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Importance of the ECHR

It is critical that those who support a more equal society based on the rule of law take a stand on maintaining and progressing hard won equality and human rights across the UK. There is a danger that some of the mud recently thrown in the direction of equality and human rights might stick.

Claims that the Equality Act 2010 needs revising in order to end confusion in relation to definitions of sex and gender, or by threatening to withdraw from the European Convention on Human Rights (ECHR) if it endangers national security as *'border security and controlling "illegal migration" is more important than membership of a foreign court'*,[1] are clear warnings of the potential for a dangerous shift away from equality and towards a more right-wing agenda in the near future.

Instead, we should be proud of the fact that the UK was a founding member of the Council of Europe which was set up to protect democracy, human rights and the rule of law after the atrocities of the Second World War, and that its lawyers helped draft the ECHR. As demonstrated by the cases reported in this edition, the ECHR, as given effect by the Human Rights Act 1998 (HRA), continues to provide critical protection of the right to free speech and the rights of vulnerable people including disabled people and minorities.

The relevance of the ECHR to the protection of the rights of vulnerable minorities was aptly demonstrated in the judicial review application by Wendy Smith in relation to new police powers to increase from three to twelve months the period in which Gypsies and Travellers were permitted to return to land on which they had previously camped. Marc Willers KC and Oliver Persey explain that it is the chronic shortage of authorised permanent and transit sites for travelling families which is the cause of them settling on unauthorised land. The High Court recognised this and in protection of their right to a nomadic lifestyle, it took the unusual step of declaring that the police powers are incompatible with the ECHR.

In *re Northern Ireland Human Rights Commission and JR295 for judicial review* (Illegal Migration Act 2023), May 13, 2024, the High Court also declared that the Illegal Migration Act 2023 (IMA) is incompatible with ECHR provisions. These applications were brought by the Northern Ireland Human Rights Commission and a 16-year-old asylum seeker from Iran who arrived in the UK as an unaccompanied child. He had travelled from France by small boat and claimed asylum on July 26, 2023. His application is not yet determined. He is currently residing in Northern Ireland and made the case that he would be killed or sent to prison if returned to Iran.

The applicants challenged certain core provisions of the IMA alleging that they are incompatible with Articles 3, 4, 5, 6 and/or 8 of the ECHR, and s4 HRA. Mr Justice Humphreys ordered the disapplication of provisions of the IMA in Northern Ireland; and *'given the significant nature of the violations identified'* he also granted the s4 HRA declarations of incompatibility sought in respect of the duty to remove, the provisions relating to children and those relating to potential victims of modern slavery or human trafficking.

The judge also agreed with the applicants' argument that the IMA's statutory provisions are incompatible with Article 2 of the Ireland/Northern Ireland Protocol or Windsor Framework. This article provides that the UK shall ensure no diminution of rights, safeguards, or equality of opportunity, as set out in the Belfast-Good Friday Agreement, results from its withdrawal from the EU, including in the area of protection against discrimination.

The UK's record on protecting and promoting the rights of disabled people in line with the ECHR and the UN Convention on the Rights of Disabled Persons (CRDP) is rightly criticised by Disability Rights UK. Following the CRDP Committee's finding that the UK government has *'failed to take all appropriate measures to address grave and systematic violations of the human rights of persons with disabilities and has failed to eliminate the root causes of inequality and discrimination'*; its letter to the government highlights the latter's *'complete disregard for international law, contempt for human rights, harmful proposals for welfare reform, the inadequacy of housing and the ongoing crisis across public services'* and calls for action as set out in the Disabled People's Manifesto.

The DLA supports these calls for action and the work of those who continue the UK's proud tradition of using the law to challenge the impact of governmental decisions, laws and policies which undermine people's human rights.

Geraldine Scullion
Editor, *Briefings*

1 See https://consoc.org.uk/leaving-the-echr/; or p36 of the Conservative Party Manifesto.

Gender critical cases: making bad law?

Oscar Davies, barrister at Garden Court Chambers,✦ argues that the law is tying itself in knots over gender critical cases and a new approach is needed urgently to make the UK safer for trans people. Oscar considers that in recent gender critical cases, judges have taken the wrong approach, permitting the erosion of trans and non-binary people's rights. Judges must focus on what the belief is, and whether it contains elements of transphobia. If a belief is protected, the manifestations must comply with the Equality Act 2010, or the employer is likely to be justified in sanctioning the employee. Sex has its place, but gender identity – and trans identity – must be respected.

'Gender critical' cases are a hot seat of litigation in the UK. But are judges getting it right in their approach?

A 'belief' can be protected in certain circumstances under s10 of the Equality Act 2010 (EA). S10 states: *'Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.'*

For a philosophical belief to be protected – i.e., so you can seek compensation based on being discriminated against because of or related to that belief – it must pass the five *Grainger* criteria, from the EAT case of *Nicholson v Grainger plc* [2010] 2 All ER 253, [2010] ICR 360, [2009] Briefing 549.

The focus in the gender critical cases is on the fifth criterion (*Grainger* V): the belief *'must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others'.* This is the battleground in current litigation as to whether a belief which may be contentious should be protected.

While each person's individual belief may be summarised differently, those who hold gender critical views generally believe that sex is immutable, sex matters and that sex is not to be conflated with gender or gender identity.

Others consider that 'gender critical' is merely a broad-spectrum dog whistle (an expression which has a secondary meaning intended to be understood only by a particular group of people) that is a euphemism for views which espouse and encourage transphobia, often with the effect of erasing trans people's existence by either suggesting trans people (i) are mistaken about their gender or (ii) are actively deceiving society in their chosen gender because their sex is what is said to define them.

The *Forstater* litigation

Forstater v CGD Europe and others (2021) UKEAT/0105/20, [2021] IRLR 706, [2022] ICR 1, [2021] All ER (D) 62 (Jun), [2021] Briefing 998 was a case brought by Maya Forstater, a researcher, writer and adviser on sustainable development, against her former employer, the Center for Global Development (CGD), a not-for-profit think tank based in the EU and US. She was appointed a visiting fellow of CGD in November 2016, which was renewed in 2017. In that capacity, she carried out paid consultancy work on specific research projects.

Forstater regularly posted comments on Twitter relating to transgender issues. Regarding Pips Bunce, a senior director at Credit Suisse who describes themselves as being 'gender fluid' and 'non-binary', Forstater said: *'Bunce does not "masquerade as female" he is a man who likes to express himself part of the week by wearing a dress'* and *'Bunce is a white man who likes to dress in women's clothes'.* In a letter to Anne Main MP, Forstater stated: *'Please stand up for the truth that it is not possible for someone who is male to become female. Transwomen are men, and should be respected and protected as men.'*

✦ This article first appeared in the New Law Journal, Issue 8068, April 26, 2024. It is reproduced here with kind permission of the author and the NLJ.

In Autumn 2018, some staff at CGD raised concerns about some of Forstater's tweets, alleging that they were 'transphobic' and *'exclusionary or offensive'*. An investigation into Forstater's conduct followed, the result of which was that she was not offered further consultancy work and her visiting fellowship was not renewed.

Forstater lodged proceedings in the employment tribunal alleging, among other matters, direct discrimination because of her gender critical beliefs and/or harassment related to those beliefs. The tribunal directed that there be a preliminary hearing to determine, among other matters, whether the belief relied upon by the claimant amounts to a philosophical belief within the meaning of the EA 2010, s10.

...a central part to evaluating whether a belief should be protected at the *Grainger V* stage is whether the belief infringes on Article 17 of the ECHR, which prohibits the destruction of the rights of others.

First instance decision

Forstater in that case cast her belief in the following general terms (para 67 of her further particulars):

> *The Claimant believes that 'sex' is a material reality which should not be conflated with 'gender' or 'gender identity'. Being female is an immutable biological fact, not a feeling or an identity. Moreover, sex matters.*

At para 41 of the judgment, the ET explained that her belief further included that if a transwoman says she is a woman, that is untrue, even if she has a Gender Recognition Certificate (GRC). She said she would generally seek to be polite to trans persons and would seek to respect their choice of pronoun but would not feel bound to.

Article 9 of the European Convention on Human Rights (ECHR) states: '(1) *Everyone has the right to freedom of thought, conscience and religion.*' But this may be limited: '(2) *Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.'*

The tribunal concluded that the specific belief that Forstater held was not a philosophical belief protected by the EA. Her belief failed *Grainger* V largely because the judge considered Forstater's belief *'in its absolutist nature, is incompatible with human dignity and fundamental rights of others. She goes so far as to deny the right of a person with a Gender Recognition Certificate to be the sex to which they have transitioned.'*

Employment Appeal Tribunal

Forstater appealed to the EAT, which broadly agreed that the first instance judge summarised the claimant's belief properly. However, Choudhury P, as he then was, gave judgment overturning the ET's decision, finding that the claimant's belief did pass *Grainger* V, saying at para 79:

> *In our judgment, it is important that in applying Grainger V, tribunals bear in mind that it is only those beliefs that would be an affront to Convention principles in a manner akin to that of pursuing totalitarianism, or advocating Nazism, or espousing violence and hatred in the gravest of forms, that should be capable of being not worthy of respect in a democratic society. Beliefs that are offensive, shocking or even disturbing to others, and which fall into the less grave forms of hate speech would not be excluded from the protection. However, the manifestation of such beliefs may, depending on circumstances, justifiably be restricted under Article 9(2) or Article 10(2) as the case may be.*

It was noted that a central part to evaluating whether a belief should be protected at the *Grainger* V stage is whether the belief infringes on Article 17 of the ECHR,

which prohibits the destruction of the rights of others (para 59). The EAT concluded that the claimant's belief did not approach Article 17 and was not akin to Nazism or totalitarianism, and so *Grainger* V was satisfied. The EAT's decision concluded that Forstater did not seek to destroy the rights of others, yet noted that she would sometimes misgender people, and did not dispute the statements made by Forstater regarding Pips Bunce or that *'transwomen are men'.*

The matter was then remitted to the ET for trial with the belief protected, and the claimant won on some of her discrimination claims.

Subsequent cases

The decision in *Forstater* has led to a number of other cases of claimants espousing similar views.

In *Bailey v Stonewall Equality Ltd and others,*[1] 2202172/202, the claimant's belief was that *'a woman is defined by her sex. She disagrees with the beliefs of those who say that a woman is defined by her gender, which may differ from her sex, and is for the individual to identify.'* This was agreed as protected by the respondents, presumably because it was similar to Forstater's belief.

In *Mackereth v Department for Work and Pensions and another* [2022] ICR 1609, [2022] Briefing 1032, the claimant had a lack of belief (i) that it is possible for a person to change their sex/gender, and/or (ii) that the society should accommodate and/or encourage anyone's impersonation of the opposite sex. This, at first instance, was considered not protected under *Grainger* because they were *'incompatible with human dignity and conflict with the fundamental rights of others, specifically here, transgender individuals'* [para 196]. However, the EAT dismissed the claimant's appeal, stating that that tribunal had erred in its approach to considering whether the beliefs were not protected. The ET had applied too high a threshold in so deciding.

...it is evident from the case law that in many cases because the belief itself has been protected first, so too then is the manifestation...

In *Joanna Phoenix v The Open University and others*: 3322700/2021 and 3323841/2021, the claimant's belief that *'sex is immutable'* was protected, and the claimant succeeded on some of her claims.

While a manifestation of the belief will not always be worthy of protection (subject to Article 9(2) ECHR), it is evident from the case law that in many cases because the belief itself has been protected first, so too then is the manifestation (that which has caused distress to other employees or considered by them transphobic), thereby enabling successful claims of gender critical claimants without proper consideration of whether the views intended or had the effect of destroying trans people's rights.

Lowering the threshold

In *Forstater*, the EAT redrew the test for *Grainger* V, effectively lowering the threshold such that only beliefs *'pursuing totalitarianism, or advocating Nazism, or espousing violence and hatred in the gravest of forms'* would not meet the threshold. The test almost becomes meaningless due to its now very permeable membrane. The wording *'totalitarianism, or advocating Nazism'* did not originate from the previous case law and in fact seems to have originated from respondent counsel's submissions (*Forstater,* EAT, para 38).

There are several issues with this, one being that the test for victimisation claims seems much easier for claimants to succeed in, with a tweet that a claimant is being investigated by the employer being enough for a victimisation claim to succeed (see *Bailey*). This

1 Note that the author's chambers, Garden Court Chambers, were co-respondents in this case.

has had an inadvertent chilling effect on employers/organisations which no longer feel confident in sanctioning gender critical employees, even when their views have overstepped the line into harassing/discriminating against trans colleagues.

What is the actual belief?

One of the issues is that belief is often being dealt with as a preliminary issue, which separates it out from the actual manifestations of that belief which are complained about. This divorce can create absurd results, when the belief which is self-described by the claimant is not the extent of the belief at all. Judges must be able to scratch below the surface of the belief and dig deeper as to what that actually entails, and what its implications are for others, including trans people.

Is the belief limited to *'sex is immutable'* – or is there more to it? Does *'sex is immutable'* include legal sex as well as biological sex, which would mean that a person with a GRC, in a gender critical person's view, does not actually attain the sex that the purpose of the Gender Recognition Act 2004 (GRA) gives them? If that is the case, it is difficult to see how the belief does not seek to destroy the rights of trans people with a GRC.

The framing of a gender critical belief as solely *'sex is immutable'* conveniently omits gender. However, if the belief leads to manifestations such as *'transwomen are men'*, the belief elides sex and gender such that the actual belief seems to be *'sex is immutable and gender does not exist/is not important/trans people are lying'.* It is one thing to say you cannot change your (natal) sex; it is another to say that you cannot change your gender. At the core of many gender critical beliefs seems to be a paternalistic prerogative seeking to strip people of their rights of self-definition, where a gender critical person may self-define their sex/gender, but a trans person may not – in essence, that a transgender person has no right to claim any aspect of the gender that they live in. Imagine telling someone you're a lesbian and they laugh in your face. Who are these people who think they have a right to tell you who you are?

