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Equality and access to justice

The exclusion of older and/or disabled people from accessing services which are increasingly being provided solely online could amount to unlawful indirect discrimination, a breach of human rights and a failure to comply with the public sector equality duty (PSED). The 'digital first' approach of government and other providers means that people who do not use the internet, who cannot afford the equipment or who lack the skills or confidence to carry out activities online are excluded from a wide range of public and private services including the NHS, local council or government services, financial services, and utility providers.

Relying on the 2022 UK Consumer Digital Index, Age UK reports that 5.8 million people aged 65 years or over lacked basic digital skills – 30% of people aged 65 to 74, and 69% of those aged 75 or over could not complete all eight of the most fundamental tasks considered to be required to use the internet safely and successfully.

Age UK's campaign on digital exclusion – *Offline and Overlooked* – is demanding an end to this discrimination and is calling for all public service providers to offer and promote an affordable, easy to access, offline way of reaching and using services. Age UK's article for *Briefings* highlights the importance of the PSED as a pre-litigation campaigning tool which activists can use to challenge policies and help decision-makers pay due regard to the needs of the members of age and disability groups and consider alternative means of service provision.

Another important issue raised in this edition is the ability of litigant-in-persons to effectively access the tribunals. In its response to the consultation on the proposed new EAT Practice Direction and amendments to the EAT Rules 1993, the DLA has highlighted an opportunity to improve the experience of such litigants. Suggestions to assist their access to the tribunals include making information more accessible to the layperson and providing more guidance, for example, a 'court guide' on topics such as preparing grounds of appeal or constructing concise skeleton arguments. In his article, Les Allamby reports on a litigant-in-person reference group in Northern Ireland which is working with litigants-in-person on an equal footing with representatives of the judiciary and the legal profession on enabling their participation in legal proceedings and making it more effective.

In its September 2023 report, *The State We're In: Addressing Threats & Challenges to the Rule of Law*, Justice, the cross-party law reform and human rights organisation, highlights significant systemic inequalities which need to be addressed. Declaring that [the UK's] *'approaches to tackling inequality and discrimination are unfit for purpose'*, it refers to the failure of policymakers to conduct equality impact assessments *'as seen most recently where the Illegal Migration Act 2023 lacked such an assessment until after its passage through the House of Commons. Often discrimination goes entirely undetected due to data being uncollected, unpublished, or of poor quality. In modern slavery cases, for instance, no data is regularly researched or published in relation to complainant ethnicity'.*

Justice calls on the government to prioritise tackling inequalities by, for example making equality impact assessments a mandatory part of the legislative process and ensuring legislators comply with their public sector equality duties. It urges government to collect, publish and monitor equalities data systematically, increase the use of equality impact assessments for legislation, and strengthen and protect the powers and independence of the Equality and Human Rights Commission – whose budget has *'plummeted from a peak of £70.3 million in 2007 to £17.1m today'.*

The DLA echoes these demands. The theme of its annual conference on November 3, 2023 is *'equality and access to justice'*; the conference will particularly focus on access to justice for persons with disabilities and combatting the effect of sex and race discrimination in police forces on victims of crime's access to justice.

Aware of the devastating cuts to legal aid which have decimated universal access to justice, Justice reports that *'Annual public expenditure on legal aid dropped by a quarter between 2009 and March 2022, resulting in "legal aid deserts", with no access to legal advice at all.'* The DLA conference will also address how practitioner and activists can use the PSED to combat these advice deserts. You can find full details of the conference on the DLA website **here**; to book a place click **here**.

The DLA is encouraging organisations which are running equality campaigns to promote these, as Age UK has done, by writing articles for publication in *Briefings* and bringing them to the attention of members and practitioners interested in such campaigns.

Geraldine Scullion
Editor, *Briefings*

Challenging the impact of digital exclusion

The DLA is seeking to enhance practitioners' ability to find test cases on aspects of discrimination law and to tie into the campaigning work of organisations working for equality in the UK. In this article Sally West, policy manager, and Christopher Brooks, head of policy, at Age UK respectively, and Declan O'Dempsey, barrister, Cloisters Chambers, explore Age UK's experience of non-digital access to services and the impact of digital exclusion on older people. They highlight the inequalities this creates and outline the legal context for aspects of digital exclusion, providing guidance on how such exclusion could breach equality and human rights law.

For many people the internet and digital technology are essential to the way they work, communicate, shop, manage their finances, access services, and enjoy entertainment. However, not everyone is online and some people who use the internet only do so for limited tasks such as emails or video calls. For some people being offline is a lifestyle choice, but many are excluded for reasons such as limited digital skills, lack of access, or cost.

Older people and those with disabilities, in particular, may be excluded. This often leads to people feeling cut off or finding daily life increasingly difficult. This could, to some extent, be addressed by helping people gain and increase their digital skills and by ensuring digital services and websites are easy to access. However, as technology is always advancing, it is likely there will always be some people who will not be able to fully engage in the digital world.

Age UK is urging the government to end the discrimination against people for not being online. Its campaign on digital exclusion – *Offline and Overlooked*[1] – raises the question of whether service providers, including the state, are fulfilling their legal obligations under the Equality Act 2010 (EA) in terms of provision for those who are digitally excluded.

What is digital inclusion and digital exclusion?

Digital inclusion means having access to and being able to use the internet. A research project developing a UK benchmark for digital inclusion at a household level sets out this definition:

> *A minimum digital standard of living includes, but is more than, having accessible internet, adequate equipment, and the skills, knowledge and support people need. It is about being able to communicate, connect and engage with opportunities safely and with confidence.*[2]

In this article when the authors refer to people who are digital excluded, they are referring to those who do not use the internet or who do not have the skills or confidence to carry out activities online.

Who is digitally excluded?

Although the concept of digital inclusion is much broader than whether someone has access to the internet, national survey data on whether or not people use the internet provides a useful way of looking at factors associated with a higher risk of digital exclusion. The protected characteristics of age and disability under the EA are

1 www.ageuk.org.uk/our-impact/campaigning/offline-overlooked/

2 www.goodthingsfoundation.org/insights/developing-a-new-benchmark-a-minimum-digital-living-standard/#:~:text='A%20minimum%20digital%20standard%20of,opportunities%20safely%20and%20with%-20confidence

particularly relevant when considering barriers to internet use. So, while nearly all younger people in the UK have used the internet in the last three months, this is not the case for 10% of people aged 65 to 74 years (around 700,000 people in the UK) and 34% of those aged 75 years or older (around two million people). Overall, in 2022, an estimated 2.7 million people aged 65 years or older in the UK had not recently used the internet, the majority of whom had never used it.[3] In any indirect discrimination claim such statistics will be of use in establishing the particular disadvantage at a group level.

5.8 million people aged 65 or over... could not achieve the 'Foundation Level' of digital skills.

Digital exclusion is also linked to disability. For all age groups, people who are disabled as defined by the EA, are less likely to be internet users than non-disabled people. The most recent publication of the ONS UK internet users statistics covers 2020.[4] These show that at that time 22% of people aged 16 and over were disabled as defined by the EA.

Among those aged 65 to 74, 34% were defined as disabled. In this age group, 79% of disabled people had recently used the internet compared to 89% of non-disabled people. Among those aged 75 and over, 47% were disabled people and 47% of these had recently used the internet compared to 62% of those aged 75 or over who were not disabled.

Access to computer equipment and the internet at home is also linked to age. In 2021, 94% of all adults aged 18 and over in the UK had access to the internet at home, including two per cent who had access but did not go online. Among those aged 65 and over, 80% had access including 7% who did not go online.[5]

Smartphone use is also less common among older people. In 2022, 58% of people aged 65 and over had a smartphone; in contrast, 95% or more of people aged between 16 and 54 had a smartphone.[6]

However, it is also important to look beyond access to and use of the internet. The annual Lloyds UK Essential Digital Skills benchmark provides a measure of the fundamental tasks needed to access the online world, and the essential digital skills needed for life and work. The most recent survey (2022) found that 30% of people aged 65 to 74, and 69% of those aged 75 or over could not achieve the 'Foundation Level' of digital skills meaning that they could not complete all eight of the most fundamental tasks considered to be required to use the internet safely and successfully. This amounts to 5.8 million people aged 65 or over.[7]

Those classified as having an impairment were less likely to reach the Foundation Level than those with no impairment and there were differences depending on the type of impairment. For example, the proportion who had Foundation Level skills was:

- 87% among those with no impairment
- 77% among those with mental health impairment
- 60% among those with physical impairment, and
- 55% among those with sensory impairment.

3 Source: Age UK analysis of ONS analysis of quarterly Labour Force Survey, January - March 2021 projected to 2022. www.ageuk.org.uk/globalassets/age-uk/documents/reports-and-publications/reports-and-briefings/active-communities/policy-briefing---facts-and-figures-about-digital-inclusion-and-older-people.pdf

4 ONS Internet Users, 2020, released April 6, 2021, www.ons.gov.uk/businessindustryandtrade/itandinternetindustry/datasets/internetusers. Accessed October 9, 2023.

5 Ofcom, Online Nation, 2022 Report; www.ofcom.org.uk/__data/assets/pdf_file/0023/238361/online-nation-2022-report.pdf

6 Ofcom. March 2023. Adult's Media Literacy Core Survey 2022 Data Tables. Table 20. [online] Available at www.ofcom.org.uk/research-and-data/data/statistics/stats23#adultmediatracker. Accessed October 9, 2023.

7 Age UK analysis of data from Lloyds Bank. November 2022. 2022 Consumer Digital Index. The UK's largest study of digital and financial lives. Essential Digital Skills Interactive Data Tables [online]; available at https://www.lloydsbank.com/banking-with-us/whats-happening/consumer-digital-index.html. Accessed April 12, 2023.

Digital exclusion and access to local public services

Public authorities are prohibited from discriminating in the provision of their public functions and service provision under s29 EA, including in the terms on which the authority provides the service to the service user. S149 EA also requires authorities to have due regard to the need to eliminate unlawful discrimination and advance equality of opportunity between different groups. This public sector equality duty (PSED) will in particular impact on certain policy measures of local authorities.

Local authorities are increasingly adopting a 'digital first' approach where people are encouraged to access services and information online through their website. This is efficient for the provider and works well for the many people who are confident using digital systems. However, Age UK regularly hears from people who are finding it difficult to access local services if they are not online. Some examples include:

- applying for blue badges (which provide disabled parking)
- applying for housing benefit and council tax reduction (means-tested benefits to reduce rent and council tax)
- applying for social housing and bidding for properties
- paying at a parking meter – for example, in some areas people are expected to use an app, excluding those who do not use a smartphone
- buying visitors' parking permits.
- finding information about council services.

Local authorities are increasingly adopting a 'digital first' approach... Age UK regularly hears from people who are finding it difficult to access local services if they are not online.

Some individuals and local organisations have told Age UK that in their area, some services which can only be accessed online. Those who cannot access them are told to ask for help with the online application from family, friends, or local organisations.

More commonly, there are alternative ways to contact the local authority or access services, but these may be hard to find out about or are difficult for people to use. For example, one local Age UK organisation explained that although its council provides a telephone service for blue badge applications, some people are told they need to claim online. Another said applicants have to *'argue with council staff'* to get a paper form. In some areas the offline alternative involves going to a council office to complete the application face-to-face which may be difficult for those with mobility problems or who do not have good public transport. Others face long waits to speak to someone on the telephone.

In June 2023 Age UK produced a report about applying for blue badges and other council services based on feedback from local Age UK organisations.[8] This survey of 61 Age UK partner organisations across England and Wales reported the difficulties people faced when applying for a blue badge and other support from their local authority due to pressure to apply online. It concludes that in most areas there is strong encouragement to access council services digitally which risks excluding people who do not use the internet. Age UK is encouraging councils to review their systems to ensure that those who are not online can easily find out about, and access, services.

Using the Equality Act 2010 & the Human Rights Act 1998

These difficulties in accessing services raise questions as to whether local authorities are always fulfilling their obligations under the EA, and whether there are potential breaches of human rights under the Human Rights Act 1998 (HRA) and the European Convention on Human Rights (ECHR).

Those advising or supporting disadvantaged groups should consider whether indirect discrimination in the provision of services/functions (ss19 and 29 EA) is occurring.

8 *Applying for a Blue Badge and other council services if people are not online,* Age UK, 2023

They should also consider whether there is discrimination in relation to the rights of these groups to respect for family and private life (Article 8) and the right to receive information (Article 10) under the ECHR, read with Article 14. In relation to disabled persons, consideration should also be given to the duty to make, in an individual case, reasonable adjustments. This is dealt with below.

