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The fight for equality requires tenacity and courage

When the Equal Pay Act 1970 (EPA) became law in December 1975 it was rightly seen as a landmark legal development in the fight for equal pay in the UK. Fast forward 45 years and, incredibly, the gender pay gap persists with the average median gap of all firms reporting to the EHRC in 2020/21 being 10.4% while particular groups of workers such as older women or Black African women,[1] face an even bigger gap when compared with white British men.

The EPA was one outcome, albeit nearly 100 years later, of industrial action taken by women workers to challenge exploitative pay and working conditions. One recorded major dispute was the East End Match Girls Strike in 1888 when more than 1,400 women workers walked out of the Bryant & May factory. Their actions led to the establishment of the Union of Women Matchmakers and were described at the time as putting *'new heart into all who are struggling for liberty and justice'*. Other influential industrial actions by women to challenge inequality in pay included the Ford machinists' strike in Dagenham in 1968 which led directly to the introduction of the EPA, and the Grunwick Film-Processing Laboratories strike in Willesden between 1976–78 which highlighted in particular the contribution of Asian women to the UK workforce, and their poor treatment.

In their article *'Dare to compare – it just got easier'* Paula Lee and Lara Kennedy celebrate the legal progress seen this year in the legislative battle to secure equal pay. They review the decision of the SC in *Asda Stores Ltd v Brierley* which has finally settled the meaning of the common terms of employment test which entitle the claimant to compare her work to that of a colleague in a different establishment belonging to the same employer. The CJEU decision in *K & Others v Tesco Stores Ltd* confirmed in June that Article 157 TFEU has direct effect in equal value cases and so the easier EU test of focusing on whether there is a 'single source' for the pay inequality, should now be applied in equal pay cases. Both cases will, at last, enable the workers in the current supermarket disputes to get off the starting blocks and cross the legal threshold to initiate their comparative evaluation exercises.

The authors pay tribute to the workers who laid the ground work for these battles and engaged in the exhausting and glacially slow legal process, which has resulted in *'a giant leap'* which should now make future equal pay litigation more accessible. Their struggle was built too on the industrial action of women workers and their supporters who dared to stand up over the decades to ill treatment and risked their livelihoods and liberty to challenge exploitative and unequal pay practices. Their determination to keep fighting for justice is an inspiration and a reminder that achieving change requires tenacity and courage.

Briefings too has reached a landmark in 2021 as it has now been in production for 25 years. First published in 1996, its aim has been to provide a complainant focused source of accessible, high quality analysis of employment and non-employment discrimination cases and to support practitioners by sharing knowledge and expertise and enabling more effective challenges to unlawful discrimination. To mark its 25th year, a new, updated design for *Briefings* has been developed and this new version will be launched in March 2022. *Briefings* is a mere youngster when compared to the decades of struggle in the fight against pay inequality and other injustices but the DLA is committed to ensuring it will, with your support, continue to make its contribution.

Geraldine Scullion
Editor

1 Fawcett Society Gender Pay Gap by Ethnicity in Britain – March 2017 Briefing

Dare to compare – it just got easier

Paula Lee, partner, and Lara Kennedy, solicitor, at Leigh Day review the development of case law on the 'common terms' test under the Equal Pay Act 1970 (EPA) which included three significant judgments in 2021. They highlight the importance of the Supreme Court's decision in *Asda Stores Ltd v Brierley* [2021] UKSC 10 *'Asda'* and the CJEU's decision in *K and others v Tesco Stores Ltd* which, together have finally settled the common terms test and established that Article 157 TFEU is, beyond doubt, directly effective in equal value cases. Applied by the ET in *Morrisons*, these decisions mean that there should now be a meaningful application of the right to choose the comparator in a cross-establishment workplace case and that the point is dealt with as a routine preliminary issue – a hugely beneficial outcome for claimants.

To borrow from Neil Armstrong and the long title of the EPA, 2021 has been '*one small step for woman, one giant leap for womankind towards preventing discrimination as regards terms and conditions of employment between men and women*'.

Any non-employment lawyers watching the news this year might be surprised to learn that the women working in our country's supermarkets have not actually won their equal pay claims yet, but that the well-publicised victories they secured in the SC in March (*Asda Stores Ltd v Brierley* [2021] UKSC 10; Briefing 977) *'Asda'* and the CJEU in June (*K and others v Tesco Stores Ltd* C-624/19) '*Tesco*', was judicial permission to enter the arena – to actually begin the process for claiming their contractual right to equal pay.

A brief recap

More than 55,000 Asda and Tesco store workers are bringing claims for equal pay against their employers. They have chosen to compare themselves to male warehouse colleagues who work in their employers' distribution centres. Add Morrisons, Sainsbury's and Co-op into the mix and the number of store workers who say that their work is equal to that done in the distribution centres soars to in excess of 70,000. A number which is growing every day.

That is over 70,000 people, mainly women, who are pointing to the sex equality clause in their contracts of employment and asking that it does its job; that it automatically rewrites the terms of their contracts so that these are no less favourable than the terms of their male comparators' contracts.

And they are entitled to do that.

Neither the EPA nor its successor, the Equality Act 2010 (EA), limits a woman to comparing herself to a man who works at the same place as her. Both Acts permit her to look further afield, but the right is qualified; she must work in the same employment as her chosen comparator.

The question is how do women who want to compare themselves with a man who works in a different place show that they are in the same employment?

Under s79 EA the test is divided:

- where the claimant and her comparator are employed by the same employer or an associated employer at the same establishment, or
- where the claimant and her comparator are employed at different establishments belonging to the same employer or an associated employer at which 'common terms' of employment are observed.

This means that if she works in the same place as her comparator, sharing a common employer is enough, but, if she works in a different place to her comparator, it is not enough that they share a common employer – common terms must also be observed.

From 1983 the question of when common terms apply became hotly contested, and this was because the 'equal value' route to establishing equal work was finally made possible. From 1983, the European Union[1] insisted that our domestic legislation afford women the right to compare their job with wholly different jobs undertaken by men. This meant that equal pay litigation was no longer confined to blatant examples of women working side by side with men, doing the same or broadly similar jobs as them but for less pay; its scope was now far reaching, subject to meeting the entry requirement of having the right to compare in the first place.

1 *EC Commission v UK* Case 61/81 [1982] ICR 578

It is perhaps understandable that employers were not going to give their female staff a free pass to summon an external job evaluation. One assumes the employers had already decided not to undertake their own internal job evaluation scheme; had they done so, the women would have been confined to 'rated as equivalent' claims, and the risk of 'equal value' claims would have been significantly reduced.

For employers, doing nothing to try to objectively evaluate the different jobs across their organisations allows the status quo to hold in respect of male and female pay inequality; something the legislation wanted to address. Also doing nothing forces women to take legal action to have their roles compared, and their being able to look further afield than their immediate place of work is vital in ensuring that the purpose of the equal pay legislation is satisfied.

In *British Coal v Smith* [1996] ICR 515 Lord Slynn said that '*the reason for this is obvious since otherwise an employer could so arrange things as to ensure that only women worked at a particular establishment or that no man who could reasonably be considered as a possible comparator should work there*'.

Sixteen years later in *Dumfries and Galloway Council v North & ors* [2013] ICR 993 ('*North*'), Lady Hale said:

> *This point is of particular importance, now that women are entitled to claim equality with men who are doing completely different jobs, provided that the women are doing jobs of equal value. Those completely different jobs may well be done in completely different places from the jobs which the women are doing.*

She went on to say:

> *This is not just a matter of preventing employers from so organising their workplaces that the women work in one place and the men in another. There may be perfectly good reasons for organising the work into different places … The fact that of necessity their work has to be carried on in different places is no barrier to equalising the terms on which it is done.*

But why is this so important? Why should women who do one type of job be able to compare themselves with men doing a different job?

The reason has been known for decades; if you are serious about addressing sex-tainted pay discrimination in employment, you must recognise that its roots are often found growing in the fertile soil of 'occupational segregation' and the notion of 'women's work'. See for example, the Women & Work Commission report[2] which in 2006 highlighted that a prominent cause of the gender pay gap is that 'women's work', often regarded as the '*lower paid occupations, in particular dominating the five 'c's – caring, cashiering, catering, cleaning and clerical'* is under-valued.

So, we have 70,000 (mainly) women, working in 'cashiering', a well-known low paid occupation, asking the ET to compare their jobs with that of their male colleagues who work in logistics; and they are doing that because they are of the view that the jobs they do in stores are of equal value to some of the jobs done in distribution centres. These two hourly paid roles have developed along gender-segregated lines for decades and the pay disparity between them is acute.

But, before the tribunal can begin to determine whether the woman and man do equal work, the woman must choose a valid comparator (the 'comparability' stage) and what made 2021 such a vintage year in the glacially slow '*levelling up of women's work'* arena, was that the golden threads of domestic and EU law finally knitted together and created a golden rope, to which the highest courts attached a grappling hook and tore down the steep wall of comparability – meaning now, showing that common terms are observed, should be as straightforward as showing that a dismissal has occurred in an unfair dismissal claim.

The golden threads

The common terms requirement ensures that the claimant and her comparator's contract of employment can be the subject of a fair comparison.

It is similar to the role served by the requirement of a single source in EU law, which is a less restrictive mechanism than our domestic provision, in that there is no requirement that the claimant and her chosen comparator be in the same employment for an equal pay claim to proceed. Under EU law, a claim may proceed where the man and woman are employed '*in the same establishment or service'* and the pay disparity in question is attributable to a 'single source'; that is, where there is one body which is both responsible for the inequality and which has the power to restore equal treatment.

Domestic test

But what has made clearing the 'common terms' hurdle so difficult in the past, is that, as noted by Lady Arden in *Asda*, '*Parliament has not provided a definition of "common terms" and the courts have therefore had to find the meaning of this expression intended by Parliament.*'

It is not surprising that it has taken decades to finesse this test – how work is organised has changed dramatically since the '70s and ensuring the purpose of the legislation is not defeated requires the test to

2 Women & Work Commission *Shaping a Fairer Future* (2006)

have a degree of flexibility, to be future proofed. But it is the changing landscape of the world of work which has enabled employers to argue that the common terms test was not satisfied on the facts of their situation and that their female staff should be denied the right to compare.

Finding meaning to the domestic common terms test, which is capable of being applied to myriad underlying factual situations, has to date taken two trips to the House of Lords and two to the Supreme Court. There were two knotty issues:

1. what is meant by common terms, and
2. if they do exist, who must they be common between?

Even now, drafting this article and having lived the cases for years now, we struggle to articulate in simple terms how the test developed and how it was to be applied pre-2021. So it is unsurprising that employers were able to turn a low threshold test into a significant wall, and make no mistake, crossing it was, until 2021, in the case of *Abdar & others v Wm Morrison Supermarkets Plc*, truly exhausting, hideously expensive, incredibly time consuming and fraught with uncertainty.

The formative years

In the case of *Leverton*[3] in 1989 the claimant and her comparator worked in different establishments; they were employed by the same Council and their terms were governed by the same collective agreement. The case established that while a common source for the terms would be sufficient, it would not always be necessary nor that a sufficient similarity could never be enough.

The most commonly cited passage is: '*Terms and conditions of employment governed by the same collective agreement seem to me to represent the paradigm, though not necessarily the only example, of the common terms and conditions of employment contemplated by the subsection*.'

This was later described as a 'common genesis' case.

Lord Bridge noted that common terms could be satisfied notwithstanding significant variations between particular groups of employees. He relied upon the purpose of the legislation, rejecting the argument that a claimant was always required to show that her terms and conditions were similar to those of the comparator. Which to equal pay lawyers seems so obvious; after all it is the heart of the claim that certain key contractual terms are different and should be equalised.

In contrast, in 1996 in *British Coal*[4] the claimants and comparators worked for the same employer, in different establishments, but were governed by different collective agreements – so a move away from the paradigm situation of a single collective agreement in *Leverton*.

Here the House of Lords said it was necessary to interpret common terms 'generally' and Lord Slynn, as Lord Bridge before him did, adopted a purposive approach to interpreting the legislation.

Lord Slynn stated that it was '*obvious*' why claimants were not limited to relying upon comparators employed at their own establishment, developing the test to allow a finding of common terms between the claimant and her chosen comparator where their terms were '*broadly similar*'. In adopting a broadly similar test, Lord Slynn laid the groundwork to the *North* hypothetical (a test Lady Hale gave us 17 years later) saying it would be enough to establish common terms as between a hypothetical comparator employed at the same establishment as the claimant and an actual comparator employed elsewhere. He said:

> *The purpose of requiring common terms and conditions was to avoid it being said simply "a gardener does work of equal value to mine and my comparator at another establishment is a gardener". It was necessary for the applicant to go further and to show that gardeners at other establishments and at her establishment were or would be employed on broadly similar terms. It was necessary but it was also sufficient.*

As common terms were observed generally for most employees across the employer's sites, the common terms test was again found to be satisfied and the women could move forward in the litigation.

Seventeen years later in 2013, the common terms test was again before the highest court, this time the SC, in the case of *North.* Here the claimant classroom assistants and nursery nurses sought to compare themselves with male manual workers, including road workers and refuse collectors, all working at different establishments and under different collective agreements. The employer sought to deny the validity of the chosen comparators by arguing that in addition to working at different establishments and under different collective agreements, the men would never in reality perform their roles in the claimant's establishment.

Lady Hale presiding rejected this argument, stating that common terms apply where despite working at different establishments and different terms and conditions applying, a hypothetical question is asked:

> *If the comparators were transferred to do their jobs in a different location (i.e., the claimant's workplace) would*

3 *Leverton v Clwyd CC* [1989] AC 706

4 *British Coal Corporation v Smith* [1996] ICR 515

they remain on terms broadly similar to their existing terms? (i.e., would they retain their higher rate of pay)?

