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An inspirational lead in fighting for equality and social justice

This edition of *Briefings* is complemented by reports of legal reform and judgments in discrimination cases from across these islands. *CT & FE v Dunnes Stores* is the first Irish court judgment in a case brought by Roma service users who were discriminated against on the grounds of their ethnic origin. As such complaints are often settled, and it is not clear whether there have been any such judgments in the UK, it is a step forward to have a court decision which can be published and used to educate and improve practice among those providing services to this particularly marginalised group. Without the support of the Free Legal Advice Centres, the complainants would have been unable to access justice, or the equality law to be enforced.

The Scottish legislature also features; first, in Robin Moira White's account of the debate and arguments around the Gender Recognition Reform Bill, in two major Court of Session judgments with significant impact and also in the interesting Sheriff Court's decision following a complaint by the Billy Graham Evangelistic Association.

In *Jasim v Scottish Ministers* (Students Award Agency Scotland), the Court of Session upheld a medical student's complaint in relation to support allowances for university students, the residency requirements of which discriminated against her on the basis of her immigration status. In the *Petition of For Women Scotland Ltd*, Lady Haldane confirmed that the definition of 'sex' in the Equality Act 2010 is not limited to biological or birth sex, but includes those in possession of a GRC stating their acquired gender, and thus their sex. This latter decision is subject to appeal so the debate about this definition will continue.

Earlier last month, the DLA was devastated to learn of the sudden death of Barbara Cohen. Many tributes to her professionalism, legal expertise, drafting and training skills, as well as her accessibility, kindness, generosity and joy have poured in from across the world as friends and family learned of her death.

Barbara played a hugely significant role in the development of discrimination law in the UK and across Europe. Passionately believing in equality, she was one of the inspirational founder members of the DLA and she supported the association and *Briefings* throughout her career and long after her resignation from the executive committee. In the words of Catherine Rayner who chaired the DLA committee between January 2015 and February 2019, *'she worked with great energy, wit and determination, to improve and promote the policy and practice of discrimination law for the benefit of those who suffer discrimination'*. Barbara's legal career included providing advice and support to some of the most significant events of recent decades ranging from Greenham Common, the Wapping printers' dispute, the Stephen Lawrence Inquiry, campaigns which led to the Race Relations (Amendment) Act 2000 which extended it's reach to the police and implemented the new race equality duty, or the development of the EU Race and Framework Directives, to name just a few. Her clarity in explaining discrimination law is legendary and her extensive training in the UK, Europe and Kenya has left a lasting legacy of trained and committed discrimination experts.

Renowned for *'doing life at 101%'*, Barbara devoted her astonishing energy, tenacity and fierce determination to the fight for equality and social justice. She was described by Ulele Burnham, chair of the DLA from 2009 to 2012, as acting *'as the backbone of the DLA … [making] sure that we keep our eyes firmly fixed on the objectives that brought the organisation into being'*. Gay Moon's tribute to her reflects her enormous contribution to the DLA as well as her warmth and generosity.

When *Briefings* celebrated the DLA's 20th anniversary in 2015, Barbara was asked about what she thought was the greatest challenge to discrimination protection. Aware that there is *'no real protection if anti-discrimination law is not enforced'*, she reflected on the irony that, although the law in Great Britain was possibly the strongest anti-discrimination legislation in the world, government decisions and actions had *'undermined both the law and the means of enforcing the law so that actual protections are possibly weaker than in previous decades'*. She highlighted swingeing cuts to legal aid, the removal of funding for law centres and advice centres as well as laws and policies, especially in the immigration or security fields, *'based on false fears created by politicians and stirred up by the media, which induce or encourage discrimination'*.

Aware that current government policy continues to contribute to such false fears or proposes to undermine protection of fundamental human rights, it is vital that we follow Barbara's inspirational lead in fighting to ensure access to justice and protection against discrimination.

Movement and action were the essence of Barbara; life is smaller without her. The DLA offers sincere condolences to all her family and friends.

Geraldine Scullion
Editor, *Briefings*

Barbara Cohen – reflections on her life

Gay Moon, long-standing DLA member and friend for about 40 years, reflects on the life and career of Barbara Cohen who died on June 8, 2023.

Barbara Cohen was a wonderful, happy, committed, progressive person who made such an enormous contribution to the DLA – all members will be saddened by the news of her death.

When Paul Crofts first mooted the idea of a discrimination law association – some 26 years ago – she quickly became involved. As a co-founder she was inspirational; without her involvement and support, the project might well have foundered.

Barbara continued to support the DLA for the rest of her life. She joined the executive committee in 2002, becoming its vice-chair in 2003. Ten years later she agreed to take on the position of chair, which she held until January 2015, continuing to serve on the committee until February 2016. However, long after she had given up her official role on the committee, she contributed to every facet of its output. Only last month she completed its submission to the European Commission against Racism and Intolerance (ECRI) in her usual comprehensive and reflective way.

This barest sketch of Barbara's involvement does not do justice to her unceasing and totally dependable commitment to our association. So, for the many members who knew her, and for the much wider community of international equality activists, the news of the death of our so-energetic, constantly smiling, sometimes critical, frequently cajoling, irrepressibly energetic, yet always kind, friend, will have been a great shock.

Career

Barbara was born in June 1940 in Salt Lake City, Utah in the USA. After a first degree in America, she moved to the UK to study at the London School of Economics. Thereafter she worked in a youth project and a Citizens Advice Bureau before marrying and giving birth to her two children, Rachel and Hilary.

Studying at evening classes, she gained a first-class law degree and then trained as a solicitor at Bindman's, qualifying in 1982. From there she moved to the National Council of Civil Liberties (now Liberty), thereafter taking up a position at Hodge, Jones and Allen (HJA) solicitors, in Camden.

While at HJA, she became involved in one of the most important early county court discrimination cases representing John Alexander, a prisoner in Parkhurst who had been denied a request to work in the prison kitchens. Alexander sued the Home Office on the grounds of race discrimination and succeeded but was only awarded nominal damages of £50 for his injury to feelings. Barbara supported his appeal which established the basic principle that such damages should be compensatory and not nominal, and his award was increased ten-fold.

This was not her only test case. She also brought cases against the police, including a successful House of Lord's case for the women of Greenham Common regarding the Ministry of Defence's boundaries.

DLA members will recall Barbara as being always feisty, determined and tenacious.

After HJA, Barbara worked for the London Borough of Camden for a short period acquiring valuable experience of local authority contracting. It was here that she started thinking seriously about the way in which procurement could be a means for pursuing progressive equality policies. Inevitably she became deeply involved in the proposals for a fully effective public sector equality duty.

Barbara joined the Commission for Racial Equality (CRE) around 1995, ultimately becoming the Head of Enforcement and Legal Policy. She left in 2002 and in her role as a discrimination law consultant, she conducted training across Europe, prepared reports and wrote Codes of Practice and Guidance documents for the Equality and Human Rights Commission (EHRC) and the UK government.

She also worked with the Northern Ireland Council for Ethnic Minorities as a trainer on a number of its training projects including in particular its EU funded Strategy on Litigation tackling Discrimination project (SOLID) which provided intensive training on equality law in all the EU countries. The director of the European Network Against Racism, Kim Smouter Umans, paid tribute to Barbara's contribution to its SOLID training programme between 2004 – 2006, which trained up around 300 lawyers on the EU Race Directive, by holding a minute's silence at the opening of its General Assembly on June 15, 2023.

Contribution to the DLA

DLA members will recall Barbara as being always feisty, determined and tenacious.

She had very high standards both for herself and for others; if Barbara approved what you had written, you knew that you had got it right – though nearly always, she had something useful to add. As well as being a co-author of the second edition of the Legal Action Group's Discrimination Law Handbook in 2007, contributing invaluable chapters on the public sector equality duties, harassment and the powers of the old Commissions and the new EHRC, she made no less than 24 contributions to *Briefings* between March 1996 and 2022.

Barbara's articles and case notes in *Briefings* reflected her special concerns and interests. Her first article entitled *'Fighting Discrimination: Two Steps Backward - The Asylum & Immigration Bill',* was published in 1996. This examined government action designed to make the UK a far less attractive destination for immigrants through increased official scrutiny and the withdrawal of benefits. Inequality in immigration was an issue she worked on all her life and she returned to it again in November 2013 in an article entitled *'A wider and deeper culture of suspicion'.* In later articles, she explored the critical examination of the UK by the UN's International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in 2011, and, with Razia Karim, in 2018 challenged the lawfulness of the Home Office's 'hostile environment' policy which had been exposed by the Windrush scandal.

Her last article for *Briefings* in July 2022 provided a valuable critique of the proposal for a 'Bill of Rights' in which she set out its potential to limit and/or dilute the protection of human rights in the UK.

As well as writing on race discrimination issues, Barbara's also reported on landmark disability and age cases, including *Mangold v Helm ECJ* in 2006 and *Attridge Law v Coleman* in 2009. Barbara was also a demon consultation-responder, writing or contributing to more consultations than any other DLA member. Her responses were always widely respected, being consistently detailed, demanding and comprehensive. Among other countless responses, she helped draft the shadow submission to ICERD in 2016 and represented the DLA in person in Geneva when the UN Committee examined the UK. Many of these – including her ECRI submission in May 2023 – had deep significance, such as her contribution to the discussion about the continued UN accreditation of the EHRC. She would often bring these issues to the DLA committee's attention, as she always had her finger firmly on the pulse of equality law throughout the UK, Europe and around the world.

International collaboration

Starting Line Group

While at the CRE, Barbara became involved with the Starting Line Group (SLG) initiative and contributed to its drafting of a proposal for an EU Directive tackling race and ethnic discrimination. The SLG gained enormously from her insights and experience of working with the Race Relations Acts and her understanding of how racial and ethnic discrimination was fought on the national level.

... she always had her finger firmly on the pulse of equality law throughout the UK, Europe and around the world.

At the time only six EU countries had specific race equality legislation and not many believed in the need for legislation to harmonise and provide minimum standards for protection on racial and ethnic discrimination across all the EU member states.

Barbara was not one of those. Together with the other members of the SLG in the late 1990s, she campaigned for this change, recognising the need for a broader European treaty which would empower European institutions to take measures to combat discrimination. These efforts – along with those of others – led to the adoption of Article 13 of the Amsterdam Treaty which paved the way for the two EU equality directives – 2000/43/EC on race and ethnic origin, and 2000/78/EC on workplace discrimination on the grounds of religion or belief, disability, age or sexual orientation. Her expertise was an invaluable asset to the SLG, whether on drafting definitions, illuminating case law or sharing her experience and expertise on a particular issue.

Migration Policy Group

She continued her involvement throughout the process of discussion and debate until the EU anti-discrimination directives were adopted in 2000. Once the European Commission adopted a proposal for a directive, very similar to the one proposed by the SLG, she was always ready and available to continue the fight and assist members of the European Parliament draft their amendments, answering questions and promoting the directive. Throughout this time her openness to understand the challenges faced by other countries and her availability were a particular asset for an informal network of equality activists based around the Migration Policy Group (MPG) in Brussels. As part of the MPG network of experts following the adoption of the 2000/43 Race Directive, Barbara worked on a three-year project to write a report on the effectiveness of the implementation of UK legislation, analysing its potential gaps and good practices when compared with the EU directives. She also engaged with the training component of this project for 15 countries with a very broad range of participants, including trade unions, practicing lawyers, and judges.

Barbara was heavily involved in two other extensive MPG training projects: between 2004-2006 she contributed to *'Mapping capacity of civil society dealing with anti-discrimination'* in 13 countries; between 2006-2008 she contributed to its *'Anti-Discrimination and Diversity Training'* project where her ability to adapt to all national contexts was considered remarkable.

Many jurists, lawyers and activists across Europe have thanked Barbara for the training she gave them, commenting on her unbelievable skills when explaining apparently rigid and complex legal concepts to non-lawyers.

Equal Rights Trust

Barbara was a key member of the Equal Rights Trust's expert working group tasked with drafting a Declaration of Principles of Equality; published in 2008, these contained a set of legal principles which were in due course endorsed by more than 140 experts from across the globe.

This was work of great significance. For more than a decade afterwards, the Declaration was the basis for the Trust's technical support to campaigns for equality law in countries ranging from Armenia to the Philippines. It was also central to the Trust's efforts to build consensus on the need for an inclusive, comprehensive approach to equality at the international level, culminating in December 2022, when the Office of the UN High Commissioner for Human Rights issued *'Protecting Minority Rights – a Practical Guide to Developing Comprehensive Anti-Discrimination Legislation'.*

Kenya

Between 2009 and 2012, Barbara acted as an expert adviser to a joint project of the Equal Rights Trust, the Federation of Women Lawyers – Kenya and the Kenya Human Rights Commission, which sought to develop consensus on the need for comprehensive equality law in Kenya.

... a wonderful person to work with, so deeply knowledgeable, encouraging and challenging at exactly the right time...

This project was instrumental in securing the establishment of a unified, independent equality body, the National Gender and Equality Commission. It also inspired and helped to develop the careers of a number of lawyers who are now recognised national experts on equality.

Assessment

Barbara's unique contribution was recognised when she received a Lifetime Achievement Award from Liberty in 2001:

> *For her tireless commitment to racial justice and equality, as demonstrated by her important contributions to the Race Relations (Amendment) Act 2000, and for her extensive and dedicated public advocacy and training in the field of anti-discrimination law over many years.*

Although the award was very well-deserved, it was premature – she had by no means finished her work in 2001!