When an authority is devising or reviewing its digital strategy, the PSED requires the minds of the decision-makers to be focused on the needs of the age and/or disability groups which are different to the needs of other age groups or non-disabled persons groups. Local activists can bring to the attention of the local authority decision-makers information which will need to be weighed by the decision-maker.

The PSED represents a pre-litigation campaigning tool in the hands of such activists. The guidance in *Hotak v Southwark* LBC [2015] UKSC 30; [2016] AC 811 [para 75] on the requirements to exercise the *'due regard duty'* in substance and with rigour and an open mind can be emphasised. As can the factors mentioned in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin) [para 91] in relation to the timing of the consideration of the duty and the requirement for the authority to have a *'conscious approach and state of mind'.*

In the context of digital exclusion, practitioners are likely to want to ask the authority whether it has taken into account the way in which those of the disadvantaged age or disability group are affected by online service provision and what consideration has been given to how such disadvantage could be mitigated. If there is a tendency for the provision by the local authority to result in indirect discrimination, it should be asked how it has had due regard to the need to eliminate unlawful discrimination in this area.

Those advising or supporting disadvantaged groups should consider whether indirect discrimination in the provision of services/ functions (ss19 and 29 EA) is occurring.

As noted in *Cengiz and Others v Turkey* 48226/10 and 14027/11 European Court of Human Rights (Second Section) December 1, 2015, the right under Article 10 ECHR applies to the means of dissemination of information; any restriction imposed on such means necessarily interferes with the right to receive information. Even if no breach of Article 10 can be shown in a case, the discriminatory dissemination of information will need to be justified under Article 14 to avoid a breach of the disadvantaged group members' human rights.

Similarly, due to the way in which many services impact on the ability of individuals to establish and develop relationships with other people and the outside world, discrimination in respect of provision of access to services may have a similar effect in relation to Article 8 rights, which are likely to be engaged even if not breached. An interesting analysis of human rights arguments in relation to age can be found in [2013] UKFTT 522 (TC) (*LH Bishop Electrical Co Ltd v Revenue & Customs Commissioners*); Briefing 706 [2014] which appears to be the only case to have considered age-related human rights arguments in relation to online function provision.

In relation to disabled persons it is important to recall, first that the duty to make reasonable adjustments (ss20 and 21 EA) is owed to *'disabled people generally'* in the context of provision of functions and goods and services (para 2(2) Schedule 2 EA). In addition, the service provider must also fail to comply with the duty in respect of an individual for an unlawful act to take place. When considering this aspect of the duty in the context of access to services and functions provided by a public authority, practitioners should consider asking how this aspect of the duty has been considered under s149 EA. The authority should have due regard to the need to eliminate unlawful discrimination by considering whether the provision, criterion or practice, physical feature or lack of auxiliary aid impedes persons with one or more kinds of disability (see *Roads v Central Trains Ltd* [2004] EWCA Civ 1919, and *Finnigan v Chief Constable of Northumbria Police* [2013] EWCA Civ 1191).

Under s15 EA one or more disabled persons may be able to bring a claim against a service or function provider that, because of something (inability to use online services) arising from their disability, they are treated unfavourably.

With this, and with s19 EA, the defendant authority has the option to show, and the burden of proving, that the treatment or provision, criterion or practice was justified as an appropriate and reasonably necessary means of achieving a legitimate aim. Care should be taken to make any such defendant define the legitimate aims on which reliance is placed.

In the context of reasonable adjustment claims, in particular, it is important to define the service which is being provided properly (and realistically) in all cases. Online provision of information/services is simply the provision of information/services by some other means and no argument is likely to be accepted to the effect that moving access to services online renders them a completely different service to traditional services or functions. The provider is not obliged to change the nature of the service being provided (see *Edwards v Flamingo Land Ltd* [2013] EWCA Civ 801) but provision of offline services is similar to the request for an alternative means of interpretation (such as British Sign Language).

When dealing with a claim for s19 EA discrimination against a public authority service or function provider, consideration should always be given to asking for details of whether and how the authority has had due regard under s149 EA... It will have much more difficulty justifying what appears to be unlawful indirect discrimination if due regard has not been had.

The question of how expensive the alternative means of service provision is will be important in different contexts, but in principally the same way:

a) A putative adjustment may be seen as unreasonable if it is too expensive (but the service provider cannot pass on the cost of any reasonable adjustment to the disabled person).

b) When seeking to justify the provision, criterion or practice which excludes the (age or disability based) disadvantaged groups (or when seeking to justify unfavourable treatment of disabled persons under s15) the provider can seek to invoke the expense of the alternative means provided that this does not amount to an argument that it is cheaper to discriminate.

When dealing with a claim for s19 EA discrimination against a public authority service or function provider, consideration should always be given to asking for details of whether and how the authority has had due regard under s149 EA. Arguably an authority must select its aims as well as its means having due regard to the aims in s149. If it does not do so, it may not be able to prove that the aims it has are lawful ones and/or that the means adopted are lawful. It will have much more difficulty justifying what appears to be unlawful indirect discrimination if due regard has not been had.

Finally, practitioners seeking to bring discrimination complaints arising from disability cases or failure to make reasonable adjustments should ensure that the provider is fully aware of the person's disability. Many cases will involve seeking injunctive relief in this area, so it is important to have pointed out the claimant's disability when requesting the adjustment or that the unfavourable treatment should stop, so that there cannot be any real question under s15(2) (knowledge of disability status) or in relation to the duty to make reasonable adjustments (where it is necessary to have knowledge of both the disability and that the claimant is likely to be disadvantaged).

Access to health services

Digital transformation is seen as important in the modernisation of the health service and NHS England refers to *'websites and apps that make care and advice easy to access wherever you are'*.[9] For those online this has clear benefits, but it risks disadvantaging people who are digitally excluded. Age UK hears from people who are finding it harder

9 www.england.nhs.uk/digitaltechnology/

to access the health services they need because they are digitally excluded. Some examples are:

- Many GP surgeries are strongly encouraging patients to book appointments online. While telephoning for an appointment may be an option, it can be very difficult to get through – people may have to hold on for a long time to only find all appointments have gone.
- Age UK has been told that some surgeries are no longer allowing people to request repeat prescriptions over the telephone. One enquirer said her mother was very upset as she had been told she would have to go to the surgery in person which was very difficult for her to do. Her only option was to depend on others to order her prescriptions online.
- People are directed to online services to book hospital appointments. A woman in her 80s told Age UK she was only given the option to book a clinic appointment online.
- People are being encouraged to access services through the NHS app.[10] This gives access to GP services and other health services and enables people to, for example: book and manage hospital appointments, 'shop around' for where to go for treatment, and search for information and advice on conditions and treatments. People offline do not have the same options.

Digital transformation is seen as important in the modernisation of the health service ... but it risks disadvantaging people who are digitally excluded.

Patients waiting for treatment are told that they can look at www.myplannedcare.nhs.uk to find waiting times, support information and guidance on what to do while they are waiting. The authors are not aware of an offline alternative unless people are given a leaflet with their letter or at their referral appointment.

In examples such as these, it is not necessarily the case that people are denied access to health care and services altogether. However, because they cannot use the online systems, they may find it harder to do so, may have to depend on other people or, as in the case of finding information, may get more limited support. In some situations, these barriers may make people more reluctant to seek help. For example, one person told Age UK *'Making an appointment with my GP surgery seems so complicated now, I don't like to try.'*[11]

As with local authority services, there are questions about whether health services are fully considering the needs of digitally excluded people. Practitioners should be astute to consider how the behaviour of health providers can altered in this respect. For NHS providers early intervention relating to the PSED may be sufficient to change behaviour to make it more inclusive. However the full array of ss15, 19, 20, 21 and 29 EA should also be considered.

Private sector products and services

The increased use of digital technology is also transforming the way the private sector provides services and products. Plainly the range of legal challenges available in relation to private sector providers does not include the PSED or HRA challenges directly, although the interpretive effect of ECHR rights will influence the interpretation of the duties owed by private providers (s3 HRA).

Closure of local bank branches driven by the move to online banking is an issue which Age UK hears about regularly with some people now expected to travel many miles to the nearest branch. Even among older people who use the internet for some activities, not everyone wants to, or feels able to bank online with security concerns being a

10 www.nhs.uk/nhs-app/about-the-nhs-app/

11 Age UK Older People's Health and Care online survey, promoted through Age UK networks and on social media, October 4 – 27, 2022

major issue. Among internet users, 51% of people aged 75 or over and 41% of those aged 65 to 74 do not bank online or do so less than once a month.[12]

Those who are digitally excluded can also face higher costs for a range of products and services. For example, online-only savings accounts may offer higher rates of interest; supermarkets can provide reductions for those who download their app (so only for those with a smartphone); and, a specific example, Royal Mail provides a discounted rate for some parcel services arranged online in comparison to the price of services purchased at the post office.[13]

Accessing customer services can also be more difficult if people are not able to go online to contact companies. Age UK regularly hears of the difficulties people face in accessing customer services such as contacting energy companies. It can often be hard to find the number in the first place; people may face a range of push button options (hard for people with certain conditions e.g. hearing impairments, arthritis), and then may face a long wait to get through.

Challenging digital exclusion

The government should lead on the development of a long-term, fully-funded national Digital Inclusion Strategy to support people of all ages who want to go online to do so.

In order to highlight the extent and impact of digital exclusion, and to encourage public and private sector organisations to ensure that their services are accessible to everyone, Age UK's *Offline and Overlooked* campaign is calling for:

- All public services, including the NHS, council services and other nationally-provided public services, to offer and promote an affordable, easy to access, offline way of reaching and using them.
- The government must make sure local governments receive enough funding to provide offline services.
- Much more funding and support to enable people who are not computer users, but who would like to be, to get online.
- The government should lead on the development of a long-term, fully-funded national Digital Inclusion Strategy to support people of all ages who want to go online to do so (the last such strategy was produced in 2014).
- Banks must accelerate the roll-out of Shared Banking.

One of the most effective levers for change or accommodation is changing the mindset of the public sector providers of services and functions. Practitioners should consider working with local or national groups to engage with these authorities in their decision-making processes, encouraging them to have due regard to the needs of the members of these age and disability groups, and supporting them to consider the need to provide alternative means of service provision.

Practitioners should consider (a) whether there are individual test cases which can probe the lawfulness of some of these practices outlined above and (b) whether there are group litigation cases which would more effectively change the practice of businesses and authorities in respect of these matters.

Although Age UK is unable to provide funding to support legal cases, it is interested to learn about any relevant examples of cases which readers are currently working on, or have undertaken in the recent past, in order to assist its campaigning work. If you would like to get in contact, please email policy@ageuk.org.uk.

12 Age UK analysis of Understanding Society: Wave 12, 2020-2021 [data collection]. 17th Edition. UK Data Service. SN: 6614, DOI: 10.5255/UKDA-SN-6614-18. Downloaded February 21, 2023. Available at https://beta.ukdataservice.ac.uk/datacatalogue/studies/study?id=8806

13 www.royalmail.com/current-postage-prices

Developments in US on unlawful discrimination on grounds of height and weight and the Equality Act 2010

Laura Redman, dual-qualified US and English barrister, Cloisters Chambers, and former Director of the Health Justice Program at New York Lawyers for the Public Interest, looks at the introduction of protection against height and weight discrimination in the United States. She highlights the extent of such discrimination in the UK and considers how the Equality Act 2010 could be used to address this widespread form of discrimination.

Testimony of New York City residents before New York City Council, February 8, 2023

'As a large breasted Black woman, I was told early in my legal career that I shouldn't wear my actual clothes size: "It wouldn't be a problem if you're a skinny size 2 or 4, but if you have large breasts or butt or any kind of curves, you're going to look unprofessional."'

'I am a person with dwarfism. I have experienced discrimination based on unalterable physical characteristics. People have immediately judged my abilities, competence, and intelligence based on my appearance.'

'The sizeism I've experienced on the job has taken many forms, ranging from an employer refusing to purchase an office chair that would fit and support my body to a supervisor who let me know she wouldn't support my application for a more public-facing role in the organisation because seeing me as the face of the organisation would "give the wrong impression."'

'John was a skilled blue-collar worker. He was happily married and had grown children with whom he was close. He was so good at his job that his boss gave him raises, praise, and a new Cadillac to reward him for how well he had worked over many years. He was also a fat man. His company was eventually taken over by a new owner, who told John that he had to lose either 100 pounds or his job. John tried everything he could to lose the weight, but couldn't lose 100 pounds. A middle-aged man, he eventually lost his job.'

