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Editorial

Call for implementation of socio-economic duty in England and Wales

The case for the implementation of the socio-economic duty in England and Wales under S1 of the Equality Act 2010 (EA) is gaining strength as can be seen in this edition of *Briefings*.

Ample evidence of the socio-economic inequalities in the UK today, if such were needed, is contained in the report of the special rapporteur on extreme poverty and human rights. Published in May and presented to the UN Human Rights Council at the end of June, Professor Philip Alston's report records the devastating impact of the government's austerity policies on UK society. Despite being the world's fifth largest economy with a booming economy, high employment and a budget surplus, one fifth of our population, 14 million people, live in poverty, and 1.5 million of them experienced destitution in 2017. Using figures provided by the Institute for Fiscal Studies, the National Audit Office and other independent sources, he reports that close to 40 per cent of children are predicted to be living in poverty by 2021; life expectancy is falling for certain groups; the legal aid system has been decimated; benefit rates for working-age people have remained frozen and housing benefit decimated. Women, racial and ethnic minorities, children, single parents, persons with disabilities and members of other historically marginalised groups face disproportionately higher risks of poverty.

Stephen Heath, in his article about Mind's engagement with the Mental Health Act review echoes Professor Alston's recognition that living in poverty can take a severe toll on people's physical and mental health. In his article he argues persuasively that there is institutional race discrimination in aspects of the mental health service which, as a result, is failing some BAME communities. Among a range of causes of mental ill-health is socio-economic inequality which *'is associated with higher rates of suicide and mental illness, by exposing individuals to a wide range of stressors, including negative life events as well as diminishing their hopes and expectations for a positive future with meaningful opportunities for work and life'*.[1]

Another example of the need for a legal duty to reduce inequalities of outcome which result from socio-economic disadvantage is highlighted by Marc Willers QC and Tim Baldwin. In their article they outline the government's inability or unwillingness to tackle the discrimination and inequalities faced by Gypsies, Roma and Travellers, providing an overview of the socio-economic disadvantages these ethnic groups face.

Disappointingly, in a May 2019 challenge to government austerity measures which has decimated housing benefit, the SC has dismissed the claimants' argument that the revised housing benefit regulations have had a discriminatory impact on lone parents. In *DA and Ors, R (on the application of) v Secretary of State for Work and Pensions* [2019] UKSC 21 the government successfully justified the regulations on the basis that imposing a cap on benefits achieves fiscal savings and incentivises parents in a non-working family to obtain work. In his dissenting judgment Lord Kerr stated the obvious: *'One can only incentivise parents to obtain work if that is a viable option. The evidence in this case overwhelmingly shows that … this is simply not feasible. In particular, lone parents are placed in an impossible dilemma. If they go out to work, they must find the resources for childcare. Those in the DA and DS groups will routinely find it impossible to obtain employment which will remunerate them sufficiently to make this a sensible choice. They also face the difficulty of obtaining suitable childcare, irrespective of whether they can afford it.'*

The work being done on implementing the socio-economic duty in Scotland is welcome and should blaze a trail for its implementation in England and Wales. The Scottish government's interim guidance on reducing inequalities of outcome caused by socio-economic disadvantage reflects the complexity of putting the duty into operation. Agreement on how to define and measure low income and wealth is critical given that the UK has no official measurement of poverty. This permits the Prime Minister to state that the numbers of people living in absolute poverty is at a record low – a view which so clearly clashes with Alston's findings.

The Scottish guidance recognises the clear links between the aims of the socio-economic duty and the s149 EA public sector equality duty and notes that those who share particular protected characteristics are often at higher risk of socio-economic disadvantage. As Willers and Baldwin argue in Briefing 897, involving the community through consultation and participation in defining measurements of socio-disadvantage, effective outcomes and the methodology of implementing the duty, will be critical to its success.

The DLA will follow with interest the three-year implementation phase in Scotland; it urges members to join with it and those MPs supporting the early day motion[2] on the commencement and enforcement of the s1 EA duty and demand that immediate steps are taken to implement the duty in England and Wales.

Geraldine Scullion
Editor

1. *Racism and Mental Illness in the UK* Apu Chakraborty, Lance Patrick and Maria Lambri https://www.intechopen.com/books/mental-disorders-theoretical-and-empirical-perspectives/racism-and-mental-illness-in-the-uk

2. https://edm.parliament.uk/early-day-motion/51058/commencement-and-enforcement-of-the-socioeconomic-duty-s1-of-the-equality-act

Please see page 33 for list of abbreviations

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Discrimination facing Gypsies, Roma and Travellers in the UK today

Marc Willers QC and Tim Baldwin, Garden Court Chambers, set out an overview of the discrimination and socio-economic disadvantages experienced by Gypsies, Roma and Travellers in the UK which, despite equality legislation and legal protection for their traditional way of life, has changed little over recent years. The failure of policy-makers to address the inequalities they experience was highlighted by the Women and Equalities Committee report: *Tackling inequalities faced by Gypsy, Roma and Traveller communities*. The authors review recent Strasbourg and domestic discrimination case law relating to Gypsy, Roma and Traveller communities. They conclude by identifying some goals to make better use of human rights and equalities legislation both as part of bringing cases and campaigning to improve protection for Gypsy, Roma and Traveller communities.

Overview

On January 27, 1945 Soviet troops liberated the Nazi death camp at Auschwitz-Birkenau. Quite rightly we reflect on the terrible fact that the Nazis murdered six million Jews in the Holocaust. Yet there is often little mention of the hundreds of thousands of Roma and Sinti people that were also murdered by the Nazis during World War II, in what has become known as the Porrajmos (the '*Devouring*').

The question always remains as to how the Nazis were able to commit these terrible crimes with impunity? The Nazi propaganda machine played a very significant role by reinforcing age old prejudices. Roma and Sinti were made scapegoats, blamed for the ills of society, dehumanised and characterised or stereotyped as anti-social thieves and vagabonds. The propaganda campaign worked; the settled population was conditioned to believe what they were being told (by what would now clearly be understood as '*hate speech*') and there was little opposition when Roma and Sinti were rounded up before being transported to camps from which they would never return.

Over 70 years later the horror of the Nazi concentration camps is hard to imagine but the widespread prejudice that Roma face in Europe (known as '*Anti-Gypsyism*' or '*Romaphobia*') has not abated; it is an unwelcome fact of their daily lives and with the growth of populist politics throughout Europe such prejudice appears to be on the rise. Politicians throughout Europe continue to use hate speech against Roma which in turn creates a climate in which racist violence is thought acceptable by offenders and, tragically, in recent years, Roma have been the victims of violent racist attacks and murder. For example, in 2012 a Slovakian policeman shot dead three Roma and severely injured two more in a killing spree which he said was motivated by a desire to '*solve the Roma problem*'; whilst in 2013 four men with links to nationalist organisations were jailed in Hungary for nine separate attacks on Roma and the murder of six people. Meanwhile, Roma continue to be forcibly evicted from their homes without the provision of suitable alternative accommodation, their children continue to suffer segregation in schools and they tend to live on the margins of society.

We are not immune from this hateful and discriminatory behaviour here in the UK. Romani Gypsies, Travellers and Roma migrants are amongst the most discriminated ethnic groups in our country, routinely targeted by those using hate speech both online and in other media platforms.

Gypsies and Travellers have been living in the UK for hundreds of years and in some rural areas of the country represent the main established ethnic minority group, yet they remain amongst the most disadvantaged racial groups in our society, with low levels of life expectancy, high vulnerability to serious illness, poor mental health, high child mortality rates and low levels of educational attainment and literacy.

A key contributor to the poor socio-economic status of Gypsies and Travellers is that thousands of families still have no lawful place to station their caravans and live their traditional way of life. Meeting the accommodation needs of Gypsies and Travellers should be a relatively simple task, but in the face of widespread prejudice amongst the settled population, successive governments have done little to address the shortage of sites.

Meanwhile, those Gypsies and Travellers without lawful sites continue to face eviction and a forced nomadic life in which children cannot attend school and healthcare needs are not properly addressed.

Romani Gypsies, Irish Travellers, Scottish and Welsh Gypsy Travellers are all entitled to protection from discrimination under the Equality Act 2010 (EA).

Nevertheless, Gypsies and Travellers still experience discrimination of the most overt kind. By way of example, '*no blacks, no Irish, no dogs*' signs disappeared long ago, but 'no Travellers' signs, used intentionally to exclude Gypsies and Travellers, are still widespread.

In 2004 Trevor Phillips, then Chair of the Commission for Racial Equality (CRE), compared the prejudice experienced by Gypsies and Travellers living in the UK to that of black people living in the American deep south in the 1950s, and in 2005, Sarah Spencer, a CRE Commissioner, drew further attention to their plight in an article entitled '*Gypsies and Travellers: Britain's forgotten minority*':[1]

> *The European Convention on Human Rights ... was a key pillar of Europe's response to the Nazi holocaust in which half a million Gypsies were among those who lost their lives. The Convention is now helping to protect the rights of this community in the United Kingdom ...*
>
> *The majority of the 15,000 caravans that are home to Gypsy and Traveller families in England are on sites provided by local authorities, or which are privately owned with planning permission for this use. But the location and condition of these sites would not be tolerated for any other section of society. 26 per cent are situated next to, or under, motorways, 13 per cent next to runways. 12 per cent are next to rubbish tips, and 4 per cent adjacent to sewage farms. Tucked away out of sight, far from shops and schools, they can frequently lack public transport to reach jobs and essential services. In 1997, 90 per cent of planning applications from Gypsies and Travellers were rejected, compared to a success rate of 80 per cent for all other applications ... 18 per cent of Gypsies and Travellers were homeless in 2003 compared to 0.6 per cent of the population ... Lacking sites on which to live, some pitch on land belonging to others; or on their own land but lacking permission for caravan use. There follows a cycle of confrontation and eviction, reluctant travel to a new area, new encampment, confrontation and eviction. Children cannot settle in school. Employment and health care are disrupted. Overt discrimination remains a common experience ... There is a constant struggle to secure the bare necessities, exacerbated by the inability of many adults to read and write, by the reluctance of local officials to visit sites, and by the isolation of these communities from the support of local residents ... But we know that these are communities experiencing severe disadvantage. Infant mortality is twice the national average and life expectancy at least 10 years less than that of others in their generation.*

Sadly, as the Women and Equalities Committee recently concluded, little has changed in the last fifteen years.

1. [2005] EHRLR 335

The Women and Equalities Committee report

On April 5, 2019 the Women and Equalities Committee published its report entitled *Tackling inequalities faced by Gypsy, Roma and Traveller communities*.[2] In essence, the report concluded that Gypsy, Roma and Traveller communities have been *'comprehensively failed'* by policy makers.

The report found that Gypsies, Roma and Travellers have the worst outcomes of any ethnic group across a huge range of areas, including education, health, employment, criminal justice and hate crime and made 49 recommendations for change.

The chair of the committee, Maria Miller MP, said:

> *Our inquiry has tried to shine a light on the issues that are rarely talked about by policy makers: Gypsies and Travellers are likely to die over a decade earlier than non-Travellers, only a handful of Gypsy and Traveller people go to university every year and many Roma are being exploited by rogue landlords and paid far below the minimum wage.*

The focus of the report was on improving policy and service provision in a range of areas including: education, health, discrimination and hate crime, and domestic violence.

These are some of the worst inequalities that the inquiry heard about:

Education:

- pupils from Gypsy or Roma backgrounds and those from a Traveller or Irish heritage background had the lowest attainment of all ethnic groups throughout their school years (government Race Disparity Audit).

Health:

- 14% of Gypsies and Travellers describe their health as '*bad*' or '*very bad*' – more than twice as high as white British people (2011 Census)
- the health status of Gypsies and Travellers is much poorer than that of the general population, even when allowing for other factors such as variable socio-economic status and/or ethnicity
- life expectancy is 10-12 years less than that of the non-Traveller population
- 42% of English Gypsies are affected by a long-term condition, compared with 18% of the general population
- one in five Gypsy Traveller mothers will experience the loss of a child, compared with one in a hundred in the non-Traveller community (evidence submission from University of Bedfordshire).

2. https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/360/full-report.html

Discrimination and hate crime:

- a 2017 survey carried out by Traveller Movement found that 90% of respondents had experienced discrimination and 77% had experienced hate speech or a hate crime.[3]

The committee's key recommendations were:

1. Data collection

The Race Disparity Audit should review all the government and public datasets that currently do not use the 2011 census ethnicity classifications and require their use before the end of 2019. Also that Romani Gypsy, Irish Traveller and Roma categories should be added to the NHS data dictionary as a matter of urgency.

Maria Miller MP commented: '*There is no data collected on Roma people. This leaves them with problems accessing the services they need. They are invisible to policy makers. If you're not counted, you don't count.*'

2. Government policy

Leadership from the Department of Housing, Communities and Local Government on tackling inequalities in Gypsy, Roma and Traveller communities has been lacking. The situation is made worse by the government's ongoing resistance to cross-departmental strategies on race equality issues including for Gypsy, Roma and Traveller communities. The government must have a clear and effective plan to support these communities which is equal to the level of the challenges they face.

3. Discrimination

As discrimination was found to exist in public services it was recommended that senior leaders in all public service bodies be trained in the public sector equality duty and that each body have a Gypsy, Roma and Traveller '*champion*', similar to the role that exists in the National Police Chiefs Council.

4. Domestic violence

The committee heard of effective work that community organisations are doing working with Gypsy and Traveller men and women to challenge outdated attitudes towards women and it was recommended that the Home Office should work with these organisations with a view to funding similar programmes across the country.

5. Education

The committee stated that it was intolerable that any child should not be receiving a suitable education. Many parents, schools and local authorities are letting down Gypsy and Traveller children. The committee said that the first priority for the government, local authorities and Ofsted must be to ensure that the legal right to an education is not denied to any child, including Gypsy, Roma and Traveller children. Home education should be a positive, informed choice, not a reaction to either a poor school environment or family expectations. In addition the committee stated that schools should, as part of their responsibilities under the public sector equality duty, be challenging race and gender stereotypes wherever they encounter them and that Ofsted should ensure that inspectors are actively inspecting schools for gender and racial stereotyping.

6. Health

It was found that Gypsies, Roma and Travellers have some of the worst health outcomes of any group; and the committee heard about problems with accessing healthcare services due to discrimination or language and literacy barriers and that service-providers were not considering Gypsies, Roma and Travellers properly when they design their services. Thus, it was recommended that the Equality and Human Rights Commission should conduct a formal inquiry under s16 of the Equality Act 2006 into how Joint Strategic Needs Assessments are including Gypsy, Roma and Traveller health needs.