...belief is often being dealt with as a preliminary issue, which separates it out from the actual manifestations of that belief which are complained about.

Yet a belief that sex and gender are the same/gender doesn't exist/gender cannot be changed is not the belief which has been protected. The failure of tribunals to recognise this has led to perverse conclusions, whereby claimants voicing views online which may be considered transphobic, such as *'a transwoman is a man',* can sue their employer for disciplining them.

The basis of identity

Crucially, if one looks at the content of the statements such as *'a man's internal feeling that he is a woman has no basis in material reality'* (said by Forstater) or that a transwoman is a man, this flies in the face of the very basis of transgender identity. Transgender identity clearly has a basis in 'material reality'. Trans life is not a fiction. It is strange to have to repeat this in 2024, but trans people are protected under EA, s7 and have been protected under Article 8 of the ECHR since 2002 (*Christine Goodwin v the United Kingdom* (no 28957/95)). Gender identity as part of one's individual autonomy is a core component of their Article 8 rights (see also *R (on the application of Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, [2022] 2 All ER 1).

The reality is that lots of trans people probably agree that sex matters. However, so does gender, and respect for one's gender is crucial. If someone's gender is not respected (wrong pronouns, deadnaming, etc.), then this is likely to lead to harassment and/or discrimination on the basis of gender reassignment under EA, s7. If a manifestation of a belief is a *'transwoman is a man'*, how can this not be objectively anti-trans or transphobic? It denies the very basis of the trans person's gender.

Interrogating the belief

Moving forwards, it is necessary that tribunals interrogate the alleged belief more critically. What is actually being complained about, and how does this relate to other rights such as trans and non-binary rights? If the matter is to be decided as a preliminary issue, the question must be asked at the same time, before the belief is protected: does the actual belief infringe on the rights of others, notably trans and non-binary people? Only then can the tribunal make a fair assessment as to whether the belief properly passes *Grainger* V, and whether it should be protected.

Ideally, belief will be considered along with the substantive issues. That way, the belief and its manifestations are not divorced from one another, and the tribunal can come to a more realistic conclusion of what makes up the belief, and whether the employer's reaction to the expression of that belief is justified.

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The EAT in *Higgs v Farmor's School* [2023] EAT 89, [2023] Briefing 1069 gave instructive guidance as to the proportionality exercise which must be undertaken when considering whether a reaction to a manifestation of a gender critical belief will be justified in terms of investigating and potentially disciplining the person with that belief (see para 94).

Most recently, in the case of *Lister v New College Swindon* ET 1404223/2022, the tribunal was clear that a claimant's gender critical beliefs expressed in not referring to a pupil by the correct pronouns, and making transphobic and homophobic tweets, did not lead to a successful claim. Lister's dismissal was a proportionate response to the complaints made against him by both pupils and colleagues. In particular, the fact that Lister said he would not have changed his behaviour had a less serious sanction been applied played an important part in why the dismissal was justified and proportionate.

In *Lister*, the tribunal has clearly understood that the nature of the manifestations would have likely been harassing and/or discriminatory to the pupils and colleagues (especially if they were trans). This is the correct approach, in contrast with the remitted tribunal's approach in *Forstater*, where the judge somehow concluded that a statement such as *'a man's internal feeling that he is a woman has no basis in material reality'* was not objectively unreasonable because it was close to the protected belief (para 295 of that judgment), thus making the reasoning circular.

Outside the ETs, in *Ali v Green Party of England & Wales* [Central London County Court, February 9 2024; see Briefing 1099 in this edition], the claimant claimed discrimination based on his gender critical views for being removed as a spokesperson for the Green Party. HHJ Hellman was careful to specify that it was not discriminatory for a political party merely to remove a spokesperson on the grounds of belief, provided it follows a fair procedure in doing so. He stated:

> *The Green Party could not, in any event, have been compelled to maintain Dr Ali as a spokesperson if (outside of a party election period) he expressed beliefs that were inconsistent with Party policy, or if they reasonably concluded that he would do so, as this would infringe their article 9(1) rights by obliging them to manifest a belief which they did not hold* [para 243].

Wrong turns in the law

In a common law system, it is not infrequent for the law to take wrong turns. This is then rolled back on. Notable examples include:

- The subjective element of the test for dishonesty in *R v Ghosh* [1982] QB 1053, [1982] 2 All ER 689 was overruled by the SC in *Ivey v Genting Casinos (UK) Ltd* [2018] AC 391, [2018] 2 All ER 406.

- In *Montgomery v Lanarkshire Health Board* [2015] UKSC 11, [2015] 2 All ER 1031, the SC overruled the long-standing, prudent doctor standard of care (departing from the House of Lords decision in *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871, [1985] 1 All ER 643) in favour of a new reasonable patient standard which obliges doctors to make their patients aware of all material risks of the recommended treatment and of any reasonable alternative treatment.
- In *Arthur JS Hall & Co (a firm) v Simons* [2002] 1 AC 615, the House of Lords departed from settled previous authority and held that barristers were not immune from claims in professional negligence.

Here, judges are frequently making the same mistake in failing to recognise that gender critical views often include anti-trans sentiments. Judges are unusually being asked to accept and normalise behaviour that might – at the same time – also amount to harassment of co-workers. This goes against the grain of the EA's purpose: to protect people from discrimination in the workplace and in wider society.

The consequence is that workplaces become less safe for trans people, and trans people may be less likely employed by employers due to envisaged issues.

We now seem to be in a position that if an individual A harasses B with behaviour which infringes their dignity, but so long as A's behaviour is capable of being labelled as having a connection (nexus) to an opinion and also A's opinion is not so bad as to be totalitarianism/Nazism, then there is nothing the employer can do. If it doesn't investigate, B has a viable tribunal claim against the employer. If it does investigate, A has a viable tribunal claim against the employer. There is literally nothing the employer can do to escape legal liability to one of those two parties.

The tribunals have tied themselves in knots, which are only going to get knottier - with more claims coming from both sides – if they are not untangled soon. The consequence is that workplaces become less safe for trans people, and trans people may be less likely employed by employers due to envisaged issues.

The bigger picture

It is notable that gender critical beliefs – as legitimised by decisions of the tribunals and courts – are unique to the UK, with those in other countries resisting trans rights mainly being right-wing extremists and from certain religious groups. International bodies such as ILGA-Europe and the Council of Europe have noted how trans lives and the legitimacy of trans identity have, since 2016 proposals for GRA reform, been turned into a culture-war issue and an indefinite form of 'debate' in the UK unlike anywhere else.

It is time for UK law to get in step with other progressive countries, or it will continue to drop in international rankings for safety of LGBT+ people. (The Rainbow Map shows that the UK has dropped down the list, from 14th in 2022 to 17th in 2023.) Sadly, the courts and tribunals will be part of the reason for this drop.

In 50 years' time, this slew of cases will be considered 'bad law' and history will not treat the decision-making in them kindly unless a change in approach is made soon.

1090

High Court declares provisions in the Police Act incompatible with the rights of Gypsies and Travellers

Marc Willers KC and Ollie Persey, barristers at Garden Court Chambers, set out the background to the successful challenge brought by Wendy Smith, who is a Romani Gypsy, to new powers given to the police to move Gypsy and Traveller families from unauthorised encampments and prohibit their return within 12 months. The authors explain that it is the chronic shortage of authorised permanent and transit sites which is the real cause of unauthorised encampments. Despite the police confirming this fact and indicating that the new powers were unnecessary, and despite concerns being expressed by both the Council of Europe and the Joint Committee on Human Rights that the new powers would exacerbate the difficulties faced by Gypsies and Travellers in pursuing their nomadic way of life, they were enacted by parliament in 2022. However, the High Court has now recognised that extending the no-return period to 12 months not only puts Gypsies at a particular disadvantage but also, and of itself, compounds that disadvantage. The High Court therefore declared these powers to breach the prohibition on discrimination in the European Convention on Human Rights. The authors express the hope that a new parliament will review the new powers in their entirety and recognise that rather than criminalising the Gypsy and Traveller way of life, meaningful investment in lawful encampments is what is required.

Introduction

Wendy Smith, a Romani Gypsy, brought a successful claim for judicial review challenging amendments to the Criminal Justice and Public Order Act 1994 (CJPOA 1994) which had been inserted by Part 4 of the Police, Crime, Sentencing and Courts Act 2022 (PCSCA 2022). In *The King on the application of Wendy Smith, claimant, and the Secretary of State for the Home Department, defendant, and (1) Friends, Families and Travellers, (2) Liberty, interveners* [2024] EWHC 1137 (Admin), May 14, 2024, Ms Smith challenged the new provisions on the basis that they constituted unjustified race discrimination against Gypsies and Travellers and sought a declaration of incompatibility that the provisions violated Article 14 of the European Convention on Human Rights (ECHR) (the prohibition on discrimination) read with Article 8 ECHR (the right to a private and family life).

Her claim succeeded: Swift J took the significant and unusual step of granting a declaration of incompatibility under s4 of the Human Rights Act 1998 (HRA 1998) on the basis that the introduction of *'12 month no-return periods'* (an increase from three months laid down in the original provisions in the CJPOA 1994) to prevent Gypsies and Travellers returning to unauthorised encampments was a discriminatory and disproportionate interference with their nomadic way of life and therefore unlawful.

The claim was supported by interventions from Friends, Families and Travellers (FFT) and Liberty. FFT provided crucial evidence of the systemic impact of the legislative reforms on Gypsies and Travellers.

The claimant

Wendy Smith is a Romani Gypsy. She lives in a caravan and had never lived in bricks and mortar accommodation. Her local authority has allowed her, her ex-partner and her son and daughter-in-law to reside in a layby since the start of the Covid-19 pandemic. Prior to that she was subject to frequent evictions. She was concerned at the effect that the legislative reforms would have on her and her family's traditional and cultural way of life, as they have *'no choice'* but to remain living on unauthorised encampments due to a lack of authorised permanent and transit sites.

The legislative reforms

The PCSCA 2022 received Royal Assent on April 28, 2022 and came into force on June 28, 2022. Part 4 of the PCSCA 2022 is concerned with unauthorised encampments. The focus of the challenge was on the new offence of *'residing on land without consent in or with a vehicle'* in s60C CJPOA 1994 and the 'strengthening' of existing powers.

Part 4 PCSCA 2022 operates by way of amendments to Part 5 CJPOA 1994. It adds to and extends the existing police powers contained in that legislation to restrain unauthorised encampments. Those existing powers are, in summary, as follows:

1. Under s61 CJPOA 1994, if a senior police officer reasonably believes that two or more persons are trespassing on land with the common purpose of residing there, that reasonable steps have been taken by or on behalf of the occupier to ask them to leave, and that either:
   i. any of those persons has caused damage to land or property on land or used threatening, abusive, or insulting words of behaviour towards the occupier (or the occupier's family member, employee, or agent) or
   ii. those persons have between them six or more vehicles on the land,

   then the officer may direct those persons to leave the land and remove any vehicles or other property they have on the land. A person who fails to leave the land as soon as reasonably practicable or who, having left, re-enters within the period of three months, commits an offence.
2. Pursuant to s62 CJPOA 1994, if a direction has been given under s61 and the person to whom it applies fails to remove their vehicle from the land or enters the land as a trespasser with a vehicle within three months, then the police may seize and remove the vehicle.
3. Under s62A CJPOA 1994, if a senior police officer reasonably believes that a person and one or more others are trespassing on land with the common purpose of residing on the land, the trespassers have at least one vehicle and one or more caravans, there is a suitable pitch on a relevant caravan site for that caravan or each of those caravans, and the occupier or a person acting on his or her behalf has asked the police to remove the trespassers, then he may direct the person to leave the land and/or to remove any vehicle and other property from the land. A person who fails to leave the land as soon as reasonably practicable, or who enters any land in the area of the relevant local authority as a trespasser before the end of three months with the intention of residing there, commits an offence: ss63(1) and (2) CJPOA 1994. If a constable reasonably suspects that a person to whom a direction has been given under s62A(1) CJPOA 1994 has, without reasonable excuse, failed to remove any vehicle on the land or entered any land in the area of the relevant local authority with a vehicle as a trespasser before the end of three months with the intention of residing there, then the constable may seize and remove the vehicle: section 62C CJPOA 1994.

The focus of the challenge was on the new offence of *'residing on land without consent in or with a vehicle'* in s60C CJPOA 1994 and the 'strengthening' of existing powers.

As originally enacted, s61 CJPOA 1994 provides that if a person to whom a direction has been given under s61 re-enters the land as a trespasser within a period of three months, he or she will commit an offence. However, s84(4) and (5) PCSCA 2022 extends that period to 12 months. This same extension to 12 months also applies to s62 (power to seize the vehicle of a person to whom a direction under s61 CJPOA 1994 has been given where he or she enters the land with a vehicle within the prohibited period), s62B (commission of an offence where a person to whom a direction under s62A(1) CJPOA 1994 has been given enters any land in the area of the relevant local authority within

the prohibited period as a trespasser with the intention of residing there), and s62C (power to seize the vehicle of a person to whom a direction under s62A(1) CJPOA 1994 has been given where he or she enters the land with a vehicle within the prohibited period) by virtue of s84(6-8) PCSCA 2022.

The 'chilling effect' on Gypsies and Travellers

It was the claimant's case that the impugned statutory provisions were introduced against a backdrop of a systemic shortage of authorised permanent and transit pitches for Gypsies and Travellers.