When undertaking this hypothetical determination, there is no requirement that there be a 'real possibility' or that it would be feasible that the comparators would be able to do their jobs at the claimant's workplace – to do so would undermine the purpose of the legislation of ensuring equal pay for equal work. The '*North* hypothetical' helps prevent potentially discriminatory action by an employer who segregates groups of employees to different sites so that they have different terms and so avoid comparison.

While the highest UK court was showing the flexibility to be applied when considering the common terms test between 1989 and 2013, in the EU progress was also being made, but there it was less restrictive.

European Union test

The European principle of equal pay is found in Article 157 Treaty of the Functioning of the European Union (TFEU) (previously Article 119 EEC):

Each Member State shall ensure that principle of equal pay for male and female workers for equal work or work of equal value is applied.

In *Lawrence v Regent Office Care Ltd* C-320-00 [2003] ICR 1092, the CJEU held that, in considering whether a claimant was entitled to compare herself to a comparator, the focus should be on whether there was a single source responsible for the inequality and which could restore equal treatment.[5] Unlike the domestic test, a contractual analysis between the claimant and her comparator is unnecessary, thereby creating a simpler, broader test to enable comparison.

2014 – Enter Asda …

In 2014 the Asda equal pay litigation began in earnest – this was the first time there had been a mass private sector, equal value, equal pay claim and the size and scale of the litigation meant that all the old case law on comparability came under intense scrutiny.

Following a well-trodden path, Asda argued that the women did not satisfy the common terms test, or the *North* hypothetical, or the single source test. It also argued that Article 157 was not directly effective in equal value cases as the issue of whether the work and circumstances of the claimant and comparator were alike, thus comparable, was contested; equal value claims being '*indirect and disguised discrimination which can only be identified by reference to more explicit implementing provisions of a community or national character*'.[6]

At a preliminary hearing in 2016 Employment Judge Ryan confirmed that the threshold test of comparability had been passed under 1) the common terms test generally, 2) on the *North* hypothetical and 3) on the single source test. The preliminary hearing took 10 days and considered 16 lever arch files of documents but was not enough to put the issue to bed.

The complexity of the domestic test, the uncertainty as to how it should be applied, and whether Article 157 was directly effective in equal value claims continued for a further five years.

2018 – Enter Tesco …

Before *Asda* reached the SC in 2021, in February 2018, the Tesco litigation started and the issue of comparability was stayed pending the decision in *Asda* which at the time of issuing the first claims was already heading to the CA, with the SC on the horizon.

In 2019 the CA again found in favour of the Asda women, confirming that they could compare their terms and conditions with their chosen comparators in the distribution centres. However, LJ Underhill observed that it was not definitive whether Article 157 was directly effective in equal value claims. In any event, even if Article 157 was directly effective in equal value claims (which was denied by Tesco), Tesco also denied that it was a single source, pointing to a complex patchwork of distribution centres to assert a lack of control over the setting of pay – this meant, from Tesco's perspective at least, that the ability of its female staff to rely on the more simple EU test for comparability was far from secure.

So in 2019 with the domestic battle continuing and the UK's imminent departure from the European Union, the parties applied, on a joint basis, for a preliminary ruling from the CJEU.

Two questions were posed:

1. is Article 157 of the TFEU directly effective in claims made on the basis that claimants are performing work of equal value to their comparators?
   and
2. if the answer to question one is no, is the single source test for comparability in Article 157 distinct from the question of equal value, and if so, does that test have direct effect?

But, before the CJEU could provide its answer *Asda* proceeded to the SC.

5 Para 15-18; see also *Allonby v Accrington and Rossendale College* C-256/01 [2004] ICR 1327, para 45-46

6 *Defrenne v Sabena* (No.2) Case 43/74

2019 – Enter Morrisons …

The women working in Morrisons supermarkets began their mass equal value claim in 2019 and comparability was a live issue.

2021 – A vintage year

March 2021: Supreme Court decision on Asda

As discussed in the July 2021 edition of *Briefings*, the SC, despite hearing arguments on the domestic and EU positions, considered only the domestic provisions in its judgment. This may have reflected a desire to build a strong set of equal pay laws independent of EU law or perhaps, knowing that the CJEU reference was being decided without a hearing, the court was confident that the direct effect of Article 157 in equal value claims would be put beyond doubt.

Lady Arden was clear – '*claimants who bring equal pay claims must overcome a number of hurdles*'; she agreed with the lower courts that comparability was satisfied and that the common terms requirement is '*only a threshold test*', saying that a line-by-line comparison of terms was unnecessary, and instead, only a broad comparison was required. Applying the *North* hypothetical to the facts in *Asda*, the simple question to be asked was: if (however unfeasibly) distribution workers were employed in distribution jobs in stores, would they retain their distribution terms?

Lady Arden held the answer to this question was yes, if transferred to the stores the comparators would retain their distribution terms.

If the answer to this question is no, and the comparator's terms (i.e. pay) are tied to their location, so upon transfer they would acquire the store-based pay, then they are not common terms, and the comparator cannot be relied on by the claimant.

In her judgment Lady Arden criticised the substantial amount of evidence relied upon by the parties which caused the proceedings to become '*markedly over-complicated*'. She stated that the common terms requirement is a '*threshold test with a limited function … to weed out comparators who cannot be used because the differences between them and the claimants are based on geographical factors, and possibly also historical factors*'. Cases where the threshold test cannot be met are likely to be '*exceptional*'.

While cases in which the claimant and the comparator are governed by the same collective agreement are the paradigm examples, it is not the only situation in which common terms will apply. In circumstances where the claimants and comparators work at different establishments and it is not clear that the comparators' terms apply to work at that establishment, the comparability can simply be answered by applying the *North* hypothetical question.

Lady Arden instructed tribunals not to countenance prolonged enquires at the threshold stage. She reminded employers of the simplicity of the *North* hypothetical and reassured them that they will have ample opportunity to show that pay disparities are justified after the claimants' work has been equally evaluated, providing of course that it has a genuine material factor defence – and made clear these things are not to be considered when determining the initial question of comparability.

June 2021: CJEU decision on Tesco

Following swiftly behind *Asda*, the CJEU judgment confirmed that Article 157 must be interpreted as having direct effect in equal value proceedings.

It held that Article 157 imposes, '*clearly and precisely*', an obligation to ensure that the principle of equal pay for male and female workers is applied and is mandatory as regards both 'equal work' and 'work of equal value' – it is a principal foundation of the European Union[7].

Furthermore, despite it not being a question for determination, the CJEU went on to consider single source. Notably, it held that Tesco appeared to constitute, in its capacity as employer, a single source pursuant to Article 157; a question for the referring tribunal to determine.

September 2021 – weaving the golden threads into a golden rope

September 2021: ET decision on Morrisons

In September 2021, Employment Judge Davies at Leeds Employment Tribunal, presided over a short preliminary hearing in *Morrisons* on the issue of comparability. She provided a clear, unambiguous judgment. Taking on board Lady Arden's case management guidance in *Asda*, the judgment strips back decades of protracted and costly arguments and determines what is necessary for claimants to cross the comparability threshold.

EJ Davies found that Lady Arden had provided '*clear and authoritative guidance on the proper approach'* to be applied, noting her words that '*the time had come to apply the equal pay provisions of the Equality Act 2010 "with confidence and unswervingly according to their terms, with Parliament's purpose clearly in mind"*'.

In the space of a page, EJ Davies succinctly and coherently summarised the preceding case law. In applying this to the facts in *Morrisons* she held that the common terms requirement was met. In reviewing

7 *Defrenne v Sabenna* Case 149/77 [1978] 3 CMLR 312, paras 26-27

distribution centre 'site packs', prepared in advance of annual pay negotiations and including information on general market factors, she held that they didn't support Morrisons' contention that specific localised demand or public transport accessibility were issues which affected the negotiations or influenced the outcome of the logistic workers' terms and conditions.

EJ Davies also went on to consider the EU single source test. In resolving a dispute between the parties as to whether the *Tesco* CJEU decision was binding on them, she had regard to the *Asda* EAT decision which held that that Article 157 was directly effective in equal value claims, and that under s6 European Union (Withdrawal) Act 2018, the tribunal may have regard to the *Tesco* judgment. In doing so, she stated that had she not already held that the common terms required was met, she '*would have had no hesitation in finding that [Morrisons] was a single source*' which could restore equal treatment. The fact that collective bargaining took place at a regional level was distinguished from the case of *Department for Environment, Food and Rural Affairs v Robertson* [2005] ICR 750, where the collective agreements were underpinned by legislative delegation, while in Morrisions, responsibility was merely delegated for its '*internal affairs*'.

Conclusion

The approach applied in *Morrisons* to determining this threshold test is very welcome and we must thank Mesdames Leverton, Smith, North, Brierley and Element – all the women who have gone before, for it was they who laid the groundwork to ensure that the legal right to have your role compared to your chosen comparator's in a cross-establishment case is not only meaningful, but actually accessible and can be dealt with as a routine preliminary issue.

This is hugely beneficial for the lone, individual claimant – who does not have the support and backing of a class action.

It remains to be seen whether Morrisons will appeal – in some respects it seems unlikely, but for the first time, now that commons terms as a test is settled and now that Article 157 is beyond doubt directly effective in equal value cases – the air has been cleared, revealing the genuine fighting ground of geographical and/or historical differences and how far an employer might be able to argue that it is not a single source.

Our view is that employers will need to think very carefully as there is a great deal of overlap in the arguments that are likely to be advanced to try to defeat comparability, equal work and show a material factor defence. Employers and their advisors will have to carefully consider when those arguments are likely to be most effective. Frontloading the arguments at the comparability stage has the advantage, from the respondent's perspective, that it might knock out the whole litigation, and from the claimant's perspective, now that the test is a low bar, should it be contested, they will get that rarest and most valuable of things in equal pay litigation – comprehensive disclosure at an early stage. When considering this issue employers will do well to remember that clever legal arguments may serve to delay mass equal pay claims, but these rarely defeat the purpose of legislation and we suspect that weak arguments on comparability will be met with applications for costs and deposit orders.

Compulsory Covid-19 vaccination in the workplace: a moral maze?

Changez Khan, barrister at No.5 Chambers, considers whether a compulsory Covid-19 vaccination policy in the workplace would fall foul of the Equality Act 2010 (EA).

Introduction

Should an employer be allowed to insist that its employees get a Covid-19 vaccine? There may properly be objections based on autonomy and human rights, but what is the discrimination law angle in all this? These questions are no longer simply academic.

For those employed in the care home sector reality bites on November 11, 2021, when the Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 (the Regulations) enter into force. If by that date an employee is unvaccinated and cannot provide an exemption, they will be unable to work indoors. In short, they will face either some form of re-deployment or unemployment. It is predicted that approximately 7% of the workforce in the care home sector, or 40,000 people, will refuse vaccination and so find themselves in this position. Refusing to get vaccinated could in very real terms spell the end of their chosen career.

The Regulations are currently subject to a judicial review challenge by two care workers. Amongst other things, they argue that the Regulations interfere with a person's right to 'bodily integrity' and disproportionately discriminate against women and workers from a Black/Caribbean background contrary to Articles 8 and 14 of the European Convention on Human Rights.

The issue is also becoming real for other frontline health and care workers. The government has been consulting on whether to legislate a similar mandatory scheme across frontline care as a whole. Its consultation closed on October 22, 2021. We wait to see what happens next.

Meanwhile, in other countries, public and private sector employers alike have already adopted a firm stance on compulsory vaccination. Thus, in France, some 3,000 medical staff were suspended (without pay) in September 2021 for failing to get vaccinated. In the USA, some public employers and many private companies have already imposed a no-jab, no-job policy on their workforces.

What is the potential for discrimination?

Any workplace policy which discriminates against unvaccinated employees has the potential to engage discrimination law. This is because, for some people, the decision not to vaccinate is linked to a protected characteristic under s4 EA. Consider three examples:

1. The disabled employee

X refuses to get vaccinated because he is worried about the potential side-effects of the vaccines. He has a blood disorder and has read about the risk of blood clots linked to the AstraZeneca vaccine. His doctors have tried to persuade him to take the Pfizer vaccine instead but he does not trust them. Through his own research, X has read that the Pfizer dose itself may be linked to a risk of myocarditis (inflammation of the heart muscle). He is uncomfortable with that risk because he has a history of cardiac problems. Can an employer dismiss X, alter his workplace duties or suspend him because he is unvaccinated?

The EA is in play. The issue is that X's underlying medical conditions (a blood disorder, cardiac problems) may well amount to 'disabilities' under s6. His reasons for refusing the vaccination are directly linked to those disabilities. Under s15, the employer is arguably prohibited from treating X unfavourably because of his unvaccinated status because it 'arises from' his disabilities. Any action the employer does take against X may be prima facie unlawful discrimination, unless it can show it is a '*proportionate means of achieving a legitimate aim*' (see further below).

2. The pregnant employee

Y is pregnant. She declines the vaccine because she is worried that it may affect her unborn child. Y's employer points her to the current government advice. It is contained in a handbook for health professionals entitled '*Immunisation against Infectious Disease*', also known as the Green Book: https://www.gov.uk/government/publications/covid-19-the-green-book-chapter-14a. The Green Book says that Covid-19 vaccinations pose 'no known risk' to pregnant mothers.

However, Y remains sceptical. The only reason there is no known risk is because, according to the Green Book, there have been no large clinical trials involving pregnant women (Chapter 14a, p.23).

Again, the EA is probably in play. Y's unvaccinated status is directly linked to her pregnancy. If her employer treats her unfavourably (for example, by dismissing her), then this is arguably *'because of her pregnancy'* and so unlawful under s18.

3. The employee with an ethical anti-vaxx belief

Z rejects vaccination as a matter of principle. She objects to the fact that some of the vaccines had involved experimenting on aborted foetal tissue during their testing and development phase. She refuses to have anything to do with them given her deeply-held views on abortion. Can her employer treat her less favourably because she is unvaccinated?

