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Editorial

# *European rights' framework in jeopardy*

Cases reported in this edition of *Briefings* illuminate the battlelines along which the fight to maintain the equality/non-discrimination protections and human rights currently enjoyed throughout the UK, will be drawn in the coming years. The domestic legislation and the arguments in the cases all make clear discrimination complainants' reliance on legislation and case law stemming from the UK's membership of the EU and Council of Europe; these are now under threat.

Even before the EU right of free movement has ended, the rights of EEA nationals to live and access work in the UK is being undermined. Since the 2016 referendum, there have been many anecdotal accounts of EU nationals being asked to take unnecessary steps to prove their entitlement to reside in the UK or access jobs, health care or housing, despite this being contrary to their right to free movement and potentially amounting to unlawful discrimination under the Equality Act 2010. The 3million's report on the impact of the EU Settlement Scheme now provides evidence of this discrimination with 10% of EU respondents reporting that they have been required to provide proof of their status when this cannot legally be required.

Directive 2004/38/EC confers on EU citizens and their family members, irrespective of their nationality, an automatic right to move and reside freely in the member states. *Badara v Pulse Healthcare Limited* highlights a policy approach which conflicts with such rights being protected under EU law where, despite previous EAT case law confirming that a non-EU spouse's right to work derived simply from her status as family member of an EEA national and did not depend on documents in her passport or from the Home Office, contrary and unhelpful guidance from the Home Office continues to be applicable for employers. Although the Directive still applies to the end of 2020, further harm can only be expected during the transition period.

Rights arising from Directive 2000/43 (the Race Directive) and the EU Charter of Fundamental Rights were pleaded in Bessong. The arguments in Safeway relied heavily on EU treaty rights and the Court of Justice's jurisprudence. In *Gilham* the SC construed the Employment Rights Act 1996 to ensure compliance with the ECHR; the age and sex discrimination challenge in Delve was brought on the basis of EU and ECHR laws.

And such challenges continue to develop understanding and effectiveness of the law. The appeal in *JD & A v UK* to the European Court of Human Rights under Article 14 ECHR has resulted in a tightening of the wide margin of appreciation available to national governments in the economic or social policy sphere. Ruling on the implementation of the 'bedroom tax', a government austerity policy which has now been held to indirectly discriminate against women at risk of domestic violence, the ECtHR has stated that it will limit its acceptance of a state policy being not *'manifestly without reasonable foundation'* to transitional measures designed to correct historic inequalities. In any other circumstances, any policy which results in difference in treatment must be justified by '*very weighty reasons'*.

Conservative politicians have expressed antipathy towards the Human Rights Act over many years and the Party's 2019 Manifesto commits it to 'updating' the Act and administrative law *'to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government'.* Given recent reports that the government is preparing to reject the EU's proposals in a post-Brexit trade agreement which would require the UK to remain signed up to the ECHR, and given repeated refusals to rule out the UK's withdrawal from the Convention (repeated again by the Solicitor General Michael Ellis during Parliamentary questioning on February 13, 2020), fears about laws which guarantee our fundamental rights being undermined are justified.

The DLA will work with its members and all those who work for social justice to campaign to ensure existing rights are protected and that the proposed Constitution, Democracy & Rights Commission is robustly challenged to defend existing equality and human rights standards.

**Geraldine Scullion**
Editor

**Please see page 31 for list of abbreviations**

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# Belief – a new frontier or the same thing re-packaged?

Catherine Casserley, barrister, Cloisters, reviews recent case law on philosophical belief and considers whether anything has really changed and how such claims under s10 of the Equality Act 2010 might be approached in the future.

***There has been considerable publicity recently concerning the case in which an ethical vegan was held to have a philosophical belief protected under the Equality Act 2010 (EA) – it being hailed by the press as a 'landmark judgment'. But was it such a landmark judgment? And what of the other cases which have been decided recently in this area?***

## Background

S10(2) of the EA defines religion or belief as meaning any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.

Article 9 of the European Convention on Human Rights states as follows:

*Freedom of thought, conscience and religion*

*9.1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*

*9.2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.*

Whilst the court or tribunal must 'tread carefully' if the genuineness of a complainant's professed belief is an issue, as will invariably be the case (there are likely to be relatively few cases where this is conceded by an employer – though see below for an exception), it must enquire into and decide this issue as a question of fact.

As stated by Simler P in *Gareddu v London Underground Ltd* [2017] IRLR 404, EAT, citing the guidance of Lord Nicholls in *R (on the application of Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15; [2005] 2 AC 246:

*… this is a limited enquiry, the court being concerned to ensure that an assertion of religious belief is made in good faith and is 'not an artifice'…. [but] that the court does not enquire into the validity of an asserted belief or test its validity by reference to objective or other standards.*

## The *Grainger* test

The test by which belief is determined remains that set out in *Nicholson v Grainger plc* [2010] IRLR 4; Briefing 549.

Mr Nicholson claimed less favourable treatment on the grounds of his philosophical belief which was said to be that *'mankind is heading towards catastrophic climate change and therefore we are all under a moral duty to lead our lives in a manner which mitigates or avoids this catastrophe for the benefit of future generations, and to persuade others to do the same'*.

The EAT upheld the decision of the ET that the claimant's asserted belief was capable of being a 'belief' for the purposes of the 2003 Religion and Belief Regulations. Burton J held that there must be some limit placed upon the definition of philosophical belief, setting out in effect a test, namely that:

1. the belief must be genuinely held;
2. it must be a belief and not, as in *McClintock*,[1] an opinion or viewpoint based on the present state of information available;
3. it must be a belief as to a weighty and substantial aspect of human life and behaviour;
4. it must attain a certain level of cogency, seriousness, cohesion and importance;
5. it must be worthy of respect in a democratic society, not incompatible with human dignity and not conflict with the fundamental rights of others.

It is also important to note a number of other aspects set out in *Grainger* :

*It was said that where the assertion is of a philosophical belief (as opposed to religious), it is plain that the limiting words of Lord Nicholls (as to enquiring into the validity of the religion) do not, or at any rate, may not, apply. To establish a religious belief, the claimant may only need*

1. *McClintock v Department of Constitutional Affairs* [2007] UKEAT/0223/07

*to show that he is an adherent to a particular religion. To establish a philosophical belief, not least to establish, if such be necessary, all the underlying facts set out, or assumed, in the short extract from [his evidence set out above], it is plain that cross-examination is likely to be needed.* [para 6]

### Protected beliefs

There have been a variety of cases since *Grainger* which have met with varying degrees of success as to whether or not the belief purported to be a protected belief is one which is protected by the EA. These include a belief that:

- *'we should all pay our respects to those who have given their lives to us by wearing a poppy from All Souls' Day on 2nd November to Remembrance Sunday'* – *Lisk v Shield Guardian Co Ltd and others*, ET/3300873/11(held not to be a protected belief);
- a belief in the right of Scotland to national sovereignty – *McEleny v MOD*, Glasgow ET Case Number S/4105347/2017 (held to be a protected belief);
- a belief in democratic socialism – *Olivier v Department of Work and Pensions,* ET 1701407/2013 (held to be a protected belief) ;
- vegetarianism – *Conisbee v Crossley Farms,* Norwich ET Case Number 3335357/2018 (held not to be a protected belief).

Recent months alone have seen significant cases relating to belief and so before turning to consider the highly publicised case of *Costa v The League Against Cruel Sports,* I will consider three of these below.

#### *Gray v Mulberry Company Design Ltd*[2]

The CA considered perhaps one of the most unusual and potentially far reaching cases in *Gray v Mulberry Company Design Ltd*. The claimant (G) is a writer and film maker who worked for the respondent as a market support assistant. On beginning employment she was required to sign a copyright agreement which aimed to protect the respondent's intellectual property. G refused to sign that agreement on the basis that it interfered with her own work as a writer and film maker and could extend to her artistic activities away from work. The respondent made clear that it had no interest in obtaining the copyright of any of G's personal work, only that which related to its business. It suggested amending the agreement to address G's concerns but the amendments did not satisfy her. Discussions continued but having been unable to come to an agreement, G brought proceedings in the ET arguing discrimination on the basis of belief – '*the statutory human or moral right to own the copyright and moral rights of her own creative works and output except when that creative work or output is produced on behalf of an employer'*.

G had undertaken a masters degree in America which had included some teaching on certain aspects of the legal principles associated with film making and intellectual property law. In her witness statement, as set out in the ET decision, she stated that she had become passionate about her belief in the right of an individual to not only own, but to profit from and receive credit for their individual work if they wished. She went on in a supplementary document to state that she hoped that the court would see that there was in the case '*an issue of deeply held belief of spiritual practice, of identity, of human rights and of the attempted colonisation of those private areas of person's life and mind by a commercial enterprise with no actual interest in that individual's work or devotions or poems or hymns of life'*.

The ET found that whilst G may have held those views privately, there was nothing in what she did or said to the respondent which made the company aware that she held them. Her actions by not signing the agreement were not sufficient to give that indication to the respondent.

Having approached its decision according to the *Grainger* criteria, the tribunal accepted that G's belief:

- was genuinely held;
- was a viewpoint held by her as a belief – not just an opinion based upon logic which, if the foundations changed, was capable of causing her to have altered her view;
- concerned a weighty and substantial aspect of human life and behaviour (this was not disputed by the respondent).

However, the tribunal held that G's belief failed to meet the test of attaining a certain level of cogency, seriousness, cohesion and importance. Whilst it was capable in certain cases of doing so – the tribunal found that there could be a considerable range of levels at which the belief might be held – G was found not to have held her belief '*as any sort of philosophical touchstone to her life'*. It was not sufficiently cohesive to form any cogent, philosophical belief system.

On appeal to the EAT, the ET's decision was upheld. The EAT re-iterated that the bar must not be set too high in determining what is a philosophical belief, but emphasised that when applying the *Grainger* criteria, and the fourth *Grainger* criterion in particular, the focus should be on the manifestation of the belief.

The *Grainger* criteria reflected 'objective minimum' or threshold requirements; those criteria are therefore

2. [2019] EWCA Civ 1720

to be applied to the manifestation of the belief but an act which is motivated by a belief is not necessarily a manifestation of it. Whether or not it is in a particular case will depend on the facts. Actions must express the belief concerned (rather than just be motivated by it) in order to have the protection of Article 9 (and thus the EA) (see the court's reference to *Arrowsmith v United Kingdom* (1978) 3 EHRR 218).

In considering and dismissing the ground of appeal on protected belief, (G also appealed against the rejection of her indirect discrimination claim) the EAT held that the question is whether there was manifestation of the belief through an act or omission, as opposed to such act or omission merely being motivated by the belief. Given the terms of the stated belief and the fact that G was being required to sign the agreement, the manifestation of that belief would axiomatically have been in raising it as a reason for refusing to sign. She did not do so. In fact, the impression she clearly gave to her employer was that her objection was because of the difficulty it might create for her in seeking to sell her private work.

There was much criticism of the approach taken by the EAT to the manifestation of belief. In particular, that it appeared to require a direct expression of belief, particularly in indirect discrimination cases, and imported a knowledge requirement into such cases. Further, that it set the bar too high.

In *Grainger* it had been said that if a manifestation is to attract protection under Article 9, a non-religious belief, as much as a religious belief, must satisfy the modest threshold requirements implicit in this Article. In particular, for its manifestation to be protected by Article 9 a non-religious belief must relate to an aspect of human life or behaviour of comparable importance to that normally found with religious beliefs. The emphasis remained on the 'modest' threshold, however.

G appealed to the CA which dismissed her direct and indirect discrimination claims. However the court also found that whether or not the belief amounted to a philosophical belief was irrelevant because it did not put G at a disadvantage. There was no causal link between the belief and the G's refusal to sign the agreement or the respondent's decision to dismiss her.

Thus manifestation and how it should be approached remain an issue.

### *Forstater v (1) CGD Europe (2) Centre for Global Development (3) Massod Ahmed* [3]

In the recent, and somewhat controversial case of *Forstater v CGD Europe, Centre for Global Development and Massod Ahmed* the claimant (F) brought claims of direct and indirect discrimination against the respondents when her consultancy relationship was not renewed as a result of her expressing 'gender critical' opinions, namely that sex is immutable whatever a person's gender identity or gender expression. F contended that her gender critical views were a philosophical belief.

Her belief was set out as being that '*sex is a material reality which should not be conflated with gender or gender identity. Being female is an immutable biological fact, not a feeling or an identity. Moreover sex matters. It is important to be able to talk about and take action against the discrimination, violence and oppression that still affect women and girls because they were born female*'.

In a lengthy judgment, EJ Tayler found that F did not have a protected belief for the purposes of the EA. He began his analysis with his concern, as expressed at the hearing, about whether the matter was best dealt with at a preliminary hearing, given '*the significant overlap between beliefs, manifestations and things that are said to be justified by the belief*'.

He also stated that it can be difficult to '*tease out what constitutes a belief and what are expressions of that belief*' – giving examples of whether F's tweets evidenced the nature of her belief or were statements she made based on that belief, or which even may not actually reflect what she believed, having been made in the heat of the moment.

