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UK Covid-19 Inquiry to highlight disparate impact

The devastating impact of Covid-19 on the rights of disabled people is starkly set out in this edition of *Briefings*.

In her article on the impact of the government's response to Covid-19, Catherine Casserley puts in context the pandemic's differential impact on disabled people and how it exposed and magnified existing structural failings and inequalities. As highlighted by the Women and Equalities Committee (WEC), disabled people suffered *'a range of profoundly adverse effects from the pandemic, including starkly disproportionate and tragic deaths'*. She outlines particular areas where government action, legislative changes and the policies of public authorities contributed to the pandemic's disproportionate adverse impact on them and undermined their human rights.

She highlights discriminatory policies which restricted their right to access critically important, life saving information, or policies in respect of decisions on medical treatment such as the blanket designation of 'do not resuscitate orders' which hugely undermined their access to adequate health care. The emergency legislation introduced by the Coronavirus Act 2020 substantially raised the threshold at which disabled people's care and support needs were required to be assessed and met and as a result many were denied the vital services they relied on. The relaxation of local authorities' duties to assess and provide for the educational, health and care needs of children and young people with special educational needs and disabilities denied many of them their right to education. Disabled children were doubly disadvantaged by the pandemic on the basis of their educational and their health and social care needs not being met

These are just some of the catastrophic impacts of government actions which caused huge distress and anxiety for disabled people and doubtless damaged the emotional health and well-being of members of their families. It resulted in many of them feeling abandoned and forgotten.

In December 2020, the WEC called for a discrete independent inquiry into the causes of these adverse outcomes for disabled people, including the decisions and policies of the government and public authorities, expressing the hope that this inquiry would take place in the first half of 2021.

The UK Covid-19 Inquiry, which formally commenced in June 2022, will consider disparities in the impact of the pandemic on, along with other groups, disabled people. Among other things, the Inquiry will examine core political and administrative decision-making in relation to the pandemic. This will be a huge undertaking but the DLA welcomes the fact that the Inquiry has committed to look at its impact on inequalities at every stage of its investigations.

It is of fundamental importance that lessons are learnt from the way the government undermined the human rights of disabled people in its response to Covid-19. The s149 Equality Act 2010 duty to have due regard to the need to eliminate discrimination and advance equality of opportunity for disabled people is not a duty which can be suspended in moments of national crisis. It should be part and parcel of the decision-making processes of government and public authorities and considered without question.

The DLA echoes the WEC view that disabled people's experiences of public services during the pandemic has made the case for strengthening the public sector equality duty and that this outweighs any concerns about additional burdens on authorities. The WEC called on the government to consent to the Equality and Human Rights Commission issuing a statutory Code of Practice on the duty. The DLA supports that call and demands that public authorities are held to account, lessons are learnt and the rights of disabled people are protected and upheld.

Geraldine Scullion
Editor, Briefings

COVID-19

The UK Covid-19 Inquiry – impact on disabled people of the government's response to the pandemic

Catherine Casserley, barrister, Cloisters Chambers, addresses the catastrophic impact of the Covid-19 pandemic on disabled people. She outlines particular areas where government action, legislative changes and the policies of public authorities contributed to the disproportionate adverse impact on them and undermined their human rights. The pandemic magnified the existing inequalities that disabled people already experience and this must now be the subject of rigorous scrutiny by the UK Covid-19 Inquiry to ensure lessons are learnt and there is due accountability.

UK Covid-19 Inquiry

On July 21, 2022, Baroness Heather Hallett officially launched the UK Covid-19 Inquiry and opened its first investigation into how well prepared the UK was for a pandemic.

The terms of reference for the Hallett Inquiry are relatively broad: they are to consider and report on preparations for and the response to the pandemic in England, Wales, Scotland and Northern Ireland, up to and including the Inquiry's formal setting-up date, June 28, 2022 and, of importance for the purposes of those concerned with discrimination, in meeting its aims to, among other things, consider any disparities evident in the impact of the pandemic on different categories of people, including, but not limited to, those relating to protected characteristics under the Equality Act 2010 and equality categories under the Northern Ireland Act 1998.

The aims of the Inquiry are:

1. Firstly, to examine the Covid-19 response and the impact of the pandemic in England, Wales, Scotland and Northern Ireland, and produce a factual narrative account, including:
   a. The public health response across the whole of the UK. The terms set out a list of matters to consider here such as how decisions were made, use of lockdown, impact on mental health, impact on education, hospitality etc.
   b. The response of the health and care sector across the UK. The matters to consider here include capacity and resilience, the role of primary care settings, the management of the pandemic in hospitals and care homes, care in the home etc.
   c. The economic response to the pandemic and its impact, including governmental interventions by way of support for businesses, additional funding for relevant public services and the voluntary and community sector, benefits and sick pay and support for vulnerable people.
2. Secondly, to identify the lessons to be learned from the above to inform preparations for future pandemics across the UK.

In light of the commencement of the Inquiry, this article looks back at the impact upon disabled people of the government's actions in the wake of Covid-19 and the areas which the Inquiry will doubtless consider during its deliberations. It draws on an article previously published by the same author in *Briefings* in July 2020[1] and on the report of the Women and Equalities Committee (WEC): *Unequal Impact? Coronavirus, disability*

1 Briefing 935, July 2020 *The Coronavirus Act 2020 and its impact on disabled people* by Catherine Casserley and Chris Fry

and access to services: full Report (December 20, 2020) – 'the WEC Committee report' which found that:

> *Disabled people who already faced substantial barriers to full participation in society, for example because services were inaccessible or they had additional health, care and support or special educational needs, have suffered a range of profoundly adverse effects from the pandemic, including starkly disproportionate and tragic deaths.*

.... for disabled people it has exposed and magnified existing structural failings and inequalities.

Disproportionate and devastating impact on disabled people

The Inquiry has a huge task on its hands. There is no doubt that the pandemic had a devastating effect on a significant portion of the population. It affected in particular those who were already marginalised, and that included disabled people who were disproportionately affected by the actions taken by government during the pandemic and who were, according to the Office for National Statistics between two and four times as likely as non-disabled people to die from Covid-19.

In relation to people with learning disabilities, the WEC Committee report highlighted the *'starkly disproportionate and tragic data on death rates from coronavirus of disabled people, including shocking figures for deaths of people, including young people, with learning disabilities.'* The PHE estimated that the death rate of people with learning disabilities was some 6.3 times higher than in the general population; a third of the people with learning disabilities who died were living in residential care.

Despite this, as stated by Shakespeare et al in *Disabled people in Britain and the impact of the Covid-19 pandemic* (Social Policy and Administration, Volume 56 Issue 1 – 'Shakespeare'), and despite the wealth of research into other aspects of the pandemic, little detailed qualitative research has been conducted exploring the impact of Covid-19 on disabled people, their lives and the services they receive. Shakespeare's research appears to be the first piece of extensive qualitative research. Its conclusions are that many disabled people and their families felt abandoned and forgotten during the pandemic and that for disabled people it has exposed and magnified existing structural failings and inequalities. The pandemic has differentially impacted on them; in many cases their needs were not protected and the response of the state has compromised their human rights. It is perhaps not a surprising finding but it is a damning indictment of the position in which disabled people were placed during an already stressful time.

Access to information

Disabled people are a diverse group with differing needs. But one commonality in the pandemic was the speed with which they were hit, from the outset, by differential treatment.

Access to information – or rather what people were not told – remained a recurring theme throughout the pandemic but it was an even more critical issue for disabled people. The nightly broadcasts from Downing Street which started on March 16, 2020 and which became so familiar and contained such crucial information did not, for the first six broadcasts, have any British Sign Language (BSL) interpretation. As a result, the 80,000+ BSL users who tuned in to watch the BBC were not able to follow that critical explanation of the unprecedented and dangerous situation facing the nation.

Lynn Stewart-Taylor launched a campaign *'#where's the interpreter'*[2] to highlight that lack of information at the initial Prime Minister's Downing Street briefings, and in particular that there was no on-platform BSL interpreter in England when it was available in Wales, Scotland and Northern Ireland (and in other parts of the world).

2 See www.cfd.org.uk/where-is-the-interpreter-campaign/

Whilst a few weeks later interpretation was provided via the BBC News Channel, there remained no live interpretation. The Equality and Human Rights Commission (EHRC) wrote to the Prime Minister's Office regarding this on April 30, 2020, asking the PM to reconsider the decision not to have a live interpreter at the briefings. Mass claims were started on behalf of those deaf people who have not had access to information. On September 23, 2022 High Court claims were initiated by 276 deaf people concerning the lack of BSL interpretation at the televised coronavirus briefings.

A failure in respect of two subsequent scientific briefings was the subject of successful (in part) judicial review proceedings in *R (on the application of Rowley) v Minister for the Cabinet Office* [2021] EWHC 2108 (Admin); Briefing 1000 [2021] which led to the High Court making a declaration that the absence of any BSL interpretation for the two data briefings constituted discrimination against the claimant by reason of the Ministry's breach of its reasonable adjustments duty.

Similarly, there remained an inequity in the information available in BSL on government websites, as indicated by the evidence in *Rowley*.[3]

Printed coronavirus warning leaflets accompanied by a letter from No 10 Downing Street were sent all households in the country; however, these lacked alternative formats available for either Deaf people or those with visual impairments. This was the subject of challenges by a number of disabled people on the basis that there was a failure to make reasonable adjustments in according with s20 of the Equality Act 2010 (EA) – a duty which is anticipatory in nature – and/or the Human Rights Act 1998 (HRA); see for example – blind woman issues legal challenge to government over Covid-19 communications; and another example in relation to inaccessible government information on shielding.

Not only was the format of the communication poor, but the quality of the information left a great deal to be desired. As the WEC Committee's report summarised, the way the government communicated with disabled people during the pandemic, on occasions, caused confusion and compounded already keenly felt anxiety. Communications were sometimes poorly thought out, with insufficient consideration given to the psychological effects on recipients and their families. Ministers and officials involved in communicating public health messages to disabled people should undergo training in psychologically informed communications which take fully into account and empathise with disabled people's lived experiences.

It should also be noted that the wearing of masks – which I will turn to below, had a profound effect on the ability of those who are BSL users and who lip read to communicate effectively. The government appeared to do little to respond to the calls for clear face masks to be more routinely adopted.

Medical treatment

At the outset of the pandemic, disabled people and organisations of and for disabled people were extremely concerned by the British Medical Association's and the National Institute for Clinical Excellence's (NICE) guidance on treatment in respect of Covid-19

3 The court was provided with the results of an investigation and report by Open Inclusion in conjunction with Heriot-Watts University, which was commissioned by Fry Law, into the Deaf community's access to and experience of government advice and information relating to Covid-19. The investigation surveyed BSL speakers and reviewed government information available online. The headlines from the latter review are that: • Not much BSL information is available: the vast majority of important information provided by the UK government relating to Covid-19 and its impacts on society has no BSL interpretation. Most of it is in written format and is of varying degrees of complexity on government websites. • The majority of the written content requires a Year 9 reading level or above. The information on education and childcare, financial support for business and on coronavirus restrictions and what you can and cannot do demands a university level reading skill. This is unacceptable bearing in mind that one study reported that 16-year-old deaf school leavers in the UK had an average reading age of 9 years (Conrad, 1979) and recent studies show little improvement in the last forty years (Harris, Terlektsi, & Kyle, 2017b; Kyle, Campbell, & MacSweeney, 2016; Kyle & Harris, 2010).

and particularly triaging for the purposes of intensive care unit admittance (and thus access to the ventilators which were to keep people with the virus alive).

Initially the Clinical Frailty Scale (CFS) was being used as a basis for determining who would have access to ventilation. The scale assesses people's clinical frailty largely based on relative fitness and level of dependence on the care of others on a scale of one (very fit) to nine (terminally ill, with life expectancy of less than six months). NICE issued guidelines for its use in these circumstances, developed in just a week (rather than their two-year consultation period) which suggested that those scoring seven (severely frail, completely dependent on care *'from whatever cause, physical or cognitive)* and above would be *'unlikely to survive even with medical intervention'.* This unsurprisingly left disabled people extremely concerned about the prospect of their access to medical care in the event of having Covid-19. There was particular anxiety among parents of children with learning disabilities and people with stable, long-term disabilities such as cerebral palsy. Following rapid challenges by the disability movement, the guidance was amended.

... blanket use of 'do not resuscitate' (DNR) notices, imposed with no patient discussion.