It is important to note that the committee did not address accommodation issues in any meaningful way. In its summary the report stated:

> *The Committee did not set out to tackle issues relating to Traveller sites or encampments but to tackle a wide range of other policy issues often eclipsed by issues of accommodation. Given that three in four Gypsies and Travellers live in non-caravan accommodation, we are deeply concerned that Government policy-making is overwhelmingly focused on planning and accommodation issues.*

Commenting on this decision, Abbie Kirkby, Advice and Policy Manager at Friends Families and Travellers said:[4]

> *The omission of site provision is a glaring gap in an otherwise useful report. The chronic shortage of places where Gypsies and Travellers can live is intrinsically*

3. https://travellermovement.org.uk/phocadownload/userupload/equality-human-rights/last-acceptable-form-of-racism-traveller-movement-report.pdf

4. https://www.gypsy-traveller.org/report/women-and-equalities-committee-call-on-uk-government-to-address-stark-inequalities-faced-by-gypsy-roma-and-traveller-communities/

linked to the stark health and educational inequalities and social exclusion faced by these communities. This absolutely must be addressed.

In a commentary on the report, the Community Law Partnership[5] also expressed its major disappointment with the committee's failure to address the dire accommodation needs for those living in caravans. It was noted that large numbers of Gypsies and Travellers still have to resort to unauthorised encampments and developments due to the failure of central and local government to ensure that there is adequate site provision; and that all Gypsy and Traveller support and campaigning groups recognise that if the accommodation problems were addressed then that would inevitably lead to improvements in education, health and employment outcomes.

Recent developments in case law

Whilst national and local government in Europe and the UK seem unable or unwilling to tackle the discrimination and inequalities faced by Gypsies Roma and Travellers, individuals and NGOs will continue to fight for their rights in the courts.

The recent case law highlighted below demonstrates that litigation can produce very positive results but it cannot be seen as a substitute for meaningful and sustainable action by governments and public bodies to address what many believe to be the last acceptable form of racism.

Strasbourg case law

Lingurar v Romania (Application no. 48474/14) April 16, 2019[6]

The four applicants were members of a Romani family living in Romania. The applicants were badly beaten by police officers and gendarmes who forced their way into their home. The applicants filed criminal charges against the officers. The prosecutor initially decided not to bring charges, but was ordered by a court to reconsider the case. After a second set of investigations, the prosecutor again decided not to prosecute those responsible, on the basis that there was insufficient evidence that the incident occurred as the applicants described. This second decision was upheld by the domestic courts in Romania. The applicants then made a complaint to the European Court of Human Rights (ECtHR).

In April 2019, the ECtHR delivered a judgment which held that Romania had violated the *'substantive limb'* of Article 3 of the European Convention of Human Rights (ECHR), meaning that the officers had subjected the applicants to ill-treatment. The ECtHR also found a violation of Article 14 read with Article 3, that is, that the officers' conduct had been discriminatory. Lastly, the ECtHR found a violation of Article 14 read with the *'procedural limb'* of Article 3, on the grounds that the state had violated its human rights obligations by failing to investigate what had happened.

In particular, and for the first time ever in its case law, the ECtHR used the term *'institutionalised racism'*, saying: *'Roma communities are often confronted with institutionalised racism and are prone to excessive use of force by the law-enforcement authorities.'* The ECtHR also used the term *'ethnic profiling'* for the first time in its case law, noting that *'the domestic courts did not censure what seems to be a discriminatory use of ethnic profiling by the authorities'*.

Although, the ECtHR did not go so far as to describe what was happening in Romania as *'institutional anti-Gypsyism'*, or use the term *'anti-Gypsyism'* when condemning Romania, this judgment provides a damning account of how the law enforcement authorities in Romania treat Romani people. The ECtHR stated that *'the decisions to organise the police raid and to use force against the applicants were made on considerations based on the applicants' ethnic origin. The authorities automatically connected ethnicity to criminal behaviour, thus their ethnic profiling of the applicants was discriminatory'*; the court awarded each applicant €11,700 as just satisfaction for the violation of their rights.

Commenting on the importance of the judgment, Dorde Jovanovi'c, the president of the European Roma Rights Centre, said:

We have been urging the European Court for years to use the term 'institutional racism'. Now, for the first time, they have embraced the term in their reasoning. This is a big deal for Roma and other ethnic minorities targeted by police in Europe.

Burlya and others v Ukraine (Application no. 3289/10) November 6, 2018

On September 7, 2002, the murder of a 17-year-old ethnic Ukrainian took place in the village of Petrivka. This crime was allegedly committed by a member of the Roma community after an argument between Roma and local youngsters. The next day, a group of village residents gathered and asked for the village council to expel all persons of Roma ethnicity from

5. http://www.communitylawpartnership.co.uk/news/tackling-inequalities-faced-by-gypsy-roma-and-traveller-communities

6. https://hudoc.echr.coe.int/eng#{"itemid":["001-192466"]}

Petrivka. The council members decided to support the residents' request. On September 9, 2002 the council met again to discuss how to bring this decision in conformity with legal norms. This time, the head of the district administration was present and *'invited the village council members to carefully consider the wisdom of their decision, drawing a clear line between crime-related problems and inter-ethnic relations'*. Then the council changed the wording of its decision and asked the law-enforcement officers to expel *'socially dangerous individuals, regardless of ethnic origin'*.

That evening, the mayor gathered all Roma residents to warn them that a 'pogrom' would start and to advise them to leave their homes. Indeed, several hundred people initiated a mob attack that night. They ransacked the applicants' homes, burned down homes and destroyed their belongings. Although local police officers had been present during the attack, it was argued by the applicants that the police had done nothing to prevent or stop the event, but had concentrated solely on preventing human casualties. Immediately after these events, the district prosecutor's office initiated criminal proceedings *'against persons unknown on suspicion of disorderly conduct committed in a group'*. However, the district prosecutor refused to open criminal proceedings against the village council's officials *'for lack of constituent elements of a crime in their actions'*. The investigations were conducted by a team involving local police officers, led by a regional police investigator. The investigations were suspended and reopened several times before being definitively closed in 2009. During this time, in 2003, the village council's decision to expel socially dangerous individuals was quashed by the domestic courts because *'it was contrary to the constitution and had been taken under the pressure exerted by a crowd of angry villagers in order to calm them down and prevent the lynching of the Roma'*.

It was not until 2018 that the ECtHR addressed the complaints of nineteen Ukrainian Roma about the pogrom. First, the ECtHR held that the attack had undoubtedly been motivated by anti-Roma sentiment. Secondly, it stated that the applicants who had been forced to flee their homes due to the attack had suffered degrading treatment. One important factor which led to this finding was the local authorities' attitude during the events, namely the appearance of their official endorsement for the attack, as well as the ineffective investigation into the crime. Therefore, the court found a violation of both the substantive and procedural aspect of Article 3, taken in conjunction with Article 14 ECHR.

The ECtHR also recognised that the applicants' homes had been targeted in the attack and, therefore, they suffered displacement. Though the facts did not show that the applicants *'were actively prevented from returning to the village'* the ECtHR considered that it would *'have been unreasonable to expect the applicants to permanently live in damaged houses in a locality where the authorities had clearly communicated to them that they would have no protection against mob violence – particularly in circumstances where no investigation has been conducted and no person has been held responsible for the attack'*. Therefore, the damage to the applicants' homes had interfered with their Article 8 rights in a grave and unjustified way and the ECtHR held that a violation of Article 8 taken together with Article 14 ECHR had occurred.

Domestic caselaw

R (on the application of Gullu) v Hillingdon LBC; R (on the application of Ward) v Hillingdon LBC [2019] EWCA Civ 692, April 16, 2019

In this case the CA considered whether the local authority's housing allocation policy, which prioritised people who had been resident in the local area for ten years, indirectly discriminated against certain protected groups.

S166A of the Housing Act 1996 required local authorities to have a scheme for determining priorities in allocating housing. The Localism Act 2011 enabled them to decide, subject to exceptions, what classes of person were qualifying persons. Guidance issued by the Secretary of State encouraged local authorities to prioritise applicants with a local connection. The government guidance also stated that consideration had to be given to the implications of excluding members of groups of non-qualifying persons and to the EA. Further, s11(2) of the Children Act 2004 (CA 2004) imposed a duty to ensure that regard was had to safeguarding and promoting the welfare of children.

Hillingdon's allocation scheme stated in paragraph 2.2.4, that, subject to exceptions, a person who did not fall within a group entitled to reasonable preference and had not been resident in the borough for at least ten years would not qualify. Two claims for judicial review had been brought against the lawfulness of the policy on the grounds of unjustified indirect race discrimination. One, brought by an Irish Traveller (Ward) who has three children, succeeded; the other, brought by a Kurdish refugee (Gullu), failed. The local authority appealed against the first decision; Gullu appealed against the second decision.

The CA allowed the appeals and reached the following conclusions.

On the issue of indirect discrimination the court considered whether para 2.2.4 was a provision, criterion or practice amounting to indirect discrimination. The local authority had been prepared to concede the point in both appeals, but the judge in *Gullu* did not accept the concession and wrongly held that the policy was not discriminatory. The protected characteristic identified was that of race.

Although the public sector equality duty had only been raised as a specific ground in Gullu's appeal, the court considered that performance of the duty had a bearing on the approach to justification of indirect discrimination, and to an alleged breach, in Ward's case, of s11(2) CA 2004 in the formulation of the policy. Compliance with the duty required the decision-maker to be informed about which protected groups should be considered. That involved a duty of inquiry.

The local authority relied on features of the scheme as providing 'safety valves', including the possibility of a higher banding being given because of hardship. However, the key principle was that the goal was equality of outcome. If policy resulted in a relative disadvantage to one protected group, any measure relied on as a safety valve had to overcome that disadvantage. There was no evidence that the purported safety valves had operated to eliminate the disadvantage to the two protected groups. Consequently, the court held that the judge in Ward's case had correctly rejected the local authority's reliance on them, and the judge in Gullu's was wrong not to do so.

The court also held that as a whole, the allocation policy indirectly discriminated against the two protected groups by imposing the ten-year residence requirement. Thus Gullu's appeal was allowed and in Ward's case, the court held that the appropriate declaration should be framed in the following terms: the impugned allocation provisions of the scheme constituted indirect discrimination against Irish Travellers and non-UK nationals which was unlawful unless justified, and that the local authority had not yet shown justification for that discrimination.

London Borough of Bromley v Persons Unknown (London Gypsy Travellers intervening) QBD May 17, 2019 (unreported)

Over the past two years, more than 30 local councils, including 14 in London, have been granted wide injunctions against persons unknown which prohibit Gypsies and Travellers from camping on open land within their boundaries.

The London Borough of Bromley made a similar application which covered 171 separate parcels of land which it owned or managed. However, a charity known as London Gypsies and Travellers[7] intervened in the proceedings and argued that:

- the injunction created a blanket ban which circumvented the need to comply with government guidance on the humane management of un-authorised camping
- the council had failed to comply with its public sector equality duty before deciding to seek the injunction
- the injunction would disproportionately affect ethnic Gypsies and Travellers and constituted unjustified indirect discriminated in breach of s19 EA and a violation of their rights protected by Articles 8 and 14 ECHR.

Put more shortly, it was argued that the injunction sought amounted to a disproportionate and discriminatory response to the accommodation crisis faced by Gypsies and Travellers, effectively criminalising their traditional way of life.

The case was heard in the High Court by Mulcahy QC. Having heard submissions the judge refused to grant an order which prohibited unauthorised encampments on any of the council's land. The judge made clear her concerns about the impact of wide injunctions on the ability of Gypsies and Travellers to pursue their traditional way of life, particularly given the shortage of lawful sites and the council's failure to undertake an equality impact assessment before seeking the injunction.

Debby Kennett, Chief Executive of London Gypsies and Travellers, commented:

> *The judge recognised that Gypsies and Travellers have been present in this country for hundreds of years and that their traditional way of life is protected under human rights and equalities law. She referred to the shortage of sites and stopping places and also the cumulative impact of these injunctions on the Gypsy and Traveller community across the country. … The judge also recognised that simply pushing families out of one area into another was not a solution and criticised Bromley for not considering alternatives.*

The judgment clearly has implications for other local authorities which have obtained, or are seeking, similar injunctions and the council has been granted permission to appeal to the CA … so watch this space.

7. http://www.londongypsiesandtravellers.org.uk/what-we-do/

Conclusion

The recent ECtHR case law reminds us that *anti-Gypsyism* is prevalent in mainland Europe and we welcome the court's acknowledgement, at last, that conduct such as that of the Romanian police constituted institutionalised racism.

But we should not consider our society in the UK to be immune from such pervasive prejudice against Gypsies, Roma and Travellers. Hate speech which dehumanises these communities needs to be tackled and rooted out by us all. The ethnic profiling of Gypsies, Roma and Travellers by our police forces and other public authorities needs to stop. The severe shortage of caravan sites to accommodate those Gypsies and Travellers who wish to live in caravans in accordance with their traditional way of life needs to be properly addressed. Barriers which prevent Gypsies, Roma and Travellers from gaining access to healthcare and education need to be torn down and other policies and practices which have a discriminatory effect on them must be adapted or abandoned.

Litigation can help achieve these aims and we suggest that advisers, advocates and support groups should build on the successes in the ECtHR and domestic courts and develop arguments based upon human rights and anti-discrimination legislation which help bring an end to institutionalised racism and tackle the gross inequalities which affect Gypsies, Roma and Travellers in the UK.

However, we do not believe that piecemeal success in the courts will eradicate institutionalised racism on its own. It is imperative that the government grapples with the issue too if real progress is to be made.

On June 17, 2019 the United Nations Special Rapporteur, Tendayi Achiume, issued her final report on contemporary forms of racism, racial discrimination, xenophobia and related intolerance and recommended that the UK government should adopt *'concrete strategies for the elimination of racial discrimination against … members of the Gypsy, Roma and Traveller communities'*.[8]

The government's recent announcement that it plans to launch a new cross departmental strategy to tackle inequalities experienced by Gypsies, Roma and Travellers is to be welcomed.[9] If such a strategy is to be effective then it will need to be devised in partnership with Gypsies, Roma and Travellers and their support groups. However, if the government fails to recognise the need for community involvement then we fear that its strategy will join a long list of failed policy measures and that we will be no closer to improving the lives of Gypsies, Roma and Travellers and eradicating the institutionalised racism they face in the UK.