'When my first wife Joyce and I were seeking an apartment, we had a difficult time, as several landlords did not want to rent to a couple in which the wife was very large. We were openly sneered at by several; at the apartment building in which we finally ended up, we had to listen to the superintendent, who was showing us the place, share his concerns that someone the size of my wife might easily damage the property (things like the built-in ironing board, for example which he feared she might lean on.) Other landlords seemed to doubt that a couple like us could afford to pay the rent, and we should seek an apartment in a poorer part of town.'

'I am fat. I use the term "fat" and I encourage you to, as well. It's a morally neutral descriptor.'

New York City anti-discrimination law

On November 22, 2023, New York City (NYC) will join a few smaller municipalities in the United States and the State of Michigan in outlawing discrimination based on height and weight.[1] The sponsors of NYC Council's bill presented evidence which showed *'pervasive bias against people of size in the United States, as well as detailed evidence of weight-based discrimination'.* Data demonstrated that gaining weight predicted a decrease in salary; weight-based bullying in schools, often ignored, led to high rates of depression. Personal responses to a survey in NYC found that 90% of respondents had personally experienced weight-based discrimination and 55% within the workplace.[2]

In response, and after extensive advocacy from campaigning groups, mostly concerning weight-based discrimination, in May 2023 NYC added the words 'height' and 'weight' to the list of characteristics protected under its anti-discrimination law.[3] An individual will now be able to bring a claim based on the stand-alone category of weight or height in employment, housing or the provision of goods and services.

The state of Michigan has had a stand-alone protected characteristic for weight for several years, although note that in 2018 weight discrimination complaints made up only 1.5% of complaints to the Michigan Department of Civil Rights.[4] One weight discrimination case which made it through summary judgment in federal court in Michigan, concerned a FedEx employee whose weight made him unable to use certain delivery trucks leading to his request for a seatbelt extender, which was denied. His claim under disability discrimination law failed, but he was able to continue his claim under Michigan's weight discrimination law as the court found that there was a factual dispute concerning the employer's alleged reason for not providing a seatbelt extender.[5] The case settled in February 2023.

... weight had an impact on whether a candidate was perceived as suitable with stereotypes, such as people with more weight are physically less capable, often being applied. Female candidates who were considered 'obese' were viewed as even less suitable and assessed less favourably.

Weight and height discrimination in the UK

The same data which inspired the NYC Council to act paints a similar picture here in the UK. With regard to weight, a detailed academic study in 2016 confirmed that people who are fat are discriminated against when applying for employment. The study went even further and found that weight had an impact on whether a candidate was perceived as suitable with stereotypes, such as people with more weight are physically less capable, often being applied. Female candidates who were considered 'obese' were viewed as even less suitable and assessed less favourably.[6]

1 It may be helpful to first understand that there are multiple jurisdiction levels in US discrimination law. First, there are federal prohibitions against discrimination in employment, housing and provision of goods and services (called public accommodations) which come from Congressionally enacted legislation such as the Civil Rights Act 1964 or Disability Discrimination Act 1992. These pieces of legislation cover the basic protected characteristics and can be enforced in federal or state court after exhausting certain administrative requirements. There is also the New York State Human Rights Law which covers the same characteristics plus several others, including sexual orientation and gender identity. Claims under this law can be brought alongside a federal claim in federal court if they come from the same '*nucleus of facts*', otherwise known as pendant jurisdiction, but if not, only in state court. Then there is the New York City Human Rights Law which is the most expansive and includes additions such as caregiver status, credit or previous salary history, sexual or reproductive decisions or in housing, source of income. Claims under this law can be enforced either by making a complaint with the Human Rights Commission Law Enforcement Bureau, filing a claim in NY state court or if pendant jurisdiction exists and is accepted, in federal court. This tiered system operates in cities all over the US. It is common for city anti-discrimination law to be more expansive and inclusive than the other jurisdictions.

2 Office of City Council Member Brad Lander, Issue Brief, August 2021, available at council.nyc.gov/brad-lander/wp-content/uploads/sites/40/2021/08/Policy-Brief-on-Weight-Based-Discrimination.pdf

3 Section 8-101, New York City Human Rights Law

4 Harvard Strategic Training Initiative for the Prevention of Eating Disorders, *Body Size Anti-Discrimination Law* available at www.hsph.harvard.edu/wp-content/uploads/sites/1267/2022/02/MI-Weight-Discrimination-Claims-4.pdf

5 *Trapp v Federal Express Corp.*, US District Court for the Eastern District of Michigan, Case No. 1:21-cv-11271 (December 1, 2022)

6 Flint, Stuart W. and others *Obesity Discrimination in the Recruitment Process: 'You're Not Hired'*, May 3, 2016, Frontiers in Psychology, available at www.ncbi.nlm.nih.gov/pmc/articles/PMC4853419/

The World Obesity Foundation carried out an extensive survey in 2018 and found that four out of five people in the UK believe people who are 'obese' are viewed negatively because of their weight – higher than other forms of discrimination. Twenty five per cent of the adults surveyed admitted that out of two equally qualified candidates, they would appoint the one they considered having 'healthy weight' over a candidate they considered 'obese'. And nearly half of adults who consider themselves 'obese' have felt judged because of their weight when shopping or accessing healthcare.[7]

A 2023 report by a UK employment research group found that 70% of respondents believe weight discrimination occurs in their workplace. Thirty two per cent of respondents say they have witnessed weight discrimination at work, yet only 11% of witnessed incidents are reported to human resources.[8]

With regard to height, a 1992 UK study determined that the rate of promotion amongst civil service managers in Britain was correlated to height.[9] Further, a study into genetics at the University of Exeter in 2016 found that shorter height in men could lead to lower income.[10] In other parts of the world, studies have considered why these correlations exist finding that men (and sometimes women) who are taller are viewed as more 'leader-like', charismatic and having more 'perceived intelligence'. However, taller women are often viewed as too dominant, which can lead to lower outcomes.

The World Obesity Foundation ... found that four out of five people in the UK believe people who are 'obese' are viewed negatively because of their weight – higher than other forms of discrimination.

At the outset, it is not likely that the government is going to create a stand-alone protected characteristic for weight or height and this article does not seek to necessarily push for such but to alert readers to this area of discrimination and how current protections can, or cannot, be used to address this widespread problem.

Intersection with disability

The most obvious area where size discrimination could be considered unlawful is within the scope of disability discrimination. As the NYC resident with dwarfism confirmed, she would very likely be covered under relevant disability discrimination law as having a disability, and so enjoy the protections which apply.

In Europe, the intersection of weight and disability was initially addressed in *Fag og Arbejde v Kommunernes Landsforening* (also known as *Karsten Kaltolf v the Municipality of Billund)* [2015] ICR 322, EU; Briefing 734 [2015]. In a preliminary ruling, the CJEU found that while there was no EU law which prohibited discrimination on the grounds of 'obesity', obesity could be afforded protection if the claimant's experience met the test for disability in that jurisdiction. Responding to the question addressed to it, the court found that the concept of disability within Framework Directive 2000/78 did not depend on the extent to which the person may or may not have contributed to the onset of their disability – a commonly held weight-based stereotype.

Shortly after the CJEU decision, in the UK in *Bickerstaff v Butcher* [2014] WL 10246872 the Northern Ireland Industrial Tribunal, being mindful of this ruling, found that the claimant's condition met the test of a disability under s1 of the Disability Discrimination Act 1995 (the equivalent of s6 of the Equality Act 2010 (EA)). It determined that his mobility was substantially affected by his morbid obesity and he was disabled by a

7 World Obesity Federation *Weight Revealed as the UK's Most Common Form of Discrimination* October 11, 2018; based on survey of 1,115 UK adults in September 2018.

8 Pearn Kandola *Weight Discrimination at Work Report 2023* August, 21 2023, available at https://pearnkandola.com/research/weight-discrimination-at-work-report-2023

9 Melamed, Tuvia and Nicholas Bozionelos, *Managerial Promotion and Height*, Sage Journals, Vol. 71, Issue 2, October 1992, abstract available at https://journals.sagepub.com/doi/abs/10.2466/pr0.1992.71.2.587.

10 Frayling Tim and Dr Jessica Tyrell *Shorter statute and higher BMI lower socioeconomic status: a Mendelian randomisation study in the UK Biobank* 12 January 2016, available at www.bmj.com/content/352/bmj.i582

combination of his morbid obesity and gout conditions, and by each condition separately. [paras 4(iv) and (viii)] The tribunal found that he had experienced harassment for a reason related to his disability. [para 9(2)]

Several of the people testifying before the NYC Council, and in UK studies, explained the challenges they face in terms of physical structures within society. Such an example is the size of theatre seats; even where entities had fulfilled their obligations by removing seats to accommodate customers using wheelchairs, customers of larger size were not accommodated for and thus excluded.

Once alerted to these challenges across our physical world, it becomes apparent that navigating the world in a larger sized body not only means encountering stereotypes and assumptions but also direct limitations in the ability to enjoy and experience entertainment and services. If a person's weight was determined to be a disability, as in *Bickerstaff*, a court should be able to apply the general principles of reasonable adjustments in the provision of services under s29 EA.

Intersections with sex, race and age

But as the data and testimony reveals, the NYC law did not just seek to cover those who might meet the s6 EA definition of disability. Others may experience height and weight discrimination intersected with sex, race or age stereotypes. The same issues are present here in the UK and are appearing in the courts.

In 2018 in *Esoterikon v Kalliri*, [2018] IRLR 77, EU, the CJEU issued a preliminary ruling that Greece's minimum height for police officers could constitute indirect sex discrimination because many more women than men would not make the height limit. Further, although Greece had established the legitimate aim of operational capacity and proper functioning of the police services, that particular height limitation was not appropriate or necessary to achieve that end. The discrimination at issue in this case was based on sex, but the factual matrix concerned height.

If a person's weight was determined to be a disability ... a court should be able to apply the general principles of reasonable adjustments in the provision of services under s29 EA.

Back in the UK, in the recent decision in *Ola v King's College Hospital NHS Foundation Trust* London South Employment Tribunal, Case No. 2305835/2021 and 2301696/2022, August 9, 2023, addressing issues of height and sex, EJ Macey noted that:

> *We have found on the evidence that Ms Quainoo informed the claimant on 31 March 2021 that when Ms Quainoo had seen the claimant before she 'felt unable to concentrate at her tasks' and that the reason why other staff members were complaining was because, in [her] opinion, the claimant is taller and her style … We do conclude that these comments were related to the claimant's sex (being female). It is more likely for a woman to be subjected to comments about her body shape, whether that be a reference to her height or weight.* [paras 353 & 357]

In this case an employee in a hospital pharmacy department, who was considered tall, received comments about her dress and had been asked to go home and change because of her dress. On that particular day, she had been told that what she was wearing was inappropriate for work; the EJ determined that her dress was 'not tight' and *'the hemline was higher than 2 inches above the knee'.* [para 66] She alleged this was 'body shaming' and discriminatory. The tribunal found that the specific comments cited by EJ Macey above constituted harassment based on sex but did not find either direct or indirect sex discrimination. EJ Macey stated that the evidence demonstrated that men were treated the same regarding the dress code. The claimant presented a series of images where men who did not abide by the dress code were not penalised; however, the tribunal agreed with the respondent that each situation could be distinguished in terms of whether the same dress code applied, and thus were not appropriate comparators.

In 2005, under previous sex discrimination legislation, a 6ft 10in man brought a claim for indirect discrimination after his training offer was withdrawn because the respondent had said it was too dangerous for him to sit at the desks provided. The employment tribunal in *Sargeaunt-Thomson v National Air Traffic Control Centre* [2005][11] held that the respondent's actions were justified because of safety concerns in terms of the claimant being able to sit comfortably at the Centre's work stations and no alternative options were practical. The BBC News report of the case notes that the claimant later found employment where there were adjustable desks.

Discrimination based on stereotypes

In many instances, height and weight discrimination is based on stereotypes – see the NYC testimonial examples above of the couple trying to rent a flat or the employer's 'public-facing role' comment. Discrimination can be made out where it is based on a stereotype associated with a group, but *'there must be evidence from which the employment tribunal could properly infer that wrong assumptions were being made about that person's characteristics and that those assumptions were operative in the detrimental treatment'. Stockton on Tees Borough Council v Aylott* [2010] ICR 1278, CA, paras 48-49 (a case challenging stereotypes about mental health disability).

It does not require any great explanation that to say to any individual that they will not be offered shifts because they are too fat would be unwanted conduct, and that such a comment would undermine the dignity or create a hostile, degrading, humiliating or offensive atmosphere ...

In other words, there *'must still in any given case be sufficient reason to find that the putative discriminator has been motivated by such a stereotype'. B v A* [2010] IRLR 400, EAT, para 23 (stereotypes regarding men).