The issue here is that Z's views could qualify as a protected philosophical belief under s10 EA. They probably would meet the five criteria laid down in *Grainger plc v Nicholson* [2010] IRLR 4. If an employer dismisses Z because of her belief, then this is arguably direct discrimination under s13 EA.

Is the real issue 'protected characteristic' or risk aversion?

Pausing there, one could question whether these examples are actually EA cases at all? In the case of X (the disabled employee) and Y (the pregnant employee), to what extent is the protected characteristic actually in play?

For example, it might be argued that X's disability is not the *real* reason he is unvaccinated. His doctors have advised him to get the vaccine notwithstanding his disability. On one view, his refusal to follow his own doctors' advice is unscientific and irrational. Is that really something that 'arises from' his disability within the meaning of s15 EA? Is there a sufficient connection to his disability?

Similarly, in Y's case, she may consider that she is acting out of concern for her unborn child – but what if she too is acting against medical advice? Many expectant mothers are following medical advice and are taking the Covid-19 vaccine. Why should Y's case be different? Could it be said that her decision not to vaccinate is not so much related to her pregnancy, but rather to her aversion to risk?

Of course, the problem here is that people are entitled to be sceptical about public health advice. Some will point to the current Infected Blood Inquiry[1] into the government's handling of donated blood as just one example of where medical experts arguably got it wrong. Many people question whether the current Covid-19 vaccines are safe and whether they have been sufficiently tested. It is their right to question, challenge and reject medical advice. But should they have to pay the price of losing their jobs? Surely, one of the purposes of discrimination law is to protect those who find themselves in the minority. Can their refusal to vaccinate be genuinely separated from their protected characteristic (disability; pregnancy)?

By contrast, the case of the employee with an anti-vaxx belief (Z) engages a protected characteristic under the EA head-on. If an employer wishes to push through compulsory vaccination it must identify a legal defence.

Defences to discrimination claims brought by employees

Employers who wish to treat their unvaccinated staff differently must check that they are operating within the parameters of the law. The EA does not make non-discrimination an absolute principle and there are exceptions. The problem, however, is that they may not necessarily be sufficiently flexible to deal with the issue of Covid-19 vaccination.

Let's return to the three examples:

1. The disabled employee

X is refusing to get vaccinated because he fears the vaccine may have an adverse impact on his underlying disability. His employer has a strict no-jab, no-job policy and dismisses him. X brings a claim under s15 EA. He argues that his employer treated him unfavourably because of something arising in consequence of his disability. The employer seeks to defend itself under s15(1)(b) itself by arguing that its vaccination policy was a proportionate means of achieving a legitimate aim. It will be for the employer: (i) to identify the legitimate aim; and (ii) to show that dismissing X was a proportionate means of achieving this aim.

What can qualify as a 'legitimate aim' under s15? It might be said that the employer wishes to protect X's vulnerable co-workers or to protect its vulnerable customers. However, could the concept of legitimate aim stretch further than those obvious examples? What if X's employer is in a sector where its business rivals boast a 'fully-vaccinated' service and it too wants to keep pace with the competition? That is a business aim, as opposed to a health-related aim – even so, is it not still a 'legitimate' one?

1 This is an independent public statutory Inquiry established to examine the circumstances in which men, women and children treated by national Health Services in the UK were given infected blood and infected blood products, in particular since 1970.

On the other hand, X's employer may impose a no-jab, no-job policy simply because it takes a strong moral or political stance on vaccinations. Perhaps it considers that vaccination is '*the right thing to do*' for society. Would that count as a 'legitimate' aim? The problem here is that having your own viewpoint on vaccination is one thing; imposing it upon your staff is quite another.

Even once an employer has shown a legitimate aim, it must still demonstrate that any vaccination policy it adopts is 'proportionate'. For example, if the 'legitimate aim' is to minimise the spread of Covid-19 amongst staff, then the employer must show how its policy achieves this. No doubt an employment tribunal would want to test the evidence. A well-advised employer would produce a risk assessment with input from a health and safety consultant. This would consider, for example: the size of the workplace; the number of staff present at any given time; the degree of close contact working; the number of staff who have already been vaccinated (voluntarily); and the use of other control methods to reduce the risk of transmission, such as social distancing, PPE and regular testing.

Once that evidence is in place, the question becomes: what marginal *additional* gain is there to be achieved in making vaccination mandatory? If there are already other control measures in place (social distancing, PPE, regular testing, a high level of voluntary vaccination) then is it proportionate to *insist* on vaccination for the remaining few? Is the risk already adequately controlled? Is the marginal extra gain proportionate to the sanction of singling out X for dismissal?

2. The pregnant employee

Y, who is pregnant, was dismissed because she refused to get vaccinated. She brings a claim for pregnancy discrimination under s18 EA. Does the employer have a defence?

The grounds for defence here are even narrower. Schedule 22, paragraph 2 of the EA would permit the employer to discriminate only if it was 'required to' dismiss Z in order to comply with a legal provision concerning the protection of women at work. Z's employer would not be able to rely upon a generic health-and-safety justification. For example, an argument that vaccination protects *all* staff is not enough. A defence under schedule 22 works only if the employer is able to identify a rule whose purpose is to protect *women's* health specifically, whether in relation to pregnancy, maternity or '*risks specifically affecting women*': see schedule 22, paragraph 2(2).

3. The employee with an anti-vaxx ethical belief

Z, who holds an ethical anti-vaxx belief, is dismissed for her failure to vaccinate. She brings a claim for direct discrimination under s13. Does her employer have a defence?

Schedule 9 of the EA offers a faint glimmer of a defence, but the employer must clear a double hurdle. Not only must it show that dismissing Z was a '*proportionate means of achieving a legitimate aim*' (see above); it must also somehow show that there was an 'occupational requirement' for Z to have a particular protected characteristic. This seems fraught with problems.

Could it really be said that having an 'anti'-anti-vaxx belief is in itself a 'protected characteristic'? Is there such a thing? Moreover, could it be said that such a belief was objectively necessary to carry out the particular job? Trying to argue a defence under Schedule 9 seems rather like forcing a square peg into a round hole.

Government intervention

By contrast, schedule 22 EA provides an employer with a much surer footing. Where an employer dismisses an unvaccinated employee, it will be a defence for it to show that dismissal is something that it 'must do' pursuant to the requirement of 'an enactment'. Currently, that covers care home employers. This is perhaps the only bright-line exception which gives employers the necessary legal comfort to introduce a mandatory workplace vacation policy. It may explain why the government feels the need to intervene directly with new legislation.

Concluding thoughts

Ever since it has appeared Covid-19 has presented a dynamic and ever-shifting problem. The medical understanding, the government advice and the legal landscape are liable to change at any moment. That may explain why most employers in this jurisdiction are very cautious when it comes to introducing workplace vaccination policies. Perhaps the highest risk option for an employer is a blunt, one-size-fits-all approach to vaccination. Such a policy will naturally overlook employees whose refusal to vaccinate is linked to an underlying protected characteristic under the EA. Unless and until new legislation is introduced, an employer must tread carefully. Before taking action against an unvaccinated employee, it must properly explore *why* they are unvaccinated. It must then consider whether presenting the employee with an ultimatum is a course of action which it is prepared to defend in litigation.

A silent revolution?

John Horan, barrister at Cloisters Chambers, examines some important but underreported changes to the Civil Procedure Rules that will improve disabled and vulnerable people's experiences in the courts.*

On January 28, 2021, the government made a statutory instrument called the Civil Procedure (Amendment) Rules 2021 SI No 117. Among other things, these provisions, which come into force on April 6, 2021, amend the Civil Procedure Rules 1998 (CPR) so as to add the rights of vulnerable and disabled people to the overriding objective (Part 1).

The changes were not announced by the Judicial Press Office, nor were any group of disabled people or those who love them – for example, the Equality and Human Rights Commission or the Law Centres Network – informed that they were coming. This is extraordinary as, for the first time in history, the procedure in any civil forum in the UK courts system must expressly take into account the rights of vulnerable and disabled people, identifying their rights as part of the 'overriding objective' of every case.

The amendments action the report entitled *Vulnerable witnesses and parties within civil proceedings: current position and recommendations for change* (Civil Justice Council, February 2020) (the *Report*). The central requirement is that (from April 6, 2021) judges, in each and every case before them and at each and every stage, make sure that parties can '*participate fully in proceedings*' and can '*give their best evidence*' (CPR 1.1(2)(a) as amended).

The amended rule directs to a practice direction (PD), CPR PD 1A,[1] to determine '*how the court is to give effect to the overriding objective in relation to vulnerable parties or witnesses*' (new CPR 1.6).

In addition, rules that pertain to costs now say that, exercising their cost discretion, judges are to consider '*any additional work undertaken or expense incurred due to the vulnerability of a party or any witness*' (new CPR 44.3(5)(f)).

Under CPR PD 1A para 1, judges are reminded that:

> *The overriding objective requires that, in order to deal with a case justly, the court should ensure, so far as practicable, that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence. The parties are required to help the court to further the overriding objective at all stages of civil proceedings.*

It is pointed out (in para 2) that:

> *Vulnerability of a party or witness may impede participation and also diminish the quality of evidence. The court should take all proportionate measures to address these issues in every case.*

It is clear and expressly true in all cases and at all stages of cases. The PD goes on to say:

> *Factors which may cause vulnerability in a party or witness include (but are not limited to) –*
> *i. Age, immaturity or lack of understanding;*
> *ii. Communication or language difficulties (including literacy);*
> *iii. Physical disability or impairment, or health condition;*
> *iv. Mental health condition or significant impairment of any aspect of their intelligence or social functioning (including learning difficulties);*
> *v. The impact on them of the subject matter of, or facts relevant to, the case (an example being having witnessed a traumatic event relating to the case);*
> *vi. Their relationship with a party or witness (examples being sexual assault, domestic abuse or intimidation (actual or perceived));*
> *vii. Social, domestic or cultural circumstances.* [para 4]

Looked at as a whole, the amendments cover both physical and mental disability, age and immaturity, parties or witnesses who have difficulties with English (whether orally or in written form, whatever the reason), parties or witnesses who have difficulties with other people involved with the case (be it sexual assault, domestic abuse or other intimidation), and the broad heading of social, domestic or cultural circumstances.

1 *See 127th update – practice direction amendments*, Courts and Tribunals Judiciary, February 1, 2021, Schedule 1

* This article is reprinted with kind permission of the author. It was first published in the *Legal Action Journal* in March 2021.

HHJ Cotter QC, who compiled the *Report*, while noting with surprise that no data on the number of vulnerable witnesses or parties appearing before the civil courts existed, pointed out that 25 per cent of individual claimants who answered a civil court user survey indicated that they considered themselves to have a physical or mental condition (para 17). The number of parties and witnesses who are affected by this change in the rules will undoubtedly be enormous.

At CPR PD 1A para 5, judges are told:

> *When considering whether a factor may adversely affect the ability of a party or witness to participate in proceedings and/or give evidence, the court should consider their ability to –*
> *a) understand the proceedings and their role in them;*
> *b) express themselves throughout the proceedings;*
> *c) put their evidence before the court;*
> *d) respond to or comply with any request of the court, or do so in a timely manner;*
> *e) instruct their representative/s (if any) before, during and after the hearing; and*
> *f) attend any hearing.*

The widest scope of interactions is expressly rehearsed for the court to consider, including instructions to representatives at any stage. It is clear that the PD requires that judges now look at aspects of the proceedings and identify vulnerability at the earliest possible stage.

CPR PD 1A para 7 says:

> *If the court decides that a party's or witness's ability to participate fully and/or give best evidence is likely to be diminished by reason of vulnerability, the court may identify the nature of the vulnerability in an order and may order appropriate provisions to be made to further the overriding objective.*

At para 8, it continues:

> *Subject to the nature of any vulnerability having been identified and appropriate provisions having been made, the court should consider ordering 'ground rules' before a vulnerable witness is to give evidence, to determine what directions are necessary in relation to the nature and extent of that evidence, the conduct of the advocates and/or the parties in respect of the evidence of that person, and/or any necessary support to be put in place for that person.*

For the first time, a nod is given, albeit implicitly, to the Judicial College's *Equal treatment bench book* (ETBB), a new edition of which was published in February 2021, and which, in past years, has been notorious for not having been read by a goodly number of judges themselves. 'Ground rules', of course, refers to the ground rules hearings that the ETBB says should be done in the vast majority of cases involving children and vulnerable adults (see in particular chapter 2). Judges are told (in CPR PD 1A para 5, as mentioned above) that they should try to identify vulnerability at the earliest possible stage and then consider whether or not a party or witness is adversely affected by their vulnerability in doing their part in the case.

Implications for disabled and other vulnerable adults

There is no doubt that the impact of the amended rules on all aspects of civil litigation will be huge. In particular, there is no doubt that every single judge in every jurisdiction of the CPR will have to consider the needs of vulnerable people – which includes physically and mentally disabled people and also victims of sexual and domestic abuse – at each stage in each case, as part of the overriding objective.

The wording in the addition to CPR 44.3(5) could not be wider, requiring judges to consider the cost implications of 'any' additional work undertaken or expense incurred due to the vulnerability of the party/witness. This presumably includes extra time in conference, extraordinary travel expenses if the physical disability means that the instructions must be taken in the party's home, etc. – the list is endless and will depend on the particular circumstances of each case.

It is clear that the ETBB is a powerful guidance tool, teaching judges how to do the nuts and bolts of the ground rules hearing (albeit that 'ground rules *hearing*' is not a term which the CPR adopt). The need for early ground rules hearings is obvious. Not surprisingly, nothing has materially changed in terms of what disabled people and their lawyers must do, although the legal framework within which that sits is much clearer due to the new amendments.

