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Regressive and unnecessary plans to replace the HRA

Access to the human rights protection afforded by the Human Rights Act 1998 (HRA) is high on the political agenda currently and features in two cases highlighted in *Briefings*.

In line with the commitment in its 2019 Conservative Manifesto *'to update the Human Rights Act and administrative law'* the government is consulting on its proposals to reform the Act and replace it with a Bill of Rights. The government's case for reform is that the framework for the application of human rights is flawed; it has seen the growth of a 'rights culture' which has created legal uncertainty, confusion and risk aversion for public service-providers and put public protection at risk.[1] The consultation questions reflect its view that the HRA is a problem and the *'shift of law-making power away from Parliament towards the courts, in defining rights and weighing them against the broader public interest, has resulted in a democratic deficit'*.[2]

In their article on how an employment tribunal used s3 of the HRA to extend Equality Act 2010 (EA) protection to ex-service men and women, Nicola Braganza and Emma Norton, emphasise that the decision provides a compelling reminder of the need to retain the HRA in its current form. The tribunal found that the EA exception excluding *'service in the armed forces'* from protection from age and disability discrimination breached the claimant's human rights and so it used s3 to interpret the EA to avoid that breach. As the EU (Withdrawal Agreement) Act 2018 has removed the right to seek a reference under the relevant anti-discrimination EU Directives to the CJEU, this, they argue, underscores the importance of retaining s3 (which the government proposes to replace) in its current form for those in need of EA protection.

In his account of the ECtHR's decision on the admissibility of the plaintiff's appeal in *Lee v UK*, Robin Allen QC, records his sense that there was a political dimension to the court's decision. In his view the court's reasoning that Mr Lee did not invoke his ECHR rights expressly at any point in the domestic proceedings was *'neither true, fair, nor relevant'*. Given the growing agenda to cut the UK loose from the ECHR, he speculates that the court would have been conscious that a judgment which contradicted the UKSC would have *'provided further ammunition to those wishing to undermine the ECtHR's role and jurisprudence'* and this influenced its decision. The government indeed proposes to make it clear in the new Bill of Rights *'that the courts are not required to follow or apply any judgment or decision of the European Court of Human Rights'*.[3]

The independent Human Rights Act Review (IHRAR) examined the operation of the HRA's relationship between domestic courts and the ECtHR and, reporting in December 2021, it found that *'in several instances that problems with the HRA were more to do with perception than reality and recommended a focus on human rights education'*.[4]

In its submission to the IHRAR in March 2021, the Joint Committee on Human Rights, argued that there was no compelling case for reform of the HRA; it found that the Act does *'not draw the UK courts into making decisions which are not for the courts but should be made by Parliament and Government… and [it] provides an important mechanism which allows individuals to enforce their rights which would be impossible for most people, were it to require the great expense and years of delay of going to the ECtHR'.*

A wide range of organisations[5] have gone further and condemned the proposals as deeply regressive; as drafted it is feared they will limit the courts' interpretation of legislation, create different classes of people worthy of rights' protection, limit government accountability and make it harder for people to access their rights.

The DLA joins them in rejecting the proposals which create unwanted, complex solutions to non-existing problems and impose new barriers to effective enforcement of human rights. The DLA is particularly concerned that the government refers to a human rights culture as a problem, to be solved by more restrictive legislation, rather than the essential foundation for its full compliance with Article 1 ECHR. The DLA emphasises the link between rights guaranteed under the HRA and the EA and highlights the threat to fair enforcement of equality law contained in certain of the changes the government now seeks, for reasons which seem unrelated to equality and justice.

The DLA will join with those who cherish our human rights in striving to halt these dangerous, politically motivated proposals to undermine human rights protection in the UK.

Geraldine Scullion, Editor

1 Page 28 https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights

2 ibid para 177

3 ibid page 95

4 Commons Library Research Briefing, Reform of the HRA, December 21, 2021 page 6

5 E.g. the Scottish Human Rights Commission, NI Human Rights Commission, Liberty, British Institute of Human Rights, End Violence Against Women Coalition, Inclusion London, Asylum Aid, Amnesty, Human Rights Consortia of Scotland and Northern Ireland, JustRight Scotland, Making Rights Real, among others.

Moral victory of the 'Gay Cake Case'; the decision in *Gareth Lee v UK*, ECtHR Application no. 18860/19

In January 2022 the European Court of Human Rights (ECtHR) declared that Gareth Lee's complaint of breaches of the European Convention on Human Rights (ECHR) in relation to the treatment of his complaints of discrimination by Ashers Bakery Ltd and its owners, the MacArthurs, was inadmissible. This brings his case to an end. Robin Allen QC, Cloisters Chambers, who represented the plaintiff throughout his litigation journey to Strasbourg, shares his reflections on a case which has made history – not just in making new discrimination law and highlighting potential conflicts of rights, but in influencing social and political change in Ireland, north and south. He asks what can be learnt from the ECtHR's decision, and more generally, from this litigation about events that took place over a weekend, nearly eight years ago in 2014?

Litigation background

Those events which gave rise to the litigation could hardly have been more mundane. They concerned a request in early May 2014 from Mr Lee to Mrs MacArthur, that the Belfast based business Ashers Bakery Ltd she owned with her husband, should bake a cake for him icing it to his design; her acceptance of the request was followed by her subsequent refusal to honour the commission. The sticking point for her and her husband was that Mr Lee's design contained the words '*Support Gay Marriage*', hence the case has been called the '*Gay Cake Case*'. Though the facts are mundane, the case was controversial from the outset. It has made new discrimination law, and its final conclusion raises really significant issues for all discrimination lawyers who are concerned with conflicts of rights.

Despite or because of, the mundane nature of the desired transaction, the refusal and subsequent litigation have achieved so much public attention that it has been deemed worthy of its own page in Wikipedia; so by now most readers of *Briefings* will already have heard about the case. They will know that Mr Lee was successful twice in proceedings in Northern Ireland (NI) – first in 2015[1] in the Northern Ireland County Court, then in 2016[2] in the Northern Ireland Court of Appeal – in establishing that Mrs MacArthur's actions were unlawful direct discrimination in respect of sexual orientation, religion and political opinion. They will also know that Mr Lee lost when the case eventually came before the SC in 2018; the court held that he had not suffered sexual orientation discrimination and to the extent that it was potentially religion and political opinion discrimination, the MacArthurs' rights under the Article 9 - freedom of thought conscience and religion and Article 10 - freedom of expression of the ECHR protected them from liability.

In 2019 he complained to the ECtHR about the law of the United Kingdom as explained in that SC judgment alleging that it amounted to a breach of his human rights under Article 8 - right to respect of private and family life, as well as Articles 9 and 10, both alone and in conjunction with Article 14 - prohibition of discrimination ECHR. It might be thought that there was something in this complaint which was worthy of consideration by the ECtHR because it took it nearly three years to consider the case. It was only by a majority that the court determined on the January 6, 2022 that it would not give a substantive judgment in this complaint: *Lee v The United Kingdom*.[3]

A political dimension?

The timing of this decision may explain in part why the majority of the ECtHR reached this view. There is no doubt that if it was accepted as admissible the ECtHR would have been required to decide whether the UK's SC had got it wrong in 2018. Given how controversial the case had been when it was being heard in the UK's courts, that must have looked potentially very dangerous in 'political' terms because for some time the UK's current government has been complaining about the allegedly adverse effects of the rulings and jurisprudence of the ECtHR on the UK and threatening to take action.

While the ECtHR has been willing in the past to criticise judgments in UK courts, the debate about

1 *Lee v Ashers Baking Co Ltd* [2015] NICty 2 (May 19, 2015); Briefing 757, July 2015

2 *Lee v McArthur & Ors* [2016] NICA 39 (October 24, 2016); Briefing 819, March 2017; and see the judgment on the application for permission to appeal: *Lee v McArthur & Ors* [2016] NICA 39 (December 16, 2016).

3 [2021] ECHR 1129

cutting the UK loose from the ECHR has been growing and growing. So, it has to be wondered how this potentially dangerous undermining of the ECHR looked to the judges of the ECtHR in Strasbourg when confronted with Mr Lee's application. It seems certain that from a 'political' point of view a degree of caution before accepting his complaint for substantive treatment could have seemed very sensible.[4]

Thus, less than a month before the ECtHR's ruling, on December 14, 2021, the UK government published 'Human Rights Act Reform: A Modern Bill Of Rights A consultation to reform the Human Rights Act 1998'; this was not the first time that it had expressed its intentions to substantially loosen the power of the ECtHR in the UK. This report made it clear yet again that the government intended to cut the ties which bind the SC and other courts to give effect to the judgments of the ECtHR.

Whether this was the turning point in the ECtHR's thinking or whether the earlier statements by the government were more significant is not something which can be known. It is though obvious that a judgment in Mr Lee's case disagreeing with or contradicting the judgment of the SC would have provided further ammunition to those wishing to undermine the ECtHR's role and jurisprudence.

In other times and circumstances, I would hesitate to reach a conclusion that there was such a political dimension to a ruling by the ECtHR, but in this case my suspicion that this was a factor is strengthened by my analysis of the reasoning in the admissibility decision and its very odd consequences.

ECtHR's majority decision

The essence of the reasoning of the majority of the ECtHR is at [69] where it is said that Mr Lee '*did not invoke his Convention rights expressly at any point in the domestic proceedings. Instead, he formulated his claim by reference to…*' the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (SOR) and the Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO).[5]

In my view this is neither true, fair, nor relevant.

First in order to make a claim in the county court in Northern Ireland Mr Lee had to establish a cause of action. That is why he had to rely on the provisions of SOR and FETO since these were the two provisions which gave the court jurisdiction to hear his complaint. There was no possibility of an original complaint that the MacArthurs or Ashers had breached his human rights since the Human Rights Act 1998 (HRA) does not give such a direct cause of action. The HRA's enforcement of ECHR rights is possible against the government because the government has the obligation to protect those rights. In litigation between non-government parties the HRA gives protection through the interpretative obligation in s3 and the obligation in s6 on the courts as public authorities to respect those rights.

Secondly, when the MacArthurs complained that pursuant to s6 of the HRA the court had to respect their rights under Articles 9 and 10, it was argued for Mr Lee that they were in conflict with his rights under the ECHR. I know this because I was there and did the arguing. I have added above that it was not fair of the ECtHR to suggest otherwise, because it had itself noted in a prior paragraph as much. It said at [15] -

> *[The MacArthurs] invited the court to read down the provisions of the 2006 Regulations and the 1998 Order in a manner which was compatible with their Convention rights, under section 3 of the Human Rights Act 1998 (see paragraph 46 below) or, if that was not possible, to disapply the relevant provisions of the 2006 Regulations and the 1998 Order. In addressing this argument, the [County Court] observed that:*
>
> > *"What we are faced with in this case are competing rights under the Convention. There is the Defendants right under Article (9) of the Convention to manifest their religion without unjustified limitation and the right under Article 14 of the Plaintiff to enjoy his right (under Article 8) to respect for his private life without unjustified discrimination on grounds of his sexual orientation. The Plaintiff also has additional rights under the 2006 Regulations."*

But not only was this said, it is also a fact that I explained to every court how SOR and FETO had been made, and that these were intended by the UK's different legislatures to be legal provisions which provided protection of the relevant rights mentioned above. In fact, I went further and said that they were intended to resolve the conflict which it was foreseen would arise between those with differing religious or political views about sexual orientation in a human rights' compliant way. I cited the background to FETO in the workings of human rights bodies in NI and the Belfast Agreement, and the approval of the SOR by the Parliamentary Joint Committee on Human Rights. I am completely clear that both the county court judge and the judges of the NI Court of Appeal took this all on board. It was

4 Moreover, by now it would have realised that across the UK there was no longer a need to campaign for 'Support [for] Gay Marriage' as it was now possible in each of the four UK jurisdictions.

5 These are similar to provisions in the Equality Act 2010, which does not extend to Northern Ireland. There are few differences: FETO protects against discrimination based on religion or political opinion whereas the Equality Act 2010 speaks of religion and belief.

spelt out at length in written submissions and moreover the ECtHR were made aware of this. Regrettably the SC ignored this factual background, whether this was because it was concerned that it had gone too far in *Bull and Bull v Hall and Preddy*,[6] an earlier decision in which a conflict between sexual orientation and religious opinion had been before it, I do not know.[7]

The decision of the ECtHR poses a really difficult problem for all discrimination lawyers. If there is a possibility of a conflict of rights argument in the course of a case between private (i.e. non-governmental parties) how should a lawyer protect the right to take a complaint in due course to the ECtHR? It seems it is not enough to invoke the provisions of the ECHR in argument, and it is not enough to get the trial court to say that this has happened. The ECtHR seems to expect a pleaded case that there has been a breach of the ECHR. This is no easy thing to do given the way in which the SOR and FETO or, for that matter, the Equality Act 2010 are written. However, the learning point seems to be to put any possible ECHR right that might be invoked in some way into the pleadings. It won't be pretty and it will run the risk of annoying the tribunal or court if it considers it has no direct jurisdiction to protect those rights beyond ss3 and 6, but it will be necessary to protect this ultimate review by the ECtHR.

