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Editorial *Assessing the equality impact of budget cuts*

The enactment of the Equality Act 2010 represents a milestone in the struggle to eliminate unlawful discrimination and embed equality at the heart of public services, education, housing and all aspects of employment in Great Britain. It is the result of enormous work by civil society groups, lawyers and parliamentarians who championed its progress through parliament.

In this edition of *Briefings* six discrimination practitioners bring their own perspective to selected topics, highlighting strengths and weaknesses in each. Deborah Nathan looks at the discrimination definitions and suggests that while the Act's stated intention was to harmonise existing anti-discrimination law, many differences remain between different discrimination grounds.

Ulele Burnham welcomes the extension of the public sector duties to religion, sexual orientation, age, pregnancy and maternity, but regrets that the new socio-economic duty is so weakly expressed and potentially unenforceable. The government's lack of commitment to implementing this leads her to doubt whether it will ever be put into effect.

Liz Sayce, chief executive of RADAR, highlights the positive impact of new rules on pre-employment health checks which prohibit employers from asking job applicants about their health – a change which should build the confidence of disabled people when applying for jobs. Welcoming this, she argues that employers should take the opportunity to re-evaluate their use of health questionnaires, both before and after job-offer. They should also consider re-branding them as adjustment and support questionnaires, making a strong statement about their workplace's positive disability culture, encouraging openness and enabling disabled people to work to their maximum effectiveness.

A new government has brought uncertainty about the commitment to deliver the changes introduced by the Act, including when these will be implemented. The Home Secretary, Theresa May is the also the new Minister for Women and Equalities with Lynne Featherstone the Parliamentary Under Secretary of State (Minister for Equalities) and they share responsibility for the Act's implementation. The Government Equalities Office website continues to foresee a staggered introduction of provisions with *'commencement of the Act's core provisions in October 2010.'* The public sector equality duty will not come into force before April 2011, which had been proposed as the start date for combined direct discrimination and the socio-economic duty. It would be a blow if the equality duty on public authorities to have due regard to the need to tailor their services to minimise or remove disadvantage and meet the different needs of service users and employees was postponed indefinitely.

Government spending cuts outlined by the new Chancellor, George Osborne, raise the spectre of compounding existing inequalities in society. How will cuts in the welfare budget of £11billion and average cuts of around 25% in departmental budgets over the next four years, impact on the poorest and vulnerable groups, and on women, ethnic minority and disabled people working in the public sector?

The major question of public law identified by Sedley LJ needs to be addressed – can, and if so to what extent, a local authority rely on a *'budgetary deficit to modify its performance of its statutory duties?'*[1]

Public authorities' duty to have due regard to the need to promote equality of opportunity and to eliminate discrimination and harassment on grounds of race, disability or sex when carrying out their functions, requires them to give '*advance considerations*' to issues of discrimination before making policy decisions. The duties under the GB and the Northern Ireland legislation require a transparent process, which addresses how to avoid and eliminate discrimination which could result from a policy decision and, if there is an indirect discriminatory effect, checking whether it is in pursuit of a legitimate aim and is proportionate. This requirement for the statutory duty to form *'in substance an integral part of the decision making process'* has been emphasised again recently in the Court of Appeal.[2]

Although breaches of this duty can, and should be challenged by judicial review and the relevant Commissions, action needs to be taken before the event, otherwise what is the point of the legislation in the first place? The Commissions in GB and Northern Ireland must lead the way in challenging government policy and we need to insist that they do so.

The harsh truth is that too many Britons still face discrimination on an almost daily basis because of their race, gender, age, sexual orientation, religion, belief or background. We will take action to bring this to an end.[3] Lets ensure we keep the Home Secretary to her promise!

Geraldine Scullion

1. *R (Domb) v London Borough of Hammersmith and Fulham* [2009] EWCA Civ 941

2. *R (Harris) v London Borough of Haringey* [2010] EWCA Civ 70

3. Teresa May – A CONTRACT FOR EQUALITIES, the Conservative Party Manifesto, 2010

Please see back cover for list of abbreviations

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EQUALITY ACT **2010**

Briefing 563

The Equality Act 2010 (the Act) received royal assent on April 8, 2010. Replacing existing anti-discrimination laws with a single piece of legislation, it represents a milestone in the development of equality and anti-discrimination law in GB. The government states that in drawing up the legislation its aim is to provide *'a new cross-cutting legislative framework to protect the rights of individuals and advance equality of opportunity for all; to update, simplify and strengthen the previous legislation; and to deliver a simple, modern and accessible framework of discrimination law which protects individuals from unfair treatment and promotes a fair and more equal society'*.

In this edition of *Briefings*, discrimination practitioners have examined six aspects of the Act including definitions, disability protection, the single equality and socio-economic duties, positive action, equal pay, pregnancy and maternity, and finally, remedies. Later editions of *Briefings* will examine other aspects of the Act.

Deborah Nathan, solicitor, Russell-Cooke LLP, explores the new definitions in the Act.

Protected characteristics

Ss 4 to 12 draw together age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation as the protected characteristics under the Act.

Within these protected characteristics, the current grounds for discrimination have generally been maintained, save for amendments in relation to the definitions of gender reassignment, race and disability. S7 of the Act provides that gender reassignment will be a protected characteristic regardless of medical supervision where a *'person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.'*

The definition of race is no longer exhaustive and s9 simply provides that the definition of race includes colour, nationality and ethnic or national origin. The Act also includes a power to expressly include caste discrimination within the area of race discrimination. It is of course arguable that caste discrimination falls within the existing definition of race discrimination, particularly following the decision in *R (on the application of E) (respondent) v Governing Body of JFS and the Admissions Panel of JFS and others (appellants)* [2010] IRLR 136. [See Briefing 538]

The present definition of disability has been replicated without significant amendments but the government did not carry over the categories which need to be affected to establish a physical or mental impairment, taking the view that this did not assist tribunals when assessing disability. This aspect of disability discrimination is discussed in more detail below. Government's power to provide that certain conditions should be included or excluded from the definition of progressive conditions remains but no longer applies to types of cancer as cancer, HIV infection and multiple sclerosis are now deemed, in a separate provision, to be disabilities.

Direct discrimination

S13 of the Act provides that direct discrimination occurs *'if, because of a protected characteristic, A treats B less favourably that A treats or would treat others,'* replacing the familiar 'on the grounds of test'. The previous government stated that they believed this did not change the legal test but simply made the legislation more accessible and provided clarity. However, there is a risk that the new definition will be construed as requiring a conscious intention or motive which is not required under the present definition.

In *James v Eastleigh Borough Council* [1990] IRLR 288, Lord Goff stated that *'whether or not the treatment is less favourable in the relevant sense, i.e. on the ground of sex, may derive either from the application of a gender-based criterion to the complainant, or from selection by the defendant of the complainant because of his or her sex; but, in either event, it is not saved from constituting unlawful discrimination by the fact that the defendant acted from a benign motive.'* This case and many subsequent cases had confirmed that direct discrimination can occur both where an act is intrinsically discriminatory and where a (perhaps otherwise permissible) act is motivated by discriminatory intent.

Despite the previous government's stated intentions, there remains a risk that cases where the alleged discriminator has a benign, even laudable motive but has applied a decision or criterion that is in itself discriminatory, will now be treated differently under the Act and could form part of many defences to direct discrimination claims following the implementation of this part of the Act.

Associative discrimination

S13 does not stipulate that the less favourable treatment must be because of B's protected characteristic, thereby expanding anti-discrimination protection to allow claims of associative discrimination in the areas of sex, gender reassignment and age and placing associative disability discrimination on a new footing following the EAT decision in *Coleman v Attridge Law* [2010] IRLR 10 (which followed the ECJ judgement that the direct discrimination and harassment provisions of the Employment Equality Directive 2000/78/EC covered those less favourably treated as a result of their association with a disabled person). [See Briefings 499 and 547]

However, the marital and civil partnership status provision does not permit associative discrimination as claims will only be permitted where it is alleged that the discriminatory treatment is because the claimant is married or a civil partner.

Different definitions

While the Act's stated intention has been to harmonise existing anti-discrimination law, many of the existing differences between different grounds of discrimination remain. S13(2) preserves the ability to justify direct age discrimination if it amounts to a proportionate means of achieving a legitimate aim. Disability discrimination will continue to be asymmetrical as claims from non-disabled persons are excluded from the Act. In the employment context, discrimination because of marriage or civil partnership status will also continue to be one sided (see above).

S13(6) explicitly provides that in cases of sex discrimination (outside the employment context), less favourable treatment of a woman includes cases of less favourable treatment because she is breast-feeding. In addition, male complainants are not entitled to allege discrimination in relation to *'special treatment afforded to a woman in connection with pregnancy or childbirth'*.

Dual discrimination

S14 of the Act now permits discrimination claims based on a combination of two (but no more) relevant protected characteristics. All protected characteristics can be used in dual discrimination claims save for marriage and civil partnership, and pregnancy and maternity. The exclusion of these characteristics appears to be due to an apparent lack of evidence that discrimination on these grounds is in practice combined with other characteristics. In practice, the new provision may allow claimants to counter certain stereotypes in a more direct fashion, but the current law does not require individuals to establish that discrimination on one ground is the only, or even chief, cause of the less favourable treatment. Presently, individuals can pursue claims of discrimination on two or more grounds in relation to the same act and it is open to claimants to argue that the reason for the treatment includes both grounds, separately or in conjunction with the other. The new provisions may not, in practice, make it easier for claimants to succeed in discrimination claims

The Explanatory Notes to the Act indicate that dual discrimination cannot be used to overcome a defence, such as justification or an occupational requirement that might be available in respect of one of the two characteristics.

Indirect discrimination

S19 of the Act harmonises the definition of indirect

discrimination, which applies to all protected characteristics (including disability) save for pregnancy and maternity which will continue to be covered by sex discrimination. The Act substantially retains the test currently in use but extends its scope by providing that indirect discrimination will cover cases where individuals would suffer a particular disadvantage due to the application of a provision, criterion or practice (PCP). This provision incorporates the decision in *Firma Feryn* [2008] IRLR 732 and the subsequent amendment to the Race Relations Act 1976 (RRA) and permits a claim from individuals who are dissuaded from applying for a role because of an employer's discriminatory PCP.

Harassment

S26 of the Act does not substantially change the existing definition of harassment but conduct will only need to be 'related to a relevant protected characteristic' to amount to harassment. This provides a clear avenue for claims in cases where discriminatory language is used in the course of harassment but there is no discriminatory intent, addressing the issue that arose in the case of *English v Thomas Sanderson Ltd* [2009] IRLR 206. [See Briefing 516]

Burden of proof

Consistency in relation to the burden of proof to be met by claimants will be welcome and the previous inconsistencies in relation to discrimination on the grounds of nationality (and previously colour) have now been removed. S136(2) of the Act provides that '*if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred*' and this shift in the burden of proof will apply consistently to proceedings under the Act.

Conclusion

The harmonisation of the definitions in the Act is likely to provide assistance to claimants relying on case law relating to a different protected characteristic in the future and consistency has been introduced in relation to associative discrimination and in *Firma Feryn* type cases relating to protected characteristics other than race. However, both claimants and respondents will face uncertainty following the implementation of this part of the Act as until the new definition of direct discrimination is clarified.

Catherine Casserley, barrister, Cloisters Chambers and **Caroline Gooding, discrimination consultant,** examine the main disability provisions of the Act.

Some of the most significant changes to the current legislation have occurred in the field of disability; these provisions were also the subject of considerable amendment during the Act's passage through parliament.

Definition of disability

S6 defines disability as follows:

1. A person (P) has a disability if:
   a. P has a physical or mental impairment, and
   b. the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

2. A reference to a disabled person is a reference to a person who has a disability.

3. In relation to the protected characteristic of disability:
   a. a reference to a person who has a protected characteristic is a reference to a person who has a particular disability;
   b. a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

S212 now specifies that 'substantial' means 'more than minor or trivial'. Previously this interpretation was only contained in guidance and statutory codes. This definition will apply wherever 'substantial' is used in the Act.

Schedule 1 replicates, with slightly different wording, Schedule 1 to the Disability Discrimination Act 1995 (DDA), save for one difference. The list of

capacities which must be affected in order for an impairment to affect the ability of the person concerned to carry out normal day-to-day activities, presently contained in Paragraph 4 to Schedule 1 of the DDA, has been removed. The government explained its reasoning for this in the green paper *'Discrimination Law Review: Framework for a Fairer Future'*, July 2007, when it stated:

> *8.5…This requirement was included in the DDA in 1995 as there were concerns that, without such a qualification, the protection of the Act would be too wide-reaching. In practice, this concern has proved unfounded.*
> *8.6 There is also evidence of confusion about the purpose of the list of 'capacities' and it has often incorrectly been described as a list of normal day-to-day activities. Furthermore, it has sometimes proved difficult for some people, particularly those with a mental impairment, to show how their impairment affects one of the 'capacities'. In order to put this right, we propose to remove the list of 'capacities' from the definition of disability.*

It is doubtful as to how much difference this will make as tribunals will undoubtedly look to the former capacities for some framework for normal day-to-day activities. It should, however, make it easier for those with mental health issues to bring themselves within the definition as they have been poorly served by this list of capacities.

