement that the aim is rational. As per the SC in *Seldon v Clarkson Wright & Jakes* [2012] UKSC 16; [2012] ICR 716; Briefing 636, the means of achieving any legitimate aim must be carefully scrutinised.

Applied to the present cases, the CA found no need to depart from the decision of the ET in *McCloud*. There, the judge had afforded a margin of discretion, but was entitled to say that on the facts, the aims relied on did not stand up to scrutiny. The EAT and the CA should be slow to substitute their judgment of a mass of evidence for that of the ET.

By contrast, in *Sargeant*, the ET had proven too willing to defer to the government, failing to objectively assess the legitimacy of aims in the particular context of the case. The CA questioned some of the assertions made by the government – it was not apparent, for instance, that younger firefighters could mitigate reductions in their pension benefits by changing careers or investing more of their salary. That the provisions purported to serve some 'moral' agenda, did not displace the need for evidence justifying the adoption of differential age criterion. Consequently, the CA concluded, the difference in treatment could not be justified, and the age discrimination claims were successful.

2. Indirect race discrimination and equal pay

Although it noted that the success of the age discrimination claims meant these claims were of no practical significance, the CA went on to find that they were made out in *McCloud* and likely made out in *Sargeant*. Given the success of the initial age discrimination claim, it was agreed that no independent question as to justification arose on the facts. Consequently, the only remaining question was whether a *prima facie* case of discrimination had been made out.

The court's analysis focused on two key issues: group disadvantage and causal connection.

Group disadvantage

In *Sargeant*, it was argued that, as the majority of those affected by the transitional provisions were white males, women and black and minority ethnic (BME) firefighters were not sufficiently disadvantaged for a prima facie case of discrimination to be established. The CA disagreed. Women and BME firefighters formed protected sub-groups of the disadvantaged class, and statistics suggested that they were particularly affected by the transitional provisions. However, while the CA considered it highly likely that group disadvantage was made out, this matter would have been remitted to the ET if the age discrimination claim had not succeeded.

Causal connection

Applying Lady Hale's judgment in *Essop v Home Office and Naeem v Secretary of State for Justice* [2017] UKSC 27; [2017] ICR 640; Briefings 830 & 840, the CA rejected the submission that there was a need for a causal connection between that claimants' race and sex and the disadvantage suffered. It was immaterial that the cause of female and BME firefighters' disadvantage was the age criterion contained within the adopted transitional provisions. By removing the provisions, the disadvantage would likewise be removed.

Comment

The CA's decision represents a positive restatement of the need for judicial oversight of government measures in the realm of social policy. It rightly recognises the government's margin of discretion in respect of both aims and means, while recognising this does not enable the government to rely on generalisations, or merely restate the anticipated discriminatory impact of a law in justification of its adoption, including in cases that involve an element of political or moral judgment.

The CA's judgment on indirect discrimination is also of note. It demonstrates the value of Lady Hale's judgment in *Essop* and *Naeem*, and its ability to counter submissions which, if upheld, would undermine the very purpose of indirect discrimination law.

With the judgment's costly implications for these and other pension scheme changes, an appeal is expected.

Joanna Whiteman and Sam Barnes
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Briefing 890

Although statutory pro rata principle not applicable because of the working pattern, prima facie discrimination confirmed where part-time workers paid half of full-time salary yet available contract days proportionately more than half

British Airways Plc v Pinaud [2018] EWCA Civ 2427; November 1, 2018

Facts

The claimant (P) was a member of British Airways cabin crew. In 2005 she transferred from full-time to part-time working. The full-time comparator contract is known as the '6:3' contract whereby the employee is available for work for six working days and has three days off. When P went part-time, she switched to a '14:14' contract whereby she was available for work for 10 working days and had 4 days off, followed by 14 days off because she was part-time.

As a part-time worker P was paid exactly 50% of her full-time comparator's salary who was on the 6:3 contract. However analysis of the annual working days and pay under the '6:3' and '14:14' contracts revealed that P had proportionately more available or working days than the comparator i.e. 8.5 more days (pro rata) or in percentage terms 3.53% more available days, whilst receiving exactly half the salary.

There was a distinction between available hours based on the contract and the actual duty hours worked in any period. Whilst P was contractually required to be available certain hours as outlined above, her actual working hours or duty hours were determined by the employer taking into account various factors, such as operational need and employee bids, and translated into rotas. Throughout the internal and external proceedings British Airways contended that in applying the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (the Regulations), actual working hours were the relevant hourly determinant.

The appeal focused upon the interpretation of the relevant statutory provisions and the European Directive Council Directive 97/81/EC of 15 December 1997 on part-time work (the Directive). Regulation 5(1)(a) of the Regulations provides as follows:

> *A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker – (a) as regards the terms of his contract.*

Regulation 5(3) speaks to the application of the statutory pro rata principle: '*in determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate*'.

The 'pro rata principle' is defined in the following terms:

> *where a comparable full-time worker receives or is entitled to receive pay or any other benefit, a part-time worker is to receive or be entitled to receive not less than the proportion of that pay or other benefit that the number of his weekly hours bears to the number of weekly hours of the comparable full-time worker;*

and at Regulation 1(3):

> *In the definition of the pro rata principle and in regulations 3 and 4 'weekly hours' means the number of hours a worker is required to work under his contract of employment in a week in which he has no absences from work and does not work any overtime or, where the number of such hours varies according to a cycle, the average number of such hours.*

It is instructive to note clause 4 of the Directive provides as follows:

> *1. In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part-time unless different treatment is justified on objective grounds. 2. Where appropriate, the principle of pro rata temporis shall apply.*

Employment Tribunal

The ET's decision was predicated upon a comparison of *'availability for work'* and salary. The ET noted that (a) the parties agreed the statutory pro rata principle did not apply to the present complaint under regulation 5(1)(a); and (b) British Airways accepted that the requirement to be available for 243 days (FT) and 130 days (PT) respectively were contractual terms of the comparator and P. The tribunal found there was indirect discrimination and it was not justified.