Impact of the litigation

So has the litigation been a waste of time? I do not believe so; indeed, I consider Mr Lee to be one of many heroes in the cause of gay rights. His '*Support [for] Gay Marriage*' became well known as a result of his determination not to accept the refusal of Mrs MacArthur to honour the contract she had entered into. That was at a time when some countries, including Great Britain, were moving to enact the necessary legislation but others were facing huge push-back, none more so than in Ireland, where the Catholic Church and the Free Presbyterian theology was in full agreement in condemning consistently the idea of same-sex marriage.[8]

Of course, there was an important campaign in the Republic of Ireland for constitutional change to provide for civil marriage rights for same-sex couples. I am sure that the judgment of the Belfast County Court in Mr Lee's favour, which was given just one week before the day of the referendum (May 22, 2015) on altering the constitution must have had some effect there. I like to think that the publicity around this result may have given the campaign some encouragement.

Mr Lee's case had also highlighted the fact that it was not likely in the foreseeable future that the NI Assembly would ever muster a sufficient majority to pass the necessary legislation to make such a change. Indeed, the reason he had wished to commission this cake in the first place was for a small gathering of campaigners after the latest failure to secure the necessary votes in the Assembly.

Those campaigners continued to argue for change and while Mr Lee's litigation was still on foot, on January 13, 2020, following regulations made under s8 of the Northern Ireland (Executive Formation etc) Act 2019, same-sex marriages were permitted to be celebrated in NI. This was only possible because the Assembly was suspended at the time of this 2019 Act thus requiring the UK parliament to become its legislature again and enabling it to impose the necessary change to bring it into line not only with Great Britain but also the Republic of Ireland.

Mr Lee's case is important for yet another reason. In NI, as in Great Britain, litigation about discrimination in consumer cases where a provider of goods and services is challenged in court is very rare. There are many times fewer such cases than those brought in the employment tribunal. In large part this may be because the county court is a venue in which costs may be payable by the losing party and where the damages are often very small making the risk-reward ratio unattractive. This is important because it does mean that those providing goods and services can be less concerned to comply with equality law. Mr Lee's case shows that this is not always so.

There will be future conflicts of this kind and the judgments in Mr Lee's cases will be cited in these and other contexts. The law will roll on but I hope that it will not be necessary again to argue '*Support Gay Marriage*' in any part of the UK. Mr Lee's cases have contributed to the right to same-sex marriage being embedded in our constitutional rights. I am proud to have represented him in those cases.

6 [2013] 1 WLR 3741, [2013] WLR(D) 454, [2014] HRLR 4, [2013] UKSC 73, [2014] 1 All ER 919, [2014] Eq LR 76, [2013] WLR 3741, 36 BHRC 190, Briefing 697, March 2014

7 Certainly, Lady Hale has already expressed some concern about the resolution of such conflicts in public lectures after the judgment in *Bull and Bull v Hall and Preddy.*

8 Thus the official website of the Free Presbyterian Church of Ulster states 'Marriage is a holy institution given by God for the monogamous, lifelong, marital union of men and women' and the Irish Catholic Church has taken the same position as can be seen in this posting in 2015 on the Irish Catholic Bishop's Conference website.

From exemption to inclusion: extending the reach of the Equality Act 2010 – with a little help from the Human Rights Act 1998

Nicola Braganza, barrister at Garden Court Chambers, and Emma Norton, solicitor at the charity Centre for Military Justice, consider the recent landmark Employment Tribunal decision of *T v Ministry of Defence*. Applying the Human Rights Act 1998 (HRA), the ET read into s108 of the Equality Act 2010 (EA) (relationships that have ended) additional words which extended its reach to permit disabled ex-service personnel (and those relying on the protected characteristic of age) to bring claims under the EA, when they were previously expressly excluded. The authors are representing T in her discrimination litigation.

Introduction

The ET's decision in *T v Ministry of Defence*[1] on December 13, 2021 changed the law for ex-service women and men subjected to discrimination because of their disability or age. Whilst it is not binding, it provides helpful and persuasive guidance in the approach to be taken on issues of this kind.

Schedule 9 (Work: Exceptions), paragraph 4 (Armed forces) sub paragraph (3) of the EA expressly excludes those subjected to age or disability discrimination from bringing a claim under Part 5 (Work) of the EA. In *T*, the Ministry of Defence (MoD) argued that this primary legislation put an end to T's post-service disability discrimination ET claim; T's claim was bound to be struck out for lack of jurisdiction.

The ET disagreed. It held that the MoD's application and the wording of Schedule 9, paragraph 4 (3) breached T's human rights. The tribunal applied s3 of the HRA and read into s108 of the EA (post-termination discrimination) additional words, so that T was permitted to proceed with her claim. By this route, it transformed an absolute exception to a just and necessary inclusion.

T may now continue with her claim to a full hearing. The MoD has not appealed the decision. And what of the wider implications beyond this case? More generally, the MoD can no longer discriminate against veterans on grounds of disability or age with impunity. Secondly, the decision illustrates how challenges to the EA, considered through the prism of the HRA, can succeed. Finally, the decision provides a compelling reminder as to the need to retain the HRA in its current form. This is particularly since the EU (Withdrawal Agreement) Act 2018 removes the right to seek a reference under the relevant anti-discrimination EU Council Directives to the Court of Justice. Further, it comes at a time when the HRA faces its gravest threat to date by the current government's latest consultation to repeal and replace it.[2]

What is the claim about?

T was an Able Seaman in the Royal Navy from 2014, aged 18, until 2018. After completing her initial training, she became a junior rating. T was given her first assignment in 2015. In 2017 she made two formal complaints through the Navy's Service Complaints process about what she alleged to be sexual harassment, bullying and discrimination. Her claim to the ET concerns the handling of the second of those complaints about her time in service. In 2018 T left the Royal Navy after being medically discharged. She suffers from post traumatic stress disorder, anxiety and depression.

The Service Complaints system

The Armed Forces Service Complaints process is a statutory procedure governed by its own extensive policies and regulations.[3] There are strict deadlines, an admissibility stage and a substantive investigation stage, usually with terms of reference set. An admissibility decision is expected within 14 days and a final decision made by the 'Decision Body' within 24 weeks. A complainant has a right of appeal to an 'Appeal Body' if the appeal is lodged within strict time limits, and

1 https://www.gov.uk/employment-tribunal-decisions/t-v-ministry-of-defence-2201755-slash-2021; December 13, 2021.

2 https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights

3 Armed Forces (Service Complaints) Regulations 2015: https://www.legislation.gov.uk/uksi/2015/1955/made; and Joint Service Publication 831 (Directive & Guidance): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1013136/20210629-JSP831_Part1_v2.0_released_29_June_21-O.pdf; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1017025/JSP831_Part2.pdf

a final right of appeal to the Service Complaints Ombudsman for the Armed Forces. During the life of the complaint, if a service person is concerned that there has been 'undue delay' they may also complain to the Ombudsman about that delay.

Delay

There was significant delay in the handling of T's service complaint. In 2018, after she had been medically discharged, T submitted her first complaint of delay to the Ombudsman. This led to a first formal ruling by the Ombudsman of excessive delay. T re-submitted her service complaint. Further delay ensued. In April 2020 the Ombudsman made a second formal ruling that there had been excessive delay. The MoD determined T's service complaint shortly thereafter, dismissing nearly all of it. In June 2020 T appealed within the strict time limits to the Appeal Body. In November 2021 the Ombudsman ruled, for a third time, that the MoD had excessively delayed in its handling of T's appeal. At the time of writing, over 4 years since she first submitted her complaint, T continues to await the outcome of her appeal.

T's Employment Tribunal claims

T brought claims of sex discrimination, disability discrimination and victimisation against the MoD. Her claims concern the handling and near total dismissal of her service complaint. She relies on s108 of the EA (relationships that have ended) and the discrimination arising after her service. Her disability discrimination claim concerns the MoD's breach of the duty to make reasonable adjustments for her as a disabled person by failing to resolve her complaints promptly and with priority.

The MoD argument that T was excluded from the protection of the EA

The MoD applied to strike out T's claim for disability discrimination relying on the exemption from liability provided to it under Schedule 9 (Work: Exceptions), paragraph 4(3) of the EA which expressly excludes all claims of disability – and age – discrimination in the Armed Forces. T was therefore barred from bringing her claim for disability discrimination as a result of this statutory provision.

What is the exemption?

The Armed Forces has always enjoyed a complete exemption from liability on disability (and age) discrimination claims under Schedule 9, paragraph 4(3) of the EA. When parliament passed the EA, the exemption was said to be justified to preserve combat effectiveness. S108 of the EA protects against post-employment discrimination but only if the complainant would have been protected from discrimination while in employment. In that way the MoD argued that because it enjoyed immunity from a claim of discrimination by serving service personnel on the grounds of disability (and age), the same principle applied to its dealings with T as a veteran.

How does the HRA assist?

S3 of the HRA requires all legislation to be interpreted in a way that is compatible with the European Convention on Human Rights (ECHR) so far as it is possible to do so. T argued that that meant s108 and Schedule 9, paragraph 4(3) must be read in a way to permit her to bring her claim before the ET. Her claims were within the ambit of her rights under Article 6 (right to a fair trial) and Article 8 (right to private life). She argued that veterans were in a different position to serving service personnel. They would not be required to deploy or engage in combat, as they had left service, and so the principle of combat effectiveness could not justify the exemption and the MoD should not be permitted to discriminate against them on the grounds of their disability. Reading the EA through the prism of the HRA, the exemption breached T's human rights and so required to be read in a way which was compatible with the HRA.

In *Ghaidan v Godin-Mendoza* [2004] UKHL 30 per Lord Nicholls, the House of Lords held that the '*interpretative obligation decreed by section 3 is of an unusual and far-reaching character*' [30] which bids the court to '*depart from the unambiguous meaning the legislation would otherwise bear*' and from '*the intention reasonably to be attributed to Parliament in using the language in question*' [32] ... '*a court can modify the meaning, and hence the effect, of primary and secondary legislation*' [33] but '*cannot … adopt a meaning inconsistent with a fundamental feature of legislation*', the adopted meaning being one which '*must be compatible with the underlying thrust of the legislation being construed*'.

Employment Tribunal decision

The ET determined that its decision on this jurisdictional point was final and binding. It rejected the MoD's reliance on the complete, statutory exemption on disability discrimination claims in the armed forces. It observed that '*On the face of the (Equality) Act, accordingly, the armed forces are free to discriminate against disabled ex-servicemen and women*'.

It found this 'surprising' as despite Kenneth Parker J's decision in the *Child Soldiers' case*[4] as to derogation provided by the EU Framework Directive,[5] the purpose of the derogation is to protect the combat effectiveness of the armed forces. In the words of the ET *'there can be no possible link between combat effectiveness of the armed forces and the way that the armed forces is permitted to treat disabled ex-servicemen and women.'* That provided the fatal blow to the MoD's argument.

Referring to *Ghaidan* the ET held that the interpretative obligation in s3 of the HRA permits a tribunal to rewrite '*even a wholly unambiguous legislative provision if the Convention requires it and if doing so does not go against a fundamental feature of the legislation*'. It concluded that where paragraph 4(3) of Schedule 9 is read as not applying to claims brought under s108, that appeared '*to be a legislative oversight rather than cutting across the grain of the existing legislation*'.[6]

The ET considered whether the EA exemption violated T's Article 8 rights read with Article 14 ECHR applying the four-step approach as set out by Lady Black in *R (Stott) v Secretary of State for Justice* [2018] UKSC 59.[7] The tribunal accepted that T's claim '*plainly*' came within the ambit of Article 8 ECHR.[8] By its nature and impact, her claim of discrimination concerned her disability and caused injury to her feelings and distress, which included psychological integrity;[9] and her treatment had affected activities of a professional nature where factors relating to private life have been brought into a work context.