The new s60C CJPOA 1994 offence prevents those required to leave land from returning to it for 12 months (as opposed to three months under existing powers). This exacerbated the difficulties faced by Gypsies and Travellers in finding sites and pursuing their nomadic way of life.

...there are other ways of tackling unauthorised encampments – for example, a statutory duty on local authorities to provide adequate authorised encampments – which would achieve the same aim without interfering with human rights in such a significant manner.

Following legislative scrutiny of Part 4 of the PCSC Bill, the Joint Committee on Human Rights produced a report (HC/478/HL Paper 37, July 2, 2021) in which it identified:

> *… significant concerns with the justification behind this new offence and consider[ed] that there are other ways of tackling unauthorised encampments – for example, a statutory duty on local authorities to provide adequate authorised encampments – which would achieve the same aim without interfering with human rights in such a significant manner. The provision of more authorised sites would also benefit landowners, who are quite rightly concerned about the present situation.*

The legislation under challenge in this claim was introduced following two consultations. The first, entitled *'Powers for dealing with unauthorised developments and encampments'*, ran from April 5, 2018 to June 15, 2018 and had 2,198 respondents. The second, entitled *'Strengthening police powers to tackle unauthorised encampments'*, ran from November 5, 2019 to March 5, 2020 and had 26,337 respondents. The defendant Secretary of State principally relied on the 52% majority support for criminalisation of encampments from the first, far smaller consultation.

Evidence from the National Police Chiefs' Council (NPCC) indicated that it considers the new powers to be unnecessary:

> *The lack of sufficient and appropriate accommodation for Gypsies and Travellers remains the main cause of incidents of unauthorised encampment and unauthorised developments by these groups.*

Following the defendant's 2019 consultation, FFT sent Freedom of Information Act 2000 (FOI) requests to all 45 police forces, 40 Police and Crime Commissioners in England and Wales, the NPCC and the Association of Police and Crime Commissioners. Of these, 50 police bodies confirmed that they did not respond to the 2019 consultation, 6 did not respond to the FOI request within the stipulated 20 working days, and 23 police bodies confirmed they had responded directly to the consultation. Of those 23, 16 police bodies shared a copy of their submission with FFT.[1] In summary:

- only 21.7% of police respondents agreed with the defendant's proposals to criminalise unauthorised encampments;
- 93.7% of police bodies called for site provision as the solution to unauthorised encampments;
- just 18.7% of police respondents agreed with the defendant's proposals to give police power to seize vehicles;

1 www.gypsy-traveller.org/wp-content/uploads/2020/10/Full-Report-Police-repeat-calls-for-more-sites-not-powers-FINAL.pdf

- only 43.7% of police respondents agreed with the defendant's proposals to increase the length of time in which those on encampments would be unable to return from three months to 12 months.

A 2017 survey of Gypsies, Roma and Travellers in the UK found that 91% of respondents had experienced discrimination and 77% had experienced hate speech or hate crime.[2] In 2023, the Centre on the Dynamics of Ethnicity published its Evidence for Equality National Survey report,[3] which showed that 62% of Gypsies and Travellers had experienced a racially motivated assault. This was higher than any other minority group in the country.

The challenged statutory provisions were clearly designed with Gypsy and Traveller people in mind, and on the defendant's own analysis, had a disproportionate impact on them. The foreword to the 2019 consultation stated:

> *The Government recognises that the proposals contained in this consultation are of interest to a significant minority of Gypsies, Roma and Travellers who continue to travel. The Government's overarching aim is to ensure fair and equal treatment for Gypsy, Roma and Traveller communities, in a way that facilitates their traditional and nomadic way of life while also respecting the interests of the wider community.*

[The Advisory Committee] is also profoundly alarmed that the UK is pursuing a course of action which is knowingly discriminatory against the minority which is most exposed to discrimination in the country.

The Council of Europe's Advisory Committee on the Framework Convention for the Protection of National Minorities produced its fifth opinion on the United Kingdom, which was adopted on December 8, 2022 and found, with reference to the PCSC Bill that:

> *The criminalisation of unauthorised sites and **the potential to seize property has sewn fear among communities. The Advisory Committee considers that any benefits to wider society resulting from these measures have not been adequately substantiated.** For instance, the Government's evidence shows that in a minority and decreasing number of cases, unauthorised development occurs on land which Gypsies and Travellers do not own; the larger number of such developments being on land owned already by Gypsy or Traveller individuals, which would not be trespass and would rather be dealt with through the planning system. It is also profoundly alarmed that the UK is pursuing a course of action which is knowingly discriminatory against the minority which is most exposed to discrimination in the country. The Advisory Committee considers that this, taken with the systemic site shortage and definition and in the absence of substantive measures to promote the culture of the minority, threatens one of the tenets of Gypsy and Traveller identity and runs counter to the UK's obligations under the Framework Convention. The Advisory Committee observes that in the UK issues around planning dominate the discussion about Gypsies and Travellers. It is therefore of great urgency to work progressively and in partnership with minority representatives to resolve any issues and ensure appropriate provision of culturally adequate accommodation, in light of the positive examples highlighted by some of the Advisory Committee's interlocutors.* [para 106]
>
> *The Advisory Committee urges the authorities to take priority measures to address the accommodation needs of persons belonging to Gypsy, Roma and Traveller minorities, including through reverting to the pre-2015 definition of "Gypsy" for planning purposes in England, obliging local authorities to provide the sites they have identified through needs assessments, and continuing to work to increase the number of sites and pitches, both transit and permanent. **They should also reconsider***

2 https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/360/full-report.html

3 www.ethnicity.ac.uk/research/projects/evens/

> ***the implications of the criminalisation of unauthorised sites and the seizure of property in light of the risk of forced assimilation this poses to the minorities.*** [para 107] (Emphasis added.)

As noted by FFT in its intervention before the High Court, the impugned statutory provisions were expressly modelled on Irish legislation from 2002. The evidence from Ireland over the past two decades demonstrates the severe chilling effect that criminalising the use of unauthorised encampments has had. A 2017 report by the European Commission cites a national survey which shows that fewer *'Travellers are travelling now. Only 1 in 10 respondents said that they still travel, versus 1 in 3 when asked in 2000. For those who had travelled, but no longer do so, 19% said they stopped as they are not allowed to do so by the law and 18% said it was because there are less places to travel now (which is a direct result of the change in the law)'*, with the Irish Traveller Movement attributing the criminalising of trespass as being *'largely responsible for the decrease in the number of families living in unauthorised sites, a decline in nomadism and the increase and continuation of families sharing accommodation'*.[4]

The claimant argued that the provisions were excessive and not offset by any meaningful action by the government to address the chronic shortage in authorised sites, which was the *real* cause for unauthorised encampments that the legislation purported to address.

A 2019 report commissioned by the Irish Department of Housing, Planning and Local Government found that the anti-trespass legislation was having

> *… a severe impact on members of the Traveller community who continue to live in caravans. This is the case where there has been a failure by local authorities to implement and provide appropriate provision in terms of permanent halting sites and, in particular, catering for transient provision recognising the nomadic traditions of the Traveller community …*[5]

The legal arguments

By the time of the High Court hearing, it was common ground between the parties that the impugned statutory provisions had a disproportionate impact on Gypsies and Travellers. There was therefore *at least* indirect race discrimination, and the Court should *at least* adopt the strictest level of scrutiny when considering the question of justification. It was also not in dispute that where discrimination is based on a *'suspect ground'*, which includes race, this ordinarily requires *'very weighty reasons'* to be advanced by way of justification: see *A and B v Criminal Injuries Compensation Authority* [2021] UKSC 27; [2021] 7 WLUK 99 at para 85.

The focus of the arguments was therefore on whether the provisions could be justified. It was the claimant's case that the provisions had a significant *'chilling effect'* on Gypsy and Traveller communities exercising their nomadic way of life as Gypsies and Travellers will invariably comply with a direction to leave a site forthwith even if that direction was given unlawfully. The claimant argued that the provisions were excessive and not offset by any meaningful action by the government to address the chronic shortage in authorised sites, which was the *real* cause for unauthorised encampments that the legislation purported to address. The criminalisation of unauthorised encampments, the dearth of authorised permanent and transit site provision and other measures such as the increasing use of injunctions had left Gypsies and Travellers with no *'room to manoeuvre'*: *Wolverhampton City Council and others v London Gypsies and Travellers and others* [2023] UKSC 47; Briefing [2024] 1078 at para 225. Moreover, it was argued that the powers were unnecessary as there was no cogent evidential basis for their enactment, with the police expressly rejecting the necessity of these *police* powers and the evidence in support of them being highly selective and taken from a misleading consultation.

4 https://rm.coe.int/complaint-no-100-2013-european-roma-rights-centre-v-ireland-response-b/1680483a05

5 www.paveepoint.ie/wp-content/uploads/2019/07/Expert-Review-Group-Traveller-Accommodation.pdf

High Court

Swift J found the 12-month no-return periods in all three provisions constituted unjustified race discrimination in circumstances where there was a lack of authorised transit site provision on which Gypsies and Travellers could camp lawfully. The judge held:

> *The Claimant submits that the decision to extend the non-return periods is largely unexplained, and that the mismatch between the 12-month period and the 3-month maximum stay at a transit pitch is a matter calling for explanation as it means that Gypsies will no longer be able avoid the risk of criminal penalty by resort to transit pitches. The position might be different if transit pitches were readily available: moving between several different pitches over the course of a 12-month period would be a feasible option. But the evidence shows this is not the position. The Claimant's submission is that the increased protection to land owners given by the 12 month no-return periods places a disproportionate burden on Gypsies. It expands the scope of the criminal penalties and at the same time makes it more difficult to comply with the law.*
>
> *… I accept this submission. The point here is not simply that the no-return periods have been extended. That of itself does revisit the balance struck between the property rights of landowners and occupiers and the interest of Gypsies, but if this point stood alone the likely success of the submission that the change produced a disproportionate outcome would be in the balance. The matter that is decisive in the Claimant's favour is that the extension of the no-return period of itself narrows the options available to comply with the new requirement. Resort to a transit pitch will no longer suffice as the maximum stay on a transit pitch is 3 months. The under supply of transit pitches renders it much less likely that the opportunity exists to move from one to another. In this way, extending the no-return period not only puts Gypsies at particular disadvantage but also and of itself, compounds that disadvantage…* [paras 54-55]

Importantly the judgment recognised that the right of Gypsies and Travellers, protected by Article 8 and 14 of the ECHR, to live in accordance with their traditional way of life cannot be further restricted without cogent justification.

Although Swift J did not accept the claimant's submission that s60C of the CJPOA 1994 in its entirety was unlawful, he was clear that the police must comply with statutory guidance limiting the use of s60C before taking a decision to exercise the new enforcement power, as that guidance included important safeguards to protect Gypsies and Travellers. For example, at para 34 of the judgment, the judge held that:

> *[The] guidance includes a requirement to follow the operational advice issued by the National Police Chiefs' Council, 'Operational Advice on Unauthorised Encampments'. Any officer following this operational advice would not act precipitately. This ought to be sufficient to filter out the possibility of malicious or discriminatory action by the legal occupiers of land.*

Conclusion

Importantly the judgment recognised that the right of Gypsies and Travellers, protected by Article 8 and 14 of the ECHR, to live in accordance with their traditional way of life cannot be further restricted without cogent justification. None had been advanced by the defendant. Following the general election, a different parliament will have to consider the compatibility of new enforcement provisions brought in by the PCSCA 2022 with the ECHR. It is hoped that parliament will take this opportunity to review the new powers in their entirety and that it can be persuaded that the aims of the legislative reforms are better served by meaningful investment in lawful encampments rather than by criminalising the Gypsy and Traveller way of life.

ENAR urges collaboration and coalition to support anti-racist work

Francesca Almond, public law and human rights lawyer, attended the European Network Against Racism's (ENAR) regional meeting in the Hague on April 25-27, 2024 as a representative of the DLA. She summarises the main outcomes of the meeting.

Collaboration and coalition between European civil society organisations were the positive messages which came out of this year's regional ENAR meeting.

Set up in 1998, ENAR is a pan European anti-racism network which '*combines advocacy for racial equality and facilitating cooperation among civil society anti-racism actors in Europe*'. ENAR was founded by grassroots activists whose mission was to achieve legal changes at a European level and to try to bring racial equality across EU member states.

ENAR is made up of several member organisations from European states. The DLA is one of their UK members; other organisations from the UK include the Runnymede Trust and the Northern Ireland Council for Racial Equality. Other UK attendees were representatives from Europia, International Decade for People of African Descent (IDPAD) Coalition UK, and IDPAD Hackney. Although the UK is no longer a member of the European Union, given our geographical proximity, historical ties and political overlap, ENAR still encourages member groups from the UK.

Unlocking the potential of NAPARs to address structural racism

The first day focused on National Action Plans Against Racism (NAPARs) with the aim of exploring how to unlock their potential to challenge structural racism.

ENAR facilitators briefed the group on the history of NAPARs and the current issues facing civil society organisations (CSOs) which use them to challenge structural racism. Following the public mobilisation under the Black Lives Matter movement and anti-racism protests, in September 2020 the EU published an EU Anti-Racist Action Plan 2020-2025 (ARAP). The EU's adoption of the action plan followed years of intense campaigning by CSOs including ENAR. ENAR colleagues said that the EU ARAP was the first time the EU had explicitly acknowledged the existence of the structural, institutional, and historical dimensions of racism.[1] The EU ARAP was an attempt to give a framework to states for developing their own national anti-racist action plans; it emphasised the need for states to mainstream racial equality in different policies and take an intersectional approach.