Employment Appeal Tribunal

The EAT similarly compared available time and salary because that's what the contractual terms referenced. The statutory pro rata principle was not relevant because weekly hours were not a relevant variable and it would not have been rational to bring actual hours into account in the determination of less favourable treatment under regulation 5(1)(a). Whilst the EAT upheld the ET's decision on less favourable treatment, it found the tribunal had failed to correctly address the question of justification and remitted the case for a re-hearing on that point.

British Airways appealed further this time arguing the statutory pro rata principle ought to have been applied; reiterating that the tribunal ought to have compared actual or duty hours rather than available hours; and, asserting that if it had done so it would have found P was not disadvantaged.

Court of Appeal

Giving the court's judgment, Bean LJ dismissed the appeal in the following terms:

> *The terms of P's contract required her to be available for work 130 days per year. The terms of the comparator's contract required her to be available 243 days per year. P was paid 50% of the comparator's salary. Half of 243 is 121.5. There may be advantages to the part-time worker from the way the 14-14 contract was constituted, and these may or may not be found sufficient to establish the justification defence when the case is remitted to the ET. But that does not affect the question of whether the terms of P's contract, insofar as they require her to be available for 130 days rather than 121.5 days, were prima facie less favourable than those of her full-time comparator: which is all we are concerned with in this appeal. In my view the ET were right to hold that they were.* [para 19]

The CA made three other noteworthy points. The National Minimum Wage Regulations 1999 and *Royal Mencap Society v Tomlinson-Blake* [2018] IRLR 932 did not provide British Airways

any assistance on the meaning of the phrase *'required to work'* in the part-time regulations. Evidence showing the part-time contract accrued advantages to employees may be relevant in the remitted hearing when examining proportionality. If the case went to a remedies hearing, it would be a very surprising conclusion to award compensation of 3.5% salary for any period of loss claimed if P actually worked fewer days then her comparator in the relevant period.

Comment

Whilst part-time (14:14) workers were paid half the salary of full-time (6:3) workers, annually their available contract days were proportionately more than half. This constituted prima facie less favourable treatment. 8.5 days per year pro rata is not de minimis.

The statutory pro rata principle did not apply because the analysis involved available days and did not involve weekly hours. Actual hours worked may be relevant to the question of justification, but were not a relevant determinant of less favourable treatment. There are few authorities speaking to the issues raised in this case including how the pro rata principle operates in practice. Consequently this judgment has some value for practitioners.

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Briefing 891

Guidance on the relevance of mental ill-health on extension of time applications

J v K and another (Equality and Human Rights Commission intervening) [2019] EWCA Civ 5; January 22, 2019

Facts

J's claim against the respondents in the ET was struck out and he was ordered to pay the respondents' costs in the sum of £20,000. J sought to submit an appeal to the EAT via email, five minutes before the 4pm deadline on the very last day for appealing. However his appeal submission failed to be received because the attachment was too large. J then resubmitted his appeal with the attachments as a smaller number of files, received by the EAT an hour later, by 5pm. J applied for an extension of time with his grounds including that he was suffering from serious mental ill-health. His application for an extension was refused by the registrar on the papers, and later by HHJ Hand QC at an oral rehearing. J appealed further to the CA. The CA invited the Equality and Human Rights Commission to apply to intervene on the issue of guidance on the relevance of a party's mental ill-health in the context of an application for an extension of time for appealing.

Employment Appeal Tribunal

Under rule 3(1)(a)(i) of the Employment Appeal Tribunal Rules of Procedure 1993 (as amended) J was obliged to institute his appeal by serving on the EAT a notice of appeal and various specified additional documents by no later than 42 days after the date that the ET's reasons were sent. By rule 37(1A) he was obliged to serve the relevant documents by 4pm.

At 3:55pm, five minutes before the deadline on the last day for appealing, J sent an email to the EAT with an attachment containing the notice of appeal and specified documents. The communication failed because the attachment was larger than the 10 MB capacity of the EAT's server. J's resubmitted smaller files were all received by the EAT by 5pm and were treated as received on the next working day.

HHJ Hand rejected the argument that there were good reasons for J leaving it to the last minute to institute his appeal. The EAT held that there was (a) '*freely and easily available*' guidance online (i.e. T440, guidance by HMCTS on the gov.uk website: *I want to appeal to the Employment Appeal Tribunal*)) which would and should have alerted J to the need to break up documents of more than 10 MB into smaller parts; and (b) that there was nothing about his particular circumstances, and specifically his mental condition, which excused him from having accessed that guidance.

Court of Appeal

The CA with LJ Underhill delivering the leading judgment held it was just to grant an extension of time to an appellant whose failure to institute an appeal within the time limit stipulated by the EAT Rules

1993 rule 3(1)(a) and rule 37(1A) had been caused by the inability of the EAT's server to accept emails and attachments whose size exceeded 10 MB. Although the EAT had drawn attention to the problem in its published guidance (T440), that guidance had not been drawn to J's attention.