Many of Barbara's friends and colleagues have contacted the DLA on hearing of her death, providing touching insights and conveying their deep respect and affection. One example from a former chair of the Citizen Advice Equality Committee of which she was an independent member, is typical remembering her:

> *… as a wonderful person to work with, so deeply knowledgeable, encouraging and challenging at exactly the right time and in the most effective of ways. She may not have realised how critical a role she played in pushing Citizens Advice to really advance its understanding of equality, diversity and inclusion and especially discrimination.*

The work that she did with fellow independent members to hold the organisation to account, at a critical juncture, was a real catalyst to progress. I loved my conversations with Barbara and always held with that wonderful twinkle in her eye.

A colleague from the MPG emphasised her professionalism as well as her warmth and enthusiasm:

… her ability to adapt, listen to people, understand their needs, making accessible what seems not to be, her accessibility, kindness and joy. Her loyalty to what she believed in and the fact she would not [put] her name on something she would not agree with…. She was always ready to adapt to changes of situations or programmes and to find solutions…She was loved by all the trainees and people she worked with… I can remember her arriving late at night in a remote village in Romania to provide a training the next day and spending the night with us and all the participants in the hotel disco.

The DLA celebrated its 20th anniversary as well as the anniversary of the Race Relations Act 1965 and other equality laws in 2015. In her contribution to a *Briefings* article entitled *'The distance travelled to secure legal protection'*, Barbara described the DLA's achievements as follows:

A main achievement of the DLA, from the outset and continuing, is the bringing together of people working in different disciplines who share a commitment to eradicate discrimination using the law as one of the means of doing so. DLA has been able, during these 20 years, to draw on the knowledge and experience of its members in all of its work; this has given it greater strength and authority, with DLA's views increasingly sought by government and parliamentarians.

She was... extremely generous with her time to those who were new on the committee, or who perhaps simply needed her wisdom and guidance.

Though this comment was directed to the DLA, it also reflects her beliefs and achievements.

The last word must go to the DLA committee:

She was also just a lovely person, who was extremely generous with her time to those who were new on the committee, or who perhaps simply needed her wisdom and guidance. She was the type of activist we look up to, who would lead the way and light the path so that we could follow and hopefully learn. She was a wonderful person to share time with and you were always glad to find her in attendance at events, both as a DLA alumna and as a friend. Her contributions and generous nature will be sorely missed.

Barbara was not one to blow her own trumpet. The fact is, though, that much of the reputation and status of the DLA today has been built on her work and achievements over many years. This is why we shall miss her so very much and why we are all privileged to be able to celebrate her life lived so well in pursuit of the fight for equality and social justice.

Scottish Gender Recognition Reform Bill

Robin Moira White, barrister at Old Square Chambers, explores the history of gender change legislation in the UK and its international context, how proposals for change have fared in the UK and what may happen in coming months. Robin is Britain's only transgender discrimination barrister; she has given evidence to the Scottish and UK parliaments on the Gender Recognition Reform Bill and also attended the Scottish parliamentary sessions which debated the Bill in December 2022.

Historical protection for gender reassignment and the facility for gender change in the UK

Before the case of *Corbett v Corbett* [1970] 2 All ER 33, the few individuals wanting to change their gender had often been dealt with privately and quietly by registrars applying the discretion to correct birth certificates normally used for intersex people who might be registered as one sex but later identify with another. The high-profile *Corbett* case concerning the divorce of a minor member of the aristocracy and trans model April Ashley, brought matters into public focus. Thereafter trans people had to wait almost 30 years to find legislative acceptance and protection in the UK. That came first with the Sex Discrimination (Gender Reassignment Regulations) 1999 which provided employment protection for trans people undergoing medically-supervised transition.

The ground-breaking Gender Recognition Act 2004 (GRA) provided a mechanism for binary trans people to have their gender recognised by the state. This had particular importance at the time as pensions (state and private) were paid at different ages for men and women, and marriage could only be conducted between persons the state recognised as a man and a woman. Evidence of gender-change had (and still has) to be submitted to a panel of legal and medical experts and if the panel is satisfied, a Gender Recognition Certificate (GRC) is issued, which allows the alteration of the individual's birth certificate from 'boy' to 'girl', or vice versa.

Non-binary identities were not considered in the GRA, although a case regarding the position of a US citizen recognised as non-binary in the US who is arguing that the panel has power to issue a non-binary GRC, is currently being considered. The effect of a GRC is that the person is recognised 'for all purposes' in their new gender except where the GRA or other relevant legislation provides. The GRA includes a number of exceptions in areas such as parenthood, social security payments and the inheritance of peerages. Whilst the equalisation of pension age payments and the coming of equal marriage may have reduced the practical effect of a GRC, it has huge symbolic importance to some trans people and has become significant in Equality Act 2010 (EA) matters as we shall see.

Equality Act 2010

The next big change in the UK was the coming of the EA. For most of the nine characteristics for which the EA provides protection (age, disability, gender reassignment, marriage and civil partnership, maternity and paternity, race, religion and belief, sex, sexual orientation), the EA consolidated and codified previous provisions; but for gender reassignment the EA made a significant change in that it removed the requirement for a person to be undergoing medically-supervised transition.

The trigger for the protection against discrimination on the ground of gender reassignment is set by S7 EA which includes the requirement that an individual declares that they propose to undergo transition:

> *A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.*

Thus the change may be to physical or other (i.e. non-physical) attributes of sex. So the bar is set low in that a person may not be intending to have medical or surgical procedures but merely to live in their affirmed gender with changed name or pronouns or an altered style of dress or hairstyle, as long as that is part of a process to alter their gender. But the change cannot be intended to be temporary since its purpose must for reassigning the person's sex.

It can be argued that this is, in effect, self-identification of gender.

The EA provides protection against discrimination in the workplace, in the provision of services and other areas such as education and membership of clubs and associations. Some exceptions are specified in the EA where it is lawful to exclude trans people, including gender-affected sport for safety or fair competition and in other areas where such exclusion is *'a proportionate means of achieving a legitimate aim'*. Such exceptions will be rare and limited; for example in the provision of a service where communal nudity is involved, it may be lawful to exclude an early-transition trans person whose transition has not progressed very far. This remains contentious as it may result in an employer or service-provider policing the service user's appearance.

Controversy has arisen in recent years as to the interaction of the GRA and the EA, particularly over the meaning of 'sex' in the EA.

Statutory guidance on the EA was published in 2011. The Equality and Human Rights Commission (EHRC) produced new non-statutory guidance on separate and single sex services in 2022. This has proved controversial and the EHRC's own board minutes record that many organisations are not following the new guidance, finding it not to be trans inclusive. In some aspects it appears to contradict the 2011 statutory guidance. While not following the statutory guidance may be taken into account by a court when considering a discrimination case, the new non-statutory guidance has no such effect.

Meaning of 'sex'

Controversy has arisen in recent years as to the interaction of the GRA and the EA, particularly over the meaning of 'sex' in the EA. Does 'sex' in the EA mean 'biological sex' however defined, or 'legal sex'? The definition in the EA is rather circular: s212 EA provides that *'a man is a male of any age'*, On the one hand it is argued that 'male' should be given its natural meaning, which some claim is 'biological sex'. On the other, there is no reference to the GRA in s212, the definition section of the EA (whereas there are references to it elsewhere in the EA).

So it is argued that s212 EA does no more than to include 'boy' in the definition of 'man' and 'girl' in the definition of 'woman' in an act which deals with matters such as schools, and provision of services where young persons are involved. It is therefore argued that the general provisions of the GRA take effect to alter 'legal sex' under the EA when a person possesses a GRC.

It may be, however, that an even more nuanced interpretation of 'sex' in the EA is required, sometimes 'biological sex' (e.g., when gender-affected sports are being considered) and sometimes 'legal sex' for example when the general provision of services is considered.

In the *Petition of For Women Scotland Ltd* [1] [2022] CSOH 90; December 13, 2022 (see Briefing 1053 in this edition) Lady Haldane ruled that 'sex' in the EA means 'legal sex'. That decision has been appealed to the Scottish Inner House and the appeal is expected to be heard in October 2023. Petitions on whether the meaning of 'sex' in the EA should be clarified or changed were debated by MPs in a Westminster Hall debate on June 11, 2023 but it does not appear that the UK government has much enthusiasm for bringing forward any proposals.

This law in this area remains controversial.

International experience

The Yogyakarta principles... make clear that self-identification should be the standard.

The Yogyakarta principles 2006 represent international best practice in human rights in respect of sexual orientation and gender identity. The principles make clear that self-identification should be the standard. While some states (e.g. Romania) have no formal process to recognise changed gender and others (e.g. Russia) are moving backwards on this issue, the international direction of travel is towards self-identification of gender, usually with some form of state-regulated formal recording process. Argentina was first to move to a self-identification regime for personal gender in 2012, and a number of other states including Malta, Ireland, Denmark, New Zealand, and recently Spain, have followed suit. Some other federal countries, such as Australia and the US allow self-identification in some states but not in others. This area is controversial but there appears to be relatively little evidence to show that self-identification has caused difficulties where it has been introduced.

UK proposals to change

When Theresa May became UK Prime Minister in 2016 she re-iterated her pre-election pledge to introduce self-identification of gender in the UK. That change had support from the Labour Party and seemed likely to become law. However, when the May government foundered on the Brexit rock in 2019, the proposals were lost. The subsequent Johnson-led government, which had absorbed many UK Independence Party members and lost a significant number of liberal-wing Conservatives, had much less enthusiasm for self-identification. Despite a public consultation in 2018 which supported the change, progress on gender recognition in the UK as a whole has been limited to reducing the fee paid with an application (if the means-tested exemption could not be used) from £140 to £5 and making the process internet-based. Those who support trans rights have been deeply unimpressed with this progress while there is still a range of views, including calls to end the GRA process altogether.

The Gender Recognition Reform Bill, Scotland

Gender is a devolved matter under the Scotland Act 1998 which established the Scottish parliament, but equality legislation is not. In 2004 the Scottish parliament passed a motion adopting the GRA.

The Scottish National Party (SNP) included a move to reform gender recognition law in its 2016 manifesto. Public consultations in 2018 and 2020 found support for the change but parliamentary time could not be found for it, perhaps because of Covid-19.

After the 2021 Scottish election, the SNP found itself governing in coalition with the Scottish Green Party. Both parties had included gender recognition reform in their manifestos, the Greens perhaps more explicitly. The coalition agreement between the SNP and the Greens specifically dealt with reform as an issue which was to be brought forward.

1 [2023] IRLR 212

The Gender Recognition Reform Bill (the Bill) was introduced in March 2022, and underwent a third round of public consultation before being passed, *in principle*, by a total of 88 votes to 33 with eight abstentions. It had wide support from Scottish Labour, but opposition from the Scottish Conservatives and individual members of other parties.

It then entered a committee stage (at which I was privileged to give evidence) which considered the detail of the Bill. Holyrood held two mammoth sessions to deal with proposed amendments on December 20 and 21 (the only times the Scottish parliament has sat beyond midnight) and a final shorter session the following day, December 22, 2022 at which the (very slightly amended) Bill was passed by 86 votes to 39 with the majority of Scottish Conservatives, two Labour and nine SNP Members of the Scottish Parliament voting against – slightly different numbers from the previous 'in principle' vote.

Effect of the Bill

If the Bill were to become law it would result in the:

- removal of the requirement for certified medical diagnosis of gender dysphoria (increasingly 'gender incongruence') and replacement by statutory declaration, with penalties for false declaration;
- replacement of consideration of applications by a specialist panel by application to the Registrar General;
- reduction in the age of eligibility from 18 to 16 years;
- replacement of the requirement for *'living in the acquired gender'* from two years to three months (six months under 18) but with a three-month reflection period;
- use of a simplified process to recognise overseas grants of gender recognition.

The above changes would only apply to people whose births were registered in Scotland or who are normally resident in Scotland.

UK government blocks the Bill

At the very end of the 28-day period allowed by the Scotland Act 1998, on January 17, 2023, Alistair Jack, Scottish Secretary of the UK government, used s35 of the Scotland Act to block the Bill. This section gives the Secretary of State power to intervene and make an order in certain cases prohibiting the Presiding Officer from submitting a bill for royal assent.

This is the first time this power in the Scotland Act has been exercised by the UK government. This action was debated in the House of Commons on January 17, 2023 and supported by 318 votes to 71, with 249 abstentions, including 183 Labour Party abstentions.

The UK government published a 12-page document setting out its concerns; these include a concern that the Bill will affect matters reserved to the UK government on devolution, principally 'equal opportunities', and the definition of the protected characteristic of 'sex'.

It predicts difficulties in three areas:

- administrative difficulties;
- risks posed by fraudulent applications; and
- exacerbations of effects on institutions such as clubs and schools.

The test under s35 of the Scotland Act to justify its use is that the provisions of the Bill would:

> *… make modifications of the law as it applies to reserved matters and which the Secretary of State has reasonable grounds to believe would have an* ***adverse effect***

on the operation of the law as it applies to reserved matters. (emphasis added)

The first two categories of concern appear to lack any real substance.

Administrative difficulties

The UK government alleges there would be difficulties in the administration of taxes and state benefits. However, very few state benefits are now sex-based. And, for example, many female barristers continue in practice in their maiden names and the tax system has no difficulty collecting their taxes, relying on a unique tax identifying number as the identifier. Cross-border difficulties for operating equal pay provisions and operation of the S149 EA public sector equality duty seem equally flimsy.