As noted by ENAR, the EU ARAP's impact is limited as it is not legally binding; the EU has left it up to member states to adopt and develop their own NAPARs. And of course, whether a member state creates and adopts its own NAPAR is subject to its domestic political agenda. ENAR also commented on its frustration at the European Commission and the subgroup set up by the Commission to handle ARAPs as these institutions often have not fully engaged with the third sector and CSOs. There is an EU ARAP Civil Society Forum, which is an informal coalition of civil society groups set up to progress implementation of NAPARs across member states.

In terms of implementation, so far 11 NAPARs have been adopted out of total of 27 member states. States which have developed NAPARs include Finland, Belgium Germany, France and Ireland.

1 Action Plans Against Racism - European Network Against Racism (enar-eu.org)

ENAR has been monitoring the NAPARs of seven member states and the results of this exercise and its anti-racism map are available here.

Of course, the EU ARAP does not apply to the UK. Representatives from UK organisations noted that the UK lacked any framework which mirrored a NAPAR. Some representatives noted the widespread criticisms of the report of the Commission on Race and Ethnic Disparities (the Sewell report) and its denial of structural racial inequalities in the UK.[2]

... civil society groups should collaborate at a national level when pushing for greater implementation of NAPARs.

On behalf of the DLA, I explained the S149 Equality Act 2010 public sector equality duty (PSED) and how it operates. I also noted its limitations and the wider criticisms of the duty's effectiveness in addressing racial disparities and structural inequalities and highlighted recommendations that the PSED needs to be more robust in terms of compliance and enforcement.[3]

A representative for BePax, a Belgium racial justice NGO, spoke about how it had organised a civil society coalition to monitor and push for better implementation of Belgium's NAPAR. Representatives from Irish organisations, such as the Waterford Integration Services, also clarified that whilst Ireland has a NAPAR in place, there was a lack of engagement by the state with the third sector and lack of awareness of the plan has meant that it is not being used effectively.

The session on NAPARs was insightful and concluded that civil society groups should collaborate at a national level when pushing for greater implementation of NAPARs. Some of the UK attendees expressed interest in setting up a working group[4] to try and push for the UK to develop a framework akin to a NAPAR.

Shrinking civic space

Under the heading *'Shrinking civic space',* representatives discussed the legislative and political frameworks of their countries in order to rank where each country fell on a scale, ranging from liberal, democratic societies on one end through to more authoritarian societies on the opposite end of the spectrum. There were lively debates in this session. Representatives of French member groups reported that the political environment for CSOs in France was increasingly hostile, with state institutions targeting civil society groups if they public criticised the state for being institutionally racist. Representatives from groups in Ireland and the UK noted the impact of government rhetoric against migrants and other marginalised groups, the passing of the Safety of Rwanda (Asylum and Immigration) Act in April 2024, and the failure of the state to adequately address the Windrush scandal.[5]

The rhetoric coming from right-wing movements in member states and the hostile environment this was creating for CSOs was a concern which was widely discussed.

Challenges facing ENAR members

The challenges facing member organisations and how ENAR could help them was the focus of the second day's sessions. Governance issues and funding was a critical theme. Many grassroots organisations outlined the struggles they face in getting core funding to develop their organisations. Coupled with a lack of resources and capacity to apply

2 No 10's race report widely condemned as 'divisive' | Race | The Guardian

3 61bca661b8abd33d2f6f579c_Runnymede CERD report v3.pdf (website-files.com)

4 Readers interested in the working group should contact the author for further details; cesca.almond@outlook.com

5 See [2021] Briefing 961 *A critique of the Windrush Lessons Learned Review* published on 19 March 2020 and [2018] Briefing 859 *What is the Windrush scandal?*

for project based funding, it is clear that CSOs and NGOs are increasingly struggling with funding and resources in the current climate.

ENAR suggested CSOs could form coalitions to channel resources as one way of responding to capacity and funding issues; it offered support to member organisations to help them form such collaborations.

Conference overall

The two-day conference was an enlightening and engaging event. I met and made connections with a diverse and fascinating group of professionals and activists working in the field of anti-racism across Europe. From discussions it was clear that civil society organisations were feeling pressures from the wider political environment but there was also hope in collaboration and coalition building. I found the event truly inspiring and encourage other DLA members to participate in the next ENAR regional meeting.

Finally I would like to thank DLA member, Hamna Khan and DLA committee member, Declan O'Dempsey, for helpful input prior to my trip to the Hague.

Photo of some of the representatives of members at the ENAR meeting; DLA representative, Francesca Almond, fourth in from the left on the bottom row.

Decision to reject disabled lecturer's promotion application was not discriminatory

Pipe v Coventry University Higher Education Corp ✦ EWCA Civ 191; March 4, 2024

Facts

The appellant, Mr Simon Pipe (SP) was a grade 6 lecturer employed by Coventry University (the University), who suffered from a sleep disorder and ADHD. He applied for promotion to a grade 7 lecturer three times over the course of three years (2017 -2019) through the University's framework for progression (the Framework). The criteria included, amongst other things, that the applicant have a PhD or equivalent. Following the rejection of his first application, SP obtained medical evidence showing that undertaking a PhD would be difficult for him due to his diagnosis.

Nonetheless, all three of SP's applications were rejected by the University on the basis that he had not shown a clear pathway to a PhD or equivalent and that there was an insufficient 'business case' to justify promotion.

In 2020, SP made two further requests to the University, asking them to consider promoting him outside the normal process as a reasonable adjustment because his disability had *'a significant impact on [his] ability to meet the requirements set out in the progression system'.* The University rejected his requests and SP later resigned from his position.

Employment Tribunal

SP pursued discrimination claims relating to s15, s19 and ss20-22 of the Equality Act 2010 (EA), all of which were considered, but subsequently dismissed.

1. Failure to make reasonable adjustments

In assessing SP's reasonable adjustment claim, the ET found that the University's framework for promotion was fundamentally comprised of two questions:

1. was there a recommendation to go to the next stage on the grounds that the applicant had met the required standard?
2. was there a business case (and budget) for the role?

The ET found that SP had been subjected to unfavourable treatment in relation to the first question in that his applications for promotion had been rejected. Ultimately, however, there was no business case (or budget) for such a role, which meant that SP had not been put at a substantial disadvantage because he, nor any non-disabled person, would have been promoted.

2. Discrimination arising from disability

The parties agreed that the rejection of SP's applications amounted to unfavourable treatment. The University also accepted that 'something' arose from SP's disability, but denied that this was the cause of the unfavourable treatment. The ET agreed, concluding that the rejection of SP's applications was *'in no sense whatsoever caused by the something arising out of his disability'*. Instead, the ET determined the causal link to be the absence of a business case for the role, and SP's own failure to engage with the University regarding alternative pathways to undertaking a PhD.

✦ [2024] IRLR 514

The ET went on to consider the question of justification. The tribunal acknowledged that the University was trying to apply a consistent system for progression, and was satisfied that the Framework was proportionate and that any unfavourable treatment was therefore justified.

3. Indirect discrimination

SP also alleged indirect discrimination in relation to disability and age, arguing that the application of the Framework placed him at a disadvantage due to his disability. In assessing these claims, the ET was not satisfied that the provision, criterion or practice (PCP) (the Framework's criterion of requiring a PhD) was in fact applied to SP. The requirement for a PhD was not absolute as there was a degree of flexibility through alternative pathways.

Employment Appeal Tribunal

The EAT heard 12 grounds of appeal, broadly concerning three areas: the reasonable adjustment claim; the 'something arising' claim; and the indirect discrimination claim.

In relation to the reasonable adjustment claim, SP argued that the ET had misapplied the test for causation by concluding that there was no disadvantage [to him], citing the case of *Sheikholeslami v University of Edinburgh* UKEATS/0014/17/JW, where it was found that the threshold for establishing causation is low.

The EAT rejected this. It considered the question posed in *Sheikholeslami* i.e. what would the position have been if SP did not have the relevant disability, and it came to the same conclusion as the ET (that there was no substantial disadvantage to SP due to the lack of a business case for the role).

... the absence of a business case each time SP applied for promotion was *'a show-stopper'*, because an able-bodied person would have experienced *'exactly the same roadblock'* and would not have been promoted.

Further, SP argued that the ET had misapplied the test for causation in determining that the rejection of his applications did not constitute 'something arising' from his disability. The EAT was, however, not satisfied by this argument, and went on to note that even if such a causal link existed, SP would still have been subjected to the unfavourable treatment as there was no business case.

In considering the indirect discrimination claim, the EAT noted that, although the wording of the causation test was slightly different to that of the reasonable adjustment claim, it did not mean that the ET was required to reach a different conclusion when assessing disadvantage. The ET had found as a matter of fact that SP's applications would have failed due to the lack of a business case, regardless of the PhD criteria.

The EAT upheld the ET's findings and dismissed the appeal.

Court of Appeal

The appeal, heard by Laing LJ, Bean LJ, and Moylan LJ, was brought on four grounds, relating to assessments of causation and proportionality. The first two grounds concerned the ET and EAT's application of s15(1)EA, and the second two grounds concerned the application of s19(1) and (2)EA.

When assessing causation, the CA looked to the ET's finding of fact regarding the fundamental elements of the Framework. It determined that the absence of a business case each time SP applied for promotion was '*a show-stopper*', because an able-bodied person would have experienced '*exactly the same roadblock'* and would not have been promoted. Laing LJ noted that SP's disability played no *'casual role of any kind'*, and that the specific causation test applied was therefore irrelevant. She further remarked that the application of causation in respect of the indirect discrimination claim (despite its different wording) should lead to the same result due to the similarity of substance.

Finally, in considering proportionality, the CA held that the ET and EAT had sufficiently balanced the justification of the PCP with the individual impact upon SP. It drew a link with the ET's reasons for rejecting the s20 reasonable adjustments claim, which saw the ET consider SP's individual circumstances in detail, and which laid the foundation for the ET's application of the s15(1)(b) and s19(2)(d) tests.

The CA dismissed the appeal on all grounds, ultimately concluding that there had been no error in law made by either the ET or EAT.

Comment

Provisions in the EA are rightly in place to ensure that a disabled person is not disadvantaged when compared to a non-disabled person. However, this case highlights that the parameters of reasonable adjustments are not limitless. Where there is no business case or budget for a role, and a non-disabled person would face the same hurdles, an employer is not obliged to offer reasonable adjustments which would in effect 'bypass' the hurdles.

Nevertheless, employers should still take steps to ensure parity in their promotional frameworks by offering flexibility in their requirements, working with individuals to identify any barriers, and allowing alternative avenues to place disabled candidates on equal footing with non-disabled candidates.

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Lack of capacity not relevant status for Article 14 purposes in failed succession case

Dudley Metropolitan Council v Mailley [2023] EWCA Civ 1246; October 27, 2023

Implications for practitioners

This is another case in a line of unsuccessful Article 14 Human Rights Act 1998 (HRA) challenges to the statutory rules for succession to local authority tenancies.

The case also brings into focus the question of whether mental capacity could be considered relevant status for Article 14 purposes and finds that, because of the potentially uncertain nature of mental capacity, it could not.

... [this case] highlights the need for secure tenants to assign their council properties to a qualifying relative while they still have mental capacity to do so.

It also highlights the need for secure tenants to assign their council properties to a qualifying relative while they still have mental capacity to do so. This underscores a problem with the legal aid system, where the appellant, Marilyn Mailley (MM), did not meet a housing lawyer until she was defending a possession claim and it was too late. A future government would do well to add pre-emptive advice and assistance to the legal aid offering so that future secure tenants are able to assign their tenancy while they have mental capacity to do so.

Facts

MM's mother lived in a council house since 1965; she had been a secure tenant there since 1980. MM also lived in the property since 1965. She would have succeeded to the tenancy if her mother had died at home or had assigned the tenancy to her.

Mrs Mailley senior had to go into a care home in 2016. Owing to vascular dementia, she lacked mental capacity to assign the tenancy to her daughter. In January 2018, Mrs Mailley died in the care home and Dudley Metropolitan Council (the Council) commenced possession proceedings. During this period the Council continued to offer MM alternative council properties, which she declined.

High Court

MM's defence was threefold. Firstly, a public law challenge that the Council was in breach of its lettings policy in that fair and proper consideration was not given to the grant of the council tenancy to her. Secondly, MM asserted that eviction would constitute an unjustifiable violation of her rights pursuant to Article 8 HRA and amounted to unlawful direct discrimination on grounds of her status.

Thirdly, MM argued that s87 Housing Act 1985 (HA 1985) was incompatible with Article 14 HRA. S87 provides that:

> *A person is qualified to succeed the tenant under a secure tenancy if he occupies the dwelling-house as his only or principal home at the time of the tenant's death and either:*
>
> *(a) he is the tenant's spouse or civil partner, or*
>
> *(b) he is another member of the tenant's family and has resided with the tenant throughout the period of twelve months ending with the tenant's death; ….*

Although it was accepted that MM was a potentially qualifying family member, she could not satisfy the condition in s87(b) because she was not residing with Mrs Mailley

in the property throughout the period of twelve months ending with her mother's death.

In respect of the public law challenge, Cotter J held that while a review of the decision to seek possession was not carried out prior to the claim being issued, when the review was carried out, MM didn't play any part in it despite repeated invitations to participate by the Council. Cotter J held that MM did not begin to clear the necessary high hurdle to be successful in a public law challenge.

MM's Article 8 argument was on the basis of her mental health at the time of the trial, the impact of eviction on her mental health and the length of time she lived in the property. The Council's legitimate aim was effective management of its housing stock. Cotter J held that its claim for possession was proportionate. In the balancing exercise, he set greater weight on under-occupancy than on the potential impact of eviction on MM's mental health.

