ISSN 1759-2925

Discrimination Law Association

Briefings 961-972

Volume 72

March 2021

Briefings 961-972

Please see page 36 for list of abbreviations

Threats to equality and social cohesion

Entrenched inequalities in society have been exposed and exacerbated by COVID-19. As more information becomes available about the pandemic, it is clear that both its immediate and long-term impact is being, and will be, experienced by the poorest and most vulnerable in our society. The Health Foundation reports that people living in the most socioeconomically deprived areas of England face a higher risk of death than people living in the least deprived and the ONS data show that disabled people accounted for 59% of COVID-19 deaths to November 2020. Public Health England reported that COVID-19 death rates of people with learning disabilities have been between four and six times higher than for the general population. The Women and Equalities Committee sub-inquiry Unequal impact? Coronavirus, disability and access to services reported in December 2020 that *'disabled people who already faced substantial barriers to full participation in society… have suffered a range of profoundly adverse effects from the pandemic, including starkly disproportionate and tragic deaths'.*

The same committee's sub-inquiry into Unequal Impact? Coronavirus and BAME people also reported that BAME *'people have been acutely affected by pre-existing inequalities across a huge range of areas, including health, employment, accessing Universal Credit, housing and the no recourse to public funds policy. As the pandemic progressed, many of these underlying inequalities made the impact of the pandemic far more severe for BAME people than their White counterparts'.* ONS also reports that COVID-19 death rates are higher for most ethnic minorities compared with white ethnic groups.

Legal challenges to underlying inequalities and the differential impact of COVID-19 are beset by difficulties.

Dealing with the scandal of Black, mainly Caribbean, people and their descendants' treatment in the UK following post-war migrations, the Windrush Lessons Learned Review is critiqued by Jacqueline McKenzie. On the first anniversary of the review's publication, she sets out the context for the scandal including the history of British opposition to immigration, systemic racism and discrimination and the perceived problem of immigration which continues to dominate political discourse today. The review did not seek to analyse the role political ideology, race and identity played in the scandalous treatment of the Windrush generation; its focus was on learning and cultural change in the Home Office. She expresses concern about the ongoing delay in obtaining practical redress and compensation for the victims, and also a lack of leadership and worrying indications which do not bode well for ensuring the change of culture needed in the department.

In her assessment of the current 'state of the nation' for the DLA annual conference, Karon Monaghan QC also highlighted the serious, entrenched and deep seated inequalities already in place in the UK which, despite the progressive elements of the Equality Act 2010 (EA) which created opportunities to challenge systemic inequality, have remained largely unchanged. The pandemic will only increase these pre-existing disadvantages and its consequent impact on living standards and increasing poverty will be most keenly felt by particular groups such as ethnic minorities, young people and disabled people. She expressed disappointment that the EA has not delivered the progress anticipated over a decade ago; this is due in part to the failure to implement the s1 EA public sector duty regarding socio-economic inequalities, the failure to implement s14 EA on combined discrimination and the courts 'light touch' approach to finding breaches of the s149 EA public sector equality duty or to justifying Article 14 HRA discrimination.

The Women and Equalities Committee echoed concerns about the lack of impact of the PSED and, as far as disabled people are concerned, argued that their *'experiences of public services during the pandemic make the case for a strengthening of the public sector equality duty, outweighing any concerns about additional burdens on authorities'*. The committee recommended that the government consents to the EHRC issuing a statutory Code of Practice on the PSED.

This would be a step in the right direction but much more can and needs to be done to address increasing inequalities; the DLA calls on the government to take immediate steps to implement ss1 and 14 of the EA.

Geraldine Scullion
Editor, Briefings

A critique of the Windrush Lessons Learned Review

Jacqueline McKenzie,[1] solicitor and partner at McKenzie Beute and Pope, considers the Windrush Lessons Learned Review which was published almost one year ago on March 19, 2020. She sets out the background to the Windrush scandal and analyses the Review's findings and remit. In her opinion, the Home Office's handling of the Windrush generations' right to live and work in the UK sits squarely within a discourse of ideology, race and discrimination. Despite the Home Secretary's acceptance of institutional failings at the heart of the Home Office,[2] she expresses concerns about the lack of progress on the cultural change required of the department by the Review. She considers there is a lack of political leadership or willingness to engage in a meaningful way with the Review's recommendations, both of which are required to change Home Office culture and ensure that such a scandal can never happen again.

Immigration policy is largely driven by ideological considerations and voter priorities. The idea that ministers decide policies which civil servants advise on and implement would suggest that it is government, past and present, which ought to come in for closer scrutiny in the assessment of the Windrush scandal. The review of the scandal and the injustices meted out to the members of the Windrush generation has however, largely focused on the role, culture and operations of the Home Office.

The recommendations of the Windrush Lessons Learned Review focus on the need for learning, engaging and cultural reform in the Home Office with little analysis of how political ideology informs and drives the department's outputs and outcomes. The women and men affected by the scandal represent a marginalised group of UK citizens. Mostly characterised by images of people disembarking off ships, including the HMT Empire Windrush which docked at Tilbury on June 22, 1948, or in the various uniforms of London Transport, British Rail and the NHS, theirs is largely a history of surviving racism and a hostile and unequal society.

British opposition to immigration

Studies done from the 1960s onwards found that an overwhelming majority of British people thought that too many immigrants had come to the UK; about half of those surveyed felt very strongly on the issue. Ivor Crew, in his essay Representation and the Ethnic Minorities in Britain,[3] explained: '*the typical British elector is implacably opposed to further coloured immigration, regards strict immigration control rather than city aid as the key to good race relations and considers that action on behalf of racial equality has already gone far enough*'.[4] He pointed to the demonstrations in support of Enoch Powell after his 1968 'Rivers of Blood' speech and the rise in support for the Conservative party after Margaret Thatcher's January 1978 interview on World in Action during which she proclaimed, in response to the arrival of people from the new commonwealth and

1 Jacqueline McKenzie was a member of the Independent Advisory Group which worked with Wendy Williams on the Windrush Lessons Learned Review and is a member of the Home Office's Windrush Advisory Group. With her colleagues at McKenzie Beute and Pope, she runs legal surgeries at the Black Cultural Archives and has run Windrush surgeries across the UK. She is the founder of the Centre for Migration Advice and Research. jacqueline@mckenziebeuteandpope.com

2 CP 293 – The Response to the Windrush Lessons Learned Review: A Comprehensive Improvement Plan – September 2020 (publishing.service.gov.uk)

3 Glazer N and Young N, 1983, *Ethnic Pluralism and Public Policy – Achieving Equality in the United States and Britain* p 262

4 Ibid pp 262-263

Pakistan *'… it is an awful lot and I think it means that people are really rather afraid that this country might be rather swamped by people of a different culture'.* Crew explained that Thatcher understood that *'there are votes for the picking in fanning the flames of racial resentment… and few extra votes to be won by dousing the flames.'*[5]

The Runneymede Trust reported[6] that her speech caused Labour to lose their prime position in the polls, and Thatcher went on to win the 1979 election. This thinking prevails today. The Migration Observatory at Oxford University found that British people make distinctions between immigrants from different countries. *'Just 10% of a 2017 sample said that no Australians should be allowed to come and live in Britain compared to 37% saying that no Nigerians should be allowed.'*[7]

The 'coloured immigration' referred to, to use a now discredited term, was in the main the half a million men and women who settled in the UK from the Caribbean between 1948 and 1973, now described as the Windrush generation. Many of the people affected by the Windrush immigration scandal are from that era, but there are victims who are their descendants. Most of those who came to the UK before the end of the 1970s thought that they were moving from one part of the motherland to another. Few ever imagined, despite the legacies of slavery, colonialism and their experiences of the independence movements, that the documents they possessed, qualifying them as British subjects or Citizens of the United Kingdom and Colonies (CUKC), endorsed with a myriad of stamps confirming their right to remain in the UK indefinitely, conferred a status that was distinguishable from that of white people in the UK, including white people from the old Commonwealth. In their minds they were British people who happened to be born in other countries.

The Windrush generation were right to feel secure in the UK. There is no reason why they should have known that their status had changed by dint of legislation and the independence of their countries, or that the citizenship registration drives of the 1970s or 1980s had anything to do with them. There can be few groups in society to which so little regard was paid that no one in authority thought it necessary to safeguard their status by keeping adequate records or providing information and advice when changes were afoot. The failures to protect this group of people is in part due to the historic and continuing inefficiencies of the Home Office, but also due to how this particular group of people were, and in many ways are, regarded in society i.e. Black people of low strata.

It was never the intention of those politicians and policy makers of the 1960s and 1970s that the Windrush generation were ever really going to be considered as equal citizens or even permanent citizens of the UK. It was hoped that once they had helped in the post-war rebuilding of the UK, most would return to where they came from. Churchill was committed to this policy. Paul Gilroy, author of the seminal *There Ain't No Black in the Union Jack: The Cultural Politics of Race and Nation* which assessed the relationship between racism and nationalism, concluded that whilst extolling the virtues of the mother country, Churchill was steadfast in his desire to place migrants from the new Commonwealth at a distance and '*keep Britain white*'.[8]

Researchers looking into the causes of the Windrush scandal, whilst pouring over the historic speeches and archives of Enoch Powell, Margaret Thatcher and Theresa May, inter alia, were surprised to find a letter stating:

> *The British people fortunately enjoy a profound unity without uniformity in their way of life, and are blest by the absence of a colour racial problem. An influx of coloured people domiciled here is likely to impair the harmony, strength and cohesion of our public and social life and to cause discord and unhappiness among all concerned.*[9]

The real surprise though was that this letter was signed by eleven Labour MPs and sent to Clement Atlee, a Labour prime minister. In fact, Attlee had enquired of the possibility of re-routing the Windrush passengers to work on a peanut project in East Africa rather than have the ship enter Tilbury Docks; these were free men and women, subjects or citizens, being discussed in this way. Clive Harris in the reader *Post War Migration* featured in *Inside Babylon*, found the concern of the Labour government to be *'an unmistakeable anxiety about the challenges posed by black immigration to a racialized conception of national identity'.*[10] Just a year earlier the Ministry of Labour had opposed the recruitment of workers from the Caribbean. Harris points to the Ministry's contradictory stance in

5 Ibid p 263

6 Runnymede Trust *An oral History of the Runnymede Trust 1968-1988* (runnymedetrust.org)

7 The Migration Observatory Oxford University *UK public Opinion toward Immigration: Overall Attitudes and Levels of Concern* January 20, 2020 (migrationobservatory.ox.ac.uk)

8 Gilroy, P, *There A'int No Black in the Union Jack: The Cultural Politics of Race and Nation,* 1987

9 National Archives, Letter from Labour MPs to Cement Atlee about immigration to the UK, June 22, 1948 (HO 213/244)

10 James W and Harris C, 1993, *Inside Babylon: The Caribbean Diaspora in Britain* p 51

describing the unsuitability of a Caribbean workforce to Britain because they could not withstand outdoor work in the winter but conversely, the mines would be too hot.[11] He concluded that '*via the imperialization and hegemonizing palimpsest of the immigrant, black workers found themselves positioned within new discourses of differentiation, hierarchisation and fixity which were to have profound impact on notions of Britishness and Black identity*'.[12]

The history of the Windrush generation in the UK is posited within a discourse on race and racism, identity and nationality. It follows therefore that any investigation into the causes of any injustices experienced by this group should critically analyse the role that race and identity played in creating a malfeasance that caused people who were legally settled in the UK to be denied access to housing, critical health care, benefits and employment, and who ended up in immigration removal centres or removed from the UK.

The Windrush scandal does not only affect people from the Caribbean but to date, they are the largest group supported by the Home Office's Windrush Taskforce, followed by people from Nigeria and Ghana. Legislation enacted in the 1960s and 1970s caused net immigration from the Caribbean to reduce to under 2,000 between 1973-1982, from almost 500,000 between the 1950s, 60s and early 70s. Paul Gilroy finds an inextricable link between racism and nationalism and points to the *patriality* clause in the British Immigration Act 1968 as evidence of this:

> *It is important to recognise that the legal concept of patriality, introduced by the Immigration Act of 1968, codified this cultural biology of race into statute law as part of a strategy for the exclusion of Black settlers.*[13]

Windrush Lessons Learned Review

In May 2018, Sajid Javid MP, then Home Secretary, commissioned the Windrush Lessons Learned Review (the Review). The independent review was undertaken by Wendy Williams, the head of HM Inspectorate of Constabulary and Fire and Rescue Services who worked alongside a team of civil servants and an Independent Advisory Group. Its remit was to undertake an assessment of the events leading up to the Windrush scandal over the period 2008 to 2018. It was published on March 19, 2020 on the eve of the national lockdown caused by the Coronavirus pandemic.

Williams' baseline was that an illegitimate act had been done to people legitimately in the UK.

> *The 1971 Immigration Act confirmed that the Windrush generation had, and have, the right of abode in the UK. But they were not given any documents to demonstrate their status. Nor were records kept. They had no reason to doubt their status, or that they belonged in the UK. They could not have expected to know the complexity of the law as it changed around them.*[14]

A critique of the Review must be posited within the constraints not just in terms of its ten-year scope, but in terms of what it set out to do i.e. to investigate key legislative, policy and operational decisions. It sought to explain how members of the Windrush generation, legally resident in the UK, came to be entangled in measures to stem illegal immigration under the 'hostile environment' (administrative and legislative measures designed to make staying in the UK difficult for people without evidence of their right to be in the UK), and to make recommendations for the future.

Williams' extensive review examined 69,000 official documents and interviewed over 450 government staff, officials and politicians. In addition, 270 people affected by the scandal were consulted and ethnographic research was conducted on several cases. Immigration and other lawyers, local authorities, charities, think tanks and academics were consulted. Her report is comprehensive within its terms of reference and critical of the Home Office. It has been welcomed across the board by those affected by the scandal and those who work with them, with many viewing it as a blueprint for reform of the operation of immigration policy in the UK.

The review team were tasked with looking at legislative, policy and operational decisions, and '*what other factors played a part*'.[15] It was structured across themes, but notably, race and discrimination did not feature as themes though these issues are addressed. There was an examination of equalities legislation, policy, practice and operational matters, but the methodology used meant that the level of analysis fell short of the sort of assessment needed to identify whether there were breaches of the Equality Act 2010 (EA) or whether the Home Office could be described as institutionally racist.

