ISSN 1759-2925

Discrimination Law Association

# *Briefings* 836-847

Volume 62

November 2017

# Editorial *Access to justice*

Racial inequality and access to justice are topical and powerful issues. The Lammy Review has highlighted the disproportionate representation of BAME prisoners in the criminal justice system, and the Women's Budget Group and Runnymede Trust report that, for BME women, gender inequalities intersect with and compound racial inequalities. The Bach Commission has identified a crisis in the justice system and the need to restore access to justice as a fundamental public entitlement.

It is not surprising then that these themes which run through the very heart of society are reflected in this edition of *Briefings*.

The Traveller Movement's research on discrimination experienced by Gypsies, Roma and Travellers sets out in the respondents' own words how they cope with a world which denigrates their culture and ethnicity. From their first experiences at school through to applying for a job or seeking health services, the impact of racism and prejudice, means that many go through life with a strong distrust of educational, police or other authorities which they could turn to for help. As hiding their ethnicity is the dominant mechanism to cope with this discrimination and hatred, unsurprisingly, although 91% of the respondents had experienced discrimination, the majority of them do not seek legal redress.

In her review of the *UNISON* judgment which determined that the imposition of tribunal fees was unlawful as they infringed the rights of workers by denying them access to justice, Catherine Rayner, the DLA Chair, focuses on the SC's consideration of access to justice as a fundamental part of the UK's constitution. The SC emphasised the need for people to have unimpeded access to the courts to ensure that laws are applied and enforced and government lawfully carries out its functions. The SC emphasised that access to the courts is of value to the wider public interest, as well as to the individual. The court added that in order for rights to be effective *'and to achieve the social benefits which Parliament intended, they must be enforceable in practice'.*

Before the stage of accessing the courts, there is a more basic need which must be addressed. Discrimination practitioners will be familiar with the Bach Commission's view that: *'The law is meaningless unless people are supported to have the knowledge to understand it and the power to enforce it. … if you don't recognise when a dispute has a legal dimension then you can't resolve it through the justice system. Or if you recognise your problem has a legal remedy but don't have the means to access the justice system on a fair footing with your adversary, then the outcome that is reached is unlikely to be just. And if the expenses incurred by seeking justice are greater than the benefits from achieving it, then justice becomes irrelevant'.*

Improving people's access to legal remedies includes improving their legal knowledge and their awareness of where to go for information and support; it also includes building trust in the legal professions. In addition to calling for a new Right to Justice Act which would be monitored and enforced by a new, independent commission, the Bach Commission is calling for a *'national public legal education and advice strategy that improves the provision of information, education and advice in schools and in the community'.*

The DLA supports that call; it is active in supporting the improvement of public legal capacity and through its practitioner group meetings, it assists to improve the quality of assistance and support available to people who are, or who may be, facing discrimination. The EAT update, new in this edition, will be a regular feature aimed at assisting practitioners by summarising developments in practice and procedure and focusing on key points for practitioners.

However, ensuring that grass roots communities have knowledge of discrimination law and legal remedies is more complicated. Learning more about the barriers particular communities face and building relationships with them is a good start. As government is unlikely to take steps to support legal education among the public, we must redouble our efforts to make our services as accessible as possible.

**Geraldine Scullion**
Editor

**Please see page 35 for list of abbreviations**

*Briefings* is published by the Discrimination Law Association. Sent to members three times a year. Enquiries about membership to Discrimination Law Association, PO Box 63576, London, N6 9BB. Telephone 0845 4786375. E-mail info@discriminationlaw.org.uk.
**Editor:** Geraldine Scullion geraldinescullion@hotmail.co.uk. Designed by Alison Beanland. Printed by The Russell Press.
Unless otherwise stated, any opinions expressed in *Briefings* are those of the authors.

# ‘The last respectable form of racism’?
## The pervasive discrimination and prejudice experienced by Gypsies, Roma and Travellers

Geraldine Scullion, Briefings Editor and consultant advisor with the Traveller Movement (TM) reviews research published by TM* in September 2017 which highlights the prejudice and discrimination faced by Gypsy, Roma and Traveller (GRT) people in their everyday lives. The research findings describe an experience of prejudice which is seemingly so common that it has become normalised for many members of these communities. The research highlights insurmountable barriers which deny access to justice and which result in public authorities and others not being challenged or held to account. This pervasive experience of discrimination has led to a withdrawal from, and lack of trust in, those who could assist GRT people to challenge discrimination and hold public bodies to account. This report will be a useful tool for discrimination practitioners to understand the hurdles the GRT communities must overcome and to assist them to bring such challenges.

### Background

As long ago as 2004 the Commission for Racial Equality described discrimination against GRT people as *‘the last respectable form of racism’*;[1] yet the Equality and Human Rights Commission’s (EHRC) last report confirms that they continue to experience multiple disadvantage, bias and hostility.[2]

The EHRC reports that GRT communities in Britain are disadvantaged in education, health, the workplace and the justice system. Gypsy and Traveller children are far less likely to get the minimum number of GCSEs compared to their White British peers. Gypsy and Traveller communities have poorer heath; they have a lower life expectancy (10-12 years lower than the national average), higher infant mortality rates (3 times higher than the national average), lower rates of child immunisation, and a higher prevalence of anxiety and depression compared to other groups.

One possible explanation for the significantly worse outcomes they experience is the widespread discrimination these communities face, particularly from the public, the police and other authorities.

In relation to Roma people specifically, the EHRC’s 2015 report noted evidence which suggested that half of Britons had an unfavourable view of Roma people,[3] and the European Commission’s conclusion in 2013 that the UK had failed to make progress on four of the 23 steps to fight discrimination set out in its 2011 Framework for National Roma Integration Strategies.[4]

When TM’s survey asked *‘Have you ever been discriminated against because you are a Gypsy, Roma or a Traveller?’* shockingly 91 per cent of respondents replied ‘Yes’.[5]

### Traveller Movement’s online survey

TM circulated its survey via social media between February 2016 and July 2017; 214 GRT people aged 18+ took part, making it one of the largest surveys conducted among the GRT communities in the UK.[6]

Informed by TM’s 17 years’ experience working with GRT individuals and communities, the survey questions explored experiences of racism and discrimination in the following areas:

- Education, employment, healthcare, and policing
- Access to services
- Hate crime and hate speech
- Coping mechanisms
- Seeking help.

The survey findings in each area are summarised below; the respondents’ voices speak out in this report and give a startling and shocking insight into their experiences.

1. BBC 2004, CRE examines treatment of gypsies
2. EHRC *Is Britain Fairer? The state of equality and human rights* 2015 p.85
3. 2014 Global Attitudes Survey, Pew Research Center, 2014
4. European Commission, 2013
5. http://travellermovement.org.uk/wp-content/uploads/TMreportFinalWeb1.pdf
6. E.g. Lane, P., Spencer, S. and Jones, A. (2014): *Gypsy, Traveller and Roma: Experts by Experience. Reviewing UK Progress on the European Union Framework for National Roma Integration Strategies* Anglia Ruskin University

* **The Traveller Movement** is a national community charity promoting inclusion and community engagement with Gypsy, Roma and Traveller communities. TM seeks to empower and support Gypsy, Roma and Traveller communities to advocate for the full implementation of their human rights; http://**www.travellermovement.org.uk**

## EDUCATION

*Schools are the worst.*
*Gypsy children are constantly bullied*

Seventy per cent of respondents experienced discrimination and bullying at every level of the education system, from pre-school to university. The most prevalent areas were the conduct of teachers and bullying by other pupils/students.

### Teachers perpetuating stereotypes

Teachers were frequently reported perpetuating cultural stereotypes, particularly around illiteracy, having poor engagement with parents and overlooking bullying and racism.

*Even the teachers would call our family the "Gypsy family"– like we were a disease.*

Teachers were accused of assuming a GRT child would fail because of their ethnicity and expecting their GRT pupils to be illiterate.

*Not being taught in the same way as settled children as teachers thought it was a waste of time.*

Some pupils spoke of how if they displayed strong educational understanding, they were met with *'incredulity'* while many spoke of being *'separated into lower educated class groups'* without tests for capabilities. One pupil claimed a teacher said: *'There is no point teaching you, you will only end up tarmacking drives'.*

> *"The teachers at my school were worse than the pupils for highlighting that I was different*

### Poor teacher engagement with parents

*Because me mam couldn't read or write, they belittled her.*

Students reported that teachers made their parents, or themselves as parents, feel uncomfortable and inadequate.

*A head teacher [was] showing me and my child around her school. [She] was perfectly polite until I told her we were Travellers. She then launched into a rude and extremely judgmental lecture on personal hygiene and time keeping. I took my child to a different school.*

### Teachers overlooking bullying and racism

*When I reported racist bullying aged 14, I was told by the head teacher to 'tone down the Traveller thing' and maybe it would stop. Even though I had no control over my accent, or how I look and I don't know how to stop it or tone it down.*

### Bullying by other pupils/students and hiding ethnicity

Bullying by other children was the second most common experience of discrimination in schools.

Many parents told of how their children and they themselves had experienced racist name calling. This was often combined with a sense that schools did not treat instances of GRT bullying seriously – *'Yes, the children get called Gy*o [or Pi**y] and the teachers will not record it as a race hate incident.'*

Respondents also spoke of wider social isolation.

*Couldn't sleep over at my friend's house because her mother said Gypsy children would steal.*

Bullying and discrimination were also reported by two university students experiencing discrimination at post-graduate level.

*As a PhD student, I have been treated as an oddity or as incompetent by my peers and professors.*

## EMPLOYMENT

Forty-nine per cent of respondents experienced discrimination in employment.

*I went for a cleaning job; when I told her where I lived … the pub owner said 'we don't serve your sort and I would not employ you'.*

### Discrimination in recruitment

Employees' experiences included direct racist comments such as being told they could not have a job because as a *'Gypsy, I was too untrustworthy'*. Some applicants said they did not put their ethnicity in job or training course application forms.

*I wouldn't tell them I'm Romany till I had the job; I had to hide on my CV [that] I lived on a site so I can get a job.*

The same approach applied when completing equality and diversity monitoring forms.

*It's a sad fact but whenever I receive an equalities form, I never tick the Irish Traveller box. I feel like I would be treated differently. I now have a managerial position and hope to encourage recruitment of people within the community and a fair view of their lifestyle and culture.*

Some respondents said they altered their accent to secure a job, whilst others stated they were 'White British' to avoid discrimination.

*I am now in a job where I have identified myself as White British for the first time so that I reduce the impact of my cultural identity affecting my employment.*

### Losing a job after revealing GRT identity

Eleven workers provided examples of being fired after revealing their ethnicity, including cases of co-workers refusing to work with them:

*I have worked for a company and I was asked not to come back because the other men refused to work with a Gypsy.*

> *I would not say I am a Traveller anymore*

### Hiding ethnicity in work

Fifty-six respondents said they hid their GRT ethnicity while in employment.

*In my first job at a fast food restaurant, I changed my accent and wore makeup etc. so as they wouldn't know I was a Traveller.*

Hiding ethnicity was also used to ensure that employees wouldn't be overlooked for promotions, with one health and safety officer explaining *'if I divulged my ethnic roots, then I would be passed over on many occasions'.*

Many felt a sense of sadness and frustration that they had to hide their ethnicity and identity.

*[I hide my ethnicity] all the time. [I own] shops that would go bankrupt if customers knew I were Gypsy, even my staff are racist against Gypsies but don't realise I employ them, pay their taxes, National Insurance & pensions for them.*

## HEALTHCARE

Despite the known health disparities among the GRT community, 30 per cent of respondents experienced discrimination when accessing health care. Examples included being refused registration with a GP surgery because they had no permanent address or their address was on a caravan site.

> *My family would never say we was Gypsies in case they refused to give us health care*

*I stopped using the camp address because they always look down on us. I now use my mother-in-law's house address because it doesn't draw [attention] when I'm making appointments.*

*I was having a baby and passing blood. I tried to get an appointment with the doctor's but was not able to. I went to A&E where I waited three hours. After being seen by a nurse, I was told to go back and see the doctor as it wasn't an emergency. I returned to the doctor's surgery; they said I had to have a permanent address so I told them I was staying at a hotel and gave that address. When I finally saw the doctor, he said I was very ill and was upset with the staff.*

One parent said that GPs repeatedly *'refused help for my child's hernia because [we] were of no fixed abode'.*

Respondents also reported that they regularly hid their ethnicity in order to access health services.

*I'm registered as white British; it's just easier – why run the risk?*

## POLICING

Over 50 respondents reported mistreatment or perceived harassment by the police.

*[Repeatedly] being stopped, questioned and sometimes searched by the police who freely admitted their only reason for doing so was because we were Travellers.*

*Having the local police stop and question me every time I went out shopping, as I was a 'known criminal' despite never having a criminal record.*

Respondents' comments on the police ranged from feeling 'harassed' to having their claims of racism not taken seriously.

*The police don't take racism against Gypsies as valid.*

> *The police refuse to turn up when vigilantes are trying to burn you out*

## ACCESS TO SERVICES

Fifty-five per cent of the respondents were refused access to services because of their ethnicity, the most common example of which was denial of service in pubs and restaurants. Eighty-two respondents blamed pubs when providing examples of discrimination and over 40 mentioned restaurants.

*I walked into a pub. The landlord shouted: 'Oi you', I said 'who me?' He shouted again 'Yeah you, fuck off we don't want your sort in here'. I had never been in there before. Was with a couple of mates; we were all parked up on a*

*field nearby, which we had permission for because we are circus people. None of us drank much at all and it is very unusual for us to visit a pub. We said nothing, left and went for a pint in a different pub but I made sure to take my trilby off first.*

## HATE CRIME AND HATE SPEECH

Seventy-seven per cent of respondents were victims of hate speech/hate crime either often (38%) or sometimes (39%).

*Random people would just shout 'Dirty fucking Pi**ys', 'Get out of my country', 'I will burn your caravan down when you sleep!' and at one point a woman screamed at my 9-year-old sister 'Dirty thieves who should have been deported. Even the young one' (even though we was born in England).*

Individuals told of regular racist abuse in public, including both verbal and physical assault.