Regarding the Article 14 argument, Cotter J applied the four questions identified by Lady Hale in *R (Stott) v Secretary of State for Justice* [2018] UKSC 59 to the facts:

1. Does the treatment complained of fall within the ambit of one of the rights in the European Convention on Human Rights?
2. Is that treatment on the ground of some 'other status'?
3. Is the situation analogous to that of another person who has been treated differently?
4. Is the difference justified: is it a proportionate means of achieving a legitimate aim?

In answer to the first question, it was clear that Article 8 was engaged. As regards the question of relevant 'other status', Cotter J found that the mental incapacity of the secure tenant could not be *'sufficiently certain to provide status for an Article 14 claim'.* [para 186]

On the analogous question, Cotter J held that MM's predicament was not analogous to the situation of a relative who succeeds to a tenancy through death or assignment. This was because, in contrast to the certainty of those scenarios, MM's proposed right to succeed would be comparatively uncertain and possibly temporary due to the possibility of the secure tenant regaining her/his capacity.

In respect of whether the difference of treatment because of s87 HA 1985 was justified, Cotter J held that the legitimate aim of the legislation was certainty as to when an occupier can succeed to the tenancy. MM argued that s87 HA 1985 should be read down to include a situation such as hers, that is where Mrs Mailley had ceased to permanently live at the property due to ill-health and was incapable of assigning the tenancy to her daughter. The judge concluded that it would be overstepping a constitutional boundary to read s87(b) in this way and it would not provide certainty.

Court of Appeal

MM's appealed on five grounds. Firstly she argued that Cotter J was wrong to find that she had no relevant status pursuant to Article 14 HRA. Grounds two and three argued that the judge was wrong in law in finding that MM's situation was not analogous to relatives living with secure tenants who had died or assigned the tenancy; MM also argued that Cotter J was wrong on the justification point. Finally she argued that Cotter J was wrong to find that even if there was Article 14 discrimination, it was impermissible to read down s87b HA 1985 to allow MM and people like her to succeed to the tenancy.

In her lead judgment, Simler LJ agreed with Cotter J that relevant status required certainty and mental capacity lacked this.

At appeal, MM's lawyers tried to change the definition of the status that she relied on at trial. The attempted change would have been that MM was the qualifying successor daughter of a disabled person who, because of her physical and mental impairments, was too disabled to maintain her security of tenure and to assign the tenancy. Simler LJ refused permission for MM to amend her proposed status at appellate stage. Relevant status should have been formulated at trial and the factual issues of whether Mrs Mailley was disabled pursuant to s6 Equality Act 2010 (EA) could have been explored then with expert evidence and the aid of assessors.

With reference to grounds 2 and 3, Simler LJ agreed with Cotter J and found that the correct comparator was not a successful occupier but the occupier relative of a secure tenant who either lost security of tenure for a non-health/disability reason or who had failed to assign the tenancy for a non-health/disability reason. She found that MM was treated no differently by the Council than what she considered the 'true comparator', namely other unsuccessful successors.

Simler LJ opined [at para 55] that the case might have been better argued as indirect discrimination, rather than how it was pleaded as direct discrimination.

Presently, it seems clear that mental capacity is not considered relevant status for Article 14 purposes...

Simler LJ then considered justification for the difference in treatment; she found that the aim of the legislation limiting succession was to strike a balance between the rights of people in need of housing and would-be successors. The need for bright line certainty about who can succeed also forms the basis for justification of the difference in treatment.

Comment

MM does not appear to have appealed to the Supreme Court. Presently, it seems clear that mental capacity is not considered relevant status for Article 14 purposes because of its potential uncertainty, and because whether or not the party has capacity can be issue specific.

From Cotter J and Simler's LJ treatment of the justification for the difference of treatment it is likely that there would have been a similar outcome even if it had been pleaded as an indirect discrimination case or pleaded as disability rather than capacity. However, it does potentially open the door to other ways for practitioners to challenge the difference in treatment. Practitioners should consider whether, instead of lack of capacity, pleading indirect discrimination or pleading relevant status as a qualifying family member of a tenant unable, because of disability, to assign their tenancy would lead to a more successful outcome when challenging failed succession cases in the future.

In any event, from the judicial criticism of MM's evolving case, in Article 14 cases it is vital that the case is carefully pleaded from the inception of the challenge.

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Duty on the ET to make reasonable adjustments

Abanda Bella v Barclays Execution Services Ltd and others ✦ [2024] EAT 16; February 23, 2024

Implications for practitioners

In this case, the EAT clarified the approach which should be taken by employment tribunals when considering applications to record tribunal hearings by disabled litigants. The EAT held that the tribunal is under a duty to make reasonable adjustments to assist disabled parties. It held that tribunals should consider the guidance set out in *Heal v The University of Oxford* [2020] ICR 1294 and all the evidence in support of an application for reasonable adjustments. In this particular case, it was held that, as the adjustment requested was unlikely to impact on the proceedings but was likely to assist the appellant in resisting the respondents' strike-out application, it should have been granted. This case emphasises the importance of ensuring that applications for reasonable adjustments in tribunal proceedings are made in advance and, if possible, supported by medical evidence.

The EAT held that the tribunal is under a duty to make reasonable adjustments to assist disabled parties.

Facts

The claimant, Abanda Bella (AB), was unrepresented in the ET for claims he brought against his employer, Barclays Services Ltd (BSL). It was accepted that AB was disabled in law: he was diagnosed with anxiety, depression, PTSD, paranoia, psychosis and sleep disturbance. As a result of AB's disability and the impact it had on his mental ability, including issues with memory and focus, he applied for permission to record a three-day preliminary hearing in his claim. This application was supported by a report from his psychotherapist of over three years. The report recommended three adjustments as being appropriate to enable AB to effectively participate in his hearing. One of these recommendations included being allowed to record the proceedings on the basis that he would be unable to take reliable notes and at the same time participate effectively in the hearing. This would mean he would be unable to follow BSL's submissions and reply to them.

Employment Tribunal

Employment Judge Crosfill dismissed AB's application to record the preliminary hearing. He confirmed that while he had given regard to the medical report submitted by AB, he was not satisfied that AB's disability required the tribunal to make reasonable adjustments. The judge confirmed he had considered the psychotherapist's report but was not bound to follow her recommendations. The judge explained that no evidence was to be given at the hearing, and any disputes could be dealt with following each party's submission. As a result, the judge claimed that AB would only need to take a brief note during the proceedings and verbally respond to any queries, as he had done in previous hearings. Additionally, recordings would be taken and retained by the Courts and Tribunals Service (HMCTS). AB could theoretically apply for a transcript at his expense.

AB appealed to the EAT on the basis that the ET had failed to apply the principles set out in *Heal,* that it had been too dismissive of the medical evidence and had erroneously substituted its own view of the impact of the proceedings on AB's health.

✦ [2024] IRLR 375

Employment Appeal Tribunal

The EAT upheld AB's appeal. The EAT's view was that permission to record was a reasonable adjustment which should have been made and the tribunal's decision to refuse it was unlawful. It noted the judgment in *Rackham v NHS Professionals* UKEAT/0110/15/LA which stated that,

> *… in many cases, if not most, a person suffering from a disability will be the person best able to describe to a court or to others the effects of that disability on them and what might be done in a particular situation to alleviate it.* [para 50]

Additionally, although EJ Crosfill confirmed that the guidance in *Heal* is not mandatory, it should have been considered by the ET. The tribunal should have taken into account the following matters, as set out in *Heal*, in determining whether to grant permission:

i. *The extent of the inability and any medical or other evidence in support;*
ii. *Whether the disadvantage in question can be alleviated by other means, such as assistance from another person, the provision of additional time or additional breaks in proceedings;*
iii. *The extent to which the recording of proceedings will alleviate the disadvantage in question;*
iv. *The risk that the recording will be used for prohibited purposes, such as to publish recorded material, or extracts therefrom;*
v. *The views of the other party or parties involved, and, in particular, whether the knowledge that a recording is being made by one party would worry or distract witnesses;*
vi. *Whether there should be any specific directions or limitations as to the use to which any recorded material may be put;*
vii. *The means of recording and whether this is likely to cause unreasonable disruption or delay to proceedings.* [*Heal*, para 27].

This case demonstrates the importance of representatives taking a proactive approach to providing reasonable adjustments for disabled people.

By failing to comply with the above guidance EJ Crosfill had failed to take into account material factors when assessing AB's request. In reality, a disabled claimant, particularly one acting in person, was already likely to be at a disadvantage when facing experienced lawyers on the other side.

The ET's judgment was flawed for the following reasons:

1. The judge too readily dismissed the psychotherapist's evidence and recommendations.
2. The fact that the hearing would be based on submissions only and without evidence being taken did not make any material difference to the nature and context of AB's request.
3. Having a recording available would have relieved some of AB's difficulty in making notes during the hearing.
4. A recording by HMCTS, which would be made available after the hearing, would have been of no use to AB as he wished to use the recording during the course of the preliminary hearing.

Comment

There is a high frequency of disabled claimants or witnesses coming before the employment tribunals. This case demonstrates the importance of representatives taking a proactive approach to providing reasonable adjustments for disabled people. Practitioners should ensure that clients are promptly asked whether any adjustments are required so that an application supported by evidence can be made as soon as possible.

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Trial periods can constitute a reasonable adjustment

Rentokil Initial UK Ltd v Miller [2024] EAT 37; March 14, 2024

Implications for practitioners

This ruling demonstrates the flexibility tribunals have in interpreting what constitutes a reasonable adjustment under the Equality Act 2010 (EA). The case confirms that a trial period can be considered a reasonable adjustment, particularly if it significantly reduces the risk of a disabled employee being dismissed.

Facts

... a trial period can be considered a reasonable adjustment, particularly if it significantly reduces the risk of a disabled employee being dismissed.

Mr M Miller (MM) worked as a pest control technician, regarded as a 'field role' for Rentokil Initial Ltd (RIL) but, after being diagnosed with multiple sclerosis, he struggled with the physical demands of the job such as working at heights. Despite RIL trying to adjust his role, MM's difficulties worsened and RIL concluded that no further adjustments could be made and that it was unsafe for him to continue in the role.

Facing the threat of dismissal, MM applied for a less demanding administrative position within RIL. All candidates were required to undertake a written and verbal assessment. Unfortunately, MM's performance in these tests and at interview was poor, resulting in him being unsuccessful in securing the position. In coming to this decision, RIL didn't offer MM any training or a trial period in the role.

RIL concluded it could not offer MM any further reasonable adjustments or suitable alternative roles, resulting in his dismissal on capability grounds. MM's internal appeal was unsuccessful.

MM presented a claim for unfair dismissal, discrimination arising from disability and a failure to make reasonable adjustments.

Employment Tribunal

MM was successful in his claims.

The ET evaluated RIL's failure to implement reasonable adjustments, particularly its reluctance to provide a trial period in the administrative role which made his dismissal inevitable.

The ET confirmed that requiring field staff to work in their substantive roles was a provision, criterion, or practice (PCP) which significantly disadvantaged MM due to his disability as it limited his ability to perform physically demanding tasks and work at heights – activities which constituted a substantial proportion of his job.

Despite RIL's concerns that MM had not performed well in the tests, the ET ruled that a four-week trial period in the administrative role would have been a reasonable adjustment in determining whether it would be suitable on a permanent basis. The administrative role was less physically demanding and could have potentially allowed MM to adapt and continue his employment under conditions more suited to his capabilities.

It was further held that MM's field experience would have been valuable in the administrative role and that his lack of particular skills could have been addressed through targeted training, for example in Excel, resulting in a 50% chance that he would have performed in the role, which would have prevented his dismissal.

Employment Appeal Tribunal

RIL appealed to the EAT which rejected the appeal and upheld the ET's decision.

In coming to this judgment, the EAT considered four grounds of appeal:

1. whether a trial period could be deemed a reasonable adjustment or merely an investigation tool;
2. whether the burden of proof was misapplied;
3. whether if an employer contends an employee is not qualified and suitable for a role, it cannot be a reasonable adjustment to appoint them; and
4. in determining whether the trial period should have been given, the tribunal was wrong to have focused on what was in the mind of the decision-maker at the time.

Ground one

It is for the tribunal to objectively assess whether it would have been reasonable in the circumstances to offer a trial period, considering the requirements of the role and the evidence adduced by the employer.

The EAT ruled that there is no rule or principle of law that a trial period in a new role cannot be a reasonable adjustment or that the proposed adjustment is guaranteed to work. Whether it is reasonable is a matter for the tribunal, taking account of all the circumstances, including the suitability of the role, and the prospects of the employee succeeding at the role and passing the trial.

Applying the facts of this case, the EAT confirmed that MM was placed at a substantial disadvantage because of his disability and as he could no longer perform his duties as a pest control technician, it could have constituted a reasonable adjustment for RIL to offer him a trial period in the administrative role, especially as it could have prevented his dismissal.

This decision contrasts with the views expressed in *Environment Agency v Rowan* [2008] ICR 218, where it was argued that trial periods are merely investigatory in nature and do not qualify as adjustments in themselves.

Ground two

The EAT held that the ET had applied the burden of proof correctly; once an employee demonstrates a prima facie case of discrimination, in this case that the PCP placed him at a substantial disadvantage and that the adjustment of placing him in the administrative role, at least for a trial period, was potentially suitable, the burden then passed to the employer to show that it was not reasonable to have either placed him in the role or offered a trial period.

Ground three

In upholding the ET's decision, the EAT confirmed that although the employer's assessment of the employee's suitability for a new role is significant, it is not the final determining factor. It is for the tribunal to objectively assess whether it would have been reasonable in the circumstances to offer a trial period, considering the requirements of the role and the evidence adduced by the employer.

