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Editorial *Fighting to protect hard won freedoms*

The environment for people seeking legal remedies for unlawful discrimination, harassment and victimisation is changing rapidly – and so far none of the changes are for the better. New barriers to accessing justice are being erected and will soon be in place. Provisions in the Equality Act 2010 are being whittled away. Along with the removal of important functions and drastic cuts to its staffing and resources, the EHRC risks losing its essential independence. The future of the public sector equality duty, the vital statutory mechanism to secure lasting change across all functions of the state, remains uncertain. Proposed changes to legal aid add new restrictions, the effects of which are likely to be limited financial savings weighed against denial of justice to some of the most vulnerable members of our society.

Fortunately not all of these unwelcome changes are taking place without challenge. The DLA welcomes UNISON's proposed judicial review of the introduction of fees to bring employment tribunal claims under the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. UNISON is arguing that the requirement to pay fees is contrary to EU law as this will make it virtually impossible, or excessively difficult, for individuals to exercise their rights under European Community law. UNISON also argues that the Ministry of Justice is in breach of its statutory equality duty as it failed to give careful, objective consideration to the likely equality impact of the proposed imposition of ET and EAT fees.

On a different front, the European Commission has decided to refer the UK to the CJEU because it considers that the 'right to reside' test the UK imposes on EU nationals in order to become eligible for certain social security benefits breaches EU law. Secretary of State for Work and Pensions, Iain Duncan-Smith, rather than reconsidering whether this test is needed, uses the action by the European Commission as an opportunity to attack the EU and to use false hyperbole to stir up antagonism towards EU citizens lawfully living and working in the UK and disproportionately contributing to our tax and benefits systems. He was reported as saying: *'If we do away with our right-to-reside test, what will happen almost immediately is that people from day one will be eligible to income-related benefits.'*

In *The Fight for Refugee and Migrant Rights* (reviewed in *Briefings*) Frances Webber describes the ongoing battle against the inherent xenophobia displayed in the workings of the immigration system towards non-citizens. Her description of a system of state control which has the underlying aim of embedding suspicion within everyday interactions between citizen and non-citizen chimes with frequent government and tabloid references to 'scroungers' and 'benefit tourists' which inevitably pit one group in our society against another in a struggle for resources.

Challenges to institutional racism and xenophobia require determination and courage; fundamental freedoms must be, in Webber's words *'fought for repeatedly'*. And this edition of *Briefings* alerts us to new battles such as on caste discrimination or for the rights of older women in the field of employment.

Such battles also involve the maintenance and development of tools which put equality and non-discrimination at the heart of decision-making.

Concerned that the public sector equality duty review will recommend a dilution or partial disapplication of the duty, the DLA urges readers to seize the opportunity to collaborate with public bodies to argue for the benefits of keeping the duty – by providing public services in a non-discriminatory manner which meets the needs of everyone, especially the most vulnerable, authorities can make more effective use of their resources while ensuring that individuals and groups gain respect and recognition of their different contributions and different needs. We also urge you to ask your MP to support the Early Day Motion in support of the public sector equality duty (see the news item on page 31).

Geraldine Scullion, Editor

Please see back cover for list of abbreviations

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Older women in the labour market face greater discrimination as cuts bite

This article is based on a report by Richard Exell, Senior Policy Officer at the Economic and Social Affairs Department of the TUC. Produced for the 2013 TUC Women's Conference, it uses official data and draws on independent research to look at the position of older women in today's labour market. He concludes that discrimination on the grounds of age and gender continues despite legislation. Older women in addition face multiple discrimination and furthermore carry a double burden of caring for parents and grandchildren which can substantially limit their ability to remain in paid employment. As older women are more likely to be employed in the public sector, public sector cuts and redundancies pose a bigger threat to them.

Trade unionists have been increasingly concerned about older women's employment prospects and the double discrimination they face. In addition, many older women have multiple caring responsibilities, looking after children, grandchildren and parents; combining this unpaid work with paid employment can be extraordinarily difficult.

Employment inequality and older women

Age discrimination is a persistent problem for older women. There is no official definition of 'older'; this report focuses on women aged 50–64 (except in the case of the European comparisons, which follow the EU in looking at women aged 55–64).