*Been called Gy*o or Pi**y in front of my children.*

*People making comments that we're all thieves and that was accepted.*

*Have been called a Gy*o and a Pi**y as a child by adults and as an adult; these terms including tinker have been used at times by people who think it's funny.*

Some respondents provided first hand examples of physical attacks on them or their property because someone disliked their ethnicity.

*Was physically assaulted by a man who said he was tired of Pi**ys taking over 'his country'.*

Respondents also described abuse on social media, including as part of campaigns and protests in local areas against the presence of GRT people or Traveller sites.

*Locals protesting to us being in the area, posting lies on social media, local councillors making personal vendettas, having caravans stoned by local youths, harassment by police.*

## COPING MECHANISMS

Seventy-six per cent of respondents hid their ethnicity to avoid racism and discrimination.

*All the time it has become part of life if nobody knows what you are they cannot attack you.*

Many described speaking with a different accent, wearing plain black clothes, giving friend's settled addresses when required, and pretending to be Irish or Mediterranean in order not to disclose their GRT background.

*[I hide my ethnicity] every day! I wear very plain black clothes, hair in a bun and glasses on, talk quiet or hardly at all to people just to not have the hate put towards me as, if I'm alone in towns, it gets scary as I have been followed to my car and had stone thrown at me and my car before by several men.*

Parents frequently reported having to tell their children to behave differently to avoid discrimination.

*As a child, my mother told us to say we were Portuguese rather than Romany.*

Some individuals resorted to hiding their ethnicity in social situations and with friends for fear of social exclusion and isolation.

*All the time. I won't tell anyone I am a Traveller until I have known them for a month or more. Until I feel that I can judge their reaction.*

## SEEKING HELP

Seventy-seven per cent of respondents had not looked for any legal help after experiencing discrimination.

*It will never stop so why bother.*

*Grown a thick layer of skin.*

The view was expressed that there was 'no point' in seeking legal help, as was the belief that many of the institutions and organisations tasked with addressing discrimination and hate crime would not take them seriously because of their ethnicity.

*Pointless as they would just look at my case and throw it out because I'm a Traveller.*

Alongside low levels of institutional trust, respondents also highlighted the mistrust the settled community has towards GRT individuals and communities.

*Who cares if we live or die?*

*No one helps you report it to the police; and they just give you a crime number, report it to the boss of the places and they say they will 'talk' to them but never seem to do anything. It's the last acceptable form of racism.*

Others explained how when they had sought advice, the treatment they received made them feel worse: *'I got advice but not helpful as we are looked down on as vermin.'*

> *"They always assume we wasn't worth the time or just plain lying*

## Failure of government

None of TM's research findings will come as a surprise to government bodies or public bodies tasked with providing health, education and criminal justice or other services on an equitable basis to the public, including the GRT community.

TM and other GRT NGOs have been making government aware of the ineffectiveness of government policy for decades. The UN CERD[7], CEDAW[8] and CRC[9] as well as the European Commission on Racism and Intolerance[10] among other bodies have highlighted failures in improving the health and educational outcomes and tackling discrimination. The Lammy Review[11] has highlighted the over-representation of GRT children and adults in the criminal justice system. Government bodies are fully aware of the problems but there is no political will to address them.

The Women and Equalities Committee is currently holding an inquiry into what happened as a result of the government's 28 commitments to tackle inequalities faced by Gypsies and Travellers which a ministerial working group published in 2012.[12] Part of the Committee's remit is to investigate the effectiveness of government policy-making and implementation, and how it can tackle such continuing inequalities.

Not only has no government body been held accountable for the failure to reduce these inequalities, in TM's opinion, government's actions, and inactions, have made the lives of GRT people even more insecure and increased the disadvantages they face.

Aside from the impact of its austerity policies, its legal aid budget cuts and the reduction in advice services, to name but a few, particular GRT focused government policies have contributed and continue to contribute to the marginalisation of these communities.

The government's failure to provide appropriate accommodation has a wide impact, as noted by the UN's Special Rapporteur on Adequate Housing who highlighted that *'appropriate and culturally adequate residential and transit accommodation is often at the root of the stigma and discrimination faced by Gypsies and Travellers [and underpins] a range of other problems, from access to education or work to appropriate health care or inclusion in community life.'*[13] Additional difficulties have been created by the change in 2015 to the criteria by which Gypsies and Travellers are defined for the purposes of planning law, and in 2016 the removal of the statutory duty on local housing authorities to assess the needs of Gypsies and Travellers [see Briefing 785].

Spending cuts to, and a reduction in the remit of, local education authorities caused by the growth of independent academies, has resulted in a dramatic loss of expertise from educationalists who previously supported GRT children and families and this has created difficulties in co-ordinating responses at local level which could otherwise target GRT children's poor educational attainment.

English local authorities have been cutting their Traveller Education Support Services since 2011. Despite an equality impact assessment which highlighted a negative impact on Gypsy and Traveller (GT) children, the Welsh government axed its previous specific per pupil grant for GT pupils in 2015 and subsumed it into a new Education Improvement Grant which has no link with GT pupils and does not target their needs. TM is concerned that the loss of Traveller Education Services has resulted in loss of ring fenced funding for specific support and initiatives for GRT pupils, loss of data on these pupils and diminished resources for those pupils not currently engaged with the education system.[14]

## Lack of evidential data

Without accurate official statistical data to measure the impact of government policies on GRT communities, no action will be taken to redress the inequalities they undoubtedly face.

The first Census to record GRT identity was the 2011 Census; before then they did not exist, for statistical purposes anyway. The police, youth justice and health authorities still do not record the ethnicity of GRT users. Despite the Prime Minister's intention to address 'burning injustices' among ethnic minorities in Britain by making data publicly available, GRT individuals do not appear in many of the categories on the new government Race Disparity Audit website; for example, there are no GRT statistics for policing (stop and search, youth cautions, numbers of arrests), courts, sentencing and tribunals, prison and custody incidents or health (with the exception of experiences of GP services) as,

7. CERD/C/GBR/CO/21-23, August 201
8. CEDAW/C/GBR/CO/7, July 2013
9. CRC/C/GBR/CO/5, May-June 2016
10. ECRI Monitoring Report on the UK, CRI(2016)38, October 2016
11. *The Lammy Review An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System*; September 2017
12. Progress report by the ministerial working group on tackling inequalities experienced by Gypsies and Travellers https://www.gov.uk/government/publications/reducing-inequalities-for-gypsies-and-travellers-progress-report
13. Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik; Addendum; Mission to the United Kingdom of Great Britain and Northern Ireland; A/HRC/25/54/Add.2, [2013] para 69.
14. See TM's submission to the Human Rights Council, September 2016; http://travellermovement.org.uk/wp-content/uploads/TM-fully-referenced-endorsed-submission-to-the-UPR-2016-1.pdf

even when individuals do self-identify, they are merged with 'White' or 'Other' ethnic minority categories.

Where ethnic monitoring data does exist for GRT communities – such as in education – the inequalities are stark and shocking. For example GRT school pupils have the lowest attainment of all ethnic groups throughout their school years. Only around a quarter of Gypsy and Roma pupils achieved a good level of development at age five, *'making them around three times less likely to do so than average. At key stage 4 the disparity is wider; in 2015/16 the Attainment 8 score for Gypsy and Roma pupils was 20 points compared with the English average of 50 points.'* [15]

TM has campaigned for public authorities to include Gypsies, Roma and Travellers in their ethnic monitoring categories in line with the 2011 Census. Without such data, there is no pressure on public bodies to ensure that their services meet the needs of these users and there is no evidence to show that they are meeting their s149 EA public sector equality duties.

In February 2017 TM secured a commitment from the Minister for Families, Victims and Young People to implement the 2011 census categories in the youth justice system; it was also informed by the Home Office earlier this year that the police will be rolling out these categories across all forces in England and Wales; the latter changes should take effect in 2018 with data being available in 2019. However, despite extensive lobbying with senior officials at NHS England and the Department of Health, no changes in the ethnic monitoring categories used in the health services have been promised by the health departments.

## Conclusion

In her foreword to TM's research report Baroness Sal Brinton referred to the lasting impact of 'traumatic experiences of prejudice and discrimination' on GRT communities which, together with negative experiences in school, has *'fuelled a lifelong impression that British society does not value or respect their culture and certainly does not recognise the rich contribution they make'.*

This widespread distrust for institutions and authorities means that many GRT individuals do not make complaints of discrimination and so this goes unchallenged and private and public service providers and government bodies are not held to account.

Patrick O'Leary, Irish Traveller and Traveller rights activist, and the complainant in *O'Leary v Allied Domecq* (unreported Central London County Court, CL.950275-79, August 2000) which determined that Irish Travellers are a legally protected ethnic group, speaks about the extent of discrimination in the foreword to TM's research report, saying: *'… what breaks my heart is that too many of us still see this as a fact of life. Something we can do nothing about. Too many of us think there's no point in getting legal help because 'what's the point!'*

Discrimination practitioners need to be aware that in addition to barriers created for many by ill health and poor educational attainment, there are the barriers of mistrust which have been created by the experience of marginalisation and discrimination for generations. Beginning at school, negative experiences with authorities and public institutions have encouraged and maintain a culture of self-reliance, resilience and low expectations of change in the status quo.

Many GRT people are not aware of the services which could help them bring forward discrimination complaints and in any event, they do not expect to be believed by lawyers or judges.

TM has established an Equality and Social Justice Unit to start to tackle this gap. The ESJU is facilitating GRT led training with a local lawyer's association on the youth sentencing guidelines which came into effect in June 2017; the training will also address what the community expects from its legal advisors. Knowing your client and their unique culture and history as well as the barriers they must overcome to approach and work with lawyers in the first place, can assist improve the service lawyers provide. TM believes that this training will help to break down the barriers of mistrust and ensure that powerful action is taken to finally bring to an end widespread unlawful discrimination and the inequality of services experienced by the GRT community.

15. Cabinet Office *Race Disparity Audit Summary Findings from the Ethnicity Facts and Figures Website*, October 2017; page 19 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/650723/RDAweb.pdf

# EAT practice and procedure update

This EAT practice and procedure update is a new feature in *Briefings*. The aim is to briefly highlight the main points arising from cases in which the EAT has confirmed developments in practice and procedure. The focus will be on the practical implications for practitioners. The intention is to provide further regular updates.

**Witness orders:**

*Jones v Secretary of State for Business, Innovation and Skills* UKEAT/0238/16/DM; June 29, 2017

*Outcome*

The ET's decision to grant a witness order and then fail to inform the other side that it had been granted meant that the unrepresented claimant had suffered an unfair trial. Communication from one party to the ET without copying the other side should almost never occur and was especially serious where one party was unrepresented, *R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 158 followed.

*Brief facts*

The EAT held that where the ET had granted a witness order without informing the unrepresented claimant, the judgment was unsafe for material irregularity. Rule 60 requires the ET to notify parties of a decision made without a hearing. The claimant was unaware of his right to ask for an adjournment to call rebuttal evidence. The case was remitted to a fresh ET.

*Implications for practitioners*

- Parties should copy the other side in when communicating with the ET particularly where the other party is unrepresented
- When making a witness order the ET should notify both parties
- EJs should remind parties at a hearing where only one party is represented that both the represented party and the tribunal had a responsibility to ensure that the unrepresented party would not be prejudiced by their lack of representation.

**Deposit orders:**

*Tree v South East Coast Ambulance Service NHS Foundation Trust* UKEAT/0043/17/LA; July 4, 2017

*Outcome*

A deposit order was overturned where the ET failed to properly consider the way the claimant was putting her disability claim. When making a deposit order there must be a proper basis for doubting the likelihood of an employee being able to establish the facts essential to make good their claims.

*Brief facts*

The ET made a deposit order of its own volition at a preliminary hearing despite that the claimant had clarified the basis of her claim under s15 EA 2010.

The EAT held that the deposit order process was not to be used instead of case management orders such as further particulars or amendment. The s15 claim was that the respondent had sought to avoid making reasonable adjustments and wished to avoid its future obligations. There was no need to show motive for the purposes of s15, following *Pnaiser v NHS England* [2016] IRLR 170.

*Implications for practitioners*

- Deposit orders are not a substitute for case management orders
- Where the claim has been clarified and a dispute of fact remains it would be a matter for a full merits hearing
- Orders for further particulars and amendments are properly to be used for case management.

837 **Compensation awards:**
*De Souza v Vinci Construction (UK) Ltd* [2017] EWCA Civ 879; [2017] IRLR 844; July 4, 2017

### *Outcome*
A *Simmons v Castle* uplift of 10% applies to injury to feelings awards in discrimination cases.

### *Brief facts*
The CA reversed the EAT's finding that the *Simmons* uplift applied to neither the personal injury nor the injury to feelings award. The CA held that s124(6) EA required discrimination awards correspond with that which could be awarded by the county court. Accordingly, *Simmons v Castle* uplifts should be applied to injury to feelings as well as psychiatric injury.

### *Implications for practitioners*
- *Simmons v Castle* uplift of 10% applies to injury to feelings and psychiatric injury awards (arising out of discrimination) in discrimination cases
- Note that for claims issued on or after September 11, 2017 they are subject to the uplifted categories of compensation in any event; lower band (less serious cases): £800 to £8,400; middle band: £8,400 to £25,200; upper band (the most serious cases): £25,200 to £42,000; and exceptional cases: over £42,000.

**Effect of procedural irregularity:**
*NHS TDA v Saiger and Ors; North Cumbria University Hospitals NHS Trust v Saiger and Ors*
UKEAT/0167/15/LA; UKEAT/0276/15/LA; July 17, 2017

### *Outcome*
A procedural irregularity in and of itself does not amount to an error of law. For the appeal court to intervene it must be established that it has led to an unjust or unfair result.

### *Brief facts*
In general terms, the claimant complained of victimisation for the failure to obtain a role to which he was well suited having previously pursued a successful discrimination claim against the Trust.

One ground of the respondents' appeal was that there had been a serious procedural irregularity by the ET when it reached certain determinations without giving the witness a proper opportunity to comment on that proposition or inviting the parties to make submissions about it.

As a matter of law the EAT concluded that in order for an appeal on the basis of procedural irregularity to succeed, it must be able to conclude that it would be 'unjust' to allow the ET's decision to stand.