On 25 March, NICE issued revised guidelines, acknowledging the concerns that:

> *… applying the score to people with learning disabilities, autism and other stable long-term disabilities, would put them at a disadvantage when decisions were made about admission to critical care in this time of intense pressure.*

The revised guidelines made explicit that the CFS should not be used 'in isolation' by clinicians making decisions about access to critical care and included a clarification that *'the tool should not be used in certain groups, including those with learning disabilities with stable long-term disabilities such as cerebral palsy'.*

The issue of this guidance took place at the same time as disabled people were experiencing the blanket use of *'do not resuscitate'* (DNR) notices, imposed with no patient discussion. There were reports from support teams in group homes who said that they had been contacted by GPs who had deemed the people they supported should ALL be DNR – there having been no consultation with families, and no best interests' assessments. These were mostly working age adults. Unsurprisingly, at a time of already heightened anxiety this caused disabled people great distress and anxiety and left them feeling their lives were less valued than others. And such blanket DNRs were potentially in breach of not only the EA but also the HRA.

The Coronavirus Act 2020

The Coronavirus Act 2020 (the 2020 Act) passed through parliament extremely speedily. Its primary purpose was to give the government emergency powers to deal with the pandemic by making regulations to impose what was known as 'lockdown' and to provide for, for example, statutory sick pay for reasons related to the pandemic, allow nurses and doctors to return to help with the hospital effort, and to make ancillary provisions.

However, it also made significant changes to legislation specifically concerned with disabled people – by modifying the powers and duties of local authorities in England and Wales in relation to the provision of care and support essential for disabled people's education and their access to life opportunities. It also made changes to the Mental Health Act 1983, though those changes were never brought into force. Again, disabled people were being hit on all sides by the impact of the virus – directly or indirectly.

Social Care

Schedule 12 to the 2020 Act gave local authorities which chose to do so the ability to suspend a large part of the Care Act 2014 (CA 2014) where the relevant pre-conditions

as set out in the guidance were met. The most significant of the provisions which could be suspended related to the assessment and meeting of needs – affecting the assessment and provision of care for disabled people in their homes at a time of particular vulnerability, meaning that their needs would be met in far more restricted circumstances than provided for in the CA 2014. According to the WEC Committee's interim report: *'Any use of Care Act easements therefore represents a very substantial raising of the threshold at which the care and support needs of disabled people must be assessed and met.'*

The government produced guidance to accompany the revisions to the CA 2014. *Care Act easements: guidance for local authorities*, May 20, 2020 (the guidance) which set out a process to be followed by those authorities who wished to implement the provisions.

In particular, s6 of the guidance stated:

> *A local authority should only take a decision to begin exercising the Care Act easements when the workforce is significantly depleted, or demand on social care increased, to an extent that it is no longer reasonably practicable for it to comply with its Care Act duties (as they stand prior to amendment by the Coronavirus Act) and where to continue to try to do so is likely to result in urgent or acute needs not being met, potentially risking life. Any change resulting from such a decision should be proportionate to the circumstances in a particular local authority.*

The guidance also set out a detailed process for putting an easement into practice, including who the decision to implement an easement should be agreed by and who should be involved and briefed; the detail of the record keeping necessary; and who should be informed.

Implementation of the Care Act easements

According to the WEC Committee report, eight English local authorities triggered Care Act easements at some stage in the period from the end of March until July 2020: Birmingham, Coventry, Derbyshire, Middlesbrough, Solihull, Staffordshire, Sunderland and Warwickshire. This is a little over five per cent of the 151 English local authorities with social services responsibilities. Since early July up to the time of writing the WEC Committee report, there had been no local authorities using the easements. Some local authorities had faced legal challenges as a result of what appeared to be a rush to implement easements without following the correct procedure and without the basis for implementation. The Local Government Association, in its evidence to the WEC Committee, reported that some authorities had adopted a 'pre-emptive' approach to the use of the easements, right at the beginning.

This left disabled people vulnerable to the prospect of local authorities suspending their provision and assessment without necessarily having the basis for doing so – the only way to stop this being a legal challenge.

The provision of care was affected not only by statutory measures: in its May 28, 2020 edition Community Care reported[4] on a broad survey that it had carried out into the impact of *'pandemic operating conditions'* on services provided to service users. It asked social workers very broadly about whether they believed the coronavirus pandemic, or measures associated with it, had had a negative impact on the people to whom they provided services.

The response was fairly damning, with 96% of people working in mental health, 88% in adult social care and 87% in children's services answering 'yes'.

Adults' social care and mental health practitioners warned that being forced to stay at

4 See www.communitycare.co.uk/2020/05/28/social-workers-say-coronavirus-negatively-affected-services-people-they-support/

home, with some services suspended due to the need for social distancing, was fuelling clients' social isolation, ramping up distress and heaping pressure on carers.

Shakespeare states that:

> *People told us how for some funding for their normal support services had been stopped completely and they had been left without any other alternative. Others had been offered phone support, one person we spoke to for example described how his support had been reduced from 12 h[ours] a week to one short phone call a week. A mother of a young man with profound learning disabilities described how the normal respite and short break support she received had been stopped completely and she had not been contacted by social care for over 4 months.*

... the pandemic *'brought into focus and exacerbated widely acknowledged pre-existing systemic issues in the wider SEND system'.*

Education

In addition to the changes made to social care, the 2020 Act also made changes to education provision for disabled pupils. It provided the Secretary of State with a power to modify local authorities' duties under the Children and Families Act 2014 to assess and provide for the educational, health and care needs of children and young people with special educational needs and disabilities (SEND). In May, June and July 2020, the Secretary of State used this power to relax the duty on local authorities, modifying it from an absolute duty to one of 'reasonable endeavours'. Regulations relaxed the time limits for assessments and provision to be put in place, meaning that local authorities needed only to meet the requirements *'as soon as reasonably practicable'*. The absolute duty on local authorities to assess and provide for children and young people's needs resumed from August, and the Regulations on time limits expired on September 25, 2020.

The WEC Committee report found that the pandemic *'brought into focus and exacerbated widely acknowledged pre-existing systemic issues in the wider SEND system',* which was far from operating as the 2014 Children and Families Act reforms had intended before the pandemic struck.

The evidence before it indicated that:

- children and young people with SEND received little or no support in the early months of the pandemic – in part because of local authorities' varied interpretation of 'reasonable endeavours'
- the patchiness of support was indicative of what things were like in normal times
- the National Audit Office's assessment of effectiveness of the whole system found several systemic problems, including that increased funding for high needs i.e. support for children attending special schools and those with education and health care plans in mainstream schools, had not kept pace with increasing numbers of pupils
- the Education Committee's October 2019 Inquiry found that the integration of education with health and social care had not worked and the Department for Education's approach to the problems was piecemeal.

While it was recognised that the pandemic had had a detrimental effect upon education more generally and the government made available an educational catch-up fund, it is not clear to what extent this will be able to remedy the long-term difficulties with SEND and the additional problems caused by the pandemic. The government published its long-awaited SEND review on March 29, 2022, and closed the consultation on its proposals on July 22, 2022; it is currently analysing the responses.

It is clear though that disabled children will have been doubly disadvantaged by the pandemic on the basis of their educational and their health and social care needs not being met. On September 10, 2021 the Disabled Children's Partnership published a

report 'Then There Was Silence' bringing research together alongside analysis and an evaluation of how the voluntary sector responded to meet the needs of children and families. Its key findings were that:

- children and families have been isolated, abandoned and not listened to
- Covid restrictions meant that services were stopped or reduced, and many had been still slow to return
- mental health and the wellbeing of all the family had deteriorated
- children's conditions had worsened and their needs become more complex
- delays in assessments meant that needs had not been identified.

The only positive feature was that voluntary organisations had been able to step up to meet some of the needs identified.

Other provisions

Restrictive Covid-19 regulations

The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 came into force on March 26, 2020. These made provision for, amongst other things, the lockdown restrictions imposed upon the population of England which meant that no one could leave the place where they were living without reasonable excuse. Regulation 7 set out the reasonable excuses – one of which was leaving the house for exercise. The government produced guidance on the Regulations and included a requirement that you could only go out once a day for exercise. A failure to adhere to 'lockdown' was punishable by means of a fixed penalty notice (Regulation 10).

... children and families have been isolated, abandoned and not listened to.

A requirement to exercise only once a day, however, put disabled people who needed to leave their house more regularly at a disadvantage – for example, those with autism who needed to leave the house and had a routine of doing so, or those with mental health issues who needed to be outdoors.

Contrary to the government's guidance, Regulation 7 did not specify that leaving the house for exercise could only be done once a day – it stated that the house could be left *'to take exercise either alone or with other members of their household'* – there was no limit on the number of times.

As a result, legal action was threatened against the government on behalf of disabled people. It was argued that adults and children with certain health conditions (including those with autism and mental health conditions) were disproportionately impacted by the inflexible policy which required everyone to only leave the house for exercise once per day, and which was therefore unlawful and discriminatory (this could have amounted to both indirect discrimination and a failure to make reasonable adjustments). The restrictions in the policy were also not reflected in Regulation 7 above and so were unlawful on that basis. The guidance was changed following the challenge to read instead:

> *You can leave your home for medical need. If you (or a person in your care) have a specific health condition that requires you to leave the home to maintain your health – including if that involves travel beyond your local area – then you can do so. This could, for example, include where individuals with learning disabilities or autism require specific exercise in an open space two or three times each day - ideally in line with a care plan agreed with a medical professional.*

On July 24, 2020 the Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place) (England) Regulations 2020 came into force. These provisions made it mandatory to wear a face covering in England in certain places such as shops and hospitals without a reasonable excuse. 'Reasonable excuse' included if you could *'not put on wear, or remove a face covering because of any physical or mental illness or*

impairment, or disability' (within the meaning of s6 EA), or without severe distress.

There was also guidance accompanying these provisions which stated that:

> *If you have an age, health or disability reason for not wearing a face covering:*
> *• you do not routinely need to show any written evidence of this*
> *• you do not need to show an exemption card.*
>
> *This means that you do not need to seek advice or request a letter from a medical professional about your reason for not wearing a face covering.*

The requirement to wear a face covering can cause particular difficulties for disabled people with anxiety and/or post-traumatic stress disorder and/or respiratory conditions such as chronic obstructive pulmonary disease.

However, disabled people were often challenged as to the basis for not wearing a mask and found themselves at the end of criticism from not only store staff but other members of the public (see Disability Rights UK's letter to the Minister about hostility towards disabled people for not wearing masks). In addition, some stores maintained blanket policies of not admitting customers without masks. The EHRC issued a statement regarding this in 2021, warning that a blanket 'no mask, no entry' policy could be considered a failure to make reasonable adjustments under the EA.

... it appeared that no thought had been given to disabled people and their needs.

Claims have been brought by disabled people unable to wear face coverings and who were refused access to premises under s15 and/or ss20/21 EA.

NHS Visitors Guidance

NHS Visitors Guidance issued in April 2020, prohibited visitors to hospital, save in particular circumstances. These circumstances did not include where disabled people required carers or personal assistants who might be needed to assist them with their care in hospital, nor did it include those who might be needed to interpret for a BSL user. Again, it appeared that no thought had been given to disabled people and their needs and so legal action was threatened; this was on the basis that this policy was in breach of the public sector equality duty contained in s149 EA, specifically in relation to disability, in that it failed to have due regard to the need to eliminate discrimination and promote equality of opportunity to disabled people; and that it was discriminatory (this could be both on the basis of a failure to make reasonable adjustments under s20, and indirect discrimination under s19 EA). As a result the guidance was amended in June 2020 so that it made provision for carers/supporters and personal assistants to accompany disabled people and they are no longer to be treated as additional visitors.

Access to services

Many will have seen the chaotic scenes at supermarkets as the virus first began to spread, when panic buying led to crowded stores and empty supermarket shelves. As lockdown began, disabled people found it harder to access the services which they had been reliant upon before the pandemic – such as online deliveries.

One of the difficulties lay in the government's approach to focusing on the group of around 2.2 million people identified by the NHS as being *'clinically extremely vulnerable'* (CEV). This included, for example, transplant recipients and those with specific cancers, respiratory conditions etc. They were advised not to leave home for 12 weeks. The government then worked with national food distributors and others to assist them in obtaining food. However, this did not assist those outside of the CEV group to obtain food. The government digital service shared data on people in the CEV group who had requested food boxes with supermarkets so that people on the list could be prioritised for click and collect services and online delivery slots if they needed them. This had an

obvious effect on those outside the CEV list and thus the broader (not medical model, but rather the EA) group of disabled people – who found themselves often unable to access delivery services which many had been receiving and had been reliant upon up until the pandemic (see the WEC Committee report for detailed information on this). Again, legal action was threatened and though the situation did ease, the EHRC had to issue guidance to retailers to remind them of their legal obligations under the EA to make reasonable adjustments for disabled people.

Conclusion

This article outlines only some of the issues which arose during the pandemic for disabled people. It does not address, for example, its impact on those who were confined to residential homes with no visitors and no services; the widespread closure of support services; the failure to provide PPE for home care services, or the inaccessibility of the Covid-19 testing services and track and trace – ultimately the failure to 'build in' accessibility; the impact for those were working, or trying to work, and who were unable to return to work when shielding 'officially' ended; nor the approximately 500,000 who are immunosuppressed and who continue to shield.