Next, the ET concluded that the alleged discrimination was on grounds of 'other status' as provided for within Article 14. This was whether the discrimination was between disabled ex-servicemen and women, who could not bring discrimination claims, and non-disabled ex-servicemen and women, who could on the basis of their other protected characteristics, so that T as a disabled person had a recognised status under Article 14.[10] Alternatively, the legislation discriminated between ex-servicemen and women and ex-employees of civilian employers on the basis of their status as ex-services personnel. Again, the tribunal accepted that being an ex-serviceman or woman was also capable of amounting to 'other status' under Article 14.[11]

The final and fourth *Stott* question went to justification, on which the ET concluded that it was not possible to see what could be the legitimate aim for the exemption. The purpose of the exemption must be to safeguard the combat effectiveness of the armed forces, and as such could have no relevance once the individual had been discharged.

That meant that s108 taken with paragraph 4(3) of Schedule 9 '*as presently drafted breaches the Claimant's rights under Articles 8 and 14 of the ECHR because it prevents her bringing a disability discrimination claim against the Respondent in respect of matters that have occurred since her discharge*'. S3 of the HRA '*requires it to be interpreted to avoid that result.*' The ET concluded that the EA '*can be so interpreted without offending any fundamental feature of the legislation.*' It even went further and proposed a '*minor amendment*' to the drafting.

S108(1)(b) of the EA should read*:*

> *A person (A) must not discriminate against another (B) if -*
> *(a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and*
> *(b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act* ***(or would do were the Act not disapplied by paragraph 4(3) of Schedule 9)****.*

The ET concluded: '*With that minor amendment, the exemption from the prohibition on disability discrimination for those serving in the armed forces remains intact, but the armed forces are not permitted to discriminate against disabled ex-servicemen and women.*'

Implications of the judgment

First, the judgment enables T to proceed with her claim. This also applies to any other claimants who since discharge from service have suffered disability discrimination (or discrimination in relation to their age), whether in the handling of a service complaint or any other matters related to their service.

No longer can the MoD point to Schedule 9 paragraph

4 *Child Soldiers International v the Secretary of State for Defence* [2015] EWHC 2183; see also *Gowland v Ministry of Defence* (2500663/2016); *Smith v Ministry of Defence* (1401295/2019)

5 See Recital 19 and Article 3(4) of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation

6 The ET also specifically distinguished this case from *Steer v Stormsure Ltd* [2021] IRLR 172 Briefing 994, November 2021, concerning extending the jurisdiction of the tribunal to new categories of interim relief for claimants of discrimination claims.

7 UKSC 59, [2020] AC 51, at [8]

8 It doubted whether it came within Article 6 but made no finding on this.

9 *Costello-Roberts v the United Kingdom* (1993) 19 EHRR 112, *X and Y v the Netherlands* (1985) 8 EHRR 235 and *Glor v Switzerland* 13444/04 [2009] ECHR 2191; see also in *Denisov v Ukraine* (Application No. 76639/11), judgment of 25 September 2018 at [95]–[107]

10 *Glor v Switzerland* ibid at [53]

11 *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63, [2009] 1 AC 311 per Lord Neuberger at [43].

4(3) to try to strike out a claim under section 108 of the EA. It had not been the intention of parliament to include disabled veterans in the blanket exemption and the need to preserve combat effectiveness cannot possibly apply to them.

Women in the Armed Forces

The House of Commons Defence Committee's inquiry on women in the Armed Forces, July 2021revealed the extent of sexual harassment endured by service women in the armed forces. The inquiry found that the MoD is *'failing to help female personnel achieve their full potential'*; that women are under-represented among senior officers; and that 62% of female service personnel and veterans report experiencing bullying, harassment and discrimination. Women are more than twice as likely as men to experience bullying, harassment and discrimination and, in 2021, ten times more likely to have experienced sexual harassment in the last 12 months. Further, nearly 40% of women rated their experience of the complaints process as *'extremely poor'*; and *'a lack of faith in the system contributes to 89% of both male and female personnel in the Regular Forces not making a formal complaint'.*

The Service Complaints system

The Ombudsman's annual reports have also shown that the Service Complaints system is *'not yet efficient, effective and fair'* and finds that female personnel, and those from minority ethnic backgrounds, were over-represented in the Service Complaints system, making up 21% and 15% of complainants compared to their representation in the UK Armed Forces, 12% and 8%. Reflecting these statistics, a very significant proportion of the women who contact the Centre for Military Justice for help, like T, report suffering serious mental health problems as a direct consequence of their experiences while serving, many of which they ascribe to discrimination based on their sex. These women may now bring claims if they are discriminated against in relation to their disabilities post-service.

After they leave the Services, veterans may still need to have considerable contact with the Armed Forces or MoD. For example: they may need to seek reviews of their pension arrangements; they may need to apply to the Armed Forces Compensation Scheme because they have sustained injury, including psychiatric injury, during service; or, as in T's case, they may have a Service Complaint which, because of the serious and endemic delays in the system, remains outstanding and continues long after they have left. If a disabled veteran believes that, post-service, the MoD has discriminated against them on the basis of their disability, or has failed to make reasonable adjustments for them to address any substantial disadvantage they may suffer, they may now be able to bring a claim.

Secondly, this judgment is a rare example of the successful application of s3 of the HRA in seeking to extend the EA. Without that application T's claim would have been struck out; she would have been denied protection from discrimination and access to the tribunal to have her claim adjudicated upon. This judgment may prompt further challenges to exemptions in the EA which give rise to serious questions as to their compatibility with an individual's human rights. Examples may include exemptions relating to potential discrimination claims for acts done on grounds of nationality and ethnic or national origin in certain immigration related decisions.

Finally, this case is a necessary reminder as to why the HRA is so important, particularly post-Brexit. Gone are the days when the ET can make a reference to the Court of Justice as to whether domestic discrimination legislation is compatible with the relevant anti-discrimination EU Directives. Set against the current consultation on replacing the HRA with a British Bill of Rights, T's case further underscores the importance of retaining s3 in its current form for those in need of the protection of the EA and more broadly.

CJEU considers whether a ban on wearing visible religious symbols in the workplace amounts to religious discrimination

IX v WABE, & MH Muller v MJ; Cases C-804/18 and C-341/19; July 15, 2021

IX v WABE Case C-804/18

Facts

IX, a special needs carer, brought a claim in the Arbeitsgericht Hamburg (Hamburg Labour Court) against her employer WABE (a national childcare centre provider). In March 2018, WABE adopted new guidelines on neutrality in the workplace which included the following stipulation:

> *Employees shall not wear any signs of their political, philosophical or religious beliefs that are visible to parents, children and third parties in the workplace.*

The Christian cross, Islamic headscarf and Jewish Kippah were not permitted.

In June 2018, IX was suspended from work for failing to remove her Islamic headscarf. When she wore the headscarf on a second occasion she was issued with a warning and suspended.

IX complained to the Arbeitsgericht Hamburg which stayed the proceedings and made a request for a preliminary ruling to the Court of Justice of the European Union (CJEU) on whether WABE's prohibition on the wearing of religious symbols constituted:

1. Direct discrimination on the grounds of religion against employees who, due to religious covering requirements, follow certain clothing rules?
2. Indirect discrimination on the grounds of religion and/or gender against a female employee who, due to her Muslim faith, wears a headscarf?

In particular:

a. Can [indirect] discrimination on the grounds of religion and/or gender be justified by the employer's wish to pursue a policy of neutrality even where the employer seeks to meet the wishes of his customers?

b. Can a ban on religious clothing be justified not simply on the basis of maintaining neutrality in the workplace, but only on the basis of an economic disadvantage to the employer or a third party?

MH Muller v MJ Case C-341/19

Facts

In 2016 MJ, an employee of MH Muller, was asked by her employer to remove her Islamic headscarf. She refused and was sent home and informed she could not attend work with any '*conspicuous, large-sized signs of any political, philosophical or religious beliefs'.*

MJ brought an action before the national courts seeking a declaration that that instruction was invalid. MH contended that the policy was applied in its stores to protect neutrality and prevent conflict which had arisen in the past between employees.

In support of her action, MJ invoked her right to freedom of religion and asserted that the policy of neutrality adopted by MH Muller did not enjoy unconditional priority over her freedom of religion and must be subject to the proportionality test.

MJ's claim was upheld and MH Muller appealed on a point of law to the Bundesarbeitsgericht (Federal Labour Court, Germany), arguing that it is not necessary to establish specific economic harm or a reduction in customers in order for a prohibition on manifesting beliefs to be validly applied (relying upon *G4S Secure Solutions* (C-157/15, EU:C:2017:203).

The court decided to stay the proceedings and to refer the following questions to the CJEU for a preliminary ruling:

1. Can indirect unequal treatment on grounds of religion resulting from an internal company rule be justified if it prohibits the wearing of any visible sign of religious, political, or other philosophical beliefs, and not only such signs as are prominent and large-sized?
2. If question 1 is answered in the negative:
   a. Is Article 2(2)(b) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (the Directive) to be interpreted as meaning that the rights derived from Article 10 of the Charter of Fundamental Rights of the European Union (the Charter) and from Article

9 of the European Convention on Human Rights (ECHR) may be taken into account in the examination of whether indirect unequal treatment on grounds of religion is unjustifiable on the basis of an internal rule which prohibits the wearing of prominent, large-sized signs of religious, political or other philosophical beliefs?

b. Is Article 2(2)(b) of the Directive to be interpreted as meaning that national laws which protect freedom of religion may be taken into account as more favourable provisions within the meaning of Article 8(1) of the Directive in the examination of whether established indirect unequal treatment on grounds of religion is justifiable on the basis of an internal rule of a private undertaking which prohibits the wearing of prominent, large-sized signs of religious, political or other philosophical beliefs?

3. If questions 2a and 2b are answered in the negative: Can an EU primary law override a national law of constitutional status which aims to protect religious freedom even where the primary EU law, such as Article 16 of the Charter, recognises national laws and practices?

Court of Justice of the European Union

The CJEU ruled as follows:

- Prohibiting the wearing of visible religious symbols does not constitute direct discrimination provided that it is a general rule which is applied in a general and 'undifferentiated' way and there is no difference in treatment built on a criterion based on religion or belief.
- It was acknowledged that such a rule might cause an inconvenience to some workers; however it was accepted that this has no bearing on the findings. This was emphasised further by the fact that WABE appeared to apply the rule to all its employees irrespective of religious background.
- As regards indirect religious discrimination, an employer's internal rule prohibiting workers from wearing any visible sign of political, philosophical or religious beliefs in the workplace, may be justified by its desire to pursue a policy of political, philosophical and religious neutrality with regard to its customers or users, provided that:
  i. that policy meets a genuine need on the part of that employer, which it is for that employer to demonstrate, taking into consideration, inter alia, the legitimate wishes of those customers or users and the adverse consequences that that employer would suffer in the absence of that policy, given the nature of its activities and the context in which they are carried out;
  ii. the difference of treatment is appropriate for the purpose of ensuring that the employer's policy of neutrality is properly applied, which entails that that policy is pursued in a consistent and systematic manner; and,
  iii. the prohibition in question is limited to what is strictly necessary having regard to the actual scale and severity of the adverse consequences the employer is seeking to avoid by adopting that prohibition.

- Regarding the question of indirect sex discrimination, the court found that the policy statistically affected Muslim women more than their comparators, but that the employer's wish to express to the public a policy of political and religious neutrality was found to be a legitimate aim.

- In contrast, in *MH Muller v MJ,* it was found that a prohibition which is limited only to the wearing of '*conspicuous, large-sized signs of political, philosophical or religious beliefs*' (and not more general neutrality) is liable to constitute direct discrimination on the grounds of religion or belief, which is incapable of justification.

- Article 2(2)(b) of the Directive must be interpreted as meaning that national provisions protecting the freedom of religion may be considered as more favourable provisions (in comparison to other Directive rights, including equal treatment), within the meaning of Article 8(1) of that Directive, in examining the appropriateness of a difference of treatment indirectly based on religion or belief.

It is therefore apparent that a ban on wearing religious or ideological symbols in the workplace may not be considered religious discrimination if the employer's aim is to enforce a policy of neutrality in the workplace provided that this policy is applied equally and does not differentiate between employees.

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Sexual orientation discrimination by a religious charity providing a public service was impermissible

R (Cornerstone (North East) Adoption and Fostering Services) v OFSTED [2021] EWCA Civ 1390; September 24, 2021[1]

Facts

The claimant, Cornerstone Adoption and Fostering Services (C), is a charity which exclusively recruits heterosexual, married, evangelical Christians as foster carers. Clause 5, paragraph 10 of C's Code of Practice states that prospective carers should '*abstain from all sexual sins including … homosexual behaviour*'. For the purposes of s4(4)(a) of the Care Standards Act 2000 (CSA), C is an independent fostering agency (IFA).

