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Enhancing equality protection

The coming to power of the new Labour government creates expectations of a fresh approach and a new direction at Westminster after 14 years of Conservative rule. Discrimination law practitioners and organisations concerned with challenging unfair treatment and supporting people disadvantaged by poverty and inequality recall that it was a Labour government which introduced the Equality Act 2010 (EA); they hope that tackling discrimination and advancing equality will be front and centre in the new government's approach. In her review of the government's plans for legislative reform, Alice Ramsay confirms that while equality is not one of Labour's *'five missions to rebuild Britain*', its party manifesto did feature various equality-related commitments. She outlines recently proposed new legislation including the Employment Rights Bill, the equality commitments in the King's Speech and reforms proposed under the *Next Steps to Make Work Pay* document.

Clearly the new government has inherited a wide range of problems to address but given some of its decisions in the first months of attaining power such as failing to support the scrapping of the two-child benefit cap or its blanket abolition of winter fuel payments to pensioners not in receipt of Pension Credit or certain other means-tested benefits, questions about its approach are valid.

One group which welcomes an early promise by the Prime Minister Sir Keir Starmer MP, is the National Youth Advocacy Service which supports care experienced young people. In its *Briefings* article NYAS writes that the announcement that care leavers will get priority access to social housing, wherever they choose to live, is an important and welcome reform. For many young people leaving care, the eligibility criteria for a tenancy coupled with the lack of access to a guarantor or a local authority rent deposit scheme can be an insurmountable barrier to them establishing a home when they leave care. The authors explain the lack of legal protection from the structural disadvantage they face and raise the issue of whether the EA should be amended to include 'care experience' as a protected characteristic. Alternatively, they argue, the Renters' Rights Bill could include protection for care leavers against discrimination by private landlords and lettings agents in the same way as section three of the draft Bill proposes to prohibit discrimination by landlords against benefit recipients or parents with one or more children.

While we focus on Westminster and wait to see how the government will deliver on its manifesto commitments to enhance equality, the Council of Europe and the UN offer valuable resources to bring pressure to bear on our representatives to address inequality. The European Commission against Racism and Intolerance's (ECRI) sixth report on the UK highlights a wide range of unacceptable findings such as increasing hate speech and hate-motivated violence against Jews and Muslims, or reports of *'pervasive racism and discrimination across maternal and infant healthcare'* with Black women about three times more likely to die in childbirth than White women. ECRI calls for action by the UK authorities through appropriate measures such as research, development of strategies, training and adequate funding with urgent action required on two important areas – protection of LGBTI people through the adoption of a national plan in England, and changes to the system of support for asylum seekers so that there is no gap in support when they transition to refugee status.

Members of the Traveller Movement seized the opportunity presented by the periodic review of the UK by the Committee on the Elimination of Racial Discrimination to have their voices heard and articulate their concerns about persistent racism and structural discrimination which keeps the Romani (Gypsy), Roma, and Irish Traveller communities in a perpetual cycle of inequality. The Committee has responded to their concerns by calling on the UK authorities to act and adopt measures to meet their human rights obligations and ensure the rights of these communities are protected and fulfilled.

As Alice Ramsay concludes in her article, expectations of the new government are high. Only time will tell if these will be realised.

Geraldine Scullion
Editor, *Briefings*

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What's on the new government's equality agenda?

Alice Ramsay, senior associate solicitor at Leigh Day, reviews the Labour government's plans for legislative reform in relation to its equality agenda.

Following a parliamentary general election on July 4, 2024, the Labour Party swept to power, winning 411 seats in the House of Commons. Sir Keir Starmer MP became Prime Minister on July 5, 2024. Labour's election manifesto promised to *'stop the chaos, turn the page, and start to rebuild our country'*.[1] It focused on six '*first steps for change*': delivering economic stability, cutting NHS waiting times, launching a new Border Security Command, setting up Great British Energy, cracking down on antisocial behaviour, and recruiting 6,500 new teachers.

Equality was not highlighted as one of Labour's '*five missions to rebuild Britain*'. The manifesto did, however, feature various equality-related commitments, including supporting disabled people and those with health conditions into work, *'banning exploitative zero hours contracts; ending fire and rehire; and introducing basic rights from day one to parental leave, sick pay, and protection from unfair dismissal'.* The manifesto set out Labour's commitment to enacting the socio-economic duty in the Equality Act 2010 (EA), taking action to reduce the gender pay gap, introducing a Race Equality Act *'to enshrine in law the full right to equal pay for Black, Asian, and other ethnic minority people, strengthen protections against dual discrimination and root out other racial inequalities*', introducing the full right to equal pay for disabled people, introducing disability and ethnicity pay gap reporting, and delivering a full trans-inclusive ban on conversion practices. The manifesto also pledged to '*modernise, simplify, and reform the intrusive and outdated gender recognition law to a new process'.* It also pledged that Labour would continue to support the implementation of the EA's single-sex exceptions.

The ERB has ... [been] referred to by the Trades Union Congress as a *'landmark piece of legislation'* which *'offers a real moment of hope for working people'.*

What is on the equality agenda now that the new government has had over 100 days in power? Has anything been achieved to date and what has been left off the agenda? Does anything on the horizon risk blowing the new government's plans off-course?

Legislative developments

When measuring what progress has been made by the new Labour government in delivering on its manifesto commitments to enhance equality, it is worth noting that the parliamentary recess from July 30, 2024 until September 2, 2024 restricted the new government's ability to introduce legislation. There are various government bills now progressing through parliament, including, most notably, the Employment Rights Bill (the ERB). The ERB was announced within the new government's first 100 days in power and had its first reading in the House of Commons on October 10, 2024. The ERB has already been widely discussed in the media and elsewhere, being referred to by the Trades Union Congress as a *'landmark piece of legislation'* which *'offers a real moment of hope for working people'*.[2] The ERB currently stretches to 158 pages and is likely to be extensively amended as the Bill passes through parliament. Most of the proposed legislative changes have broad application but there are some provisions which have a specific focus on equality, including, for example, the proposed changes in relation to dismissal during pregnancy, protection from harassment at work, and statutory family leave.

1 https://labour.org.uk/change/

2 https://www.tuc.org.uk/blogs/employment-rights-bill-potential-gamechanger

Jane van Zyl, chief executive officer of Working Families has welcomed *'any strengthening of legislation that helps protect pregnant women and new mothers against losing their jobs unfairly at a vulnerable time in their lives'*.[3] The protection from harassment measures are also likely to be of particular benefit to women, who, it is widely recognised, are more likely to be victims of sexual harassment than men. The ERB is explored at greater length below.

Other government bills currently progressing through parliament include, among others, the Great British Energy Bill, the House of Lords (Hereditary Peers) Bill, the Passenger Railway Services (Public Ownership) Bill, the Renters' Rights Bill, and the Terrorism (Protection of Premises) Bill. These bills indicate where the new government's priorities lie, and it is currently unclear what scope it has for introducing other legislative measures which are likely to require significant time for parliamentary debate.

The clearest indication of what is on the government's legislative agenda, now that Labour is in power, is in the contents of the King's Speech from July 17, 2024; this included the following equality-related commitments:

- *My Government is committed to making work pay and will legislate to introduce a new deal for working people to ban exploitative practices and enhance employment rights [Employment Rights Bill].*
- *My Government will bring forward plans to halve violence against women and girls.*
- *A Bill will be introduced to raise standards in education and promote children's wellbeing [Children's Wellbeing Bill].*
- *My Government will improve the National Health Service as a service for all, providing care on the basis of need regardless of the ability to pay. It will seek to reduce the waiting times, focus on prevention and improve mental health provision for young people. It will ensure mental health is given the same attention and focus as physical health. My ministers will legislate to modernize the Mental Health Act so it is fit for the twenty first century [Mental Health Bill].*
- *A draft Bill will be brought forward to ban conversion practices [Draft Conversion Practices Bill].*
- *Legislation on race equality will be published in draft to enshrine the full right to equal pay in law [Draft Equality (Race and Disability) Bill].*

Further detail of what is proposed in each of these bills is awaited, other than in relation to the ERB which has been published. It is not yet clear how quickly the government will press ahead with its legislative plans or what will happen to the other commitments from Labour's manifesto which were not specifically mentioned in the King's Speech.

Plan to make work pay

As well as introducing the ERB on October 10, 2024, the government also published *'Next Steps to Make Work Pay'*[4], a document which outlined its vision and objectives, summarised the provisions of the ERB, and set out wider reforms including the following measures sitting outside the ERB:

- *taking forward the Right to Switch Off through a Statutory Code of Practice;*
- *removing the age bands* [from the National Minimum Wage] *to ensure every adult worker benefits from a genuine living wage;*
- *supporting workers with a terminal illness through the Dying To Work Charter;*

3 www.gov.uk/government/news/government-unveils-most-significant-reforms-to-employment-rights

4 www.gov.uk/government/publications/next-steps-to-make-work-pay/next-steps-to-make-work-pay-web-accessible-version

- *modernising health and safety guidance;*
- *enacting the socioeconomic duty* [s1 EA];
- *ensuing the Public Sector Equality Duty provisions cover all parties exercising public functions;* and
- *developing menopause guidance for employers and guidance on health and wellbeing.*

The ERB, as currently drafted, proposes 28 changes to employment law. At the time of writing, the ERB had only been introduced in the House of Commons and so a detailed analysis of its proposals is outside the scope of this article. The main reforms proposed by the ERB, as summarised in '*Next Steps to Make Work Pay*', are as follows:

- *'Day 1' rights of employment, including entitlement to Paternity Leave, and Unpaid Parental Leave as well as protection from Unfair Dismissal while allowing employers to operate probation periods. Establishing Bereavement Leave, and making Flexible Working the default.*
- *Addressing one-sided flexibility by banning exploitative zero-hours contracts, abolishing the scourge of fire and rehire and strengthening provisions on collective redundancy.*
- *Establishing the Fair Work Agency.*
- *Bringing forward measures to modernise Trade Union laws.*
- *Improving pay and conditions through a Fair Pay Agreement in adult social care, re-establishing the School Support Staff Negotiating Body, and re-instating the two-tier code for procurement.*
- *Increasing protection from sexual harassment, introducing gender and menopause action plans and strengthening rights for pregnant workers.*
- *Strengthening Statutory Sick Pay.*

... the government referred to the ERB as the first phase of delivering its *'Plan to Make Work Pay.'*

In 'Next Steps to Make Work Pay', the government referred to the ERB as the first phase of delivering its *'Plan to Make Work Pay.'* As part of that plan, the government has confirmed that it will deliver the following measures through the Equality (Race and Disability) Bill, including:

- *extending pay gap reporting to ethnicity and disability for employers with more than 250 staff and measures on equal pay;*
- *extending equal pay rights to protect workers suffering discrimination on the basis of race or disability;*
- *ensuring that outsourcing of services can no longer be used by employers to avoid paying equal pay;* and
- *implementing a regulatory and enforcement unit for equal pay with involvement from trade unions.*

The government has confirmed that it will begin consulting on this legislation in due course, with a draft bill to be published during this parliamentary session for pre-legislative scrutiny. The government has also announced that further consultation will take place prior to the making of secondary legislation implementing these reforms. Injury to feelings awards are not currently granted in equal pay cases (where the pay inequality relates to sex). Responses to the consultation are likely to raise queries about what the consequences would be in terms of injury to feelings compensation in the context of extending equal pay rights on the basis of race or disability. Considering that equal pay claims are often legally and factually complex and tend to require significant employment tribunal resources in terms of case management and determining the

outcome of claims, questions are likely to also be asked in relation to what additional funding will be allocated to the employment tribunals so that claims can be heard within a reasonable timescale.

The government has also announced the following reforms:

- conducting a full review of the parental leave system;
- reviewing the implementation of carer's leave and examining all the benefits of introducing paid carer's leave;
- consulting on workplace surveillance technologies;
- consulting on a simpler framework for employment status, including a *'simpler framework that differentiates between workers and the genuinely self-employed'*. During this consultation, the government will also consult on measures to strengthen protections for the self-employed through a right to a written contract, extending blacklisting protections, and extending health and safety protections;
- launching a Call for Evidence to examine a wide variety of issues relating to the Transfer of Undertakings (Protection of Employment) Regulations and process, including how they are implemented in practice;
- reviewing health and safety guidance and regulations, including looking at neurodiversity awareness in the workplace, extreme temperatures, supporting and protecting those experiencing symptoms of long Covid, and ensuring health and safety reflects the diversity of the workforce;
- consulting with ACAS on enabling employees to collectively raise grievances about conduct in their place of work;
- reforming the procurement system, including ensuring social value in contract design, using public procurement to raise standards on employment rights, ensuring that public bodies carry out a quick and proportionate public interest test; and
- extending the Freedom of Information Act to private companies which hold public contracts and to publicly funded employers.

Considering Labour's majority, had the government supported an end to the two-child limit, the cap could have been abolished.

What is missing?

Although Labour had 411 MPs at the time of the general election, it now has 403. Seven Labour MPs had the whip suspended for six months after voting against the government on July 23, 2024 during a debate regarding the King's Speech where the Scottish National Party put forward an amendment calling for the government to immediately abolish the two-child benefit cap. The cap has previously been noted by the Supreme Court in the case of *R (on the application of SC, CB and 8 children) v Secretary of State for Work and Pensions and Ors* [2021] UKSC 26 to have a greater impact on women. The SC held in its judgment of July 9, 2021 that the measure was objectively justified, noting that parliament had decided that the disproportionate impact of the two-child limit was outweighed by the importance of achieving its aims, which were to protect the economic wellbeing of the country by achieving savings in public expenditure and thus contributing to reducing the fiscal deficit.