Fraudulent applications

...extending the *'proportionate means of achieving a legitimate aim'* exception... would seem a simple, easy and proportionate approach 'fix' rather than negating the whole Bill...

This concern seems somewhat illogical. If a predatory male wished to gain access to female spaces for illicit purposes, would he be likely to declare himself to state authorities for such a purpose? What evidence supports this concern? Some 350 million people now live under regimes (including in Argentina, Ireland and Switzerland) in which self-identification of gender is available and there is no evidence of trouble with fraudulent applications.

Exacerbation of existing problems with the EA

The third category of concerns appears to have a stronger logical basis, but here the *de minimis* principle would seem to be important. Take, for example, the objection that a Scottish school pupil aged 16 to 18 might obtain a GRC and then move to England, complicating the position for a single-sex school which wished to exclude pupils of one legal sex. The tiny numbers of trans individuals (about 1 in 700 of the population as revealed by the 2021 UK census) coupled with the unlikelihood of a pupil who had obtained a Scottish GRC moving to England or Wales during their senior school education, means that these problems are likely to occur very rarely. The same could be said of alleged difficulties for clubs and associations. If the UK government was really concerned about these tiny effects, then extending the *'proportionate means of achieving a legitimate aim'* exception allowing exclusion of trans people where it can be justified in schools and associations would seem a simple, easy and proportionate approach 'fix' rather than negating the whole Bill and its benefits for Scotland as seen by the Scottish parliament.

Scottish government seeks judicial review

It was announced in April 2023 that the Scottish government has initiated a judicial review of the Secretary of State's action to block the Bill under s35. The Court of Session will first decide whether to grant permission for the petition to proceed – it seems impossible that permission would not be given – and then directions will be given for a full hearing. It may be that interested organisations ask to intervene. It is anticipated that the application will be heard in the autumn of 2023.

CJEU confirms EU protection from discrimination based on sexual orientation extends to self-employed persons

JK v TP SA ✦ Case C-356/21; January 12, 2023

Implication for practitioners

This decision confirms that EU anti-discrimination protections under the Framework Directive 2000/78/EC (the directive) should be interpreted broadly and do apply to those who are self-employed. The decision nevertheless leaves open the question of when a self-employed worker's relationship with a provider of work will be *'personal'* or *'stable'* enough for the directive to apply. As emphasised by the CJEU, it is for national courts to make such fact-based determinations.

Facts

The applicant (JK) had a longstanding working relationship spanning seven years with the defendant (TP), a state-owned Polish TV broadcaster. The work was characterised by the regular assignment of successive short-term contracts, typically for two weeks in each month, whereby JK provided edited audio-visual content for the channel. Following a company reorganisation, JK was retained as a freelancer by TP and a further contract was concluded. A short time after, JK released a YouTube video which featured him alongside his same sex partner and encouraged the acceptance of LGBTQ+ couples. Subsequently his shifts under his existing contracts were cancelled by TP and no further contracts were offered.

JK lodged an application with the District Court in Warsaw seeking compensation for direct discrimination based on sexual orientation.

Warsaw District Court

The referring court sought advice from the CJEU on the interpretation of the directive and its compatibility with the Polish law on equal treatment, which excluded from protection (on the grounds of freedom of choice of parties to a contract) a refusal based on sexual orientation to conclude or renew a contract with a self-employed worker.

The question for the CJEU (as later summarised in the Opinion of Advocate General Ćapeta[1]) was:

> *Must Article 3(1)(a) and (c) of [Directive 2000/78] be construed as permitting the exclusion from the scope of [Directive 2000/78], and consequently also as permitting the exclusion from the application of the sanctions laid down in national law pursuant to Article 17 [of that directive], of the freedom of choice of parties to a contract so long as that choice is not based on sex, race, ethnic origin or nationality, in a situation where the alleged discrimination consists in a refusal to enter into a civil-law contract under which work is to be carried out by a self-employed natural person when that refusal is based on the sexual orientation of the prospective counterparty?* [point 102]

✦ [2023] IRLR 306

1 https://curia.europa.eu/juris/document/document.jsf?text=&docid=265089&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1293998

Court of Justice of the European Union

The CJEU sought to clarify the meaning of *'self-employment'* within the directive. It reasoned that the concept of *'conditions for access to employment, to self-employment or to occupation'* in Article 3(1)(a) was not defined with reference to member state law and that to interpret the directive effectively, it was necessary look to its fundamental purpose, as well as interpreting the terms in line with their ordinary meaning in everyday language. The CJEU decided that the EU legislature did not intend to limit the scope of the directive to posts occupied by a 'worker', within the meaning of Article 45 of the Treaty on the Functioning of the European Union. Considering the objectives of the directive, particularly the need to implement the principle of equal treatment across the EU, the CJEU decided that it could not interpret the directive's terms restrictively.

The CJEU held that although there is no express reference to 'self-employment' in Article 3(1)(c), interpreting the directive purposively means that self-employment can be within the scope of the directive.

Accordingly, the court held that the directive was intended to cover a wide range of occupational activities, including those carried out by self-employed workers to earn their livelihood.

However, the CJEU also emphasised the need to define the scope of this interpretation by drawing a boundary between occupational activities, which would fall within the scope of the directive, and the mere provision of goods and services, which would not. The court clarified that occupational activities would only fall within the scope of the directive if they were *'genuine'* and *'pursued in the context of a legal relationship characterised by a degree of stability.'* In considering the specifics of JK's situation, the CJEU emphasised the importance of work being done personally by him for TP.

The CJEU considered whether TP's decision not to honour and not to renew the contract with JK fell within the scope of the Article 3(1)(c) of the directive, which deals with *'employment and working conditions, including dismissals and pay'*. The CJEU held that although there is no express reference to 'self-employment' in Article 3(1)(c), interpreting the directive purposively means that self-employment can be within the scope of the directive.

The CJEU looked at the economic reality of the situation, recognising that in certain circumstances terminating a self-employed worker's contract may place a discriminatory obstacle to them accessing their livelihood such that it falls within the scope of the directive. It also held that the unilateral termination of any work done by a self-employed person may be equivalent to the dismissal of an employee.

Finally, the CJEU had to decide whether it could permit an exclusion based on sexual orientation as prescribed by Article 5(3) of the relevant Polish law on equal treatment. The reason for the exclusion was purported to be on the basis of protecting freedom of contract, by guaranteeing the freedom to choose a contracting party, provided that that choice is not based on sex, race, ethnic origin or nationality. The CJEU considered Article 2(5) of the directive, which allows for restrictions on the principle of equal treatment where necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others. It held that the Polish exclusion was not necessary for the protection of the rights and freedoms of others in a democratic society.

Reinforcing its earlier notions on the necessity for a broad interpretation of the directive, the court stated that the objectives of the directive to combat discrimination in *'employment and occupation'*, explicitly including sexual orientation, would be unachievable in practical effect if it was accepted that freedom to contract could allow a refusal to contract with a person on the ground of that person's sexual orientation.

The CJEU held that the fact that Article 5(3) provided a number of exceptions to the freedom to choose a contracting party, demonstrated that Poland's legislature had already acknowledged that discrimination cannot be justified in the interest of safeguarding freedom of contract in a democratic society.

In summary, the court concluded that the directive's protection against discrimination based on sexual orientation in the context of self-employment could not be excluded by national legislation to protect freedom of choice between contracting parties.

Comment

The CJEU's broad interpretation of the directive represents a significant and positive step towards confirming the wide extent of its scope and the protection available under EU law for self-employed people. The court's resourceful approach, which involved examining European language translations of the directive, demonstrated a commitment to truly understand the purpose and intent of the legislation. The ruling makes clear that the directive provides protection against discrimination for self-employed individuals based on the full range of protected characteristics listed in Article 1, including religion or belief, disability and age, in addition to sexual orientation. This could have far-reaching consequences for businesses operating within the EU, which will need to consider more seriously any potential discrimination against self-employed individuals where national laws may appear to narrow the scope of protection against discrimination available under the directive.

Kane Jackson
Trainee Solicitor
Leigh Day
KJackson@leighday.co.uk

Alice Ramsay
Senior Associate Solicitor
Leigh Day
ARamsay@leighday.co.uk

Sexual harassment – anonymity & similar fact evidence

Eugene Geraghty v Alona Forose ✦ [2023] NICA 2; January 26, 2023

Implications for practitioners

This is one of several cases in the Industrial Tribunal (IT) and the Northern Ireland Court of Appeal (NICA) regarding the issue of anonymity in sexual harassment cases. The NICA relied upon the strong principle that justice should be open and public both at common law and in accordance with Article 10 of the European Convention on Human Rights (ECHR). The female claimant had given clear evidence to the IT on the specific point that she wished anonymity to be removed because she wanted to empower other women.

NICA relied upon the strong principle that justice should be open and public both at common law and in accordance with Article 10 of the European Convention on Human Rights.

The NICA supported the appropriateness of special measures adopted by the IT to protect the woman in giving evidence to the tribunal. This included the judge asking her the cross-examination questions rather than allowing the unrepresented perpetrator of the harassment to ask questions. The special measures also included the use of live video links rather than the claimant being in the same room as the perpetrator.

The NICA also decided that the tribunal was correct in admitting or taking into account similar fact evidence in respect of strikingly similar allegations of harassment made against the employer by three children several years previously.

Facts

Alona Forose (AF) was employed by Eugene Geraghty (EG) as a part-time shop assistant in his ice-cream shop. She became an employee in March 2017 when she was 15 and he was 59 years of age.

AF alleged that EG subjected her to physical and verbal sexual harassment which forced her to leave her job. At the end of May 2017, AF confided in her mother about EG's behaviour and they complained to the Police Service of Northern Ireland (PSNI).

EG was charged in the criminal courts with several counts of sexual offences. He pleaded guilty to a charge of common assault and agreed to the imposition of a Risk of Sexual Harm Order (ROSH order) in May 2019. The terms of the ROSH order prohibited EG from approaching or communicating with AF and her family unless approved by PSNI. EG received a term of imprisonment of four months, suspended for two years, in addition to the ROSH order.

Industrial Tribunal

Procedural matters

The PSNI gave permission for EG to attend and participate in the tribunal hearing so that he would not be in breach of the ROSH order. EG was not represented at the tribunal.

In light of the ROSH order, the IT put specific measures in place. The tribunal panel, AF and EG were all in separate rooms, with a live video link between the three rooms. There were staggered arrival and departure times and separate waiting areas for AF and EG to ensure they were always separated. EG was required to provide his cross-examination questions to the judge in advance of the hearing. Any appropriate questions would be put to AF by the judge hearing the case. If EG wanted any additional questions to be put to AF at the hearing, he was required to make an application to the judge. EG was not allowed to speak directly to AF.

Anonymity

At the time AF brought her case in 2017, the 2005 IT rules required that all cases involving an allegation of a sexual offence were automatically anonymised with the removal of

✦ [2023] IRLR 376

claimants' and respondents' names without any discretion or decision-making function by the tribunal.

In 2020 new IT rules were introduced which provided that the tribunal could at any stage of the proceedings make an order preventing or restricting the public disclosure of any aspect of the proceedings.

Rule 44 in Schedule 1 of the Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (NI) 2020 provides that such an order may be made in any of the following circumstances:

(1) (a) Where the tribunal considers it necessary in the interests of justice;
(b) In order to protect the Convention rights of any person;

(2) In considering whether to make an Order under this Rule, the tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.

AF applied for the lifting of the anonymity order. EG objected to the removal of anonymity. AF wished the truth to be made public in order to empower other women.

The IT weighed the competing rights under ECHR Articles 6 (right to a fair trial), 8 (right to respect for family and private life) and 10 (freedom of expression), and gave full weight to the principle of open justice.

The tribunal decided to lift the automatic anonymisation order. However, since EG had indicated that he wished to appeal any such decision, the removal of anonymisation was stayed until six weeks after the tribunal judgment to allow EG to take advice on any appeal.

Previous incidents

While EG was being questioned in 2017 by the PSNI about AF's allegations against him, he was also asked about a previous arrest. In 2013 EG had been arrested and questioned in relation to two charges of inciting a child to engage in sexual activity and one charge of sexual assault. These sexual abuse allegations were made by three females, all under the age of 18. The IT noted that the 2013 allegations were remarkably like the allegations made by AF.

EG gave evidence that he did not think he was before the tribunal to talk about incidents in 2013; he did not recollect any such incident and that the three girls had been lying.

In 2015 AF and her friend XY had been in EG's shop as customers. AF alleged that EG had told XY that if she crawled from one side of the room to the other, she could have a free soft drink. XY was 13 years of age at the time. AF had made a video of the incident. When XY and AF later watched the video, they noticed that EG had an erection when he was walking behind XY crawling on the floor.

Liability

For the purposes of the criminal prosecution, the PSNI had seized CCTV footage from cameras within EG's shop. This footage was not available at the IT. However, the PSNI's records of interviewing EG were available and referred to the CCTV being shown to him. The tribunal found that the CCTV footage had shown EG touching AF inappropriately.

The IT concluded that AF's allegations occurred as she had described for the following reasons:

- the interview records of the PSNI corroborated AF's allegations to a significant extent;
- the tribunal's conclusions on the credibility of EG as opposed to the credibility of AF;
- the fact that the incidents alleged were consistent with and similar to the incidents separately and independently alleged by three underage girls in 2013;
- the fact that the allegations were consistent with the allegation of sexual misconduct

towards XY which was supported by the credible evidence given by XY and by AF. [Para 103 of the IT judgment[1]].