The factors that judges are to consider regarding disabled or other vulnerable people with respect to:

a) a request by the court that they do some action; and
b) their ability to respond to or comply with such a request, at all or in a timely manner (see CPR PD 1A para 5),

also have profound implications for any sanction that the court may be asked to consider for non-compliance. The court will classically impose sanctions that lead to serious consequences – and which the party may apply

to the court for relief from. CPR Part 3 provides for the court's general powers of case management; under CPR 3.4(2)(c), the court can strike out a claim or defence, including for failure to comply with a rule, PD or court order. From April 6, judges are required, in every case, to consider the disabled individual's ability to comply with such an order. This will surely have an effect on a judge's discretion not to do anything to 'punish' for any default. It will also affect the discretion to grant relief from sanctions for disabled people. This is in line with the UN Convention on the Rights of Persons with Disabilities (UNCRPD), which requires the UK government to '*guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds*' (Article 5(2)) and to '*ensure effective access to justice for persons with disabilities on an equal basis with others*' (Article 13(1)).

This is new law. It must be understood as the judiciary trying, at long last, to actually bring about the changes that the UNCRPD has stipulated. This has consequences not only politically, but also on the interpretation of the new rules themselves: in my view, they must be interpreted purposively, with the purpose being, in part, to comply with the UNCRPD. That was the reason that HHJ Cotter QC gave for rule amendments[2] and is obviously what the drafter intended when they chose the words that they did.

The amendments are not perfect:

- They leave out of the equation any individuals involved in a case who are not parties or witnesses. These people – including disabled barristers, solicitors, Law Centre workers, court clerks and judges – also have rights that qualify for protection under UNCPRD Article 13. The scandalously low numbers of disabled solicitors, barristers and judges reflect poorly on the UK's human rights record. Something must be done about their plight.

- The international guidance over actioning Article 13 that the UN Committee on the Rights of Persons with Disabilities put out last year (*International principles and guidelines on access to justice for persons with disabilities*, August 2020) is still to be complied with in many key areas. There are still areas where effective justice requires disabled people to have access to lawyers; the current legal aid scheme is woefully inadequate in terms of meeting this need. This must be addressed, even if that is a decision to be made here by parliament.

- There was no consultation whatsoever about this change in the law with disabled people and their relevant organisations – none. This is clearly a breach of UNCRPD Article 4(3) and is yet to be addressed.

However, the procedural amendments offer protection for disabled people who want to bring any kind of claim in whatever jurisdiction and about any subject matter. It is a truly historic event – although the authors of the new rules apparently don't think so.

2 See para 88 of the *Report*

CJEU gives with one hand but takes with the other on refusal of Universal Credit to applicant with limited leave to remain

CG v Department for Communities in Northern Ireland C-709/20; July 15, 2021

Facts

CG moved to Northern Ireland in 2018 with her then partner and children. In June 2020, she was granted an immigration status under the UK's EU Settlement Scheme (EUSS). Broadly speaking, the EUSS provides for two rights of residence for EU nationals living in the UK at the time the UK left the EU. One is known as settled status (SS) and can be acquired by those who have lived in the UK for five years or more at the time the UK seceded from the EU on December 31, 2020. Persons with SS have indefinite leave to remain. The other is known as pre-settled status (PSS), which can be acquired by those who lived in the UK for less than 5 years at the time the UK seceded from the EU. Persons with PSS have limited leave to remain and CG had been granted PSS.

CG then applied for Universal Credit (UC). She was refused an award on the basis that she did not have the requisite immigration status for the purposes of the Universal Credit Regulations (Northern Ireland) 2016, as amended by the Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations (Northern Ireland) 2019 (the 2016 Regulations). Regulation 9(3)(d)(i) of the 2016 Regulations explicitly excludes those with PSS, such as CG, from being deemed habitually resident in the UK. Without this status, CG was not entitled to UC and so this provision was referred for a preliminary ruling so as to ask the CJEU to determine whether it was unlawfully discriminatory.

Importantly, the provision in question is analogous to the equivalent that is applicable in England and Wales, which has been the subject of an appeal to the England and Wales Court of Appeal in the case of *Fratila & Anor v Secretary of State for Work and Pensions & Anor* [2020] EWCA Civ 1741; Briefing 981. For that reason, the decision in *CG* also has broader implications for those with PSS that live in the UK.

Court of Justice of the European Union

The questions referred

The CJEU initially determined procedural questions. Firstly, it found that it had jurisdiction to make preliminary rulings in relation to EU law as it applied in the UK until the end of the transition period [paras 48-49, 51]. Secondly, the court determined that it had jurisdiction to answer the questions referred because CG had exercised her right to move freely [paras 57-58]. In terms of the substantive issues, the court then outlined the justiciable questions referred to it by the Appeal Tribunal as asking:

1. whether Regulation 9(3)(d)(i) of the 2016 Regulations is directly or indirectly discriminatory contrary to Article 18 of the TFEU, and
2. if it is indirectly discriminatory, whether the provision's effect can be justified [paras 39, 52].

However, the court then went on to reformulate the first question insofar as it related to whether or not CG could avail herself of Article 18 [paras 61-66, 72]. Consequently, whilst the court observed that CG could '*in principle*' rely on Article 18's prohibition of discrimination on the basis of nationality, it went on to answer a different question entirely [para 64]. For that reason the second question went unanswered altogether.

The question answered

This reformulation led to a restatement of the fact that Article 18 has been interpreted as applying only to circumstances in which the TFEU does not provide for rules on non-discrimination [para 65, citing C181/19 *Jobcenter Krefeld*]. In short, Article 18 would not be engaged if there was another source of EU law providing for non-discrimination in relation to EU nationals exercising their rights to move and reside within another EU member state. The corollary of this was that the court determined that there *was* another applicable source in this context: Article 24(1) of Directive 2004/38 [para 66]. Consequently, UC was categorised as social assistance for the purposes of Article 24(2) of the Directive instead of applying Article 18 of the TFEU [para 71].

Crucially, whilst the Directive provides for non-discrimination of EU nationals, it is caveated with the need for EU nationals to comply with the terms of the Directive if they wish to be treated equally to nationals of the host member state [para 75]. It was here that CG's claim failed because:

a) she had lived in Northern Ireland for less than 5 years (but more than 3 months),
b) was economically inactive,
c) otherwise lacked sufficient resources, and
d) under Article 7 of the Directive, member states can withhold welfare benefits to such EU nationals [para 76].

This meant that the UK could refuse to pay CG the benefit because she would be an *'unreasonable burden on the social assistance system of the United Kingdom'* and thus could not rely on the principle of non-discrimination provided for by Article 24 [para 80].

Charter of Fundamental Rights of the European Union

Notwithstanding this, the CJEU then went on to find that Charter of Fundamental Rights of the European Union still applied to CG [para 88]. This was premised on the fact that Article 1 of the Charter required the UK to ensure CG lived in dignified conditions, which recognised that CG was an EU national in a vulnerable situation who had exercised free movement rights and had been granted a right to reside in the UK [para 89].

Article 7 of the Charter – right to respect for private and family life – was also deemed to apply, as was Article 24(2) – the need to consider the best interests of children. In practice, this analysis saw the court determine that social assistance such as UC can only be refused if the UK has ensured that this refusal does not:

> *expose the citizen concerned and the children for which he or she is responsible to an actual and current risk of violation of their fundamental rights as enshrined in Articles 1, 7 and 24 of the Charter.* [para 92]

Practical implications

In determining that Directive 2004/38 applied so as to render the UC Regulations in Northern Ireland lawful, the CJEU departed from the CA's position in *Fratila.* In *Fratila,* the court found that PSS gave rise to a freestanding right of residence which is not rooted in the Directive (albeit as this pertained to the equivalent provision applicable in England and Wales). This then led the CA to address Article 18 TFEU's prohibition of discrimination, which does not have the same caveats as Article 24 of the Directive. Precluding entitlement to UC to those with PSS was found to be unlawful, and Regulation 9(3)(c)(i) of the UC Regulations 2013 was quashed insofar as it applied in England and Wales. However, that decision has been stayed because the SC granted permission for the Secretary of State for Work and Pensions to appeal. That appeal has been adjourned pending the outcome of *CG.*

Had the court adopted the approach in *Fratila,* it would have distinguished *Trojani v Centre Public d'Aide Sociale de Bruxelles* [2004] 3 CMLR 38 from *Krefeld* so as to apply the former and thus focus on residence derived from national law as opposed to EU law. This distinction would have precluded, or in the least limited, the applicability of the Directive. In turn this approach would have narrowed the arguments in favour of limiting UC to those with PSS. However, in essence the CJEU in *CG* removed the need to evaluate the source of an EU national's residence rights and focused instead on whether CG met the requirements of Article 7 of the Directive, but did so without overruling *Trojani* (indeed the CJEU's approach to this question replicated that argued by the Secretary of State for Work and Pensions in *Fratila* at first instance and on appeal).

It is easy to speculate and posit that this approach is one alive to political sensitives in a post-Brexit UK, and even a post-Brexit EU. That is not the preserve of this article. However, undoubtedly the decision is a curious and creative one. Whilst *CG* has ultimately determined that the UK's refusal to award UC to those with PSS is lawful, it has also provided for a mechanism to soften the impact of this decision. That is, by making clear that decision-makers must have regard to Articles 1, 7 and 24 of the Charter before refusing UC, there is hope yet for claimants with PSS who applied before December 31, 2020.

In practice, this places the SC in an invidious position where the outstanding *Fratila* appeal is concerned. Subject to creative thinking, on any reading of *CG,* it seems that the CA's decision to quash Regulation 9(3)(c)(i) is liable to be overturned because it focused on Article 18 as opposed to the Directive; the SC remains bound by CJEU decisions that address EU law as it applied in the UK prior to December 31, 2020. However, arguments in relation to the Charter were not made in *Fratila* but clearly formed the basis of *CG's* backstop where there was a risk of violating a claimant's dignity/right to respect for family and/or interests of a claimant's children. Whether the SC will entertain arguments addressing the Charter, as they apply to that appeal, will be crucial to claimants with PSS who claimed for UC before December 31, 2020.

It is of note that according to s5(4) of the European Union (Withdrawal) Act 2018, the Charter does not apply in the UK after December 31, 2020. For that reason, even if claimants who have applied for UC before that date can avail themselves of arguments under the Charter so as to circumvent a refusal due to PSS, those who apply after that date will not be afforded the same protection.

Joshua Yetman
7BR Chambers

Two-stage burden of proof test confirmed

Royal Mail Group Ltd v Efobi [2021] UKSC33; July 23, 2021

Implications for practitioners

This is an important decision concerning the burden of proof. It reaffirms the two-stage test applicable in discrimination cases and identifies the factors which an ET should take into account when considering whether, and if so, what inferences could properly be drawn from the employer's failure to call the relevant decision-maker.

Facts

Mr Ike Efobi, (IE), who was employed by the Royal Mail (RM) as a postman, was of Nigerian ethnic origin and had university qualifications in computing. Wishing to put his qualifications to good use, IE applied for over 30 IT-related job vacancies, each being unsuccessful. He complained that RM subjected him to race discrimination.

Employment Tribunal

IE brought claims against RM including direct race discrimination, victimisation and harassment under ss13, 26 and 27 of the Equality Act 2010 (EA). The ET upheld IE's complaint of victimisation and one allegation of harassment related to race, but dismissed his direct discrimination claim concerning his unsuccessful job applications. RM did not call the relevant decision-makers to explain its reasons for rejecting IE's applications for the various vacancies. Instead, it called two managers who sought to explain the likely reasoning processes of the recruiters, but could not shed any light on the actual reasons for the relevant decisions. IE appealed to the EAT.

Employment Appeal Tribunal

The main issue raised on appeal concerned the correct interpretation of the burden of proof in discrimination cases and the effect of the new wording adopted in s136(2) EA 2010, i.e., whether the change from *'Where … the complainant proves facts …'* (s54A Race Relations Act 1976) (RRA) to *'If there are facts …'* in s136(2) EA substantively changed the law. The EAT allowed the appeal on two grounds:

- the ET had wrongly interpreted s136(2) as imposing an initial burden of proof on the claimant;
- the ET had in any event erred in law in its assessment of the evidence.

The EAT considered that s136(2) did not put any burden on a claimant. Instead, it required the ET to consider all the evidence, from all sources, at the end of the hearing so as to decide whether or not *'there were facts'* from which inferences could be reasonably drawn in the absence of an adequate explanation. Laing J ordered that the claim be remitted for rehearing.

Court of Appeal

RM appealed to the CA[1]. In the meantime, the CA in *Ayodele v Citylink Ltd* [2018] ICR 748 had overruled Laing J's decision in the EAT. The CA (LJ Singh giving lead judgment with whom LJ Davis and LJ Beatson agreed) held that the burden of proof on the claimant at the first stage of the enquiry in discrimination cases had not been removed by s136 EA. Before an ET could start making an assessment, the claimant had to prove a prima facie case, otherwise there was nothing for the respondent to answer and nothing for the tribunal to assess. As far as the CA was concerned, the wording difference between s136 and its predecessor provisions should be regarded as a legislative *'tidying up'* exercise and not intended to change the law in substance.

Accordingly, the CA in the instant case was bound by its previous decision in *Ayodele* and held, reversing the EAT decision (LJ Elias, with whom Underhill and Baker LJJ agreed), that the ET had not made any error of law in its analysis of the evidence.

Supreme Court

The SC confirmed (expressly approving LJ Sing's observations in *Ayodele*) the two-stage process for analysing complaints of discrimination remained good law. Lord Leggatt in a unanimous judgment acknowledged the change in wording in s136(2) created the possibility of misunderstanding that there was no longer any burden of proof on a claimant. However, there was nothing in the background to the EA which supported the suggestion that this was or might have been a goal of the legislation.