The CA held that in the present case the obstacle here was not something extraneous to the EAT, for example, documents going astray in the post or the appellant's computer failure. The problem being the limited capacity of the EAT's own system (insufficiently notified to J) put the case into a different category.

The CA cited the cases of *Desmond v Cheshire West and Chester Council HQ* [2012] UKEAT 0007/12/2006 and *Farmer v Heart of Birmingham Teaching Primary Care Trust* [2015] UKEAT 0896/14/3103 where short extensions of time had been granted to appellants in similar circumstances to J. In *Desmond,* HHJ McMullen granted an extension notwithstanding his finding that the appellant '*only had himself to blame for leaving [service] so late*'.

The CA found that in the very particular circumstances of the present case HHJ Hand was wrong to refuse an extension. The correct analysis being that J had provided a satisfactory explanation for missing the deadline, namely his (on the particular facts, reasonable) ignorance of the 10 MB limit. Where J had not been directed to the guidance sufficiently, where the cause of the problem was the EAT's own system, and where service was correctly effected within an hour of the deadline, this was properly one of those exceptional cases where an extension was required as a matter of justice.

Guidance on approach to issues of mental health

The CA went on to give some guidance where mental ill-health, or indeed any other disability, had contributed to a potential appellant failing to lodge an appeal in time.

The starting-point in a case where an applicant claimed that they had failed to lodge their appeal in time because of mental ill-health, had to be to decide whether the available evidence established that they had been suffering from mental ill-health at the relevant time. This would usually require some independent support preferably in the form of a medical report directly addressing the question but might be sufficiently established by less direct forms of evidence.

If that question was answered in the applicant's favour the next question was whether the condition in question explained or excused (possibly in combination with other good reasons) the failure to institute the appeal in time. The fact that a person was suffering from a particular condition, for example, stress or anxiety, did not necessarily impair their ability to take and implement the relevant decisions. Medical evidence specifically addressing whether the condition in question had impaired the applicant's ability to take appropriate decisions would be helpful but was not essential. The CA warned against applications for an extension becoming elaborate forensic exercises.

If found that the failure to lodge the appeal in time had been the result (wholly substantially) of the applicant's mental ill-health, justice would usually require the grant of an extension. However, that would not always be so, particularly if the delay had been lengthy. [paras 33-40]

In this case HHJ accepted that J had been suffering from stress and depression. However, he did not find that this had impaired his ability to pursue his appeal. There was no medical evidence to that effect and, at the relevant time, J had been actively pursuing other litigation. Accordingly, the CA found no error in that reasoning or conclusion. [paras 42-46]

Comment

This case highlights the need to consider the individual circumstances in respect of the late submission of appeals. This is particularly important where there is sound evidence supporting a mental health condition serious enough to have potentially impacted on the timing of the appeal, especially where the time extension sought is very short, as it was here.

Elaine Banton
Barrister
7BR Chambers

EA Disability Regulations and excluded conditions challenged in employment case

Wood v Durham County Council UKEAT/0099/18/00; September 3, 2018

As readers will be aware from the November 2018 edition of *Briefings*, the exclusion of certain impairments from the scope of the Equality Act 2010's (EA) disability provisions in regulations has been held to be contrary to the European Convention on Human Rights in respect of children in education cases (see *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*;* Briefing 883). Where does that leave those exclusions in employment cases?

Wood came out not long after *C & C*. There did not appear to be any arguments in *Wood* about the claimant's rights under the Human Rights Act 1998 however, and it is not, so far as the writer understands, subject to appeal. At present, then, these exclusions remain applicable to employment cases.

Facts

Mr Wood (W) worked for the respondent (the Council) as an anti-social behaviour officer for nine years. Previously he had been a police officer for 17 years. W asserted that he had post-traumatic stress disorder (PTSD) and associated amnesia and memory loss which on occasions caused him to suffer forgetfulness and that such forgetfulness would include him forgetting to pay for items before leaving a shop. It is common ground that on August 24, 2015, he left Boots the Chemist, not having paid for items he had placed in his bag, and that the consequence of his doing so ultimately led to his dismissal. It was not in dispute that what happened in Boots that day was the effective cause of his dismissal.

Employment Tribunal

W brought a tribunal claim for unfair dismissal and disability discrimination. In respect of the latter, he maintained that the accusation of shoplifting and subsequent issue of a fixed penalty notice was, for the purposes of a s15 claim (discrimination because of something arising as a consequence of disability), the 'something' arising from his disability.

He also brought disability claims of indirect discrimination and failure to make reasonable adjustments – both relying upon the provision, criteria and practice of the standards of conduct and the requirement to disclose the issue of the penalty notice.

It was implicit that what had happened in August had not been an isolated or one-off act.

At the tribunal hearing it was conceded by the Council that W had the mental impairment of PTSD and, on the face of it, was therefore disabled. However, the Council relied on Regulation 4(1)(b) of the Equality Act (Disability) Regulations 2010 (the Regulations) where a tendency to steal is an excluded condition. The nub of the dispute (as framed by the EAT) between the parties was whether the events of August 24, 2015 demonstrated that W had a tendency to steal, or exhibited merely a tendency to memory loss and forgetfulness. It appears to have been accepted by W that if the Council could prove to the civil standard that what happened in Boots on August 24, 2015 amounted to a tendency to steal, then his condition would be excluded by virtue of the Regulations because he was dismissed in consequence of events that day and he would be deemed not to be disabled.