EG appealed to the NICA. Northern Ireland does not have an EAT.

Court of Appeal in Northern Ireland

EG did not have any legal representation at the NICA. He raised the following points of law in his notice of appeal.

Anonymity

EG opposed the removal of anonymity because he contended that the allegations made against him were false and he wanted neither himself nor his family to receive further abuse because of adverse publicity.

The NICA decided to revoke anonymity at the outset of the hearing before the court. They gave three principal reasons for this decision:

- the strength of the principle that justice should be open and public, both at common law and in accordance with Article 10 ECHR;
- the fact that there have already been reports in the local media of the prosecution of EG in the Magistrates Court for the same conduct which the tribunal had dealt with;
- the desire, still strongly maintained by AF, to remove anonymity.

When considering the extent to which EG and/or members of his family had a right to privacy within Article 8 ECHR, the NICA noted that the right is qualified and was outweighed by the three reasons given above.

Conduct of the cross-examination of AF via the employment judge

EG had provided the IT with 24 pages of handwritten questions for AF. The employment judge had asked AF such questions as the tribunal deemed to be appropriate and relevant. Some of EG's questions were not asked as the employment judge decided that some were repetitious and others were more in the form of submissions.

The NICA decided that it was not apparent from the IT's judgment or from EG's submissions to the NICA what issues EG had been wrongly prevented from pursuing in cross-examination.

The NICA decided that the cross-examination of AF by the employment judge was an appropriate and structured way forward. The tribunal's approach could not be faulted in circumstances where EG was subject to a ROSH order. The NICA was satisfied that EG received a fair hearing.

Similar fact evidence

EG had argued that the IT erred in law by admitting or taking into account similar fact evidence in respect of the 2013 allegations made against him.

In the criminal prosecution of EG for his treatment of AF, the Public Prosecution Service (PPS) applied to adduce evidence of EG's bad character under the provisions of the Criminal Justice (Evidence) Order (NI) 2004. The PPS argued that the 2013 evidence demonstrated a propensity on the part of EG to commit sexual offences.

The NICA decided that the admission of evidence about the 2013 alleged harassment in similar circumstances was comfortably within the discretion of the tribunal. The 2013 allegations were strikingly similar to AF's allegation. It would have been irrational for the tribunal to exclude them.

Mary Kitson
Senior Legal Officer
Equality Commission Northern Ireland
mkitson@equalityni.org

1 See https://www.bailii.org/nie/cases/NIIT/2021/04865_17IT.html

Scottish court rules on the meaning of 'sex'

Petition of For Women Scotland Ltd ✦ [2022] CSOH 90; December 13, 2022

The issue

Under the Scotland Act 1998 (the Act), any provision of legislation passed by the Scottish Parliament is of no effect in so far as it is '*outside the legislative competence of the Parliament*'; a provision is outside the legislative competence of the Parliament if it relates to reserved matters. Equal opportunities is a 'reserved matter' by schedule 5 to the Act, but that reservation is subject to certain exceptions, one of which relates to '*the inclusion of persons with protected characteristics in non-executive posts on boards of [a defined class of] Scottish public authorities*'.

The Scottish Parliament passed the Gender Representation on Public Boards Act 2018 (GRPBA 2018) purporting to make use of that exception. The Act defined a *'gender representation objective'* for Scottish public boards that 50% of its non-executive members should be women, and required preference to be given to female candidates for such roles under certain conditions.

For the purposes of these provisions, the Act included a definition of 'woman':

> *… 'woman' includes a person who has the protected characteristic of gender reassignment (within the meaning of section 7 of the Equality Act 2010) if, and only if, the person is living as a woman and is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of becoming female.*

That definition was struck down by the Inner House of the Court of Session in *For Women Scotland v Lord Advocate* [2022] CSIH 4 as conflating the two distinct protected characteristics of sex on the one hand, and gender reassignment on the other; and impermissibly encroaching on the reserved matter of equal opportunities by purporting to redefine a protected characteristic. The result was that the GRPBA 2018 continued in force, but the novel definition of 'woman' was of no effect. The word therefore bore the same meaning it bore in the Equality Act 2010 (EA).

The Scottish Ministers then issued revised statutory guidance in relation to s7 of the GRPBA 2018 which defines the separate protected characteristic of gender reassignment; the guidance included these words:

> *… in terms of section 9(1) of the Gender Recognition Act 2004, where a full gender recognition certificate has been issued to a person that their acquired gender is female, the person's sex is that of a woman, and where a full gender recognition certificate has been issued to a person that their acquired gender is male, the person's sex becomes that of a man.*

Court of Session (Outer House)

Challenging the guidance, For Women Scotland (FWS) argued that this guidance, including in the definition of 'women' any man who was in possession of a gender recognition certificate (GRC), led to unworkability and absurdity; that since the introduction of same-sex marriage, the impact of a GRC was largely symbolic; and (although this point was 'pressed with less force') that the Gender Recognition Act 2004 (GRA) had been impliedly repealed (or the impact of s9 at least disapplied) by the EA.

✦ [2023] IRLR 212

Lady Haldane in her judgment rejected all three arguments, and upheld the guidance as lawful. She observed that the EA did not seek in any way to amend or repeal section 9(1) of the GRA [para 50] and held that, for the purposes of the EA, 'sex' *'is not limited to biological or birth sex, but includes those in possession of a GRC obtained in accordance with the 2004 Act stating their acquired gender, and thus their sex'.* [para 53]

An appeal is to be heard by the Inner House on October 4, 2023.

Comment

This is the first judicial answer to a question which has been controversial among discrimination lawyers for some time: is the meaning of 'sex' (and related terms) in the EA modified by the operation of s9 of the GRA so that 'man' includes a woman with a GRC, and 'woman' includes a man with a GRC? Or do these words simply bear their common law (biological) meaning? Or does it vary depending on the particular provision in question?

...is the meaning of 'sex' (and related terms) in the EA modified by the operation of s9 of the GRA so that 'man' includes a woman with a GRC, and 'woman' includes a man with a GRC?

In my view, Lady Haldane's choice of the first of these options has a number of profound implications for the operation of the EA in relation to the protected characteristics of sex, sexual orientation and gender reassignment.

The first relates to the choice of comparators. If 'sex' means sex as modified by a GRC, the comparator to test whether a GRC holder identified by it as a woman has suffered sex discrimination will be a man; the comparator to test whether the holder has suffered gender reassignment discrimination will be a person without the protected characteristic of gender reassignment. But because of the requirement of s23 EA that the other circumstances of the comparator must be the same, operating on the law's understanding of the GRC holder as a woman, the comparator must be a woman without the protected characteristic of gender reassignment.

That means, for example, that if a GRC holder deemed in law to be a woman is excluded from a women's changing room, the law will not analyse the exclusion as being *'on grounds of sex'.* Instead, because the law understands the GRC holder to be a woman – and a woman without the protected characteristic of gender reassignment would not have been excluded – exclusion will be on grounds of gender reassignment. That is so notwithstanding that it is biological sex which is the whole reason that the holder is unwelcome there. Lawful exclusion may still be possible, but the justification for doing so is different.

In a similar way, a woman with a GRC declaring her to be a man will not be able to claim equal pay by reference to a male comparator.

But the effects go far beyond comparators. An *'as modified by a GRC'* interpretation would seem to deprive women who identify as men from the pregnancy and maternity protections in the EA. That interpretation also makes nonsense of the protected characteristic of sexual orientation, defined in the EA as a person's sexual orientation towards *'persons of the same sex', 'persons of the opposite sex'* or *'persons of either sex'.* If sex means *'sex as modified by a GRC',* homosexuality has been redefined as sexual attraction towards people who either are, or are certificated as being, of the same sex. That is not a plausible description of the sexuality of any real person, so if Lady Haldane is right, s7 now points to an empty set.

The 'as modified' interpretation wreaks havoc with various of the exceptions in the EA. For example, one of the conditions justifying single-sex services in schedule 3 to the EA is that *'only persons of that sex have need of the service';* but while there are many services which are only needed by (biological) women or men, it is difficult to

imagine any service needed by women *except* for any woman who has a GRC whom the law deems to be a man, or vice versa. Schedule 16 permits associations limited to those who share a protected characteristic (or more than one); but since not having the protected characteristic of gender reassignment is not a protected characteristic for these purposes, an 'as modified' interpretation would seem to outlaw any association which restricts its membership to women only and which excludes (biological) men from membership.

Rights which women have to privacy and freedom of association under Articles 8 and 11 of the European Convention on Human Rights would seem to be engaged; and in the case of some services and public functions, particularly those involving nakedness or intimate contact, their Article 3 (inhuman or degrading treatment) rights may also be in play.

There are similar difficulties with the effect of this interpretation on the s149 EA public sector equality duty, which imposes obligations to do things like *'have due regard to the need to remove or minimise disadvantages suffered by persons who share a relevant protected characteristic connected to that characteristic',* or to *'take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it'.* That duty assumes some commonality of need between those who share a protected characteristic and those who do not, but that assumption founders if the categories 'men' and 'women' are expanded to include people of the opposite sex in possession of a particular certificate.

Conclusion

It is not surprising that FWS's attempts to relegate the GRA to a residual symbolic function or to persuade the court that it had been impliedly repealed by the EA were unsuccessful. But its argument based on the absurdities which result from the 'as modified' interpretation merited more serious consideration. It will be interesting to see whether the human rights arguments, seemingly not aired before the Outer House, play a part in the appeal.

Naomi Cunningham
Barrister
Outer Temple Chambers

Refusal of student support based on immigration status was unlawful

Ola Jasim v Scottish Ministers (Student Awards Agency Scotland) [2022] CSOH 64; September 9, 2022

Implications for practitioners

The Human Rights Act 1998 (HRA) is a valuable tool to protect against discrimination, particularly in relation to policy implications which may otherwise go unchallenged and unnoticed. This decision confirms that when determining the ground for discrimination in European Convention on Human Right's (ECHR) cases, practitioners should look at the detail of what makes the circumstances different for each group. They should note that, in the correct circumstances 'length of residence' may be considered a ground under Article 14 of the ECHR. Further, practitioners should consider that there is no hard and fast rule concerning the intensity of review for ECHR purposes based on the ground. Finally, even policy with the best of intentions can discriminate and performing equality impact assessments (EIA) is vital and should be pushed for.

Facts

Ms Ola Jasim (OJ) was born in Iraq in September 2002. She came to the UK with her family shortly after she turned 11. At the relevant time, she had limited leave to remain in the UK; she intended to apply for indefinite leave to remain when she was able, and to live her life in Scotland.

The Student Support Scotland Regulations 2007 (replaced in 2022 but not materially different) created a structure for providing student allowances to students with settled status (or indefinite leave to remain) which had different requirements for a student to have resided in the UK depending on whether they were under or over 18.

This provision was brought in after a similar regulation in England was successfully challenged in *Regina (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57. The regulations were changed in England after an EIA. To create consistency across the UK, the regulations were changed in Scotland in a similar fashion but without the assessment. The change in the regulations' purpose was to allow access to student support for people who have a sufficient connection to Scotland, rewarding those who are most likely to enter the Scottish labour market and contribute to the Scottish economy after graduation. In Scotland many more students begin university under the age of 18 (25-50% versus 1% in England).

When OJ started university she was 17 years of age and not yet eligible for settled status. She did not apply for student support for other reasons and her parents '*made considerable sacrifices in order to fund her first year without support from the state*'. She applied for student support for her second year and was determined ineligible because she was short of the required period by 58 days. She was unable to fund the remainder of her studies independently and to stop and then restart later would have caused 'extensive disruption'. OJ brought a judicial review claiming that the residence period in the regulations was incompatible with her rights under the ECHR because they discriminated against her Article 2 right to education on the basis of age, immigration status and length of residence (Article 14 – prohibition of discrimination).

Outer House, Court of Session

Lord Sandison gave the opinion of the court. He first addressed the relevant discrimination at issue in the case finding that '*it is not necessary to determine formally*

whether length of residence is indeed a relevant 'other status' for purposes of Article 14 of the ECHR'. [para 33]

He found that OJ's complaint was on the ground of her immigration status alone, specifically lack of settled status, as she was not complaining about a length of residence requirement but that she belonged to a group, those without settled status, who were subject to demands she could not achieve and those demands were not placed on those with settled status. Lord Sandison did note, however, if it had been required, he would have had *'no difficulty in finding that length of residence was indeed a 'status' for purposes of Article 14, albeit (like immigration status and age) not one which, when used as a basis for differential treatment, inherently requires very weighty reasons by way of justification'.* [para 33]

When determining the intensity of review Lord Sandison said the court should look at the precise role the discrimination ground had in the circumstances; he noted that any case will contain factors which pull in either direction and the determination of such is for the court. He stated that the decision-making process can be considered but failures in that process would not alone be enough.

Society has an interest in the integration of minorities and the right to education is considered fundamental *('if not the most important kind').*

In relation to the margin of appreciation, Lord Sandison found that immigration status, although not inherently suspect, does result in a significant degree of social exclusion. Society has an interest in the integration of minorities and the right to education is considered fundamental (*'if not the most important kind'*), although higher education is recognised as allowing a wider margin of appreciation.