The SC emphasised the importance of the separation of powers. Considering Labour's majority, had the government supported an end to the two-child limit, the cap could have been abolished. Rosie Duffield MP later resigned from Labour, criticising the government's position on the two-child benefit cap and on winter fuel payments. The government announced cuts to the winter fuel payment scheme on July 29, 2024 restricting availability to people aged 66 and over who receive Pension Credit or certain other means-tested benefits. Age UK has strongly opposed the cut to the winter fuel

payment.[5] The new government's record on equality issues already appears somewhat patchy, therefore, and it is possible that more MPs may choose to leave Labour or have the whip suspended if required by the government to vote in a way that does not align with their values on poverty-reduction and equality. The government does still, however, retain a significant majority and is likely to be able to push through the legislative changes it requires to advance its equality agenda.

Although mentioned in the *'Break down barriers to opportunity'* section of Labour's manifesto, there is currently no clarity regarding the new government's equality-related proposals regarding trans people. One of the points stated in the manifesto, that Labour will continue to support the implementation of the EA's single-sex exemptions, doesn't make clear the new government's position on the definition of sex for the purposes of the EA, including whether the government considers that the definition of a woman for the purposes of the EA includes a person who has a male birth certificate but who lives and presents as a woman.

One of the points stated in the manifesto, that Labour will continue to support the implementation of the EA's single-sex exemptions, doesn't make clear the new government's position on the definition of sex for the purposes of the EA ...

There is an upcoming SC hearing which will consider the definition of a woman for the purposes of the EA and so it is possible that the government may clarify its position on this issue in due course. On November 26 and 27, 2024 the SC will hear an appeal against the Court of Session's decision in *For Women Scotland Ltd v The Scottish Ministers* [2023] CSIH Civ 37. The issue in question in that appeal is whether a person with a gender recognition certificate (GRC) recognising their gender as female is a woman for the purposes of the EA.

The current version of the Equality and Human Rights Commission's statutory Code of Practice on Services, Public Functions and Associations confirms that if a service provider provides single or separate sex services for women and men, or provides services differently to women and men, they should treat trans people according to the gender role in which they present.[6] A judicial review challenge to this part of the EHRC's Code of Practice was unsuccessful in the case of *AEA v Equality and Human Rights Commission* [2021] EWHC 1623. The EA does allow service providers to exclude a trans person from a single or separate sex service or provide them with a different service if doing so would be a proportionate means of achieving a legitimate aim. The government does not appear to be proposing any change to the law in relation to single-sex services.

The EHRC is currently consulting on an updated version of the Code of Practice on Services, Public Functions and Associations. The current Code became law in 2011. Any updated version would only become law if approved by parliament via a statutory instrument. Regarding single-sex services, the updated Code states that 'sex' for the purposes of the EA means 'legal sex', which the EHRC refers to as *'a person's sex recorded either on their birth certificate, or their Gender Recognition Certificate'*. The updated Code acknowledges, however, that if a service provider limits or modifies a trans person's access to, or excludes a trans person from, a separate or single-sex service of the gender in which they present, the service provider's actions would be unlawful unless they could show that those actions are a proportionate means of achieving a legitimate aim. The EHRC's consultation in relation to the updated Code of Practice opened on October 2, 2024 and remains open until 5pm on January 3, 2025.

The King's Speech did confirm that the government will be taking forward Labour's manifesto commitment regarding conversion practices. The Conversion Practices Bill has not yet been published, however, and so the scope of what the government is

5 www.ageuk.org.uk/our-impact/campaigning/save-the-winter-fuel-payment/

6 www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf

proposing is unclear. The bill will be published in draft and will undergo consultation. It may be some time, therefore, before any new act of parliament is brought into force to ban practices aimed at changing or suppressing someone's gender identity or sexual orientation.

In terms of what is missing from Labour's manifesto and from the new government's equality agenda, there is currently no suggestion that the new government will legislate to provide legal recognition for people with non-binary gender identities, something which was included in the manifestos for the Green Party and the Liberal Democrats in the July election.[7] With four MPs now representing the Green Party and 72 MPs representing the Liberal Democrats, it is possible that there could be a Private Members' Bill (PMB) put forward on the subject of legal recognition for non-binary people sometime between now and the next general election but it is unclear how much progress would be made with a PMB, considering the limited parliamentary time allocated to those type of bills. Twenty MPs have been picked in this year's PMB ballot; the titles of these bills are listed here.[8] None address the issue of legal recognition for non-binary people but this is a topic which could potentially be discussed in future parliamentary sessions via a PMB. Also missing from Labour's manifesto and the new government's equality agenda are any measures to address various equality and human rights issues faced by intersex people. Such measures could also potentially be discussed in parliament by means of a PMB.

The new government has work to do in consolidating public awareness of the benefits of equality and human rights...

Kim Leadbeater MP's PMB, Terminally Ill Adults (End of Life) Bill, had its first reading on October 16, 2024. Its focus on giving terminally ill adults the right to request and be provided with assistance to end their own life raises equality-related considerations. The Prime Minister has confirmed that the government will remain neutral on the subject and that Labour MPs will be given a free vote on the issue.[9] The debate will take place on November 29, 2024.

Other PMBs with a potential impact on equality issues include Josh MacAlister MP's Protection of Children (Digital Safety and Data Protection) Bill, Dr Scott Arthur MP's Rare Cancers Bill, Peter Lamb MP's Free School Meals (Automatic Registration of Eligible Children) Bill, and Jake Richards MP's Looked After Children (Distance Placements) Bill.

Risks ahead?

Anti-immigration demonstrations and riots took place across the UK between July 30, 2024 and August 7, 2024. Making a statement in the House of Commons on September 2, 2024, Yvette Cooper MP, the Secretary of State for the Home Department referred to the violent disorder as *'thuggery, racism and crime.'*[10] She noted her concern that:

> *… not enough is being done to counter extremism – including both Islamist extremism and far right extremism* [announcing that she had] *ordered a rapid review of extremism to ensure that we have the strongest possible response to the poisonous ideologies that corrode community cohesion and fray the fabric of our democracy.*

Events such as the riots which took place across the UK this summer indicate that not everyone in the UK is committed to enhancing equality. The new government has work to do in consolidating public awareness of the benefits of equality and human rights,

7 https://greenparty.org.uk/about/our-manifesto/ and https://www.libdems.org.uk/manifesto

8 www.parliament.uk/business/news/2024/october/mps-present-private-members-bills-to-parliament/

9 www.bbc.co.uk/news/articles/c3e9031n142o

10 https://hansard.parliament.uk/Commons/2024-09-02/debates/BCE59770-06E2-4D12-908D-4CDAD8046C58/ViolentDisorder

as well as protecting measures already on the statute book. The government's focus on its equality agenda also risks being diverted by having to respond to unexpected developments, such as the Treasury's announcement over the summer that the forecast overspend on departmental spending was expected to be £21.9 billion above the resource departmental expenditure limit set at the Spring Budget 2024.[11] Parliamentary time may also need to be allocated to developing international matters, including climate change, conflicts in Ukraine, in the Middle East and elsewhere, global economic trends, and future pandemics.

At the time of writing this article, the government's autumn budget has not yet been announced. It will be the government's first budget and will indicate its spending plans for the year. Will there be funding for socio-economic measures which have a positive effect on making the UK a more equal society (akin to the Sure Start initiative launched in 1998 by the previous Labour government) or are there chill winds ahead in terms of government spending on equality-related programmes? All eyes are likely to be on the House of Commons on October 30, 2024 when the budget will be announced. Expectations of the changes to be delivered by the new Labour government are high. Will those hopes be realised? Only time will tell.

11 www.gov.uk/government/publications/fixing-the-foundations-public-spending-audit-2024-25

Care leavers and housing – a complex story of discrimination and inequality

Phoebe White and Kathy Evans from the National Youth Advocacy Service (NYAS) set out some of the challenges and disadvantages facing care leavers seeking safe and secure homes. NYAS is the leading charitable provider in England and Wales of independent advocacy and independent visitors for children in and leaving care, and of specialist legal representation for children in family law proceedings. They share insights and learning from the young people in both nations with whom the organisation works. They explore options for reform including making care-experience a protected EA characteristic or extending statutory corporate parenting duties to more public bodies. Given the many differences in political context and policy, laws and practice between the two nations, their policy and legislative analysis mainly focuses on England.

Setting the scene

Every year more children are entering the care system in England than ever before. In 2023 over 83,000 children[1] were being cared for by a local authority and this number is projected to rise further to 100,000 by 2025.[2] The experience of care, and what follows, can be far from what any parent would hope for their child. Though the system is intended to provide children with a stable and loving home, it is fast becoming, if not already, a system in crisis which is struggling to provide children with the care and tools they need to thrive.

Young people regularly report that on the day they first entered care, a social worker arrived at their home, asked them to pack a bag and then moved them to live with adults they had never met before. As one young person told us *'I was only nine and I came home from school one night, I was playing with my cousins and then social services arrived. The next thing I knew I was being taken on a "trip" somewhere, but my mum wasn't coming with me.'*

Once in care, their homes, bureaucratically referred to as 'placements', can offer little stability, familiarity or consistency. One in 10 children will experience *'high placement instability'* – three or more moves per year – and 20% of children will be moved over 20 miles away from their local area, making it difficult for children to find their social circles, form healthy relationships and succeed in education.

Perhaps the most difficult part of the care experience starts when, at 18 years of age, the journey of being 'in care' ends and being a 'care leaver' begins. After leaving care, support for young people is significantly reduced as they enter adulthood. Over a third of care leavers have reported to Ofsted that they felt they left care too early, attributing this to the transition happening 'abruptly' without the young person feeling prepared for *'all the sudden changes'* which accompany a life after care.[3] Most young people turning 18, will start university, travel or take up apprenticeships and continue to live with their parents (or return to live there periodically) until they feel ready to fully start adulthood. Some care leavers will also enjoy similar experiences, but research suggests the transition out of care to into adulthood is more often associated with negative outcomes than positive ones.

1 Department for Education, 2023 Children looked after in England including adoptions, Reporting year 2023 - Explore education statistics - GOV.UK (explore-education-statistics.service.gov.uk)

2 BBC News, 2021.Children in care in England could hit almost 100,000 by 2025 - BBC News

3 Ofsted, 2022. 'Ready or not': care leavers' views of preparing to leave care - GOV.UK (www.gov.uk)

One of the most concerning challenges facing young people leaving care is finding safe, secure and stable housing. Though the option of supported accommodation and schemes such as 'Staying Put' (an arrangement for care leavers to continue living with foster parents after the age of 18) are available, these are quite often short-term arrangements or require a young person to move further away from their local area. These limited options, alongside an overall reduction in support services, make homelessness a very real and immediate threat for care leavers. One in three care leavers will experience homelessness within the first two years of leaving care, and around a quarter of all individuals who experience homelessness have also experienced the care system.[4] Data released by the UK government in October 2024 showed that 4,300 care leavers aged 18-20 were assessed as homeless in 2023/24, representing a 54% increase over the last five years.[5]

The legal context

[October 2024 Data] showed that 4,300 care leavers aged 18-20 were assessed as homeless in 2023/24, representing a 54% increase over the last five years.

The primary legal basis for the definitions of, and duties towards, children in need of protection, care and support as they become care leavers, is the Children Act 1989, and the many subsequent amending acts expanding and updating it. The Children Act places a particularly unique and strong legal duty on a local authority to act as if they have become the actual parent of any child entering their care – referred to as a 'corporate parent' duty. This duty makes the authority responsible for the life and welfare of the whole child in their care – their safety and stable home life, their health and emotional wellbeing, educational outcomes and career prospects, and their transition into adulthood – not merely their 'accommodation' in an alternative home from that of their birth parent.

While only a small proportion of children will ever experience local authority care, councils collectively are expected by law to act 'corporately' as the responsible parent to tens of thousands of children every year, and to continue to be responsible (or legally liable), for every adult for whom they were once responsible as a child. This is a very different kind of statutory duty from all others held by a local authority. This is important to recognise because in a child's transition from being 'in care', to leaving that care and entering the housing market as an adult, there is no equivalent duty in the housing sector matching the strength of the council's duty as a corporate parent to try and prevent them becoming homeless.

The second essential applicable legislative framework is the Human Rights Act 1998 (HRA) and the Strasbourg court's judgments under the European Convention on Human Rights and Fundamental Freedoms (ECHR) – which has in turn, since 1989, used the UN Convention on the Rights of the Child as its guide to interpreting the application of ECHR rights to children. The HRA makes any breach of the rights and freedoms every child enjoys challengeable and enforceable in a domestic court, including protection from discrimination under Article 14. There is no restrictive list of the potential grounds for discrimination under Article 14, although it includes the well-established 'protected characteristics' of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation as set out in the Equality Act 2010 (EA). Care experience is not a 'protected characteristic' in law, although the Independent Review of Children's Social Care[6] (the Care Review) did recommend government considered making it one, and there is ongoing campaigning

4 Step by Step, 2022. Care_Leavers_and_Homelessness.pdf (stepbystep.org.uk)

5 BBC News, 2024. Huge rise in number of young care leavers facing homelessness - BBC News

6 The Independent Review of Children's Social Care, 2022 The-independent-review-of-childrens-social-care-Final-report.pdf (nationalarchives.gov.uk)

pressure to pursue this aim. NYAS understands that there have been some attempts to challenge discrimination against care-experienced people under Article 14 HRA in British case law, but to our knowledge no significant legal precedent establishing care-experienced discrimination under the HRA has been set to date.