The ET stated that it was necessary not only to consider if a claimant has an excluded condition pursuant to Regulation 4(1)(b), but also how it relates to the act of discrimination complained of. The tribunal concluded that since the effective cause of W's dismissal (which was the discriminatory treatment complained of) was this excluded condition, the claim must fail.

Employment Appeal Tribunal

W appealed against the decision on three grounds, namely that the ET:

1. erred in finding a tendency to steal
2. should not have sat with a judge alone
3. its judgment was perverse.

The EAT dismissed the appeal having considered the tribunal's appropriate approach to the case law involved (specifically *Edmund Nuttall Ltd v Butterfield* [2006] ICR 77 and *Governing Body of X Endowed Primary School v Special Educational Needs and Disability*

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Tribunal (No 1) [2009] IRLR 1007).

On the first ground, the EAT held that W had always put his case on the basis that he had a tendency to do whatever the correct description was of what he was found to have been doing – it was not simply a 'one off'. The question of whether what he was doing was forgetfulness or dishonesty was a matter of fact for the judge. The question of dishonesty is a question for the fact-finder, be that a jury or an employment judge, see *Ivey v Genting Casinos (UK) Ltd t/a Crackfords* [2017] UKSC 67.

The second ground was rejected on the basis that it could have been, but was not, raised at the time; nor was it certain that a request for a full tribunal would have been acceded to.

As for the third ground, only one perversity point was held to have been potentially significant but as it made no difference to the outcome, this ground was also dismissed.

As a postscript, the EAT re-iterated the caution that should be applied when tribunals consider whether to hold preliminary hearings on strike-out of discrimination claims, as follows:

> *In future, it would be advisable for Tribunals to think extremely carefully before listing as a Preliminary Hearing matters involving Regulation 4 where there is also a free-standing wrongful or unfair dismissal complaint unless the issues are genuinely discrete.* [para 39]

Comment

The Regulations are likely to face further challenges outside the education sphere but for the moment they present a barrier to those who experience detrimental treatment as a result of an impairment which falls within the exclusions in Regulation 4.

This case is useful though for those facing a respondent who is asking for a preliminary hearing to determine the application of the Regulation, or indeed any other aspect of disability, given the re-iteration of the House of Lords' views in *SCA Packaging Limited v Boyle (Northern Ireland)* [2009] IRLR 746; Briefing 540, on the desirability of avoiding a preliminary hearing and moving instead to a final hearing.

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893 Briefing 893

Implied term protects employees on long-term disability benefit from incapacity dismissal

Awan v ICTS UK Ltd UKEAT/087/18/RN; November 23, 2018

Implications for practitioners

The EAT's decision reinforces previous case law on the existence of an implied term that an employer will not dismiss for reasons of incapacity the beneficiary of permanent health insurance (PHI) or other long-term benefits. Dismissal of a disabled employee in those circumstances will almost inevitably be found unfair under the Employment Rights Act 1996 s98 and objectively unjustifiable discrimination arising from disability under Equality Act (EA) s15. The EAT decision makes clear unless the express contractual term giving the benefit limits its application to circumstances where there is insurance cover, the implied term applies irrespective of whether the benefit will be paid by an insurer or out of the employer's own pocket.

Facts

The claimant (A) worked in security at Heathrow Airport. He was employed by American Airlines. His contract of employment entitled him to benefit from a long-term disability benefit plan paying an annual payment of two-thirds of salary. That benefit was derived from an insured income protection policy held with Legal & General, entitling insured members to be paid long-term disability benefits so long as they were a 'disabled member', a term defined as including those incapacitated by injury or illness from performing their own occupation but who continue to be in employment. The benefit would terminate on ceasing to be in employment with the insured employer.

In October 2012 A was certified unfit to work. Six weeks later, A's employment was transferred to ICTS under TUPE. ICTS did not benefit from transfer of the

insurance policy, so sought a new insurer, Canada Life, who refused to provide cover for those on sick leave at the time of transfer. Legal & General refused to provide cover following transfer, relying on the fact A was not an American Airlines employee, but in negotiations agreed to pay A's benefits as a gesture of goodwill until September 2014. Once that expired, ICTS agreed to pay A the benefit on a without prejudice basis whilst the situation was clarified.

The following month, A was dismissed on incapacity grounds. A complained his dismissal was unfair and discriminatory because of something arising from his disability.

Employment Tribunal

The ET found ICTS contractually obliged to pay long-term disability benefits to A during the currency of his employment. However, it found there to be no implied contractual term preventing dismissal for incapacity whilst receiving those benefits. There was no inconsistency between the terms of A's contract dealing with disability benefits, sick pay and the right to terminate. Accordingly business efficacy did not demand such a term be implied. To imply such a term would have restricted the contractual right to terminate, and would have offended the principle that terms will not be implied if inconsistent with an express term. The ET held the decision to dismiss was for operational reasons, fell within the range of reasonable responses and was fair, and that whilst dismissal was unfavourable treatment it met the objective justification test under EA s15(1)(b). On that proportionality question, the ET relied on operational difficulties caused by A's absence, the length of his absence and the lack of indication he could return to work with adjustments.

Whilst A's claim was dismissed, his former colleague, Mr Visram (V), succeeded before a different ET on similar grounds. In V's case, the ET found there to be an implied term that whilst benefiting from long-term disability benefits, V would not be dismissed save for cause other than ill-health. V's dismissal was found to be unfair and the objective justification defence to the EA s15 claim failed.