Finally, he found that this was an example of a 'socio-economic' decision which should be given a wide margin. As OJ's challenge was to the process chosen to achieve the socio-economic goals and there was no evidence that those considerations had been looked at by the decision-makers, Lord Sandison then applied a margin of appreciation which was '*somewhere near mid-point, perhaps inclining towards a greater rather than lesser degree of intensity'.* [para 47]

Turning to proportionality, Lord Sandison found that the line drawn here did not *'closely correspond with the policy objective'* in that it excluded many of those it would wish to have included. The rules, therefore, were unlawful because they *'fail to strike a fair balance'* between the impact on those with a connection to Scotland but who are excluded from support and the benefit to the state of adopting rules which are clear but only provide *'an approximate means of achieving the objective'.* [para 55]

Finally, he noted that this conclusion would have been the same even if the intensity of the proportionality review applied by the court *'had been much less'.*

Comment

This case demonstrates how the HRA can have a very positive impact and address inequalities in systems which were otherwise intended to be fair, but which, without oversight, would be able to continue.

Prologue: the Scottish government ran a consultation on several different proposals to address the inequalities highlighted in this case. It announced plans in May 2023 to extend student support to those granted leave to enter or remain (instead of only indefinite leave to remain) and introduced a payment scheme to cover those who were denied, like OJ, in the 2021/22 and 2022/23 academic years. This change will be implemented by statutory instrument 2023 No. 142, Education (Fees and Student Support) (Miscellaneous Amendment) (Scotland) Regulations 2023 which will come into force on August 1, 2023.

Laura Redman
Barrister
Cloisters Chambers

Inadequate provision of toilet facilities constituted direct sex discrimination

Earl Shilton Town Council v Ms K Miller ✦ [2023] EAT 5; January 31, 2023

Facts

Ms K Miller (KM) was employed by *Earl Shilton Town Council* (ES) as an office clerk. The men's toilets were in the part of the building used by ES and the women's toilets were in the part of the building used by a playgroup. In order to use the women's toilets, female employees had to attract the attention of one of the playgroup staff and wait for them to check if a child was present for safeguarding reasons.

From 2017, female employees were offered the use of the men's toilets. These consisted of a single cubicle and a urinal. There was a sign placed on the door whilst the toilet was being used by a woman, but it did not always stay in place. Women could use the single cubicle, but they could only access it by passing the urinal. There was no lock on the main entrance door to the toilets, so men could enter the facility regardless of the sign on the door. This created a risk of a woman seeing a man using the urinal. There was also no provision of a sanitary bin.

In June 2018, an internal lock was fitted to the external door to the men's toilets to prevent access to the men's toilets when a woman was using the cubicle; a sanitary bin was also provided which was only emptied on KM's request.

KM claimed that the toilet arrangements resulted in direct sex discrimination.

Employment Tribunal

The ET held that not having immediate direct access to toilet facilities, the risk of seeing a person of the opposite sex using toilet facilities, and not having a bin to dispose of sanitary products constituted a series of detriments.

KM was treated less favourably in these respects than a man. At no point until May 2017 was a man in a position of not having immediate access to toilet facilities. Thereafter, at no point was he at risk of seeing a woman using toilet facilities, nor did he experience any disadvantage by the absence of a bin in those facilities. Even when the bin was provided, a man did not have to inform a caretaker, still less one of the opposite sex, that the bin needed emptying of intimate waste.

The less favourable treatment was because of sex. In terms of the arrangements with the bin, this was a case of inherent discrimination as they did not arise as an issue for men. This was also the case in relation to the immediate access to facilities prior to May 2017 and the risk for women of seeing a man using the facilities thereafter. Sex was more than part of the context or circumstances in which these issues arose; it was in the nature of the arrangements. As a result, the question of the reason for the treatment in terms of the mental processes of the alleged discriminator did not arise. Nor did the application of the burden of proof provisions which would be required in a mental processes case (*Amnesty International v Ahmed* [2009] IRLR 884 and *James v Eastleigh Borough Council* [1990] ICR 554 applied).

✦ [2023] IRLR 352

Employment Appeal Tribunal

ES asserted that the ET had erred in law by failing to apply the requirements that the:

1. treatment of KM be considered less favourable than an actual or hypothetical comparator (ES asserted that the ET should have considered whether the risk a man faced of being observed using the urinal by a woman was equivalent to that of a woman seeing the man using the urinal, such that there was no less favourable treatment); and
2. less favourable treatment in respect of each detriment must be because of sex (ES submitted that the ET found that the toilet arrangements resulted from safeguarding arrangements, so could not be because of sex).

The EAT found that the ET had applied *'robust common sense'* in determining that this type of treatment constituted direct sex discrimination. From the perspective of KM, she was treated less favourably than men in that she, a woman, was at risk of seeing a man using the urinals. This was not the same as the risk of a man seeing another man using the urinals. KM was not provided with toilet facilities adequate to her needs because of the risk of coming across a man using the urinal and the lack of a sanitary bin. That treatment was less favourable than that accorded to men.

..the ET... did not have to consider the mental process of a discriminator because the treatment was inherently because of sex.

ES had not asserted at the ET stage that there was no less favourable treatment because a man was at risk of being seen using the urinals by a woman. Nevertheless, the EAT concluded that even if a man might be able to assert direct sex discrimination, this would not be fatal to KM's claim. Nor did it matter that another woman had not objected to the arrangements, because the discriminatory impact was to be assessed from KM's perspective.

In reaching this conclusion, the EAT took account of *Chief Inspector of Education, Children's Services and Skills (Secretary for State for Education and others intervening) v Interim Executive Board of Al-Hijrah School* [2018] IRLR 334; Briefing 854 [2018], which concerned a school which provided education segregated by sex. In that case, it was held that both girls and boys could establish less favourable treatment through being segregated. Sir Terence Etherton MR stated:

> *The starting point is that EA 2010 s13 specifies what is direct discrimination by reference to a "person". There is no reference to "group" discrimination or comparison. Each girl pupil and each boy pupil is entitled to freedom from direct discrimination looking at the matter from her or his individual perspective.* [para 50]

The EAT went on to consider whether the ET was entitled to conclude that the less favourable treatment was because of sex. The EAT agreed with the ET that this was a case in which it did not have to consider the mental process of a discriminator because the treatment was inherently because of sex.

The EAT considered *R v Birmingham City Council, Ex p Equal Opportunities Commission* [1989] AC 1155. In that case, Birmingham City Council had reserved fewer places at selective grammar schools for girls than for boys, meaning that the pass mark for girls was higher than for boys. This was held to be less favourable treatment because of sex.

The EAT also noted *Regina (Coll) v Secretary of State for Justice (Howard League for Penal Reform intervening)* [2017] UKSC 40; Briefing 703 [2014]. In that case, it was argued that direct discrimination was inherent in the provision of fewer *'approved premises'* for women than men, just as it had been when Birmingham City Council provided fewer grammar school places for girls than boys. The SC accepted this argument and concluded that there was no doubt that the difference of treatment was because of sex.

The EAT concluded that, as in the cases of *Birmingham* and *Coll*, separate facilities of a poorer quality had been provided for females than males. This less favourable treatment was inherently because of sex.

The EAT considered that the issue of safeguarding could only go to motive and could not prevent direct discrimination being established. In any event, the safeguarding issue was a factor in KM not being able to use the women's toilets, rather than the unsatisfactory arrangements in place when the men's toilets were shared.

The EAT concluded that there had been no error of law by the ET in determining the case and dismissed the appeal.

Comment

This was a clear example of direct discrimination in which there was no need to consider the mental processes of the discriminator because the treatment was inherently because of the protected characteristic.

The risk of one of ES's employees seeing a person of the opposite sex using the facilities could have been avoided by putting a lock on the main door to the toilet and requiring both men and women to lock it when in use. The EAT indicated that such an arrangement may comply with s20(2)(c) of the Workplace (Health, Safety and Welfare) Regulations 1992, which deals with the provision of separate toilets for men and women. This was not referred to by the parties in this case but is worth considering if advising employers on the provision of adequate facilities.

Charlotte Pettman
Leigh Day
cpettman@leighday.co.uk

Justifying age discrimination – the 'cost plus' approach

Cook v Gentoo Group Limited ✦ [2023] EAT 12; February 15, 2023

Implications for practitioners

The EAT's decision in this case illustrates the need for careful consideration when assessing whether direct age discrimination is justified; it provides a useful reminder that *'saving or avoiding costs'* alone will not be enough to justify direct age discrimination without something more (the 'cost plus' approach).

Facts

Mr K Cook (KC) started working for Gentoo Group Limited (Gentoo), a public sector social housing landlord, on March 1, 1992. Gentoo decided to undertake a restructure in April 2019. Such a restructure required board approval but the company decided to forego obtaining approval so that the redundancy process could take place before KC turned 55 years of age and became entitled to an enhanced pension. This would have required Gentoo to make a payment of £80,000 to KC. A board meeting had been fixed for May 22, 2019 but KC was dismissed on May 16, 2019 which meant Gentoo avoided having to seek board approval for a restructure and KC did not receive his enhanced pension.

KC lodged tribunal proceedings claiming unfair dismissal, automatic unfair dismissal for the reason or principal reason that he made a protected disclosure, detriment on the ground that he had made protected disclosures, and direct age discrimination.

Employment Tribunal

The ET found that the principal reason for KC's dismissal was redundancy but that his claim of unfair dismissal was well-founded as the process was unfair for a number of reasons including the speed at which the process was conducted and the fact that no 'conscious effort' had been made to seek suitable alternative employment for KC.

The ET found that there was a 100% chance that KC would have been dismissed after the next board meeting and thus paid his enhanced pension had a fair procedure been applied. However, it found that KC's compensation award would have been reduced by 90% in total due to his own contributory conduct. This included 15% because KC *'attempted to delay the consultation process'.*

The ET rejected KC's automatic unfair dismissal claim, his detriments claim and his claim that curtailment of the redundancy process to avoid him obtaining an enhanced pension was direct age discrimination. It held that the comparators which KC had identified were inappropriate but the tribunal went on to say that, even if they had been appropriate, it would have found that the detriment was a proportionate means of achieving a legitimate aim.

Employment Appeal Tribunal

KC appealed on two grounds.

The first was that the ET had erred in making the 15% reduction in compensation because KC had attempted to delay the consultation process (it had been argued that he used various delaying tactics and failed to engage in the consultation process). Gentoo did not resist this ground.

✦ [2023] IRLR 357

The second was that the ET had erred in holding that the detriment he experienced by being dismissed was a proportionate means of achieving a legitimate aim.

In response to the appeal, Gentoo obtained an order that the ET be asked to set out the aim relied on and the reasons why the tribunal found the detrimental treatment was a proportionate means of achieving that aim.

The ET judge replied that the aim was the *'saving [of] costs which would have been incurred in making the additional payment into the pension fund to meet the additional entitlement of the claimant and the disapproval of the regulator for making such generous redundancy arrangements'*. This was identified as a 'cost plus' argument with the 'plus' element being the Regulator of Social Housing's disapproval of the practice of windfall pension enhancements.

The ET judge, EJ Shore, said that the tribunal would have found this aim to be legitimate because Gentoo was a public sector employer and the funds would therefore have come out of the public purse. EJ Shore explained that the ET would have found the detriment to KC to be proportionate as the balancing exercise would have fallen in Gentoo's favour given that the claimant was awarded more than £47,000 in redundancy and notice pay and had access to a pension scheme which he had chosen to freeze earlier.

The EAT expressed some concerns about EJ Shore's response. It gave careful consideration to the relevant case law in this area including:

- *Seldon v Clarkson Wright & Jakes (Secretary of State for Business, Innovation and Skills and another intervening)* [2012] UKSC 16, [2012] ICR 716; Briefing 636 [2012] which considered the special nature of justification in direct age discrimination and noted that legitimate aims must be social policy objectives such as those related to employment policy, the labour market or vocational training.
- *Woodcock v Cumbria Primary Care Trust* [2012] EWCA Civ 330, [2012] ICR 1126; Briefing 640 [2012] which had similar facts to the Gentoo case but could be distinguished. *Woodcock* also involved the limited curtailment of procedural requirements to avoid an enhanced pension entitlement. However, in *Woodcock* had the employer acted fairly and complied with its procedures, the employer could have dismissed the employee before he reached the age when he would obtain enhanced pension benefits, unlike in this case where proper application of Gentoo's procedures would have meant that KC would have been dismissed after reaching 55 years of age.
- *Heskett v Secretary of State for Justice* [2020] EWCA Civ 1487, [2021] ICR 110; Briefing 966 [2021] which considered the circumstances in which an aim may be legitimate despite involving an element of cost saving.

The EAT found that the ET had not demonstrated a proper application of the relevant legal principles.

The EAT found that the ET had not demonstrated a proper application of the relevant legal principles in that it had not:

- considered any 'social policy objectives' or referred to *Seldon*;
- considered the fact that this case departed from Gentoo's usual policies rather than justifying a general policy;
- considered the circumstances in which the regulator had criticised previous severance payments and whether they were comparable or whether the regulator may have considered failing to comply with the Gentoo's usual policies was itself poor governance;
- considered the case of *Woodcock* as referred to above;
- considered the discriminatory impact on KC of losing his right to the application of Gentoo's procedures and the infringement of his protection against unfair dismissal;
- considered the discriminatory impact on KC of losing what was a general enhancement

of pension which was provided for any employee who was dismissed by reason of redundancy having reached age 55;

- balanced the gravity of the discriminatory effect of the dismissal on KC against Gentoo's legitimate aim.

In addition, the ET had appeared to consider the enhanced pension to be a windfall for KC but gave no explanation as to why it thought this.