F's core belief was stated to be that sex is biologically immutable. Sex is fundamentally important, rather than gender, gender identity or gender expression. She would not accept in any circumstances that a trans woman is in reality a woman or that a trans man is a man. The tribunal held that F genuinely held the view that sex is biological and immutable; that the belief was more than an opinion or viewpoint based on the present state of information available, and was one which goes to substantial aspects of human life and behaviour.

The EJ considered that F largely ignored '*intersex conditions and the fact that biological opinion is increasingly moving away from there being an absolutist approach to there being genes the presence or absence of which determine specific attributes to understanding that it is necessary to analyse which genes are present, which are switched on, the extent to which they are switched on and the way in which they interact with other genes*'. Nevertheless he bore in mind that coherence required

3. London Central Case No. 2200909/2019

that a belief can be understood and that not too much should be expected and thus found that, though there was significant scientific evidence that her belief was wrong, it met the modest threshold of coherence.

When it came to compatibility with human dignity and the fundamental rights of others, however, the ET found that F's views, in their absolutist nature, failed that test. She denied the right of a person with a Gender Recognition Certificate to be the sex to which they had transitioned; she did not accept that she should *'avoid the enormous pain that can be caused by misgendering a person, even if that person has a Gender Recognition Certificate'*.

In setting out his views on this aspect of the *Grainger* test, EJ Tayler drew a distinction '*between belief and separate action based on the belief that may constitute harassment'* but, he continued, *'if part of the belief necessarily will result in the violation of the dignity of others, that is a component of the belief rather than something separate and will be relevant to determining whether the belief is a protected philosophical belief'*. [para 88]

The EJ concluded that it was a core component of F's belief that she would '*refer to a person by the sex she considers appropriate even if it violates their dignity and/or creates an intimidating, hostile, degrading, humiliating or offensive environment. This approach is not worth of respect in a democratic society*'. He also held that the lack of belief failed to meet the *Grainger* test.

This decision has been the subject of considerable legal debate and criticism – in particular, for a focus on the 'absolutist' nature of the belief; on the manifestation of belief rather than what is seen to be the core belief itself; and the level at which the bar has been set. The decision is the subject of an appeal to the EAT.

### *Miller v the Chief Constable of Police and Ors* [4]

Not long after *Forstater* came out, the High Court, in Mr Miller's action against the police for its response to tweets which were said to be transphobic, held that the police's actions in dealing with him following the reports of the tweets had been an interference with his Article 10 right to free speech – he had the right to post the comments he had made on trans matters. The court did not find, however, that the guidance on reporting non-criminal hate crime was unlawful.

### *Costa v The League Against Cruel Sports*[5]

Of all the belief cases, however, it is the *Costa* case, perhaps reflecting the upsurge in vegan lifestyle, which has captured the attention of the press.

It is important to note that whilst there was a preliminary hearing on the issue of 'belief', the respondent had already conceded the issue. Mr Costa (C) is a qualified zoologist and has worked in animal protection for most of his working life. He became a vegan in 2000, stopped consuming animal products, and got rid of clothes and household items which contained animal products. His ethical veganism was summed up:

> *ethical veganism is not just about choices of diet, but about choices relating to what a person wears, what personal care products he or she uses, their hobbies and the jobs he or she does. They are in fact people who have chosen to live as far as possible without the use of animal products.* [para 12]

Ethical veganism dictated C's lifestyle choices; the tribunal judgment includes examples such as C:

- has a 100% vegan diet and if he is unsure of the content of food products, he avoids them;
- does not eat animal flesh, including fish or sea food;
- does not consume any product that contains any animal product, including additives and does not keep any such products in his home;
- would not allow non-vegan food to be brought into his home by anyone;
- advises hotels when staying away of his veganism and when travelling will take a dietary supplement;
- will not consume food that in its production harms animals (e.g. figs are grown in a symbiotic relationship with wasps; wasp lava may be inside the fig and so he would not consume them);
- avoids paying with notes which contain animal products; and
- walks, if a destination is within an hour's walking distance, so as to avoid accidental crashes with insects or birds when taking a bus or public transport.

The tribunal considered the case in accordance with both the definition of belief in the EA and Articles 9 and 14 to Schedule 1 of the Human Rights Act 1998 (HRA), with the established case law of *Williamson* and *Grainger,* and the criteria as set out in paragraph 2.59 of the Equality and Human Rights Commission statutory Code of Practice on Employment 2011.

The tribunal held that C's belief was genuinely held, and that ethical veganism is an important moral essential which C personally holds as a belief. It is not simply a viewpoint. His belief concerns a substantial

4. [2020] EWHC 225 (Admin)

5. Nottingham Employment Tribunal, Case Number 3331129/2018

aspect of human life, and is capable of constituting a belief which seeks to avoid the exploitation of fellow species – a weighty and substantial aspect of human life and behaviour.

It was also held to be 'without doubt' a belief which obtains a high level of cogency, cohesion and importance.

As to the final limb of the *Grainger* test, the tribunal said that given modern day thinking '*it is clear ethical veganism does not in any way offend society*' and that it is '*increasingly recognised nationally particularly by the environmental benefits of vegan observance*'.

The EJ found it 'easy' to conclude that there is 'overwhelming' evidence that ethnical veganism was capable of being a philosophical belief. Whilst this is the way in which the judgment was framed, the decision which the EJ had to make was whether C had a philosophical belief which was protected under the EA: that, it is assumed, flows from the judgment. A full merits hearing is listed for hearing shortly.

## Conclusion

So what do these cases, in particular *Costa*, tell us about belief, *Grainger* and the future of this area of law?

As can be seen, there was nothing earth shattering about the reasoning in *Costa*. The *Grainger* test was adhered to. What perhaps was novel was the realisation of how far 'belief' was capable of being stretched. In the same way that in the sphere of public law, Article 14 has had an awakening in the area of welfare benefits challenges, this may herald an increased use of these provisions.

Questions are likely to remain, however, about the scope of 'cogency', and, in light of both *Mulberry* and *Forstater,* the role of manifestation and, in respect of the latter case, what is the threshold for a belief to be unworthy of respect in a democratic society.

As to the latter, in *Grainger*, when considering the relevant criteria in respect of belief, the court made specific reference to a fear that reliance could be placed upon an alleged philosophical belief based on a political philosophy which could be characterised as objectionable: a racist or homophobic, political philosophy for example. It went on to say that the way to deal with that would be to conclude that it offended against the requirement set out in paragraph 36 of *Campbell and Cosans v UK* [6], that the belief relied on must be '*worthy of respect in a democratic society and not incompatible with human dignity*' or, in accordance with paragraph 23 of *Williamson*, '*a belief consistent with basic standards of human dignity or integrity*'. Paragraph 36 *Campbell* expressly refers, as the source of this requirement/caveat to Article 17 of the ECHR, which deals with '*prohibition of abuse of rights*'.

Other cases which have failed to meet this criteria have included *Ellis v Parmagon Ltd* [2014] EqLR 343 where the views relied upon as forming the claimant's 'belief' were first that '*homosexuality was contrary to god's law and nature*', and second that '*no Jewish people were killed by the use of poison gas in concentration camps during the Second World War*'. The ET reminded itself that its function was to enquire as to the genuineness of the belief and not the validity of the belief itself. As to the first, it held that the beliefs relied upon were not worthy of respect in a democratic society and were in conflict with the fundamental rights of others, and the Holocaust denial was insufficiently cogent to qualify for protection, being based on '*a knowingly partial and distorted approach to the evidence available to a lay person who shares his degree of interest in the subject*'. Nor was the view worthy of respect in a democratic society relying as it did on bigoted and offensive material consistent with anti-Semitism.

In addition however, the matter of 'misgendering', as it is known, had already been before the ET in *Dr David Mackereth v DWP & Another* Case Number: 1304602/2018 The claimant, a Christian doctor, was dismissed for refusing to agree he would use trans-patients' preferred pronouns in the course of medical assessments. He relied upon three 'subset' religious or philosophical beliefs: belief in Genesis 1:27, lack of belief in transgenderism and conscientious objection to transgenderism. Having found that to refuse to refer to patients by their assumed gender would be unlawful under the EA, the tribunal held that his beliefs were not protected by the EA as they were incompatible with human dignity and conflicted with the fundamental rights of others, specifically here, transgender individuals.

These issues are unlikely to be resolved until they reach the higher courts. In the meantime, what is clear, however, is that any belief must be clearly defined at the outset of proceedings (there was some discussion in the CA in *Mulberry* as to the limits of Ms Gray's belief), and that a comprehensive witness statement will be crucial to the claimant's success. Despite the low threshold needed to meet the *Grainger* test, expert evidence related to belief (as in the *Costa* case) can be useful to set the context for both the weighty and substantial aspect of human life and behaviour, and the cogency aspects of the test.

6. ECtHR Application Number 7511/76; 7743/76

# Justifying age discrimination – recent developments

Declan O'Dempsey, Cloisters, reviews recent case law developments in the field of age discrimination, concentrating mainly on developments concerning direct age discrimination justification, and the continuing development of the 'cost plus' justification argument. He highlights the importance of requiring respondents to produce evidence to support their justification defence and cautions that a proper analysis of the elements of justification will be critical to determining the outcome of the case.

***Over the past year the field of age discrimination law has thrown up some interesting developments, some of which are yet to reach their conclusion. On the back of the judges' and firefighters' challenge over pension entitlement, certain teachers are now challenging the transitional provisions in relation to their pensions; it may be that there will be challenges from certain doctors over pension claims also. The firefighters' challenge to the occupational pension arrangements and transitional provisions, in particular, has thrown up useful points about the approach to justification which are of more general application. At the same time other cases have illustrated the more stringent justification test set down for direct age discrimination cases in Seldon v Clarkson Wright & Jakes* [2012] UKSC 16; Briefing 578.**

The standard approach to justification in EU law can be seen in Case C–143/16, *Abercrombie and Fitch Italia v Bordonaro* [2017] IRLR 1018. Italian law permitted a contract to be concluded with a worker under 25 years of age containing a term that the contract would come to an end automatically on the worker attaining 25. The Court of Justice of the European Union (CJEU) held that neither the Charter of Fundamental Rights nor Directive 2000/78 (the Directive) precluded this. This was because the measure pursued a legitimate aim and the means were appropriate and necessary. The difference in treatment amounted to the setting of special conditions on access to employment, including dismissal conditions for young people (which is permitted under Article 6(1) of the Directive). The aim was to encourage recruitment of young people and this was a legitimate aim. It was appropriate to conclude less rigid employment contracts in order to achieve a degree of flexibility in the labour market, as this might encourage undertakings to respond to more job applications from younger workers. The CJEU had regard to the context of persistent economic crisis and weak growth in Italy in reaching its conclusion. Thanks to the flexible employment contract, the under-25-year-old was able to access the labour market. This was a better situation than someone who could not access that type of contract: in other words it avoided unemployment. The court thus engaged in a standard analysis of legitimate aims and justification at the EU level.

The question of how the courts approach justification in the domestic setting has also been the principal subject of the most high-profile case of 2018: *Lord Chancellor and Secretary of State for Justice and another v McCloud and others* [2019] IRLR 477. This concerned the transitional provisions in judges' and firefighters' pension schemes. The transitional provisions in relation to the pension schemes involved moving from a final salary to a career average basis of calculation of entitlements. The transitional schemes treated younger judges and firefighters less favourably, so justification was required. The burden of proving justification was on the Secretary of State. The Secretary of State put forward as the aim that it was, amongst other things, seeking to protect those closest to retirement from the effects of the scheme reforms (protection of older workers).

The CA recognised, the now very familiar position under European Union law, that governments have a wide margin of discretion in deciding which social policy aims to pursue. They also have a margin of discretion in relation to the means by which they seek to achieve them. However the court reiterated that tribunals must assess whether the aims are objectively legitimate in the circumstances of the employment (following *Seldon*) and also whether the means are objectively legitimate in the circumstances of that employment.

On one view the Secretary of State lost the case because it failed to prove that it was pursuing any legitimate aim. However this is perhaps a harsh view, and the case is probably better taken as giving guidelines to practitioners on the approach that they should adopt

when dealing with the analysis of a legitimate aim.

Establishing that an aim is capable of being a *legitimate* aim is only the start, as Lady Hale said in *Seldon*. In an ordinary case, not involving a state body, the tribunal has to decide whether the aim is legitimate in the circumstances of the case and this requires an objective assessment. In the case of the state employer the tribunal, in conducting that assessment must accord an appropriate margin of discretion to the state employer (see paragraphs 85 – 86 and 144 of *McCloud*).

In the case of the judges' scheme, the tribunal had considered that the aim thus relied on did not stand up to scrutiny (whatever margin of discretion was afforded). The tribunal itself had a '*margin of discretion*' in deciding whether the treatment of the younger judges was a proportionate means of achieving the legitimate aim. It was within that margin when it decided that it was not. There was no error of law consequently.