Discrimination

Young people who have experienced care will frequently encounter care-related discrimination throughout their lives because of the negative, and often inaccurate, perceptions society holds of what it means to be care-experienced. These perceptions are mostly underpinned by harmful narratives in the media or pop culture which suggest that care-experienced individuals are inherently bad or deviant from societal norms, resulting in this group becoming marginalised within society. Those experiencing care are not a homogeneous group; children from ethnic minority backgrounds for example, are disproportionately over-represented within the care system yet are much less likely to receive support and onward referrals to helping services such as the Child and Adolescent Mental Health Services. The Care Review highlighted that racial inequality is *'amongst the most pronounced disparities in children's social care'* and heard accounts of social workers witnessing racism towards families in their day-to-day work.[7]

Young people who have experienced care will frequently encounter care-related discrimination throughout their lives because of the negative, and often inaccurate, perceptions society holds of what it means to be care-experienced.

In research conducted with Coram Voice, 40% of children said they had been treated negatively because of their care-experience.[8] Other children have told us they often hide their experiences of care as they are worried that knowledge of these might change how they are perceived:

> *People often assume that you are problematic and have many things wrong with you because you're in care. They expect you to be aggressive and loud, when really you just want to be heard. Being in care is probably the worst thing a child experiences and they need support, not discrimination for being in an unfortunate circumstance.*

As the Care Review highlighted, those with care-experience can face both direct and indirect discrimination but, without any specific legal protection against care-related discrimination, it can be almost impossible for an individual to seek legal redress even when there is tangible evidence that discrimination has occurred.

Direct discrimination: prejudiced attitudes and overt discrimination because of care experience

Residential care homes account for nearly one fifth of all care settings for children in care and there are just over 2,000 children's homes across England.[9] Though residential care can provide a safe and nurturing environment, children living in these homes are more likely to experience discrimination and stereotyping than children who live in other types of care. This can be attributed to residential care being stereotyped as a 'last resort' for children, alluding to a view that children living in these homes are *'at their worst'* as they cannot live in other forms of accommodation.[10] Not only is this an inaccurate representation, but it has also fuelled negative views of children's homes and the children living in them.

7 The Care Review, p89.

8 NYAS and Coram Voice, 2022, page 17-22. Children and young people's views on England's care review (coramvoice.org.uk)

9 Ofsted, 2023. Main findings: children's social care in England 2023 - GOV.UK (www.gov.uk)

10 The Therapeutic Care Journal, 2022. Perceptions and Attitudes towards Children's Residential Care Homes in the Community. By Hannah Dobbs - The Therapeutic Care Journal (thetcj.org)

Organisations setting up new children's homes can face objections and hostility from residents which are underpinned by outright discriminatory views about children living in residential care. Planning applications receive objections which express 'fears' about what the presence of a children's home, or rather the children living in them, would mean for their neighbourhood. Though some objections have included concerns such as a reduction in residential parking and increased traffic, the majority feature complaints suggesting that a children's home will increase crime rates, reduce house prices and compromise the *'health and safety'* of neighbourhoods. In such cases, residents have labelled these children as antisocial, deviant and only likely to bring trouble to their communities, rather than recognising the trauma and adversity they have experienced leading them to needing a home in residential care in the first place. In one particularly shocking story, the chief executive of the Independent Children's Home Association told the BBC that residents making these complaints generally view children living in care as *'criminals rather than victims'* recalling that they had seen terms such as 'murderer' and 'rapist' used in some objections to planning.[11]

As there is no legislation prohibiting care-related discrimination, there is nothing to stop landlords refusing to rent their properties to tenants because of their care experience.

There are plenty of UK examples where those wishing to set up children's homes have met with discriminatory attitudes towards children in care. In Derbyshire, multiple councils received nearly 100 complaints, letters and petitions from residents over applications for just three homes.[12] In Leicester, one home intended for children aged four to eleven years of age received over 100 objections from residents.[13] One application in Stoke-on-Trent generated 68 objections that a nearby children's home would *'lower property prices',*[14] and another home in Basingstoke received objections from councillors themselves citing that the homes would *'fundamentally alter the residential character of the neighbourhood'*. [15]

Discrimination is also present within the private rented sector and is another barrier facing care leavers seeking safe and secure homes after leaving care. There are multiple accounts from care leavers across the country detailing that once their prospective landlord found out about their care experience, their tenancy applications were denied. Research conducted by the charity Centrepoint found that 13% of care leavers reported being unable to access private rented property because landlords were unwilling to rent to them.[16] The same report also describes how for local authorities, discriminatory landlords remain one of the biggest challenges preventing care leavers finding homes. As there is no legislation prohibiting care-related discrimination, there is nothing to stop landlords refusing to rent their properties to tenants because of their care experience.

This was most recently demonstrated in a property advert from one England's largest affordable housing and care providers – Guinness Partnerships. The advert was for a two-bedroom flat in Greater Manchester and had been labelled by the provider as a:

> *SENSITIVE LET: No history of substance misuse within the last 5 years - no care leavers – no criminal convictions within the last 5 years.*[17]

11 BBC News, 2022. Children in care homes 'seen as criminals not victims' - BBC News

12 Community Care, 2022. 'Resident protests against children's homes are a microcosm of an uncaring care system' - Community Care

13 Leicester Mercury, 2024. Young people in care are in need and not yobs, children's home organisation says - Leicestershire Live (leicestermercury.co.uk)

14 Stoke on Trent Live, 2024. 68 objections as neighbours fear children's home will lower property prices - Stoke-on-Trent Live (stokesentinel.co.uk)

15 Basingstoke Gazette, 2024. Building to become children's home despite objections | Basingstoke Gazette

16 Centrepoint, 2017. From care to where - Centrepoint report

17 CYP Now, 2024. CYP Now - Housing association under fire over 'no care leavers' advert

Though the advert was quickly removed, and an apology issued, it highlights the very real issue of direct care-related discrimination and its impact on young people simply trying to find a home.

Indirect discrimination: structural and societal barriers to care leavers being treated equally

In addition to widely reported instances of direct discrimination, the failure to consider the needs and particular circumstances of care leavers can amount to discrimination which significantly disadvantages them, even if unwittingly.

The societal 'norm' for young adults as they reach 18 is one of ongoing reliance on their parents and carers. The average age for young people leaving their parents' family home in Britain is now 24. The *'bank of mum and dad'* is a trope in British culture because it reflects a documented reality for increasing proportions of young adults still relying on their parents for financial support, or accommodation at their childhood home long into adulthood as they start to navigate work opportunities, as they save up for (or are given) deposits for tenancies, or house purchases.

... the high demand for social housing across England means that action is needed to make the private rental sector more accessible to young adults whose parent is the state.

In 2012 the Department for Work and Pensions (DWP), in an attempt to avoid asking the taxpayer for financial assistance, withdrew entitlement to Housing Benefit for anyone aged under 25 on the basis that if they couldn't afford to rent, they should still live at home. Exceptions to this policy do include care leavers and young parents, but they are nonetheless viewed as anomalies to the norm for young adults in our society. Even when eligible for Housing Benefit, there are no guarantees that it will cover the full cost of a young carer's rent should the DWP disagree with the valuation price set by the landlord. In Wales, however, young care leavers have been the focus of a very radical pilot scheme, in which they are offered a generous basic income of £1,600 a month.[18] It will be important to see how the impact of that scheme will affect care leavers' ability to afford and secure a home.

We acknowledge that the private rental market is a sector in which all young people (except perhaps those from the very wealthiest of families) face significant barriers to securing and keeping their homes. Landlords and lettings agents increasingly require extensive 'vetting' information and requirements which are hard for most young adults to provide, especially those seeking their first home; these include: good references from employers and previous landlords; a person willing to act as guarantor for the tenant; security deposits at several multiples of their monthly rent; bank statement histories to prove stability of income and outgoings; not to mention steep annual rent rises to match the 'market rate', regardless of affordability for existing tenants. If these are challenging barriers for most young people who are new to becoming tenants, they are insurmountable for most care leavers, especially if their council isn't willing or able to act like a parent and help them through it.

While councils have a corporate parenting duty to care leavers until the age of 25, those duties do not currently require them specifically to act as a guarantor for care leavers as tenants. Even where councils do put themselves forward as a willing guarantor, they can be rejected by landlords and lettings agents who insist on having a named individual rather than an organisation. For these and many more reasons, social housing will often be the more appropriate, preferred option for a care leaver, but the high demand for social housing across England means that action is needed to make the private rental sector more accessible to young adults whose parent is the state.

18 Welsh Government, 2022. Basic income pilot for care leavers: overview of the scheme | GOV.WALES

NYAS sent Freedom of Information Requests[19] to 151 local authorities in England and out of 113 responses, found that only 48 local authorities (42%) will offer to act as a guarantor for their care leavers and 87 local authorities (77%) will provide rent deposit schemes. Of those willing to act as a guarantor, over 60% have an eligibility criteria care leavers must meet before they can access this scheme and an additional 32% will only offer this on a case-by-case bases. Similarly, of the 77% which will provide a rent deposit, 80% of these have eligibility criteria and an additional 14% work on a case-by-case basis. In one response, a local authority told NYAS that acceptance onto these schemes *'is not automatic'*.

Not only is the offer of guarantors and rent deposit schemes not equally available for care leavers across the country, but it is also not equally accessible at local level because of the qualifying criteria set by some local authorities. While some of the criteria set out may be considered reasonable, the majority appear to mimic landlords' vetting requirement of a stable record of previous responsible renting. Some even create a two-tier system which care leavers may find impossible to meet – for example, only offering such support to care leavers who go to university. This makes it extremely difficult for a care leaver who falls short of their council's criteria for tenancy support (or whose parent council offers no such support at all) to find a home in the private rental sector and illustrates some of the barriers which care leavers must overcome just to have a safe and secure roof over their heads. What's more, it also poses a question as to why services expect so much more from care leavers than young people who grew up without comparable trauma, adversity and instability.

... there is evidence of an intergenerational cycle of discrimination for care-experienced young mothers.

At public housing level, there is little focus on, or provision for, the needs of young adults in the development and planning of new housing. Public housing duties do not require councils to plan and develop housing for sections of the population or types of housing need, other than ensuring that proportions of the new build to be 'affordable', defined as 80% of the average market value. Nonetheless it can be common to see the development of housing sites and communities for older people and their particular needs for example, but there seems to be no comparable encouragement for developing new housing which is safe, affordable or accessible to young adults. Perhaps because the societal 'norm' is that they're expected to still be living with their parents?

Systemic and intergenerational disadvantage

Care experience mirrors, intersects with, and compounds other recognised forms of systematic, structural and intergenerational disadvantage and inequality, like racial inequalities and poverty. This is true both at the level of the risk of being brought into care in the first place, (which is far higher for BAME children, and more likely for children in low income families), and the risk of care-experienced people being disproportionately overrepresented in school exclusions and unemployment, or experiencing poverty, poor physical and mental health, homelessness, crime and imprisonment.

Just as children who grow up in poverty are more likely as adults who become parents to remain trapped in poorly paid work and economically depressed communities, there is evidence of an intergenerational cycle of discrimination for care-experienced young mothers. Within the general population, women beginning their journey to motherhood at what is perceived as a *'young parenting age'* are more likely to experience discrimination and stereotyping than those who are older. While UK

19 NYAS, What support are councils offering care leavers in need of private tenancies across England and Wales? 2024. https://nyas.s3.eu-west-1.amazonaws.com/Policy%20docs/Housing%20FOI%20Briefing%20-%20Oct%2024%20(2).pdf

parenting policy is said to *'view young parents through a narrow deficit lens',*[20] this does not take account of the additional challenges or discrimination facing young mothers who are also care-experienced.

Over a quarter of mothers who have had their child placed for adoption were themselves care leavers[21]. Other data suggests that 40% of mothers who have had more than one child removed from their care, spent time in care as a child. This disproportionality has often been associated with a generalised view held by health and social care professionals regarding *'intergenerational cycles of parents and their children experiencing care'*. It can be wrongly assumed that these mothers are inherently less capable as parents in comparison to their peers who did not experience care or childhood adversities. The stereotypical perceptions of care-experienced young women are said to only intensify if their child is taken into a care, contributing to further mental and emotional challenges.

Potential reforms

The many barriers and disadvantages which care leavers face in our society generally, and in housing specifically, are complex and deep-rooted. Potential remedies are equally complex and require a combination of actions to offer significant improvements.

The Care Review recommended an amendment to the EA to make care-experience a protected characteristic, increasing legal protection and providing mechanisms to challenge care-related discrimination in the provision of goods and services.

At the time of writing, the Prime Minister, Sir Keir Starmer MP, has made a hugely valued announcement that care leavers (as well as military veterans and domestic abuse survivors) will be given priority status for social housing. Care leavers who have moved and settled (or hope to do so) away from their parent council will be exempted from the requirement to prove their 'local connection' to be eligible for social housing priority in their new local authority area. This is a very positive reform and could have a significant impact on thousands of care leavers and signifies that the scandal of care leaver homelessness is now recognised at the highest levels of government, but more is needed. NYAS considers the following areas for potential reform and improvement are equally important.

Make care experience a 'protected characteristic' under the Equality Act 2010

The discrimination facing care-experienced individuals is like that felt by others with protected characteristics under the EA. The Care Review recommended an amendment to the EA to make care-experience a protected characteristic, increasing legal protection and providing mechanisms to challenge care-related discrimination in the provision of goods and services. This would mean that public bodies and organisations would have to consider the impact of their policies and decision-making on individuals with care-experience, as they do with other protected characteristics.