The Home Office's equality duties

It is interesting that despite taking over two years to get there, possibly energised by the Black Lives Matter campaign, the Equality and Human Rights

11 Lab 13/42, Memorandum, Recruitment of Colonial Subjects for Employment in Great Britain, May 1948

12 James W and Harris C *Inside Babylon: The Caribbean Diaspora in Britain* p 51

13 Gilroy, P, *There A'int No Black in the Union Jack: The Cultural Politics of Race and Nation*, 1987

14 Williams, W 2020, Windrush Lessons Learned Review p 11

15 Ibid p 9

Commission (EHRC) announced on June 13, 2020, that it would launch an assessment under s31 of the Equality Act 2006 to examine whether, and how, the Home Office complied with the public sector equality duty (PSED) in relation to understanding the impact of its policies on the Windrush generation. Its assessment was published on November 25, 2020, see below.[16]

The Review did not have the investigative powers of the EHRC, the National Audit Office or the Public Affairs Committee.

Williams concluded that she was not able to reach a fair and accurate conclusion regarding the Home Office's duty under EA s(29)(1) which provides that '*A person (a service-provider) concerned with the provisions of a service to the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with this service.*'[17] Though the EA pertains to people in the UK, s29(9) covers people seeking entry clearance to the UK under the 1971 Immigration Act; several victims of the Windrush scandal outside of the UK fall within this remit.

Williams was also unable to compare whether the decision-making in Windrush cases was distinguishable from that in non-Windrush cases because the Home Office does not collect data based on the ethnicity of applicants. A country analysis was possible however, resulting in inferences. Overwhelmingly, applicants from the new Commonwealth tend to be Black and Brown and the old Commonwealth and Europe, white. Williams considered however:

> *… several of the institutional factors outlined in this report to have posed, and to continue to pose, a substantial risk of causing the Windrush generation (who can be defined as a racial group by reference to nationality and national origin, deriving from the Caribbean … and who almost all are black) to be treated less favourably and suffer detriment as compared with those: a) who were born in the UK, b) who arrived in the UK neither from the Caribbean nor within the window 1948-1973, c) who are British passport holders, a much higher proportion of whom are black.*[18]

Although Williams was unable to do a comparator exercise, she concluded that it is the Windrush generation who '*faced very significant detriment*'.[19]

The Home Office's public sector equality duty

The formulation of immigration policy as a whole is not excluded from the scope of the EA and Schedule 23 does not exempt the Home Office from a duty not to discriminate directly or indirectly on grounds of colour, national origin or ethnic origin. Williams invited the Home Office to comment on this and it accepted there is no blanket exception. However, she says that when she interviewed senior officers *'equality considerations, especially considerations as to whether the development of policy could have a particular adverse impact on a definable racial group, whether by reference to colour, national or ethnic origins, seemed not to have occurred to the individuals concerned … There appeared, especially early on in my review, to be an implicit assumption both at junior and senior levels that the duties in the Equality Act 2010 did not apply to what they did on a day-to-day basis'.*

This concerned her because of the s149 EA duty of public authorities to carry out their functions with due regard to achieving the objectives of the EA to a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the EA, and b) advance equality of opportunity between persons who share a relevant protected characteristics and persons who do not share it and c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Equality impact assessments were required across government from early 2000 but on November 19, 2012, David Cameron, then prime minister, announced that these would no longer be required, describing them as bureaucratic rubbish.[20] Instead, he suggested that policy makers should use judgment rather than tick boxes.

That he thought that the choice was between individual judgment and tick boxes demonstrates the institutional ignorance which Williams talks of.

She found an inadequate discussion or understanding of African and Caribbean people. This ignorance, found across society, in part explains the poor indicators experienced by members of this group in most areas, including health and well-being, poverty, education, employment, entrepreneurship and the criminal justice system. This is so despite over 50 years of race relations and equalities legalisation and almost every major organisation having equalities, diversity and inclusion policies and is central to the issues being raised by the Black Lives Matter movement. The inequalities in society are caused by individual action and is systemic.

16 Home Office failed to comply with equality law when implementing 'hostile environment' measures | Equality and Human Rights Commission (equalityhumanrights.com)

17 Equality Act 2010 s 29 (1) Legislation.gov.uk

18 Williams, W 2020, Windrush Lessons Learned Review p 71

19 Ibid 13

20 David Cameron axes equality assessments in war on 'red tape' | David Cameron | *The Guardian*

It cannot be the case therefore that the mistreatment of the Windrush generation, both historically as explored earlier, and in contemporary times under the hostile environment, is not in part due to inherent and systemic racism and discrimination.

The Equality and Human Rights Commission assessment

The EHRC's assessment concluded that the Home Office did not comply with its s149 EA duties in understanding the impact on the Windrush generation and their descendants when developing, implementing and monitoring the hostile environment policy agenda. The Commission did not assess the question of institutional racism but concluded that '*the devastating effects of the hostile environment on Black members of the Windrush generation, showed a clear failure by the Home Office to develop and implement immigration policies that were fit for purpose for the Black people affected by them*'. The Commission agreed with the Review's conclusion that the experiences of the Windrush generation were '*foreseeable and avoidable*' and made several recommendations designed to help the Home Office to comply effectively and meaningfully with its PSED obligations in the future development, implementation and monitoring of immigration policy and practice.

Williams fell short of making a finding of racism or institutional racism despite finding that issues connected to race, culture and identity are causative. She reports that the European Commission for Human Rights found that there was a racial element to both the 1968 and 1971 immigration legislation and found that '*this was a key reason why so many of the Windrush generation were so caught up by the hostile environment.*'[21] She explained that when questioning senior civil servants and former ministers on the role that race might have played in the scandal, she found them to be '*unimpressively unreflective, focusing on direct discrimination in the form of discriminatory motivation and showing little awareness of the possibility of indirect discrimination or the way in which race, immigration and nationality intersect. …I have concluded that race clearly played a part in what occurred, that some of the failings would be indicators of indirect discrimination if the department was not capable of establishing objective justification and that the department should therefore consider whether such justification exists and be alive to the risk of discrimination.*'[22] If race played a part, then, in the author's opinion, so does racism.

Williams concluded that she could not make a definitive finding of institutional racism as the late Sir William MacPherson did of the Metropolitan Police Force following his review of its investigation into the murder of Stephen Lawrence: '*While I am unable to make a definite finding of institutional racism within the department, I have serious concerns that these failings demonstrate an institutional ignorance and thoughtlessness towards the issue of race and the history of the Windrush generation within the department, which are consistent with some elements of institutional racism.*' But if there are elements of institutional racism then, in the author's opinion, there's institutional racism.

Williams continued: '*The department has failed to grasp that decisions in the arena of immigration policy and operation are more likely to impact on individuals and the families of individuals who are BAME, who are not born in the UK, or who do not have British national origins or white ethnic origin.*'[23] This is something however that both governments and the Home Office ought to be acutely aware of. A deeper analysis of these findings was deemed outside the scope of the report.

Williams did not find evidence of deliberate targeting of the Windrush generation by reason of their race or otherwise but said this does not mean this was not the case. '*I have not found evidence of stereotypical assumptions being made throughout the Home Office about those from the Caribbean or black people. What I have found… is a generation whose history was institutionally forgotten.*' It is though, the very stereotyping of this group which caused this historical amnesia and drives the current discourse on the decolonisation of education, critical race theory and the teaching and celebration of the contribution of migrants to the UK. The Review features a quote from Professor Andrew Thompson of Exeter University in which he states, '*The stain that Windrush has left on our public life has been a very long time in the making*'.[24] The making of the Windrush scandal has its roots in colonialism and inequality and underpinned by scientific racism. There are findings of this in immigration jurisprudence. In 1981, the European Commission for Human Rights in the case of *East African Asians v United Kingdom* found that the UK had discriminated against citizens from Tanzania, Kenya and Uganda on racial grounds and that the unfair treatment meted out to them had racial motives.[25]

The Review did not undertake a comparative study based on race but drew an inference. All members of the

21 Ibid p 71

22 Ibid p 13

23 Ibid p 14

24 Ibid p 52

25 ECHR judgment in *East African Asians v United Kingdom* (Application number 4403/70) (1973) 3 EHRR 76

Commonwealth were equally affected by the Windrush scandal. But the Commonwealth Immigrants Act of 1968 extended immigration control to citizens of the CUKC who did not have a parent or grandparent born, naturalised, adopted or registered in the UK. Because of migration from the UK to countries like New Zealand, South Africa, Australia and Canada, white people born in those Commonwealth countries were therefore more likely to qualify. Equally, those with CUKC status could not pass it on to their children born overseas so that those who left children overseas until they were settled economically, found that their children who arrived in the UK after the January 1, 1973, did not have a right of abode. Some became adults and were never able to join their parents and of those who did, many found themselves without status and still unable to benefit from the Windrush Scheme. Sir Burke Trend, Cabinet Secretary said that the main motive of the Act was *'to avoid the risk of being swamped by immigrants from the new Commonwealth, and that such a resurgence would inflame community relations'*.[26]

Immigration policy and the hostile environment

The Review did not set out to consider the impact of ideology on immigration policy generally or the Windrush scandal specifically. However, on the launch of the framework for the hostile environment, first by Labour and then by the Conservatives, no one thought that there needed to be safeguards to protect people who may get caught up in the operations of the policy unwittingly. Williams concludes that *'… the root cause can be traced back to the legislation of the 1960s, 70s and 80s, some of which, as accepted at the time, had racial motivation'*[27] and that *'opportunities to correct the racial impact of historical legislation was either not taken or could have been taken further'*. She concluded that the politicians ought to have identified the risks which would adversely affect the Windrush generation and that the monitoring of racial impact on immigration policy and decision-making in the Home Office was not just poor, but in fact, likely to have been non-existent.

Theresa May MP, as Home Secretary, defended her extension of the hostile environment polices by incorporating them into the Immigration Act 2014. The role of government in setting the framework for hostile operations are mired in the political decisions governments make to combat their fear that their electorate are intolerant of migration, particularly the sort that attracts Black and Brown-skinned people. Williams found that the dominant political discourse failed to challenge, and even encouraged, the association of immigration with negative social and economic outcomes. Both the political parties positioned themselves as *'tough on the immigration of black, Asian and over time – other disfavoured groups'*. [28]

Governments whip up hysteria regarding migrants as seen particularly during the December 2019 general election and during the Brexit referendum. On June 17, 2020, the National Audit Office reported that the Home Office had no idea whether the government's hostile environment policies had any impact on its stated aim, i.e. to encourage illegal migrants to leave the UK on a voluntary basis. Ironically, the policy aimed at stemming illegal immigration to the UK appears to have affected those lawfully in the UK, more so.

Many organisations had warned the Home Office of the impact of the hostile environment both on members of the Windrush generation and people seeking to rent, the latter known as the 'right to rent' scandal. Williams was asked after her review had started, to examine the right to rent policy which many suggested would lead landlords to take decisions which would disproportionately affect people who are non-white for fear of incurring financial penalties if they were to rent to someone not eligible under the policy. Despite recognising in October 2013[29] concerns that this proposal could lead to unlawful discrimination and outlining actions to mitigate the risk, the government still fought the Joint Council for the Welfare of Immigrants' legal action to declare the policy unlawful.[30]

Though there were signs for almost a decade that some groups were disproportionately affected by Home Office policies, it was not until the end of November and beginning of December 2017 when *The Guardian* highlighted the case of Windrush victim Anthony Bryan,[31] did it start to take any action. Even then it would take until April 2018, in response to the outrage of the Caribbean leaders in London for the Commonwealth Heads of Government meeting, who had been refused a formal request to meet the prime minister, before the government would create a task force to correct the wrongs evident in the scandal.

26 The Guardian, Ministers saw law's 'racism' as defensible | Politics | *The Guardian* January 1, 2002

27 Williams, W 2020, Windrush Lessons Learned Review p 12

28 Ibid p52

29 Home Office, Response to Public Consultation *'Tackling illegal immigration in privately rented accommodation'*, October 2013 p 7

30 *Secretary of State for the Home Department v The Queen on the application of the Joint Council for the Welfare of Immigrants and others* [2020] EWCA Civ 542; April 24, 2020; Briefing 994

31 *The Guardian, They Don't Tell You Why: Threatened with removal after 52 years in the UK* December 1, 2017

The Review's recommendations

Wendy Williams produced 30 recommendations. Most of these are about the culture and learning requirements of the Home Office. Recommendation 27 requires the department to establish an overarching race advisory board to inform policymaking and improve organisational practice whilst recommendation 29 requires a review of its diversity and inclusion and unconscious bias training. Recommendation 30 is particularly interesting in that it requires the Home Office to consider the impact of discrimination on its own staff, with a regular review of all successful employment tribunals claims which relate to race discrimination, harassment and victimisation. The obstacles to progression of Black, Asian and other ethnic minorities in the Home Office were dealt with in the Supreme Court case of *Essop v Home Office (UK Border Agency)* [2017] UKSC 27; Briefing 752 Black, Asian and Minority Ethnic (BAME) staff are predominantly concentrated in lower grades and in 2018, made up 26.14% and 26.33% of the lowest two grades, respectively. It is a different story at the more senior levels, with only 7.18% of the senior civil service in the Home Office being BAME. Give the department has the highest representation of BAME staff across Whitehall, this is a stark disparity.[32]

Williams found that there had been a low take up of internal equalities and unconscious bias training and a defensiveness, lack of awareness and an unwillingness to listen and learn from mistakes. The Home Office's sensitivity to public claims of racism underscores why cases which hit the media are instantly resolved but do not result in systemic change.

Three years on

Three years after the scandal was publicly uncovered, the victims still complain of mistreatment with reports of inexplicable delays in the provision of status documents, hardship assistance and compensation. Many struggle to obtain assistance and the processes, both in terms of obtaining status and compensation, require evidence of a high standard going back decades; there are complaints about the completion of lengthy forms and the complex guidance. There is evidence of some claimants receiving follow up letters with 30 questions, questions which have been answered or evidenced in the original claim, suggesting either callousness or poor case working. The Windrush victims are in the main a vulnerable group of people. Many are elderly, suffer ill health and have variable other complex needs. Thousands have not even begun the process and some commentators believe that this is because of an ongoing fear of the hostile environment.

