ISSN 1759-2925

Discrimination Law Association

Briefings 848-858

Volume 63

March 2018

Editorial

Time to act

2017 saw the publication of a number of key research papers and reports on the extent and impact of racial inequality in Britain. Discrimination law practitioners will not be surprised to find that widespread discrimination persists with little change in 2017. The data makes depressing reading. The reports, featured in this edition of *Briefings,* focus on different areas yet all highlight inequalities in education, criminal justice, health, employment, housing and economic status.

In her article *Moving beyond disbelief and complacency – a review of recent reports on racial inequality in Britain* Susan Belgrave outlines some appalling statistics. Black Caribbean pupils are falling behind at school; Irish Travellers have the lowest rate of educational attainment and are the most likely to leave school at 16 years than any other ethnic group. Members of Black and Mixed ethnic groups are arrested at much higher rates than compared to white groups; the odds of receiving a prison sentence for drug offences are around 240% higher for Black, Asian and Minority Ethnic offenders. Black, Minority Ethnic women as a group experience multiple disadvantages and have lower rates of employment, lower incomes and are more likely to be living in poor households. Over half of Bangladeshi and Pakistani children live in poverty.

This devastating impact on the potential and well-being of children and communities is avoidable. It is not only in the interests of individuals and the success of our communities, but also the economy, that action is taken to address the structural inequalities which create such an unequal society. Full representation of BME individuals across the labour market through improved participation and progression is estimated to be worth £24 billion a year.

The House of Common's Women and Equalities Committee is currently considering evidence as part of its inquiry into how the government should respond to the inequalities revealed in its race disparity audit. As Susan Belgrave argues, the implementation of ss1 and 14 EA could make a key difference to outcomes for individuals; as could better use of the public sector equality duties including in relation to procurement. These changes would have a real and immediate impact on legal enforcement and are changes and developments supported by DLA. She also argues for a strengthened EHRC to lead the work and hold government and employers to account for the implementation of their statutory equality duties – a critical issue which the DLA has long supported.

There are two progressive sex discrimination cases reported in *Briefings* which deal with 'separate but equal' treatment. In *Carvalho Pinto De Sousa Morais v Portugal* the ECtHR considered how a lower court's approach to compensation for medical negligence combined two factors, age and sex, and created a stereotypical assumption about older women which resulted in discrimination against the complainant. The judgment underscored a core equality law principle that individuals should be treated as individuals, not as members of a group, nor on the basis of stereotypical assumptions. In the *Al-Hijrah School* case, the SC also rejected an approach which compared the treatment of girl pupils with boy pupils when it considered the mixed-sex school's gender segregation policy. Holding that the policy was detrimental to both girls and boys, it pointed out that 13 EA defines direct discrimination by reference to a 'person' not a 'group'. *'Each girl pupil and each boy pupil is entitled to freedom from direct discrimination looking at the matter from her or his individual perspective'* the SC held.

These are important judgments which should assist complainants successfully argue that 'separate but equal' treatment is discriminatory.

But while case law develops and attitudes slowly change, there is huge work still to do. The EHRC's February 2018 survey of British employers finds that they are *'living in the dark ages'* and have worrying attitudes towards unlawful behaviour when it comes to recruiting women. Just under a third of senior decision-makers consider that women who become pregnant and new mothers in work are generally less interested in career progression than other employees in their companies; 59% of decision-makers believe that women should have to disclose during the recruitment process whether they are pregnant.

The Fawcett Society's January 2018 review of sex discrimination law *'Equality. It's about time.'* concludes that our legal system is failing women and needs fundamental reform. The report has revealed a *'deeply misogynistic culture where harassment and abuse are endemic and normalised coupled with a legal system that lets women down because in many cases it doesn't provide access to justice'.*

These inequalities do not result from what some call 'pipeline issues', and the hope that time will resolve them is misplaced. Action is needed by government and policy makers now. As Susan Belgrave emphasises in her review of the racial inequality reports, we must implement lasting solutions if we are to start closing the ever-deepening gaps in society.

Geraldine Scullion
Editor

Please see page 31 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.

Moving beyond disbelief and complacency – a review of recent reports on racial inequality in Britain

Susan L. Belgrave, barrister, 7 BR Chambers, reviews the range of reports on racial inequality in Britain which were published in 2017. These reports contain data which lays bare the impact of racial inequality in every aspect of life including education, health, employment, criminal justice, housing and economic deprivation. She highlights the wealth of recommendations in these reports and concludes by setting out a number of steps which could be taken to make tangible improvements to redress the devastating outcomes which result from such inequalities. These include legal reform, government action to tackle the causes of poverty and systemic inequalities, strengthening the role of the EHRC in investigating, reporting and challenging such disparities, and encouraging employers to set ambitious targets for change in the workplace.

If the media is to be believed it is the best of times for Black people and it is the worst of times for Black people. We have a society where we have had a Black woman high court judge but where a Muslim woman cannot safely walk the streets of any major city without an increased risk of being spat at or physically assaulted. We have an increasing number of Black and Asian MPs but more hatred and vitriol displayed towards the first Black woman MP, Diane Abbott, than all other MPs combined. In short, progress (albeit slow) is being made in some areas and in others we appear to be standing still or possibly even going backwards.

2017 was a bumper year for reports on this topic: in February the McGregor-Smith review of race in the workplace was published; in September the Lammy Review on race and the criminal justice system; in October the government race disparity audit came out and the Women's Budget Group reported on *Intersecting Inequalities – the impact of austerity on BME women in the UK*, while in November the Runnymede Trust produced a report on Islamophobia.

While we have this multiplicity of data we seem no closer to implementing the lasting solutions so badly needed in all spheres of society.

It seems appropriate to start with the government's race disparity audit which purports to cover all sectors of society while many of the others provide greater in-depth analysis in relation to a particular aspect of the problem.

The government's Race Disparity Audit

This audit was striking for what it did not contain: any systematic analysis or recommendations. It was merely an accumulation of data which had in many cases been available elsewhere. The data was for the first time brought together under one roof and made available on the internet for consultation by those involved in policy. It showed for instance that the proportion of people identifying as White British in England and Wales decreased from 87.4% in 2001 to 80.5% in 2011 and, as is widely apparent, the UK is growing increasingly more diverse. This audit summarised problems in the workforce and criminal justice system, dealt with more analytically in the Lammy review and the McGregor-Smith report, but also highlighted issues in health, education and housing which are troubling and need to be addressed.

In the field of education, the data on results was very mixed. Pupils from Chinese and Indian backgrounds showed high attainment and progress throughout their school careers and high rates of entry to university. Pupils from Gypsy and Roma, or Irish Traveller background (which are not included in the White British category), had the lowest attainment and progress, and were least likely to stay in education after the age of 16. Although pupils in the Black ethnic group made more progress overall than the national average, Black Caribbean pupils fell behind. White British pupils and those from a Mixed background also made less progress than average.

Low educational attainment and progress is closely associated with economic disadvantage in some ethnic groups, but there was little difference say between poor and middle class Black Caribbean pupils for whom attainment is very low overall, with a smaller gap between pupils eligible for free school meals and those not. Pupils from Pakistani and Bangladeshi backgrounds are achieving almost as well as, and progressing better than, White British pupils, whereas the attainment and progress of Black Caribbean pupils is much lower. White pupils from state schools had the lowest university entry rate of any ethnic group in 2016.

Disadvantaged pupils in receipt of free school meals in London made more progress and had higher attainment than their counterparts elsewhere in England.

Interesting data is also available in relation to the health sector. There are differences between ethnic groups across a range of health-related behaviours and preventable poor outcomes, and each ethnic group exhibits both healthy and unhealthy behaviours. Most Asian groups express lower levels of satisfaction and less positive experiences of NHS General Practice services than other ethnic groups and there are differences in the prevalence of mental ill-health, its treatment and outcomes between ethnic groups. In the general adult population, Black women were the most likely to have experienced a common mental health disorder such as anxiety or depression in the last week, and Black men were the most likely to have experienced a psychotic disorder in the past year. However, White British adults were more likely to be receiving treatment for a mental or emotional problem than adults in other ethnic groups. Of those receiving psychological therapies, White adults experienced better outcomes than those in other ethnic groups. Black adults were more likely than adults in other ethnic groups to have been sectioned under the mental health legislation.

In the area of housing, White British householders were most likely to own their own home within every region of the country, every socio-economic group and income band, as well as all age groups. Households of Indian, Pakistani, and Mixed White and Asian ethnicity had similar rates of home ownership to White British households, of whom 68% owned their homes. Apart from these groups, households in all other groups were less likely to be home owners than White British households. Fewer than one in four African, Arab, and Mixed White and Black African households were owner-occupiers. White British households were correspondingly less likely to rent either privately or from a social landlord than all other households.

The EHRC 2016 report, *Healing a divided Britain,* had noted in 2011/12 in England, a higher proportion of individuals in households where the household reference person (HRP) was from an ethnic minority lived in substandard housing compared with those where the HRP was White. The figure for Black households was 27.9%; it was 26.3% for Pakistani/Bangladeshi households, and 20.5% for White households. Children from Pakistani/Bangladeshi (28.6%) and Black (24.2%) households were more likely to live in substandard accommodation than those in White households (18.6%) in 2011/13.

In England, a higher percentage of Indian (13.4%), Pakistani/Bangladeshi (21.7%), Black (15.7%) and 'Other' (12.5%) households lived in overcrowded housing than White households (3.4%) in 2012/13. Similarly, children in Indian (21.1%), Pakistani/Bangladeshi (30.9%), Black (26.8%) or 'Other' households (23.6%) were more likely to live in overcrowded accommodation than children in White households (8.3%) in 2012/13.

Runnymede Trust – Islamophobia: Still a challenge for us all

This report marks the 20-year anniversary of Runnymede's 1997 report *Islamophobia: A Challenge for Us All.* The 2017 report includes recommendations to address Islamophobia, outlines the evidence on Islamophobia in various social domains, and differing perspectives on how to understand the concept.

Runnymede considers that the government should adopt its definition of Islamophobia as anti-Muslim racism. As with many Black and minority ethnic groups, Muslims experience disadvantage and discrimination in a wide range of institutions and environments, from schools to the labour market to prisons to violence on the street. Policies to tackle Islamophobia should be developed in line with policies to tackle racial discrimination more generally, with the focus also on the real effects on people. Public services as well as private and charity sector employers should collect more data on Muslims and other faith/non-faith groups. Historically, Pakistani and Bangladeshi ethnic group categories were used as proxies for Muslim; these groups currently account for just over half (55%) of British Muslims.

The report recommends that the government should reintroduce a target to reduce child poverty, and develop a wider anti-poverty strategy. Given that over half of Bangladeshi and Pakistani children live in poverty, and given that the rates of poverty among Muslims generally are much higher than the average, tackling poverty would greatly improve British Muslims' opportunities and outcomes. Employers and employment support organisations should address barriers to equal labour market participation. Policies addressing racial discrimination within the labour market will also improve outcomes for minority faith groups. Race equality, Muslim and other faith-led civil society groups and organisations should work more closely together to build a common platform to challenge all forms of racism and prejudice. It is important to understand that different forms of racism have different attributes, whether anti-Jewish, anti-

Muslim or anti-black, and that it is therefore reasonable and justifiable to understand and respond to specific forms of racism. Local mayors and Police and Crime Commissioners should ensure appropriate resources are allocated to tackling hate crime effectively at a local level. In addition to criminal justice sanctions for the most serious hate crime offenders, the government should utilise community based, restorative and rehabilitative interventions to tackle hate crime.

Runnymede recommends that the government should robustly challenge hate speech. There should be a full independent and fully transparent inquiry into the government's counter-terrorism strategy bearing in mind that such measures must not lead to discrimination on the grounds of race, colour, religion, descent, or national or ethnic origin, in purpose or effect.

Following the Brexit vote and terrorist attacks in Manchester and London in 2017, there has been a sharp rise in hate crimes and anti-Muslim attacks in Britain (Sharman and Jones 2017, Littler and Feldman 2015). These incidents include mosques being targeted, Muslim women who have had their hijab (headscarf) or niqab (face veil) pulled off, and two Muslims in London who were the subject of a horrific acid attack (Hooper 2017).

Women's Budget Group – Intersecting Inequalities

This report contains the findings of a cumulative impact assessment of the impact of spending cuts since 2010 on Black and Minority Ethnic (BME) women. It is the first intersectional analysis of the cumulative impact of austerity using both qualitative and quantitative data.