While this call was ultimately rejected by the previous government following concerns that *'self-declaration of care experience could increase stigma',*[22] campaigner Terry Galloway has found a way to achieve a similar outcome at a local level. Since 2022, Terry has campaigned across the UK for councils to pass a motion to treat care-experience as a protected characteristic within their local area. As of October 2024, 106 councils have passed this motion, equating to just over 30 million people in the UK (46% of the total population) now living somewhere where care-experience is regarded by their local

20 The International Journal of Childhood and Children's Services, 2022, p1280-1295. 'It's the way they look at you': Why discrimination towards young parents is a policy and practice issue - Owens - 2022 - Children & Society - Wiley Online Library

21 Centre for Child and Family Justice Research, 2023, p9. CFJ-Care_experienced_mothers_and_their_children_in_care_in_Wales_report_-FINAL_13_Feb_2024_.pdf (lancs.ac.uk)

22 Department for Education, 2023, p196. Children's social care stable homes built on love consultation (publishing.service.gov.uk)

authority as a protected characteristic. This incredible work should result in positive outcomes for anyone with a history of care. Perhaps most importantly, it signifies that across the country, decision-makers are recognising and proactively working to end the discrimination facing individuals with care-experience.

Extending corporate parenting duties

When the decision was made not to amend the EA, an alternative proposal was to extend corporate parenting responsibilities. In their current form, corporate parenting duties only apply to local authorities' children's services rather than all public bodies which interact with care-experienced children and young people. If corporate parenting was to be extended and fulfilling these duties made statutory, it would encourage all public bodies to always prioritise and act in the best interests of care-experienced children and young people. In practice, this would mean the views, wishes and feelings of care-experienced children would be at the forefront of decision-making and any opportunities created to help them thrive into adulthood. Making this duty statutory would mean that public bodies could be held to account for any failures to implement the duty.

If corporate parenting was to be extended and fulfilling these duties made statutory, it would encourage all public bodies to always prioritise and act in the best interests of care-experienced children and young people.

Expand and standardise deposit & guarantors' schemes & eligibility

There are examples of great practice in some councils already, such as Kent County Council's Care Leavers Local Offer, translating their corporate parent duty into dedicated schemes to support their care leavers as young tenants.[23] These include not only proactive commitments to act as guarantors and pay rental deposits, but also to work and negotiate with local landlords on young people's behalf, reducing the stigma and fears of accepting care leavers as tenants, and giving meaningful support and learning opportunities to young people in developing the financial and behavioural habits they'll need to maintain their tenancies.

Such schemes have evolved without needing a legal duty but the extreme disparities between this kind of positive, proactive tenancy support and those councils which offer neither deposits nor guarantorship are stark. Whether by specifying the active prevention of homelessness as part of the corporate parent duty in law or by investing in spreading best practice, standards across all councils should be raised to the best standards successfully pioneered by some already. The promised Children's Wellbeing Bill will be an important opportunity to seek government commitments on this.

Renters Rights Bill – more specific protection from discrimination in housing

The Renters Rights Bill is currently in passage through parliament. Some of the reforms already promised, and indeed long-awaited, will benefit care leavers alongside other renters. The end of 'no fault' evictions would increase the security of tenure for young people too often abruptly uprooted, through no fault of their own, from their homes. The Bill presents an opportunity to raise awareness of, and prevent, both direct and indirect discrimination against care leavers in the private rental sector. Following campaigning led by Shelter, landlords are already being prohibited from discriminating against benefits recipients, even without that being an EA protected characteristic. This development has set a precedent for a further prohibition on discrimination against potential or actual tenants with care experience. The Bill may also be an opportunity to require landlords to accept a council as a tenant's guarantor, rather than insisting on a named person.

23 Kent County Council, 2024. Kent County Council to act as guarantor for care leavers - BBC News

Help to Buy ISA

While no-one in our society has a simple right to buy a home, per se, it is the most common desired housing goal for most people as they grow into adulthood, especially as they start families. There are huge problems for a great many young people (not only young care leavers) in achieving this goal, but for those who do make it onto the housing ladder in their 20s or early 30s, family financial support and backing is usually essential. In recognition of these profound challenges for young adults, the government has created a '*Help to Buy ISA*' savings scheme, which can only be used to pay for a mortgage deposit, and which the government will top up by 25% of the saved amount.

Forward-thinking councils should consider the role of such a scheme for their care leavers' futures and include consideration of the option in care leavers' pathway plans. Where appropriate, and if the young person agrees they want to save towards it, councils could also consider making a lump sum deposit to start one off as a smart use of their budget to support their young people, and a strong, incentivising investment in a young person's ambitions for their future.

In conclusion

Ensuring that no child who needs care ever faces homelessness as an adult is complex. It requires addressing systematic failures and inconsistencies in both housing and social care, and more fundamentally, confronting the realities of the prejudice and discrimination care-experienced young people often face. NYAS's mission is to devote every effort to standing by children in and leaving care in the decisions which affect them, promoting their rights, views and opinions, and campaigning for change. The organisation is keen to hear from all those who want to share and contribute to achieving the change they deserve.

Contract workers could not claim indirect race discrimination against the principal

Boheene and others v Royal Parks Ltd ✦ [2024] EWCA Civ 583; May 24, 2024

Introduction

In a judgment examining the applicability of s41 of the Equality Act 2010 (EA), the Court of Appeal found that contract workers could not claim indirect race discrimination against the principal.

Facts

Royal Parks employs staff directly in predominantly office-based roles and outsources manual work to contractors, including Vinci Construction UK Ltd (Vinci). The claimants were a group of contract workers employed by Vinci to provide those manual services to Royal Parks. They were predominantly black and from other minority ethnic backgrounds, whereas Royal Parks' directly employed staff were predominantly white.

Royal Parks paid its directly employed staff London Living Wage (LLW), a rate of pay set higher than the national minimum wage. When it invited Vinci to tender for the contract, the invitation was based on two alternative tenders: one to account for the provision of LLW rates, and the other for non-LLW rates. Royal Parks accepted the non-LLW tender. After five years, the contract was renewed and, at that point, Royal Parks agreed to fund the cost of paying the LLW to Vinci's workers.

The claimants argued that the practice of paying the national minimum wage for the first five years of the contract disproportionately affected workers from black and minority ethnic backgrounds. They brought claims under s41 for indirect race discrimination pursuant to s19 EA. The provision, criterion or practice (PCP) identified in the claim was Royal Parks' policy of paying a different minimum wage to its outsourced workers compared to its directly employed staff, and that a greater proportion of black and minority ethnic origin staff were negatively affected by the minimum wage PCP.

Legal framework

S19 EA provides that:

1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

2) A cannot show it to be a proportionate means of achieving a legitimate aim.

S41 EA provides for the following:

1) A principal must not discriminate against a contract worker:
a) as to the terms on which the principal allows the worker to do the work;
b) by not allowing the worker to do, or to continue to do, the work;
c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;
d) by subjecting the worker to any other detriment.

✦ [2024] IRLR 668; [2023] Briefing 1071

Under s41(5), a 'principal' is a person who makes work available for an individual who is (a) employed by another person, and (b) supplied by that other person in furtherance

of a contract to which the principal is a party (whether or not that other person is a party to it).

Under s41(7), a 'contract worker' is an individual supplied to a principal in furtherance of a contract such as is mentioned in s41(5)(b).

Employment Tribunal

... it was Vinci that had subjected the contractors to the detriment of being paid less than the LLW, not Royal Parks.

The claimants claimed that Royal Parks' failure to require Vinci to pay the LLW constituted unlawful indirect discrimination contrary to s41. The claimants pleaded that all employees of contractors providing outsourced services formed the pool for comparison; however, the evidence put before the ET related only to Royal Parks' directly employed staff and those retained under the Vinci contract. The ET proceeded on the basis that the Vinci staff made up the relevant pool. It found that the PCP placed the black and minority ethnic workers at a disproportionate disadvantage and that the decision not to pay contract workers the LLW was not justified as a proportionate means of achieving a legitimate aim.

Employment Appeal Tribunal

The EAT overturned the decision. It held that if the contractor's ability to offer terms to its workers is essentially dictated by the principal, the matter does fall within the scope of s41(1). In this case, it found that Royal Parks did effectively dictate the terms. However, it found ET's decision to proceed on the basis of using a Vinci-only pool was a fundamental error. As the claimants had failed to adduce any evidence of the application of the PCP to a pool that included all contractors, they had failed to prove a particular disadvantage.

Court of Appeal

The claimants appealed, arguing that ET was right to find a particular disadvantage based on a Vinci-only pool.

The CA dismissed the appeal but disagreed with the EAT's reasoning as to the application of s41 in these circumstances, finding that the claims did not fall in scope. Whilst the ET did not expressly address the question of whether the alleged discrimination fell within s41(1), the EAT did consider the issue and found the determining factor was whether the principal dictated the terms on which the contract workers were retained.

The CA held that the claimants had no claim against Royal Parks under s41(1) because the discrimination relied on related to a term of their contracts with Vinci. It held that the only natural reading of the phrase *'terms on which the principal allows the worker to do the work'* in s41(1)(a) is that it is concerned with a stipulation imposed by a principal on a worker as a condition of the worker being allowed to do the work, and not with any stipulation imposed by a principal on the worker's employer:

> *… it is artificial to the point of impossibility to describe the payment of LLW by [Royal Parks] as a term on which [Royal Parks] allows the Claimants to work …* [para 66]

In relation to any potential claim under s41(1)(d), the court found that it was Vinci that had subjected the contractors to the detriment of being paid less than the LLW, not Royal Parks.

The CA found that it would:

> *… be inconsistent with the rationale of that distinction to treat the terms of the worker's contract of employment as falling within section 41(1) even if they could be said to be to a greater or lesser extent controlled by the principal.* [para 68]

Turning to the pool for selection, the claimants' pleaded case was on the basis of the pool for comparison which included all contractors for outsourced services, not just those employed by Vinci. However, at no stage did it seek any disclosure from Royal Parks or from other contractors about the terms of the other outsourced contracts, the numbers working under them, or their ethnicity. The CA agreed with the EAT that the ET had erred in confining its analysis to the Vinci-only pool, finding that the claimants did not prove their pleaded case.

Comment

The decision provides useful guidance on the scope of protection afforded to contract workers under s41 EA, in particular in respect of what it means for a principal to permit a contract worker to work on certain terms. It will be a welcome outcome for employers that regularly outsource work, confirming that it would not be possible for a claim for contract worker discrimination to succeed in circumstances where the alleged discrimination arises from the terms of a contract worker's contract with their employer.

Nina Khuffash
Associate
Magrath Sheldrick LLP
nina.khuffash@magrath.co.uk

Liability of medical examiners as agents for purposes of vicarious liability in discrimination claims

Anderson v CAE Crewing Services Ltd ✦ [2024] EAT 78; May 22, 2024

Facts

Ms Jessica Anderson (JA) was employed by CAE Crewing Services Ltd (CCS) as a cabin crew member on a fixed term contract entered into on January 29, 2019. Members of cabin crew are required to hold a Fit to Fly Certificate (FTFC) issued by an aviation medical examiner (AME). The Civil Aviation Authority holds a register of AMEs approved to issue FTFCs. A FTFC is valid for five years from the date of issue, unless there is a change of circumstance.

JA suffered from bipolar disorder and a heart condition. Prior to joining CCS, JA was issued with a FTFC in 2017. In November 2018, JA was diagnosed with costochondritis (inflammation of the cartilage that joins the ribs to the sternum), which triggered a further medical examination by an AME. JA's crew manager at CCS, Ms Allison Doran (AD) arranged for an AME assessment with Dr Christopher Watts (CW). As part of the assessment, JA was asked to complete a form in which she disclosed her bipolar diagnosis. As a result of the disclosure, CW did not consider that he was qualified to assess JA in relation to her bipolar condition and confirmed that JA would need to be assessed separately by a psychiatrist before CW could consider issuing a FTFC. CW was not prepared to accept a report from JA's GP relating to her bipolar condition.

JA complained that the decision by CW to ask for a psychiatric report was discriminatory. JA engaged her own AME, Dr Rowley, who assessed her and issued her with a FTFC. JA provided this to CCS on January 17, 2019, confirming that she was cleared to fly. CCS decided to commission a third AME to consider whether JA was fit to fly. JA was examined by Dr Chris King (CK) for purposes of an AME assessment on February 27, 2019. CK also decided that he wanted to refer JA for a psychiatric assessment, given her bipolar diagnosis. JA similarly complained that the decision by CK to ask for a psychiatric report was discriminatory.

JA agreed to see a psychiatrist and was assessed on May 22, 2019, with a report being finalised on June 26, 2019. The psychiatric report was sent to CW and, once reviewed, CW issued JA with a FTFC on July 4, 2019.

JA accepted that CW and CK were not employed by CCS but argued that the two doctors were agents of CCS and therefore CCS was vicariously liable for any acts of discrimination by them.

Employment Tribunal

JA brought claims of direct discrimination on grounds of disability, discrimination arising from disability and harassment. The disability relied on by JA was her bipolar disorder. JA was still employed by CCS when she presented her claim but gave notice to terminate her employment prior to the full merits hearing.

Despite the parties agreeing that CW and CK were not employees, JA argued that CW was acting as an agent of CCS, given the extent to which her employer was keen to justify and to uphold his opinion over that of Dr Rowley whom JA had commissioned. CCS submitted that CW was not an agent of CCS but a self-employed consultant.

✦ [2024] IRLR 645

The tribunal found that CW and CK were both independent contractors engaged to provide a specific service, namely assessments for FTFCs. The tribunal did not find that there was any agency involved which would render CCS liable for any discriminatory acts of CW or CK. It concluded that there was nothing akin to an employment relationship and, as such, found that CCS was not vicariously liable for any acts of discrimination that may have been done by either CW or CK. JA was therefore unsuccessful in her claims of direct discrimination on grounds of disability, discrimination arising from disability and harassment.

