ISSN 1759-2925

DISCRIMINATION LAW ASSOCIATION

Briefings

JULY 2022 | VOLUME 76 | **1014-1025**

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

Fighting against the 'Rights Removal Bill'

The publication of the Bill of Rights Bill (the Bill) on June 22nd has sent a chill down the spine of those who work to challenge injustice and abuses of power by public authorities in the UK. The Conservative 2019 manifesto signalled the party's intention to *'update the Human Rights Act and administrative law to ensure a proper balance between the rights of individuals'*, national security and effective government. The Bill goes much further and seeks to reform human rights law by repealing and replacing the Human Rights Act 1998 (HRA).

The DLA strongly opposes the Bill and the apparent intention of the government to weaken statutory protections against human rights violations by making it more difficult for vulnerable people to bring proceedings for a breach of their human rights and imposing new constraints on UK courts considering such claims. The Bill represents an attack on the hard won freedoms and rights to which *Briefings* readers have contributed over the decades.

The Bill undermines human rights protection by, among many others, imposing barriers on victims of human rights abuses seeking the court's protection. For example, it includes a requirement for a claimant to first obtain the court's permission to bring the complaint which will only be granted if the claimant has suffered 'significant disadvantage'; it will ban interpretations of the HRA which would require public authorities to comply with a positive obligation; and it will ban human right challenges in relation to acts done abroad in the course of overseas military operations.

In her preliminary analysis of the Bill, Barbara Cohen highlights the potential indirect discrimination its provisions are likely to create. The permission requirements will create major obstacles for those claimants unable to obtain legal advice which could assist them applying for permission and demonstrating that they have suffered significant disadvantage. As such, *'the permission requirement is likely to exclude people with disabilities, migrants, Gypsies, Roma and Travellers, Black and minority ethnic people, prisoners and ex-prisoners, young people, women and others with low incomes'.*

The Bill singles out prisoners and 'foreign criminals' for differential treatment completely ignoring any potential breach of Article 14. It seeks to impose such strict grounds for the latter that it will be almost impossible for them to argue for the protection of their Article 8 rights in deportation hearings. When making damages awards, a court will be required to take into account any conduct of the claimant which the court considers relevant. There is a risk that certain marginalised groups *'too often stereotyped in relation to their conduct, will disproportionately be denied their rights on this basis, raising possible Article 14 non-discrimination concerns'.*

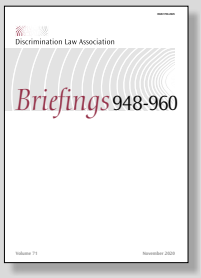
The DLA is also extremely concerned that the government appears to have simply ignored the Independent Review of the Human Rights Act as well as the responses to its own consultation which overwhelmingly disagreed with its proposals. Instead the government seems intent on pushing this Bill through against the will of the relevant experts and ordinary people.

The principles underlying the HRA require that every individual is treated equally, fairly and with dignity and respect. The Bill – increasingly referred to as the 'Anti-Rights' or the 'Rights Removal Bill' – is a direct threat to these principles and the DLA stands with its partners and colleagues in opposing it.

The DLA's *Briefings* will continue to highlight attempts to undermine precious rights and freedoms. Developing the new *Briefings* design being launched in this edition has provided a moment to reflect on the changes the journal has documented since it was first published in 1998; the same critical issues of rights without remedies, the withdrawal from international obligations or the undermining of rights are issues which are as relevant today as in previous decades.

The DLA encourages readers to contact their MPs, trade unions, community and social networks and use any parliamentary contacts they have to register their opposition to this Bill. As any campaign against it gathers momentum, the DLA will update its members on further action to stand together and fight against the Rights Removal Bill.

Geraldine Scullion
Editor, Briefings



25 years

1000 editions

2022 new look

The new design of *Briefings* is being launched in this July edition. The new, refreshed look, with an attractive layout and typeface, is intended to update the journal and attract new readers.

The DLA's first briefings were produced in March 1996 and brought together in the first published volume of *Briefings* in 1998; the journal has informed readers about developments in discrimination law ever since with the aim of extending protection and rights in both the employment and non-employment spheres.

In our celebration of *Briefings*' 50th edition in 2013, two of the DLA's founder members, Paul Crofts and Camilla Palmer, highlighted the integral part it has played in supporting our mission to challenge injustice and support those suffering discrimination. The protection of the right to challenge unlawful discrimination and provide effective remedies is as important today as it was in 1996 and the new-look *Briefings* will continue to make its contribution to that cause.

The contribution of the volunteers who write for *Briefings* is invaluable – the journal would not exist without their dedication and commitment and is to be celebrated. A special thank you is due to Alison Beanland, our typesetter and designer, whose creative flair and artistry is evident in the new look. Thanks too to our administrator Chris Atkinson and all the DLA executive committee members who work so hard to ensure the organisation will continue to flourish in the years ahead.

We look forward to readers continuing to write for *Briefings* or share their expertise with the DLA's lobbying or educational work. We also encourage you to share the information about the new look *Briefings* with colleagues in order to extend readership and contribute to the future of the organisation through a strong membership base.

Geraldine Scullion, Editor

"The contribution of Briefings as a key discrimination law journal has been immense. Congratulations on the new design!"
Robin Allen QC

"Unite encourages our work place reps and branch officers to sign up to Briefings. It provides authoritative insight into current discrimination issues and legal cases. Easy-to-read and digest, it is essential reading for all union reps interested in equality in the work place."

Diana Holland, AGS for Equalities, Unite the Union

"As a specialist adviser on all aspects of discrimination I find Briefings to be an invaluable resource for legal updates and detailed case reports with comments."

Richard Owen, Discrimination Specialist, Citizens Advice Gateshead

"As well as covering employment discrimination decisions, Briefings is the only real source of information and commentary about non-employment cases. It is essential reading for any discrimination practitioner."

Michael Rubenstein, Editor IRLR

"As a disability rights activist who uses the law, I find Briefings uniquely useful to keep on top of consultations, changing case law and other developments."
Doug Paulley, Disability Rights Activist

Menopause discrimination in the workplace: do the protected characteristics of sex, age and disability provide sufficient protection?

Annapurna Waughray, Professor of Human Rights Law, Manchester Metropolitan University, Colin Davidson, Head of Employment Law, Edwards Duthie Shamash, specialising in employment and discrimination law, and Declan O'Dempsey, barrister, Cloisters Chambers, review protection for menopause discrimination in the workplace under the Equality Act 2010. They conclude that this is inadequate and argue that a new protected characteristic of menopause should be created. The authors are members of the DLA executive committee which is currently co-chaired by Annapurna Waughray and Colin Davidson. This article draws on the DLA's submission to the Women and Equalities Committee Menopause and the Workplace Inquiry (2021-22) drafted by Declan O'Dempsey.✦

Introduction

In *Best v Embark on Raw Ltd* (January 2022) the employment tribunal held that the claimant, Mrs Leigh Best, had suffered harassment under s26 of the Equality Act 2010 (EA) related to the protected characteristic of sex when her boss, Mr Fletcher, directly asked her whether she was menopausal.[1] The ET held that this invaded her privacy and tactlessly broached a highly sensitive topic for her when she had made it clear she did not wish to have any such discussion. Mr Fletcher's pursuit of the topic amounted to unwanted conduct which had the effect of violating her dignity and creating a humiliating environment at work for her.[2]

This case is one of the latest in a line of employment cases concerning unfavourable treatment related to the menopause. However, menopause is not a protected characteristic under the EA, which means that women wishing to bring a claim of menopause discrimination must argue that menopause is covered under the protected characteristics of sex, age or disability. Since February 2017[3] there have been around 44 ET decisions mentioning the words menopause or menopausal, of which 18 have involved an extended discussion of menopause or menopause discrimination on various grounds. The majority of these 18 cases show that menopause has been addressed under disability discrimination, but cases have also involved sex discrimination claims and claims of age and sex discrimination.

This article examines how workers have pursued claims on the basis of treatment in the workplace related to menopause falling within discrimination and harassment on grounds of sex, age and disability. It addresses questions such as choosing comparators and what evidence would be needed to make the case for menopause falling within the ambit of these three grounds. The article also touches on the steps that employers can take and practices they could introduce to remove workplace health and safety risks for menopausal workers, implement accommodations in individual cases, and create a culture in which women feel able to disclose menopausal symptoms at work to their

✦ The article reflects the views of the authors, not the DLA. All errors and opinions are our own.

1 *Best v Embark on Raw Ltd* [2002] UKET 3202006 (January 5, 2022)

2 The tribunal also found that Mr Fletcher made comments about Mrs Best's age which had the effect of creating a degrading, humiliating and offensive environment for her at work in violation of s26 EA. However these comments related to Covid, not menopause.

3 Until September 2021 – the date the DLA submitted its evidence to the Women and Equalities Committee.

employer. Finally, against the backdrop of the recent Women and Equalities Committee (WEC) Inquiry into Menopause in the Workplace, the article considers how well the EA protects women from menopause discrimination in the workplace and whether the legislation should be amended by adding menopause as a new protected characteristic.[4]

Context

Menopause is not analogous to an illness or impairment, rather, it is a normal and important part of a woman's natural life cycle.

First we offer a brief overview of the nature and extent of discrimination suffered by women experiencing menopause. The authors consider that menopause is not analogous to an illness or impairment, rather, it is a normal and important part of a woman's natural life cycle. However, unlike pregnancy or maternity, menopause and the menopause transition (peri-menopause) is not a well understood life stage in the workplace. On the contrary it has traditionally been a taboo subject which women have been reluctant to raise. Consequently, it is not surprising that it is not well provided for at work, whether in terms of culture, training or policies. To put it in context, the concept of 'the workplace' or 'work' is not gender neutral. Historically, working practices and structures have been designed around the life cycle and working lives of men rather than women. This can be seen, for example, when considering retention rates in work after childbirth or the way in which sickness trigger points are approached.

For most women, menopause is a natural part of the ageing process. The average age of the menopause in the UK is 51 and by the age of 54, 80% of women are menopausal. The peri-menopausal (transition) stage lasts anything between four to eight years. However these averages do not, of course, reflect every woman's experience. The evidence shows that 70% of women are in paid employment and women constitute 47% of the UK workforce (ONS, 2017). There are 4.3 million women aged 50 and above in employment. Over the last 30 years, employment for women aged 55-59 has increased from 49% to 69% and for women aged 60-64 from 18% to 41%. In part this reflects steps taken to eliminate age discrimination in relation to retirement but also the increasing economic pressures on women of all ages to work. According to Atkinson et al, the proportion of women aged 55-64 in the workplace in the UK grew from 39% in 1990, to over 60% in 2017.[5] Thus women can expect a substantial part of their economically active life to be during and after menopause, and the time that women remain economically active after menopause is likely to increase. More than 75% of women will experience menopausal symptoms and 1/3 of women will experience long-term symptoms. According to the organisation Henpicked: Menopause in the Workplace,[6] one quarter of working women aged between 50 and 54 contemplate leaving work due to the menopause.

Respondents to the WEC survey on Menopause in the Workplace in September 2021 (the WEC survey) stated that only 11% of those undergoing the menopause in work asked for adjustments to accommodate their symptoms. Of those who did not request adjustments, the main reason given was *'I was worried about the reaction of others'* (26%). The next most commonly given reason was *'I didn't know who to speak to'* (19%)[7]. The problem therefore is not simply the impact of less favourable treatment on women with menopause, it is a problem of the needs of a group in society being different to

4 See https://committees.parliament.uk/work/1416/menopause-and-the-workplace/

5 Atkinson, Carmichael and Duberley, *The Menopause Taboo at Work: Examining Women's Embodied Experiences of Menopause in the UK Police Service, Work, Employment and Society* (2021) 35(4) 657-676, 658

6 See https://menopauseintheworkplace.co.uk/about-us/ . Sally Leech of Henpicked was a contributor to the DLA's Practitioner Group Meeting on menopause in the workplace in September 2021, and provided helpful statistics which were used in the DLA's submission to the Women and Equalities Committee Inquiry on menopause and the workplace.

7 See WEC Menopause and the Workplace Survey Results at: https://publications.parliament.uk/pa/cm5802/cmselect/cmwomeq/1157/report.html

those for whose benefit society has traditionally been structured. To avoid the impact of failure to retain women experiencing menopause in the workforce and to ensure that they can be as productive as men of a similar age, accommodations for this life phase need to be made.

The meaning of discrimination

In determining the impact of 'discrimination' on women due to menopause we need to have a clear understanding of what we mean by the concept of discrimination. An understanding of discrimination which is confined to direct and indirect discrimination, harassment and victimisation under the EA is unlikely to capture the true impact of workplace design on women during the menopause. In the DLA's response to the WEC Inquiry[8] we suggested that the starting point must be the tests laid down in international law relating to sex discrimination, in particular in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which in its Preamble notes:

> *Discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity.*[9]

The way in which, historically, work-places and work practices have been designed by and for men creates barriers for women affected by the menopause.