Following the 2010 Emergency Budget, continuing public spending cuts totalling £83bn have led to further cuts to social security and public services. Women have been disproportionately affected by these cuts as a result of structural inequalities which mean they earn less, own less and have more responsibility for unpaid care and domestic work. BME households also face persistent structural inequalities in education, employment, health and housing and are thus disproportionately affected by these cuts. For BME women, gender inequalities intersect with and compound racial inequalities making these women particularly vulnerable to cuts to benefits, tax credits and public services. The report shows the extent to which the BME women, and the poorest BME women in particular, are disproportionately affected by the spending cuts since 2010.

As a result of these benefit cuts and tax changes:

- women will lose more than men.
- Asian women in the poorest third of households lose on average 19% of their income by 2020 (over £2,200) compared to what their position would have been if the 2010 policies had continued to 2020.
- Black women in the poorest households will lose on average 14% of their income (over £2,000 a year).
- Black and Asian lone mothers, respectively, stand to lose £4,000 and £4,200 a year on average by 2020 from the changes since 2010, about 15% and 17% of their net income.
- BME women are more likely to be living in poor households. In 2015/16, 50% of Bangladeshi households, 46% of Pakistani households and 40% of Black African/Caribbean households were living in poverty compared to 19% of White British households.
- BME women face multiple disadvantages, including sexism and racism in the labour market. Whilst only 4% of White British and White Irish women are unemployed, it is more than double that for Black Caribbean (11%), Black African (12%) and Bangladeshi women (9%). The very groups that have been hardest hit by cuts to benefits are also those that are least able to compensate through increased earnings in the formal labour market. As a result, households from these ethnic backgrounds tend to have much lower incomes and be over-represented amongst those in poverty.

Lammy review of criminal justice

David Lammy MP also concluded in September 2017 his *Independent Review into the treatment of and outcomes for Black Asian and Minority Ethnic individuals in the criminal justice system* which highlighted inequalities in the justice system at all levels for minorities in England and Wales. He found that tougher decisions on charging and sentencing were made in respect of minorities. One of the findings that stays with you is the fact that juries give fairer outcomes than single judges when dealing with individuals from ethnic minorities.

He concluded that BAME individuals still face bias, including overt discrimination, in parts of the justice system in relation to charging, prosecuting and sentencing decisions as well as treatment while in prison and afterwards. Prejudice has declined but still exists in wider society and thus it would be a surprise if it was entirely absent from criminal justice settings. He focused primarily on the treatment and outcomes of BAME individuals rather than the intentions behind

countless decisions in a range of different institutions. Decision-making must be subject to scrutiny to ensure greater fairness. Bringing decisions out into the open encourages individuals to check their own biases and it helps to identify and correct them. In practice, this can mean different things in different settings, from publishing more data to allowing outside scrutiny, to governance arrangements that hold individuals to account within organisations. As technology develops with for example, greater use of algorithms, the nature of scrutiny will need to evolve too. Lammy argues that the criminal justice system will need to find new ways to deliver transparent decision-making. In the US, there are examples of individuals being sentenced partly on the basis of software that is proprietary and therefore not open to challenge and scrutiny.

McGregor-Smith Review of Race in the Workplace

This report also contains some useful data on the extent of the issues facing minorities in the workplace:

- in 2015, one in eight of the working age population were from a BME background, yet BME individuals make up only 10% of the workforce and hold only 6% of top management positions;
- the employment rate for ethnic minorities is only 62.8% compared with an employment rate for White workers of 75.6% – a gap of over 12 percentage points. This gap is even worse for some ethnic groups, for instance the employment rate for those from a Pakistani or Bangladeshi background is only 54.9%;
- people with a BME background have an underemployment rate of 15.3% compared with 11.5% for White workers. These people would like to work more hours than they currently do;
- all BME groups are more likely to be overqualified than White ethnic groups but White employees are more likely to be promoted than all other groups.

The underemployment and underpromotion of people from BME backgrounds is not only unfair for the individuals affected, but a wide body of research exists that has established that diverse organisations are more successful. As McKinsey identified in 2015, companies in the top quartile for racial and ethnic diversity are 35% more likely to have financial returns above their respective national industry median. The lost potential and productivity – both from these individuals being more likely to be out of work or working in jobs where they are overqualified (and underutilised) – has a significant impact on the economy as a whole. If the employment rate for ethnic minorities matched that of White people, and BME individuals were in occupations commensurate with their qualifications, the benefits would be massive. The potential benefit to the UK economy from full representation of BME individuals across the labour market through improved participation and progression is estimated to be £24 billion a year, which represents 1.3% of GDP.

The McGregor-Smith review also contains many useful recommendations and insights into how the situation might be improved and importantly highlights the need to appeal to businesses in terms of commercial advantage rather than moral rectitude. Many employers only take the positive action required when success is woven into the key performance indicators (KPIs) of both senior management and the organisation as a whole. In many instances KPIs focus on sales figures or profits, but more recently some companies set KPIs to try and increase gender diversity at all levels of their organisation. In part this has been driven by the requirement to report the gender pay gap. It raises and rejects the idea of quotas because apparently a significant number of employers and individuals during the review argued that quotas can cause resentment and, in some cases, lead to unintended consequences.

TUC: Is racism real?

The TUC published this report in November 2017 and its findings will not surprise. There are over three million BME employees in the UK, of whom nearly a quarter of a million are in a zero-hours or temporary contracts. The report found that one in 13 BME workers are in insecure work compared to one in 20 White employees. People from the Black community were twice as likely as White workers to be in temporary work, and have experienced the largest jump in the number of people in temporary jobs between 2011 and 2016, with a sharp rise of 58% compared to an overall increase of 11%. The report also found that almost one in 20 Black workers are on a zero-hours contract compared to the national average of one in 36 workers. More strikingly, Black women had seen an increase of 82% in temporary contract work in the last five years.

The TUC conducted a poll among its members and some of the key findings were:

- more than a third (37%) of BME workers have been bullied, abused or experienced racial discrimination by their employer;
- BME people reported that the discrimination they experienced at work was based on their race or ethnicity. However, when reporting assault or violence, most BME workers reported that they

experienced this type of assault because of their gender;
- direct managers were most likely to be the main perpetrators of assault and physical violence, bullying or harassment as they were for BME workers facing discrimination. The racist remarks, opinions, and jokes were mainly perpetrated by colleagues;
- the next most common perpetrator was a customer or client, reported by 23% of both men and women;
- the most commonly reported effect of racial harassment and discrimination was its impact on the respondent's performance at work and its negative impact on their mental health. Respondents reported wanting to leave their jobs, but being unable to afford to do so.

The TUC noted significant complaints of bullying, assault and attendant mental health problems from Black women which correlate with issues raised in other reports.

In relation to young workers they found:
- most younger workers (18- to 24-year-olds) polled had experienced detrimental racism and discrimination at work. BME young workers are more likely than workers aged over 45 to be in an insecure job, either on a zero-hours contract (26%), facing underemployment (22%) or having their hours reduced at short notice (27%);
- BME workers aged under 34 were more likely than older workers to have had racist comments directed at them or heard them directed at someone else. They were also more likely to have seen racist material being shared online;
- 19% of young workers who did raise the issue of verbal abuse were treated less well at work.

Translating statistics into policy: what now?

These reports cover the same ground repeatedly and while it is wholly admirable that so many organisations are concerned about the extent of racism in our society one has to consider whether this plethora of evidence and research will lead to tangible policies, different practices and better outcomes for those identified as being adversely affected by the current system. To put it bluntly, in 10 years will this have made any difference whatsoever?

There are some issues which require government intervention as a matter of urgent priority. The overwhelming evidence is that poor outcomes for ethnic minorities are largely, but not exclusively, linked to poverty and economic deprivation. Many of these are low-income households, many dependent on benefits, where education and health opportunities are not as advantageous as they are to middle income or wealthier families. The government's response to the Taylor Review on the gig economy gives no hope that it has any intention of lifting families out of precarious employment. An indifference which particularly affects families of minority ethnic background.

Such individuals are in poorer housing and more precarious employment and are often known to the criminal justice system where they experience more severe outcomes than their White peers. While charities and other institutions can be active at the margins, the systemic inequalities in jobs, education, health and criminal justice are matters for the government to tackle head on. The role of the EHRC in investigating, reporting and challenging such disparities must clearly be strengthened.

In its 2016 report *Healing a divided Britain: the need for a comprehensive race equality strategy*, the EHRC highlighted these very issues and urged action. It is no secret that for many years the EHRC has worked with a diminished budget, staff and a reduced enforcement role. It seems to me that this situation must be reversed as the Commission, which has an important statutory role in all areas of society, should be a key leader in all aspects of this work.

When one looks at the Equality Act 2010 (EA), we note that there has been a signal failure to implement important aspects of that Act which could make a key difference to outcomes for individuals:
- after being critical of the socio-economic duty set out in s1 EA, I consider that perhaps its significance lies in providing public sector organisations with the framework many of them need to begin to tackle much of the unfairness which currently exists in society and identified by these reports;
- consideration needs to be given to implementing s14 on intersectional discrimination or in amending it so that some focus is given to the double disadvantage that some minorities face, in particular Black women and young people from ethnic minority backgrounds;
- the unforgiveable repeal of s40 EA dealing with employer liability for third party harassment should be immediately reversed so that workers can expect better protection from their employers in relation to racial and indeed sexual harassment from clients and customers of their business or organisation;
- greater transparency in relation to the race pay gap and a requirement for reporting should introduced;
- better use should be made of the public sector equality duties, and procurement policies used in a more compelling fashion by public sector organisations.

848

Processes and procedures

Organisations seem to naively believe that once their processes are recorded and reasonably transparent the outcomes must necessarily be fair. However, an organisation which has never recruited a Black employee in an area where they are well represented perhaps ought to question whether more ought to be done. Examining their methods of recruitment, issues of implicit bias and recruitment in their own likeness may expose room for improvement. Where Black employees remain represented at the lower echelons of the organisation similar searching questions should be asked and, as McGregor-Smith identifies, key performance indicators introduced to consider the issue. The disproportionate number of BME employees unnecessarily subject to disciplinary proceedings and those capriciously deemed not good enough for promotion should also be monitored to uncover unfairness in these processes where discretion if often a crucial factor.

British society has been largely hostile to the idea of positive discrimination and quotas being imposed on private and public sector organisations. There are many arguments on both sides. However, there seems little disincentive to setting ambitious targets for managers and institutions which will have to consider how best these may be achieved. This may, instead of the customary hand-wringing of despair that little progress has been achieved lead to some tangible improvement in the situation.

849

Briefing 849

PRACTICE & PROCEDURE UPDATE

Update on practice and procedure

Jurisdiction issues:

Michalak v General Medical Council and others [2017] UKSC 71; November 1, 2017

Outcome

S120(7) EA generally excludes jurisdiction over a complaint against a qualifications body where there is a statutory provision for an appeal, or proceedings *'in the nature of an appeal'*, against that body's decision. The SC held that s53 EA provides that a person seeking or holding a professional or trade qualification is nevertheless protected from discrimination by the relevant qualifications body.

Brief facts

Dr Michalak was dismissed by the NHS Trust that employed her. An ET found that her dismissal was tainted by race and sex discrimination and awarded her compensation with a public apology. Prior to the ET's determination, the NHS Trust referred her to the GMC to consider the issue of her registration. Michalak complained that through its investigation and the hearing relating to her fitness to practise, the GMC had harassed and discriminated against her, contrary to the EA. Whilst ss38 and 40 of the Medical Act 1983 provide for an appeal against GMC determinations, they only covered decisions in relation to registration. Consequently, Michalak brought a claim of race discrimination in the ET.

The issue for the SC was whether judicial review could be said to be *'an appeal or proceedings in the nature of an appeal'*, and whether it was available *'by virtue of an enactment'*. Both conditions had to be satisfied for s120(7) EA to be engaged and to prevent the EA from applying here. Lord Kerr held that an appeal involves a review of an original decision in all its aspects, including substituting its own view if it disagrees. An appeal in a discrimination complaint against the GMC must confront directly the question of whether discrimination has taken place, not whether the GMC has taken a decision which was legally open to it. Judicial review was not an appeal, it is a proceeding in which the legality of a decision, or the procedure by which it was reached, is challenged.