Employment Appeal Tribunal

The EAT concluded that the ET had erred in applying the test under s109 of the Equality Act 2010 (EA).

S109 EA provides:

1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A -
a) from doing that thing, or
b) from doing anything of that description.

... employers need to take measures such as implementing policies and training to reduce the risks associated with vicarious liability for the acts or omissions of their agents, not just their employees.

The question was whether, on a proper application of the test set out in s109 EA, CW and CK were acting as agents of CCS and, if so, whether they did so with the authority of CCS, whether or not the acts complained of were done with CCS's knowledge or approval. The question of whether they acted as agents was not necessarily answered by determining whether they were independent contractors.

The EAT found that the ET had made limited findings about the contractual arrangements between CCS and CW and CK, with little consideration of the statutory/regulatory context. The matter was therefore remitted back to the ET for a redetermination of the claims.

Implications for practitioners

The EAT's analysis of s109 EA highlights the correct test to be applied when deciding whether someone was acting as an agent of the employer. The test is whether the contractors were acting on behalf of and with authority from the employer, rather than whether they were providing an independent service.

Being an independent contractor for employment status purposes does not preclude the contractors from acting as agents for discrimination law purposes. It is not necessary for there to be an employment relationship, or a relationship akin to employment, in order to establish an agency relationship.

This case is a reminder that employers need to take measures such as implementing policies and training to reduce the risks associated with vicarious liability for the acts or omissions of their agents, not just their employees.

Sacha Sokhi
Senior Associate
Cole Khan Solicitors LLP

EAT considers request for reasonable adjustments in light of employer's pending restructure

Cairns v Royal Mail [2024] EAT 129; July 23, 2024

Facts

The appellant, Mr Raymond Cairns (RC), was a long serving postman employed in a delivery role at the Royal Mail's (RM) Hendon delivery office in London. Following an accident in 2016 in which he sustained a knee injury, and an operation in February 2017 which revealed osteoarthritis, RC could no longer perform outdoor deliveries. As a result, he was moved to an indoor, supernumerary role.

On February 14, 2018, RC attended a meeting with RM following the preparation of an occupational health report which advised that he met his employer's criteria for ill-health retirement. At the meeting, RC asked whether there might be an alternative (permanent) indoor role following a projected future merger between the Hendon office and another office. At that time, RM did not know when the merger would happen, and, whilst enquiries were made, there were no other suitable vacancies to which RC could move.

On February 28, 2018, RC was dismissed by way of ill-health retirement. He unsuccessfully appealed the dismissal in May 2018.

Employment Tribunal

RC brought a claim for unfair dismissal, discrimination arising from disability pursuant to s15 of the Equality Act 2010 (EA) and failure to make reasonable adjustments under s20 EA.

The ET dismissed all three of RC's claims. The tribunal held that, at the time of dismissal, there was no relevant alternative employment which he could have done. Further, it considered that RM was not *'required to create a position for the employee, nor is he expected to bump employees out of a job'.* The tribunal's view was that, despite the respondent being a large employer, it should not be required to keep RC 'forever' in a surplus job which he had already been performing for nine months. For those reasons, it found that RC's dismissal was a proportionate means of achieving a legitimate aim. The ET also accepted evidence that any indoor role would require some ad hoc outdoor duties, deciding therefore that it would not be possible for RC to continue in such a role in any event.

Employment Appeal Tribunal

The EAT heard four grounds of appeal in respect of the ET's decisions relating to RC's s15 and s20 complaints, all of which focused on the employer's decision to reject his dismissal appeal in May 2018. RC did not appeal the ET's decision in relation to his claim for unfair dismissal.

Firstly, RC contended that the tribunal erred in respect of the s15 complaint, in that it failed to treat the decision to dismiss him and the decision to reject his appeal as *'a composite decision requiring justification'.* RC's case was that the ET had considered the appeal stage *'in substance only with whether the process had been fairly conducted'* (i.e., simply the questions of whether there had been an appeal hearing and had a union representative attended) but had failed to engage with his actual complaints.

Secondly, RC contended that the tribunal's decision was not *Meek*[1]-compliant because it failed to take into account several pieces of vital evidence. Namely, at the time of his appeal in May 2018, the merger had progressed significantly, such that RM knew that it was due to take place in June 2018, and that, as a result, there would be permanent indoor roles suitable for RC (including one which had in fact been earmarked for him by his union and two depot managers).

Ground 3 challenged the ET's conclusion that it was not reasonable to keep RC in a supernumerary role indefinitely. Given the change in circumstance at the time of RC's dismissal appeal, it was argued that the question should actually have been whether RM should have allowed him to remain in his role temporarily so that he could take a new, alternative indoor position following the merger; the tribunal had erred by failing to consider this question. RC contended therefore that *'it was not proportionate to the legitimate aim, or justified, to dismiss him'.*

Finally, RC argued that the ET erred in relation to the s20 complaint by accepting that any indoor role would include some outdoor duties while failing to consider whether it would be a reasonable adjustment to exempt him from those outdoor duties required in an indoor role.

... in considering the availability of alternative employment in order to provide reasonable adjustments, an employer should consider its future as well as its current circumstances.

Defending the ET's decision, RM cited the case of *O'Brien v Bolton St Catherine's Academy* [2017] EWCA Civ 145 which suggested that the outcome of an unfair dismissal complaint and a s15 complaint in relation to the same factual issues is often likely to be the same, noting that RC had not appealed the unfair dismissal claim. RM's view therefore was that the fact that the dismissal had been found to be fair should *'increase the EAT's confidence that the decision on the Equality Act complaints had been soundly reached'.* HHJ Auerbach disagreed, stating that the tribunal's conclusion that the dismissal was fair did not make *'good the deficiencies in its decision on the Equality Act complaints'.*

The EAT upheld RC's appeal. It did, however, note that this was not a case where it could substitute its own decision. Accordingly, the case was remitted for reconsideration to a different ET.

In its decision, the EAT stated that the tribunal had only focused on the factual situation at the time of RC's dismissal. In doing so, the ET had failed to consider the specific circumstances at the time of his dismissal appeal in May 2018, at which point the merger was to take place imminently.

This was important for two reasons. First, whilst the tribunal had found that there was no indoor role for RC *until* the merger went ahead, it had failed to answer the question of whether there would be no role when the merger *did* go ahead. Second, the ET had decided it was unreasonable to expect the employer to keep RC in a supernumerary role indefinitely but had failed to consider whether it was reasonable to keep RC in that role for a further few weeks until the merger took place, to allow him to take up a permanent indoor role. This error, the EAT said, constituted a failure by the ET to *'assess and determine a fundamental part'* of RC's case. The EAT also accepted RC's fourth ground of appeal that the tribunal had failed to consider whether it would be a reasonable adjustment to exempt RC from any outdoor duties occasionally required in an indoor role.

Comment

This case highlights that, in considering the availability of alternative employment in order to provide reasonable adjustments, an employer should consider its future as

1 *Meek v City of Birmingham District Council* [1987] IRLR 250

well as its current circumstances. Employers should have regard to any pending changes to its business, such as a prospective restructure or reorganisation, which may offer employment opportunities (albeit in the future) to an employee who otherwise faces dismissal. Essentially, the outcome here reminds employers to review and evaluate its circumstances at key intervals to ensure they are making decisions based on a complete and up-to-date set of facts.

Shannon Henderson
Solicitor
Leigh Day
shenderson@leighday.co.uk

1107

Tribunal's reasons for its decision must be clearly stated

Minis Childcare Ltd v Ms Z Hilton-Webb [2024] EAT 108; July 10, 2024

Implications for practitioners

This case highlights some of the complexities in bringing an indirect discrimination claim. It focuses on the importance of a tribunal giving clear and detailed reasoning for its decisions, especially in the area of indirect discrimination. If a decision is not clear, it can be vulnerable to appeal.

In this case the ET had not adequately explained why it considered that there was no legitimate aim, and it had not adequately dealt with the issue of whether the provision, criterion or practice (PCP) was objectively justified.

This case highlights ... the importance of a tribunal giving clear and detailed reasoning for its decisions.

Facts

Ms Z Hilton-Webb (ZHW) has Apert Syndrome which results in impaired vision. She brought various disability discrimination claims against her employer, Minis Childcare Ltd (MC).

MC had a policy of providing documents in font size 10 to 12. ZHW was unable to read documents in this font size, due to her disability.

Employment Tribunal

The original claim submitted to the ET concerned multiple claims of disability discrimination. One claim succeeded – indirect disability discrimination under s19 Equality Act 2010.

The ET held that MC's decision to provide documents in 'small font' was a PCP which placed ZHW at a substantial disadvantage compared to others who do not have a disability. MC stated that the reason it provided documents in small font was for management efficiency reasons.

The ET rejected this reasoning and concluded that:

> *With regard to … small font sizes, there is simply no objective justification for this. There is no legitimate aim, and it cannot be proportionate when the simple thing to do would be to provide documents in larger font.*

The ET rejected ZHW's claim for reasonable adjustments on the grounds that, as she had not explained *'her difficulty with documents in small font size to the Respondent at the time of the events in question',* MC did not know and could not have reasonably been expected to know that the font size put her at a substantial disadvantage. This decision was not appealed.

Employment Appeal Tribunal

MC appealed the ET's decision that the choice of font size was unjustified and consequently discriminatory against ZHW i.e. was not a proportionate means of achieving a legitimate aim.

MC accepted that it had applied a PCP of providing documents with a small font size, and that this put ZHW at a disadvantage when compared to people who were not disabled by having Apert Syndrome.

The EAT confirmed that ZHW had been indirectly discriminated against on grounds of disability by providing her with documents in small font size.

The EAT examined the decision of the ET and concluded that the reasoning given by the ET was insufficient to understand what it meant when it said there was *'no legitimate aim'* for the small font PCP, in circumstances where MC had asserted that the legitimate aim it pursued was 'efficient management'.

Judge Taylor stated that it would be helpful to break down the justification requirement further. The question for the ET was whether MC had a legitimate aim and whether the application of the PCP was a proportionate means of achieving that aim. MC must first assert and establish the aim. It is for the ET to then decide whether the aim is legitimate. MC must establish that the PCP was a means of achieving that aim. It is for the ET to decide whether the adoption of the PCP was a proportionate means of achieving that aim.

The duty to give reasons ... is a duty to give sufficient reasons so that the parties can understand why they won or lost and why the ET reached the decision.

The duty to give reasons was summarised by Cavanagh J in *Frame v The Governing Body of Llangiwg Primary School* UKEAT/0320/19/AT. This is a duty to give sufficient reasons so that the parties can understand why they won or lost and why the ET reached the decision.

The ET provided a single paragraph in its judgment, and so the key to this appeal was what the ET meant when it stated: *'there is simply no objective justification'* and that there is 'no legitimate aim'.

Judge Taylor considered various interpretations of the meaning of these words and concluded that he did not consider the reasons provided by the ET explained why it stated that there no *'no legitimate aim'.* The appeal therefore succeeded.

The case was sent back to the ET to decide whether MC had a legitimate aim behind the decision to provide documents in small font size and whether that aim could be objectively justified.

Jessica Hunt
Senior Associate
Leigh Day
jhunt@leighday.co.uk

1108

Material factor defence in equal pay

Scottish Water v Edgar ✦ [2024] EAT 32; March 6, 2024

Implications for practitioners

A failure of a respondent to evidence the identity of the relevant pay decision-maker and their contemporaneous mindset in an equal pay claim will not necessarily be fatal to a material factor defence (MFD). Whilst such evidence may be helpful, respondents can demonstrate the cause of the difference in pay in other ways, including with evidence postdating the pay decision.

Facts

A failure of a respondent to evidence the identity of the relevant pay decision-maker ... in an equal pay claim will not necessarily be fatal to a material factor defence.

Ms Lynne Edgar (LE) worked as a corporate affairs officer at Scottish Water (SW). This role fell within pay band C. LE and an external candidate, Mr Matthew Bingham (MB), both unsuccessfully applied for a corporate affairs specialist (band B) role at SW. During June and July 2021, an interviewer, Ms Reid, offered MB a corporate affairs officer job, 'signed-off' by SW's head of corporate relations, Mr Thompson.

MB started in the role on August 23, 2021. Whilst LE was paid £30,605, MB's pay was set at £36,500.

LE brought an equal pay claim against SW, relying on MB as her comparator.

SW defended the claim on the basis that LE did not do equal work to MB. It also advanced an MFD, arguing that the material factors of:

- skills-related or other relevant supplements
- experience
- responsibility and potential, and
- where, in conjunction with one or more of the above factors, cost

gave rise to the difference in pay between LE and MB and these factors were not tainted by sex discrimination.

The tribunal decided to determine the MFD before considering the question of equal work.

Employment Tribunal

The ET directed itself that the first two issues for it to determine in relation to SW's MFDs were:

1. to what extent, if at all, were the alleged material factors operating on the mind of the respondent's decision-maker in June / July 2021?
   and
2. if one or more of the alleged material factors were operating on the mind of the respondent's decision-maker, to what extent were they significant and relevant at that time?

The tribunal considered that, to determine these questions, it needed to confirm the identity of the pay decision-maker. It said that without identifying them it was not appropriate to speculate on what might have been in their mind at the relevant time.

The tribunal considered that the evidence lacked clarity as to the decision-maker's identity and rejected the possibility that it was Ms Reid or Mr Thompson. It found that SW had failed to evidence the identity of the decision-maker.