The respondent, Ofsted, is the public body authorised to regulate and inspect IFAs. Following its inspection of C, Ofsted produced a draft report (the draft report) on June 12, 2019 assessing C's management as 'inadequate' and marking other areas as '*requires improvement to be good*'. Ofsted asserted that C's recruitment process contravened various provisions of the Equality Act 2010 (EA) and the Human Rights Act 1998 (HRA) and required C not to discriminate against prospective carers on the grounds of religious belief or sexual orientation. On June 19, 2019, C sought judicial review for the decision, namely that Ofsted's report was unfounded. See *R (on the application of Cornerstone (North East) Adoption and Fostering Service Ltd v Office for Standards in Education, Children's Services and Skills* [2020] EWHC 1679 (Admin); July 7, 2020; Briefing 971, March 2021.

Notably in 2011, the Charity Commission found that C's recruitment policy *did not* discriminate on the grounds of sexual orientation. The Charity Commission's investigation followed the judgment in *Catholic Care ((Diocese of Leeds) v Charity Commission for England and Wales* [2010] EWHC 520 (Ch)) which found that if a charity discriminates in a way which is not justified, it will no longer be for the public benefit and therefore will not have charity status.

C's claim failed at both the HC and the CA.

High Court

The HC found that C was a 'hybrid' public authority for the purposes of s6 of the HRA. It also concluded that its recruitment of foster carers is done on behalf of a public authority under the terms of a contract between the organisation and the public authority pursuant to paragraph 2(10)(a) and (b) of Schedule 23 EA. Consequently, it decided that C had breached the EA and Articles 8 and 14 of the European Convention on Human Rights (ECHR) on the grounds of sexual orientation. However, the court rejected Ofsted's argument that C had also breached Articles 8 and 14 on the grounds of religious belief because the exception in paragraph 2 of Schedule 23 of the EA applied. As explained by Knowles J, the exception:

> … *specifically allows religious organisations such as Cornerstone to discriminate on the grounds of religious belief in relation to various things, including the provision of goods, facilities or services in the course of activities undertaken by the organisation or on its behalf or under its auspice* [para 284].

The same exception could not be applied to sexual orientation discrimination because of C's public nature in recruiting foster carers under the provisions of a contract.

Court of Appeal

C appealed the HC's decision on twelve grounds, of which the CA considered five.

Ground 1: Ofsted's Jurisdiction

Following the Charity Commission's findings in 2011 that C did not discriminate on the grounds of sexual orientation, C argued that Ofsted did not have jurisdiction to require it to disapply or modify its recruitment policy. The CA confirmed the approach of the HC such that Ofsted was in fact entitled to make its own findings. It described the idea that parliament had conferred exclusive jurisdiction on the Charity Commission as 'unpersuasive' [para 50] and highlighted that overlapping regulators was a common concept with untroubling consequences. The judge rejected this ground, determining that Ofsted was permitted to rely on the EA and HRA in its investigations under the powers granted by ss13 and 14 CSA.

1. [2021] IRLR 993

Ground 3: Direct discrimination on grounds of sexual orientation

Secondly, the CA considered whether C had directly discriminated against prospective foster carers on the grounds of sexual orientation under s13(1) EA, conjecturing two questions:

1. *Does C's policy amount to direct discrimination?*
2. *If so, is the policy in the case of a charity a proportionate means of achieving a legitimate aim, so that the exception under s193(2)(a) EA 2010 applies?*

Jackson LJ confirmed the HC's approach that '*the focus is on the objective factual criteria that are applied, and not upon the subjective motives for which they are applied*' [para 61]. Notably, the court rejected C's logic [set out at para 40], supported by evidence from Reverend Matthew Mason, that to be an evangelical Christian is to eschew a sinful lifestyle (ergo, engaging in same-sex relationships), thereby equating the two protected characteristics and suggesting its entitlement to discriminate against both.

Jackson LJ addressed this at para 67(1) stating '*[t]he fact that the rule on homosexual behaviour forms part of a broader belief system does not alter the fact that this aspect of Cornerstone's policy expressly excludes people of a particular sexual orientation*'. Further, stating '*Cornerstone's policy, which specifically requires carers not to engage in homosexual behaviour, is as clear an instance of direct discrimination "because of" a protected characteristic as can be imagined*' [para 67].

Proportionality is considered below.

Ground 4: Indirect discrimination on grounds of sexual orientation

The CA swiftly addressed ground four, reasoning that '*because direct and indirect discrimination are mutually exclusive, this ground therefore only arises if the conclusion regarding direct discrimination is incorrect*' [para 69].

Ground 9: ECHR discrimination against hypothetical foster carers

As Knowles J found that C constitutes a 'hybrid' public authority for the purposes of Article 6 HRA, it follows that C's policy cannot breach the ECHR rights of prospective carers. Defending its position, C contended that Ofsted did not have the requisite power under Article 7 HRA to find that the policy had breached ECHR rights because Ofsted could not ascertain 'actual' or 'identifiable' victims. The CA's conclusion, consolidating the HC's finding, was that Ofsted's report was made in line with its own investigative powers and therefore it was not required to identify victims.

Ground 10: ECHR discrimination against Cornerstone

On the issue of whether C itself had been discriminated against, the CA contemplated a four-stage test to assess whether Ofsted had acted in a way that breached C's Convention rights [in requiring C to modify its policy]:

1. Whether C's rights under Article 9 ECHR had been engaged because its recruitment policy was a manifestation of religion;
2. Whether Ofsted's requirements materially interfered with C's right;
3. Whether C's rights were breached by the production of the draft report; and
4. If C's rights were breached, whether Ofsted's actions pursued a legitimate aim in a proportionate manner.

On the first point, the CA held that the HC judge had erred in his decision that C's recruitment policy did not fall within the ambit of Article 9 ECHR. It also found that Ofsted's requirements had materially interfered with C's right and Knowles J was incorrect to consider whether '*Cornerstone's policy was sufficiently closely connected to its aims, when the correct question was whether it was sufficiently closely connected to its beliefs*' [para 91]. Jackson LJ decided that '*Ofsted's requirement that [C] changes its recruitment policy in a manner that is dissonant with one of its foundational purposes is consequently a matter that is of significance for it in practice*' [para 98].

Proportionality

The CA dealt concurrently with proportionality in relation to the question of proportionality under s193 EA (direct discrimination), indirect discrimination under s19(2) EA, and the purported breaches of the ECHR by both C and Ofsted, stating that '*on the facts of this case, it is common ground that the outcomes under each of these heads will harmonise*' [para 99]. The starting point was that '*particularly weighty reasons*' were required to justify sexual orientation discrimination.

The HC had used a four-stage test set out in *Bank Mellat v HM Treasury* (No 2) [2014] AC 700 to approach the question of proportionality [para 112]. The HC decided that the claim had failed at the third limb of the *Bank Mellat* test, namely whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective. By comparison, Jackson LJ challenged this conclusion and stated that the claim actually failed at the fourth limb, that is to say whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, the former outweighs the latter. Jackson LJ stated that '*in*

order to justify a policy of this nature, it needed to provide credible evidence that there would otherwise be a seriously detrimental impact on carers and children' [para 145]. C did not and the claim failed.

Comment

The judgment demonstrates that exceptional justification may be required before discrimination will be permitted. Further, it signifies an unwillingness to accept sexual orientation discrimination under the guise of justified religious discrimination stating:

> *... we should be slow to accept that prohibiting fostering agencies from discriminating against homosexuals is a disproportionate limitation on their right to manifest their religion* [para 143].

Significantly, C's status as a religious charity providing a public service necessitated it being held to a high standard of justification. In this context, the judge described sexual orientation discrimination as impermissible [para 127].

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Briefing 1006

Associative disability discrimination

Bennett v MiTAC Europe Ltd EA-2020-000349-LA (previously UKEAT/0185/20/LA); October 20, 2021[1]

Facts

Mr James Bennett (JB) brought a discrimination claim on the basis that he was dismissed due to a colleague's disability. JB worked in sales/marketing for MiTAC Europe Limited (R), the European subsidiary of the Taiwanese MiTAC Group, a consumer electronics company. A decision was taken by Steve Chang, a company president based in Taiwan, to cease the work done by JB's manager, Stuart Balaam (SB), UK sales and marketing director. This decision was taken after SB had notified the company of various health issues.

On April 18, 2018 SB was admitted to hospital with a suspected heart attack. Mr Chang was informed of this and sent an internal email to Ms Huang, the EU business head, noting that there was a 'personnel issue' and reaffirming the importance of delivering on sales targets.

On April 21, 2018 SB emailed his colleagues advising them of the possible heart attack, high blood pressure, and a growth found on his kidneys necessitating a further investigation to see if it was 'something sinister'. In early May a diagnosis of suspected kidney cancer was made and when SB advised Ms Huang that he expected that one of his kidneys would have to be removed and that he would require dialysis, he alleged that her attitude towards him changed. SB's cancer diagnosis was confirmed on August 7, 2018.

Around this time, management in Taiwan discussed concerns they had about the performance of the business in the UK, including whether SB and JB should pass their probationary periods. Thought was given to the prospect of dismissing SB, along with others in the UK sales team, and there was also internal correspondence about the risk that dismissing him could lead to a claim of disability discrimination. Ms Huang recommended that both employees should be retained; however, a decision was taken by Mr Chang in September 2018 to cease the work being done by SB and JB – this was in spite of a picture emerging that the company's UK business prospects were improving, and a recommendation of Ms Huang to extend the probation periods of both employees.

JB brought a claim for associative direct disability discrimination under s13(1) Equality Act 2010 (EA), on the basis that he was treated less favourably due to SB's disability, citing *Coleman v Attridge Law* (2008) C-303/06 (ECJ); Briefing 499, November 2008.

Employment Tribunal

The ET dismissed JB's claim of associative disability discrimination on the basis that it was not well-founded. The ET concluded that the true reason for his dismissal was poor performance.

1. [2021] IRLR 25

Employment Appeal Tribunal

JB appealed to the EAT which found that the ET had erred in law by holding that R had discharged the burden of proof, and by holding that for a disability such as cancer (a specified disability under schedule 1 para 6 EA), deemed or actual knowledge of the disability requires that there has been a medical diagnosis. The EAT criticised the fact that Mr Chang was not called to give evidence and nor were any notes made available concerning his decision to dismiss the employees. The EAT also found that the tribunal had not considered whether the decision-maker had been available to give evidence, and, if so, why he had not, given the ET would have been free to draw adverse inferences from this.

The EAT found that the ET's logic was flawed when it determined that an employer's knowledge of a disability for the purposes of direct discrimination is only fixed after a diagnosis concerning the disability has been made.

The EAT remitted the matter to be considered by a differently constituted ET.

Implications for practitioners

This case has two key elements which are of use to practitioners.

Firstly, HHJ Tayler embarks on a thorough investigation of the nature of the burden of proof in discrimination cases and the duty of the tribunal to examine all the relevant circumstances of a case.

His judgment noted the decision made by Linden J in *Gould v St John's Downshire Hill* [2020] IRLR 863, quoting *Nagarajan v London Regional Transport and Swiggs* [1999] IRLR 572, that the tribunal must determine whether the decision-maker's professed reasons were their actual reasons, and whether a protected characteristic influenced their decision. There is a requirement to establish that the treatment in question was '*in no sense whatsoever*' because of the protected characteristic, and whether the protected characteristic was a material cause of the treatment, even if not the only cause. In this case, stereotypical assumptions could potentially have been made about the ability and/or likely future ability of a disabled person, which would amount to direct discrimination under the s13 EA.

The EAT explored s136 EA, which sets out the two-stage process concerning the burden of proof in discrimination cases. The EAT noted the relevance of the SC's decision in *Efobi v Royal Mail Group Ltd* [2021] ICR 1263; Briefing 992, November 2021, in that the tribunal should draw adverse inferences from the failure to call decision-makers stating that, '*if a claimant has established sufficient evidence for the burden of proof to shift to the respondent, cogent evidence is required to discharge the burden*'. The EAT held that in this case the failure of the ET to explore why a decision-maker was not called as a witness meant that this evidential threshold was not satisfied [para 51].

Secondly, this decision makes clear that an employer can be deemed to be aware of a person's disability in advance of any formal diagnosis. It noted that the requirement for a diagnosis can be inferred from the statutory guidance; however, the EA does not expressly require this, and various situations can arise which would render this requirement illogical.

The EAT also noted that a person can be subject to discrimination if it is believed that a disability may arise at a later date. The EAT declined to make a final determination on this point although it has arguably already been considered in the case of *The Chief Constable of Norfolk v Coffey* [2019] EWCA Civ 1061; Briefing 917, November 2019.