The second issue before the SC was whether the ET erred in law in not drawing any adverse inference from the fact that the employer adduced no evidence from the relevant decision-makers who dealt with IE's job applications. In rejecting IE's contention that the

1 *Royal Mail Group Limited v Efobi* [2019] EWCA Civ 18; Briefing 901

ET erred in failing to draw adverse inferences from RM's omission to call the actual decision-makers, Lord Leggatt said:

> *… tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances.* [para 41]

Relevant considerations include:

- whether the witness was available to give evidence;
- what relevant evidence it was reasonable to expect that the witness would have been able to give;
- what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence; and
- the significance of those points in the context of the case as a whole.

Further, where it is said that an adverse inference ought to have been drawn from a particular matter – here the absence of evidence from the decision-makers – the first step must be to identify the precise inference(s) which should have been drawn.

However, there could be no reasonable expectation that a respondent would call someone as a witness in case that person could recall information that could potentially advance the claimant's claim. As far as Lord Leggatt was concerned, there was no reason why the ET should have inferred that, by not calling as witnesses any of the numerous individuals involved in making the various recruitment decisions, RM was seeking to withhold information about the successful candidates. The ET found that RM received thousands of applications in response to the jobs it advertised. Crucially, IE did not establish that the successful candidates were of a different race. He argued that the recruiters would have believed he was black of African origin from his surname and place of birth. However, IE could not prove that his town and country of birth was viewed or considered when processing his applications. Lord Leggatt concluded, applying the dicta by Lord Mummery LJ in *Madarassy v Nomura International plc* [2007] ICR 867 CA, that *'bare facts of difference in status and a difference in treatment without more is insufficient to shift the burden of proof'*.

Accordingly, SC upheld the ET's decision not to draw any adverse inferences in light of its primary findings of fact.

Comment

The SC decision reaffirmed the two-stage analysis disturbed by the EAT. The initial burden of proof is on the claimant to establish sufficient facts to shift the burden to the respondent. While difference in treatment and difference in status without more is insufficient to shift the burden, the *'something more'* required to create a prima facie case requiring an answer need not be a great deal. In some instances it may be furnished by the context in which the act has allegedly occurred (para 19 per LJ *Deman v The Commission for Equality and Human Rights* [2010] EWCA Civ 1279). If the claimant does not discharge that burden, their claim must fail. If such facts are proved, the burden moves to the respondent to provide a non-discriminatory explanation. The rationale for placing the burden on the employer at the second stage is that the relevant information about the reasons for treating the claimant less favourably than their comparator is usually in the employer's hands. A claimant may seek to draw inferences from outward conduct but cannot give any direct evidence about the employer's subjective motivation – not least since, as Lord Browne-Wilkinson observed in *Glasgow City Council v Zafar* [1997] 1 WLR 1659 at para 1664: *'those who discriminate … do not advertise their prejudices: indeed they may not even be aware of them'*.

Thus, practitioners need to be alive to any attempts to rely upon Lord Leggatt's comments about *'no reasonable expectation on an employer to call the relevant decision-maker(s)'* as a general proposition beyond the facts of the instant case. This would make direct discrimination harder to establish given the CA's emphasis on considering the subjective motivation, i.e., on ascertaining the mental processes of the relevant decision-maker(s) in *CLFIS (UK) Ltd v Reynolds* [2015] ICR 1010 CA; Briefing 749.

It is important to remember that IE did not establish the identity of the successful candidates, and therefore, could not establish a prima facie case of discrimination under stage one of the ET's analysis. Had he done so, then the failure to call the relevant decision-maker to explain RM's actions may have placed it in difficulty in proving that there was no racial discrimination. It is worth remembering that the partial reversal of the burden of proof in race discrimination complaints initially introduced by the Race Relations Act 1976 Amendment Regulations 2003 via s54A RRA (as implemented by s136 EA 2010) was in recognition of the difficulties complainants faced in proving what was going on in the mind of the putative discriminator.

David Stephenson
Barrister, Doughty Street Chambers
d.stephenson@doughtystreet.co.uk

Flexible approach to the margin of discretion in Article 14 discrimination cases

R (SC and others) v Secretary of State for Work and Pensions [2021] UKSC 26 ; July 9, 2021

Implications for practitioners

In this case the SC decided that legislation which limited child tax credit to two children was compatible with Article 14 European Convention on Human Rights (ECHR). The judgment is a detailed guide to Article 14 discrimination law, and will now be the leading authority in the area of welfare benefits. It was the unanimous judgment of seven justices, and over the course of 210 paragraphs involved a thorough examination of the case law, departing from previous cases in this field.

Facts

This was a challenge to the amendments made to s9 of the Tax Credits Act 2002 by s13 of the Welfare Reform and Work Act 2016, which limited child tax credit to two children in any one family. All the claimants had more than two children and sought declarations that the two-child limit was incompatible with their ECHR rights including Article 14 read with Article 8 and Article 1 of Protocol 1. They argued that the limitation was indirect sex discrimination against the claimants as women, and directly discriminated against the child claimants compared to adults whose benefits had not been reduced, or against children in smaller households. Rejecting the challenge, the SC found that the two-child limit was potentially indirectly discriminatory against women, and directly discriminatory against children in families with more than two children. However, that discrimination was justified.

Supreme Court

The key aspects of the SC's decision are as follows.

Margin of appreciation and 'MWRF'

Perhaps the most important aspect of the case is how it deals with the '*manifestly without reasonable foundation*' (MWRF) issue. The SC held that the intensity of the domestic courts' review, and the '*discretionary area of judgment*' afforded to the decision-maker, is a flexible and nuanced question which depends on a number of factors. Those factors include the following [see generally paras 100-159, with summaries at paras 115 and 142]:

- The nature of the ground of discrimination, in particular whether it is a suspect ground.
- The impact of the measure on the best interests of children [paras 158 and 203].
- The nature of the measure in question, for example whether it is a general measure of social or economic strategy, or whether it involves other contentious moral or political issues, such as national security or penal policy [paras 159-161 and 208].
- Whether the legislation challenged was bringing to an end positive discrimination which was applied to correct an historical inequality.
- The extent to which there is consensus or common ground on the issue between the laws of contracting states.

If parliament made a judgment on the issues that are relevant to the court's assessment, the court will be more inclined to accept parliament's decision. If the matters relevant to the compatibility of the measure with the ECHR, such as to discrimination under Article 14, were raised during the legislative process, whether in debate or otherwise, then a broader margin of discretion will be appropriate. If not, not [paras 180-183].

There is not a binary or mechanical rule that the judgment of the legislature in the field of welfare benefits and pensions will be respected unless it is manifestly without reasonable foundation. That context is a relevant factor, but it is only one factor which must be balanced against all of the other relevant considerations in the particular case, to decide how broad or narrow is the discretionary area of judgment.

As Lord Reed, PSC, stated MRWF '*does not express a test… It is merely a way of describing a wide margin of appreciation.*' [paras 151 and 160]

Thus, the SC departed from the reasoning in *Humphreys v Revenue and Customs Commissioners* [2012] 1 WLR 1545 (SC) at paras 19-22, and the cases which followed it, such as *SG* [2015] 1 WLR 1449*; MA* [2016] 1 WLR 4550 and *DA* [2019] 1 WLR 3289. Insofar as those cases concluded that the question of whether the MWRF formulation is applied is a binary question which depends only on whether social, economic or other contentious policy is involved, then they are no longer good law. Real caution should be applied to cases which followed *Humphreys* and preceded this case on the MWRF issue.

Ambit

Welfare benefits which are designed to facilitate or contribute to family life, by supporting families with children, are likely to fall within the ambit of Article 8 [para 41].

Status

'*Status merely refers to the ground of the difference in treatment between one person and another.*' [para 71] Cases in which the court has found the 'status' requirement not to be satisfied are few and far between: it rarely troubles the European court. The 'status' need not exist independently, in the sense of having a special or legal importance for other purposes or in other contexts, than the difference in treatment complained of. Children living in households containing more than two children, as compared with children living in households containing one or two children, were a 'status' for the purposes of Article 14 [paras 69-72].

Analogous or relevantly similar situation

The question of whether the two groups are analogous or relevantly similar generally depends on whether there is a material difference between them as regards the aims of the measure in question [para 59]. There was no direct discrimination between children who benefitted from child tax credit as compared to adults in receipt of other types of benefit. They were not in an analogous situation.

Indirect discrimination

The SC gave a useful summary of indirect discrimination: a neutrally formulated policy or measure that has disproportionately prejudicial effects on a protected group is indirectly discriminatory (or *'creates a presumption of indirect discrimination'*). If the applicant shows a *prima facie* case, the government must show that the measure was not discriminatory. It can discharge that burden by showing that the difference in the impact of the measure was the result of objective factors unrelated to the protected ground. Alternatively, the government must show indirect discrimination was justified: that is, the measure in question had an objective and reasonable justification: it pursues a legitimate aim by proportionate means [paras 49 and 53]. See also *DH v Czech Republic* (2008) 47 EHRR 3, paras 175-178, 184 and 196.

There was no indirect discrimination between children and adults because child tax credit did not affect children and adults in comparable ways [paras 60-63]. A rule limiting child tax credit to two children was indirectly discriminatory against women. The rule was also directly discriminatory against children in families with more than two children. But both were justified. As to indirect discrimination, a disproportionate impact on women was inevitable in order to achieve the legitimate aims of reducing expenditure and discouraging unfair and unreasonable burdens on the taxpayer, and there was no alternative means of achieving those aims. As to direct discrimination, there was no basis on which the court could take a different view to parliament's decision that the impact of the legislation on the interests of the children was outweighed by the need for fairness in the child tax credit scheme [paras 190-199, 202, 203 and 209].

International law

Relevant international law and its interpretation by competent authorities may, where appropriate, inform or aid the interpretation of Article 14. For example, it may be relevant to evidence of common ground between states, and therefore the questions of proportionality or the margin of appreciation, or the question of justification. However, the domestic courts do not decide whether a right in an international treaty, which has not been incorporated through legislation, has been breached. Those rights are not part of domestic law [paras 76-96].

This departed to some extent from *obiter* comments made in *DA* paras 71-78; *Mathieson* paras 42-44; and *SG* paras 137, which suggested it may be appropriate for a court to decide whether international law rights were breached.

An example is the United Nations Convention on the Rights of the Child. Article 3.1 of that Convention states that the best interests of the child are a primary consideration. That is not directly applicable in domestic law. However, it is a relevant factor in deciding whether discrimination under Article 14 is justified: the best interests of the child are a relevant consideration [paras 86 and 92].

Comment

This judgment contains a number of important conclusions for Article 14 discrimination cases. Most importantly, it takes a flexible approach to the question of the margin of discretion. Practitioners will need to carefully examine the factors relevant to that margin, when bringing claims.

Adam Straw QC
Doughty Street Chambers

Interim relief not available for discrimination-dismissal cases

Steer v Stormsure [2021] EWCA Civ 887; June 11, 2021

Implications for practitioners

The CA held that the absence of interim relief for discrimination claims arising from dismissal did not breach the prohibition of discrimination under Article 14 European Convention of Human Rights (ECHR). In reaching this decision, the CA referred to the four-stage approach for establishing an Article 14 infringement, set out in *R(Stott) v Secretary of State for Justice* [2020] AC 51.

Employment Tribunal

The claimant (SS) was dismissed by the respondent (SL) and brought discrimination and victimisation claims under the Equality Act 2010 (EA) and a whistleblowing dismissal claim under the Employment Rights Act 1996 (ERA). When lodging her claims, SS submitted an interim relief application for the discrimination, victimisation and whistleblowing claims.

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

Employment Appeal Tribunal

SS appealed against the ET's refusal to consider interim relief for the discrimination/victimisation claims arising from dismissal, arguing that the failure to afford access to interim relief for EA claims breached various provisions of European law. SS also asserted a breach of Article 14 ECHR (prohibition of discrimination), read in conjunction with certain substantive Convention rights including Article 6 (right to a fair trial) and Article 8 (right to respect for private and family life).

For the purposes of Article 14, SS relied on the core status of sex, asserting that female claimants would be disproportionately affected by the lack of interim relief for discrimination-dismissal cases. In the alternative, SS claimed 'other status', namely the status of being an individual who wishes to bring discrimination/victimisation dismissal claims.

SS was successful in asserting the Article 14 breach on the grounds of 'other status'. 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 and not the other. However, no justification had been put forward – the government had not intervened to provide justification and SL could not provide justification as a private employer. The EAT therefore upheld the breach of the ECHR in the absence of justification being provided.

The EAT decided it could not give the EA a conforming interpretation to resolve this breach under s3 of the Human Rights Act 1998 (HRA); it had no power to make a declaration of incompatibility and was therefore was unable to provide a remedy for this breach. The appeal was dismissed but SS was granted permission to appeal so that the CA could consider whether there was a breach and, if so, the appropriate remedy.

Court of Appeal

SS appealed to the CA submitting that the EAT was wrong in finding that she could not rely on the core status of sex for the Article 14 breach. In the alternative, SS relied again on the 'other status' of being a discrimination-dismissal claimant.

The CA referred to the four-stage approach to establish a breach of Article 14 set out in the *Stott* judgment. Firstly, the circumstances must fall within the ambit of a Convention right. Secondly, the difference in treatment must be on the grounds of a characteristic listed in Article 14, or another ground qualifying as 'other status'. Thirdly, the appellant and the comparator (in this case a whistleblower dismissal claimant) must be in analogous situations. Fourthly, there must be a lack of objective justification for the difference in treatment.

Addressing the *Stott* elements, the Secretary of State acting as an interested party, submitted that Article 14 was not breached as this case did not fall within the ambit of a substantive Convention right; SS was not treated differently on any of the prohibited grounds within Article 14; SS was not in an analogous situation with a hypothetical dismissed whistleblower, and the absence of interim relief remedy in discrimination

claims arising from dismissal was justified.