✦ [2024] IRLR 537

The respondent has the burden of proof of showing that an MFD is genuine and not a sham or pretence and that it is material in a causative sense. The tribunal concluded

that because SW had failed to evidence who the decision-maker was, it had failed to discharge its burden, and it therefore failed to establish an MFD.

The ET refused to consider evidence relating to MB and LE's comparative performance after the former's appointment, declaring such evidence to be *'completely irrelevant'* as at the time the pay decision was made, it could not have been known.

SW appealed the tribunal's decision on two grounds:

1. that the tribunal erred in law in its self-direction as to what was required to be proved to establish the MFD; and
2. that the tribunal, in its conduct of the preliminary hearing, showed actual and/or apparent bias against the appellant.

Employment Appeal Tribunal

The EAT upheld the appeal on the first ground, remitting the question of the MFD to be determined by a fresh tribunal. Before hearing the appeal, the EAT decided to hold over submissions on the second ground, which subsequently fell away as a result of the decision to remit the case to a fresh tribunal.

It will be important to guard against *post hoc* explanations being advanced as the MFD, particularly in cases where there is a lack of direct evidence of the reasons for a pay decision.

The EAT held that it was an error of law to conclude that identifying the decision-maker was essential. It considered that the tribunal had been fixated on this and consequently ignored a substantial amount of evidence and findings which were in fact relevant to the cause of the difference in pay.

The EAT cited *Development Scotland Co Ltd v Buchanan and others* EATS/0042/10, as noting that the issue of causation in an MFD is assessed objectively and demonstrating that while evidence of the subjective thought processes of decision-makers may well be helpful, it is not essential to proving the MFD, as a sufficient causal link between a factor and the pay decision can be established in other ways. A difference in pay may not arise from an identifiable decision of anyone about pay but from a prior event, such as a TUPE transfer. The EAT found that SW's failure to evidence a decision-maker was not therefore automatically fatal to its MFD.

The EAT ruled that the ET had also erred by refusing to consider comparative evidence of the respective skills and abilities of LE and MB from after MB's appointment. It said that such evidence was plainly relevant as it demonstrated a pleaded MFD – the difference in skills and abilities between LE and MB.

The EAT also criticised the tribunal's reasons as disproportionately lengthy and, in places, muddled and confused.

Final comment

The EAT's decision is an important reminder that when advancing an MFD it is not essential to establish a pay decision-maker and what that person had in mind when making their decision. It is possible to evidence factors causing a pay disparity in other ways. This decision is helpful for respondents who may have difficulty evidencing the identity of pay decision-makers and/or providing direct evidence of the factors they took into account when making their decision.

Whilst the EAT found such evidence relevant, from a claimant perspective one would hope that tribunals take care when giving weight to evidence relied on as demonstrating the cause of pay disparities which post-dates pay decisions. It will be important to guard against *post hoc* explanations being advanced as the MFD, particularly in cases where there is a lack of direct evidence of the reasons for a pay decision.

Fiona Byrne
Paralegal, **Leigh Day**

Roshan Croker
Solicitor, **Leigh Day**

Narrow causation test in part-time worker's less favourable treatment claim

Mr W Augustine v Data Cars Ltd [2024] EAT 117; July 15, 2024

Implications for practitioners

Part-time workers are protected from being treated less favourably because of their part-time status. However, there is conflicting case law on the test for causation in claims of less favourable treatment brought by part-time workers. This conflict arises from a difference in wording between the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (PTWR) and the Part-time Work Framework Directive. Reg 5(2) PTWR stipulates that the right to equal treatment applies if *'the treatment is on the ground that the worker is a part-time worker'.* However, the Directive provides that people shall not be discriminated against *'solely because they work part-time'*.

In this case, the EAT dealt with the question of whether a claimant's part-time status needs to be the 'sole cause' or an *'effective and predominant cause*' of the less favourable treatment. The EAT followed the approach set out by the Court of Session (Inner House) in *McMenemy v Captia Business Services Ltd* [2007] IRLR 400 that a worker's part-time status must be the sole cause of the less favourable treatment.

The EAT followed the approach ... that a worker's part-time status must be the sole cause of the less favourable treatment.

This will be an unwelcome judgment for claimants as the EAT has followed the narrower of the two tests. A particular concern for part-time workers could be, for example, where there are various reasons for the less favourable treatment with the claimant's part-time status being one of them.

Additionally, this case also highlights to practitioners the importance of detailed and careful descriptions of the less favourable treatment, as the EAT, taking into account the pro rata principle, held that the ET had erred in its finding that there was no less favourable treatment because the same fixed fee was applied to every worker.

Facts

The claimant, Mr W Augustine (WA), was a private hire driver who was a part-time worker for Data Cars Ltd. Private hire drivers for Data Cars Ltd worked a range of hours with the average being 43.17 hours per week. WA worked on average 34.8 hours per week. All drivers for Data Cars Ltd had to pay a 'circuit fee' of £148 per week, which gave the drivers access to Data Cars Ltd's booking system. This fee was the same for all drivers, irrespective of whether the driver worked full-time or part-time.

WA complained to the ET that the fixed flat rate circuit fee was contrary to the PTWR. WA relied on Reg 5 PTWR, which states that a part-time worker has the right not to be treated less favourably than a comparable full-time worker. His comparator worked an average of over 90 hours a week.

Employment Tribunal

The ET found that WA was not treated less favourably, as WA and his full-time comparator were treated in exactly the same way. The charging of the circuit fee applied to all private hire drivers, and all drivers were required to work a certain number of hours and complete a certain amount of jobs to cover the fee. It was found that, applying the test set out *McMenemy*, that the charging of the circuit fee could not be considered

less favourable treatment, as it was not done on the sole ground that the claimant was a part-time worker.

WA appealed to the EAT on the following grounds:

1. that the tribunal failed to take account of the fact that he was paying a higher circuit fee when considered as a proportion of his hours worked and/or pay;

and

2. the tribunal wrongly applied the test set out in *McMenemy*, which stated that part-time status must be the *sole* cause of the less favourable treatment and that an examination of the employer's intention was required.

WA argued that the test identified in *Carl v University of Sheffield* [2009] ICR 1286 should be applied; this provides that part-time status must be an effective cause of the treatment, understanding that the employer's intention is not determinative.

In its judgment, ... the EAT gave detailed reasons as to why it disagrees with *McMenemy.*

Employment Appeal Tribunal

The EAT held that the ET had erred in its approach to the issue of less favourable treatment. The EAT found that, in considering the circuit fee as a proportion of pay, the pro rata principle under Reg 5(3) PTWR would apply, and so the circuit fee represented a higher proportion of fares for a part-time driver compared to a full-time driver.

Additionally, the EAT found that CA's decision in *British Airways plc v Pinaud* [2019] ICR 487 applied, and so the ET was permitted to make a comparative assessment of the circuit fee as a proportion of hours worked, despite the narrow definition in Reg 5(3) which limits the pro rata principle to *'pay or other benefit'.*

Therefore, the EAT found that the tribunal failed to take into account that WA was paying a higher circuit fee than his full-time comparator when assessed as a proportion of hours worked and/or as a proportion of earnings. The EAT also held that the ET had erred in its consideration of the intent of the respondent and found that the fact that the employer had not intended to treat WA less favourably was irrelevant.

However, on the issue of causation, the EAT upheld the ET's decision that the claim failed because WA's part-time status was not the sole reason for the less favourable treatment. Although the EAT was not bound to follow the sole reason test in *McMenemy,* given that the decision in question relates to a legislative protection that extends to workers throughout Great Britain, the EAT decided there was a legitimate public interest in being consistent with decisions of other higher courts within Great Britain.

Comment

Although the EAT has followed the narrower test for causation in claims of less favourable treatment brought by part-time workers, the situation may not remain this way for long. In its judgment, the EAT states that, had the matter been open, it would have followed earlier English case law. In doing so, the EAT gave detailed reasons as to why it disagrees with *McMenemy*. The decision is being appealed and will be heard at the CA by July 7, 2025. Both employers and part-time workers should be wary of this pending appeal and the impact this may have in changing or strengthening the decisions set by this case.

Sean O'Donoghue
Paralegal
Leigh Day

Guidance on how the burden of proof operates in discrimination cases

Leicester City Council v Parmar ✦ [2024] EAT 85; June 4, 2024

Implications for practitioners

This is an important decision concerning the burden of proof. It is a welcome reminder about how the burden of proof operates and identifies what factors can be taken into account when considering whether the burden of proof has shifted in any given case.

Facts

Mrs B Parma (BP), a British national of Indian origin, was appointed head of service for Locality West within Leicester City Council's (the Council) Adult Social Care and Safeguarding division (ASC&SD) in 2005. BP was responsible for several teams within ASC&SD and reported to Ms Ruth Lake (RL), the division's director.

Prior to the events which led to the claim, BP had not been subjected to any disciplinary proceedings or performance measures.

HM, a white British head of service for another area, was heard swearing at RL during a telephone call in May 2018. RL discussed the incident with HM, who acknowledged that her behaviour was *'inappropriate and unprofessional.'* RL took no further action.

In November 2018, HM sent an email about handover arrangements which the Locality West staff found upsetting; BP complained to RL, alleging harassment and bullying, but RL did not take any action against HM.

BP raised further concerns about the tone of HM's communications during her one-to-one supervision meeting with RL in January 2019 and accused RL of having an unconscious bias against black and ethnic minority heads of service. RL asked BP if she was accusing her of being racist.

Meanwhile, the Locality West team leaders lodged a collective grievance against HM, stating that they felt 'devalued' and *'denigrated by the oppressive and inequitable treatment we have been subjected to on two occasions in a year'.*

On December 16, 2020, AE emailed RL raising concerns about the working relationship between Locality West and other service areas. She did not specifically complain about BP.

In February 2020, a principal social worker (JD) held a session with her colleagues, about which one of the attendees (JR) complained. JR sent an email suggesting that JD *'humiliated and denigrated'* her. JD replied that the content and tone of JR's email were *'unacceptable'* and raised her concerns with RL. RL offered mediation between JD and JR but did not instigate the formal disciplinary process.

In December 2020, SCC, an acting head of service described as white British, emailed RL stating that she no longer wanted to be mentored by BP. SCC raised some *'fairly low-level concerns'* about working relationships between local service areas. Although SCC did not explicitly complain about BP, RL contacted human resources to discuss her concerns about BP.

✦ [2024] IRLR 721

On January 4, 2021, there was an angry email exchange between staff about a case where safeguarding alerts had not been actioned. BP considered the dispute a

difference of opinion about when time alerts should be entered into the system and sought the opinion of a principal social worker.

Meanwhile, on January 7, 2021, AE complained about BP and her team, stating: *'The West locality has a long reputation of intimidating and unhelpful behaviour long before I or SR joined [the Council], and I cannot understand why they are still able to behave in the way they do.'* This led to a disciplinary investigation into BP's conduct and her temporary transfer to another location.

BP's formal disciplinary investigation meeting took place on February 19, 2021. The allegations were vague, alleging:

The ET found that the burden of proof shifted to the Council, requiring a non-discriminatory reason for the treatment to which BP had been subjected.

- failure to comply with agreed management/leadership standards, both ASC-specific and those set out in the code of conduct and professional social work standards;
- failure to ensure that the people BP directly managed behaved as per the agreed standards;
- her creation of an environment that was detrimental to individuals and the delivery of core functions, which could impact on people who need support.

On February 22, 2021, BP sent an email to the Mayor and elected councillors, raising whistleblowing issues and asserting racial discrimination against 'BAME' staff by RL.

The follow-up disciplinary investigation meeting with BP scheduled for February 24, 2021 had to be postponed due to her absence because of work-related stress from February 23, 2021 to March 25, 2021.

Caroline Tote was appointed to take over the disciplinary investigation. She held a follow-up meeting with BP on March 26, 2021, during which BP said:

> *I hope you understand that I have been interviewed for three hours now, and I still don't know what I have failed in. What code of conduct have I failed in? What professional standard have I failed in? Why can't somebody tell me what I have done wrong?*

BP was informed by Ms Tote on May 7, 2021 that there was no case to answer and that the disciplinary investigation had been concluded.

Employment Tribunal

BP brought a claim for race discrimination against the Council complaining that, amongst other things, the instigation of the disciplinary process and her temporary removal (suspension) from her head of service role constituted direct race discrimination under s13 of the Equality Act 2010 (EA).

She argued that RL had only commissioned disciplinary investigations against two employees comparable to BP, both of whom were of Asian origin. Moreover, RL had not commissioned any investigation against any white employees of comparable status.

The ET found that the burden of proof shifted to the Council, requiring a non-discriminatory reason for the treatment to which BP had been subjected. The ET was satisfied that there was a disparity in treatment between BP and others sharing her protected characteristic and other white employees who might also have been subject to formal disciplinary investigation but were dealt with informally [para 37-38].

The ET was troubled by RL's failure to initiate any formal disciplinary process in several comparable situations where an investigation might reasonably have been instigated and the fact that she chose not to do so when it concerned white employees.

The ET noted that:

> *The only other Head of Service to be the subject of a disciplinary investigation was JSB who is of Asian origin. The only other person of a comparable grade to the Claimant against whom a disciplinary investigation was commissioned by Ms Lake was KR, who is also of Asian origin. Ms Lake has not commissioned any disciplinary investigations against any white employees of a comparable status.*

RL was slow to move to formal measures when assessing allegations against white employees, but moved speedily to investigation and suspension when it concerned BP for alleged conduct which was either at the same or a lower level [para 41]. This, coupled with the following factual findings were sufficient to shift the burden, namely that:

- the only employees RL had ever disciplined were of Asian ethnicity [para 38];
- there was nothing of substance to start the investigation against BP [para 40];
- there was a failure to interview a crucial witness [para 40];
- the email sent by AE on December 16, 2020 raised general concerns about Locality West and not about BP in particular [para 40];
- there was a conscious decision by the Council (or its legal team) not to disclose highly relevant evidence.