Many of those who work with the victims feel certain that the Home Office has failed to consider the characteristics of the group they are dealing with, that it is business as usual and that justice is far off. There are also numerous media reports of delays and paltry offers of compensation and the National Audit Office, Home Affairs Select Committee and the Parliamentary and Health Service Ombudsman have condemned the process, as have countless lawyers and NGOs.

Pressure was brought to bear and on December 14, 2020 the Home Secretary announced some improvements to the compensation scheme which saw the tariff for impact on life rise from a minimum of £250 to £10,000 and the top quantified sum from £10,000 to £100,000. These sums were announced five days after the author and another lawyer, Holly Stow, gave evidence to the Home Affairs Committee during which the rationale for the low tariffs, which most people saw as insulting, was questioned. This is a welcome change as it is the one head of claim most claimants qualify under. For historical reasons and given the length of time most people affected had been in the country, few lost university opportunities or housing for example and many were lucky to have employers who did not think to question their immigration status given how long they had been employed.

However, there is still some way to go. Claimants are still very unhappy with being unable to claim for loss of pension contributions or the impact of reduced pensions; many used up life savings in order to survive which they are unable to reclaim. These issues were not addressed in the December announcements.

Further, unlike the millions provided to community groups to assist EU citizens with the EU Settlement Scheme and the millions spent on advertising, no such attempt has been made, even on a pro rata basis, to assist those affected by the Windrush scandal. The Home Office has said that it did not know who it could fund and that it feared a judicial review of any organisations not provided with funding – a response largely deemed illogical and insulting by those representing the people affected.

The government had contracted with Citizens Advice, formerly the Citizens Advice Bureau, to deliver assistance and, despite the credibility of this organisation, many of the victims reported not wanting to use it because this is where they first went when they encountered immigration difficulties. In December, the government announced that it had awarded the

32 Williams, W 2020, Windrush Lessons Learned Review p 93

contract to a firm called We Are Digital to take over from the Citizens Advice.[33] Time will tell how the firm gets on because it has not worked with the cohort before or delivered a service of this nature.

Delay and slow progress

There was much speculation as to why the government took so long to release the Review. Williams blames the culture, lack of learning and organisational methods within the Home Office as the precipitating factor in the scandal. The underlying theme of the Review is the need to learn and change. It does not bode well if, whilst the public spotlight is still on the issue, the grievances continue.

Moreover, there has been much concern about how change in the Home Office will be progressed and at the lack of a definitive blueprint in its improvement plan published in September 2020 in response to the Review.[34] Giving her own evidence to the Home Affairs Select Committee on October 14, 2020, Williams expressed concerns about the slow progress being made since her review. She told MPs that the Home Office risked losing a once-in-a-generation opportunity for change stating: '*the department has a choice. It can really embrace my recommendations or it can pay lip service to my recommendations, and not institute that fundamental cultural change… the Home Secretary's priorities are very clearly not focused on righting the wrongs of Windrush but on doggedly pursuing the same approach of unbridled hostility that created them*'.[35]

MacPherson defined institutional racism as '*the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people*'.[36] It is quite difficult to see how this does not apply to the Home Office.

In November 2020, there was widespread concern about news of an internal investigation in the Home Office into complaints of racism and discrimination within its teams set up to address the Windrush scandal, and the resignation of a senior official, Alexandra Ankrah, a former barrister and policy expert. Alexandra was the most senior black Home Office employee in the team responsible for the Windrush compensation scheme which she described as systemically racist and unfit for purpose.

At the same time, *The Guardian* also reported that about 20 members of staff working on the Review were interviewed by a civil service equality, diversity and inclusion officer after allegations of racially discriminatory treatment were made by minority ethnic staff members. That this should happen three years after the first stories advising of the Windrush scandal appeared in *The Guardian*, is extremely worrisome and not at all indicative of lessons being learned. [37]

Ideology, race and discrimination are as much causative of the Windrush scandal as is the culture and operations of the Home Office. The problems are historic, systemic and institutional. The treatment of people risking their lives to cross the channel to seek refuge, the deportation of people en masse on charters, including the grandchildren of people of the Windrush generation and the disdain shown to human rights lawyers, of which both the Home Secretary[38] and the Prime Minister stand accused, does not inspire confidence that there is the political leadership or will to listen, learn and engage in a meaningful way so that something like the Windrush scandal can never happen again.

33 Windrush compensation scheme overhauled - GOV.UK (www.gov.uk)

34 Windrush Lessons Learned Review response: comprehensive improvement plan – GOV.UK (www.gov.uk)

35 Gentleman A, October 14, 2020 Windrush report author attacks Home Office's response | Windrush scandal | *The Guardian*

36 4262.pdf (publishing.service.gov.uk)

37 In November 2020, the most senior Black member of staff Black official quit 'racist' Windrush compensation scheme | Windrush scandal | *The Guardian* November 18, 2020)

38 Priti Patel accused of putting lawyers at risk by branding them 'lefty do-gooders' | *The Independent*; October 6, 2020

Artificial Intelligence and the risk of discrimination in the workplace

Robin Allen QC & Dee Masters, of Cloisters and AI Law Consultancy, explore some ways in which the use of AI and related technologies lead to discrimination in employment. They suggest how recruitment and other practices might give rise to challenges under the Equality Act 2010 and set out how such claims could be structured. They emphasise the importance of understanding the connection between potential unlawful discrimination arising from AI decision-making and the UK General Data Protection Regulation. They conclude that while some reform is needed, the current law and the Equality Act 2010 can protect employees from many of the negative effects of these new technologies.

Introduction

New technologies such as Artificial Intelligence (AI) are increasingly being deployed in the work sphere. COVID-19 has accelerated this trend as highlighted by a recent Trades Union Congress (TUC) survey. AI and related technologies can create many benefits but there is also another side to their use which can all too readily lead to discrimination contrary to the Equality Act 2010 (EA). Working together as the AI Law Consultancy we have been working on these issues since 2018 including writing a significant report for Equinet – the European Network of Equality Bodies – entitled *Regulating for an equal AI* published in 2020, working with the Council of Europe to develop a training programme on AI for regulators, working with the Centre for Data Ethics and Innovation's *Review into bias in algorithmic decision-making*, and advising the TUC on the legal implications on the use of AI in the post-pandemic workplace.

AI in the employment field

Recently the use of AI systems has expanded rapidly, especially in the employment field during the pandemic. Over the summer of 2020, the TUC surveyed how UK employers were deploying AI and automated decision-making to recruit, monitor, manage, reward, and discipline their workforce. The conclusions of the survey are set out in the TUC's report *Technology managing people: The worker experience* published on November 30, 2020.[1]

The TUC's survey measured the impact of AI technologies on employees and workers. Its report showed that, by the summer of 2020, these new technologies were being experienced in areas ranging from recruitment to dismissal as this chart from the report shows:

1 See https://www.tuc.org.uk/sites/default/files/2020-11/Technology_Managing_People_Report_2020_AW_Optimised.pdf

In which areas of working life have you experienced technology?
Please select all that apply

The report highlighted some important themes:

- Employers have deployed new monitoring technologies because of the increase in homeworking created by the pandemic.
- Employees think new technologies are intrusive going well beyond the type of monitoring which they would experience in their usual working environments.
- They, and union representatives, think this new technology is being deployed without their full knowledge or understanding.
- There are many concerns that AI-powered solutions can be flawed e.g. automated absence-management systems were highlighted which had wrongly concluded that employees were improperly absent from work leading to performance processes being incorrectly triggered.
- Workers and employees had experienced poor mental health due to perceived unfairness driven by AI-powered technology.
- Trade union representatives perceived that managers often do not understand AI-powered technology and perceived it to be unimpeachable.

To our own knowledge, employers have also used scores from unexplained automated online staff interviews, conducted without human intervention, to determine redundancies.

Some of these new systems could potentially have huge benefits – a recent ACAS report[2] said Unilever cut its average recruitment time by 75% by using AI to screen curriculum vitae – but we need to be equally aware these technologies can cause discrimination as discussed below.

What is AI?

There is no one definition of AI in the UK primary law, but Prof. Frederik Zuiderveen Borgesius has cleverly summarised the idea, saying:

> *Artificial intelligence (AI) is, loosely speaking, 'the science of making machines smart'. More formally, AI concerns 'the study of the design of intelligent agents'. In this context, an agent is 'something that acts', such as a computer…*[3]

The starting point, which has been around for a very long time, is that machines might be made to work in the same way as humans, only faster, better, and more reliably. Some people have even argued that AI might be a more morally 'perfect' version of humans who can side-step ingrained prejudices.

How are machines made smart?

In broad outline, there are five steps which are utilised to make machines intelligent as follows:

- an understanding of human thought processes and how they proceed to action
- a logical analysis of such processes
- a means to describe that analysis as a set of instructions for a machine
- the supply of data to the machine on which it can then work, and
- the construction of a machine which can do this work more quickly than a human.

The instructions to the machine are '*algorithms*',[4] the logical steps, created by programmers, which instruct a computer to use a data input and to create an output often by comparing the input with other data which the computer has already processed.

Algorithms usually perform repetitive and tedious tasks in lieu of human actors. For example, when LinkedIn informs a user that someone within her network is also connected to five people in her contacts list, it is an algorithm – and not a human – which has quickly compared the two networks to find common contacts.

Machine learning is another way in which machines can become 'intelligent' and where discrimination can arise.

The International Association of Privacy Professionals has neatly described[5] machine learning as:

> *… a technique that allows algorithms to extract correlations from data with minimal supervision. The goals of machine learning can be quite varied, but they often involve trying to maximize the accuracy of an algorithm's prediction. In machine learning parlance, a particular algorithm is often called a 'model,' and these models take data as input and output a particular prediction. For example, the input data could be a customer's shopping history and the output could be products that customer is likely to buy in the future. The model makes accurate predictions by attempting to change its internal parameters – the various ways it combines the input data – to maximize its predictive accuracy. These models may have relatively few*

2 My boss the algorithm

3 See *Discrimination, artificial intelligence, and algorithmic decision-making*

4 In international trade agreements algorithms are often defined as being *'a defined sequence of steps, taken to solve a problem or obtain a result'*: see for instance Article 8.71 of the UK-Japan Comprehensive Economic Partnership Agreement of the 23 October 2020 or Article 19.1 of the United States-Mexico-Canada Agreement of July 1, 2020.

5 See *The privacy pro's guide to explainability in machine learning* IAPP.

parameters, or they may have millions that interact in complex, unanticipated ways. As computing power has increased over the last few decades, data scientists have discovered new ways to quickly train these models. As a result, the number – and power – of complex models with thousands or millions of parameters has vastly increased. These types of models are becoming easier to use, even for non-data scientists, and as a result, they might be coming to an organization near you.

In effect, machine learning is an independent process in which an algorithm is allowed to analyse data so as to 'learn' patterns and correlations which may be too subtle, complex and time consuming for a human to do.

How can machine learning lead to discrimination?

Algorithms are code written by humans and can discriminate on the grounds of protected characteristics, when tainted by the unconscious assumptions and attitudes of their creators. Also, AI can lead to discrimination in the machine learning process when it has data already tainted by discrimination.

The easiest way to illustrate the potential for discrimination is to examine recruitment. Thus some algorithms target adverts in a way which excludes women to begin with. Researchers studied the way in which ad-promoted job opportunities were targeted on Facebook. They discovered that across 191 different countries a 'gender neutral' job advert in science, technology, engineering, and mathematics fields was significantly more likely to be shown to men. Specifically, men saw 20% more impressions of the ad than women. Younger women were even less likely to see the advert. Different researchers also discovered that women were less likely to be shown adverts for high paying roles.

Another potentially discriminatory application has been highlighted in Austria. The Austrian Public Employment Service (AMS), a leading provider of labour-market related services, matches candidates to job openings and assists job seekers. It uses an algorithm to assign a score automatically to each job seeker placing them in a group according to the likelihood that they will obtain employment. If the algorithm decides that a jobseeker is unemployable, they will receive less assistance from AMS. One document (which is not available in English) shows that:

… women are given a negative weight, as are disabled people and people over 30. Women with children are also negatively weighted but, remarkably, men with children are not …

Discrimination can also continue during the selection process, even if the disadvantaged group sees the advert. One recent trend is the use of biometric information to assess personality traits. These practices are being used in recruitment processes. Algorithm Watch has identified companies in Europe which use these methods including Precire which analyses a voice sample and draws conclusions based on word choice and sentence structure, and DigitalMinds which examines a person's social media footprint to create a personality assessment.

One of the most talked about users of AI technology in the recruitment field is HireVue, a US based company which also operates in Europe. Its website explains how its algorithms work:

… a HireVue Assessments model/algorithm is not a robot, but a form of AI/machine learning that has a single, specific, early-stage evaluation to perform. Its only focus is determining which subset of candidates within a given pool are most likely to be successful when compared to people already performing the job. That information is then provided to human recruiters as decision support. Those top candidates then move on from the screening stage to the person-to-person interviewing stages. Skilled recruiting professionals continue to decide which candidate gets the job after the completion of multiple stages in the hiring process.

The algorithm analyses a vast amount of information about a candidate to decide who is a best fit for the recruiter as explained later on its website:

… HireVue Assessments do use technology to study facial movements and actions. This represents just one category of characteristics reviewed by the model in order to predict whether a person is likely to be successful in a job. Tens of thousands of factors – including audio and language content – come from a candidate's interview and are available for consideration in a given model, but only those scientifically validated as being predictive of job performance are included in the algorithm or model for that specific job role.

HireVue's use of biometric information to identify an 'ideal' employee has been heavily criticised as discriminating against persons with disabilities. Scholars at New York's AI Now Institute wrote in November 2019:

The example of the AI company HireVue is instructive. The company sells AI video-interviewing systems to large firms, marketing these systems as capable of determining which job candidates will be successful workers, and which won't, based on a remote video interview. HireVue uses AI to analyze these videos, examining

speech patterns, tone of voice, facial movements, and other indicators. Based on these factors, in combination with other assessments, the system makes recommendations about who should be scheduled for a follow-up interview, and who should not get the job. In a report examining HireVue and similar tools, authors Jim Fruchterman and Joan Mellea are blunt about the way in which HireVue centers on non-disabled people as the 'norm,' and the implications for disabled people: '[HireVue's] method massively discriminates against many people with disabilities that significantly affect facial expression and voice: disabilities such as deafness, blindness, speech disorders, and surviving a stroke.