As the administrative position supported MM's previous role and the administrative skills required for both, which he had competently performed before, overlapped, RIL was unable to show that a trial period would not have been a reasonable adjustment.

The EAT criticised RIL's failure to call as a witness either the appeal manager or the dismissing manager. It had also failed to adduce evidence that, as a disabled employee, MM had been given any form of priority consideration for the administrative position in comparison to the other candidates. Furthermore, RIL failed to seek the views of a manager who had the benefit of knowing MM's skills and attributes and whether these could be transferred across to the administrative role.

For these reasons, the tribunal was entitled to disagree with RIL's view that MM was unsuitable for the role, and it could not be a reasonable adjustment to appoint him or offer him a trial period.

Ground four

The EAT confirmed the legal position that in a reasonable adjustment claim it does not matter what was in the mind of the decision maker at the time. Whether an adjustment should have been made is an objective question for the tribunal.

As RIL was unable to provide evidence that it had regarded MM as a disabled employee and should have treated him more favourably, this affected the evidence it relied on at the tribunal, and thus the weight the ET could place upon it when considering why RIL assessed a trial period was unreasonable.

Comment

The EAT's decision emphasises the importance of employers carefully evaluating the individual circumstances of each case involving disability adjustments. They should exhaust all possible adjustments, including considering whether a trial period in a different role would be reasonable, if they are to not fall foul of placing disabled job applicants and employees at a substantial disadvantage.

In considering what reasonable adjustments may be appropriate, employers should gather substantial evidence to support their decision, including feedback on the individual's ability to undertake the sought-after role.

In a situation where an alternative role could be potentially suitable, an employer will need a *'very good reason'* for not offering it, at least on a trial basis – regardless of whether it is certain or likely that the employee would be permanently appointed. There will of course be situations where a trial period would not be reasonable.

In undertaking a trial period, if it transpires that the disabled employee lacks the necessary skills or fails to meet the criteria, then an employer will be in a better position to legally defend its decision to dismiss or not appoint permanently to the role.

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Bowing to the mob: a 'business case' defence?

Omooba v Michael Garrett Associates Ltd (1) Leicester Theatre Trust Ltd (2) ✦ [2024] EAT 30; March 6, 2023

Implications for practitioners

The judgment of the EAT seems to mean that employers, service-providers and others which bow to external pressure to discriminate will not be liable for discrimination if the reason they acted as they did was to protect their business interests, and not out of a discriminatory motivation of their own. The case seems vulnerable to being overruled, and practitioners should proceed with caution in basing advice on it.

Facts

Ms Seyi Omooba (SO) is an actor who was cast to play a lesbian character, Celie, in a stage production of *The Color Purple*. When SO's casting was announced, an actor in another West End production tweeted a screenshot of a 2014 Facebook post in which she had expressed her belief that homosexuality was a sin, adding:

> *@Seyiomooba Do you still stand by this post? Or are you happy to remain a hypocrite? Seeing as you've now been announced to be playing an LGBTQ character, I think you owe your LGBTQ peers an explanation. Immediately.*

A social media storm ensued. SO refused to retract her earlier statement, and her agent and the theatre both terminated their contracts with her. The theatre dropped SO from the role, explaining that the production was *'seeking to promote freedom and independence and to challenge views, including the view that homosexuality is a sin'*, but paying her in full the contractual sum. SO's agent also dropped her, fearful that the social media storm could threaten its viability.

SO brought employment tribunal claims of discrimination and harassment on grounds of religion and belief against both the theatre and the agent (as well as a breach of contract claim, which it is not necessary to discuss in this note). Shortly before the hearing of her claim, SO read the script of the play, and volunteered that she would have felt unable to play the part of Celie, and would have resigned in any event. Nevertheless, she continued with her claims.

Employment Tribunal

The ET held (mostly although not wholly by concession) that all SO's relevant beliefs were protected under the Equality Act 2010 (EA). But it held that the decisions of both the theatre and the agent were motivated not by SO's protected beliefs, but their concerns about the commercial risks to their respective businesses, so the direct discrimination claim failed. Dealing with harassment, the tribunal held that it was not reasonable for the respondents' actions to have had the requisite effect of violating SO's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

The tribunal dismissed all SO's claims. It awarded costs against her on the basis that her harassment claim had lacked any reasonable prospect of success, and further that in light of the effect on the value of the claim of her concession that she would have had to withdraw from the role of Celie in any event, her refusal of a 'drop hands' offer in relation to her direct discrimination claims (i.e. not to seek costs if she withdrew) amounted to unreasonable conduct of proceedings.

✦ [2024] IRLR 440

Employment Appeal Tribunal

The EAT dismissed the appeal. In relation to direct discrimination, it held:

> *[T]he operative reasons (the commercial reality facing the theatre; the threat to the agency's survival) were not informed by, or dependent upon, the claimant's belief: faced with a similar reality or threat arising from an equivalent social media storm, but relating to an entirely different belief, the ET was plainly satisfied that the decisions would have been the same.*

SO's argument that because the social media storm arose directly from her belief, the tribunal should have held that her belief was part of the operative reason for the treatment was rejected as confusing reason with context. The appeals against the tribunal's harassment and costs decisions also failed.

Comment

... the question of less favourable treatment brought about by discriminatory pressure from third parties owing no duties of their own to the claimant has received surprisingly little attention from the courts before now.

The interesting part of the EAT's judgment is the dismissal of SO's appeal from the tribunal's judgment on direct discrimination. SO was dropped by both respondents as a result of a social media storm which blew up because third parties found her earlier public expression of her protected belief unacceptable. Those third parties undoubtedly acted as they did because of SO's protected belief; but because what motivated the two respondents was not SO's protected belief itself, but their fears for the impact of the social media storm on their businesses, the ET and the EAT held that direct discrimination was not made out.

This is a surprising result. If a hotel refused accommodation to a black guest because its other guests objected to his presence, one would not think that in 2024 he would have to fall back on the common law duties of innkeepers (as the West Indian cricketer Leary Constantine did in 1944: see *Constantine v Imperial Hotels* [1944] KB 693); nor that faced with comparable discrimination in the employment context brought about by the employer's capitulation to the racism of third parties, he would be left without any remedy at all.

Nevertheless, the question of less favourable treatment brought about by discriminatory pressure from third parties owing no duties of their own to the claimant has received surprisingly little attention from the courts before now. A sheriff court in Scotland seems to have taken it as axiomatic that third party objections could not provide an alleged discriminator with a *'business case defence'* (*Billy Graham Evangelist Association v Scottish Event Campus Ltd* 2022 SLT (Sh Ct) 219; [2023] Briefing 1059). In *Commission for Racial Equality v Westminster City Council* [1985] IRLR 426, the Commission for Racial Equality served a non-discrimination notice on the council, having found it to have discriminated against a black road-sweeper by withdrawing an appointment for fear of racially-motivated industrial unrest. The council's application for judicial review of the discrimination notice failed: the court held that there was material on which the commission could have been satisfied that the council had discriminated as alleged. But in neither case is the question of the reason for the less favourable treatment squarely addressed. For the moment the law in this respect must be regarded as unsettled.

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University exams and assessments: reasonable adjustments and competence standards

University of Bristol v Abrahart ✦ *(administrator of the estate of Abrahart)* [2024] EWHC 299 (KB); February 14, 2024

Facts

Natasha Abrahart (NA) was a physics student with depression and severe social anxiety who killed herself in April 2018 during the second year of her course. She had that day been due to participate in an assessed group presentation.

The group presentation was for a practical physics module in which students conducted a series of four-week experiments with a lab partner. They were assessed via lab notebooks, written reports, five face-to-face interviews and a group presentation at a course conference.

In NA's first interview in October 2017 she did not speak and left unexpectedly, so scored 8/20 on the basis of her lab notebook. The demonstrator was sufficiently concerned to contact the module director, Dr Bell, who contacted the departmental student administration manager, Ms Perks, and NA's personal tutor. All of them contacted NA that week, encouraging her to seek support and offering to reschedule the interview.

NA attended the rescheduled interview but performed poorly. Ms Perks sent her some links to counselling, but she did not attend. Physics department staff continued to contact NA between November and February encouraging her to seek support, but during that time she missed three interviews and scored zero for each.

In December she met with the senior tutor, Dr Barnes, who noted panic and anxiety issues with the interview assessment format. He encouraged her to get a diagnosis, so disability services could provide a Disability Support Summary (DSS) recommending appropriate adjustments. She did not do so.

In January 2018 Dr Bell emailed Dr Barnes asking whether NA had completed any disability paperwork, noting *'I don't want to adapt the procedure without any "official" reason.'* [para 48]

On February 13 Dr Barnes contacted disability services on her behalf, saying *'We are willing to help her and to consider modified or alternative forms of assessment but without any recommendations it is difficult to see what reasonable adjustments we can make … I do not wish to see her failing the unit because she is unable to get any support in place.'* [para 50] NA did not respond to contact from disability services.

On February 20 she emailed Ms Perks saying she had been having suicidal thoughts and *'to a certain degree attempted it.'* [para 62] Ms Perks accompanied her to the student health service and NA was referred to the local mental health crisis team. Ms Perks did not mention the suicide attempt to anyone else.

In March 2018 Ms Perks suggested alternative strategies to oral assessment, such as scripted discussion. She also sent NA an extenuating circumstances form, a procedure by which marks affected by illness may be adjusted after the fact. It required the attachment of medical evidence. NA did not complete the form.

In April the students were sent information about the course conference emphasising the need to participate in the presentation. Ms Perks asked Dr Bell to take extenuating

✦ [2024] IRLR 396

circumstances into account if NA was quiet at the conference. She told NA that she did not have to speak at the conference if she did not wish to, provided her contribution was clear, but NA said she would participate in the delivery of the presentation.

On the day of the conference she killed herself.

NA's father brought a claim against the University in the county court on behalf of her estate. HHJ Railton held that the University had failed to make reasonable adjustments and had indirectly discriminated against her. He also found that there had been unfavourable treatment because of something arising in consequence of her disability under s15 EA, although this appears to have been incorrectly described as direct discrimination.

Universities therefore have an anticipatory duty, before they know who their students will be, to consider what adjustments may be needed by disabled students and to prepare to make them.

The University appealed to the High Court, which dismissed the appeal. This case note focuses on the court's key findings in relation to reasonable adjustments.

Law

The reasonable adjustments duty

Under s91 Equality Act 2010 (EA), universities must not discriminate against students in the way they provide education. S91(9) includes the duty to make reasonable adjustments. S20(3) EA defines the duty which comprises the following three requirements:

> *The first requirement is a requirement, where a provision, criterion or practice of [the responsible body] puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

Under paragraph 3(3)(c)(ii) of Schedule 13 EA, universities owe the duty to disabled students generally. Universities therefore have an anticipatory duty, before they know who their students will be, to consider what adjustments may be needed by disabled students and to prepare to make them. Most universities employ specialist staff to advise on potential adjustments, but the duty applies to the governing body of the institution and not to any particular unit within it.

There is no requirement that a university must know that a student is disabled before the duty to make adjustments for them arises, although whether it will be reasonable to have to take any particular step for a student may depend in part on what was known about the student's needs. There is no obligation on the student to suggest adjustments.

Competence standards

An important feature of the duty in the context of education is that it does not arise in relation to the application of a 'competence standard', defined as an *'… academic, medical or other standard applied for the purpose of determining whether or not a person has a particular level of competence or ability'.* [Sch 13, paragraph 4(3)].

The purpose of the reasonable adjustment duty is to remove the barriers which make it difficult for disabled people to participate in the activities of everyday life. Learning, however, is supposed to be difficult: you cannot learn without facing and overcoming challenges. To use an analogy, if you are lifting heavy weights because you are moving house, you will use any help you can get such as using trolleys and ramps, or paying someone to lift it all for you. But if you are lifting heavy weights in the gym, it is pointless to pay someone else to lift them. Instead, you carefully target the muscles you are trying to develop and select weights which provide the right degree of challenge.

Education is like going to the gym. In order to offer disabled students equal access to education, universities must remove unnecessary barriers but leave in place the challenges which are central to the students' learning. Competence standards function as an exception to the reasonable adjustments duty in order to protect those challenges. They maintain academic standards for all students, and they ensure that disabled students are not deprived of education by adjustments which remove the very challenge they were seeking.

However, the exception is a narrow one, and the obligation to make reasonable adjustments **does** apply to the methods by which standards of competence are taught and assessed.

In addition, the application of a competence standard can still amount to a provision, criterion or practice (PCP) for the purposes of indirect discrimination under s19 EA, so it must be objectively justifiable as an appropriate and necessary means of achieving a legitimate aim.

County Court

The alleged PCP was the requirement to be assessed orally, including the format, structure and venue of the interviews and presentation. It was accepted that this put NA at a substantial disadvantage.

The University argued that *'the assessment of a student's ability to explain laboratory work orally, to defend it and to answer questions on it'* was a competence standard, because a professional physicist must be able to explain ideas and discuss their work orally [para 188]. The duty to make reasonable adjustments therefore did not arise.

However, the physics degree programme only had one intended learning outcome on oral communication, and that was not one of the learning outcomes which the practical physics module was said to teach or assess. That was confirmed by the fact that the marking criteria for the assessments did not include marks for quality of oral presentation, or for quality of presentation at all. In addition, Ms Perks had said NA did not have to speak so long as she contributed to the presentation in other ways.

HHJ Railton rejected the University's position and held that the purpose of the interviews and presentation was to test the students' knowledge and understanding of the experiment they had carried out, not their oral proficiency. They were therefore methods of assessment, rather than applications of competence standards, and so the duty to make adjustments applied. There were other ways of testing a student's ability to answer questions. He found it was a fundamental difficulty with the University's position that NA could have scraped a pass in the module without undertaking the interviews at all.