The main issue raised on appeal concerned the application of s136 EA and whether the ET failed to consider the burden of proof as regards each allegation separately...

As for their non-discriminatory explanation, the Council asserted, amongst other things, that the disciplinary investigation against BP and her temporary removal were necessary to establish the facts and gather evidence. In rejecting this explanation, the ET expressed concern that the allegations against BP had never been particularised, finding that there was no potential misconduct in reality.

Accordingly, the ET concluded that the Council had not discharged the burden of proof and upheld BP's complaints of direct race discrimination for transferring her from her head of service role and causing the disciplinary investigation to be conducted against her. [para 43-45]

Employment Appeal Tribunal

The main issue raised on appeal concerned the application of s136 EA and whether the ET failed to consider the burden of proof as regards each allegation separately as required by *Essex County Council v Jarrett* [2015] UKEAT/ (per Langstaff J) [paras 56-57].

HHJ Tayler reviewed fundamental principles of law contained in the earlier cases before rejecting the Council's submission that *Jarrett* was authority for the proposition that in every case concerning multiple allegations of discrimination, the ET will err in law if it does not consider the application of s136 EA in respect of each allegation relied on:

> *The decision that it was an error of law to adopt a blanket approach must be seen in the context of the case in which there were multiple allegations against a number of individuals that were not apparently linked.* [para 57]

> *Similarly, I do not consider that Commissioner of Police of the Metropolis v Maxwell [2013] EqLR 680 EAT is authority for the proposition that it will never be an error of law to consider the burden of proof together for all of the allegations. There may be some circumstances in which a blanket approach is inappropriate, but others in which it is permissible. All depends on the facts of the case, including the nature and number of allegations and whether there are a number of alleged perpetrators. Save in the clearest of cases the EAT should be slow to decide that the Employment Tribunal, that was best placed to make that assessment, got it wrong.* [para 59]

As far as HHJ Tayler was concerned, *Jarrett* was very different to the instant case because the key allegations related solely to RL's conduct. The ET was entitled to consider the evidence overall in deciding whether the burden of proof had shifted, requiring the Council to prove that RL's actions were not discriminatory.

The second issue on appeal concerned the application of the burden of proof and whether BP had proved primary facts from which the ET *could* infer race discrimination. The Council relied on *Madarassy v Nomura International plc* [2007] ICR 867 in asserting that difference in status and treatment was insufficient to shift the burden of proof [paras 62-64]. In addressing the Council's argument, HHJ Tayler said:

> *It is important to note that Mummery LJ referred to the 'bare facts of difference in status and a difference in treatment', i.e., absent any other factors such as the extent to which the situations are similar and the specific nature of the treatment.* [para 64]

HHJ Tayler explained:

> *The analysis is highly context specific. Where such a comparison is made, as part of an analysis of a range of relevant factors, it is not valid to pick apart small components of the comparative analysis, and to trot out the well-worn phrase that there is nothing more than a mere difference of status and treatment, while ignoring all of the other relevant findings of the tribunal that contributed to the overall analysis.* [para 66]

... the ET was entitled to consider the evidence overall when deciding whether the burden of proof shifted so that the Council was required to prove that RL's actions were not discriminatory.

> *It is also important not to salami slice a judgment into multiple components, each of which is individually assessed, out of context, against the criteria of whether there is no more than a difference in status and difference of treatment and/or no more than an allegation of unreasonable conduct. If there are multiple examples of different treatment between those of different status, and of unfair treatment, it is unlikely to be a case where it can be said that there is mere difference in status and treatment and/or mere unfair treatment.* [para 71]

HHJ Tayler was satisfied that the ET's core reasoning was the opposite of a mere difference in status and difference of treatment, citing that the similarity of the circumstances, and the fact that several white employees were treated more favourably, obviously established more than a mere difference in treatment and status [para 73].

As far as HHJ Tayler was concerned, if what the ET found was not evidence which could support a claim of race discrimination, it was hard to imagine what would be.

Accordingly, HHJ Tayler held, dismissing the Council's appeal, that the ET was entitled to consider the evidence overall when deciding whether the burden of proof shifted so that the Council was required to prove that RL's actions were not discriminatory.

Comment

This case is a helpful reminder to ETs and practitioners alike of how the burden of proof operates in discrimination cases. ETs can be easily persuaded by the mantra regurgitated by representatives that *'mere difference in status and difference in treatment is insufficient to shift the burden'.* HHJ Tayler reminds us that Mummery LJ's dictum should be considered in its entirety and how important it is not to salami slice the application of the burden of proof out of context and assess it against the criteria of whether there is no more than a difference in status and difference of treatment and/or no more than an allegation of unreasonable conduct.

David Stephenson
Barrister, **Doughty Street Chambers**
d.stephenson@doughtystreet.co.uk

Named respondents liable even if employer is also found to be liable

Baldwin v Cleves School, Hodges and Miller ✦ [2024] EAT 66; May 3, 2024

Facts

Miss C Baldwin (CB) was employed by Cleves School (the school) as a newly qualified teacher (NQT) from September 2014 until CB's resignation on March 18, 2015. Ms Miller was designated CB's mentor. Mr Hodges was the headteacher of the school.

Because of ill health, at the time of accepting the role CB had not completed her postgraduate certificate in education (PGCE). CB had a number of absences during her first term at the school.

Employment Tribunal

CB resigned and brought claims for disability discrimination, victimisation and harassment against the school, Mr Hodges and Ms Miller. It was conceded that CB was disabled at the relevant time during her employment.

The ET found the school was liable under s109 of the Equality Act 2010 (EA) for two acts of disability discrimination done by the Mr Hodges and Ms Miller.

One concerned an email from Ms Miller to Ms Sternstein, who was CB's PGCE tutor.

There followed an exchange between Ms Miller and Ms Sternstein which the ET considered showed that the respondents were suspicious about whether CB had significant health issues which she had not disclosed to the school.

The other act concerned an NQT report on CB completed by Mr Hodges at the end of CB's first term at the school. The report included a comment that CB had '*not acted with integrity at all times*'. The tribunal found there was insufficient evidence to support this view and it had not been raised with CB before.

The ET dismissed separate claims against the individual respondents brought under s110 EA, saying their acts were only *'misguided attempts to address a complex situation'*. The ET also dismissed CB's other claims.

Employment Appeal Tribunal

CB appealed to the EAT. Initially she submitted six grounds of appeal, which were subsequently condensed into four grounds, one of which was withdrawn at the appeal hearing. The EAT considered three grounds of appeal.

The first ground claimed that the ET had erred in holding that the individual respondents were not liable for the acts of discrimination, and failed to consider s110 EA.

The EAT considered the wording of s110 EA as well as the history of the section in predecessor equality legislation.

S110 EA deals with the liability of employees and agents; it states as follows:

1) A person (A) contravenes this section if
a) A is an employee or agent,
b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and

✦ [2024] IRLR 637

c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

2) It does not matter whether, in any proceedings, the employer is found not to have contravened this Act by virtue of section 109(4).

3) A does not contravene this section if

a) A relies on a statement by the employer or principal that doing that thing is not a contravention of this Act, and

b) it is reasonable for A to do so.

4) A person (B) commits an offence if B knowingly or recklessly makes a statement mentioned in subsection (3)(a) which is false or misleading in a material respect. ....

6) Part 9 (enforcement) applies to a contravention of this section by A as if it were the contravention mentioned in subsection (1)(c).

The EAT considered that there was no discretion in the wording of s110 EA which allowed the ET to refuse to find against individual respondents if the conditions in that section were met.

The EAT noted that the school did not raise a defence under s109(4) EA with the consequence that acts of the individual respondents were treated as done by the school as their employer.

The EAT considered that there was no discretion in the wording of s110 EA which allowed the ET to refuse to find against individual respondents if the conditions in that section were met.

The EAT stated that it was implicit in the ET's findings that the conditions in s110(1) EA applied; namely, the individual respondents were employees or agents of the school and their acts were treated as done by the school under s109(1). The EAT stated that the unavoidable result of this was a finding of a contravention of s110 by the individual respondents also.

In respect of the first ground, the EAT held that as, on a proper construction of s110, the ET had no discretion to find that the second and third respondents were not liable, the tribunal had erred. The EAT substituted a finding of a contravention of s110 EA by the individual respondents in respect of their acts for which the school was liable. It noted that the situation might be different when it comes to remedy, and that an ET has discretion to split the responsibility to pay any award between respondents, not necessarily in equal proportions. The first ground of appeal was allowed.

CB's second ground claimed that the ET had made a procedural irregularity because it used the wrong list of issues with the consequence that one of the protected acts relied on by CB was missed.

During the appeal hearing it became clear that the parties were mistaken and the protected act had been included in the list of issues considered by the ET. The EAT granted CB permission to amend this second ground. However it later emerged in subsequent correspondence with the ET panel that, although it had failed to deal with one of the complaints of victimisation in its written reasons, the tribunal had considered this issue and adequately explained to the EAT why it had not upheld that particular complaint. The second ground of appeal was dismissed.

The third ground was a perversity challenge based on Mr Hodges's email of November 13, 2014. CB said the only rational conclusion open to the ET in respect of this email, in light of its content, was that it had to amount to harassment.

Dismissing the third ground, the EAT stated it was not persuaded that the complaint was ever alleged as an act of harassment. Further, in any event the EAT did not consider

the ground of appeal came close to the threshold for a perversity challenge. The EAT said it was far from clear that the email in question was 'related to' CB's disability in any event. Even if it was, it could not be said that '*the only possible conclusion was that the email had the purpose or effect of violating the Claimant's dignity, or of creating an "intimidating, hostile, degrading, humiliating or offensive environment for her" - or that it was reasonable for it to do so.*'

Implications for practitioners

This case is a good reminder for practitioners to advance a defence under s109(4) EA where possible and that named respondents cannot always be safe from liability merely because they were acting in the course of their employment.

Daniel Zona
Kingsley Napley LLP

Government's failure to enact some recommendations from the Windrush review was unlawful

R (On the application of Donald) v Secretary of State for the Home Department (with Black Equity Organisation, UNISON and Speaker of the House of Commons intervening) [2024] EWHC 1492; June 19, 2024

Implications for practitioners

This case challenged the government's decision not to implement a number of the recommendations made by Wendy Williams in the 'Windrush Lessons Learned review'[1] (Windrush review) which led to indirect discrimination contrary to Article 14 of the Human Rights Act 1998 and breaches of the public sector equality duty (PSED) in s149 of the Equality Act 2010 (EA). It cast a prominent spotlight on which government decisions can be placed under scrutiny by the court and how to identify a legitimate expectation, whether substantive or procedural.

This was a partial victory for the claimant and the intervenors. The judgment also contains helpful information and summarises important public law principles such as parliamentary privilege which are useful for practitioners.

Facts

In March 2020, the report of an inquiry conducted by Wendy Williams into the Windrush scandal was presented to parliament. The Windrush review confirmed that the Home Office had demonstrated *'an institutional ignorance and thoughtlessness towards the issue of race'.* Williams made thirty recommendations to ensure change and improvement so that history would not be repeated.

Although the Secretary of State for the Home Department (Home Secretary) initially promised to implement the recommendations in full, on January 20, 2023, the then Home Secretary, Suella Braverman MP announced she would not implement recommendations 3, 9 and 10. These stated:

> **Recommendation 3** – *In consultation with those affected, and building on the engagement and outreach that has already taken place, the department should run a programme of reconciliation events with members of the Windrush generation.*
>
> **Reommendation 9** – *The Home Secretary should introduce a Migrants' Commissioner responsible for speaking up for migrants and those affected by the system directly or indirectly.*
>
> **Recommendation 10** – *The government should review the remit and role of the ICIBI (Independent Chief Inspector of Borders and Immigration), to include consideration of giving the ICIBI more powers with regard to publishing reports.*

In response to this decision, Mr Trevor Donald (TD), one of the Windrush generation, brought a judicial review claim to challenge the decision of the Home Secretary which reneged on promises made to the public.

TD was born on August 6,1955 in Jamaica and came to the United Kingdom in 1967; the UK became his permanent residence for the next 43 years. On February 22, 2010, TD travelled to Jamaica to, among other reasons, attend his mother's funeral. When he returned to the UK, he was not permitted re-entry.

1 For a critique of the Windrush review, see [2021] Briefing 961 and [2018] Briefing 859

For the following nine years he was denied the right to return and live in a place he had called home since 1967. He was only granted re-entry when the Home Office responded to the Windrush scandal. TD was granted British citizenship on January 4, 2022.

A number of organisations acted as intervenors in the judicial review including UNISON, the largest trade union in the UK, and the Black Equity Organisation (BEO), as well as the speaker of the House of Commons.

The judge also took into account a number of other witness statements from the intervenors documenting the experiences of other individuals within the Windrush community and how they were denied the right to work, right to rent or were denied access to medical care despite permanently residing in the UK for decades.

High Court

TD argued that HS's decision was unlawful on five grounds, in that:

1. The decision not to implement recommendations 3, 9 and 10 was in breach of a substantive legitimate expectation which had been established by the government by its actions. These actions included a Comprehensive Improvement Plan (CIP) which the Home Office had published in response to the Windrush review.
2. A procedural legitimate expectation of consultation established through the government's actions had been unlawfully breached by the defendant.
3. The decision not to implement certain recommendations amounted to indirect discrimination which could not be objectively and reasonably justified.
4. The defendant failed to conduct the necessary inquiries required in law to satisfy the Tameside[2] duty of inquiry.
5. The defendant's decision not to implement recommendations 3, 9 and 10, did not comply with the requirements of the PSED.