The EAT further considered the implications of the 'rule' in *Browne v Dunn* [1893] 6 R 67, namely that where evidence is not challenged specifically, it must be accepted. Such a rule was impractical, undesirable and should admit of exceptions. Depending on the context and circumstances of the case, deciding whether there has been *'procedural unfairness will involve a consideration of all of the evidence, how the matter stood at the end of all of the evidence and what the parties and the Tribunal should have recognised from that material was still in issue in the case'*. Every failure to put every particular aspect of a case does not amount to a serious procedural failure.

### *Implications for practitioners*
- Not every procedural irregularity amounts to an error of law. Care must be taken in considering whether any irregularity led to the ET reaching an unjust outcome.
- The EAT has confirmed that proportionate cross-examination is, despite *Browne v Dunn*, to be welcomed in the modern era.
- When considering the areas of contention, however, a basic question should be asked: '*why not cross-examine on the point?'* Failure to cross-examine remains the exception rather than the rule.

**Litigation friend at the ET:**
*Jhuti v Royal Mail* UKEAT/0061/17/RN & UKEAT/0062/17/RN, July 31, 2017

### *Outcome*

While there is no express power provided by the Employment Tribunal Act 1996 (ETA) or the 2013 Rules made under it, the ET has the power to appoint a litigation friend in circumstances where otherwise a litigant who lacks capacity to conduct litigation would have no means of accessing justice or achieving a remedy for a legal wrong.

### *Brief facts*

The claimant's solicitor was concerned about her capacity to give instructions and applied to the ET to appoint a 'litigation friend'. The application was refused as the EJ considered there was no power to do so following the judgment in *Johnson v Edwardian International Hotels Ltd etc.*

The EAT held that Schedule 1 paragraph 29 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 confer a broad power to make case management orders and should be interpreted with the overriding objective to deal with cases fairly and justly ensuring parties are on an equal footing as much as possible.

### *Implications for practitioners*

- Evidence required – the burden of proof is on the party asserting capacity was lacking
- The litigation friend must fairly and competently conduct proceedings, have no personal interest in litigation or adverse interest to protected party
- Evidence is required to support the litigation friend's suitability and agreement to act.

**Early conciliation:**
*De Mota v (1) ADR Network; (2) The Co-operative Group Ltd* UKEAT/0305/16/DA, September 13, 2017

### *Outcome*

The early conciliation (EC) process is not to become a source of satellite litigation. An ET must take an EC certificate at face value rather than analyse the process leading to it. The ET further erred in concluding that it was a mandatory requirement of an EC certificate that it must name only one respondent. The claim was validly presented.

### *Brief facts*

The claimant sought to pursue various complaints against two respondents: 'ADR Network' (the trading name for a driver-supplier company legally named PPF Group Ltd) and 'the Co-operative Group' (again a trading name whose correct legal name is the Co-operative Legal Group Ltd). English was not the claimant's first language. The EC form, completed by the claimant's friend but in his presence, encompassed 'ADR Network and the Co-operative Group.'

Acas did not reject the form and instead issued an EC certificate confirming with standard wording that the prospective complainant had complied with the requirement to conciliate under s18A ETA 1996 against both 'ADR Network and The Co-operative Group.'

The ET1 against these entities was filed using the same EC number. The ET agreed with the respondents' contention that due to a failure to enter conciliation against the correct entities and to pursue on the basis of a single form/certificate, the tribunal had no jurisdiction.

The EAT roundly rejected this approach, particularly given the claimant's position as a *'meagrely resourced non-native English speaker who was unrepresented when he contacted Acas'*. Building on earlier EAT decisions, it held that the sole focus was upon the existence of a certificate. It is not compulsory to disclose details as to any complaint or to actively conciliate. The process leading to a certificate should not be the subject of criticism, examination or satellite litigation. There is no reason why a certificate cannot be made out against two individuals provided the Acas officer has accepted it as valid.

### *Implications for practitioners*

- The EAT has now on five occasions deprecated technical points being taken on EC procedure once a certificate has been obtained. There is no sensible scope now left for jurisdictional arguments: the requirements begin and end with the existence of a certificate.

**Elaine Banton** 7BR Chambers and **Christopher Milsom** Cloisters

# SC finds ET fees unlawful as denying access to justice

*UNISON v The Lord Chancellor* [2017] UKSC 51, July 26, 2017

In August 2017 the SC determined that Employment Tribunal fees introduced in 2013 were unlawful from the outset because they were destined to infringe the constitutional rights of workers by denying them access to justice.

UNISON had filed a claim for judicial review of the fees regime on a number of grounds, including gender discrimination. Despite some stark evidence before the courts about affordability and impact on access to justice, all the lower courts rejected the application.

The immediate result of the SC judgment was the quashing of the 2013 fees rules; this means firstly that no further fees have been charged under the regulations and refunds must be made to those who have already paid them.

### The nature of the power being exercised

S42(1) of the Tribunals, Courts and Enforcement Act 2007 (the 2007 Act) provides that the Lord Chancellor may by order prescribe fees payable in respect of anything dealt with by the First-tier and Upper Tribunals or by an 'added tribunal'. S42(3) defines an 'added tribunal' as a tribunal specified in an order made by the Lord Chancellor. The ET and the EAT were so specified by the Added Tribunals (Employment Tribunals and Employment Appeal Tribunal) Order 2013 (SI 2013/1892).

The 2007 Act is thus the primary legislation which gives power to the minister to prescribe fees for courts and tribunals. In this case the two objectives underlying the introduction of fees were accepted as legitimate. Those were:

a) To use fees to make resources available to the justice system thus assisting in access to justice
b) Deterring frivolous tribunal claims thus ensuring resources available to deal with valid claims, furthering access to justice.

The imposition of fees must not however prevent access to justice; a fees order will be ultra vires if there is a risk that it causes persons to effectively be prevented from accessing justice, stated Lord Reed [para 87].

Even if the legislation did allow a limitation or intrusion on a right to access justice, such power would always be subject to an implied limitation that the degree of intrusion must be no greater than is justified by the objectives which the measure is intended to serve.

### The ability to pay the fee

Lord Reed underlined the fact that the legal principle of proportionality, common in EU law, is also a fundamental principle of the UK common law.

However the SC further stated that the ability of a particular individual to pay the fee, is not determinative of the proportionality of that fee. The common law already recognises that an interference with an individual's access to the courts which is NOT insurmountable, will still be unlawful if it cannot be justified as necessary to meet a legitimate objective.

The Lord Chancellor argued that the fees order could only be unlawful if a person could be proved to have been prevented from accessing justice. He argued that claimants could pay the fees, if they cut back on other expenditure and that access to justice was not prevented where the decision whether or not to make a claim was the result of making a choice of whether to pay a fee, or spending one's income in another way.

The SC disagreed. It was not necessary for the court to have conclusive evidence that fees have prevented people from bringing cases; it was enough that evidence demonstrated a real risk that people had been prevented from bringing cases. In this case, the available evidence did demonstrate a real risk.

### The evidence

The SC accepted there had been a significant and sustained fall in the number of ET cases being brought of between 66-70%, and concluded therefore that a significant number of people had found fees unaffordable.

Secondly, Acas had carried out research which suggested that 10% of those who went to Acas but did not get resolution and did not then proceed with claims, decided not to proceed because they could not afford to do so. There was no explanation from government as to why this evidence was not accepted.

Thirdly, the SC recognised that a claim to the ET is not in the nature of a consumer choice, but is the result of a practical compulsion. Unless there is a valid and accessible mechanism for enforcing the rights given to workers which all parties are aware of and which they know can and will be used, rights can become meaningless. Workers go to an ET not because they choose to but because they need to enforce rights, often

to compensate for job loss, or to expose discrimination or recover unpaid wages.

Fourthly, the SC considered that the fees remission scheme did not make the fees regime affordable but was such as to render some types of claim futile or irrational. Claims which had no monetary value, or which were for smaller amounts were simply not worth pursuing. Put another way, justice in these cases was simply too expensive.

The SC rejected the Lord Chancellor's argument that for the deterrent effect of fees, the higher the fee, the more effective they would be at delivering the objective.

> *It is elementary economics, and plain common sense, that the revenue derived from the supply of services is not maximised by maximising the price. In order to obtain the maximum revenue, it is necessary to identify the optimal price, which depends on the price elasticity of demand* [para 10].

### The fundamental point about access to justice

The judgment places the right to access to justice at the centre of the discussion about the level of fees. The SC did not find that any level of fees would be unlawful, but that the fees and remission provisions set in the ET under the 2013 Order were unlawful because they were unaffordable to many people in any realistic sense.

The SC rejected the approach of government as ignoring the reality of peoples lives. It failed to understand that expenditure which the government suggested was non-essential and could be saved to pay ET fees, is often expenditure which will simply be incurred at a later date. It will not be saved, but postponed. The SC determined that the affordability issue becomes relevant to the principle of effectiveness if the court could reach a conclusion that fees were realistically unaffordable to individuals with typical financial circumstances.

Lord Reed set out why access to justice is a fundamental part of the UK's constitution:

> *Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them.Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other.*
>
> *Access to the courts is not, therefore, of value only to the particular individuals involved* [para 68-69].

The point for claimants and their lawyers is that access to justice does not depend upon a case having substantial merit, since litigation and the development of case law has a wider public interest and the possibility of litigation is an important aspect of the rule of law:

> *When Parliament passes laws creating employment rights, for example, it does so not merely in order to confer benefits on individual employees, but because it has decided that it is in the public interest that those rights should be given effect. It does not envisage that every case of a breach of those rights will result in a claim before an ET. But the possibility of claims being brought by employees whose rights are infringed must exist, if employment relationships are to be based on respect for those rights. Equally, although it is often desirable that claims arising out of alleged breaches of employment rights should be resolved by negotiation or mediation, those procedures can only work fairly and properly if they are backed up by the knowledge on both sides that a fair and just system of adjudication will be available if they fail. Otherwise, the party in the stronger bargaining position will always prevail. It is thus the claims which are brought before an ET which enable legislation to have the deterrent and other effects which Parliament intended, provide authoritative guidance as to its meaning and application,and under-pin alternative methods of dispute resolution* [paras 71-72].

Looking at the particular nature of employment claims, the SC recognised that:

> *Relationships between employers and employees are generally characterised by an imbalance of economic power. Recognising the vulnerability of employees to exploitation, discrimination, and other undesirable practices, and the social problems which can result, Parliament has long intervened in those relationships so as to confer statutory rights on employees, rather than leaving their rights to be determined by freedom of contract. … In order for the rights conferred on employees to be effective, and to achieve the social benefits which Parliament intended, they must be enforceable in practice* [para 6].

### What happens now?

Aside from government regulations on reclaiming fees, there are other issues for claimants. Many advisors will have reinstated or issued claims out of time for claimants who had been deterred by the introduction of fees from bringing claim.

An ET can only hear an out-of-time claim if the claimant demonstrates that either it was not reasonably

838 practicable to bring the claim (for example unfair dismissal) or that it is just and equitable to extend time (for example, discrimination cases).

What is not clear is how the ET will deal with the *UNISON* judgment. It is hoped that its considerations will focus on the reason for not proceeding, rather than questions about the affordability of fees; so that if a claimant can establish that the real or main reason for not proceeding was the fees, the ET will have jurisdiction to hear the claim.

How far time can be extended and whether claims can still be filed on this basis beyond a three month period (or longer period to take account of Acas conciliation procedures) is less straight forward and is likely to require submissions on reasons for a delay as with any out of time application.

The real message for any claimant who has not yet made a claim but who may have a valid historic case, is to seek advice as soon as possible.

For claimants and their representatives who have already paid the fee on an active or ended case, the government has created a repayment scheme which includes a 0.5% interest rate. (See page 32 for more information.)

Whilst many questions remain, the judgment forcefully underlines the importance of access to justice as part of the UK's constitutional landscape being a reality for users of the justice system. The SC in a judgment which is both strong on principle and detailed in its criticism of the government's approach, also restates the importance of private litigation as a public good.

**Catherine Rayner**
Barrister 7BR, Chair DLA

839 Briefing 839

## Spouses' pension rights – sexual orientation – non-retroactivity of EU Law

*Walker v Innospec Limited and others* [2017] UKSC 47; July 12, 2017

### Facts

Mr Walker (W) joined the pension scheme of his employer Innospec Limited (IL) on January 2, 1980, where he worked until his retirement on March 31, 2003. W entered into a civil partnership with a man on January 23, 2006, approximately a year after the Civil Partnership Act 2004 came into force on December 5, 2005. They have married subsequently. IL informed W that in the event of his death, his spouse would only receive a survivor's pension of around £1,000 per annum, whilst the amount payable would have been approximately £45,700 per annum if W had been in a heterosexual marriage, or if he married a woman in the future. The company relied on paragraph 18 schedule 9 of the Equality Act 2010 (EA), which states that the right to a benefit, facility, or service may be prevented or restricted for homosexual married couples or civil partners, provided the right to it accrued before December 5, 2005, or if it is payable in respect of periods of service before that date.

### Employment Tribunal

W brought a claim against IL and the trustees of the pension scheme in 2012. He argued that the pension scheme breached Directive 2000/78/EC (the Equality Framework Directive) which ensures equal treatment in employment and occupation, because it treated him less favourably than a heterosexual married person in a similar situation.

IL argued that the scheme did not result in direct discrimination, and if it amounted to indirect discrimination, the restriction was justified, as it was necessary to ensure the scheme's proper funding. The ET unanimously ruled that the scheme was in fact both directly and indirectly discriminatory, finding that the respondents ought to have interpreted paragraph 18 in a manner as to render it compatible with the Equality Framework Directive.

### Employment Appeal Tribunal

IL appealed the decision in 2014 and the Secretary of State for Work and Pensions joined as an interested party in support of Innospec. The EAT allowed the appeal, finding that paragraph 18 was compatible with EU law, which included the principle of non-retroactivity. The EAT went on to find that, had it held differently, it would also have found that it was not possible to read paragraph 18 to be compatible with EU law.