The gains to companies from using AI are potentially enormous. Unilever, which has been open about using AI in recruitment, explained that the use of machine learning algorithms had led to 'saving' 70,000 person hours of interviewing. However, the EA provides no exceptions to the rules which outlaw discrimination merely because a system has some practical benefits.

How would these AI systems be analysed under the Equality Act 2010?

We can illustrate this by considering AI Now Institute's research into the ways in which machine learning algorithms can impact on disabled job applicants where they assess biometric information such as speech.

A potential claim for indirect disability discrimination arising from an AI-powered video interview would proceed thus:

- The algorithm and/or the data set would be a provision, criterion or practice (PCP) or two PCPs under s19(1) EA.
- The PCP would be applied neutrally if all applicants were subject to the same algorithmic process and so s19(2)(a) EA would also be satisfied.
- Prospective disabled employees would then be obliged to show particular disadvantage as per s19(2)(b) EA e.g. that their disability wrongly meant that they were downgraded or assessed for a job. Academic research, like that produced by AI Now Institute, could be deployed to prove disadvantage and its relationship to disability. In addition, if the disabled person could highlight someone with similar skills or qualities (perhaps through a data sharing website), who was not disabled and scored 'better' in the AI process, they would be well on their way to a successful discrimination claim.
- Next, assuming that the disabled job applicant could show disadvantage, the employer using the AI system would have to justify its actions by reference to a legitimate aim.

Employers might well be able to identify relevant legitimate aims e.g. the need to recruit a suitable candidate on a remote basis especially during a time of pandemic. However, we think many organisations would struggle in relation to the rest of the justification test.

There is much evidence suggesting that AI does not accurately identify the best candidates e.g. research from New York's AI Now Institute shows that there is little evidence to link biometric information to competence, noting:

… a meaningful connection between any person's facial features, tone of voice, and speech patterns, on one hand, and their competence as a worker, on the other, is not backed by scientific evidence – nor is there evidence supporting the use of automation to meaningfully link a person's facial expression to a particular emotional state…

Naturally, a disabled candidate might be able to deploy a similar analysis to argue for reasonable adjustments to the system such as an interview with a human being trained to understand and accommodate an individual's disability.

Accordingly, unless a careful audit has been conducted of the AI system to remove any unwitting discrimination, there is a risk that companies which deploy this type of technology will find themselves in breach of the EA.

Unsurprisingly, some countries are considering whether using AI in the recruitment process should be banned altogether. This has already led to the State of Illinois in the US to introduce an AI Video Interview Act 2019 to regulate AI systems.

No statutory defence for employers where discrimination is caused by an agent

We emphasise that whilst there is a statutory defence in an employment context under the EA in relation to the actions of an employee, there is no equivalent when it comes to the actions of an agent. This means that that an employer *cannot* avoid liability for discrimination by arguing that technology has been supplied by a third party or outsourced to it.

What does the 'black box' mean for employers?

The next hot topic in the AI world is the 'black box' problem. One major problem with AI and in particular

the machine learning process is that it can make it very difficult to understand how a decision is being made and accordingly to identify whether or not there has been discrimination.

A programme called 'Deep Patient' which was developed by Mount Sinai Hospital in New York is one powerful example of what this kind of opacity actually means in practice. The hospital applied deep learning to its patient database which contained hundreds of variables on 700,000 patients. Deep Patient proved to be more effective than the hospital doctors at predicting illnesses. But it also confounded medical staff because it could fairly accurately predict the onset of psychiatric illnesses such as schizophrenia even though the medical community generally considers that it is notoriously difficult to predict these illnesses. What is fascinating about Deep Patient is that even though the hospital could build the AI system, it had no idea how it worked.

It may not be problematic that the hospital did not know how Deep Patient predicts the onset of psychiatric illness, but, in certain contexts it plainly will matter, such as in the criminal justice system.

An example of a complex AI system supported by machine learning in the criminal justice system is the Harm Assessment Risk Tool which has been utilised, since 2017, by Durham Constabulary.

It deploys a machine learning algorithm to classify individuals according to their '*risk*' of committing violent or non-violent crimes in the future. The algorithm used to analyse this information and assign a '*risk*' rating is eye-wateringly complex, with over 4.2 million decision points. It follows that the processing detail is therefore not comprehensible. This is problematic because what we do know is that the classification of risk is created by examining an individual's age, gender and postcode (which can be a proxy for race).

So, it is perfectly conceivable a business could purchase or develop an AI system which has learnt a discriminatory behaviour and yet that discrimination will be 'unseen'.

Practical implications of the 'black box'

A cynic might say well, doesn't the 'black box' serve businesses rather well? If we can't see the discrimination, then how is a potential claimant to do so? After all, under equality legislation, there is a shifting burden of proof whereby it is for the claimant to prove facts from which discrimination could be inferred, and it is only at this point that the burden of proof shifts to the employer to prove a non-discriminatory reason for its actions

But we consider that the cynical view of transparency is a dangerous position for two reasons.

First, it is possible that a determined and well-resourced claimant could identify discriminatory practices by collating data on the outputs of an AI system. This happened in the US in relation to a machine learning algorithm which attaches a risk rating to individuals so as to predict whether they are likely to re-offend. This risk rating is then used as part of the sentencing process. Journalists at ProPublica analysed 7,000 'risk scores' to identify that a machine learning tool deployed in some states was nearly twice as likely to falsely predict that black defendants would be criminals in the future in comparison to white defendants. Equally, there are examples of organisations encouraging people to donate their data so that engineers can understand how algorithms work. The type of data donation might also allow possible claimants to identify comparators.

Secondly and perhaps more significantly, in equality law it is well established that a lack of transparency in a pay system can give rise to an *inference* of discrimination. This principle was first laid down some thirty years ago in C-109/88 *Danfoss* and has been reiterated on many occasions.[6]

This means that paradoxically, the lack of meaningful transparency as to the way in which an algorithm or AI or machine learning works, might assist claimants who are prepared to litigate without having certain evidence of discrimination. If a complainant was able to advance an indirect discrimination claim such that a business found itself at the justification stage, we suspect that it will be hard to succeed where an explanation for how the system works cannot be provided due to the lack of transparency.

How does AI intersect with data protection?

AI also means that discrimination lawyers need to start learning about data protection legislation and in particular the General Data Protection Regulation as incorporated into UK law post Brexit (UK GDPR)[7].

This is because under Article 22 of the UK GDPR, there is a broad prohibition on fully automated decision-making, that is, where there is no human actor, and the processing creates legal effects or equivalent on the individual:

6 Case C- 109/88, *Handels- og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening Ex p. Danfoss A/S* EU:C:1989:383;[1989] ECR 3199; [1991] 1 CMLR 8; [1991] ICR 74; [1989] IRLR See also Case C-415/10 *Meister* in which the CJEU held that there was no right to have disclosure of unexplained material in such cases, though inferences of discrimination might otherwise be drawn.

7 Guide to the General Data Protection Regulation – GOV.UK (www.gov.uk)

Article 22

1. *The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her.*
2. *Paragraph 1 shall not apply if the decision:*
   a. *is necessary for entering into, or performance of, a contract between the data subject and a data controller;*
   b. *is authorised by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests; or*
   c. *is based on the data subject's explicit consent.*
3. *In the cases referred to in points (a) and (c) of paragraph 2, the data controller shall implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, at least the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision.*
4. *Decisions referred to in paragraph 2 shall not be based on special categories of personal data referred to in Article 9(1), unless point (a) or (g) of Article 9(2) applies and suitable measures to safeguard the data subject's rights and freedoms and legitimate interests are in place.*

The European Data Protection Board has been clear that where a fully automated data processing algorithm discriminates against an individual then Article 22 is engaged and it will be unlawful.

Its *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679,* state at page 21:

> ***'Similarly significantly affects him or her'***
> *Even if a decision-making process does not have an effect on people's legal rights it could still fall within the scope of Article 22 if it produces an effect that is equivalent or similarly significant in its impact.*
>
> *In other words, even where there is no change in their legal rights or obligations, the data subject could still be impacted sufficiently to require the protections under this provision. The GDPR introduces the word 'similarly' (not present in Article 15 of Directive 95/46/EC) to the phrase 'significantly affects'. Therefore the threshold for significance must be similar to that of a decision producing a legal effect.*
>
> *Recital 71 provides the following typical examples: 'automatic refusal of an online credit application' or 'e-recruiting practices without any human intervention'.*
>
> *For data processing to significantly affect someone the effects of the processing must be sufficiently great or important to be worthy of attention. In other words, the decision must have the potential to:*
> - *significantly affect the circumstances, behaviour or choices of the individuals concerned;*
> - *have a prolonged or permanent impact on the data subject; or*
> - *at its most extreme, lead to the exclusion or discrimination of individuals.*

We anticipate that this approach will also be followed in the UK. Accordingly, in certain circumstances, we predict that discrimination claims will be accompanied by claims for breach of the UK GDPR.

Conclusion

Equality lawyers must not underestimate the seismic changes coming from the increased use of AI and related technologies in the workplace. The law as it currently stands can protect employees from many of the negative effects of these new technologies and the EA is particularly well suited to tackling discriminatory algorithms.

Yet, some reforms are required. In March 2021 the authors will be publishing a report commissioned by the TUC entitled '*The Legal Implications of AI in the Post-Pandemic Workplace*'. The report will make a series of recommendations including the creation of new rights for workers and additional obligations for employers to ensure that technology in the workplace supports, rather than undermines, the working relationship. Although not directly affecting the UK, it is expected the European Commission will propose legislation to regulate the use of 'high risk' AI systems in Spring 2021.

More information about this topic can be found on the AI Law Consultancy's website www.ai-lawhub.com and by following the consultancy on Twitter at @AILawHub.

Direct disability discrimination on the basis of a different impairment

VL v Szpital Kliniczny im. dra J. Babińskiego, Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie Court of Justice of the European Union Case C-16/19; January 26, 2021

Readers will recall the Advocate General's (AG) opinion[1] in this case which considered the scope of Directive 2000/78 EC (the Directive) in respect of discrimination against disabled people where the comparator is someone with a different disability. The Grand Chamber of the CJEU has now considered the case and, as is usual, has affirmed the AG's opinion.

Facts

The subject of the case was the payment of an allowance to VL who was employed as a hospital psychologist. She submitted a certificate to her employer in 2011 which confirmed that she had a moderate, permanent disability. Following a meeting with the staff in 2013, the hospital director decided to pay, in addition to salary, a monthly allowance of 250 Polish złoty (approximately €60) to employees who submitted a certificate confirming a disability. The relevant date for the grant of the allowance was the date on which the certificate was submitted to the hospital's director, rather than the date on which the certificate was obtained, and that date was after the staff meeting. The employer wanted to bring about an increase in the number of disabled workers it employed, so as to obtain a reduction in its contribution to a state disability fund (which was calculated according to worker numbers).

Thirteen employees were eligible. However, employees who had already submitted a disability certificate prior to the staff meeting – some 16, including VL – were not eligible and so were not paid the allowance.

Court of Justice of the European Union

VL brought a claim of discrimination which was initially rejected, and the Polish appellate court referred a preliminary question to the CJEU as follows:

> *Is article 2 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation to be interpreted as meaning that the differing treatment of the situations of individual members of a group distinguished by a protected characteristic (disability) constitutes a form of breach of the principle of equal treatment where the employer treats individual members of that group differently on the basis of an apparently neutral criterion and that criterion cannot be objectively justified by a legitimate aim and the means of achieving that aim are not appropriate and necessary?* [para 26]

The AG had invited the court to consider that the Directive should be interpreted as allowing a comparison group for the purpose of establishing indirect discrimination to be another group of workers sharing the same protected characteristic (in this case, disability); the criteria was 'apparently neutral' though related to disability in that only a disabled person could obtain a certificate. It would be for the national court to determine justification.

Having considered the wording not only of the Directive, but also the context and the objectives of the legislation, the CJEU held that the principle of equal treatment enshrined in the Directive is intended to protect a worker who has a disability, for the purposes of that Directive, against any discrimination on the basis of that disability, not only as compared with workers who do not have disabilities, but also as compared with other workers who have disabilities. [para 36]

Direct discrimination

As to the question referred on direct discrimination, the CJEU re-iterated that the situations for the purpose of comparison need not be identical but only comparable and the assessment of that comparability must be carried out not in a global and abstract manner but in a specific and concrete manner in the light of the benefit concerned (*Cresco Investigation* C-193/17 para 43).

In addition, the court stated that it cannot be held that a provision or practice establishes a difference in treatment directly based on disability for the purposes of the combined provisions of Articles 1 and 2(2)(a) of the Directive where it is based on a criterion that is not inextricably linked to disability – see *Milkova* C-406/15 and *Ruiz Conejero* C270/16.

1 See Briefing 950

The CJEU referred to cases where on grounds other than disability the court has held that a difference in treatment based on workers' marital status and not expressly on their sexual orientation was still direct discrimination because in the member states concerned, at the time of the facts under consideration, only persons of different sexes could marry and it was therefore impossible for homosexual workers to satisfy the condition necessary for obtaining the benefit claimed. In such a situation, marital status could not be regarded as an apparently neutral criterion (*Maruko* C267/06, *Romer* C147/08).

Concluding this examination of the caselaw, and perhaps the most important thing to emerge from this case, the court stated:

> *It follows that, where an employer treats a worker less favourably than another of his or her workers is, has been or would be treated in a comparable situation and where it is established, having regard to all the relevant circumstances of the case, that that unfavourable treatment is based on the former worker's disability, inasmuch as it is based on a criterion which is inextricably linked to that disability, such treatment is contrary to the prohibition of direct discrimination set out in Article 2(2)(a) of Directive 2000/78.* [para 48]

The CJEU left it to the referring court to determine, having regard to all the relevant circumstances of the case, in particular the national legislation, the interpretation of which falls within its jurisdiction alone, whether the temporal condition imposed by the employer for receiving the allowance at issue in the main proceedings, namely the submission of the disability certificate after a date chosen by that employer, constitutes a criterion which is inextricably linked to the disability of the workers who were refused that allowance; if this was the case a finding of direct discrimination on the grounds of that disability would be necessary.

Should the referring court conclude that there is direct discrimination, such discrimination cannot be justified except on one of the grounds referred to in Article 2(5) of the Directive (see *Hay* C-267/12, paragraph 45).