The government's regulation-making powers have been retained – presumably these will be exercised to exclude coverage of those with tattoos, and addictions, as at present, although those regulations continue in any event to be in force for the moment.

The government's ability to issue guidance on the definition of disability has been retained. The revised guidance, issued in May 2006, has proved extremely helpful in expanding upon the application of the definition, and it is to be hoped that the government issues updated guidance as soon as possible.

Direct discrimination already extends to disability in employment; S13 extends this concept to services, education, associations etc.

Following *Coleman v Attridge Law* C-303/06, the formulation for direct discrimination ('because of') is intended to include those who are less favourably treated because of association with a protected characteristic or because they are perceived to have a protected characteristic. The Explanatory Notes state that the formulation is *'designed to provide a more uniform approach by removing the former specific requirement for the victim of the discrimination to have one of the protected characteristics of age, disability, gender reassignment and sex. Accordingly, it brings the position in relation to these protected characteristics into line with that for race, sexual orientation and religion or belief in the previous legislation'.*

It remains to be seen how 'perceived' disability will work in practice. Will a person bringing a claim have to show that an employer perceived them to have a physical or mental impairment which has a substantial and long term adverse effect on their ability to carry out normal day-to-day activities? This would be extremely tortuous and practically unworkable. If tribunals take a more 'common sense' approach, then it is likely that those who would not meet the definition but who have

Timetable for implementation

The provisions in the Act will come into force at different times. The government's published timetable for implementation envisages commencement of the Act's core provisions in October 2010. The published timetable is as follows:

	Indicative date:
Main provisions	October 2010
Equality duty (general and specific duties)	April 2011
Dual discrimination	April 2011
Socio-economic duty	April 2011
Age in goods and services – general	2012
Age in goods and services – financial services	2012
Age in goods and services – health and social care	2012
Gender pay publishing	2013
Civil partnerships in religious premises	tba
Diversity reporting by political parties	tba

been less favourably treated because of their impairment will claim direct discrimination on the basis of perception; this may be a means of avoiding the sometimes stringent requirements of what is currently s1 of the DDA.

S13 also contains specific provision that, in relation to disability, it is not discrimination to treat a disabled person more favourably than a person who is not disabled. This means that it will continue to be lawful for employers and others to positively discriminate in favour of disabled people.

Discrimination arising from disability – solution to the *Malcolm* problem?

The case of *London Borough of Lewisham v Malcolm* [2008] UKHL 43 [see Briefing 497] has had major ramifications for disability discrimination law. As readers will doubtless be aware, it overturned *Clark v Novacold* [1999] ICR 951 so that discrimination for a reason relating to disability – currently section 3A(1) of the DDA – equates essentially to direct discrimination.

Both the CA in relation to education *(*see *R (on the application of N) v London Borough of Barking and Dagenham Independent Appeal Panel*, [2009] EWCA Civ 108) and the EAT in relation to employment (see e.g. *Child Support Agency (Dudley) v Truman* UKEAT/0293/08/CEA) have held that *Malcolm* applies not only to the premises provisions but also to other areas of the DDA.

S15, which was amended during its passage through parliament, introduces the concept of discrimination arising from disability. It states as follows:

S15 Discrimination arising from disability

1. A person (A) discriminates against a disabled person (B) if –

a) A treats B unfavourably because of something arising in consequence of B's disability, and

b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

2. Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

It is clear that the drafters were trying to distance the section from any comparator, hence no 'less favourable treatment', but rather 'being treated *unfavourably*'. It preserves the breadth of disability-related discrimination pre-Malcolm, covering as it does any treatment which is *'because of something arising in consequence'* of the disability.

The provisions make knowledge of disability – but not the *effects* of a disability – a requirement for discrimination arising from disability; however, it will be for the alleged discriminator to prove that s/he did not know and could not reasonably be expected to know.

Finally, the provisions are subject to the justification applicable to indirect discrimination. This should set a higher threshold than the current justification ('material and substantial reason' in employment). In relation to services justification, the DDA has a range of specified conditions, such as 'health and safety', which a service provider must reasonably believe applies to the situation. The test is thus both subjective and objective: the new justification removes the subjective element.

There is no longer, however, an explicit tie-in between justification and the duty to make reasonable adjustments (as per s3A(6) of the DDA – which provides that treatment cannot be justified if a reasonable adjustment which should have been made would impact on the justification). Nevertheless, in practice if there has been a failure to make reasonable adjustments in relation to the treatment then it will be difficult to show that the treatment was proportionate, whatever the legitimate aim.

Indirect discrimination

S19 extends indirect discrimination to disability for the first time. Whilst there is undoubtedly some overlap between discrimination arising from disability, the duty to make reasonable adjustments and indirect discrimination, the latter should be able to address certain anticipatory situations which will affect a group of disabled people – for example, where an employer is proposing to introduce a software system that is inaccessible to those with visual impairments.

However, s23, which sets out the comparison test – that like must be compared with like – applies to indirect discrimination. In the context of disability, this could limit the pool for comparison.

Duty to make reasonable adjustments

Ss20-21, which set out one overarching duty to make reasonable adjustments, states that a failure to comply

with this duty is discrimination and deals with the application of the duties in the different areas covered by the Act in a variety of schedules.

The duty itself is divided into three parts (referred to as 'requirements' in the Act). The three requirements are as follows:

1. The first requirement is a requirement, where a provision, criterion or practice (PCP) of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
2. The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
3. The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

S20(9) expands on what is meant by avoiding the disadvantage in relation to physical features (removing, altering or providing a reasonable means of avoiding); and in relation to the first and third requirement, where this relates to the provision of information, the Act specifies that the reasonable steps include providing the information in an accessible format (s20(6)).

Part 5 of the Act deals with work and Schedule 8 sets out the application of the duty to employers, trade organisations etc. Paragraph 20 repeats the formulation currently in 4A(2) and (3) as to whom the duty is owed (e.g. any applicant for employment) and in what circumstances – in particular, that the duty is not imposed where the employer does not know that the person has a disability and is likely to be affected in the way mentioned in the three requirements.

Part 3 deals with services, and Schedule 2 sets out how the reasonable adjustment duty applies to services. The most significant change here is that whereas the DDA duty arises in relation to policies, procedures and practices, or aspects of physical features which make it 'impossible or unreasonably difficult' for disabled persons to use a service, or where an auxiliary aid or service would 'facilitate' the use of a service, the Act requires reasonable adjustments where disabled persons would otherwise be placed at 'substantial disadvantage' (Schedule 2 paragraph 2). In practice, since case law had given a broad meaning to the phrase 'impossible or unreasonably difficult' the change is unlikely to be significant.

However, there is a very significant change in relation to the reasonable adjustment duty as it applies to schools. Whereas the DDA did not impose a duty to provide auxiliary aids and services on schools for their pupils, Schedule 13 now includes such a duty.

Pre-employment enquiries

S60 is undoubtedly the most important new provision for disabled people and is discussed at more length in a separate article by Liz Sayce, Briefing 564. It prohibits employers from asking about the health (which is said to include whether or not a person has a disability) of an applicant for work before offering work to that applicant or, where a pool of potential employees is being created, before including the applicant in such a pool, except for questions necessary for a limited range of specific purposes. Work has a wide meaning, including contract work, pupillage, partnership or appointment to a public or private office.

The Equality and Human Rights Commission (EHRC) has power to enforce these provisions. Having asked such a question, a tribunal may conclude that the employer has committed a discriminatory act, and in these circumstances the burden of proof will shift to the employer to show that no discrimination took place.

Clearly the impact of this provision, which was originally proposed by the Disability Rights Taskforce in 1999, will depend on the breadth given to the exceptions which permit questions related to, among others, the intrinsic functions of the job.

Ulele Burnham, barrister, Doughty Street Chambers, examines the new single equality duty and the socio-economic duty under the Act

The Act creates a new single equality duty which will oblige public authorities, in the performance of their functions, to have 'due regard' to specific equality considerations in respect of almost all of the protected characteristics covered by the Act.

At present, the duty on public sector bodies to have regard to such aims as the elimination of discrimination and the promotion of equality of opportunity only applies to race, disability and gender. The new single equality duty will now extend the application of the duty to religion, sexual orientation, age and pregnancy and maternity but not to marriage and civil partnership. Like the race, gender and disability duties contained in the RRA, the Sex Discrimination Act 1975 (SDA) and the DDA, the new single equality duty will place a *general* duty on bodies listed in Schedule 19 to the Act and further *specific* duties on certain of those bodies to make procedural arrangements to ensure compliance with the general duty.

The Act also creates an entirely new public sector duty referred to as the 'socio-economic duty'. This duty, apparently less onerous than the new single equality duty, requires public authorities to have due regard, in the context of strategic decision-making, to the desirability of reducing inequalities which result from socio-economic disadvantage. Whereas these new features are to be welcomed, as discussed below there remain uncertainties about whether they will in practice be a significant improvement upon the existing duties.

Single equality duty

S149(1) of the Act obliges the bodies listed in Schedule 19 to have due regard to three equality aims:

a) to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
b) to *advance* equality of opportunity between persons who share a relevant protected characteristic and those who do not share it;
c) foster good relations between person who share a relevant characteristic and persons who do not share it.

The first and the third aims broadly mirror those contained in the three present public sector-duties applicable to race, gender and disability. The one change to the first aim is that it now explicitly refers to harassment and victimisation rather than only to discrimination. As far as the third aim is concerned, its effect is altered only in so far as it applies the 'good relations' mandate to all relevant strands or protected characteristics where this kind of requirement was only present in the race and disability duties.

The second aim replaces the old requirement to have due regard to the need to *promote* equality of opportunity with a requirement to have due regard to the need to advance that end. It is hoped that the use of the word 'advance' will indicate to the relevant bodies that this limb of the duty does not merely relate to a nebulous aspiration with no practical effect or consequence. Rather it can be seen as a requirement to improve equality of opportunity and may afford a greater opportunity to attempt to measure the effectiveness of the duty.

Unlike the statutory provisions applicable to the old public sector duties, the Act offers specific guidance on the content of the new duty. It describes what is meant by 'due regard' and this may offer clearer guidance to the authorities required to discharge the duty. S149(3) states that the advancement of equality of opportunity involves having regard to the need to *'remove or minimise disadvantage suffered by persons who share a relevant protected characteristic'* and represents a recognition of the need to break cycles of disadvantage associated with the membership of certain groups.[1]

S149(3) also makes clear that there must be recognition of the need to accommodate and cater for different needs differently. S149 also expressly states that the 'due regard' obligation includes a requirement to encourage the participation in public life and other activities of members of a group sharing a particular protected characteristic covered by the Act. This makes express the link between advancing equality and increasing the representation of minorities in public life.

Good relations

The Act also specifically defines what the 'good relations' mandate is intended to cover. S149(4) describes this mandate as an obligation to have regard to the need to tackle prejudice and promote understanding. Some useful examples of how this aspect of the duty might operate is provided in the Explanatory Notes. For instance, these suggest that this could involve the provision of education and guidance on transsexual issues by a large government department, the review of a school's anti-bullying strategy to ensure that homophobic bullying is tackled and the introduction of measures which could lead to understanding and conciliation between different religious minorities.

Unfortunately, the Act does not expressly define what is a 'public authority' and, as stated above, tends to replicate the 'list' approach taken in the RRA. This may lead to an unwelcome inconsistency between those authorities which will be regarded as public authorities for the purposes of the Human Rights Act 1998 (HRA) as opposed to the Act. In addition, the application of the duty to bodies that are not contained in Schedule 19 in respect of their 'public functions' may further complicate the debate about 'pure' and 'hybrid' public authorities which has animated the courts in the context of attempting to determine which bodies are subject to the duty to ensure compatibility with the European Convention on Human Rights. It would have done more for coherence to make sure that the cohort of bodies to which the duty applies was consistent with those to which the positive duty to protect human rights also applies.

Exemptions to the new duty

The exemptions to the new duty are in large part unsurprising. The legislature, the security and intelligence services and judicial functions are, as might be expected, specifically exempted. As far as specific protected characteristics are concerned, the duty is disapplied in respect of age in relation to the provision or education and children's services. Similarly as regards age, race and religion or belief, the requirement to have regard to the need to advance equality of opportunity is disapplied in relation to specified immigration and nationality functions (see Schedule 18).

S153 confers on Ministers of the Crown, Welsh or Scottish Ministers, the power to impose *specific* duties upon certain of the Schedule 19 public bodies. The previous Labour government's proposals for the new specific duties were contained in a January 2010 policy statement entitled *'Equality Bill: Making it work. Policy Proposals for specific duties'*. In light of the change of government in May 2010, it cannot be assumed that the policy proposal contained in that document will be implemented. In this sense, the proposals referred to below should be seen only as contextualising the forthcoming debate about the precise content of the specific duties.