In reaching these conclusions, the EAT considered that since the unequal treatment occurred at the point at which the pension benefit began to accrue and this was before December 2, 2003, the transposition deadline of the Equality Framework Directive, the non-retroactivity rule precluded the application of the equal treatment protection in that Directive. The EAT relied on the *Barber v Guardian Royal Exchange* C-262/88 and *Ten Oever* C-109/91 cases of the CJEU, in which the question of non-retroactivity had been considered in respect of non-discrimination provisions within EU law.

The EAT considered that those rulings confirm that where pensions accrue on a discriminatory but lawful basis, the payer is not obliged to remedy past discrimination despite it being unlawful at the moment the pension comes into payment. For this reason, the EAT also concluded that it could not disapply paragraph 18. The EAT added that, in the alternative, if paragraph 18 was indeed incompatible with the Directive, the tribunal did not have the power to interpret it to make it compatible with EU law. The legislator's intent to create a temporal exception to the non-discrimination rule was deemed to be specific and clear, and nullifying it would run against '*the grain of the legislation*'.

The EAT went on to consider and reject the discrimination arguments made by the IL. On its analysis, W's treatment amounted to direct discrimination and, if this were not accepted, unjustifiable indirect discrimination. However, given its above findings and the existence of paragraph 18, this was immaterial and the appeal was allowed.

## Court of Appeal

W appealed. The CA considered two relevant EU principles, namely, the 'non-retroactivity' principle which prohibits retroactive effects of legislation unless intended by the legislator, and the 'future effects' principle, which stipulates that amending law applies to '*future effects of a situation which arose under the law as it stood before amendment*'.

The CA, like the EAT, relied on the *Barber* and *Ten Oever* line of CJEU jurisprudence to hold that entitlement to a survivor's pension was 'permanently fixed' as it is accumulated, and its legal effects ended upon the end of service. The '*future effects principle*' thus could not protect W, and the non-retroactivity principle precluded equal payment of the survivor's pension. Accordingly, W's appeal failed.

## Supreme Court

The SC unanimously allowed W's appeal.

### *The rule against retroactive legislation*

The SC concurred with the CA that determining whether the legal effects of a situation have ended, or more specifically, whether the pension was 'permanently fixed', provided the answer as to whether the temporal exception in paragraph 18 is to be considered incompatible with the Equality Framework Directive.

However, the SC found that the CA erroneously read the principles of 'non-retroactivity', 'future effects' and the corollary analysis of fixed versus continuing legal effects into the *Barber* and *Ten Oever* judgments of the CJEU, for those principles apply only to EU *legislation*. That line of case law, according to the SC, established the exceptional temporal limitation of the effects of new *judgments* of the CJEU, which generally have retrospective effect. In the *Barber* ruling, the CJEU interpreted existing EU law to have increased the scope of protection from discrimination in the area of pension entitlements. Allowing the ruling to have retrospective effect would have had severe financial consequences for pension funds. The CA had incorrectly applied this temporal limitation to deny W the right to rely on the Equality Framework Directive.

The SC went on to hold that the moment of evaluating whether W has been treated unequally is when the survivor's pension falls due, not when it accrues, thus overruling both the EAT and CA on this point. Indeed, if W married a woman after his retirement, she would be entitled to a spouse's pension. The SC found that the appellant was entitled to a spouse's pension for his surviving partner.

Lord Kerr, who delivered the leading judgment, stated: '*The period during which he acquired that entitlement had nothing whatever to do with its fulfilment*' [para 56]. The SC relied on the CJEU's ruling in *Römer* C-147/08, Briefing 598, to conclude that although W did not have the right to claim a spouse's survivor's pension for his husband before the transposition deadline of the Equality Framework Directive, the calculation of the entitlement payment was to be on the basis of his entire service time, even before the entry into force of the Directive.

Turning to W's remedy and, relying on the CJEU rulings in *Römer* and *Maruko* C 267/06, Briefing 485, the SC ruled that unless there was evidence of severe economic or social consequences arising from providing W equal access to the survivor's pension entitlements for his husband, there is no reason for unequal treatment

839 with respect to payment of said pension.

Therefore, the SC ruled that the exception in paragraph 18 of Schedule 9 EA, to the extent that it authorised a restriction of payment of benefits based on periods of service before December 5, 2005, was incompatible with the Equality Framework Directive and held that it must be disapplied. In addition, W was deemed to be entitled to a spouse's pension calculated based on all the years of his service with Innospec.

### Comment

The ruling of the SC is a welcome development which will have a significant positive impact on many gay married couples. According to a 2017 House of Commons briefing, although approximately two-thirds of occupational pension scheme voluntarily pay the same survivor's benefits to spouses, civil partners and unmarried same-sex and different-sex partners, one-third have been using the exception in paragraph 18 Schedule 9 EA to legally discriminate against survivors from gay relationships. Those schemes will now have to be amended in order to equalise survivor's pension entitlements for same-sex married couples.

After W's initial ET victory in 2012, MPs proposed an amendment to the EA to remove the exception in paragraph 18. The government took the position that employers and pension trusts would be unreasonably burdened by such repeal, as they could not have taken account of retrospective financial obligations arising from the introduction of civil partnerships in December 5, 2005, and it fought against its removal both legislatively and in the courts. The Secretary of State for Work and Pensions was an interested party in the *Walker* proceedings from the EAT onwards, arguing *inter alia* that civil partners and married persons are not in a comparable position in regard to pension entitlements. Its position has been roundly rejected by the SC.

**Pouya Fard and Joanna Whiteman**
Equal Rights Trust

840 Briefing 840

## Indirect discrimination untangled

*Naeem v Secretary of State for Justice* [2017] UKSC 27; April 5, 2017

### Implications for practitioners

In *Home Office (UK Border Agency) v Essop* [2017] UKSC 27; Briefing 830, the SC held that a claimant bringing a claim of indirect discrimination does not need to be able to identify the reason why the group sharing its protected characteristic is put at a particular disadvantage for the purpose of s19(b) of the Equality Act 2010 (EA). In *Naeem*, which was heard at the same time, the SC considered the different but related question of whether the reason for the group or individual disadvantage has to be related to the protected characteristic in question.

Following this judgment it will now be easier for claimants to establish indirect discrimination. An employee will only have to show that a policy or practice adopted by their employer disadvantages a protected group in which they are included. This can often be done by looking at statistical information. It is now clear that there is no need to go further and analyse the detail of the reason why the group is at a disadvantage, something which it is often difficult for claimants to know or fully understand.

### Facts

Mr Naeem (N) was an imam working as a chaplain in the prison service (PS). Within the PS some chaplains are employed on a salaried basis under contracts of employment and some are engaged on a sessional basis as and when required and paid at an hourly rate. Before 2002, Muslim chaplains were engaged on a sessional basis only. The PS stated that this was due to its belief that there were not enough Muslim prisoners to justify employing a Muslim chaplain on a salaried basis. N began working as a prison chaplain at HMP Bullingdon in June 2001, at first on a sessional basis but in October 2004 he became a salaried employee.

The PS operates an incremental pay scale, with (usually) annual increments in pay in addition to cost of living increases, until the top of the scale is reached. When N became an employee, it would take 17 years to progress from the bottom of the pay scale to the top. The PS had begun implementing changes to shorten this progression to six years; however this was interrupted by government constraints and a pay freeze from 2010/11 onwards.

N brought proceedings complaining that the incremental pay scheme was indirectly discriminatory against Muslim or Asian chaplains as it resulted in them being paid less that Christian chaplains in a post where length of service served no useful purpose as a reflection of ability or experience. When the proceedings were launched in April 2011 the average basic pay for Muslim chaplains was £31,847, whereas the average basic pay for Christian chaplains was £33,811. It was common ground that the PCP in question was the prison pay scheme for chaplains.

The question in *Naeem* concerned both whether the claimant could show he was put at a particular disadvantage (s19(2)(c) EA) and also whether the respondent could justify the disadvantage (s19(2)(d)).

### Previous decisions

It is interesting to note that the claim failed on different grounds at each stage of its appeal, with the SC dismissing the reasoning of the EAT and the CA and reinstating the ET's original decision.

The ET found that the pay scheme was indirectly discriminatory in relation to both race and religion but that it was objectively justifiable as a proportionate means of achieving a legitimate aim. The tribunal identified the objective as '*rewarding length of service and increased experience… that is clearly a serious objective which represents a real organisational need'.* [para 27]

The EAT concluded that the ET had applied the wrong pool for comparison; it held that the pool should only contain chaplains who started after 2002. On that basis there was no difference in pay, and the scheme was not indirectly discriminatory as the pay of both Muslim and Christian chaplains who started after 2002 would progress equally. The EAT went on to consider whether the scheme was justified: it concluded that the aim was legitimate but the tribunal should have considered other possible ways of modifying the scheme so as to avoid the disadvantage.

The CA dismissed N's appeal on a different ground. It held that when considering particular disadvantage, it was not enough to show that the length of service criterion had a disparate impact upon Muslim chaplains, it was also necessary to show that the reason for that disparate impact was something peculiar to the protected characteristic in question (see Briefing 778 for an analysis of the CA judgment). It concluded that the reason for the difference in pay was the use of employment contracts for Christian chaplains only prior to 2002: this was not itself unlawful discrimination and so not sufficiently related to the protected characteristic.

### Supreme Court

In giving judgment in Naeem's and Essop's combined appeals, Lady Hale, with whom all the other justices agreed, identified six salient features which characterise the concept of indirect discrimination as it has developed and as it should now be understood. These six features are laid out in the Briefing on *Essop* (see Briefing 830 for these) and therefore are not reiterated here.

Turning specifically to N's appeal, the SC began by looking at what was referred to as the 'context factor' i.e. that Muslim chaplains had statistically shorter employment histories than Christian chaplains. This was the context in which the PCP was applied that put Muslim chaplains at a disadvantage. It was argued by the respondent that both the context factor and the PCP had to be related to the protected characteristic i.e the more recent start date had to be peculiar to the group as Muslims. However Lady Hale concluded that:

> *This cannot be right. The same could be said of almost any reason why a PCP puts one group at a disadvantage. There is nothing peculiar to womanhood in taking the larger share of caring responsibilities in a family. Some do and some do not… Indeed, it could be said that the lack of need for the Muslim chaplains is more "peculiar to them as Muslims" than are many of the reasons why women may suffer a particular disadvantage. All that this means is that the employer may have to justify the PCP.*

As such, the SC found that there is no additional legal requirement that the reason for the context of a particular group disadvantage required to be related to the protected characteristic.

The SC also dismissed the respondent's argument that pre-2002 chaplains should be excluded from the pool. In considering this point the SC referred to the EHCR's Statutory Code of Practice (2011) which advised that:

> *In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively and negatively, which excluding workers who are not affected by it, either positively or negatively.*

Accordingly, all workers affected by the PCP should be considered within the pool for comparison and the SC found no warrant for excluding affected persons pre 2002.

Having concluded that Muslim chaplains had been put at a particular disadvantage by the pay structure (satisfying ss19(2)(b) and (c)) the SC also had to consider the question of whether the respondent could justify this as a proportionate means of achieving a legitimate aim. The SC identified the question as *'not whether the original pay scheme could be justified but whether the*

840

*steps being taken to move towards the new system were proportionate'* [para 47]. While the EAT had identified other ways in which it considered the respondent could have progressed Muslim chaplains to pay parity more quickly, the SC court restored the ET's findings of fact concluding that the tribunal had applied the correct legal test when considering justification.

**Final comment**

The SC's decision has produced a number of illuminating principles which dispel confusion over the nature of indirect discrimination and which can be referred to for future guidance. It has also now provided common sense clarity on who should be contained within a pool for comparison i.e. those affected by the PCP. This lucidity and simplicity is welcomed following the appeal's troubled path to the SC.

**Colin Davidson**
Solicitor (qualified in Scotland)
Slater and Gordon (UK) LLP

841

## Briefing 841

# SC subjects socio-economic policy making to rigorous scrutiny

*In the matter of an application by Denise Brewster for judicial review (Northern Ireland)* [2017] UKSC 8; February 8, 2017

**Background**

The claimant Denise Brewster (DB) lived with her partner Lenny McMullan (LMcM) for ten years; they were financially interdependent. LMcM worked for Translink, Northern Ireland's public transport service provider. He died unexpectedly in December 2009, shortly after the couple had got engaged.

LMcM had been a member of the NI Local Government Officers' Pension Scheme which was governed by the Local Government Pension Scheme (Pensions, Membership and Contributions) Regulations (NI) 2009 (the 2009 regulations). Pursuant to the legislation DB was excluded from enjoying a survivor's benefit because no nomination form had been completed. Previously, survivors' pensions were available to spouses but in 2009 the NI legislation had been amended to extend survivors' benefits to unmarried couples. (Similar reform occurred in England and Wales in 2007.)

Regulation 24(1) of the 2009 regulations states:

> *If a member dies leaving a surviving spouse, nominated cohabiting partner or civil partner, that person is entitled to a pension payable from the day following the date of death.*

Regulation 25 is the key provision and provides as follows:

> *(1) 'Nominated cohabiting partner' means a person nominated by a member in accordance with the terms of this Regulation.*
>
> *(2) A member (A) may nominate another person (B) to receive benefits under the scheme by giving the committee a declaration signed by both A and B that the condition in paragraph (3) has been satisfied for a continuous period of at least two years which includes the day on which the declaration is signed.*
>
> *(3) The condition is that— (a) A is able to marry, or form a civil partnership with, B; (b) A and B are living together as if they were husband and wife or as if they were civil partners; (c) neither A nor B is living with a third person as if they were husband and wife or as if they were civil partners; and (d) either B is financially dependent on A or A and B are financially interdependent.*

**Judicial review**

DB brought a judicial review challenge asserting that the said requirement was unlawful discrimination contrary to A14 of the European Convention on Human Rights (ECHR) read in conjunction with A1 of Protocol 1 (A1P1) on property rights.

The case focused upon Regulation 25(2) – the nomination requirement – whereby a member nominates another person to receive benefits by providing a signed declaration that relevant conditions have been satisfied for a period of at least two years. The respondents (the Department of the Environment for Northern Ireland who was responsible for the legislation and the scheme administrator, the NI Local Government Officers' Superannuation Committee (NILGOSC)) accepted that a pension was property for the purposes of A1P1. They also accepted that DB's cohabiting status engaged A14, and married couples and civil partners (to whom the nomination requirement did not apply) were analogous for the purposes of comparison. Justification was the issue to be determined.