On justification, the Secretary of State submitted the legitimate aims of (a) protecting and encouraging claimants who take steps regarding collective rights or public interest, (b) avoiding additional burden on employers, (c) maintaining a fair balance within and between different sets of rights and remedies for different claims, and (d) maintaining an efficient and effective ET system.

The CA held that SS' complaint that the ET could not order interim relief for discrimination claims arising from dismissal did not fall within the ambit of Article 6. Referring to *Matthews v Ministry of Defence* [2003] 1 AC 1163 the CA stated that Article 6 concerns procedural fairness and integrity of a judicial system, not the content of national law. However, the CA accepted that the case fell within Article 8.

The CA agreed with the EAT that SS could not rely on the status of sex to engage Article 14. The CA stated that any dismissed whistleblower, whether male or female, could apply for interim relief, and no discrimination claimant, whether male or female, could. The CA also found that an Article 14 breach could not be advanced on the basis of discrimination-dismissal claimants being 'other status'. The CA held that a particular remedy not being available in one type of litigation but being available in another did not constitute discrimination. The appeal therefore failed.

The CA nonetheless continued to assess the remaining elements of the *Stott* approach. The CA did not find there to be less favourable treatment, stating that the interim relief remedy should not be viewed in isolation. Instead, the sets of remedies available for discrimination claims and whistleblowing claims should be viewed as 'packages', and when viewing the remedy packages in their entirety, it was not correct that discrimination claimants were treated less favourably. The CA listed examples of more favourable treatment for discrimination claimants, including the 'just and equitable' discretion to extend time limits (as opposed to the 'reasonably practicable' test applicable to unfair dismissal claimants), and a more claimant-favourable burden of proof.

Turning to justification, the CA considered the various opportunities the legislature would have had to introduce interim relief for discrimination claims arising from dismissal, including the introduction of the EA. The court noted the limits of the remedy:

> *Interim relief is a measure protecting employees who have done certain acts in a representative capacity, or on behalf of the workforce generally, or in the public interest. That is the common thread which links trade union activity, health and safety representation and whistleblowing claims and distinguishes them from cases (or at any rate the great majority of cases) brought by individuals alleging that they have been subjected to discrimination or unfairly dismissed.* [para 60]

The CA concluded that there must have been a positive decision by parliament not to make interim relief available to discrimination claimants, and the court had to give weight to this.

Comment

The CA finding that the lack of interim relief for discrimination claims arising from dismissal does not breach ECHR is a setback for this remedy being available to victims of discrimination. Nonetheless, the court did set out useful guidance for considering an Article 14 breach.

Yavnik Ganguly
Bindmans

Unintentional indirect discrimination – the correct approach to remedies and injury to feelings

Wisbey v Commissioner of the City of London Police [2021] EWCA Civ 650; April 21, 2021

Implications for practitioners

This is a helpful decision concerning the correct approach to remedies and injury to feelings arising from unintentional indirect discrimination under ss124(4) and (5) of the Equality Act 2010 (EA).

Facts

Mr Alex Wisbey (AW) is a serving police officer with the City of London Police (CLP) who had trained as an Authorised Firearms Officer since 1997 and a rapid response driver in 1998 before joining the Tactical Firearms Group in March 2010. There were no performance issues in relation to either qualification. He had obtained various commendations with no pronounced effect on his ability to discharge his duties.

The College of Policing (CoP) is responsible for setting standards and giving guidance nationally to the 43 police forces in England and Wales. CoP's visual and eyesight standards require all police forces to screen for colour vision defects using a specific test. If abnormal, police forces must confirm results with one of the two identified follow-on tests (Farnsworth D:15 or 2nd Ed City University Test). Most colour vision defects, being genetic, neither improve nor deteriorate. Once diagnosed, there is little need to retest.

AW failed the screening test in September 2016; he passed one of the follow-on tests in November 2016 and was allowed to continue in his firearms role. Following a meeting between CLP and CoP's Mr Wedge (the National Police Firearms Training Curriculum Manager) in March 2017 *'to adopt a corporate force position regarding new guidelines on eyesight'*, CLP removed him from firearms and rapid response driving duties. AW was devastated and challenged the decision. Subsequently, he was tested again, failing the screening test on each occasion but passing the follow-on tests. Notwithstanding, CLP did not reinstate him until February 2018. AW complained of indirect sex discrimination because the testing regimes adopted were inherently unreliable and discriminatory.

Employment Tribunal

AW brought proceedings against CLP for indirect sex discrimination. He argued that CLP operated a policy, provision or practice (PCP) requiring officers to take and pass specified colour vision tests to remain authorised for firearms and advanced driving duties. He contended that the relevant PCPs were discriminatory because about 8% of men and only 0.25% of women suffer colour vision defects.

AW also brought a claim against CoP under s111 EA for instructing, causing or inducing discrimination by CLP regarding Mr Wedge's involvement in the decision to remove him from firearms duties.

It was common ground that the relevant PCP was applied to AW, which disadvantaged him. The ET found that the incidence and cause of colour vision defects put men at a particular disadvantage. Thus the real issue for the ET was justification, i.e. whether the practice of requiring an officer to undertake and pass the screening and follow-on tests for colour vision defects was a proportionate means of achieving a legitimate aim.

The ET dismissed AW's claims against both CLP and CoP concerning his removal from firearms duties, holding that it had been proportionate to check equivocal test results given the risk of harm. However, the ET upheld AW's claim for indirect sex discrimination for removing him from his rapid response driving duties, finding that there was no evidence to show it was necessary or appropriate to bar drivers with any but the most severe defects.

Notwithstanding, the ET declined to award compensation for injury to feelings in light of the evidence and having regard to the terms of ss124(4) and (5) EA. The ET was satisfied that the unlawful discrimination was unintentional in the sense that CLP did not know, in applying the colour vision requirements for driving, that AW would be put at a particular disadvantage as a man and did not intend that consequence. Given its finding, the ET did not go on to consider injury to feelings but made a declaration that CLP had unlawfully discriminated against AW.

Employment Appeal Tribunal

AW's appeal to the EAT that the ET did not adopt a structured approach to the question of justification and erred in its approach to remedy and injury to feelings was unsuccessful. AW sought permission from the CA to appeal.

Court of Appeal

The sole ground of appeal before the CA, permission being granted by Lewison LJ, concerned the ET's finding not to award injury to feelings, and whether s124(4) and (5) EA were compatible with EU Law (Council Directive 2006/54/EC (the Recast Directive), the Charter of Fundamental Rights, and Articles 8, 13 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms).

AW contended that ss124(4) and (5) were incompatible because they imposed an additional threshold or hurdle to be met before any consideration could be given to awarding compensation in a case of unintentional indirect discrimination, with the result that the available remedies for indirect discrimination were neither effective nor dissuasive. In other words, they gave a steer to tribunals that other remedies were likely to be better or more appropriate than compensation in this sort of indirect discrimination case.

AW also argued that a restriction on the right to compensation for breach of the prohibition on unlawful sex discrimination in circumstances where compensation was available for other claims (unfair dismissal, for example), itself violated the Recast Directive because it indirectly discriminated against women.

It was common ground that the provisions of the Recast Directive and the Charter allow member states to determine what measures to implement in order to ensure that the Recast Directive is effective in domestic law in accordance with its stated purpose and objective.

Lady Justice Simler gave the lead judgment (with whom LJJ Jackson and Lewis agreed) holding that:

- Ss 124(4) and (5) on remedies for unintentional indirect discrimination were compatible with EU law.

- The wording of ss124(4) and (5) is clear and unambiguous. Before it can consider making an award of compensation, an ET must first consider whether a declaration and/or recommendation should be made. S124(5) simply sets out a procedure for considering a declaration and a recommendation first. There is nothing in the wording of this provision that prioritises or emphasises one remedy over another, nor that steers ETs away or dissuades them from making compensatory awards.

- There was no restriction or prohibition in s124(5) on an ET's power to make a compensation order where loss is sustained as a consequence of established unlawful, but unintentional, indirect discrimination.

- Importantly, if loss and damage have been sustained as a consequence of the indirect discrimination suffered, it is to be expected that compensation will be awarded. Moreover, such compensation should be both adequate to compensate for the loss and damage suffered and proportionate to it.

For the same reasons LJ Simler held that ss124(4) and (5) did not breach the principle of effectiveness under EU Law. As far as the CA was concerned, there was no difference in treatment as between discrimination claims and other employment-related claims which could form the basis of an indirect sex discrimination claim.

LJ Simler observed that the suggestion in the ET judgment that the finding of unintentionality disposed of any need to consider or assess injury to feelings constituted a misdirection of law. However, any such misdirection was not material because, on the findings made by the ET, there was no scope on appeal to argue AW had suffered damages in the form of injury to feelings as a consequence of the driving ban.

Comment

The CA decision provides helpful guidance to ETs and practitioners alike regarding the correct approach to remedies for unintentional indirect discrimination. Importantly, any loss or damage sustained as a result of unlawful discrimination should be compensated by way of injury to feelings, albeit after the ET has considered a declaration or recommendation under s124(2)(a) or (c). Moreover, such compensation should be both adequate to compensate for the loss and damage suffered and proportionate to it. It is a welcome reminder to ensure that evidence of injury to feelings for each act of discrimination relied upon is adduced and advanced before the ET.

David Stephenson
Barrister, Doughty Street Chambers
d.stephenson@doughtystreet.co.uk

Syrian refugee resettlement scheme which excluded Palestinians was not discriminatory

S M Turani & H Marouf v Secretary of State for the Home Department [2021] EWCA Civ 348; March 15, 2021

Facts

The appellants in this case were Palestinian refugees from Syria who had fled to Lebanon. They challenged the application of voluntary UK resettlement schemes aimed at assisting non-Syrian nationals who had fled the Syrian conflict, but which had the effect of excluding Palestinian refugees from Syria from being resettled in the UK.

The purpose of the UK's resettlement schemes (the Scheme) was to offer resettlement in the UK to those refugees judged most in need according to criteria set by the United Nations High Commissioner for Refugees (UNHCR).

The UK government chose to rely exclusively on the UNHCR to make referrals under the Scheme. However, Palestinian refugees from Syria fell under the exclusive mandate of another UN agency, the United Nations Relief and Works Agency (UNRWA), which assists Palestinian refugees in Lebanon, Jordan, Syria, the West Bank and Gaza. Unlike the UNHCR, the UNRWA does not have a resettlement mandate and so could not refer the appellants for resettlement under the Scheme. Further, the exclusive mandate of the UNRWA over the appellants prevented the UNHCR from referring them for resettlement under the Scheme.

The appellants challenged the government's decision to rely exclusively on the UNHCR for referrals under the Scheme, which they argued indirectly discriminated against them on the grounds of race.

Their claim failed at both the High Court and the CA. For brevity, this case note focuses on the CA's decision.

Court of Appeal

The key issues were as follows:

- What is the territorial reach of s29(6) of the Equality Act 2010 (EA)?
- If s29(6) applies outside the UK, is the indirect discrimination inherent in the Scheme justifiable as a proportionate means of achieving a legitimate aim?
- What is the territorial reach of s149(1)(b) of the EA?

Territorial reach of s29(6) EA

S29(6) EA prohibits discrimination, harassment and victimisation in the exercise of public functions which do not constitute the provision of a service to the public. S29(9) EA provides that '*in the application of this section, so far as relating to race or religion or belief, to the granting of entry clearance (within the meaning of the Immigration Act 1971), it does not matter whether an act is done within or outside the United Kingdom*'.

Simler LJ ruled that the '*natural reading of section 29(1) and (6) is that they do not ordinarily extend to things done outside the United Kingdom because otherwise section 29(9) would not be necessary*'. S29(9) is an exception to that general rule.

The respondent argued that s29(9) did not apply because the application of the resettlement policy was different from the final entry clearance or refusal in an individual case. Simler LJ rejected this argument, holding that it was artificial to differentiate between the various stages of the decision-making process: the failure to refer the appellants fell within the granting of entry clearance, so s29(6) applied.

Indirect race discrimination was justified (just)

The Scheme put Palestinian nationals at a particular disadvantage. The question was whether the Scheme was justified as a proportionate means of achieving a legitimate aim.

The CA was critical of the government, observing that it had not appreciated the effect on Palestinian refugees from Syria of using the UNHCR as the exclusive gatekeeper. Laing J had also commented on this in the High Court, noting '*a puzzling obtuseness about the consequences of the exclusive mandates of UNRWA and UNHCR*'. Nevertheless, Simler LJ ruled that the High Court was entitled to find that the Scheme was justified, 'just' [para 90].

The broad purpose of the Scheme was to help the most vulnerable refugees from Syria as quickly and effectively as possible. There was a humanitarian emergency which required urgent action. The situation was also complex, requiring for example an assessment of the

relative vulnerabilities of groups of refugees in different countries well as identifying former combatants and those guilty of war crimes.

The UNHRC was described by Laing J as the world's foremost resettlement expert with capabilities second to none. It had the resources on the ground in the relevant regions, it could implement the Scheme with the requisite speed and skill, and it had an established relationship with the UK government.

Simler LJ upheld the High Court's finding that there were no less intrusive means which could have been adopted by the UK government without unacceptably compromising the objective of the Scheme. It was not tenable to suggest that the Home Office could send officials to the region to administer the Scheme. As for other NGOs, those identified either could not fulfil the task or, due to a lack of a pre-existing referral relationship with the UK government, they could not do so with the requisite speed. The High Court was entitled to conclude that as with self-referral, referral by an NGO could not have achieved the '*security, reliability, speed and consistency which flow from using UNHCR as a gatekeeper*'.

Public sector equality duty

Simler LJ held that the PSED did not have extra-territorial effect in this case. There was nothing in the express words of s149(1)(b) EA to suggest that parliament intended to extend its reach outside the UK; there was no exceptional connection with the UK; and requiring a public authority to have regard to the need to advance equality anywhere in the world is incoherent, with nothing to suggest that this was parliament's intention.