Duty to produce equality schemes

The January 2010 policy proposals indicated the previous government's intention to abandon the duty to produce equality schemes. According to that statement, public bodies would be required as part of their core business planning to:

- develop and publicly set out their *equality objectives*
- set out the steps they will take to achieve these over the coming business cycle (likely to be three years)
- implement these steps unless it would be unreasonable and impracticable to do so
- review and update, as necessary, the objectives every three years

The proposals included provision for the government to disseminate 'national equality priorities' and the only one identified in that document was one relating to the reduction of the gender pay gap. The proposals did not address in detail how the assessment of the impact of policies upon specific groups would be performed. This reticence is thought to have been associated with a belief that the existing requirement to perform impact assessment as part of the specific duty was too onerous and time consuming. The proposals seem to suggest that the requirement to gather and analyse evidence before setting equality goals might replace the requirement to assess impact. Nonetheless, the proposals did provide for consultation with the EHRC on impact assessment measures.

1. For more on this see Fredman, *Human Rights Transformed*, pp.179-180

Public procurement

A positive aspect of the January 2010 policy statement was that it indicated the previous government's intention to make equality related criteria part of the public procurement process. This is an extremely welcome development in the context of the increasing privatisation of public service provision. The current trend in public service provision has been for large public authorities to 'contract out' certain services by means of competitive tendering. Equality groups have long been concerned about the ability of public authorities to safeguard equality in service delivery where the ultimate providers were not directly answerable to the authority to which the equality duty applied. The January 2010 statement suggested the specific duties would impose requirements on contracting authorities to:

- include reference to how they will ensure that equality factors are considered part of their public procurement activities when setting their equality objectives
- consider using equality-related award criteria where they are relevant to the subject matter of the contract and are proportionate
- consider incorporating equality-related contract conditions where they relate to the performance of the contract

Many criticisms can be made of the previous government's proposals for the specific duties. First, the abandonment of the duty to produce equality schemes ignores the fact that, although many public authorities believed the requirement to produce schemes to be overly bureaucratic, that requirement put in place a framework within which the arrangements for the discharge of the general duty could be measured.

Second, the proposals specifically stated that there would be no requirement to set out an equality objective in relation to a particular protected characteristic where there was no evidence of need in relation to that group. This, it would seem, is an entirely retrograde step as it may permit public authorities to exclude a category of persons who share a particular protected characteristic from their list of equality objectives entirely. A much better approach would have been to require objectives in relation to each protected characteristics but to make clear that where there was a demonstrable absence of need, the objective need only be directed at maintaining current service provision to that group or at meeting relatively modest and identified needs.

Third, the lack of clarity in relation to impact assessment makes it difficult to understand how the process of setting equality objectives will work and how the discharge of the obligation might be measured or challenged.

The 'socio-economic' duty

This duty emerged in the context of an increasing recognition – by both governmental and non-governmental organisations – that discriminatory treatment on the basis of membership of a particular group is often compounded by poverty or socio-economic disadvantage. For example, discriminatory treatment on the grounds of pregnancy, maternity or race might be experienced more frequently (or with more lasting consequences) by those on lower incomes. The duty was therefore intended to encourage public authorities to take account of the distinct role played by economic position in the way discrimination may be experienced. Regrettably, the duty as it is cast in s1 of the Act is alarmingly weak. In addition, this is one aspect of the Act to which the Conservative Party was significantly opposed so there is little indication that it will ever be put into effect.

The duty as defined in s1 requires the relevant public bodies *'when making decisions of a strategic nature about how to exercise its functions, to have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome that result from socio-economic disadvantage'.*

The policy document associated with this new duty. *'The Equality Bill: Duty to reduce socio-economic inequalities. A Guide'*, again produced by the previous government, makes clear that the duty is intended to oblige specific public bodies to consider how their strategic decisions might help to reduce inequalities associated with socio-economic disadvantage. It is said to be targeted to key, high-level decisions. The kinds of 'outcomes' in question are described as related to 'material goods and services' and factors that affect wider life chances such as experiences of crime, levels of police protection, educational attainment and levels of unemployment.

The bodies to which the duty is intended to apply are listed in s1 and are described as bodies with strategic functions. The list includes central government authorities and bodies who work in strategic partnership with local authorities. There is a power to amend the list of bodies to which the duty applies by regulation. Monitoring and implementation will be done by inspectorates and compliance is to be measured by a monitoring process conducted by the government.

The focus on socio-economic disadvantage as part of a focus on equality is extremely timely. However, the duty as set out in the Act is unlikely to tackle the thorny and difficult compound discrimination which may occur in the context of poor economic means/status. The primary difficulty with the duty as currently defined is that to does not require 'due regard' to the reduction of unequal outcomes. Rather it requires only due regard to the 'desirability' of reducing such outcomes. There is therefore a good chance that the duty, if ever implemented, will be virtually unenforceable.

Further, whilst the duty is contained in the 'Equality Act 2010', the previous government's guidance states that it is not part and parcel of any formal equality obligation. More worrying still is the fact that those who, by dint of immigration rules are not entitled to remain in the UK, will not benefit from its existence. The impact of these significant exclusions is at least two fold: first, despite no less than 5 years of research demonstrating the relevance of socio-economic status to equality of opportunity in practice, the duty will not be treated as relevant to a public body's equality profile and will therefore do little to address class disadvantage as a true equality issue. Second, the exclusion of those who fall on the wrong side of immigration and nationality rules, that is, some of the most vulnerable and most unequally treated members of society, will not be helped by the new duty to alter their life chances: some life chances continue to be more equal than others.

Barbara Cohen, discrimination law consultant, examines the positive action measures in the Act; these include general positive action clauses under s158, positive action in recruitment and promotion, and positive action by political parties when selecting candidates for election.

Positive action – general

S158 of the Act significantly expands possibilities for meaningful positive action across all of the areas within its scope. It permits employers, service providers, housing providers, educational institutions, associations and others to treat more favourably members of groups who, as a result of historic or present discrimination or disadvantage have particular needs or are socially or economically excluded, provided such action meets the conditions in the Act.

'Positive action' under the Act does not include action to remove barriers to equal participation that does not involve more favourable treatment of the target group, for example, wider advertising or more inclusive promotional activities, since such action will always be lawful. The Act sets out conditions which make lawful action involving different treatment of a particular group, that would otherwise be unlawful. Preferential treatment of an under-represented group that does not meet these conditions will, as currently, be unlawful unless specific exceptions in the Act apply.

There are three conditions, all of which must be met to ensure the action is 'positive action' under the Act; these are:

1. the employer/service provider/association/school governing body etc. must reasonably think that people who share a protected characteristic (referred to herein as an 'equality group')
   - suffer disadvantage related to that characteristic,
   - have different needs or
   - have disproportionately low level of participation in an activity, and
2. the employer/service provider/association/school governing body etc. takes action which aims to
   - enable or encourage the equality group to remove or minimise the disadvantage

- meet their different needs or
- enable or encourage increased participation, and

3. the action is a proportionate means of achieving that aim.

The Act does not define 'disadvantage' or 'different needs', merely indicating that such circumstances should relate to the protected characteristic that defines the equality group. So, for example, while all women need good quality ante-natal care, the high rates of infant mortality among Gypsies and Travellers could be said to make this a different need of Gypsy and Traveller women.

The Act also does not specify when participation in an activity would be disproportionately low. An 'activity' is not defined but as this general form of positive action applies to all areas within the scope of the Act, it will include being a customer or service user, being a member of an association, being a pupil or student or tenant and being an employee, trainee or office holder. The activity could be very wide, for example playing football, or it could be more limited, for example being a player, or a coach or manager of a Premier League football team. It could be the whole of a workforce, for example all employees of a local authority, or it could be people employed to do particular work, for example science teachers.

The Act does not define what is necessary for an employer/service provider/association/school governing body etc. reasonably to think that a particular group is disadvantaged etc. In many cases this is likely to be obvious; in some cases statistical or other monitoring data may be useful to support an impression or perception. This condition as a first requirement also means that it will rarely be lawful for a positive action measure to continue indefinitely since, over time, the action should achieve an improvement in the group's circumstances.

Different treatment will be lawful only if the action is a proportionate means of achieving one of the specified aims. Balancing the benefit to the group targeted for positive action against the disadvantage to other groups, is the action appropriate and necessary? Is there a less discriminatory way to achieve that aim? For example, it is unlikely to be a proportionate means of increasing participation of Asians for a football club to pay its Asian players more; the club is more likely to meet this test by targeting recruitment and offering extra coaching to Asian players.

Positive action in recruitment and promotion

The Act includes a second form of positive action that applies only in recruitment or promotion.

'Recruitment' is given a wide definition, including the process for deciding whether to offer employment, partnership, membership of an LLP, offer of a pupillage or tenancy, apprenticeship, work as a contractor, to recommend a person for appointment to public office and to offer a service for finding employment. The Act does not define 'promotion'.

To be lawful, positive action in recruitment or promotion must meet the conditions specified in s159 of the Act:

1. the employer or other person making a recruitment or promotion decision (the employer) must reasonably think that members of an equality group
   - suffer a disadvantage or
   - have disproportionately low level of participation in an activity
2. the aim of the employer's action is to enable or encourage members of the disadvantaged or low participation group to
   - overcome or minimise the disadvantage, or
   - participate in that activity
3. the employer may treat one person more favourably than another in connection with recruitment or promotion because that person is a member of the disadvantaged or low participation group only if:
   - the member of the disadvantaged or low participation group is as qualified as the person who is not a member of that group, and
   - the employer does not have a policy of automatically treating all members of the disadvantaged or low participation group more favourably in recruitment or promotion, and
   - the action is a proportionate means of achieving the above aim

The Act does not define 'as qualified as'. It is likely that the employer will be expected to demonstrate that they have carried out an assessment of each candidate's qualifications, skills, experience, competence etc. against objective criteria. An employer cannot choose a member of a disadvantaged or low participation group

if there is a better qualified person who is not a member of that group. An employer also cannot 'fast track' applications from members of a disadvantaged or low participation group, since this would imply a policy; the Act permits an employer to give preference to a candidate from a disadvantaged or low participation group only at the point of a recruitment decision.

Whether giving preference to a candidate from a disadvantaged or low participation group in a particular recruitment situation will be a proportionate means of enabling or encouraging members of that group to overcome or minimise the disadvantage or participate in the activity is ultimately a decision for the Employment Tribunal. Relevant factors could include how the activity is defined and therefore the pool against which the employer measured low participation, for example, the whole of a large workforce or a specialist unit.

The aim in both general positive action and positive action in recruitment and promotion is to improve the relative position of a particular equality group, and in both cases the action will only be lawful if it is a proportionate means of achieving the specified aim or purpose. What distinguishes positive action in recruitment from the general form of positive action is that the former permits action to meet this aim in the form of preferential treatment of an individual member of a disadvantaged or low participation group, while general positive action enables a wide range of action to meet this aim involving preferential treatment of the group as a whole.

Both of the above forms of positive action are optional, not mandatory. However, public authorities and other organisations subject to the public sector equality duty under the Act may need to consider taking positive action in order to comply with their duty to have due regard to the need to advance equality of opportunity (see discussion above on the single equality duty).

Positive action by political parties in selecting candidates:

S104 of the Act introduces a separate form of positive action for political parties when they select candidates to stand in a 'relevant election', i.e. elections to parliament, to the European Parliament, the Scottish Parliament and the National Assembly for Wales and local government elections.

The Act permits a political party to make arrangements regulating the selection of candidates for a particular relevant election

- with the purpose of reducing the inequality in the party's representation in the body in question, but only if
- the arrangements are a proportionate means of achieving that purpose

'Inequality in a party's representation' is defined as the inequality between the number of the party's candidates elected to the body concerned who share a protected characteristic, that is, who are members of a particular equality group, compared to the number of the party's successful candidates who are not members of that group.

A party's selection arrangements could include their procedures for identifying suitable candidates and in determining how a final shortlist will be chosen. Thus a party could reserve places on its selection shortlist for members of groups that are under-represented amongst their representatives on the particular body, provided to do so was a proportionate means of reducing the inequality of its representation on that body.

As for the other forms of positive action, whether selection decisions by a political party meet the Act's proportionality test will ultimately be a matter for the courts.

The Act does not permit a political party to shortlist *only* people with a particular protected characteristic, other than sex. The Sex Discrimination (Election Candidates) Act 2002 which permits all-women shortlists remains in force; s105 of the Act extends it to 2030.

Michael Newman, Leigh Day & Co, considers the changes the Act makes to equal pay, pregnancy and maternity and suggests that the impact of these changes is difficult to gauge. This, he suggests, is for the same reason that applies to the Act as a whole – if its intention is to replicate the effect of previous legislation, how can that intention survive where changes have been made to the wording of legislative provisions?

The two most obvious new factors in respect of equal pay are ss77-78, dealing with discussions about pay and gender pay gap information. The latter is to be dealt with by regulations, is limited to organisations with more than 250 employees, and there seems to be little political appetite for pay audits to be made compulsory. S77 makes 'relevant pay disclosures' unenforceable. The debate around so called 'secrecy clauses' would lead you to believe that the Act means that employers can no longer make discussion of pay, including bonuses, a breach of contract. This is not the effect of s77, which only outlaws disclosures made for the purpose of finding out whether there is a connection between pay and a protected characteristic. In practice, it might be difficult to enforce a clause prohibiting employees from discussing pay generally, but permitting them to discuss pay if it might establish discrimination.