Implications for practitioners

- S53 EA may provide protection from discrimination against a qualifications body;
- identify the appeal processes available against the body's decision;
- there must be a statutory appeal or proceedings '*in the nature of an appeal'* available for s120(7) to apply and s53EA to be disapplied;
- S120(7) will not prevent the EA from being engaged where judicial review is the only option for an appeal.

Jurisdiction issues:
P v Commissioner for Police of the Metropolis [2017] UKSC 65; October 25, 2017

Outcome

The principle of judicial immunity did not act to prevent a police officer's discrimination claim relating to a decision of a misconduct panel. S42(1) EA was read by the SC to comply with EU law in these cases.

Brief facts

P, a serving police officer, was assaulted in 2010 and subsequently suffered post-traumatic stress disorder (PTSD). In 2011, she was arrested after an incident which she blamed on her PTSD. At a misconduct hearing, apart from one issue of fact which was resolved in her favour, she accepted that she had been guilty of the misconduct alleged. She relied on her good record as a police officer and her PTSD in mitigation.
The disciplinary panel dismissed P without notice.

P appealed unsuccessfully against her dismissal to the Police Appeals Tribunal (PAT), which could allow her appeal if it considered the disciplinary action taken to be unreasonable.

She also brought EA proceedings in the ET against the Commissioner of Police for the Metropolis claiming that the decision to dismiss her constituted discrimination arising from disability, disability-related harassment, and a failure to make reasonable adjustments.

The ET struck out P's claim on the basis that the PAT was a judicial body, and that since P's claim was that its decision and the process by which it was reached were unlawfully discriminatory, the claim was barred by judicial immunity. P's appeal against that decision was dismissed by the EAT, following *Heath v Commissioner of Police of the Metropolis* [2004] EWCA Civ 943.

The SC held that Directive 2000/78 granted all persons, including police officers, a right to be treated in accordance with the principle of equal treatment in relation to employment and working conditions. The creation of a statutory process which assigned disciplinary functions for police officers to persons whose conduct might attract judicial immunity under domestic law did not prevent complaints by officers to an ET that they had been treated contrary to the Directive. The reasoning of the CA in *Heath v Commissioner of Police of the Metropolis* [2004] EWCA Civ 943, in relation to EU law, was incorrect and was overruled in part.

Implications for practitioners

- The determination of a misconduct panel may be properly scrutinised for discrimination under the EA;
- the Framework Directive applies the principle of equal treatment to all;
- S42(1) EA must be interpreted so as to comply with EU law.

CA restates original understanding of proving facts and shifting the burden of proof:
Ajayi Ayodele v CityLink Ltd & Napier [2017] EWCA Civ 1913; November 11, 2017

Outcome

There was no fair reason why an employer should have to discharge the burden of proof until an employee had demonstrated a *prima facie* case of discrimination. Prior to an ET making an assessment, the claimant had to start the case, otherwise there would be nothing for the employer or ET to assess. *Efobi v Royal Mail Group Ltd* [2017] IRLR 956; Briefing 844, was incorrectly decided and should not be followed.

Brief facts

Ajayi Ayodele (AA) resigned from his employment claiming constructive unfair dismissal, racial discrimination, racial harassment, victimisation, and unfair dismissal. The ET dismissed all his claims, finding that he had failed to prove a *prima facie* case of discrimination, so the burden of proof had not shifted to the employer. It also found that AA's exceptionally poor attendance rate made it likely that the employer had expressed some frustration, but he had not been treated less favourably.

AA argued that the ET had erred by (1) failing to examine the employer's evidence at the first stage of analysis; (2) holding that the burden of proof lay on an employee at the first stage to show a prima facie case of less favourable treatment. He argued that s136(2) EA required the tribunal to consider all the evidence in deciding whether the facts indicated discrimination and, unless the employer could discharge the reverse burden of proof, the tribunal had to find discrimination.

849 **CA restates original understanding of proving facts and shifting the burden of proof:**
Ajayi Ayodele v CityLink Ltd & Napier [2017] EWCA Civ 1913; November 11, 2017

Brief facts (continued)

The CA held that the burden of showing a prima facie case of discrimination under s136 EA remains on the claimant, and that *Efobi* was wrongly decided and should not be followed.

Wong v Igen Ltd (formerly Leeds Careers Guidance) [2005] EWCA Civ 142, approved by the SC in *Hewage v Grampian Health Board* [2012] UKSC 37, was preferred.

Implications for practitioners

- The burden of showing a prima facie case of discrimination under s136 EA remains on the claimant;
- only after showing a *prima facie* case of discrimination will the burden of proof shift to the employer.

Amending ET1s:
Galilee v The Commissioner of Police of The Metropolis [2017] UKEAT 0207/16/2211; November 22, 2017

Outcome

Amendments to pleadings in the ET which introduced new claims or causes of action took effect for the purposes of limitation at the time permission was given to amend. There was no doctrine of 'relation back' which applied.

Brief facts

G appealed against a refusal of permission to amend his ET claim. He was dismissed on February 5, 2015. Representing himself, he lodged a complaint of unfair dismissal on March 20, 2015. He later instructed solicitors.

On July 31, 2015, G sought permission to amend his case by introducing complaints of disability discrimination, harassment and victimisation. He accepted that these amendments, if allowed, would have the effect of adding causes of action in respect of which it was arguable that proceedings had not been brought within the appropriate time limit. He claimed that he had been the victim of a series of acts extending over a period. When hearing the application for permission to amend, the employment judge (EJ) reminded himself of the guidance given in *Selkent Bus Co Ltd v Moore* [1996] ICR 836.

The EJ stated that the critical issue was time and that if the application were allowed, the respondent would be deprived of its jurisdictional/limitation defence. The EJ also stated that whether it was just and equitable to extend time could have been tested by issuing further proceedings and the balance tipped in favour of refusing permission to amend.

The EAT held that the EJ, when stating that allowing the amendments would deprive the respondent of a limitation defence, must have been relying on the doctrine of 'relation back' and had erred in doing so. Amendments to pleadings in the ET which introduced new claims or causes of action took effect for the purposes of limitation at the time permission to amend was granted. There was no doctrine of 'relation back' here. *Rawson v Doncaster NHS Primary Care Trust* [2008] UKEAT/0022/08/ZT and *Newsquest (Herald and Times) Ltd v Keeping* [2010] UKEAT/0051/09/BI in so far as they were relied on the 'relation back' doctrine, were wrongly decided. The conclusions reached in *Potter v North Cumbria Acute Hospitals NHS Trust* [2009] IRLR 900 and *Prest v Mouchel Business Services Ltd* [2011] ICR 1345 were to be preferred.

Implications for practitioners

- No doctrine of relation back applies to amendments to pleadings in the ET;
- amendments to pleadings introducing new claims or causes of action take effect for limitation purposes, at the time permission to amend is granted;
- in many cases it will be preferable to hear evidence when evaluating the likelihood of the granting of any extension of time on 'just and equitable' grounds and resolving the issue of whether there had been a 'continuing act' at play.

Sex and age stereotyping – intersectional discrimination

Carvalho Pinto De Sousa Morais v Portugal ECtHR Application no. 17484/15; July 25, 2017

Facts

Ms Carvalho Pinto de Sousa Morais (C), a Portuguese national, had a painful gynaecological disease. After unsuccessful treatment, she underwent surgery to try and resolve it. The surgery was negligent, injuring her left pudendal nerve. This caused intense pain, a loss of vaginal sensation, urinary and faecal incontinence and difficulty in sitting and walking. Sex was difficult. She was severely depressed. She felt diminished as a woman. The negligence left her with a permanent degree of disability assessed at 73%. At the time of the operation, she was 50 years old, married with children.

Portuguese domestic proceedings

In C's civil claim for damages against the hospital, the Lisbon Administrative Court awarded €80,000 compensation for non-financial loss and €92,000 for financial loss. Of that, €16,000 was to pay for the services of a maid.

The hospital appealed to the Supreme Administrative Court (SAC). SAC upheld the first-instance judgment on the merits but reduced the compensation.

It cut the amount allocated for the services of a maid by €10,000, finding it '*manifestly excessive*' and observing:

> *Indeed, (1) it has not been established that the plaintiff had lost her capacity to take care of domestic tasks, (2) professional activity outside the home is one thing while domestic work is another, and (3) considering the age of her children, she probably only needed to take care of her husband, this leads us to the conclusion that she did not need to hire a full-time maid ...*

On non-financial loss, in cutting the amount to €50,000, SAC took into account that she had been in severe pain and depressed before the surgery, adding:

> *Additionally, it should not be forgotten that at the time of the operation the plaintiff was already 50 years old and had two children, that is, an age when sex is not as important as in younger years, its significance diminishing with age.*

The Attorney General's Office, joined by C, appealed, but SAC dismissed both appeals and upheld its earlier judgment.

European Court of Human Rights

C complained to the ECtHR, arguing that SAC's decision was a breach of Article 14 (prohibition of discrimination), read with Article 8 (right to respect for private and family life) of the Euopean Convention on Human Rights (ECHR).

By a majority, the ECtHR declared the application admissible: the facts at issue fell within the scope of Article 8. The notion of '*private life*' is a broad concept, encompassing also the right to personal development, so that elements such as gender identification, sexual orientation and sex life fall within the '*personal sphere protected by Article 8*'.

By five votes to two, the ECtHR held there had been a breach of Article 14 read with Article 8 because SAC had made a general assumption without attempting to look at how valid it was in relation to C. The court found that age and sex appeared '*to have been decisive factors in the final decision, introducing a difference of treatment based on those grounds*'.

SAC had assumed that sexuality was not as important for a 50-year old woman and mother of two children than it would be for someone younger. That assumption reflected the '*traditional idea of female sexuality as being essentially linked to child-bearing purposes and thus ignores its physical and psychological relevance for the self-fulfilment of women as people*'.

The ECtHR considered the contrasting approach taken in two cases where significantly higher awards had been made for 55 and 59 year-old men who were no longer able to have sex, with no consideration of their age, nor whether or not they already had children.

The two dissenting judges argued there was insufficient evidence of a difference in treatment to satisfy Article 14; also that the main focus of the offending passage was on age, not gender.

Judge Yudkivska in her concurring opinion agreed there was not a sufficient series of Portuguese cases demonstrating men and women being treated systematically differently. She countered this in two ways. First,

> *… this is a case where prejudicial stereotypes have affected the judicial assessment of evidence, which is perfectly sufficient to find a violation of Article 14 …*

850

The court's wording proves that sex stereotypes certainly played some role in its decision-making … even if their role was a minor one, they still represented an attack on the applicant's human dignity, and as such were a negation of her rights. The point is that prejudicial stereotypes and antiquated perception of gender roles had no place in a rational judicial assessment.

Secondly, that the wrongs of stereotyping are not comparative in nature. The language of SAC's judgment was '*discriminatory in and of itself*'. It was '*both irrational and degrading*' for SAC to speculate about C's sex life in general and to make any presumption in this respect based on a generalisation:

… when a judge engages in stereotyping, he or she reaches a view about an individual based on preconceived beliefs about a particular social group and not relevant facts or actual enquiry related to that individual or the circumstances of their case.

Judge Motoc agreed that '*the test of comparability is not suited to cases of stereotyping*'. She went on to explain that the ECtHR's reference to the similar decisions on men was '*not used as a comparator, but also as a contextual element.*' It reinforced the court's finding of discrimination.

Comment

Even though the ECtHR does not address intersectional discrimination explicitly, this can be seen as an example. Two factors, age and sex, combine to deliver the core stereotypical assumption. Rather than analyse laboriously the separate influence of each factor, the court focuses on the outcome, the resulting discrimination.

The strength of the ECtHR's unpicking and spelling out the nature of the stereotypes at play is that it underscores a core theme informing equality law that individuals should be treated as individuals, not as members of a group, nor on the basis of stereotypical assumptions. This should prove useful in challenging attempts to argue that treatment is 'different but equal'.

Sally Robertson
Cloisters

851 Briefing 851

Risk assessments for breastfeeding mothers – the consequences of failure to comply

Otero Ramos v Servicio Galego de Saúde and another Case C-531/15 [2018] IRLR 159; October 19, 2017

Implications for practitioners

The CJEU's decision makes clear an employer directly discriminates against a breastfeeding mother by failing to properly conduct a risk assessment satisfying Article 4(1) of the Pregnant Workers Directive (Council Directive 92/85/EEC) (PWD). The exclusion under s13(7) EA of protection for breastfeeding mothers directly discriminated against at work is incompatible with this judgment. The *Otero Ramos* judgment also suggests employers are under a positive duty to conduct a risk assessment regardless of whether or not the worker shows evidence of possible risk, contrary to the position in domestic jurisprudence.