The intersection of sex and weight and stereotypes around women and weight were grappled with in *Galvani v Mr A Walters trading as The Crown Inn* [2021] WL 11457388, ET. In this case the claimant brought a claim of direct sex, or in the alternative age discrimination, alleging that she had not been allocated shifts because she was 'too fat'. When she asked her employer if it was because she was 'too fat' he responded 'yes'. His defence to the comment was that he had lost patience and wanted the conversation to end.

The tribunal did not uphold the claimant's direct sex or age discrimination complaints because there were both younger larger weight men and younger larger weight women who were offered shifts, creating a challenge to finding an appropriate comparator. Further, business needs dictated the allocation of shifts. With regard to harassment, EJ Midgley stated that:

> *It does not require any great explanation that to say to any individual that they will not be offered shifts because they are too fat would be unwanted conduct, and that such a comment would undermine the dignity or create a hostile, degrading, humiliating or offensive atmosphere for the person to whom it was directed ... [and] we accept in general that in the hospitality industry there might be a bias for younger, thinner female staff at busier times such as evening shifts, and that that might go some way to establishing the necessary connection.* [para 52]

However, the tribunal did not find there was evidence of this connection in Ms Galvani's case and dismissed her discrimination and harassment claims.

The stereotypes expressed in the NYC Council testimony quotes above are similar to claims where claimants argue they experienced less favourable treatment based on stereotypes such as the *'angry black woman'* or *'aggressive black male'.* Employment tribunals are willing to consider that such stereotypes exist and the argument has been successful in a number of cases. In *Shaikh v Moorfields Eye Hospital NHS Foundation*

11 See news.bbc.co.uk/1/hi/england/4227752.stm

Trust, Central London Employment Tribunal, May 11, 2023 a black woman had been described on several occasions as showing *'very aggressive behaviour'* and was told that she would be moved to allow for *'a cooling off period'*. EJ Keogh stated the evidence *'generally points strongly towards [the respondent] stereotyping the claimant as a "loud ethnic female"'* and found for the claimant on her claims of direct discrimination, harassment and victimisation.

Similarly, in *Morgan v Arriva Rail London Ltd,* London Central Employment Tribunal, October 26, 2022, Case No. 2207398/21 where a black male was repeatedly called 'angry' and 'intimidating' EJ Lewis stated: *'we believe that [the respondent] had a conscious or unconscious stereotyped perception of [the claimant] as intimidating and aggressive because he is a black man'.* [para 148]

In both cases the employment judges carried out a detailed analysis of the alleged discriminator's evidence and motivations.

However, where evidence is limited to the claimant having been called 'aggressive' or 'difficult' after exhibiting certain behaviour, the claims have not succeeded. In these cases, the tribunal found that the employer would have responded to the same behaviour (for example shouting) with the same action (calling someone aggressive), if it had been a white person and/or man who exhibited the same behaviour.[12] As with Ms Galvani, the claims failed in establishing the appropriate comparator and causal link.

Conclusion

How can weight and height discrimination be so pervasive today? Might it be that people don't think there are protections against discriminatory treatment or don't see it as harmful? Stereotypes are attached to both weight and height and how the person may carry out their job or what they may need in goods and services. There are also stereotypical assumptions with a person's weight that the individual is at fault as they could control their weight and, thus, do not deserve the same respect as the immutable, or even non-immutable, protected characteristics under the EA. Whatever the reasons, the evidence from the UK, similar to the evidence in the US, demonstrates that many people are experiencing discrimination because of their weight and height characteristics, particularly in employment.

... employment tribunals understand and are willing to consider the intersection of sex and weight, or sex and height or dress, and the stereotypes which apply; however, the facts of each individual case need to line up in terms of the causation requirements under the law.

The recent judgments in *Ola* and *Galvani* demonstrate that employment tribunals understand and are willing to consider the intersection of sex and weight, or sex and height or dress, and the stereotypes which apply; however, the facts of each individual case need to line up in terms of the causation requirements under the law. Although the EAT has said that as *'most courts have regularly recognised, direct evidence of discrimination is rare',*[13] unfortunately in these circumstances, as noted in responses to research and testimony above, people appear comfortable stating out loud the connection between their action or decision and an individual's weight or height. Research demonstrates that the bias experienced with regard to weight is often conscious and overt. Unsurprisingly, where such statements are made there would be no need for the court to draw inferences of discrimination and it is those claims which are most likely to be successful.

It is incumbent upon discrimination law practitioners to think about these intersections. It will be of value to claimants for their representatives to consider their experiences, not just narrowly within the established protected characteristics, but how they may be

12 Examples include: *Lewis v North Huddersfield Trust and Fell*, Leeds Employment Tribunal, July 28, 2023, Case nos. 1805209/21 and 1801640/22, paras 393-99; Okoh v North East London NHS Foundation Trust, East London Employment Tribunal, May 1, 2020, Case No. 3201955/18, paras 171-83.

13 *London Borough of Islington v Ladele (Liberty intervening)* [2009] ICR 387 para 40(3); Briefing 523 [2009]

grounded in the defendant's/respondent's view or impression of their height or weight and how these features intersect with an EA protected characteristic.

The description of a comparator will be essential – see *Galvani*. Lessons can be learned from the *'angry black women/man'* comment; while it is understood that the stereotype exists, the evidence must show that the stereotype was part of the motivation for the treatment using a comparator who had behaved in a similar way but did not have the same protected characteristic (race or sex). For example, with a larger sized woman, practitioners should think, as with a sex discrimination claim, not just how a male would be treated but particularly how a larger size male would be treated. Similarly, with a shorter sized man, comparison would be made with how a shorter sized woman was treated.

... the evidence must show that the stereotype was part of the motivation for the treatment using a comparator who had behaved in a similar way but did not have the same protected characteristic.

Without a stand-alone protected characteristic of height and weight similar to what is now enshrined in NYC law, although the stereotype is how the larger woman and shorter man are treated because they are larger or shorter, the comparator must be of the different sex and a person who materially shares their situation. This is the limitation that sunk the case in *Galvani* – even where such stereotypes around weight and waitressing were accepted as existing in that sector. Where disability can be established based on the impact of height or weight on day-to-day activities, stereotypes also come into play and can be found to motivate discrimination as in *Stockton*.

The new law has not yet come into effect in NYC and regulations and guidance are currently being drafted; there is no doubt however, that based on the extensive evidence of often blatant discrimination, litigation will follow. Discrimination practitioners in the UK will follow that litigation with interest.

Enabling effective participation of litigants-in-person

Les Allamby, chair of the Litigant in Person Reference Group (NI) and formerly the Director of Law Centre (NI) and Chief Commissioner at the NI Human Rights Commission examines the work of the group, its genesis, composition and achievements to date. He outlines how much remains to be done to improve the experiences of the 5000+ individuals[1] in Northern Ireland who go to court each year without legal representation.

Background

In 2018 Ulster University (UU) School of Law and the NI Human Rights Commission (NIHRC) published *'Litigants in Person in Northern Ireland: Barriers to legal participation'.*[2] The research focused on litigants-in-person involved in the civil and family courts. It observed proceedings, interviewed key actors including personal litigants, judges, solicitors, barristers, court officials and McKenzie Friends[3] to gain a holistic picture of the experiences of personal litigants. In addition, half of the personal litigants involved in the research were offered procedural advice and assistance through a *'procedural advice clinic'* provided by a NIHRC lawyer with the participants then interviewed to see if the support was valued or not.

The UU research found that many personal litigants had surfed in and out of legal representation for various reasons including being unable to afford a lawyer, while others chose to spend their monies on other essentials, with some losing faith in their lawyer. The research was unable to explore the 'protected characteristics' of litigants-in-person as the NI Courts and Tribunals Service (NICtS) data does not include demographic details about them.

The barriers to effective participation were analysed through the prism of the right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR). Obstacles encountered included difficulty obtaining NI specific legal information and advice, lack of awareness of court procedures, the adversarial nature of the proceedings and expectations that emotions should be compartmentalised despite the stressful setting and what was at stake. The response to the procedural advice clinic was positive with almost all of those interviewed suggesting they would recommend such a clinic to others. Among the conclusions of the research was a recognition of a substantial communication gap between personal litigants and lawyers and judges. The report's recommendations were wide ranging embracing the need for cultural and administrative change, better access to legal information, advice, and in-court support, judicial training and enhanced engagement with the legal profession.

The reference group

The research became the catalyst for the establishment of the reference group. In tune with the research's emphasis on effective participation, it was agreed that half of the reference group members would be individuals with personal litigant experience. As a result, the group membership comprises representatives from the Department of Justice NI (DoJ NI), NICtS, a solicitor, a barrister, a High Court judge, UU School of Law, NIHRC, the voluntary and disability sectors and an equal number of personal litigants. Rather than

1 These figures do not include the Small Claims Court which is designed to be used without either party being represented.

2 *Litigants in Person in Northern Ireland: Barriers to Participation* by Grainne McKeever, Lucy Royal Dawson, Eleanor Kirk and John McCord (2018) is available on the NIHRC website www.nihrc.org

3 A McKenzie friend is a person who attends a trial as a non-professional helper or adviser to a litigant who does not have legal representation in court.

seeking a High Court judge to take that role, the group appointed an independent chair. The reference group has no financial resources though the NICtS provides a secretariat and small amounts of funding have been sought for specific initiatives.

Work to date

The reference group's work has entailed several strands.

One of its first pieces of work was a 'walk through' of courthouses in Belfast and Dungannon with NICtS representatives, following which the group produced recommendations for improvements. These varied from 'quick wins' (e.g. improved signage and displaying information in more accessible places) to longer-term measures such as improved access to court forms online and development of an app for personal litigants.

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The first of the group's range of seminars in February 2020 examined practical ways of managing individuals in distress including by recognising the signs and developing effective strategies for supporting them. These built on findings in the UU/NIHRC research which showed much greater levels of mental ill-health among personal litigants than in the population at large. Whether this reflected general well-being of personal litigants or a heightened anxiety due to facing court proceedings was something the research was unable to interrogate further.

The most recent seminar in March 2023 examined the developments in England and Wales following the Civil Justice Council's report into vulnerable witnesses and other parties in civil proceedings. This report led to the introduction of the Civil Procedure (Amendment) Rules in April 2021 requiring judges in all cases and at every stage to enable all parties to participate fully in proceedings in order to give their best evidence. This sits alongside the overriding objective in the Civil Procedure Rules (CPR) that judges ensure, so far as is practicable, that parties are on an equal footing. The keynote speaker at the seminar, High Court Judge Karen Walden-Smith, outlined how the change came into effect, its value in practice and that realising effective participation still has a considerable way to go.

While the CPRs do not apply in Northern Ireland, the reference group has an ambition to secure an equivalent provision through a practice direction from the Office of the Lady Chief Justice as a starting point. Moreover, the CPRs till the same ground as the Equal Treatment Bench Book (ETBB) produced by the Judicial College in England and Wales, offering ground rules and guidance on how to ensure people with disabilities and other groups should be enabled to participate in court and tribunal proceedings actively and effectively. In 2016 NICA held that an Industrial Tribunal failed to give an applicant with Asperger's syndrome whose English was limited a fair hearing holding that it should have had cognisance of and applied the arrangements suggested by the ETBB.[4] Further highlighting the value of the ETBB is another ambition of the reference group.

The reference group has also participated in NICtS initiatives covering estate management, modernisation and digitalisation and in its stakeholder forum. The group has provided feedback to the DoJ NI on initiatives to improve access to information for court users. It has provided updates on its work to the Judicial Studies Board and the shadow Civil Justice Council (CJC) and Family Justice Board, and has responded to consultations on practice directions.

In addition, the reference group members have participated in an advisory group working with UU's School of Law's additional research on understanding and supporting legal participation for litigants-in-person. Tangible outcomes from this research have

4 See *Galo v Bombardier Aerospace (UK)* 2016 NICA 25; Briefing 804 [2016]

included the School of Law hosting a family court information website. UU also hosts the reference group's webpage Litigant Voice (litigant-voice.co.uk) with up-to-date information on its work.

Reference group impact

Although the achievements of the reference group may seem modest, the group has established a foothold so that when initiatives are being planned, the voice and needs of personal litigants are from the outset considered alongside other stakeholders rather than as an after-thought. An illustration of why this is important can be gleaned from the experience of Lord Justice Gillen's review of civil justice which had its own review group of officials, the legal profession, judges and a separate stakeholder group representing wider consumer and user interests.

... the group has established a foothold so that when initiatives are being planned, the voice and needs of personal litigants are from the outset considered alongside other stakeholders rather than as an after-thought.