In any event, banning secrecy clauses is hardly the radical idea for promoting equality as has occasionally been claimed. While it does not disadvantage those who might seek pay information from potential comparators, neither does it encourage employees to ask, or disclose, details about pay. In institutions where a culture of secrecy has pervaded for years, there is still no incentive or enforcement mechanism for disclosure of pay. This means there are many reasons why pressure might continue to withhold pay information, even if doing so may no longer be a breach of contract. One reason is perhaps that a more transparent system might create an inflationary effect on wages, so that those who are currently better paid have a vested interest in maintaining that secrecy.

One more technical aspect is the question of comparators, dealt with specifically by s79. The previous law said that discrimination in relation to a contract was dealt with by equality clauses, and non-contractual discrimination (promotions, other exercises of discretion by an employer) were dealt with as sex discrimination. One difference between these two areas was that equal pay required a real comparator, while sex discrimination permitted hypothetical comparators. The combined effect of ss70-71 seems to permit some form of hypothetical comparators in equal pay claims.

S70 deals with exclusions from sex discrimination, with s70(2) excluding equality clauses (and any contractual terms they might give rise to) from amounting to sex discrimination. S71(2) provides an exception to the s70 exception. If the contractual term amounts to direct or dual discrimination under ss13 – 14, then s70 is disapplied. The overall effect seems to be to introduce hypothetical comparators to equal pay apart from where the inequality is alleged to be as a result of indirect discrimination.

S64(2) states that the comparator's work does not need to be contemporaneous to the claimant's work, and is intended to codify *MacCarthy's Ltd v Smith*, permitting predecessor comparators. The Explanatory Notes state that it is not intended to widen the available comparators, but in opening up non-contemporaneous comparison of work, it might reignite the question of successor comparators. S64(2) certainly does not allow hypothetical comparators under the equality clause provisions.

The genuine material factor defence no longer has a requirement to be genuine – see s69. However, this does not mean that employers can rely on sham reasons; the government thought the phrase 'genuine' added nothing to the existing tests enshrined in case law, and these are replicated in s69.

S69 clarifies that equality clauses apply not only to employees, but they also apply to those people holding personal or public office.

Pregnancy and maternity discrimination is dealt with at ss17-18, dealing with non-work and work situations respectively. The headline change is that both

sections acknowledge that maternity discrimination is distinct from sex discrimination, and that one of the defining elements of this distinction is that pregnancy and maternity do not require a comparator. This is dealt with by use of 'unfavourable' instead of the more common 'less favourable' used in relation to other protected characteristics.

S18(5) deals with decisions affecting the employee where implementation is delayed. This is especially important with maternity leave, as it is common for any detriment to only take effect upon the employee's return to work. This does not prevent the employee from taking advantage of the protection afforded by s18, provided that the decision was taken during the protected period. It also means, as the Explanatory Notes make clear, that an employer must not take into account an employee's period of absence due to pregnancy-related illness when making a decision about her employment.

With regards to non-work protection, Part 7, s17 extends the previous scope of sex discrimination law so that associations are also covered.

Another feature about pregnancy and maternity discrimination is that it is excluded from the various lists of protected characteristics scattered around the Act. One example is the new provisions on dual discrimination in s14; other examples are the provisions on harassment in s26. If pregnancy and maternity was thought distinct enough from sex discrimination to warrant separate protection in other areas, there can be no reason for their exclusion from dual discrimination and harassment. While in practice, many cases might be caught by sex discrimination, it is still an unnecessary gap in protection. It cannot be that the burden on employers (or service providers or other responsible parties under the Act) would be greater if these protections were extended to pregnancy and maternity. In areas such as service provision (s29) and schools (s84), it was thought important to extend uniformity to all protected characteristics, or at least to include pregnancy and maternity as a protected characteristic and it is disappointing that this policy has not been replicated throughout the Act.

Sophie Garner, barrister, St Philips Chambers, examines remedies under the Act. While the Act does not make substantial changes to the existing remedies available in discrimination claims, she highlights some important changes which need to be taken into account.

Remedies and equal pay

Under the old equal pay provisions, declarations in relation to equality clauses and 'not less favourable terms' were the standard remedies alongside awards of arrears of remuneration. The basic equal pay provisions are effectively reproduced in s66 (sex equality clause), s67 (sex equality rule for occupational pensions), and s71 (exclusion of contractual provisions which are discriminatory on the grounds of sex), and the provisions relating to remedies in non-pension and pension cases are found at s132 and ss133-4 respectively. As before, declaratory relief and arrears of pay are the options.

As mentioned in the previous article, s77 prevents 'gagging clauses' from being enforceable. So any attempt on the part of an employer to prevent employees from discussing their salaries openly with each other becomes ineffective and if an employee does have discussions about her pay and suffers a detriment as a result, the employer will be found to have acted unlawfully under the victimisation provisions contained in s27. The normal remedies for victimisation will follow.

S78 provides that regulations can be made which require employers to publish information about employees' pay to expose whether or not there are gender pay differences in pay levels. This is only in relation to employers with more than 250 employees. Failure to comply with such regulations would amount to an offence with a fine not exceeding level 5. When

in opposition, the current government voiced its view that it would be unlikely to enact such regulations if it got into power, so it is questionable whether the terms of s78 will now be put into effect.

Remedies and the public sector duty

With regard to the new public sector equality duty, which at present extends just to the general duty, s156 of the Act refers to enforcement only to state that a failure to comply with the general (or specific duties as and when they arrive) gives rise to no private cause of action.

As before, then, any failure on the part of a public authority to adhere to the general duty will have to be dealt with by way of judicial review (see the recent case of R (*on the application of Janet Harris) v Haringey London Borough Council and others* [2010] EWCA Civ 703 for a good example of such a claim). In the context of private law claims, there is nothing to prevent a claimant from referring to any failure to comply with the duty or duties when a tribunal or court is considering whether the respondent/defendant has discharged its burden of proof in relation to the act complained of (the burden of proof provision can be found in s136 of the Act).

Remedies and general discrimination

All current financial remedies effectively remain unchanged under the Act. The notable alteration to the remedy provisions is in the power given to tribunals to make recommendations more widely. Currently, s56(1)(c) of the RRA (for example) provides that a tribunal may make *'a recommendation that the respondent take within a specified period action appearing to the tribunal to be practicable of the purpose of obviating or reducing the adverse effect* ***on the complainant*** *of any act of discrimination to which the complaint relates'*. In practice due to the high percentage of discrimination claims coming before tribunals in which the employment has already terminated, this is a rarely used remedy.

The new provision (s124(3)) gives power to a tribunal to make *'a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect of any matter to which the proceedings relate (a) on the complainant; (b) or another person'*. There is also provision to increase the amount of compensation payable to the complainant if the employer does not comply (s124(7)).

If the case is one of indirect discrimination but there was a lack of intention on the part of the discriminator, the tribunal is obliged to consider a declaration and/or a recommendation first before moving on to consider compensation (s124(4)).

Potential recommendations might involve measures such as a review of existing diversity policies, or requiring key employees to undertake training. Practitioners bringing claims on behalf of complainants in discrimination claims have long been frustrated at the lack of effective measures to tackle 'repeat offenders' in relation to discrimination claims, so it will be interesting to see how enthusiastically this new provision is embraced by the tribunals.

Employment health checks – time for a rethink?

Liz Sayce, Chief Executive of the Royal Association for Disability Rights (RADAR)[1] examines employment health checks before job-offer or at any stage. Now that s60 of the Equality Act will permit pre-employment health checks in only very limited circumstances, she questions their value at all and suggests that a radically reduced use of health checks would signal a shift from 'screening out' some people for health/disability-related reasons – towards a culture of openness and inclusion for the benefit of both employer and disabled employees.

Ending pre-employment health checks

As the Equality Bill proceeded through parliament, one key amendment accepted by government concerned pre-employment health questionnaires. Finally, a decade after the Disability Rights Task Force first recommended that pre-job offer health questions should be prohibited, s60 of the Equality Act 2010 introduces a prohibition on employers undertaking health checks before conditionally offering someone employment (except in tightly defined circumstances – like asking if they need reasonable adjustments for the interview.)

The aim is to bring transparency and fairness to the selection process: first you select on merit and make a conditional offer and only then do you inquire about any job-related health issues. If the employee is rejected after the conditional job offer, they know why – and can question and challenge the rejection if they wish. If, on the other hand, the employer has information on medical history before the job offer, it is all too easy to reject someone with (say) a history of depression or back pain. All the individual knows (whatever their suspicions) is that there was someone better on the day.

Disabled people's experience of pre-employment health checks

More and more people living with mental or physical health conditions/impairments have spoken out against the way prejudice and excessive fears about health and safety creep into recruitment decisions. For example, as a human resources director in a large multi-national, Helen Waygood saw the medical report on herself. It stated that because of her bi-polar disorder on no account should the company employ her. As she put it: *'I filed the letter away fairly carefully and continued in that job, quite happily, for several years'*.[2]

Some used the law to challenge rejections and low expectations of what disabled people can do. A construction company offered Andrew Watkiss a company secretary's job only to withdraw it after a health check revealed his psychiatric diagnosis. He took a Disability Discrimination Act 1995 (DDA) case and won, on the grounds that the company had made a generalised decision based on his diagnosis, rather than deciding whether he as an individual could do the particular job, with adjustments if needed. Christine Laird did not mention her past depression when applying for the post of Chief Executive of Cheltenham County Council. Later, when they tried to sue her for concealing information on the health questionnaire, she appealed and won – nothing required her to reveal this information, which they had not in any event clearly asked for.

From rights to wider change

The Equality and Human Rights Commission recently challenged a Primary Care Trust (PCT) whose occupational health policy stated that if you had recent or current experience of panic attacks or psychosis you were unfit to work with any client group (adults, children, the public). Someone who was 'stable' with no recent psychosis might be considered fit, but only if functioning well at work for the previous 5 years. Despite one in 4 people experiencing mental health problems at some point, this PCT appeared content to screen out applications from a group of people whatever their talent. It is hard to know where to start in detailing the problems with this policy:

- the employer will miss talent. Some NHS organisations are mobilising the power of peer support and leadership of people with mental or physical health conditions: South West London Mental Health Trust, for instance, sees the fact that a third of its most senior managers and clinicians

1. www.radar.org.uk

2. RADAR/Lloyds Banking Group, *Doing Seniority Differently*, 2010

have mental health problems as an asset.
- blanket exclusions based on diagnosis are illegal. Excluding someone on health grounds must be an individual decision, made on job related grounds and only after considering whether reasonable adjustments would enable the person to do the job.
- it creates a perverse incentive to conceal mental health issues – rather than seeking the support that can help people work more effectively. If you are afraid to be open, you cannot ask for the reasonable adjustments that are your right under the DDA.
- it runs counter to good occupational health practice – by being excessively risk averse

Having a written discriminatory policy like this PCT's might be unusual. Unfortunately the approach – being risk averse, giving a message that openness may lead to rejection – is still relatively common.

This is not just a matter of legal rights. It goes to the heart of what sort of workplaces we want – their culture, working practices and, indeed, productivity and outcomes.

Workplace health and disability culture

RADAR's research on disabled people in senior jobs found that nearly two-thirds (62%) of disabled respondents had the option to hide their impairment at work, of whom three-quarters (75%) did so sometimes or always. Those most likely to keep their impairment private were those in the private sector, and those with mental health problems who were 4 times more likely than other disabled people to be open to no one at work.

People were motivated by different things in their decisions about whether to be open. Some found openness an important part of managing other people's responses to their impairment while others decided not to be open, simply because they do not see it as relevant. Most people hid their impairment because they thought this would benefit their career or because they feared discrimination if they were open. Fear of the consequences of others knowing was a key driver.

Many people with mental health problems talk of having a 'huge secret'. The fear of being 'found out' causes huge stress – which can exacerbate the mental health condition.

Fear is not conducive to high performance. The UK Commission for Employment and Skills recently reported on High Performance Working: the practices employers can adopt to boost both employer success (profitability, sales success) and employee well-being. They identified the pivotal importance of sustaining employee commitment and motivation and achieving a partnership between employers and employees, within a strong base of values and ethos.[3]

Fear is a drag on motivation and commitment to a company. It distracts energy from productivity. It holds people back from openness with colleagues, which can detract from teamwork, and with management, which prevents partnership. It makes it harder for people to believe in a company's values and ethos. It deters people from applying for promotions.

Where fear is lifted, creativity and teamwork can be unleashed. Commitment, motivation and loyalty to the company can rise.