CEDAW defines discrimination against women as any restriction made on the basis of sex which has the effect of impairing the enjoyment or exercise by women on a basis of equality of men and women of human rights in the economic or any other field (Article 1). This is the definition we have used when considering whether discrimination has taken place in respect of the design of work and the workplace.

CEDAW provides that the states parties *'shall take in all fields, including the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men'* (Article 3). It requires states parties to *'modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'* (Article 5).

Article 5 is an important principle in considering whether work and the workplace are to be considered a neutral starting place, or a starting point predisposed in favour of male life cycles. The way in which, historically, workplaces and work practices have been designed by and for men creates barriers for women affected by the menopause. The model of work has traditionally been based on masculine needs and on the tacit assumption that a worker will be a male worker.

Article 11 requires the elimination of discrimination against women in the field of employment in order to ensure on a basis of equality of men and women the same rights to (a) work; (b) the same employment opportunities; (c) the right to job security; and (d) protection of health and safety in working conditions. It is against these measures that the current legislation should be tested. If this is done it is clear that, in respect of the life cycle of women, these aims are not being achieved. Whilst there is theoretical

8 See https://committees.parliament.uk/work/1416/menopause-and-the-workplace/

9 See https://www.un.org/womenwatch/daw/cedaw/

protection, there is not real practical and effective protection against discrimination based on the life cycle feature of menopause.

A key feature of equality law is that like cases be treated alike and that unlike cases be treated differently. If the fact that the needs of menopausal women are different to the needs of non-menopausal women – and men – is taken into account, the impact of failing to accommodate those needs must also be taken into account. The failure to take account of these different needs must be a form of discrimination.

How well does current legislation protect women from discrimination in the workplace associated with the menopause?

The nature of the discrimination faced by women due to menopause breaks down into two categories: (1) workplaces are not designed to take account of the female lifecycle properly, resulting in ignorance of the menopause, peri-menopause and its effects, and in working practices which create barriers for women at work; (2) less favourable treatment, indirect discrimination and harassment. Although there is plentiful evidence of category 2 discrimination being a problem, it is possible that category 1 discrimination in reality causes more difficulties for women.

Menopause discrimination as direct discrimination based on sex

With both sex and age discrimination, a primary issue is the comparator. The claimant must show that they have been treated less favourably than someone of the opposite sex or a different age.

In the case of sickness absence, the comparator would be someone who has an underlying health condition which causes a similar level of absences but who is a different sex or age. To bring a claim for direct discrimination related to menopause it is necessary to show that a man (or, for direct age discrimination, a younger non-menopausal person) experiencing the same symptoms would be treated better. In such cases it is entirely possible that an employee would be dismissed on the basis of these absences – in which case there is no discrimination as both are treated equally. However, this does not take account of the fact that these absences are as a result of a stage in that individual's natural life cycle – accordingly it is an unsatisfactory solution that both are treated the same, yet are in very different circumstances.

The limitations of showing direct sex discrimination in relation to menopause echo the difficulties prior to the case of *Webb* in showing direct discrimination in respect of pregnancy.[10] Because menopause is not treated as a necessary indicator of female sex, women have to show that they have experienced less favourable treatment in comparison with a man in comparable circumstances. In the 2012 case of *Merchant*[11] the ET found that direct sex discrimination had occurred when the claimant was dismissed for capability reasons, where the reason for the reduction in performance resulting in the dismissal was health issues relating to menopause. The claimant had to rely on a hypothetical comparator: a man who had significant performance concerns and an underlying health problem understood to effect his concentration at times and relevant to his poor performance. The manager decided that because his wife and the HR adviser had gone through menopause, no further investigations were needed to understand the claimant's menopausal condition or prognosis. The employer did not refer the claimant for medical reports when he would have done so in the case of a man exhibiting similar symptoms to ascertain whether they contributed to the claimant's

10 *Webb v EMO Air Cargo (UK) Ltd (No 2)* (1994) C-32/93 in which the European Court of Justice held that dismissal of a pregnant woman during the period from the beginning of pregnancy to the end of maternity leave amounted to sex discrimination.

11 *Merchant v BT plc* [2012] UKET/1401305/11

poor performance and before making a decision on dismissal. The manager took the view that menopause health problems did not require the same approach as other non-female specific health conditions and thus failed to treat the employee's menopause in the same way as he would treat a man's medical conditions when applying the performance management policy. While this claimant was ultimately successful, this highlights the lack of understanding of discrimination arising from menopause and its related symptoms.

Menopause discrimination as indirect sex discrimination

The claimant who objects to her menopause-related absences contributing to sickness trigger points within an absence procedure raises a claim of indirect discrimination. She must complain that what appears to be a neutral absence policy places her and all women with menopause at the disadvantage of having to take sickness absence for menopause-related symptoms. However, under the model of indirect discrimination it is open to the employer to justify the use of a sickness absence policy as a proportionate means of achieving a legitimate aim (ensuring a certain level of employee attendance necessary to meet business needs). We suggest this is a defect in legal coverage because it does not take into account the menopausal individual's life cycle; it reflects an attendance requirement level which accommodates the likely needs of men and their normal absence patterns, but not those of women who may have need of higher sickness trigger points to ensure that they remain in the workforce. It is questionable whether an employer ought to be able to take into account absences which are for the medical reason of menopause-related symptoms, and to justify the imposition of sanctions on a woman because she is going through this part of the female life cycle. Judged against the standards of international law, referred to above, it is suggested that the ability to justify indirect sex discrimination due to the conflict between an employer's rules and the menopause is not acceptable as it requires a tribunal to treat the current workplace and work requirements of an employer as factors which are not conditioned by gender. We argue that an employer should not be able to justify disadvantaging a woman as a result of menopause unless there are no accommodations which could be made in the individual case to remove the particular disadvantage she suffers as a result of menopause. At present however there is no requirement for an employer to have taken all accommodations for the menopause in the individual case which are reasonable.

An employer should not be able to justify disadvantaging a woman as a result of menopause unless there are no accommodations which could be made in the individual case to remove the particular disadvantage.

The 2020 case of *Sokolova v Humdinger Ltd* illustrates the lack of a concept of reasonable adjustment in relation to menopause discrimination.[12] The claim for indirect sex discrimination failed on the basis that the provision, criterion or practice (PCP) (a policy of requiring the wearing of buttoned up overalls) was reasonably necessary to achieve the employer's aim. If the claimant had been able to access the concept of reasonable accommodations for menopause, she arguably would have been able to obtain a remedy.

Menopause discrimination as age discrimination

One of the difficulties of proving direct discrimination on grounds of age is that people experience menopause and peri-menopause at different ages; the assumption that peri-menopause and menopause only affects women above a certain age is erroneous and using a comparator of a different (i.e. younger) age will not be appropriate in all cases. There is no agreed menopausal age range in case law. In *Sloan v Dumfries and Galloway Health Board* a claim of indirect sex discrimination and age discrimination related to menopause failed due to lack of evidence that a PCP applied by the employer requiring

12 *Sokolova v Humdinger Ltd* (2020) UKET 805866

the claimant to work in a low temperature environment placed females in the 50-65 age range at a significant disadvantage compared with male colleagues and female colleagues outwith that age range. The claimant asserted that 50-65 was the age range for women undergoing menopause, an assertion which the ET did not challenge.[13] In an earlier case in the Scottish ET (*A v Bonmarche*) claiming direct discrimination and or harassment on grounds of age and sex, the claimant did not name a specific comparator but the judge understood her *'to be comparing her case with another employee who was not a female of menopause age'* and found on the facts that the respondent had treated the claimant less favourably than he would treat someone who was not a female of menopausal age. The unwanted treatment was specifically related to the claimant's protected characteristic and would not have happened to someone who did not have those characteristics.[14] The claimant's evidence, which was accepted by the tribunal, was that she felt the respondent had created a hostile environment for her and that this was related to her status as a woman going through the menopause. The judge considered this amounted to unlawful harassment on grounds of age and sex.

Claimants may also be reluctant to apply the terminology of disability to the symptoms of menopause, which is simply a natural part of a life cycle.

Menopause discrimination as disability discrimination

The treatment of menopause as a disability requires women to show that they satisfy the criteria in s6 EA. This requires women to prove they have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. This is a requirement we suggest which would dissuade claimants from seeking protection from discrimination based on menopause, not least because their intimate and personal details may form part of an online judgment in perpetuity. Claimants may also be reluctant to apply the terminology of disability to the symptoms of menopause, which is simply a natural part of a life cycle.

The test for whether a person is disabled is complex and may involve considerable time and resources being expended in employment tribunals by all parties on the question of whether the claimant is a disabled person. That said, the majority of successful menopause discrimination cases have argued menopause as disability. The advantage for claimants and advisers of treating menopause discrimination as disability discrimination is because it allows the argument that there has been a failure to make reasonable adjustments where the employer has not made changes to the way they operate, for example, or to their performance management procedure.

In the 2020 case of *Donnachie v Telent Technology Services Ltd* the ET found that the effect of menopausal impairment on the claimant's day-to-day activities was more than minor or trivial, and that the range of her daily activities and her ability to undertake them when she would wish with the rhythm and frequency she once did was markedly affected.[15] In the 2018 case of *Ibolya Kun v Cambridge University Hospital NHS Foundation Trust* the claimant was considered disabled by virtue of menopause-related heat sensitivity.[16] In *Davies v Scottish Courts and Tribunals Service* the ET accepted that Ms Davies' menopause transition symptoms included very heavy bleeding or 'flooding', cystitis, severe anaemia, depression, feeling 'fuzzy', emotional and lacking concentration.[17] She was anxious and upset, suffered short-term memory loss and confusion, and needed to attend the toilet frequently to change her sanitary protection, and became weak, dizzy and disorientated because of the anaemia. The

13 *Sloan v Dumfries and Galloway Health Board* Employment Tribunals Scotland 4100022/2020 (March 17 2021)

14 *A v Bonmarche Limited (in administration)* Employment Tribunals (Scotland) 4107766/2019 (December 19, 2019) paras. 13-14

15 *Donnachie v Telent Technology Services Ltd* [2020] 1300005 (August 20, 2020)

16 *Ibolya Kun v Cambridge University Hospital NHS Foundation Trust* UKET 3201544/2018 (October 16, 2019)

17 *Davies v Scottish Courts and Tribunals Service* [2018] S/4104575 (April 6, 2018)

ET held that her employer had failed to protect her when, during the course of its investigating and in making the decision to dismiss, it did not consider that her *'conduct was affected by her disability'.* Her memory loss and confusion were in fact caused by her disability (which was in turn the result of her transition).

In October 2021 in *Rooney v Leicester City Council*[18] the EAT gave its first ruling on the question of whether menopausal symptoms amount to a disability, overturning an earlier ET decision that Ms Rooney, a child care social worker, was not disabled in relation to her menopause symptoms. The ET had dismissed her disability discrimination claim. Her evidence to the ET, which was not contested, was that she experienced severe physical, mental and psychological peri-menopausal and menopausal symptoms in her workplace over several years amounting to a disability, including insomnia, fatigue, light headedness, confusion, stress, irritability, depression, anxiety, dizziness, incontinence, palpitations, memory loss, concentration problems, low self-esteem and confidence, migraines and hot flushes. Specifically, she said that her symptoms led to her forgetting to attend events, meetings and appointments, losing personal possessions, forgetting to put the handbrake on her car and forgetting to lock it, leaving the cooker and iron on and leaving the house without locking doors and windows. She also spent prolonged periods in bed due to fatigue/exhaustion. The EAT held that the ET erred in law in holding that she was not a disabled person at the relevant time and remitted the claim to the ET.

Should the Equality Act 2010 be amended by adding menopause as a new protected characteristic?

There is therefore an argument for amending the EA by the creation of a new protected characteristic of menopause.

While some unfavourable treatment related to the menopause can be met by the existing protected characteristics in the EA, the coverage is inadequate and requires considerable work to establish status. Currently, claims of menopause discrimination are most likely to succeed where the claimant can show that they are a disabled person within s6 EA. However, the authors consider it important that menopause is not viewed as an illness or impairment but is recognised as a natural and important part of an individual's life cycle. From this perspective, the terminology of impairment is not the right terminology to use where what is being described is a natural part of the life cycle, and, because it does not accurately reflect the situation, it may even deter individuals from raising complaints about the way that the workplace operates.[19]

There is therefore an argument for amending the EA by the creation of a new protected characteristic of menopause. This would cover those who experience symptoms caused by the onset of menopause and peri-menopause and those who have the menopause, regardless of the age at which these symptoms occur.