The case is perhaps more useful for practitioners because of what happened in the case of the firefighters. The EJ had assumed that the aims were social policy aims and concluded immediately that they were also legitimate aims. This was an error, but an understandable one due to the respondent's conduct of the proceedings. The error was that the judge did not engage in an objective assessment of their legitimacy. The court then went on to point out that the government had provided no evidence as to the reasons underlying the aims. So in this case it could be said that the government lost because it failed to provide evidence as to the reasons legitimising the aim.

This raises the important point that can be transposed to cases not involving state employers: the employer's aims will generally be ones whose claimed justification needs to be supported by evidence. The burden of proof is important in this context. It is for the employer, here the government, to show that despite apparently discriminatory effects between different age groups, the measures adopted were a legitimate aim (in this case of social policy). An employer may not do this by simply employing assertion and generalisation.

In the light of that analysis, which is derived from many preceding cases, it was no surprise that the SC refused permission to appeal.

The important point to take away from the approach adopted in the CA is that it is always helpful to ensure that the employer specifies the legitimate aim for which it contends. Many claimant practitioners simply do not do this. It is important to do this at the stage of defining the list of issues, as that is the opportunity to draw the attention of the tribunal to the correct, staged, test set down in cases such as *Seldon*.

The list of issues should articulate the question of justification:

- First is there an aim?
- Second is it a legitimate aim in the context of this business (i.e. does the context of the business require it)?
- Third, are the means the employer has adopted appropriate to achieve that aim?
- Fourth, are the means the employer has adopted reasonably necessary to achieve that aim? This last question will always involve the tribunal in considering whether there are less discriminatory means of achieving the same aim.

If the employer has not pleaded the details of its legitimate aim and the precise means used, then practitioners should obtain further particulars of those pleadings. The danger otherwise is that the tribunal simply skims over the first step of the process, namely identifying the aim in deciding whether it is legitimate within the context of section 13(2) of the Equality Act 2010 (EA). If it is not particularised and not listed as an issue for the tribunal there is a real danger of the tribunal not giving it the serious attention it deserves.

An example of this type of approach is that in *National Union of Rail Maritime and Transport Workers v Lloyd* [2019] IRLR 897. A member of a trade union (L) was nominated at the age of 62 to stand for election to the National Executive Committee (NEC) for a three-year term. The union had a rule under which his nomination was rejected because he would be unable to complete the full three-year term before age 65 (retirement). The issue was whether that less favourable treatment because of age was justified under section 13(2) EA. The union relied on legitimate aims of intergenerational fairness, efficient planning as to NEC composition and consistency with its policy to campaign for a younger retirement age.

The tribunal rejected those as legitimate aims because there was no evidence that the rule encouraged younger members to stand for the NEC. The union had also claimed that permitting L to stand would cause considerable expense as a result of needing to have by-elections. However the tribunal thought that when compared to the number of by-elections which could be triggered by retirement of paid officials, this argument could not justify the rule. Finally it held that it could not be legitimate to justify the discriminatory effect because of the desire to ensure consistency with a national policy in this way.

The EAT rejected the union's appeal. However it said that it would have been better if the tribunal had dealt in its judgment with the successive questions of

whether each asserted aim was a true aim and actual objective; whether it was capable of being a legitimate aim and whether it was a legitimate aim in the particular circumstances.

In *Ewart v Chancellor Master and Scholars of the University of Oxford* (Case Number 332 4911/2017) the ET sitting at Reading determined that subjecting an academic to forced retirement at 67 years (with a limited opportunity to obtain an extension) constituted unlawful age discrimination country to s13 EA. It found that safeguarding high standards; intergenerational fairness (providing opportunities for career progression); adopting new ideas, new areas of study and research; facilitating succession planning (predictable vacancies), and promoting equality and diversity were all legitimate aims. However it then assessed the question of whether the treatment was reasonably necessary to achieve those aims. The retirement rule had a plain discriminatory effect and the tribunal concluded it was not moderated to any substantial degree by the possibility of an agreed extension.

The tribunal pointed out that there could hardly be a greater discriminatory effect than being dismissed simply because you have a particular protected characteristic. This is a point that is worth making to tribunals where direct age discrimination is in play. It is still important to point out to tribunals, in certain cases, that the EA treats age as a protected characteristic having the same value as all the other protected characteristics. The existence of potential justification makes no difference to this point.

The ET held that, although the retirement age pursued a legitimate aim, the university could not show that it contributed to or was expected to contribute to the achievement of those aims sufficiently to justify the discriminatory effect. The tribunal's remarks on methodology are informative. The employer had never properly attempted to assess or measure the extent to which the retirement age achieved the creation of vacancies (which would not otherwise arise). The tribunal held it was not obvious or a matter of common sense that the retirement age created additional vacancies over and above a (at most) 4% increase which could only be proved as a result of information supplied by the claimant. Therefore it was a strongly discriminatory measure resulting in, at best, a 4% increase in vacancies which would not have occurred otherwise. The tribunal held that this could not be proportionate. The increase in vacancies was trivial in comparison to the discriminatory effect.

What does this tell practitioners about the approach they should adopt to the evidence in relation to justification claims? Here the claimant had conducted his own analysis of the impact on the creation of vacancies. Where it is possible, claimants ought to address each element of the justification put forward, and if possible produce evidence as to the impact of the measures the employer seeks to defend.

### Costs plus

Finally, the debate about the meaning of, acceptability of, and scope of 'costs plus' justification of discrimination (whether direct or indirect) rumbles on. A case to watch out for on this is *Heskett v Secretary of State for Justice* UKEAT/0149/18. The Ministry of Justice introduced a new pay progression policy which increased from eight years to 23 years progression from the bottom to the top of the pay band. The case is of interest because it deals with whether the employer was seeking impermissibly to place reliance solely on cost-cutting. It was said to be legitimate for an organisation to seek to break even year on year and make decisions about the allocations of its resources. The new policy was said to be more nuanced than a policy of simply cost-cutting. It seems that this was because the respondent had negotiated with the trade unions and taken steps to prioritise lowest paid employees' progression within the pay bands. The pay bands had been shortened by elevation of the entry point to them, and that mitigated the discriminatory effect on others. I understand that the case is subject to appeal.

### Conclusion

The process of ensuring that respondents produce evidence can be traced back to the very early age discrimination cases in the tribunals. *McCloud* appears to suggest that there is still a tendency for the state to assume rather than prove the legitimacy of its aims and this is something which private employers frequently seek to do. Cases such as *Ewart* demonstrate how the outcome of a case can be affected by the proper analysis of the elements of justification.

### Future developments – menopause and the workplace

There has also been an interesting development concerning the way in which age discrimination can overlap with gender discrimination and, potentially, disability discrimination. In March 2019 the Chartered Institute of Personnel and Development (CIPD) published a guide for professionals on the menopause at work.

According to the CIPD women over the age of 50 are the fastest growing segment of the workforce, and

most will go through the menopause transition during their working lives. For every ten women experiencing menopausal symptoms, six say it has a negative impact on their work. Yet this experience has been largely neglected as an economic, workplace and diversity and inclusion issue.

Where women experience less favourable treatment at work because of the menopause, the issue of sex and/or age discrimination needs to be considered. In certain cases disability discrimination and a requirement to make reasonable adjustments might also arise.

This is an area in which practitioners may need to do significant work, as it is an area where multiple discrimination has real practical meaning. This topic, including the question of whether specific law might be required to protect menopausal women's rights, will be explored in future editions of *Briefings*.



## Briefing 924



# Redefining manifestly without reasonable foundation, very weighty reasons and compensation

*JD & A v UK* European Court of Human Rights, Case Nos 32949/17, 34614/1; October 24, 2019

### Facts

These cases challenged the implementation of the 'bedroom tax' in the UK, which financially penalises the recipients of Housing Benefit who are deemed to be under-occupying their properties. The stated aim of this policy is to reduce the under occupation of properties in order to save public funds.

Claimant A is a female victim of extreme domestic violence who had moved into a home which had a panic room in order to ensure her safety under a Sanctuary Scheme.

Claimant JD is the parent of a severely disabled daughter who benefited from the provision of an extra room in her property to assist with the care needs of her daughter.

Both JD and A were subjected to a diminution of their benefits income and therefore applied to the courts alleging a breach of the European Convention on Human Rights 1950 (ECHR) Article 14 (prohibition of discrimination) in conjunction with Article 8 ECHR (right to respect for private and family life) based on their circumstances as set out above.

### Domestic decisions

Claimant A argued that the bedroom tax policy discriminated against her on grounds of gender; claimant JD argued that the policy subjected her to disability discrimination.

The cases progressed through the domestic courts with the UK government consistently maintaining that the aim of reducing public expenditure and provision of Discretionary Housing Payments (DHPs) (top up benefit payments for those facing hardship as a result of a loss of Housing Benefit income) were sufficient justification for the discriminatory consequences of their bedroom tax regime. It was also argued that the correct legal test to be applied was whether the policy is '*manifestly without reasonable foundation*' as it is a general measure of economic or social strategy.

The SC eventually held (with Lord Carnwath and Lady Hale powerfully dissenting) that the policy was justified and could not be said to be manifestly without reasonable foundation in either case.[1]

### European Court of Human Rights

The ECtHR opted to treat these cases as a matter of indirect discrimination, applying Article 14 ECHR in conjunction with Article 1 of Protocol 1 and sought to establish whether the bedroom tax policy was:

1. prejudicial to either of the claimants based on their particular protected characteristics; and
2. justifiable in the circumstances by reference to the relevant legal test.

The ECtHR held that the policy was justifiable in relation to JD, but not justifiable in relation to A. In arriving at this decision, the court drew a distinction between the particular requirement for an extra room under the Sanctuary Scheme and the possibility that JD could have an adapted home without an extra room to meet the needs of their daughter.

In coming to this decision the ECtHR rejected the '*manifestly without reasonable foundation*' test and, in its

1. https://www.supremecourt.uk/cases/docs/uksc-2014-0125-judgment.pdf

place, deemed that in cases such as these the national courts must look at whether there is a reasonable relationship of proportionality between the aim of a policy and the means by which this aim is achieved. The ECtHR ruled that a domestic government would be required to provide '*very weighty reasons*' for imposing a discriminatory policy on a readily identifiable group. The reasoning for this bears repetition in full as it is likely to prove to be of great significance:

> *… as the Court has stressed in the context of Article 14 in conjunction with Article 1 Protocol 1, although the margin of appreciation in the context of general measures of economic or social policy is, in principle, wide, such measures must nevertheless be implemented in a manner that does not violate the prohibition of discrimination as set out in the Convention and complies with the requirement of proportionality… Thus, even a wide margin in the sphere of economic or social policy does not justify the adoption of laws or practices that would violate the prohibition of discrimination. Hence, in that context the Court has limited its acceptance to respect the legislature's policy choice as not "manifestly without reasonable foundation" to circumstances where an alleged difference in treatment resulted from a transitional measure forming part of a scheme carried out in order to correct an inequality…* [para 88]

> *Outside the context of transitional measures designed to correct historic inequalities, the Court has held that given the need to prevent discrimination against people with disabilities and foster their full participation and integration in society, the margin of appreciation the States enjoy in establishing different legal treatment for people with disabilities is considerably reduced… and that because of the particular vulnerability of persons with disabilities such treatment would require very weighty reasons to be justified… The Court has also considered that as the advancement of gender equality is today a major goal in the member States of the Council of Europe, very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention.* [para 89]

The ECtHR made an award of damages of £10,000 to A in respect of non-financial damages – a sum significantly greater than the courts of England and Wales have been willing to award in similar cases.

### Implications for practitioners

There is an immediate impact for the claimant A, and others in her situation, but also wider implications for those who seek to hold the UK government to account, utilising the ECHR.

The lowering of the bar in respect of the domestically troublesome '*manifestly without reasonable foundation*' test will see the government face a more difficult task in justifying its discriminatory policies and, as a corollary, should also encourage practitioners to pursue more of these cases.

### Comment

The decision is a welcome one for discrimination and public lawyers. The contextually minor gripes are the failure of the court to explore the likely limited availability of suitably adapted accommodation for JD and her daughter which would not have been caught by the bedroom tax, and its acceptance of DHPs as something of a panacea. Those engaged with the welfare benefits system are aware that it is anything but.

The award of non-financial damages is particularly significant. The domestic courts have been reluctant to make such awards in cases linked to economic and social policy. This first major damages award made against the UK government following a breach of the ECHR gives significant support to the long-held view that the courts of England and Wales have historically been too timid in their non-financial damages awards for such breaches. The judgment provides a useful guideline figure that must now be borne in mind by all parties to such cases. This issue was covered in detail in Briefing 909, *Briefings* Volume 68, November 2019.

The SC has appeared wedded to the '*manifestly without reasonable foundation*' test for some time, and indeed may be particularly unwilling to provoke any further confrontation with the present government. The ECtHR has indicated that this test should only be applied where a policy is solely aimed at correcting historic inequalities and that in all other circumstances the government must provide very weighty reasons for any policy with a discriminatory impact. With the proliferation of discrimination cases arising out of the chaotic implementation of various benefit reforms, it appears certain that similar issues will arise before too long. The SC bench will therefore have to wrestle with its inclination towards a deferential approach to the executive branch of government, and embrace the opportunity to lay down a marker thus encouraging more fully considered policies from across Whitehall.