Indirect discrimination

As to indirect discrimination, the CJEU stated that it is apparent from the court's case-law that such discrimination may stem from a measure which, albeit formulated in neutral terms, that is to say, by reference to other criteria not related to the protected characteristic, leads, however, to the result that persons possessing that characteristic are put at a particular disadvantage (see *CHEZ Razpredelenie Bulgaria*, C-83/14, Briefing 762, paragraph 94, and *Milkova*, C-406/15, paragraph 43). It would be for that court to investigate whether, by having made receipt of the allowance conditional upon submitting the disability certificate after a date chosen by the employer, the practice introduced by the hospital at issue in the main proceedings had the effect of putting certain workers with disabilities at a disadvantage because of the particular nature of their disabilities, including the fact that such disabilities were visible or required reasonable adjustments to be made, such as adapted workstations or working hours.

As to justification, the court indicated that saving money – the purpose of the practice at issue in the main proceedings – would not be sufficient grounds for justification.

Comment

As indicated in Briefing 950 on the AG's opinion, both direct discrimination and indirect discrimination relating to discrimination between different types of impairment, are capable of being brought as claims currently under the Equality Act 2010, and so this judgment may do little in that respect bar bolstering those potential claims.

However, what is particularly important is the CJEU's approach to direct discrimination and what is 'inextricably linked' to disability. Readers may recall *Owen v Amec Foster Wheeler Energy Ltd* [2019] EWCA Civ 822; Briefing 914, a case regarding a refusal to transfer a disabled employee to work in a different country essentially for reasons of health and safety directly related to his disability. On appeal to the CA, where it was argued for the purposes of direct discrimination that the reasons for the treatment were indissociable from his disability, the court held that '*the concept of indissociability … cannot readily be translated to the context of disability discrimination*'. [para 72]

It is certainly arguable, at the least, that this approach must be revisited in light of the CJEU's decision.

Catherine Casserley
Cloisters

Housing allocation policy based on religious observance is lawful

R (Z and another) v (1) Hackney LBC and (2) Agudas Israel Housing Association
[2020] UKSC 40; October 16, 2020

Introduction

This was a claim for judicial review, which began in the Divisional Court challenging the lawfulness of the allocations policy of a small housing association, Agudas Israel (AIHA), which restricted the provision of its housing stock to the Orthodox Jewish community. The challenge failed in the High Court and the Court of Appeal.[1] On appeal to the Supreme Court the challenge again failed and the policy was upheld as lawful.

Facts

Z was a tenant of Hackney LBC who the council had identified as having a priority need to be rehoused in a larger property. She was unable to be rehoused in one of AIHA's properties available to Hackney's tenants as she is not from the Orthodox Jewish community.

The appellants' case was that AIHA's policy included unlawful religious, racial and other discrimination contrary to s29 Equality Act 2010 (EA), i.e. in the provision of services. AIHA accepted that its policy meant direct discrimination on grounds of religion (subject to the statutory defences), but denied that this was about race at all. The Divisional Court dismissed all the claims against AIHA and Hackney, holding that AIHA's policy came within exclusions: ss158 (positive action) and 193 (the charities exception) and the policy was proportionate.

Supreme Court

The appeal was heard by Lord Reed, Lord Kerr, Lady Arden, Lord Kitchin and Lord Sales.

The SC's focus was on proportionality and the interpretation of the statutory exceptions. The court's consideration of proportionality has significant outcomes for housing associations and will be particularly relevant in other areas of discrimination law.

Proportionality in appeals

The approach for an appellate court reviewing the proportionality or disproportionality of a measure was considered. On appeal, it is not sufficient to argue that the first instance court made an error or that there was a flaw in reasoning. For an appeal to succeed, such a flaw had to undermine the cogency of the conclusion. If there were no such flaw, the appeal court should not substitute its own assessment of proportionality. An appeal court will be restricted as to when it could interfere.

This underlines the importance of convincing the first instance court as to proportionality. In the Divisional Court in this case, there was substantial evidence of AIHA's work in the community, the poverty, disadvantage, discrimination, specific housing needs and security concerns of the community, and the ways in which AIHA addressed the needs and disadvantages of the community. In some judicial review cases, in order to challenge aspects of evidence, it may become necessary for witnesses to be cross-examined. However, this was not the case here. The unchallenged evidence of AIHA was that the housing association did as much as it could with the limited resources it had; it was a charity set up for a specific purpose and its resources were already stretched to meet the needs of those it could assist. If AIHA had more resources it would be able to allocate housing beyond the Orthodox Jewish community.

The SC upheld the Divisional Court's assessment of this evidence and its conclusion as to proportionality, and did not substitute its own view of proportionality.

Applications for permission to appeal must identify a sufficiently important error of approach and explain how it undermines the conclusion on proportionality. This point should be utilised in defending appeals.

Race

In the SC, on the question of the interpretation of s193, the appellants sought to rely additionally on Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the Race Directive). They argued that the Race Directive should be applied in accordance with European case law relating to Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle

1 See Briefing 896 for a summary of the case at the Divisional Court and Court of Appeal.

of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (the Equal Treatment Directive). Whilst the case law considered themes such as blanket policies and absolute criteria, these matters arose in the wholly different, employment context.

Furthermore, AIHA's allocation policy meant differentiating between applicants on the basis of religious observance, which was not addressed by the Race Directive. Its selection criteria did not represent discrimination on grounds of race or ethnic origin, because AIHA did not allocate housing based on an applicant's Jewish matrilineal descent, but instead on the grounds of whether they observed Orthodox Jewish religious practices. No right of the appellant was therefore engaged under the Race Directive.

Legislative interpretation

The approach to statutory construction was that legislation should be read and given effect in a particular case according to its ordinary meaning, unless the person affected could show it would be incompatible with their Convention rights under the Human Rights Act 1998 (HRA) or a provision of EU law that applied. Only then did the special interpretive obligations under s3(1) HRA or under the EU *Marleasing* principle authorise the court to search for a conforming interpretation different to the ordinary meaning of the legislation. This meant that the same legislative provision might be given a different interpretation in different cases, depending on whether Convention rights or EU law were applicable in the case or not, a point the court accepted.

There was to be a wide margin of appreciation for parliament in considering an exemption for charities from the general anti-discrimination rules in the EA. Parliament's judgment was to be respected unless manifestly without reasonable foundation. The manifestly without reasonable foundation test was appropriate in cases involving welfare benefits, and this case, because it involved the allocation of scarce resources and was analogous.

Reading s193(1) with s193(2)(b), parliament itself established a regime which was proportionate and compatible with ECHR Article 14. Parliament designed the wording of the legislation with the benefit of explanation from the government during the passage of the legislation; it was subject to active consideration and discussion, and parliament should be taken to have considered that, given the combination of provisions, the regime satisfied the requirement of proportionality for the purposes of EU law.

In any event, it was not possible, within the meaning of s3(1) HRA to read and give effect to s193(2)(b) by implying into it an additional proportionality requirement. To do this would render s193(2)(b) redundant. It was held that the omission of such a requirement from s193(2)(b) was a deliberate choice by parliament and a feature of the legislation.

Comment

Charities have gained potential protection as a result of the SC's decision, by the recognition that s193(2)(b) constitutes a complete defence to claims of unlawful discrimination under the EA without any requirement of proportionality.

For those with policies which may be vulnerable to challenge on proportionality, the decision also potentially creates protection: it seems that in assessing proportionality, the court endorsed a group-based approach. This was derived from the approach to housing allocation schemes in *R (Ahmad) v Newham LBC* [2009] UKHL 14; [2009] PTSR 632, in which the House of Lords emphasised the danger of testing the lawfulness of the balance struck by the policy maker by reference to the circumstances of just one individual's circumstances. How the matter is dealt with at first instance, in terms of evidence, will remain important however, because of the restricted circumstances in which an appellate court can interfere.

The SC consciously left open the difficult question of the ambit of ECHR Article 8 in housing allocations for a case where that issue would be decisive. Article 14 will not operate unless the subject-matter of the case falls within the ambit of another Convention right. Whilst most housing-related cases may fall within the ambit of Article 8, and although the latter does not provide a right to housing, it does provide a right to respect for (among other things) the home and family life.

Rea Murray
4-5 Gray's Inn Square

Pension equalisation legislation does not discriminate against women

R (on the application of Delve) v Secretary of State for Work and Pensions [2020] EWCA 1199; [2020] 9 WLUK 137; [2020] HRLR 20; [2021] ICR 236; September 15, 2020

Implications for practitioners

The CA confirmed the decision of the Divisional Court that 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. Delay in bringing the claim was a further basis for refusing relief.

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 appellants 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 women 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 under European Convention on Human Rights (ECHR) and EU law.

Their claim failed before the Divisional Court: *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 (Briefings 934 and 937). Dingemans LJ granted them permission to appeal to the CA.

Court of Appeal

Age discrimination

1. *EU law:* The appellants did not seek to appeal the finding of the Divisional Court that there was no age discrimination contrary to EU law.
2. *ECHR law:* It was accepted that entitlement to a state pension was a possession for the purposes of ECHR, Protocol 1, Article 1. However, the legislative scheme under challenge would only be discriminatory on grounds of age contrary to Article 14 if the appellants could establish a valid comparator group and if any difference in treatment thereby established was not justified.

On the first issue, the Divisional Court had adopted the analysis set out in *Ackermann v Germany (Admissibility)* (71477/01) (2006) 42 EHRR. SE1, [2005] 9 WLUK 106 to suggest 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. The CA accepted that the reasoning in the *Ackermann* judgment was sparse and would not have dismissed the claim on this basis alone. However, even if the appellants could identify a proper comparator group, the CA was not willing to interfere with the Divisional Court's conclusion that the legislation equalising, and then raising, the state pension age was justified: the legislation related to macro-economic policy where the decision-making power of parliament is very great; 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 (MWRF), that being the applicable test.

Sex discrimination

1. *EU law:* The CA agreed with the Divisional Court that the appellants' 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.

2. *ECHR law:* The Divisional Court held that the appellants' indirect discrimination claim failed in part because the legislation did not apply indiscriminately to all, but only applied to women born after April 1,1950: on that basis, it was not the kind of apparently neutral measure considered in *Essop v Home Office (UK Border Agency)* [2017] UKSC 27, [2017] 1 WLR 1343, [2017] 4 WLUK 75; Briefing 830. The CA accepted the appellants' arguments that this was not a complete answer to their claim: the nub of their indirect discrimination claim was not the way in which equalisation was introduced but the fact that as a result of the legislation, the state pension age is now the same for men and women, whether that age is 65, 66 or older.

The CA then went on to consider the nature of the disadvantage suffered by women as compared with men of the same age. Like the Divisional Court, albeit for slightly different reasons, the CA concluded that the removal of the earlier pension age for women did not satisfy the need for a causal link between the measure and the disadvantages affecting the women. The CA observed that there may well be other groups with a different protected characteristic combined with age who can also show that because they have suffered disadvantage in the workplace over the course of their lives, they are more reliant on a state pension that comparator groups and so were adversely affected to a greater degree by the increases in pension age.

Finally, the CA held that even if the appellants could show *prima facie* indirect discrimination, the Divisional Court was right to hold that the regime was justified as not MWRF. The CA could not be persuaded to take the stricter approach to justification suggested by the ECtHR decision in *JD and A v UK* (Appn 32949/17) [2020] HLR 5; Briefing 924: the court considered itself bound by the SC decision in *DA v Secretary of State for Work and Pensions* [2019] UKSC 21, [2019] 1 WLR 3289; Briefing 912 and, in any event, concluded that the regime under challenge constituted transitional measures to correct historical inequalities, such that even applying *JD*, MWRF was the appropriate test.

Notice

The CA did not consider that there was any legal duty to consult affected individuals, or notify them, before passing legislation, especially primary legislation. Notification of changes to be applied by legislation was desirable but the government had in fact undertaken wide-ranging notification exercises.

Delay

As a final point the CA concluded that the appellants had standing to bring their judicial review claims as soon as the legislation was passed. The delay was a further reason to deny the appellants relief.

Comment

The appellants are seeking permission to appeal to the SC on three grounds:

1. The CA erred in its approach to the 'causal link' element of the indirect discrimination claim. The appellants argue that it is not simply that the 1950s women are more reliant on their state pension: their case is that *but for* the change in the law they would not have been in the worse off position that they are in today (i.e. caused by the delay in receiving the pension). This is not something that affects the other groups listed by the CA unless they too fall within the cohort of 1950s women (for example, BME 1950s women, disabled 1950s women etc.). The appellants' position is that there is a clear causal link between the measure and the disadvantage suffered by the 1950s women who expected their pension when they turned 60 years of age, and the CA erred in holding otherwise.
2. The SC should resolve the tension between *DA* and *JD and A*, and determine whether the MWRF test continues to apply where gender-based discrimination in the provision of welfare benefits is argued (as well as the fact-specific issue of whether the regime in this case was indeed intended to address historical inequalities).
3. The CA erred in its approach to the issue of delay and should have held that time does not start to run until legislative provisions are applied to the individual affected.

Henrietta Hill QC
Doughty Street Chambers
h.hill@doughtystreet.co.uk

Can costs be used as a justification for discrimination?

Heskett v Secretary of State for Justice [2020] EWCA Civ 1487; November 11, 2020

Implication for practitioners

It has been long established that sole reason of saving costs cannot be used to justify discriminatory practices. This judgment confirms that the combination of costs and another factor, such as the need to reduce expenditure to live within budgetary constraints, can be a legitimate aim for the purposes of justifying indirect discrimination.

Facts

Craig Heskett (CH) was a probation officer who worked for the National Offender Management Service whose budget was set by the Ministry of Justice (MoJ). Due to government-imposed funding cuts, as part of its austerity policy, the MoJ revised its pay scheme which included a significant reduction to the rate at which certain probation officers progressed up an incremental salary scale. This policy disproportionately disadvantaged younger employees, including CH, as it would now take significantly longer for them to reach the top of the applicable pay band. By comparison, a higher proportion of older employees were more likely to progress further up to the top of the pay band having moved up at a quicker rate and would therefore earn significantly than those lower down the band.

Employment Tribunal

CH brought a claim for indirect age discrimination. He argued that the pay policy was indirectly discriminatory in that it put those aged under 50 at a significant disadvantage to those aged over 50.

The tribunal found that although the pay progression policy was *prima facie* discriminatory, it amounted to a proportionate means of achieving a legitimate aim. In its reasoning, the tribunal accepted that whilst the respondent's aim was to cut costs (which produced inequalities which could not be justified in the long-term), there were other factors to consider. The policy had been designed to allow the respondent to live '*within their means*' and was a proportionate short-term response to extreme financial stringency imposed by the Treasury and was therefore justified.