Employment Appeal Tribunal

The principal ground of appeal centred on the existence of an implied term preventing A's dismissal for incapacity whilst entitled to long-term disability benefits.

The EAT found in A's favour, holding the implied term existed. It relied on case law starting with *Aspden v Webbs Poultry Meat Group (Holdings) Ltd* [1996] IRLR 251 and ending with *Briscoe v Lubrizol Ltd* [2002] IRLR 607 to hold that the purpose of a contractual benefit to PHI or similar protection would be defeated if an employer could end the entitlement by dismissing employees when they become unfit for work. The EAT was not persuaded a distinction should be made where the scheme lacks insurance cover, so the funds come out of the employer's pocket. Whether through the officious bystander test or the business efficacy test, the term could be implied. If the employer wanted the express term to be restricted by insurance cover, it could have said so in the contract.

The EAT did not engage with the EA s15 proportionality question, simply holding that given the reversal of the ET's position on the implied term, neither the conclusion on unfair dismissal nor on proportionality could stand.

The EAT's judgment is currently awaiting a decision on an application for permission to appeal to the CA.

Comment

The EAT judgment illuminates no principles under EA s15. The proportionality of A's dismissal almost certainly stands or falls upon the finding of breach of the implied term. It is, however, a useful reminder of the protection from dismissal for incapacity afforded since *Aspden* to the beneficiaries of PHI and other long-term disability benefits.

Awan is factually unusual. Ordinarily the benefit is insurance-backed and is contractually negotiated with the current employer. In *Awan*, the combination of a TUPE transfer and lack of insurance cover means that ICTS found themselves responsible for paying a long-term benefit to an employee who had never performed a day's work for them. Although given short shrift by Simler J, there remains room on appeal to resurrect the argument that these factual circumstances take A's case far away from *Aspden*, where the court held the officious bystander inquiring about the possibility of dismissal of the PHI beneficiary for incapacity reasons could be waved away by the contract's negotiators with a reassuring *'Of course it wouldn't happen'*.

In the meantime, unless an employer expressly ties long-term disability benefits to the existence of insurance cover, disabled employees with those benefits can rest assured that to dismiss them for incapacity will likely be both unfair and not objectively justifiable under EA s15(1)(b).

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Use of colloquial term does not cause a departure from the legal test

Martin v University of Exeter UKEAT/0092/18/LA; August 24 & 30, 2018

Implications for practitioners

Establishing whether a claimant is disabled pursuant to s6 of the Equality Act 2010 is a technical hurdle which can either make or break a case. Consequently, many practitioners see it as essential to use expert evidence to support the assertion that the disability criterion has been met. Whilst there is no rule of law requiring a claimant to discharge this evidential burden by way of expert evidence, judicial observations (*Royal Bank of Scotland plc v Morris* UKEAT/0436/10) imply that pertinent issues relating to disability are likely to be answered where this type of evidence is available. Additionally, the outcome of this case suggests that there are inherent risks associated with pursuing a case without this evidence.

Facts

The claimant (M) was employed by the University of Exeter and during his employment he encountered a very distressing situation, which in turn caused him great anxiety. Prior to that incident no stress related illnesses were recorded on M's medical records. However, in June 2015 M's GP recorded for the first time that he had a stress related illness. In July 2015 M was placed on extended sick leave and remained absent from work for many months. During this period a diagnosis of post-traumatic stress disorder (PTSD) was made. M sought to pursue claims against the university on the grounds of disability discrimination and failure to make reasonable adjustments.

Preliminary hearing

By the date of the preliminary hearing the respondents conceded M was disabled and suffering from PTSD. However, the preliminary hearing proceeded on the basis that it was still necessary to determine two keys issues: (a) was M disabled during the material times when the alleged discriminatory acts and failure to make reasonable adjustments occurred, and (b) when did M first become disabled?

At the hearing M provided GP and Occupational Health Practitioner medical notes and he and his wife gave witness evidence of the impact the disability had on him. Notably, there was no expert medical evidence to support (a) the premise that M was a disabled person and (b) the date when he became disabled. Given that M was suffering from a mental impairment, it was surprising that this was absent. Particularly, more so, as EAT judicial observations suggested that the '*… existence or not of a mental impairment is very much a matter for qualified and informed medical opinion…*' (*Royal Bank of Scotland plc v Morris*).

Despite the absence of any expert medical evidence to assist in the assessment of the issues placed before him, the ET judge determined: '*In order to satisfy the statutory definition [of disability] it is also necessary to consider first when these symptoms started to have a substantial adverse effect on his day-to-day activities and secondly when did the condition become long-term in the sense that it had lasted 12 months or was likely to do so*'. [para 30]

The judge then proceeded to examine the evidence presented by M at the hearing and remarked that: '*… there is nothing in the GP notes or other medical evidence to suggest that this [the disability] could necessarily have been predicted either in June 2015 when an anxiety relation [sic] impairment was first recorded nor in September 2015 when PTSD was first suspected'.*

Additionally, the judge made the following key findings: *'It is obviously difficult to be exact in a claim of this nature, but bearing in mind all of the above matters I conclude that the impairment was having a substantial adverse effect on the claimant's day-to-day activities by April 2016, and although it had not lasted 12 months by that time, nonetheless it is reasonable to conclude (because it had already lasted for at least nine months) that it was likely to last 12 months.'*

In view of these findings, M failed to leap over the technical s6 disability hurdle and consequently was unable to progress his disability discrimination claims. M appealed to the EAT.