Similarly evidence from the sphere of sexual orientation suggests that productivity increases when people are confident that they can be safely 'out' at work.[4]

This suggests we need nothing short of a culture shift in the world of work. One in 5 of the British population experiences a disability/health condition as defined by the DDA. This means every team is touched by disability – in team members and also in their families. The more we can encourage openness and discussion about this aspect of human difference at work and find the adjustments and supports to enable everyone to flourish, the better for high performance working. The aim is to make fear of management 'finding out' about a health condition or disability a thing of the past. To be sure some people may still choose to keep their condition private for more positive reasons. But the nagging, draining fear of others knowing your 'secret' could be removed, with positive benefits for all.

Pre-employment enquiries under s60 Equality Act 2010

S60 of the Act provides that employers must not ask about the health (which is said to include whether or not a person has a disability) of a job applicant before offering work to that applicant or, where a pool of potential employees is being created, before including the applicant in such a pool. S60 does not, however, apply to questions which are 'necessary for the purposes' of:
- establishing whether the job applicant will be able to comply with a requirement to undergo an assessment (such as a selection test) and whether a duty to make reasonable adjustments will arise in relation to such an assessment

3. UKCES *High Performance Working*, 2009

4. *Peak Performance: Gay people and productivity,* Stonewall 2008

- establishing whether the job applicant will be able to carry out a function that is intrinsic to the work concerned; for example an employer would be allowed to ask an applicant for a job at a warehouse that involved heavy manual lifting whether s/he could carry out this work, with reasonable adjustments, if required
- monitoring diversity
- taking positive action to advantage people with a particular disability in compliance with s158
- establishing whether the applicant has a particular disability where this is an genuine occupational requirement which is a proportionate means of achieving a legitimate aim

S60(6)(a) permits the employer to ask people if they need any adjustments for the recruitment assessment process. S60(6)(b) recognises that there may be particular jobs where it is important to find out whether the applicant is able to carry out specific physical or mental activities. An employer is not prohibited from asking a question necessary for the purpose of establishing whether the job applicant will be able to carry out a function that is intrinsic to the work concerned. Some roles require activities that may not be possible for some disabled individuals, even with adjustments. A pilot needs good eyesight to fly a plane; a scaffolder needs to be able to climb scaffolding safely; a call centre operator needs to be able to deal with the pressure of constant calls.

S60(6)(c) permits questions before job offer which are necessary for the purposes of monitoring diversity. If equality monitoring includes disability then of course questions can be asked – but good practice suggests that the answers should be kept separate from the application and seen by human resources, not the panel. Similarly, under s60(6)(e) employers who want specifically to employ a disabled person or someone with mental health problems – for instance as a peer support worker – can ask questions about this occupational requirement. These are all permitted under the DDA and continue to be allowed under the Act.

Where a particular job requires particular fitness levels, practical tests (asking people to demonstrate the activity, for instance) or targeted and specific questions on fitness can be a fair way of testing, provided these are carried out after, but not before, job offer.

Post-job offer health checks

S60 prohibits pre-employment health enquiries prior to job offer, except in highly specific circumstances, as set out above. Some employers have gone further – and decided that employment health checks even AFTER job offer are not the best approach to managing health and disability at work.

For instance Barclays and British Telecom (the latter was recently named the best employer in the country on disability by the Employers' Forum on Disability) have dropped health checks at all stages because the information they offer is not predictive of work performance. This is born out by research: for instance, the employment success of people with mental health problems is correlated with individuals' motivation and the support available to them – but NOT with their diagnosis or severity of condition.[5] On this analysis, health checks are not worth the money spent on them. Better to wait till the person has been appointed, ask them at that stage if there is anything they need – and then manage the adjustments required and whatever health issues emerge.

Post-job offer, it is of course helpful for employers to ask people whether they have any issues on which they will need adjustments or supports in the job – so that they can work to maximum effectiveness.

Where there are particular risks to be identified and managed, ending universal health checking may focus the employer more effectively on the best way of obtaining the information really needed. Criminal Records Bureau (CRB) checks may be a better way of checking for any risk to others. Targeted practical tests or specific questions for particular jobs (from scaffolders to pilots or prison officers) may be a more proportionate approach than universal health checks. If drug or alcohol use is a particular risk for the role, it may be relevant to ask about that specifically. Universal use of health checks creates woolly thinking; a targeted approach focuses people on what they really need to know and why.

Promoting a positive disability work culture

Organisations that ask health questions only once the person is appointed to ascertain their needs at work, give a profoundly different message externally (and internally) to the message associated with routine health checks. No longer are questions asked to see if the person is employable (which generates fear, concealment, reduced commitment). Instead people are asked in order that the employer can offer support or adjustments. BT has been able to state confidently that no one is turned down for a job because of a mental health condition – because they simply do not ask (although once people are working, they are asked

5. Bond GR (2004) *Supported Employment: Evidence for an Evidence Based Practice.* Psychiatric Rehabilitation Journal 27, 4: 345-359

if there is anything they need and may benefit from a range of line manager and HR practices designed to support people's mental health).

On this model, resources previously used for widespread checking can be channelled instead into the supports that employees need to work effectively; and into training and development needed by managers to enable it to happen. This means moving expenditure from averting risk to direct benefits on health, well-being and productivity at work.

Guidance for NHS employers in 2008 states that 'all NHS staff must have a pre-appointment health check'. The 2009 Boorman report into NHS health and well-being has helpfully proposed re-modelling occupational health to focus more on early intervention and rehabilitation and suggested re-branding occupational health to have a more positive well-being focus.[6] This 2008 guidance will now have to be reviewed when s60 is implemented.

Of course, it is not only the employer who carries responsibility for making such policies work; and for small business in particular, resources to invest in employee well-being are limited. Government support programmes – like Access to Work – are also crucial in enabling individuals to work successfully. Some companies, such as Royal Mail, have pioneered effective methods of working jointly with Job Centre Plus to make these programmes as flexible and effective as possible.

Conclusions

From October the Equality Act will require employers to completely re-evaluate the use of pre-job offer and, I suggest, post-job offer health checks. With so little evaluation, and so much concern amongst people with long-term health conditions and disabilities, there are some simple steps that employers could take to improve the work culture and become an employer of choice:

- make a public commitment to recruiting, retaining and promoting all the talents, including those of people living with health conditions or disability – lead from the top!
- say publicly, before the legislation requires it, that you are committed to not asking health or disability related questions before conditional job offer (although you can ask questions which are compliant with s60 to ascertain if people need adjustments in recruitment, and confidential equality monitoring questions covering disability – not seen by the recruitment panel)
- make it clear in recruitment documentation that you welcome disabled people and any health questions, pre and post-employment, are restricted to essential permitted issues; get the word out now, before legislation requires the change – build confidence that people will not be rejected on health or disability grounds
- review whether health checks are needed after conditional job offer. Consider the most effective use of resources – between health checks and actions after people have started work (adjustments, supports, manager training). Consider whether your current approach is a proportionate approach to managing risk – or overly risk averse. If some jobs do require health questions at interview, or practical tests, or health checks, consider which ones, how to target and which questions to ask.
- if health questions are considered necessary, think through how to make them as enabling as possible, focused on removing barriers and supporting effective working. Consider re-branding them as adjustment and support questionnaires: they could be sent as soon as the job offer is made, together with strong statements on the company's commitment to doing work differently, flexible working and making adjustments where needed. This should enable any arrangements like new equipment, Access to Work funding, etc to be put in place in good time for the person to begin work.
- most importantly, give a signal to potential and current employees that living with health conditions or disabilities is an ordinary part of human experience and one that your workplace understands. Gradually build a culture in which people feel safer to be open if they wish to be – so they can request reasonable adjustments and work to maximum effectiveness. Enable people to share experiences of what has worked for them as individuals, or as managers.
- view employment health questionnaires not as a minor HR matter or a matter of legal procedure – but as a key cultural practice that makes a fundamental difference to how employees touched by disability and health conditions feel, how confident managers feel to respond to them – and how commitment, motivation and high performance working can be unleashed in your organisation.

6. *NHS Health and Well Being*. Final Report. Department of Health 2009

Racist stereotyping in sentencing violates Article 14

Todorova v Bulgaria European Court of Human Rights (Application 37193/07) March 25, 2010

The European Court of Human Rights (the ECtHR) unanimously upheld the complaint of Ms Pareskeva Todorova (PT) that the refusal by the Bulgarian domestic courts to suspend her sentence of imprisonment was based solely on her Roma ethnic origin and was therefore a breach of Articles 14 and 6(1) of the European Convention on Human Rights (ECHR).

Facts

PT is a Bulgarian national of Roma ethnic origin. In 2005 she was prosecuted for fraud and was subsequently convicted. The prosecution recommended that she be given a suspended sentence in view of certain extenuating circumstances and her state of health. On May 29, 2006 the Plovdiv District Court sentenced her to three years' imprisonment. The judgment, in identifying her, mentioned her ethnic origin. The court refused to suspend her sentence, in particular on the ground that there was *'an impression of impunity, especially among members of minority groups, who consider that a suspended sentence is not a sentence'.*

PT complained of discrimination to the Bulgarian higher courts, which did not respond to this allegation. The Plovdiv Regional Court, October 16, 2006 upheld the district court's judgment, stating that it 'subscribed fully' to that court's conclusions regarding the refusal to suspend her sentence, and on June 5, 2007 the Supreme Court of Cassation upheld the sentence and the refusal to suspend it.

European Court of Human Rights

PT applied to the ECtHR under Articles 14 (right to non-discrimination in the enjoyment of ECHR rights) and 6(1) (right to a fair trial by an impartial tribunal). She complained that she had been discriminated against in the domestic court's reasons for refusing to suspend her sentence and that the Bulgarian courts had not been impartial as they had taken account of her Roma ethnicity when determining her sentence.

The ECtHR accepted that she had been subjected to a 'difference in treatment' and referred to its case law which makes it incumbent on the respondent state to justify a 'difference of treatment' by domestic courts based solely on a factor such as race/ethnicity, failing which the state would be held in breach of Articles 14 and 6(1).

The ECtHR found that the Bulgarian court's remark concerning 'the impression of immunity' implying both minority groups and PT, taken with PT's ethnic origin, could create a sense that the court was seeking to impose a sentence that would serve as an example to the Roma community. The ECtHR found that the District Court's silence on her health condition, which had been the basis for the application to suspend her sentence, and the failure by the higher courts to respond to her allegation of discrimination reinforced their view that she had been subjected to different treatment.

The Bulgarian authorities claimed that PT had not been subjected to different treatment based on ethnicity and did not seek to justify the difference as alleged by PT. They argued that under national law sentencing has a dissuasive aim to discourage others and to prevent re-offending by the convicted person, and both deterrent aims had to be taken into account by the courts.

The ECtHR was of the view that the difference in treatment could not be objectively justified and emphasised the seriousness of the situation complained of by PT given that stamping out racism had become a priority goal for all ECHR contracting states.

The ECtHR held that there had been a violation of Article 14 with Article 6(1). They recommended that the criminal proceedings be re-opened (which appeared possible under the Bulgarian Code of Criminal Procedure) and awarded PT €5,000 for non-pecuniary damage and €2,218 costs and expenses.

Comment

On its own this case is important for two reasons; it exposes negative stereotypes relating to Roma that permeate much of public life in many parts of Europe, and makes clear that under the ECHR, decisions in criminal proceedings must not be influenced by racial stereotypes.

Is this case relevant in Great Britain? The non-discrimination provisions of the Race Relations Act 1976, and the Equality Act 2010, do not apply to

judicial proceedings. Any challenge of discrimination in sentencing would have to be under the Human Rights Act 1998 (HRA) – relying on Articles 14 and 6(1) of the ECHR as in the Todorova case. To the best of the writer's knowledge no such claim has yet been litigated in Great Britain.

Is there race discrimination in sentencing in Great Britain? Are any of our judges, like at least some judges in Bulgaria, consciously or unconsciously influenced by negative stereotypes of particular racial groups? The short answer is that we do not know. The latest Race and the Criminal Justice Statistics show that for both adults and juveniles in 2008 higher percentages of people from black and minority ethnic (BME) groups compared to white groups were sentenced to immediate custody.[1] The Ministry of Justice comments that *'this could be due to a number of reasons other than discrimination including: the mix of crimes committed; the seriousness of the offence; the presence of mitigating or aggravating factors; whether a defendant pleads guilty; or whether the defendant was represented or not'*. The Ministry acknowledges that there is a need for research on the factors that may be relevant to this higher proportion of immediate custodial sentences.

Despite guidance by the Judicial Studies Board[2], there are still anecdotal reports of judges making unsuitable remarks relating to the race or religion of parties in criminal and civil proceedings. However, unless a particular sentencing decision is challenged under the HRA or unless there is relevant up-to-date research data, we cannot know whether, and if so how often, cases like Todorova occur or could occur here.