8. https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23073&LangID=E

9. https://www.gov.uk/government/news/new-national-strategy-to-tackle-gypsy-roma-and-traveller-inequalities

The Ministry of Housing, Communities and Local Government (MHCLG) has announced a national strategy to tackle entrenched inequality and improve the lives of Gypsy, Roma and Traveller communities. Launched on June 6, 2019 the MHCLG is to lead the strategy, working with several government departments and the Cabinet Office Race Disparity Unit to improve outcomes in areas including health, education and employment.

The strategy was announced following publication of the Women and Equalities Committee's report 'Tackling inequalities faced by Gypsy, Roma and Traveller communities.' The committee recommended, among other things, that *'the Cabinet Office create a specific workstream within the Race Disparity Unit for eliminating Gypsy and Traveller inequalities. The Unit should work closely across Government departments to ensure that the "explain or change" process is completed promptly and that every Government department has a strategy to tackle Gypsy and Traveller inequalities that are uncovered. Each department should have a strategy in place before the end of 2019'*.

Traveller Movement has welcomed the announcement. While no further information is available at present, it hopes that the MHCLG will work closely with grass roots organisations to ensure effective and meaningful implementation of the committee's recommendations.

MHA review and why being black in Britain might be bad for your mental health

Stephen Heath, lawyer with Mind, examines evidence which suggests that *'being black in Britain is bad for your mental health'.* Black women have higher rates of mental ill-health and Black people are diagnosed for psychosis more frequently than white people but yet they experience poor treatment. He outlines some reasons for this which include socio-economic disadvantage, the impact of racism and discrimination, and the negative perception of BAME people among mental health practitioners which leads to misdiagnosis based on negative stereotypes. He highlights in particular the high rates of detention, the use of community treatment orders and the level of restraint within psychiatric settings experienced by Black people. There is, he argues, an urgent need to grapple with the *'deep-seated drivers of racial disparity that persist despite the various initiatives aimed at improving mental health services for BAME people'.*

One of the bigger pieces of work to which Mind contributed last year was the Independent Mental Health Act Review chaired by Professor Sir Simon Wessely (the Independent Review). One stated aim of the review was to understand the reasons for '*the disproportionate number of people from black and minority ethnic groups detained under the [Mental Health] Act [1983]*'. Detention rates under the Mental Health Act 1983 (MHA) are only part of the picture, but they provide a vivid snapshot of inequalities faced by some BAME communities in this area. Many people to whom Mind spoke as part of its engagement work for its submission to the Independent Review put it bluntly – the mental health system is failing some BAME communities.

When the evidence is examined, it is hard to escape the conclusion that the system under the MHA is institutionally racist[1]. The numbers speak for themselves and there is concern that negative stereotyping may lie at the heart of the sectioning and detention process for some BAME communities.

Mental health

The World Health Organisation says '*Mental health is defined as a state of well-being in which every individual realizes his or her own potential, can cope with the normal stresses of life, can work productively and fruitfully, and is able to make a contribution to her or his community.*'[2]

But there is no uniform conception of what mental health, or its flipside, mental illness or mental health problems, are. In fact there are diverse views. For example, some Chinese people believe that some mental illness can be ascribed to a lack of balance between the two complementary poles of life and energy, Yin and Yang; while there is an Indian tradition which emphasises the harmony between a person and their group as indicative of health. In parts of Africa the concept of health is more social than biological, and in many parts of the world there is a spiritual component to any conception of mental health which sees an indivisible whole that includes not just mind and body, but other dimensions of life and even beyond.[3]

But mental health services in the UK are firmly set in a western and European psychological and psychiatric framework within a 'medical model' of dealing with problems as individual '*illness*' or '*disorder*'. The way that a British psychiatrist might conceive of feelings, fears and anxieties or even family problems and social behaviour in terms of '*illness*' requiring '*treatment*' and '*cure*' might be totally alien to, say, some Asian or African cultural worldviews. People from some communities who find themselves labelled and receiving treatment within the western system may find it confusing, inappropriate and problematic.

Experience of mental illness by different communities

There is mixed evidence about the way that children from different communities at age 11 experience mental ill-health. Sample sizes in research have historically been small for children and young people from BAME groups and it has been difficult to establish a reliable picture. However, some analysis of the Millennium Birth Cohort focused on children aged 11 in 2012 revealed that children of mixed heritage had the highest

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

2. https://www.who.int/features/factfiles/mental_health/en/

3. Suman Fernando, chapter 1 *Mental Health in a Multi-Ethnic Society* ed. Fernando and Keating. This section of the article draws heavily from Fernando's work.

likelihood of meeting the criteria for a diagnosable mental health problem, followed by white children. Children of Indian heritage had the lowest rates of mental ill-health.[4]

By adulthood some differences emerge, as was highlighted in the *Adult Psychiatric Morbidity Survey: Survey of Mental Health and Wellbeing*, England, 2014[5] and which can be seen in the health section of the *Ethnicity facts and figures* on the gov.uk website.[6]

Common mental health problems are conditions such as anxiety and depression. It can be seen that, for example, Black men and white men experience these conditions at the same rates whereas Black women experience them at a significantly higher rate than 'white other' women, e.g. 29.3 per cent as against 15.6 per cent. Some sharper differences can be seen at the more severe end of the mental health spectrum.

Psychosis is a condition which affects the way that those who experience it perceive and interpret reality. It can lead to hallucinations or hearing voices and can create delusions – persecutory or of grandeur. People can experience short episodes of psychosis (for example post-partum psychosis) or the condition can be with them throughout their lives. It can also be a free-standing condition, or a symptom of another condition such as severe depression, bipolar disorder or schizophrenia.

It can be seen that Black people have 'screened positive' (or diagnosed) for psychosis at 10 times the rates for white people. A diagnosis of a mental illness is often a less precise exercise than with a physical illness – it reflects an assessment by a medical professional of a cluster of emotions, behaviours and physical symptoms. A diagnosis can, and often is, subject to revision and review. Dr Nuwan Dissanayaka, a Leeds-based psychiatrist, describes in his article *Racial Narratives in mental health: challenging false narratives* how, as a junior doctor, he watched his boss diagnose mental health patients, and how in many cases these patients were re-diagnosed.

> *The real revelation to me however was that this change in diagnosis seemed to apply most of all to young Black men with a previous diagnosis of schizophrenia.*[7]

The international evidence shows that Black people in majority Black countries such as in the Caribbean and in Africa do not appear to have higher rates of psychosis than white people in predominantly white countries. However, the rates of psychosis of Black Britons of Caribbean or African origin is so high as to lead one professor of psychiatry to conclude that: '*Being black in Britain is bad for your mental health.*'[8]

Causes of poor mental health in BAME communities

The causes of poor mental health in BAME communities are extremely complex and this section will just touch on some of the issues which contribute to poor mental health among some BAME communities.

Migration trauma

Many people who are new arrivals in the UK have a cluster of issues which have a negative impact on their mental health. They may have fled conflict or persecution, endured a traumatic transit or have been trafficked, face restrictions on working or access to services or benefits, compounded by unfair vilification in the press and in the community once in the UK.

Historical trauma

Many believe that slavery and colonialism have cast a long shadow and that there is an inherited trauma which plays a part in the mental ill-health of people today. As the Centre for Mental Health's (CMH) report *Against the Odds*[9] puts it '*Some young men also still keenly felt the residual and intergenerational effects of slavery and historical trauma – effects which could be further fuelled by ongoing experiences of trauma and injustice.*'

Social factors

Many BAME communities occupy particular positions of disadvantage in the UK and experience inequalities across many domains of economic and social wellbeing. Poverty, poor housing, poorer educational and employment opportunities, social exclusion and other environmental factors can have a significant negative impact on mental health. Individuals who have had adverse childhood experiences, many of which relate to social difficulties, have more physical and mental health problems as adults. '*Socio-economic inequity is associated with higher rates of suicide and mental illness, by*

4. See Centre for Mental Health's *11-15 years: Missed opportunities: children and young people's mental health* referencing the research of Gutman, Joshi, Parsonage and Schoon

5. https://digital.nhs.uk/data-and-information/publications/statistical/adult-psychiatric-morbidity-survey/adult-psychiatric-morbidity-survey-survey-of-mental-health-and-wellbeing-england-2014

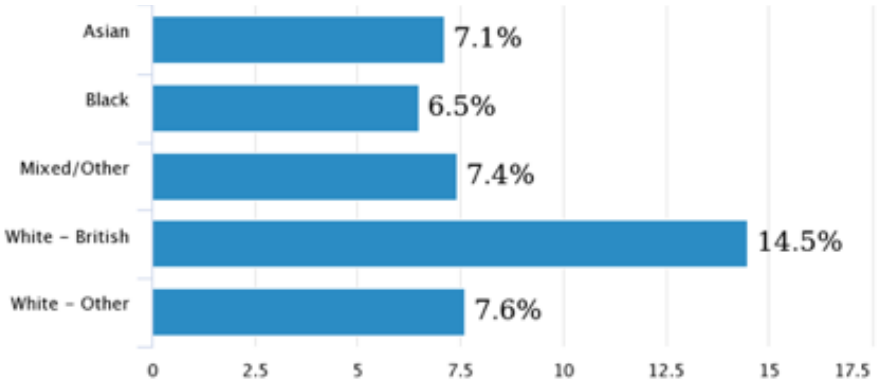
6. https://www.ethnicity-facts-figures.service.gov.uk/health

7. *Racial Narratives in mental health: challenging false narratives* https://www.centreformentalhealth.org.uk/racial-disparity-mental-health-challenging-false-narratives

8. *Being black in Britain is bad for your mental health* Dr Kwame McKenzie http://www.africanecho.co.uk/edition57-beingblack.html

9. https://www.centreformentalhealth.org.uk/sites/default/files/2018-10/Against%20the%20odds%20-%20Up%20My%20Street%20evaluation.pdf This report was an evaluation of Birmingham-based community projects commissioned by Mind to improve the resilience of young African Caribbean men.

Percentage of people aged 16 years and over receiving treatment for mental or emotional problems by ethnicity. Location: England. Time period: 2014. Source: NHS Digital | Ethnicity Facts and Figures GOV.UK



exposing individuals to a wide range of stressors, including negative life events as well as diminishing their hopes and expectations for a positive future with meaningful opportunities for work and life.'[10]

Racism and discrimination

There is a body of robust research[11] confirming that experiences, perceptions and fear of racism and discrimination have a negative effect on both physical and mental health, and are a causative factor in both common and serious mental illnesses. Racism in both overt form and in the form of 'micro-aggressions' (more subtle slights and injustices) can erode confidence, undermine resilience and wear down hope and motivation. Evidence suggests that those exposed to racism are more likely to encounter difficulties with anger, depression, substance misuse and even psychosis. Significantly, people when surveyed overwhelming believed that racism is a causal factor in mental ill-health.[12]

Racism and discrimination do not just take place on an interpersonal level. CMH's report *Against the Odds* notes the '*incrementally damaging impact of a constant stream of negative media representations of black men and demonising portrayals of black culture that led young men to 'mask' their true selves*'. Society's negative stereotypes can be internalised by communities and structural discrimination at a societal level feeds into the social problems outlined above and worsen mental health.

10. *Racism and Mental Illness in the UK* Apu Chakraborty, Lance Patrick and Maria Lambri https://www.intechopen.com/books/mental-disorders-theoretical-and-empirical-perspectives/racism-and-mental-illness-in-the-uk

11. Referenced in the Synergi Collaboration's briefing paper *The impact of racism on mental health* https://synergicollaborativecentre.co.uk/wp-content/uploads/2017/11/The-impact-of-racism-on-mental-health-briefing-paper-1.pdf

12. *Model values? Race, values and models in mental health* (King et al 2009) 87% of those surveyed.

Routes to treatment

There are a variety of different types of treatment in a variety of settings. In brief, there is treatment in primary care, generally for the low level or common mental health problems, usually in the GP's surgery, and often involving simply the prescribing of medication. Also within primary care is 'Improving Access to Psychological Therapies' which provides low-level interventions, such as cognitive behavioural therapy, in a primary care setting.

Care is also delivered in the community by community mental health teams for more serious mental health problems. Finally there is in-patient treatment in psychiatric hospitals. Just under half of in-patients are 'voluntary' or 'informal' patients, meaning that they are not under any form of compulsion and are free to leave if they choose. Just over half are detained, or 'sectioned' under the MHA. These patients are compulsorily detained under the powers of the MHA and are generally not free to leave unless discharged by clinicians, hospital managers, mental health tribunals or the Secretary of State. Some patients are detained following criminal justice disposals under Part 3 of the MHA, but the majority are there through 'civil' sections under Part 2 of the MHA. Additionally, patients detained under the MHA can be treated (including medicated) against their will and can be subject to both physical and chemical restraint.

As can be seen, despite (in very broad-brush terms) people from BAME communities having worse experiences of mental health, white people are around twice as likely to receive treatment. There are also differences in how different communities get to treatment, what treatments they are offered, in what settings and for how long.

This is a complex picture but, focusing on Black

African and African Caribbean patients, in headline terms these patients are:

- less likely to be receiving treatment for mental health problems (6.5% v 14.5%)
- less likely to be offered psychological therapies
- more likely to be compulsorily admitted for treatment
- 40% more likely to access treatment through a police or criminal justice route than through primary care referral
- more likely to be on medium or high security wards
- likely to have longer stays in hospital
- more likely to be subject of seclusion and restraint (restrictive interventions are 56.2 per 100,000 population for black Caribbean as against 16.2 per 100,000 population for white)
- having higher rates for repeat admissions.

Basically, Black patients get to the sharp end of treatment in the more unpleasant of ways.

Engagement with services – 'Circles of Fear'

Part of the reason some BAME communities are not receiving treatment or not receiving it until the point of crisis, relates to the issue of western or Eurocentric dominance in the field of psychiatry and psychology. It is no wonder, say, that communities for whom mental health is expressed more in terms of mind, body and spirit might struggle or be reluctant to engage with the dominant psychological models. But there is undoubtedly more to it than this. The recently appointed Mental Health Equalities Champion, Jacquie Dyer puts things starkly when she says that there is a belief in some Black communities that if you go into mental health services '*it's not that you get recovery, it's that you die there'*. Similarly some of the people from BAME communities which Mind engaged with in developing its MHA Review submission clearly said that sectioning was not experienced as a therapeutic intervention, but as little more than chemical and physical containment.