Facts

Ms Otero Ramos (OR) is a nurse in a Spanish A&E department. She gave birth and breastfed her child. Before returning to work, she informed her employer she was still breastfeeding and considered her working conditions liable to adversely effect her milk, exposing her and her child to risk.

A hospital management report asserted her post had been classified as risk-free and that a doctor from the department of preventive medicine for occupational risks had declared her work posed no risk to a breastfeeding mother and child. The report lacked reasoning. The INSS (social security institute) took the report into account in rejecting OR's application for a financial grant as someone unable to work due to hazards to her and her child whilst breastfeeding.

A report by OR's line manager – a doctor and the director of the hospital's A&E department – came to the opposite conclusion. That report was not referred to in the management report nor in the INSS rejection.

OR challenged the rejection in court and appealed on dismissal of her application.

The appeal court referred four questions concerned with whether and how the burden of proof provisions

under the Equal Treatment Directive (Council Directive 2006/54/EC) (ETD) applied.

Legal framework

Under the PWD, as transposed into Spanish law, OR's employer was required to conduct a risk assessment. Article 4 PWD requires an assessment of the nature, degree and duration of exposure to risks, and determination of measures to be taken to counter identified risks. PWD Annex 1 sets out a non-exhaustive list of risks. Article 4 must also be read with Article 3, which empowers the European Commission to draw up guidelines on the assessment of hazardous chemical, physical and biological agents and industrial processes. Article 3 prescribes that the guidelines also cover:

> *…movements and postures, mental and physical fatigue and other types of physical and mental stress connected with the work done by [a breastfeeding worker]*

The guidelines provide wide-ranging guidance on risks and preventive measures, explaining there are at least three phases of an appropriately conducted risk assessment:

- identification of hazards;
- identification of worker categories (i.e. pregnant, new mothers and breastfeeding mothers), and
- a risk assessment in both qualitative and quantitative terms.

The guidelines emphasise the need for individualised assessment and continued review due to the dynamic nature of pregnancy and early maternity.

Where risk is found, Article 5(1) PWD requires the employer to adjust working conditions and/or working hours to avoid exposure to that risk. If not feasible or reasonable, Article 5(2) requires the employer to move the worker to another job. If that is not feasible or reasonable, Article 5(3) requires the grant of leave for the period necessary to protect the worker's safety or health. During leave, Article 11 requires the maintenance of payment and/or entitlement to an adequate allowance.

The burden of proof provisions under the ETD apply to situations covered by the PWD. Article 19(4)(a) makes that clear. Moreover, in defining discrimination, Article 2(2)(c) expressly includes *'less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of* [the PWD]*'*.

CJEU

The CJEU, following closely the opinion of Advocate General Sharpston, held failure to assess risk posed to a breastfeeding worker in accordance with Article 4(1) PWD amounts to direct sex discrimination. The burden of proof provisions apply. The female worker needs to establish facts or evidence which could show the risk assessment was not conducted in accordance with Article 4(1). The letter from OR's line manager, a reasoned letter from a senior A&E consultant, sufficed. It was capable of showing the workplace risk assessment excluded specific individualised assessment and was thus not conducted in accordance with the legislative requirements. The burden shifted. The unreasoned employer's report did not provide an irrebutable presumption an appropriate assessment had been carried out. The same approach also applied to the burden of proof when considering Article 5 PWD.

Comment

The impact of this judgment on domestic legislative interpretation may be twofold.

First, s13(7) EA can surely not remain unaltered. The disavowal of protection of breastfeeding mothers against direct sex discrimination in the workplace is incompatible with *Otero Ramos*. In its January 2018 Sex Discrimination Law Review, the Fawcett Society recommended an immediate legislative change to align the EA with the judgment. That must be right. In the meantime (and awaiting the post-Brexit legislative transition), practitioners ought to plead breach of the European legislation and rely on the expansive European interpretative tools available to resolve matters of domestic legislative incompatibility.

Secondly, *Otero Ramos* appears to require the employer to be proactive in conducting a risk assessment. This is contrary to domestic judicial interpretation. The requirement under the PWD to hold a risk assessment is transposed into domestic law by the Management of Health and Safety at Work Regulations 1999 (SI 3242/1999). Reg 16(1) requires a risk assessment where the work in question *could* involve a relevant risk. In *Madarassy v Nomura International Ltd* [2007] EWCA Civ 33 [2007] IRLR 246, the Court of Appeal held the statutory wording means absent evidence of potential risk there is no obligation. See also the EAT in *O'Neill v Buckinghamshire County Council* [2010] IRLR 348. However, all that was required in *Otero Ramos* to shift the burden of proof was evidence a compliant risk assessment had not been conducted. Although the line manager's report was relied upon to shift the burden, it was not relied upon to show preliminary evidence of risk but merely to show that a compliant risk assessment had not occurred.

Jason Braier
Field Court Chambers

Transgender challenge to the DWP's data retention systems

R (on the application of C) v Secretary of State for Work and Pensions [2017] UKSC 72; November 1, 2017

This appeal challenged whether policies adopted by the Department for Work and Pensions (DWP) which govern how data which reveals the gender history of transgender people is retained, are in breach of the Gender Recognition Act 2004 (GRA), the Human Rights Act 1998 (HRA) and the Equality Act 2010 (EA).

Background

The DWP records information about every individual with a National Insurance number on a database, the Customer Information System (CIS). This includes, for a trans person, their current sex, the fact that they were previously recorded as having a different sex (if applicable), their current name and title, and any former names and titles, the fact that a person has a Gender Recognition Certificate (GRC) and its date, and the reason for a change of recorded sex being due to gender reassignment (if this is the case).

Under its data retention policy, the DWP holds this data for the life of the individual concerned and for 50 years and a day thereafter. The DWP states that it retains this data because gender at birth currently remains relevant to the calculation of state pension entitlement (for a small and decreasing number of trans people[1]), and in order to reduce the prospect of old identities being used for fraudulent reasons.

In the course of this litigation, the DWP changed its policy so that the fact of a GRC and the reason for a change of recorded sex being gender reassignment is still retained but is no longer visible to front-line staff. However, front-line staff do continue to have access to any previous name, title or gender if they need to access the CIS in order, for example, to make changes to an individual's contact details.

In recognition of the privacy and safety concerns of its trans service-users, the DWP applies its 'Special Customer Records' (SCR) policy to the records held on the CIS in relation to trans individuals. This policy restricts access to SCRs to those with specific authorisation to access the particular record, with an alert message whenever access is sought to such a customer record. Authorisation to access a customer record protected by the SCR policy can be sought on a case-by-case basis. The vast majority of SCRs are in relation to trans customers and, as such, the SCR 'marker' on their records – whilst restricting access to the data which 'outs' them as trans – has the effect of marking them out for particular attention. The access restrictions also cause delay.

Facts

During a lengthy period of unemployment, the claimant (C), was required, as a condition of receiving Job Seekers Allowance, to attend a Job Centre Plus office in person every two weeks. She complained about the way in which her history was recorded by the DWP and the effect that had on her interactions with its officials. She experienced, as have many other trans people, a number of extremely distressing incidents in which front-line staff openly referred to their transgender status. She was concerned that the DWP policies did not effectively protect the privacy of her status but rather tended to draw attention to it.

Moreover, C and other trans service-users experienced fairly significant delays in accessing benefits.

C challenged the lawfulness of the DWP's policies under the HRA and alleged direct and indirect discrimination contrary to s13 and s19 EA respectively.

Supreme Court

The SC agreed that the DWP policies both constituted a 'very serious interference' with C's right to respect for her private life under Article 8 of the European Convention on Human Rights (ECHR), and that the polices placed her at a particular disadvantage when compared to non-transgender people. The issue for the court was whether the policies constituted a proportionate means of achieving a legitimate aim.

The SC found that the aims of calculating state pension entitlement and preventing fraud were legitimate. When conducting the necessary balancing act for the purposes of proportionality, Lady Hale

1. Only those trans people born before December 6, 1953 are affected by the pensions' calculation aim as, for them, state pension age is not equalised as between men and women. However, for those born thereafter, the state pension age is the same for a man or women so a change of gender is immaterial to the question of access to or calculation of state pension.

concluded that the policies were proportionate. In so concluding, she considered that the complexities of the DWP's IT systems and the expense of altering these systems were important factors in this decision.

Direct discrimination s13 Equality Act 2010

C claimed that the policies caused her less favourable treatment because of her gender reassignment. It was accepted by the SC that the prohibition of less favourable treatment (under s13 EA and/or Article 14 ECHR) could entail a positive obligation on the DWP to treat trans and cisgender people differently in order to ensure substantive equality. However, the SC found that transgender customers were treated differently from general DWP service-users by way of the SCR policy which was aimed at the particular privacy needs of trans customers. Moreover, the SC went on to find that trans benefits claimants are not treated less favourably than other claimants in the application of the SCR (para 42). This is because all claimants whose records are subject to the SCR regime have their previous names and titles recorded (for example) and there can be a variety of reasons for this, some of which relate to the claimants' private or family life. Accordingly, there was no difference in treatment.

Comment

The issue with the SC's analysis in relation to the direct discrimination arguments is that, in many cases, a person's trans status can be deduced quite easily from a historic change of name, and few circumstances in which a person's name is changed can be as stigmatising as 'outing' a trans person by reference to their 'dead' name. Because the direct discrimination argument focused on the particular impact of the treatment rather than the treatment itself, the SC concluded that this could only ever be a case of indirect discrimination which, on the facts of the case, it found was justified.

In its evaluation of the DWP's data retention and SCR policies, the SC noted that it was not for the courts to administer the benefits system. However, it cannot be correct that where the system is administered in a way which adversely affects a particular protected group or groups, the intricacies of the system cannot be reviewed by the courts. People with certain protected characteristics such as disability, for whom the HRA and EA provide important protection, are very much more likely to be users of this system.

Conclusion

Whilst the SC judgment was, in many respects, disappointing in relation to trans equality, the court, via Lady Hale, acknowledged the very real and distressing impact for trans people of any reminders of their birth gender, making clear that any practices or policies which served to disclose a trans person's gender history needed to be as non-intrusive as possible if they were to meet the proportionality test inherent in Article 8 ECHR and/or s19 EA. This will be highly relevant in relation to the provision of goods and services (Part 3 of the EA) and education (Part 6) and, of course, in the workplace (Part 5).

Claire McCann
Cloisters Chambers

Benkharbouche and the limitations of the doctrine of state immunity

Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs, and *Secretary of State for Foreign and Commonwealth Affairs and Libya v Janah* [2017] UKSC 62; October 18, 2017

Implications for practitioners

State immunity cannot always be invoked to deny embassy workers their employment rights within the UK, even if their contracts were negotiated at a time when they were living abroad.

Ss4(2)(b) and 16(1)(a) of the State Immunity Act 1978 (SIA) have been declared incompatible with the Human Rights Act 1998 (HRA) and were dis-applied in this case as being contrary to the protection provided by Article 47 of the Charter of Fundamental Rights (EU Charter) in respect of their application to the claimants' claims which derived from EU law.

Practitioners should also note the helpful commentary in this case on the significance and application of the EU Charter and the way in which it confers a distinct, free-standing route to dis-applying primary legislation.

Facts

Ms Benkharbouche, a Moroccan national, was employed as a cook at the Sudanese embassy in London. Ms Janah, a Moroccan national who had lived in the UK since 2005, was employed as a domestic worker in the Libyan embassy in London. Both were dismissed and brought various claims against their employers including for unfair dismissal, failure to pay the minimum wage and breach of the Working Time Regulations 1998, race discrimination and harassment. Both embassies claimed state immunity under the SIA.

It was not at issue that the SIA on its face appeared to grant procedural immunity but the claimants argued that the barring of their claims was a disproportionate restriction on their right of access to a court or tribunal under Article 6 of the European Convention on Human Rights (ECHR) and the parallel protections under Article 47 of the EU Charter, and was also discriminatory contrary to Article 14 ECHR.

Employment Appeal Tribunal

The EAT heard the claimants' appeals together. Allowing the appeals it held that those sections were incompatible with Article 47 of the EU Charter which reflects the right in EU law to a remedy before a tribunal. The EAT dis-applied ss4(2)(b) and 16(1)(a) SIA insofar as those sections barred the claims derived from EU law. The EAT had no power to make a declaration of incompatibility under the HRA.