... undoubtedly there are the longer-term ramifications from the pandemic which have yet to emerge and which will hit disabled people harder.

And undoubtedly there are the longer-term ramifications from the pandemic which have yet to emerge and which will hit disabled people harder. There is also the impact of Brexit, which was only just beginning to have an effect when Covid hit, and which is now combining with the Covid-19 effect to contribute to an acute lack of carers.

On a positive note, however – and it is very hard to find one – disabled people did come together online during the pandemic and campaigns were formed quickly to challenge some of the more obvious discriminatory decisions which were speedily reversed.

The WEC Committee report called for a discrete independent inquiry into the causes of the disproportionate effects of Covid-19 on disabled people, including the decisions and policies of the government and public authorities. Whilst the UK Covid-19 Inquiry is not the discrete inquiry perhaps envisaged, it is to be hoped that it will explore these issues fully and ensure that disabled people are never 'abandoned' and excluded in this way again. Organisations of disabled people have applied to be core participants to the Inquiry and will be able to make representations and question participants if they are granted that status.

In addition, the Inquiry can take on the recommendations of the recently established Commission on Covid-19, Disablism and Systemic Racism which was launched in August 2022. Established by the Voluntary Organisations Disability Group, the Commission aims to explore how the worst impacts of the pandemic have fallen on disabled people, particularly disabled people from Black, Asian and minority ethnic groups.

The Commission is examining the extent to which systemic long-term neglect of social care, confused government approaches and guidance, and poor implementation of policy contributed to the bad outcomes. It is funded by the Joseph Rowntree Foundation Charitable Trust, and chaired by Kamran Mallick, the chief executive officer of Disability Rights UK.

What happened during Covid-19 reflected what was already entrenched across the board in society. The lack of awareness of the needs of disabled people and the inequality they experience was magnified. Increased disability awareness, sufficient resources and an effective enforceable public sector equality duty would go some way towards ensuring that these structural failings are addressed and the profoundly adverse effects of the pandemic they experienced are not repeated.

Covid-19 and disability discrimination in employment ✦

Graeme Lockwood, Senior Lecturer in Business Law and Employment Relations and Vandana Nath, Research Affiliate, King's Business School, King's College London explore some of the challenges Covid-19 has created for disabled workers. The pandemic brought about a transformation in working practices which in turn has given rise to elevated health risks and apprehensions about in-the-office working, concerns about flexible/hybrid working arrangements and managing care obligations with work demands. The authors focus on four areas where potential legal challenges associated with post-pandemic disability discrimination might arise, namely hot-desking arrangements, the continued use of personal protective equipment (PPE), health-related leave, and the risks of associative discrimination. Noting that government guidelines, medical evidence and directives relating to health management as well as the legal landscape in this area are continually evolving, they encourage employers to act cautiously and to ensure they consult staff and their representatives on health and safety issues.

Background

The Covid-19 pandemic has underlined continued employment-related concerns for individuals who are disabled, and indeed, has demonstrated how the challenges they face have potentially been exacerbated by the crisis. Examples of some of these concerns:

1. during the pandemic disabled employees in the UK had higher than average redundancy rates compared to non-disabled workers
2. the widespread switch to digital working within certain contexts during the emergency period, reportedly resulted in greater workplace exclusion of people with disabilities (e.g. due to an absence of special assistive technology or a lack of accompanying skill development)
3. disabled individuals were found to experience mental health deterioration as a result of Covid-19 to a greater extent than the general population
4. a Trade Union Congress survey revealed that over half of its sample had experienced some form of discrimination due to 'long Covid',[1] and
5. access to healthcare and treatment for non-coronavirus related problems had a greater negative bearing on disabled people than others.

S6 of the Equality Act 2010 (EA) provides that a person has a disability if 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. Schedule 1 EA states that the effect of an impairment is long-term if it has lasted for at least 12 months, it is likely to last for at least 12 months, or is likely to last for the rest of that person's life.

✦ Adapted from UK Equality Law and Covid-19: *Employee vulnerability and employment relations in the workplace*, KBS Covid-19 Research Impact Papers, No. 5.

1 Long Covid is also termed as post-Covid-19 syndrome and can cause symptoms that last weeks or months after the infection. The condition might include brain fog, loss of concentration, cognitive impairment, and broken sleep (NHS, 2022).

In the employment context, a failure to make reasonable adjustments for workers with disabilities amounts to discrimination (s21 EA). What is reasonable is dependent on the circumstances and any alterations must be proportionate not only to the needs of the employee but also to the employer. The EA Employment Statutory Code of Practice (paragraph 6.33) provides a non-exhaustive list of possible adjustments which might be considered by an employer. These include:

- allocating some of the disabled person's duties to another worker
- altering the disabled worker's hours of work or training
- granting the disabled worker absence during working or training hours for rehabilitation or treatment
- providing supervision or other support
- modifying disciplinary or grievance procedures, and
- adapting performance related pay arrangements for disabled workers.

For an individual to be covered by the disability provisions contained in s15 EA (discrimination arising from disability) and s20 EA (reasonable adjustment), however, the employer must be aware of the existence of the said disability.

Both employers and employees continue to grapple with transformations in their working practices and experiences as a result of Covid-19. The ongoing areas of concern include elevated health risks and apprehensions, flexible/hybrid working arrangements, and the management of care obligations with work demands. The illustrative cases featured below highlight the potential legal challenges associated with post-pandemic disability discrimination and on return to office premises. For brevity, we focus on four issues which include a) hot-desking arrangements; b) the continued use of PPE such as face masks; c) health-related leave; and d) the risks of associative discrimination.

... employers and employees continue to grapple with transformations in their working practices and experiences as a result of Covid-19.

Can employees refuse to hot-desk?

As a result of virus transmission concerns, if an employee is apprehensive about their organisation's hot-desking arrangements, employers should take these concerns seriously. Disabilities include both physical and mental health problems and employers need to be aware of the potential risks involved in open-plan and shared workspaces. Shared workstations, computers and keyboards are widely known to be potential breeding grounds for bacteria and viruses, and cross-contamination concerns might contribute to an individual's ill-heath, stress or anxiety. The employer should make reasonable adjustments to alleviate the associated apprehensions, for example, by providing adequate sanitation, offering flexible homeworking options where feasible, and conducting ongoing health and safety risk assessments.

As a case in point, in *Roberts v North West Ambulance Service* (2012) UKEAT/0085/11, the claimant was deemed disabled due to the significant anxiety and depression which he experienced on an ongoing basis. He resigned from the organisation and claimed constructive unfair dismissal and disability discrimination. He contended that as a result of the hot-desking arrangements at work there was a failure to make the reasonable adjustment of ensuring that a particular seat in the office was exclusively available for him in order to alleviate his feelings of anxiety of being physically close to other employees. In this particular case, it should be noted that while it was not always feasible to keep the applicant's preferred desk unoccupied, the organisation had made provisions for other occupants to relocate when the claimant came on shift.

The issue of reasonable adjustment is therefore subject to questions of feasibility in the context of the facts of the case, and in this instance, the tribunal concluded that the employer had indeed made a reasonable adjustment. Nevertheless, under

conditions where an employer fails to consider all reasonable steps which would reduce the disadvantages suffered by an employee because of their disability, it would likely constitute discrimination.

Can employees refuse to wear a mask at work?

Individuals might choose not to wear a mask due to their physical or mental health condition, or if they provide assistance to someone who requires lip reading services.

In a recent case during the pandemic, a claimant was held to have suffered disability discrimination and to have been unfairly dismissed for refusing to wear a face mask at work [*Laura Convery v Bristol Street Fourth Investments Ltd* (2020) ET1807364]. The UK government guidelines at the time indicated that a person did not need to wear a face covering if they suffered from a physical or mental impairment or disability, and where wearing a face covering could bring about severe distress. While Ms Convery was in the process of seeing her GP about her circumstances, she outlined to her employer that there was *'no such thing'* as a mask 'exemption certificate'. The tribunal upheld the complaint, stating that even though the employer had the legitimate aim of protecting the health and safety of staff and customers, it had not acted proportionately in dismissing the claimant – neither did it act in accordance with its own health and safety policy nor the government guidelines on exemptions.

In contrast to the former case, in *Deimantas Kubilius v Kent Foods Ltd* (2020) ET 3201960, the dismissal of a driver with a distribution company on the grounds of his refusal to wear a mask was deemed a reasonable response by the employer. The claimant did not oppose wearing the mask in the open, but took issue with wearing a face covering in his cab where he was isolated. As a result of his refusal to wear a mask, the respondent's client banned the claimant from site visits. Third party (client) pressure in the form of the ban meant that the claimant could not carry out his role as 90% of the respondent's driving work was to and from the said client's premises. In this case, the procedure and consultation undertaken by the employer were central to the outcome. The respondent had undertaken an investigation and engaged in dialogue with the employee concerning the wearing of a mask on the client's premises. However, the employee refused to comply with PPE instructions at the client's site.

Overall, employers should be mindful of the potential risks involved in inadvertently engaging in unlawful discrimination against people who are exempt from wearing face coverings or have legitimate reasons for not using them (e.g. sufferers from asthma). Reasonable adjustments in this regard might include organisational exemptions from wearing masks, allowing employees to work remotely if possible, or providing a more private working space.

Can employers dismiss individuals for extended health-related leave?

The previous lockdown measures and the backlog of patients together with staff deficits in the National Health Service have been a continuing burden on the healthcare system. Under such circumstances, employees might have had their health treatments delayed or extended and might require lengthy time off for medical treatment or recovery. In *Ms Adeline Willis v Nat West Bank* plc (2020) ET2205821, the 44-year old employee was selected by the bank for dismissal on the grounds of redundancy two days after her surgery to remove a malignant tumour. In a recorded phone conversation a few weeks into her diagnosis, the claimant's managers consulted with their Human Resource Department about the termination of her contract because of the leave she sought for her cancer treatment. Ms Willis was held to have been unfairly dismissed and discriminated against contrary to s15 EA which makes it unlawful for an employer to

knowingly treat a person unfavourably because of anything arising as a consequence of that person's disability, where it cannot be shown that the action is a proportionate means of achieving a legitimate aim.[2]

When dealing with workers with health problems, employers must act rigorously in order to satisfy their obligations with respect to both dismissal procedures and their responsibilities under the EA's disability discrimination provisions. This is patently of heightened importance as a consequence of the Covid-19 pandemic. For example, in a recent Scottish employment tribunal case it was decided that long Covid could constitute a protected disability. Whether long Covid constitutes a 'disability' will turn on the facts of a particular case and will depend on the nature of the individual's symptoms and the consequent impact on their daily life. In *Burke v Turning Point Scotland* (2022) ET4112457, the ET held that the claimant's particular medical symptoms, including joint pain, a loss of appetite, reduced ability to concentrate, difficulties in sleeping and in standing for long periods of time amounted to a disability. It is important to note that the decision in *Burke v Turning Point Scotland* is a preliminary ruling on the question as to whether long Covid *could* constitute a disability. If the case proceeds to a full hearing, it will be decided whether the claimant was discriminated against and/or unfairly dismissed.

Whether long Covid constitutes a 'disability' will turn on the facts of a particular case ...

Employers should therefore be sensitive to the possibility of some employees experiencing different symptoms of long Covid and make reasonable adjustments following a fair procedure in investigating their ill-health. If feasible, workers could be given time flexibility to allow them to have more control over *when* they engage in their agreed work hours to accommodate their outside-of-work/health commitments.

Relatedly, organisations might need to revisit and alter how performance is measured, appraised and remunerated so that it does not disadvantage particular groups of employees. For instance, in *Devaney v Porthaven Care Homes No 2 Ltd* (2020) ET2304184, the ET found that the employer had failed in its duty under the EA to make reasonable adjustments for the claimant whom it employed as a care worker. During the pandemic, Mrs Devaney had received a letter from the NHS informing her that she was *'extremely clinically vulnerable'* due to suffering from Crohn's disease. The letter told her not to leave home and not to engage in face-to-face contact for at least twelve weeks. The care home had not utilised the government's Coronavirus Job Retention Scheme (furlough) at the time. Instead, the employer applied a provision, criterion or practice (PCP) of only paying care staff their full wages if they attended work in-person during the pandemic in 2020; if they did not, the employer only paid the equivalent of statutory sick pay. This PCP put the claimant at a substantial disadvantage compared to someone without her disability, as she had to opt between the risk of catching Covid-19 or receiving statutory sick pay (and hence receiving substantially less pay). The tribunal found that the employer either *'deliberately or through an oversight'* (paragraph 54) failed to acknowledge the difference between workers who were clinically extremely vulnerable and those who were merely vulnerable. The employer could and should have applied for assistance under the Coronavirus Job Retention Scheme for employees who were advised to shield by the NHS and paid the claimant 80% of her salary through the scheme.