### Lower court decisions

Mr Justice Treacy found the nomination requirement could not be objectively justified and was contrary to the ECHR as alleged. He declared that DB was entitled to a survivor's pension; see [2012] NIQB 85. His decision was overturned by the NICA in a split decision, a majority of the court finding that the nomination requirement was objectively justifiable; see [2013] NICA 54.

### Supreme Court

The SC overturned the CA's decision restoring the decision of the judge at first instance.

Lord Kerr gave the SC judgment with which the rest of the court concurred. He noted that the nomination requirement had been removed from comparable English and Scottish regulations in 2013 and 2014. He considered the impetus for reform of the regulations – that survivors' benefits be extended beyond spouses to cohabiting partners.

The SC considered the background to the legislative provisions including the consultation processes in the noughties. In correspondence to the Department in 2006 NILGOSC had identified the disparity in the legislation as between the married and civilly registered couples on the one hand and cohabitees on the other, noting that '*the lack of a valid nomination form was likely to result in disputes where all the other criteria were met*'. The SC observed that no independent assessment of the need for or the viability of a nomination form had been undertaken by the Department prior to the 2009 regulations being enacted. The motivation for including the nomination scheme appeared to be a preference for parity with, or mirroring of, the scheme in England and Wales.

Two key questions were identified: what was the aim of the regulations, and why the nomination requirement was necessary for cohabiting couples when it was not necessary for married couples?

The SC endorsed the trial judge's formulation of the aim of the regulations:

> *The aim or underlying objective of this aspect of the pension scheme is to place unmarried, stable, long-term partners in a similar position to married couples and those in a civil partnership to facilitate entitlement to a pension without discrimination on the grounds of status* [para 54].

Nomination was not included in the legislation to test the truth of the claim that the relationship was stable and long-lasting. The SC cited with approval paragraph 6 of Girvan LJ's dissenting judgment in the CA wherein he stated that there had been no evaluation of the '*pros and cons*' of having a nomination or opt-in procedure and the consultation paper provided no explanation as to why nomination would or should be evidentially required. In short, beyond mirroring Westminster, there appeared to have been no analysis of the purpose or validity of the requirement.

#### *Objective justification*

The legal principles applicable to an objective justification analysis of the alleged discriminatory interference with DB's right to property were identified as follows:

1. it is the duty of the state to secure the claimant's entitlement to equal treatment
2. there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised
3. the state must be vigilant to secure rights – the duty to secure rights calls for a more proactive role than the requirement to respect rights
4. whether justification has been established must be assessed objectively
5. in this case the test to be applied is whether the purported justification is '*manifestly without reasonable foundation*'.

The parties made competing submissions on the breadth of discretion that ought to be accorded to the relevant authorities, and the role of a court in such cases.

DB contended that the court should accord the respondents' post hoc justification arguments such weight as they merited, but refrain from institutional defence because of the constitutional responsibility of the decision-maker. This did not meet with the court's unqualified approval, Lord Kerr stating '*retrospective judgments … if made within the sphere of expertise of the decision-maker, are worthy of respect, provided that they are made bona fide*'.

The respondents contended that greater deference should be accorded to the state's position because of the immutable nature of the characteristic engaged; that the bright-line rule as applied in the socio-economic arena accorded greater discretionary judgment to the authorities; and, that the authorities enjoy a broad margin of appreciation in the socio-economic sphere.

The SC held that whilst non-immutability was a relevant factor, it did not weigh heavily in the justification assessment; the bright-line principle had little or no application essentially because there was no thought-through rational basis for the nomination requirement; and the respondents' post hoc justification arguments – which were '*unsupported by concrete evidence and disassociated from the particular*

841 *circumstances of the claimant's case'*, were not sufficiently robust to enable the state authorities to benefit from the margin of appreciation doctrine [paras 64-65].

The SC adopted the test for the proportionality of interference with an ECHR right previously propounded by Lord Reed at para 74 in *Bank Mellat v HM Treasury (No.2)* [2014] AC 700 at para 74:

> *It is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter …*

Applying this test the SC held that objective of the provisions in question must have been to remove the difference in treatment between a long-standing cohabitant and a married or civil partner of a scheme member. There was no rational connection between the objective and the imposition of the nomination requirement and neither the third or fourth strands to the test were met. The SC allowed the appeal declaring that the nomination requirement be disapplied and DB entitled to receive a survivor's pension.

**Comment**

The state authorities attempt to justify the impugned nomination requirement fell far short of the mark in this instance. From the decision one can conclude that the nomination requirement was a flaw in the legislation, conflicting with the objective of the provisions and incompatible with ECHR law; the litigation outcome was inevitable on the facts; the decision to appeal Justice Treacy's decision ill-judged; and, the decision of the majority in the CA profoundly out of step with relevant recent jurisprudence.

Of interest to practitioners is the court's consideration of judicial scrutiny of state decision-making. This traverses a number of important issues including:

1) what is required of the state to ensure equality?
2) what level of scrutiny should be applied by the court in cases involving a challenge to socio-economic law and policy making? and
3) what discretion should be accorded to the state in its decision-making where equality is abrogated?

This is a progressive and instructive decision for practitioners involved in strategic litigation in the equality field and beyond. Here is a judicially active court prepared to subject law and policy to rigorous scrutiny within the parameters of the applicable legal principles. It demonstrates that even in the sacred arena of socio-economic law and policy making, the courts play a significant role in ensuring state authorities act within the law.

**Michael Potter**
Bar Library, Belfast; Cloisters, London

842 Briefing 842

## Dismissal for long-term absence caused by disability

### *O'Brien v Bolton St Catherine's Academy* [2017] EWCA Civ 145; [2017] IRLR 547,CA; March 15, 2017

The CA has provided guidance to tribunals when considering the overlap between s15 Equality Act 2010 (EA) and s98(4) Employment Rights Act 1996 (ERA) in the context of the dismissal of a disabled employee for long-term sickness absence.

**Facts**

Georgina O'Brien (O'B) was a teacher employed as Director of Learning Information and Communication Technology by Bolton St Catherine's Academy (the school). O'B was assaulted by one of the pupils at the school. She had only a short period off work in the immediate aftermath. But she was very shaken by the incident. She felt unsafe in parts of the school and her duties were restricted accordingly.

O'B believed that the school authorities were not taking sufficiently seriously the incidence of aggressive behaviour by students; in particular, she was dissatisfied by its refusal to reinstate an earlier policy under which pupils who assaulted staff were automatically excluded.

After some further incidents, on December 9, 2011 she went off sick. The initial diagnosis was stress at work. There were subsequently other diagnoses including anxiety, depression and post-traumatic stress disorder.

A medical incapacity hearing under the school's procedures took place on January 28, 2013 before a panel of three governors. The ET noted that no material was put before the panel about the effect of O'B's absence on the school. There was no challenge to the medical history as presented by the school, but O'B told the panel that she had recently been referred to a therapist who had decided to treat her for post traumatic stress disorder, although she was not in a position to make a formal diagnosis; the treatment would involve several sessions. O'B stated that the therapist had not felt able to confirm that she would be able to return to work and would not feel able to express a view until the conclusion of the treatment. O'B was dismissed for incapacity having been off work for over a year.

The appeal against her dismissal was heard in April 2013. O'B presented a Fitness to Work Form signed by her GP dated the previous day and a letter from an Associate Psychologist dated February 23, 2013 recommending a course of treatment with either eye movement desensitisation and reprocessing therapy or cognitive behaviour therapy. O'B told the appeal panel that following an original failure to diagnose her condition, she had now undergone the appropriate treatment and was fit to return to work full-time. The panel was not satisfied that the fresh evidence really established that she was fit to return to work; it upheld the decision to dismiss.

### Employment Tribunal

#### *S15 Equality Act 2010*

The ET found that the dismissal constituted unfavorable treatment because of something arising in consequence of the disability, namely O'B's long-term sickness absence; and that it followed that it was for the school to show that the treatment was a proportionate means of achieving a legitimate aim. The school identified its aims as being '*the efficient running of the school, the reduction of costs and the need to provide a good standard of teaching*'; the tribunal accepted those aims were legitimate.

The tribunal concluded that O'B's dismissal was disproportionate because:

a) the school had adduced no satisfactory evidence about the adverse impact which her continued absence was having on the running of the school and
b) that in the absence of such evidence it was reasonable to wait '*a little longer*' to see if she would be able to return to work, particularly in the light of the encouraging evidence available at the appeal hearing.

The ET recognised that it would be reasonable for the school to obtain its own evidence to confirm (or otherwise) what she was saying; but that only occasioned a short delay and there was no real evidence that serious further damage would be done during that time.

#### *Unfair dismissal*

The ET found that any reasonable employer would have conducted the appropriate balancing exercise required of it under s15 EA before reaching the decision to dismiss, and before upholding that decision on appeal. The tribunal found that both internal panels, at the initial stage and at the appeal hearing, failed to carry out that balancing exercise. The school was well aware that O'B was a disabled person within the meaning of the EA. The tribunal found that dismissal fell outside the band of reasonable responses in the circumstances because it was a discriminatory act.

### Employment Appeal Tribunal

HHJ Serota allowed the school's appeal on a number of grounds; the relevant grounds considered by the CA were that:

1. the tribunal was wrong to find the dismissal was not a proportionate means of achieving a legitimate aim
2. the finding of the tribunal that the school unlawfully discriminated against O'B by failing to conduct '*a balancing exercise required of it under section 15 Equality Act*' was wrong in principle and an error of law
3. the tribunal erred in law by concluding that dismissal was disproportionate in the circumstances where the school could reasonably have been expected to '*wait a little longer*'
4. the tribunal erred in applying the test of justification to circumstances prevailing at the date of the appeal rather than the date of the dismissal
5. the tribunal conflated unfair dismissal and s15 EA
6. the tribunal concluded there was an unfair dismissal without considering the authorities on dismissals on the grounds of capability and health.

### Court of Appeal

The CA allowed the appeal by a majority and upheld the ET's decision (Underhill LJ and Sir Terence Etherton MR, with Davis LJ dissenting).

The CA dealt with ground 4 first; the majority decided that the correct date when considering the test of justification for the dismissal was the date of the appeal hearing, the decision to dismiss being the

product of the combination of the original decision and the appeal hearing, applying *Taylor v OCS Group Ltd* [2006] EWCA Civ 702, [2006] IRLR 613, to cases under s15 EA in the same way as to unfair dismissal cases under s98(4) ERA.

### *Grounds 1-3 – the proportionality of the dismissal*

The CA was not prepared to say that the conclusions reached by the ET were not open to it on the facts. At the dismissal appeal hearing O'B stated that she was fit to return to work and the tribunal accepted that the school might reasonably have required a further examination before accepting that, but the available evidence suggested she might well be fit to return in the near future. The court found that this threw the question of the impact on the school into sharp focus at this point: even if her absence over the previous 15 months had caused real difficulties, that harm was already done, and if the school had in fact managed to cope adequately with those difficulties it might be expected to cope a little longer, i.e. the short further period it would take for the school to obtain its own occupational health report.

### *Grounds 5 & 6 – unfair dismissal*

The CA doubted the proposition that any unlawfully discriminatory dismissal was therefore necessarily unfair under s 98(4) ERA but held that it was legitimate in this case for the tribunal to decide that its finding that the dismissal was disproportionate under s15 meant that it was not reasonable for the purposes of s98(4).

Underhill LJ accepted that the language of the two tests is different but considered both tests to be objective and concluded that it would be a pity if there were any real distinction between the two in the context of dismissal for long-term absence where an employee was disabled within the meaning of the EA. He noted that:

> *The law is complicated enough without the parties and tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim and by a different standard for the purpose of discrimination law.*

LJ Underhill doubted whether in this context the two tests should lead to different results. He rejected the submission that the tribunal had impermissibly substituted its own view for that of the employer under s98(4). He also rejected the argument that the tribunal had failed to consider the relevant authorities on long-term sickness absence. Whilst it had not expressly discussed them it had not needed to as it had thoroughly discussed the relevant factors in relation to its findings in the discrimination claim.

## Comment

This case illustrates how applying appropriate scrutiny to the question of proportionality in respect of the discriminatory nature of a dismissal can impact upon the question of reasonableness under s98(4) ERA.

However this may not be the last word on the subject. The dissenting judgment of Davis LJ illustrates how conflating the two tests, of reasonableness and proportionality, can also potentially work against the claimant. In his view, the tribunal ought not to have substituted its view for that of the panel, and its reasons for doing so were 'unacceptably purist'. He accused the tribunal of 'second guessing' the governors, adopting the language of substitution (which is impermissible in terms of s98(4)). He then went on to find that the decision reached on the evidence presented to the appeal panel was within the range of reasonable responses open to it and was also proportionate and justified.

It may be no coincidence that the reasoning of Underhill LJ began, as did the tribunal, with assessing the question of justification and proportionality and then proceeding to the question of reasonableness finding in favour of the claimant; whilst in reaching the contrary conclusion, Davis LJ appears to begin by considering the governors' actions against the test of reasonableness and draws the conclusion on proportionality following his assessment of reasonableness.

**Catrin Lewis**
Barrister
Garden Court Chambers

# Unfavourable treatment under S15 EA

## *Williams v Trustees of Swansea University Pension and Assurance Scheme and another* [2017] IRLR 882 [2017] EWCA Civ 1008; July 14, 2017

S15 of the Equality Act 2010 (EA) provides broad protection from disability discrimination and its provisions have been clarified in a number of very useful EAT cases, such as *Pnaiser*.[1] Readers will remember the EAT's approach to one aspect of s15, however – the meaning of 'unfavourable' and the case of *Williams*. The Court of Appeal has now determined the latest appeal in this case.

### Facts

Mr Williams (W) worked as a full time technician at Swansea University. He was disabled by reason of Tourette's Syndrome, OCD, depression and other conditions. To accommodate the effects of his disability he reduced his hours. By the end of July 2011 he was working half-time. Subsequently, W became permanently incapable of performing his role and accepted ill-health retirement on June 30, 2013 at age 38.