The University then argued that it had taken all the steps it was reasonable to have to take. It had procedures for assessing disabled students' needs and for recommending adjustments, and also for taking extenuating circumstances into account. Ms Perks had told NA she need not speak at the course conference and had given her the extenuating circumstances form. However, it was reasonable to require expert advice, such as a DSS or medical evidence, before taking steps which it said *'had the effect of reducing the rigour of the academic assessment'* [para 207]. The University had therefore done all it could in circumstances where NA was not engaging with the processes for obtaining expert advice.

HHJ Railton also rejected this argument. He noted that staff in the department had been well aware that anxiety was very significantly affecting her in the interviews and

had no doubt the effect was genuine. They had even tentatively suggested alternative methods of assessment such as providing written questions in advance or using a real-time remote typing service. The University's own policies provided for interim support, before receiving a DSS, including offering alternatives to group or presentation work where possible. He found that there had been failure to make reasonable adjustments.

High Court

The core of the University's appeal was that it did not have the level of actual or constructive knowledge of NA's disability necessary to found the breaches of the EA.

Competence standards

The University said HHJ Railton was wrong to find that the possibility of scraping a pass without doing the interviews constituted a fundamental difficulty for its case, because competence is not an all or nothing matter: *'students may be more or less competent physicists, lawyers or mathematicians at any particular time'.* [para 124]

Linden J agreed that it is possible for someone to fail to meet a particular standard of competence within a course but pass the course overall. However, he noted that if presenting results orally really were a core competency of a professional physicist, one would expect completing the oral assessments to be a requirement for passing the module. He agreed that the oral assessments were not a competence standard.

This case highlights a problem which is not confined to education cases: the tendency of decision-makers to think they need an expert's seal of approval before making adjustments for disabled people.

Reasonable adjustments

The University also argued that before it could determine what steps were necessary and reasonable, it needed to know about NA's *'… disability, its effects on her ability to engage with the assessment process, what steps might be taken and what the effects of taking them was [sic] likely to be'.* [para 125] That was why it had processes like the DSS and extenuating circumstances, which ensured academic integrity and fairness for all students. NA had not engaged with those processes and the University therefore lacked the information it required.

Linden J rejected this argument. HHJ Railton had been entitled to find that the department's staff knew enough about the disadvantage and the reasons for it. The University had also known that NA's disability was itself preventing her engaging with the University's processes, but it kept *'…referring a student known to be unable to talk to strangers, to strangers'*. [para 212] In addition, the judge had been critical of the fact that the University continued to mark NA down, leaving any later modification of marks to the extenuating circumstances procedure which itself required NA to obtain evidence and complete a form.

As Linden J noted *'[t]he problem with the University's reliance on its own Regulations and policies… was that they are not the law. They were subject to the law, including the requirements of the Equality Act 2010… An argument that the University followed its procedures begged the question whether those procedures ought reasonably to have been adjusted in the circumstances of this case.'* [para 220] He upheld HHJ Railton's finding that the University had failed to make reasonable adjustments.

Comment

This case highlights a problem which is not confined to education cases: the tendency of decision-makers to think they need an expert's seal of approval before making adjustments for disabled people.

In universities, a worry persists that making adjustments reduces academic rigour and so has to be justified by expert recommendations. However, if an adjustment reduces

academic rigour – that is, compromises the application of a competence standard – then there is no duty to make it. Conversely, if an adjustment still allows for the robust application of a competence standard, then there should be no concern about reducing academic rigour.

Only academic staff have the expertise in their subject areas to properly identify competence standards and to define learning outcomes which reflect them. It is that which protects academic rigour, not advice from disability services. It is also a perfect example of something which can and should be done in advance of any student requesting an adjustment.

As Linden J notes, that is not to say evidence or procedures are unimportant; in fact, they are usually appropriate. But

> *… what a disabled person says and/or does is evidence. There may be circumstances, such as urgency and/or the severity of their condition, in which a court will be prepared to conclude that it is sufficient evidence for an educational institution to be required to take action.* [para 267]

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ABBREVIATIONS

AC	Appeal Cases
ADHD	Attention deficit hyperactivity disorder
AI	Artificial intelligence
All ER	All England law reports
AOC	Areas of choice
ARAP	Anti-racism action plan
CA	Court of Appeal
Civ	Civil
CJPOA 1994	Criminal Justice and Public Order Act
CRPD	UN Convention on the Rights of Disabled Persons
CSO	Civil society organisations
DDA	Disability Discrimination Act 1995
DLA	Discrimination Law Association
DSS	Disability Support Summary
EA	Equality Act 2010
EAT	Employment Appeal Tribunal
ECHR	European Convention on Human Rights 1950
EJ	Employment judge
ENAR	European Network Against Racism
ET	Employment Tribunal
EU	European Union
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
FDA	Full Duty Applicants
FFT	Friends Families and Travellers
FOI 2000	Freedom of Information Act 2000
GRA	Gender Recognition Act 2004
GRC	Gender recognition certificate
HA 1985	Housing Act 1985
HHJ	His/her honour judge
HMCTS	His Majesty's Courts and Tribunals Service
HRA 1998	Human Rights Act 1998
ICOS	Integrated Courts Operating System
ICR	Industrial Case Reports
IDPAD	International Decade for People of African Descent
IMA	Illegal Migration Act 2023
IRLR	Industrial Relations Law Reports
KB	Kings Bench
LGBTQ+	Lesbian, gay, bisexual, transgender transsexual people and questioning (queer) plus those whose sexuality is not heterosexual, or whose gender identity is not based on a traditional gender binary
NAPAR	National Action Plans Against Racism
NGO	Non-governmental organisation
NHS	National Health Service
NPCC	National Police Chiefs' Council
PCP	Provision, criterion or practice
PCSCA 2022	Police, Crime, Sentencing and Courts Act 2022
PhD	Doctor of Philosophy
PSED	Public sector equality duty
PTSD	Post-traumatic stress disorder
QB	Queens Bench
SC	Supreme Court
TUC	Trades Union Congress
UKEAT	United Kingdom Employment Appeal Tribunal
UKSC	United Kingdom Supreme Court
WLUK	Westlaw United Kingdom
WLR	Weekly Law Reports

Understanding the duty of housing authorities to make reasonable adjustments for disabled homeless persons in Northern Ireland

Patricia Boyle and Richard Boyle v Northern Ireland Housing Executive County Court Division of Belfast, ICOS: 20/027667; May 10, 2024

The Disability Discrimination Act 1995 (the DDA) makes it unlawful for a public authority to discriminate against disabled persons in carrying out its statutory functions and provides that a public authority will discriminate if it fails to comply with its duty to make reasonable adjustments to a practice, policy or procedure in circumstances in which the effect of that failure is to make it *'impossible or unreasonably difficult'* for a disabled person to receive any benefit that is or may be conferred.[1]

As this case makes clear, once it arises, the duty to make reasonable adjustments is owed personally to a particular disabled person. Therefore, a public body must proactively consider the particular difficulties of that individual so that a reasonable adjustment to the practice, policy or procedure can be considered in order to address those difficulties. Furthermore a public body cannot avoid liability by abdicating its functions to another body.

The Northern Ireland Housing Executive (NIHE) has duties and functions in relation to the provision of housing for homeless persons under the Housing Orders (NI) 1981 and 1988. The Housing Selection Scheme and the Special Acquisition Scheme, two of the policies put in place to discharge those obligations, were under consideration in this case.

Mr and Mrs B are both disabled within the meaning of s1 DDA and are to be treated as 'a unit' for the purposes of housing allocation. In 2011 they were designated as 'Full Duty Applicants' (FDA) in priority need of housing. This designation meant that they had priority to some degree to be offered homes as they became available. The FDA group comprised those deemed most at need of housing on various grounds not all of which related to disability.

The couple lived in 'temporary' private rented accommodation totally unsuited to Mr B's needs. His health drastically deteriorated in 2017. Bedbound downstairs, he could no longer access bathroom and toilet facilities, causing immense suffering and distress.

The couple needed a 2-bedroom property adapted for Mr B as a wheelchair user. However, due to historical trauma experienced by Mrs B and previous sectarian harassment, flats, and accommodation in perceived loyalist areas were deemed unsuitable. Mrs B also needed to be able to care for a disabled son living nearby. The NIHE Housing Selection Scheme restricted them to nominating two areas of choice (AOC).[2] However, the points awarded under this policy, including points for disability, did not bring them to the top of the waiting list in their AOC. The NIHE refused a request to allow the couple to have a third AOC as a reasonable adjustment. The NIHE offered accommodation in loyalist areas which the couple refused. Deputy County Court Judge

1 Ss21B and 21D to s21E of Part III of the Disability Discrimination Act 1995 as amended still applies in Northern Ireland.

2 Rule 52 of the Housing Selection Scheme was amended in January 2023 to remove the limit on the numbers of areas of choice.

Murray ruled that these refusals were not unreasonable, because the phrase *'in all the circumstances'* within the relevant statutory provisions[3] encompassed wider reasons for refusal, such as the fear of sectarian harassment, not just reasons relating directly to disability.

The NIHE eventually agreed to explore an option to purchase a property suitable for adaptation under the Special Acquisitions Scheme and made nominations to housing associations to undertake an options appraisal limited to the couple's two existing AOCs. Rule 8 of this Scheme makes clear that the NIHE remained subject to legal requirements including equality legislation. The housing associations responded that the limited supply of dwellings suitable for adaptation in the existing AOC were high cost, that adaptation costs would likely exceed departmental *'Total Costs Indicators'* guidelines and enquired whether the NIHE would make further funding available.

The NIHE interpreted this as a refusal of the nomination and failed to explore the possibility of making further funds available to the housing associations. The NIHE's specialist team failed to inform the housing associations that there was scope for exceptional circumstances under this Scheme and abandoned this option in 2018. The judge found that responsibility for the reasonable adjustments duty under the DDA proactively to explore options under the Scheme lay with the NIHE but it had effectively abdicated responsibility for its function to the housing associations. The couple was eventually allocated alternative accommodation in late 2022.

The failure to make reasonable adjustments could not be justified as a proportionate means of achieving a legitimate aim... the court rejected NIHE arguments that costs and shortage of accommodation provided justification.

The court decided that:

- the NIHE was under a duty to make reasonable adjustments given the particularly adverse effect of the operation of the Housing Selection Scheme on disabled people with severe mobility issues, and on Mr B in particular, as compared to the adverse effect of the shortage of housing on those within the FDA group. As the duty did arise, it was incumbent on the NIHE to take reasonable steps to apply and if necessary, change its policies so that they no longer had that effect.
- allowing the couple to nominate a third AOC would have been the simplest and a reasonable step which would have increased the chances of being offered suitable accommodation at a much earlier date both under the Housing Selection Scheme and the Special Acquisitions Scheme, and of obtaining a suitable property or one which could be adapted without excessive cost.
- the failure to make reasonable adjustments could not be justified as a proportionate means of achieving a legitimate aim. While accepting it is a legitimate aim to share out limited housing in a fair way to those in need as efficiently as possible within budget, the court rejected NIHE arguments that costs and shortage of accommodation provided justification. The court held that the Housing Selection Scheme's points system of itself is not a proportionate means of achieving a legitimate aim where a disabled person with severe mobility issues is particularly adversely affected by the Scheme because the search for the limited stock of dwellings suitable for a severe mobility disability was unduly restricted. Applying its policies flexibly and allowing a third area of choice would not necessarily incur any cost; alternatively, any costs incurred may have been within existing financial guidelines.
- in the circumstances £30,000 was the appropriate measure of compensation for injury to feeling, due to NIHE failure to find a speedier solution.

Julie Knight

3 S21D(3)(b) and s21E(2) DDA

Protected beliefs and political parties

Dr Shahrar Ali v (1) Ms Elizabeth Reason (2) Mr Jon Nott Mayor's and City of London Court, Claim No. J00CL858; February 9, 2024

Facts

Dr Shahrar Ali (SA) was the Green Party's Home Affairs spokesman from 2016 until June 2021 and then the spokesman on Policing and Domestic Safety until he was dismissed from that post on February 5, 2022. The defendants were sued as representatives of all members of the Green Party except SA.

SA holds *'gender critical beliefs'*, namely that a woman is defined by her chromosomes; that women suffer disproportionately because of their sex; and that biological sex should not be conflated with gender identity.

He had signed up to the Green Party guidelines for spokespeople which required them to promote the party's principles *'…in line with the Party's political and messaging strategies…'*

The guidelines also covered the use of social media.

SA complained that he had been subject to 20 instances of discrimination because of his protected beliefs. Many of these involved his appointments being criticised by members of the Party on the basis that it was inappropriate to have appointed SA given the Party's stated position supportive of trans rights.

Many of the alleged instances of discrimination related to the criticism of, and campaigning against, SA after he had been appointed as a spokesman and his gender critical views became known.

Six of the alleged instances of discrimination amounted to a challenge to his removal as a Party spokesman in June 2021.

County Court

The court was satisfied that SA held the protected beliefs he said he did and that he had been dismissed as a spokesman for having manifested those beliefs on social media and elsewhere.

The court found that criticism of him and campaigning against him by party members, based on the perceived clash between his protected beliefs and the party's values, was legitimate free speech by the members, not unlawful discrimination.

The court found that it was reasonable for the party to determine that SA's beliefs were contrary to party policy on trans rights. Green Party Policy RR530 provides:

> *The Green Party recognizes that trans men are men, trans women are women, and that non-binary identities are valid.*

The court found that SA's removal was procedurally unfair in that the internal disciplinary body failed to make appropriate findings in respect of the alleged breaches. The Green Party could not satisfactorily explain why it had failed to make these findings and by operation of the reverse burden of proof which applies in discrimination cases, the court found the failure to follow fair process to be unlawful discrimination because of the subject matter of the removal – SA's beliefs.