If an employer cannot make reasonable adjustments, then it might be legitimate to dismiss the employee. However, an employer must follow a fair and reasonable procedure in order to dismiss the worker on the grounds of capability. Prior to effecting a dismissal, the employer must consult with the employee and investigate their medical circumstances. This might include a referral to an occupational health professional

2 Legitimate aims might include the health and safety of others and genuine business needs (e.g. the continued efficiency and effectiveness of operations).

to carry out an assessment. In reaching a decision on dismissal, the employer should consider a range of factors including:

- the nature of the illness
- the likelihood of reoccurring absences due to ill health
- length of service
- the impact on the organisation and work colleagues, and
- the organisation's sickness policy.

Can denying employees remote working options amount to associative discrimination?

In the aftermath of the pandemic, a return-to-premises work policy could potentially result in disability discrimination by association. S13 EA includes discrimination by association (treating an individual unfavourably because of their association with another person who has protected characteristics) or perception (treating a person unfavourably because of an incorrect and maybe stereotypical belief about their attributes, abilities, beliefs, etc. relating to a protected characteristic).

... a return-to-premises work policy could potentially result in disability discrimination by association.

For example, an employee might be reluctant to return to office premises (a) because they are concerned about a vulnerable person they live with or, (b) due to their caring responsibilities. Employers who dismiss individuals on this basis and cannot justify their working-on-premises requirement might face a charge of indirect disability discrimination by association [*Follows v Nationwide Building Society* (2018) ET2201937]. The following examples serve as a caution against acting precipitously and unfairly when dismissing an employee under these conditions. While the claimants in the cases below brought allegations of unfair dismissal to the courts, organisations should be aware that if the said (associated) vulnerable person has a medical condition which constitutes a disability, a dismissal/disciplinary action against the employee could theoretically be considered discrimination by association.

In *Quelch v Courtiers Support Services Ltd* (2020) ET3313138, it was held that the claimant was unfairly dismissed when he refused to return to work as he was genuinely concerned about passing the virus onto his girlfriend who had a heart condition. The claimant's contractual place of work was the employer's Henley office. When the Covid-19 pandemic started in March 2020, the claimant was living in a one-bedroom flat with his girlfriend, who as a result of a heart condition and asthma, was classified as 'clinically vulnerable' under government guidelines. Given the potential vulnerability of his girlfriend, the claimant had a meeting with his line manager where it was agreed that he could begin working from home. During the period in which he worked from home, there were no performance issues or concerns. Despite this, and the fact that his line manager stated he had full trust in the claimant to continue working from home, Mr Quelch was asked to return to work in July 2020. When he refused, he was dismissed for gross misconduct. The ET held that the claimant's dismissal had been contrary to s100(1)(d) and (e) of the Employment Rights Act 1996 and therefore he had been automatically unfairly dismissed.

Similarly, in *Gibson v Lothian Leisure* (2020) ET4105009, an employee with a clinically vulnerable father was automatically unfairly dismissed after he raised health and safety concerns about the lack of PPE and other failures to comply with government guidelines. The ET concluded that the claimant was dismissed/selected for redundancy because he took steps to protect his father in circumstances which he reasonably believed to be of serious threat.

Concluding remarks

The cases above highlight various ongoing challenges that both employers and employees might face as a result of Covid-19. These include concerns about health and safety, flexible working arrangements and dealing with instances of extended sick-leave or long Covid. It is vital that employers adopt fair procedures, consult employees and their representatives and make reasonable adjustments in relation to issues such as personal health, shared working spaces, the use of PPE, remote working options, and the management of a phased return to work following illness. This would assist employers in protecting themselves from litigation and in preventing discrimination at work.

... government guidelines and the legal landscape in this domain are continually evolving.

It is important to note that both government guidelines and the legal landscape in this domain are continually evolving as is the medical evidence and directives relating to health management (e.g. advice and findings associated with vaccinations). As of October 14, 2022, the UK government does not expect every business to consider Covid-19 in its risk assessment, or indeed, to have specific associated measures in place. Nevertheless, organisations are encouraged to consult staff and their representatives on issues of health and safety and refer to guidance from the Department of Health and Social Care on protecting immunosuppressed people and those previously considered clinically extremely vulnerable to Covid-19 (www.hse.gov.uk/coronavirus/).

Government's social care cap discriminates against disabled people ✦

In 2011, recommendations were made by an independent commission of experts to introduce a cap on the amount anyone in England would need to spend on social care throughout their life, in a move intended to make the cost of care more affordable. Over ten years later, under the Health and Care Act 2022, the government will introduce a cap more than twice as high as that recommended in 2011. Concerns have been raised that the cap breaches the Equality Act 2010 by discriminating against disabled people and other groups.

In the UK, social care that is provided by councils is 'means-tested'. This means that those whose income or capital is above a particular threshold are charged in part or in full for their care. People who need residential care or long-term support can pay many thousands of pounds for care over their lifetime, with some having to sell their home to pay for this.

The World Health Organisation's constitution (1946) recognises *'The highest attainable standard of health as a fundamental right of every human being.'* This right is also included in the Universal Declaration of Human Rights (1948) and the International Covenant on Economic, Social and Cultural Rights (1966).

The cap will begin in 2023

From October 2023,[1] the government will introduce a cap of £86,000 on the amount anyone in England will need to spend on their care over their lifetime. That is more than double the amount recommended by the Commission on Funding of Care and Support in 2011. That report, produced by what was known as the Dilnot Commission, aimed to avoid *'catastrophic care costs'* and so recommended a cap of £35,000 on 'individual contributions'.

The cap will no longer count contributions from local authorities towards care costs, meaning that people who need access to social care the most, may struggle to afford it.

Reforms to adult social care under the Health and Care Act were proposed to increase eligibility for means-tested contributions from local authorities towards a person's care.

The public is being treated as the 'wealthiest in society'

In a parliamentary debate in March 2022, Baroness Wheeler said that preventing local authority costs from counting towards the cap would mean that the public is being treated as if they are the 'wealthiest in society', when, for many, care costs are catastrophic.

Wheeler stated:

> *The cap at £86,000 is set too high to benefit the majority of people who need to be protected, and the bombshell of abandoning the key safeguarding Dilnot principle enabling local authority care costs to count and accrue towards the cap means that poorer people will be exposed to the same care costs as the very wealthiest in society.*

Disabled people living in the UK already spend an average of £583 a month in relation to their healthcare. Despite attempts by some MPs to amend the bill, it passed into law in April becoming the Health and Care Act 2022.

1 On October 18, 2022 *The Times* reported that Chancellor Hunt was considering postponing the introduction of the social care cap for a year or more.

✦ This article, written by Ella Hopkins for EachOther, was first published on May 27, 2022, and is reproduced here with kind permission of the organisation. EachOther is a UK-focused charity using independent journalism, story-telling and film-making to put the human into human rights.

Nearly 90,000 adult social care users in the UK have fallen behind on payments

Earlier this year it was found that nearly 90,000 adult social care users who are being charged for their care have fallen behind on payments. The disability charity Sense estimated that some people with complex disabilities could face care costs amounting to 80 per cent of their income.

The disability charity Real said the cap was 'inherently discriminatory' and called for free social care. They said: *'With the cost-of-living crisis we are currently facing, it is outrageous that people who are struggling to put food on the table after paying for care will be charged the same as somebody who lives in a mansion.'*

'The government's proposed social care charging reforms will discriminate against disabled people with the lowest income and wealth.'

Without further action from the government, disabled people will go without the right care

Sarah White, Head of Policy, Public Affairs & Research at Sense, said that disabled people should not have to spend the majority of their income on care costs.

White explained that the government's proposed cap would not *'make a significant difference to the lives of many working-age people with complex disabilities'*, and called instead for the introduction of a zero care cap to address a care system at 'breaking point'. She added: *'Without further action from the government, disabled people will go without the right care and support.'*

The cap places an 'unfair burden' on young disabled people without assets or savings, said Fazilet Hadi, from Disability Rights UK. She said that excluding local authority care costs from the cap would mean that it could take more than a decade for disabled people to reach it. Instead, she argues the government should provide free care to disabled people under 40.

Inclusion London, a campaigning group for deaf and disabled people, has called on the government to exclude means-tested benefits from means-tested social care. The group called the current system 'unjust' and that it *'discriminates against disabled people on lower incomes'.* Inclusion London also stated: *'The government's proposed social care charging reforms will discriminate against disabled people with the lowest income and wealth'*. The group explained that benefits *'are paid in light of the extra life costs disabled people and their families face'* and should not be used for social care.

Despite the threshold for those having to contribute to their care costs rising to above £20,000, many will still have to pay out large sums of money through their disability benefits or pensions.

A spokesperson from the Department of Health and Social Care (DHSC) said:

> *The Health and Care Act provides a limit to the cost of care for everyone and strikes the right balance between public contributions and people's personal responsibility for planning for their care. Everybody will be better off under the new system which will provide certainty and reassurance so people can both plan for their future and pass on more of what they have saved to their loved ones.*

The DHSC told us that, while it paid close attention to the recommendations made by the Dilnot Commission, inevitably the priorities and challenges regarding the funding of social care *'are not the same as they were a decade ago'.*

The DHSC stated: *'The government aims to balance providing protection and predictability when it comes to the cost of care with how much additional burden should be placed on the taxpayer.'*

Ella Hopkins, Journalist

ECtHR makes substantial just satisfaction awards in Article 6 cases

Benkharbouche & Janah v The United Kingdom ✦ Application nos. 19059/18 &19725/181, April 5, 2022

Implications for practitioners

When considering awards of just satisfaction, the European Court of Human Rights (ECtHR) is not bound to discount consideration of the sum which might have been awarded in the civil claim before a domestic court. This case demonstrates a departure from the approach in previous cases where loss of opportunity has been assessed without consideration of the value of the substantive domestic case. In this matter the amount claimed formed part of the court's reasoning as to the level of damages it awarded.

Facts

Ms Fatima Benkharbouche (FB), a Moroccan national, was employed as a cook at the Sudanese embassy in London. Ms Minah Janah (MJ), a Moroccan national, was employed as a domestic worker in the Libyan embassy in London. Both were dismissed and brought claims in the employment tribunal against their employers for unfair dismissal, failure to pay the national minimum wage, breach of the Working Time Regulations 1998, race discrimination and harassment. Both embassies claimed state immunity under the UK's State Immunity Act 1978 (SIA).

The claims proceeded from the ET through to the CA. The embassies' reliance on the SIA was held to be incompatible with the Human Rights Act 1998 and dis-applied as being contrary to the protection provided by Article 47 of the Charter of Fundamental Rights in respect of claims which derive from EU law. On appeal to the SC, it was held that the UK government's approach to state immunity lacked any basis in customary international law and the government's appeal was dismissed – see *Benkharbouche v Embassy of Sudan, Janah v Libya* [2017] UKSC 62, Oct 18, 2017; Briefing 853 [2018].

Following the judgment of the SC, both FB and MJ agreed settlements with their respective employers in relation to their EU derived complaints i.e. those arising from the Working Time Regulations. Claims in relation to race discrimination and harassment could not be pursued following the SC's judgment in *Taiwo v Olaigbe* [2016] UKSC 31; Briefing 788 [2016]. However, both claimants, as a result of the application of ss4(2)(b) and 16(1) of the SIA, had been barred from obtaining compensation for unfair dismissal, wrongful dismissal and the failure to pay the National Minimum Wage. As such their right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR) had been breached.

European Court of Human Rights

Applications were presented in April 2018 to the ECtHR seeking just satisfaction arising from FB's and MJ's lost opportunity to have their domestic employment claims heard.

The government submitted a unilateral declaration to the ECtHR seeking to resolve the matters raised by the application for just satisfaction. The government acknowledged that ss4(2)(b) and 16(1) of the SIA had resulted in a breach of FB's and MJ's Article

✦ [2022] IRLR 624

6 rights. In the case of MJ, a recognised victim of trafficking, it had also breached her Article 14 rights when read with Article 6. The government undertook to issue a remedial order to amend the SIA and pay FB and MJ £20,000 each in respect of pecuniary and non-pecuniary loss and £2,500 each in respect of legal costs and expenses. The government asserted, in view of the intention to remedy the SIA and its offer to pay damages, that the applications for just satisfaction should be struck out of the court list.

FB and MJ resisted the government's request to strike out their applications on the basis that the sums offered in respect of damages were extremely low, particularly in light of the value of the employment claims which they had lost the right to pursue. In both cases the potential compensation would have exceeded £200,000. Further, whilst the government had indicated that the SIA would be remedied, no indication had been given as to when steps would be taken to do so.