Research in 2009–10 by Metcalf and Meadows found that, four years after the introduction of the Employment Equality (Age) Regulations 2006, 2% of establishments still normally included a preferred age range in their job advertisements. Even more worrying were the facts that 42% sought information on age in the recruitment process and 28% made age information available to recruiters. The authors noted that, although only the first of these was unlawful in itself, *'the potential for discrimination is illustrated by the finding that 23% of respondents thought that some jobs in their establishment were more suitable for certain ages than others.'* [1]

Although there are some signs of improvements, gender inequality continues to characterise the labour market. The Equality and Human Rights Commission reports that:

'Occupational segregation continues to feed pay differences, especially in the private and voluntary sectors where at age 40 men are earning on average 27% more than women. The large proportion of women in part-time jobs also contributes to this.' [2]

The full-time gender pay gap is smaller than it was but still stands at 9.6%[3]; part-time work is dominated by women and median hourly pay for women part-time workers (£8.12 an hour) was just 63.6% of the median for men in full-time work.[4] Research for the BBC in 2012[5] found that women hold less than one-third of all 'top jobs', including:

- 1.3% of senior jobs in the armed forces
- one-eighth of High Court judges and above
- one-sixth of Directorships in FTSE 100 companies
- the same proportion of chief police officers
- one-fifth of the Cabinet
- 30% of senior managers in news media

Older women face multiple discrimination, with recent research suggesting that *'the more disadvantaged identities someone has, the greater the pay penalty they suffer'* and the age/gender combination is *'particularly "toxic" for women'*.[6] Earlier research, looking at employment disadvantage over a comparatively extended period (from 1973 to 2003) found that the disadvantage faced by women '*has been reduced dramatically*', but that *'a new disadvantage associated with age above 50 years has come about in the period'*,[7] so older women may not have benefitted from improved opportunities available to other women.

1. *Second Survey of Employers' Policies, Practices and Preferences Relating to Age*, Hilary Metcalf and Pamela Meadows, BIS & DWP, Employment Relations Research Series No. 110, 2010, p. xvi .

2. *How fair is Britain? The first Triennial Review*, EHRC, 2010, p 380

3. 'Gender pay gap falls to 9.6% in 2012', ONS press release, 22 Nov 2012

4. Annual Survey of Hours and Earnings, 2012 Provisional Results, ONS, 22 Nov 2012

5. 'Women hold fewer than third of top jobs – BBC research', BBC News website, Gerry Holt, 29 May 2012

6. *The Snowballing Penalty Effect: Multiple Disadvantage and Pay*, Carol Woodhams, Ben Lupton and Marc Cowling, presentation at conference 'Democratising Diversity Management in Europe: Future research directions and challenges', 12 November 2012

7. *Persistent Employment Disadvantage*, Richard Berthoud and Morten Blekesaune, DWP Research Report 416, 2007, p 91

Older women, caring and employment

Caring responsibilities have typically been a major reason for older women's non-employment. The Resolution Foundation has noted that people with caring responsibilities are significantly less likely than those without caring responsibilities to be in employment, are more likely to be 'economically inactive', and that carers are disproportionately likely to be women and to be over 50.[8]

The same report highlighted poor health and caring as *'two of the major factors that push older people out of the labour market.'*[9]

This confirms research for the Department for Work and Pensions[10] a decade ago, which looked at people aged between 50 and state pension age who were not in employment. The researchers found that, for both men and women, this was most commonly due to health or disability (given as their main reason for not looking for paid work by 58% of men and 50% of women.)

But the second most common reason for men was that they had retired or were financially secure or simply didn't want work, with 23% of men (and 20% of women) giving this reason. For women, the second most common reason was that they were looking after their family or home, given by 24% of women – and just 3% of men.

This study was followed by qualitative research, which pointed out the different experiences of men and women, with men tending to care for their partners or children and women caring for parents and grandparents too. The researchers noted the importance of carer-friendly attitudes and the availability of flexibilities that allowed carers to remain in employment:

Some people's health problems and caring responsibilities had been taken into account by their employer and they remained in work. Those with positive experiences showed how redeployment, opportunities to negotiate flexible working conditions, retraining or a move into self-employment helped to keep people in work.[11]

In addition to caring for their parents and grandparents, older women often provide childcare for their grandchildren. The Daycare Trust has quoted[12] official data showing that 2.6 million people rely on grandparents for childcare and that grandparents are the third most common providers of childcare after nurseries, schools and breakfast clubs. Grandparents Plus point out that *'4 out of 10 parents say they are more likely to turn to grandparents for extra help with childcare during the recession'*[13]

Older women and pay

Factors such as discrimination and reduced employment opportunities have substantial impacts on labour market outcomes for older women. Research by the TUC[14] using the Annual Survey of Hours and Earnings has revealed that the gender pay gap is twice as large for women in their 50s as it is for women overall.