... a procedural legitimate expectation [to consult] had been established regarding all three recommendations which had not been implemented.

The court heard oral submissions on behalf of the Home Secretary, TD, UNISON and BEO as well as written submissions made by the speaker of the House of Commons.

Grounds 1 and 2 – legitimate expectation (argued by TD)

TD submitted that the CIP which was published in response to the Windrush review contained a clear and unambiguous promise to implement all thirty of the recommendations made by Wendy Williams. As this promise was unqualified, it gave rise to a substantive legitimate expectation.

The court held that the CIP did not create an unambiguous promise; there was no explicit statement in the plan confirming that all recommendations would be implemented; nor did the text support TD's argument that the promise was implied. The court held that the CIP reflected a potential future plan in a policy area which is complex, and as such, the plan would be kept under review and could change.

Nevertheless, the court did uphold ground 2 stating that a procedural legitimate expectation had been established regarding all three recommendations which had not been implemented. This expectation arose as it would be conspicuously unfair not to consult with relevant stakeholders such as the Windrush community before changing the plan set out in the CIP.

The judge then had to determine whether the defendant had breached this procedural promise to consult. The judge held that sufficient consultation had taken place regarding recommendation 3 and, given the controversy and competing views surrounding whether to hold reconciliation events, the procedural legitimate expectation was not breached.

2 *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014

However, the same level of consultation did not take place in order to determine whether to continue with plans to implement recommendations 9 and 10 and this amounted to an unlawful breach.

Ground 3 – indirect discrimination (argued by BEO)

Under ground 3, the court examined whether the Home Secretary's decision amounted to indirect discrimination. It held that not implementing recommendation 3 was indirectly discriminatory. However, the Home Secretary was able to prove that not proceeding with reconciliation events satisfied a legitimate aim, namely that as there was a *'strong divergence of views'* about whether the events should be held, it was proportionate not to implement a divisive recommendation which could cause distress to some within the Windrush community. Ground 3 was not upheld

In relation to recommendations 9 and 10, the court was not satisfied that the Home Secretary had presented sufficient evidence or justification for deciding not to implement them; it accepted that there was a disproportionately prejudicial effect upon Windrush victims (including TD) from the policy decision not to proceed with the responses to the recommendations and therefore the decision did amount to indirect discrimination which could not be justified.

Ground 4 – duty to make reasonable inquiries (argued by TD)

Ground 4 relating to the duty to make reasonable inquiries was dismissed. The judge held that the high threshold required was not satisfied, stating *'no reasonable Secretary of State could have been satisfied that they possessed the necessary information to proceed to make a decision'* on responding to recommendations 9 and 10.

The failure to implement the recommendations was seen as disregarding the importance of preventing a future Windrush scandal.

Ground 5 – public sector equality duty (UNISON)

Finally, the court held that the PSED had been satisfied with regard to recommendation 3 due to the considerations mentioned above.

However, the government did breach its duty in relation to the refusal to introduce a Migrant's Commissioner (recommendation 9) and the refusal to expand the powers of the ICIBI (recommendation 10). To that end, UNISON's evidence was recognised as illustrating the devastating effects of the Windrush scandal and highlighted the ways in which the Secretary of State's decision to abandon these recommendations affected both Windrush victims and migrant workers more broadly. The failure to implement the recommendations was seen as disregarding the importance of preventing a future Windrush scandal. These factors paved the way for the critical conclusion that the Home Secretary had not paid due regard to the PSED. The judge was not satisfied that the defendant could prove she had considered the wider effects of the decision on the wider Black community, the migrant community as well as future migrants, the majority of whom would share the protected characteristic of race.

Comment

Within the current political landscape where immigration is constantly in the spotlight, it is important to take note of cases such as this where political promises amounting to procedural legitimate expectations were not honoured by the government and led to more harm to a community who had already experienced marked injustice and ill treatment. This highlights the importance of judicial reviews and the rule of law in holding politicians to account.

Shannon Salomone
Trainee solicitor – **UNISON in-house legal team**
s.salomone@unison.co.uk

Advocating for equality on an international stage

Grace Preston, senior policy & advocacy officer with the Traveller Movement (TM), reports on her attendance along with two TM colleagues at the UN Committee on the Elimination of Racial Discrimination.

In August, TM marked a significant milestone by attending the 113th session of the United Nations Committee on the Elimination of Racial Discrimination (CERD) in Geneva, Switzerland. This event, held at the UN Human Rights building, provided a vital platform for voicing the concerns of Romani (Gypsy), Roma, and Irish Traveller communities in the UK.

A focused agenda

TM's attendance was rooted in its commitment to highlighting the ongoing racial disparities faced by these communities. TM's comprehensive written submission to CERD detailed the appalling state of race and racism in England and critically examined how the government has failed to uphold the rights of Romani (Gypsy), Roma, and Irish Traveller communities and breached the International Convention on the Elimination of Racial Discrimination (ICERD). TM's submission highlighted in particular race hate crime, breaches of the right to equal treatment before courts and tribunals, and breaches of the right to employment, education and training, health, housing and the right to equal participation in cultural activities. TM emphasised that our communities do not enjoy equal access to the human rights and fundamental freedoms guaranteed to them under ICERD but instead experience a perpetual cycle of inequality.

TM's key recommendations collated some of the most pressing concerns faced by Romani (Gypsy), Roma, and Irish Traveller communities and called on the government to take immediate and meaningful action to uphold the rights enshrined in ICERD.

Thanks to funding from the Equality and Human Rights Commission, TM was able to send a 3-person delegation to the session, facilitating direct engagement with the members of CERD.

Making our voices heard

On the first day of the session, TM delivered a two-minute oral statement which focused on the racial inequalities experienced by our Romani (Gypsy), Roma, and Irish Traveller communities, and calling for urgent action by CERD. The statement served as a crucial reminder of the rights being compromised and set the stage for further discussion.

The CERD members then asked questions of the delegation. However, due to time constraints, not all attendees were able to contribute meaningfully to the dialogue, so TM documented all the questions posed during the session and submitted written responses to the committee's secretariat afterwards. This ensured that all concerns raised by the committee were thoroughly addressed and a continuous flow of communication was maintained.

The following day, TM attended an informal CERD meeting along with other NGOs. Prior to this session, representatives from various organisations met to coordinate their responses, with the aim of providing a broader perspective on the issues by including everyone attending. This cooperation and united action among the NGOs helped us to advocate for our marginalised communities and ensured a more diverse range of insights was presented to the committee.

Continuing the fight for rights

TM was heartened to see CERD's commitment in its concluding observations to tackling the issues facing Romani (Gypsy), Roma and Irish Traveller communities. It made recommendations addressing all the issues we raised and urges the government to

… take adequate measures to combat the structural discrimination and inequalities faced by ethnic minorities [and] address the root causes of racial discrimination and inequalities …

in most of the areas we had highlighted, including a recommendation to address environmental health hazards. This latter recommendation is so important for Traveller communities living in sites segregated from the settled community and close to environmental hazards.

TM is dedicated to amplifying the voices of our Romani (Gypsy), Roma, and Irish Traveller communities and holding the government accountable for its failure to fulfil its human rights obligations. The recent session in Geneva was not just a moment for sharing experiences; it was a rallying point for ongoing advocacy and the pursuit of justice for all our communities.

ECRI's 6th report on the UK

The European Commission against Racism and Intolerance's (ECRI) sixth report on the UK was published on October 25, 2024. Established by the Council of Europe, ECRI is an independent human rights monitoring body specialised in questions relating to the fight against racism, discrimination (on grounds of 'race', ethnic/national origin, colour, citizenship, religion, language, sexual orientation and gender identity), xenophobia, antisemitism and intolerance.

The report addresses a range of issues in the UK under the headings of effective equality and access to rights (covering equality bodies, inclusive education, irregularly present migrants and LGBTI[1] equality), hate speech and hate motivated violence, integration and inclusion (addressing migrants Roma and Travellers).

In relation to effective equality and access to rights, ECRI highlights the reduction in the annual budget of the Equality and Human Rights Commission (EHRC), from £60 million in 2008-9 to its present budget of £17.1 million for all its work. The impact of this reduction on staff numbers and its capacity to fulfil its full mandate is a matter of concern for the body. ECRI recommends that the UK authorities ensure sufficient resources for both the EHRC and the Equality Commission for Northern Ireland, which has seen its budget subject to successive yearly cuts for more than a decade, to allow these institutions to carry out their full mandates effectively.

ECRI observes 'with apprehension' that, following the resurgence of tensions and violence in the Middle East in the course of 2023, there was a drastic increase in hate speech against Jews with the Community Security Trust having recorded 4,103 antisemitic incidents in the UK in 2023, the highest total in a calendar year reported to the organisation. Likewise, there was a substantial increase in anti-Muslim hate speech, particularly online; it was informed by Tell MAMA that in the month of October 2023 alone, over 700 anti-Muslim hate incidents were logged, which amounted to a seven-fold increase over the same period in 2022.

ECRI also expressed deep concern about the significant recent *'increase in attacks, such as firebombing, against businesses owned by people with a migration background in Belfast, Northern Ireland, as well as about similar attacks against premises used for worship by religious minorities, notably mosques, in both of which there might be a degree of involvement by paramilitary groups, which police have reportedly been reluctant to investigate effectively for fear of upsetting the fragile peace prevailing between different paramilitary groups'.*

Among several recommendations to address hate speech, ECRI *'recommends that public figures, such as high-level officials and politicians are strongly encouraged to take a prompt, firm and public stance against racist, and LGBTI-phobic hate speech and react to any such expression with strong counter-hate speech messages and alternative speech, as well as promote understanding between communities, including by expressing solidarity with those targeted by hate speech'.*

In relation to asylum seekers, one aspect which ECRI focuses on is the difficulties caused by the withdrawal of their asylum support when they are granted refugee status; this support ceases 28 days after status is granted; within that period the refugee must find housing and apply for social security support. ECRI agrees that this is a 'major obstacle' to their smooth integration, stating that *'the short timescale of this move-on period, coupled with insufficient support for refugees to navigate the social security system and private housing market, and delays experienced in receiving documents needed to register for social security support, continues to leave many newly recognised refugees homeless and destitute.'*

ECRI recommends, *'as a matter of priority, that the UK authorities prolong the move-on period between the asylum support and the general social support systems well beyond 28 days to ensure that there is no gap in support, notably as regards housing and payments ensuring subsistence'.* This is one of two specific recommendations for which ECRI requests priority implementation by the UK and which it will follow up within the next two years.

1 ECRI defines LGBTI to mean persons identified or perceived as being lesbian, gay, bisexual, transgender or intersex.

The second is the development of *'a new national LGBTI plan to be developed and adopted in England in close consultation with relevant civil society actors, which should include concrete measurable goals with an accompanying timeline for their implementation and impact evaluation'.*

Finally, noting the criminalisation of trespass with a vehicle and the use of unauthorised encampments, and the fact that Gypsy, Roma and Traveller children continue to have the lowest school attainment of all ethnic groups in the UK,[2] ECRI calls on the UK authorities to *'adopt a UK-wide strategy specific to the "Gypsy", Roma and Traveller communities, after appropriate consultation with representatives of the GRT communities themselves, relevant civil society organisations and equality bodies, accompanied by sufficient funding for implementing the strategy and regular independent evaluations of it'*.

2 Shadow report to the Universal Periodic Review Working Group and UN Member States: focus report on Gypsy, Roma and Traveller Communities by Friends, Families and Travellers, March 2022, page 15.

ABBREVIATIONS

AC	Appeal Cases
ACAS	Advisory, Conciliation and Arbitration Service
All ER	All England law reports
AME	Aviation medical examiner
ASC	Adult social care
BAME	Black, Asian and minority ethnic
BEO	Black Equity Organisation
CA	Court of Appeal
CERD	Committee on the Elimination of Racial Discrimination
CSIH	Court of Session Inner House
CIP	Continuous improvement plan
Civ	Civil
DLA	Discrimination Law Association
EA	Equality Act 2010
EAT	Employment Appeal Tribunal
ECHR	European Convention on Human Rights 1950
ECRI	European Commission against Racism and Intolerance
EHRC	Equality and Human Rights Commission
EqLR	Equality Law Reports
ERB	Employment Rights Bill
ET	Employment Tribunal
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
FTFC	Fit to Fly Certificate
GP	General practitioner
GRC	Gender recognition certificate
GRT	Gypsy, Roma and Travellers
HC	High Court
HHJ	His/her honour judge
HRA 1998	Human Rights Act 1998
ICERD	International Convention on the Elimination of Racial Discrimination
ICIB	Independent Chief Inspector of Borders and Immigration
ICR	Industrial Case Reports
IRLR	Industrial Relations Law Reports
KB	King's Bench
LGBTI	Lesbian, gay, bisexual, transgender or intersex
LLP	Legal liability partnership
LLW	London Living Wage
MFD	Material factor defence
NGO	Non-governmental organisation
NQT	Newly qualified teacher
NYAS	National Youth Advocacy Service
PCP	Provision, criterion or practice
PGCE	Postgraduate certificate in education
PMB	Private Members Bill
PSED	Public sector equality duty
PTWR	Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000
QB	Queen's Bench
SC	Supreme Court
TM	The Traveller Movement
TUPE	Transfer of Undertakings (Protection of Employment) Regulations 2006
UKEAT	United Kingdom Employment Appeal Tribunal
UKSC	United Kingdom Supreme Court
WLUK	Westlaw United Kingdom
WLR	Weekly Law Reports