A related question arises, namely how should people who experience the menopause but do not identify as women be supported in relation to menopause and the workplace. The question is predicated on the point that the person experiences the menopause. Medically, peri-menopause and menopause are usually defined in relation to hormone deficiencies affecting the person. In all cases the changes in hormone levels are the marker for the characteristic we describe as 'menopause' (which includes peri-menopause). There is no reason why a person who does not identify as a woman but who experiences the menopause should not have the same protection as everyone else who experiences the menopause. Those who have this combination should receive

18 *Rooney v Leicester City Council* EA-2020-000070-DA and EA-2021-0002560-DA; (October 7, 2021); Briefing 1007, March 2022

19 Adam Pavey, Director of Employment and HR, Pannone Corporate; Women and Equalities Committee Oral Evidence: Menopause and the workplace, House of Commons 602, January 19, 2022

inclusive support in relation to the menopause in the workplace as they too are affected by the male-design of the workplace which does not take account of the needs of those who experience menopause but do not identify as women.

Non-legislative measures: what can employers do?

In the WEC survey respondents were asked what employers could do to support employees experiencing menopause. Responses included having a workplace policy on menopause; providing adjustments such as ventilation, fans, breathable uniforms; information on where women who are struggling at work can seek advice both internally and externally; conversely not penalising individuals with menopause through sickness or absence policies; providing flexibility in working hours and place of work; providing education and training on menopause and its impact in the workplace, and supporting cultural change to de-stigmatise menopause and to normalise discussion of menopause.[20]

At the national level, while guidance on existing law could go some way to addressing workplace menopause discrimination, the history of purely voluntary codes of guidance does not suggest this will be very effective. While existing law can provide a certain level of protection, it does not counteract the impairment of the right of women to enjoy access to the workplace and working practices in the same way as men. The authors consider that this could be achieved by the introduction of a right to reasonable accommodation for menopause without the need to prove that the menopause amounts to a disability. Statutory guidance could be issued by the Equality and Human Rights Commission in the form of a Code of Practice on avoiding menopause discrimination under its powers in s14 of the Equality Act 2006. This could contain provisions designed to ensure or facilitate compliance with the EA or to promote equality of opportunity. A failure to comply with a provision of a code does not of itself make a person liable to criminal or civil proceedings but, by s15(4) of the Equality Act 2006, it is admissible in evidence in proceedings and it must be taken into account by a tribunal in any case in which it appears to the tribunal to be relevant.

Whilst this would make provision for cases in which the symptoms of menopause amounted to a disability within s6 of the EA, and could make provision for indirect sex discrimination based on menopause, or discrimination based on age and sex in respect of menopause, it would not, as matters stand, be able to deal with workplace adjustments that might be needed where menopause does not amount to a disability but has an impact on performance within the workplace. It could not, in other words, meet the need to design the workplace to meet the needs of individual women affected by the menopause. As such, the authors consider that wholly non-legislative means are not sufficient and supports the creation of a protected characteristic of menopause, either via secondary legislation as a deemed disability or by the creation via amendment to the EA of a separate protected characteristic of menopause. The choice of approach is a political question, but the authors support the latter approach as it treats menopause as a normal part of an individual's lifecycle rather than adopting the deficit model which has been used to define disability. Defining menopause inevitably creates a problem of knowledge; this could be addressed in the statutory code via examples for employers, employees and tribunals which would mitigate the risk that only those who are more vocal about the causation of their symptoms are protected, by illustrating situations in which, despite a lack of assertion by the individual with menopause, the employer should have been aware that the individual had this characteristic.

20 See survey results, note 8 above

Conclusion and looking ahead

Issues around menopause in the workplace are being discussed more widely now than ever before, with awareness being raised by a large number of groups doing important work. However, action beyond raising awareness is required. As is set out above, the authors believe that the option which offers the most protection to those experiencing the menopause would be to introduce a separate characteristic under the EA. This could be modelled on a s18 claim (pregnancy) to establish that an individual has been treated unfavourably because of menopause. This would avoid the need to show 'less favourable' treatment as under a direct discrimination claim, thereby foregoing the need for a comparator and so avoiding the problems we have seen with some of the claims above. Direct discrimination claims would remain available on the basis of sex, age or gender reassignment as alternatives. This would provide protection against unfavourable treatment on the basis of menopause

Further provision is required to grant access to reasonable adjustments and accommodations in the workplace.

However further provision is required to grant access to reasonable adjustments and accommodations in the workplace. This new provision would provide a right for a person with menopause to be able to claim accommodations for the effects of menopause. Because the aim of the legislation is to ensure that the workplace and policies are designed to achieve equal access for men and women and others experiencing menopause, the duty should be stronger than the duty to make reasonable adjustments i.e. employers should show that they have taken all reasonably practicable steps which are proportionate (appropriate and reasonably necessary) in order to remove any disadvantage. The duty would arise when the employer knows or ought reasonably to have known that the employee has menopause and that knows or ought reasonably to have known that the employee experiences a menopause related disadvantage as a result of the employer's working arrangements (i.e. provisions criteria or practices applied to the employee).

Repealing and replacing human rights protection: the Bill of Rights Bill

The Bill of Rights Bill (the Bill) was introduced in parliament on June 22, 2022. Its purpose is stated in Clause 1(1): *'This Act reforms the law relating to human rights by repealing and replacing the Human Rights Act 1998.'* In this first *Briefings* article on the Bill, Barbara Cohen, former DLA chair, discusses the government's main aims and the Bill's main regressive provisions and serious potential adverse impacts. She also highlights some of its questionable provisions and why it is already being referred to by many people as the 'anti-rights bill'.

In December 2021 the government published a 113 page consultation document *Human Rights Act Reform: A Modern Bill of Rights*. This contained nearly all of the changes to the Human Rights Act 1998 (HRA) now in the Bill, with examples carefully selected to support its arguments; so the government can respond to its critics – *'you can't say that you were not warned!'*

On the same day it introduced the Bill the government published its response[1] to the consultation, to which it had received 12,873 responses. An overwhelming majority of respondents disagreed with every main proposal, disputing that there was any real evidence for change and submitting repeatedly that the HRA should be retained in its present form. Nevertheless, in nearly every case, the government indicated its intention to proceed. Therefore, in response, the DLA and hundreds of human rights and equality lawyers, advisers, academics and community groups can say to the government *'you too have been warned'* as they galvanise for a major campaign to oppose the Bill.

Relying on its huge majority in parliament, the government seeks to enact a bill which will limit and/or dilute protection of human rights in the UK.

What does the Bill say?

As promised, the Bill retains protection for the same rights within the European Convention on Human Rights (ECHR) as under the HRA; however, relying on its huge majority in parliament, the government seeks to enact a bill which will limit and/or dilute protection of human rights in the UK and restrict the powers of UK courts in human rights cases. In relation to past decisions in which protection of human rights under the HRA produced outcomes which this government did not like, it has now written into the Bill statutory provisions intended to prevent such outcomes in the future.

Of major concern to the DLA and many other consultation respondents was the ease with which the government has been prepared to enact a new human rights law which will directly conflict with the UK's fundamental duties under Article 1 and Article 13 of the ECHR.

Article 1 requires the UK as a signatory to the ECHR to *'secure to **everyone within their jurisdiction** the rights and freedoms defined in Section 1 of the Convention'.*[2] (emphasis added)

Article 13 requires the UK as a signatory to the ECHR to ensure that ***'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy** before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'* (emphasis added)

The Bill introduces a range of new barriers which are likely directly or indirectly to exclude members of particular groups from enjoying and/or enforcing their Convention rights.

1 Human Rights Act Reform: A Modern Bill of Rights Consultation Response, Ministry of Justice, June 2022

2 Articles 2 - 18

Prior permission to bring a human rights claim

Clause 15 of the Bill will require the court to grant permission before any person can bring proceedings against a public authority for violation of their human rights. The court may only grant permission if the person is (or would be) a victim of the act (or proposed act) and the person *'has suffered (or would suffer) a significant disadvantage in relation to the act (or proposed act)'*. By definition, this assessment of the degree of disadvantage will be made before the court can consider the content of the victim's claim. For very many prospective claimants who lack access to skilled legal advice, this requirement is likely to operate as a major barrier in two ways: firstly because they will not even reach the first stage to submit a relevant application for permission to bring a claim; and secondly, regardless of how grave the violation has been for them, they may fail to be assessed as having suffered significant disadvantage by whatever standard the courts will be required to apply.

The permission requirement is likely to deny the right to bring a human rights claim to people with disabilities, migrants, Gypsies, Roma and Travellers, Black and minority ethnic people, prisoners and ex-prisoners, young people, women and others with low incomes, anticipating new rules prescribing fees to apply for permission.

Clause 5 will bring to a complete halt the ability of a UK court to interpret a Convention right to require a public authority to comply with a positive obligation.

Possibly to give some validity to this strongly opposed requirement, the government refers in Clause 15(8) to a 'significant disadvantage' admissibility requirement applied by the European Court of Human Rights (ECtHR) under Article 35. The critical difference is that Article 35 applies to cases on appeal to the ECtHR after all domestic remedies have been exhausted and permits an exception *'if respect for human rights as defined in the Convention … requires an examination of the application on the merits'*. The Bill would exclude human rights claimants before any court has considered their claim with an exception only *'for reasons of wholly exceptional public interest.'*

Are some groups less deserving of human rights protections?

Foreign criminals

The Bill reflects the government's determination to remove foreign offenders *'to protect the public from dangerous criminals'.* Clause 8 makes it almost impossible for a foreign ex-offender to challenge a deportation order on grounds of incompatibility with their Article 8 ECHR right to respect for family life: they would need to prove both the closeness of their relationship with their child or other dependant or that the child or dependant would come to overwhelming, unavoidable harm if they were deported. Clause 20 sets an exceptionally high test where deportation is challenged as a breach of the right to a fair trial.

Prisoners

The government appears to have found unacceptable the number of successful HRA claims by prisoners. It has added an additional condition that, when UK courts are determining human rights claims (except regarding rights under Articles 2,3, 4(1) and 7) by offenders serving custodial sentences, the court is required to *'give the greatest possible weight to the importance of reducing the risk to the public from persons who have committed offences in respect of which custodial sentences have been imposed'* (Clause 6).

Positive obligations

Clause 5 will bring to a complete halt the ability of a UK court to interpret a Convention right to require a public authority to comply with a positive obligation. In its consultation response the DLA emphasised that in order to avoid a breach of Convention rights, it has been inevitable that courts have required public authorities to take positive steps to ensure compliance. This has included measures by the police to protect women from domestic violence, action by the NHS to meet medical needs of particularly vulnerable

groups, and changes to practices in residential care affecting the health and personal dignity of millions of older and disabled people.

Prior to the start date for this total ban, in order to require a public authority to comply with a positive obligation, the court must *'give great weight'* to the need to avoid applying an interpretation which would affect the ability of a public authority to perform its functions, conflict with allowing public authorities to use their own expertise in deciding how to allocate their resources, undermine police ability to determine their operational priorities, or set too high a standard for an inquiry or investigation.

Clause 5 has been met with both outrage and fear by organisations concerned about the safety of women and girls on our streets, in domestic violence situations and in encounters with the police. Groups dependent on public authorities for their welfare, including asylum-seekers, adults and young people in residential care, young offenders and adult prisoners are also likely to be at greater risk of repeat human rights violations when a court can no longer require the relevant public authority to provide effective protection by complying with a positive obligation.

Judicial remedies: damages

Clause 18 proposes that when determining whether to award damages to a person, and if so the amount of any damages, as a remedy for unlawful breach of a Convention right, the court must take into account *'any conduct of the person that the court considers relevant (whether or not the conduct is related to the unlawful act)'.* This leaves it open to a court to deny or reduce damages to any successful claimant who at some time in their past committed a criminal offence, was dismissed from a job, was excluded from school, was made bankrupt, was subject to an order under mental health legislation or similar recorded past conduct.

The government's over-arching aim is to give itself greater control over how human rights are to be maintained and enforced in the UK.

The right to an effective remedy for violation of a Convention right in ECHR Article 13 is unconditional and belongs to 'everyone' regardless of their conduct. To require the courts to act otherwise, and to make a claimant's conduct a determining factor in the award or level of damages as in Clause 18 will not bring about the more responsible citizenry the government desires; it will merely deny many victims of human rights violations the just and fair remedy which, by Article 13, they are entitled to receive. There is a risk that certain groups, too often stereotyped in relation to their conduct, will disproportionately be denied their rights on this basis, raising possible Article 14 non-discrimination concerns.