Professor Frank Keating and colleagues examined the issues surrounding the fact that some BAME communities had difficulties engaging with the mental health system in their review *Breaking the Circles of Fear*.[13] The authors found what they termed '*circles of fear'* which stopped Black people from engaging with mental health services.

> *Black people see using mental health services as a degrading and alienating experience: the last resort. They perceive that the way services respond to them mirror some of the controlling and oppressive dimensions of other institutions in their lives, e.g. exclusion from schools, contact with police and the criminal justice system. There is a perception that mental health services replicate the experiences of racism and discrimination of Black people in wider society, particularly instances where individuals have experienced the more controlling and restricting aspects of treatment.*

The authors observe: '*Service users become reluctant to ask for help or to comply with treatment, increasing the likelihood of a personal crisis, leading in some cases to self-harm or harm to others. In turn, prejudices are reinforced and provoke even more coercive responses, resulting in a downward spiral, which we call "circles of fear", in which staff see service users as potentially dangerous and service users perceive services as harmful.'*

Detention under the Mental Health Act 1983

The MHA is the legal framework which allows for the detention of people with mental health problems and for their treatment without their consent. So it is obvious that this is legislation with significant civil liberties implications.

S2 governs applications for admission to hospital for the assessment of a patient:

> S2(2) *An application for admission for assessment may be made in respect of a patient on the grounds that -*
> *(a) he is suffering from mental disorder of a nature or degree which warrants the detention of the patient in a hospital for assessment (or for assessment followed by medical treatment) for at least a limited period; and*
> *(b) he ought to be so detained in the interests of his own health or safety or with a view to the protection of other persons*. [emphasis added].

S3 concerns applications for admission to hospital for the treatment of patients and is drafted in similar terms in that the criteria for admission are that the patient is considered to have a mental disorder and that it is necessary to detain him or her for their own or other people's safety.

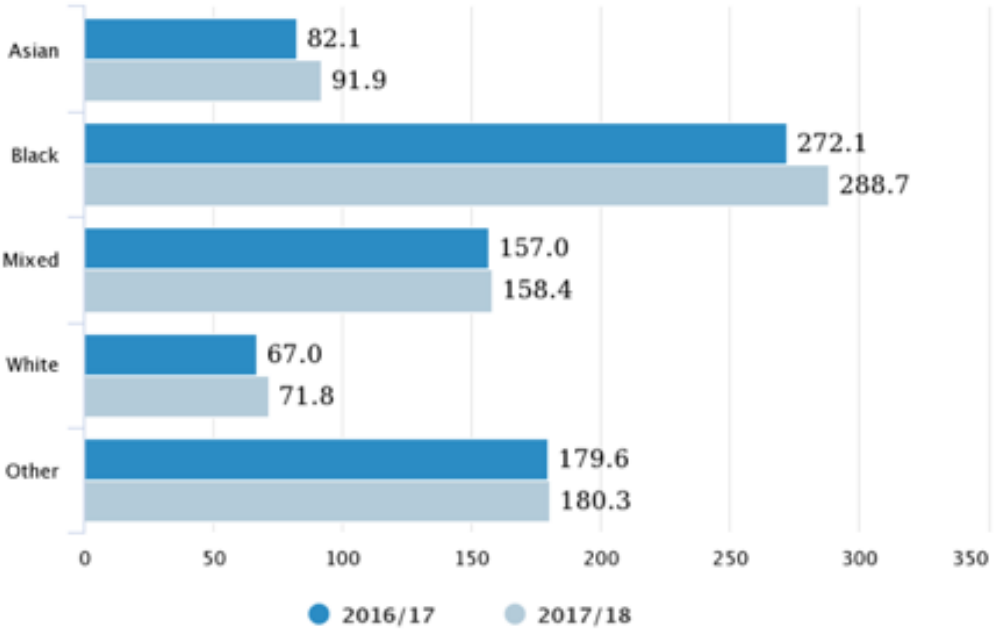
S136 states:

> *If a person appears to a constable to be suffering from mental disorder and to be in immediate need of care or control, the constable may, if he thinks it necessary to do so in the interests of that person or for the protection of other persons -*
> *remove the person to a place of safety within the meaning of section 135 etc.* [emphasis added].

The decision to admit under ss2 or 3 is made by an Approved Mental Health Professional, who is usually a social worker, on the written recommendation of two medical professionals (usually the patient's GP and a psychiatrist). S136 is a police power, but one which can

13. *Breaking the Circles of Fear* Keating, Robertson, McCulloch and Francis https://www.centreformentalhealth.org.uk/sites/default/files/breaking_the_circles_of_fear.pdf

Number of detentions under the Mental Health Act per 100,000 people, by broad ethnic group (standardised rates. Location: England. Time period: 2016/17. Source: NHS Digital | Ethnicity Facts and Figures GOV.UK



lead to an assessment and the sectioning process under ss2 or 3.

Uses of s136

The MHA statistics for England show that the highest usage of s136 is on Black people at 50.8 per 100,000 population and the lowest is on Asian people at 16 per 100,000.[14]

The criteria for detention under ss2 and 3 MHA and the criteria for arrest under s136 involve, among other things, subjective assessments of whether someone poses a risk to themselves or others. These criteria in themselves might open the door to biases. Could it be that stereotypes of Black people, men especially, as being dangerous are operating at a sub-conscious level on decision-makers at the point of entry into the mental health system?

Certainly research on clinical decision-making suggests that clinicians often hold negative implicit attitudes toward people from minority backgrounds and that there is a direct link between these attitudes and clinicians' treatment decisions.[15]

Additionally there is a study comparing Black and white patients which found that, despite having lower scores on aggressive behaviour, Black patients were perceived as being more dangerous.[16] But these biases in clinicians probably only reflect, in microcosm, the negative stereotypes which exist within society at large.

Dr Nuwan Dissanayaka describes in his article *Racial Narratives in mental health: challenging false narratives*[17] how these stereotypes play out for 'Michael', an amalgam of the patients he sees.

I think the nurses are scared of me because I am big, black and loud, especially if I swear. And the doctors just don't understand me. They don't get my culture and they want me to act like them. And when I get angry it's worse for me than it is for the white patients ... if you know what I mean.

Dissanayaka reminds us that '*Big, black and dangerous*?' was the subtitle to the Committee of Inquiry into the death of Orville Blackwood. The impression that Black patients like Orville were '*big, black and dangerous*' was given so often to the inquiry that the committee saw fit to include it in the title, albeit with a question mark.

Community Treatment Orders (CTOs)

There is provision under s17A MHA to discharge a patient into the community subject to a power of recall if they fail to adhere to certain conditions. This is an MHA outcome that has the biggest disparity between Black and white patients – Black patients are

14. Source: Mental Health Act Statistics, Annual Figures England, 2017-18 page 18 https://files.digital.nhs.uk/34/B224B3/ment-heal-act-stat-eng-2017-18-summ-rep.pdf

15. *Racism and Health: Pathways and Scientific Evidence* Williams and Mohammed https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3863357/

16. *Over-representation of Black people in secure psychiatric facilities* Bhui https://www.cambridge.org/core/journals/the-british-journal-of-psychiatry/article/overrepresentation-of-black-people-in-secure-psychiatric-facilities/BD93349370969B1B30ED00BE91A5A17A

17. https://www.centreformentalhealth.org.uk/racial-disparity-mental-health-challenging-false-narratives

proportionately eight times more likely to be discharged onto CTOs.[18] In Mind's engagement with people with lived experience of the operation of the MHA, the organisation was told that CTOs are experienced as intrusive and they felt that, as Black people, they were not trusted to comply with their medication regimes.

Restraint

Within psychiatric settings it seems that Black people are around 4 times as likely as white people to be the subject of restrictive interventions (56.2 per 100,000 population for Black Caribbean as against 16.2 per 100,000 population for white)[19]. As outlined above, Black people are perceived as being more dangerous despite having lower scores for aggressiveness.

The MHA Independent Review

One of the aims of the panel in Professor Sir Simon Wessely's Independent Review of the MHA was to understand and make recommendations relating to disproportionate detention rates. The review has been completed and the final report[20] was published in December 2018. The authors of the final report described the issue of disparate detention rates among BAME groups as '*one of the most troubling and difficult areas'* they considered in conducting the review.

The review itself had the benefit of input from both an African Caribbean topic group and an Asian and minority ethnicities topic group. Additionally it received evidence from numerous organisations and individuals, some of which focused on issues of race.[21]

Mind urged the review, in relation to the criteria for detention, to work towards legislation which would give primacy to a person's capacity to make their own decision rather than revolving around their mental disorder and the risk they are perceived to present. As can be seen, having criteria which hinge on mental disorder and the subjective perception of the risk that someone presents, opens the door to bias. The final report of the Independent Review did not include Mind's suggestion. It did, however, recommend tightening the criteria to say that there must be a substantial likelihood of significant harm and that risks would need to be evidenced.

Its further recommendations included:

- the development of a Patient and Carer Race Equality Framework (PCREF), developed and implemented by the NHS but rolled out to other public services
- more muscular regulator involvement (e.g. from the Care Quality Commission and the Equality and Human Rights Commission)
- culturally appropriate advocacy
- greater representation of people of African and Caribbean heritage at senior levels in mental health professions
- combatting bias in decision-making with piloted behavioural 'nudges', and
- improved data and research on issues leading to mental disorder in BAME communities.

These recommendations are welcome. There was disappointment in some quarters that while the foreword of the final report acknowledged that unconscious bias and structural and institutional racism were to be found in the mental health system there was no mention of this in the body of the report, let alone suggestions for how to address it.[22]

Patient and Carer Race Equality Framework

However, the PCREF may provide some hope on that score. The PCREF is a practical approach for organisations to monitor areas where there are disparities in outcomes, setting up processes to improve things while seeking the input of communities most deeply affected. But one problem with the PCREF is that no-one really seems to know exactly what it is or how it is going to work. There is a whole annex devoted to the PCREF in the Independent Review's supporting documents[23] which leave one none the wiser. It would be easy to quote some of its jargon out of context and sneer cynically, but it is probably more productive to laud its core aim to '*ensure equality of treatment access, experiences and outcomes of mental health care regardless of race/ethnicity.'*

As a framework, if properly constructed and applied, it could, for example, help shine a spotlight and heighten accountability at certain points where the door is open to unconscious bias (such as the point of sectioning). This, allied with other recommendation such as greater BAME representation in the mental health professions

18. Mental Health Act Statistics, Annual Figures England, 2017-18 page 19 https://files.digital.nhs.uk/34/B224B3/ment-heal-act-stat-eng-2017-18-summ-rep.pdf

19. Mental Health Bulletin 2017-18 Annual Report – reference tables table 7.2 https://digital.nhs.uk/data-and-information/publications/statistical/mental-health-bulletin/2017-18-annual-report

20. https://www.gov.uk/government/publications/modernising-the-mental-health-act-final-report-from-the-independent-review

21. See for example the Race on the Agenda submission https://www.rota.org.uk/sites/default/files/ROTA_REF%20Submission%20to%20MentalHealth%20Act%20review%20030718.pdf

22. See Suman Fernando's blog *Review of the Mental Health Act fails to put 'Race' on its Agenda for change, but acknowledges the reality of institutional racism in the mental health system* https://www.rota.org.uk/content/review-mental-health-act-fails-put-%E2%80%98race%E2%80%99-its-agenda-change-acknowledges-reality

23. At page 55: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/778898/Independent_Review_of_the_Mental_Health_Act_1983_-_supporting_documents.pdf

and culturally competent advocacy, could begin to make a difference especially if it leads to what Mind's Head of Equality and Improvement, Marcel Vige, calls '*a root-and-branch deconstruction of current practice, stripping out or else counteracting the effects of structural racism in the operation of mental health policy and the commissioning and delivery of services'.*

Conclusion

Those unfamiliar with the mental health system may find themselves nonetheless recognising themes and issues they see in other settings such as employment, education, policing and criminal justice. Just as some communities feel they are being failed by these systems, so some BAME communities, Black people especially, feel they are being failed by the mental health system.

Private law remedies do not seem to be the answer. Arguments about race hardly ever feature in the Mental Health Tribunal. The focus there is on whether the patient satisfies the criteria for detention (do they have a mental disorder? do they present a risk to themselves or others?) and the Tribunal will not look at the thought processes involved in the sectioning process. Suggesting to a treating psychiatrist that his or her view on risk is influenced by unconscious bias is not going to get you anywhere. He or she would in all likelihood point to numerous references in the medical record of lack of engagement with services or violent flashpoints; and despite the fact that these historical instances might have been part of the 'circles of fear' described above, they would no doubt be seen as reinforcing the legitimately held views of the medical professional on the question of risk.

It may be that public law remedies may present themselves. However, as with education, employment and criminal justice, the difficulty is the size and pervasiveness of the problem. The people with whom Mind engaged to inform its submission to the Independent Review, all of whom had personal or professional experience of the MHA, and many of whom were from BAME communities spoke about the need to grapple with, what Marcel Vige terms, the '*deep-seated drivers of racial disparity that persist despite the various initiatives aimed at improving mental health services for Black and Minority Ethnic people'.*

While Mind supports the Independent Review's recommendations on race equality, it is very conscious that these will require a continuous commitment to tackling racial discrimination and increasing diversity and inclusion in wider mental health services to bring about significant and sustained change. Mind hopes that the recommendations may be part of a solution to complex problems which have proved intractable for many decades, but it will continue to campaign for race equality in mental health until there is genuine equality for all. Mind is an organisational member of the Discrimination Law Association and has welcomed the opportunity to present to its practitioners' group meetings and submit this article for publication in *Briefings*. Mind would also welcome hearing ideas from, and working with, the DLA to bring about much needed change in the mental health system.

The EA socio-economic duty: a powerful idea hidden in plain sight

Dr Koldo Casla, Policy Director, Just Fair,[1] and Research Associate, Institute of Health & Society, Newcastle University reflects on the potential of the public authority duty to reduce inequalities arising from socio-economic disadvantage, contained in s1 of the Equality Act 2010 (EA). Despite the UK government's failure to take steps to commence the duty in England, the Scottish government implemented the duty in April 2018 and the Welsh government plans to do so in 2019. Dr Casla calls for pressure to be put on the UK government to make ending poverty a human rights priority and to make full use of this potentially powerful tool across the whole of the UK.[2]

S1 EA requires public authorities to actively consider the way in which their policies and their most strategic decisions can increase or decrease inequalities. The socio- economic duty complements the s149 public sector equality duty.