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ET erred in deciding severe menopausal symptoms were not a disability

Rooney v Leicester City Council EA-2020-000070-DA and EA-2021-0002560-DA; October 7, 2021[1]

Implication for practitioners

In addition to highlighting the fact that someone experiencing severe menopausal symptoms may be a disabled person for the purposes of the Equality Act 2010 (EA), this case is a useful example of the importance of an ET giving reasons for its decision on any disputed issue, whether substantive or procedural.

Facts

Ms Rooney (MR) worked for Leicester City Council (LCC) as a childcare social worker for over 12 years. MR resigned in 2018. In 2019 she presented various claims to the ET, including constructive unfair dismissal, sex discrimination and disability discrimination.

Employment Tribunal

As originally submitted, MR's claim form stated she was not contending that she was disabled. MR later made an application to amend on the basis that her then solicitors had included that concession without her permission. MR submitted a second claim form claiming sex and disability discrimination due to her severe menopausal symptoms. MR outlined the '*physical, mental & psychological effects of the menopause*' which she had been suffering with for the last two years as including insomnia (causing fatigue and tiredness), light-headedness, confusion, stress, depression, anxiety, palpitations, memory loss, migraines, and hot flushes. She referred to being prescribed hormone replacement therapy by her GP and attending a specialist menopause clinic.

Following a preliminary hearing, the ET held that MR's '*alleged medical conditions of anxiety and depression and menopausal symptoms*' did not amount to a disability for the purposes of the EA. MR appealed to the EAT against the dismissal of her disability discrimination claim. She also appealed the ET's other decisions.

Employment Appeal Tribunal

The EAT found that the ET had erred in deciding that MR's menopausal symptoms did not amount to a disability for the purposes of the EA.

The EAT held that the ET's reasoning that MR did not rely on the physical symptoms associated with the menopause was inconsistent with the description MR gave of her menopausal symptoms. The ET had not rejected MR's evidence, in which she had stated that her menopausal symptoms included '*hot flushes and sweating, palpitations and anxiety, night sweats and sleep disturbance, fatigue, poor concentration, urinary problems and headaches*'.

The EAT criticised the ET's lack of reasoning for its finding that any impairment was not long-term. The EAT also noted that the ET had not explained its conclusion that MR's evidence did not demonstrate an effect on day-to-day activities which was more than minor or trivial.

The EAT found that the ET had erred in focusing on the things MR could do and had fallen into the error of weighing what she could do against what she could not do, contrary to the approach required in *Ahmed v Metroline Travel Ltd* UKEAT/0400/10/JOJ.

The EAT noted that the ET had taken into account the fact that MR was able to carry out some day-to-day activities as she provided care to others but expressed doubts as to how much this should have added to the ET's analysis. The EAT noted that many people, including those with disabilities, have caring responsibilities.

In considering the pleading at paragraph 71 of MR's original claim form, which stated that she was not disabled, the EAT found that the ET had failed to take into account the fact that MR stated that the paragraph had been pleaded without her instructions and that there was an outstanding application to amend the claim form by removal of that paragraph.

The EAT decided to remit the issue to the ET and highlighted that determination of whether MR was a disabled person at the relevant time would require '*a careful factual analysis*'.

The EAT also allowed MR's other appeals. It allowed the appeals against the striking out of MR's sex discrimination, harassment and victimisation claims on the basis that the ET had not explained its decisions and MR could not know why her claims

1. [2022] IRLR 17

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had been dismissed. The EAT also allowed the appeal against a different ET's decision to refuse MR's application to amend her claim to include a complaint of being subjected to a detriment because of a protected disclosure. The EAT held that the ET had not given reasons for not considering MR's explanation as to why her application to amend was made late.

The EAT remitted the case back to a freshly constituted ET.

Comment

This case highlights how difficult it can be for a claimant experiencing severe menopausal symptoms to meet the EA's definition of a disabled person. This is of particular relevance for women, many of whom may be experiencing menopausal symptoms in the workplace. Intersex people, non-binary people and trans men may also experience menopausal symptoms. Trans women may experience some symptoms similar to that of the menopause if they are taking hormones and their hormone doses are adjusted or stopped. Considering the number of people potentially affected, greater clarity regarding the circumstances in which a person experiencing menopausal symptoms may be covered by the disability discrimination provisions of the EA would be helpful.

The EAT's criticism of the emphasis placed by the ET on MR's caring responsibilities in considering her disability status is useful in the context of the generally accepted fact that women are disproportionately more likely than men to have caring responsibilities. This is particularly important as people experiencing menopause may have caring responsibilities for both children and older relatives. The fact of those caring responsibilities should not preclude them from being considered as disabled people if they otherwise would have met the statutory definition under the EA.

The EAT's scrutiny of the ET's error in analysing MR's disability status in the context of her menopausal symptoms comes at a pertinent time. The House of Commons Women and Equalities Committee is currently undertaking an inquiry examining the extent of discrimination faced by menopausal people in the workplace, and is investigating how government policy and workplace practices can better support those experiencing menopause. Whether the EA sufficiently protects people who are experiencing severe menopausal symptoms from discrimination is likely to be considered as part of that inquiry and remains a topical issue.

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Briefing 1008

Constructive dismissal may constitute an act of harassment

Driscoll v (1) V&P Global Ltd and (2) Varela EA-2020-000876-LA and EA-2020-000877-LA;[1] July 15, 2021

Facts

Ms Driscoll (D) started employment with V&P Global Ltd, a legal recruitment consultancy, as an executive assistant/operations manager, on April 2, 2019. Mr Varela (V) was the founder and chief executive of V&P Global Ltd.

D's employment terminated on July 29, 2019. She presented an employment tribunal claim asserting (amongst other things) that, on various occasions during her employment, V made comments which constituted harassment related to sex, race or disability, contrary to s26 Equality Act 2010 (EA). D claimed that she had resigned in response to the alleged harassment and this amounted to a constructive dismissal which was, in itself, an act of harassment.

Employment Tribunal

At a preliminary hearing, the ET held that it was bound by the EAT's decisions in *Timothy James Consulting Ltd v Wilton* [2015] IRLR 368 and *Urso v Department for Work and Pensions* [2017] IRLR 304 to conclude that, as a matter of law, a constructive dismissal could not amount to harassment contrary to s26 EA. The ET therefore struck out D's claim, under

1. [2021] IRLR 891

rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013 (as amended), as having no reasonable prospect of success.

D appealed to the EAT arguing (amongst other things) that the *Wilton* and *Urso* cases should not be followed and/or are inconsistent and/or do not implement properly the relevant anti-discrimination EU Directives.

Employment Appeal Tribunal

The EAT allowed D's appeal with Ellenbogen J (sitting alone) undertaking a careful analysis of the EAT's decisions in the *Wilton* and *Urso* cases.

Ellenbogen J observed that, in the *Wilton* case, the EAT had held that, although incidents of harassment related to sex had led the claimant to resign, the application of harassment as prohibited conduct in the context of employment in s40 EA did not include a resignation amounting to constructive dismissal; and that, accordingly, it had not been open to the ET, as a matter of law, to find that the constructive dismissal had been, in itself, an unlawful act of harassment, contrary to s26 EA.

Ellenbogen J noted, however, that the EAT had decided the *Wilton* case without regard to the relevant EU Directives.

Turning to the *Urso* case, Ellenbogen J found that Supperstone J's comments in relation to constructive dismissal (which endorsed the EAT's decision in the *Wilton* case) were obiter (and therefore not binding precedent) and, in any event, were themselves expressed without the benefit of any potentially relevant EU law or related submissions.

Ellenbogen J used Supperstone J's analysis of the nature of a constructive dismissal, finding that *'there can be no dismissal in the absence of conduct of the requisite manner on the part of the employer'.*

She relied on the CA's decision in *Meikle v Nottinghamshire County Council* [2005] ICR 1 as authority for the proposition that there is no principled basis for distinguishing between different types of dismissal when considering a discrimination claim. Ellenbogen J observed that the *Meikle* case, which concerned the question of whether a constructive dismissal amounted to a 'dismissal' within the meaning of s4(2)(d) Disability Discrimination Act 1995 (the equivalent of which is now found in s39(2) EA), was not referred to in the *Wilton* or *Urso* cases (and, as such, both cases were decided without regard to it).

Analysing the relevant EU Directives, Ellenbogen J held that *'there is no principled basis upon which, in the Directives with which I am concerned, the word dismissal should be taken to exclude constructive dismissal'.*

Turning to the EA, Ellenbogen J held that its harassment provisions must be construed purposively so as to conform with the relevant EU Directives (a position that is unaffected by Brexit due to s5(2) of the European Union (Withdrawal) Act 2018). She held that *'the [EA] must be construed so as to proscribe harassment in the form of dismissal, including constructive dismissal'* and concluded that the decision in the *Wilton* case was 'manifestly wrong', having been made without regard to the relevant EU Directives and the *Meikle* case.

Comment

This is an important decision and one which may carry significant practical implications for employment law practitioners and their clients.

One of its main effects relates to time limits under s123 EA. Under the law espoused in the *Wilton* case, each act of harassment by an employer leading up to an employee's resignation would trigger a primary three-month limitation period within which a claim in respect of that act of harassment would have to be brought. A series of acts of harassment leading up an employee's resignation might amount to *'conduct extending over a period'* for the purposes of s123(3) EA, in which case all the acts in the series might be actionable even if some of them occurred outside of the primary three-month limitation period. If not, however, then some or all of the acts which occurred outside of the primary three-month limitation period might be time-barred, with the claimant being able to bring claims only in relation to those acts that were within the three-month limitation period.

The EAT's decision that a constructive dismissal can constitute an act of harassment may alleviate limitation difficulties in some cases. The resignation of an employee in response to a series of acts of harassment would, in a sense, bring all those acts into scope for the purposes of the harassment claim (and do away with limitation difficulties in respect of earlier acts in the series) provided, of course, that the resignation occurred within the three-month limitation period.

Moreover, the ability to base a harassment claim on a constructive dismissal, as opposed to having to couch the constructive dismissal in terms of direct discrimination, avoids the need for a claimant to identify a comparator and imports the wider test for claims of harassment (whereby the conduct complained of need only be 'related to' the relevant

1008 protected characteristic rather than 'because of' it, as is the case in the context of direct discrimination).

Furthermore, the EAT's decision in this case may give rise to a potentially greater remedy for a successful claimant than was the case previously in that, where a constructive dismissal is found to constitute an act of harassment, the claimant would be entitled to compensation for any losses flowing from it, which might reflect substantial loss of earnings (without a statutory upper limit) in addition to injury to feelings.

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1009 Briefing 1009

The location of transgender prisoners on the women's estate

R (FDJ) v Secretary of State for Justice [2021] EWHC 1746 (Admin);[1] July 7, 2021

Implications for practitioners

In cases that allege competing interests between those of transgender women and of non-transgender women:

1. The rights of non-transgender women can be engaged in circumstances where transgender women are in their company. However, whether non-transgender are put at a particular disadvantage will turn on the facts.
2. There is no general compulsion on service providers, or those otherwise exercising a public function, to make use of the single-sex exceptions in the Equality Act 2010 (EA).

Facts

The claimant (C) was a female prisoner on the women's estate. The defendant (D), the Secretary of State for Justice, is responsible for the prison service. C challenged D's policies which allow for the location of transgender prisoners on the women's estate, particularly transgender women with a Gender Recognition Certificate (GRC) – i.e. prisoners who are, in law, women, upon being issued a GRC under the Gender Recognition Act 2004 (GRA).

In 2019, D introduced two new prison policies concerning the management of transgender prisoners.

The first policy, the Care and Management Policy, relates to the care and management of transgender prisoners. It provides for case boards with specialist members, including Complex Case Boards (CCBs), to make decisions about the location of transgender prisoners. CCBs are required to make decisions by reference to a number of relevant factors, particularly risks posed to and by the prisoners.

C particularly challenged provisions to the effect that a transgender woman with a GRC will ordinarily be located on the women's estate unless there are exceptional circumstances which justify locating her elsewhere.

The second policy, the E Wing Policy, concerns the E Wing at HMP Downview. The E Wing is a designated wing on the women's estate for transgender prisoners assessed as presenting a high risk of harm to other women in custody.

C brought two challenges. She alleged that the policies constituted indirect sex discrimination against women (both under Article 14 ECHR (prohibition of discrimination) – read with Articles 3 (prohibition of torture) and 8 (right to private and family life) – and under s19 EA). She also alleged that the policies misstate the law.

High Court

Ground 1: indirect discrimination

Engagement of Articles 3 and 8

C successfully argued that an unconditional introduction of a transgender woman into the women's estate carries a statistically greater risk of sexual assault upon non-transgender prisoners, and thus the policies fell within the ambit of Articles 3 and 8.