Employment Appeal Tribunal

M submitted 3 grounds of appeal; however, the crux of his appeal rested on his view that the ET judge's use of the colloquial term, 'necessarily predicted' was a departure from the legal test set down in the House of Lord's decision, *SCA Packaging Ltd v Boyle* [2009] ICR 1056, Briefing 746. In that case it was established that

when assessing if the substantial adverse effects of an impairment were '*likely*' to last 12 months or more, the correct legal test is: was that something which *'could well happen*'.

The EAT noted that the ET judge regrettably failed to make any mention of the legal test in *Boyle*. However, the EAT did find that the ET judge had referred in his judgment to a case authority which outlined the legal test established in *Boyle*. In view of this the EAT held that the judge's use of the word '*necessarily*' was in a predictive context, for the sole purpose of balancing the differing views he found in the medical notes before him.

On this basis the EAT held that the ET judge had applied the correct legal test, albeit that he coined a colloquial term to determine the date on which M fell to be assessed as disabled, and the appeal was dismissed.

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Briefing 895

Context is crucial when assessing offensive conduct

Evans v Xactly Corporation Limited UKEAT/0128/18/LA; August 15, 2018

S26 of the Equality Act 2010 (EA) provides protection from unwanted conduct related to a relevant protected characteristic which has the purpose or effect of violating a complainant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. This appeal addresses the difficult area where conduct which might ordinarily be taken on its face value as offensive and amounting to harassment, seen in context, is neither intended to nor has the effect of doing so.

Implications for practitioners

At first glance the decision of the EAT to uphold an ET's decision that using the term '*fat ginger pikey*' did not amount to harassment looks like a surprising one and is one that caused some alarm among discrimination lawyers reading the headline. But on closer reading it is clear that this case does not find that the use of such derogatory terms is acceptable; what it does remind us of however is that in harassment claims context is all important, noting that '*the context in which behaviour occurs can be crucial to understanding its meaning*'.

Facts

Mr Evans (E) was employed as a sales representative by Xactly Corporation Limited (X) for less than a year. Following his dismissal he brought a number of claims under the EA including claims of harassment related to disability and/or race. He relied on two impairments as disabilities: his type 1 diabetes, which was conceded by X, and his under-active thyroid (hypothyroidism) the effects of which were not conceded as amounting to a disability. E described himself to the tribunal as fat and contended that his weight was linked to his disability.

As well as complaining about the use of the phrase '*fat ginger pikey*', E also complained about the use of the terms 'salad dodger', 'gimli' and 'fat yoda' which he relied on as size-related comments.

E's claim for harassment related to race was based on his association with the Traveller community.

Employment Tribunal

E failed to produce medical evidence to establish a link between either his type 1 diabetes or his hypothyroidism and his weight. The ET also found on the evidence that none of X's witnesses considered E to be fat. His colleagues were aware of his type 1 diabetes as he would regularly inject himself at work but nobody had an issue with it, or with his weight. Size-related comments were made indiscriminately regardless of E's or anyone else's actual size.

It was accepted that one colleague, who was described as E's friend knew that E had close links to the Traveller community but the ET found that none of X's other witnesses were aware of those links.

The ET (Employment Judge Wade sitting with members Ms M Taylor and Ms M Jaffe) heard evidence as to the office culture and what E's line manager described as the 'banter' that took place. This included on E's part his regular use of the word c***, calling his line manager 'fat paddy', calling a female colleague 'pudding' and giving her cuddles, which he continued to do after she had asked him to stop, leading her to complain to her manager who had to point out to E that his behaviour was not appropriate.

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It was accepted that one of E's colleagues had used the phrase '*fat ginger pikey*'. His evidence that he had no idea E had any links to the Traveller community and that he had not intended to offend E was accepted by the tribunal. The ET accepted that the colleague thought of E as a friend and that they had been out together socially both before and after the phrase was used. E told the tribunal that he did not believe that his colleague had used the phrase with the intention of upsetting him.

The ET prefaced its findings on the harassment allegation with the observation '*context being all in harassment cases*'. The ET readily accepted that the comment '*fat ginger pikey*' could have amounted to harassment but went on to set out why in the particular context of this case it was not, giving 11 reasons based on its findings from the evidence it had heard, including:

- E's participation in the 'office banter'
- the finding that E was not upset at the time
- E's lack of complaint at the time
- that E only raised it in a grievance once he was faced with performance improvement procedures and likely dismissal.

The ET expressed its clear view that E was not genuinely upset at the time or subsequently but had retrospectively, or in the ET's words 'tactically', raised it in order to head off disciplinary proceedings and to negotiate an exit.

Employment Appeal Tribunal

HHJ Stacey dismissed E's appeal and upheld the ET's decision. Unsurprisingly she held that the ET was best placed to make findings of fact about the context and office culture which were necessary to understand E's allegations of harassment. The ET had made very careful findings of fact and having done so was fully entitled to conclude that the comments complained of did not amount to harassment, whilst acknowledging that in other contexts and circumstances it might have done. The EAT reiterated that harassment claims are highly fact sensitive and context specific.

The ET had found that E was an active participant in inappropriate comments and behaviour in the workplace and was seemingly comfortable with the office culture and environment.