Employment Appeal Tribunal

A key consideration in the EAT was whether there was a valid distinction to be made between an absence of means on one hand and the respondent seeking to impermissibly rely on 'costs alone' as a justification. CH argued that the tribunal had erred in law by making this distinction.

In dismissing the appeal, the EAT held that this was a valid distinction to make. It was held that the respondent, for reasons beyond its control, was compelled to introduce the changes to its current pay system. The EAT explained that it was legitimate for an organisation to break even and make decisions about allocation of its resources which it considered to be '*an absence of means*' and hence justified the discrimination.

Court of Appeal

On appeal, CH sought to argue that the respondent's case was purely based on saving costs, and no evidence was provided that the policy was short-term. On this basis, the tribunal had erred by relying on this in its judgment.

The CA considered previous case law to establish whether a '*cost plus principle*' exists. It held that the principle did in fact exist and that '*an absence of means*' could in fact constitute the 'plus factor'. However, Underhill J advised that the label should be avoided as much as possible. The key consideration should in fact be whether the legitimate aim was '*solely to avoid increased costs*'. In this case, the respondent's need to reduce its expenditure, and specifically its staff costs to balance its books, could constitute a legitimate aim for the purpose of a justification defence.

In considering whether the policy was proportionate, the CA held that it was relevant that the measure was intended to be a '*temporary stop gap*' and that it is valid for an employer to argue that an act is proportionate as a temporary measure, whilst acknowledging that it would not be proportionate long-term.

Comment

The judgment draws the subtle but important distinction between seeking to justify discriminatory practices on costs alone (as was the case in *O'Brien v Ministry of Justice* [2013] UKSC 6, [2013] ICR 499; Briefing 675) and an employer's need to reduce its expenditure in order to live within budgetary constraints.

Given the current climate, many employers will no doubt be making difficult decisions in response to financial constraints. This judgment highlights that the courts will take a pragmatic approach, recognising that almost any decision by an employer will inevitably have regards to costs, and considering an employer's aims via a subtle and nuanced gaze. If an employer can show that it is responding to a legitimate business need which requires a reduction in expenditure and to live within its means, the court may find that a discriminatory measure is legitimate. On this basis, it may be difficult for claimants to argue that that an employer's actions are motivated by the wish to save costs alone.

However, it must also be remembered that policies or acts introduced due to '*an absence of means*', must be proportionate. For the discriminatory act to be justifiable, employers must consider all reasonable alternatives which would reduce the discriminatory effect on their employees.

Ayisha Akamo
Leigh Day
aakamo@leighday.co.uk

Briefing 967

Interim relief for discrimination dismissal cases

Steer v Stormsure Ltd [2020] UKEAT/0216/20/AT; December 21, 2020

Implications for practitioners

The EAT held that the absence of interim relief for discrimination and victimisation dismissal claims is a breach of the European Convention on Human Rights (ECHR). However, it could not remedy this breach as it could not interpret the Equality Act 2010 (EA) to be compatible with the EHRC under s3 of the Human Rights Act 1998 (HRA) and did not have the power to make a declaration of incompatibility. The EAT therefore dismissed the appeal.

Permission was granted for an appeal to the CA to consider the issue of remedy, specifically whether a compatible interpretation of the EA can be made or whether a declaration of incompatibility should be made. This appeal is expected to be heard later this year.

Employment Tribunal

The claimant (SS) was dismissed by the respondent (SL) and brought discrimination and victimisation claims under the EA and a whistleblowing unfair dismissal claim under the Employment Rights Act 1996. When lodging her claims, SS submitted an application for interim relief for the discrimination, victimisation and whistleblowing claims.

The ET stated it did not have jurisdiction to consider interim relief for the discrimination/victimisation claims, only the whistleblowing claim.

Employment Appeal Tribunal

SS appealed against the ET decision on interim relief for the discrimination/victimisation dismissal claims, arguing that the failure to afford access to interim relief for EA claims constituted a breach of European law; namely that:

- without access to interim relief, discrimination and victimisation claimants are deprived of an effective remedy, in breach of the principle of effectiveness, particularly in view of delays at the ET
- as interim relief is available for similar actions of a domestic nature, namely whistleblowing dismissal claims, it should be available for discrimination/victimisation dismissal claims, to comply with the EU principle of equivalence
- the absence of interim relief for discrimination/victimisation dismissal claims constituted a breach of fundamental principles of EU law, including non-discrimination and right to an effective remedy under Article 47 of the EU Charter of Fundamental Rights (the Charter).

SS further submitted that the absence of interim relief for discrimination/victimisation dismissal claims amounted to a breach of the ECHR, engaging Article 14 (prohibition of discrimination) in conjunction with Article 6 (right to fair trial). SS relied on 'other status' for the purposes of Article 14, namely the status of being an individual who wished to bring discrimination/

victimisation dismissal claims.

The EAT dismissed the arguments that the lack of access to interim relief for EA claims breached EU law. The EAT found that the remedies available for discrimination claims satisfied the requirement of effectiveness. If a claimant is successful at the final hearing, the potential remedies include a declaration, compensation (which is uncapped) and a recommendation. Interest can be awarded on compensation to account for delays experienced in waiting for the proceedings to be concluded. The EAT stated that the question was not whether interim relief would improve the remedies available, but whether the current set of remedies were effective.

The EAT accepted that the whistleblowing unfair dismissal claim was comparable to discrimination/victimisation dismissal claims for the purposes of the equivalence principle. However, the EAT did not accept that the procedural rules/remedies when compared in their entirety were less favourable for discrimination claims than for whistleblowing claims.

The EAT also stated that the '*no most favourable treatment proviso*' applied. As the procedural rules/remedies for discrimination claims are no less favourable than those for ordinary unfair dismissal claims, another similar domestic action, there could be no breach of the principle of equivalence. This was the case even if whistleblowing claims did have more favourable procedural rules/remedies, the equivalence principle does not oblige member states to extend their most favourable procedural rules/remedies to the EU-derived discrimination claims.

The EAT also dismissed the argument that the absence of interim relief for discrimination/victimisation claims was a breach of fundamental principles of EU law. SS relied upon the provisions of the Charter which ban sex discrimination and require member states to provide effective remedies. The EAT held that the fundamental principles of EU law did not assist SS, as the principle of non-discrimination was implemented into domestic law by the EA and the domestic law provided effective remedy for the reasons previously set out.

In the alternative, SS argued that the absence of interim relief for discrimination/victimisation claims in comparison with whistleblowing claims was discriminatory in contravention of the fundamental principles of EU law. SS relied on discrimination as between types of claims, arguing that those who would want to lodge discrimination/victimisation claims were more likely to be women or from a protected group, which was not the case with whistleblowing claims. The EAT also dismissed this argument, stating that there was no basis for expanding the scope of the fundamental principles of EU law to prevent member states from having different procedures or remedies for discrimination cases in comparison with non-discrimination cases which were similar.

As to whether the absence of interim relief for discrimination/victimisation dismissal claims amounted to a breach of Article 14 ECHR, the EAT had to consider whether there were differences between discrimination/victimisation dismissal claims and whistleblowing dismissal claims which justified the availability of interim relief for one type of claim and not the other. However, no justification had been put forward; the government had not intervened to provide justification and SL was not in a position to provide justification as a private employer.

The EAT stated that it was not appropriate for it to speculate on justification and, whilst it did not rule out the possibility that there was justification, it held that the ECHR had been breached as no justification had been put forward.

Despite a breach of the ECHR being established, the EAT was unable to provide a remedy for this breach. The EAT decided it could not give the EA a conforming interpretation under s3 HRA, as this would have constituted an amendment of the statute. The EAT also has no power to make a declaration of incompatibility. It therefore dismissed the appeal.

However, permission was granted to SS to appeal to the CA so that the court can consider the appropriate remedy, namely whether a conforming interpretation can be made or whether to grant a declaration of incompatibility.

Comment

The EAT finding that the absence of the interim relief remedy for discrimination/victimisation dismissal claims amounts to a breach of the ECHR could be a significant step towards making this relief accessible to victims of discrimination. On appeal, the CA will reconsider the issue of conforming interpretation or, in the alternative, consider a declaration of incompatibility. This could lead to a significant change in the remedies available for discrimination claims.

Yavnik Ganguly
Bindmans LLP

Employee suffering short-term paranoid delusions was not disabled

Sullivan v Bury Street Capital Ltd UKEAT/0317/19/B; September 9, 2020

Facts

Mr Sullivan (S) started working as a senior sales executive for Bury Street Capital Ltd (BSC) in 2008. Between March to May 2013 he was in a relationship with a Ukrainian woman. In July 2013, following the breakdown of the relationship, he suffered paranoid delusions that he was being followed by a Russian gang. These delusions affected his timekeeping, attendance and record-keeping (a concern before the onset of his delusions). Matters improved after September 2013.

Between July 2014 and September 2017 S's performance reviews constantly mentioned his poor timekeeping and attitude to work. While the paranoid delusions continued throughout, from April 2017 they again started to affect his day-to-day activities, resulting in his dismissal on September 8, 2017 on grounds of capability and attitude.

He lodged a claim in the ET for disability discrimination (amongst other claims).

Employment Tribunal

The ET held that S was not disabled within the meaning of the Equality Act 2010 (EA). While accepting that his delusions were a mental impairment, they did not meet the long-term requirement in the definition of disability. Despite the delusions continuing throughout, the ET found that they only had a substantial adverse effect (SAE) on his ability to carry out day-to-day activities in 2013 and 2017, and on neither occasion was it likely that the SAE would last for at least 12 months or that it would recur.

The ET further held that should it be wrong in its conclusion that S was not disabled, BSC did not have actual or constructive knowledge of his disability at the relevant time.

Employment Appeal Tribunal

S appealed primarily on two grounds:

1. that the SAE did not last throughout the relevant period; and
2. that it was not likely to recur (when it in fact had in 2017).

The EAT dismissed the appeal.

Ground 1

The EAT held that the ET did not err in concluding that the long-term requirement in the definition of disability was not met. While there existed a SAE on S's ability to carry out day-to-day activities in 2013 and 2017, on neither occasion was it likely that the effect would last for 12 months or that it would recur.

The EAT found that the tribunal had correctly drawn a distinction between his delusional beliefs and the *effect* they had on his ability to carry out normal day-to-day activities. In doing so, it correctly asked itself whether, having regard to all the circumstances, there was a SAE during the relevant period (i.e. on the information available in 2013). In reaching the conclusion that there was no SAE, the ET made no error of law.

Ground 2

In considering whether the SAE was likely to recur, the ET had correctly applied 'likely' as if it meant *'could well happen'*. It was irrelevant that the SAE did recur later in 2017; what mattered was whether on the available information in 2013 it could be said that a recurrence of the effect could well happen. While this was a low threshold, the ET was not precluded from concluding that in 2013 the SAE was not likely to recur.

Knowledge

Finally, the EAT considered the question of knowledge (although unnecessary having concluded that there was no disability). S contended that the ET was wrong to have relied on the evidence of his colleague, who knew nothing of his delusions, and that instead the ET should have considered BSC's corporate knowledge.

Again, the EAT upheld the ET's decision. It was not unduly restrictive or unreasonable to rely on the evidence of a colleague in his capacity as an employee or agent of BSC when determining whether BSC had the requisite knowledge. This is particularly the case where the company, such as BSC, is small.

Comment

Although not establishing any new legal principles, this case emphasises the hurdles a claimant must clear to meet the definition of disability under the EA.

In considering the requirement of 'long-term', a crucial

968 distinction should be drawn between the condition and its effect. It also highlights the importance of a claimant's credibility as a witness; in this case the ET preferred the evidence of S's colleague over S or his psychologist when determining whether his delusions had a SAE on his ability to carry out normal day-to-day activities.

Further, in considering whether a condition is likely to recur, the tribunal must make an assessment based on the information available at the relevant time and not with the benefit of hindsight. Recurrence of SAE does not prevent a tribunal from concluding that at an earlier date it was not likely to do so.

Lara Kennedy
Leigh Day, Solicitor
lkennedy@leighday.co.uk

969 Briefing 969

Indirect discrimination and the 'undeserving claimant'

Elizabeth Ryan v South West Ambulance Services NHS Trust [2020] UKEAT/0213/19/VP; October 6, 2020

Facts

Elizabeth Ryan (ER) was employed at South West Ambulance Services NHS Trust (the Trust) and was aged 67 at the relevant time. The Trust developed a recruitment tool which it called the 'Talent Pool' (TP), designed to identify future leaders at the Trust and to fill some vacancies with *'limited need to advertise for and to interview candidates'*. Due to the nature of the service the Trust provided, there was a degree of urgency in its recruitment process in order to maintain its effective operation.

Employees of the Trust could gain entry to the TP in three ways:

1. by achieving a grade of 'exceeding expectations' at an appraisal meeting with their line manager
2. by appealing their line manager's decision if this grade was not reached, and being given that grade on appeal
3. by self-nominating for inclusion to the TP during a twice-yearly window and the application being approved by an independent manager.

ER was not a member of the TP, although she was aware of its existence and had been involved in its development. She was given a 'meets expectations' grade during her appraisal; she did not appeal this grade or self-nominate in either of the application windows that year.

When a managerial position became vacant, the Trust decided to fill it immediately from the TP. When a second vacancy arose as a result of the first promotion, ER expressed interest in it but was told that she could only apply if it remained unfilled through recruitment via the TP. The role was filled through the TP and ER was not considered for the position.

The TP statistics showed that there was a comparatively lower percentage of members of the TP in her age bracket compared with other age brackets. Although 12% of the Trust's employees were in the 55-70 age bracket, only 6% of TP members were in that age group.

ER lodged claims at the ET including for indirect age discrimination.

Employment Tribunal

The ET held that the Trust had a provision, criterion or practice (PCP) of only promoting managerial staff on the basis of their pre-exiting membership of the TP.

The Trust argued that the TP statistics did not reveal discrimination; they reflected the *'normal generalised career path'* of their employees, including the need to build up experience in the 16 to 20 age group and the greater likelihood of people in ER's age group *'winding down'*.

The ET was referred to *Essop and others v Home Office (UK Border Agency); Naeem v Secretary of State for Justice* [2017] UKSC 27; Briefing 830. Applying that case, the ET rejected the Trust's submission, noting that *'the reason for the disadvantage need not be unlawful in itself, nor under the control of the employer'*.