Disproportionate impact on women under Article 14

C alleged that the location of certain transgender prisoners on the women's estate put other women at a particular disadvantage. Reasons for this included that a history of sexual assault is prevalent among the female prisoner population, and locating transgender women (particularly those with convictions for sexual and

1. [2021] 1 WLR 5265

violent offences) put other women at risk.

Whilst the court accepted that the female cohort is vulnerable, it rejected C's generalised complaint of disproportionate risk. It found that the policies require a careful, case-by-case assessment of the risks posed by transgender prisoners and the ways in which any risks should be managed. Accordingly, there is in fact no disproportionate impact on women.

Justification

In any event, the court had no doubt that the policies are justified. They pursue the legitimate aims of ensuring the safety and welfare of all prisoners whilst enabling transgender prisoners to live in their chosen gender. D is not obliged to make greater use of the single-sex exceptions in the EA. The use of such exceptions is not obligatory either generally or in any particular case. In any event, the careful risk assessments ensure that risks to women are accounted for and given appropriate weight. Risks can also be safely managed on the women's estate (such as by locating transgender women on E Wing under risk assessed supervision).

Section 19 EA claim

The analysis under s19 EA followed a similar path. For the same reasons as under Article 14, the policies cause no particular disadvantage to women and in any event they are justified.

Ground 2: misstatement of law

This claim failed because the court found that the policies do not purport to state the law at all. They are internal guides on the management of prisoners.

Comment

The court stressed that it was concerned with the '*lawfulness, not the desirability*' of the policies. It recognised that policies in this area engage competing interests and require balancing of rights, and that it is unlikely that any policy will satisfy all persons affected by it. The judgment reflects a degree of reluctance to pick a winning side in a fraught public debate.

For those concerned with sex-based rights, the judgment is a public recognition that the rights of non-transgender women can be affected by the presence of transgender women.

However, the court did not clearly specify what concerns of non-transgender women were valid and/or needed balancing, in part because it felt C's own case was blurred on the disadvantage caused to non-transgender women. And whilst the court found that the unconditional introduction of transgender women to the women's estate fell within the ambit of Articles 3 and 8, there is in fact no unconditional introduction and the policies as they operate do not put women at a particular disadvantage.

Although not directly in issue between the parties, the judgment also lends support to a 'case-by-case' theory when considering whether to allow transgender women to enter single-sex spaces (rather than supporting a case that a blanket rule one way or the other is either required or desirable).

The judgment is also clear that there is no general compulsion on service providers to exercise the single-sex exceptions. Whether, and how, they do so appears principally to be a matter for them.

Separately, the case is a rare example of a finding that the facts fall within the ambit of Article 3 without also constituting a breach of Article 3.

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DWP still discriminating against severely disabled people

R (TP, AR, AB and F) v Secretary of State for Work and Pensions [2022] EWHC 123 (Admin); January 21, 2022

Implications for practitioners

This case has potentially important implications for anyone advising adults who are or were in receipt of Severe Disability Premium (SDP) ('severely disabled adults') and who have gone through or are planning to go through a change in personal circumstances which might require them to start claiming Universal Credit (UC). It is especially important for severely disabled adults who are or were previously in receipt of Enhanced Disability Premium (EDP) or who qualify for disabled child support under Child Tax Credit. The approach of the High Court to the claimants' claims is also of some wider interest to practitioners considering discrimination challenges to government rules about social security entitlements.

Facts

Two of the claimants, TP & AR, are severely disabled adults who were required to move from 'Legacy Benefits' (the 'old' system of benefits) to UC after they moved house across a local authority boundary. They suffered significant financial losses on UC because UC has no equivalent to the SDP or to the EDP to which they were entitled under Legacy Benefits.

TP & AR had previously brought two successful judicial review claims arguing that the failure to provide any transitional payments to cushion against the loss of SDP and EDP after they moved onto UC violated their right not to suffer discrimination as protected by Article 14 of the European Convention on Human Rights (ECHR): see *R (TP and Ors) v SSWP* [2018] EWHC 1474 (Admin), Briefing 909, November 2019; *R (TP & AR) v SSWP* [2019] EWHC 1116 (Admin); *R (TP & AR) v SSWP* [2020] EWCA Civ 37.

In this case, TP & AR brought a further judicial review challenge arguing that, notwithstanding the introduction of increased transitional payments (£120 per month, an increase from £80 per month) to compensate severely disabled people for loss of SDP, the DWP was still unlawfully discriminating against them because they still received no compensation for the element of the loss attributable to EDP.

The third and fourth claimants, AB & F, are a severely disabled mother (AB) and her disabled child (F). AB was required to move from Legacy Benefits to UC after her partner, F's father, moved into the family home. AB suffered very significant financial losses because she lost access to SDP and EDP, but also because support for disabled children under UC (the UC 'lower' disabled child element) is much lower than the equivalent under Legacy Benefits (the disabled child element of Child Tax Credit). At current rates the UC lower disabled child element is £157.36 per month lower than the Child Tax Credit disabled child element (per eligible child). AB did begin to receive transitional payments compensating her for the loss of SDP (only) following the earlier TP & AR judicial reviews.

AB & F brought a judicial review challenge arguing that they were the victims of discrimination contrary to Article 14 ECHR on the basis that the DWP had failed to provide any transitional payments to cushion against the loss of EDP or against the loss of disabled child support.

All the claims were heard together.

High Court

Holgate J, sitting in the Administrative Court, upheld the claimants' claims.

There was no dispute that the claims fell within the 'ambit' of Article 1 of Protocol 1 ECHR, so that Article 14 ECHR (the right not to suffer discrimination) was engaged. In summary, the HC held that:

1. The claimants (severely disabled people who had moved onto UC) had been treated differently from their comparators (essentially, severely disabled people who had not moved onto UC). The difference in treatment was that the claimants had lost EDP and, in the case of AB and F, they had also lost substantial sums in disabled child support.
2. The claimants and their comparators were in an 'analogous' situation.
3. The difference in treatment of the claimants compared with their comparators was based on a qualifying 'status' for the purposes of Article 14 ECHR, meaning that the difference in treatment between them had to be justified.
4. There was no lawful justification for treating the claimants differently from other severely disabled

claimants who had not transferred to UC.

On the first three questions, Holgate J found that there was no basis to reach different findings from those reached by the HC in the earlier TP & AR judicial reviews.

On the issue of justification, Holgate J accepted that he ought to apply '*a low intensity of review*', or in other words offer a '*wide margin of appreciation*' to the Secretary of State [para 195]. Nevertheless, he concluded that there was no proper justification for treating the claimants differently. In particular, the changes in circumstances, or 'trigger events', which led the claimants to claim UC did not justify the differential treatment.

Holgate J dismissed a wide range of arguments advanced by the Secretary of State (who bore the burden of justifying the difference in treatment). He noted that much of the material, and many of the arguments, used by the Secretary of State were no different to those she had used in the earlier judicial review challenges brought by TP & AR [paras 161, 166, 188]. Insofar as the Secretary of State sought to rely on arguments to do with the supposed administrative burden and cost of implementing transitional support for severely disabled adults, Holgate J was highly critical of the lack of detail in her evidence, particularly bearing in mind that this was the third judicial review focusing on the same issues.

Comment

The success of the claimants' claims represents the third time in four years that the HC has found that the lack of transitional protection for severely disabled adults who migrate to UC (and therefore lose critical financial support) violates Article 14 ECHR. This most recent judgment is significant in particular because it is the first time that Article 14 ECHR discrimination has been found in relation to the loss of disabled child support under UC. It is to be hoped that the government responds to the judgment by putting in place an enhanced scheme of transitional protection which compensates severely disabled adults not only for the loss of SDP but equally for the loss of EDP and disabled child support.

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Briefing 1011

Service provider should have made reasonable adjustments and provided BSL interpretation for deaf customers at live music event

Reynolds & others v Live in the UK (Creditors in Voluntary Liquidation) Ltd
Central London County Court, Case no E89YJ500, September 16, 2021

British Sign Language (BSL) has received increasing attention over the past year with the participation and eventual crowning of Rose Ayling-Ellis, a Deaf BSL using actor, as champion of Strictly, the '*Where's the Interpreter*' campaign and the subsequent judgment in *R (on the application of Rowley) v the Cabinet Office* [2021] EWHC 2108 (Admin); July 28, 2021; Briefing 1000, November 2021.

Last year also saw a county court hand down a detailed judgment, for the first, time, with significant ramifications for deaf people's access to music events. Unusually, the claimants had continued their claim despite the original defendant having gone into liquidation during the pandemic (although this was after the exchange of witness statements and other preparations for trial) as they were determined to seek a judgment which could make a difference.

Facts

The claimants are three deaf BSL users. They have hearing daughters and decided to take them to an open-air Little Mix concert in September 2017, organised by the defendant Live in the UK Limited, for the birthday of one of their daughters. They purchased the tickets in June, and in July emailed the chief executive officer of Live in the UK to ask what provision would be made for disabled people; they indicated their need for BSL, as well as specific requirements for a successful

interpretation – a place from which they could clearly see the stage, and a list of songs in the order in which they would be sung. They offered to signpost the defendant to BSL service providers if a BSL service had not yet been arranged.

The answer from Live in the UK was a resounding 'No'. The claimants replied by pointing out the defendant's obligations under the Equality Act 2010 (EA). They even put the defendant in touch with Attitude Is Everything, a charity promoting deaf people's access to live music, which offered support in making arrangements. Live in the UK merely offered three 'carer tickets' and space in the disabled viewing area, pointing out that '*these come at significant cost to us as promoters*'.

After repeated requests, and two days before the concert, the claimants issued a claim for injunctive relief in the Central London County Court. On the same day, Live in the UK confirmed that a BSL interpreter had been booked. However, the interpreter had only been booked to provide interpretation for Little Mix. There was no interpreter for any of the announcements or for the two support acts.

County Court

The claimants brought claims for, amongst other things, failure to make reasonable adjustments contrary to s29(2)(c) and in breach of s20(5) of the EA. District Judge Avent heard the claims in July 2021. Live in the UK did not participate in the trial because it went into liquidation in August 2020, so its evidence was limited to witness statements which had been exchanged before liquidation. However, the claimants were subjected to questioning from the court to test their evidence. The trial was by zoom and interpreted by BSL, though there were some difficulties with the interpretation. It did however reach a significant number of viewers.

DJ Avent found that the defendant had failed to make the reasonable adjustment of providing BSL interpretation for the entirety of the concert. The claimants received an injury to feelings award of £5,000 each.

The reasoning

The service which was being provided was access to the entire concert, particularly as the essence of the reasonable adjustment is to approximate the experience to those without hearing loss. The defendant tried to argue that it met its equality obligations by providing a BSL interpreter for the show of Little Mix, the artist whom the claimants had paid to see. The claimants argued that the tickets were not just for Little Mix but for the whole event. The judge agreed. As soon as the support acts were named, they became part of the event. Even if the claimants – like, perhaps, the rest of the audience – had not been interested in the support acts, they were entitled to an adjustment that would enable them, as far as possible, to approximate their experience to that of the other attendees (as per *Roads v Central Trains* Limited [2004] EWCA Civ 1541).

The reasonable adjustment duty requires service providers to anticipate the needs of potential disabled customers. It was foreseeable that people with hearing loss would want to attend this concert, therefore BSL interpretation ought to have been planned. This was all the more so when one of the claimants, Ms Reynolds, emailed the defendant nearly two months prior to the concert, to ask about it.

The duty was triggered: the defendant tried to suggest that the claimants' cochlear implants and lip-reading ability were sufficient to enable them to experience the concert (and thus in effect that there was no substantial disadvantage). The judge found this position 'naïve' and lacking '*any understanding of the nature and extent of the disability of each claimant*'. After having read the evidence of the expert instructed, DJ Avent found that auxiliary aids are of no use in concerts, and lip-reading is only possible in specific circumstances (proximity to the speaker, good lighting conditions, nothing obstructing sight of the mouth, among other things). Even then, a large part of what is said would still be missed.

In addition, the judge accepted the claimants' evidence that deaf people are unlikely to be able to access concerts of this nature in a musical sense of appreciation, which means that lyrics and words take on a much greater importance for them, both in terms of the songs sung and the artists' interaction with the audience.

As to the reasonableness of the adjustment, the judge found that had the defendant anticipated the adjustment, it could have absorbed the cost of a BSL interpreter into the overall costs of the event. The cost was reasonable in any event: it would have amounted to less than 0.5% of the overall concert costs.