The initial draft of the review's chapter on personal litigants overwhelmingly focused on personal litigants in the higher courts particularly on those who were vexatious and took up a disproportionate amount of the court's time. The input of the wider stakeholder consumer group and the openness of Lord Justice Gillen to feedback led to a more holistic chapter recognising the needs and experiences of the vast majority of personal litigants who were struggling for the reasons outlined in the UU/NIHRC research.

The characterisation of personal litigants as troublesome and difficult in some quarters rather than users of a service whose circumstances need to be recognised and facilitated to participate effectively, remains a challenge for the reference group to overcome. Neither the shadow CJC nor the shadow Family Justice Board in Northern Ireland has any personal litigants or organisations working with personal litigants directly involved. Other learning from the reference group is the value that personal litigants' experience can bring by offering practical insight and a different perspective from those who spend much of their time in or around courts. Having a High Court judge willing to engage, offering a judicial perspective and to facilitate discussion elsewhere has been invaluable. The participation and willingness of DoJ (NI) and NICtS officials to take the group seriously when developing new strategies and initiatives has helped in creating a sense of value in persevering with the work. Further, the continuing research of the School of Law at UU has been critical in keeping the flame alive, effective participation of all court users remaining a watchword. The recommendations of the original research including cultural and administrative change, greater engagement with personal litigants and access to legal information, advice and support is still some distance from being realised. Nonetheless, despite the lack of financial resources the reference group has made it to base camp. Moreover, it has done so by holding on to the principle of ensuring there are equal numbers of personal litigants and professionals pursuing the same goals together.

As NICtS moves forward with a major modernisation programme and the challenging impacts of Covid-19 and remote justice are felt throughout the justice system, the reference group will continue its dialogue with stakeholders to make sure that the experiences of litigants-in-person are taken into account.

Indirect discrimination on grounds of sex

Glover v Lacoste UK Ltd ✦ [2023] EAT 4; February 2, 2023

Facts

Ms M Glover (MG) was an assistant store manager at Lacoste UK Ltd's (LUL) store in Nottingham. She was a full-time employee, working five flexible days per week before commencing her maternity leave on March 3, 2020.

During her maternity leave, on November 9, 2020 MG made a flexible working request to return to work three days a week. After meeting with LUL's HR Director her request was rejected by letter dated March 10, 2021, albeit with a right of appeal. On March 11, 2021 she appealed the decision.

In a letter dated April 7, 2021, LUL upheld the decision in part, offering MG the option to return on a part-time basis working four days a week across any days. The letter stated that the decision was final and that MG had no further right of appeal.

On April 14, 2021, MG's solicitors sent a letter before action to LUL asking the company to reconsider MG's request and informing it that, should the request not be granted, MG might be forced to resign and claim constructive dismissal. On April 23, 2021, LUL granted MG's initial flexible working request of working three days a week.

Although MG's maternity leave ended on March 21, 2021, due to the Covid-19 pandemic she was placed on furlough and did not actually return to work until April 25, 2021 – after LUL had granted her flexible working application. This meant that MG never worked under the four-day flexible working arrangement which had been granted following her appeal.

Despite the fact that MG was granted her request to work three days a week, on May 4, 2021 she lodged an indirect sex discrimination claim against LUL. This was on the basis that the requirement to work four flexible days per week was a provision, criterion or practice (PCP) which had been applied to her and put women such as her at a disadvantage due to childcare implications, which she claimed could not be justified.

Employment Tribunal

The ET rejected the claim of indirect sex discrimination on the basis that a PCP had not been applied to MG. The ET held that because LUL overturned its decision and granted MG's initial request to work three days a week on April 23, 2021 (before she had returned to work), the PCP of working a four-day arrangement was never actually applied to her. In reaching its decision, the ET relied predominantly on the EAT judgment in *Little v Richmond Pharmacology* Ltd [2014] ICR 85.

The ET did, however, find that if the PCP had been applied it would have put women at a disadvantage because of consequential difficulties in arranging childcare, and that this would have been unjustified.

Employment Appeal Tribunal

MG appealed to the EAT.

The issue for the EAT to decide was whether the PCP was applied when MG began working under the new arrangement (April 25, 2021) or at the point when the flexible working application was determined. If the latter, there was the further issue of when

✦ [2023] IRLR 457

the application was considered to have been determined, namely was this the date of her appeal outcome (April 7, 2021) or when the employer overturned its refusal further to MG's letter before action (April 23, 2021)?

The EAT found that the ET had erred in its interpretation of *Little*. In contrast to the ET, the EAT held that *Little* established that a flexible working PCP was applied when an application was determined and not when an employee attempts to return to work under the discriminatory arrangement. However, based on the specific facts in *Little*, the PCP was not found to have been applied to the employee because the original decision to reject her request was subject to appeal and therefore provisional. The claimant in *Little* had exercised that right of appeal and the decision was overturned with her initial request being granted.

... employers should carefully consider flexible working requests from the outset, particularly where the applicant is not afforded, or has exhausted, any right of appeal.

This was to be distinguished in this case as the decision to grant MG's request came only after a letter before action had been sent, after the appeal stage had concluded and was expressly stated to be final. LUL's eventual decision to grant MG's initial request on April 23, 2021 was therefore not the final step in deciding whether to apply the PCP, but a reversal of its previous decision to apply it.

Finding in favour of MG, the EAT held that the PCP was applied to her upon the outcome of her appeal on April 7, 2021. The EAT held that the ET erred in law and remitted the case to the ET to determine whether the PCP subjected MG to a disadvantage.

While the EAT did not make a finding on whether there was a disadvantage or detriment, it noted that it would be difficult to find that there was no detriment when MG had felt the need to consider resigning as a result of LUL's refusal of her flexible working application.

Implications for practitioners

This case illustrates that an employee who has had their flexible working request rejected could bring a successful claim of indirect sex discrimination, even if the request is subsequently granted, provided that the initial decision was not objectively justified. This could apply not just to indirect discrimination on the basis of sex, but also other protected characteristics such as age, disability or religion or belief.

Although it may be rare for these claims to be brought where the request is ultimately granted, employers should carefully consider flexible working requests from the outset, particularly where the applicant is not afforded, or has exhausted, any right of appeal.

If an employee is able to return to work under the arrangement they initially requested (as MG did in this case), it may be difficult to show any financial loss and so compensation would likely be restricted to an award for injury to feelings.

Sophie Etherton
Paralegal, Leigh Day

Lara Kennedy
Solicitor, Leigh Day

Relevant principles for establishing failure to mitigate losses and the correct approach to calculating consequent losses

Mr J Edward v Tavistock and Portman NHS Trust ✦ [2023] EAT 33; March 17, 2023

Implications for practitioners

This decision reiterates that the burden of proving that a claimant has failed to take reasonable steps to mitigate their losses always lies with the respondent. If this cannot be proven on a balance of probabilities, there will not have been a failure to mitigate.

Whilst the burden to prove a failure to mitigate lies with the respondent, it should be remembered that claimants have a duty to take reasonable steps to mitigate their losses and, if they do not, the ET ought to consider what steps should have been taken, when they would have resulted in alternative income and how much alternative income would have been earned, in order to calculate any compensation.

Facts

Mr Edward (JE) brought claims for discrimination and victimisation after he had his role downgraded from an NHS band 5 data officer to a band 4 role, and was then dismissed on the basis of there being no band 4 vacancies.

Employment Tribunal

JE was successful in his claims for discrimination and victimisation. He was out of work for over two and a half years after the dismissal but had secured a higher paid, fixed term role by the time of the remedy hearing. Whilst being out of work JE had not applied for band 4 roles in the NHS.

The tribunal found that by a certain time during his period of unemployment, JE should have applied for band 4 roles and it reduced his loss of earnings compensation for part of the period of past loss by 50% to reflect the fact that he had failed to mitigate his loss and would have obtained work if he had applied for band 4 roles.

Employment Appeal Tribunal

There were various appeal points from both the claimant and respondent and the appeals were allowed.

JE appealed against the reduction in his award for a failure to mitigate.

The EAT found that it was not clear whether the ET had applied the correct legal test of placing the burden of proof on the respondent to prove failure to mitigate and it was not clear whether it had asked itself if JE had acted unreasonably in failing to take steps to mitigate. The question of mitigation was remitted for rehearing.

The EAT went on to find that the ET had erred in applying the 50% discount to loss of earnings for failure to mitigate, advising it should instead have made a finding as to when JE would reasonably have found new employment and what he would have then been paid.

The EAT said that the ET should have considered the questions identified in the case of *Gardiner-Hill v Roland Berger Technics Ltd* [1982] IRLR 498, namely:

✦ [2023] IRLR 463

- What steps was it unreasonable for the claimant not to have taken?
- When would those steps have produced an alternative income?
- What amount of alternative income would have been earned?

This is the established approach and it was therefore found that the ET's percentage reduction approach to past losses was impermissible.

Mandy Bhattal
Leigh Day

DLA practitioner group meeting programme

The DLA is delighted to announce it is holding three PGMs in November and December, with more to follow in the New Year. These meetings will be hybrid (in-person and online) and you are encouraged to come along to the venue if at all possible. The meetings are free for DLA members. If you are attending online, login details will be sent out to you in due course.

Tuesday, November 14, 2023

TIME: 6:00-7.30pm

SPEAKER: **Naomi Cunningham**

TOPIC: ***Higgs v Farmer's School*** – the last word on religion or belief discrimination?

VENUE: **Outer Temple Chambers,** 222 Strand, London WC2R 1BA

Register: here

Thursday, November 23, 2023

TIME: 6:00-7.30pm

SPEAKER: **Jeffrey Jupp**

TOPIC: **Shifting the burden of proof; what evidence can a claimant rely on?**

VENUE: **7BR Chambers,** 7 Bedford Row, Holborn, London WC1R 4BS

Register: here

Wednesday, December 13, 2023

TIME: 6:00-7.30pm

SPEAKER: **Gus Baker**

TOPIC: **Disclosure and demeanour**

VENUE: **Outer Temple Chambers,** 222 Strand, London WC2R 1BA

Register: here

EAT considers whether contractual termination was because of a protected act

McDermott v Sellafield Ltd and Ors ✦ [2023] EAT 60; April 28, 2023

Implications for practitioners

In considering an appeal against an unsuccessful whistleblowing and victimisation claim, the EAT found that the ET had erred in its approach to one protected act but concluded that this error did not disturb the tribunal's original decision. It upheld the claimant's appeal against a costs award in favour of the respondents.

The case highlights the importance of ensuring factual causation exists between the protected act and the detriments complained of.

This case also emphasises that only in very limited circumstances will an ET costs award be deemed safe.

Facts

Alison McDermott (AD) was a consultant specialising in equality, diversity and inclusion. The first respondent Sellafield Ltd (the company) operates a nuclear site in Cumbria and is a wholly owned subsidiary of the second respondent, the Nuclear Decommissioning Authority (NDA). AD previously worked for NDA but was subsequently retained by the company through a consultancy contract with her own company. The third respondent, Heather Roberts (HR), was the company's human resources director.

Following anonymous complaints of sexual harassment in the company's human resources team, it asked AD to carry out focus group interviews with employees to establish any evidence which might support the allegations. AD initially responded to that request by stating that there should be a formal investigation, but eventually agreed to conduct focus groups and produce a report on the human resources department's function and leadership.

When the report was produced, it expressed significant concerns around the culture in the human resources lead team and referred to low morale in the department. When it was shared, a number of employees complained that the report did not represent a balanced picture, had not included their positive statements, and that AD's line of questioning was intended to adduce criticism of HR and other employees in the team.

Shortly thereafter, HR decided to terminate AD's contract which was said to be a financial decision.

AD presented claims against the company, NDA and HR alleging protected disclosure detriment under s47B of the Employment Rights Act 1996 (ERA) and victimisation under s27 of the Equality Act 2010 (EA).

Employment Tribunal

It was accepted that AD was a worker within the extended meaning of s43K of ERA and a contract worker under s41 EA.

AD relied upon a number of disclosures in the ET. Those included her comment that a formal investigation should be conducted (rather than focus group interviews), her requests for human resources to investigate workplace issues she was made aware of, and the eventual submission of the report.

✦ [2023] IRLR 639

The detriments relied upon by AD included the failure to take action to investigate her concerns, the alleged pressure placed on her to use focus groups and the eventual termination of her contract.