Court of Appeal

The CA affirmed the EAT's judgment and declared those sections of the SIA to be incompatible with the right to access a court under Article 6 ECHR.

The decisions of both the EAT and the CA are discussed in full in Briefing 651, July 2015. The Secretary of State appealed in both cases.

Supreme Court

The SC unanimously dismissed the Secretary of State's appeal and affirmed the CA's order. Lord Sumption gave the leading decision, with whom Lord Neuberger, Lady Hale, Lord Clarke and Lord Wilson all agreed.

S16(1)(a) SIA extends state immunity from claims regarding the employment of all members of a diplomatic mission. The SC rejected the Secretary of State's argument that a state is entitled in international law to absolute immunity in respect of the employment of embassy staff. The court held that in customary international law whether a foreign state will be entitled to immunity in respect of the employment of a claimant depends on whether the functions of the employee involve the exercise of sovereign power or if the case engages some other sovereign interest of the state.

Under s4(2)(b) SIA whether a foreign state is immune depends entirely on the nationality and residence of the claimant at the date of the employment contract. The section draws no distinction between acts of a private nature and acts of a sovereign nature. The court held that approach to state immunity lacked any basis in customary international law.

Consequently, the SC held, ss4(2)(b) and 16(1)(a) SIA are incompatible with Article 6 ECHR. The Secretary of State accepted that on that basis, those sections were also incompatible with Article 47 of the EU Charter.

The SC also accepted Ms Janah's argument that s4(2)(b) SIA discriminated unjustifiably on the grounds of nationality and was contrary to Article 14 ECHR because it prevented claims by non-UK nationals, or those without habitual residence in the UK when their contract was made, in circumstances where there was no rule of customary international law requiring such a provision. However, in the circumstances this did not add anything to the claim.

As EU law prevails over domestic law in the event of a conflict, in relation to the claimants' employment law claims which were derived from EU law (the discrimination claim and working time claims), the SC held that the SIA was to be dis-applied as its application would breach the claimants' rights under the EU Charter.

Since it was not possible to achieve an ECHR-compliant reading of the SIA under s3 HRA, the SC upheld the declaration of incompatibility under s4 HRA which had been granted by the CA.

Comment

Benkharbouche is obviously of assistance to all those who work in embassies as it confirms that they can indeed access some employment law protections within the UK even if their contracts are negotiated when they are living abroad.

This impact is bolstered by the similarly restrictive approach adopted by the SC in *Reyes v Al-Malki & Anor* [2017] UKSC 61, October 18, 2017 in relation to diplomatic immunity. In *Reyes*, the court held that a former diplomat would not be entitled to diplomatic immunity in relation a claim of human trafficking brought by a domestic worker because the worker's employment and alleged treatment would not constitute acts performed in the course of the diplomat's official functions.

More widely the judgment is welcomed by anti-trafficking campaigners as establishing the important principle that those whose contracts of employment are determined overseas can also access employment rights, including protection from discrimination, within the UK.

It also provides some welcome clarification with regards to the impact of the EU Charter. The CA affirmed that the EU Charter can be relied upon as providing horizontal direct effect in certain circumstances. Horizontal direct effect allows individuals to invoke the EU law itself before national courts in disputes with other private individuals.

In C-144/04 *Mangold v Helm* [2005] ECR I-9981, which was decided before the EU Charter came into effect, the CJEU gave general principles of EU law horizontal direct effect. In Case C-555/07 *Kücükdeveci v Swedex* [2010] IRLR 346; Briefing 554, the CJEU stated that the Lisbon Treaty provided that the EU Charter had the same status as the Treaties. In *Benkharbouch*e, the CA considered the case law concerning the direct effect of the Charter and held that the right to an effective remedy guaranteed by Article 47 EU Charter is a general principle of EU law so that Article 47 accordingly has horizontal direct effect [para 81].

In relation to claims whose origins are only in domestic law, the declaration of incompatibility means that claimants can try and seek compensation from the government in the European Court of Human Rights in Strasbourg.

Juliette Nash
Anti-Trafficking and Labour Exploitation Unit

Louise Price
Doughty Street Chambers

Court of Appeal rules complete gender segregation in mixed-sex schools is discriminatory

HM Chief Inspector of Education, Children's Services and Skills v The Interim Executive Board of Al-Hijrah School and Ors [2017] EWCA Civ 1426; October 13, 2017

Implications for practitioners

The CA has allowed Ofsted's appeal against the decision of Jay J, who at first instance ([2016] EWHC 2813 (Admin); Briefing 820) had held that a mixed school's practice of segregating pupils by sex was not discriminatory. The decision is of interest to all discrimination lawyers, not only because of the implications for education providers, but because of the CA's approach to the correct comparator in incidents of discrimination against a group.

Facts

The respondent to the appeal - the claimant at first instance – (C) is a voluntary-aided faith school which adopts a Muslim ethos. Its pupils are aged between four and 16 and, although a mixed school, boys and girls were completely segregated not only in lessons but also during breaks, clubs, activities, school trips and social functions from year five onwards. This was approved of by parents, though there was evidence before the court that at least some students disliked the fact that they did not have the opportunity to mix with peers of the opposite sex, and were concerned about their ability to interact with the opposite gender when they left school. There was also evidence of materials in the library containing regressive attitudes about women in society, including condoning violence towards women.

The appellant – the defendant at first instance – (D) acting through Ofsted, carried out an inspection of the school and placed the school in special measures. It sought to publish a report in which it alleged that the practice of segregation was discriminatory. C obtained an injunction preventing the publication of the report and sought judicial review of D's decision on a number of grounds, although the principal issue of concern to practitioners was whether D was correct to say that gender-segregation in a mixed-sex school amounts to direct discrimination contrary to s13 of the Equality Act 2010 (EA). It should be noted at this stage that the argument did not relate to single-sex schools, for which specific exemptions in the EA apply.

High Court

In the Administrative Court D argued that the segregation of pupils constituted less favourable treatment for both boys and girls because they were denied the opportunity to choose to socialise with the opposite gender and therefore lost out on a choice of companions and the chance of learning to socialise confidently with the opposite sex. It was also argued that segregation imposed a particular detriment on girls because the female sex is the group with the minority of power in society, and cannot be separated from '*deep-seated cultural and historical perspectives as to the inferiority of the female sex and therefore serves to perpetuate a clear message of that status*' [para 86].

C's case was essentially that although the students were segregated, they were treated equally, and that absent any finding of differential treatment between the sexes, the restriction of interaction with the opposite sex amounts to equal treatment and is therefore '*the very definition of what discrimination is not*' [para 94].

Although Jay J was willing to accept D's case that the loss of opportunity to associate with the opposite gender was capable of amounting to a denial of a benefit or facility and therefore could potentially amount to a detriment, he rejected D's argument that there was less favourable treatment because the detriment in question applied equally to both the boys and the girls. There was, he said, "*symmetry between both contingents on either side of the line*' [paras 125-7 of the Administrative Court judgment]. He was also not willing to accept, on the evidence, that segregation imposed a particular disadvantage on women because of the social or cultural context.

Court of Appeal

D appealed to the CA; the Secretary of State for Education, the Equality and Human Rights Commission (EHRC), Southall Black Sisters and Inspire were given leave to intervene. The CA (Sir Terence Etherton, MR; Beatson LJ; Gloster LJ) all allowed the appeal.

All members of the court agreed that Jay J's analysis

of the appropriate comparator was flawed. He had '*made a mistake of law in approaching the issue of discrimination by comparing the girls, as a group, with the boys, as a group, rather than looking at the matter from the perspective of an individual pupil* [para 43]. There was, they said, '*no doubt that the restriction on a girl pupil socialising with boy pupils, and on a boy pupil socialising with girl pupils, is by reason of their respective sex*' [para 48], and Ofsted was entitled to take the view that such differential treatment was detrimental to both the girl pupil and boy pupil. It was not appropriate to simply compare the treatment of both groups as entities. S13 EA '*specifies what is direct discrimination by reference to a "person". There is no reference to "group" discrimination or comparison. Each girl pupil and each boy pupil is entitled to freedom from direct discrimination looking at the matter from her or his individual perspective* [para 50]. This analysis was further supported by a review of case law and detailed examination of the various exemptions which exist in the EA statutory scheme.

It was also argued by Ofsted, supported by Southall Black Sisters and Inspire, but not supported by the Secretary of State or the EHRC, that gender segregation causes greater harm to girls because '*the female sex has the minority of power in society and that power imbalance will be reinforced in adulthood by the loss of opportunity for girls and boys to socialise with each other and to regard each other as equals*' [para 107]. Although all three judges were willing to take judicial notice of the fact that the female sex continues to have the minority of power in society, Sir Terence Etherington and Beatson LJ were not willing to take judicial notice that gender segregation would perpetuate or reinforce this, and were not willing, therefore to allow the appeal on that basis on the evidence before them. Interestingly, however, Gloster LJ would have allowed the appeal on this additional ground. Citing the evidence concerning the material in the library as well as written work by pupils and the fact that the girls were required to wait for their boys to finish their break before they were allowed a break, she held that '*the segregation regime had a real potential for exposing girls to greater detriment than the boys*' [para 139]. She would have taken judicial notice of the fact that where a mixed-sex school tolerated an environment of intolerant views about the role of women, where teachers approved the expression by pupils of gender stereotyped views of men and woman, and where no sufficient consideration was given to promoting equal opportunity, that a sex segregation policy would be '*likely to reinforce or create misogynist attitudes amongst the boy pupils*' [para 141] which would be less favourable to the girls. Apparently recalling her own experiences (Gloster LJ is an alumnus of Girton College, Cambridge), she said:

> *In my judgment, once the principle is accepted… that, as a generality, men exercise more influence and power in society than women, and that persistent gender inequalities remain in the employment market, evidence is not required to establish that an educational system, which promotes segregation in a situation where girls are not allowed to mix with boys or to be educated alongside them, notwithstanding they are studying the same curriculum and spending their days on the same single school site, is bound to endorse traditional gender stereotypes that preserve male power, influence and economic dominance. And the impact of that is inevitably greater on women than on men. One does not need to have been educated at a women's college at a co-educational university, at a time when women were still prohibited from being members of all-male colleges, to take judicial notice of the career opportunities which women are even today being denied, simply because they are prevented from participating in hierarchical male networking groups, whether in the social, educational or employment environment [para 145].*

Comment

This is an important judgment. It will no doubt impact on how we think about comparators, particularly when comparators are applied to a group. It will now be more difficult for respondents, whether education providers, employers or service providers to be able to successfully argue that 'separate but equal' treatment is not discriminatory, unless specific exceptions in the EA apply.

Additionally, that Gloster LJ was so willing to take judicial notice of the struggles women face in employment and education when it comes to male networking groups, her judgment, although dissenting, will likely be helpful to claimants seeking to bring direct or indirect discrimination claims arising from exclusion from networking activities or other opportunities.

Eirwen Pierrot
Barrister
Eirwen.pierrot@fieldcourt.co.uk

Transgender father wins the right to have contact with her children raised in the Jewish Orthodox community

In the matter of M (Children) [2017] EWCA Civ 2164; December 20, 2017

Summary

The CA overturned the Family Court's decision and found that the potential for the children to be ostracised from their Jewish Orthodox Charedi community was given undue weight and it was in the children's best interests to have direct contact with their transgender father despite the discrimination they may face.

Implications for practitioners

- What should the family courts do in an apparent clash of Article 8 and Article 9 rights under the European Convention on Human Rights (ECHR)? First, contact with the father in accordance with Article 8 is likely to be in the children's best interests. Second, consider whether there is an actual manifestation of belief. The practice of excluding children from the community and school because of their association with their transgender father is not. Third, if the community's Article 9 rights are infringed, the infringement is justified if it involves psychological harm to children, such as severing their relationship with their father.
- The primary position is that if it is in the best interests of the children to have contact with their father, the position cannot be displaced by the community's attitudes against transgender people.
- The courts should not treat the potential unlawful discrimination by the school as a factor against permitting direct contact.

Facts

These private law proceedings concerned a transgender father and a mother of five children, all under the age of 14. In 2015 the father left the family home to live as a woman. Solely because she is transgender the father is shunned by the North Manchester Charedi Jewish community (the community). The children face ostracism by the community if they have contact with her. The father applied for a child arrangements order to have direct contact with her children.

Family Court decision

In a public judgment, Peter Jackson J (as he then was) dismissed the father's application for direct contact, but ordered indirect contact by way of writing letters. This conclusion was recommended by the children's guardian.