Comment

This appears to be an extremely harsh outcome given that Palestinian refugees from Syria met the criteria for resettlement under the Scheme and were excluded merely by an administrative quirk of UN agencies. However, once the practical difficulties of administering the Scheme in a way which met its legitimate aims are understood, the decision seems to be a fairly uncontroversial application of the test for indirect discrimination.

Annie Powell & Shriya Samani
Associate solicitor & paralegal
Leigh Day

Briefing 997

Approaching the PCP 'generously'

Martin v City and County of Swansea EA-2020-000460-AT; July 29, 2021

Implications for practitioners

The identification of the provision, criterion or practice (PCP) in disability cases continues to prove difficult for claimants, defendants and lawyers alike. In *Martin* HHJ Tayler considers the nature of the disadvantage arising from a sickness absence policy and provides a reminder of the flexibility with which tribunals should approach the PCP.

Facts

The claimant, Mrs A Martin (AM), commenced employment with the City and County of Swansea (CCS) on January 7, 2014 as an Equality Engagement Officer. Her post was made redundant and she was redeployed as a senior renewals and adaptation support officer in the Housing Department from April 1, 2015. AM was absent due to stress related ill-health from March 10, 2016, and did not return to the housing team. She went through the redeployment process for 19 weeks in 2016, during which she worked in a supernumerary placement in Employee Services from July 28, 2016. AM undertook a trial as a contract monitoring officer from July 1, 2016 but went off sick to avoid contact with one of the managers with whom she had been in conflict.

On September 5, 2016 AM was redeployed for a work trial as a mentor on the European funded 'Workways+ Project'. She was confirmed in the post on October 17.

The role was at a lower grade than her previous role as a result of which AM received salary protection. She applied for more senior roles in the project and was shortlisted for the role of external funding programme officer but decided not to attend the interview without giving a reason. On January 22, 2017, AM commenced a period of sickness absence from which she did not return. During her absence her salary was paid from

the project budget and, as a result, her role could not be covered.

AM's sickness absence was due largely to work related stress. She said that there was a toxic work environment in the Workways+ Project. She was put on the redeployment list and applied for jobs; was offered and undertook some retraining. AM was unsuccessful in obtaining redeployment however. Her supernumeracy role came to an end; the redeployment period came to an end; and AM said to human resources that there should be an exit strategy.

AM accepted at tribunal that she had disengaged from the redeployment process and not applied for some roles that were available. She was invited to a final absence review meeting on October 17, 2017 following which she was dismissed on the grounds of capability.

Employment Tribunal

AM lodged claims of unfair dismissal and disability discrimination. The ET found that the dismissal was not unfair and rejected her disability discrimination claims. In considering the claim of failure to make reasonable adjustments, the tribunal concluded that the PCP asserted by AM could not place her at a substantial disadvantage in comparison with non-disabled persons because CCS' management of absence policy allowed exercise of discretion, and so the claim necessarily failed.

Employment Appeal Tribunal

AM appealed on the basis of the ET's findings on reasonable adjustment. The EAT upheld the appeal.

Whilst the relevant PCP had been through a number of iterations, it was clear at the tribunal hearing that the asserted PCP was the application of the management of absence policy and the asserted substantial disadvantage was increased risk of dismissal.

The EAT held that it was necessary to distinguish between the terms of an absence management policy and its application (*Griffiths*[1] considered). A policy can result in a disabled person being put at a substantial disadvantage because the policy is more likely to be applied to a disabled person in comparison with people who are not disabled because of the greater likelihood of sickness absences, even if there is a discretion in the policy that could be exercised which would avoid the disadvantage.

In this case the EAT considered that it was clear that AM did not merely assert that the PCP was the terms of the management of absence policy, but contended it resulted from the application of the policy to her resulting in her dismissal because she was absent from work and was not fit to undertake the duties of her role, even though the employer had a discretion to find her an alternative role. As a disabled person, AM was at increased risk of absence which could result in dismissal.

The EAT concluded that the tribunal erred in law in holding that because there was a discretion in the policy to move AM to an alternative role, that could avoid the substantial disadvantage, and so the consequence was that the PCP did not put her at a substantial disadvantage.

The application of the policy put AM at a disadvantage because she was at a greater risk of absence than people who are not disabled and so, because the discretion to find an alternative role might not be exercised in her favour, was at a greater risk of dismissal. The real question in this case was whether CCS had taken such steps as were reasonable to avoid the disadvantage [para 44].

HHJ Tayler found that the tribunal had correctly held that CCS had discharged its duty to make reasonable adjustments and so the decision should stand. The appeal was therefore dismissed.

Comment

The judgment is a useful reminder not only of the need to precisely draft the PCP but also of the flexible approach that the ET should take to it – particularly when the claimant is unrepresented. HHJ Tayler addressed the difficulty that many have in identifying the correct PCP, opining that it is clear that PCPs are not designed to be traps for the unwary and a practical and realistic approach should be adopted at the case management stage to identify a workable PCP which should not thereafter be over-fastidiously interpreted with the result that a properly arguable reasonable adjustments claim cannot be advanced, particularly when dealing with litigants in person. He endorsed the approach taken by HHJ Eady at paras 30-32 in *Carreras v United First Partners Research* UKEAT/0266/15/RN as to the identification of the PCP and the necessity of the causative link between the PCP and the disadvantage. What may be of particular use is HHJ Tayler's statement: '*But whatever PCP is finalised it should be given a reasonably generous reading when determining the claim*.' [para 19]

Catherine Casserley
Cloisters Chambers

1 *Griffiths v Secretary of State for Work and Pensions* [2016] IRLR 216; Briefings 777

Gender-critical beliefs are worthy of respect

Forstater v CGD Europe Ltd [2021] UKEAT/0105/20/JOJ;[1] June 10, 2021

Implications for practitioners

The full range of discrimination protection is available to those who are disadvantaged at work or in one of the other contexts covered by the Equality Act 2010 (EA) by reason of their gender-critical beliefs, or by reason of their lack of belief in gender identity. Practitioners need to bear in mind that they are themselves providers of services and must not decline work in this area because of a distaste for the client's views, or because of a fear that their other clients may feel such distaste.

Importantly, *lack* of belief in gender identity theory (also a protected belief) need not itself satisfy the *Grainger* criteria to qualify for protection: those who do not subscribe to gender identity theory will be protected from discrimination whether they do not subscribe out of conviction, ignorance, indifference or bemusement.

Facts

Maya Forstater (MF) was a researcher on sustainable development who worked on a freelance basis for a think tank. When the government started consulting on reform of the Gender Recognition Act 2004 to make it easier to get a gender recognition certificate, MF became engaged in the public debate, particularly on Twitter. Some colleagues took exception to the views she expressed, which they thought 'transphobic'. When her fixed-term consultancy came to an end, it was not renewed. MF complained to the ET that she had suffered discrimination on grounds of her gender-critical belief.

Employment Tribunal

The ET considered as a preliminary issue whether MF's belief was a protected belief within the meaning of s10 of the EA.

MF's belief was characterised by the ET at para 3 of its judgment as being '*in outline, that sex is immutable, whatever a person's stated gender identity or gender expression*'. The tribunal considered whether the belief met each of the five criteria for a protected belief, drawn from *Grainger plc v Nicholson* [2010] ICR 360, namely:

i) the belief must be genuinely held;
ii) it must be a belief and not an opinion or viewpoint based on the present state of information available;
iii) it must be a belief as to a weighty and substantial aspect of human life and behaviour
iv) it must attain a certain level of cogency, seriousness, cohesion and importance; and
v) it must be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others.

The tribunal found without difficulty that the belief met the first three criteria. (The first and third were indeed a foregone conclusion, but it is interesting that CGD did not argue that the belief that humans cannot literally change sex was simply an observation of scientifically incontrovertible fact, and not a 'belief' in the relevant sense at all.)

The judge chewed his pencil a bit over the fourth criterion, holding that MF's belief met it '*on balance*' even though he thought there was significant scientific evidence that it was wrong.

But as to the fifth of these criteria, the judge criticised the 'absolutist' nature of MF's belief and the certainty with which she held it, and observed:

> *She goes so far as to deny the right of a person with a Gender Recognition Certificate to be the sex to which they have transitioned.*

The tribunal also found that it was a 'core component' of MF's belief that she would refer to a person by the sex she considered appropriate, even if that violated their dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for them.

The tribunal accordingly held that MF's belief was '*incompatible with human dignity and fundamental rights of others*' and was therefore not worthy of respect in a democratic society.

Employment Appeal Tribunal

The EAT held that the tribunal had erred in straying into an evaluation of MF's belief, instead of assessing its conformity with the *Grainger* criteria on its own terms. The correct standard against which a belief was to be judged in considering the fifth *Grainger* criterion was that contained in Article 17 of the European Convention on Human Rights:

1. [2021] IRLR 706

> *only if the belief involves a very grave violation of the rights of others, tantamount to the destruction of those rights, would it be one that was not worthy of respect in a democratic society.*

The EAT's judgment has been widely mischaracterised as finding that MF's belief fell *only just* outside this category, so it is worth emphasising that the EAT noted at para 113 that her belief was widely shared, including amongst respected academics; and at para 111:

> *Most fundamentally, the Claimant's belief does not get anywhere near to approaching the kind of belief akin to Nazism or totalitarianism that would warrant the application of art 17. That is reason enough on its own to find that Grainger V is satisfied.*
> [emphasis supplied]

The EAT held that the tribunal had erred in concluding that MF's belief meant that she would always 'misgender' trans people irrespective of the circumstances: it was clear from the tribunal's other findings of fact that her position was more nuanced than that.

Finally, the ET had also erred in approaching MF's lack of 'gender identity belief' on the basis that the lack of belief must independently meet the *Grainger* criteria. If the positive belief which she lacked was '*Grainger* compliant', it followed that her lack of that belief would be protected. The EAT's judgment was not appealed.

Comment

The judgment of the EAT in *Forstater* provides a salutary corrective to widespread myths about the implications of EA protection from discrimination on grounds of gender reassignment, and what behaviour (or even beliefs) can properly be deemed 'transphobic'. But those myths remain widely believed and it seems likely that there will be a great deal more litigation raising related issues. Questions for the future will include the extent to which employees are entitled to require their colleagues to use their pronouns of choice and related questions about the freedom of speech and belief of colleagues subject to those demands; the risks for employers and service providers in making their existing single-sex facilities mixed-sex by allowing users to choose whichever facilities they feel most comfortable using; ticklish questions about the limits of acceptable manifestation of gender critical beliefs in or outside of the workplace; refusal of services to those with gender-critical views; and much more besides.

Naomi Cunningham
Outer Temple Chambers

Non-discrimination rule automatically overrides pension schemes' discriminatory terms

London Fire Commissioner, West Midlands Fire and Rescue Authority, Cornwall Fire and Rescue Authority, South Wales Fire and Rescue Authority v Sargeant & Others UKEAT/0137/17/LA; February 12, 2021

Implications for practitioners

In *Sargeant,* the EAT held that the effect of a non-discrimination rule is that it automatically overrides or replaces any discriminatory terms in a pension scheme. In a public sector context, those in charge of 'managing' or 'administering' the scheme, therefore, are not obliged to apply any discriminatory provisions. The decision clarifies the scope of the statutory defence available under paragraph 1(1) of Schedule 22 of the Equality Act 2010 (EA).

Facts

On April 1, 2015, new pension schemes were brought in for firefighters in England and Wales under the Public Sector Pensions Act 2013. The applicable regulations were made by the Secretary of State for the Home Department and Welsh Ministers.

The 2015 schemes had less favourable benefits than the previous pension schemes. Firefighters who were born on or after April 2, 1971 ceased to accrue benefits under the previous pension schemes and were, instead, moved to the 2015 schemes.

The comparators were firefighters born on or before April 1, 1967 who remained in the more favourable previous pension schemes until retirement, with no requirement to move to the 2015 schemes.

Firefighters born between April 2, 1967 and April 1, 1971 were able to remain in their previous pension schemes for a further period of time beyond April 1, 2015 but were required to move to the 2015 schemes at some point before usual retirement age.

Age discrimination claims (among other claims) had been brought against the Secretary of State, Welsh Ministers and the Fire and Rescue Authorities (FRAs) and the terms of the pension scheme were found to be discriminatory and unjustified on the grounds of age by the CA; see *McCloud v Lord Chancellor & others; Secretary of State for the Home Department & others v Sargeant & others* [2019] EWCA Civ 2844; Briefing 889.

In this appeal, the FRAs sought to establish that liability for the age discrimination lay solely with the government.

Employment Tribunal

The ET found the FRAs were not entitled to rely upon paragraph 1(1) of Schedule 22 EA due to the effects of s61 and/or s62 of the EA. On this basis, they were liable for age discrimination alongside the government.

The specifics relied upon in terms of paragraph 1(1) of Schedule 22 were that the FRAs were required by the government to apply the terms of the pension scheme and it was the government which had devised the pension scheme, which included the relevant terms which were discriminatory on the basis of age.

Ss61 and 62 EA refer to non-discrimination rules and non-discrimination alterations, respectively.

The FRAs appealed to the EAT arguing that the ET had erred with regards to s61 and its impact on whether the defence provided by paragraph 1(1) of Schedule 22 was available.

Employment Appeal Tribunal

The EAT was asked to consider whether paragraph 1(1) of Schedule 22 provided the FRAs with a defence to age discrimination on the basis that the provisions which led to age discrimination were contained within a statutory instrument and the FRAs were acting in accordance with the requirements of the 2015 pension scheme regulations made by the Secretary of State and Welsh Ministers.

The FRAs argument was that paragraph 1(1) of Schedule 22 provided the FRAs with a defence to age discrimination and that central government was exclusively responsible and liable for the age discrimination. They argued that as they were merely applying the rules of the pension scheme, as prescribed to them by the government, they were entitled to rely upon paragraph 1(1) of Schedule 22.