The ET found that none of the disclosures relied upon by AD amounted to protected acts. In considering the exchanges where AD was said to have raised workplace concerns, it preferred the evidence of the respondents' witnesses, describing one alleged disclosure as a *'well-nigh total distortion of what had actually happened'.*

Importantly, the ET also found that the detriments complained of by AD were not related to those disclosures. It concluded that AD was not pressurised to set up focus groups, and had complete autonomy as to their format and content. In examining the reason for the termination of AD's contract, it found that the decision was because HR had received information which cast doubt on the balance and impartiality shown in AD's report, and that the report was vague, generic and lacking in meaningful analysis (with the financial cost of AD's engagement also being a consideration).

The case emphasises the importance of ensuring that a clear factual link exists between the detriment complained of and the original protected act.

The ET also concluded that NDA did not knowingly aid or help with the termination of AD's contract (or any other alleged detriment). It found that NDA could not, as alleged, have been liable for procuring, aiding or abetting any victimisation, nor was it the case that the company was acting as its agent and with its authority in any event.

The ET also went on to make costs awards against AD in favour of all three respondents.

Employment Appeal Tribunal

AD raised a number of appeal grounds to the EAT, relating to both the liability decision and the costs awards.

A number of the liability appeal grounds related to whether the disclosures were protected acts. In its decision, the EAT agreed that the ET had erred in finding that AD's statement that a formal investigation should be conducted into the sexual harassment complaints was not a protected act. It found that the ET had failed to consider whether this statement was a disclosure of information or whether the facts demonstrated that AD might have held a reasonable belief of wrongdoing in making that disclosure. It concluded that the ET's reasoning that such a disclosure did not amount to a protected act was flawed, in circumstances where AD's request for a formal investigation was in the knowledge that a sexual harassment allegation had been made (and therefore in connection with EA).

Despite AD's success on these appeal points, the EAT found that it was not sufficient to disturb the reasoning which supported the ET's decision. It concluded that the ET had made specific and reasoned findings that AD was not subjected to the detriment of being pressurised to carry out focus groups, also highlighting its findings that the contractual termination was unrelated to AD's request for a formal investigation into sexual harassment.

The liability appeal was therefore dismissed.

However, taking account of the points on which the liability appeal had succeeded, and having regard to aspects of the reasoning and contents of the costs decision, the costs awards were deemed unsafe. The costs applications were remitted to a freshly constituted tribunal panel.

Comment

The case emphasises the importance of ensuring that a clear factual link exists between the detriment complained of and the original protected act.

It also highlights the importance of thoroughly exploring whether brief discussions or exchanges between colleagues can sensibly amount to a protected disclosure of information.

Care should also be taken by claimants when considering whether a potential respondent should be named in the proceedings. The ET was particularly critical of the 'agency' argument put forward against NDA, finding absolutely no evidence that NDA was involved in decision-making related to the detriments.

Gabriel Morrison
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ABBREVIATIONS

AC	Appeal Cases
CA	Court of Appeal
Civ	Civil
CJEU	Court of Justice of the European Union
CPR	Civil Procedure Rules
DLA	Discrimination Law Association
DoJ, NI	Department of Justice (NI)
EA	Equality Act 2010
EAT	Employment Appeal Tribunal
ECHR	European Convention on Human Rights 1950
EHRR	European Human Rights Report
EqA	Equality Act 2010
ERA	Employment Rights Act 1996
EJ	Employment judge
ET	Employment Tribunal
ETBB	Equal Treatment Bench Book
EU	European Union
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
HHJ	His/her honour judge
HRA	Human Rights Act 1998
IAI	Indian Actuarial Institute
ICR	Industrial Case Reports
IRLR	Industrial Relations Law Reports
IT	Industrial Tribunal
J/JSC	Judge/Justice of the Supreme Court
LJ/LJJ	Lord/Lady Justice of Appeal (singular and plural)
LLP	Legal liability partnership
LLW	London Living Wage
NHS	National Health Service
NICA	Court of Appeal in Northern Ireland
NICtS	Northern Ireland Courts and Tribunals Service
NIHRC	Northern Ireland Human Rights Commission
ONS	Office for National Statistics
PCP	Provision, criterion or practice
PSED	Public sector equality duty
TC	Tax Chamber
UKEAT	Employment Appeal Tribunal
UKFTT	United Kingdom First-Tier Tribunal
UKSC	United Kingdom Supreme Court
US/USA	United States of America
UU	Ulster University
WLR	Weekly Law Reports

Manifestation of belief and appearance of bias

Higgs v Farmor's School ✦ [2022] EAT 102; July 5, 2022 (bias); [2023] EAT 89; June 16, 2023 (manifestation)

Implications for practitioners

Detrimental action because of a protected belief is likely to be unlawful but it is not unlawful discrimination to act in response to a justified objection to the manner of expression of a protected belief.

Facts

Mrs Kirstie Higgs (KH) was a support worker at Farmor's School (FS) (a secondary school). She made colourful posts on social media related to relationships education in primary schools.

FS received a complaint about KH's posts; following an investigation and a disciplinary hearing, she was summarily dismissed on the ground of gross misconduct. Her appeal against that decision was dismissed.

Employment Tribunal

KH lodged complaints of direct discrimination because of her religion or belief and/or harassment relating to her religion or belief. Her protected beliefs were a lack of belief in:

- gender fluidity
- that someone could change their sex
- in same-sex marriage.

And a belief in:

- marriage as a divine union between one man and one woman
- opposition to sex/relationship education for primary school children
- the literal truth of the Bible, and
- the obligation to speak out when unbiblical ideas are promoted.

The ET found her dismissal not discriminatory in respect of her beliefs because the school reasonably believed that her social media posts could be read as showing her to have homophobic and transphobic views (which KH denied holding).

Employment Appeal Tribunal

KH appealed on a number of grounds.

Preliminary – recusal of an EAT member

At a preliminary stage,[1] a lay member of the EAT was recused by order of the EAT President on an application by KH. That member had previously made definite statements on Twitter about matters closely related to the issues the EAT was to decide and to proceed with that member would have given the appearance of bias.

Main hearing

At the main hearing,[2] the EAT President, The Honourable Mrs Justice Eady DBE, remitted the case to the ET. The ET had failed to engage with the question in *Eweida v United*

✦ [2023] IRLR 662

1 [2002] EAT 102; July 5, 2022

2 [2023] EAT 89; June 16, 2023

Kingdom [2013] 57 EHRR 8; Briefing 663 [2013] and should have concluded that there was a close or direct nexus with KH's beliefs and her posts on social media.

That being so, the question was whether FS's actions were because of KH's protected beliefs, or in fact due to a justified objection to the manner of expression or manifestation of those beliefs (see *Page v NHS Trust Development Authority* [2021] EWCA Civ 255). Answering that question required the ET to assess whether FS's actions were prescribed by law and were necessary for the protection of the rights and freedoms others, recognising the essential nature of KH's rights under the European Convention of Human Rights, particularly Articles 9 (belief) and 10 (manifestation of belief). This required a proportionality assessment, *Bank Mellat v HM Treasury* (No.2) [2014] AC 700.

The President gave guidance for employers on the principles to be adopted in assessing such cases in future:

1. Free speech is a fundamental right in a democracy, even where that speech may not be popular or mainstream or may offend.
2. Manifestation of belief is protected except where the law permits limitation of expression to the extent necessary for the protection of the rights of others. Where that limitation of expression is objectively justified given the manner of manifestation, that limitation is not action taken because of the protected rights but because of the objectionable nature of the manifestation.
3. Whether a limitation is objectively justified will be context specific.
4. It will always be necessary to ask:
   - is the objective sufficiently important to justify the restriction
   - whether the restriction is rationally connected to the objective
   - could a less intrusive limitation achieve the objective, and
   - whether the importance of the objective out-balances the effect on the worker?
5. In the context of a working relationship the following factors are likely to be relevant to the balancing exercise to be carried out:
   - the manifestation
   - its tone
   - its extent
   - the likely audience
   - the intrusion on the rights of others and the employer's business
   - whether the manifestation is clearly personal or might be seen as representing the business, and the
   - potential power imbalance between the parties.

... the question was whether FS's actions were because of KH's protected beliefs, or in fact due to a justified objection to the manner of expression or manifestation of those beliefs.

Comment

This is helpful guidance from the EAT President on a controversial and developing area. It should be read by discrimination practitioners and human resources specialists. Free speech is an essential part of a functioning democracy but that does not mean that employers cannot restrict actions by employees likely to harm the employer's business. Clear policies establishing the employer's standards of behaviour expected from employees will be helpful, not least in satisfying the *'prescribed by law'* element of the test.

It will be interesting to see how the Bristol employment tribunal answers the questions now posed to it on remission.

Robin Moira White
Old Square Chambers

Lack of clarity about decision-maker in pregnancy-related dismissal

Alcedo Orange Limited v Ferridge-Gunn ✦ [2023] EAT 78; March 30, 2023

Facts

Mrs Ferridge-Gunn (FG) worked for Alcedo Orange Limited (AO) as a care home recruitment manager.

On February 19, 2020, during her probationary period, FG informed AO that she was pregnant. She took pregnancy-related leave due to morning sickness on February 24 and 25. AO dismissed FG on February 27, claiming she was dismissed for poor performance.

Employment Tribunal

FG submitted a claim to the ET for pregnancy-related discrimination and automatic unfair dismissal.

The fundamental question for the ET concerning dismissal was whether or not FG was dismissed because of her pregnancy.

FG provided evidence that Ms Caunt, the registered manager, seemingly made negative comments about her pregnancy and her morning sickness. When asked, Ms Caunt had told Mr Boardman, managing director, that FG should not continue in her role.

AO submitted that FG was dismissed fairly because of capability concerns, relying on evidence of meetings where concerns were directly raised with FG as to the need for performance improvement.

AO pointed to examples of poor performance and had stated that FG had misled Mr Boardman during a meeting on February 21. AO gave examples of meetings where poor performance was explored with FG, although it was said in one meeting that FG's performance was improving.

The ET concluded that FG had not been automatically dismissed. FG had not satisfied the burden of proof to establish that the reason for the dismissal was connected to her pregnancy. It found AO had evidence of FG's failure to comply with procedures and processes and a failure to engage with advice. Pregnancy was found by the ET to be a significant influence in the dismissal but not the principal reason. As a result, the automatic unfair dismissal claim was dismissed.

However, the ET did not agree with AO concerning FG's meeting with Mr Boardman. It found that FG would have been able to complete the task which she had agreed to undertake had it not been for her pregnancy-related absence.

The ET did however conclude that FG had been subject to pregnancy discrimination. The tribunal made an inference that pregnancy was a significant influence upon Ms Caunt when she recommended to Mr Boardman that FG should not continue in her role.

Alongside Ms Caunt's comments, the timing of FG's dismissal with the notification of pregnancy and the pregnancy-related absence (morning sickness absence and an antenatal appointment), FG successfully showed that in relation to s18 Equality Act 2010 (EA), she had been subject to pregnancy discrimination.

✦ [2023] IRLR 606

Employment Appeal Tribunal

AO appealed; it argued that there has been a misapplication of s18 EA due to a failure to separate the role of Mr Boardman (the decision-maker) from that of the alleged influence which Ms Caunt had over the decision to dismiss FG.

AO submitted that the ET had failed to properly apply the case of *Reynolds v CLFIS (UK) Ltd* [2015] ICR 1010; Briefing 749 [2015] which calls for a more direct focus on the mental state of the decision-maker.

The *Reynolds* case was not brought to the ET's attention and the EAT found that it should have been.

Reynolds concerned a situation where an act, which is detrimental to a claimant, is done by an employee who is themselves innocent of any discriminatory motivation, but who has been influenced by information or views expressed by another whose motivation is discriminatory (often called 'tainted information').

... simply because a detriment or dismissal closely follows a protected act or disclosure of a protected characteristic, the latter is not necessarily caused by the former ...

The EAT criticised the ET for not clearly determining who took the decision to dismiss FG. It was not clear whether the dismissal decision was taken by a sole decision-maker or a decision by a sole decision-maker influenced by others, or whether it was a joint decision made by Ms Caunt and Mr Boardman.

AO submitted that Mr Boardman was the sole decision-maker and was unknowingly influenced by Ms Caunt who was the only person with discriminatory motivation. FG submitted that it was a joint decision between both or that Mr Boardman was knowingly influenced.

The EAT did not accept either submission and found the ET's decision to be unsafe because it did not analyse the case in accordance with the principles set out in *Reynolds*. The case was remitted back to the same ET.

Implications for practitioners

The EAT's consideration of the *Reynolds* case highlighted the potential difficulty in deciphering who the decision-maker is, what they knew at the time they made the decision and whether they were knowingly or unknowingly provided with 'tainted information'. Often a claimant may not know who the decision-maker really is until the disclosure stage, or indeed at trial itself.