Median full-time hourly earnings (excluding overtime) for men and women and gender pay gap by age:

Age	Male	Female	Pay gap (%)
16–17	£4.35	£3.68	15.4
18–21	£7.23	£6.82	5.7
22–29	£10.22	£10.52	-2.9
30–39	£14.27	£14.17	0.7
40–49	£15.26	£12.93	15.3
50–59	£14.69	£11.99	18.4
60+	£12.18	£11.00	9.7
All employees	**£13.27**	**£12.00**	**9.6**

This table also shows that both men and women face falling hourly wage rates when they are in their fifties. This decline is somewhat worse for women, with women in their fifties earning less than women in their thirties and forties, whilst men in their fifties earn a little more than men in their thirties. In all age groups, men's median hourly rate is higher than women's.

The picture for older women workers is rather worse than this. In all age groups, women are more likely than men to work part-time, but (with the exception of 16- and 17-year-olds) the proportion of women workers who are part-time rises steadily:

8. *Unfinished Business: Barriers and opportunities for older workers,* Giselle Cory, Resolution Foundation, 2012, p34

9. ibid, p3

10. *Factors Affecting the Labour Market Participation of Older Workers*, Alun Humphrey, Paddy Costigan, Kevin Pickering, Nina Stratford and Matt Barnes, NatCen and IFS for DWP, Research Report 200, 2003

11. *Factors Affecting the Labour Market Participation of Older Workers: Qualitative research*, Pat Irving, Jennifer Steels and Nicola Hall, ECOTEC for DWP, Research Report 281, 2005, p4

12. *Informal Childcare: Choice or Chance?* Jill Rutter and Ben Evans, Daycare Trust, 2011, p53

13. Grandparents Plus response to BIS consultation on Modern Workplaces, 2011

14. *Women over 50: work and pay*, TUC, Feb 2013

Number of part-time employees by age and gender, 2012 (000s):

Age bands	Male	Female
16–17	92	120
18–21	311	440
22–29	320	594
30–39	264	1,014
40–49	254	1,447
Over 50	526	1,681
Total	**1,746**	**5,273**

Women part-time employees by age, 2012 (000s):

Age bands	Full-time	Part-time	Proportion part-time
16–17	15	120	88.9%
18–21	261	440	62.8%
22–29	1,430	594	29.3%
30–39	1,606	1,014	38.7%
40–49	1,836	1,447	44.1%
Over 50	1,729	1,681	49.3%
Total	**6,868**	**5,273**	**43.4%**

This is important because part-time wage rates are so much lower than full-time:

Median gross hourly earnings (£ per hour, excluding overtime) by gender, April 2012:

	Men	Women
Full-time	13.27	12.00
Part-time	7.72	8.12
All	12.50	10.04

The majority of women over 50 in part-time work earn less than £10,000 a year. The average salary for all women over 50 is just over £15,000 – and it is less than £11,000 for women over 60.

Older women and employment: European comparisons

The EU produces data on the employment of older workers, defined as aged 55–64. For the sake of brevity, this table only provides data for the larger western European member states, with which the UK is commonly compared. It shows that, by this standard, the UK had a comparatively high employment rate for older women in 2011, but growth had been slow by European standards.

Employment rate of older women workers (%)[15]:

Rank	2011		Change since 2001		Change since 2007	
1	Sweden	68.9	Germany	23.6	Germany	9.6
2	Finland	57.2	Netherlands	18.4	Netherlands	6.3
3	Denmark	55.3	Belgium	16.1	Belgium	5.6
4	Germany	53.0	Austria	14.5	Spain	5.6
5	UK	49.6	Ireland	14.2	Italy	5.1
6	Netherlands	46.4	Spain	13.9	Austria	4.9
7	Ireland	42.9	Finland	12.2	EU	4.3
8	Portugal	42.1	EU	12.0	Ireland	3.3
9	EU	40.2	Italy	11.9	France	3.1
10	France	39.1	France	11.3	Denmark	2.4
11	Spain	35.6	UK	6.6	Finland	2.2
12	Austria	32.9	Denmark	5.6	Sweden	1.9
13	Belgium	31.6	Sweden	4.9	UK	0.7
14	Italy	28.1	Portugal	1.8	Portugal	-1.9