The claimant firefighters relied on the argument that s61 and/or s62 introduces a non-discrimination rule into the 2015 pension schemes and, therefore, paragraph 1(1) of Schedule 22 was not applicable.

The FRAs argued that whilst s61 does introduce a non-discrimination rule, it does not automatically alter the rules of a pension scheme or remove the discriminatory provisions. It simply enables a party to be liable if discrimination occurs.

In addition, they argued that s62 provided power to trustees or managers of a pension scheme to make non-discrimination alterations to a pension scheme, but the FRAs were not trustees or managers of the 2015 pension schemes. There were further arguments that the existence of s62 implies that s61 does not automatically alter the rules of a pension scheme.

The claimants contended that s61 has overriding effect whether or not the FRAs were the 2015 pension scheme managers but, in any event, the FRAs are responsible for managing and administering the pension schemes.

Retired judge Sir Alan Wilkie at the EAT found that the ET did not err in law regarding s61 or paragraph 1(1) of Schedule 22 and that the FRAs remain liable for age discrimination in respect of the 2015 pension schemes. He agreed with the claimants' interpretation that the effect of s61 is to automatically insert a non-discrimination clause and the FRAs were not duty bound or entitled to apply the discriminatory pension provisions, even if contained in secondary legislation. On this basis, as there had been no requirement on the FRAs to apply the discriminatory pension terms, there was no ability to rely on paragraph 1(1) of Schedule 22 as a defence.

In addition, reference was made to Article 16 of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation which provides that laws or provisions which do not comply with the principle of equal treatment must be abolished. Thus both EU and UK law state that the discriminatory provisions of a pension scheme are to be overridden, again meaning that the FRAs were not entitled to apply the discriminatory pension provisions and were not able to rely on paragraph 1(1) of Schedule 22 EA as a defence.

Mandy Bhattal
Leigh Day

Cabinet Office's failure to provide BSL interpreters for two Covid-19 government briefings was discrimination

R (on the application of Rowley) v Minister for the Cabinet Office [2021] EWHC 2108 (Admin); July 28, 2021

Facts

The claimant Katherine Rowley (KR) is a visually impaired and profoundly Deaf person.[1] At the time of the relevant government Covid-19 briefings, she was living alone, pregnant and anxious. Having learned that they were taking place, she tuned into the data briefings on September 21 and October 12, 2020, but was unable to find any British sign language (BSL) interpretation.

High Court

The court focused on two issues in particular. The first was the absence of any BSL interpreter for the two government data briefings on September 21 and October 12. The second was the government's continued position that it will not use 'on-platform' interpreters for briefings (i.e. standing in the room behind the speaker); rather it will use 'in-screen' interpreters (a feature available in government live online coverage).

Fordham J considered the following two questions.

1. *Was the absence of any BSL interpretation for the data briefings on the two relevant dates discrimination against the claimant by reason of the defendant's breach of its reasonable adjustments duty?*

It was common ground that KR had a disability (s6(1) Equality Act 2010 (EA)), and that the defendant was a service-provider in relation to national briefings to the public about the Covid-19 pandemic (s29(1) EA).

In providing that service, the defendant owed a duty to make reasonable adjustments (s29(7)(a) EA). KR focused on the requirements imposed by ss20(5) and (6) EA, i.e. the provision of an auxiliary aid to ensure that information is provided in an accessible format.

In determining whether the duty to make reasonable adjustments had been triggered, Fordham J applied the following test of comparative substantial disadvantage:

> *Unless there is provision for BSL interpreters, would Deaf people who use BSL be put at a more than minor or trivial disadvantage in comparison with persons who are not disabled, regarding the provision of information in an accessible format in relation to the briefings, if delivered with no aid or service providing extra support or assistance to people with disabilities?* [para 27]

The answer to this question was: *'Yes, they would be put at such a disadvantage, whose nature and extent are serious.'*

Fordham J reasoned that the very nature of the briefings was to provide information relating to the pandemic, a subject matter of the greatest public interest and a vital concern. Given that BSL is a language in its own right, rather than a signed equivalent of English, and given that many d/Deaf readers have an average reading age of eight to 11 years, without BSL interpretation there was a clear barrier for a vulnerable and marginalised group, undermining accessibility of information.

The court was satisfied that KR had demonstrated facts from which it could decide, in the absence of any other explanation, that the defendant had contravened its duty to make reasonable adjustments [para 33]. In the circumstances, the burden of proof switched to the defendant to show that it was not in breach of this duty.

The court rejected the defendant's arguments that reasonable adjustments had been made. In particular, Fordham J rejected the proposition that subtitles constituted a reasonable adjustment, stating that *'subtitles – fast-moving text in relation to technical information in a language which is not the first language of BSL users and assumes a level of literacy in that further language which very many of them will not have – are not an answer for Deaf BSL users'*. This was a *'failure of inclusion, suggestive of not being thought about, which served to disempower, to frustrate and to marginalise.'* [para 35]

KR's evidence that she could not understand the subtitles was sufficient to show that she had suffered

1 The capital D 'Deaf' is used as a cultural label and refers to people who are profoundly deaf, whose first or only language is sign language and are part of a cultural and linguistic minority known as the Deaf community.

a detriment. The court made a declaration that the absence of any BSL interpretation for the two data briefings constituted discrimination against KR by reason of the defendant's breach of the reasonable adjustments duty. The case was transferred to the county court to assess damages.

2. In relation to 'on-platform' BSL interpretation for briefings, is there any present and continuing breach of (i) the PSED and/or (ii) the reasonable adjustments duty involving discriminatory treatment of the claimant?

S149 Equality Act public sector equality duty

In response to these proceedings, the defendant had produced a PSED assessment in which it considered the merits of in-screen and on-platform BSL interpretation for televised briefings. Notwithstanding that it was produced '*at the door of the court*', Fordham J considered that the assessment was a '*rigorous evaluation*' which '*recognised the features of the statutory duty*'. There had been '*proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them*' and the defendant had taken '*reasonable steps to make enquiries about what may not yet be known*' to it [para 43]. In the circumstances, the defendant had discharged its procedural duty under s149 EA.

Reasonable adjustments

In relation to the defendant's continued position that it will use in-screen interpreters for briefings, rather than on-platform interpreters, the court was satisfied that the duty to make reasonable adjustments had been triggered and that the burden of proof had switched to the defendant to show that there was no present or continuing breach of this duty [para 45].

Fordham J considered that there were powerful arguments as to why there should be on-platform provision for briefings and that, in order to discharge the burden of proof, the defendant would have to show some disadvantage as to on-platform provision.

In its PSED assessment, the defendant had pointed to the fact that the government makes frequent use of data slides during these briefings. These data slides are presented 'in-screen' for clarity, meaning that the speakers are not in view. If an on-platform BSL interpreter is to be used, a choice would have to be made between making the data slides less clear (by filming the slides on a screen with an interpreter stood next to them) and losing the BSL interpreter altogether.

The court accepted that, in order to ensure that the data slides are presented clearly, it is open to the defendant to present the slides in-screen with an in-screen BSL interpreter. Whilst on-platform interpretation is the more inclusive option, in the context of these briefings, the defendant had shown that in-screen interpretation is a reasonable alternative.

The court concluded that in relation to the defendant's use of in-screen BSL interpretation for the data briefings, it is not in present or continuing breach (i) of the PSED or (ii) of the reasonable adjustments duty.

Comment

This case highlights the importance of making reasonable adjustments to ensure that information is provided an accessible format, particularly when it concerns the Covid-19 pandemic.

The judgment underlines the importance of considering the position and experiences of the relevant group when discharging the reasonable adjustments duty. Fordham J was particularly critical of the defendant's position that subtitles constituted a reasonable adjustment for Deaf BSL users, stating '*the idea that "subtitles are an answer" amounts to "a stereotypical opinion or feeling about individuals who share a protected characteristic … formed without proper knowledge of people with that protected characteristic" and thus constitutes "prejudice*"'.

Charlotte Pettman
Solicitor, Leigh Day
cpettman@leighday.co.uk

A Guide to Conducting Internal Investigations

Jake McQuitty, 1st edition, February 2021, Bloomsbury Professional, 240 pages, £70 (£59.84 Kindle edition, Amazon)

This book does what it says. In the preface, the author explains the book is *'an attempt to tackle … misconceptions … to shed some light on what a good investigation looks like and to help guide the investigator through the myriad, complex issues that may (and frequently do) arise'*. McQuitty, a partner at Eversheds Sutherland, emphasises that '*this is intended to be a practical guide'.*

The focus is largely on the financial services sector, but as McQuitty suggests, the principles and approach apply to investigations in any regulated sector. However, its potential uses are wider. That is probably because he takes a holistic approach, seeing any investigation as *'a critical part of an organisation's risk management framework, designed to identify areas of potential weakness or risk, to deliver recommendations for managing or mitigating that weakness or risk and be a part of the process for effecting meaningful change'*. Within that, there is a regular emphasis on the importance of managing expectations. For whistleblowers, that includes explaining what feedback will be provided and when.

The book is above all, practical. Its structure follows the usual course of an investigation, segueing into a more detailed focus on specific aspects afterwards, starting with liaison with regulators and disclosure obligations, cooperating with authorities, as well as matters such as confidentiality, privilege, whistleblowing, litigation risks and communications strategy.

The approach is a joined-up one, setting any investigation into its own regulatory and stakeholder contexts and flagging-up matters the investigator (and those commissioning an investigation) should address: from the immediate priorities at the start, to anticipating and dealing with the fallout, as well as all points in between. Not every organisation or incident will need a communications playbook, but deciding upon and implementing a communications strategy is part of anticipating managing the outcome of an investigation. For example, will a whistleblower be given an opportunity to respond to any findings?

It is not a legal text-book but tackles the legal issues and particular difficulties that can often arise. It is as useful for a lawyer as for a lay practitioner. There is no sense that it holds back when explaining legal issues. The practical focus is paramount.

For example, the section on investigating senior staff notes that record-keeping is key to assessing a senior manager's conduct. It then goes through the different types of record, in particular those which flow from the organisation's governance framework, listing the critical questions which might arise. Some of the terms (such as the second and third lines of defence) are relevant only for the financial services sector, but the underlying questions about risk management, scrutiny, accountability and challenging those responsible for an activity, are universal.

Another example is that the chapters on preserving evidence and reviewing digital and documentary evidence are relevant not just for those involved in commissioning or carrying out an investigation, but for anyone involved in litigation. The chapters would be useful for any in-house or local authority lawyer dealing with disclosure from client departments.

The book is easy to dip into, coming across as having been edited by a practitioner. The title of each chapter explains the content clearly. The content's list includes each of the sub-headings under each chapter head. The 16-page index can also work as a series of checklists. Under 'interviews', just over a

page of references gives a speedy way of checking you have covered everything. Sadly, there is no index entry which lists all the invaluable boxes giving 'practical tips' but as they are printed on a grey background it is easy to locate them.

The identification of what a 'good' investigation should look like provides a helpful structure for those commissioning investigations and for those conducting them. McQuitty has almost 20 years' practical experience and it shows.

The book is as useful for claimant as for employer practitioners. Identifying what should be expected helps highlight poor practice. In a highly regulated environment, departure from what is expected can be a source for adverse inferences. This may assist in planning cross-examination and its converse: for advising a lay client about potential litigation risks.

If you are reviewing an organisation's employment policies and procedures, this guide is worth reading just to get that holistic perspective. In terms of governance, in particular for local authority statutory officers, it should be recommended reading.

Sally Robertson
Cloisters Chambers

DLA 2022 spring conference

Building on the success of this year's online conference which brought together an array of high-calibre national and international speakers, the DLA looks forward to inviting its members to another online conference in spring 2022.

The 2022 conference will explore the role of equality law in addressing social and economic disadvantage and inequalities. In order to ensure the widest possible access to speaking opportunities, the DLA is inviting members who are interested in presenting at next year's conference to provide a brief (500 words) synopsis on their chosen topic for consideration by the committee along with their availability in February-March 2022. Send your synopsis to Chris at info@discriminationlaw.org.uk by November 29, 2021. Applicants will be informed of the committee's decision by January 31, 2022.

Abbreviations

AC	Appeal Cases
BSL	British sign language
CA	Court of Appeal
CJEU	Court of Justice of the European Union
CMLR	Common Market Law Reports
CPR	Civil Procedure Rules 1998
DLA	Discrimination Law Association
EA	Equality Act 2010
EAT	Employment Appeal Tribunal
ECHR	European Convention on Human Rights and Fundamental Freedoms 1950
EHRR	European Human Rights Reports
EJ	Employment judge
EPA	Equal Pay Act 1970
ERA	Employment Rights Act 1996
ET	Employment Tribunal
ETTB	Equal Treatment Bench Book
EU	European Union
EUSS	European Union Settlement Scheme
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
HC	High Court
HHJ	His/her honour judge
HRA	Human Rights Act 1998
ICR	Industrial Case Reports
IRLR	Industrial Relations Law Reports
J/JSC	Judge/Justice of the Supreme Court
LJ/LJJ	Lord/Lady Justice of Appeal (singular and plural)
LLP	Legal liability partnership
MWRF	Manifestly without reasonable foundation
PCP	Provision, criterion or practice
PD	Practice direction
PPE	Personal protective equipment
PSED	Public sector equality duty
PSS	Pre-settled status
RRA	Race Relations Act 1976
SC	Supreme Court
SS	Settled status
TFEU	Treaty on the Functioning of the European Union
UC	Universal Credit
UKEAT	United Kingdom Employment Appeal Tribunal
UKSC	United Kingdom Supreme Court
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities
UNHCR	United Nations High Commissioner for Refugees
UNRWA	United Nations Relief and Works Agency
WLR	Weekly Law Reports

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