Increased government control

The government's over-arching aim is to give itself greater control over how human rights are to be maintained and enforced in the UK. If adopted, this Bill will establish an increased role for parliament and a greater distance between UK courts and the ECtHR. Both the Independent Review of the Human Rights Act and vast majority of consultation respondents did not consider that these changes are needed or would be beneficial to the full enjoyment and effective enforcement of human rights in the UK.

After stating the one-line purpose of the Bill at Clause 1(1), the government states very clearly in Clause 1(2) its determination to 're-balance' the relationship between UK courts, the ECtHR and parliament – the insertion of parliament as a player being the major change. Given the present government's very large majority in parliament, it is relevant when reading these first sub-clauses notionally to insert 'government' alongside 'parliament' since that is where, under this Bill, at least today, the third pillar of influence and control will reside.

The Introduction firstly confirms the paramount role of the UK Supreme Court *'that determines the meaning and effect of Convention rights for the purposes of domestic law'*; it removes the duty on UK courts in determining a question concerning a

Convention right to take into account any relevant judgment, decision etc. of the ECtHR (repealing s3 HRA).

Completely new, the Bill requires UK courts to *'give the greatest possible weight to the principle that in a Parliamentary democracy decisions about the balance between different policy aims, different Convention rights and Convention rights of different persons are properly made by Parliament'.* Clause 7, which sets out how a court may determine whether a provision in legislation is incompatible with a Convention right, specifically requires this principle to be applied.

In the consultation document the government expressed its concern regarding the ECtHRs 'expansion' of individual Convention rights, which are much wider now than in the Convention when it was signed more than 60 years ago. It proposes in Clause 3 of the Bill that UK courts are required to have 'particular regard' to the text of a Convention right and must not adopt an interpretation of the right going beyond that protection *'unless the court has no reasonable doubt that the ECtHR would adopt that interpretation if the case were before it'*. This extremely strict restriction on interpretation of Convention rights by UK courts could well result in an increased number of dissatisfied human rights claimants appealing successfully to the ECtHR.

Clause 24 states that neither UK courts nor UK public authorities are to take account of any interim measure issued by the ECtHR in determining rights or obligations of a public authority or any other person.

The one provision which was not contemplated by the government last December when it consulted on proposals for reform of the HRA, but was very clearly at the fore front of its agenda in June when it finalised the contents of the Bill, is Clause 24, concerning interim measures of the ECtHR, and likely to be referred to, informally, as the 'Rwanda clause'. Clause 24 states that neither UK courts nor UK public authorities are to take account of any interim measure[3] issued by the ECtHR in determining rights or obligations of a public authority or any other person.

Clearly the government remains extremely unhappy about the interim measure which the ECtHR indicated to it on June 14, 2022 that K.N., an Iraqi asylum seeker facing imminent removal to Rwanda, should not be removed to Rwanda until three weeks after delivery of the final domestic decision in his ongoing judicial review proceedings. Clause 24 is its riposte. However, it would appear that the government omitted to consider decisions of the ECtHR which have established that failure to comply with an interim measure by a signatory to the ECHR would put that state in breach of ECHR Article 34. This article prohibits a signatory state to the ECHR from hindering *'in any way the effective exercise'* of the right to complain to the ECtHR about a violation of Convention rights, and cases in the ECtHR have established that failure by a state to comply with an interim measure could be a breach of Article 34.

It will be a matter for wider debate as to the wisdom of maintaining in national legislation a blanket prohibition on all UK courts and public authorities, in all cases, never to comply with an interim measure.

Conclusion

The Bill as drafted will profoundly undermine the UK's framework of human rights protection and have a significant negative impact on the fundamental rights of those people for whom in 1951 the ECHR was signed and in 1998 the HRA was enacted to protect.

3 The European Court of Human Rights may, under Rule 39 of its Rules of Court, indicate interim measures to any State Party to the Convention. Interim measures are urgent measures which…. apply only where there is an imminent risk of irreparable harm. Such measures are decided in connection with proceedings before the Court without prejudging any subsequent decisions on the admissibility or merits of the case in question.
... In practice, interim measures are applied only in a limited number of areas and most concern expulsion and extradition. They usually consist in a suspension of the applicant's expulsion or extradition for as long as the application is being examined.
... Although interim measures are provided for only in the Rules of Court and not in the ECHR, States Parties are under an obligation to comply with them. Two Grand Chamber judgments have given the Court an opportunity to clarify this obligation based particularly on Article 34 of the ECHR. *ECtHR Factsheet – Interim measures,* June 2022 pp 1-2 and 12

Indirect pregnancy/maternity discrimination caused by the Self Employment Income Support Scheme was justified

R (on the application of The Motherhood Plan and another) v HM Treasury✦ [2021] EWCA 1703; November 24, 2021

Facts

In response to the Coronavirus pandemic and lockdown, the government developed a package of economic measures to assist the employed and the self-employed. The Coronavirus Job Retention Scheme (CJRS) was devised for the employed; the Self Employment Income Support Scheme (SEISS/the scheme) was devised for the self-employed and was introduced by Order in April 2020.

Under the scheme the government paid eligible self-employed applicants a taxable grant of 80% (up to £2,500 per month for three months) of their previous earnings. The grant was calculated on the basis of average monthly profits over a specified number of previous tax years. The adopted formula was intended to even out the profits over the years of trading thereby providing an accurate reflection of the profits generated by the business. Whilst devising the scheme, ministerial briefing notes had considered the equality impact of the proposed measure; recommendations were made to address the potential disadvantage arising for women not working during the relevant calculation period due to pregnancy/maternity. However the final implemented scheme did not make an accommodation to cater for women in that situation.

The scheme was challenged by a charity called 'The Motherhood Plan' and Kerry Chamberlain, a self-employed energy analyst who had taken maternity leave in the period 2017 – 2018, (the claimants).

The claim was brought under Article 14 of the European Convention on Human Rights (ECHR) (protection against discrimination) read in conjunction with Article 1 Protocol 1 (the right to property). The claimants contended that the scheme was indirectly discriminatory first because it disadvantaged women who had been unavailable for work in the calculation period due to pregnancy/maternity compared to others in an analogous situation; and second, that it constituted *Thlimmenos* discrimination[1] – i.e. to avoid disparate impact, the scheme should have proactively catered for women who had taken pregnancy/maternity leave during the relevant period.

The claimants sought a declaration that the defendant had breached the public sector equality duty under s149 of the Equality Act 2010 (EA), and a mandatory order requiring the Chancellor to reconsider his duties under the scheme. The claimants were granted leave in September 2020 and Whipple J heard their application in January 2021.

1 *Thlimmenos v Greece* 31 EHRR 15; 'Thlimmenos discrimination' implies that '*the right not to be discriminated against … is also violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different*' – Lord Reed at para 48 *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2021] 3 WLR 428.

✦ [2022] IRLR 324

High Court

The judge accepted that the scheme fell within Article 1 Protocol 1; and that women on maternity leave shared a protected characteristic. Whilst accepting the group suffered a disadvantage, she found that the disadvantage was not caused by the scheme itself but by an absence of, or reduction in, past earnings. The scheme imposed no hidden barriers to eligibility – and there may be many reasons self-employed people do not work which results in lower wages.

Whipple J stated:

> *… quantum is based on past (average) trading profits, which are a matter of past fact. The same rule applies to all* ***and it is no harder for a woman who has been on maternity leave to qualify or calculate their payment****, than someone who has not. The fact that some claimants will receive lower paymentsthan others reflects the fact of lower earnings in past years; I agree with the Defendant that the reasons for lower earnings in past years, in the context of this Scheme with its stated purpose, are not relevant.* [para 64] (emphasis added)

The design of the Scheme, specifically in the way the payments were calculated by reference to ATP, was not manifestly without reasonable foundation.

She rejected the argument that this was a unique situation requiring a unique solution and concluded there was no indirect discrimination either under the Convention or *Thlimmenos.*

The judge went on to consider the justification defence and identified five justification reasons.

1. Purpose:

The purpose of the scheme was to provide support for self-employed people whose businesses were adversely affected by the pandemic by reference to average trading profits (ATP).

2. Policy delivery:

It was necessary for the government to adopt an approach which was simple and applicable to all; the use of information already supplied to HMRC in tax returns kept implementation costs down and enabled payments to be made quickly.

3. Risk of fraud:

The use of data already held by HMRC reduced the risk of fraud.

4. Perverse effects:

Given the exigencies, it was not possible to cater for all hard cases and anomalies – a broadbrush/bright line solution was adopted which was a political decision for government to make.

5. Value for money:

The claimants' proposals would have cost money. Simplicity was the key to the scheme and kept implementation costs down, enabling quick payments to be made.

Whipple J stated:

> *Whether the various justifications are taken separately or in combination, the Defendant's decisions were reasonable ones, especially when judged in context. The Scheme was a macro-economic policy involving substantial public expenditure to mitigate the effects of a global pandemic. The Government had a wide margin of appreciation. The design of the Scheme, specifically in the way the payments were calculated by reference to ATP, was not manifestly without reasonable foundation.* [para 85]

(The court found the government had met its equality assessment duty by considering the disproportionate impact issue.)

Court of Appeal

The claimants appealed on three grounds:

1. the HC had misapplied the test for indirect discrimination and failed to address the crucial issue of disproportionate impact
2. the HC had failed to properly consider if the government's failure to treat those who had been on maternity leave differently amounted to *Thlimmenos* discrimination; and
3. with respect to justification, the HC had applied an excessively broad approach and that less deference to the decision, and the decision-maker, was appropriate.

The decision

In a joint judgment of Underhill LJ and Baker LJ the CA reviewed domestic and European indirect discrimination law and concluded:

> *… it is clear that the same principles underlie the concept of indirect discrimination in the Convention, EU and domestic courts. Broadly speaking the concept of a measure does the same work as a PCP in EU law, and the requirement that it has disproportionately prejudicial effects essentially corresponds to the requirement that it puts members of that group at 'a particularly disadvantage'.*

In contrast to Whipple J's findings, the CA found a clear nexus between the disadvantage caused by the scheme and the situation of new mothers whose propensity to earn was reduced and concluded *'as a matter of principle the fact of the disproportionate effect is enough'.*

Whipple J had relied upon three cases: *Barry v Midland Bank plc* [1999] UKHL 38, [1999] 1 WLR 1465, *Trustees of Uppingham School Retirement Benefits Scheme v Shillcock* [2002] EWHC 641 (Ch), [2002] IRLR 702, and *R (Adiatu) v HM Treasury* [2020] EWHC 1554 (Admin), but the CA distinguished all three cases stating:

> *Once the ratio of* Barry *is understood, it can be seen that, contrary to para [63] of Whipple J's judgment, it provides no analogy to the present case. The purpose of SEISS is to compensate self-employed persons for their loss of profits in the current year as a result of the pandemic. The ATP measure works by using past profits to represent, in however rough-and-ready a manner, their likely hypothetical no-Covid profits. If its use in the case of new mothers produces results which are disproportionately unrepresentative of those profits, as compared with others, that necessarily puts them at a particular disadvantage. By contrast, Mrs Barry's previous (whole-career) earnings were irrelevant to the earnings that she would have received but for her dismissal…The purpose of SEISS is to compensate self-employed people for the loss of the earnings that they would have received in the current year but for the pandemic and to use past earnings as the measure of those lost hypothetical earnings. In those circumstances, the past earnings in question are not immaterial: on the contrary, they are crucial.* [paras 87 & 92]

Noting that *Thlimmenos* discrimination involves a positive duty to treat individuals differently in certain situations where their situations are significantly different from their comparators and there is no objective and reasonable justification for failing to take such a step, the CA was inclined to the view that there was *Thlimmenos* discrimination in this case but did not reach a definitive view.

Justification

The CA agreed with Whipple J that the scheme was justified. Whilst acknowledging that the decision was reached prior to the issuance of the Supreme Court's authoritative statement of the law on justification in indirect discrimination cases – *R (on the application of SC) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2021] 3 WLR 428, the court expressed the view that the law relied upon by the High Court judge and Lord Reed's summary in *SC* were not materially different.