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# 'Words have wings': Advocate General Sharpston considers that homophobic comments made in a radio interview can contravene the Equal Treatment Framework Directive

*NH v Associazione Avvocatura per i diritti LGBTI — Rete Lenford,* Case C 507/18 EU:C:2019:922; October 31, 2019

## Implications

Advocate General (AG) Sharpston's opinion is not binding and the judgment of the Court of Justice of the European Union (CJEU) is awaited. However, such opinions are commonly followed by the CJEU, and if this one is, there could be implications for UK law, in particular in relation to the enforcement powers of the Equality and Human Rights Commission.

## Facts

A senior Italian lawyer (NH) was interviewed on an Italian radio programme. In the course of the interview he said that he would never hire a homosexual person to work at his law firm, nor would he engage their services. At the time of the interview recruitment was not on going.

The Associazione Avvocatura per i diritti LGBTI (AA) – an Italian association of LGBTI lawyers – brought a discrimination claim against NH seeking remedies including a press retraction, a statement in a national newspaper with an action plan to eliminate discrimination, and damages of €10,000.

The case progressed to the Supreme Court of Italy which made a referral on the following points:

- Does the scope of Article 3(1)(a) of the Equal Treatment Framework Directive 2000/78 (the Directive) which prohibits discrimination in access to employment, extend to generic comments in a radio interview about hypothetically not hiring homosexual applicants?
- Can an association seek enforcement of the prohibition of discrimination in employment where there is no identifiable victim?

## Previous decisions

On August 6, 2014 the Tribunale di Bergamo found that NH had acted illegally and his comments constituted discrimination.

NH appealed the decision, and the appeal was dismissed by the Corte d'Apello di Brescia on January 23, 2015.

NH appealed to the Corte Supreme di Cassazione The Corte Supreme made a referral to the CJEU on the question of whether AA had standing to bring proceedings against NH under Article 9(2) of the Directive; and whether NH's comments were within the scope of the Directive as expressions of employment, or if they were excluded as individual expressions of opinion.

## Advocate General Sharpston's opinion

*Scope of the Equal Treatment Framework Directive:*

The referring court raised doubts as to whether there was a sufficient link between NH's comments and access to employment. NH submitted that his remarks were his personal opinions with no professional context.

AG Sharpston returned to the objective of the Directive, and the nature of the rights it seeks to safeguard. Following the broad interpretation of **access to employment** as applied in sex discrimination cases, the comments were judged to be capable of falling within the scope of the Directive.

AG Sharpston confirmed that it is for national courts to establish and assess the relevant categories for determining whether there is a sufficient link between statements and employment opportunities.

Relevant categories can include the:

- status and capacity of the person making the statement
- nature and content of the statements made
- context in which the statements were made
- extent to which these factors may discourage persons belonging to the protected group from applying for employment with that employer.

*Standing of the AA to bring proceedings:*

AG Sharpston identified three questions:

1. Does the association have standing to bring proceedings in the absence of a direct victim?
2. Are there specific criteria which an association has to fulfil in order to have standing; if so, what are they?

3. Does the possibility of an association bringing proceedings to enforce obligations under the Directive in the absence of an identifiable victim also include bringing claims for damages?

The AG concluded that Articles 8(1) and 9(2) allow national legislation to permit associations with a **legitimate interest** to bring proceedings to enforce the Directive where there is no identifiable victim. The decision as to which associations fit these criteria is for the member state to make, taking into consideration the principles of equivalence and effectiveness.

### Comment

AG Sharpston's opinion makes clear that the decision as to whether a link between discriminatory comments and discrimination under the Directive is more than hypothetical, should not be made at face value.

It is crucial to consider the meaning behind the words, and to put the potential victim at the heart of the decision. The fact that recruitment was not on going at NH's firm at the time of the interview did not negate the fact that LGBTI candidates would be discouraged from applying if/when a vacancy did arise. Also, considering the status of the individual making the comments, and the list of (non-exhaustive) criteria AG Sharpston proposes, if NH were a junior member of staff (rather than a senior lawyer), with no hiring power, the link would have been harder to establish.

This is a strong statement on the overriding importance of equality of opportunity and fair treatment, above and beyond the right to freedom of expression. The final, crucial, criterion under 'Scope of the Directive' directs focus back to the protected group, as well as to the individual making the comment.

AG Sharpston's comments are particularly powerful in respect of the need to consider the context of the statements. Are the statements in question private remarks, shared between partners or friends? Or are they comments made in public, to an audience, which could be reproduced online? She dismisses the proposition that offhand remarks, particularly those which claim to be purely opinions, or humorous, cannot constitute discrimination:

> *…I reject emphatically the proposition that a 'humorous' discriminatory statement somehow 'does not count' or is acceptable. Humour is a powerful instrument and can all too easily be abused.* [para 56]

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## Briefing 926

# Equal pay and pensions

## *Safeway Ltd v Newton* Case C 171/18; [2019] IRLR 1090; October 7, 2019

This case essentially concerns whether an amendment by Safeway (S) to its occupational pension scheme (the scheme), to equalise pension benefits (by way of levelling down) between men and women, could be lawfully backdated from May 1996, when the amendment was eventually validly made to the scheme, to December 1991, when S had first purported to make the same amendment.

### Facts

In May 1990, the Court of Justice of the EU (CJEU) gave its decision in *Barber v Guardian Royal Exchange* (Case C-262/88). It was held in *Barber* that having different occupational pension ages for men and women ran contrary to Article 119 of the EC Treaty (now Article 157 Treaty on the Functioning of the EU (TFEU) and referred to as such below), which enshrines the principle that men and women should receive equal pay for equal work.

At that time, the scheme had a normal pension age (NPA) of 65 years for men and a more favourable 60 years for women. In 1991, S sought, by way of two written announcements, to change the NPA in the scheme to 65 for both men and women with effect from December 1, 1991, so levelling down the rights of female scheme members to those of the men. S also stated an intention to subsequently amend the trust deed governing the scheme to the same effect.

It was not, however, until May 2, 1996 that the trust deed and rules of the scheme were formally amended. The 1996 amendment purported to be retroactive as of December 1, 1991, and such a retroactive amendment was permitted under the scheme rules.

The potential cost to S of the difference between an NPA of 60 years as opposed to 65 between December 1991 and May 1996 was said to be the region of £100 million.

### High Court

S brought proceedings in the High Court seeking a declaration that the NPA of 65 had been validly established as of December 1, 1991. Mr Newton, a member of the scheme, was designated as a representative beneficiary in the proceedings, on behalf of all of the scheme members.

The High Court held that the purported retroactive amendment of the scheme infringed Article 157 and that, therefore, the pension rights of the members had to be calculated on the basis of an NPA of 60 for both men and women, thereby levelling up the rights of the men, in respect of the relevant period between 1991 to 1996.

### Court of Appeal and CJEU referral

S appealed to the CA. The CA held that the 1991 announcements alone could not validly amend the scheme and that the only valid amendment was that resulting from the trust deed in 1996. However, it then went on to hold that the scheme rule permitting retroactive amendments and the 1991 announcements had the effect under national law, of rendering the rights acquired by the scheme members, in respect of the period between December 1,1991 and May 2,1996, 'defeasible', or in other words open to revision, such that those rights could subsequently, at any point, be **reduced with retroactive effect**.

The CA did, however, then refer on to the CJEU the question as to whether, whilst under the national law it was possible for the amended trust deed of May 2, 1996 to have retroactively set the NPA of both women and men at 65, in respect of the 1991 to 1996 period, such an approach complied with Article 157?

### Court of Justice of the European Union

The CJEU found in essence that, in the absence of objective justification, S's levelling down of the women's pension age was contrary to Article 157, notwithstanding that such a measure was otherwise permissible under the national law. Its reasoning was, in summary, as follows.

By way of the backdrop to the issues in the present case, the CJEU noted the following principles from its case law (*Coloroll Pension Trustees Ltd v Russell* (C-200/91); *Smith v Avdel Systems Ltd* (C-408/92) and *van den Akker v Stichting Shell Pensioenfunds* (C-28/93)):

- for periods of service **between** the *Barber* decision and the date of the subsequent adoption by the pension scheme concerned of '*measures reinstating equal treatment*', in light of the *Barber* decision, Article 157 required that the persons in the disadvantaged category, the men in this case, must in the meantime be granted the **same advantages** as those enjoyed by the persons in the favoured category, here the women, or in other words, levelling up was required during that interim period

- for periods of service completed **after** the adoption, by the pension scheme concerned, of '*measures reinstating equal treatment*', Article 157 did not preclude the advantages of the persons previously favoured from being **reduced** to the level of the advantages of the persons previously within the disadvantaged category. Article 157 only required that men and women should receive the same pay for the same work but did not impose any specific level of pay (*Coloroll*), or in other words, the measures reinstating equal treatment could do so by way of levelling down going forwards.

Turning to the present case, S had firstly contended in essence, that the measures it took in 1991, namely making two announcements to change the scheme's NPA universally to 65 from December 1991 and stating an intention to later correspondingly amend the trust deed, constituted '*measures reinstating equal treatment*' and so levelling down was permissible from then onwards. The CJEU observed, however, that in order to be capable of being regarded as '*measures reinstating equal treatment*' in compliance with Article 157, the measures in question had to be:

1. immediate and full, and
2. legally certain.

The CJEU held that in the present case, the initial measures taken by S in 1991 to purportedly reinstate equal treatment, did **not** satisfy these two requirements. It was not until the 1996 amendment to the trust deed that valid measures reinstating equal treatment were implemented.

The CJEU then considered the second main issue, namely whether the purported retroactive aspect of the amendment in 1996 was valid in view of Article 157. The CJEU again noted that, until such time as measures reinstating equal treatment were adopted, the principle of equality under Article 157 required granting to persons within the disadvantaged category the same advantages as those enjoyed by persons

926 within the favoured category. However, it needed to consider whether, in a situation where the national law regarded the pension rights in issue as defeasible and open to retroactive amendment, the same principle of equality **precluded** a pension scheme from eliminating discrimination contrary to Article 157 by removing, with retroactive effect, the advantages of the persons within the advantaged category.

In answer, the CJEU held that there was no support under EU law for a power to, in effect, retroactively level down in the circumstances. Such a power would deprive the case law noted above of its effect. Furthermore any measure seeking to eliminate discrimination contrary to EU law constituted an implementation of EU law and so must observe its requirements. Neither national law nor the retroactive provisions of the trust deed could circumvent those requirements.

Finally, the CJEU considered whether there may be any exceptions to the general position above, whereby retroactive amendment **may** be permissible in some circumstances. It observed an exception might arise only where both

1. an overriding reason in the public interest so demanded, and
2. where the legitimate expectations of those concerned were duly respected.

The CJEU observed that a risk of seriously undermining the financial balance of the pension scheme concerned may constitute an overriding reason in the public interest, but noted that in the present case there had been no finding in the national court that such a risk existed and so there appeared to be no objective justification, although this would ultimately be for the national court to verify.

### Comment

The decision affirmed the principles of CJEU case law on levelling down during the '*Barber* window' and in addition dealt with the specific conflict between an express retroactive power of amendment on the face of the pension scheme rules and EU law, indicating that only in exceptional cases might such a power be objectively justified.

It is not known whether S may still seek to raise an argument that the exceptional circumstances may apply, given the amount of money involved.

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## Supreme Cout rules judges are protected by whistle-blowing legislation

*Gilham (Appellant) v Ministry of Justice (Respondent)* [2019] UKSC 44; October 16, 2019

The SC has held that a district judge is entitled to claim whistle-blower protection as an office-holder despite not being a 'worker' under the Employment Rights Act 1996 (ERA). In utilising the interpretative powers of the Human Rights Act 1998 (HRA) to construe the ERA in accordance the European Convention on Human Rights (ECHR), the SC has extended the scope of those who may be afforded whistle-blowing protection, with potentially far reaching consequences.

### Facts

Ms Gilham (G) is a district judge engaged under terms of appointment which include a detailed document entitled '*District Judges – Memorandum on conditions of employment and terms of service*'. She raised several concerns about the effect of public sector cost-cutting reforms on the justice system, including a lack of appropriate and secure courtroom accommodation, increased workloads and administrative failures. Her complaints were raised with local leadership judges and senior managers in Her Majesty's Courts and Tribunals Service and eventually in a formal grievance. G claimed that her complaints fell within the definition of protected disclosures.

She also alleged that she had been subjected to various detriments as a result, including delays in investigating her complaints, being bullied, ignored and undermined. She also claimed that the handling of her complaints detrimentally affected her health, resulting in psychiatric injury and disability.

### Employment Tribunal

G lodged ET claims of disability discrimination and detrimental treatment arising from her protected

disclosures. These claims depended upon her status as a 'worker'. Her disability discrimination claim was able to proceed, although stayed pending the SC outcome, as it is commonplace that judicial office-holders are protected under the Equality Act 2010.

As regards her whistle-blowing detriment claim, the MOJ alleged that G was not a worker but was an office-holder; and that protections for whistle-blowers did not extend to officer-holders.