Both the ET and the EAT referred to the judgment of Underhill P (as he then was) in *Richmond Pharmacology v Dhaliwal* UKEAT/458/08, Briefing 535, in which he observed that:

> *Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly where it should have been clear that any offence was unintended.*

Comment

Briefings has previously reported on the pervasive discrimination experienced by Gypsies, Roma and Travellers – see Briefing 836 '*The last respectable form of racism?*' which referred to the Commission for Racial Equality's findings on this topic from as long ago as 2004.

Setting aside the headline reporting of this case and the alarm which it may have caused to discrimination practitioners and members of the Traveller community, it should be noted that it was not disputed that the term 'pikey' could (in other circumstances) be harassment related to race. The decision in this case should properly be seen as one confined to its particular facts.

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Briefing 896

EA exemption for charities and positive action meant no unlawful discrimination

R (Z and others) v (1) Hackney LBC and (2) Agudas Israel Housing Association
[2019] EWHC 139 (Admin); Divisional Court, February 4, 2019

Implications for practitioners

This case[1] represents an important precedent for charities and small organisations which provide benefits to persons sharing a protected characteristic. In this case, the defendant, Agudas Israel Housing Association (AIHA), successfully defended a claim of unlawful discrimination by arguing the exceptions under the Equality Act 2010 (EA) s158 (positive action) and s193 (charities).

Owing to the scarcity of case law interpreting the

1. Judgment is available here: http://www.bailii.org/ew/cases/EWHC/Admin/2019/139.html

exceptions under the EA, the court placed considerable reliance upon the Statutory Code of Practice issued by the Equality and Human Rights Commission, which courts are required by s15(4)(b) Equality Act 2006 to take into account where it appears relevant.

The court's decision was based on a large body of evidence as to the poverty, overcrowding, discrimination, needs and disadvantages connected to the protected characteristic of religion shared by members of the Orthodox Jewish Community (OJC). A defence based on one of the exceptions may struggle to succeed without such strong evidence. This included qualitative and quantitative data in reports, surveys and interviews.

The dividing line between positive action, which is lawful under s158, and positive discrimination which is unlawful, will depend upon the context, the wording of the positive action provision and crucially, whether the priority that is accorded to a disadvantaged group is automatic or unconditional:

> *In any event, [AIHA's] is not a case where "automatic and unconditional priority" has been accorded to members of the Orthodox Jewish community. AIHA's charitable objective confers only a "primary" position to such members, and, for reasons already explained at length, it is the very special market circumstances that explain why AIHA in fact allocates each of the small number of properties that become available to members of the Orthodox Jewish Community.* [paras 79 – 83]

It will also depend upon the size of the organisation. AIHA was assisted by the fact that it had insufficient resources to meet its stated primary aim. Had the organisation held surplus stock, it would have been difficult to argue that it was proportionate to refuse to provide to a wider pool of people.

Facts

AIHA is a small, charitable, private registered provider of social housing. Its charitable objects stated that it would provide housing *'primarily for the benefit of the Orthodox Jewish Community'*. In practice AIHA's policy precluded anyone who was not a member of the OJC from becoming a tenant of AIHA's properties.

AIHA had fewer than 1,000 social housing units and was accordingly classified as a smaller provider by the Regulator of Social Housing. However, over 40% of its properties had four or more bedrooms in response to the overcrowding and large family sizes common in the OJC. In 2017-2018, 50% of all four-bedroom properties let in Hackney were let by AIHA and 100% of all such properties in Stamford Hill. Accordingly AIHA's charitable benefit was centred on one of the largest Orthodox Jewish communities in Europe.

The claimants were a family of a mother and four children who lived in Stamford Hill but were not members of the OJC. A number of properties owned by AIHA, which fitted the family's criteria, became available but were let to others. The claimants alleged that AIHA's system involved unlawful racial and religious discrimination in respect of the provision of services contrary to s29 EA.

AIHA defended its policy on the basis that it prioritised letting to members of the OJC to meet the specific needs of the community and to address disadvantages which members of the OJC experienced. AIHA's housing had special features to facilitate following the tenets of the Orthodox Jewish faith in relation to observing the Sabbath.

High Court

The claims were dismissed. AIHA's policy involved direct discrimination on the basis of the protected characteristic of religion and AIHA treated less favourably those persons who were not members of that community. However, there was no contravention of s29 because of the exception for positive action under s158 and for charities under s193.

The exception under s158

S158 EA does not prohibit a person from taking any action which is a proportionate means of achieving the aim of enabling persons who share a protected characteristic to overcome a disadvantage connected to that characteristic or from meeting their needs which are different to the needs of others.

The court held that the requirements of s158 were satisfied because, on the evidence before the court, members of the Orthodox Jewish religion shared real, substantial disadvantages connected to religion. The needs of the OJC were different from the needs of persons who did not share the protected characteristic. AIHA's services directly addressed those needs and disadvantages.

For this exception to apply, the court had to consider the action to be proportionate and followed *Akerman-Livingstone v Aster Communities Ltd (formerly Flourish Homes Ltd)* [2015] UKSC 15; [2015] AC 1399; Briefing 747:

> *First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective? [And] … step four … whether the impact of the rights infringement is disproportionate to the likely*

benefit of the impugned measure. [para 28]

AIHA's arrangements were proportionate. In part this was because AIHA's properties in Hackney were only 1% of general needs housing. AIHA had limited resources and did not completely satisfy its primary objective.

The exception under s193

AIHA '*acts in pursuance of a charitable instrument*' for the purposes of s193(1). The court held that this phrase meant that it acted *in line with*, *in accordance with* or *authorised by* it. Its actions did not need to be *mandated* by the charitable instrument.