The CA rejected the criticism of Whipple J's approach when addressing justification:

> *We are not persuaded that in the circumstances of the present case the reformulation of the law in* SC *is material to how Whipple J approached the issue of justification. Her assessment was appropriately nuanced, gave appropriate respect to the assessment of democratically accountable institutions, and recognised not only the need for caution before intervening in areas of social and economic policy but also that cogent justification was required for a measure having a differential impact on women. In our view she applied a level of scrutiny appropriate to the circumstances of the case. There is no merit in the appellant's contention that the judge's assessment of justification was tainted by her decision about discrimination. She was careful to say that it was conducted on the basis that she was wrong on the first issue and that the circumstances did amount to indirect discrimination. Furthermore, the appellants have not satisfied us that she failed to take into account any factor relevant to the assessment. Their attack on her assessment was directed at her attribution of weight to the factors identified. We were not persuaded that there was any error of principle or any flaw in her reasoning. In those circumstances, it would be contrary to established authority for this Court to re-determine this issue which is fundamentally a question of proportionality.* [para 125]

And ultimately the CA judges agreed with Whipple J that the ends justified the means:

> *In short, given the cardinal features required of the scheme – and above all speed and simplicity – the first respondent was in our view justified in introducing the scheme in a form which did not contain special provision for the position of recent mothers. …. In short, we do not consider that the impact of the use of the ATP measure, in unmodified form, on recent mothers was disproportionate to the benefit of the impugned measure. Given the exigencies under which the Treasury and HMRC were operating, as clearly described in the material put before the court, we conclude that the judge was right to conclude that if there was indirect discrimination (as we have found) it was justified.* [paras 132 & 134]

Comment

In this decision the CA's consideration of the relevant principles underlying indirect discrimination (including the comparative discussion of domestic and European Union and ECHR law) is most illuminating, making this a useful judgment for lawyers practising in this area.

The HC decision on disproportionate impact was fundamentally flawed. In the light of well established principles, SEISS was indirectly discriminatory – a women unable to work during the calculation period due to pregnancy/maternity was disadvantaged because the formula for calculating the grant did not exclude or make accommodation for such periods of inactivity resulting in new mothers, who earned less during pregnancy/maternity, suffering financially under the scheme. Notwithstanding, there

was always a cogent justification argument in this case that a broad brush approach was justifiable in an emergency situation, i.e. in the face of the lockdown and its impact on employment and economic activity arguably it was necessary in the public interest for the government to provide financial protection; to act with urgency; and to implement a workable scheme. It is not surprising in the circumstances of this case that the government's arguments were accepted so readily by the courts.

The circumstances of the case, however, potentially camouflage the underlying change of judicial direction in Lord Reed's court involving a more deferential approach to government policy and decision-making than was the case in Lady Hale's court. Lord Reed's policy principle as stated in *SC* is re-stated by the CA:

... bright lines are not necessarily the right lines ...

> *Since the principle of proportionality confers on the courts a very broad discretionary power, such cases present a risk of undue interference by the courts in the sphere of political choices. That risk can only be avoided if the courts apply the principle in a manner which respects the boundaries between legality and the political process.*

The CA has been careful to acknowledge and reflect the Supreme Court's new direction in its judgment. It will be important to scrutinise the outworking and impact of a judicial approach which accords greater weight to the state's position in social and economic litigation – bright lines are not necessarily the right lines – and such an approach could increasingly legitimise discriminatory action by the state and private organisations.

Michael Potter
Bar Library & Cloisters

Pool for comparison must accurately reflect the PCP

Allen v Primark Stores Ltd [2022] EAT 57; April 8, 2022

Facts

Ms Natasha Allen (NA) was a department manager at the Primark store in Bury who was preparing to return to work following maternity leave.

Under Primark's standard terms and conditions department managers were required to guarantee their availability to work a range of shifts, including the late shift from 10.30am-8.30pm. NA was concerned about this requirement because she had sole responsibility for her child and only limited family support, so she made an application under the flexible working policy for a change to her contractual hours.

Primark offered to make some adjustments, but under the proposed arrangements NA would still have been required to be available to work the Thursday late shift.

At the time there were six department managers at the Bury store, including NA. Each shift required at least two department managers present. One department manager, Piotr, had his own flexible working arrangements which meant he was not available for the Thursday late shift. In addition two further department managers, Zee and Imran, had historic but informal arrangements because of childcare responsibilities which meant they did fewer Thursday late shifts. Imran mainly did these shifts during school holidays, and had done only four over a 51-week period. Zee had done 16 over a 51-week period but complained that he was frustrated at doing so many. As a result, Thursday late shifts were commonly covered by Adam (26 shifts over 51 weeks) and Julie (30 shifts over 51 weeks).

Indirect discrimination may arise where an apparently neutral provision, criterion or practice (PCP) puts people who share a protected characteristic at a comparative disadvantage.

Primark therefore proposed to remove the requirement that NA be available for late shifts for other days but not for Thursdays. That did not meet NA's needs and, following a failed appeal, she resigned. She claimed indirect discrimination and constructive unfair dismissal.

Law

Under s19 of the Equality Act 2010 (EA), indirect discrimination may arise where an apparently neutral provision, criterion or practice (PCP) puts people who share a protected characteristic at a comparative disadvantage. Put shortly, a claimant must show that the PCP applied by the respondent:

- is applied to persons who do not share the relevant protected characteristic (s19(2)(a)),
- puts persons with whom the claimant shares the characteristic at a particular disadvantage when compared with persons with whom the claimant does not share it (s19(2)(b)), and
- puts the claimant at that disadvantage (s19(2)(c)).

If the claimant shows this, she succeeds unless the respondent can show the PCP to be a proportionate means of achieving a legitimate aim (s19(2)(d)).

The purpose of s19 is to tackle group disadvantage, sometimes referred to as 'disparate impact'. It therefore requires a comparison between the effects of the PCP on the group of people with the protected characteristic and the effects on the group without

it. Under s23(1) EA, there must be no material differences in the circumstances of the two groups.

The people in the two groups used for the comparative exercise are often called the *'pool for comparison'*. According to the Equality and Human Rights Commission Statutory Code of Practice for employment:

> *In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively…*
>
> *Example: A marketing company employs 45 women, 10 of whom are part-timers, and 55 men who all work full-time. One female receptionist works Mondays, Wednesdays and Thursdays. The annual leave policy requires that all workers take time off on public holidays, at least half of which fall on a Monday every year. The receptionist argues that the policy is indirectly discriminatory against women and that it puts her at a personal disadvantage because she has proportionately less control over when she can take her annual leave.*
>
> *The appropriate pool for comparison is all the workers affected by the annual leave policy. The pool is not all receptionists or all part-time workers, because the policy does not only affect these groups.* [para 4.18]

The first step, then, is to identify the pool of people affected by the PCP. The second step is to divide that pool into two groups, according to whether they share the protected characteristic with the claimant. The third step is to compare the effect of the PCP on the two groups.

Employment Tribunal

NA clarified at the start of the ET hearing that the PCP complained of was the requirement to guarantee availability to work the Thursday late shift. The ET therefore identified the pool of people affected by the PCP as the department managers and trainee managers at the Bury store *'who potentially have to work the Thursday [late] shifts '.* [para 15]

The ET excluded Piotr from the pool because his formal flexible working arrangement meant he would never have to work the Thursday late shift. However, it included both Zee and Imran in the pool because they *'had historically worked on Thursdays'.* [para 15] The pool of people affected by the PCP consisted of two women and three men: Adam, Julie, NA, Imran and Zee.

Three of the people in the pool were disadvantaged by the requirement because of childcare responsibilities – NA, Imran and Zee – and because two of the three were men, the ET found that women were not at a particular disadvantage. The claim of indirect discrimination failed; the claimant appealed.

Employment Appeal Tribunal

The appeal turned on the question whether, given its findings of fact, the ET was wrong to include Imran and Zee in the pool of people who were potentially required to work the Thursday late shift.

The ET had found that *'when asked, and when the store required (perhaps in an emergency or when Adam and Julie could not work)* [Imran and Zee] *did work on a Thursday'*. [para 17]

The evidence of the store manager, Mr Davis, was that although the arrangements for Imran and Zee not to work Thursday late shifts were informal he had inherited them

from a previous store manager and could not change them. NA would need to be available to work Thursday late shifts because otherwise there would be *'no cover for Adam'.* [para 40]

The EAT found that this meant Imran and Zee's circumstances were materially different from NA's: while they might sometimes work a Thursday late shift when asked, they were not **required** to be available for that shift.

In constructing the pool in the way that it did, the ET had had effectively rewritten the PCP from being **required to guarantee availability** for Thursday late shifts – which was the claimant's case – to being **asked** to work Thursday late shifts. As a result, it had included in the pool two individuals who were not in fact subjected to the PCP as defined by NA.

The ET's conclusions were set aside in their entirety and the case remitted for re-hearing.

Implications for practitioners

It is for a claimant to define the PCP, since that fixes the nature of their complaint. It is then for the ET to construct a pool for comparison which will *'realistically and effectively test the particular allegation before them'.* [see para 33] This case shows how important it is to focus on the specific wording of the PCP in identifying the pool, particularly in relation to the degree of compulsion which is alleged to be applied to the claimant.

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ET awards maximum ACAS uplift for discriminatory dismissals on the grounds of pregnancy or maternity

Slade & Hamilton v Biggs & Stewart ✦ EA-2019-000687-VP and EA-2019-000722-VP; December 1, 2021

Implications for practitioners

This case is a stark example of blatant discrimination by an employer. It illustrates when the maximum ACAS uplift of 25% under section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA 1992) will be appropriate and sets out a four-stage test for the ET to follow when assessing the effect of an employer's failure to follow the ACAS Code of Practice.
In addition, the case contains useful guidance on the taxation of awards for injury to feelings and aggravated damages.

Facts

Mrs Melissa Biggs (MB) and Ms Roxanne Stewart (RS) worked for an events company. They notified Sir Benjamin Slade, baronet, (BS) of their pregnancies in May 2017 and October 2017 respectively. MB started her maternity leave in September 2017. She resigned in January 2018 following a course of detrimental treatment by BS and his agent, Mr Andrew Hamilton (AH), including the non-payment of her Statutory Maternity Pay. RS was dismissed by letter in December 2017. MB and RS presented various claims to the ET, including discrimination on the grounds of pregnancy or maternity and unfair dismissal.

Employment Tribunal

The ET held that BS had found it 'highly inconvenient' that MB and RS were pregnant *'at roughly the same time'* and had *'decided to engineer their departure from their employment'.*

The ET decided BS had subjected RS to a spurious and vindictive disciplinary process, designed to drive her from the business at a point both before she gave birth prematurely and while her baby was in intensive care. The ET held that the charges against RS were *'absolutely trumped up'* and characterised RS's suspension and dismissal as *'one of the most egregious acts of discrimination possible'*. The ET found BS and AH jointly and severally liable.

The ET held that BS's behaviour, when giving evidence, was *'arrogant and misogynistic'* and that he had made lurid and 'entirely fanciful' allegations against both claimants.

The ET upheld the claims of MB and RS and awarded a 25% uplift for failure to follow the ACAS Code. The ET considered that the unfair dismissal and discrimination claims were 'intimately linked' and applied the uplift to the awards for financial loss, injury to feelings and aggravated damages.

The respondents appealed to the EAT on the grounds that there was double-counting and that the awards for injury to feelings and aggravated damages should not have been grossed up.

Employment Appeal Tribunal

The EAT upheld the ET's judgment and dismissed the appeals.

✦ [2022] IRLR 216

The EAT held that there was no obvious or significant double-counting in the 25% uplift and the awards for aggravated damages and injury to feelings. The EAT also held that the absolute value in money terms of the 25% uplifts in these cases was not too high to be proportionate or acceptable. The EAT decided that there must be cases in which the maximum uplift of 25% is applicable, otherwise the range set by parliament is not being respected. It found that the discretion given to the ET by the statute is very broad, both as to whether there should be an uplift at all, and as to the amount of any uplift. Noting that the top of the range should only be applied to the most serious cases, the EAT held that the statute did not require such cases to be classified, additionally, as exceptional.

The EAT provided a four-stage test for the ET to apply when considering what should be the effect of an employer's failure to comply with the relevant Code:

1. Is the case such as to make it just and equitable to award any ACAS uplift?
2. If so, what does the ET consider a just and equitable percentage, not exceeding, although possibly equalling, 25%?
3. Does the uplift overlap, or potentially overlap, with other general awards such as injury to feelings; and, if so, what in the ET's judgment is the appropriate adjustment, if any, to the percentage of those awards in order to avoid double-counting? This question must be answered using the ET's common sense and good judgment having regard to the final outcome. It cannot be a mathematical exercise.
4. Applying a final sense-check, is the sum of money represented by the application of the percentage uplift arrived at by the ET disproportionate in absolute terms and, if so, what further adjustment needs to be made?

The ET would have to determine what percentage uplift would be *'just and equitable in all the circumstances.'*

The EAT acknowledged that wholly disproportionate sums would need to be scaled down and that the ET would have to determine what percentage uplift would be *'just and equitable in all the circumstances',* including the seriousness and/or motivation for the breach. The EAT confirmed it is not necessary to apply, in addition to the question of seriousness, a test of exceptionality.