Barbara Cohen
Discrimination law consultant

1. In 2008 28% of white adults were sentenced to immediate custody for indictable offences in England and Wales and the percentage for BME groups ranged between 42% and 52%; for juveniles the pattern was similar with 10% of white juveniles sentenced to immediate custody for such offences while for BME groups the percentage ranged between 17% to 22%. Statistics on Race and the Criminal Justice System 2008/09, Ministry of Justice, June 2010

2. Equal Treatment Bench Book, Judicial Studies Board, April 2010 http://www.jsboard.co.uk/etac/etbb/index.htm

Briefing 566

Closed proceedings and the right to a fair trial

The Home Office v Tariq [2010] EWCA Civ 462, May 4, 2010

Legal issues

In this case, the CA was asked to consider the impact of the closed material procedure provided for under rule 54 Employment Tribunals (Constitution and Rule of Procedure) Regulations 2004 (Tribunal Rules) and under the Employment Tribunals (National Security) Rules of Procedure on an individual's right to seek an effective judicial remedy for discrimination. In particular, it had to determine whether the closed material procedure amounted to an unlawful derogation from European Union directives providing for the right not to be discriminated against, and whether it contravened the right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR).

Facts

Mr Kashif Tariq (T), a Muslim of Pakistani origin, was employed by the Home Office (HO) as an immigration officer from April 21, 2003. As an immigration officer, T would have access to sensitive information and was therefore subject to security clearance checks. On August 10, 2006 T's brother and cousin were arrested in relation to a suspected plot to carry out terrorist attacks on transatlantic flights. Whilst T's brother was released without charge, T's cousin was, in 2008, convicted of conspiracy to murder.

Around the time of the arrests T was questioned by the police and although there was no information to suggest that he was involved in the terrorist plot, the police concluded that there was a risk that he could be influenced to abuse his position as an immigration officer. Subsequently on August 18, 2006 T was informed that his security clearance was being reconsidered and he was suspended from duties pending the outcome. On December 20, 2006 T's security clearance was withdrawn. T appealed against the decisions and the consequent action taken.

Employment Tribunal

On March 15, 2007 T lodged a claim in the ET alleging that the withdrawal of his security clearance amounted to unlawful direct and indirect discrimination on the grounds of his race and or

religion. He alleged direct discrimination claiming that he had been treated less favourably because he shared the same race or ethnicity as the individuals who had been suspected of terrorist activity. He alleged indirect discrimination arguing that the HO policy on security clearance placed individuals of his racial, ethnic and religious origin at a disadvantage. T relied on the provisions of the Race Relations Act 1976 (RRA) and the Employment Equality (Religion and Belief) Regulations 2003 (the 2003 Regulations).

The HO denied the allegations relying upon regulation 24 of the 2003 Regulations which provides a defence to a finding of discrimination where the discriminatory act was 'done for the purpose of safeguarding national security' and was 'justified by that purpose'. The HO sought to engage rule 54 of the Tribunal Rules and on February 15, 2008 the ET ordered that the whole of the proceedings be conducted in private and that T and his representatives be excluded from proceedings where closed evidence or closed documents were to be given or considered. A Special Advocate (SA) was appointed to represent T when closed evidence was being heard.

T had applied for a pre-hearing review to consider whether rule 54 was compatible with European Community law and his right to a fair trial under Article 6 ECHR. However, the tribunal resolved to hear arguments on this point before hearing the open evidence.

On March 5, 2009 the ET found in the HO's favour ruling that it had the power to use the closed material procedure and that the procedure was not incompatible with T's rights under EC law and the ECHR. The tribunal also determined it would hear the closed evidence before the open evidence. T appealed to the EAT.

Employment Appeal Tribunal

Before the EAT hearing, a decision was handed down on *Secretary of State for the Home Department v AF* (No.3) [2009] UKHL 28, [2009] 3 WLR 74. The applicability of the findings in that case became a live issue in T's appeal. *AF (No.3)* provides that, where a closed material procedure is used, a claimant is entitled to be provided with sufficient information to enable him to effectively instruct legal representatives; he is entitled to know the 'gist' (as it has been referred to) of the allegations against him.

Subsequently, the EAT upheld the ET's decision that the closed material procedure was lawful and appropriate. However, in light of *AF (No.3)* and *A v United Kingdom* (3455/05) (2009) 49 EHRR 29 ECHR (Grand Chamber), it held in addition that T's Article 6 ECHR right entitled him to be provided with sufficient information to give effective instructions to legal representatives. The HO appealed to the CA on the latter point and T cross-appealed challenging the lawfulness of adopting the closed material procedure in the ET.

The EAT also considered the third issue in dispute regarding the sequence in which the evidence should be heard. The EAT disagreed with the ET finding that, in order to determine whether further material should be disclosed to T, the tribunal should hear the open evidence of both sides first and only then hear the closed evidence of the respondent.

Court of Appeal

Lawfulness of the closed material procedure

The CA judgment records that T submitted on appeal that a closed material procedure in the ET was not provided for by the ECHR or the relevant EU legislation – the Employment Equality Directive 2000/78/EC and the Race Directive 2000/43/EC – from which the domestic law derived. On this basis, the Tribunal Rules providing for a closed procedure amounted to an unlawful derogation from the EU legislation.

It is notable that the actual point made by counsel for T was that there was no necessity for closed evidence in ET proceedings where necessity meant that there was a risk as serious as terrorism on both sides of the equation; i.e. as pointed out by the EAT, if the HO could not use closed evidence there was then no risk of a terrorist incident by virtue of not relying on that information, a subtle but significant point. The CA went on to deal with the EU directives and the ECHR separately.

With regard to the directives, the CA found that there was no authority for T's proposition that a substantive right derived from a directive cannot, without express provision in the directive, be subject to a closed procedure.

Under *Johnston v Chief Constable of the Royal Ulster Constabulary* [1987] 1 QB 129 a substantive right may not be taken away without an express derogation provision. However, the present case concerned the reduction of procedural rights and in such circumstances the law under *Kadi v Council of the European Union* [2008] 3 CMLR 41 provided a safeguard. Under *Kadi* appropriate scrutiny is required to be applied in such circumstances to ensure that effective judicial protection is not lost. Paul Troop, who acted for T, has subsequently indicated that counsel's

argument on this issue was actually that a closed procedure can only be justified by necessity, and since there was no necessity, it was unlawful to invoke a closed procedure.

With regard to Article 6, the CA referred to *A v UK* and *AF (No.3)* to support its view that the interests of national security can necessitate a closed material procedure. The CA did not accept that such a procedure was inherently incompatible with Article 6.

With regard to T's submission that SAs are inherently prejudiced by virtue of being appointed by the Attorney General, the CA dismissed this relying on Lord Bingam's judgment in *Regina v H* [2004] 2 AC 134, [2004] UKHL 3 supporting the independence and reliability of the Attorney General's function.

Does AF (No.3) apply to the proceedings

Having decided that the closed procedure rules were not inherently unlawful, the CA went on to consider whether Article 6 impacts on the content of the rules, and in particular whether *A v UK* and *AF (No.3)* give rise to a disclosure obligation over and above disclosure to a SA. The CA focused on the issue of whether a litigant has a right to know the essence of the case against him, if necessary by 'gisting.' Citing *Al-Rawi v Security Service* (2010) EWCA Civ 482, common law principles and the cases of *A v UK* and *AF (No.3)*, the CA considered the HO's submissions that the nature of the present case, being one which does not concern control orders (as in the precedent cases), should preclude T from being entitled to know the gist of the allegations. The CA held that the principle illustrated by *AF (No.3)* must apply to ensure that T benefits from the fairness to which he is entitled under Article 6 and at common law.

Open or closed evidence first?

Lastly, the CA considered the issue of whether a tribunal should hear open evidence before it hears the closed evidence. In the course of its findings on this point, the CA highlighted the continuing duty on the tribunal to *'keep matters under review so as to ensure that the hearing continues to be Article 6 compliant'*. However, it concluded that the order of evidence remained a matter for the discretion of the tribunal.

To ensure Article 6 compliance in the context of the closed material procedure, the CA commented that:

- T should be entitled to submit written representations for consideration at a closed hearing;
- 'substantial weight' should be given to 'the procedural wishes' of the party disadvantaged by the closed material procedure; and,
- where the claimant's legal representative and/or SA seek to have the open evidence heard before the closed evidence a tribunal would need to have *'very cogent reasons indeed'* to go against their wishes. On this final point, the CA observed that an SA may be assisted by hearing the open evidence before the closed evidence is called. The SA is often given a useful 'steer' by the way the open case is put.

The CA dismissed the HO's appeal and T's cross appeal. It was clear that its comments on the sequence of evidence should be read as clarification and guidance.

Implications and comment

This case has to some degree clarified the law in this area without substantially changing it. Claimants who are suspended or dismissed on national security grounds will continue to face enormous frustration where a closed material procedure is invoked.

The decision is welcomed for clarifying that *AF (No.3)* is applicable in discrimination cases not concerning control orders. However, the notion of 'gisting' remains a vague one and offers little consolation to claimants and practitioners on the receiving end of the closed materials procedure and faced with the inequality of arms that comes with it.

The judgment in *Tariq* offers no clarification however on the level of detail required to constitute 'the gist' and therefore goes little distance to allay fears about abuse of the closed material procedure. Respondents' duty in such cases to respect an individual's Article 6 right has not been extended far enough to ensure protection of that right. Consequently it remains incumbent upon the individual to ensure his Article 6 rights are protected by challenging, where necessary, a respondent's compliance with their duty under *AF (No.3)*. This will inevitably involve challenging the interpretation of the 'gisting' duty so far as this is possible (where a claimant has no idea what information remains undisclosed, which tends to be the majority experience of claimants).

There are also residual problems such as perception of the fairness of the proceedings where the SA is actually supported by the same solicitor as the HO. It also remains a serious concern that SAs are restricted from meeting with the excluded person once they have seen the closed material.

The judgment in *Tariq* gives emphasis to the common law right to a fair trial and highlights the positive duty on employment tribunals to 'ensure' compliance. However, it remains the case that the right

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only extends so far as the interests of national security permit. Fundamentally, and as per the proposition advanced by counsel for T, closed evidence is unnecessary in these cases. If the current position is allowed to stand then this has a very serious and significant impact in the safeguarding of an individual's civil liberty in all court proceedings which invoke the closed procedure. Protection for an individual's Article 6 rights remains compromised. It is, after all, damage to individuals that this Article is intended to prevent.

Despite being obiter, the CA's procedural guidance in *Tariq* is welcomed and practitioners are encouraged to seek to enforce their procedural preferences taking full advantage of the opportunity to submit written submissions in closed proceedings addressing in the strongest terms the impact of the closed procedure on their client's Article 6 rights.

Counsel for T has confirmed that an application for permission to appeal and a cross appeal to the Supreme Court has been lodged and remains to be considered.

Shazia Khan & Nick Fry
Employment Team
Bindmans LLP

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Briefing 567

Religion or belief discrimination in employment: whose belief counts?

Eweida v British Airways Plc [2010] EWCA Civ 80, February 12, 2010

Implications for practitioners

This decision has important implications for proving unlawful discrimination in employment on grounds of religion or belief. It highlights the following key factors in such cases:

- it must be proved by the claimant that a group of persons of the claimant's religion or belief are, or would be, put at a particular disadvantage by the provision criterion or practice (PCP); and
- it must be proved that the PCP interferes with the observance of an established religious doctrine or belief. It is not sufficient that the claimant personally believes that they have experienced a particular disadvantage.

Facts

Ms Eweida (E) is a practising Christian who had worked part-time for British Airways (BA) on their check-in desk since 1999. She is required to wear a uniform. In 2004 BA changed its uniform from a high-necked blouse to a uniform that incorporated an open collar but prohibited the wearing of visible items of jewellery. Between May 20 and September 20, 2006, E attended work on a number of occasions wearing a visible silver cross on a necklace. When she refused to conceal the cross, she was sent home. She remained at home, unpaid, from September 20 until February 2007, when the uniform policy was amended allowing staff to display a faith or charity symbol. She then returned to work and remains employed by BA.

E brought a number of claims against BA including claims under the Employment Equality (Religion or Belief) Regulations 2003 (the 2003 Regulations) of direct and indirect discrimination and harassment on grounds of religion or belief.

Employment Tribunal

The ET dismissed E's claims. It held that there was no direct discrimination. E had not been treated less favourably than BA would have treated any other person with a faith, or no faith, displaying jewellery over their uniform.

The ET also held that there had been no harassment. There was no evidence that BA had engaged in unwanted conduct. It had simply sought to enforce its contractual uniform policy. Further there was no evidence that BA's treatment of E was on the grounds of her religion.

In relation to the claim of indirect discrimination, the ET found that BA had applied a PCP to E. This was the requirement that any personal jewellery should be concealed by a uniform. However, the tribunal said that this did not put Christians at a particular disadvantage compared with other persons. As a result the claim of indirect discrimination also failed.

Employment Appeal Tribunal

E appealed the ET's finding on indirect discrimination. The EAT upheld the tribunal's decision. It said that the whole purpose of indirect discrimination is to deal with

the problem of group discrimination. The starting point is that persons of the same religion or belief as the claimant should suffer a particular disadvantage, distinct from those that do not hold that religion or belief, as a consequence of holding that religion or belief. E had not provided any evidence that others shared her religious conviction about openly displaying a cross and it was not enough for E to identify a disadvantage which she personally suffered. It must be possible to make some general statements which would be true about a religious group such that an employer ought reasonably to appreciate that a particular provision may have a disparate impact on the group.