However, successive governments since 2010 have failed to *commence* it, to bring it to life in technical terms, which means that public authorities are not technically bound by s1.

S1 provides that authorities listed in s1(3) '*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.*'

A December 2018 report by Just Fair shows that tax and social security cuts since 2010 have violated the right to social security and to an adequate standard of living, in breach of international human rights law. The evidence has made abundantly clear that universal credit, the benefit freeze and cap, and benefit sanctions have disproportionately affected people at risk of harm, discrimination and disadvantage. Had the socio-economic duty been in force, the government would have been unable to demonstrate how austerity policies were compatible with its international human rights obligations.

Putting S1 into practice

S1 EA is not binding for public authorities in England, but some councils are showing what the duty could look like in practice. Just Fair interviewed 20 council representatives, senior officers and voluntary sector groups in Manchester, Newcastle, Oldham, Wigan, Bristol, York and the London Borough of Islington. Respondents used different frames and agendas to articulate their policies: fairness, inclusive growth, impact assessment, equality budgeting, economic disadvantage, social exclusion… But all of them were clear that austerity had prompted them to react both because of the way social security reforms were affecting their residents and because of the limitations on local government funding.

All seven councils examined in this research show a combination of visible leadership, cultural shift, meaningful impact assessments, data transparency, and engagement with residents and the voluntary sector. Just Fair's research shows that it is vital that someone senior, the leader or an executive member of the local authority, champions the council's work, ideally with local cross-party support. The commitment to tackle socio-economic disadvantage must trickle down all levels of decision-making to ensure that election results or staff turnover, significantly high in recent years, do not compromise the council's work. A systematic and transparent assessment of the cumulative impact of political decisions is of paramount importance. To be transparent and accountable, data must be available. All seven local authorities use a wide range of data on residents' standard of living as well as a significant amount of sources shared with health services and other stakeholders. Finally, residents and organised civil society can be both critical challengers and creators of innovative ideas.

The socio-economic duty could have made a difference in the case of Grenfell, for example. Had it been in force, it would have required the Kensington and Chelsea Council to consider whether its policies in relation to council tax, social housing, homelessness and disaster planning were adequate to address the enormous inequalities in the borough.

1. Just Fair exists to realise a fairer and more just society in the UK by monitoring and advocating the protection of economic and social rights. Along with the Equality Trust it is leading a campaign urging the government to implement S1 EA. For more information see: https://1forequality.com/, http://justfair.org.uk/ or email info@justfair.org.uk

2. A version of this article was first published in May 2019 in the Oxford Human Rights Hub: https://ohrh.law.ox.ac.uk/the-socio-economic-duty-a-powerful-idea-hidden-in-plain-sight-in-the-equality-act/

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In the near future, Scotland will provide other valuable examples through the new Fairer Scotland Duty, which is the name of the socio-economic duty there, in force since April 2018. The Welsh government has announced its intention of bringing the duty into effect in 2019, and more than 80 MPs from five different parties are calling on the UK government to follow suit. Together with partners in the north east of England, Just Fair has secured the support of 60 candidates standing in the local elections there to implement the socio-economic duty in their local authorities as a matter of good practice.

As observed by the UN Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston in November 2018, *'the experience of the United Kingdom, especially since 2010, underscores the conclusion that poverty is a political choice'*.

Rising levels of inequality are incompatible with the duty to respect, protect and fulfil human rights. Only equalising policies can ensure public authorities make use of the *maximum* of available resources – as required by Article 2(1) of the International Covenant on Economic, Social and Cultural Rights – to ensure socio-economic rights for everyone without discrimination of any kind.

The socio-economic duty offers a powerful lever to reduce the damaging gaps that harm us all. Equality defines a fair society. It should not be a postcode lottery.

900 Briefing 900

An incomplete explanation is an inadequate explanation

Iwuchukwu v City Hospitals Sunderland NHS Foundation Trust [2019] EWCA Civ 498; March 26, 2019

Facts

Obiukwu Iwuchukwu (OI) was the only black African consultant general surgeon employed at the City Hospitals Sunderland NHS Foundation Trust (S). From 2010 onwards, after about 3 years with S, it had concerns about his capability in performing breast reconstructive surgery as well as other issues about his practice and conduct. Investigations took place in 2012 and 2013 but did not warrant further action. However an audit of OI's practice had shown a '*significant complication rate*' in his work. Then followed a serious incident in which OI, having been handed an alcohol-based rather than an aqueous-based antiseptic, set a patient on fire on the operating table. An investigation was launched and from September 2013 OI was restricted to non-clinical practice with no patient contact. Those restrictions remained but were not kept under any proper or adequate review until OI was dismissed some 20 months later.

A Royal College of Surgeons (RCS) review concluded in early 2014 that 80% of his work was not to be criticised, but noted an effective breakdown of trust, a reluctance on OI's part to accept different opinions, and recommended continuing the practice restrictions until he had a mentor and direct clinical oversight. He was also referred to the GMC and the supervision requirements of an interim fitness to practice order effectively prevented him from practising.

In June 2014 he presented a grievance complaining of a discriminatory and vindictive policy, adding at a preliminary meeting about his grievance in July that this was race discrimination. He was asked for more information in August in a letter that did not refer to any time limit nor give any deadline for reply.

In September 2014, S fixed a capability hearing. OI tried to continue with his grievance but was told it was outside the time limit. S refused to consider it unless OI identified exceptional circumstances preventing him raising it within the one-month limit.

In response to a second grievance raised in October 2014, S appointed a case investigator (a required step which had been omitted in the RCS review). The investigator's report noted conflicting evidence and identified four options going forward. S pressed ahead with a capability hearing: the ET found that S had seen the grievances as an attempt to derail the capability process.

A capability panel decided OI should be dismissed with notice. He appealed, noting the panel had failed to make any findings about his complaints of race discrimination and victimisation. It took three months to fix a date for the appeal hearing, making the delay from appeal to hearing some 5 months. OI's representative complained the delay in organising the appeal was an act of harassment. The appeal was cancelled and no hearing took place.

OI moved to Cornwall to work after his dismissal. His practice under the supervision of a former colleague caused no difficulty and successful remediation to his former level was a reasonable prospect.

Employment Tribunal

In August 2015, OI brought a number of claims of direct race discrimination, harassment, victimisation, whistleblowing and unfair dismissal. The ET upheld one aspect only of his direct race discrimination claim, victimisation and unfair dismissal.

The ET decided that the failure to investigate OI's grievances was direct race discrimination, and found it just and equitable to extend time. As both grievances alleged race discrimination, they were protected acts so the failure to investigate also constituted victimisation. It found the dismissal unfair, largely for procedural reasons which tainted all that followed.

In terms of finding a prima facie case sufficient to reverse the burden of proof, the ET relied on the length of time and nature of S's investigations, the failure to distinguish between conduct and capability issues, and the breakdown in personal relationships. To those, it added the fact that at the material time OI was the only black African consultant employed by S.

Having found the burden reversed, the ET rejected S's explanation that the grievances were an attempt to delay or derail the capability process. This was because the first grievance preceded the start of the capability process. Moreover, by convening a meeting, S had accepted the grievance had been raised properly. Thus S's refusal to continue with the grievance was contrary to the terms of its grievance policy. The ET rejected the explanation because the grievance was in fact not out of time in accordance with the policy.

Employment Appeal Tribunal

S appealed. The EAT allowed the appeal: although the *'out of time'* reason for not dealing with the grievances was not a sustainable one, S's view that the grievances were presented as an attempt to delay or derail capability proceedings provided a complete explanation for S's conduct unrelated to race.

Court of Appeal

The CA allowed OI's appeal, restoring the ET's decisions on direct race discrimination, victimisation and unfair dismissal.

On direct discrimination, the CA held the ET had conducted a carefully reasoned application of the provisions reversing the burden of proof: there was no '*unjustified leap of reasoning*' as the EAT had found. The ET had rejected S's explanation because it found the grievances were not out of time in accordance with the policy. Moreover, the first grievance had been raised before capability proceedings had been mooted, so the belief could not apply to that stage: as such it was not a complete explanation for the conduct. As S's reason for not dealing with the grievances was rejected, it could not necessarily be said with safety that the reason was completely untainted by considerations of race.

On analysis of the victimisation findings, the ET had been entitled to conclude that the grievances were protected acts and that the failure to investigate was materially influenced by the allegations of discrimination.

On unfair dismissal, the EAT had relied upon *McAdie v Royal Bank of Scotland* [2008] ICR 1087. The EAT had misunderstood *McAdie* which was different on the facts. The previous history was relevant as one of the circumstances to be considered when addressing the reasonableness of the dismissal.

Comment

As Singh LJ emphasises, each case must turn on its own facts. Davis LJ had 'initially wondered' whether the ET had sufficiently confronted the point that although the explanation was legally a bad one, it was still S's explanation and that *'explanation (bad though it was) … precluded direct discrimination…'*. However, because the ET did not find the explanation a 'complete' one, S had failed to discharge the reversed burden of proof.

Implications for practitioners

- Avoid short cuts. Analyse and argue each aspect of a case.
- Make sure the time line is clear. Which people are involved at each stage and what is their actual knowledge of events?
- Unpick and check a respondent's explanation – does it cover all of the conduct?
- If there is a gap in the case, you should try and deal with it.
- Establishing the 'something more' to make out a prima facie case may require very little. Here there was unreasonable behaviour; but that and a difference in race between a claimant and the appropriate comparator is not enough. Here, the only extra factor apparent which pointed to race as being a significant influence was that OI was the only black African consultant employed by S.

Sally Robertson
Cloisters

Back to Madarassy – CA reverses the EAT and restates the approach to the burden of proof

Royal Mail Group Limited v Efobi [2019] EWCA Civ 18; January 23, 2019

Implications for practitioners

The difficulties which claimants may face in proving allegations of discrimination are well recognised. Whilst a claimant will know that he has not been appointed to a post or has not been given an opportunity, he may not know why he has failed, or why others have succeeded. He may also not be able to easily find out if there is a pattern of non-appointment of persons sharing his protected characteristic, since the information and evidence will all be held by the employer respondent. Whilst early focused disclosure may assist in some cases, it will not do so in all cases.

The statutory provisions of s136 of the Equality Act 2010 (EA) dealing with the burden of proof were introduced specifically to deal with this difficulty, by requiring an ET to find that discrimination has occurred '*if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned'* unless A shows that A did not contravene the provision.

The meaning and application of these provisions continue to pose problems, and in *Efobi*, the EAT considered that the slight change in wording in s136 EA from earlier versions in the Sex Discrimination Act 1975 and Race Relations Act 1976 for example, meant that a change of approach was required; see *Efobi v Royal Mail Group Ltd* UKEAT/0203/16/DA, Briefing 844.

That judgment has now been considered and disapproved by the CA, reversing the judgment of the EAT on the approach to the burden of proof, and reinstating the finding of the ET that there was no direct race discrimination against Mr Efobi.

Facts

Mr Efobi (E) is a black Nigerian and a citizen of the Republic of Ireland. He was employed by the Royal Mail Group (RMG) from August 2013 as a postman sorting and delivering mail. He applied for over 22 posts in management and IT but was unsuccessful in all of them. He claimed that he had been discriminated against on grounds of his race and nationality and brought claims for direct and indirect discrimination, harassment and victimisation. Whilst he succeeded in some claims, he failed to establish direct discrimination and appealed to the EAT.

E argued that there had been systematic, subtle discriminatory bias embedded in the recruitment process, which involved an online application and an upload of his CV.

Employment Tribunal

The ET focused on 22 of E's applications. These had been considered by various different individuals and E had been long-listed for two posts and interviewed for two. Some decisions not to shortlist him had been made by external recruiting agency staff and there was no suggestion that any of them had discriminated against E. However E alleged that some vacancies for posts had been pulled because he was the only remaining applicant and that his colour, nationality or ethnicity was a factor in such decisions.

The ET found that there was no evidence that any advertised post had been pulled or that any advertisement was cancelled or postponed because of E's colour, nationality or ethnicity. They also made critical findings in respect of the quality and relevance of his CV.

E had not asked for any discovery of other applicants, or successful candidates, and did not in fact identify any actual comparator. RMG did not adduce any evidence in respect of other candidates, and therefore the ET did not have before it evidence of the identity or qualifications of any of the other candidates for any of the posts. The ET also found that E had failed to prove any fact from which the tribunal could infer that his colour, race or nationality was actually known to any of the individuals who were taking decisions about hiring or recruiting.

The ET concluded that E had not discharged the burden of proof at the first stage and, in the light of all the relevant evidence it did have, including RMG's evidence of the procedure followed, dismissed his allegations of direct race discrimination.

Employment Appeal Tribunal

The EAT took a different approach to the question of the burden of proof and was critical of RMG's decision

not to call the decision-makers to give evidence. The comments made about the operation of s136, and the obligation of an employer respondent to give evidence at the first stage of the test, was disapproved by the CA, which stated that much of the reasoning of the EAT was taken up with an erroneous analysis of s136.

Court of Appeal

The EAT had stated that:

> *At the first stage of the analysis required by section 136 there is no burden on a claimant to prove anything... What the tribunal has to do is look at the "facts" as a whole. If the respondent chooses, without explanation not to adduce evidence about matters which are within its own knowledge, it runs the risk that an employment tribunal will draw inferences, in deciding whether or not section 136(2) has been satisfied, which are adverse to it on the relevant areas of the case.*

The CA said this was an incorrect analysis. The correct approach, regardless of slightly different wording, remains that set out in *Madarassy v Nomura International plc* [2007] ICR 867.

Sir Patrick Elias, giving judgment for the court, agreed with RMG that the EAT had placed an improper burden on the employer to adduce evidence. The ET had correctly considered the evidence and formed the view that there were innocent non-race reasons for the failure to appoint. It was therefore not necessary for the employer to produce witnesses who had actually made the decision not to appoint E. It was enough to have witnesses who explained the recruitment process and for the ET to take their evidence into account.

The CA considered the obligation on a claimant and issues for litigants in person. They stated that the onus of proof at the first stage remains on E to prove facts showing discrimination. This meant that E must adduce information which he said supported his case, and this included an obligation on him to request it, or obtain an order from the ET for disclosure.

Whilst the CA recognised that the process can be daunting for litigants in person, and that the ET can assist them in the process, it must exercise care when doing so and the tribunal must not to be seen as losing impartiality by favouring one side. The argument for E that, as a litigant in person, he could not be expected to understand the niceties of the procedure and to require disclosure of documents from the respondent, was considered but not persuasive here. Whilst it is for the ET to determine how far it can assist a litigant in person, it is not an error of law to fail to do so. See *Mensah v East Hertfordshire NHS Trust* [1998] EWCA Civ 954; [1998] IRLR.