The ET, EAT and the CA all agreed that as a judicial office-holder she was not a 'worker' pursuant to the ERA. The lower courts held that the definition of 'worker' was limited to circumstances where there existed a contractual relationship. None of the courts below were satisfied that a judge was appointed under a contractual arrangement.

### Court of Appeal

At the CA the intervenor (Protect – a whistle-blowing charity) raised a new argument on the basis that the failure to provide G with the protection offered to others was discriminatory and in breach of her rights under Articles 10 and 14 of the ECHR.

The CA dismissed the Article 14 ground of appeal on the basis that the case did not satisfy questions 3-5 of the questions to be answered in a human rights challenge, namely:

1. Do the facts fall within the ambit of one or more of the Convention rights? (*Yes – Article 10*)
2. Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison? (*Yes – others could rely on whistle-blowing protection under the ERA*)
3. Was the difference in treatment based on one or more of the grounds proscribed by Article 14? (*No – there was no difference of treatment on the ground of any 'other status' within the meaning of Article 14*)
4. Were those others in an analogous situation? (*No – judges are in a unique position*), and
5. Was the difference in treatment objectively justifiable? (*Yes – it was parliament's intention to exclude whistle-blowing protection to office-holders, in particular, judges*).

G appealed to the SC.

### Supreme Court

The SC agreed with the lower courts that G was not a worker for the purposes of whistle-blowing protections under the ERA as no contractual relationship existed. However, it considered whether not affording her whistle-blower protection was a violation of her right to freedom of expression protected by ECHR Article 10.

The SC also considered whether a judge could be a crown employee, but decided that this was not a satisfactory approach to the issue.

The SC unanimously decided that G was entitled to protection under whistle-blowing protection, allowing her appeal and remitting her case back to the ET.

Under s3 HRA, the courts must, insofar as possible, interpret primary legislation in a way that is compatible with Convention rights. As such, whistle-blowing protection under the ERA had to be interpreted purposively to avoid a breach of the Article 14 prohibition against discrimination. The SC concluded, contrary to the CA's decision, that:

- The facts of G's case fell within the ambit of the Convention rights, namely her Article 10 right to freedom of expression
- In being denied whistle-blower protection, she had been treated less favourably than others (namely employees and workers who make protected disclosures) due to her occupational classification of office-holder which was clearly capable of 'other status' (a protected ground) within the meaning of Article 14, and
- A legitimate aim had not been put forward for excluding judges as office-holders from whistle-blowing protection.

As the President of the SC Lady Hale concluded, whistle-blower legislation could be read so as to extend protection to judicial office-holders.

### Implications for practitioners

In reaching this decision the SC was clearly concerned that a judge may have a different legal status and ability to pursue employment claims depending on whether the claim in question derived from EU or UK law. However, it did not go as far as declaring that judges are workers for all legislative purposes.

Although the case was concerned with district judges, it's likely that the judgment will result in claims which continue to push the parameters of protected disclosure, the currently unexplored aspects of whistle-blowing legislation and their reliance on the interpretative provisions of the HRA. In particular, it has potentially wide implications for individuals whose occupational classification has previously placed them outside the scope of 'worker' status, arguably also affording them whistle-blowing protection.

The classification of 'office-holder' could apply to other professions such as company directors, company secretaries, board members, the clergy and other statutory appointments. Other categories such as volunteers, secondees and job applicants may also be in

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with a chance of protection.

As the ECHR derives from the Council of Europe it is not EU law. Its implementation into UK law via the HRA means that we will still have to comply with the ECHR despite the UK's exit from the EU on January 31st, 2020. The Conservative Party states in its 2019 Manifesto that it will update the HRA. The outcome of this process and its impact on human rights' protections remains uncertain.

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928 Briefing 928

## Court of Appeal reviews when the burden of proof shifts in discrimination claims

*Base Childrenswear Ltd v Otshudi* [2019] EWCA Civ 1648; October 10, 2019

### Facts

Ms Otshudi (O) worked for Base Childrenswear (BC) as a photographer. After just three months of employment, her manager called her into the office and told her that her role was redundant and that she should leave the premises immediately.

O appealed against the dismissal and also raised a grievance, arguing that she had been dismissed due to her race. BC declined to deal with either the appeal or the grievance and so O brought a tribunal claim for racial harassment.

### Employment Tribunal

BC's ET3 originally argued that the reason for dismissal was redundancy on a '*purely financial*' basis. However, just three weeks before the hearing, BC filed amended grounds of resistance, raising an entirely new explanation for the dismissal – one of suspected theft. BC suggested that the pretext of redundancy was to '*minimise potential confrontation*'.

The ET was not satisfied with either explanation.

As the primary facts relied on by O were largely undisputed, the crucial question was whether the ET '*could conclude that race was a factor*' in the decision to dismiss. Although there was little direct evidence of discrimination, the ET questioned why BC had reached such an adverse conclusion so readily, '*based on rather flimsy evidence and no investigation*'.

The ET held that there was a proper basis for inferring a prima facie case that O's race had been a factor in her dismissal. The burden therefore shifted to BC to provide a discrimination-free explanation. It could not and O's claim succeeded.

### Court of Appeal

Following BC's unsuccessful appeal to the EAT, the company appealed to the CA.

The CA confirmed that the ET had been entitled to conclude that the action of lying about the reason for dismissal was sufficient to shift the burden of proof to the respondent to prove that it had a non-discriminatory reason for the dismissal. It noted that '*giving a wholly untruthful response when discrimination is alleged was well recognised as the kind of conduct that could indicate that the allegation was well-founded*'.

When dealing with the question of whether the ET was able to make a conclusion about BC's unconscious bias in these circumstances, the CA found it likely that O's manager had a genuine belief in her guilt. However, the court found that this belief was influenced by a '*stereotypical prejudice based on her race*'.

The appeal was unanimously dismissed.

### Conclusion

This case highlights the dangers of employers giving a false reason for dismissal, even if the reason is given in good faith. Employers should be clear and honest about the reasons for dismissal from the outset and be aware that if redundancy is not the genuine reason, then mislabelling it as such can be very dangerous.

If, as in this case, there are sufficient facts from which the tribunal could decide that the employer has committed an act of discrimination, then the burden of proof will shift to the employer to prove it had a non-discriminatory reason for the dismissal.

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# Employers' liability for third-party harassment

*Colleridge Bessong v Pennine Care NHS Foundation Trust* UKEAT/O247/18/JOJ; October 18, 2019

**Implications for practitioners**

The EAT confirmed that 26(1) Equality Act 2010 (EA) cannot be interpreted to impose liability on an employer for third-party harassment against employees. In so doing it observed that harassment is a very different kind of claim to indirect discrimination and can result in different, and possibly greater, compensation.

**Facts**

The claimant (CB) worked as a mental health nurse and was assaulted by a patient on racial grounds. The ET found that as a result of various failures on the part of his employer, including a failure to ensure that all incidents of racial abuse were reported, CB had been indirectly discriminated against.

However, the tribunal rejected his harassment claim. It accepted that the failure to ensure that all incidents of racial abuse were reported amounted to '*unwanted conduct*' by the employer, but held that there was still a requirement that this related to race (following *Unite the Union v Nailard* [2017] ICR 121; Briefing 823) and, on the facts, the employer's failings were not themselves related to race.

The claimant appealed to the EAT, relying on Directive 2000/43/EC (the Race Directive) and various aspects of the Charter of Fundamental Rights of the European Union, to argue that member states should outlaw third-party harassment without a requirement that the employer's actions were linked to race.

**Employment Appeal Tribunal**

CB raised a number of issues in his appeal.

*1 Was the appeal academic?*

It had been argued that the appeal was academic in light of the ET's findings on the indirect discrimination claim.

Choudhury P concluded that it was not academic because:

i) harassment is a very different head of claim which might give rise to a distinct and possibly greater level of compensation (not least because of the need to prove intention before compensation can be awarded in an indirect discrimination claim); and
ii) a declaration of harassment may have a certain value and level of vindication for the claimant.

Even if it was properly considered academic, Choudhury P held that that it would have been appropriate to exercise the discretion to hear the appeal applying the criteria set out in *Hamnett v Essex County Council* [2017] 1 WLR 1155 because the issue of third-party harassment is one of some importance and could potentially affect many employees and employers; the respondent was not at any realistic risk of costs and had been able to place very full written submissions before the EAT.

*2 Does the Race Directive require member states to outlaw third-party harassment where the harassment was foreseeable and preventable, without a requirement that the employer's failures were themselves 'related to' race?*

CB argued that the answer to this question was yes, relying on Article 2(3) of the Race Directive, under which it is sufficient for liability to arise where the act of harassment '*takes place*' without any requirement that the employer's failings themselves are related to race. He argued that this interpretation was supported by the wording of Articles 3(1)(a) and (c) of the Directive, which do not require that the acts of racial harassment are themselves done by the employer but only that the acts are done within the sphere of occupation and working conditions.

Choudhury P rejected this submission on the grounds that:

i) such an interpretation did not accord with the natural and ordinary meaning of the words in Article 2(3);
ii) while it is correct that Article 2(3) does not stipulate that the unwanted conduct related to racial or ethnic origin must be conduct of the employer, that is merely because this broadly applicable Directive seeks to adopt a definition of harassment which can be applied in a number of contexts, only one of

which is employment;
iii) this interpretation would impose liability for third-party harassment on those outside the employment sphere and in respect of both direct and indirect harassment; and
iv) it would effectively create a situation of strict liability for employers.

CB's reliance on:
i) Articles 21 (the non-discrimination provision), 31 (the right to working conditions which respect health, safety and dignity) and 47 (the right to an effective remedy) of the Charter of Fundamental Rights of the European Union,;
ii) Article 2(10) of Directive 2006/54 (the Recast Directive); and
iii) Article 4 of the International Labour Organisation's Convention 190, did not assist.

Choudhury P rehearsed the history of the old version of s40 EA which provided that an employer could be liable for third-party harassment if it had failed to take such steps as would have been reasonably practicable to prevent the harassment, and the employer had known that there had been at least two previous occasions of harassment. This provision was repealed by the coming into force of s65 of the Enterprise and Regulatory Reform Act 2013. CB argued that these provisions had been enacted because the government considered that they were required by EU law. Choudhury P held that *Nailard* made clear that this was not the correct interpretation of *Equal Opportunities Commission v Secretary of State for Trade & Industry* [2007] EWHC 483 (Admin), [2007] ECR 1234: rather the introduction of the old third-party harassment provisions had been a matter of government policy.

For all these reasons Choudhury P concluded that the Race Directive could not be interpreted in the manner advanced by the claimant.

### 3 *If the Race Directive covers third-party harassment, can s26(1) EA be interpreted to give effect to this?*

Choudhury P continued by holding that even if he was wrong about the interpretation of the Race Directive, it would have been his view that the '*related to*' element of the s26(1) EA is not capable of being interpreted to encompass liability for third-party harassment. As Underhill LJ had held in *Nailard*, the '*negligent failure to prevent another's discriminatory acts is a very different kind of animal from liability of one's own: it requires careful definition, and I would have expected it to be covered by explicit provision*'.

He considered that the strict liability scheme contended for by the claimant would go considerably further than the old s40 scheme. A court could not reasonably deploy an interpretative exercise to develop such a scheme. Such a scheme would also run contrary to the '*grain*' of the legislative scheme as it would seek to impose liability on persons whose thought processes contained no motivational element related to race.

### 4 *If s26(1) EA cannot be read and given effect to conform to the requirements of the Race Directive, does the relevant provision of the Race Directive have direct effect?*

In light of Choudhury P's conclusions as to the meaning of the Race Directive, the issue of direct effect did not arise.

### 5 *Was the ET and the EAT bound by the CA's decision in Nailard?*

Choudhury P held that the answer to this was clearly 'yes': there is nothing in *Nailard* which can be said to be inconsistent with or amount to a failure to apply EU law.

## Comment

CB tried and failed to obtain a 'leapfrog' certificate to have this case considered directly by the SC. Part of Choudhury P's reasoning for refusing the certificate was that the arguments deployed before him had not yet been fully argued before the CA. While CB was refused permission to appeal, it is understood that he has applied for permission from the CA itself.

Claimant lawyers would no doubt welcome further consideration of this important issue, not least because there will be cases of third-party harassment where, since the repeal of the old s40, employees are left without a remedy.

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# EEA family member unlawfully denied employment

*Badara v Pulse Healthcare Limited* UKEAT/0210/18/BA; July 1, 2019

## Introduction

Employers may be liable for a civil penalty pursuant to section 15(1) of the Immigration, Asylum and Nationality Act 2006 (the 2006 Act) if they employ an individual who does not have the right to work in the UK.

However by complying with the prescribed requirements referred to in s15(3) of the 2006 Act, an employer can establish a 'statutory excuse' from the penalty. The requirements are contained in the Schedule to the Immigration (Restrictions on Employment Order) 2007 (the 2007 Order), which sets out the acceptable documents required by employers from individuals. The Home Office Guidance dated May 16, 2014 (Home Office Guidance) provides employers with some additional advice in respect of acceptable documents, including the requirement that employers must check the individual's original documents.