Under the rules of the pension scheme, employees were entitled to a pension on retirement at age 67, but not earlier, unless retiring due to ill-health, in which case they would be entitled to immediate payment of pension and an enhanced pension – based on rule 15.5 of the pension scheme, which was the key provision. The enhanced pension was calculated as if the individual had continued working until normal retirement age at the same salary as per the date of their actual retirement. For W, this meant calculation of his salary on the basis of his half-time salary. He claimed discrimination arising from disability as it was his disability that had led to him needing to reduce his hours in the first place.

### Employment Tribunal

The ET upheld his claim, finding that the fact *'that the scheme is particularly generous and that the claimant is in absolute terms much better off than he might have been does not alter the fact in our judgment that he has been treated unfavourably in that he has been placed at a disadvantage in the application of the rules of this particular scheme'* [cited at para 7 of EAT judgment].

### Employment Appeal Tribunal

The EAT, however, disagreed. Langstaff J concluded that the ill-health retirement scheme was more favourable to those who were disabled because only those who stopped work earlier than retirement age due to disability would be entitled to its benefits. The employee who chose to retire at 38 for non-disability related reasons would not be entitled to the scheme benefits. Thus he concluded that the scheme was advantageous to disabled persons to begin with and therefore could not possibly be unfavourable treatment [paras 24-26].

Controversially, the EAT held that 'unfavourable' treatment is not to be equated with the concept of 'detriment' or 'less favourable treatment' used elsewhere in the EA. Unfavourable treatment is more akin to concepts of placing a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person [para 28]. It is a question for the tribunal to recognise when an individual has been treated unfavourably.

#### *Justification*

The ET had considered whether the respondents had established a defence under s15(1)(b) EA showing that the treatment was a proportionate means of achieving a legitimate aim. It accepted that the treatment did have a legitimate aim, namely: '… *the provision or operation of a viable defined benefit occupational pension scheme for employees … which provides benefits at an appropriate and affordable level to all eligible members of the scheme whether disabled or otherwise without placing an undue financial burden on the scheme including but not limited to the availability of appropriate immediate enhanced ill health pensions for those unable through illness to continue in their scheme.'* However, the ET was not satisfied that the treatment was a proportionate means of achieving that legitimate aim.

Their reasons included:

a) at the time of formulating the scheme rules in 2008 the trustees had not appreciated the effect of rule 15.5 and *'self-evidently did not consider any alternative methods of achieving the same overall result without the discriminatory effect'*
b) the respondents' argument related solely to cost and was therefore indistinguishable from the proposition rejected by the SC in the context of judicial pensions in *O'Brien v Ministry of Justice* [2013] IRLR 315; Briefing 675
c) *'Whether a [pension] scheme is discriminatory and*

*whether that discrimination can be justified cannot be dependent on the financial condition of the scheme at the time the question comes to be answered.*'

The EAT disagreed with the finding that the treatment was not justified. This was for a number of reasons:

- because the tribunal found force in the argument that the trustees had not considered justification at the point of making the scheme
- the tribunal held that the scheme rules had to be justified at the point at which they had been made, rather than at the point of discriminatory treatment (and at the point at which they were made, s15 did not exist)
- the tribunal had stated that there were any number of ways in which the generosity of the scheme could be lessened, achieving the same or greater savings without any discriminatory impact without identifying any particular way it had in mind, and what the evidence was which established it as a reasonable and less discriminatory way of achieving the legitimate object postulated
- and because it had identified as legitimate the aim quoted above – yet went on in its paragraph 41, apparently where it was considering whether the means adopted to achieve that aim were reasonably necessary and appropriate to do so, to describe the argument for the trustees as one purely of cost, and to reject justification on that basis.

## Court of Appeal

The CA upheld the EAT's decision, though without any detail on the meaning of unfavourable, and without having to consider justification (though it observed that Langstaff J's analysis on this had 'considerable force' [para 50]).

The CA dealt with heart of the appeal in fairly short shrift. The core submission on behalf of W was that at the time of his retirement '*he was working reduced hours because of his disability …; as a result his benefit was reduced'* and *'that this was simply unfavourable treatment – a disadvantage – because of something arising in consequence of his disability*' .

The CA responded:

> *But this cannot possibly be sufficient to establish disability discrimination. If it were, it would be difficult to see why it would not apply to a disabled claimant who applies for and secures a part-time job because that is as much as he can manage, but would otherwise have worked full-time. He will be paid a part-time salary because of something arising in consequence of his disability. It can hardly be said to have been Parliament's intention that he should be able to claim that he has been the victim of unfavourable treatment under s15 and throw the onus onto the employers to establish that the part-time salary is a proportionate means of achieving a legitimate aim. Similarly it would be remarkable if he could maintain an entitlement to the same retirement pension as he would have received had he worked full-time throughout his employment* [para 45].

It went on to consider another example:

> *A disabled person applies for a full-time job with the university and works full-time for (say) six months. At this point, he realises that the full-time job is too onerous for him and asks the university to reduce his working hours to 50% of full-time salary. The employers agree and for the next 13 years he works 50% of full-time working hours, before becoming permanently incapacitated and taking ill health retirement. It would be very surprising if on those facts he was entitled to a pension as if he had worked full time throughout his employment: yet the only difference between this and the previous example is that for his first few months in the job he tried full time working but found that he could not manage it* [para 46].

The CA's view was that though it was stated that a comparator was unnecessary, in reality one was required – another disabled member of the scheme with a different disability.

The CA dismissed the appeal; permission to appeal has been sought and this outcome is awaited.

## Comment

This case can in my view be confined largely to its facts and there are unlikely to be a large number of claims affected by the definition of 'unfavourable' as set out by the EAT. Nevertheless it is an unhelpful judgment. The reality of s15 is that it was intended to have a broad reach; the 'brake' on that reach is justification. In the first example given in the CA decision, as well as justification, there is the matter of the links in the chain of causation. The salary is paid because the job is part-time and the job is taken in the full knowledge of that. Yes, it may be that the disabled person can only take a part-time job because of their disability. But taking that link one step back (i.e. they have not had to reduce their hours when in a job because of disability) may be one step too far removed for the treatment to be unfavourable because of something arising in consequence of disability.

**Catherine Casserley**
Cloisters

1. *Pnaiser v NHS England & Anor* UKEAT/0137/15/LA; Briefing 779

# End of the shifting burden of proof?

*Efobi v Royal Mail Group Ltd* UKEAT/0203/16/DA; August 10, 2017

## Introduction

Judicial notice has been taken for many years of the difficulties which face those who seek to prove discrimination. Much discrimination is unconscious or certainly not admitted and has to be inferred from circumstantial evidence. Information and data that a claimant will need to demonstrate a pattern of adverse treatment or less favourable treatment than that of others in a recruitment process will be in the hands of the respondent who may be reluctant to disclose anything helpful to the claimant.

The Burden of Proof Directive and the UK implementation of those provisions were aimed specifically at addressing this difficulty, and had the effect of formalising an approach long used by the UK courts, that if a claimant was able to show a facts from which discrimination might be inferred, the respondent would be required to prove no discrimination whatsoever had been involved in the decision, or treatment.

In a number of UK cases the courts described the process as imposing a shifting burden of proof, such that the claimant had an initial burden of proving facts from which discrimination could be inferred, at which point the burden would shift to the respondent.

### *S136 Equality Act 2010*

In 2010 the EA came into force introducing, under s136, a slight variation in wording. Instead of stating that the claimant has the burden of proving facts from which discrimination can be inferred, s136(2) states:

> *If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.*

S136(3) provides *'But subsection (2) does not apply if A shows that A did not contravene the provision'*.

It is the meaning and application of s136 which is central to Mr Efobi's case, and which has lead to the EAT finding that there is no initial burden on the claimant to prove facts which could lead to a finding of discrimination, but rather the court must look at all the facts and determine whether or not there are such facts so that the respondent bears the burden of proving no discrimination whatsoever.

This relatively small change in emphasis has important consequences for the process of determining discrimination cases.

## Facts

Mr Efobi (E) made a fairly common complaint that despite having relevant qualifications and experience for internal promotions and jobs he applied for with the Royal Mail, he was never promoted. He claimed that his race was a factor in the decisions made by a variety of staff and managers with responsibility for recruitment and appointments.

The Royal Mail Group Ltd (RM) argued that he was wrong and that his applications had simply not been of good enough quality and that he was not the best candidate for any of the positions applied for.

E sought to rely on around 33 applications he had made but faced a significant difficulty because he had no information about who had been successful for any of the posts, what their race was, and why they had been appointed and not him. The RM did not produce any evidence about the racial profile of applicants and successful candidates, and did not call any of the mangers who had made the decisions to give evidence.

Advisors will be well aware that the removal of the questionnaire procedure means that claimants will face some difficulties in getting access to relevant disclosure.

## Employment Tribunal

The ET determined that although E had been discriminated against by some individuals over unrelated matters, and had been victimised, his failure to gain the posts applied for was not the result of unlawful race discrimination. The ET made a number of specific findings that he had not proved facts from which the ET could conclude that discrimination had taken place, and furthermore, that the respondent had proved a valid and credible explanation for their failure to appoint him in most cases.

## Employment Appeal Tribunal

The EAT found that the judgment was flawed and remitted it to differently constituted ET for a reconsideration. The ET had wrongly placed a burden of proof on the claimant which the statutory language did not support:

*As Peter Gibson LJ made clear in paragraph 16 of Igen v Wong, what matters most in the applicable statutory provision about the burden of proof is its words; it is from those that ETs must take their main guidance. 'Could' must mean 'a reasonable tribunal could properly conclude': see per Mummery LJ at paragraph 57 of Madarassy v Nomura International plc [2007] EWCA Civ 33; [2007] ICR 867.*

The EAT determined that the words of s136(2) do not put any burden on a claimant. It requires the ET, instead, to consider all the evidence, from all sources, at the end of the hearing, so as to decide whether or not '*there are facts etc'* (para 65 of *Madarassy).*

Dame Elizabeth Laing QC held:

*The word 'facts' in section 136(2) rather than 'evidence' shows, in my judgment, that Parliament requires the ET to apply section 136 at the end of the hearing, when making its findings of fact. It may therefore be misleading to refer to a shifting of the burden of proof, as this implies, contrary to the language of section 136(2), that Parliament has required a Claimant to prove something. It does not appear to me that it has done.*

Its effect, says the EAT, is that if there are such facts, and no explanation from A, the ET must find the contravention proved. If, on the other hand, there are such facts, but A shows he did not contravene the provision, the ET cannot find the contravention proved.

The EAT also found that s136 means that submissions of no case to answer at the end of an applicant's evidence in a discrimination claim, long discouraged by the ETs, are now prohibited.

For E, the result is another hearing and for him and other claimants the impact may be a difference between success and failure.

### *Factors the EAT considered*

Firstly the EAT was very critical of the RM's failure to provide diversity data for applicants and successful applicants in a discrimination claim. Since they were an organisation that would be expected to hold such data and since it would be useful, and there was no valid explanation for not disclosing it, adverse inferences could be drawn against them as to what the data said.

Secondly, the EAT was critical of the RM's failure to call any of the decision-makers to give evidence of their own reasons for their decisions. Whilst it was accepted that some may have moved on to other work and be unavailable to the respondents, there was no evidence that this was the case for all of them, and again their explanations and cross examination of them, would have been useful to the claimant and the ET. The failure to call them could lead to an adverse inference being drawn.

The ET had to consider all the facts before it, including its own findings of discrimination, and had it considered matters in this way, it may well have reached a different conclusion.

### Comment

Whilst the principles are not new ones, the emphasis placed upon the RM's approach to the case and the evidence as relevant to the fact finding exercise marks a different approach. If relevant and useful information is requested by the claimant and refused, an ET can be asked to take notice of it and to draw adverse inferences about its contents.

Whether this case will assist claimants in gaining early disclosure of diversity monitoring data in recruitment cases remains to be seen, but the focus on the way that a respondent chooses to run a case, and the inferences which may be drawn from that may go some way towards redressing the impact of the loss of questionnaires for example and may well be helpful in cases of unlawful, unconscious discrimination.

**Catherine Rayner**
Barrister 7br; Chair of the DLA

# Interplay between ECHR Article 9 and indirect discrimination – *Mba* explained

*Trayhorn v Secretary of State for Justice* UKEAT/0304/16/RN; August 1, 2017

### Implications for practitioners

The EAT reinforced that in an indirect discrimination case where European Convention on Human Rights Article 9 rights are in play, the claimant is still required to prove group disadvantage at the s19(2)(b) EA stage, notwithstanding that Article 9 itself does not have such a requirement.

### Facts

Mr Trayhorn, T, was employed as a prison gardener. T is also an ordained Pentecostal minister, albeit he was not employed as a prison chaplain. In February 2014, he felt moved to preach at a prison chapel service, and spoke about marriage between homosexuals being wrong. A complaint was made. No disciplinary action was taken, but it was realised T did not have the relevant security clearance required to preach. He was told not to preach at future chapel services.

In May 2014, T was leading a service's singing when he decided to quote from the Bible and to speak about repentance. Complaint was made that he preached that prostitutes and gays were not welcome here and would not be welcome in heaven. An investigation followed, and an invitation to a disciplinary hearing was sent. T then went on sick leave, during which the prison governor sought to reassure him the disciplinary action could not lead to dismissal. A week later, T resigned with notice, claiming to be constructively dismissed. The disciplinary process proceeded during the notice period, and T was given a final written warning, to remain on file for a year. T's appeal was rejected.

### Employment Tribunal

T's pleaded case included EA claims for direct and indirect discrimination and for harassment. Reliance was also placed on ECHR Articles 9 and 10. This case report focuses on the indirect discrimination claim. That aspect of T's claim relied principally on whether the respondent's disciplinary and equal treatment policies put those of the Christian faith and/or Pentecostal denomination at a disadvantage due to such believers being more likely to quote or discuss parts of the Bible which those attending chapel services may find offensive.