The judge also found that offering a 'carer ticket' so that the claimants could bring their own interpreter was not a reasonable adjustment, because only a professional interpreter could have dealt with the level of interpretation required, and this would involve a cost to the claimants, which goes against the statutory requirements

What this means for disabled people accessing live events

Relatively early in the judgment DJ Avent makes clear the importance of BSL – stating that BSL is a mainstream means of communication for a significant section of society as was acknowledged by Lord Dyson at paragraph 2 in the case of *Finnigan v Chief Constable of Northumbria Police* [2013] EWCA Civ 1191 when he said:

> *BSL is a language in its own right which is regularly used by a significant number of people. It is a visual-gestural language with its own vocabulary, grammar and syntax.*

DJ Avent's judgment includes some important comments about access to live events for people without hearing. It states that '*where concerts of this magnitude and size of being provided for a particular band, with or without support acts, for one night only at a specific geographic location, it seems to me generally speaking that the provision of a BSL interpreter will always be more than likely a reasonable adjustment to make or provide*'. However, the judge refused to say anything about whether this would apply to festivals, which are different in nature to a single-stage music event.

Comment

This judgment is a significant win for the deaf community and disabled people in general. Service providers must anticipate the needs of disabled people who may wish to use their services, and make appropriate adjustments to provide access to a service as close as reasonably possible to that offered to the public at large, even if this involves additional costs. BSL interpretation will generally be an obvious adjustment at live events. There is presently a BSL Bill[1] making its way through parliament. Whilst it is to be welcomed, the EA continues to provide important rights for deaf people in addition to any further statutory provisions.

Catherine Casserley with thanks to Laurene Veale
Cloisters

1 The British Sign Language Bill: a private members bill sponsored by Rosie Cooper MP which aims to declare BSL an official language of the UK; to provide for a BSL Council to promote and advise on the use of BSL; to establish principles for the use of BSL in public services; to require public bodies to have regard to those principles and to guidance issued by the Council, etc.

Briefing 1012

Indirect disability discrimination; the role of an assessor in county court proceedings and compensation

Rosebery Housing Association v Cara Williams and Elaine Williams (2021) EW Misc 22 (CC) Case No: G01KT427; December 10, 2021

Facts

This case concerned an application for an injunction made by a housing association against a disabled tenant (CW).

CW shares ownership of her home with Rosebery Housing Association (Rosebery). CW has obsessive compulsive disorder (OCD) which manifested in the form of several daily rituals which included the '*extensive and obsessive filming of her surroundings*'. This manifestation of her disability had caused a significant amount of tension with CW's neighbours resulting in police involvement.

In January 2020 Rosebery put the allegations of anti-social behaviour to CW and, in June 2020, brought proceedings seeking an injunction against her and her mother, EW. There were 123 examples of behaviour which Rosebery cited as evidence of CW and EW's conduct causing nuisance and harassment to their neighbours, the majority focusing on CW's filming of them.

CW counterclaimed, stating that she had been discriminated against for reasons arising out of her disability contrary to s15 and s35 Equality Act 2010 (EA). Expert evidence was provided which established that CW's OCD was a disability and that she was not in control of behaviours arising out of her condition.

In evidence the housing officer, who had completed what Rosebery entitled an '*Equality and Human Rights Impact Assessment*', revealed that he was not at all familiar with the terms of the public sector equality duty in s149 EA. This contributed to the case being described as a '*forensic disaster for Rosebery and for the residents in whose interests it thought it was proceeding*'.

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County Court

HHJ Luba QC held that of the various allegations against CW only a relatively minor allegation of noise nuisance had been made out. This left him to concentrate on the substance of the counterclaim.

The main thrust of the application for an injunction was based around CW's filming of her surroundings. As this behaviour arose as a consequence of her disability it followed that the proceedings were only brought as a consequence of CW's disability. It was held that the application for an injunction was a detriment for the purposes of the EA.

Turning to Rosebery's assertion that the application for an injunction was a proportionate means of achieving a legitimate aim, it was noted that the allegations had been presented to CW as a whole and that its encouragement of CW's neighbours to film her behaviour had only exacerbated the tensions between them and exacerbated CW's condition. The expert evidence was that with the increasing stress of being filmed, CW's own propensity to video her surroundings would increase. Perhaps unsurprisingly HHJ Luba QC concluded that Rosebery had '*failed to come anywhere near*' establishing that its application was proportionate.

There was detailed consideration of Rosebery's duties to CW under s149 EA:

> *If ever there was a case in which the social housing provider needed to acknowledge, become familiar with and then discharge the public sector equality duty with vigour it was this one. From a very early stage [it] should have been obvious to Rosebery that Cara's condition, particularly if untreated and worsening, would need to be accommodated with reason and understanding by her neighbours and that it would itself need specialist expertise to address a situation with which its own staff had little or no experience … It was a delicate and difficult task for which Rosebery was not equipped and for which it failed to equip itself.*

Addressing the question of quantum it was noted that the treatment CW had been subjected to had taken a 'considerable toll' on her mental health and general wellbeing and consequently, by reference to the Joint Presidential Guidance, HHJ Luba QC made an award of £27,500:

> *I am satisfied that this case justifies an award reflecting a degree of seriousness just within the lower reaches of the top band. That band is described in Vento as appropriate for "the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race". That the characteristic here is disability, and that the discriminatory conduct has extended over a considerable period with very significant adverse impact on the disabled person, to my mind that brings this case into at least the lowest reaches of the top band.*

Comment

This judgment provides useful guidance for those bringing goods and services discrimination claims on the key role played by the assessor – one which should not be overlooked:

> *Because of the nature of the counterclaim, I sat with an Assessor appointed pursuant to section 114(7) of the 2010 Act. Ms Lucy Moreton has long experience in the fields of disability and discrimination and sits as a fee paid member in the specialist tribunals. I pay tribute to the considerable assistance she provided to the Court, both during the trial and in a post-trial discussion. Her contribution amply justified the statutory presumption in favour of the appointment of specialist assessors in this class of case.*

The issue of whether a disability assessor is required is often fraught, with the appointment of an assessor all but requiring that the claims are heard on the multi-track. For legal representatives acting for claimants, the appointment of an assessor can enable the recovery of costs in successful claims. This could prove to be an issue for litigants in person, who may wish to ensure their claim is allocated to the small claims track in order to minimise adverse costs risks against themselves.

The level of compensation awarded, albeit in the context of prolonged and stressful proceedings which threatened CW's ability to remain in her home, is significant. Discrimination claims in the county court have been undervalued since the EA came into force and an award which falls within the upper Vento band is to be welcomed. Given the dearth of reported cases of this type, this compensation award can be cited in other cases as evidence that the county court may be prepared to make substantial awards to claimants who have been subjected to discriminatory acts when accessing goods and services.

For housing solicitors this judgment suggests that social housing providers seeking anti-social behaviour injunctions ought to seek to establish whether the behaviour complained of is connected to a disability before moving to issue proceedings in the court.

Ryan Bradshaw
Leigh Day

Indirect race discrimination in disparate pay arrangements for outsourced workers

Antwi and Ors v The Royal Parks Limited Case Nos: 2202211/2020, 2204440/2020 & 2205570/2020; November 16, 2021

Introduction

Since the practice of outsourcing became widespread in the 1980s, many companies and public bodies have sought to minimise their labour costs by contracting out certain key functions such as cleaning, security and catering. According to TUC estimates in 2018, more than 3.3 million workers are employed under outsourcing arrangements across the UK. Such workers are often employed on inferior pay and conditions compared to their in-house colleagues. Given the prevalence of migrant workers in these outsourced industries, many such arrangements have a disparate impact in practice, creating a two-tier workforce which disadvantages black and minority ethnic (BME) workers. Until recently however, courts and tribunals have rarely grappled with the question of whether such practices amount to indirect race discrimination.

Facts

The claimants were cleaners employed by Vinci Construction UK Limited (Vinci), who were deployed to clean the public toilets across the respondent's (TRP) eight Royal Parks in London, pursuant to a services contract between Vinci and TRP concluded in 2014.

At the point of contracting, Vinci provided costings to TRP for paying the claimants the London Living Wage (LLW), a voluntary hourly rate determined annually by the Living Wage Foundation by reference to what it considers a person working in London needs to earn to meet their basic living costs. That option was not taken up by TRP. Instead TRP agreed with Vinci that it would pay the workers on the contract £7.00 per hour, slightly above the prevailing National Minimum Wage. The contract was priced on that basis. Taking up the LLW option would have increased the overall contract price by 12%, that being £718,906 over five years.

TRP had by 2014 already adopted the LLW as a benchmark for its own direct employees. No TRP employee was paid less than the LLW during the period 2014 – 2019, and deliberately so. Only 12.6% of direct employees of TRP were BMP individuals. At least 80% of the workers on the Vinci contract were BME.

In 2019 the claimants went on strike demanding an increase to the LLW. Vinci subsequently informed them that TRP had opted to fund the LLW for workers on the contract.

Employment Tribunal

The claimants brought claims of indirect race discrimination against TRP under s41 of the Equality Act 2010 (EA) which protects 'contract workers' from discrimination by 'principals'. They alleged that TRP had, between 2014 – 2019, applied a double-standard as to the acceptable minimum rate of pay for staff, in that directly employed staff were paid at least the LLW, and outsourced staff were not. This put BME workers at a disadvantage as they occupied outsourced roles in proportionally greater numbers.

TRP argued that the appropriate pool for testing this provision, criterion or practice (PCP) was all directly employed staff and all outsourced staff, not only on the Vinci contract but those employed by TRP's other contractors in connection with catering and landscaping (although there appears to have been no evidence that TRP determined those other workers' terms of employment, or about their ethnic diversity). On this point the ET held that it was clear that the complaint was about how TRP treated the workers on the Vinci contract compared to staff employed by TRP, and that the appropriate pool was all of the staff subjected to that differential treatment.

Judgment

The ET held that TRP, in deciding against the claimants being paid the LLW, had applied a PCP to them. All of those workers were people working in London who needed to meet their basic costs of living, so there was no material difference of circumstances within the pool. The particular disadvantage was stark, given the comparative underrepresentation of BME individuals within TRP's better paid directly employed staff.

TRP asserted by way of justification that it could not afford to pay the LLW to the Vinci contract workers in

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2014. The ET held that TRP had provided no budgetary or other evidence that the LLW had been unaffordable in 2014. Rather, what had changed between 2014 and 2019 (other than the workers having taken industrial action) was TRP's attitude to incurring the extra cost, because it was '*the right thing to do*'.

Comment

This appears to be a novel case, in the nature of an equal pay claim based on race rather than sex, which could have wide significance for organisations which outsource functions dominated by BME and migrant workers. Even if its focus when contracting is simply on limiting the cost of the service, it may, as TRP did, make agreements with its contractor which amount to a policy as the terms of employment of the staff on the contract. Where those are inferior to its in-house terms and conditions (as they so often will be in respect of cleaning and security) organisations must ensure they can properly justify the disparity.

TRP is appealing the decision.

Finnian Clarke, future pupil barrister, Doughty Street Chambers

Richard O'Keeffe, pupil barrister, Old Square Chambers

Notes and news

Scottish Court of Session's census ruling

Fair Play for Women (FPW) has lost its legal challenge to the guidance issued by the National Records of Scotland which will accompany the 'sex question' in the 2022 Scottish census.

The Scottish 2021 census was moved to March 2022 because of the impact of COVID-19. The guidance relates to the census question *'What is your sex?'* which gives the option of choosing one or other of binary 'female' or 'male' options.

The guidance on 'How do I answer this question? states as follows:

> *If you are transgender the answer you give can be different from what is on your birth certificate. You do not need a Gender Recognition Certificate (GRC).*
>
> *If you are non-binary or you are not sure how to answer, you could use the sex registered on your official documents, such as your passport.*
>
> *A voluntary question about trans status or history will follow if you are aged 16 or over. You can respond as non-binary in that question.*

FWP had unsuccessfully judicially reviewed the guidance in the Scottish Outer House, Court of Session, [2022] CSOH 20 and it appealed to the Scottish Appeal Court.

FPW argued that the law does not permit any form of self-identification to affect one's legally registered sex. It was also concerned that permitting or encouraging sex self-identification would degrade the utility of the census output.

FPW had won a similar High Court challenge in March 2021 against the Office for National Statistics in relation to the census in England and Wales (QBD Admin Court, Claim No CO/715/2021). Following that challenge, the parties agreed that 'sex', in the census regulations means sex as recorded on a birth certificate or GRC. The Northern Ireland Statistical and Research Agency, which conducts the census in Northern Ireland, applied this ruling in the NI census in 2021.