The judge found that the children would suffer serious harm if they were deprived of a relationship with their father. However, he determined that the acts of the community resulting in psychological harm could only be prevented by refusing direct contact.

> *… the likelihood of the children and their mother being marginalised or excluded by the community is so real and the consequences so great that this one factor, despite its many disadvantages, must prevail over the many advantages of contact* [para 38].

The judge came to his conclusion giving weight to the witness testimony of Mrs S, an Orthodox Jewish foster carer who described two striking cases of children she fostered. They had been ostracised by their Orthodox community because of being exposed to 'outsider influences.' One of the children had been sexually and emotionally abused within her family and the wider community since the age of 11. She was rejected by her family, no longer allowed to talk to her friends and it was difficult to protect her. This showed the '*lengths to which the community is prepared to go, regardless of the justice of the matter or the welfare of the young people*' [para 34].

Court of Appeal

The father appealed on the following grounds:

1. The judge lost sight of the paramountcy principle i.e. that children's welfare shall be the court's paramount consideration (s1(1)(a) Children Act 1989);
2. the judge failed to evaluate why indirect contact and the giving of staged narratives to the children about their father's transgender status was in the children's best interest and direct contact was not;
3. the judge failed to exhaust the court's powers to attempt to make direct contact work.

In the single judgment of Sir James Munby, President of the Family Division, Lady Justice Arden and Lord Justice Singh, all three grounds were allowed and the proceedings were remitted to the family court for final determination. Stonewall and Keshet Diversity UK intervened with written submissions.

The CA disagreed with Jackson J's analysis for a number of reasons. First, it held that the judge arrived

at his conclusion by failing to ask pertinent questions. The role of the court is to act as the judicial reasonable parent and judge welfare by reference to the standards of reasonable men and women today, having regard to the ever-changing nature of our world and social attitudes. Why, the CA asked, did he not directly challenge the parents and the community that if they did not change their attitudes the court may have to contemplate the drastic measure of removing the children from the mother's care? Why did he not challenge their discrimination? How was his conclusion in the best interests of the children? The CA said that the judge's omission to address these questions seriously undermined, indeed vitiated, his ultimate conclusion.

Secondly, the judge did not address head on the important human rights and discrimination issues which arose [para 78].

Thirdly, the judge did not make it clear why indirect contact was said to be acceptable, but direct contact was not. Why would it not include the same 'risks of exposure' to transgender matters?

The CA addressed each issue to provide guidance upon remitting the case to the family court.

The CA focused on the legal position of schools as, it indicated, the Equality Act 2010 (EA) does not apply to a '*nebulous entity such as "the community"*'. If a school were to ostracise a pupil because of his/her father's transgender status that would likely amount to a 'detriment' to that child which would be unlawful direct and associative discrimination under the EA.

While the CA was anxious to point out that in the present case no assumption should be made that any school attended by the children had acted unlawfully or would do so in the future, nevertheless, the courts should not, it warned, treat such potential discrimination as a factor to be weighed against permitting direct contact between the father and the children. To do so would be contrary to the rule of law [para 97].

ECHR rights

Article 14 ECHR (via Article 8) was engaged and the task of the family court below would be to consider '*with care the suggested justification for the apparent discrimination which the father faces on the ground of her transgender status, not least to ensure that the court itself does not breach its duty under section 6 [right to a fair trial of the] Human Rights Act 1998*' [para 115].

Article 9 protects the right to freedom of thought, conscience and religion, which includes manifestation of a belief. On behalf of the father it was argued that the community's beliefs which lead to young children being ostracised does not constitute the manifestation of any religious belief recognised under Article 9 [para 128].

In principle, the CA agreed [para 131]; such a belief was not a religious belief which was entitled to protection under Article 9.

The court questioned whether an order for direct contact would in principle violate the Article 9 rights of the community? The best interests of the children in the medium to longer term would be more contact with their father, if that could be achieved – this was a matter for the family court to determine. If this involved an interference with the community's Article 9 rights, it would be justified in accordance with Article 9(2) on the basis that it serves the legitimate aim of protecting children's rights to have contact with their father and thus enjoy family life with her (Article 8) [para 134].

Comment

This case explores the circumstances when the law can intervene to mitigate religious practices. The conclusion is that it can - when it causes harm to children. As Rabbi Abel said in evidence in the family court, it is a practice to censor and eject people from the community for transgressions such as contact with a transgender parent. It is not their faith. With professional regulation and parental arrangements, the community may step back. The duty of the judge, as the judicial reasonable parent, is to be optimistic that the community can change.

Religious parents should not receive special treatment by the courts. Munby P reminded us that in cases where a parent is intransigent about raising a child with a damaging view of and alienating the other parent, the court must take a robust approach [para 64]. If a father is the target of exclusion by a community, or subject to threats to his person and home, as in the case of father[1] who was a member the English Defence League, the court must not give up. It is incumbent to explore and facilitate suitable interventions to enable the children to have a relationship with their parents, one that is in their best interest, essential to their welfare and upholding their ECHR rights. The fear of exclusionary practices of a religious community must not dictate the future of the children. As the judicial reasonable parent, who is tolerant and receptive to change, the court has a duty to not weigh a religious sect's potential prejudice and discrimination against a parent as a factor against direct contact.

Rosalee Dorfman Mohajer
Pupil Barrister, Lambeth Borough Council
rosaleedorfman@outlook.com

1 *Re A (Application for Care Proceedings and Placement Orders: Local Authority Failings)* [2015] EWFC 11, [2016] 1 FLR 1

Employee's refusal to work following his employer's alleged discrimination was misconduct

Rochford and WNS Global Services Ltd [2017] EWCA Civ 2205; December 20, 2017

This case considers the relationship between unlawful discrimination and subsequent dismissal related to the employee's response to the conduct of the employer. It provides a salutary lesson for employees in similar situations.

Facts

Mr Rochford (A) was employed by WNS (R), a global supplier of business process management services, in a vertical sales lead role (VSL) and had been so since July 2011. A had a serious back condition which it was held amounted at all material times to a disability within the meaning of the Equality Act 2010 (EA). In February 2012 he had surgery and was off work for almost a year.

Prior to A's return to work, there were discussions about his return. R was not prepared to allow him to return straight away to his full VSL role, but proposed that initially on return he would have responsibility for the manufacturing sector only. A was not prepared to return to work on that basis, or any basis, other than in his full VSL role. Although he formally returned to work on January 16, 2013, he did no actual work. He initiated an internal grievance, complaining about how he had been treated, alleging that it constituted discrimination. R regarded his stance as unacceptable. Disciplinary proceedings were initiated, which in due course led to him being summarily dismissed for misconduct on April 9, 2013.

Employment Tribunal

A brought ET proceedings for disability discrimination, victimisation, unfair dismissal and wrongful dismissal. In April 2014 the ET allowed the claim for disability discrimination in part only in that it held that R treated A unfavourably for reasons arising from his disability when it demoted him (as it held that giving him responsibility only for the manufacturing sector was in effect demotion), and failed to give him any clear indication of when he could return to work in his substantive position.

As R could not justify that unfavourable treatment, the ET found that there was a breach of s15 EA – discrimination because of something arising as a consequence of disability. The tribunal dismissed the remainder of the discrimination claim, including claims that A's dismissal was unlawfully discriminatory and that R had failed to make reasonable adjustments.

The ET found that A's 'demotion' was of a limited nature, since he suffered no loss of money or benefits, or indeed of his Senior Vice President status, and consisted only in the removal – said to be temporary though of uncertain duration – of a large part of his responsibilities. However, it could properly be described as demotion.

As for the claim for unfair dismissal, the ET held that the dismissal was procedurally defective and for that reason unfair, but it also made a finding that A's refusal to return to work on the limited basis proposed by R constituted gross misconduct such as would have justified his dismissal, if a fair procedure had been adopted.

The effect of that finding was that the A was liable to receive only very limited compensation for unfair dismissal in accordance with the *Polkey* principle. Another effect of the finding was that the claim for wrongful dismissal failed. The claim for victimisation was also dismissed.

Employment Appeal Tribunal

A appealed to the EAT against, in substance, the finding that he had been guilty of gross misconduct. In September 2015, the EAT dismissed the appeal. A appealed to the CA.

Court of Appeal

There were four grounds of appeal, all of which were unsuccessful.

The first was that the ET was wrong to characterise the reason for A's dismissal as 'conduct', and thus as constituting an admissible reason of one of the kinds identified in s98(2) of the Employment Rights Act 1996. It was said that in truth the reason for A's dismissal was his refusal to acquiesce in his demotion. The CA rejected this – the tribunal found

that A was dismissed because it was believed that his refusal to do any work constituted misconduct. It was clearly a dismissal for misconduct. The employee's reason for that refusal might be very relevant to the reasonableness of the dismissal, but it did not alter the character of R's motivation [para 17].

The second ground was that the ET was wrong in law to find that it was reasonable for R to dismiss A for his refusal to work when that refusal was itself a reasonable response to its own refusal to allow him to return to his full previous role which the tribunal had found to constitute unlawful discrimination. The requirement that he return to a much more limited version of his previous role was a requirement that he acquiesce in an act of discrimination against him, and that was wrong in principle.

In dismissing this ground, the CA opined that it is well established that an employee would sometimes be justified in refusing to work, in which case it would not be reasonable for the employer to dismiss them for not doing so. What needed to be considered was whether the fact that there had been an unlawful discriminatory failure to allow the employee to resume his full role at once, or to tell him at what stage in the future he would be allowed to do so, meant that he was justified in refusing to do even the work that he had been required to do, so that it had been unreasonable of R to dismiss him. That had to be a question of fact and degree [para 21].

The fact that the employee was being asked to do the work in question had not been discriminatory itself, and the tasks in question had all been tasks which were well within his contractual role. His complaint, and the one that had eventually been upheld, was, rather, that he had not been permitted to perform other tasks. That was obviously a related matter, but it was not the same thing. The fact that R had acted discriminatorily against the employee, even in a closely related way, had not given him an absolute right to refuse to work.

Generally, the fact that one party to a contract had committed a prior wrong against the other, whether in the form of a breach of contract or tort or any other wrong, did not constitute an automatic solvent of his or her continuing obligations, and there was nothing special about discrimination in that regard. It was not the law that an employee who was the victim of a wrong could in all circumstances simply refuse to do any further work unless that wrong was remedied. He might in some circumstances have to seek his remedy in the courts [paras 23 and 25].

Ground 3 was dismissed on the basis that procedural defects rendered A's dismissal unfair: the ET had made a finding to that effect and A's problem was its finding that, if the procedure had been fair, dismissal would have been within the range of reasonable options. Ground 4 was dismissed on the basis that it stood or fell with Ground 2, and so it fell.

Comment

This case is a stark reminder that where an employee considers themselves to be a victim of discrimination, they cannot consider that 'knuckling down' will amount to acquiescence in the discriminatory act/s; they may need to bring tribunal proceedings in parallel to continuing in the workplace.

Resignation is not the only option – A might have preferred not to resign and claim constructive dismissal: he might reasonably prefer to have a job rather than a tribunal claim, especially as he could not be certain that R's conduct would be held to be unlawful, or, even if it was to be, sufficiently grave to constitute a repudiatory breach.

He could have remained at work and done what was, as the tribunal found, reasonably asked of him, while, if he still felt that his continuing demotion and/or, the uncertainty as to its duration was unlawfully discriminatory, bringing ET proceedings [para 25].

As the judgment states *'Acts of unlawful discrimination are not uniquely heinous: like other wrongs, they come in all shapes and sizes, and how it is reasonable to respond to them in any given case is a matter for the assessment of the Tribunal'* [para 23].

Catherine Casserley
Cloisters

Unfair dismissal – reasonableness of dismissal

Baker v Abellio London Limited [2017] UKEAT 0250/16/0510; October 5, 2017

Facts

Mr Baker (B) is a Jamaican national who has lived in the UK since childhood. He has the right of abode in the UK and had worked as a bus driver for Abellio since 2012. Abellio had always accepted that he had the right to work in the UK.

However, Abellio (wrongly) thought that they were required to have certain documents proving B's right to work under the Immigration, Asylum and Nationality Act 2006 (IANA). B did not have a UK passport, and was told by Abellio that he needed to provide both a passport and visa documentation. Abellio obtained advice from the Home Office about the documentation required under IANA which confirmed that both a passport and visa were required for those subject to immigration control.