The EAT also confirmed that, considering the compensation awarded to MB and RS was in connection with the termination of their employment, the awards for injury to feelings and for aggravated damages were taxable under s401 of the Income Tax (Earnings and Pensions) Act 2003 and were not excluded from taxation by s406. Consequently, the EAT determined that the ET had correctly decided that the awards would need to be grossed up to take account of the effect of taxation.

Comment

It is worth reading the EAT's judgment in full. It sets out clearly the history of the ACAS uplift regime, including the fact that parliament had previously reduced the maximum uplift from 50% to 25%. It contains useful points for both claimant and respondent representatives to consider. It is also a shocking example of how badly some employers try to treat employees who are pregnant or on maternity leave.

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EAT considers the claimant's perception when evaluating allegations of harassment

Ali v (1) Heathrow Express Operating Company Ltd (2) Redline Assured Security Ltd [2022] EAT 54; April 7, 2022

Introduction

In an appeal against a decision that the use of a sacred religious phrase in a security training exercise was not harassment under the s26 of the Equality Act 2010 (EA), the EAT provided guidance on the relevance of the claimant's perception when evaluating the allegations of harassment.

Facts

The claimant, Mr A Ali (AA), was a Muslim employee of the first respondent, Heathrow Express Operating Company Limited. Redline, the second respondent, was responsible for carrying out security testing at Heathrow Airport, including the Heathrow Express stations. Part of the security testing included deploying suspicious packages to test how security staff responded to them.

As part of this security checking process in August 2017, Redline left an unattended carrier bag at the airport. The bag contained some visible electric cabling and a cardboard box and a visible piece of paper with the words 'Allahu Akbar' written in Arabic. Allahu Akbar is a sacred Islamic phrase meaning 'God Is Greater'.

AA was not on duty on that particular day and learned of the security test after an email was circulated showing the outcome along with photographs of the bag and the note. He brought a claim in the ET asserting (amongst other things) that he had been subject to harassment contrary to s26 EA because of his Muslim religion.

Employment Tribunal

The ET carefully examined the definition of harassment in the EA.

Harassment occurs when a person engages in unwanted conduct related to a relevant protected characteristic (s26(1)(a)), and the conduct has the purpose or effect of violating the other person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them (s26(1)(b)).

When deciding whether conduct has the effect referred to above, a key factor for the ET to consider is the perception of the complainant (s26(4)(a)). However, the ET must also consider more objective elements, being the other circumstances of the case (s26(4(b)), and whether it is reasonable for the conduct to have that particular effect on the complainant (s26(4)(c)).

It was not disputed that the conduct of Redline in the current case was unwanted by AA, and that, given the association of the handwritten phrase with Islam, it related to his religion and he felt that it violated his dignity and created a hostile environment for him.

However, after considering the objective elements at s26(4)(b) and (c), the ET rejected AA's claim. It found that the other

circumstances of the case were that, regrettably, the phrase 'Allahu Akbar' had been used in connection with recent terrorist attacks including a number of terrorist attacks that year. The ET therefore found that it was legitimate for Redline to reinforce the suspicious nature of the package by referring to known threats and matters connected with previous incidents.

Furthermore, the ET found that AA should have understood that in adding this phrase, Redline was not seeking to associate Islam with terrorism, but seeking to produce a suspicious item based on possible, and realistic, threats to the airport. It concluded that it was not reasonable for him to find that the conduct violated his dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for him.

AA appealed on the grounds that the ET decision was perverse for several reasons, including that the idea that a religious phrase in itself makes a bag more suspicious, is offensive to Muslims.

Employment Appeal Tribunal

The EAT closely reviewed the s26(4) objective elements in the definition of harassment in the context of this case. It appreciated *'the strength of feeling that the claimant plainly has about this matter, and about matters more generally concerning the treatment of Muslims in society'* [para 74], but ultimately agreed with the ET's finding and concluded that the effect on the claimant and his perception of the conduct had to be balanced against the other circumstances of the case.

For conduct to amount to harassment under s26(1), the ET must conclude that the claimant's perception is reasonable in all the circumstances of the case.

Redline's role in this situation was to run scenarios which involved suspicious packages in order to test the security measures in place. It is undeniable that the phrase had been used in connection with recent terrorist attacks. The EAT found that it had been legitimate for Redline to draw on known threats and matters connected with previous terrorist incidents to make the package appear suspicious. AA had not been on duty on the day in question, and therefore it could not be said that the security exercise was particularly directed at him.

The EAT did not accept that there was a proper basis on which to find that Redline had stereotyped all Muslims as terrorists or supporters of terrorists, as AA had argued. In light of the circumstances, he should have appreciated that the phrase had been chosen to reinforce the suspicious nature of the package and not to cause offence to him, and that it was not seeking to associate Islam with terrorism. The EAT did not find that AA's perception of the conduct was reasonable.

The ET's decision was upheld and the EAT found that a balance must be struck between the perception of the complainant and the matters to be considered in the objective elements of harassment in s26(4).

Comment

This decision is a reminder of the legal principles in harassment claims, making it clear that the claimant's perception of the conduct complained of is only one factor to take into account. For conduct to amount to harassment under s26(1), the ET must conclude that the claimant's perception is reasonable in all the circumstances of the case.

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Fatigue not considered a disability in circumstances where it was not substantial or long-term

Navarro v Eurostar International Ltd [2022] EAT 7; January 21, 2022

Facts

Ms D Navarro (DN) worked for Eurostar International Ltd (EI) in their customer service team. She underwent a double mastectomy in June 2018. Following the surgery DN suffered right breast pain and discomfort and pain in her right arm. This pain (the physical impairment) caused her to have likely permanent functional issues around her scars. DN also reported suffering from fatigue and depression (the mental impairments).

In January 2019 DN requested a reasonable adjustment of 48-hour rest periods between shifts to prevent extreme fatigue caused by her disability. When the request was rejected in June 2019 for business reasons, DN went off sick and attended her GP who diagnosed severe depression.

DN lodged a grievance in April 2019 with a second request to change her shifts due to fatigue.

Employment Tribunal

DN lodged a claim for her employer's failure to make reasonable adjustments and a claim for discrimination arising from disability related to a warning for sickness absence.

DN claimed her physical and mental impairments amounted to disabilities under the Equality Act 2010 (EA). DN also reported suffering from several other medical conditions and menopausal symptoms, which were not claimed as disabilities.

The ET held a preliminary hearing to determine whether the physical and mental impairments amounted to a disability.

The ET found that following her return to work after surgery, DN found it increasingly difficult to cope with her shift without sufficient rest periods between shifts. In October 2018, DN visited an occupational health adviser who recommended adjustments to assist her with her physical impairment.

The ET found that DN attended a further occupational health consultation in January 2019. The occupational health adviser undertook a mental health assessment and noted that she suffered mild depression and moderate anxiety symptoms. The ET found that DN's depression was not so severe at this time and the advisor didn't recommend any further treatment. There was no mention of tiredness or fatigue during this consultation.

DN was absent from work in May 2019 due to flu and menopausal symptoms. DN attended her GP in June 2019, where it was noted she had suffered an episode of depression three years previously.

The ET found that during a further occupational health consultation in late June 2019, the doctor reported a deterioration in DN's mental health. The ET found that DN first mentioned fatigue at this consultation and only after her absence in May 2019 for flu and menopausal symptoms.

In her witness statement and during cross examination, DN stated she often fell asleep unexpectedly as a result of her anti-depressants and that her fatigue was due to her menopausal symptoms and mild anaemia.

The ET found that DN's mental impairments (with or without fatigue) were not substantial until around June 2019. There was no evidence of DN's fatigue being related to her physical impairment although it may have been related to DN's depression and menopausal symptoms.

The ET found DN's mental impairments (including fatigue) were not substantial and so did not amount to disabilities. It stated there was no evidence that DN's depression was an underlying condition despite her previous episode and that in June 2019 it could not have been said to be likely to be a long-term condition.

The ET found that DN's physical impairments were substantial and long-term and so amounted to disabilities.

Reconsideration by the ET

DN submitted an out-of-time application for reconsideration to the ET. In requesting reconsideration, DN relied on a previously overlooked note of a meeting with her manager in January 2019 in which it was mentioned that she felt *'… easily tired/ overwhelmed'* (the note).

The ET granted an extension for the application on the grounds it could avoid the expense and delay of an appeal to the EAT. However, the ET concluded there was no prospect of a successful reconsideration of the finding that fatigue was not substantial and long-term at the relevant time.

The ET found DN's comment about being easily tired and overwhelmed was noted down between her complaints of physical impairments, and against a background of several consultations with occupational health and her GP in 2018 and 2019 during which there was no record of DN complaining about fatigue. The ET considered the note but it was discounted by a finding that fatigue had not been present at a substantial level before June 2019.

Employment Appeal Tribunal

DN appealed the decision on 3 grounds:

1. the ET did not apply the correct legal test when determining if fatigue was a disability on its own right or part of another impairment
2. the issue of causation was not a relevant consideration and the ET erred in law in addressing the matter, and
3. the finding of causation was perverse.

DN argued in respect of grounds 1 and 2 that the ET set out the correct legal test in its judgment but failed to apply it correctly.

Addressing grounds 1 and 2 together, the EAT found that on a generous construction of the ET's judgment, the tribunal had essentially found that fatigue was not a severable impairment but part and parcel of the physical impairment, which the EAT considered an entirely appropriate conclusion. The EAT found it permissible that the ET could use causation as a determination of whether the fatigue was actually a part of the physical impairment and could not be treated separately.

The EAT stated that when the ET used the word 'cause', it was really considering which symptoms are linked, related to or part of the physical impairment.

The EAT stated the ET was clear in its findings that DN's fatigue was neither substantial nor long-term at the relevant time. This finding itself was not the subject of the appeal and grounds 1 and 2 were dismissed.

Ensuring medical and other records accurately record all impairments and symptoms is essential.

Regarding ground 3, the EAT found there was nothing perverse in the ET's findings and it was open to the ET to find that fatigue had not been mentioned in any substantive way by DN before June 2019. Ground 3 was accordingly dismissed.

Comment

Claimants should be mindful of the evidentiary burden in demonstrating an impairment is substantial and long-term. Ensuring medical and other records accurately record all impairments and symptoms is essential. Legal advisers need to ensure they give due care and attention to accurately particularising a claimant's disabilities.

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ABBREVIATIONS

AC	Appeal Cases
ACAS	Advisory, Conciliation and Arbitration Service
ATP	Average trading profits
CA	Court of Appeal
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRA	Compulsory retirement age
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
EHRR	European Human Rights Reports
EJRA	Employer justified retirement age
ET	Employment Tribunal
ETA	Employment Tribunals Act 1996
EU	European Union
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
GP	General practitioner
GRT	Gypsies, Roma and Travellers
HC	High Court
HHJ	His/her honour judge
HL	House of Lords
HMRC	Her Majesty's Revenue and Customs
HR	Human resources
HRA	Human Rights Act 1998
ICR	Industrial Case Reports
IRLR	Industrial Relations Law Reports
J/JSC	Judge/Justice of the Supreme Court
LJ/LJJ	Lord/Lady Justice of Appeal (singular and plural)
LLP	Legal liability partnership
NI	Northern Ireland
ONS	Office for National Statistics
PCP	Provision, criterion or practice
PHE	Public Health England
RPO	Restriction of proceedings order
SC	Supreme Court
TULRCA	Trade Union and Labour Relations (Consolidation) Act 1992
UKEAT	United Kingdom Employment Appeal Tribunal
UKHL	United Kingdom House of Lords
UKSC	United Kingdom Supreme Court
WEC	Women and Equalities Committee
WLR	Weekly Law Reports
WLUK	Westlaw UK

Disability: nature of causal relationship between impairment and effect

Da Silva Primaz v Carl Room Restaurants Ltd t/a McDonald's Restaurants Ltd and others✦ EA-2020-000110-JOJ (previously UKEAT/0137/20/JOJ) EA-2020-000278-JOJ (previously UKEAT/0172/20/JOJ); July 15, 2021

Facts

The claimant, Dias da Silva Primaz (DSP), was diagnosed in 1996 as having epilepsy. A benign low-grade astrocytoma brain tumour was discovered in the course of her treatment and surgically removed in 2008. The tumour was not described anywhere in her medical records as cancer, but Public Health England (PHE) now classifies all astrocytomas as cancer.

DSP believed that both her epilepsy and a further condition of vitiligo, which involves loss of skin pigmentation, were caused by the brain tumour. Since she continued to experience epilepsy and vitiligo, she believed that the tumour had not been completely removed. Her core case on disability was that she was still suffering from cancer in 2018 at the time of the alleged discriminatory treatment, and her cancer was causing her epilepsy and vitiligo.

However, her medical records did not indicate any diagnosis of tumour or cancer since 2008, and none of her treating physicians agreed that that was the cause of her other conditions.