Accordingly, the EAT remitted this issue back to a newly constituted ET to consider and decide these issues.

Comment

It seems clear that the ET had not given enough careful consideration to Gentoo's justification argument during the original hearing. Indeed, the EAT noted that, when providing its reasons following Gentoo's application for further information, the ET appeared to set out what it 'would' have concluded rather than what it *'did conclude but failed to express'.* Perhaps if the tribunal had taken more time over this aspect of KC's age discrimination claim, justification would have been made out. However, as things stood, the EAT identified a significant number of ways in which the ET had failed to apply and/or consider the legal principles properly.

This case shows that justification of direct age discrimination is not straightforward and each element of the justification test must be carefully considered. If an employer wishes to pursue a 'cost plus' argument to justify age discrimination, it must ensure that the 'plus' argument is properly made out.

Jasmine Patel
Associate Solicitor
Leigh Day

Discrimination arising from disability: disability only needs to be a material factor in the 'something arising'

Philip McQueen v General Optical Council [2023] EAT 36, March 10, 2023

Facts

The General Optical Council (GOC) maintains a public register of qualified opticians and optometrists. Philip McQueen (PM) was a registration officer for the GOC.

The GOC accepted that PM had four impairments which amounted to disabilities under s6 of the Equality Act 2010 (EA). These were dyslexia, symptoms of Asperger's Syndrome[1], neurodiversity and left-sided hearing loss.

Both parties agreed that as a result of his impairments, PM relied on following set processes and was confused by changes, and that he therefore needed verbal communications to be backed up by written instructions.

However, in his claim PM said that because of his disabilities he also needed to stand while speaking to colleagues, and he needed others to avoid approaching him in a seemingly confrontational manner because this would cause meltdowns. The GOC denied that either of these things were a result of his disabilities.

Over several years PM became involved in a number of difficult interactions with co-workers, including what he described as 'meltdowns'. His behaviour during a meltdown included loud rapid speech, interrupting, and gesticulation which his line manager experienced as aggressive and intimidating. Following a meltdown in 2015 it was agreed that any instruction which required him to change how he performed a task, or to deviate from set procedures, would be provided in writing. He was also warned that his behaviour had been unacceptable.

PM complained of various treatment which he said was unfavourable, including being instructed not to stand up to talk to colleagues and also his manager's handling of a dispute over his job description.

Law

Under s15 EA:

1. *A person (A) discriminates against a disabled person (B) if—*
   a) *A treats B unfavourably because of something arising in consequence of B's disability, and*
   b) *A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
2. *Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

The EAT set out the proper approach to s15(1)(a) EA in *Pnaiser v NHS England* [2016] IRLR 170; Briefing 779 [2016] at paragraph 31. Having identified unfavourable treatment of B by A the tribunal must answer two questions:

1 It appears the phrase 'symptoms of Asperger's Syndrome' was used in PM's psychologist's report in 2014 and taken up by the ET and EAT. I have used the phrase in order to refer accurately to the judgment. However, I acknowledge that many people reject it, and I note that the Equal Treatment Bench Book suggests 'autism spectrum condition' as the most appropriate terminology.

a) What caused the treatment?
b) Was that reason or cause *'something arising in consequence'* of B's disability?

It does not matter which question the tribunal considers first.

Answering question (a) requires examining the reason which was in A's mind, whether it was conscious or unconscious. As in a direct discrimination case, there may be more than one reason or cause for the treatment, and it is sufficient if the 'something arising' has an influence on the treatment which is more than merely trivial.

Question (b) is an objective question and does not depend on A's thought processes. The causal chain between the disability and the 'something' may have more than one link, although the longer the chain the harder it is likely to be to establish the required connection.

For example, suppose an employee is dismissed because of a long sickness absence. The unfavourable treatment is dismissal, and the reason in the dismissing officer's mind is the employee's absence. If the absence was caused by the employee's disability, then there is unfavourable treatment because of something arising in consequence of disability.

The tribunal would then go on to consider whether the treatment was justified as a proportionate means of achieving a legitimate aim under s15(1)(b) EA, and whether the dismissing officer knew about the disability under s15(2) EA.

Employment Tribunal

The ET's judgment in PM's case had an unusual structure. Judgments conventionally start with the findings of fact, then set out the relevant law, and then apply the law to the facts for each of the various issues. In this case, however, the ET began by setting out its findings on the two disputed matters arising from disability.

The ET noted that although a psychologist had said PM had *'a number of symptoms consonant with the possible likelihood of Asperger's syndrome'*, she did not make a diagnosis of Asperger's and she did not conclude that the lack of control of his emotions was related to neurodiversity [para 23].

In relation to his need to stand while speaking to colleagues, PM's own evidence was that he did not need to wear his hearing aid at work and was able to hear people while he was sitting down, and that he stood up so others could hear what he said. The ET concluded that PM *'stands up because that is his habit, not because it is something arising from disability'* [para 23].

The ET then considered whether PM's need not to be approached in a seemingly confrontational manner arose in consequence of his dyslexia and/or his Asperger's symptoms. It recorded the common view that people with Asperger's have difficulty reading social situations, body language and understanding figurative expressions of speech but it found, on the evidence before it, that PM did not have these difficulties.

The ET accepted that unconfirmed changes of process, together with the challenges of dyslexia, could cause PM significant frustration. It therefore reviewed the situations which had led to his meltdowns at work, referring to the factual findings set out later in the judgment, and found that:

> *...these episodes did not arise from changing processes without noting them in writing, they arose when the claimant was asked to do a task in accordance with the set process and he objected to doing that task rather than another task, and sometimes just that he resented being told what to do, or told that he had done something wrong. The circumstances of these outbursts indicate that they were*

not caused by dyslexia or Asperger's, but because he had a short temper, and he resented being told what to do. [para 23]

The findings on PM's s15 claims are given at various points in the ET's judgment, but in each case it found that the alleged unfavourable treatment was because of aspects of PM's behaviour which were not caused by his disabilities. For instance, it agreed that the manager's handling of the dispute over the job description had been firm, or even tough, but that was because:

...she was out of sympathy with the claimant because of the history of meltdown behaviour towards a manager, and the claimant disrupting work with his custom of standing up and speaking loudly. [para 28]

Since it had found that meltdowns and standing up did not arise from disability, the treatment was not because of something arising from disability.

The EAT confirmed that for something to arise from disability, it is not necessary that the disability be the predominant cause of the something: it is enough if the disability plays more than a trivial part in causing it.

Employment Appeal Tribunal

PM appealed against the dismissal of his claim under s15 EA on the ground that in considering whether something arose 'in consequence of' his disability the ET applied too strict a test of causation. He argued that the ET had really only asked itself what was the main cause of PM's behaviour, when it should have considered whether disability was a material factor.

The EAT confirmed that for something to arise from disability, it is not necessary that the disability be the predominant cause of the something: it is enough if the disability plays more than a trivial part in causing it [para 53].

However, after considerable reflection, the EAT held that the ET had asked itself the correct question and had concluded that PM's disabilities did not have any effect on his conduct on the relevant occasions [para 59]. It dismissed PM's appeal.

Comment

The EAT notes how difficult it was to understand and interpret the ET's decision, with conclusions about the effects of disabilities presented before findings of primary fact and findings on time points mixed with findings on the merits. The case therefore provides a useful reminder that in complex cases it is sensible to give the ET a roadmap for finding its way through the issues, even if there is more than one sensible route. As the EAT says,

It would have been better if the tribunal had structured its decision by asking itself the questions (i) what are the disabilities (ii) what are their effects (iii) what unfavourable treatment is alleged in time and proved and (iv) was that unfavourable treatment "because of" an effect or effects of the disabilities. Or, the tribunal could have reversed the order of the questions and asked instead (i) what unfavourable treatment is alleged in time and proved (ii) what was the reason for that unfavourable treatment (iii) what were the effects of the disabilities and (iv) was the reason for the unfavourable treatment an effect or effects of the disabilities.

Whichever way a tribunal decides to approach the issues, it should structure its decision so that a reader can understand clearly what question is being asked and answered at each stage of the analysis. [paras 52 &53]

That is also good advice for preparing submissions.

Katya Hosking
Barrister, Devereux Chambers
hosking@devchambers.co.uk

Discrimination on grounds of age after Brexit

SS for Work and Pensions v Beattie and Ors✦ [2022] EAT 163; October 27, 2022

Implications for practitioners

This is a welcome decision for trustees of occupational pension schemes, as well as those involved in their administration. In effect, any age discrimination claims brought against trustees of occupational pension schemes will not succeed if they are brought after December 31, 2020 – the date by which the European Union (Withdrawal) Act 2018 was implemented (IP completion day) – if those claims relate to pre-December 1, 2006 pensionable service. This latter date is relevant because this is the date in the Equality Act (Age Exceptions for Pension Schemes) Order 2010 (the 2010 Order) which disapplies the non-discrimination rule for all pensionable service pre-December 1, 2006.

Those practitioners seeking to bring age discrimination claims in respect of occupational pension schemes could still have valid claims if proceedings were commenced before December 31, 2020, even where those claims concern pre-December 1, 2006 pensionable service. This issue has been remitted to the ET for determination.

Facts

This case concerned the T&N Retirement Benefits Scheme and the insolvency of its sponsoring employer. Seventeen members of the scheme left pensionable service and began to draw down their pensions before January 31, 2005. This was before they had reached normal pension age. On the insolvency of the employer, the scheme entered into a Protected Pension Fund (PPF) assessment, and the claimants' occupational pension benefits were reduced in accordance with s138 Pensions Act 2004 because they had not reached normal pension age.

The claimants alleged this was age discrimination under s61 Equality Act 2010 (EA). In particular, the pensioners argued that the disapplication of s61 EA by the 2010 Order was unlawful under general principles of EU law or, alternatively under Council Directive 2000/78/EC (the Framework Directive).

Employment Tribunal

The ET found in favour of the pensioners that the December 1, 2006 cut-off date was incompatible with the Framework Directive. The ET placed particular emphasis on the analogous case of *Innospec Ltd and others v Walker* [2017] ICR 1077; Briefing 839 [2017]. This case concerned a similar cut-off date in the context of the Civil Partnership Act 2004; the SC ruled that the cut-off date was incompatible with the Framework Directive.

The ET relied significantly on Lord Kerr's judgment:

> *I would allow Mr Walker's appeal and declare that, in so far as it authorises a restriction of payment of benefits based on periods of service before 5 December 2005, paragraph 18 of Schedule 9 to the 2010 Act is incompatible with the Framework Directive and must be disapplied. I would make a further declaration that Mr Walker's husband is entitled to a spouse's pension calculated on all the years of his service with Innospec, provided that at the date of Mr Walker's death, they remain married.* [para 76]

✦ [2023] IRLR 13

Although that case concerned a restriction of payment of benefits to surviving civil partners based on periods of pensionable service before December 5, 2005, the

ET considered that it was not distinguishable as both cases ultimately turned on compatibility with the Framework Directive.

The ET in the present case therefore ruled:

> *… that Article 3 of the Equality Act (Age Exceptions for Pension Schemes) Order 2010, insofar as it authorises a restriction of pension payments related to rights accrued, or benefits payable, in respect of the claimants' periods of pensionable service prior to 1 December 2006, is incompatible with the Framework Directive and is disapplied.* [para 85]

Importantly, *Innospec* was decided in 2017 before IP completion day and before the European Union (Withdrawal) Act 2018 (the Withdrawal Act) came into force.

Employment Appeal Tribunal

… although general principles of non-discrimination and equal treatment… are to be treated as retained EU law, after IP completion day [December 31, 2020] **the EU treaties are no longer part of UK law.**

The Secretary of State for Work and Pensions appealed this decision, on the basis that the ET had failed to consider the Withdrawal Act. This was an argument which had not been put before the ET and was ultimately successful in the EAT.

The EAT ruled that due to the Withdrawal Act, the Framework Directive did not form part of UK law after IP completion day. The 2010 Order is the UK's domestic implementation of the Framework Directive and was still effective after IP completion day, but Article 3 prevents any age discrimination claims being brought in respect of pre-December 1, 2006 pensionable service. All the respondents' pensionable service occurred before 1 December 2006.

The Secretary of State argued that although general principles of non-discrimination and equal treatment such as contained in Article 21 of the Charter of Fundamental Rights of the European Union are to be treated as retained EU law, after IP completion day the EU treaties are no longer part of UK law. UK courts cannot therefore disapply UK laws or regulations for incompatibility with EU law.

However, those individuals that commenced proceedings before IP completion day may still have valid claims.

On this basis, the EAT ruled in favour of the Secretary of State for 15 of the 17 pensioners who had commenced proceedings after IP completion day. The other two claims have been remitted to the ET because they were commenced before IP completion day.

Comment

The potential to bring age discrimination claims has been narrowed as a consequence of Brexit. Any claims such as this one where proceedings have already begun, will only be able to proceed if they were brought before IP completion day – December 31,2020.

Trustees and employers will welcome this decision of the EAT, which has meant they will face fewer claims of age discrimination in the event of insolvency of a sponsoring employer. Individuals who want to bring age discrimination claims such as in the present case, must make sure that proceedings already began before December 31, 2020. Alternatively, it must be made clear that the claim concerns post-December 1, 2006 pensionable service.