The ET dismissed all claims. The indirect discrimination claims failed to prove group disadvantage, there being no evidence the policies served to disadvantage Christians or Pentecostals as a group. Relying on *Mba v Merton London Borough Council* [2014] 1 IRLR 1501, Briefing 699, the ET held the requirement to show group disadvantage was not inconsistent with T's Article 9 rights. As a belt and braces, the ET also held it would have found the PCPs objectively justified. In doing so, the ET emphasised the restrictions merely prevented the insensitive manifestation of T's beliefs within the prison and its chapel, and he was free to espouse those views outside the prison environment.

### Employment Appeal Tribunal

T appealed on three grounds, all of which the EAT dismissed. The second and third grounds concerned the indirect discrimination claim.

The second ground is of greatest interest to practitioners. T contended that given the case involved Article 9 rights, the ET erred in relying on group disadvantage as a condition precedent to establishing indirect discrimination. Alternatively, he submitted the ET set too high a threshold for establishing group disadvantage. Particular reliance was placed on *Mba,* which T submitted held it unnecessary to establish group disadvantage where Article 9 is engaged, but merely to show there exists any number of believers of the viewpoint adversely affected by the PCP, the claimant being one of them.

The EAT held this misrepresented *Mba*. In *Mba* Elias LJ made clear that notwithstanding ECHR Article 9 has no requirement for group disadvantage, s19(2)(b) EA could not be read to ignore the need for its establishment. He held, however (Vos LJ concurring), that when Article 9 is engaged and justification is in play, whether or not the claimant was disadvantaged with others should play no part in determining whether or not a *prima facie* act of indirect discrimination is justified.

On T's alternative argument, the EAT agreed the threshold under s19(2)(b) is low in an Article 9 case – whether *some* individuals of the claimant's religion are

845 disadvantaged by the relevant PCP. Whether or not this is the case is a question of fact. The ET had found as a fact that no part of either PCP put T as an individual or Christians or those of the Pentecostal denomination at a disadvantage either singly or as a group. There was no appeal against that finding and accordingly the appeal on this ground was dismissed.

T also failed in his third ground of appeal which criticised the balance the ET's justification decision afforded between T's ECHR Article 9 and 10 rights and the limitation of those rights. In rejecting this final ground of appeal, the EAT noted the ET's findings that neither of the prison chaplains supported T's view that the relevant policies disadvantaged Christians or Pentecostals, and that the chaplains recognised the need for sensitivity, which T's preaching lacked. The EAT noted also the ET's findings that derogatory comments by a person in perceived authority could be viewed as legitimising inappropriate behaviour towards the subject matter of those comments and could increase that group's vulnerability. Those findings of fact were unchallenged, and the conclusion reached on justification was upheld on the strength of them.

**Comment**

This case provides a welcome reminder of the limits of the impact of Article 9 ECHR on determination of indirect discrimination claims, as set out in *Mba*. It also provides a useful example in the context of an indirect discrimination claim of the distinction between taking disciplinary action against the manifestation of a religious belief at work *per se*, and the inappropriate manner of the manifestation of that belief. It thus adds usefully to the proselytisation cases of *Chondol v Liverpool City Council* UKEAT/0298/08, February 11, 2009, Briefing 536, *Grace v Places for Children* UKEAT/0217/13/GE; November 5, 2013, Briefing 716, and most recently *Wasteney v East London NHS Foundation Trust* [2016] IRLR 388, Briefing 797, in which that distinction was emphasised under the direct discrimination and harassment provisions.

**Jason Braier**
Field Court Chambers
jason.braier@fieldcourt.co.uk

846 Briefing 846

## Single parents of infants successfully challenge the revised benefits cap

*R (on the application of DA and others) v Secretary of State for Work and Pensions and Shelter* [2017] EWHC 1446 (Admin); June 22, 2017

**Overview**

In a strongly worded judgment, Collins J found the revised benefits cap to be unlawful as it discriminated against lone parents with children under the age of two. In concluding remarks, putting shame to government policy, he said:

> *The cap is capable of real damage to individuals such as the claimants. They are not workshy but find it, because of their care difficulties, impossible to comply with the work requirement…Real misery is being caused to no good purpose.*

**Facts**

By ss96 and 97 of the Welfare Reform Act 2012, the coalition government introduced the benefits cap, which was subsequently amended in 2016 by the Welfare Reform and Work Act. The effect of the amendment was to reduce the annual limit for the receipt of welfare benefits from £26,000 pa to £20,000 pa (or to £23,000 for those living in Greater London). This is felt by benefits claimants through a reduction in housing benefit, but is not imposed on claimants who work more than 16 hours per week in the case of single claimants, or more than 24 hours between them, in the case of a couple.

The original benefit cap was challenged by way of judicial review in 2013 and made its way all the way to the SC (*R (SG and others) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449; Briefing 748). The claimants in that case argued that the changes to housing benefit caused by the cap discriminated against women and large families, and breached both Article 8 ECHR and Article 3 of the UN Convention on the Rights of the Child. That SC claim failed by a majority of three to two.

The claimants (Cs) in *DA and others* (four single

parents and three of their children under the age of two) sought to challenge the revised benefits cap by way of judicial review against the Department for Work and Pensions (DWP).

### Administrative Court

The Cs argued that a welfare benefit is a possession within the meaning of Article 1 of the First Protocol to the ECHR (A1P1), and that any interference with that right must therefore not be discriminatory, reading A1P1 with Article 14. They also argued that the imposition of the cap on this group was a discriminatory interference with Article 8 rights. The discriminatory effect was felt by single parents with children under the age of two as they were less likely than those with no children, older children, or couples, to be able to avoid the imposition of the cap by working more than 16 hours per week.

Collins J carefully analysed the decision of the SC in *SG*, which had held that the aims of the government's benefit cuts were legitimate. Those aims were:

1) the economic wellbeing of the country, and
2) incentivising work.

Collins J was willing to accept that those aims applied in this case and were legitimate, but went on to find that the application of the cap to the Cs was not a proportionate means of achieving those aims, and that it was therefore a discriminatory interference with rights under Article 8 and A1P1. Article 8 was engaged because:

> *The effect of the cap means that the children and their parents have restrictions on what can be provided by way of housing, food and other things that an average child should have available. Further, as the ministers have said, it may be necessary to try to move to cheaper accommodation to avoid the effect of the cap so that there will be an upheaval for the family.*

The strength with which the judge rejected all of the DWP's submissions on proportionality is striking. For example, in response to the DWP's submission that the effect of the cap on lone parents with children under the age of two was mitigated against by government support for childcare costs and Discretionary Housing Payments (DHP), he noted that support for the full cost of childcare is in fact not available for children under the age of two and that, although a substantial percentage of costs may be covered for the most disadvantaged, '*for those such as the claimants living in or very close to poverty even relatively small sums can have a seriously damaging effect*'. Of DHPs, he observed that of 235 local authorities who had responded to enquires by the Cs' solicitor, none had ever made a permanent award or had agreed to make a payment before a tenancy commenced. DHPs are therefore simply:

> *… short term payments and give those affected no peace of mind. Whatever may have been the hope, the safeguard relied on is not by any means satisfactory. For those such as the claimants who are living on the edge of, if not within, poverty the system simply is not working with any degree of fairness.*

Collins J vociferously rejected the DWP's assertion that it was not in the best interests of these children to live in '*workless households*'. Whilst he was willing to accept that may be the case for families with older children, it was:

> *… entirely irrelevant to lone parents such as the claimants who find themselves in real difficulty in being able to enter work because of the need to care for a child under 2…It is surely in [the children's] interests that they should have adequate food, shelter, warmth and care since deprivation of such will produce much greater harm.*

He further commented that the DWP's point that other benefits were available to mitigate against the effects of the cap contradicted its own claim that the application of the cap incentivised work:

> *Those in need of welfare benefits fall within the poorest families with children. It seems that some 3.7 million children live in poverty and, as must be obvious, the cap cannot but exacerbate this. The need for alternative benefits to make up shortfalls is hardly conducive to the desire to incentivise work and so not provide benefits. There is powerful evidence that very young children are particularly sensitive to environmental influences. Poverty can have a very damaging effect on children under the age of five.*

Unsurprisingly, the judge rejected a suggestion by the DWP that claimants could avoid difficulties arising from the cap by negotiating lower rents, or that lone parents facing the cap '*should exercise choice*'. Of the lower rent suggestion, Collins J agreed with the Cs that this suggestion was 'laughable'. He said,

> *I suppose there may be landlords altruistic enough to reduce rent for needy tenants, but they will be a minute proportion. The suggestion is totally unrealistic.*

Of the need for claimants to 'exercise choice', Collins J said:

> *I am not impressed with this since I doubt anyone would choose to be a lone parent. Women in the position of the claimants are not lone parents by choice but because they have lost a partner who would share care with them, often from domestic violence. There is no question of real choice. It is no part of the cap policy to seek to limit the size of families or to persuade women to avoid having children: at least two of the claimants found the*

*reference to choice offensive. I am not surprised.*

The DWP also relied on the decision of Lord Reed in *SG*, who had suggested that to apply Article 8 because of the effect of a reduction in income would be to extend the scope of Article 8 beyond current understanding. Collins J rejected this argument, finding that Lord Reed's observations could not survive *R (on the application of MA and others) v Secretary of State for Work and Pensions* [2016] 1 WLR 4550, in which the SC unanimously accepted that the imposition of the bedroom tax was capable of interfering with Article 8 rights.

**Comment**

Collins J's heartfelt indictment of government policy will be welcomed by the many families with infant children affected by the revised benefits cap. It is of wider importance in reaffirming the judgment in *MA* that benefit cuts engage Article 8 rights and can therefore be challenged on that basis. Whether the decision will survive, however, is another question. Unsurprisingly, the DWP sought permission to appeal and has issued guidance that the cap should continue in the meantime. The appeal was heard by the CA on October 24th and 25th, 2017 and the judgment is awaited.

**Eirwen Pierrot**
Field Court Chambers
eirwen.pierrot@fieldcourt.co.uk



# Court examines Northern Ireland public sector duty complaint

*In the matter of an application by Joanna Toner for Judicial Review* [2017] NIQB 49; May 12, 2017

**Introduction**

'Shared space' – the broad term for the removal of kerbs, traffic lights and the 'sharing' of space between cars and pedestrians – has caused and is causing – considerable difficulties for disabled people throughout the UK. There have been some successes in using the legislation to halt or amend these schemes and this successful judicial review of such a scheme in Northern Ireland makes for interesting reading. It is also the first time that the operation of the equality duties in Northern Ireland has been challenged successfully in court rather than having to be taken through the Equality Commission for Northern Ireland's investigative procedures.

**Facts**

Joanna Toner (JT) is blind and uses a guide dog and occasionally a white cane. In the course of a city centre renovation scheme, the appointed landscape architect consulted with user groups, including RNIB, Disability Action, and Guide Dogs for the Blind Northern Ireland, over proposals to incorporate kerb heights which were reduced to 30 mm from the normal 100-130 mm.

Following the implementation of the renovation scheme JT lost her confidence in walking around the city centre, due primarily to the way in which the scheme dealt with the issue of kerb heights in its central area.

JT sought judicial review of the kerb reduction on a number of grounds, including breach of the s75 Northern Ireland Act 1998 (NIA) public sector equality duty, the Disability Discrimination Act 1995 (DDA) (still in place in Northern Ireland) and of the Human Rights Act 1998.

**High Court**

The HC made the following conclusions on the facts:

- Mr Watkiss (W), the architect, was aware of the University College London (UCL) research which recommended from at least around February 8, 2010, kerb height of 60mm. W carried out the main public consultation on behalf of Lisburn City Council (the Council) which began in March 2012. It was projected to last for 6 weeks.
- The court was satisfied that this consultation was conducted with disclosure of the height of the kerbs and that information in relation to this was to be found in relevant drawings and presentational materials. It is likely also that W mentioned the figure of 30mm in the course of his presentations.
- There was no opposition to the use of 30mm kerbs expressed to W during the consultation process. The Council therefore proceeded to apply for planning permission for the Public Realm Scheme (PRS) on

this basis.

- No objection to the kerb height was expressed by Transport Northern Ireland, the relevant roads consultee, and no other objections to it were made in the course of the Council's planning application.
- Unsurprisingly, in these circumstances, planning permission was granted for the project on January 9, 2013.
- It was not until October 2013 that the controversy over the kerb height emerged at the *Walk My Way* seminar by which stage work on the ground had already begun. The controversy centred on the UCL research.
- The Council became more directly involved in the process from in or about February 2014 and Council officials first had sight of the UCL research on May 9, 2014.
- It soon became clear that councillors would need to become involved in making decisions. Hence the matter came before the economic development committee (EDC) in June 2014. The EDC, however, declined to change course after hearing from speakers reflecting the different viewpoints.
- The Council itself adopted the EDC's recommendations without discussion later in June 2014. The matter came back before the EDC again in October 2014; the EDC declined to go down the road of a re-consultation and chose to maintain its earlier view, a position ratified by the Council without debate.

Since proceedings had started, Transport NI had issued guidance recommending a kerb height of 125 mm.

## The Court's decision

So far as the procedural grounds and the flawed consultation were concerned, the HC held that there had been adequate disclosure of the proposed kerb heights at the outset of the consultation process [paras 102-103] and there was no evidence of procedural unfairness or bias. Discretion had not been fettered, nor was there Wednesbury unreasonableness.

### *S75 Northern Ireland Act 1998*

The HC held that the local authority appeared not to have paid due regard to the needs of disabled people as required under s75 NIA, *R (on the application of Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 followed.

The HC stated that it would have expected to have seen documentation if there had been compliance but there was none. It was likely that the Council had considered the consultation to have constituted compliance. As regards enforcement when that had not been sufficient to meet the duty, the court stated as follows:

> *The underlying issue in this case is the substantive issue of the potential safety of a section of the public defined by a relevant disability when accessing a city centre. The appropriateness of a careful consideration of this issue for the purpose of section 75 could not be seriously questioned and it seems to the court that this is the sort of case where a high level of consideration of the position of the blind and partially sighted ought to have flowed from the relevancy of the issue to this group.Unfortunately, the court has concluded that the Council have failed to comply with their section 75 duty in a far greater way than some simple technical omission or procedural failing. In this case the failure appears to the court to have been longstanding in nature, as at no stage in the PRS's development, was the issue of the public sector equality duty subjected to a section 75 compliant process. Most particularly, when the matter came before the EDC and the Council (twice) in 2014 the opportunity was not taken to rectify the situation notwithstanding that the matter had by this stage become one of high controversy.*

In the exceptional circumstances of the instant case, judicial review of the Council's s75 duty was appropriate, *Neill's Application for Judicial Review* [2006] NICA 5 followed [paras 153, 156, 160-166].