It fell to the ECtHR to determine if the government's unilateral declaration provided adequate redress. In both cases Article 6 rights had been interfered with. Whilst ECtHR jurisprudence suggests that re-opening or hearing a case where there has been a breach of Article 6, would be an appropriate way of redressing the violation,[1] in this matter the fact that there was no guarantee that an ET would hear the domestic claims was relevant to the ECtHR's consideration. It was also noted that seven years had passed since the CA had made a declaration of incompatibility and more than four years since the SC had dismissed the government's appeal, yet no draft of the remedial order had been published. In any event the remedial order would still not address the lack of a guaranteed opportunity to have the domestic claims heard and compensation obtained as a result. It was noted that whilst the ECtHR was not in a position to carry out an analysis of the strength of FB's and MJ's domestic employment claims, this did not mean that it could be *'blind to the potential value of the opportunity that was lost'*.[2]

The ECtHR refused the government's application to strike out FB's and MJ's applications, concluding that the sums offered were significantly short of the amounts that it would award in respect of just satisfaction.[3] FB was awarded €55,000 in pecuniary and non-pecuniary damages and MJ €56,500 in pecuniary and non-pecuniary damages. Both were awarded €12,500 in legal costs and expenses.

On May 11, 2022 a draft State Immunity Act 1978 (Remedial) Order 2022 was laid before parliament and will be put forward for approval following review and recommendations from the Joint Committee on Human Rights.[4]

Jamila Duncan-Bosu
Anti Trafficking and Labour Exploitation Unit

1 Paragraph 58

2 Paragraph 56

3 Paragraph 59

4 publications.parliament.uk/pa/jt5803/jtselect/jtrights/280/report.html

Relationship between ss15 & 20 EA claims and unfair dismissal claims

C Knightley v Chelsea & Westminster Hospital NHS Foundation Trust ✦ [2022] EAT 63; November 9, 2021

Implications for practitioners

The EAT rejected appeal arguments that an ET which found a failure to make the reasonable adjustment of extending a dismissal appeal deadline, should have also found that the dismissal was unfair. The EAT also rejected arguments that an unfair dismissal finding should also give rise to a finding that a dismissal is disproportionate in breach of s15 of the Equality Act 2010 (EA).

Employment Tribunal

The claimant (CK) was employed by the Chelsea & Westminster Hospital NHS Foundation Trust (the Trust); she suffered from stress, anxiety and reactive depression which was accepted as a disability under the EA during the tribunal proceedings. Following extended periods of sick leave, CK was subjected to capability proceedings and eventually dismissed by the Trust. CK brought numerous claims including unfair dismissal, discrimination arising from disability contrary to s15 EA, and failure to make reasonable adjustments contrary to s20 EA.

One allegation of failure to make reasonable adjustments related to the Trust's requirement that employees submit an appeal within 10 working days of the dismissal letter. CK asserted that due to her disability this placed her at a substantial disadvantage in comparison with non-disabled employees because she was unable submit her appeal within this timeframe, which the Trust enforced despite CK requesting an extension. The ET upheld this allegation of failure to make reasonable adjustments, stating that it would not have been costly or disruptive for the Trust to extend the deadline or accept the late appeal submitted by CK.

The ET dismissed all of CK's other claims, including her other allegations of failure to make reasonable adjustments. Regarding unfair dismissal, the ET found that the dismissal procedure was fair and dismissal was within the range of reasonable responses. This was despite finding that it would have been a reasonable adjustment under the EA for the Trust to have extended the appeal deadline.

Regarding the s15 EA claim for discrimination arising from disability, the Trust did not dispute that the capability proceedings and dismissal amounted to unfavourable treatment of CK. CK also accepted that the Trust had a legitimate aim in taking these measures, but disputed that they were a proportionate means of achieving the aims. The ET dismissed this claim, finding that the capability proceedings and dismissal were proportionate given her extensive sickness absence and there being no prospect of her returning to work in the foreseeable future.

Employment Appeal Tribunal

CK appealed on various grounds, including that the ET should have upheld the unfair dismissal claim because it had found that an appeal deadline extension was a reasonable step the Trust could have taken, and that this failure to make a reasonable adjustment

✦ [2022] IRLR 567

had denied her an effective opportunity to appeal. CK asserted that, by finding that there should have been a reasonable adjustment to allow an extension of time for appeal, the ET had necessarily found that the employer acted unreasonably in failing to grant the extension.

CK also asserted that if the dismissal was found to be unfair, then it followed that the dismissal was not a proportionate means of achieving a legitimate aim and was therefore in breach of s15 EA.

The EAT stated that the lack of an opportunity to appeal does not necessarily render a dismissal unfair; whether it does will depend on the circumstances of the case. The availability of appeal is part of the dismissal procedure and is therefore relevant to the overall assessment of procedure.

The EAT set out clear distinctions between the different legal tests for unfair dismissal claims, claims for failure to make reasonable adjustment and claims for discrimination arising from disability. The EAT stated that the Employment Rights Act 1996 (ERA) and the EA have different legislative aims and there is no reason why a breach of one of the provisions should mean another is automatically breached. The EAT stated that, whilst the ET's findings of fact may be relevant to all three claims, the legal tests for each claim should be applied to those facts separately.

... the reasonable adjustments question was narrower than the range of reasonable responses test ...

The EAT held that the ET's finding that the Trust failed to make the reasonable adjustment of extending the appeal deadline was a discrete conclusion and did not depend on or reflect the merits of the unfair dismissal case. For the unfair dismissal case, the ET had correctly looked at the dismissal procedure in its entirety and concluded that as a whole it was a reasonable procedure open to a fair employer; the non-extension of the appeal deadline did not render the procedure as a whole unfair. The EAT stated that the reasonable adjustments question was narrower than the range of reasonable responses test having regard to all the circumstances required by unfair dismissal law. Further, whilst the factual finding that the appeal deadline could reasonably have been extended may have been relevant to the question of whether the dismissal was fair, the legal conclusion of a failure to make reasonable adjustments contrary to s20 EA was not relevant to the question of unfair dismissal.

Addressing CK's argument that a finding of unfair dismissal would also mean the dismissal was disproportionate under s15 EA, the EAT set out again the differences in the legal criteria of these two provisions. The proportionality test under s15 EA can be based on matters not in the mind of the employer at the time of the dismissal, whereas the law regarding unfair dismissal focuses on what is in the mind of the employer at the time of dismissal. The EAT found that ultimately this ground of appeal did not arise, because there had not been a finding of unfair dismissal.

Comment

The EAT sets out in this judgment helpful clarification on how numerous claims can be considered together. Where dismissal circumstances give rise to claims for unfair dismissal and failure to make reasonable adjustments, factual findings can be relevant to the legal criteria for the different provisions. However, where a claim is upheld regarding failure to make reasonable adjustments in the dismissal procedure, this does not mean that an unfair dismissal claim should also be upheld. The legal tests for separate provisions should be applied separately to the factual findings.

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Discrimination on grounds of religion/belief

Mackereth v Department for Work & Pensions (1) & Advanced Personnel Management Group (UK) Limited (2) ✦ [2022] EAT 99; June 29, 2022

Facts

Mr Mackereth (M) is a doctor who applied to work as a health and disabilities assessor (HDA) at the first respondent's (DWP) assessment centre in Birmingham. This required him to assess claimants for disability-related benefits, including conducting face-to-face assessments. The second respondent provided HDAs to the DWP under contract.

All HDAs would be expected to have interactions with transgender service users, albeit only on a handful of occasions each year.

M is a Christian; he gave evidence that he held a *'commitment to the supremacy of the Bible as the infallible, inerrant word of God and as the final authority in all matters of faith and practice'.* He had a conscientious objection to transgenderism and believed that *'God made humans "male or female"…'*

At the induction stage of his employment M made it clear that he objected to the use of preferred pronouns. After a fairly involved discussion as to how to proceed M effectively resigned on the basis that he would not be able to refer to a service user by their chosen sexuality and name.

Employment Tribunal

M brought a claim of direct discrimination, harassment, and indirect discrimination on grounds of religious belief. The ET began by applying the five *Grainger* criteria (from *Grainger plc v Nicholson* [2010] ICR 360 EAT; Briefing 549 [2009]). It considered that certain aspects (but not all) of M's beliefs were genuine, related to a weighty and substantial aspect of human life and behaviour and had a certain level of cogency, seriousness, cohesion and importance. However all his beliefs failed the fifth test, *Grainger V*, which states that the belief must be: *'worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others'.*

The ET found that M's beliefs were incompatible with human dignity and conflicted with the fundamental rights of others, specifically transgender individuals.

Notwithstanding its decision on the protected characteristic, the ET went on to consider M's case on its merits on each of the causes of action he was advancing,

The harassment claim failed on the facts – the ET found that the purpose of the DWP's questioning of M was not to violate his dignity nor create an adverse environment for him.

The claim for direct discrimination also failed. The ET found that *'any person holding [M's] beliefs would have been treated in the same way as a person not holding those beliefs who refused to refer to a service user using the service user's preferred pronoun'.* The ET drew on *Islington BC v Ladele* [2009] ICR 387; Briefings 556 [2010] & 523 [2009] and *Lee v Ashers Baking Co Ltd* [2018] 3 WLR 1294; Briefings 757 [2015], 819 [2017], 872 [2018] & 1002 [2022] – the reason for treating M less favourably was not his religious belief but his refusal to use preferred pronouns.

As for the claim of indirect discrimination, it was common ground that a provision, criterion and practice (PCP) requiring HDAs to use preferred pronouns had been applied, and the ET accepted individual disadvantage and some group disadvantage. However

✦ [2022] IRLR 721

the ET agreed with the DWP that the PCP was justified. The purpose of the policy was to ensure that transgender service users were treated with respect and in accordance with the DWP's obligations under the Equality Act 2010 (EA). Those were legitimate aims. The PCP was applied proportionately in that the DWP had considered all possible alternatives to retain M's services.

Employment Appeal Tribunal

On the first ground of appeal, as to the *Grainger V* issue, the EAT was assisted by its recent judgment in *Forstater v CGD Europe* [2022] ICR 1; Briefing 998 [2021]. In that case the EAT had held that the claimant's belief, that sex was immutable, did not fail criterion V of *Grainger*. It was not for the court to inquire into the validity of the belief (although it must satisfy the other *Grainger* requirements). Freedom to hold a particular belief went *'hand-in-hand'* with the state remaining neutral as between competing beliefs. It was not enough that the belief or statement had the potential to shock or disturb a section or even most of society. Article 17 of the European Convention on Human Rights (ECHR), which prohibited the use of the ECHR to destroy the rights of others, only became relevant at a level where freedom of expression was used to *'espouse hatred, violence or a totalitarian ideology that is wholly incompatible with the principles of democracy'.* Only the '*gravest violations of Convention principles should be denied protection'*, and it would only be in '*extremely limited circumstances in which a belief would be considered so beyond the pale'.*

Amongst a number of criticisms of aspects of the ET's reasoning on other *Grainger* criteria, and noting that the ET did not have the benefit of the *Forstater* guidance, the EAT had no hesitation in holding that the belief did meet the *Grainger* V test. The tribunal had imposed *'too high a threshold'* for the protection of a belief. The fact that it was likely to cause offence could not mean that it was automatically excluded from protection.

Furthermore the ET had fallen into error in taking into account the particular employment context – the background of the disability assessments was irrelevant to whether the belief met the *Grainger* tests (although it was certainly relevant to the indirect discrimination claim).

However this was a Pyrrhic victory for M. The appeal ultimately failed on all substantive elements. The EAT ruled that the ET's approach to harassment, direct discrimination and indirect discrimination was unimpeachable. The findings of fact were fatal to the claims of harassment and direct discrimination, and in addition the ET had drawn a permissible distinction between beliefs and the manifestation of those beliefs. There had been no error of law in relation to legitimate aims and proportionate means.

Comment and implications for practitioners

The case of *Mackereth* is a salutary reminder of two principles. Firstly, in accordance with *Forstater*, establishing that a belief merits protection under the EA requires a relatively low threshold to be met. It will be difficult to show that the belief does not satisfy the *Grainger V* criterion, particularly if it is a belief stemming from an established and recognised religion.

Secondly, and conversely, the case is another reminder of the difficulty for claimants in cases of alleged religion/belief discrimination. *Mackereth* is just the latest in a long line of cases where the claimant is unsuccessful because the treatment that they allege amounts to discrimination can be shown to have been due to the manifestation of the belief rather than the belief itself.

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Filling in the cavities in workplace protection

Sejpal v Rodericks Dental Ltd ✦ [2022] EAT 91; June 16, 2022

In *Sejpal* the EAT held that a dental associate engaged by Rodericks Dental Ltd (RDL) provided personal service to the company. The case has been remitted to a fresh tribunal to determine whether RDL was a client or customer of the claimant by virtue of the contract between them. If not, the associate will be held to be an worker within the meaning of s83(2)(a) of the Equality Act 2010 (EA) and, by implication, the Employment Rights Act 1996 (ERA).

Implications for practitioners

This judgment is likely to have wide implications within the dental profession. According to the most recent January 2022 figures from the General Dental Council,[1] there are 42,215 registered UK dentists. For those not already regarded as workers, which is likely to be the vast majority following previous authority on the worker status of dentists (*Community Dental Centres Ltd v Sultan-Darmon* [2010] IRLR 1024 (EAT)), this judgment will have a significant impact on their workplace protections. Furthermore, the EAT's approach to substitution clauses is likely to be felt far beyond the dental profession.