B obtained and provided a UK passport but was dismissed by Abellio for illegality, as they assumed he did not have the documentation required to work in the country.

B appealed the dismissal decision, but the appeal was unsuccessful.

Employment Tribunal

B brought a claim for unfair dismissal, amongst other claims, which was not upheld by the ET.

The Employment Judge (EJ) reiterated that all parties were agreed that B had the right to work in the UK, but held that the dismissal was fair as Abellio had '*a positive legal obligation to obtain that evidence [that he could legally work in the UK] before they could continue to lawfully employ him and so I consider that their decision fell within the range of reasonable responses*'.

S98(2)(d) Employment Rights Act 1996 (ERA) provides that an employer can fairly dismiss if '*the employee could not continue to work … without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment*'.

The EJ stated '*the right to live here is not the same as having proof of his right to work*'. The EJ also found that, in the alternative, the dismissal was fair for some other substantial reason '*namely, that he … refused to obtain the relevant evidence to prove that he could work*'.

Employment Appeal Tribunal

B appealed on several grounds, including that the EJ was wrong to find that:

1. a fair reason for dismissal had been established under s98(2)(d) ERA;
2. there was some other substantial reason for the dismissal; and
3. that the dismissal was fair.

The first and third grounds of appeal were successful.

The central issue was that both Abellio and the EJ were wrong that B needed to provide documentary proof of his right to work under IANA. Those provisions only applied to those who were subject to immigration control. S25 IANA is very clear that someone is only subject to immigration control if they require leave to enter or remain in the UK. As B had the right to live in the UK, this did not apply to him.

The EAT also made clear that the structure of IANA is such that it does not require documents from an individual in order for them to work; instead, s15 IANA means that an employer is excused from any penalty if certain documents have been obtained.

On the second ground, there was no error of law in holding that there could be '*some other substantial reason for dismissal*' as an employer believing that it would be a contravention of the law to employ B without the documents could be such a reason, even if such a belief was misplaced.

On the third ground, the EAT found that it was important to look at the reasonableness of the belief formed by the employer. Although Abellio had contacted the Home Office, there was no evidence about what questions had been asked, and how much information had been given about B's circumstances. In particular, there was no evidence about whether the Home Office knew that B did not require leave to enter or remain in the UK.

The EAT found that the EJ had erred in finding that the dismissal was fair, given that Abellio had not taken reasonable steps to see whether IANA applied and so had made a fundamental mistake as to whether B was subject to immigration control.

The EAT remitted the decision to a differently constituted ET.

Analysis

This case is important from two angles. First, it makes clear that an employer's mistaken belief in the requirements of legislation will not be enough to make a dismissal fair, even if they follow what would otherwise be a fair procedure (as the ET and EAT acknowledged).

Second, the case shows how the creeping criminalisation of immigration procedure, and the gradual outsourcing of immigration controls onto the population at large, is having an insidious effect on employers. Rather than look at the basic facts of the case (that B was allowed to live in this country), the employer decided that an overly cautious and punctilious approach to bureaucracy was required. While caution is no doubt to be applauded in many spheres, the policy enacted by IANA has resulted in an employer essentially assuming that someone who was not born in the UK is doing something illegal until they prove otherwise. The assumptions underlying the decision are made clear by the EJ who compares B's situation with '*someone [who] is British, having been born here and lived here their entire lives*'. It is difficult to see how B's situation differed from this example in any significant respect, given that he had a right to live and work here, and yet the burden was essentially placed on B to prove that he had the legal right to work, in the face of his employer's fundamental misinterpretation of the relevant legislation.

However, the case does not go so far as to place an absolute duty on employers to get the law right, only to take reasonable steps to ensure that they have attempted to make the correct interpretation.

One practical point can also be taken from the case. When an employer is seeking to rely on advice from a third party (in this case the Home Office), steps should be taken to ensure that the advice is seen in context. Much like an expert report, the answers are only useful if you know what questions have been asked – in this case, without knowing what information had been given to the Home Office about B's status, having information about the documents required under s15 IANA was irrelevant, as that section did not apply to B. It follows that employers should be asked to disclose the communications which led to the advice being given.

Michael Newman
Solicitor, Leigh Day
mnewman@leighday.co.uk

Briefing 858

EAT confirms an individual can be directly discriminated against on grounds of a perceived disability

The Chief Constable of Norfolk v Coffey UKEAT/0260/16/BA; December 19, 2017

Introduction

The appeal concerned whether the ET erred in finding that the appellant perceived the respondent to be disabled and treated her less favourably because of this.

Facts

In 2011 Coffey (C) successfully applied to become a police constable with the Wiltshire Constabulary. As part of the application process, C underwent a medical examination which found that she suffers from bilateral mild sensory-neural hearing loss with tinnitus. In September 2013, C made a transfer application to the Norfolk Constabulary (N) in which she disclosed that she suffered from upper range hearing loss.

On November 19, 2013 C was informed she had been successful at interview stage, subject to a fitness and pre-employment health assessment. The medical advisor stated that C had significant hearing loss in both ears and was '*just outside the standards for recruitment strictly speaking*' and recommended an 'at work test'.

N still did not accept a recommendation that C would pass an 'at work test' despite results showing there had been no deterioration in her condition between 2011 and 2013. Acting Chief Inspector Hooper (H) was the decision-maker.

Employment Tribunal

C claimed perceived disability direct discrimination; she did not allege she had a disability.

H gave evidence that she declined C's transfer application because her hearing did not meet the published medical standards, but she did not regard C as disabled. However H did regard C as, at least potentially, a '*non-disabled permanently restricted officer*'. In an internal memo H wrote '*regrettably the applicant's hearing is below the acceptable and recognised standard*

and we should decline the application to transfer'.

The ET found that H's comments in the internal memo could only be interpreted as H perceiving C to have a potential or actual disability. Accordingly the ET upheld C's claim for perceived disability direct discrimination and recommended her rejection to be expunged from N's records.

Employment Appeal Tribunal

The appellant's arguments

N appealed the ET's decision on the following grounds.

Firstly, N submitted that the ET had failed to identify or use the correct test in determining whether H considered C met the definition of disability. If the ET had applied the s6 EA test it would have found that H did not perceive C's hearing loss to amount to a disability. It is not enough that a putative discriminator may have perceived that C could become disabled at some date in the future.

Secondly, s23(2) EA states that a person's abilities are relevant to the comparator question in the context of direct disability discrimination. N submitted that the ET erred in considering C's case to be one of direct discrimination at all as, if A treats B, whom they perceive to be disabled, the same way they would treat a non-disabled person with the same abilities, they are not guilty of direct discrimination.

Thirdly, N submitted that the ET erred in finding the refusal of the application was because of perceived disability, when in fact it was because she did not meet the prescribed standards. This might give rise to a claim under s15 EA but such treatment can be justified. The ET's decision would also cause problems for organisations which must apply a required standard.

The respondent's arguments

C submitted that the ET applied the correct test and the finding that H perceived C to be disabled either by virtue of her current abilities or a progressive condition was sufficient to make out her claim of perceived direct discrimination.

Secondly, C submitted that the ET had the correct comparison in mind which took account of C's abilities, and C had, and would continue to have, the required abilities notwithstanding being a borderline failure on the recruitment standard. The comparison should omit H's false assessment of C's abilities. Alternatively C submitted no comparator was needed as H was trying to avoid the statutory duty to make reasonable adjustments.

Thirdly, C submitted that the ET did not err in law in concluding that the refusal of the application was due to the perceived disability. H believed C would become a liability to N because of false and prejudicial assumptions about her abilities. If C was actually disabled then the ET might properly have found direct disability discrimination.

C also did not accept that the ET's decision would render it difficult for organisations to apply a required standard. If the individual lacked an ability which was a requirement of the job this would be the reason for the treatment, and s13 EA would not be engaged. S15 EA might be engaged but organisations can justify such treatment.

The judgment

The EAT, HHJ Richardson presiding, preferred C's submission that H perceived her to be disabled, either now or in the future, as defined by the EA. If this was not the case, it would leave a gap in equality law if an employer could dismiss an employee in advance to avoid a duty to make allowances or adjustments.

This was a case of direct discrimination. A genuine difference in abilities may well be a material difference for the purposes of s23 EA but this was not relevant here. Even if an individual does lack the ability in question, and is rejected for that reason, they may have a remedy under s15 EA and an employer may be able to justify the treatment. However s23(2)(a) EA doesn't assist an employer where the individual has the required ability but is nevertheless rejected because of the employer's flawed belief in their lack of ability … *'a stereotypical and incorrect assumption that a claimant has characteristics associated with a disability may found a claim for direct discrimination'.*

The EA contains proper provisions for removing from the ambit of direct discrimination those cases which are really concerned with the application of a performance standard to a person who lacks a relevant ability.

The ET made no error of law in its reasoning. The correct focus was on whether H perceived C to have an impairment as defined in the EA. The ET was entitled to find that H did perceive C to have a disability as H's decision was at least in part tainted by her mistaken belief that C could well have a progressive condition.

N's appeal was rejected.

Implications for practitioners

This case is useful to claimants who are perceived to be disabled and are discriminated against but whose condition does not meet the statutory definition of a disability. The EAT approved a comprehensive approach for the ET when investigating the state of mind of a putative discriminator. Practitioners should be mindful to advise decision-makers to assess a candidate's abilities as they are, and not as they perceive them to be or perceive them to become at some future date.

Daniel Zona
Solicitor, Bindmans LLP
d.zona@bindmans.com

Equality. It's about time. Fawcett Society's Sex Discrimination Law Review

Following the Brexit referendum decision, the Fawcett Society convened a panel of legal and policy experts to ask: is sex discrimination law in the UK fit for purpose? Its report *Equality. It's about time* was published in January 2018.

Although in the centenary year of the first women's suffrage legislation much progress has been made towards gender equality, the report concludes that much remains to be done. The gender pay gap remains stubborn, violence against women and girls is endemic, and access to justice is limited.

The report makes recommendations across a wide range of headings. In relation to Brexit for example it recommends limiting the use of ministerial powers conferred by the European Union (Withdrawal) Bill so that the powers cannot be used to substantively amend employment law in the UK, which would disproportionately impact on women workers.

Warning that Brexit must not result in the dilution of existing equality and human rights law in the UK, including via the introduction of new opt-outs for small businesses, it suggests that Brexit also provides an opportunity to go beyond what is permitted by EU law in order to further gender equality. Examples include permitting further positive action, and reforming procurement rules to enable more specialist women's services, such as refuges, secure public service delivery contracts.

Addressing women's rights in the workplace, the report recommends action to reduce the gender pay gap. For instance, lowering the threshold for gender pay reporting to workplaces with over 50 employees, civil penalties for non-compliance with reporting requirements, resourcing the EHRC to carry out enforcement activity, and requiring data to be broken down by age, disability, ethnicity, sexual orientation and part-time status.

In order to improve the efficacy of the legal right to equal pay for work of equal value, there should be improved access to pay information including via reintroducing equal pay questionnaires in the ET, and amending the Freedom of Information Act to include pay in the private sector. The report also recommends mandatory equal pay audits every three years for employers of 250 people or more, and makes suggestions about making procedures for the resolution of claims more effective.

Other workplace recommendations address maternity, paternity and family friendly rights, as well as workplace harassment and dress codes.

The report acknowledges the positive impact of the public sector equality duty on equality practice within public authorities, but says that its aim of bringing about a transformative approach to structural inequality has yet to be achieved. To get closer to that aim '*will require much work including positive and visible leadership from elected leaders and managers; development of capacity in organisations; active engagement with service users and civil society; and greater openness and transparency'.* It will also require proper resourcing of the EHRC and reversal of decisions which have severely limited access to legal aid and judicial review actions. The report notes that the pursuit of equality is significantly undermined by the lack of access to justice; legal rights that cannot be exercised become devalued, ignored and seen as merely theoretical, it warns.

Other recommendations include the introduction of legal protection for multiple discrimination and the enactment of s1 EA on the socio-economic duty plus the commencement and broadening of s106 EA in relation to the requirement to provide information about the diversity of election candidates.

The report recommends that the power of public procurement is harnessed and that employers with equal pay judgments against them in the last two years should be ineligible for public sector contracts unless they have a high quality action plan in place to address equal pay. All public authorities should include relevant equality conditions in their procurement processes.

The time is right to introduce a new requirement on large employers to take steps to prevent discrimination and harassment in their workplaces. This new duty should require organisations with 250 or more staff to publish a diversity and inclusion review of their workplace every three years. Organisations should also be required to report on their action plan to prevent discrimination and harassment and promote equality.