The CA also rejected an argument for E that there was sufficient evidence before the ET in any event. It was argued that it was obvious that the successful candidate was a different race from E and it would have been obvious to the recruiters that he had an African name. His qualifications were such that there was a powerful case for arguing that he had discharged the burden of proof, and the ET could not then decide that there was no discrimination without hearing from those who had made the decision.

The CA disagreed. The employer is not required to do the claimant's job. Whilst a failure to call the decision-maker puts the employer at risk of not being able to discharge the burden of proof if the claimant does prove facts from which discrimination may be determined, an adverse inference cannot be drawn at the first stage against an employer who does not call them.

The CA did not consider that sufficient facts had been proved before the ET to bring the case any where near the prima facie case required, as discussed and explained in cases such as *Madarassy*.

Comment

This case is a paradigm example of the difficulties faced by litigants in person, as well as a restatement of the well-known principles to be applied to the burden of proof in discrimination claims. A claimant who alleges direct discrimination must be able to prove facts from which that discrimination could be found if they are to succeed. This means, at the very least, proving difference in treatment compared to another in the same or similar circumstances, who has different protected characteristics, as well as some factor which points to the protected characteristic as causative of that less favourable treatment. The CA restated the well-known legal principles explained and examined in *Madarassy* and subsequent cases.

However, the judgment highlights a continuing concern amongst many practitioners that the complexity of discrimination law can severely disadvantage a litigant in person. Proving a case is complicated by the fact that in most cases the evidence which a claimant needs to prove both a comparator and less favourable treatment will be in the possession of the employer or respondent. For E in this case, his failure to ask for discovery of relevant documents until the first day of hearing meant that he simply did not have the evidence he required to support arguments of direct discrimination. Without that he could not succeed.

Whether E's case was well founded or not, it raises a fundamental concern about the practicalities of

901 discovery and disclosure. Whilst the duty of disclosure requires all parties to provide the other party with documents which are relevant to the claim being made, the provision of documents about the profiles of those who apply for posts, are shortlisted and then recruited in discrimination claims is rarely made available by respondents unless requested. Whilst those advising claimants will continue to ask for such documents once claims are issued, litigants in person may simply not be aware of their right to ask, or indeed what they should ask for.

There remains a strong argument for early disclosure, and procedures such as the previously available statutory questionnaire procedure, remain worthy of consideration for reintroduction. That procedure, as the DLA has often argued, allowed claimants to consider the strengths and weaknesses of their claims, and for respondents to demonstrate the fairness of their process at an early stage.

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902 Briefing 902

Causation in maternity discrimination cases

South West Yorkshire Partnership NHS Foundation Trust v Jackson and Others
UKEAT/0090/18/BA; November 22, 2018

Implications for practitioners

The EAT's decision is a reminder to practitioners of the correct test for causation in cases where a claimant complains of unfavourable treatment for the purposes of s18 Equality Act 2010 (EA). In such cases it is necessary to consider the reasons why the claimant was treated as she was. That the unfavourable treatment would not have taken place but for the claimant exercising her right to maternity leave is not sufficient for a finding of discrimination. The characteristic of the claimant's maternity leave would have needed to have operated on the would-be discriminator's mind, or a rule applied which was inherently discriminatory (*Onu v Akwiwu and Another* [2014] EWCA Civ 279: Briefing 788).

Facts

Mrs Pease (P) was one of 19 individuals who brought claims against South West Yorkshire Partnership NHS Foundation Trust (T) following her dismissal for redundancy. P and two of the other claimants were on maternity leave at the time of the redundancy exercise and the three brought claims for discrimination on maternity grounds under EA s18(4), as well as for unfair dismissal.

On July 24, 2018, a meeting took place to discuss the forthcoming redundancies, which P attended despite being on maternity leave. The following day, P and her fellow claimants were placed at risk of redundancy. The day after that, an email was sent to P and the others asking them to urgently complete a document with their preferences for redeployment. This email was sent to P's work address but she could not access her work emails and on August 4, 2018 she rang T when she discovered she had missed something. As soon as P did this, she was sent the relevant form, which she completed and returned to T straight away. There was no suggestion that P was in fact disadvantaged by the delay, but she was left in ignorance of three job opportunities and was understandably anxious about being kept out of the loop.

Employment Tribunal

Although the sender of the email did not give evidence, the ET found that the delay in contacting P to give her the opportunity to return the preference form was a detriment and unfavourable treatment. This unfavourable treatment was said to have arisen as a direct consequence of her exercising her right to maternity leave. The judge was accordingly satisfied that the causal connection was established on the basis that the disadvantage flowed from P's absence from the workplace. The observation was made that those on sick leave, for instance, might be similarly disadvantaged, but this did not matter when considering unfavourable (as opposed to less favourable) treatment.

Employment Appeal Tribunal

T appealed on liability, relying on three points:

1. the ET should not have found that there was unfavourable treatment

2. the ET did not correctly approach the question of causation, and
3. the decision was perverse.

The EAT quickly dismissed the first and third points. It held that missing out on an important and urgent work message must amount to unfavourable treatment in one way or another. There were gaps in the ET's findings of fact, but the decision could not be regarded as perverse because further analysis could have revealed a discriminatory motive.

Turning to the second point (on causation) the EAT found that applying a 'but for' test was insufficient for discrimination and an ET must ask itself the standard 'reason why' question; see *Indigo Design Build & Management Limited & Another v Martinez* [2014] UKEAT/0020/14/DM.

In the present case it was not possible to read into the ET's judgment that the sender of the email was motivated by a discriminatory attitude in relation to P being on maternity leave, or that the characteristic of maternity leave had operated on his mind. Further fact-finding and analysis would be required to reach that conclusion, or alternatively to conclude that an inherently discriminatory rule had been applied. Only in those circumstances could the 'reason why' test be satisfied; see *Onu v Akwiwu and Another* [2014] EWCA Civ 279; Briefing 788.

Comment

On the subject of causation, practitioners should be alive to the fact there needs be a discriminatory motive or taint, in order to satisfy the 'reason why' test. This may not be present, or it may be present but not immediately obvious. It was not appropriate for the ET to conclude in the present case that the claimant had been discriminated against, based on the fact-finding that had taken place. But discrimination could not be ruled out, hence the case was remitted to the same ET to decide whether it would be appropriate to hear more evidence and to make further findings of fact.

From a practical point of view, this case serves as a reminder to employers to keep workers in the loop during maternity leave. No findings were made as to why the claimant could not access her work emails. But the EAT agreed that the claimant had been unfavourably treated. Employers would therefore be well-advised to seek confirmation of workers' preferred methods of contact while they are away from the workplace and to take steps to ensure such workers, including those on maternity leave, are not overlooked in relation to redundancy consultation, job opportunities, employment benefits and so on.

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Briefing 903

Construing the payment period for long-term disability benefits

ICTS (UK) Ltd v Visram EAT/0133/18; EAT/0134/18; March 27, 2019

Facts

Mr Visram (V) worked as an International Security Coordinator for American Airlines from 1992 until a TUPE transfer in December 2012 to ICTS (UK) Ltd. He became ill with work-related stress and depression shortly before the transfer. After 26 weeks' absence, he became entitled under his contract of employment to long-term disability benefits (LTDB) under terms set out in a Members' Explanatory Booklet of Employee Retirement Death and Disability Plans.

According to the booklet, V was entitled to LTDB payments of $^{2}/_{3}$ of his salary '*until the earlier date of your return to work, death or retirement*'. The benefits were provided by way of an insurance policy, but it had been established at an earlier stage of the litigation that the contractual entitlement was to the benefits themselves, not merely to the benefit of some suitable policy of insurance: it was a matter for the employer to decide how it wished to fund its contractual liability.

ICTS dismissed V by reason of medical incapability on August 14, 2014 (although it continued to make monthly LTDB payments on a *without prejudice* basis). V complained of unfair dismissal and disability discrimination.

Employment Tribunal

An ET held that V's dismissal was unfair, and an act of disability discrimination. It was common ground that there was no prospect that V would ever return to his

job as an International Security Coordinator. Rather than awarding a lump sum discounted to reflect the chances of various possible terminating events, the ET awarded compensation payable on a continuing monthly basis until one of the terminating events should occur. The ET construed '*return to work*' on an 'own occupation' basis for these purposes, relying in part on the terms of the insurance policy by which the benefits were provided; but made an alternative award of $^{2}/_{3}$ pay for a period of four hours from the date of the remedy hearing in case, correctly construed, his entitlement ceased when he was well enough to return to any reasonable remunerative full-time work.

The tribunal made an award (with the parties agreement) of £14,000 for injury to feelings, but declined to make an award of aggravated damages to reflect additional injury caused to V by ICTS' decision to instruct private investigators to conduct covert surveillance on him, holding that the sum of £14,000 was sufficient to compensate him for any such further injury to his feelings.

Employment Appeal Tribunal

On appeal, ICTS argued that the ET had wrongly construed V's entitlement to LTDB on an 'own occupation' basis. The reference to '*return to work*' ought to be read as meaning that the entitlement ceased when V was sufficiently recovered to return to any suitable work either for ICTS or for another employer. The appeal failed: the tribunal had been entitled to have recourse to the terms of the insurance policy as an aid to the construction of the contractual obligation, and had construed it correctly.

V succeeded in his appeal against the tribunal's failure to make a separate award for aggravated damages in respect of the surveillance which he had been put under. The parties having agreed the appropriate sum to compensate V for injury to feelings excluding any injury occasioned by the aggravating factor of surveillance, the effect of the tribunal's decision was to award nothing for that factor: the decision was to that extent not '*Meek*-compliant', and required to be explained.

Comment

The results of the appeal and cross-appeal are both unsurprising. ICTS' argument that '*until your return to work*' should be construed as '*until such time as you are capable of returning to remunerative full-time work with this or any employer*' was ambitious: the surprise is not that the EAT dismissed it, but that it let it through the sift. And the success of V's appeal in relation to aggravated damages is a fairly routine application of the *Meek* requirement to give sufficient reasons for a decision.

The unusual feature of the case is the ET's decision, recorded at para 8 of the EAT judgment, that compensation should be paid on a monthly basis. Damages for discrimination are of course intended to put the victim in the position he or she would have been in had the statutory tort not been committed. On the face of things, continuing monthly payments of LTDB until one of the terminating events should occur was indeed the most accurate way of achieving that, although such orders are rare, at least: the author is not aware of such an order ever previously having been made by a tribunal.

V had been unhappy with that aspect of the ET's decision, and had appealed, arguing that there was no power to make such an award. That interesting question will have to wait for another day: the respondent conceded that part of his appeal, and there was therefore no reasoned EAT judgment on it.

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Interpretation of 'long-term' in disability discrimination

Nissa v (1) Waverley Education Foundation Limited (2) Ms J Newsom
UKEAT/0135/18/DA; November 19, 2018

Implications for practitioners

In *Nissa* the EAT considered how 'long-term' should be interpreted for the purposes of the definition of disability for s6 and Schedule 1 Equality Act 2010 (EA). The judgment provides guidance for practitioners and a reminder of the importance of looking at the broader picture of an impairment and beyond a diagnosis or label.

Facts

The claimant, Mrs Nissa (C) was employed as a science teacher at the first respondent school of which the second respondent was the principal. C resigned on August 31, 2016 and brought claims for disability discrimination, claiming that since December 2015 she had suffered from impairments: fibromyalgia and mental distress. The diagnosis of fibromyalgia was first suggested in June 2016 and confirmed in August 2016, just before C resigned. C had been continually treated throughout this period by her GP and other clinicians; she had also been off work sick during this period.

Employment Tribunal

The respondents accepted that C did have an impairment but disputed both that C's impairments resulted in 'substantial' adverse effects and that they were 'long-term'.

This being a case where, at the material time, C's impairment had not existed for 12 months, the ET had to consider whether the impairment was '*likely to last more than 12 months*'. The ET considered the medical evidence available which included C's medical records and noted that none of her treating professionals had stated that her impairment was, or was likely to be, long-term. Furthermore, in October 2016, a few months after her resignation, her treating neurologist suggested that her symptoms may improve now that she had resigned. Therefore, the ET held that the effect of C's impairment was not long-term and further considered that the evidence did not suggest that her impairments gave rise to substantial adverse effects.

The ET held that C was not disabled during the material period (December 2015 – August 31, 2016) because at no point could it be said that C's condition would be likely to be long-term. C appealed.

Employment Appeal Tribunal

The EAT allowed C's appeal and held that the ET had erred in focusing on the question of diagnosis or label rather than her impairment. The ET had not given sufficient weight to C's own evidence of her condition. Further, the ET had taken a narrow rather than a broader view of the evidence when looking at the reality of the risk. The question to be asked was whether it '*could well happen*' pursuant to the approach set out in *SCA packaging Ltd v Boyle* [2009] ICR 1056 UKHL, Briefing 540.

The EAT held that the ET had viewed the issues with the benefit of hindsight when putting emphasis on the neurologist's prognosis that C may improve, which was outside the material period in any event. The relevant period to focus on was prior to August 31st and the ET was required to consider whether on the evidence before it, viewed at that time, it could well happen that the effects of C's impairments would be long-term.

The EAT also held that the ET's decision on substantial adverse effects could not stand because it had failed to take into account evidence which was relevant to the question (such as a report by C's doctor and C's evidence) and had failed to show that it had looked at the impact of C's condition absent mitigation by medication.

The case was remitted to a different ET for determination.

Leila Moran
Leigh Day

Direct discrimination on the grounds of religion or belief

Gan Menachem Hendon Limited v Ms Zelda De Groen UKEAT/0059/18/OO; February 12, 2019

Implications for practitioners

This case concerned the respondent's appeal against the ET's decision to uphold the claimant's direct and indirect discrimination claims on grounds of religion or belief, as well as direct discrimination and unlawful harassment on grounds of sex.

This case summary focuses on the judgment's important implications for direct discrimination claims on the grounds of religion or belief. Most significantly, Swift J concluded that discrimination claims cannot be brought on the grounds of a protected characteristic possessed by the employer, applying the ruling in *Lee v Ashers Baking Co. Limited* [2018] UKSC 2017/0020, Briefing 872, to employment case law.