Court of Appeal

E appealed the EAT's finding that the claim of indirect discrimination was not substantiated. The CA dismissed the appeal on a number of grounds.

Firstly, it analysed the interpretation which should be given to regulation 3 of the 2003 Regulations which in establishing indirect discrimination requires the existence of a PCP which *'puts or would put persons of the same religion or belief'* at a particular disadvantage when compared with other persons. The CA found that the 2003 Regulations should be interpreted such that the disadvantage must be suffered by a group of people, not one person. This was also consistent with the wording of the Employment Equality Directive 2000/78/EC which the 2003 Regulations implemented. On the facts of the case there was no evidence that Christians generally suffered a particular disadvantage.

Secondly, and in any event, the CA found that the actions of BA were justified as being a proportionate means of achieving a legitimate aim. This was decided on a number of factors:

- the aim of having a uniform code was legitimate;
- the objection to the dress code by E was entirely personal as it did not arise from a doctrine of her Christian faith nor interfere with her observance of it;
- the objection was never raised by any other employee; and
- BA had acted reasonably in trying to resolve the dispute by offering her alternative internal employment with public contact and dealing with the complaints conscientiously.

Peter Reading
Director of Legal Policy
Equality and Human Rights Commission

Briefing 568

Robust defence of judicial independence in religious discrimination case

McFarlane v Relate Avon Limited [2010] EWCA Civ B1, April 29, 2010

The CA refused Gary McFarlane's application to appeal from the EAT, which upheld an ET decision dismissing his claims of unfair dismissal and religious discrimination.

Facts

Mr McFarlane (McF) was a counsellor for Relate, an organisation providing relationship counselling services. Relate's code of ethics required therapists to avoid discrimination on grounds of sexual orientation. Relate had an equal opportunities policy which reflected this requirement.

McF is a Christian and believes that same-sex activity is sinful and he should do nothing to endorse such behaviour. He would provide counselling to same-sex couples, provided that no sexual issues arose; he refused to provide counselling to same-sex couples on sexual matters. McF was dismissed for not complying with Relate's policies on equal opportunities and professional ethics. McF claimed that his dismissal was unfair and directly and indirectly discriminatory under the Employment Equality (Religion or Belief Regulations) 2003 (the 2003 Regulations).

Court of Appeal

McF's application for leave to appeal was supported by a witness statement by Lord Carey, former Archbishop of Canterbury, which was cited at length. Lord Carey thought that for a tribunal to describe Christian beliefs as 'discriminatory' was 'unbefitting', and would give the impression that Christians were bigots.

> *The description of religious faith in relation to sexual ethics as 'discriminatory' is crude; and illuminates a lack of sensitivity to religious belief…The descriptive word 'discriminatory' is unbefitting and it is regrettable*

that senior members of the judiciary feel able to make such disparaging comments. The comparison of a Christian, in effect, with a 'bigot' (i.e. a person with an irrational dislike to homosexuals) begs further questions. It is further evidence of a disparaging attitude to the Christian faith and its values.

Lord Carey also argued for a specialist panel of judges with a proven sensitivity and understanding of religious issues to hear such cases.

As the CA was bound by *Ladele v London Borough of Islington*, [see Briefing 556] a previous decision addressing proportionality in reference to Christian beliefs and indirect discrimination in the workplace, the appeal could have been refused on this point alone. Although Laws LJ held that *Ladele* was binding on him, he still thought it important to discuss the points raised by Lord Carey.

Laws LJ called Lord Carey's observations misplaced, and rejected calls for a specialist panel saying that this would be *'inimical to the public interest'*.

The judges have never, so far as I know, sought to equate the condemnation by some Christians of homosexuality on religious grounds with homophobia, or to regard that position as 'disreputable'. Nor have they likened Christians to bigots. They administer the law in accordance with the judicial oath: without fear or favour, affection or ill-will.

Laws LJ said that there might be a misunderstanding as to the meaning of discrimination. A tribunal deciding that a person's actions were discriminatory was not the same as saying that person was homophobic or disreputable. A finding of indirect discrimination refers to the outcome of a person's actions, not their motives.

Laws LJ acknowledged that many of our current laws share a moral stance with Christian beliefs. However, this did not mean that that the law should protect Christianity above other faiths. Doing this for any faith would make a subjective opinion compulsory, and this would be contrary to the conditions of a free society. The law protected a person's right to hold a belief, rather than the substance of that belief.

In a free constitution such as ours there is an important distinction to be drawn between the law's protection of the right to hold and express a belief and the law's protection of that belief's substance or content. The common law and ECHR Article 9 offer vigorous protection of the Christian's right (and every other person's right) to hold and express his or her beliefs. And so they should. By contrast they do not, and should not, offer any protection whatever of the substance or content of those beliefs on the ground only that they are based on religious precepts. These are twin conditions of a free society… We do not live in a society where all the people share uniform religious beliefs. The precepts of any one religion – any belief system – cannot, by force of their religious origins, sound any louder in the general law than the precepts of any other. If they did, those out in the cold would be less than citizens; and our constitution would be on the way to a theocracy, which is of necessity autocratic. The law of a theocracy is dictated without option to the people, not made by their judges and governments. The individual conscience is free to accept such dictated law; but the state, if its people are to be free, has the burdensome duty of thinking for itself.

Comment

This decision marks a robust defence of judicial independence by the CA. It also makes clear that a decision about dismissal in the context of religious discrimination is not the same as a court or tribunal condemning that belief. The EAT and CA were clear that Relate had a legitimate aim of providing their services on an equal basis to both same and different sex couples. McF's contract obliged him to comply with Relate's equal opportunities policy, and his refusal to do so led to his lawful dismissal.

Lord Carey expressed concern that McF's case was a 'short step' away from a person with Christian beliefs being denied employment because of those beliefs. In fact, the law protects someone in that situation. What McF's case did confirm was that Christian beliefs receive no special protection in relation to the 2003 Regulations.

Michael Newman
Leigh Day & Co

Contract worker needs employment contract with supplier to bring claim against principal

Muschett v HM Prison Service [2010] EWCA Civ 25, February 2, 2010

Contract worker claims against a principal requires a contract of employment between the worker and the supplier.

Facts

Mr Muschett (M), a cleaner, was placed with the Prison Service (HMPS) by the Brook Street employment agency. He brought claims against both the HMPS and Brook Street for unfair dismissal as well as race and religious discrimination. One aspect of the discrimination claims was a claim that M was a contract worker, employed by Brook Street and supplied by them to the HMPS.

Employment Tribunal

The tribunal rejected the claims for unfair dismissal, in part, because M did not have a year's qualifying service.

The discrimination claims were rejected on the basis that M was not an employee of either the HMPS or Brook Street.

Employment Appeal Tribunal

M appealed. After a prolonged sift process, the EAT heard the appeal against the HMPS in which the sole issue was whether M was an employee of the HMPS.

The EAT concluded that he was not. It rejected the argument that a contract of employment had been implied between M and the HMPS. M sought to rely on his working relationship with the HMPS, which included some months of work, as well as further training, security arrangements and discussions about him taking on a permanent role.

All of this, however, in the EAT's view was to be expected for anyone working on the premises. In particular, the fact that M had applied for a permanent role made no difference. The hope of a contract of employment in the future could not change the basis on which he was working when he applied.

The contract worker element of the claim was also rejected. The EAT found that it was hopeless, because a contract worker must be employed by the organisation who supplies him or her. M had not been permitted to appeal against the ET's finding that he had not been employed by Brook Street. Once that had been decided the failure of his contract worker claim was inevitable.

Court of Appeal

The appeal to the CA, although put in a number of ways, came down to an argument that the ET and EAT had been too reluctant to imply a contract between M and the HMPS.

This attack failed, because the CA concluded that the facts on which M relied were woefully insufficient to begin to establish a contract between him and the HMPS – whether one of employment or to personally do work. Although modern employment law was more willing to imply such contracts than previously, it required much more than a few isolated indications of a connection between the worker and the end user.

Comment

This case is more important for what it does not say than what it does. It has been widely cited as restricting the scope of claims under the contract workers sections of the discrimination statutes. These make it unlawful for principals to discriminate against workers employed by another organisation which supplies them under a contract to the principal.

It does nothing of the kind. The contract worker point was disposed of by the EAT. Even there, it was restricted to the obvious point that, in order to bring such a claim, the worker must be employed by the agency (in the wide sense that employment is used within the equality statutes). This is no more than the plain wording of the statute.

The CA was only concerned with the issue of whether a contract should be implied between M and the HMPS. They followed *James v London Borough of Greenwich* [2008] ICR 545 in concluding that tribunals should only imply such contracts where it was necessary to do so.

Michael Reed
Free Representation Unit

DDA – exchanging roles could be a reasonable adjustment

Chief Constable of South Yorkshire Police v Jelic UKEAT/0491/09/CEA, April 29, 2010

Facts

The claimant, PC Jelic (J) began his service with the South Yorkshire Police (SYP) in August 1997. He became unwell and was subsequently diagnosed with chronic anxiety syndrome. Following a period of sickness he returned on 'recuperative duties' and in November 2004 was placed on the Community Service Desk (CSD) where no face-to-face contact with the public was required.

In 2005 the CSD was amalgamated with other units to form the Safer Neighbourhood Unit (SNU). J continued to perform a similar role in the new unit and over time he developed particular strengths and expertise and had few periods of sickness.

In June 2007, having concluded J's condition was permanent and was protected by the Disability Discrimination Act 1995 (DDA), SYP's medical officers advised that although J was fit to carry out his current duties, if his role changed requiring more face-to-face contact, there might be no alternative but to move him elsewhere in the organisation. By this time the role of SNU officers had developed, requiring them to deal with incidents coming directly into contact with members of the public. The District Commander requested consideration of J's retirement. In April 2008, J was informed of SYP's decision to retire him from the police service with the provision of an ill health pension. J complained to the ET.

Employment Tribunal

J claimed:

1. unjustifiable disability-related discrimination in respect of his dismissal;
2. discrimination by reason of failure to make reasonable adjustments, namely;
   a. he should have been deployed into a non-client facing officer role; or
   b. he should have been allowed to continue working in the SNU with a non-client facing restriction (i.e. the present arrangements should have been maintained); or
   b. he ought to have been transferred into a police staff role, with or without the benefit of medical retirement.

J argued that if these adjustments had been made it would have prevented his medical retirement.

The ET rejected the first claim following Lewisham *London Borough Council v Malcolm* [2008] IRLR 701. [See Briefing 497] However on the second claim, the ET was decisive in concluding there was a duty on the respondent to make reasonable adjustments for J. The tribunal considered in particular, that the duty to make reasonable adjustments arose for fresh consideration in June 2007 when SYP's medical officer advised that J's condition would be permanent.

It would not be a reasonable adjustment for J to remain in the SNU, taking into account the changes to the role and the respondent's need to balance the duty towards officers and the public. However, in a large organisation such as the SYP's there would have been a number of other alternatives. A role identified as being occupied by another officer (PC Franklin) would have been suitable given J's strengths in the requirements of that role and a reasonable Chief Constable on investigation would have established this. In a disciplined service such as the police, PC Franklin who was able to carry out an operational role in the SNU could have been ordered to move. It would be a reasonable adjustment for the officers to swap roles in the circumstances.

The ET also concluded that an alternative reasonable adjustment to swapping roles would have been to offer J medical retirement and subsequent fresh employment as a civilian to best maintain his earnings. SYP appealed to the EAT.

Employment Appeal Tribunal

SYP argued that, as a matter of law, it was not open to the tribunal to find it was a reasonable adjustment for the officers to swap roles. There was no obligation on SYP to create a vacancy for a disabled person and such a step had significant implications for the rights of other employees. Extending an employer's duty to include steps such as those suggested would create real uncertainty for employers seeking to understand the scope of their statutory duty to accommodate staff with disabilities.

Referring to the House of Lords decision in *Archibald v Fife County Council* [2004] IRLR 651, the EAT concluded that the duty to make reasonable

adjustments could include transferring a disabled employee from a role they could not do to one which they were suitably qualified for. Approving *Southampton City Council v Randall* [2006] IRLR 18 the EAT held that the ET was not precluded from concluding this as a matter of law. It was also not considered fatal to J's claim that s18B(2) DDA did not refer to swapping roles as a reasonable adjustment.

Section 18B(2) states:

> *The following are examples of steps which a person may need to take in relation to a disabled person in order to comply with a duty to make reasonable adjustments-*
> *a) making adjustments to premises;*
> *b) allocating some of the disabled person's duties to another person; [etc]*

Cox J held:

> *It is clear from the opening words of that subsection that what follows is an illustrative, but not exhaustive, list of examples of the steps that might be taken by way of adjustment. Paragraph 5:18 of the DRC's Code of Practice also makes this clear, and the matter was beyond doubt by the House of Lords in Archibald.*

In the EAT's opinion, what was required of employers was limited to what was objectively reasonable which only served to emphasise the specific nature of the enquiry in each case. In this case a specific problem arose for the employer as no consideration at all was given to reasonable adjustments.