However, Lady Hale in *Essop* [32] dealt with the argument of *'undeserving claimants, who have failed for reasons that have nothing to do with the disparate impact'* of the PCP. She stated that *'it must be permissible for an employer to show that an employee has not suffered harm as a result of the PCP in question'*.

The tribunal decided that ER was aware of the TP, having been involved in its creation, and did not seek entry into it. It therefore held that there was *'no causal link between the PCP and the disadvantage suffered by* [ER]'.

It further held that the TP was a proportionate means of achieving a legitimate aim, its purpose being to provide candidates for rapid appointment in an emergency response organisation. It was deemed proportionate for reasons including that no age group was precluded and the TP was reviewed twice annually for fair representation, which it met in all other equality categories.

The ET therefore dismissed ER's indirect age discrimination claim.

Employment Appeal Tribunal

ER appealed on two grounds; namely that the ET erred in concluding that:

1. there was no causal link between the PCP and the disadvantage suffered, and
2. the PCP was objectively justified.

ER argued on the second point that the decision of the ET had been perverse i.e. that no reasonable tribunal, on a proper application of the evidence and law, would have reached that conclusion.

On the first ground, the EAT noted the necessity of *'correspondence'* between the group and individual disadvantage in the statutory test for indirect discrimination. While the tribunal had found that the group disadvantage was the statistically lower likelihood of people in ER's age bracket being in the TP, it had not found that the individual disadvantage was also the lower likelihood of being in the TP; rather it framed the individual disadvantage as a result of ER's failure to apply to the TP.

The EAT noted that ER had in fact been considered for the TP through her appraisal meeting, but been graded lower than was required for entry.

The ET had also not considered that the Trust had presented no evidence to show what would have happened had ER tried to actively gain entry to the TP, through appealing or self-nominating (i.e. that she would have gained entry to the TP and therefore been considered for the roles). As it could not be said what would have happened, it could equally not be said that it was ER's own actions or omissions which prevented her from being in the TP. This was an error.

To advance the 'undeserving claimant' argument, the Trust would have had to prove that it was in fact ER's performance which had resulted in her not attaining the 'exceeding expectations' rating in her appraisal. Alternatively, the Trust could have proven that had ER appealed or self-nominated, she would have succeeded in being placed in the TP.

This evidence was not presented to the ET. The EAT reasoned that the TP policy had a prima facie discriminatory effect on people in her age bracket, a disadvantage to which which ER was also subject; but for the PCP, ER would have been considered for the promotions.

In relation to the objective justification of the PCP, the EAT held that the ET had not conducted a critical evaluation of the impact of the policy on the affected group against the importance of the aim to the Trust. The EAT agreed with ER's appeal on the ground of perversity.

Comment

The EAT expressed concerns that issues had not been clearly articulated; the group disadvantage was expressed in different terms to the individual disadvantage asserted by ER. It criticised the parties for not identifying the correct issues. Practitioners need to ensure that the statutory test is being followed closely in their pleading of a case. It was not contended by the Trust either at first instance or on appeal that the mispleading should have in itself led to the dismissal of the claimant's claims. The claimant may have been vulnerable to this argument, considering she was legally represented, highlighting the importance of properly pleaded claims.

This case also speaks to the need to present a thorough and careful analysis at each stage of the statutory test for indirect discrimination and the relevant defences. Had the Trust submitted evidence to show that ER's performance led to her 'meets expectations' grade, or shown that the effect of the TP policy had been considered against the aim of the Trust, this case may have turned in its favour. Without this latter analysis, the EAT was open to conclude that the respondent had not justified the TP as a proportionate means of achieving a legitimate aim and that, but for the PCP, ER would have been considered for the roles.

Finally, the case demonstrates that employers must be very careful about the effect of their policies. The TP had been reviewed for compliance with equality objectives and it had been shown that its effect was statistically skewed. This should have put the Trust on notice for potential liability for a discrimination claim. Practitioners should advise employers to be vigilant in correcting for this and considering whether the policy is necessary, or whether other more proportionate alternatives are available.

Daniel Zona
Solicitor, Bindmans
d.zona@bindmans.com

Matthew Manso de Zuniga
Paralegal, Bindmans
m.mansodezuniga@bindmans.com

Applying risk assessments to pregnant employees

Chief Constable of Devon and Cornwall Police v Mrs N Town UKEAT/0194/19; September 10, 2020

Facts

Mrs Town (T) was employed by Devon and Cornwall police (DC) as a Response Officer working on the frontline. On November 21, 2017 she informed her line manager that she was pregnant. He conducted a risk assessment which indicated that T could safely remain in the Response Team if certain adjustments were made. T was to be placed on restricted frontline duties which involved her being in plain clothes, having the jobs she undertook risk assessed and applying some recommendations made in relation to night shifts. T was content with these restrictions.

T remained on restricted duties in the Response Team until December 21, 2017 when she was moved to the Crime Management Hub; a back office role. This was part of DC's general policy for police officers on restricted duties beyond two weeks. This move was contrary to T's wishes and her risk assessment.

The new role in the Crime Management Hub caused her to suffer from serious anxiety and migraines; consequences which were foreseen by T and accepted in a subsequent risk assessment as having been caused by the move. Following a period of sick leave and a successful grievance, T returned to her role in the Response Team in May 2018 before going on maternity leave on July 1, 2018.

Employment Tribunal

T commenced proceedings against DC alleging pregnancy discrimination and indirect sex discrimination. The alleged unfavourable treatment was the transfer from a frontline/operational role in the Response Team to an office-based role in the Crime Management Hub which she considered a retrograde step in her career.

The ET accepted that this treatment was unfavourable to T as it put her at a disadvantage because it removed her from a working environment she found supportive against the backdrop of an earlier miscarriage, placing her at risk of injury to her mental health.

The ET rejected DC's argument that the transfer was advantageous to T as continuing work in the Response Team was potentially dangerous for pregnant women.

In disregarding her initial risk assessment, DC had discriminated against T on the grounds of pregnancy under s18 Equality Act 2010 (EA) and indirectly on the grounds of her sex under s19. The ET further found that the policy of transferring officers who had been on restricted duties beyond two weeks to the Crime Management Hub amounted to a practice which was indirectly discriminatory to female employees as pregnancy would likely be an automatic trigger for the policy.

Employment Appeal Tribunal

DC appealed on two grounds:

a) the relevant treatment for the purpose of s18 was removing T from danger and was not therefore unfavourable; and
b) that any 'particular disadvantage' under s19 was suffered by pregnant women and not women in general.

Ground 1 – section 18

DC argued that the ET had misidentified the treatment as it had failed to consider the purpose behind transferring T to the Crime Management Hub. DC stated that the purpose of the transfer was to remove T from the danger of being a Response Officer when pregnant. DC asserted that removing T from danger was advantageous and could have been satisfied by either keeping her in the Response Team on restricted duties or by transferring her to the Crime Management Hub.

The EAT dismissed this argument and stated that it was clear that T was not complaining about being removed from danger, but rather transferring her from the supportive environment of the Response Team to the Crime Management Hub, which risked her mental health. The only question for the EAT was whether that treatment was unfavourable. This was a matter of fact and the ET found the treatment was unfavourable.

Ground 2 – section 19

In respect of s19, and in reliance on *Essop & Ors v UK (Border Agency)* [2017] 1 WLR 1343; Briefing 830, the

EAT agreed that it was not necessary that all members of the group be placed at a particular disadvantage (i.e. women) if a member of the group (i.e. women who are pregnant or on restricted duties) is more likely to be disadvantaged than the comparative group. In this case, since only woman as a group can get pregnant and pregnancy is an automatic trigger for the application of the policy (i.e. transfer to the Crime Management Hub), women were disproportionately likely to be transferred compared to men.

The appeal failed on both grounds.

Comment

This judgment highlights the importance of undertaking risk assessments for pregnant employees, carefully considering the recommendations made and acting accordingly. Despite DC's 'good intentions' of removing T from danger, ignoring a risk assessment which advised against the transfer was clearly unfavourable treatment.

It is important for employers to consider the individual circumstances of their employees when applying broad policies as, if they do not consider the impact that policies may have on an employee's particular circumstances, they could be found to have discriminated against them.

Lara Kennedy
Leigh Day Solicitors
Solicitor
lkennedy@leighday.co.uk

Tariro Nyoka
Leigh Day Solicitors
Paralegal
tnyoka@leighday.co.uk

Briefing 971

Discrimination on grounds of sexual orientation

R (on the application of Cornerstone (North East) Adoption and Fostering Service Ltd) v Office for Standards in Education, Children's Services and Skills [2020] EWHC 1679 (Admin); July 7, 2020

Facts

This claim in the Administrative Court in Leeds concerned the lawfulness of an adoption and fostering agency only accepting heterosexual evangelical Christians as the potential carers of fostered children.

The claimant, Cornerstone (North East) Adoption and Fostering Service Ltd (Cornerstone), is an independent fostering agency (IFA) specialising in offering foster and permanent homes to children in the care of local authorities. Based on its perception of evangelical Christian principles, Cornerstone only recruits carers (as well as staff and volunteers) who are prepared to abide by its Statement of Beliefs and Code of Practice. Among other things, these require them to be evangelical Christians and to '… *abstain from all sexual sins including … homosexual behaviour* …'.

In practice, the only potential carers Cornerstone accepts are evangelical married heterosexual couples of the opposite sex. The defendant, Ofsted, inspected Cornerstone in 2019 and produced a draft report concluding that Cornerstone's recruitment policy violates various provisions of the Equality Act 2010 (EA) and the European Convention on Human Rights (ECHR) read with the Human Rights Act 1998 (HRA); it required Cornerstone to change its policy. Cornerstone issued a judicial review challenging Ofsted's conclusion.

High Court

The HC considered the following questions (inter alia):

1. Whether Ofsted erred in concluding that Cornerstone's carer recruitment policy breaches the EA in respect of sexual orientation?

The court determined that Cornerstone was providing a service within the meaning of s29(1) EA and, in the alternative, a public function for the purposes of s29(6) EA. The court held that the '*policy clearly, directly, and unambiguously discriminates against non-heterosexuals*' and was therefore directly discriminatory or, in the alternative, indirectly discriminatory. The policy would therefore be unlawful as a breach of s29(1) or s29(6) EA

unless an exemption applies.

Cornerstone had argued that because its policies refer to 'homosexual behaviour' rather than sexual orientation, it did not discriminate on the latter ground.

In relation to justification on indirect discrimination, HC confirmed that the starting point in the analysis is that particularly weighty reasons must exist on grounds of sexual orientation: *R (Steinfeld and Keidan) v Secretary of State* [2020] AC 1; Briefing 877, at para 20(3). Further, in cases involving discrimination on the grounds of sexual orientation, to be proportionate the measure must not only be suitable in principle to achieve the avowed aim, it must also be shown that it was necessary to exclude those of specific orientation from the scope of the application of the provision: *Vallianatos v Greece* (2013) 59 EHRR 12, [85]. HHJ Julian Knowles held that Cornerstone had not been able to show its policy was justified.

Cornerstone sought to rely on the exemption at schedule 23 EA as an organisation relating to religion or belief. The HC accepted that Cornerstone is an organisation to which schedule 23 para 2(1) EA applies. However, it held that because Cornerstone provides its agency services on behalf of a public authority (schedule 23 para 2(10)(a) under the terms of a contract (schedule 23 para 2(10)(b)) it did not benefit from the exemption.

Finally, Cornerstone sought to rely on s193 EA. This provides that a person does not contravene the EA by restricting the provision of benefits to persons who share a protected characteristic if the person acts in pursuance of a charitable instrument and (insofar as is relevant) the provision of benefits is a proportionate means of achieving a legitimate aim. HHJ Knowles accepted that Cornerstone acted in pursuance of a charitable instrument but considered it was not a proportionate way of achieving a legitimate aim to restrict the provision of its services to heterosexuals.

So far as discrimination on grounds of religious belief was concerned, it was held that Cornerstone's recruitment policy was objectively justified pursuant to schedule 23 para (2)

2. Whether Ofsted erred in concluding that the Cornerstone's practices breach the HRA?

Cornerstone argued that it was not a public authority for the purposes of s6 HRA and therefore the ECHR did not apply to it. However, the HC held that Cornerstone is a hybrid public authority as per s6(3)(b) HRA. When the agency placed children with foster parents, it performed a task which the local authority was under a duty to perform but which it had delegated to the agency pursuant to statutory powers. It also accepted Ofsted's submission that the HRA is relevant to the running of an IFA.

The HC went on to consider whether Cornerstone's recruitment policy breaches the ECHR. In so far as the policy discriminated on the grounds of religious belief due to the requirement that carers be evangelical Christians, this was held to be justified and not a breach of EHCR. However, on the issue of sexual orientation, HHJ Knowles held that Ofsted was right to conclude that Cornerstone's blanket exclusion of gay and lesbian individuals from being carers violated Article 14 of the Convention, read with Article 8.

3. Whether Ofsted's report (and the recommendations contained in it) breach Cornerstone's rights under Articles 9, 10, 11 and 14 of the ECHR?

The HC stated that the question was whether Ofsted's report interfered materially, that is, to an extent which was significant in practice, with Cornerstone's freedom to manifest its beliefs in this way: *R(Williamson) v Secretary of State for Education and Employment* [2005] AC 246, [39]. It held that the requirement that potential carers be evangelical Christians was not a manifestation of a religious belief for the purposes of Article 9(1) and neither was the non-recruitment of gay and lesbian foster carers.

HHJ Knowles stated:

> *Cornerstone can fulfil – perhaps even more fully fulfil – its Christian mission of providing homes for children and young people who are in need of them by ensuring it has the widest possible pool of potential carers as recruits and by not restricting potential applicants to just one faith. What Ofsted said in its Report did not impinge or interfere with the rights of Cornerstone or its officers, staff or volunteers to manifest their religion in the manner that is protected by Article 9(1).*

The HC also rejected Cornerstone's claims under Articles 10, 11 and 14 EHCR. An appeal is outstanding.