1 https://www.gdc-uk.org/news-blogs/news/detail/2022/01/17/total-number-of-registered-uk-dentists-remains-stable-following-renewal

Facts

Ms N Sejpal (NS) is a dentist who began working as an 'associate' for RDL from August 2009. NS moved to RDL's Kensington practice in 2010. Her contract contained a clause later asserted by RDL as constituting a substitution clause drafted in terms which are typical across the profession:

> *In the event of the Associate's failure (through ill health maternity paternity or other cause) to utilise the facilities for a continuous period of more than 14 days the Associate shall use his best endeavours to make arrangements for the use of the facilities by a locum tenens, such locum tenens being acceptable to the Primary Care Trust and the Company to provide Personal Dental Services Plus/Personal Dental Services as a Performer at the practice, and in the event of the failure by the Associate to make such arrangements the Company shall have authority to engage a locum tenens on behalf of the Associate and to be paid for by the Associate. The Company and Associate will agree the method of payment of the locum tenens. The Company will notify the PCT that the locum tenens is acting as a Performer at the Practice. The Associate will be responsible for obtaining and checking references and the registration status of the locum and ensuring that the locum is entered into the Performers list of a Primary Care Trust in England and will confirm to the Company that these requirements have been carried out, The Associate will provide the Company with such relevant information as he may reasonably require.*

Clauses of a similar nature have been found at first instance and by the EAT in *Sultan-Darmon* as excluding the personal service requirement necessary to establish worker status.

NS began a period of maternity leave in December 2018. RDL closed the Kensington practice on December 31, 2018.

NS claimed that others were redeployed to other locations, whereas her contract was terminated. She brought claims for pregnancy or maternity discrimination (sex discrimination was also referred to), unfair dismissal, and a redundancy payment in April 2019. Claims relying on employee status were ultimately withdrawn which left

✦ [2022] IRLR 752

the employment tribunal with the question of determining whether NS was 'employed' under s83(2)(a) EA, meaning *'employment under a contract of employment, a contract of apprenticeship or a contract personally to do work'.*

It is well-established that s83(2)(a) EA has the same scope as s230(3)(b) ERA:

> *(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—*
>
> *(a) a contract of employment, or*
>
> *(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally* ***any*** *work or services for another party to the contract* ***whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking*** *carried on by the individual.*

Employment Tribunal

The ET held that NS was not a 'worker' within the meaning of s230(3)(b) ERA, nor an 'employee' pursuant to s83(2)(a) EA as she was not employed under a contract personally to do work. The ET concluded that the necessary mutuality of obligation, per Underhill LJ in *Windle and another v Secretary of State for Justice* [2016] EWCA Civ 459, was missing. The ET also gave significant weight to the substitution clause written into NS's associateship contract referring to the contract itself as *'the heart of this case'.*

The ET considered that the contract did not constitute a sham in the contract law sense, holding that there was no evidence to support NS's contention that the terminology did not reflect the reality of her situation. It found that there was no evidence of misrepresentation, nor was there evidence that NS had lacked the capacity to understand the contract she was entering into, and there was no inequality of bargaining power. Consequently the ET determined that NS could not pursue her discrimination complaints.

The SC decision in *Uber* had not been handed down at the time of the ET decision.

Employment Appeal Tribunal

A number of grounds of appeal were advanced. The EAT began its analysis of the relevant law by establishing that a holistic approach must be taken in determining the question of worker status, emphasising that *'the statutory test must be applied, according to its purpose'* [para7]. The relevant tests are set out as follows in paras 10-12:

> *10. Accordingly, for an individual (A) to be a worker for another (B) pursuant to section 230(3)(b) ERA:*
> *a) A must have entered into or work under a* ***contract*** *(or possibly, in limited circumstances briefly discussed below, some similar agreement) with B; and*
> *b) A must have agreed to* ***personally perform some work or services for B***
>
> *11. However, A is excluded from being a worker if:*
> *a) A carries on a* ***profession or business undertaking; and***
> *b) B is a* ***client or customer of A's*** *by virtue of the contract*
>
> *12. Section 83(2)* ***Equality Act 2010*** *… provides:*
> *(2) 'Employment' means –*
> *a) employment under a* ***contract of employment****, a contract of apprenticeship* ***or*** *a* ***contract personally to do work****; [emphasis added]*

'Some' work or services requirement

The EAT placed specific emphasis on the requirement for NS to perform some work or services for RDL per s230(3)(b) ERA. Whilst the EAT simply applied the statute as written, the added emphasis is important, suggesting that it should be sufficient that the individual has agreed to perform some work personally, even if the right to engage a substitute has been utilised on other occasions. This finding is in line with the SC's finding that Uber drivers were able to turn down some work, and that this was not incompatible with the 'irreducible minimum' standard required for employee or worker status in *Uber BV v Aslam* [2021] UKSC 5.

The EAT cited *Nursing and Midwifery Council v Somerville* [2022] EWCA Civ 229 in concluding that the concept of the irreducible minimum did not assist in considering the position of NS, that is a person working under a single engagement [paras 25-26].

In *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29 Lord Wilson sought to clarify the circumstances in which a substitution clause would or would not be compatible with personal service:

> *The sole test is, of course, the obligation of personal performance; any other so-called sole test would be an inappropriate usurpation of the sole test. But there are cases, of which the present case is one, in which it is helpful to assess the significance of Mr Smith's right to substitute another Pimlico operative by reference to whether the dominant feature of the contract remained personal performance on his part.* [para 31]

... sufficient that the individual has agreed to perform some work personally, even if the right to engage a substitute has been utilised on other occasions.

Here, the EAT picked up the baton from *Uber*:

> *… post Uber, and the focus on statutory interpretation that is now expressly required, that there could be a situation in which despite there being a contractual term that provides an unfettered right of substitution, the reality is that the predominant purpose of the agreement is personal service, so that the person is a worker. It might even be argued that personal service need not be the predominant purpose of the agreement, provided that the true agreement is for the provision of "any" personal service as required by the statute.* [para 32]

Whilst the EAT stated that it was not necessary to fully determine the issue, it provided a clear indication of its preliminary conclusions:

> *Just as the concept of irreducible minimum mutuality of obligation has little to offer to the analysis of the situation when a person is working during one of a number of periodic engagements, it is hard to see what it has to offer while a person is working pursuant to a contract, even if substitution would be permissible, with the result that there could be other periods during which the person is not providing services that are, instead, provided by a substitute.* [para 28]

The end of substitution clauses as a bar to status?

Having regard to these conclusions, the EAT rejected RDL's contention that the requirement for personal service was not made out because there existed an unfettered right of substitution arising from clause 30 of the associate agreement.

Effectively, NS was contracted to provide a 'locum tenens' of acceptable quality to RDL if unable to work for more than 14 days. The EAT's analysis focused upon a *'realistic assessment of the true agreement between the parties'* [para 60], following the SC's approach in *Autoclenz Ltd v Belcher and others* [2011] UKSC 41 and clarified in *Uber* to engage in an exercise of statutory interpretation. It concluded that NS was required to provide some personal service because there were clear fetters on the right to

substitute in the practical application and the wording of the contract. Notably, RDL contended that certain factors that could be regarded as fetters should be discounted, because they were regulatory requirements; for example, a locum tenens had to meet certain standards of competency and qualification to be accepted by RDL.

The EAT held that *'The fact that terms of an agreement may be necessary to comply with regulatory requirements does not alter the fact that they form part of the agreement, and so are relevant to assessing its nature* [para 21]', referring to para 102 of *Uber*. The EAT also indicated that a substitution clause may be regarded as unlawful contracting out if an objective analysis of the relationship would lead to the conclusion that its aim is to limit statutory protections [para 20], referring to Lord Leggatt's analysis in *Uber*.

On this analysis, it will be less typical for a substitution clause to bar worker status where it would otherwise exist. The courts have been moving towards taking a holistic view of substitution clauses and their actual effects, rather than their intended purpose since *Clyde & Co LLP & another v Bates van Winkelhof* [2014] UKSC 32. Post *Uber* it was questionable whether the possibility of drafting a contract to purposefully exclude statutory protection, if a person was providing personal service, remained possible. Previously, companies focused on 'no mutuality' clauses, which *Autoclenz* put paid to as an avenue for limiting employment rights. Attention then shifted to substitution clauses. It is now possible that the dispute will fall on the customer/client exemption. The EAT highlights [para 67] that it will not be simple to make this exemption out, though it must be noted that identifying a professional undertaking for roles such as that of a courier, may be difficult.

Comment

NS's case has been remitted to a different ET to determine afresh *'the questions of whether the claimant carried on a profession or business undertaking; **and** of whether the respondent was a client or customer of the claimant's by virtue of the contract'* [para 69]. The EAT considered the case of *Hospital Medical Group v Westwood* [2012] ICR 415 in its analysis, noting that *'Maurice Kay LJ considered a submission that if a person is genuinely self-employed that person cannot be a worker. The contention was firmly rejected'* [para 35] as well as drawing attention to the *necessity* for the exclusion to apply that B is a client or customer of A's. Given the fact that NS worked exclusively for RDL for over a decade, the close integration between dental associates and the engaging practices, and the fact that her contract included post-termination covenants, a finding that RDL was her client or customer appears unlikely and as such a finding of worker status can be expected.

Even as it stands, this judgment is likely to have major implications for the dental profession. The finding that NS agreed to personally perform some work or service for RDL is in direct contrast to the finding of the EAT in *Sultan-Darmon* which was the previous authority on the worker status of dental associates. RDL owns more than 100 dental practices which all operate using the 'associate' business model of dental practitioners, and many dental companies use this same model. The vast majority of dental associates are 'self-employed' in the same manner as NS according to the British Dental Association. Should dental associates become regarded as workers, back pay of benefits such as holiday pay would need to be considered on a nationwide basis, following *Smith v Pimlico Plumbers Ltd* [2022] ICR 818. Whilst this was a case addressing worker status, the question of whether there is a contract of employment whilst working in which continuity gaps might be bridged so as to entitle dentists to bring claims of unfair dismissal and redundancy may well also emerge.

More broadly, this judgment is potentially ground breaking on the effect of substitution clauses. Substitution clauses are regularly relied upon by putative employers as a means of precluding worker status. In the long-running union recognition proceedings *R (Independent Workers Union of Great Britain) v Central Arbitration Committee* [2018] EWHC 3342 the Central Arbitration Committee concluded that the existence of a valid substitution clause was an insuperable difficulty since it left no room for a requirement of personal service, irrespective of whether the clause was exercised by the individual worker in question: that decision was not overturned in consequent appeals.

Sejpal moves the dial. In restating the requirement as one to provide 'some' personal service and having regard to the practical question of whether the clause was in fact exercised, the EAT has restricted the scope for a substitution clause as a conclusive bar to fundamental workplace rights. This has the benefit of both logic and principle on its side. Arguably, the protection against harassment or discrimination enjoyed by person A whilst at work should not be removed simply because someone could in theory have worked in her place on that day or, even if she exercised substitution rights, on previous occasions. The EAT has provided a further reminder that the ET must focus on the practical reality of the situation, recognising that worker status is a gateway to the enjoyment of fundamental statutory rights which should not be lightly denied.

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Assessing the proportionality of dismissal decisions under s15 EA

DWP v Boyers [2022] EAT 761 ✦ June 15, 2022

Facts

The claimant, Susan Boyers (SB), worked for the Department for Work and Pensions (DWP) from 2005 until her dismissal in January 2018. SB suffered from chronic migraines. In 2013 and 2014 she complained that she had been bullied and harassed by a colleague. She said this treatment exacerbated her migraines and led her to suffer from depression, stress and anxiety attacks. SB's repeated requests to move desks away from the perpetrator and/or to move teams were rejected throughout 2014 to 2016 by her line manager.

In February 2017, SB received a call from a customer who said he was suicidal. She received assistance from a manager at the time but later complained about that assistance, saying she was at *'rock bottom'.* SB was subsequently signed off on long-term sick leave due to work-related stress.

Later that month, SB raised a grievance about how her line managers had handled her complaints. She claimed that she could no longer work in the Middlesbrough office where she was based, but that she could return to a different location.

In September 2017, the DWP agreed to a six-week trial at a different site in Eston. However, during the trial, the DWP failed to provide the weekly feedback sessions that had been promised. Further, the trial was hindered by IT problems and the fact that only limited training was given. On the last day of the trial, SB was told it had not been successful and that she had to return to the Middlesbrough office.

SB did not return to Middlesbrough and was signed off sick again for work-related stress.

Around three months later, on January 9, 2018, the DWP concluded that it could not foresee SB's return to work in the near future; the trial had been unsuccessful and SB had refused to return to Middlesbrough. It therefore dismissed SB on capability grounds.