DSP's epilepsy gives rise to nocturnal seizures. As they take place only at night she is unaware of the seizures at the time, but she realises they have happened because she wakes up out of her bed or having bitten her tongue, for instance. Her evidence on frequency was not very clear, but the ET concluded that there have been long periods during which she has not had any seizures. One of the periods when she reported more frequent seizures involved four seizures in four months.

DSP's vitiligo means that some areas of her skin have lost pigmentation and therefore protection from the sun.

The more significant effect on her daily life from both epilepsy and vitiligo arises because of her avoidance behaviours. She is very worried about the risk of Sudden Unexpected Death in Epilepsy but does not take the anti-convulsant medication which her doctors have recommended because of concerns about side effects. Instead, she avoids things which she believes trigger her epilepsy and/or her vitiligo. She does not drink coffee or alcohol, does not use any cosmetics, avoids exposing her body to chemicals such as cleaning products, stays out of the sun and covers her skin when she is outside.

She is very fearful about these triggers and believes they are an immediate risk to her health and life, and she therefore restricts her daily activities significantly. However, none of steps she takes have been recommended by her doctors and there is no medical evidence supporting any link between the triggers and her conditions.

The issue at a preliminary hearing was whether DSP was disabled by reason of cancer, epilepsy and/or vitiligo.

✦ [2022] IRLR 194

Law

Under s6(1) of the Equality Act 2010 (EA), a person has a disability if:

- they have a physical or mental impairment
- the impairment has a substantial adverse effect, which under s212 EA means *'more than minor or trivial'*
- the effect is an effect on their ability to carry out normal day-to-day activities, and
- that effect is long-term.

When assessing the effect of an impairment, the tribunal must focus on what a person cannot do, or can only do with difficulty, not on what they can do.

When assessing the effect of an impairment, the tribunal must focus on what a person cannot do, or can only do with difficulty, not on what they can do.

In 2010 the Secretary of State issued *Guidance on matters to be taken into account in determining questions relating to the definition of disability*.[1] That guidance makes clear that it is not necessary for the cause of the impairment to be established (para A3).

Paragraph 6 of Schedule 1 EA provides that cancer is a disability. The EAT confirmed in *Lofty v Hamis* (2018) UKEAT/0177/17; [2018] IRLR 512 that cancer is not a matter of degree: there is no basis for disregarding any cancerous condition because it has not reached a particular stage. On the other hand, a mere risk that something might develop into cancer in the future would not be sufficient.

Under s6(4) EA, people who have had a disability in the past are also protected, so that a reference in the EA to a person who has a disability includes a reference to a person who has had the disability.

Employment Tribunal

Cancer

In relation to cancer, the evidence before the ET consisted of:

- DSP's medical records, which did not indicate a diagnosis of cancer but did say that she had had an astrocytoma brain tumour in 2008, and
- material from the internet, including from PHE, which stated that '*Astrocytic tumours are the commonest types of cancer of the brain*'. [para 23]

The ET found that this evidence was not sufficient to conclude on the balance of probabilities that DSP's tumour was cancer.

The medical evidence which related specifically to her did not mention cancer and, while the PHE material might be accurate, it required interpretation to apply it to DSP's own case. The ET held that her '*oral evidence… on this point is argument and opinion, which would need to come from a person with appropriate expertise and qualifications in order to be accepted*'.

Epilepsy and vitiligo

The ET held that DSP was a disabled person both by reason of her epilepsy and by reason of her vitiligo.

In each case, it was not just the physical effects of the impairment which grounded the finding, but the avoidance strategies she employed in her daily life. The ET found that these had led to a '*restricted, spartan lifestyle*' which was '*an important part of the impact*' each impairment had on her [para 16]. That impact was more than minor or trivial.

1 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/570382/Equality_Act_2010-disability_definition.pdf

Employment Appeal Tribunal

Cancer

The EAT allowed DSP's appeal against the ET's finding that there was insufficient evidence to conclude that she had had cancer.

Judge Auerbach held that PHE can be regarded as a reputable and reliable source, and the natural meaning of '*Astrocytic tumours are the commonest types of cancer of the brain*' is that **all** astrocytic tumours are cancers.

Since there was no dispute that she had such a tumour, and no evidence to suggest that the PHE information was wrong, the ET ought to have concluded that she had had cancer in 2008. It was irrelevant that her cancer had been low grade and that there was no evidence that it had spread before it was removed.

DSP was therefore protected under the EA as someone who was disabled in the past.

However, the ET had been correct to find that she did not have cancer in 2018. DSP's belief that she still had cancer was that based on an inference from her continuing epilepsy and vitiligo together with her belief that those conditions were caused by cancer, but there was no medical evidence to support this, and there was no other evidence suggesting the presence of any cancer cells in 2018.

Epilepsy and vitiligo

The respondent appealed against the ET's finding that DSP was disabled because of her epilepsy and vitiligo. The EAT allowed the appeal in both respects and remitted those questions back to the ET for further consideration.

Judge Auerbach held that the question whether an impairment has caused an effect is an objective question:

> *… in a case where the claimant asserts that engaging in a certain activity will risk triggering or exacerbating some adverse effect of the impairment itself, such as bringing on a seizure or an adverse skin reaction or something of that sort, and that is disputed, the tribunal must consider whether it has some evidence that objectively makes good that contention.* [para 62]

It was necessary for there to be objective evidence of an underlying causal mechanism between the impairment and the effect.

In DSP's case, the epilepsy did in one sense cause her avoidance behaviours, via the mechanism of her acting on her subjective beliefs. One way to describe that is to say that **but for** the epilepsy, '*she would not have formed the beliefs and, hence, would not have refrained from the activities*'. [para 69]

However, the EAT held that this form of causation, known as 'but-for' causation, was not sufficient to establish that the impairment caused the effect for the purposes of s6 EA. It was necessary for there to be objective evidence of an underlying causal mechanism between the impairment and the effect.

The ET had found that there was no underlying causal mechanism which would mean the triggers were objectively likely to exacerbate her epilepsy or vitiligo; that is to say, her beliefs were false, albeit sincerely and strongly held. According to the EAT, this meant that her beliefs broke the chain of causation [para 73].

Comment

It is important to understand that this case does not mean avoidance strategies adopted because of fear of triggering adverse consequences of an impairment can never amount to a relevantly disabling effect.

First, they would do so where a claimant's avoidance strategies are based on sound medical advice. However, Judge Auerbach notes that in that case '*the underlying basis of causation would be established by the evidence that, objectively, the impairment* ***does*** *affect the* ***ability*** *to engage in that activity*'. [para 67, emphasis in original]

So, for instance, a person with coeliac disease might avoid any foods which could be contaminated with gluten. Their avoidance behaviours are caused by their beliefs about how gluten will hurt them and, but for having coeliac disease, they would not have developed those beliefs. However, the beliefs are grounded in the objective causal connection between gluten and intestinal damage for coeliacs. Having coeliac disease **does** affect the ability to engage in the daily activity of eating without restriction.

Second, a person who adopts avoidance strategies because of fearful but false beliefs might be found to have a mental impairment, such as a phobia, with a substantial adverse effect. However, the parties were agreed that DSP had not relied on mental impairment, so that route to a finding of disability was not open to the tribunal in this case.

In relevant cases, it will be important for practitioners to explore whether the effects of an impairment are mediated by a mental impairment (for instance, anxiety or depression) which may have developed aside or as a consequence of the original impairment. If so, mental impairment should also be pleaded.

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Victimisation and the correct test for 'detriment'

Warburton v Chief Constable of Northamptonshire Police [2022] EAT 42; March 14, 2022

Implications for practitioners

The EAT held that the correct question when considering whether a claimant had suffered detriment in a claim for victimisation was: *'Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment'?*

This is the test determined by the House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 HL. This test sets a low threshold for claimants to prove in order to establish a detriment, as it is the view of a reasonable worker. As such, it is not an entirely objective test as it is enough that a reasonable worker would or might take such a view.

Facts

On making an application to become a police officer with the Northamptonshire Police (NP) in November 2017, Mr D Warburton (DW) disclosed information relating to proceedings he was bringing in an employment tribunal against a separate police force (Hertfordshire Constabulary). His complaint against Hertfordshire Constabulary alleged unlawful discrimination following the rescission of a job offer.

DW's application was accepted by NP on December 27, 2017. His application progressed to an interview and a test at an assessment centre and, on January 26, 2018, he was given *'a conditional offer subject to the pre-employment checks being completed'.* Six days later he was informed that he was unsuccessful in his application following the vetting checks but was not entitled to reasons.

Following DW's request for reasons, NP reviewed the vetting form and confirmed that the decision was taken not to begin the vetting until the outstanding tribunal claims were concluded. A detective sergeant emphasised that the vetting wasn't *'rejected, it simply wasn't commenced'.*

Employment Tribunal

DW presented a claim of victimisation under s27 of the Equality Act 2010 (EA) alleging that NP had acted contrary to s39 EA. It was DW's case that:

- NP did not undergo the vetting process on his application
- when NP later started the process, it embarked on an excessive vetting process, and
- NP did not ultimately offer him employment because of the proceedings he was bringing against Hertfordshire Police.

In the application form DW submitted in November 2017 he divulged details of his past and current health, previous convictions relating to driving offences, a charge of criminal damage against him and his employment history, including employment with West Midlands Police and Avon and Somerset Police.

DW also included details of the proceedings against Hertfordshire Police and also that during Hertfordshire Police's vetting process, it found that West Midlands Police had no history of DW working for them. It was later confirmed by Avon and Somerset Constabulary that DW had worked for West Midlands Police and when doing so was involved in an incident of inappropriate behaviour at a social event. DW denied this, and confirmed he

had made a complaint and had a potential defamation claim pending against Avon and Somerset Constabulary.

NP made enquiries with both West Midlands and Avon and Somerset Police.

The ET considered that DW's disclosure of information about the proceedings brought against Hertfordshire Police constituted a protected act and was covered by s27(2) EA.

The ET considered that the reason the vetting was not commenced initially was primarily due to the failure of Avon and Somerset Police failing to reply to NP's requests for information, and secondly because of the on-going proceedings against Hertfordshire Police. The ET found the hesitation with undertaking the vetting was reasonable and consistent with NP's policies. While the ET acknowledged it was an exceptional situation, the tribunal emphasised this was a temporary hold on the process, rather than termination of the application altogether.

The ET therefore found that the delay in the vetting process did not amount to a detriment. Further, the tribunal explained that, **had** it found DW suffered a detriment, it would not have been satisfied that the reason had been DW's protected disclosure, but rather the delay was because of both Hertfordshire and Avon and Somerset Police's lack of engagement.

Ultimately the ET held that DW's claim for victimisation was *'not well founded'*.

Employment Appeal Tribunal

DW appealed to the EAT.

Detriment

The EAT found that the ET had not relied on the correct test when deciding whether DW had suffered a detriment. The test which should have been applied was: *'Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?'* This test is wider than that applied by the ET. It is not wholly objective and therefore the answer to the question cannot be found only in the view taken by the ET itself. The EAT concluded that the finding of no detriment was unsatisfactory but went on to explain that substituting its decision would be inappropriate.

The EAT finding that 'detriment' should be interpreted widely and not objectively potentially broadens the scope for claimants.

Causation

The EAT also held that the ET had applied the incorrect test for causation. The correct test to apply is whether the protected act *'had a significant influence on the outcome'.* The EAT criticised the ET's conclusion that, **had** a detriment been established, this would have been caused by the absence of information from Hertfordshire Police, rather than the protected disclosure.

NP also appealed a costs award which was allowed.

The EAT remitted the case for rehearing by a different ET.

Comment

The EAT finding that 'detriment' should be interpreted widely and not objectively potentially broadens the scope for claimants to bring successful victimisation claims. It should not be overly difficult to establish a detriment in these circumstances.

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Guidance on making a restriction of proceedings order

Her Majesty's Attorney General v Mr David Taheri ✦ [2022] EAT 35; February 3, 2022

Introduction

In *Taheri* the EAT held that an indefinite restriction of proceedings order (RPO) was appropriate against a vexatious litigant who had brought more than 40 ET claims in eight years.

S33 of the Employment Tribunals Act 1996 (ETA) allows the EAT to make a restriction of proceedings order when a person has, habitually and persistently and without any reasonable grounds, instituted vexatious proceedings and/or made vexatious applications.

Any person subject to an RPO cannot begin proceedings or make applications without the leave of the EAT. RPO's can be made for a finite period, or indefinitely.

✦ [2022] IRLR 395

Facts

The respondent, Mr David Taheri (DT), made more than 40 claims in the employment tribunal against various companies between 2012 and 2020. Each claim followed a similar pattern: DT would apply for employment and then make a discrimination claim when his application was turned down.