SYP argued there had been real unfairness in the way the tribunal had dealt with the issue of swapping roles; they had inadequate notice of the proposed adjustment and therefore were denied to opportunity to address the practicalities of it. The EAT rejected this as, by the time the case was heard, there was at least some indication of suggested adjustments, sufficient enough for the SYP to understand them and any disadvantage suffered was as a result of their own failure to consult and consider the options rather than the absence of any opportunity to address them. The tribunal were entitled to conclude as they did.

The EAT also agreed that the police as a disciplined service could have ordered PC Franklin to move and swap jobs even if he objected, especially given that the *'special nature of the police force was an important part of the factual matrix of this case'.*

On the issue of whether it was an alternative reasonable adjustment for SYP to retire J and redeploy him in a police staff post, the SYP challenged the tribunal's decision on two grounds. Firstly, to require an employer to provide a medical pension and re-employ him again falls well outside the parameters of a reasonable adjustment under the DDA. Secondly, given that such a decision had serious implications for the police service, the tribunal's findings on this point were insufficiently explained. The EAT agreed with this challenge in that there was no explanation as to why an adjustment would have best maintained J's earnings. Therefore the decision that SYP was in breach of the duty to make this adjustment could not stand. If necessary, the issue could be remitted back to the tribunal for fresh consideration of all the evidence. All other grounds of appeal were dismissed.

Comment

The EAT was clear that in all cases where the duty arises to make a reasonable adjustment, the employee should be consulted and all options should be considered. There is a cautionary note for employers as in this case much emphasis was placed on their complete failure to consider anything other than retirement. In such a case the tribunal will be entitled to consider all options objectively, including swapping roles within an organisation.

Cheryl Thornley
cthornleydla@btinternet.com

The requirement for knowledge and injury to feelings awards in discrimination cases

Taylor v XLN Telecom Ltd UKEAT/0385/09/ZT, November 9, 2009

Facts

Mr Taylor (T) joined the respondent company in October 2006. XLN provides broadband and other telecom services and T was promoted to team leader in the broadband division with effect from October 1, 2007 on a three month probationary basis, which was extended due to dissatisfaction about his performance. He lodged a grievance on March 10, 2008 in which he complained of racially offensive conduct by one of his managers. His grievance was not upheld. There was a probation review on May 19 following which he was suspended; he was dismissed with immediate effect by letter on May 27, ostensibly for poor performance.

Employment Tribunal

The ET concluded that T's dismissal was unfair and constituted unlawful victimisation contrary to the Race Relations Act 1976 (RRA). In relation to the victimisation the tribunal considered that the dismissal was partly because of perceived performance but XLN was also significantly influenced by the fact that his grievance had included an allegation of race discrimination.

In the light of these findings, the ET awarded a total sum of £12,039.18 which consisted of just over £7,000 for loss of earnings, a basic award of £1,320 and interest. No award was made for injury to feelings although T had included such a claim, as well as injury to health and aggravated damages, in his schedule of loss.

The tribunal relied on the case of *Coleman v Skyrail Oceanic Limited* [1982] IRLR 398 CA which held that an award in respect of injury to feelings had to result from knowledge that it was an act of discrimination. The tribunal felt it was bound by this authority and stated that the problem was that T had not shown any evidence of knowledge on his part that his dismissal amounted to an act of victimisation. There was evidence about his anxiety and depression and treatment for that condition, however, T stated that what upset him was not knowledge of the victimisation but XLN's failure to follow the statutory grievance and disciplinary procedure.

Employment Appeal Tribunal

The EAT (Mr Justice Underhill P presiding) analysed the facts from two different legal perspectives. In allowing the appeal, he concluded, in a short point, that the question of damages for ill health was really akin to a claim for personal injury rather than injury to feelings and consequently there was no need for T to show knowledge of the respondent's motive. *Skyrail* could easily be distinguished, as it was not a case involving injury to health.

Addressing the *Skyrail* point directly, the learned judge noted first of all that the requirement for knowledge was not common in other torts before compensation could be paid. This meant that the principles for the award of damages in discrimination claims differed from those in personal injury claims. The EAT concluded that the issue of the knowledge required (arising from comments by Lawton LJ) was peculiar to the facts of that case and therefore could not be relied upon as establishing a general rule that knowledge was an essential prerequisite in each case where an act of discrimination was alleged. Further the case was decided in 1981 when the RRA was very new and the case law still developing. Although adopted by a later court in *Alexander v Home Office* [1988] IRLR 190 CA, there was no rationale or basis for the statement that *'any injury to feelings must result from the knowledge that it was an act of …. discrimination which brought about the dismissal.'*

Comment

Mr Justice Underhill has carefully avoided stating that the dicta are wrong but his nimble footwork cannot avoid the conclusion that, to the extent that *Skyrail* prevented tribunals from awarding injury to feelings where the claimant stated that he was unaware of the discrimination, the Court of Appeal's analysis should not be followed.

Susan L. Belgrave
sbelgrave@9goughsquare.co.uk

GEO consultation on new statutory questionnaire under the Act

The Equality Act 2010 will replace the nine existing statutory questionnaires about possible discrimination (for sex, disability, sexual orientation etc), with a single set of paperwork (guidance and forms) for all types of discrimination. There will also be new guidance and forms for equality of terms issues (formally known as the equal pay provisions). The Government Equalities Office (GEO) is consulting on the draft paperwork for obtaining information about potential discrimination and equality of term cases which will come into use when the Act is implemented in October 2010. The GEO has invited feedback from both individuals and organisations. The consultation opened on June 16 and closes on July 13, 2010. To contribute to the consultation, contact **www.equalities.gov.uk** or email: **formsresponses@geo.gsi.gov.uk**

Investigations into the treatment of migrant workers

Recent investigations by the EHRC and the Equality Commission for Northern Ireland (ECNI) have highlighted the exploitation of migrant and agency workers.

An EHRC inquiry has uncovered widespread evidence of the mistreatment and exploitation of migrant and agency workers in the meat and poultry-processing sector. Workers reported physical and verbal abuse and a lack of proper health and safety protection, with the treatment of pregnant workers a particular concern. Many workers had little knowledge of their rights and feared that raising concerns would lead to dismissal. While migrant workers were most affected, British agency workers also faced similar mistreatment.

The EHRC recommendations include, among others, supermarkets improving their auditing of suppliers; processing firms and agencies improving recruitment practices, working environments and the ability of workers to raise issues of concern; and for the government to provide sufficient resources for the Gangmasters' Licensing Agency to help safeguard the welfare and interests of workers. The EHRC will review action taken over the next 12 months by supermarkets, processing firms and recruitment agencies, and will consider taking enforcement action if necessary.

The ECNI's formal investigation under article 46 of the Race Relations (NI) Order 1997 focused on the recruitment sector's role in the recruitment and employment of migrant workers in Northern Ireland. There has been significant immigration into Northern Ireland in recent years, particularly from Eastern European countries, and there is a high proportion of migrant workers in particular job sectors, many of which are low skilled and low paid.

Despite heavy regulation, the ECNI found evidence of recruitment agencies not working within the legislation and migrant workers experiencing problems in recognising and asserting their rights.

The investigation found that almost one third of agency worker participants felt that they had experienced discrimination as a result of working through the recruitment sector. These workers felt they were discriminated against because of their nationality and also because they were agency workers. They identified their treatment by supervisors, both local and migrant worker supervisors, as discriminatory.

The ECNI's recommendations include, among others, that all recruitment agency staff should receive training in anti-discrimination legislation.

Employment Tribunal Claims: tactics and precedents

Naomi Cunningham and Michael Reed, third edition, LAG 2010, 416 pages, £35.00

The resolution of employment disputes faces an institutional dilemma – how to resolve the tension between providing a quick, accessible service and ensuring justice between the parties?

The wealth of case law in areas such as disclosure and jurisdiction has developed to ultimately provide a fairer result between the parties. Sadly, the unintended consequence is that all too often the professed urge for informality in the tribunals has been sacrificed in the name of justice. *Employment Tribunal Claims* recognises that, for many people, the tribunal is an alien and hostile environment. As such, this book is mostly aimed at those without legal representation, but it contains much of value to anyone working in the employment tribunals, and is a repository of advice dealing with an oft-neglected aspect of law – namely, how cases should be run, aside from knowing the law inside out. While clearly of great advantage to the non-professional, it is an apt reminder to professionals that legal knowledge is not enough to be a good adviser.

The book follows proceedings in the tribunal chronologically, from the decision whether to bring a claim through to judgment and appeal. This format is ably assisted by a series of running examples, linking the chapters, helping readers see how earlier decisions inform and assist later steps in the process. Specific examples also deal with the more esoteric areas, where these could not easily be fitted into the running examples.

The focus is definitely on claimants, and there is a thread of tips throughout the book about the steps necessary to combat (and hopefully avoid) costs applications, an increasingly popular step taken by respondents upon completion of a case. While there are constant reminders of the difficulties and hurdles facing claimants in their attempt to bring a successful claim, this is helpfully leavened with a liberal dose of humour, always a useful asset in tribunal proceedings.

In dealing with tactics rather than concentrating on the substantive law, the book eschews detailed case analysis, but this has some refreshing advantages. The short summaries of privilege and hearsay were particularly useful. There is something to be gained by forcing oneself to try to explain concepts in limited language and space, and it results in a particular lucidity that can often be absent from longer and more detailed monographs on those particular topics. That is not to say that *Employment Tribunal Claims* is a substitute for such texts, but it rather serves as an essential supplement (and primer to the uninitiated).

The glossary is detailed, and the text is also peppered with helpful translations of legalese. There is an undercurrent throughout the text that the authors are conducting a war on pomposity, which is to be welcomed. Nothing is gained by using language that is difficult for non-lawyers to understand, especially when it only serves to obscure an adviser's true meaning. Thankfully, the authors have heeded their own lesson, and the text throughout is clear and easy to understand.

The precedents for applications and correspondence usefully point out common phrasing used by lawyers, and why it is unnecessary. Why say 'further to our conversation of this afternoon', when 'as discussed just now' does the job just as well? This willingness to challenge convention is continued in other examples – the authors ask whether the formality of putting a case to witnesses is really necessary, and suggest that there is no reason why an unrepresented claimant should not seek a respondent's notes of the hearing upon appeal. The latter is an ingenious suggestion, but the convention of putting a case has perhaps not outlived its usefulness, insofar as it allows a party to refine their case, and make it clear to the tribunal

where the issues between the parties still lie, something that is always useful when the issues can shift during the hearing.

The innovation continues in the book's companion blog, a website that contains a continual stream of tips from the authors. Whereas a book will date from the second it is published, the blog serves as a means to extend the book's shelf life, and also for the authors to have a conversation with their audience about experiences before the tribunal.

Where *Employment Tribunal Claims* really comes into its own though, is distilling years of practitioner experience in aspects of bringing a claim that are often neglected by other titles. This is invaluable for advisers where such experience or good legal advice might be in limited supply. The authors have a keen awareness of how useful other analytical skills, aside from raw legal interpretation, can be in running a claim – from the emotional cost of bringing a claim to the psychological insights required in negotiation.

So, *Employment Tribunal Claims* does not seek to resolve the dilemma outlined at the start of this review, nor do I think that was its intention. What it does do is improve access to the tribunals, by providing a helping hand through the minefield created by years of lawyers taking what was meant to be a relatively informal process and subjecting it to layer after layer of complexity. And that is surely something to be welcomed.

Michael Newman
Leigh Day & Co

Advance Notice

Major DLA Conference

Getting the most out of the Equality Act 2010

Tuesday 28, September 2010

Eversheds International, 1 Wood Street, London EC2V 7WS

The DLA is holding a leading edge conference looking at the practical implications of the Equality Act 2010.

Major changes to the law will be presented by discrimination law experts including Karon Monaghan QC and Robin Allen QC. Workshop sessions will provide opportunities to discuss specific applications of the new law in more detail.

Further information from www.discriminationlaw.org.uk

Briefings

Abbreviations

BME	Black and minority ethnic communities	ECHR	European Convention on Human Rights	HO	Home Office	RRA	Race Relations Act 1976
BT	British Telecom	ECNI	Equality Commission for Northern Ireland	HRA	Human Rights Act 1998	SA	Special Advocates
CA	Court of Appeal	ECtHR	European Court of Human Rights	ICR	Industrial Case Reports	SDA	Sex Discrimination Act 1975
CRB	Criminal records bureau	ECJ	European Court of Justice	IRLR Report	Industrial Relations Law	UKCES	UK Commission for Employment and Skills
DDA	Disability Discrimination Act 1995	EHRC	Equality and Human Rights Commission	LJ	Lord Justice	WLR	Weekly Law Reports
DLA	Discrimination Law Association	EHRR	European Human Rights Reports	LLP	Limited Liability Partnership		
DRC	Disability Rights Commission	ET	Employment Tribunal	NHS	National Health Service		
EAT	Employment Appeal Tribunal	GEO	Government Equalities Office	PCP	Provision, criterion or practice		
EC	European Commission			PCT	Primary Care Trust		
				RADAR	Royal Association for Disability Rights		