Facts

The respondent (R) employed the claimant (ZDG) as a teacher in its nursery which was run in accordance with Jewish ultra-orthodox Chabad principles. ZDG and her boyfriend attended a barbeque at which nursery staff members and parents of children who attended the nursery were present. During the course of the barbeque ZDG's boyfriend mentioned to one of the nursery's directors that he and ZDG lived together. R alleged that this caused concern amongst some of the parents in the community, as many of them held the belief that co-habiting with partners before marriage contravened the laws of Judaism.

Subsequently ZDG was called to a meeting with the head-teacher and managing director of the nursery. ZDG was told that her private life and whether or not she lived with her boyfriend was of no concern to R. However, ZDG was asked to say to R that she no longer lived with her boyfriend, so R could relay this to concerned parents who might raise issues with the nursery. R acknowledged that this solution entailed ZDG acting dishonestly in relation to her private life.

ZDG was upset by this request and later asked for an apology and a promise not to be 'harassed' in this way again. R did not provide this.

R initiated a disciplinary process which eventually led to ZDG's dismissal. A letter outlined the dismissal grounds, namely that:

- ZDG had presented herself in such a way that proved she had acted in contravention of the nursery's culture, ethos and religious beliefs
- she had damaged R's reputation through complaints made by parents
- her disclosure had potentially led to R's financial detriment .

ZDG is a practicing Jew herself. She claimed that R had discriminated against her because she did not ascribe, as R did, to the tenet of the religion which forbids partners from co-habitation before marriage.

Employment Tribunal

The ET concluded that R had directly discriminated against ZDG during the numerous encounters they had with her after the barbeque leading up to her dismissal, and in dismissing her. The ET concluded that the treatment was directly linked to R's belief in the prohibition of co-habitation for unmarried couples and ZDG's lack of belief in this prohibition.

Employment Appeal Tribunal

R appealed the ET's ruling in regards to all the claims brought by ZDG. R's appeals against the ET's finding of sex discrimination and harassment against ZDG were dismissed.

In relation to the direct discrimination claim on grounds of religion or belief, Swift J allowed the appeal and disposed of the claim. Swift J ruled that the ET had erred in law by concluding that s10 of the Equality Act 2010 (EA) prohibits less favourable treatment of an employee by an employer on the basis of the employer's own religion or belief. Swift J cited Lady Hale's reasoning in her judgment in the *Ashers Baking* case.

In that case Lady Hale stated that the purpose of discrimination law is to protect individuals with a protected characteristic from less favourable treatment because of that characteristic; its purpose was not to protect individuals without a protected characteristic from less favourable treatment because of a protected characteristic held by the discriminator. Lady Hale stated that any conclusion to the contrary would run against the principle that a discriminator's motive for less favourable treatment is irrelevant. Further, any claim that rested on the protected characteristic of

religion or belief held by the respondent would fail the less favourable treatment test, because the respondent would act on the grounds of their own religion or belief regardless of who was affected. Therefore, it could be assumed that R would treat ZDG the same as any comparator and the requirement for less favourable treatment would not be satisfied.

Swift J then provided reasoning as to whether ZDG was treated less favourably because of her own lack of belief in the prohibition of unmarried couples co-habiting. He stated that in order to conclude that R acted because of ZDG's lack of belief, it would have to be shown that R's concerns extended well beyond the risk of reputational harm to a 'free-standing concern' that ZDG's beliefs were not the same as its own. Swift J concluded that this was not true on the facts of this case, stating that R acted on its own beliefs and ZDG's non-compliance with those beliefs.

On the above reasoning, the appeal against the ET's finding of direct discrimination on grounds of religion or belief was upheld and this claim was dismissed.

Swift J went on to consider a further question of law put forward by R in its appeal. Namely, whether s10 EA applies to situations where both the claimant and the respondent are members of the same religion but the claimant is treated less favourably because of their lack of belief in an aspect of the (otherwise) shared faith. Swift J concluded that s10 does protect the claimant in situations of this kind, relying on explanatory notes to the EA which state that one purpose of the Act was to strengthen the law to support progress on equality.

Comment

Swift J's analysis on this case provides important guidance for practitioners bringing discrimination claims on the grounds of religion or belief.

Perhaps the most interesting reasoning provided by Swift J is that, for a respondent to discriminate against a claimant on the grounds of belief or lack of belief held by the latter, it has to be proven that R's concern goes farther than reputational risk to a 'free-standing' disagreement with the claimant's views. This appears to contradict the acknowledgement by the judge that the motive of the 'discriminator' is irrelevant.

In many cases where an individual is treated less favourably because of a protected characteristic, religion or belief or otherwise, the employer does not act out of an express disagreement or bias against the claimant's protected characteristic. Often employers justify less favourable treatment because of perceived benefits to their business, such as protection of reputation. This reasoning seems to narrow the circumstances in which direct discrimination for religion or belief can be claimed, to situations where employers act out of dislike or disagreement with the religion or belief of the employee. This would exclude circumstances where employers act out of concern for the effects of the employee's religion or belief on the business.

Yavnik Ganguly
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Briefing 906

Sexual orientation discrimination

The Governing Body of Tywyn Primary School v Aplin UKEAT/0298/17/LA; March 4, 2019

Introduction

The appeal concerned the ET's finding that a head teacher of a school was entitled to resign and claim constructive dismissal and sexual orientation discrimination, largely based on the conduct of those investigating and deciding on his disciplinary proceedings. The EAT approved the ET's findings that the failings in procedure were so unreasonable that it was possible to infer there must have been much more to the failings than simply the allegations under investigation, specifically that discrimination can be inferred.

Facts

Mr M Aplin (MA) was appointed as head teacher by the Governing Body of Tywyn Primary School (the school) from September 1, 2015. MA had previously acted as a deputy head and acting head teacher for the school. MA was openly gay and the school governors were fully aware of his sexual orientation.

In August 2015 MA met two 17-year-old men through the 'Grindr' app and they had sex. MA reasonably believed them to be over 18. The matter came to the attention of the Police and Local Authority's Social

Services Department. A Professional Abuse Strategy Meeting (PASM) was arranged for August 28, 2015, attended by Mr Latham, the chairman of the school's governors. On September 1, 2015 MA was suspended from duties. A further PASM determined that no criminal offence had occurred and no child protection issues arose. However the PASM recommended the school consider disciplinary action. The disciplinary proceedings terms of reference were formulated by Mr Hodges (H) (local government lawyer) for Mr Gordon (G) (who worked for the local authority); G was appointed to investigate.

G's investigation report was discussed by Mr Latham and fellow governor Mr Crowley who decided the matter should proceed to a disciplinary hearing which eventually took place on May 17, 2016. MA had still not been provided with the PASM minutes or police material. G presented the case for the school. MA stated that what he had done had been lawful and part of his private life and that G's report was biased and homophobic.

The disciplinary panel, assisted by H and Ms Holt (HR Manager), found that MA had failed to recognise the impact of his conduct on his role as head teacher and on the reputation of the school. The panel called his judgment into question and considered that its trust and confidence in him as head teacher had been undermined making his position untenable. The school moved to terminate MA's employment with immediate effect but his contractual right of appeal had the effect of halting the dismissal pending the outcome of any appeal.

MA appealed the decision on May 25, 2016 on numerous grounds, including bias and unfairness in the report, failure to disclose documents, the hearing being driven by homophobic beliefs and the decision wrongly involving child protection issues. H decided the appeal should take the form of a complete re-hearing. After significant delays, on August 27, 2016 MA resigned. He complained of an inept and unfair investigation which had influenced the disciplinary panel.

Employment Tribunal

MA brought claims for unfair constructive dismissal and sexual orientation discrimination.

The ET found that the unsatisfactory investigation report and other failings in the disciplinary procedure involved breaches of the implied term. Although it held that MA had affirmed the contract by appealing, the ET found further breaches in the way the appeal was handled which entitled him to resign and claim constructive unfair dismissal.

MA claimed the entire disciplinary process, including the appeal and the decisions reached, were influenced by his sexual orientation and therefore amounted to direct discrimination.

The ET found that the way MA had been treated overall gave rise to a prima facie case of discrimination giving rise to the reversal of the burden of proof. It considered the positions of G, H, other local authority officers and the school governors separately.

The ET found that the investigating officer, G, had subjected MA to sexual orientation discrimination and thus the claim against the school's governing body, which was vicariously liable for G, was well founded. However the ET found that adequate explanations were provided in relation to H, other local authority officers and the school governors.

The ET heavily criticised G's investigation report for approaching the case on the basis that MA was a potential danger to children, for drawing selectively on PASM minutes and police material which had not been made available to MA, and for failing as required by guidance to produce a report which was factual and objective. G's report was laden with value judgments and conclusions hostile to MA. The ET found that both Mr Latham and G based their approach to the case on a premise that MA presented a child protection problem, which was inconsistent with the PASM conclusions or the terms of reference.

The ET was highly critical of the fact that MA had not being provided with the PASM minutes or police material. It was also critical of G for having presented the school's case at the hearing and H inappropriately retiring with the panel. The tribunal found H responsible for the decisions '… *at least in terms of detailed reasoning as set out in the outcome letter*'.

H accepted at the disciplinary hearing that G's report was not objective and told the panel to ignore the parts which lacked objectivity. However, at the ET hearing a panel member was unable to distinguish between the objective and subjective parts of G's report.

Employment Appeal Tribunal

The school appealed the ET's findings in relation to unfair constructive dismissal and discrimination.

The EAT held that the bringing of the disciplinary appeal did not amount to an affirmation of the earlier breaches. Instead it amounted to MA giving the school an opportunity to remedy its breaches, which it did not do. The EAT found there had been a constructive dismissal and the appeal failed.

The school appealed the discrimination finding on the basis that either the wrong legal test had been

applied or there was no evidence to justify the finding. The EAT conceded that the ET judgment should have been better expressed, but that the decision on what basis the ET considered the burden of proof had shifted was sufficiently clear. Namely, MA's sexual orientation was at the centre of the case and the procedural failings were so unreasonable that it was possible to infer discrimination. Therefore the EAT rejected the school's appeal on discrimination.

MA cross-appealed the ET's findings that H, other local authority officers and the school's governors did not discriminate against him. The EAT found the ET's findings that there were non-discriminatory explanations for H's conduct were legally sound. The EAT found that there was no basis upon which to assert that the other local authority officers had discriminated against MA.

Lastly, the EAT found that with respect to the school governors, the ET should have considered why they had abdicated their role as decision-makers to the local authority officers and H, and whether the burden was discharged in respect of the governors given this fact. The ET did not properly scrutinise the position of the governors or take into account all the relevant evidence or give sufficient reasons as to why the ET found they had discharged the burden. Therefore the EAT allowed MA's cross appeal insofar as it related to the governors.

The EAT dismissed the school's appeal in its entirety and remitted the case back to the same ET to consider the issue of discrimination in respect of the governors.

Implications for practitioners

This case confirms that an ET can draw inferences of discrimination where the failings in procedure are so unreasonable that it is possible to infer there must have been much more to the failings than simply the allegations under investigation. Panels and decision-makers should not abdicate their roles to others as to do so could open them to implications of discriminatory motives.

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Briefing 907

Something arising in consequence of disability – a reminder of the reverse burden

Baldeh v Churches Housing Association of Dudley and District Ltd. UKEAT/0290/19; March 11, 2019

Implications for practitioners

- A reminder that there is neither a comparator in s15 nor a need to show that an alleged discriminator knew that the consequence arose out of disability, only that they ought to have known that there was a disability at all. This can make it a preferred claim to other claims under the Equality Act 2010 (EA) or Employment Rights Act 1996, including unfair dismissal.
- It is not necessary to determine if ***the*** reason for the treatment arose from the consequence of disability (including its symptoms), but rather if it was ***a*** reason. If it can be inferred that it was a reason, it is then for the employer to prove that it is not a reason that had any effect. This is the reverse burden, *Pnaiser v NHS England* UKEAT/0137/15; [2016] IRLR, Briefing 779.
- An internal appeal to the employer is an important part of the dismissal process. Any knowledge that arises at the appeal is relevant to s15 and it is best to plead this explicitly.
- The test of whether the unfavourable treatment was proportionate under s15 (1)(b) is an important part of the battleground.

Facts

Mrs Baldeh (B), an experienced support worker, was dismissed by Churches Housing Association of Dudley and District Limited (CHADD) at the end of her six-month probationary period. The reasons given for her dismissal related to her performance, her communication skills and how she related to her colleagues. The performance issues included an instance of lending a service-user £10 without prior receipt of the delegated authority, a concern raised by a service-user about the tone of her text messages and two breaches of data protection by leaving out files. B appealed to her employer against her dismissal.

At the appeal hearing, B described having previously felt agitated and trapped, explained that she suffered from depression and that she had seen the pattern before and that it led to unusual behaviour and being unguarded in what she said. She also said that her long-term memory could be affected by her condition. B's appeal was rejected.

Employment Tribunal

B brought a claim in the ET for, amongst other matters, unfavourable treatment arising out a consequence of disability under s15 EA which states:

A person (A) discriminates against a disabled person (B) if –

a) A treats B unfavourably because of something arising in consequence of B's disability, and

b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

It was accepted that B was disabled by reason of depression at the time of her dismissal. However, the ET rejected her claim on the grounds that:

- CHADD did not know and could not reasonably have known of her disability at the time of her dismissal
- B provided no evidence that her behaviour towards her colleagues arose as a result of her disability, as opposed to being a personality trait
- there were other reasons sufficient for her dismissal, and finally
- even if the dismissal was unfavourable treatment, it was objectively justified under s15(1)(b) EA.

Employment Appeal Tribunal

B appealed. In allowing her appeal, the EAT found that although CHADD did not know about B's disability at the time of her dismissal, the evidence showed that it may have acquired the relevant knowledge before it rejected her appeal. As the rejection of the appeal was part of the treatment complained of, this should have been considered by the ET and properly accounted for.

There was in fact evidence of a connection between B's conduct and her depression which the ET ought to have considered; two substantial examples were the impact on her manner and her failure to put away sensitive documents.

It was sufficient for '*the something arising in consequence*' of the disability to have a 'material influence' on the unfavourable treatment: the fact that there may have been other causes was not an answer to the claim.

The EAT found that the ET had wrongly assessed the issue of justification as it did not engage with B's disability, or the question whether the dismissal was proportionate. It made no attempt to balance the prejudice to B of losing her job for something potentially arising out of her disability against the need to achieve the legitimate aim.

The EAT remitted the case back to a newly constituted tribunal to consider whether the rejection of B's appeal against her dismissal was an act of discrimination.