Although some of his claims were settled on unknown terms, most were withdrawn before any hearing could be held. Four were struck out as having no reasonable prospect of success and/or as being vexatious, and the two matters which made it to a final hearing were both dismissed with orders for costs being made against DT.

Employment Appeal Tribunal

The Attorney General applied for an RPO of indefinite duration against DT under s33 ETA. DT resisted the application arguing it was in breach of his Article 6 rights (right to fair trial) under the European Convention on Human Rights.

In determining whether an RPO should be made, the EAT considered the following questions:

1. was the respondent's conduct habitual and persistent
2. did T have reasonable grounds to bring his actions, and
3. were the relevant proceedings/applications vexatious?

On the first question, the EAT was satisfied that DT's conduct spanning eight years showed a clear pattern of behaviour. Despite a period between 2013 and 2017 where he brought no claims, it was clear that in the periods before and after, DT would claim with startling regularity (filing at least one claim a month in 2018). There was also a degree of repetition in the claims brought (described by DT himself as his *'normal approach'*) with regard to the sums of money sought and allegations made.

On the second question, the fruitless nature of DT's claims spoke for itself. The EAT noted several claims were withdrawn with an order to strike out or a deposit order looming, and four explicitly struck out on lack of merit. Though DT sought to challenge the fairness of those strike out decisions, the EAT refused to go beyond them.

The EAT cited *Attorney General v Wheen* [2001] IRLR 91, CA, which held that if a party considers a finding that proceedings are vexatious is incorrect, it should appeal the original decision and, if unsuccessful, the decision must stand for the purposes of determining an application for an RPO [*Wheen* para 24].

On the third question, the EAT considered that DT's behaviour clearly ventured into the vexatious. DT would often include an unsubstantiated amount of damages on his claim form, whilst elsewhere in the form offering a settlement for a much lower amount; he frequently sought to makes threats of adverse publicity or a regulatory referral should the matter not be settled. One such incident even led to a criminal conviction for harassment and a restraining order.

Having found the conditions were satisfied, the EAT considered it appropriate to exercise its discretion in favour of an indefinite RPO. DT's behaviour clearly indicated a predilection to use litigation to extract settlement offers from prospective employers, and the EAT took little comfort in his argument that he was currently '*only*' involved in three live claims. It therefore found an indefinite order was necessary to stem the tide.

Comment

While it is rare that a litigant will be so vexatious as to justify an RPO, this case provides useful guidance on the factors the EAT will consider – and where it sets the bar – when considering whether to impose one.

For any practitioner considering the applicability of an RPO, it is worth remembering that:

1. only the Attorney General may make an application for an RPO
2. even if the conditions for making an RPO are met, it is still up to the EAT's discretion whether to make the order, and
3. an RPO is not a total barrier to litigation – more a 'quality control' measure: the subject of the RPO may still bring well-founded claims subject to the EAT's approval.

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Age discrimination: when can a compulsory retirement age be justified?

Pitcher v University of Oxford; Ewart v University of Oxford EA-2019-000638-RN; EA-2020-000128-RN; [2021] IRLR 946, July 1, 2021

Facts

Oxford University imposed a compulsory retirement age (CRA) of 67 under its employer justified retirement age policy (EJRA). The policy included a provision for employees to apply to extend their position beyond the CRA; the application of which became the subject matter of these appeals when determining whether, under s13(2) of the Equality Act 2010, the less favourable treatment on the grounds of age could be justified.

Professor Pitcher

The first appeal considered the case of Professor Pitcher (PP), an Associate Professor of English Literature, employed jointly by Oxford University and St John's College. The application of the EJRA meant that, without any extension, his appointment would end by reason of retirement on September 30, 2016. As such, in June 2015 PP submitted an application to extend his appointment beyond 67 which was refused on the grounds that it would not outweigh the opportunities arising from creating a vacancy and there was no demonstrable need to retain his expertise to complete a project. As a result, he brought claims for unfair dismissal and direct age discrimination.

Professor Ewart

The second appeal considered the case of Professor Ewart (PE), an Associate Professor of Atomic and Laser Physics at Oxford University. In contrast to PP, PE's first application (March 2014) to extend his position beyond 67 was granted for a two-year fixed-term position on the grounds that it was necessary for succession planning and his particular area of interest would be difficult to replace. His application was further granted on the premise that no further applications for an extension would be supported, although this was not communicated to PE.

During this two-year period the EJRA was amended in 2015. Under this amendment extensions under the EJRA would only be granted under exceptional circumstances with secondary extensions only being granted if essential to addressing unforeseeable circumstances which hindered the purpose for which the original extension was granted. As such, when PE applied for a second extension (December 2016), he asserted that some of his projects were subject to unforeseeable circumstances which justified a further extension. This reasoning was not supported resulting in his application being refused and his subsequent dismissal. As a result, he similarly brought a claim for unfair dismissal and direct age discrimination.

Employment Tribunal

The ET heard these two cases separately.

In both cases Oxford University conceded that the EJRA resulted in less favourable treatment on the grounds of age. However, it asserted that enforcement of the University's CRA was a proportionate means of achieving its purported legitimate aims i.e.:

1. inter-generational fairness

2. succession planning, and

2. promotion of equality and diversity.

In PP's case, the ET ruled that the EJRA, not taking into account the extension provisions, was justified in consideration of the aforementioned legitimate aims which were both appropriate and necessary; it dismissed his claims for unfair dismissal and direct discrimination. PP appealed.

In a differently constituted ET, PE's claim was upheld. The ET concluded there was insufficient evidence to show the EJRA's influence on the legitimate aims outweighed the extent of its discriminatory impact. The CRA was held to be 'highly discriminatory' and not to any substantial degree moderated by the extension provisions. In particular, the ET found that in consideration of Oxford University's purported legitimate aims it had never properly attempted to measure the extent to which the EJRA created vacancies that would not otherwise arise. PE had attempted to do so and was able to evidence the trivial extent (2-4%) to which the EJRA had increased vacancies. The University appealed.

[The EAT's role] is not to rehear the merits of a claim and substitute its own view on the evidence before the ET but rather to determine whether the ET erred in applying the law.

Employment Appeal Tribunal

Despite the ETs concluding differently on the issue of proportionality, the EAT upheld both decisions, affirming that its role was not to find a single answer but to hand down a judgment as to whether either tribunal made an error of law based on the evidence before it; concluding neither had.

In doing so the EAT affirmed that it is possible for two different tribunals to reach opposing conclusions on the same policy without either having committed an error in law. However, it highlighted two factors of evidence which had a material impact on the differing ET judgments.

First, the EAT distinguish how PE had the benefit of statistical analysis in evidencing the trivial extent to which job roles were created as a result of the EJRA. In contrast, as the EJRA was in its infancy when PP's claim was heard before the ET, it was held that evidence should not be required to demonstrate whether the policy had actually achieved its asserted legitimate aims.

The EAT agreed that, on the evidence provided, the EJRA was essential in creating vacancies in senior positions and so assisted in facilitating the legitimate aims of increasing diversity among its employees. Accordingly, the EAT held that the ET reached conclusions open to it on the evidence and there was no error in law.

The second factor was the difference in evidence presented as to the detriment suffered by PP and PE in applying the EJRC and the extent to which that might mitigate the detriment arising from forced retirement. In particular, PE was reliant on access to his department's facilities and funding, not required to the same degree in PP's case. Therefore, while concluding that both ET judgments correctly considered the issue of detriment in general terms (namely justification relating to the policy, not individual examples of its application), the EAT held the tribunals were entitled to give different weight to the mitigating factors relied on by PP and PE respectively.

Implications for practitioners

Having upheld opposing decisions on the same policy, the EAT's decision creates a level of uncertainty for employers and practitioners as to when a policy imposing a CRA will be lawful.

The appeal highlights the need for evidence when considering the impact of a retirement policy and how proportionality is largely dependent on the unique facts of any given case. Accordingly, it emphasises that employers should frequently review their policies to ensure they are in fact facilitating their legitimate aims, and that any impact of their policies' application is considered on an individual employee basis.

The judgment further acts as an important reminder of the EAT's role. It is not to rehear the merits of a claim and substitute its own view on the evidence before the ET but rather to determine whether the ET erred in applying the law.

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NEWS

Protection of domestic abuse victims' employment rights

The passing of ground-breaking employment rights in the Northern Ireland Assembly has been welcomed by activists and the trade union movement. The Domestic Abuse (Safe Leave) Bill 2022 (the Bill) will entitle employees in Northern Ireland who are victims of domestic abuse to up to ten days of paid leave a year. Called 'safe leave', this will enable employees to use the time to deal with *'issues related to domestic abuse'* instead of having to take annual leave or unpaid leave. The aim is to protect the individual's employment position and stop their terms and conditions from being adversely affected as a result of taking leave.

During the debate on the Bill, the Assembly was informed that between January 1, 2021 and December 31, 2021, the Police Service of Northern Ireland responded to 32,219 incidents of domestic abuse. This represents a response approximately every 16 minutes and omits unreported incidents of abuse. The legislation will mean that Northern Ireland will be the first jurisdiction in the UK to provide the right to paid leave for victims.

The right to avail of safe leave will be a 'day one' employment right with no qualifying service period. It will allow victims time to deal with issues related to the abuse including finding alternative accommodation and obtaining legal advice, welfare support or healthcare.

According to the Irish Congress of Trade Union's Equality Officer Clare Moore:

> *The impacts of domestic abuse and violence are not limited to the home, they spill over into all parts of society, including the workplace. Having access to paid time off could literally be a life saver for many people who are experiencing or have experienced domestic abuse.*

The Bill was passed by the NI Assembly in March 2022 and is awaiting Royal Assent; the commencement date is yet to be confirmed.

BOOK REVIEW

A Practical Guide to Transgender Law by Robin White and Nicola Newbegin; May 2021; 318 pages; £29.99 Law Brief Publishing✦

A comprehensive account of the legal rights of transgender people, written in an engaging and authoritative style, the authors provide a compelling and, at times, eye-opening account of the development of the law.

Many employment practitioners will have limited experience of advising on trans issues. The book assumes no prior knowledge and includes a helpful glossary of trans terminology, which sets out the distinction between terms such as gender-fluid and genderqueer. Each chapter is layered in a way that makes even unfamiliar areas accessible to the reader. After setting out legislation and case law, the authors introduce relevant guidance and provide commentary, highlighting potential gaps, inconsistencies and areas of difficulty.

The book is divided into 20 chapters, covering issues from criminal justice to sport, and prisons to service provision. Each chapter is self-contained, providing a complete account of the law and guidance in that area. The chapters signpost the legal content, using straightforward headings which allow for ease of reference. Relevant legislation is quoted in full, sparing readers the need to cross-reference.

A full discussion of employment law issues

In the employment chapters, the authors cover familiar ground for employment lawyers, including the gender reassignment provisions of the Equality Act 2010, the decision in *Taylor v Jaguar Land Rover* [2020] 9 WLUK 200; Briefing 972, interpreting the scope of those provisions and recent decisions on gender-critical beliefs. The authors also highlight some of the rarely considered specific protections applicable only to trans employees, such as absence from work related to the process of gender reassignment and harassment in the form of mis-gendering or disclosing trans history. Thorny issues such as the complex relationship between trans people and sex discrimination, the application of equal pay law to transgender individuals and how to record trans employees for the purposes of gender pay gap reporting are also considered.

Non-employment issues

Outside the employment field, the authors provide useful insights for employment practitioners on a range of related areas of law. When dealing with the Gender Recognition Act 2004, the authors flag the prohibition on disclosure of information obtained in an official capacity regarding a person's gender prior to obtaining a gender recognition certificate. This is a strict liability criminal offence which, in the view of the authors, will almost certainly be relevant to records held by HR for employees and job applicants.

Authoritative, knowledgeable and objective

The authors provide detailed commentary, highlighting cases which are no longer good law, and flagging guidance and policies, such as the Law Society's model pronouns policy, which is set out in full. The personal experience of the authors enhances their ability to talk with authority and in no way interferes with their objectivity. In a discussion of advertising regulation, we are reminded of the notorious Paddy Power commercial which featured trans women attending the Cheltenham festival. The advert was banned after being held to be *'seriously offensive to trans people'* but continued to be widely available. The authors merely comment that the effectiveness of such regulation *'might be a subject for debate'.*

Conclusion

This is a highly readable guide to transgender rights in the UK. The book fills a significant gap in the market and provides employment practitioners with the knowledge they need to advise confidently in this area. The scope of the work transcends employment law, providing a full understanding of the issues transgender individuals face, both in and out of the workplace.

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✦ This review was first published in the Employment Lawyer's Association's journal *ELA Briefing* on August 1, 2021 and is reprinted here with the kind permission of the author.