Bradley Murphy
Paralegal
Leigh Day
BMurphy@leighday.co.uk

1059

No platform – booking cancelled because of religion and belief

Billy Graham Evangelistic Association v Scottish Event Campus Limited [2022] Sh Ct GLW 33: 2022 SLT (Sh Ct) 219; October 24, 2022

Facts

In January 2020, a rally, the opening event of a UK tour by the Billy Graham Evangelistic Association (BGEA) scheduled for May 2020, was cancelled. The venue, the Ovo Hydro, is the largest exhibition centre in Scotland. It is operated by Scottish Event Campus (SEC). Over 90% of its shares are owned by Glasgow City Council. SEC cancelled the booking after growing public opposition to homophobic and Islamophobic comments made during public speaking engagements by Franklin Graham, son of BGEA's founder, who would be speaking at the rally.

In October 2022, the Glasgow Sheriff Court, equivalent to a county court in England and Wales, found that in cancelling the booking SEC, as a service provider, had directly discriminated against BGEA because of religion or belief, contrary to s29 of the Equality Act 2010 (EA).

Sheriff Court

The Sheriff held that the true reasons for the cancellation were SEC's view of the religious and philosophical beliefs of BGEA and Franklin Graham, and the pressure put on SEC by its principal shareholder and others, including commercial considerations about the responses to the religious and philosophical message likely to be conveyed, and from the venue's principal sponsor which did not want its name associated with the event.

In its defence to the action, SEC argued the decision was taken solely on the basis of public safety. Although concerns about security had been discussed by the SEC Board, such concerns were not raised with BGEA contemporaneously, nor conveyed in the letter to SEC from Glasgow City Council asking that the event be cancelled, nor in SEC's letter to BGEA cancelling the booking, nor in press releases.

Having unsurprisingly rejected the 'security' explanation, and having found BGEA had made out facts from which the court could infer discrimination, the reverse burden of proof meant the court had to find direct discrimination.

In reaching that decision, the Sheriff addressed the issue of whether a protected characteristic should have *'nothing to do with'* the impugned decision, *'or **merely** "no significant influence" on the decision to terminate the agreement'* [emphasis added]. He found both tests were met but preferred the *'nothing to do with'* test [para 39].

That preference was based on *Efobi v Royal Mail Group* [2021] UKSC 31; Briefing 992 [2021] at para 28, per Lord Leggatt, given in the context of the adequacy, or otherwise, of an employer's explanation for an act so as to prevent, or enable, the burden of proof to be reversed under s136 EA.

The Sheriff accepted that *Nagarajan v London Regional Transport* [2000] 1 AC 501, a decision of the House of Lords, had not been 'overruled explicitly'. His reasons for preferring *Efobi* (and in effect holding that the *Nagarajan* approach to 'significant influence' had been implicitly overruled by the SC) were that it was *'a Supreme Court decision. It was decided in 2021 and its reasoning involves the 2010 Act'.*

The cancellation resulted in pecuniary loss from costs reasonably incurred in anticipation of the event taking place. BGEA were awarded a total of £97,325.32. The Covid-19 lockdown was irrelevant for establishing liability. It was considered as a factor only when assessing an end date for liability.

Comment

The substantive decision of Glasgow Sheriff Court covers only [sic] 72 pages. The remainder of its 280 pages is taken up by the written submissions of the parties. Pages 73 to 224 are BGEA's submissions: with 103 extensive footnotes (some spreading over two pages), and an unusual numbering system presenting additional challenges to any reader. Pages 225 to 280 are SEC's submissions.

On reading this decision, it's clear that BGEA needed no help from the burden of proof provisions. The findings on the timing of events and on the lack of the expected footprints which might show that a real contemporaneous concern with safety and security was properly separable from the protected characteristic, meant the 'reason why' was not safety and security.

A *'nothing to do with'* test is likely to make it more difficult when trying to distinguish between an aspect of the conduct or act in question which is properly separable from the protected characteristic.

Although relying on *Efobi*, the Sheriff missed the important distinction between cases where the burden of proof is relevant because there is doubt about the facts required to establish a prima facie case of discrimination, and those where there is not.

At para D26, the SEC noted Lord Leggatt's reference, at para 38 of *Efobi*, to the SC's reminder in *Hewage v Grampian Health Board* [2012] ICR 1054; Briefing 653 [2012] *'not to make too much of the role of the burden of proof provisions'* as they *'have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another'*.

Read in context, it is not apparent that the SC in *Efobi* considered it was making any departure from the established approach to *'on the grounds of'* and its replacement 'because of' when dealing with acts requiring an assessment of the mental processes of the decision-maker.

The 'significant influence' test is a long-established one. It is relevant for cases where addressing the 'reason why' question requires an assessment of the alleged discriminator's mental processes.

Despite the submissions annexed to the Sheriff's judgment covering all relevant authorities, including extensive and relevant quotes, there is no recognition in the substantive decision that *Nagarajan* is the start of a line of authority on the 'reason why', endorsed by the majority of the SC in *R(E) v Governing Body of JFS* [2010] 2 AC 728; Briefing 555 [2021].

Implications for practitioners

The BGEA case looks like a straightforward and predictable response to a variant of a 'no platform' decision. For a deeper look at the competing issues, Akua Reindorf's report for the University of Essex is worth reading.[1]

In the BGEA case, the distinction between the tests of *'nothing to do with'* and 'significant influence' made no difference as the Sheriff would have found against SEC under either test. In other cases, it may make a difference. The Sheriff's preface of 'merely' before 'significant influence' highlights it as less onerous than a test of *'nothing to do with'.*

A *'nothing to do with'* test is likely to make it more difficult when trying to distinguish between an aspect of the conduct or act in question which is properly separable from

1 Review of two events involving external speakers

the protected characteristic. That difficulty is likely to become more so when dealing with mental impairment in cases where the boundary of what is and what is not part of the disability is unclear.

One way to approach this is to use *Kong v Gulf International Bank (UK) Ltd* [2022] EWCA Civ 941, in the context of automatically unfair dismissal for whistleblowing, and argue that, in effect, there are no guidelines other than what the legislation provides: that each case turns on its own facts; that the separability principle is not a rule of law, nor a basis for deeming an employer's, or an alleged discriminator's reason to be anything other than the facts disclose it to be.

Sally Robertson
Cloisters
sr@cloisters.com

ABBREVIATIONS

AC	Appeal Cases
All ER	All England Law Reports
BL	Barrister-at-Law
CA	Court of Appeal
CCTV	Closed circuit television
Civ	Civil
CJEU	Court of Justice of the European Union
CRE	Commission for Racial Equality
CSIH	Inner House, Court of Session (Scotland)
CSOH	Outer House, Court of Session (Scotland)
DLA	Discrimination Law Association
EA	Equality Act 2010
EAT	Employment Appeal Tribunal
EC	European Commission
ECHR	European Convention on Human Rights 1950
EHRC	Equality and Human Rights Commission
ECRI	European Commission against Racism and Intolerance
EIA	Equality impact assessment
EJ	Employment judge
ET	Employment Tribunal
EU	European Union
EUWA	European Union (Withdrawal) Act 2018
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
FLAC	Free Legal Advice Centres
GLW	Glasgow
GRA	Gender Recognition Act 2004
GRC	Gender recognition certificate
HHJ	His/her honour judge
HJA	Hodge, Jones and Allen, solicitors
HRA	Human Rights Act 1998
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICR	Industrial Case Reports
IECC	Circuit Court (Ireland)
IP day	Implementation day (December 31, 2020)
IRLR	Industrial Relations Law Reports
IT	Industrial Tribunal
J/JSC	Judge/Justice of the Supreme Court
LGBTQ+	Lesbian, gay, bisexual, trans and gender diverse, queer (or sometimes questioning), intersex, asexual, and others
LJ/LJJ	Lord/Lady Justice of Appeal (singular and plural)
LLP	Legal liability partnership
MPG	Migration Policy Group
MR	Master of the Rolls
NICA	Court of Appeal in Northern Ireland
PCP	Provision, criterion or practice
PPF	Protected Pension Fund
PPS	Public Prosecution Service
PSED	Public sector equality duty
PSNI	Police Service of Northern Ireland
REUL	Retained EU Law (Revocation and Reform)
ROSH	Risk of Sexual Harm (order)
SC	Supreme Court
Sh Ct	Sheriff Court
(sic)	'sic erat scriptum' – intentionally so written
SLG	Starting Line Group
SLT	Scots Law Times
SNP	Scottish National Party
UKEAT	United Kingdom Employment Appeal Tribunal
UKSC	United Kingdom Supreme Court
WRC	Workplace Relations Commission (Ireland)

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Sex discrimination, housing allocation policies and domestic violence

R (on the application of TX) v Adur District Council [2022] EWHC 3340 (Admin); December 21, 2022

Facts

This case challenged the housing allocation policy of the defendant local authority, Adur District Council (the council). The policy placed applications into one of four priority bands. The claimant (TX) was a female victim of domestic violence who had moved to the council area to live with her mother and escape her abuser; she also had serious mental health problems.

Upon receiving TX's application to be placed on the housing register as a result of homelessness, the council accepted its housing duty towards TX under s193(2) of the Housing Act 1996 and she was put on the housing register.

TX was allocated to band C, the third lowest priority for housing. The allocation to the lower priority was because she had not lived or worked in the area continuously for the last two years; it accepted she had a local connection to the area and an overriding need to move to the area (as set out in part 3.3.3(d) of the allocation policy). This band was subsequently downgraded to band D as a result of her housing related debt.

... the policy indirectly discriminated against women... [as] ... women are more likely to be required to move to a different local authority area as a result of domestic abuse.

TX applied to the court alleging that she was being indirectly discriminated against contrary to ss19 and 23 Equality Act 2010 (EA) and that there had been a breach of the European Convention on Human Rights 1950 (ECHR) Article 14 (prohibition of discrimination) in conjunction with Articles 3 (prohibition of torture) and 8 (right to respect for private and family life).

It was accepted that the allocation policy was a provision, criterion or practice (PCP) and that TX had the protected characteristic of sex.

High Court

It was held that in spite of ostensibly neutral wording, the policy indirectly discriminated against women – the rationale being that women are more likely to be required to move to a different local authority area as a result of domestic abuse.

The placement of TX, and others in a similar position to her, in bands C or D, was a substantial disadvantage as this made it much less likely that they would be able to obtain social housing.

The court usefully set out the guiding principles, derived from the relevant case law, on how to assess the discriminatory impact of housing allocation schemes:

1. *The comparison to be drawn is between groups, not individuals (R (Ward) v Hillingdon LBC [2019] EWCA Civ 692, [2019] PTSR 1738 (Ward [paragraph 57]).*
2. *A scheme does not need to put every member of the group sharing the protected characteristic at a disadvantage (R (H) v Ealing LBC [2017] EWCA Civ 1127, [2018] PTSR 541 [paragraph 65], (Ward [paragraph 58]).*
3. *The comparator groups are those who share the protected characteristic and those who do not; the fact that some in the comparator group are disadvantaged does not negate the discrimination if a higher proportion of the protected group, suffers that disadvantage (Ward [paragraph 59]).*
4. *In considering justification, the scheme as a whole is to be considered (R (H) v Ealing LBC [paragraph 81]) and it is for the policymaker to justify the PCP (Ward [paragraph 76]).*

5. The aim is equality of outcome (Ward [paragraph 86]). [Para 38]

In the circumstances, the court decided that there was a breach of s19(2) EA. In light of this decision, and perhaps regrettably, the court did not address the Article 14 ECHR element of the claim but did correctly direct itself to the principles laid in *Thlimmenos*.

The council advanced several arguments seeking to justify its housing allocation policy, the most forceful of which was that it was exercising its power to include 'localism provisions' to ensure that housing went primarily to those with the greatest connection to the district in light of the severe pressure on social housing. The court held that the council's failure to consider the particular discriminatory impact of this policy on women fleeing domestic abuse meant that it was unable to rely on this justification.

The court granted declaratory relief only and the council was given the opportunity to re-make the decision and justify the discriminatory impact. Despite this, the council requested that the court refuse relief on the basis the claim was academic only as a result of a subsequent banding review; this was rejected.

Implications for practitioners

Discrimination practitioners should continue to push for financial damages in line with the relevant Vento bands to be the norm wherever a discrimination case is successful in the civil courts.

The decision provides a clear legal test which should be considered by the courts when assessing whether an allocation policy is discriminatory. Previous decisions have covered disability (*R (H) v Ealing LBC*) and non-UK nationals (*Ward*); the principles elided in those decisions are drawn together in this judgment.

This issue is one likely to be of on-going importance in light of the well-publicised pressures on social housing stock which seem unlikely to be relieved any time soon.

Comment

This is one of several relatively recent cases which deal with discrimination by local authorities, in the context of housing related decisions, which have been found to be discriminatory against women who are fleeing domestic abuse (see *JD & A v UK* European Court of Human Rights, Case Nos 32949/17, 34614/1; October 24, 2019; Briefing 924 [2020]). There is a pattern of local authorities failing to take into account the discriminatory impact of ostensibly neutral policies on women.

It would be helpful if all local authorities were to conduct a review of any such potentially discriminatory housing allocation policies to allow for the possibility that applicants may be survivors of domestic abuse. In any event, policies ought to be applied in a much more sensitive manner tailored to the circumstances rather than adopting a one size fits all approach in pursuit of 'fairness', while in fact achieving the opposite.

A final comment on this case is on the subject of relief. The qualified declaratory relief provided is welcome but does not go far enough as a remedy. As with many other discrimination claimants, TX will have experienced a significant amount of stress as a result of the discrimination to which she was subjected, and by the litigation process itself.