Comment

This case doesn't present any particular new law. But the application of s15 is not always straight forward and the judgment of the EAT politely picks at errors across the determinative issues.

It is particularly important that practitioners understand the way in which material or significant influence is arrived at. The purpose of the reverse burden is to avoid the evidential difficulty of the tribunal needing to know the subjective issue of what is going on in the alleged discriminator's mind at the relevant time. S136 EA circumvents this by requiring a reason which can be properly inferred to be disproved by the respondent. This is because employers are likely to produce alternative reasons either at the time or later, whether consciously or not. That does not mean that the discrimination didn't happen and any assumption that it does, even if the reasons appear credible, defeats the purpose of discrimination law. The respondent must actually disprove the inferred reason as not having any material influence. Here, two or more significant links were missed and s15 is precisely about longer or less tangible chains of causation.

It's also not infeasible that an employee with a disability can feel trapped or agitated because of systemic discrimination elsewhere, whether its transport, housing or access to medical care. It's not unfeasible that systemic discrimination results in under-employment. Both of these are matters that might lead to frictitious employment relationships, if they are not recognised. This lack of recognition is almost certainly because the difficulties faced by persons with 'impairments' are not being understood more broadly. It is an obvious downward spiral if the failures in law created by society elsewhere are then treated as personal or even personality traits either by the employer or the tribunal. This is why s136 EA should be circumventing the approach: '*these are nice people, they don't discriminate*'. It's not about being nice.

It is also where the test for proportionality ought to bite. Was the unfavorable treatment truly objectively justified?

This has further ramifications because the damage is done in close proximity to the decision. Requiring the tribunal's engagement is already too late. It's the front-line advisers, both claimant and respondent advisers, who need to be alert to the potential discrimination. That doesn't necessarily mean the big litigators, but rather the independent employment consultants, trade unions, employee and employer advice lines, law centres and the citizens advice service. There is also a plain argument that parties need to be able to find out for themselves.

There is another issue here. The other claim B made was one of making a protected disclosure. As readers are no doubt aware – whistleblowing often results in the illegitimate use of structural power to suppress exposure. As discrimination is also structural, it can be one of the operating mechanisms that is either wittingly or unwittingly operative. The paradox is that a person who is vulnerable because of disability might have a greater inclination to speak out for others and then find their own vulnerability used against them. This may well be a significant factor in the perpetuity of structural disadvantage.

Workers with disabilities have the right to make protected disclosures too. Given the pressures and tactics which arise in whistleblowing, effecting this protection may require greater scrutiny. This may well develop via parallel claims under s14 EA. In any instance, recognising the process of objectification highlights the narrow definition of disability as a purely economic issue versus the broader societal benefit of supporting differences in human experience.

The DLA is looking forward to diving deeper in to some more of these topics as it approaches its annual conference in October. Come and join us!

Peter Kumar
Chair, Discrimination Law Association

Briefing 908

Rights of disabled people to make alterations to their homes

Smalies v Clewer Court Residents Ltd Cardiff County Court, Case No: B02BS101; January 30, 2019

Implications for practitioners

There have been relatively few cases under the premises provisions of the Equality Act 2010 (EA). Notable ones include *Plummer v Royal Herbert Freehold Limited* Central London County Court, Case No: B01CL659; Briefing 882, November 2018, where it was held, most significantly, that the leisure centre operated by a residents' association was subject to the service provisions of the EA, requiring the association to therefore make anticipatory adjustments to accommodate disabled tenants wishing to use the leisure facilities attached to their homes.

One of the difficulties with the EA's premises provisions, however, is their limitations.

In *Smalies* the Cardiff County Court handed down judgment in a premises case which confirms the rights of disabled people to make disability related alterations to their homes under the EA – seeing off an attempt by the defendant landlord to diminish those limited rights even further than intended.

Facts

The case was brought by a couple, Andrew Smailes and Stacey Poyner-Smailes (PS), who had bought the lease of a two bedroomed residential property in 2014. The lease contained a prohibition on any alteration to the flat. PS has various conditions affecting her health, including Ehlers-Danlos Syndrome which is characterised by generalised joint hypermobility, joint instability complications, and widespread musculoskeletal pain which give rise to difficulties in walking, standing and using one or both of her upper limbs. The severity of these difficulties varies from day to day.

The couple engaged builders to carry out renovation works to their premises much of which was to make it more suitable for PS. These included relocating the kitchen to the lounge and relocating the latter to a bedroom, and necessitated the creation of one internal doorway, and the stopping up of another (the works). After these works commenced the defendant served the claimants with a notice to stop the works as they were

in contravention of the lease. The works stopped and, despite efforts by both parties to resolve the impasse, including mediation, a resolution was not found. The claimants finally moved out in May 2017 and their home remained in an unfinished state. They brought claims under the EA for discrimination, harassment, and victimisation. The harassment claim arose from the treatment of PS at a residents' meeting. The claims were vigorously denied by the defendant.

County Court

Of particular importance in this case was the main claim by PS in respect of the alteration clause. The duty to make reasonable adjustments applies to controllers of premises (essentially, those who manage them) by virtue of s36 EA.

S20(3), one of the reasonable adjustment duties, provides that a controller of premises must avoid any disadvantage caused by a provision, criterion or practice. Schedule 4 details the application of the reasonable adjustment duty in respect of premises, and paragraph 2(3) provides that a provision, criterion or practice includes a reference to a term of the letting. By paragraph 2(7) if such a term that prohibits the tenant from making alterations puts the disabled person at such a disadvantage, the controller is required to change the term only so far as is necessary to enable the tenant to make alterations to the let premises so as to avoid the disadvantage.

The defendant in this case, sought to rely upon the next sub-paragraph submitting that it was not in breach of the duty by refusing to give consent to the works. Paragraph 2(8) provides:

> *It is never reasonable for A to have to take a step which would involve the removal or alteration of a physical feature.*

The decision

HHJ Harman QC unsurprisingly, dismissed the defendant's argument as to the interpretation of the provision relating to the adjustment required of the controller of premises in the EA, on the basis of the following:

As was not in dispute, the scheme in force immediately prior to the EA required a landlord, where the other requirements were fulfilled, to consent to alteration of the demised premises by a disabled tenant at the tenant's own expense.

The change of wording from the previous scheme under the Disability Discrimination Act 1995 (DDA) to that in the EA was not fundamentally different (from 'consisting of, or including' to 'involve'). On an ordinary reading of paragraph 2(8), the exclusion is limited to circumstances where the step to be taken by the controller would involve the removal or alteration of a physical feature. Consent for the claimants to carry out the works does not involve such removal or alteration. It involves only a decision to consent to such works.

The express purpose of the EA, to harmonise discrimination law and to strengthen the law to support progress on equality, was a further indication that the claimants' interpretation was to be preferred. The achievement of those purposes would be hindered, rather than promoted, if paragraph 2(8) were to be construed in the way contended for by the defendant, which would impact significantly and adversely on the choice of accommodation by those with disabilities.

If further support for the claimants' interpretation was needed, it is found in the obligations under Articles 19 and 28 of the UN Convention on the Rights of Persons with Disabilities and in the strong presumption that the legislative intention is to comply with those obligations. The defendant's interpretation of paragraph 2(8) would have placed an undue restriction on the claimants' rights to choose and enjoy their home under those articles.

The court thus found in favour of the claimants.

There was also a finding of harassment in respect of the meeting attended by the claimants regarding the works which were to be carried out – the conduct of which created a humiliating environment for PS and caused her real upset [para 104].

Conclusion

The defendant in this case ran a novel argument – and not one that anyone who had been involved in the development of this legislation considered applied to this provision. This is because the provision had its roots in the recommendations of the 1999 Disability Rights Taskforce (DRTF) report (the taskforce having been set up when a new government came to power to consider the gaps in the DDA). The DRTF recommended a requirement on those disposing of premises not to withhold consent unreasonably for a disabled person making changes to the physical features of premises, and it was this which led ultimately to the legislative change in the Disability Discrimination Act 2005. This imposed a reasonable adjustment duty on premises providers for the first time – including the duty which was at issue in this case.

This case, along with *Plummer,* illustrates that although the premises provisions appear at first blush

to be limited in their application (the duty to make adjustments is not anticipatory as it is with services) there is nevertheless much which can be done with them. Given the chronic shortage of accessible homes (see, for example, the report of the Equality and Human Rights Commission on its Inquiry into Housing and Disabled People – Britain's Housing Crisis (2018)) it is critical that the law operates to enable more disabled people to continue to occupy their homes and to use the facilities that come with them.

There were also some useful findings in the judgment regarding the exercise of the court's just and equitable discretion to admit a claim which was outside the statutory time limits; these include that the primary time period for bringing the claims was 'very tight'; the fact that both parties had been continuing efforts to find a solution is a factor which mitigates in favour of the exercise of discretion, as does the fact of and nature of PS's disability; and the lack of any specific, as opposed to general prejudice to the defendant [para 90]. These may be useful for anyone dealing with out of time claims in the county court which has less experience than the employment tribunal in dealing with these issues.

Catherine Casserley
Cloisters

Abbreviations

AC	Appeal Cases
BAME	Black Asian and Minority Ethnic
CA	Court of Appeal
CRE	Commission for Racial Equality
CV	Curriculum Vitae
DDA	Disability Discrimination Act 1995
DLA	Discrimination Law Association
EA	Equality Act 2010
EAT	Employment Appeal Tribunal
ECHR	European Convention on Human Rights 1950
ECtHR	European Court of Human Rights
EHRC	Equality and Human Rights Commission
EHRLR	European Human Rights Law Review
EHRR	European Human Rights Reports
EJ	Employment Judge
ET	Employment Tribunal
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
GMC	General Medical Council
GP	General Practitioner
HC	House of Commons
HHJ	His/her honour judge
HLR	Housing Law Reports
ICR	Industrial Case Reports
ILJ	Industrial Law Journal
IRLR	Industrial Relations Law Report
J/JSC	Judge/Justice of the Supreme Court
LCJ/LJ	Lord Chief Justice/ Lord Justice
LLP	Legal liability partnership
MHA	Mental Health Act 1983
NGO	Non-governmental organisation
NHS	National Health Service
Ofsted	Office for Standards in Education, Children's Services and Skills
PCREF	Patient and Carer Race Equality Framework
PSC	President of the Supreme Court
QBD	Queens Bench Division
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
WLR	Weekly Law Reports

Fight for compensation launched for disabled people who have lost out to Universal Credit

A group of disabled people is preparing to bring a legal challenge against the government after losing out on benefits when they were migrated over to the Universal Credit system.

Leigh Day has been contacted by around 250 people so far and believes up to 13,000 people could have been affected and have a claim as a result of the problem, which affects those that made a claim for Universal Credit before January 16, 2019 and who had previously been claiming the Severe Disability Premium and/or Enhanced Disability Premium.

Leigh Day will be seeking damages on behalf of its clients for the full amount of the premiums that claimants lost when they were moved onto Universal Credit. For example, a single person previously in receipt of both premiums, who has had to claim Universal Credit, will have lost just over £4,000 in the last year alone. The group will also be claiming non-financial damages for the distress, anxiety, humiliation and disruption to life, which is being caused by the government's poorly implemented changes.

The move to Universal Credit, which has resulted in a loss of the disability premiums, has caused a multitude of problems for severely disabled people resulting in emotional and financial distress. Claimants are unable to regularly see family or attend appointments; unable to engage in leisure activities and treatments which significantly improve their mental and physical wellbeing and are left unable to pay for assistance for the cleaning and upkeep of their homes.

This claim follows the success of earlier cases brought by Leigh Day on behalf of TP and AR. The High Court ruled, in their 2018 case, that the Secretary of State for Work and Pensions unlawfully discriminated against the two men who lost their disability premiums after moving onto the benefit. Then, in May 2019, the High Court held that the subsequent amendments to the law, ostensibly aimed at remedying the initial issue, were also discriminatory.

Claimants and advisers can register an interest in the claim through the Leigh Day website.

DLA Annual Conference 2019

The DLA will hold its annual conference on Friday, October 4, 2019. The theme of the conference is ***'Discrimination through the lens of disability.'*** It will take place at the offices of Allen & Overy LLP, One Bishops Square, London E1 6AD.

The conference will be an opportunity to catch up with current equality law developments, to hear from leading experts, to be brought up-to-date on legal and policy developments, to improve understanding of particular areas of equality law and to share knowledge and experiences with other lawyers, advisers, trade unionists and campaigners. Contact info@discriminationlaw.org.uk to reserve your place.

The use of non-disclosure agreements in discrimination cases

The Women and Equalities Committee has challenged the government to take urgent action to change the routine use of legally drafted non-disclosure agreements (NDAs) to cover up allegations of unlawful discrimination and harassment in the workplace. Reporting on *'The use of non-disclosure agreements in discrimination cases'* the committee found evidence in some cases that employers did not investigate allegations of unlawful discrimination properly or at all. *'The difficulties of pursuing a case at employment tribunal and the substantial imbalance of power between employers and employees, mean that employees can feel they have little choice but to reach a settlement that prohibits them speaking out.'*

The committee recommended that the government should ensure that NDAs cannot prevent legitimate discussion of allegations of unlawful discrimination or harassment, and stop their use to cover up allegations of unlawful discrimination, while still protecting the rights of victims to be able to make the choice to move on with their lives.

It renewed its call for the government to place a mandatory duty on employers to protect workers from harassment and victimisation in the workplace; and urgently improve the remedies that can be awarded by employment tribunals as well as the costs regime to reduce disincentives to taking a case forward. Tribunals should be able to award punitive damages, and awards for the non-financial impact of discrimination should be increased significantly, it said.

Kiran Durka, partner at Leigh Day, who gave evidence to the committee, will analyse the committee's findings and explore the issues in depth in the November edition of *Briefings*.

Police challenged under the EA in facial recognition technology case

In May 2019, a claim was heard in Cardiff High Court which alleges that the South Wales Police has breached rights to privacy, data protection law and the Equality Act 2010 when it used surveillance cameras equipped with facial recognition software in public places to scan the faces of passers-by, making unique biometric maps of their faces. Facial recognition technology indiscriminately scans, maps and checks the identity of every person within the camera's range, capturing personal biometric data without consent.

There is no legal framework governing the use of this technology which violates the privacy of everyone within range of the cameras. Studies have shown that facial recognition disproportionately misidentifies women and BAME people, which could led to them being more likely to be wrongly stopped and questioned by police.

Briefings