### *Human Rights Act 1998*

So far as the human rights ground was concerned the evidence did not reveal a failure by the local authority to respect the applicant's Article 8 right to private life. The Council had sought the opinions of the visually impaired and had amended the original kerbless scheme to incorporate kerbs.

Further, it had a duty to balance the needs of all users, and arrive at a proportionate decision, *Zehnalova v Czech Republic* (38621/97) unreported, *Botta v Italy* (21439/93)(1998) 26 EHRR. 241 considered [paras 183-188].

Article 11 was not engaged. There was no evidence that the applicant's freedom of association had been removed or abridged. Even if such an interference had been found, it was a qualified right and the local authority could rely on Article 11(2) to justify any such interference [paras 190-192]. The court accepted that disability was capable of being a 'personal characteristic' for the purposes of Article 14 and discrimination legislation. However, objections to the scheme had only been received after the grant of unopposed planning permission and after work had already started. Objective and reasonable justification was established

847

since the delay and expense reasonably outweighed a change to the kerb height [paras 196-201].

*Disability Discrimination Act*

As for a breach of the DDA, the HC held that the primary method of enforcement under the Act was by a civil claim for breach of statutory duty. Although judicial review was allowed under Schedule 3 para 5(2), the court was clear that the number of factual disputes and the lack of discovery, oral evidence, and cross-examination made the claim inappropriate for judicial review *R (on the application of Lunt) v Liverpool City Council* [2009] EWHC 2356 (Admin) distinguished on its facts [paras 214-222].

The HC quashed the decisions and directed Lisburn City Council to reconsider the matter for full compliance with its s75 duty.

**Comment**

This case is very important not only for the impact in respect of public realm (or shared space) schemes but also in respect of the success of a judicial challenge to compliance with the s75 NIA duty. Prior to this judgment complaints about a public authority's failure to comply with its duty to have due regard for the need to promote equality of opportunity between nine different groups have been taken to the Equality Commission for Northern Ireland which has powers under paragraph 10 and 11 of Schedule 9 of the NIA to investigate such complaints.

This case will encourage those who consider that their local authority is failing to comply with its s75 equality duty in Northern Ireland to consider litigation in such circumstances – useful as a policy tool in negotiations given the consequences of being involved in such litigation.

**Catherine Casserley**[1]
Cloisters

1. The author advised on the equality law aspects of this case.

# Notes and news

## Ministry of Justice Employment Tribunal fees' refund scheme

On October 20, 2017, the Ministry of Justice (MOJ) announced its long awaited plans for dealing with the outcome of the *UNISON* case. As the scheme for ET fees was found to be unlawful, the government had to deal with two issues: refunding the approximately £32m in fees that had been paid (including issue, hearing and appeal fees); and, dealing with cases that had been struck out for the failure to pay a fee.

The refund scheme has a phased implementation: initially 1,000 individuals will be contacted, and given the opportunity to complete an application. This is to test the suitability of both the paper and online application process. The expectation is that in around four weeks' time the full scheme will be launched, allowing anyone who has paid a fee to apply.

Those who will be eligible to apply for a refund under the scheme are those who:

- paid a fee directly to the ET or EAT, and have not been reimbursed by their opponent pursuant to an order of the tribunal
- were ordered by the tribunal to reimburse their opponent their fee and who can show that they have paid it
- representatives who paid a fee on behalf of another person and have not been reimbursed by that person
- the lead claimant (or representative) in a multiple claim who paid a fee on behalf of the other claimants.

Interest is being paid on the refunded fees of 0.5% from the date of the original payment until the refund date. Some may feel the rate reflects commercial interest rates, rather than a rate that would be awarded by a court in a judgment for a debt, which may be a more suitable comparison.

Any members who wish to be informed about the launch of the full scheme can register their interest at **ethelpwithfees@hmcts.gsi.gov.uk**. Further news items will follow once more details are announced. If any members have comments or experiences to share of the initial phase, then please contact the DLA so that we can raise these with the MOJ if appropriate.

## Government's race disparity audit

Figures included in the government's race disparity audit highlight existing data from across departments to show:

- Black Caribbean pupils are being permanently excluded from school three times as often as White British pupils
- at the second stage of primary school (key stage two), 71% of Chinese primary school pupils meet the expected standard for reading, writing and maths, compared with 54% of White British pupils and 13% of White Gypsy and Roma pupils
- White British pupils on free school meals perform the worst at key stage two with 32% reaching the expected level
- those more likely to own their own home are Indian, Pakistani and white people, compared with black people and those from Bangladesh
- unemployment for black, Asian and minority ethnic people is nearly double that of white Britons.

It also shows:

- rates of smoking are highest in the mixed and white ethnic groups (according to 2015 figures)
- of the 41.9% of people in England who visited the 'natural environment' in the past week, white people were most likely to visit; Asian people least likely
- just over half of white adults ate five portions of fruit and vegetables a day in 2015; compared with just over a third of black adults who got their 5-a-day.

The Prime Minister Theresa May has warned public services there will be *'nowhere to hide'* if they treat people differently on the basis of their race. She says that they must *'explain or change'* any variations.

See **https://www.gov.uk/government/publications/race-disparity-audit**

## Lammy Review of the treatment of, and outcomes for, BAME individuals in the criminal justice system

The Lammy Review concluded that the criminal justice system in England and Wales is biased and discriminates in the treatment of people from ethnic minority backgrounds – see **https://www.gov.uk/government/publications/lammy-review-final-report.**

The review found that people from black, Asian and minority ethnic (BAME) backgrounds make up 25% of the prison population in England and Wales and 41% of the youth justice system, despite these groups being 14% of the general population. It has highlighted various 'concerning' statistics, including a rise in the proportion of first-time offenders from these backgrounds to 19% – up from 11% – in the past 10 years, and the same increase in the proportion of young people reoffending.

The review recommends:

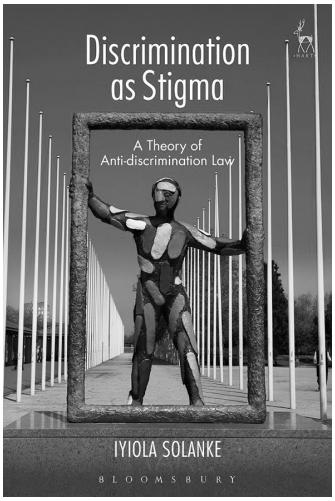
- more data should be recorded and published on both ethnicity and religion for better scrutiny of the criminal justice system's approach
- the Crown Prosecution Service should consider its approach to gang prosecutions, making sure people's actions are punished, not their associations
- modern slavery legislation should be reviewed to see if it can help prevent the exploitation of vulnerable young men and women
- identifying information should be redacted to make for 'race-blind' decisions on cases
- all sentencing remarks made in Crown Court should be published, along with a system of online feedback on judges
- hiring of new judges, with a national target of a representative judiciary of 2025, along with a more representative prison staff
- low-level offenders should be allowed to 'defer' prosecution and opt for a rehabilitation programme before entering a plea – a model used in the West Midlands
- young offenders should be assessed for their maturity to inform sentencing decisions
- the prison service should take a 'problem solving' approach for dealing with complaints and ensure fairness for prisoners when it comes to incentives and earned privileges
- reformed offenders should be able to apply to have their criminal records 'sealed' – so they need not disclose their offence to a employer.

The MOJ has announced that it will adopt some of the recommendations from the Lammy Review, including demanding that prisons have performance indicators to assess how inmates are treated and how representative their workforce is.

# Discrimination as Stigma: A theory of Anti-discrimination Law

by Iyiola Solanke, 2017, Bloomsbury Publishing plc, 223 pages, £70 (£47.82 Kindle edition, Amazon)

Solanke's monograph develops a social rather than an individualistic approach to discrimination law, promoting it as a method of determining the scope of legal protection against discrimination. As the dust jacket says, it *'reconceptualises discrimination law as fundamentally concerned with stigma. Using sociological and socio-psychological theories of stigma, the author presents an "anti-stigma principle"'* which *'recognises the role of institutional and individual action in the perpetuation of discrimination.'*




The monograph explores and uses an 'anti-stigma principle' to contextualise discrimination in its historical, social, cultural and political setting. Stigmatisation is seen as *'the social imposition of a negative relationship to a personal attribute'*. The stigmatised attribute exists independently of individual merit. Stereotyping follows but the principle goes beyond simple anti-stereotyping.

Focus on stigma as a social practice and source of discrimination is seen as akin to the social model of disability, emphasising that the problem lies not in the individual but in social structures, practices and attitudes preventing realisation of one's capabilities. This facilitates addressing intersectional discrimination where different attributes operate in synergy to create something more than the sum of the constituent parts.

Stigma provides a theoretical basis for working beyond seeing multiple discrimination within the framework of a single dimension. The four dimensions envisaged are a *'distal public sphere; a semi-proximate structural sphere; a proximate interpersonal sphere; and an intimate internal sphere'*. She urges that '*plural vision must become a norm for anti-discrimination law rather than the exception*'.

Compressing the concepts, as here and as in the author's article *Intersectionality and the 'anti-stigma principle' – disrupting anti-discrimination law* in the DLA's July 2017 *Briefings* [Briefing 827] can make the work seem too impenetrable to approach. That would be a mistake. This monograph takes one through each of the steps at a more leisurely and thought-provoking pace, illustrating the ideas and problems by drawing also on case law from different jurisdictions. Seeing 'synergy' through the example given of the colours red and yellow working together to make orange, brings both synergy and intersectionality to life. It is not an additive concept, rather synergy is transformative.

Helpfully, each sequence starts and ends with a review of what has already been and what is about to be covered. This helps set the new material into context and consolidates understanding.

After considering definitions of stigma and the results of the development of interdisciplinary research, it outlines an understanding of stigma that starts with public power and then moves to the individual level, both being relevant. The theme is to explore the role of stigma in assisting in the development of anti-discrimination law.

Solanke then gives an historical review of the development of the anti-discrimination principle in international law, considering how stigma can go beyond philosophical concepts of dignity and immutability to provide a theoretically satisfying basis for understanding which characteristics deserve protection. Her proposal is that an 'anti-stigma principle' can act as a guide to inform the boundaries of anti-discrimination law.

She then links discrimination to public health, seeing the promotion of public health as an additional non-legal rationale for anti-discrimination law. This switches the perspective from the individual to the public level. This does more than just contextualise individual acts. By framing discrimination as a public health issue, it turns it into *'a preventable health risk requiring public action for successful eradication'*. It also, she argues, makes collective action to tackle discrimination the norm, rather than the exception, creating the potential for more socially focused

remedies. Describing 'positive action' instead as a 'public action' measure lends a different legitimacy to the concept.

Solanke then moves on to discuss ways in which anti-discrimination law could be broadened before returning to consider how the anti-stigma principle can improve the ability of anti-discrimination law to tackle structural or intersectional discrimination.

She identifies ten questions to be posed when determining the stigmatised characteristics to be protected in law. These were listed in her DLA article (Briefing 827, p15). Solanke brings these to life by applying them to an evaluation of weight discrimination and of 'inkism', the social response to tattoos.

## Comment

Three passing references to Foucault as the source of some of the ideas give some warning of the need to work through the intricacies. However, it is worth engaging with Solanke's thesis. The theoretical and historical focus on discrimination as a social activity may not be groundbreaking. At times an element of caricature is utilised. But it helps set anti-discrimination law in a living and theoretical framework.

It is rare that practitioners stand back and consider the theories, basic principles, the ideology and even the sociology underlying the legal concepts that are the day-to-day bread and butter of substantive law. When they do, as in the *UNISON* ET fees challenge, resulting in the Supreme Court's focus on the meaning of the concept of the rule of law and the role of access to the courts in maintaining the rule of law, the result may go far beyond expectations. Engaging with Solanke's work suggests a similar potential.

**Sally Robertson**
Cloisters

**Abbreviations**

| | |
|---|---|
| A1P1 | Article 1 of the first protocol to the ECHR |
| AC | Appeal Cases |
| BAME | Black Asian and Minority Ethnic |
| BME | Black and Minority Ethnic |
| CA | Court of Appeal |
| CJEU | Court of Justice of the European Union |
| CPA | Civil Partnership Act 2004 |
| DDA | Disability Discrimination Act 1995 |
| DHA | Discretionary Housing Payments |
| DLA | Discrimination Law Association |
| EA | Equality Act 2010 |
| EAT | Employment Appeal Tribunal |
| EC | Early conciliation |
| ECHR | European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 |
| EHRC | Equality and Human Rights Commission |
| EJ | Employment Judge |
| ERA | Employment Rights Act 1996 |
| ET | Employment Tribunal |
| ET1 | Employment Tribunal claim form |
| ETA | Employment Tribunal Act 1996 |
| EU | European Union |
| EWCA | England and Wales Court of Appeal |
| EWHC | England and Wales High Court |
| GCSE | General Certificate of Secondary Education |
| GRT | Gypsies, Roma and Travellers |
| HC | High Court |
| HHJ | His/Her Honour Judge |
| ICR | Industrial Case Reports |
| ILJ | Industrial Law Journal |
| IRLR | Industrial Relations Law Report |
| J | Judge |
| LJ | Lord Justice |
| LLP | Legal liability partnership |
| MOJ | Ministry of Justice |
| MR | Master of the Rolls |
| NICA | Northern Ireland Court of Appeal |
| NIQB | Northern Ireland Queen's Bench Division |
| OCD | Obsessive-compulsive disorder |
| PCP | Provision, criterion or practice |
| QC | Queen's Counsel |
| RNIB | Royal National Institute of Blind People |
| SC | Supreme Court |
| UKSC | United Kingdom Supreme Court |
| WLR | Weekly Law Reports |

# Briefings



© Discrimination Law Association and the individual authors 2017
Reproduction of material for non-commercial purposes is permitted provided the source is acknowledged