This case illustrates the importance of getting the law right at first instance, to save later cost and time; perhaps, particularly in cases such as these which involve a litigant-in-person.

The case is a reminder of the fact that simply because a detriment or dismissal closely follows a protected act or disclosure of a protected characteristic, the latter is not necessarily caused by the former; claimants will always need to discharge the burden of proof in discrimination claims.

Olivia Barrett
Trainee Solicitor
Collyer Bristow LLP

Daniel Zona
Associate
Collyer Bristow LLP

Establishing the appropriate pool for comparison

The Royal Parks Ltd v Boohene and Others [2023] EAT 69; May 5, 2023

Implications for practitioners

This decision confirms that outsourced workers are able to compare themselves to directly employed staff for the purposes of indirect discrimination. It however also confirms that the difficulty in cases seeking to compare contract workers to directly employed staff lies in establishing the provision, criterion or practice (PCP) and the appropriate pool for comparison.

Facts

The 16 claimants are contract workers for Vinci Construction UK Ltd which provides public toilet maintenance and cleaning services for the Royal Parks Ltd (RP). RP's outsourced workers are more likely to come from Black and Ethnic Minority backgrounds; their rates of pay were set below the London Living Wage (LLW). Meanwhile those employed directly by RP in other, often office-based, jobs were paid at least the LLW.

The claimants sought to compare themselves with direct employees and brought claims of indirect race discrimination in respect of their treatment as contract workers as compared to RP's direct employees.

Employment Tribunal

The ET held that the claimants' claim of indirect race discrimination in respect of minimum rate of pay was well founded within the definition of indirect discrimination under s19 of the Equality Act 2010 (EA) and rendered unlawful by reason of s41 which deals with contract workers:

S41(1) A principal must not discriminate against a contract worker

a) as to the terms on which the principal allows the worker to do the work;

b) by not allowing the worker to do, or to continue to do, the work;

c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;

d) by subjecting the worker to any other detriment.

(5) A 'principal' is a person who makes work available for an individual who is

a) employed by another person, and

b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).

(6) 'Contract work' is work such as is mentioned in subsection (5).

(7) A 'contract worker' is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b).

The ET held that RP had committed to ensuring that the minimum pay of its direct employees would not fall below LLW and had decided not to adopt the option of LLW as the minimum rate of pay on the toilet and cleaning contract. The ET held that RP had applied a PCP to the claimants.

The ET held that the original decision to pay the claimants was made by RP as Vinci had submitted two bids for the services contract – one based on a wage of £7 per hour and the other based on the LLW (£9.15 per hour at that time). What Vinci paid depended on which option RP chose.

RP made the final decision as to whether the claimants were paid LLW. The PCP which was applied was that RP's employees would be paid the LLW as a minimum wage but those working on the cleaning contract with Vinci would not be paid LLW as a minimum wage.

The ET held that the pool for comparison was all RP's employees and all of Vinci's employees who worked on the contract.

Employment Appeal Tribunal

The EAT held that the ET had been entitled to conclude that the claims fell within s41. The ET was correct in finding that RP had exercised sufficient control in relation to the minimum pay of the contract workers and it had made the decision not to pay them the LLW – the contractor Vinci had merely executed that decision.

Under s19 EA the ET was entitled to find that it was RP who applied the PCP.

However the EAT held that the ET had erred in defining the PCP and had adopted an indefensible pool for comparison.

... the ET's approach [to] determining the pool for comparison... [was] too narrow ... the comparison pool should have encompassed all staff affected by the practice.

The EAT considered that the pools for comparison used by the ET were incorrect. It determined that the claimants' pool for comparison between RP's direct employees and the workers on the toilet and cleaning contract was incorrectly defined as the ET restricted the pool to RP's direct employees and only those outsourced workers employed by Vinci on contract.

The EAT held that the ET should not have excluded from the pool all other outsourced workers undertaking work for RP. The appeal was allowed on this basis.

RP did not succeed in its further challenge to the ET's approach to comparability. The EAT agreed with the ET that the nature of work and identity of the employer were not relevant to whether RP had drawn a distinction between directly employed staff and outsourced workers when considering LLW as a minimum rate of pay.

The EAT considered that this left out of the picture all other outsourced workers undertaking work for RP. This meant no account was taken of RP's treatment of other outsourced workers. The EAT considered that this amounted to an error of law.

Comment

As noted above the most significant element of the ET and EAT judgments relate to s19 and s41(1) EA. The EAT held that if the contractor's ability to offer terms to its workers is essentially decided by the principal, the tribunal can conclude that the matter falls within the purview of s41(1).

The EAT disagreed with the ET's approach of determining the pool for comparison as between *'directly and indirectly employed staff'* and restricting the *'indirectly employed staff'* to those on the contract for toilet and cleaning services. The EAT considered this to be too narrow, and stated that the comparison pool should have encompassed all staff affected by the practice. This would require a comparison between those working in toilet and cleaning services with all others carrying out work for RP including other outsourced workers in other departments.

The CA has granted the claimants permission to appeal the EAT's decision and this is due to be heard in early 2024.

Aman Thakar
Associate Solicitor, Leigh Day

Harassment: EAT confirms that claimant must be aware of the unwanted conduct

Greasley-Adams v Royal Mail Group Ltd ✦ [2023] EAT 86; June 7, 2023

Facts

Adam Greasley-Adams (GA) worked at Royal Mail's Stirling delivery office as a part-time specialist driver. It was agreed between the parties that he was disabled by reason of autistic spectrum disorder.

In 2018 GA had settled a previous employment tribunal claim. Under the conciliation agreement (COT3[1]) between the parties, regular duties and shift times were allocated to GA and he was to be given first refusal on overtime on one particular duty.

Thereafter relations between GA and his colleagues Mr McEwan (McE) and Mr Knox (K) became increasingly strained, with GA complaining that his colleagues were infringing driver regulations and taking his overtime, and the colleagues complaining that GA was threatening to report them for driving infringements and to take legal action in relation to overtime duties. There was also an incident with a different colleague which led to the delivery office manager speaking to GA, who then apologised to the colleague. According to GA, the incident was linked to his autism.

In August 2019 McE and K brought formal complaints of bullying and harassment against GA which were investigated by Mr Walker (W). W concluded that GA had not intended to harass his colleagues, but he found that GA's repeated enquiries about infringements and overtime had reasonably had a harassing effect on them. However, he recommended mediation rather than any sanction against GA.

W had carried out twelve interviews. In answer to questions, the interviewees said things about GA, or reported others saying things about GA, which were disparaging and were related to his disability. They included conversations about the autism-related incident and about his behaviour in general. GA found out about these comments for the first time in the course of W's investigation.

So far as relevant to the EAT appeal, GA brought a claim alleging that the disparaging disability-related comments between his colleagues amounted to unlawful harassment of him.

Law

Under s16 Equality Act 2010 (EA):

1) A person (A) harasses another (B) if –
- *a) A engages in unwanted conduct related to a relevant protected characteristic, and*
- *b) the conduct has the purpose or effect of –*
  - *(i) violating B's dignity, or*
  - *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –
- *a) the perception of B;*
- *b) the other circumstances of the case;*
- *c) whether it is reasonable for the conduct to have that effect.*

✦ [2023] IRLR 723

1 A COT3 is a form of settlement agreement which records the terms of settlement of an employment tribunal claim.

The matters set out at s26(1)(b) are often referred to as *'the proscribed purpose'* and *'the proscribed effect'*. In practice, the ET will usually consider the following issues separately:

- Was there unwanted conduct?
- If so, was it related to the relevant protected characteristic?
- If so, did it have the proscribed purpose?
- If it did not have that purpose, then – taking the relevant matters into account – did it have the proscribed effect?

Employment Tribunal

The ET agreed with GA that there had been discussion amongst his work colleagues about GA's behaviour, including some disparaging comments, and that this was unwanted conduct related to his disability.

It found that none of the unwanted conduct had the purpose of violating GA's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. The ET accepted that the comments were potentially capable of having that effect on GA, but not until he became aware of them as a result of W's investigation.

A claimant must show both that the unwanted conduct was perceived as having the proscribed effect ... and that it was reasonable for the conduct to have that effect ...

However, it held that it was not reasonable for the unwanted conduct to have had that effect on GA, and so his claim of unlawful harassment failed. That was because GA only found out about the comments as a result of W's investigation of his behaviour. In that context the ET said it was appropriate for an employer to investigate complaints, even if it meant that things would emerge which the subject of investigation did not like.

Employment Appeal Tribunal

In the EAT, GA argued that dignity means *'how an individual is held in esteem by those around them'* and so a person's dignity can be violated by conduct which affects how others view them, whether or not they are aware of that conduct. GA said the ET had therefore been wrong to conclude that disparaging comments did not have the proscribed effect until he found out about them.

The EAT disagreed. The language of s26(4) makes clear that the perception of the claimant **must** be taken into account in determining whether conduct had the proscribed effect, and *'if there is no awareness, there can be no perception'*.

GA's second ground of appeal related to the question of reasonableness of perception. He said that the ET had considered it too narrowly, and should not have concluded it was not reasonable for the conduct to have the proscribed effect simply because it arose in the context of an investigation. However, the EAT also rejected this argument. It said the ET had not made its finding 'simply because' GA found out in the course of an investigation, but had properly taken the context of the investigation into account in its consideration of all the circumstances of the case.

Comment

This case is an important reminder that there are subjective and objective parts of the test under s26(4). A claimant must show **both** that the unwanted conduct was perceived as having the proscribed effect (the subjective question) **and** that it was reasonable for the conduct to have that effect (the objective question).

It also means that the limitation period will not necessarily begin when the conduct takes place: since there can be no proscribed effect until the claimant has become aware of the conduct, that must be when time will begin to run.

Katya Hosking
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Clarifying the approach to claims of direct and indirect discrimination

Institute and Faculty of Actuaries v Davda ✦ [2023] EAT 63; May 11, 2023

Implications for practitioners

This is an important decision concerning the way to approach a claim of indirect and direct discrimination in line with s111 and s112 of the Equality Act 2010 (EA). It re-affirmed that for a claimant to succeed in the type of direct discrimination claim described in *James v Eastleigh BC* [1990] IRLR 288, the reason for the treatment and the protected characteristic must exactly correspond. It also looked at the correct pool of comparators and approach for indirect discrimination claims.

Facts

Mr R Davda (RD) alleged that he had been subjected to direct or indirect race discrimination as a British national in the arrangements which the Institute and Faculty of Actuaries (the Institute) (the qualifications body for actuaries in the UK) makes for conferring its qualifications. The Institute sets these examinations twice a year, whereas Indian nationals were provided with a higher number of opportunities or were granted exemptions for passing equivalent examinations or modules whilst being members of the Indian Actuarial Institute (IAI). In addition, RD alleged that the Institute subjected him to indirect race discrimination by not allowing the IAI to admit British nationals as students. This was a factual dispute.

Employment Tribunal

The ET considered s53 of the EA which prohibits discrimination by qualifications bodies, and s111 (instructing, causing or inducing contraventions) and s112 EA (aiding contraventions) which make a person liable for discrimination carried out by another in specific circumstances. The ET upheld the complaints of direct race discrimination in respect of *'the number of opportunities [the Institute] gave him to pass examinations'* compared to Indian nationals.

The ET asserted that for RD to succeed in a *James* type claim of direct discrimination *'the reason for the treatment and the protected characteristic must exactly correspond. Alternatively, if the criterion applied by the decision maker is the protected characteristic itself, or a proxy for the protected characteristic, then the reason for the treatment is the protected characteristic and the discrimination is direct discrimination'*. This was found in RD's favour on the basis that IAI members were provided with additional opportunities to pass exams and that IAI membership was not available to UK nationals.

In addition, on the evidence, the tribunal found that the IAI had a policy of not allowing UK nationals to join it.

Regarding indirect discrimination, RD relied on three provisions, criteria or practices (PCPs):

1. The Institute's rule or policy of offering two sittings of its exams per annum;
2. The rule or policy that requires student members should pass examinations by the end of the transition period – December 31, 2018 – or face losing the benefit of the exam passes already obtained and also have to take additional exams under the new curriculum; and

✦ [2023] IRLR 615

3. The Institute's policy of exempting exams set by the IAI.

As a result, the ET concluded that the PCPs did put RD at a disadvantage compared to Indian nationals.

Employment Appeal Tribunal

The EAT found that the ET erred in law in holding that the Institute subjected RD to direct race discrimination in respect of '*the number of opportunities [the Institute] gave him to pass examinations'* compared to Indian nationals as the fact that Indian nationals had a high number of opportunities was not treatment afforded by the Institute.