FPW's judicial review was rejected on February 17, 2022 by Lord Sandison who ruled that:

> *… there is no general rule or principle of law that a question as to a person's sex may only properly be answered by reference to the sex stated on that person's birth certificate or GRC.*

Vic Valentine, manager of the pro-trans campaign group Scottish Trans Alliance, which intervened in the judicial review, had welcomed that decision saying: *'We believe trans men and trans women who have not changed the sex on their birth certificate have the right to have their identity respected, recognised, and counted too.'*

On February 24, 2022, the Inner Court of Session rejected the FPW appeal and ruled that the guidance issued alongside the census, which informs transgender people they can register as male or female regardless of their legal status, is lawful.

FPW commented: *'We are surprised and disappointed with the decision. This means that the census in Scotland in 2022 will not collect clear and reliable data on sex.'*

Government consultation on the Human Rights Act

The government is consulting on proposals to revise and replace the Human Rights Act 1998 (HRA) with a Bill of Rights.

The 2019 Conservative Manifesto pledged *'to update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government'.*

The government's case for reform is that the framework for the application of human rights has proved flawed and it has seen:

- *the growth of a 'rights culture' that has displaced due focus on personal responsibility and the public interest;*
- *the creation of legal uncertainty, confusion and risk aversion for those delivering public services on the frontline;*
- *public protection put at risk by the exponential expansion of rights; and*
- *public policy priorities and decisions affecting public expenditure shift from Parliament to the courts, creating a democratic deficit.* [page 28]

The government aims to *'restore common sense to the application of human rights in the UK'*. While the UK would still remain a party to the European Convention on Human Rights (ECHR), it considers that a new Bill of Rights which will protect essential rights is required to *'reverse the mission creep that has meant human rights law being used for more and more purposes, and often with little regard for the rights of wider society'*.

The government plans have caused widespread concern across civil society in the UK. For example, Liberty condemned the plans and expressed concerns that they threaten to *'fatally weaken our rights protections and put Government beyond accountability'*. The British Institute of Human Rights points out that the government appears to have largely ignored its own independent review into the HRA which heard evidence that the Act works well and there is no case for change.

The Head of Legal and Policy, Scotland Human Rights Commission, argues[1] that the HRA objective of bringing the protections of the ECHR into domestic law, making them directly applicable to public authorities (and others providing public services), and enforceable in our national courts would be severely undermined under the government's proposed Bill of Rights as it would:

- explicitly decouple interpretation of ECHR rights by national courts from that of the ECtHR;
- require national courts to interpret Convention rights in a restrictive manner: abandoning the ECtHR's 'living instrument' approach, which ensures that rights keep pace with societal progress;
- remove the requirement to take into account decisions of the ECtHR;
- restrict positive obligations, such as the positive duty to properly investigate deaths involving state entities, which the ECtHR interpreted as part of the right to life; and
- apply an alternative interpretation of specific rights, including the rights to freedom of expression, private and family life.

A number of organisations concerned with these developments have published resources to enable readers to contribute to the debate and respond to the consultation. These include:

- Liberty - Liberty has produced this resource for civil society groups which are considering submitting a response to the consultation. It is not intended to be a comprehensive guide, but to raise some areas of concern and issues for further exploration
- BIHR - Human Rights Act Reform resources
- Amnesty - Take part in the Human Rights Act Consultation
- Human Rights Consortium - Human Rights Act Consultation guide to responding
- ALLIANCE - Have your say on the Human Rights Act Reform consultation.

The consultation on proposals to reform the Human Rights Act 1998 closes on March 8, 2022.

1 See Barbara Bolton, the Commission's Head of Legal and Policy article originally published in the Journal of the Law Society of Scotland

Employment law: an adviser's handbook

Tamara Lewis, 14th edition, December 2021, Legal Action Group, 1100 pages, £60 (print and eBook £78)

In my first five years of practice I carried round an earlier, much, much thinner, edition, then by Tamara Lewis and Thomas Kibling. It ended its working life with many handwritten notes of varying legibility and length, updating things, annotating counter arguments, variants and cross-references. The index was also heavy with additions. I could look at any page and remember, almost at a glance, swathes of submissions and the intricacies of past cases. It worked like a Bar school book, a memory-prompt. It was a real time-saver, battered, dog-eared, and much loved, retired finally as I became a tad embarrassed at producing it in public. New editions somehow never worked as well.

This edition has LAG's standard arrangements and layout, making it easy to navigate. In the range of practical appendices, checklists and samples at the end, you will find the 2012 statutory redundancy pay table, also useful as a basic award table. Online, gov.uk scrapped this in favour of a tool allowing one to calculate one's own redundancy pay – not much use for advisers. Great to be reminded of the table's existence as it makes it so much easier to doublecheck a schedule of loss.

A detailed contents list is followed by tables of cases, statutes, statutory instruments, EU legislation, international legislation and finally, abbreviations. Every indexer orders things differently, so if the index at the end of the book doesn't seem to help, but you remember a case, or have enough of a reference to an act or regulation, tracking through the tables is another way of getting to the part of the book you need.

Inevitably, the odd typo lurks. It's bad luck that on looking up *Taylor v Jaguar Land Rover Ltd*, the table of cases sent me to 15.44 (disability) rather than 14.44 (gender reassignment).

The book is divided into an Introduction, followed by four parts, and ending with the Appendices, a cornucopia of sample pleadings, letters, checklists, and a sample unfair dismissal claim from start to settlement.

Eighty pages into the book one gets to the Introduction and Chapter 1. The first, three chapters give an overall introduction to terms and conditions of employment, collective consultation and trade union rights, and to European law and human rights. Part 1 then deals with wages, including equal pay. Part 2 deals with unfair dismissal, redundancy and TUPE. Part 3 covers equality and discrimination. Part 4 is the practical heart of the book. It deals with remedies and procedures: how to run unfair dismissal and discrimination cases.

It is always worth starting with the contents list for each chapter and checking the highlighted key points. Footnotes are kept on the same page, making it quick to remind oneself, or discover the relevant cases. Where something is dealt with shortly, such as continuity, the text gives enough to flag up the issues and key cases.

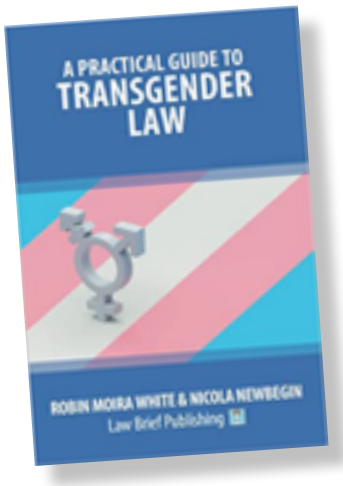
At times, for example in the discussions on the 'but for' test, or what is enough to be that 'something more' which shifts the burden of proof, it feels like engaging in a conversation. In the preface, the author explains that at certain points of the book she expresses views on points of law which are untested or could be challenged. She emphasises the importance of always keeping an open mind.

Overall, the book still meets its original intention of being an adviser's handbook covering the range of employment problems in a clear and practical form. It's quicker to use than an on-line resource. It's smaller, lighter and with larger print than a well-known rival, so is worth taking up space on a bookshelf or in a trolley. I had planned to donate my review copy to the Free Representation Unit. I've used it enough to realise I'll have to order another copy for the Unit.

Sally Robertson
Cloisters

A Practical Guide to Transgender Law

Robin White and Nicola Newbegin; May 2021; 318 pages; £29.99
Law Brief Publishing[1]



Sex matters in a wide a range of legal contexts, and wherever sex matters, questions arise about the particular needs, rights and claims of transgender people. Robin Moira White and Nicola Newbegin have written a short book of ambitious scope, taking in subjects as varied as discrimination, asylum, data protection, education, prisons, family law and sport. Their book is disappointing in its failure to illuminate these questions.

The first of many flawed passages comes in the terminology section at page xviii; the authors dismiss the judgment of the High Court in *Corbett v Corbett* [1970] 2 WLR 1306 on the basis of the claim that the existence of differences of sexual development undermine the distinctness of the categories 'male' and 'female'. This is fanciful. Biological sex is an immutable and, as a rule, easily observable feature of human beings. The fact that sex may very occasionally be incorrectly observed at birth does not undermine the male/female binary any more than the fact that individuals are occasionally prematurely pronounced dead undermines the alive/dead binary.

As the EAT has since pointed out in *Forstater v CGD Europe Ltd* [2021] UKEAT/0105/20/JOJ; Briefing 998, November 2021: *'the position under the common law as to the immutability of sex remains the same; and it would be a matter for Parliament… to declare otherwise'.*

At the other end of the book, at Chapter 15 (Prisons), the authors discuss *R (on the application of Green) v Secretary of State for Justice* [2013] EWHC 3491 (Admin). A man imprisoned for his part in the extended torture and murder of his wife wished to be supplied with items said to be necessary to his recently-conceived desire to *'live as a woman'.*

White and Newbegin summarise the case thus:

> *Whilst it was recognised by the court that there was no question of her being required "to live as a man", she was housed in a male prison and was refused items such as a wig (she was bald) and tights. The decision to refuse these items on the basis of increased risk in the prison community was upheld. The prison service said that tights could be used as a ligature and were easily concealed. A wig, it was said could be used in an escape attempt. The judge recognised the sensitivity of the position but upheld the decisions taken.*

Reading that, one might think the prisoner's requests modest and reasonable. But at paragraphs 27 and 47, the judgment describes more fully the problem and the nature of the risks:

> *The particular problem asserted by the claimant is her access to prosthetic items – wigs, breasts and vaginas… With intimate prosthetics the real issue of hiding items is pronounced. In order to alleviate this, the governor would have to institute regular and repeated intimate searches.*

As well as glossing over some of the more arresting facts of the case, the authors fail to address a key part of the reasoning. One of the issues was whether Green had suffered discrimination on grounds of gender reassignment, and there had been argument about the characteristics of the comparator which should be used to test that question: should it be a man who lacked the protected characteristic of gender reassignment, or a woman who lacked the protected characteristic? The judge did not think that a difficult question:

1 A longer version of this review was first published in September 2021 on the Legal Feminist website

A Practical Guide to Transgender Law (continued)

> *Frankly, it is almost beyond argument that the only comparator is a male Category B prisoner at HMP Frankland … I find it impossible to see how a female prisoner can be regarded as the appropriate comparator. The claimant is a man seeking to become a woman – but he is still of the male gender and a male prisoner. He is in a male prison and until there is a Gender Recognition Certificate, he remains male.* [Para 68]

This comparator question is of crucial importance to many of the contentious questions relating to the treatment of trans-identifying people. The authors' failure to discuss this aspect of *Green* is baffling.

Conclusion

The book fails in its objective of increasing understanding of the law in this area. Even a reader with little prior knowledge will be struck by the regularity with which they simply give up on the task of analysis, declaring the law to be uncertain or in need of clarification. In truth, there is little of either guidance or practical utility in White and Newbegin's 'practical guide'.

Naomi Cunningham
Barrister
Outer Temple Chambers

Abbreviations

AC	Appeal Cases
BME	Black and minority ethnic
BSL	British sign language
CA	Court of Appeal
CJEU	Court of Justice of the European Union
CSA	Care Standards Act 2000
DJ	District Judge
DLA	Discrimination Law Association
EA	Equality Act 2010
EAT	Employment Appeal Tribunal
ECHR	European Convention on Human Rights 1950
ECtHR	European Court of Human Rights
EDP	Enhanced Disability Premium
EHRR	European Human Rights Reports
ET	Employment Tribunal
EU	European Union
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
FETO	The Fair Employment and Treatment (Northern Ireland) Order 1998
GRA	Gender Recognition Act 2004
GRC	Gender recognition certificate
HC	High Court
HHJ	His/her honour judge
HMP	Her Majesty's Prison
HRA	Human Rights Act 1998
ICR	Industrial Case Reports
IFA	Independent fostering agency
IHRAR	Independent Human Rights Act Review
IRLR	Industrial Relations Law Reports
J/JSC	Judge/Justice of the Supreme Court
LAG	Legal Action Group
LJ/LJJ	Lord/Lady Justice of Appeal (singular and plural)
LLW	London Living Wage
NI	Northern Ireland
NICA	Northern Ireland Court of Appeal
OCD	Obsessive compulsive disorder
PCP	Provision criterion or practice
QBD	Queen's Bench Division
SC	Supreme Court
SDP	Severe Disability Premium
SOR	The Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006
TUC	Trades Union Congress
TUPE	Transfer of Undertakings (Protection of Employment)
UC	Universal Credit
UKEAT	United Kingdom Employment Appeal Tribunal
UKHL	United Kingdom House of Lords
UKSC	United Kingdom Supreme Court
WLR	Weekly Law Reports

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