Employment Tribunal

SB presented various complaints to the employment tribunal arising from the termination of her employment and the treatment over previous years. In particular, she claimed discrimination arising from a disability under s15 of the Equality Act 2010 (EA).

Under s15(1) EA, discrimination arising from disability occurs where A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment was a proportionate means of achieving a legitimate aim.

To assess this, an ET must balance the reasonable needs of the employer against the discriminatory effect on the employee (*Land Registry v Houghton and others* UKEAT/0149/14). When determining proportionality, it is relevant for the tribunal to consider whether or not a less discriminatory measure could have achieved the legitimate aim.

✦ [2022] IRLR 741

The ET accepted that SB was disabled. It found that the dismissal was not proportionate and upheld the s15 EA claim.

Employment Appeal Tribunal

The DWP appealed on the basis that the ET's analysis of proportionality focused on the *process* by which the DWP came to dismiss SB, rather than on whether the dismissal was justified having balanced the discriminatory impact upon SB against the needs of the DWP with respect to the stated legitimate aims (namely, to protect scarce public funds/ resources and to reduce the strain on other employees as a result of SB's absence). The EAT upheld the appeal and remitted the case back to the ET.

Second Employment Tribunal

The ET found the DWP led no evidence relevant to its legitimate aims. Notwithstanding this, the tribunal still conducted a balancing exercise and reached the same conclusion as before: the dismissal was disproportionate and, therefore, discriminatory.

The ET found that had the DWP properly assessed and evaluated the work trial, it could have resulted in SB keeping her job. It was not reasonably necessary to dismiss when another less discriminatory avenue was available.

It was the outcome of the decision-making process which must be justified, not the process itself. However, when conducting the balancing exercise, it is open for an ET to weigh in the balance the procedure by which that outcome was achieved.

Second Employment Appeal Tribunal

The DWP appealed to the EAT again on the grounds that the ET had erred in law and/ or acted perversely in finding the dismissal to be disproportionate because:

1. there was no evidence before the ET of any real prospect of SB returning to the Middlesbrough office
2. it imposed a duty on the DWP to investigate deploying SB on different duties at a different location to that set out in her contract of employment.

The EAT dismissed the appeal.

It concluded that the first EAT decision did not create authority for the proposition that the procedure followed by an employer is irrelevant to the analysis required for a s15 EA claim. It was the outcome of the decision-making process which must be justified, not the process itself. However, when conducting the balancing exercise, it is open for an ET to weigh in the balance the procedure by which that outcome was achieved.

Further, the EAT found that the protection in s15 EA would be materially lessened if the assessment of proportionality could not extend beyond the terms of the contract on matters such as place of work and the duties to be performed. Therefore, if suitable alternative work is available somewhere other than an employee's contractual place of work, then there may be a non-discriminatory alternative to dismissal. An employer's failure to consider that alternative could properly inform the ET's objective analysis.

In this case, by failing to properly evaluate the work trial to decide whether it was successful or not, the DWP could not show the dismissal was reasonably necessary to achieve its legitimate aims when balanced against the discriminatory impact on SB. Put another way, had a reasonable work trial been conducted and evaluated, it was possible that SB would have remained employed.

The EAT also determined that a s15 EA claim could succeed in circumstances where an employer was not under a corresponding duty to make reasonable adjustments under s21 EA.

Comment

The process by which an employer reaches its decisions is important in the context of s15 EA claims.

Employers ought to tread carefully in long-term absence cases rather than just going through the motions. It would be prudent to take an holistic approach when conducting the balancing exercise required, since failing to properly consider all alternatives will make it harder for an employer to show it has acted lawfully. Further, this decision is authority for the need to consider alternative places of work and duties.

This decision also underlines the need for employers to submit evidence about their legitimate aims and how the relevant decision-makers thought their actions would serve those aims. Failure to do so will make it much more difficult for an employer to show it acted proportionately. Clear contemporaneous records of this assessment ought therefore to be made.

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Unpicking disability discrimination: alleviating the disadvantage and identifying the consequence of the disability

Mr H Ahmed v Department for Work and Pensions [2022] EAT 107; July 14, 2022

Facts

Mr H Ahmed (HA) is disabled; he had been employed by the Department of Work and Pensions (DWP) since 2007. By December 2016 he had accumulated 22 days' sickness absence in the previous 12 months. He was subject at that time to a regime where eight days absence in a rolling 12 months was a trigger point for consideration for management action under the DWP's absence policy. He claimed that the provision, criterion or practice (PCP) which required him to achieve a particular rate of attendance to avoid being subject to the absence management procedure, placed him at a substantial disadvantage.

HA also made complaints that other PCP's, such as *'being required to be flexible when taking his scheduled morning breaks'* and the requirement to *'undertake an excessive workload',* also placed him at a substantial disadvantage because of his disability.

HA had been assessed by occupational health and reasonable adjustments recommended. It was his contention that these adjustments were not being adhered to and, as a result, the respondent made repeated requests for him to work during his break and take on additional work. He submitted he was subject to unfair criticism as a result of refusing these requests.

Employment Tribunal

The ET rejected HA's reasonable adjustments claim under s20 of the Equality Act 2010.

The ET recognised that further to *Griffiths v SoS for Work and Pensions* [2015] EWCA Civ 1265; Briefing 777 [2016], the application of a PCP requiring attendance at a particular level, which creates the risk of disciplinary action, could put a disabled employee at a substantial disadvantage. However, the ET found in this case that a reasonable adjustment had been made to the absence management procedure by increasing the trigger days from eight to 11. Going further, the ET stated it would not be reasonable for the DWP to allow HA to take more than 11 days absence without the absence management procedure being invoked.

The ET found that HA was asked to be flexible with his break times and take on additional work but he had refused, and that no disciplinary action was taken as a result. Therefore, it considered there was no substantial disadvantage.

It stated that the criticism HA was subjected to arose from his difficult behaviour, and was not related to his disability. Further to the evidence provided, and on the basis of his conduct at the hearing, the ET considered that that claimant was *'a very difficult employee to manage'* [para 13] and despite his social anxiety it had no evidence that his behaviour was a consequence of his disability. Therefore, the ET did not conclude that his disability was an effective cause of his conduct which resulted in the criticism.

Employment Appeal Tribunal

The EAT noted that the purpose of the adjustments recommended by occupational health were to alleviate levels of stress suffered by HA at work and were intended to reduce the risk of stress as a reaction to work.

It found that the ET did not address why the DWP considered the moving of the trigger days in the absence management procedure from eight to 11 was sufficient to have met the threshold for a reasonable adjustment and fulfil the purpose of alleviating the disadvantage faced by HA. It also noted that some absence may have resulted from the DWP's failure to implement a stress reduction plan.

Further, the ET did not explore whether there were any other adjustments which would have been reasonable for the DWP to make to alleviate the disadvantage. Nor did the ET address the respondent's admitted failing in implementing a stress reduction plan.

With regards to the other claims, the EAT found that there was never an occasion where HA actually had to be flexible with regards to his breaks (despite requests) and so the adjustment in place was not disturbed. Similarly, where the PCP was to take additional work, again HA did not actually do this additional work, and so the adjustment was not disturbed.

When looking at the criticism which HA was subjected to for refusing to be flexible and take on additional work, the EAT found that the ET had conflated the unfavourable treatment complained of (the criticism) with the consequence of the disability. The ET appeared to consider the unfair criticism was a consequence of the disability, rather than the unfavourable treatment. The ET failed to consider whether the claimant's response to being asked to be flexible, and take on additional work, was because of the attempted removal of the adjustments and therefore another consequence of his disability in the broad sense, as per *Risby v London Borough of Waltham Forest* UKEAT/0318/15/DM.

... it is essential to consider whether the adjustment made actually alleviates the disadvantage faced by a disabled employee.

The judge stated that those matters which had been argued successfully on appeal should be remitted for consideration by the ET. Accordingly, the ET will consider the broader issue of reasonable adjustments to the absence management plan and what steps would be reasonable for the employer to have to take to alleviate it. It will also consider whether HA's behaviour was a consequence of his disability in the broad sense.

The EAT invited submissions on whether this should be the same of differently constituted ET panel.

Implications for practitioners

This case illustrates the ongoing difficulty, particularly for litigants in person, of correctly defining the PCP. In this case the PCP had been reformulated multiple times before reaching the EAT. Accordingly, this task requires careful thought at the beginning of a matter and should not be reverse engineered based on the disadvantage alleged.

Additionally, which may not come as a surprise, it is essential to consider whether the adjustment made actually alleviates the disadvantage faced by a disabled employee. If not, an employer then has to consider whether there are any other adjustments which would be reasonable to make to alleviate the disadvantage.

Finally, it is important to correctly identify the consequence of the disability; the unfavourable treatment complained of cannot also be a consequence of the disability.

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Deposit order threshold and liability for race discrimination

Sami v Avellan; Sami v NanoAvionics UK Ltd (1), Nanoavionika UAB t/a Nanoavionika LLC (2), Ast & Science LLC (3) ✦ [2022] EAT 72; May 17, 2022

Facts

Tariq Sami (TS) was employed as a UK Sales Director at Nanoavionics UK Ltd (the first respondent). He was dismissed in May 2019, purportedly for performance related reasons.

TS brought tribunal proceedings claiming direct and indirect race discrimination because he was non-Lithuanian, contrary to the Equality Act 2010 (EA). Whilst his primary claims were against the first respondent, TS also brought claims against Nanoavionika UAB t/a Nanoavionika LLC, a company based in Lithuania, (the second respondent), Ast & Science LLC (the third respondent), and Mr Abel Avellan (AA) who was the second respondent's chairman and the third respondent's chief executive.

TS claimed the second respondent was liable as the first respondent's agent under s110 EA and for aiding contraventions of the Act under s112 EA. TS also claimed that AA had aided the acts of race discrimination against him within the meaning of s112, particularly, by approving the discriminatory dismissal and failing to conduct an appeal.

The second respondent asserted that TS had failed to particularise how it was the first respondent's agent, or how it had induced or knowingly helped discrimination by the latter.

AA claimed it was inherently implausible that he, as a non-Lithuanian, would discriminate against TS as alleged. The respondents applied for deposit orders regarding these complaints.

Employment Tribunal

Considering whether the second respondent was an agent of the first, the ET accepted there was a specific power of attorney granting authority to a second respondent's director to execute documentation terminating TS's employment, and therefore it may exercise some control over that company's actions.

However, the ET held there were little reasonable prospects of TS establishing agency because the claim against the second respondent was based on *'mere assertions'* and ignored the employment relationship between TS and the first respondent. For the same reasons, the ET also held there was little reasonable prospect of success of him showing the second respondent knowingly aided the first under s112 EA [para 22].

The ET further held there was little reasonable prospect of TS showing AA, a non-Lithuanian, had knowingly helped the first and second respondents contravene the EA under s112(1) EA and therefore he could not benefit from s112(2). The ET's reasons were that TS was only employed for a short period and his dismissal was alleged to be for *'poor performance/discriminatory'* [para 24.4].

The ET ordered deposits regarding these claims which TS failed to pay and the claims were consequently struck out. TS appealed the ET's deposit orders.

✦ [2022] IRLR 656

Employment Appeal Tribunal

ET Rules

Rule 39, Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the ET Rules) provides that:

> *Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*

The deposit order threshold of *'little reasonable prospect of success'* under rule 39(1) is lower than the strike out threshold of *'no reasonable prospect of success'* under rule 37(1)(a) of the ET rules.

The EAT considered *Sharma v New College Nottingham* UKEAT/0287/11/LA, in which Wilkie J indicated that a similar approach applied to making both deposit orders and strike out, where it is only in an *'exceptional case'* that the courts will strike out a claim where the core facts are in dispute. However, the EAT noted that the similarity between both orders cannot have the effect of overriding the different wording of the respective rules, and that the lower deposit order threshold gives a tribunal greater leeway to make a preliminary assessment of the strength of the case, including the factual credibility of the allegations (*Van Rensburg v Royal Borough of Kensington-Upon-Thames* UKEAT0096/07/MAA considered).

[the EAT] underlined the need for caution before making a deposit order where core facts are in dispute...

The EAT also considered the comments of Simler P in *Hemdan v Ishmail* [2017] IRLR 228, that whilst the test for a deposit order is less rigorous than for a strike out, there must still be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or defence [para 12]. The EAT highlighted:

> *The practical effect of a deposit order on the right of access to justice – probably due more to the costs warning if the case is pursued than to the deposit sum itself – means that there must be a proper basis for making such an order.* [para 26]

The EAT also considered Simler P's later comment in *Hemdan* that if there is a core factual conflict, it should be resolved at a full merits hearing where evidence is heard and tested. The EAT considered these later words guidance which should not replace the words in rule 39, nor prevent a tribunal from deciding a factual allegation has little reasonable prospects, where appropriate. However, it underlined the need for caution before making a deposit order where core facts are in dispute, and the important safeguard of sufficient reasons for deciding a claim or allegation has little reasonable prospects of success.