There has been welcome progress recently on financial damages being awarded for breaches of the EA in the civil courts in cases such as *Rosebery Housing Association v Cara Williams and Elaine Williams* (2021) EW Misc 22 (CC) Case No: G01KT427; December 10, 2021; Briefing 1012 [2022]. Discrimination practitioners should continue to push for financial damages in line with the relevant Vento bands to be the norm wherever a discrimination case is successful in the civil courts, whether the claim is brought under private or public law.

Ryan Bradshaw
Senior Associate Solicitor, **Leigh Day**

First Irish judgment finding race discrimination against Roma in goods and services

CT & FE v Dunnes Stores Company Unlimited [2023] IECC 4; May 18, 2023

Implications for practitioners

This case establishes that mistaken identity related to a complainant's ethnicity (or actions taken on foot of such mistaken identification) may constitute unlawful discrimination.

The court's engagement with the evidence of previous incidents involving the complainants (or the lack of such evidence), of the systems/processes for the recording of such incidents and in relation to the training of staff is also notable. The case illustrates that relevant documentary evidence may be sought prior to hearing through discovery processes or under data protection legislation – and that the failure or inability of the respondent to provide such evidence may be a relevant consideration in deciding the complaint.

Finally, the case may suggest that there are benefits to complainants who are engaging with the tribunal via an interpreter (and where there are conflicts of evidence) for proceedings to be conducted in-person, rather than via a remote hearing, where possible.

Facts

CT was expelled from a city-centre supermarket by a security officer as she attempted to pay for her groceries. Dunnes Stores asserted that she was removed from the shop because she had been previously barred for begging. Her niece, FE (who was a minor at the time of the incident) was present with CT and unable to complete her purchase at the shop in light of the security officer's actions towards her aunt. Both women wear traditional Roma attire in expression of their ethnic identity and were doing so at the time of the incident.

CT denied that she had ever been barred from the shop and subsequently made a data access request to the respondent pursuant to the General Data Protection Regulation for any records pertaining to her. One of the records provided by the respondent on foot of that request was a report in relation to a prior incident (where FE and CT were not present) involving different women who were also of Roma ethnicity.

Law

The Equal Status Acts 2000 to 2018 (ESA) give effect (in part) to Council Directive 2000/43/EC of June 29, 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the Race Directive) in Irish law. The ESA prohibit discrimination, including direct discrimination, on the ground of *'race, colour, nationality or ethnic or national origins'* in the provision of goods and services.

S38A(1) ESA provides that *'[w]here in any proceedings facts are established by or on behalf of a person from which it may be presumed that prohibited conduct has occurred in relation to him or her, it is for the respondent to prove the contrary.'*

Most complaints under the ESA are heard by the Workplace Relations Commission (WRC) at first instance.

Workplace Relations Commission

CT and FE made complaints of race discrimination under the ESA against Dunnes Stores. The complainants gave evidence via an interpreter at a remote WRC adjudication hearing.

The complainants' representatives referred to the fact that, in response to being notified of the discrimination complaints, the respondent had made reference to (and provided incident reports in relation to) a wholly separate prior incident at the shop (involving different Roma women). They also highlighted that the respondent had no formal system for recording persons who are barred from the shop, and had provided no evidence that staff members at the store had received any form of equality or anti-discrimination training. It was therefore submitted that CT had been mistakenly identified as a person who was barred from the store on the basis of her Roma ethnicity and that she and FE were subject to less favourable treatment contrary to the ESA as a result.

... the complainants had established that they had been subject to treatment which 'was different to how other shoppers would have been treated' contrary to the ESA.

However, the WRC adjudication officer concluded that the evidence (including oral evidence provided by the security officer) supported a finding that CT 'had been barred' from the shop previously. In dismissing the complaints, she stated that she found *'the testimony of the complainants, at times, incoherent and inconsistent'* and that *'the respondent's testimony relating to the matter was more cogent and persuasive'.*

Circuit Court

Both decisions of the WRC were appealed to the Circuit Court. On foot of a fresh, in-person hearing, Judge John O'Connor issued judgment in favour of the appellants. Judge O'Connor held that the complainants had established that they had been subject to treatment which *'was different to how other shoppers would have been treated'* contrary to the ESA.

He noted that *'[d]iscrimination has to be objectively assessed to uphold the rule of law'* and made the following findings in his assessment of the evidence:

- although the security officer believed that he had *'not engaged in discrimination… he made this assumption from his own subjective point of view';*
- the security officer's testimony to the effect that he was *'adequately trained'* was *'questionable';*
- '*there was a failure* [on the part of the respondent] *to properly record the previous alleged incidents';*
- '*Significantly there was a mix up in the discovery documentation disclosed which related to a different person and a different incident. The only commonality with the discovery of the different person and CT, one of the appellants, was the ethnic origin of both persons.*'

CT was awarded €4000 in compensation for the effects of the discrimination and her niece FE was awarded €2000.

Judge O'Connor included in his judgment a list of recommendations applicable to providers of goods and services for *'avoiding or at least mitigating'* incidents of mistaken identity which may be discriminatory or give rise to discrimination contrary to the ESA:

1. *Security officers should avoid making assumptions and relying on instinct or memory alone when an alleged previous incident(s) occurred. A time lag of an alleged previous incident is also a relevant factor in this consideration.*

2. *There should if possible be a record of previous incidents (if any). There should also [sic] an awareness of the problem that identity is frequently a genuine issue. We all have been in situations where we have embarrassed ourselves in thinking we recognise a particular person to only find it is a mistaken identity. In these circumstances there is also an added possibility of potentially stereotyping someone from an ethnic minority.*
3. *Sometimes discrimination is not recognised even though in retrospect it might seem obvious. To overcome this, it is useful to combine a degree of empathy with objectivity. In other words, there should be some awareness of the challenges and obstacles that a minority ethnic person can endure in shopping. There may in fact be more than one way to communicate a policy concern. In this regard it is important to recognise that a person from an ethnic minority may have cultural concerns in regard to some forms of communication. This can be addressed by adequate training, and not just [sic] employee shadowing another employee. This policy can be reinforced by an employee user manual.*

...there should be some awareness of the challenges and obstacles that a minority ethnic person can endure in shopping.

4. *In some circumstances where a shopper feels they have been discriminated against it would be beneficial to have an internal objectively based complaint handling mechanism option. In doing so it can facilitate the complaint being handled confidentially and carefully.*
5. *An apology in appropriate circumstances can go a long way to mitigate any potential damage.*

Comment

The judgment of the Circuit Court is the first decision of the Irish courts upholding a race discrimination complaint by a Roma person in relation to the provision of goods and services under the ESA. Free Legal Advice Centres (FLAC[1]) the independent law centre which acted for the complainants and which has provided dedicated legal services for Roma since 2017, noted that the case is:

> *… one in a long series of discrimination complaints taken by FLAC on behalf of clients of our Roma Legal Clinic against providers of goods and services. Those cases often settle on confidential terms… This form of discrimination … particularly impacts Roma women, such as FLAC's clients, who wear traditional Roma attire as part of their ethnic identity.*

The judgment may provide useful guidance to practitioners dealing with similar discrimination cases and could – through its dissuasive effect – have particular benefits for Roma and other groups who may be subject to stereotyping and stigmatisation in seeking to access goods and services.

By contrast to the decisions of the WRC, the judgment of the Circuit Court displays a marked sensitivity to *'the challenges and obstacles that a minority ethnic person can endure in shopping'* and significantly more scrutiny of the respondent's evidence. In this regard, it is worth highlighting that the case was heard remotely by the WRC – at a time when such an approach was necessitated by the prevailing public health guidance. However, pursuant to legislation that was introduced as a pandemic response-measure, the WRC continues to operate on the basis of a policy which provides that:

1 FLAC is an Irish independent human rights and equality organisation which exists to promote equal access to justice. It operates a telephone information and referral line and a nationwide network of legal advice clinics where volunteer lawyers provide free legal advice. As an Independent Law Centre, FLAC takes on a number of cases in the public interest each year and operates a Roma Legal Clinic, Traveller Legal Service and LGBTQI Legal Clinic. FLAC makes policy recommendations based on the learning and experience of its case work. See: www.flac.ie

- *Unless it appears to the WRC that conducting proceedings via remote hearing could be unfair to any of the parties involved in a particular complaint or would otherwise be contrary to the interests of justice, the WRC will schedule the case as a remote hearing*
- *All cases will be considered amenable to remote hearing, unless the parties can demonstrate how holding a remote hearing might not be in the interests of justice or would breach fair procedures, both of which are subject to a high threshold.*

This policy, and its potential adverse impact on members of marginalised and disadvantaged groups who may already be engaging with the tribunal via an interpreter in cases where there are conflicts of evidence (and in circumstances where civil legal aid is not available for proceedings before the WRC), is a cause of significant concern. Of similar concern, is the absence of any publicly available research in relation to the impact of remote hearings on the fairness of discrimination proceedings in Ireland and the outcomes in such proceedings.

Christopher Bowes BL
Legal Officer, FLAC
christopher.bowes@flac.ie

Retained EU Law (Revocation and Reform) Bill revisited

Briefings 1039 [March 2023] explored the potential impact of the proposed Retained EU Law (Revocation and Reform) Bill (the REUL Bill) on UK discrimination law which was then at the committee stage in the House of Lords. The government has since changed its position. Tom Moore, employment solicitor at Cole Khan Solicitors LLP, explains recent developments.

Government's change of approach

As originally drafted, the REUL Bill would have had a huge impact on discrimination law in the UK. In summary, as a result of the 'sunset clause', swathes of law were liable to automatic revocation at the end of 2023. In addition, the frameworks and principles which underpinned domestic discrimination law – and its interpretation – would have disappeared overnight.

Several groups and organisations had highlighted the risks of such an approach. In April 2023, Caroline Noakes, MP, chair of the Women and Equalities Committee, wrote to Kemi Badenoch, MP, Business and Trade Minister, responsible for the Bill's passage through parliament, highlighting the following:

> *It is difficult to see how you can ensure that the REUL Bill will not inadvertently lead to the revocation or erosion of equality rights and protections contained in retained EU law if you cannot readily identify all relevant retained EU laws which are within your purview.*

In a statement to the Commons on May 10, 2023, Ms Badenoch confirmed the amendments being tabled to the REUL Bill, noting the following:

> *However, with the growing volume of REUL being identified, and the risks of legal uncertainty posed by sunsetting instruments made under EU law, it has become clear that the programme was becoming more about reducing legal risk by preserving EU laws than prioritising meaningful reform.*

It appeared that the government, when faced with the enormity of the task at hand, has decided to take a different approach, which gives greater weight to the avoidance of uncertainty. This appears to be a welcome step from a discrimination law perspective.

The amended REUL Bill

The biggest change is the removal of the automatic sunset clause. This should remove the immediate uncertainty that this Bill would have caused. Instead of the proposed default removal of an unknown number of EU laws, a list of EU derived Regulations, Orders, and EU Commission Decisions are set out in a schedule, all of which are marked for revocation at the end of 2023.

At first blush, it appears that very technical regulations are to be revoked at the end of the year, very few of which operate in the discrimination sphere.

Domestic primary legislation such as the Equality Act 2010 remains safe. Laws and regulations such as the Maternity and Parental Leave Regulations 1999, the Pregnant Workers Directive, the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 and the Fixed Term-Employees (Prevention of Less Favourable Treatment) Regulations 2002 also appear to be safe from immediate revocation, for now.

There does not appear to be any further plan or proposal as to how the interpretive principles will be affected by the new legislation. The REUL Bill, as drafted, does not repeal pre-Brexit CJEU case law, or change the position in any significant manner. Of course, there is nothing in the Bill which prevents any future government from repealing these laws and regulations.

The House of Commons has considered and rejected a number of Lords' amendments to the REUL Bill; it is currently being considered again by the Lords.

The government's proposed direction?

Alongside Ms Badenoch's statement, the government published a brief policy paper which touched on, among other things, the UK's exit from the EU, and a new vision for regulation in the UK.

A review of this paper provides a sense of the specific EU-derived laws which the government may target for revocation including the Working Time Regulations, and other EU-derived regulations relating to holiday pay.

Realistically, these regulations are already under threat, and it remains the case that these rights attach to worker status. Atypical workers and non-employees are likely to struggle to fall within the scope of non-discrimination provisions within domestic law.

From a discrimination law perspective, uncertainty remains, but this is now much less than was previously suggested. Put simply, the new proposal removes the biggest 'unknown unknown'.

All options remain open to the government, and with an election due to take place next year at the very latest, it looks like uncertainty still surrounds the future of domestic discrimination law.

Singapore delegation meet the DLA

A delegation from the Singapore Ministry of Manpower, National Trades Union Congress and National Employers Federation were visiting the UK in June on a fact-finding mission to discover more about the process of implementing workplace anti-discrimination legislation in Singapore. The 10-strong delegation met representatives of the DLA on June 14, 2023.

They were keen to draw on the UK's long experience in this field, to learn from best practice and to avoid pitfalls. In particular, they were interested in how to foster a mediation/conciliation approach and discourage excessive litigation.

In an informal discussion, the DLA representatives outlined the evolution of UK equality legislation, giving practical examples of simple, low-cost initiatives such as the questionnaire which, although now officially abandoned, still lives on in practice as a useful tool. Ensuring access to justice and the potential establishment of an equality body with powers to make strategic interventions were emphasised. The DLA is grateful to Cloisters Chambers for hosting the event.