If the individual cannot provide acceptable documentation to evidence their right to work in the UK, the employer must obtain a positive verification notice from the Home Office's online Employer Checking Service (ECS) to secure a statutory excuse. If the employer receives a negative verification notice, it carries a warning that the employer should not employ, or continue to employ, the individual. The warning expressly states that if the employer does employ the individual, they could be liable for a fine or imprisonment.

Nationals from EEA countries (at least until the end of transition period following Brexit) benefit from rights of free movement to live and work in the UK. Article 23 of the Free Movement Directive 2004/38/EC, and the domestic provisions set out in the Immigration (European Economic Area) Regulations (the 2006 Regulations) extends the right to work to some family members of EEA nationals (whether or not they are EEA nationals themselves). It is an automatic right, and therefore does not require the family member to obtain any documentation to evidence their rights. This is made clear in the 'Additional Information' section of the Home Office Guidance. That being said, the Home Office Guidance states that an employer cannot conduct a valid right to work check unless such an individual can provide evidence of their right to work in the UK.

The EAT addressed these issues in the 2011 case of *Okuoimose v City Facilities Management (UK) Ltd* UKEAT/0192/11. In summary, the claimant, a non-EEA national, was an EEA national's spouse and therefore entitled to work in the UK. She was dismissed by her employer on grounds of illegality after the right of residence stamp in her passport had expired. The EAT confirmed that her right to work did not depend on documents in her passport or from the Home Office but derived simply from her status as a family member of an EEA national.

## Facts

GB (the applicant) was employed by Pulse (the respondent) from February 2013 until November 2015. He is a Nigerian national and was married to an EEA national resident in the UK. He therefore had a right to work in the UK at all material times.

GB's contract of employment required him to provide, upon request from Pulse, evidence of his right to work in the UK. The contract also required him to inform Pulse if his circumstances changed such that it might affect his continued right to work in the UK. Before GB started work, he provided Pulse with his UK residence card which confirmed his status as a family member of an EEA national and which had an expiry date of January 20, 2015.

The law is clear that GB's right to work continued automatically under EU law even after the expiry date, by virtue of his marriage to the EEA national. Despite this, following the expiry of his residence card, GB was provided with no further work by Pulse on the basis that he had not provided it with evidence of his right to work upon request and in breach of his contract of employment.

Pulse submitted a series of requests via the Home Office's ECS to obtain a positive verification notice establishing GB's right to work in the UK. However these came back negative on each occasion. There is no explanation as to why the checks came back negative. Pulse received the standard warning from the Home Office on each occasion that it should not employ the individual in question.

GB raised a grievance stating that he had the right to work in the UK by virtue of being married to an EEA national. However, as a result of the negative verification notices and the warning on it, Pulse continued to withhold work. In October 2015 GB received a new residence card confirming a permanent right to residence in the UK from October 16, 2015.

GB brought a number of claims in the ET including direct and indirect discrimination on the grounds of race and/or nationality.

### Employment Tribunal

The ET held that GB did have an automatic right to work by virtue of his marriage to an EEA national. However in light of penalty provisions under the 2006 Act, the requirements of 2007 order, and provisions in GB's contract of employment, the tribunal found that it was reasonable for Pulse to require documentary evidence of GB's right to work, and the statutory excuse in the form of a positive ECS check.

In relation to the claim for direct discrimination, the ET held that there was unfavourable treatment but that it was reasonable for Pulse to rely on the negative ECS checks, even though these may not have been correct. It found that GB did not show sufficient evidence to draw the inference that the unfavourable treatment was on the grounds of his race and/or nationality and consequently his claim failed. The decision in *Okuoimose* was distinguished on the basis that, in this case and unlike *Okuoimose,* there was no question that the contract of employment was illegal.

As to the indirect discrimination claim, Pulse accepted there was a provision, criterion or practice for a positive ECS check applied to everyone to whom it offered work and that such a requirement placed GB at a substantial disadvantage compared to someone who was an EEA national. However it also accepted that any substantial disadvantage from the ECS check requirement could be objectively justified on the basis that compliance with immigration controls and laws was a legitimate aim and that reliance on the ECS checks was a proportionate means of achieving that aim.

GB appealed, contending that the ET had erred in distinguishing the EAT decision in *Okuoimose* which made it clear that the provisions in the 2006 Act and the 2007 Order were irrelevant when the employee had the right to work pursuant to his status as a family member of the EEA national.

### Employment Appeal Tribunal

The EAT found that the ET should have taken into account the decision in *Okuoimose* and rejected the finding that it could be distinguished.

The EAT agreed with GB that the failure for the ET to consider *Okuoimose* fatally undermined its conclusion on his indirect discrimination claim. If the ET recognised the provisions of the 2006 Act and the 2007 Order, and taken into account the Home Office Guidance, it must have concluded that the reliance on the ECS checks was not a proportionate means of achieving a legitimate aim of compliance with immigration control and statutory requirements. In circumstances where an employee has a right to work, but the Home Office has no information on them it is understandable the ECS checks would provide inaccurate results.

Whilst the EAT recognised the difficulties that employers in this position may face, it held that the ET should have taken into account the decision in *Okuoimose* and the relevant sections of the Home Office Guidance which expressly stated that such persons did not have to register or obtain documentation to evidence their right to work.

The EAT remitted this claim to the ET for reconsideration taking into the account the decision in *Okuoimose* and the Home Office Guidance, and their relevance to the legitimate aim to the extent of identifying what were the relevant immigration and statutory requirements, and to the proportionality of the means used to achieve that aim.

As to the direct discrimination claim, GB argued that had the ET considered *Okuoimose* and the Home Office Guidance, it might have reached the conclusion that there was sufficient factual evidence from which an inference of discrimination could be drawn. This was dismissed by the EAT as there was no basis to conclude that had the ET properly considered the matters above, there would have been a different conclusion as to the reason why GB was subjected unfavourable treatment. The appeal in respect of the direct discrimination claim was dismissed.

### Comment

This case highlights the difficulties that employers and employees can face when balancing compliance with UK and EU immigration law, Home Office policy and employment rights.

The clash between the Home Office Guidance and the automatic right to work conferred by EU law governing free movement has resulted in confusion among employers and employees alike. This confusion is only likely to intensify during the 'transition period' to December 31, 2020 when EU law will still apply in the UK. From January 1, 2021 (unless the transition period is extended) new immigration rules will apply and we move into uncharted territory.

From the employer's perspective, employing someone who does not have the right to work can have very serious consequences. It is understandable that concerns about those penalties would outweigh their concerns about potential ET claims. However employers can prepare themselves by having a clear understanding of the relevant legislation and ensuring that the Home Office Guidance is considered when reaching its decisions.

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# Assessing the long-term effects of disability when the source of the impairment is removed

*Parnaby v Leicester City Council* UKEAT/0025/19/BA; July 19, 2019

### Implications for practitioners

This case considers the proper approach to the question of whether the effect of an impairment is long-term for the purposes of the definition of disability. The EAT emphasised that this question must be answered by reference to the circumstances pertaining at the time of the alleged discrimination rather than with the benefit of hindsight. This was all the more so where the event considered to have brought the impairment to an end itself amounted to allegedly discriminatory treatment.

### Facts

The appellant, Mr Parnaby (P), worked as a head caretaker for the respondent Leicester City Council (LCC) from 2010 until his dismissal in July 2017. He suffered two episodes of work-related stress, from April to late summer 2016, and from January to July 2017. He was dismissed due to his level of sickness absence caused by the work-related stress.

P brought a claim in the ET claiming that his dismissal was disability discrimination and/or was unfair. He also alleged that various other aspects of LCC's treatment of him prior to his dismissal amounted to disability discrimination, such as its application of its attendance management procedure. He cited his disability as being work-related stress, from which he said he had suffered since May 2016.

### Employment Tribunal

The ET determined the question of whether P was a disabled person for the purposes of the Equality Act 2010 (EA) as a preliminary issue at a hearing in August 2018. It found that P had an impairment arising from work-related stress which had a substantial adverse effect on his ability to carry out normal daily activities. However it found that this effect was not long-term.

In order to be long-term within the meaning of the test for disability, the effect of the impairment must have lasted for at least 12 months, be likely to last for at least 12 months, or be likely to last for the rest of the person's life (Sch.1, paragraph 2 EA). If an impairment ceases to have a substantial adverse effect but that effect is likely to recur, the impairment is to be regarded as continuing to have that effect. 'Likely' means 'could well happen' (*SCA Packaging Limited v Boyle* [2009] ICR 1056 HL; Briefing 540).

The ET found that P's periods of stress were discrete episodes. The earlier period was not likely to last 12 months or to recur, and did not meet the definition of disability.

In relation to the second period of stress, the ET noted that this was reactive to the difficulties P was experiencing at work and that when he was not at work, most notably following his dismissal, it subsided. The ET concluded that the impairment suffered by P during this period was therefore not long-term and did not meet the definition of disability.

P appealed the ET's decision in relation to his second period of sickness, ultimately pursuing the appeal on two grounds:

1. that the ET had failed to consider whether the effect of his impairment was likely to recur; and
2. whether the ET was permitted to take into account the removal of the cause of P's stress in considering whether the effect of his impairment was likely to last 12 months or to recur.

(He accepted that the effects of his second period of stress had not lasted 12 months.)

### Employment Appeal Tribunal

P's appeal was heard by HH Judge Eady QC in July 2019. Her judgment focuses on the second ground of appeal, namely whether, in considering the likely duration or recurrence of the effects of that condition, the ET had erred in taking into account the impact on P's condition of treatment he had alleged was unlawful.

The EAT held that such an approach was impermissible. HHJ Eady QC distils her reasoning succinctly at paragraph 25 of her judgment:

> *Looking back at what happened after the relevant acts of which complaint was made would not … be the correct approach when determining what was the likely effect; likelihood is not something to be determined with hindsight.*

To the extent that the ET found the effects of P's condition were not likely to last 12 months or to recur because they were reactive to the issues at work, '*…that would assume dismissal – the ending of the work that was*

*causing the stress in issue. That, however, was the very act of which the Claimant was complaining, as an act of disability discrimination'.*

She concludes at paragraph 27*:*

*That was an error of approach; it failed to consider the position looking forward and it assumed the implementation of the very decision that was a subject of challenge'.*

As to P's first ground of appeal, the EAT found that the ET's error in taking into account the impact of dismissal on the effects of P's condition 'infected' its approach on the likelihood of those effects recurring.

Both elements of P's appeal were upheld on this basis.

**Comment**

This decision is a useful reminder that the question of whether a person is disabled at a particular time must be determined by reference to the circumstances pertaining at that time. In considering whether the effect of P's ill-health was likely to be long-term when LCC decided to dismiss him (and therefore whether he could claim disability discrimination in relation to that decision), the ET should have discounted its knowledge of the later trajectory of P's illness once the dismissal decision had been implemented.

This conclusion must surely be right. It would make a nonsense of disability discrimination protections if, what might otherwise have been an unlawful act of discrimination, could of itself deprive a claimant of their protected status. In work-related stress cases in particular, it would be all too easy for employers to do the bare minimum needed to achieve a fair capability dismissal without considering the question of reasonable adjustments or of disability discrimination generally, relying on that very dismissal as a shield.

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## Harassment and the burden of proof

*Raj v Capita Business Services Ltd & Ward* UKEAT/0074/19; [2019] IRLR 1057; June 6, 2019

**Facts**

The claimant, Mr S Raj (SR), worked as a customer service agent for the respondent, Capita Business Services Ltd (CBS) for about 10 months before being dismissed. He failed an extended probation period. He made a number of complaints to the ET including sexual harassment and/or harassment related to sex in relation to the actions of his line manager. Only four of his complaints made it to a full hearing, with just one upheld. In a careful decision the ET rejected most of the respondents' accounts but also much of SR's account.

**Employment Tribunal**

SR represented himself at the ET. The single complaint upheld was that being required to work a late evening shift was in breach of his contract. To get home safely meant SR had to take taxis. The ET found SR's evidence of travel costs unsatisfactory, but took a common sense approach and awarded over three-quarters of the sum SR had claimed.

The ET rejected SR's disability complaint which had been based only on the failure to supply an appropriate chair given his back condition. The medical evidence was limited. The ET held SR had not met the long-term test for disability status.

The ET rejected SR's complaint that his line manager, Ms Ward (W), had said '*you Pakis don't like taking orders from women'*. This had not been raised contemporaneously and his colleagues who were sitting close to him had not recalled it.

The ET had more difficulty with SR's harassment complaint, describing the contact as *'very difficult to assess'*. SR said W had stood behind him and massaged his shoulders, back and neck on several occasions when he was seated in the open plan office with colleagues around. He said this was unwanted conduct either of a sexual nature or relating to sex. He consulted with a colleague who had observed the touching (how extensive the touching was is not stated in the reasons). She told SR to ask W to stop. He did so.