Recognising that Northern Ireland's equality law lags behind the EA and, being more reliant on EU equality law than the rest of the UK, equality rights are potentially at even greater risk due to Brexit, the report recommends that women's rights are made a political priority and a Single Equality Act is introduced to bring Northern Ireland in line with the rest of the UK.

A copy of the report is available at www.fawcettsociety.org.uk.

European Union (Withdrawal) Bill; a parliamentary update

The European Union (Withdrawal) Bill (the Bill) has gone to the House of Lords where the second reading took place on January 30 & 31, 2018. Committee stage will take place on Mondays and Wednesdays between February 21st and March 26th. The report stage could then possibly be at the end of March or after the Easter recess.

Amendments may be tabled at any stage after second reading and can be tabled during recess.

The House of Common's Women and Equalities Committee made submissions on the Bill. In respect of concerns about the extent of the delegated powers set out in the Bill, the government has inserted a new clause in relation to equalities. It will mean that all statutory instruments made under those powers will need to be the subject of a statement by the relevant minister. The statement will have two parts and will confirm:

- whether or not the draft legislation revokes, repeals or amends the EA – if so, how; and
- that the minister has had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct prohibited by or under the EA.

The government says that it is its intention to add a similar provision to all EU exit related laws.

The House of Lord's Constitution Committee has produced its report on the Bill. This report states that legislation is necessary to ensure legal continuity and certainty when the UK leaves the EU. The committee does not comment on the merits of Brexit, but concludes that the Bill, as drafted, has fundamental flaws of a constitutional nature. The committee finds that the Bill risks undermining the legal certainty it seeks to provide, gives overly-broad powers to ministers, and has significant consequences for the relationship between the UK government and the devolved administrations. The committee proposes a number of recommendations to improve the Bill to make it more constitutionally appropriate and fit for purpose, while still meeting the government's objectives.

The committee's recommendations include a proposal to remove the 'supremacy' of EU law which is in the original Bill wording as being part of core EU retained law. Also, a proposal that post-Brexit there should be only a *'limited view of ECJ rulings'* to be taken into account by UK courts.

The Joint Committee on Human Rights (JCHR) has considered the human rights implications of the Bill; it says that it is particularly concerned with the human rights implications of excluding the Charter of Fundamental Rights from retained EU law.

Review of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)

The government has announced this long-awaited review which offers an important opportunity to take stock of the damage caused by the unprecedented cuts to legal aid which LASPO introduced and to re-assess the value of justice to citizens. This Ministry of Justice consultation will examine limits imposed on the scope of legal aid for family, civil and criminal cases, the working of the exceptional case funding scheme, changes made to legal fees and the introduction of evidence requirements for victims of domestic violence and child abuse. It will investigate the introduction of the mandatory telephone gateway for legal aid applications, changes to the rules on financial eligibility and caps put upon the subject matter of disputes.

The review is due to conclude *'before the start of the summer recess 2018'.* However, doubts have been raised about whether this is realistic. The government says that interested individuals and organisations will be invited to join consultative panels and contribute to the review.

High Court finds 2017 Personal Independence Payment Regulations unlawful

The High Court has found that part of the rules governing Personal Independence Payments (PIP) are unlawful and discriminate against people with mental health impairments. In *RF v Secretary of State for Work and Pensions* [2017] EWHC 3375, December 12, 2017, the judge quashed the 2017 Personal Independence Payment Regulations (the Regulations) because they discriminate against those with certain disabilities in breach of the Human Rights Act 1998. As they were discriminatory the judge also found that the Secretary of State did not have lawful power to make the Regulations and he should have consulted before making them because they went against the very purpose of what the PIP regime sought to achieve. Contrary to the Secretary of State's defence, the judge found that the decision to introduce the Regulations was *'manifestly without reasonable foundation'* and commented that the wish to save money could not justify such an unreasonable measure.

The judge heard that the Regulations were laid by negative resolution in February 2017, received relatively little parliamentary attention, and were rushed through the parliamentary process by the Secretary of State. During the hearing, the Secretary of State accepted that the testing carried out for PIP had not looked at whether the basis for treating those with psychological distress differently was sound or not, and the testing done was limited.

The National Autistic Society, Inclusion London, Revolving Doors and Disability Rights UK supported RF's claim. All of those organisations gave statements to the court that the Regulations were unfair and that the intention to treat those with psychological distress differently had not been made clear in the early PIP consultation stages. Mind and the Equality and Human Rights Commission (EHRC) also supported the claim. The EHRC made written submissions to the court on the government's on-going and persistent breaches of its obligations under the UN Convention on Rights of Persons with Disabilities arising from its austerity measures. The judge found that this inconsistency with the UN Convention supported his finding that the measure had no objective justification.

Equality and Human Rights Commission launches two access to justice schemes

Discrimination practitioners may be interested to know about two access to justice initiatives recently launched by the Equality and Human Rights Commission: the Legal Support Project and the EHRC Adviser Support Project.

Legal Support Project

The Commission's Legal Support Project is able to provide funding for legal representatives in England and Wales in claims concerning discrimination in education, housing or social security and which relate to provisions of the Equality Act 2010 (EA), where the individual may otherwise not be able to access justice. If solicitors or advisers would like to know more about the project and how to apply for funding, they can telephone 0161 829 8140, or they can email **educationcases@equalityhumanrights.com** (for education cases), or **housingandsocialsecurity@equalityhumanrights.com** (for housing and/or social security cases).

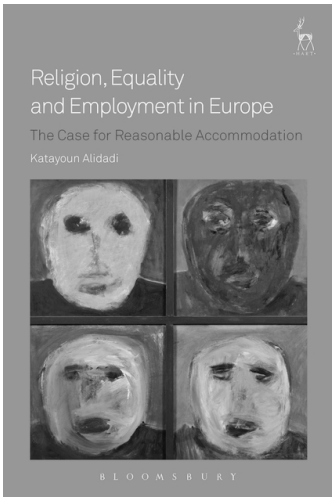
In Scotland, the Legal Support Project can provide legal assistance or funding for EA claims concerning education, services or housing. If anyone would like to know more about the assistance offered and how to apply they can contact legal **requestscotland@equalityhumanrights.com** or phone 0141 228 5951.

EHRC Adviser Support Project

The Commission has also recently launched a telephone advice service for solicitors, the advice sector, trade unions, ombudsman schemes, and other organisations that support individuals with their problems. The advice line will be able to provide advice and support about potential discrimination or human rights claims. To contact the service, advisers can call 0161 829 8190 (England); 0141 228 5990 (Scotland); or 029 2044 7790 (Wales). More information is available at **https://www.equalityhumanrights.com/en/equality-and-human-rights-helpline-advisers.**

Religion, Equality and Employment in Europe: The Case for Reasonable Accommodations

by Katayoun Alidadi, 2017, Hart Publishing, 267 pages, £80 hardcover



In this work Katayoun Alidadi does two main things. First, she reviews the national approaches of Belgium, the Netherlands and the UK to manifestations of religion or belief in private sector workplaces. Second, she argues for the introduction of a right to reasonable accommodation in the workplace for manifestations of religion or belief.

The first two chapters survey the approaches of Europe's two supranational courts, the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU), to religion and belief in the workplace.

These chapters are clear and helpful. Alidadi pays particularly close attention to the extent of any duty to provide reasonable accommodation, comparing explicit EU provisions in the case of disability with implicit and patchy obligations under the indirect discrimination provisions in the case of religion and belief. She notes that despite increases in the level of protection for religion and belief over the last 15 years, both supranational regimes have so far permitted a significant degree of divergence between the states in each jurisdiction.

Chapters three, four and five then discuss the issues which emerge from case law, including religious dress and corporate neutrality policies; religion-work time demands; social and gender relations in the workplace; proselytising, and conscientious objections to job duties. Alidadi analyses the differing approaches of Belgium, the Netherlands and the UK to each issue, placing them in the context of the EU's non-discrimination regime and the regime of the European Convention on Human Rights (ECHR) and commenting on the potential for religious accommodation.

These chapters form the core of the book and are its most important and fascinating contribution to the literature. Importantly, Alidadi offers readers who are not competent to read case law in any language other than English a rare insight into the legal systems of our close neighbours.

Alidadi's research was supported by the EU-funded RELIGARE project on religions, belonging, beliefs and secularism in Europe. Although the project has ended, its publications are still available on the website www.religareproject.eu. The database of national and international cases dealing with religious diversity up to 2013 is particularly useful, with each case summarised in English. This background of rich and detailed scholarship is evident in Alidadi's book. Seeing the different distinctions drawn in different countries is an important reminder that the ways we have come to understand certain concepts in the UK are not the only possible ones.

Finally, having offered arguments in favour of a right to reasonable accommodation throughout the book, in chapter six Alidadi addresses arguments against such a legal entitlement. This aspect of her work may be judged to be less successful, at least if she is aiming to present a comprehensive case for reasonable accommodation.

One of Alidadi's arguments is that the language of reasonable accommodation is more positive and comprehensible than the language of indirect discrimination, suggesting that it might encourage a more constructive and less defensive attitude on the part of employers. But the experiences of disabled people seeking reasonable adjustments do not bear this out. Stigma spreads easily to new concepts and phrases, and Alidadi may be too optimistic on this point.

More significantly, however, Alidadi fundamentally assumes that manifestations of religion or belief should have the same protection as other protected characteristics such as gender or disability. This may well be right, although even then the substantive implications are hotly contested. Unfortunately Alidadi's assumption means she does not adequately deal with some of the opposing arguments.

To take a single example: one objection is that there is a significant difference between manifestations of religion such as dress or observance of religious

holidays, and manifestations which involve expressing or acting on beliefs about others, such as the belief that homosexuality is wrong.

The *McFarlane* case concerned a Christian counsellor for Relate who was willing to provide relationship counselling to same-sex couples but acknowledged to his supervisor that for religious reasons he would have difficulty discussing sexual matters with such couples. Relate dismissed him because of concerns that he would not adhere to its policy of providing services without discrimination. The ECtHR found there was no breach of Mr McFarlane's human rights. Alidadi's view is that the ECtHR's balancing exercise was inadequate and *'a more thorough analysis may have led to honouring Mr McFarlane's conscientious objection'* (p.208).

However, it is unclear why she thinks it was inadequate beyond the fact that Mr McFarlane was unsuccessful. She draws no distinction between *McFarlane* and the case of the British Airways worker whose conscience required her to wear a visible cross *(Eweida)*. Yet it is surely relevant that Mr McFarlane's conscience required him to act on the belief that homosexuality is sinful in a context where his job required him to support same-sex couples at a vulnerable time, not knowing whether their difficulties might involve sexual matters. Alidadi does not properly acknowledge the potential for conflict when acting according to conscience infringes the fundamental rights of others, and this undermines her overall argument.

It is a fascinating book, and the review of national approaches is particularly informative. However, some may find her case for reasonable accommodations less satisfying.

Katya Hosking
Barrister, Devereux Chambers

Abbreviations

AC	Appeal Cases
BAME	Black Asian and Minority Ethnic
BME	Black and Minority Ethnic
CA	Court of Appeal
CIS	Customer Information System
CJEU	Court of Justice of the European Union
DLA	Discrimination Law Association
DWP	Department of Work and Pensions
EA	Equality Act 2010
EAT	Employment Appeal Tribunal
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms 1950
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EHRC	Equality and Human Rights Commission
EJ	Employment Judge
ERA	Employment Rights Act 1996
ET	Employment Tribunal
ET1	Employment Tribunal claim form
ETD	Equal Treatment Directive (Council Directive 2006/54/EC)
EU	European Union
EWFC	England and Wales Family Court
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
FLR	Family Law Reports
GMC	General Medical Council
GRC	Gender Recognition Certificate
HC	High Court
HHJ	His/Her Honour Judge
IANA	Immigration, Asylum and Nationality Act 2006
ICR	Industrial Case Reports
ILJ	Industrial Law Journal
IRLR	Industrial Relations Law Report
J	Judge
LJ	Lord Justice
LLP	Legal liability partnership
NHS	National Health Service
PTSD	Post-traumatic stress disorder
PWD	Pregnant Workers Directive (Council Directive 92/85/EEC)
QC	Queen's Counsel
SC	Supreme Court
SIA	State Immunity Act 1978
SRC	Special Customer Records
UKSC	United Kingdom Supreme Court
WLR	Weekly Law Reports

Briefings