Robyn Taylor
Deighton Pierce Glynn
RTaylor@dpglaw.co.uk

Employment Tribunal finds that protected characteristic of gender reassignment includes non-binary and gender fluid identities

Ms Rose Taylor v Jaguar Land Rover Limited 1304471/2018; November 26, 2020

Facts

Ms Taylor (RT) had worked for Jaguar Land Rover for nearly 20 years as an engineer, presenting as male and earning substantial praise for her work. In 2017 she approached her employers to say that she was beginning a gender transition and characterised herself at that time as gender fluid or non-binary.[1] She thereafter wore female clothing on some days. She became increasingly visible by representing the company at recruitment events and helping to establish an internal LGBT network. Her management were initially supportive but she began to receive comments such as her being referred to as 'it', or asked '*if that was her Halloween get up*'.

When RT raised the 'it' comment with human resources, the response was: '*what do you expect them to call you*' and when she raised the difficulties with her management, she was told that action could only be taken if she 'named names'. The tribunal found this was a far weaker response than the employer would have taken for health and safety issues (for example 'toolbox talks') or did in fact take in respect of a gifts and hospitality policy about which a strongly worded piece was circulated in the internal magazine. When the claimant suggested supportive action from her manager such as wearing a rainbow lanyard during 'Pride' month, she was laughed at.

RT became increasingly ill and resigned her employment. She claimed constructive unfair dismissal and gender reassignment discrimination, harassment and victimisation.

Birmingham Employment Tribunal

Jaguar Land Rover attempted to avoid liability by claiming that RT was not within the protected characteristic of gender reassignment as defined by s7 of the Equality Act 2010 (EA) as she, at the relevant time, described herself as gender fluid or non-binary rather than transitioning from one binary gender to another.

The ET recognised this as a 'novel' point on which no authority exists. It accepted RT's submissions that the tribunal should consider the statements recorded in Hansard made by Solicitor General Vera Baird QC when she was piloting the EA through the House of Commons. The Solicitor General had been clear that gender reassignment '*concerns a personal move away from one's birth sex*' and '*moving a gender identity away from birth sex*' (para 177, p45). The tribunal summed up its finding on the novel point as follows:

> *We thought it was very clear that Parliament intended gender reassignment to be a spectrum moving away from birth sex, and that a person could be at any point on that spectrum. That would be so, whether they described themselves as "non-binary" ie at different places between point A and point Z at different times, or "transitioning" ie moving from point A, but not necessarily ending at point Z, where A and Z are biological sex. We concluded that it was beyond any doubt that someone in the situation of the Claimant was (and is) protected by the legislation because they are on that spectrum and they are on a journey which will not be the same in any two cases. It will end up where it does. The wording of section 7(1) accommodates that interpretation without any violence to the statutory language.* [paragraph 178]

The ET was scathing about the employer's failures to act, especially given that it has over 50,000 employees and contract workers at its plants in the West Midlands, characterising its failure as 'astounding' and noting '*that hindsight featured strongly*' in the employer's evidence. Witnesses at the tribunal were the claimant's first and second-line managers and the more senior managers who had dealt with RT's grievance and grievance appeal.

The ET was sympathetic to the managers who were unsupported and out of their depth. None had seen the employer's equal opportunity policy, or received useful training on dealing with such issues and the tribunal described human resources advice as 'woeful'. The result was that nothing was done to deal with the increasingly desperate situation RT found herself in beyond referring her to occupational help, which the tribunal described as treating the symptoms not tackling the cause. No steps were taken to educate the workforce about expected behaviour or the use of

1 Gender-fluid: *'an individual whose gender identity fluctuates'*; non-binary: *'an individual who does not present with conventional male or female gender identity'*.

toilet facilities for employees who might be perceived as unconventional.

RT succeeded in her discrimination and constructive dismissal claims. The ET also awarded a 20% uplift for failure to follow the ACAS code in respect of the unsatisfactory grievance process. Unusually, it also awarded aggravated damages for both the 'wanton' disregard of the claimant in the workplace *and* for the insensitive manner of her cross-examination in which it was suggested that she had been 'hypersensitive'. In advance of a remedy hearing, compensation was agreed as £180,000. Jaguar Land Rover voluntarily accepted recommendations put forward by RT that it should have an external body examine its approach to diversity and inclusion across all protected characteristics and report at annual intervals over the next five years. The tribunal gratefully noted those voluntary recommendations. There will be no appeal.

At a later costs hearing RT was awarded 25% of her costs for unreasonable conduct in the way the proceedings were conducted by the employer, in particular pleading and arguing unarguable points. This did not include the gender reassignment point which the tribunal regarded as properly arguable.

Comment

The case is only at first instance, but it is a powerful and authoritative judgment by an experienced tribunal judge tracking the EA provision back to its parliamentary roots. The effect is to widen the protected characteristic of gender reassignment to include gender fluid or non-binary individuals. There also seems no reason that other complex gender identities which involve a move away from birth sex should not also be protected. Examples might be 'gender queer' individuals whose presentation combines elements which might be thought proper to either gender. An example is the German singer 'Conchita' who combines a generally female appearance with a male beard. Equally, 'a-gender' or 'gender-neutral' individuals, who identify without a gender are likely to be protected. In a very real sense, this can be seen as a move away from gender reassignment towards gender identity protection. It is also to be remembered that s7 of the EA requires no medical process.

But there are limits and protection still requires there to be a move of gender away from natal sex. So transvestites or drag artists who wear the clothes of the opposite sex for comfort or performance respectively, but have no intention of altering their gender, would not appear to be protected.

Employees with complex gender identities will find support in the judgment but there are likely to be a number of consequences for employers.

Firstly, workplace policies will need to be examined to ensure that complex gender identities are included. Practical issues like toilet use will need to be considered.

Secondly, training of managers and the workforce will need to be considered; ensuring that a knowledge resource is present in the human resources function of any large employer and available to small or medium sized enterprises will be important. Binary transitions pose problems for employers in terms of ensuring that matters such as pronoun preferences are followed, and ensuring that the employer's position on inappropriate comments is well-known. Transitions to more complex gender identities all the more so,

And thirdly, ensuring that effective action is taken when problems come to light or are raised as part of a grievance.

Without action on the above areas, employers are unlikely to make out the statutory defence, just as Jaguar Land Rover was unable to.

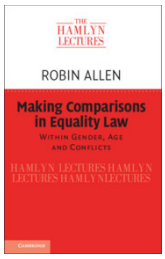
Robin Moira White
Old Square Chambers

Sioban Calcott
Brethertons

[Note: Subsequent to the case Ms Taylor now presents as female and uses female pronouns which the ET also used when referring to her. The authors represented the claimant in her claim to the Birmingham ET.]

Making Comparisons in Equality Law. *Within Gender, Age and Conflicts*

by Robin Allen, September 2020, Cambridge University Press, 358 pages, £24.99 (paperback)



Making Comparisons in Equality Law is based on three Hamlyn Lectures delivered by the author in 2018. These lectures have previously been delivered by legal luminaries such as Baroness Kennedy, Lord Denning and Lord Justice Woolf. Robin Allen QC ably follows in their footsteps.

Allen expands on his lectures, with the final chapter in particular developing the subject of comparisons of rights in conflict, interweaving the development of equality law with key questions as to how we value and prioritise competing rights.

The introductory chapter asks why we make comparisons, and why do they matter? Rather than being a complex philosophical debate, such comparisons simply reflect a basic idea of fairness.

Allen notes that the law 'tries' to help with comparisons. In UK equality law the role of the comparator is essential, can be to its detriment, with the comparator acting as a '*knockout point*'. The ECtHR takes a broader approach, recognising that comparison and justification are *'two sides of the same coin'* and what matters is the scrutiny of the facts and the reasons for the treatment in question. Allen recognises, however, that this less prescriptive approach is not in keeping with the public's understanding of discrimination.

Public opinion, and social and cultural considerations are crucial parts of the framework for comparison and Allen reminds us that time and place are everything.

In the second chapter Allen tackles the behemoth of equal pay: *The oldest problem: establishing equal work,* and reviews the basis for establishing equal pay and the crucial legal developments, providing a substantial level of detail. Describing a debate which has spanned two world wars, the suffrage movement and various global developments, Allen outlines the progress made and the inequalities which still exist despite the introduction of the Equal Pay Act 1970, over 50 years ago.

He also debunks a number of misconceptions; e.g. the Ford Dagenham sewing machinists were the first to raise the issue of equal pay for equal work (see the 1919 Treaty of Versailles); gender pay gap reporting will resolve inequality of pay between men and women's work, and unions led the charge for equal pay. He shines a light on some of the lesser known actors fighting this battle and makes astute suggestions as to how the UK can guarantee a fair wage for both sexes.

In the third chapter Allen addresses age – the newest ground of equality. Developing his lecture: *The newest problem: making a fair comparison across all ages*, Allen examines our changing society which simultaneously penalises and venerates our oldest citizens.

He challenges us to consider what is '*old*', and why? He discusses the moving marker which is the age at which we stop working and highlights the lack of protection for age-related discrimination, across all fields.

Allen sets the legal developments against recent societal changes and identifies the poor public discourse (and lack of legislative action) on the topic of ageing which, he asserts, is preventing the necessary development of adequate protection against age discrimination.

The fourth chapter expands on Allen's final lecture: *The most contentious problem: comparing rights in conflict* and is devoted to comparisons between competing rights. He refers to four SC cases in which he was instructed, to demonstrate how the conflict of competing rights can be decided.

This is the standout chapter which showcases Allen's ability to distil complex legal arguments into everyday language, and demonstrates that even the biggest cases come down to the most everyday issues, such as buying a cake or getting on a bus.

At its heart, this is a book about comparisons; and '*making comparisons appropriately*' is far from a simple undertaking, as the last 100 years have shown us.

Allen approaches this significant challenge with intellect and keen analysis, interspersing his personal insights gained from his involvement in all types of equality cases throughout. He has written a book not simply for lawyers, but one for anyone with an interest in how rights have been developed and protected.

Looking forward, Allen speculates on future developments such as those which need to be addressed in public discourse (e.g. age discrimination) or legislative changes, (e.g. the rights of transgendered people).

The UK's less than exemplary record on equality does not escape unscathed (the *Defrenne* case is one of several examples) and it is sadly prescient given the effect of the COVID-19 pandemic on equality in the UK. *Making Comparisons* is more relevant than ever.

Claire Powell, Leigh Day

Activist lawyers, discrimination and positive action; DLA annual conference, February 2021

The DLA's 2021 annual conference reflected on the current state of equality in the context of recent events such as the Black Lives Matter movement and the disproportionate effect of COVID-19 on the most vulnerable. With the work of lawyers having recently been undermined by government ministers, it provided a platform for discussing what being an 'activist lawyer' means and how the challenge of achieving equality can be progressed.

The conference was conducted as an online meeting with seven 90-minute sessions of presentations, questions and answers held over ten days. The speakers addressed discrimination in their fields of expertise and included:

- Karon Monaghan QC, barrister, Matrix Chambers who summarised the *'state of the nation';*
- Liz Davies and Nick Bano, barristers, Garden Court Chambers, addressed housing;
- Catherine Casserley barrister, Cloisters Chambers discussed goods and services;
- Matt Jackson, barrister, Albion Chambers, Rosalind Burgin membership secretary at Legal Sector Workers United, and Ryan Bradshaw solicitor, Leigh Day, who discussed employment;
- Chris Fry solicitor, senior partner, Fry Law and Kate Williams campaigner for Afro hair equality in schools, mother of Ruby Williams, plus Steve Broach barrister, 39 Essex Chambers who addressed education & higher education;
- Aarif Abraham, Mira Hammad and Christian Weaver, barristers at Garden Court Chambers North, whose topic was *'organising/lobbying/ protests: know your rights';*
- Professor Kevin Brown, Professor of Law, Maurer School of Law, Indiana University, Meghan Finn, Advocate, 621 Group, Johannesburg, South Africa, Nomfundo Ramalekana, Lecturer, Public Law at University of Cape Town, South Africa and Professor Iyiola Solanke, Chair in EU Law and Social Justice, Leeds University conducted the final session on *'international connections/ solidarity'.*

As part of the DLA's commitment to improving access, live captioning was available for all the sessions thanks to generous sponsorship by solicitors Edwards Duthie Shamash.

Some participant feedback:

'Always an excellent, inspiring conference in terms of speakers and subjects covered....'

'It was genuinely thrilling to have people from different parts of the world exchanging ideas in a thought-provoking discussion.'

'Really good, knowledgeable speakers, some of them very inspiring. Felt very relevant and it's always encouraging to know how many engaged and compassionate people are out there.'

Abbreviations

AC	Appeal Cases
ACAS	Advisory, Conciliation and Arbitration Service
ACD	Administrative Court Digest
AG	Advocate General
AI	Artificial Intelligence
BAME	Black, Asian and Minority Ethnic
CA	Court of Appeal
CJEU	Court of Justice of the European Union
CMLR	Common Market law reports
CUKC	Citizens of the United Kingdom and Colonies
DLA	Discrimination Law Association
EA	Equality Act 2010
EAT	Employment Appeal Tribunal
ECHR	European Convention on Human Rights and Fundamental Freedoms 1950
ECR	European Court Reports
ECtHR	European Court of Human Rights
EHRC	Equality and Human Rights Commission
EHRR	European Human Rights Reports
ET	Employment Tribunal
EU	European Union
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
GDPR	General Data Protection Regulation
HC	High Court
HHJ	His/her honour judge
HLR	Housing Law Reports
HMT	His Majesty's transport
HRA	Human Rights Act 1998
HRLR	Human Rights Law Review
ICR	Industrial Case Reports
IFA	Independent fostering agency
LGBT	Lesbian, gay, bisexual, transgender
LLP	Legal liability partnership
MWRF	Manifestly without reasonable foundation
NHS	National Health Service
ONS	Office for National Statistics
PCP	Provision, criterion or practice
PSED	Public sector equality duty
PTSR	Public and Third Sector Reports
QC	Queen's Counsel
SC	Supreme Court
UKEAT	United Kingdom Employment Appeal Tribunal
UKSC	United Kingdom Supreme Court
WLR	Weekly Law Reports
WLUK	Westlaw UK

Briefings is published by the Discrimination Law Association. Sent to members three times a year. Enquiries about membership to Discrimination Law Association, PO Box 63576, London, N6 9BB. Telephone 0845 4786375. E-mail info@discriminationlaw.org.uk.
Editor: Geraldine Scullion; geraldinescullion@hotmail.co.uk. Designed by Alison Beanland.
Unless otherwise stated, any opinions expressed in *Briefings* are those of the authors.