W denied SR's account, accepting only a tap on the shoulders with the comment '*well done'*, and told the tribunal SR was young enough to be her child. Statements of others, in particular from a colleague who had since become a line manager, supported part of SR's account: brief unwelcome massages of his shoulders. However, the ET rejected SR's account that

W had massaged down his back: no one else had seen it. One colleague who gave evidence for SR corroborated W saying *'well done'*, albeit not in a '*jokey*' context which the ET did not explain but which appeared to derive solely from W's account. Yet the ET had also rejected W's evidence that SR had encouraged her.

On this mixed picture, the ET rejected W's account of a single tap on SR's shoulders. It found, based also on the evidence of SR's colleagues, that W had massaged his shoulders on more than one occasion and that this was unwelcome: he had asked her to stop.

The ET found the purpose of the conduct was not to violate SR's dignity, nor to create a degrading or humiliating environment for him. Instead, based apparently on the 'well done' comment, they found it was misguided encouragement.

Turning to the effect of the conduct, and referring specifically to the ss26(4)(a), (b) and (c) Equality Act 2010 (EA) matters, the ET concluded the conduct was '*reasonably to be perceived as belittling, or degrading and humiliating*'.

However, it rejected a prohibited reason. It accepted the purpose or context was encouragement. Noting that shoulders were a 'gender neutral' part of the body, it found the conduct was not '*of a sexual nature*'. It went on to find that it did not relate to 'his' gender.

## Employment Appeal Tribunal

The sole issue on appeal was the ET's failure to grapple directly with the burden of proof and whether it had shifted to CBS. The ET reasons did not refer to s136 EA and its two-stage test. However, the EAT's detailed reading of the ET findings concluded it had found that SR had failed to make out a *prima facie* case.

Although in some cases an untrue account of what had happened and why may be enough to satisfy the stage-one test and shift the burden, that question is always fact and context specific.

In this case, the EAT held the ET on the facts found would have been quite correct to find the stage-one threshold had not been reached. It was not enough that the conduct was unwanted, that it had the required negative effect, nor that the tribunal had rejected part of the employer's explanation.

Alternatively, the EAT found that if the ET had erred, that error did not affect its decision. On looking at stage-two, the respondent's explanation, the ET had referred to the *'purpose of the conduct'* as '*misguided encouragement'.* This was another basis for dismissing the claim. It was a non-discriminatory explanation for the conduct.

## Comment

The disparity of gender and the power imbalance between SR and W make this an odd result. The ET referred to shoulders as a 'gender neutral' location but did not consider questions of dominance, the difference of sex, or culture. Nor that the conduct was in front of colleagues. The exercise comes across as being closer to one of direct discrimination rather than the broader issues at play when addressing harassment where it is the *effect* rather than the *purpose* of the harassment that is at issue.

Only s136 EA was at issue on this appeal. On stage-one of the test, the EAT held, with SR's agreement, that the ET had asked the right question. This was: were there enough facts from which the tribunal could properly conclude that *'the unwanted conduct related to the Claimant's gender'.*

However, that is not the test. Section 26(1)(a) requires only and broadly that the *'unwanted conduct'* be *'related to a relevant protected characteristic'*. Whose characteristic is not identified. If SR's discomfort was related to W's sex, that should be enough. However, there are a number of references to SR's own gender, at least fourteen in the EAT's discussion and conclusions about the appeal. This suggests that the legal issues were considered through a narrower perspective than s26(1)(a) requires.

Once a tribunal has found that the *purpose* of the conduct was not to violate dignity or create the prohibited environment, the reason for the harassment is not relevant. When considering *effect,* the requirement is simply that the conduct be related to a listed protected characteristic.

## Implications for practitioners

How s136 applies to harassment remains open. It is suggested that *Raj* does not provide a satisfactory answer. Would the result have been the same if W had been an older male team leader subjecting a female subordinate to a shoulder massage?

Pre-existing case law shows that although the substance of an explanation should be excluded from consideration when deciding whether the burden of proof should be reversed, the fact that explanations had been given which were inconsistent or not accepted can be taken into account. One example, in the context of direct race discrimination is *Veolia Environmental Services UK v Gumbs* UKEAT/0487/12. Another, cited in *Raj* and also in the context of direct discrimination, is *Birmingham City Council v Millwood* UKEAT/0564/11, where Langstaff J's caveats make clear the fact and context-sensitive nature of the exercise.

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# Subsequent reinstatement does not prevent dismissal being an act of discrimination

*Jakkhu v Network Rail Infrastructure Ltd* UKEAT/0276/18/LA; August 2, 2019

## Facts

Mr Jakkhu (J) worked for Network Rail as a support analyst. In 2004 he was diagnosed with ulcerative colitis, which caused him to take significant time off work.

In 2014 Network Rail was reorganised. J's post was moved from Milton Keynes to Manchester. He did not wish to relocate and chose to take redundancy. He was made redundant, with his notice period ending on September 24, 2014.

During that notice period, Network Rail reached an agreement with its trade unions not to make compulsory redundancies in certain bands until after 2014. This should have caused J's dismissal to be rescinded. Instead J's dismissal took effect and he was later reinstated in October 2014.

J was then considered for a number of alternative roles, but he was unsuccessful. He continued to work at Milton Keynes (although arrangements were made for some home working) until July 31, 2015, when he went on sick leave. He remained on sick leave in January 2018 when the case was heard in the ET.

## Employment Tribunal

J brought claims for disability discrimination, focusing on three issues:

- first, his dismissal on September 24, 2014;
- second, the failure to find alternative roles;
- third, failure to deal with complaints he had made about discrimination in 2015.

The ET rejected these claims. It found that the dismissal had been erased by the later reinstatement and so there had been no less favourable treatment. It found that an alternative role had been offered to J, but he failed to apply for it, and that the failure to deal with his complaint was the result of oversight, rather than discrimination.

## Employment Appeal Tribunal

J appealed. HHJ Eady QC allowed the appeal in relation to the issue of dismissal. The ET, she found, had mistakenly concluded that a dismissal which was later reversed could not found a discrimination claim. This was to consider a discrimination claim through the prism of unfair dismissal case law which focused on the act of reinstatement and what this might mean for questions of continuity of service.

Discrimination law asked a more direct and simple question: was the act by an employer a detriment? The act of dismissal (or, in this case, failing to retract the dismissal after agreement was reached with trade unions) could be a detriment. What happened later, while it might be relevant to issues of remedy, did not change that.

What the tribunal should have done, the EAT concluded, was to consider why the dismissal had not been retracted. J was the only employee dismissed in breach of the agreement, had a history of significant sickness absence and had been off sick when the dismissal took effect. The ET needed to consider whether this was enough to shift the burden of proof to Network Rail and, if it did, whether the company had proved a non-discriminatory reason for its actions. The case was remitted to the tribunal to address these points.

The EAT dismissed the other two grounds of appeal, finding they were based on permissible findings of fact by the tribunal.

## Comment

This case highlights in importance of clearly identifying the detriments relied on in discrimination cases and the difficulties which can arise when they are lost sight of.

It also demonstrates the difficulty that employers may face in attempting to '*put things right*'. While conceptually, unfair dismissal law allows for reinstatement, discrimination law does not. More generally, unfair dismissal requires tribunals to consider a disciplinary process as a whole, meaning an early error may be corrected on appeal. Again, discrimination law does not.

This means that, once there is an act of discrimination, it cannot be undone. Subsequent actions may have very significant impact on the financial remedy available to a claimant. But they are unlikely to provide a defence to an otherwise good claim.

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# Equalising the pension age for men and women was not unlawful discrimination

*R (on the application of Delve) v Secretary of State for Work and Pensions*

[2019] EWHC 2552 (Admin); [2019] 10 WLUK 17; [2019] ACD 142; October 3, 2019

**Implications for practitioners**

Legislation which equalised the pension age for men and women was not discriminatory against women on grounds of age, sex or age and sex combined as a matter of EU or ECHR law, nor had inadequate notice of the changes been given to the affected women.

**Facts**

Parliament had legislated to equalise the state pension age for men and women by introducing a staggered increase to the state pension age for women, by reference to age cohorts. The changes were introduced by the Pensions Act 1995, the Pensions Act 2007, the Pensions Act 2011 and the Pensions Act 2014. The state pension age for women was initially to be increased to 65 years, before subsequent changes raised it to 66 and 68 for some women, depending on age. All women born on or after April 6, 1950 were affected.

The claimants were women born in the 1950s who were affected by the pension changes. They relied on evidence drawn from official statistics, to the effect that the cohort of women born in the 1950s are disadvantaged by comparison to men of the same age: they have lower average incomes; they are much less likely to be in work; if they are in work they are likely to be paid significantly less than men and more likely than men to be in part-time rather than full-time employment. The loss of state pension therefore represented a much larger proportion of average income for those women than it did for men of the same age.

The claimants brought judicial review proceedings to challenge both the legislative measures and the inadequate notice they and other affected women said they had received of the changes. Their challenge was brought on the basis of age and sex discrimination, and European Convention on Human Rights (ECHR) and EU law.

**Administrative Court**

*Age discrimination*

*i) EU law:* While there was a general EU principle of non-discrimination, it only applied where the relevant national rule fell within the scope of EU law. The receipt of state pension was not '*pay*' as defined in the Treaty on the Functioning of the EU Article 157(2) because it was not a wage or salary and was not paid in respect of employment. The equal pay obligation contained in Article 157(1) therefore had no application.

Council Directive 2000/78/EC of November 27, 2000 establishing a general framework for equal treatment in employment and occupation (Directive 2000/78) expressed the general EU law principle of non-discrimination, but social security and social protection schemes were excluded under Recital 13 and Article 3(1). A regime for the payment of state pensions to those above a certain age was a paradigm example of a social protection scheme. Therefore Directive 2000/78 did not apply and the relevant UK pensions legislation was not within the scope of EU law. On that basis the legislation did not discriminate unlawfully on grounds of age.

*ii) ECHR law:* Entitlement to a state pension was a possession for the purposes of ECHR, Protocol 1, Article 1. However, the new legislative scheme was not discriminatory on grounds of age contrary to Article 14 because:

a) the analysis set out in *Ackermann v Germany (Admissibility)* (71477/01) (2006) 42 EHRR. SE1, [2005] 9 WLUK 106 was that Article 14 was not engaged because the situation of the complainant younger pensioners in that case was not comparable to that of the older pensioners;

b) if it was engaged, case law established that it was permissible for a state to change the law at a single point in time and so logically it had to be permissible to effect the change by a series of changes at different points in time; and

c) the underlying objective of the legislation was to ensure that the state pension regime remained affordable while striking an appropriate balance between state pension age and the size of the state pension, and the changes were not manifestly without reasonable foundation (that being the applicable test as the legislation related to macro-economic policy where the elected arm of government has a very great decision-making power).

### *Sex discrimination*

*i) EU law:* The claimants' reliance on the principle of equal treatment in the Social Security Directive (Directive 79/7/EEC) failed because the derogation at Article 7 of the Directive (permitting members states to exclude from its scope the determination of pensionable age) extended to all aspects of the determination of pensionable age, whether equal or unequal. It was not applicable only to discrimination caused by a member state maintaining unequal state pension ages as between men and women, but applied also to discrimination caused by *equalising* the state pension age: its overall purpose was to exclude decisions relating to pensionable age from the scope of EU law.

*ii) ECHR law:* There was no direct discrimination on grounds of sex, or age and sex combined. The legislation affected only women because women had previously enjoyed the advantage now being removed, but that did not treat women less favourably than men: rather, it corrected direct discrimination against men. The claimants' indirect discrimination claim failed applying the criteria set out in *Essop v Home Office (UK Border Agency)* [2017] UKSC 27, [2017] 1 WLR 1343, [2017] 4 WLUK 75; Briefing 830: the legislation did not apply indiscriminately because it applied only to women born after April 1, 1950; the differential in state pension age might have mitigated pre-existing disadvantages affecting women of the claimants' generation who did not have the same work expectations or opportunities as men of the same age; but the removal of the differential in state pension age did not amount to discrimination because it did not cause or exacerbate the disadvantages: they existed anyway: *Essop* followed. In any event, the legislation was not manifestly without reasonable foundation for the reasons given in relation to age discrimination.

### *Notice*

The claimants did not have a legitimate expectation that the state pension age would not be altered without prior consultation with affected individuals. Parliament had not given a clear and unambiguous undertaking that the individuals affected would be given individual notice of the changes; and had not included obligations of notice to the individuals affected. Even if common law fairness principles generated notice obligations, no breach could commit or empower the court to suspend the operation of primary legislation (*R (on the application of BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139; [2008] ACD 7; [2007] 11 WLUK 228 applied). However, on the evidence, there had been extensive consultation before the legislation was enacted and so the notice given had not been inadequate or unreasonable.

### *Delay*

As a final point the court expressed the view that as the main substantive changes to the pension age came in 1995 legislation, a delay of more than 20 years before the legal challenge would have been fatal in any event.

## Comment

The Administrative Court concluded its judgment by indicating that it was saddened by the stories in the claimants' evidence, but that its role was limited given that the policy choices reflected in the legislation were ones which were open to the government. Dingemans LJ has since granted the claimants' permission to appeal to the CA on all their grounds. The appeal is due to be heard during 2020.