Final comment

Proportionality is relevant under both ss193 and 158. The court stressed that the analysis of proportionality might be different where the service provider enjoyed a large share of whatever was considered to be the relevant market for the goods, services or other resources being provided. [para 78]

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Notes and news

Legal aid for victims of discrimination: EHRC inquiry

The EHRC is continuing with its inquiry to investigate whether changes to legal aid funding have left some victims of discrimination unable to access justice (https://www.equalityhumanrights.com/en/our-work/news/new-inquiry-determine-whether-discrimination-victims-lower-incomes-are-being-denied).

The inquiry will look at whether legal aid for discrimination cases provides effective access to justice for people who have suffered discrimination. It will look at:

- how discrimination cases are funded by legal aid
- how many people receive legal aid funding for discrimination claims
- whether there are barriers to accessing legal aid
- whether some people experience specific difficulties in accessing legal aid
- the operation of the telephone service as the access point for most discrimination advice
- if legal aid provides effective access to justice for people who complain of discrimination
- whether improvements could be made to reduce barriers and improve access to justice.

Abbreviations

AC	Appeal Cases
BAME/ BME	Black Asian and minority ethnic Black and minority ethnic
CA	Court of Appeal
CBE	Commander of the Order of the British Empire
CJEU	Court of Justice of the European Union
CMLR	Common Market Law Review
DLA	Discrimination Law Association
EA	Equality Act 2010
EAT	Employment Appeal Tribunal
ECHR	European Convention on Human Rights 1950
ECJ	European Court of Justice
EHRC	Equality and Human Rights Commission
EJ	Employment Judge
EqPA	Equal Pay Act 1970
ET	Employment Tribunal
EU	European Union
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
FTSE	Financial Times Stock Exchange
HHJ	His/her honour judge
HL	House of Lords
HMCTS	Her Majesty's Courts and Tribunal Service
HMRC	Her Majesty's Revenue and Customs
ICR	Industrial Case Reports
ILJ	Industrial Law Journal
IRLR	Industrial Relations Law Report
IT	Information technology
J	Judge
MB	Megabyte
NHS	National Health Service
ONS	Office for National Statistics
P	President
LASPO	Legal Aid, Sentencing and Punishment of Offenders Act 2012
PCP	Provision, criterion or practice
PHI	Permanent health insurance
PTSD	Post-traumatic stress disorder
LCJ/LJ	Lord Chief Justice/ Lord Justice
LLP	Legal liability partnership
QC	Queen's Counsel
SC	Supreme Court
TUPE	Transfer of Undertakings (Protection of Employment) Regulations 2006
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

Outcome of the review of the Legal Aid, Sentencing and Punishment of Offenders Act 2012

Five years after the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), the government has reviewed the Act and on February 7, 2019 published its Post Implementation Review of legal aid reforms, a new Legal Support Action Plan to transform legal support and a new Review of legal aid means tests: https://www.gov.uk/government/news/government-sets-out-new-vision-for-legal-support.

The three documents set out what government calls a 'new vision for legal support' which it describes as a new strategy to help people resolve legal problems at the earliest opportunity and avoid the need for unnecessary court proceedings.

The Coalition Government's original aim in its consultation on *'Proposals for the Reform of Legal Aid in England and Wales'* in 2010, was to:

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

The government considers that, on balance, the evidence suggests the statutory reforms in Part 2 of LASPO implemented on April 1, 2013, have successfully met their objectives and it does not therefore propose any amendments to the primary legislation.

Mandatory telephone gateway

Under its Legal Support Action Plan *'to deliver quicker and easier access to legal support services'* the government will, by spring 2020, remove the mandatory element which requires individuals to seek advice over the telephone in the first instance in discrimination cases and reinstate immediate access to face-to-face advice in this area.

The government also proposes to:

- review the thresholds for legal aid entitlement and wider eligibility criteria – this will ensure that in circumstances where it is necessary, legal aid continues being accessible to those who need it most
- amend the exceptional case funding process to improve timeliness and accessibility – this will make it easier for people to access legal aid for cases which are not generally in scope, but where there is a risk of a breach of human rights and a lawyer is required
- expand the scope of legal aid to include legal aid for non-asylum immigration matters for separated migrant children; and to cover all Special Guardianship Orders in private family law cases; and remove the means test for those with parental responsibility to oppose placement or adoption orders in family law proceedings
- invest up to £5m in innovative forms of legal support, harnessing the power of the UK's thriving LawTech sector to modernise and expand the services on offer
- double the funding for the litigants in person support strategy to £3m for the next two years, to ensure those representing themselves in court understand the process and are better supported through it
- ensure early intervention by delivering a series of pilots to explore new ways of delivering legal support and enhanced services for people in need; this will include testing new approaches to signposting support early in the process; piloting and testing legal support hubs; and bringing together existing legal support services; and
- pilot the expansion of legal aid to cover early legal advice in a specific area of social welfare law.

Bob Neill MP, chair of the Justice Committee, has given the report a cautious welcome saying: *'There are a number of positive proposals in the review and accompanying action plan but, in several key areas, proposals for further reviews and pilot evaluations risk being seen as "kicking the can down the road" … these [proposals] must be swift and focused as the pressures across the whole justice system - and the risk elements of LASPO continue to pose to access to justice - are real and immediate … I will now be discussing this matter with the Committee urgently and we will discuss what action to take.'*

Briefings