Decision

On the agency claim under s110 EA, the EAT held that the ET's reasons did not provide a sufficient basis for ordering a deposit. TS had relied on three factors supporting an agency relationship between the first and second respondents. Some of the facts pleaded did not appear to be in dispute and others were supported by documents. This *'provided a foundation more secure than "mere assertions" to support the existence of an agency relationship'.* [para 49]

Additionally, TS's employment with the first respondent did not provide a proper basis for doubting he would be able to establish an agency relationship between the first and second respondents. On the contrary, his employment by the former was consistent

with the latter acting as its agent when, for example, TS was dismissed by a second respondent director pursuant to the power of attorney.

On the claim under s112 EA, the EAT found that the ET's reasons did not amount to a sufficient basis for concluding the claim had little reasonable prospect of success. TS had put forward facts, some supported by documents, to show why second respondent employees/agents may have *'helped'* his dismissal. Additionally, TS had provided a contemporary note supporting the requisite knowledge element of s112. The EAT did not consider that TS's employment with the first respondent undermined his contention that the second respondent knowingly helped in discrimination against him. The matters he proposed to support that claim went beyond *'mere assertions'.*

Regarding the claim against AA, the EAT considered that TS had provided some supporting documentary evidence in respect of his claim based on s112. For example, TS had produced a contemporary note of the meeting in which he was informed of the decision to dismiss him, in which he recorded that the matter had been discussed with lawyers and *'with Abel',* a reference to AA. TS had also produced text messages supporting the allegation because they referred to TS having been told that he was dismissed on *'Abel's authorisation'.*

The EAT found it difficult to see how either of the ET's reasons for ordering the deposit were relevant to the strength of the claim. In relation to the first reason – TS's short period of employment – the EAT considered this neutral to his prospects, noting discrimination can occur in short or long-term employment. In relation to the second reason – that the dismissal was alleged to be for *'poor performance/discriminatory'* – the EAT considered it unsurprising that the respondents had cited this reason, as people do not generally admit to discrimination. The addition of the word '*discriminatory'* highlighted that the reason for the dismissal was in dispute.

The EAT concluded that the deposit orders made in relation to the second respondent and AA could not stand and, as a consequence, the strike out orders based on TS's failure to pay the sums ordered must fall away.

Comment

This case highlights the need for caution when making deposit orders in discrimination claims and the importance of having sufficient reasons when deciding a claim or allegation has little or no reasonable prospects of success, particularly where core facts are in dispute.

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UK Covid-19 Inquiry

The UK Covid-19 Inquiry is the independent public inquiry set up to examine the UK's response to and impact of the Covid-19 pandemic, and learn lessons for the future.

Baroness Heather Hallett, a former Court of Appeal judge, was appointed chair of the Inquiry in December 2021. Following a public consultation, the terms of reference were confirmed in June 2022.

Covid-19 Inquiry terms of reference

The Inquiry will examine, consider and report on preparations and the response to the pandemic in England, Wales, Scotland and Northern Ireland, up to and including the Inquiry's formal setting-up date, June 28, 2022.

In meeting its aims, the Inquiry will, among other things, consider any disparities evident in the impact of the pandemic on different categories of people, including, but not limited to, those relating to protected characteristics under the Equality Act 2010 and equality categories under the Northern Ireland Act 1998. The Inquiry will be looking at the impact of the pandemic on inequalities at every stage of its investigations.

The aims of the Inquiry are to:

1. Examine the Covid-19 response and the impact of the pandemic in England, Wales, Scotland and Northern Ireland, and produce a factual narrative account, including the:
   a) public health response across the whole of the UK
   b) response of the health and care sector across the UK
   c) economic response to the pandemic and its impact.

2. Identify the lessons to be learned from the above, to inform preparations across the UK for future pandemics.

The terms of reference require the Inquiry to listen to the experiences of bereaved families and others who have suffered hardship or loss as a result of the pandemic. It will include informal mechanisms, including a 'listening exercise', to gather experiences of the pandemic, including from those most affected and from *'those whose voices are not always heard'*. The Inquiry is planning to begin the listening exercise in shortly. It will review existing research about the pandemic from around the world and commission its own research into areas where necessary and will be assisted by a team of lawyers, groups of scientific and other experts.

The chair has pledged to deliver reports with analysis, findings and recommendations whilst the Inquiry's investigations are ongoing, so that key lessons from the pandemic are learned quickly.

Modules

The Inquiry will be splitting its investigations into sections, or modules, which have different subject topics. It has announced three modules: 1) resilience, planning and preparedness across the UK, 2) core political decision-making, and 3) the health care system.

Module 1 will consider the extent to which the risk of a Coronavirus pandemic was properly identified and planned for. It will look at the UK's preparedness for whole-system civil emergencies, including resourcing, the system of risk management and pandemic readiness. It will scrutinise government decision-making relating to planning and seek to identify lessons from earlier incidents and simulations and international comparisons.

Module 2 will examine the UK's core political and administrative decision-making in relation to the Covid-19 pandemic.

Working broadly in parallel, teams based across the UK will investigate each topic, obtaining and analysing evidence, and ensuring the Inquiry's core participants are provided with documents and are able to prepare for the public hearings.

The Inquiry will announce further modules in 2023. These will likely cover both 'system' and 'impact' issues including: vaccines, care sector, government procurement, test and trace, government business and financial responses across the UK; health inequalities, education, public services, public sector.

Preliminary hearings

A preliminary hearing is a procedural hearing at which decisions about the procedure for the conduct of public hearings will be made.

The preliminary hearing for Module 1 opened on October 4, 2022; and the preliminary hearings for Module 2 began on October 31st. Hearings for Module 2A (looking at decision-making in Scotland), Module 2B (decision-making in Wales) and Module 2C (Northern Ireland) take place in the first week in November.

Preliminary hearings will be open to the public and will be live streamed on the Inquiry's YouTube channel.

Core participants

Throughout its lifetime the Inquiry will open different modules for individuals to apply to be core participants. More information on how to apply to be a core participant can be found here.

A core participant is an individual, institution or organisation that has a specific interest in the work of the Inquiry, and has a formal role defined by legislation. Core participants have special rights in the Inquiry process. These include receiving disclosure of documentation, being represented and making legal submissions, suggesting questions and receiving advance notice of the Inquiry's report.

Public hearings

The Inquiry has been established under the Inquiries Act 2005; the chair will have the power to compel the production of documents and call witnesses to give evidence on oath. At public hearings the Inquiry will formally hear evidence, including from witnesses under oath.

Full public hearings for Module 1 will be starting in spring 2023. The Inquiry will take evidence for Module 2 next summer.

Retained EU Law (Revocation and Reform) Bill

The Retained EU Law (Revocation and Reform) Bill was introduced in the House of Commons on September 22, 2022. The aim of the Bill is to:

1. Repeal or assimilate retained EU law within a defined scope, by the end of 2023;
2. Repeal the principle of supremacy of EU law from UK law by the end of 2023;
3. Facilitate domestic courts departing from retained case law;
4. Provide a mechanism for UK government and devolved administration law officers to intervene in cases regarding retained case law, or refer them to an appeal court, where relevant;
5. Repeal directly effective EU law rights and obligations in UK law by the end of 2023;
6. Abolish general principles of EU law in UK law by the end of 2023;
7. Establish a new priority rule requiring retained direct EU legislation to be interpreted and applied consistently with domestic legislation;
8. Downgrade the status of retained direct EU legislation for the purpose of amending it more easily;
9. Create a suite of powers which allows retained EU legislation to be revoked or replaced, restated or updated and removed or amended to reduce burdens.

The government's intention is that the Bill will enable it to amend more easily, repeal and replace retained EU Law.

Retained EU law

Following the UK's decision to leave the EU, the European Union (Withdrawal) Act 2018 (EUWA) was enacted to allow for the retention of most EU law as it applied in the UK legal system on December 31, 2020.

The EUWA incorporated EU law which applied to the UK onto the statute book as 'retained EU law' (REUL), creating a new category of domestic law possessing most of the special features of EU law.

There are two thousand, four hundred pieces of retained EU law (REUL) in force.

REUL consists of a combination of EU regulations, decisions and tertiary legislation, domestic legislation passed to implement EU directives, general principles of EU law, directly effective rights and obligations developed in relevant case law of the Court of Justice of the European Union, and other principles developed in that case law.

The EUWA defines REUL by reference to three categories:

1. EU-derived domestic legislation. This (typically) covers any primary or secondary legislation implementing one or more EU obligations, including those under EU directives.
2. Direct EU legislation. This is defined as all EU regulations, decisions or tertiary legislation that had direct application in the UK, including certain parts of the EEA agreement.
3. Directly effective rights, powers, liabilities, obligations, restrictions, remedies and procedures in EU law.

Committee stage

The Bill passed its second reading in the House of Commons on October 25, 2022. It will now enter committee stage and will be scrutinised in detail by the Public Bill Committee. To inform its consideration of the Bill, the committee can receive written evidence from external organisations and members of the public as well as receiving

oral evidence. The committee's call for written evidence on the Bill can be found here. The first sitting of the Public Bill Committee is scheduled for November 8 and the committee is expected to report by November 22.

Potential impact of the Bill

What is proposed is that, unless specific action is taken by a minister to retain, restate or replace the legislation in question; REUL will be 'sunsetted' i.e. stop being UK law at the end of 2023.

If the Bill proceeds and there is no specifically generated regulations preserving each of the 2,400 pieces of REUL, they will cease to have effect at the end of 2023. This date can be extended by a minister by regulation to no later that June 23, 2026.

Clauses 4 and 5 of the Bill abolish the principle of supremacy of EU law and general principles of EU law; after the end of 2023, EU law will no longer take priority over UK law.

The Bill allows for a major transfer of power from parliament to the executive giving powers to ministers and devolved authorities to make wholesale changes by statutory instrument with limited scrutiny or opportunity to challenge.

Clause 12 allows a minister to *'restate, to any extent'* by regulation i.e. rewrite/change/amend any aspect of EU derived law, such as TUPE or the Working Time Regulations, which is being retained. Clause 14(2) allows the restatement to *'use words or concepts that are different from those used in the law being restated'.*

Any EU law which a minister decides will be kept will, after the end of 2023, be called 'assimilated law'.

Impact on employment rights

The Bill will have a major impact on employment law and workers' rights. Unless preserved by specific regulations, protections such as TUPE, the Working Time Regulations, regulations protecting atypical workers (such as agency workers) and certain health and safety regulations will be removed from UK law at the end of 2023; these include, for example, the:

- Working Time Regulations
- Agency Workers Regulations
- Fixed Term Employees Regulations
- Part Time Worker Regulations
- TUPE Regulations

Article 157 of the EU Treaty will no longer apply. While the principle of equal pay is protected within the Equality Act 2010 (EA), Article 157 is relied on in current equal pay challenges. If abolished, this could lead to a new approach to equal pay as courts move away from interpreting the EA in accordance with EU law.

The EA is primary legislation and primary legislation would be required to amend it. However, EU derived employment discrimination case law is included in the scope of the Bill. Clause 7(4) allows the higher courts to ignore case law decided under EU law.

The TUC referred to this development as *'a Tory assault on workplace rights'*, referring to the comment of Richard Arthur, head of trade union law at Thompsons Solicitors, that the Bill *'takes a hatchet to employment rights derived from the EU … with salvation only available at the whim of the new Secretary of State for Business, Energy and Industrial Strategy, Jacob Rees-Mogg.'*

ABBREVIATIONS

AC	Appeal Cases
BSL	British Sign Language
CA	Court of Appeal
CEV	Clinically extremely vulnerable
CFS	Clinical frailty scale
DLA	Discrimination Law Association
DNR	Do not resuscitate
EA	Equality Act 2010
EAT	Employment Appeal Tribunal
ECHR	European Convention on Human Rights 1950
ECtHR	European Court of Human Rights
EHRC	Equality and Human Rights Commission
ET	Employment Tribunal
ERA	Employment Rights Act 1996
ETA	Employment Tribunals Act 1996
EU	European Union
EUWA	European Union (Withdrawal) Act 2018
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
GP	General practitioner
HHJ	His/her honour judge
HMRC	Her Majesty's Revenue and Customs
HRA	Human Rights Act 1998
ICR	Industrial Case Reports
IRLR	Industrial Relations Law Reports
IT	Information technology
J/JSC	Judge/Justice of the Supreme Court
LJ/LJJ	Lord/Lady Justice of Appeal (singular and plural)
LLP	Legal liability partnership
NHS	National Health Service
NICE	National Institute for Clinical Excellence
ONS	Office for National Statistics
PCP	Provision, criterion or practice
PHE	Public Health England
PPE	Personal protective equipment
REUL	Retained EU law
SC	Supreme Court
SEND	Special educational needs and disabilities
SIA	State Immunity Act 1978
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