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# Government loses Universal Credit appeals against claimants with severe disabilities

**The CA has dismissed the government's appeals against two previous court judgments which found that the Secretary of State for Work and Pensions had unlawfully discriminated against thousands of severely disabled people who moved onto Universal Credit (UC).**

The ruling in *R (on the application of TP, AR & SXC) v Secretary of State for Work and Pensions* [2020] EWCA Civ 37 upholds two successful High Court challenges brought by TP and AR, in which the courts found that individuals previously in receipt of the Severe Disability Premium (SDP) and Enhanced Disability Premium (EDP) are to be protected against a drop in their income when they move onto UC.[1]
The first challenge brought by TP and AR was won in the High Court in June 2018. The men had been forced to move onto UC when they moved into a local authority area where the new benefit system had been rolled out. Under UC they lost out on the SDP and EDP, leaving them suddenly around £180 a month worse off. The judge found that this was unlawful because those that moved to a different local authority area were being treated differently to those who moved within their local authority area.

As a result of the first challenge the government attempted to rectify the situation by making regulations which stopped other severely disabled people from migrating onto UC and provided that those like TP and AR, (who had already moved onto UC), would receive retrospective and on going recompense. However, the government chose to recompense TP and AR and those like them at a rate of only £80 per month rather than £180 per month which is what they had actually lost.

TP and AR mounted their second legal challenge along with a third claimant SXC arguing that short-changing them was unlawful as they were being treated differently to those who remained on legacy benefits following the enactment of further regulations ostensibly aimed at preventing a recurrence of the circumstances that arose in the initial legal challenge. The High Court found in their favour in May 2019.

The government, whilst appealing both judgments, increased the top-up payments but only provided recompense of £120 per month rather than the £180 lost. A third legal challenge regarding that decision is pending.

The CA unanimously agreed with the lower courts that the government had unlawfully discriminated against this cohort of severely disabled claimants. The court also found that the government had breached its duty of candour by failing to disclose during the first hearing that it had already made a policy decision to stop more severely disabled people from being moved onto UC and to provide transitional payments for those that already had.

Law firm Leigh Day (which represented TP and AR) is continuing to bring a separate group claim, on behalf of those who previously received SDP and/or EDP and moved to UC prior to January 16, 2019, for the full amount lost as well as compensation for any pain and distress caused by the move to UC.

1. *R (TP and AR) v Secretary of State for Work and Pensions* [2018] EWHC 1474 (Admin); *R (TP, AR & SXC) v Secretary of State for Work And Pensions* [2019] EWHC 1127 (Admin); Briefing 909

# Health Secretary faces legal challenge for failing patients with learning disabilities and autism

**The Equality and Human Rights Commission (EHRC) has launched a legal challenge against the Secretary of State for Health and Social Care over the repeated failure to move people with learning disabilities and autism into appropriate accommodation.**

The EHRC has longstanding concerns about the rights of more than 2,000 people with learning disabilities and autism being detained in secure hospitals, often far away from home and for many years.

These concerns increased significantly following the BBC's exposure of the shocking violation of patients' human rights at Whorlton Hall, where patients suffered horrific physical and psychological abuse.

On February 12, 2020, the EHRC sent a pre-action letter to the Secretary of State for Health and Social Care, arguing that the Department of Health and Social Care (DHSC) has breached the European Convention on Human Rights for failing to meet the targets set in the Transforming Care programme and Building the Right Support programme.

These targets included moving patients from inappropriate inpatient care to community-based settings, and reducing the reliance on inpatient care for people with learning disabilities and autism.

Following discussions with the DHSC and NHS England, the EHRC is not satisfied that new deadlines set in the NHS Long Term Plan and Planning Guidance will be met. This suggests a systemic failure to protect the right to a private and family life, and right to live free from inhuman or degrading treatment or punishment.

The DHSC has 14 days to respond to the pre-action letter. Alternatively, the EHRC has offered to suspend the legal process for three months if DHSC agrees to produce a timetabled action plan detailing how it will address issues such as housing and workforce shortages at both national and regional levels.

The EHRC is also calling for the immediate implementation of recommendations made by the Joint Committee on Human Rights and Rightful Lives 8-point plan.

Alongside its discussions with the DHSC, the Care Quality Commission and NHS England, the EHRC has been calling for an enforceable right to independent living and has developed a legal model to incorporate it into domestic law.

This would protect the right of disabled people to live independently and as part of the community, and it would also strengthen the law that puts a presumption in favour of living in the community and the views of individuals at the heart of decision-making.

# Student loan discrimination not justified

In *OA v Secretary of State for Education* [2020] EWHC 276 (Admin) February 13, 2020, the High Court ruled that student finance regulations unlawfully discriminated against survivors of domestic violence.

The case involved a woman (OA) who had been refused a student loan. The finance company turned down her request as regulations required loan applicants to be 'ordinarily resident' in the UK for three full years before their course started. OA had been a victim of domestic abuse and told the court that the reason that her leave to remain in the UK had expired in September 2016 was because her former partner had withheld personal documents from her, including her passport.

OA argued that the refusal was a breach of her right under Article 14 read with Article 2, Protocol 1 of the European Convention on Human Rights.

In his judgment, Mr Justice Nicol rejected the Department for Education's arguments attempting to justify the regulations, saying *'… those harms to both the individuals concerned and the community as a whole cannot be outweighed by the administrative benefits of this particular bright line rule, which could be achieved in other ways'*. The updated regulations mean that that students who have been granted indefinite leave to remain in the UK as victims of domestic abuse are eligible for loans immediately.

**Abbreviations**

| | |
|---|---|
| AC | Appeal Cases |
| ACD | Administrative Court Digest |
| CA | Court of Appeal |
| CIPD | Chartered Institute of Personnel and Development |
| CJEU | Court of Justice of the European Union |
| DHP | Discretionary Housing Payment |
| DLA | Discrimination Law Association |
| EA | Equality Act 2010 |
| EAT | Employment Appeal Tribunal |
| EC | European Council |
| ECHR | European Convention on Human Rights 1950 |
| ECR | European Court Reports |
| ECS | Employer Checking Service |
| ECtHR | European Court of Human Rights |
| EEA | European Economic Area |
| EHRC | Equality and Human Rights Commission |
| EHRLR | European Human Rights Law Review |
| EHRR | European Human Rights Reports |
| EJ | Employment Judge |
| EqLR | Equality Law Reports |
| ERA | Employment Rights Act 1996 |
| ET | Employment Tribunal |
| ET3 | Employment Tribunal response form |
| EWCA | England and Wales Court of Appeal |
| EWHC | England and Wales High Court |
| HHJ | His/her honour judge |
| HL | House of Lords |
| HRA | Human Rights Act 1998 |
| ICR | Industrial Case Reports |
| ILJ | Industrial Law Journal |
| IRLR | Industrial Relations Law Report |
| JR | Judicial Review |
| J/JSC | Judge/Justice of the Supreme Court |
| LGBTI | Lesbian, gay, bisexual, transgender, and intersex |
| LJ | Lord Justice |
| LLP | Legal liability partnership |
| NPA | Normal pension age |
| NHS | National Health Service |
| P | President of the EAT |
| QBD | Queens Bench Division |
| QC | Queen's Counsel |
| SC | Supreme Court |
| TFEU | Treaty on the Functioning of the European Union |
| UKEAT | United Kingdom Employment Appeal Tribunal |
| UKHL | United Kingdom House of Lords |
| UKSC | United Kingdom Supreme Court |
| WLR | Weekly Law Reports |
| WLUK | Westlaw UK |

# Unsettling status

**A report by Tanja Bueltmann, professor of history at Northumbria University, on the 3million's[1] settled status survey found evidence which clearly shows that *'a majority of respondents feel that government actions do not match the government's copy-and-paste phrases of friendship and wanting to protect the rights of EU/EEA and Swiss citizens'*.**

The survey was conducted between November 20 and December 20, 2019 among 3,171 EU/EEA/Swiss citizens and their non-EU/EEA/Swiss family members (EU nationals) who need to apply, or already have applied, for settled status – the government's new immigration status for EU nationals post-Brexit.

*'Experiences and Impact of the EU Settlement Scheme Report'* examined the application process and also the wider impact of settled status and Brexit more generally on EU nationals. It refers to potential discrimination arising from survey respondents being asked to provide proof of their settled status where it is not yet required. 10.9% of respondents reported being asked to prove their status to (among others):

- landlords, estate agents and housing agencies
- banks — generally and specifically in the context of mortgage applications
- councils e.g. to receive a council tax reduction
- GP surgeries/hospitals
- children's schools
- international airports prior to boarding the plane
- recruitment/employment agencies
- embassies of different countries when respondents applied for visas
- UK border staff.

Among the report's recommendations, those which focus on avoiding discrimination include:

- the creation of a physical document as proof of settled status
- enshrining settled status in primary law to ensure those holding settled status are protected for life
- ending the current process of data sharing and replacing the existing data policy with a transparent one
- changing the EU Settlement Scheme to an automatic, declaratory system in order to avoid a Windrush-type scandal on a much larger scale with thousands of EU nationals becoming unlawfully resident in the UK
- action to increase awareness of the EU Settlement Scheme among employers, banks, landlords and others who act as the government's frontline border agents carrying out immigration checks; these groups need to be better informed about how EU nationals can prove their status during the transition period, and that settled status is not a yet a requirement
- funding for civil society support for EU nationals to help them reclaim the sense of security many of them lost as a result of the EU referendum.

The report concludes that while the EU Settlement Scheme application process works for many applicants, it has not provided them with a sense of security. Instead, the Home Office has *'failed to convey actual trust in the scheme with the process and has contributed to eroding a sense of belonging among respondents. Rather than making EU/EEA and Swiss citizens feel – as the scheme name suggests – settled, 'unsettling status' would be a much more appropriate name for the scheme based on survey evidence'.*

1. The 3million is the UK's leading NGO working on protecting EU/EEA and Swiss citizens' rights. The group carries out lobbying, litigation, media and outreach work with stakeholders, including the UK government, EU representatives, and EU/EEA and Swiss citizens themselves. See https://www.the3million.org.uk/

# Institutional sectarianism in Northern Ireland


***Sectarianism: The Key Facts,*** **published December 2019, is the report of research commissioned by the Equality Coalition on contemporary sectarianism in Northern Ireland. Written by independent researcher Dr Robbie McVeigh, the report examines 'institutional sectarianism', especially where there is evidence of sectarianism in decision-making. It finds that there has been a significant convergence between the Protestant and Catholic communities over the past 50 years but sectarian differences and inequalities continue to be explained – at least in part – by historical and contemporary discrimination.**

Sectarianism is defined as *'the belief that a ground such as religion, political opinion, language, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons'.* The Northern Ireland Human Rights Commission, the Committee of the International Convention on the Elimination of All Forms of Racial Discrimination and the Council of Europe accept that sectarianism is a form of racism.

**Summary of key messages:**

- Sectarian inequality continues to be real. There remain sectarian 'dual markets' in employment, housing and education in Northern Ireland. The resulting segregation is often marked by a sectarian differential in life experiences between Protestants and Catholics. In other words, their experience is often not just different or separate, but also unequal.
- The report is critical of recent statutory and academic 'community relations' approaches to sectarianism that focus on mindsets and perceptions, rather than facts, and overlook or problematize equality.
- There is evidence of public bodies engaging in concerted efforts to evade analysis of sectarian inequality. Baseline data is necessary in order to assess structural or institutionalised inequality.
- Sectarianism in decision-making was a contributing factor to the 2017 collapse of power sharing in Northern Ireland. The report features detailed case studies on 'single identity' housing; the influence of sectarianism on funding allocation; and failings in the promotion of the Irish language.
- There is a significant demographic change currently in progress in Northern Ireland. Originally founded on the basis of a Protestant majority, Northern Ireland may soon have a Catholic majority instead. In this 'new demographic context' Catholics may well discover what women have known for many years – namely that being in the majority does not necessarily guarantee any protection from discrimination and inequality. Contrariwise, new issues may well emerge from Protestant minority status.
- The 'Other' category is also growing in Northern Ireland, making it unviable to continue to rely on a binary 'Protestant' and 'Catholic' analysis of ethnicity in Northern Ireland.

**The report concludes:**

> *We need an approach which re-centres the commitment to equality and human rights of all citizens – Protestant, Catholic and 'Other' – who meet at the interface of sectarianism in the very particular circumstance of the Northern Ireland state. At the core of this approach is the recognition that tackling sectarianism is about building a radically different future rather than reconciling people to the present – a present that remains contested, unequal and profoundly sectarian.*

1. Founded in 1996, the Equality Coalition is a civil society alliance of NGOs and trade unions that aim to promote equality in Northern Ireland. The Equality Coalition is co-convened by a Belfast-based human rights organisation, the Committee on the Administration of Justice and UNISON. Cumulatively, the 90 member organisations in the Equality Coalition work across all nine equality categories covered by the statutory equality duty in s75 of the Northern Ireland Act 1998, in addition to working on other recognised protected equality grounds.

# Briefings