However, the court found that had the internal disciplinary body acted in a procedurally fair manner *'it is highly likely that they would have removed him as a spokesman anyway'.*

Damages for injury to feelings limited to £9,100 were awarded.

Comment

This case reaffirms the principles which arise from the *Aslef v United Kingdom*[1] on freedom of assembly in the political field in the light of more recent cases such as *Forstater v CGD,*[2] *Higgs v Farmor's School*,[3] *Page v NHS Development Authority*[4] and *Miller and Power v Turner.*[5]

The very nature of a political party is that it will adopt positions on matters of public debate that other parties or individuals are entitled to disagree with. But in choosing party spokespeople it is entitled to exclude those who cannot or do not speak in support of party policy.

Robust debate within a political party is also protected free speech, not unlawful discrimination.

The footnote is that in excluding such individuals, the party must follow a fair process or it risks a finding of discriminatory treatment as in this case.

Robin White
Barrister, Old Square Chambers

1 [2007] 45 EHRR 34

2 UKEAT/0105/2020; [2021] Briefing 998

3 [2003] ICR 1072 (EAT); [2023] Briefing 1069

4 [2021] ICR 941

5 [2023] EWHC 2799 (KB)

Challenging discrimination against working mothers

Harrison v Heritage Venues Limited 3301612/2023; November 20, 2023

Facts

Fiona Harrison (FH) was employed as a senior events and operations co-ordinator by Heritage Venues Ltd (HV Ltd), a boutique wedding planning business. FH worked in a team of three in the operations department.

In May 2022, FH returned from a period of maternity leave having arranged to work on a part-time basis. The purpose of the reduction in hours was to allow her to carry out childcare responsibilities. On her return to work, FH found that her line management responsibilities for her junior colleagues in the operations department had been removed and that a promotion opportunity had been offered to a colleague.

In September 2022, HV Ltd decided to make redundancies. FH was placed in a *'pool of one'* for the purposes of redundancy selection and was told that HV Ltd would carry out a consultation process. During the limited consultation process, FH suggested various alternatives to redundancy, including a job share. This was rejected by HV Ltd on the basis that a job share involving part-time working would not be feasible as it could cause delays in responding to the company's demanding clients. In the course of consultation meetings, the company told FH that it could not afford to lose a full-time member of staff and this was the reason she had been placed in a pool of one. At the conclusion of the consultation process, FH was dismissed.

FH appealed against her dismissal. During the appeal, HV Ltd carried out a redundancy selection matrix exercise to compare FH to her two junior colleagues within the operations team. During the litigation, HV Ltd disclosed two versions of the matrix, one of which gave FH low marks for her time keeping, performance and relevant skills. The matrix included a criterion relating to the employees' ability to take on 66 wedding events over the course of the year. In assessing this criterion, the company gave FH a lower score than her full-time colleagues. FH's appeal was dismissed.

Employment Tribunal

The ET upheld FH's claims for unfair dismissal, indirect sex discrimination, and part-time working detriment.

The ET was satisfied that the reason for FH's dismissal was redundancy [para 28]. It held that the material difference between the three roles in the operations department was that FH's role was part-time and that HV Ltd had made the decision to dismiss her on that basis before the consultation took place [para 30]. Further, the ET was troubled by the company's approach to the selection matrix exercise undertaken during the appeal, which it held was not objectively or fairly applied and was an ex post facto justification of the decision to dismiss [para 35]. Accordingly, the dismissal was unfair and the ET declined to apply a *Polkey* reduction.

In respect of the claim for indirect sex discrimination under s19 of the Equality Act 2010 (EA) the ET accepted that HV Ltd applied a provision, criterion or practice (PCP) which used part-time work status as a selection criterion in the redundancy exercise [para 48]. The ET took judicial notice of the childcare disparity between men and women (*Dobson v North Cumbria Integrated Care NHS Foundation Trust* [2021] ICR 1699) and the fact

that a higher proportion of women than men work part-time (*Home Office v Holmes* [1984] ICR 678); it concluded that the PCP put women at a particular disadvantage compared with men and FH experienced that disadvantage [para 49].

Further, the ET rejected the company's attempt to justify the discriminatory impact of using part-time work status as a selection criterion. The ET considered that the objections to the feasibility of a job share arrangement were *'a series of generic statements which in essence set out the sort of challenges that the respondent or any employer might have to address when setting out to employ people on a job share'* [para 52].

The use of part-time working as a selection criterion in a redundancy exercise... has a disproportionate impact on women, as women bear more responsibility for childcare than men and, relatedly, are more likely to work part-time.

The ET adopted similar reasoning in respect of the claim under regulation 5(1)(b) of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000. The ET rejected the distinction the company sought to draw between part-time working and FH's inability to handle the number of client's required by the business, holding that this was a distinction without a difference [paras 57-58]. It held that FH was selected for redundancy because she was part-time and HV Ltd had failed to justify the use of part-time worker status as a redundancy selection criterion [para 59].

Comment

The judgment provides useful practical guidance on how to challenge discriminatory redundancy selections of mothers with caring responsibilities. The use of part-time working as a selection criterion in a redundancy exercise is a PCP for the purposes of a claim under s19 EA and the use of this PCP has a disproportionate impact on women, as women bear more responsibility for childcare than men and, relatedly, are more likely to work part-time. The burden will then shift to the employer to justify the discriminatory impact. In these types of cases, a part-time working detriment claim can be run in conjunction with an indirect sex discrimination claim with each cause of action overlapping, to some extent, with the other.

Practitioners should consider carefully whether an employer is seeking to disguise the use of part-time working as a selection criterion by, for example, arguing that the business has a need for the employee to do a particular volume of work or deal with a particular number of clients. The use of such criteria in redundancy matrices has the effect of picking out part-time workers without explicitly using part-time status as a selection criterion.

Further, the judgment is a useful reminder to employers that the use of discriminatory selection criteria must be justified. The tribunals are unlikely to be persuaded that a generic objection to the practicability of part-time or job share working arrangements amounts to a lawful justification of discrimination.

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UK found to be in breach of disabled people's human rights

In its report published on April 24, 2024, the UN Committee on the Rights of Persons with Disabilities once again criticised the UK government for its treatment of disabled people.

In 2017 the Committee's inquiry had found *'reliable evidence that the threshold of grave or systematic violations of the rights of persons with disabilities has been crossed'* in the UK and made 11 recommendations for improving their rights.[1] In 2024 the Committee found that its recommendations had not been fulfilled; not only had *'no significant progress'* been made but there were signs of regression in the standards and principles of the Convention.

The Committee found that the UK had:

> *… failed to take all appropriate measures to address grave and systematic violations of the human rights of persons with disabilities and has failed to eliminate the root causes of inequality and discrimination as framed in General Comment No. 6 on equality and non-discrimination. This failure exists particularly with respect to the State party's obligation to guarantee the right of persons with disabilities to live independently and be included in the community (art. 19), to work and employment (art. 27), and to an adequate standard of living and social protection (art. 28)…* [para 89]

The Committee expressed concern that *'The obligation to closely consult and actively involve disabled people through their representative organizations in decision-making affecting their lives has been largely unaddressed.'* It referred to a *'pervasive framework and rhetoric that devalues disabled people and undermines their human dignity. Reforms within social welfare benefits are premised on a notion that disabled people are undeserving and wilfully avoiding employment ("skiving off") and defrauding the system. This has resulted in hate speech and hostility towards disabled people'.* [paras 73 & 74]

Responding to the report, TUC General Secretary Paul Nowak said:

> *Being disabled should not mean you are consigned to a poor standard of living. But this report from the UN paints a damning picture of life in the UK for disabled people after 14 years of Tory rule. Ministers must act on this report and eliminate the root causes of inequality.*

1 CRPD/C/15/4 October 24, 2017

Inquiry into gaps in Northern Ireland's equality legislation – call for evidence

The Committee for the Executive Office in the Northern Ireland Assembly is conducting an inquiry on differences in equality legislation between the regions of the UK and the Republic of Ireland. The purpose of the inquiry is to find out where equality legislation is different in Northern Ireland to other jurisdictions and to understand the impacts this has.

The Committee will:

- examine differences in equality legislation between Northern Ireland and other jurisdictions of the UK
- examine divergence between equality legislation in Northern Ireland, the European Union and other jurisdictions since the UK exit from the EU
- examine concluding observations relating to legislative change relating to equality in Northern Ireland from examinations of the UK by international human rights bodies
- investigate the impacts of gaps in legislation
- make recommendations for change in legislation in Northern Ireland.

The call for evidence opened on June 10, 2024 and will close on September 6, 2024.

The Committee will consider written replies, oral evidence (which will occur from September 2024) and other relevant advice. Its findings will be reported to the Northern Ireland Assembly. The inquiry is open to responses from any organisation or individual. For more information contact the Committee for the Executive Office, 02890521830, Committee.Executive@niassembly.gov.uk

TUC launches AI Bill

On April 18, 2024 the TUC published its *Artificial Intelligence (Regulation and Employment) Bill* (the Bill). The Bill was drafted by Robin Allen KC and Dee Masters[1] of the AI Law Consultancy at Cloisters chambers with input from a special advisory committee made up of representatives from a diverse range of organisations and political parties.

The Bill is a draft law which sets out the rights and obligations the TUC considers necessary to protect workers against AI-powered decision-making. The TUC considers that the UK does not have adequate laws to address the impact of AI in the workplace.

The European Parliament passed the EU's Artificial Intelligence Act on March 13, 2024. Claimed as the world's first AI act, it aims to protect fundamental rights, democracy, the rule of law and environmental sustainability from high-risk AI. The act establishes obligations for AI based on its potential risks and level of impact.

The TUC's Bill has been drafted to UK parliamentary standards in the hope that, with the support of parliamentarians, it will quickly become law.

1 The authors have written extensively on the development of AI in the workplace and made significant contributions to the debate in the UK and in Europe, highlighting in particular the potential for discrimination and the need for regulation; their articles in Briefings include [2024] Briefing 1077 *Update on the use of artificial intelligence in the workplace*; [2021] Briefing 926 *Artificial intelligence and the risk of discrimination in the workplace;* [2018] Briefing 7873 *Algorithms, apps & artificial intelligence: the next frontier in discrimination law*.

Purpose of the Bill

The Bill aims to regulate the use of artificial intelligence systems by employers in relation to workers, employees and jobseekers to protect their rights and interests in the workplace.

The Bill also has provision for trade union rights in relation to the use of artificial intelligence systems by employers; it addresses the risks associated with the value chain in the deployment of artificial intelligence systems in the field of employment, and its provisions enable the development of safe, secure and fair artificial intelligence systems in the employment field.

It includes protections against discriminatory algorithms which aim to guard against the potential for AI to entrench inequality and carry out discriminatory decision-making at work. The Bill would reverse the burden of proof, making it easier to prove AI based discrimination has taken place under the Equality Act 2010.

Transparency, observability and explainability provisions are at the heart of the Bill, intended to ensure only safe AI systems make it into the workplace, and that workers and unions are fully consulted, involved and informed.

Other key provisions include obligations on employers to carry out workplace AI risk assessments, a right to disconnect, a right not to be unfairly dismissed by an AI system, and guidance by the EHRC on avoiding AI driven discrimination at work.

The rights and obligations contained in the Bill would be enforceable in the employment tribunal.

Envisaging improvements to equality law

The DLA's practitioners' group meeting on June 13, 2024 discussed changes which would improve equality law and which a new parliament might consider.

Facilitated by Declan O'Dempsey, Cloisters Chambers, the participants discussed the following suggestions; in summary, they included:

- Enactment of the s1 EA socio-economic duties;
- Strengthening the public sector equality duty by eg replacing 'due regard' with a duty to 'eliminate unlawful discrimination'; reintroducing the specific duties in England; and/or introducing a legal requirement to publish equality impact assessment documentation, etc.
- Reviewing and enacting s14 EA on multiple discrimination; considering whether is this the best way to deal with intersectionality?
- Provision of more effective protection from third party harassment, including reviewing the standard introduced by the Worker Protection (Amendment of Equality Act 2010) Act 2023;
- Reinstatement of the questionnaire procedure, s138 EA;
- Including new EA protected characteristics eg class, menopause, caste, carers;
- Removing the justification of direct age discrimination eg replacing s13(2) EA with a series of defined exceptions;
- Reviewing the exceptions to the EA eg ending the exception to disability provisions for most addictions; defining justified age practices society wants to retain (if s13(2) EA justification is removed); reviewing exclusions relating to women-only spaces; etc.
- Tackling procedural difficulties with AI cases – gaining access to the AI developers and ensuring all those involved in producing algorithms or controlling data are amenable to civil claims;
- Reviewing time limits for lodging discrimination claims – possibly extending the time limit alongside a stricter rule on extending time;
- Tackling bullying in the workplace eg an anti-bullying law not linked to protected characteristics to encourage respectful workplaces;
- Ensuring protection from harassment while protecting free speech in the workplace;
- Exploring how to enforce equality law without litigation; eg non-judicial resolution of equal pay; strengthening EHRC powers; using inquisitorial models;
- Extending the EA to Northern Ireland;
- Reviewing the accessibility of the language of the EA to include those involved in courts and tribunals who are not legally qualified such as litigants-in-person or human resources and IT staff.

These suggestions will be discussed in more depth at the DLA's annual conference in the autumn. If readers have suggestions for improvements or amendments they would envisage for existing equality law, then these would also be welcomed. Please send to: info@discriminationlaw.org.uk