... the ET had erred in accepting this was a *James* type case as there was no exact equivalence ...

The EAT made it clear that the Institute did not subject RD to the treatment asserted in the direct discrimination claim; the ET had erred in accepting this was a *James* type case as there was no exact equivalence and there were errors in identifying the correct comparator. The s111 EA claim was no longer pursued, and the s112 EA claim was remitted.

In addition, the EAT found that the ET's finding that the Institute had *'subjected the claimant to direct race discrimination by directly or indirectly instructing, causing, inducing and or aiding the IAI not to admit British nationals as students'* was also made in error of law and was unsafe. This was because the ET had no material on which to rely which set out how many Indian nationals or non-Indian nationals obtained exceptions from the IAI or any other bodies.

The EAT also found that the ET had erred in law in holding that the Institute subjected RD to indirect race discrimination by offering only two sittings of its examinations per year, while granting exemptions to equivalent examinations set by the IAI.

The ET had compared RD's treatment and those who shared the protected characteristic of UK nationality with those who did not, ultimately finding that the PCPs put him at a disadvantage compared to Indian nationals. The EAT did not consider this to be an appropriate pool of comparison. Rather, the appropriate comparison should have been between members of the Institute who are UK nationals and those with whom RD does not share that characteristic.

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Hypothetically, what's your case and who is your comparator?

Miss D O Boesi v Asda Stores Ltd ✦ [2023] EAT 49; January 20, 2023

Facts

Miss Denise Ondowa Boesi (DB) was employed by Asda Stores Ltd (Asda) as a warehouse operative in Northampton. DB is disabled by way of a degenerative disc disease in her lower back. Asda conceded that it had knowledge of her disability at all material times. DB was dismissed on June 13, 2019 by reason of incapability.

DB's role as a warehouse operative entailed her carrying out tasks which involved bending, lifting, stretching, pushing and pulling. DB had a number of periods of ill-health leave each year from 2014. On March 7, 2018 DB made a request for healthcare leave which was extended repeatedly until March 11, 2019. When that came to an end DB was signed off as unfit to work for a further three months.

Asda's physiotherapist, who was familiar with all the various roles at Asda, reported on April 8, 2019 that they *'do not feel [DB] would be fit for any warehouse duties at present'.* DB's GP fit note dated June 12, 2019 stated that she was not fit to work.

Asda maintained a sickness absence policy which managed ill-health absences. In accordance with this policy, DB was invited to a final capability meeting on June 13, 2019. At this meeting she was asked if she could undertake tasks in another department known as 'intake' or 'dot com'. DB made it clear she could not do that work. She stated that *'she sleeps in pain, she wakes in pain, the pain management was not working, that it was not possible for her to return to work, that she did not want to end up in a wheelchair'.*

Accordingly, at the end of the meeting, DB was dismissed by reason of incapability.

At this point, DB and her representative protested that she had not been offered alternative duties appropriate to her situation. She sought lighter duties such as set out below and initially pursued an appeal on this basis but ultimately decided not to proceed and to pursue external redress through the tribunal:

- PI – duties which involved finding a location for unallocated stock, picking up stock that had fallen on the floor or misplaced and taking to a sorting area.
- Key Colleague – someone who was appointed to step up for the shift manager if they were absent.
- Ops room work – providing support in relation to operating machinery and the respondent's systems.

Employment Tribunal

DB issued a claim on August 15, 2019 which was heard in May 2021 and judgment was handed down on July 6, 2021. All of her claims were dismissed.

The appeal related solely to a claim of direct discrimination under S13(1) of the Equality Act 2010 (EA) and so only this claim is addressed.

DB sought to argue that a hypothetical comparator would have been treated more favourably, and that the reason for her treatment was her disability. DB could not point to an actual comparator and her pleaded hypothetical comparator was simply someone who was not disabled.

✦ [2023] IRLR 625

The ET identified the hypothetical comparator as:

> *… a person who does not meet the definition of disability in the Equality Act, but who has been absent from work for the same length of time, for whom a GP and a physio has provided the same sort of information and who has responded in the same way as [the claimant] has done in various meetings with the respondent.* [para 70]

The ET accepted that DB had not been offered the lighter duties identified and asked itself whether the hypothetical comparator would have been treated more favourably.

The ET took account of advice from the physio which deemed DB was not fit to return to work. It also found that the PI and Key Colleagues role were occasional tasks, not a flexible role which could be returned to. With regards to the Ops Room role, the ET also found, on the basis of the physio report, that DB was not able to bend to pick up an empty box and she could not sit or stand for more than ten minutes. As such, no matter what the Ops Room duties were, DB would not have been able to undertake these.

Ultimately the ET found that:

> *… the hypothetical comparator in the same circumstances as [the claimant] but not meeting the definition of a disabled person would have been treated in exactly the same way. There is therefore no less favourable treatment.* [para 76]

The EAT found that … the approach urged by DB … would fail to take account of the relevant circumstances … namely that DB had been absent for a very long time … she remained unfit to return to work and could not undertake the tasks required in her existing role or any of the alternative roles identified.

With regards to the dismissal the ET found that DB was not dismissed because of her disability but rather because of her absences (a year and a half) and *'… the medical advice was that she was not fit to return to work and there was no prospect of her being able to do so in the immediate future'.* [para 77] It found that that the hypothetical comparator would have been dismissed in the same circumstances.

The ET found there was therefore no less favourable treatment and the claim of direct disability discrimination failed.

Employment Appeal Tribunal

DB appealed on the sole ground that the ET had erred in its construction of the hypothetical comparator. It was DB's case that the hypothetical comparator constructed by the ET (someone who had been absent from work for the same length of time, and about whose capabilities a GP and physiotherapist had provided the same information) would meet the definition of being disabled under the EA.

Further, DB stated that the ET's error tainted its findings in respect of the less favourable treatment in respect of being offered lighter duties and dismissal.

S13 EA provides:

> *1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

S 23 EA provides:

> *1) On a comparison of cases for the purpose of section 13… there must be no material difference between the circumstances related to each case.*
> *2) The circumstances relating to a case include a person's abilities if –*
> *a) on a comparison for the purposes of section 13, the protected characteristic is disability…*

The EAT found that if the ET had adopted the approach urged by DB (that the comparator was simply someone who was not disabled) this would fail to take account of the relevant circumstances of this case, namely that DB had been absent for a very long time and it had been advised that she remained unfit to return to work and could not undertake the tasks required in her existing role or any of the alternative roles identified.

The EAT's position was that whilst many persons in DB's circumstances, as attributed to the hypothetical comparator, may be disabled, that need not necessarily be so. It would fail in its duty if it did not consider the material circumstances as identified

The EAT also found no error in the ET's finding that DB had not been offered the alternative roles and had ultimately been dismissed because she was not fit to return to work and/or could not undertake the tasks required, not because of her disability.

The EAT considered that DB erred in conflating the consequences of her disability with the disability itself and that the ET was entitled to find that the reason for the treatment itself was not the disability, even though it may be something arising from that disability.

Having made these findings, the ET was correct in its finding that the hypothetical comparator as identified would have been treated the same way.

Implications for practitioners

This case provides some guidance on the construction of hypothetical comparators and the relevant material circumstances. While it may appear counterintuitive, this may mean that the comparator could be very close to the definition of, but not quite, a disabled person under the EA.

This case also serves as a reminder to advisers and litigants-in-person to consider carefully what claim the specific circumstances fit into. Had this been a claim brought under s15 EA (discrimination because of something arising in consequence of disability) DB could have argued that her dismissal was based upon something arsing from her disability, namely her absence and inability to undertake the specific tasks.

Of course, although judges do not like a 'kitchen sink' approach, it is certainly preferable to plead alternative arguments which can be narrowed as the case proceeds.

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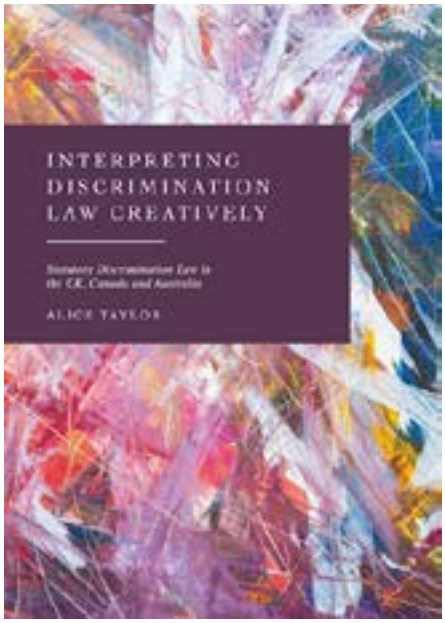

Interpreting discrimination law creatively – statutory discrimination law in the UK, Canada and Australia

Alice Taylor, August 2023, Hart Publishing, 264 pages, £85 hardback, £76.50 e-book

What is fascinating about this book lies in the results of its comparative exploration of the judiciary's role in helping achieve real equality by using statutory discrimination law, setting it in the context of human rights. Its research finds that similar legislative frameworks have very different results depending on how they are interpreted. The author does not deny the importance of the legislature, but her research demonstrates that the interpretive choices made by the courts are key.

In that interpretive exercise, 'creativity' depends on the courts' role in determining questions of rights generally. The author argues that in each jurisdiction, discrimination law can and should be understood as a form of 'quasi-constitutional' law, with outcomes varying depending on the constitutionally embedded role of the court. In Canada *'it is this status as quasi-constitutional law that justifies the courts' expansive approach to discrimination law'*, but *'this is less evident in the UK and non-existent in the Australian jurisprudence'.*

In Canada, two fundamental values of the Canadian Constitution - respect for diversity and minority rights - mean that discrimination law is interpreted within a context in which the protection of minority rights is considered a fundamental constitutional principle.

Evaluation of the British approach places the UK midway, and generally better than Australia. For example, the UK approach to the interrelated disadvantages caused by discrimination because of sex, pregnancy and family responsibility suggests *'an acknowledgment that the purpose of sex discrimination law is to redress'* those kinds of disadvantages. However, it also shows '*an inability to interpret, particularly in the case of pregnancy, the legislation to actually redress this disadvantage'.*

The Australian experience, the author argues, shows that the effectiveness of discrimination law is not simply determined by the intention of the legislature. Differences in interpretation are *'the result of the different institutional contexts in which judicial decision making takes place'.* The book notes that the courts' *'resistance to the articulation of the values underlying Australian law is reflected in the approach adopted to interpreting statutory discrimination law ... Without a consideration of the values underpinning discrimination law, the interpretation of the statute descends into the technicalities of the legislation'.*

The book is structured into three parts. Each part explores aspects of the overall research question of whether a creative interpretation is consistent with the institutional role of the judiciary. The extensive referencing of sources and the summaries at the start and end of each part and chapter, may be due to it starting life as a PhD thesis. It also makes it easy to dip in and out of.

The table of cases is grouped by national jurisdiction. The UK selection gives confidence that the selection of Australian and Canadian cases is similarly focused on the key ones. At the end is a lengthy bibliography: sadly, a search of the e-book found no reference to any article from the *Industrial Law Review.*

Looking at how discrimination law has developed across jurisdictions can help generate ideas and develop arguments. But one needs to be reasonably confident in the accuracy of unfamiliar matters. In Chapter 2 on comparing the legislative regimes, the author says *'The EqA 2010 defines direct discrimination as "less favourable treatment than what another person would receive which occurs because of a protected characteristic"'.* It is footnoted to *'EqA 2010, s13'.*

That is not the text of s13, it is a paraphrase presented as the text itself without explaining that it is only a paraphrase. This is a real defect, lessening confidence and increasing the need to fact check. More importantly, if one is exploring creativity in the interpretation of discrimination law, it helps to start from the hard letter law itself.

However, it is well worth reading on. Part II looks at a 'creative' approach in practice. Chapter 4 explores the different approaches in understanding who is entitled to protection from discriminatory conduct. The focus is on three areas: the definition and nature of race discrimination; the relationship between sex, pregnancy and family responsibility; and the stigmatisation of disability.

Chapter 5 focuses on the four key elements in a discrimination claim: comparison; causation or connection; accommodation; and justification.

Part III draws on the earlier research. It seeks to account for the differences and explores potential reasons for the divergence.

Overall, the book can be seen as a socio-historical-legal examination of the role of the courts in three jurisdictions through the perspective of their approach to discrimination law. Fascinating. It does, as it claims, provide valuable reading for academics, policy makers and those researching discrimination law and statutory human rights. For practitioners, it might take a bit more work, but it helps give a wider perspective by exploring the themes underlying discrimination case law.

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