Older women and employment: the change over 20 years

Although older women are disadvantaged in the contemporary labour market, this should not obscure the substantial improvements that have taken place. The Labour Force Survey, the source for the monthly employment headlines, has been collecting data for employment broken down by age and gender since 1992. Comparisons with the labour market then are quite enlightening, as the UK was also emerging from a recession and a large decline in employment. Between September and November 1992 and September and November 2012, over-50s accounted for 72% of the growth in the employment of women:[16]

15. Eurostat data, EU averages are for 27 member states.

16. Data in the following tables is taken from the Labour Force Survey

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Employment levels of women under & over 50, 1992 & 2012 (000s)

	Under 50	50 and over	Total
1992	9,202	2,272	11,474
2012	9,835	3,917	13,752
Change	633	1,645	2,278

The working age population has grown, but this group has also seen the largest increase in its employment rate:

Employment rates, 1992 and 2012

Age group	Gender	Sep–Nov 1992	Sep–Nov 2012	Change (% points)
25–35	Women	64.5	71	6.5
25–35	Men	82.6	86	3.4
35–49	Women	72.7	76.2	3.5
35–49	Men	86.2	88.1	1.9
50–64	Women	46.9	61	14.1
50–64	Men	64.9	72.5	7.6
65+	Women	3.3	6.6	3.3
65+	Men	7.8	12.5	4.7

This table excludes young people, where the figures are complicated by the large increase in the numbers staying in full-time education. We can see that, in each age group the employment rate is higher for men in both 1992 and 2012. More significant, however, is the change that has taken place. Except for the over-65s, the increase has been much more marked for women than for men (and note that 65 is well over women's state pension age). For both men and women, employment rates have grown most substantially for the 50–64 age group. The 14.1% increase for women in this age group is especially marked and the employment rate for women in this age group is now not much below that for the 25–35 age group twenty years ago.

This change has been accompanied by a complementary change in 'economic inactivity' – people who are not in employment but who are not classified as unemployed because they have not looked for paid work recently or are not able to start at short notice. In Sep–Nov 1992, 50.7% of women in this age group were economically inactive; twenty years later, this figure had fallen to 36.8%. The fall for men in this age group, by contrast, was from 26.7 to 23.1%.

Older women and employment: the change since 2008

Over twenty years the labour market has improved, but in recent years, the dominant story has been the recession of 2008–9 and the combination of stagnation and recession since 2010. Understanding what has happened in these years requires a little detective work – figures that, at first seem to continue the positive long-term story, actually are the result of the raising of women's state pension age.

But first, we need to see the positive story. Using recent data and those for five years ago allows us to compare the labour market now with the eve of the recession.

Employment rates by gender (%)

	Men			Women		
	Sep–Nov 2007	Sep–Nov 2012	Change	Sep–Nov 2007	Sep–Nov 2012	Change
Aged 25–34	88.6	86	-2.6	72	71	-1.0
Aged 35–49	88.8	88.1	-0.7	75.9	76.2	0.3
Aged 50–64	73.1	72.5	-0.6	58	61	3
Aged 65+	10	12.5	2.5	4.7	6.6	1.9

There is a clear pattern to changes in employment rates: at all ages men have higher employment rates than women both now and five years ago and men and women in, what is sometimes referred to as the 'prime employment age' (25–49), have higher employment rates than those over 50. But the direction of change is the reverse of this pattern, following the longer-term trend, with employment rates rising for over-50s and for women and for women aged 50–64 most of all. Another way of thinking about this is that the gap in employment rates between men and women has shrunk for all age groups and for the 50–64 age group most of all:

Gender employment rate gaps

	Sep–Nov 2007	Sep–Nov 2012	Change
Aged 25–34	16.6	15.0	-1.6
Aged 35–49	12.9	11.9	-1.0
Aged 50–64	15.1	11.5	-3.6
Aged 65+	5.3	5.9	0.6

However, this change should not be taken at face value.

Women's economic inactivity

We have to look at the three main labour market categories: employment, unemployment and 'economic inactivity'. In addition, we have to take into account the changes in the total number of women – this has been growing, especially for older women.

These figures are shown in the table below. Just 29% of women aged 16–64 are aged over 50, but they account for 69% of the increase in the total female population in this period. Without the over-50s, the number of women under 65 in employment would have fallen by 155,000 but the over-50s make up just 12% of the increase in women's unemployment.

Women's labour market status in 2007 and 2012 (000s):

Aged 16–64	Total	Employment	Unemployment	Inactivity
Sep–Nov 2007	19,830	13,221	701	5,908
Sep–Nov 2012	20,176	13,376	1,079	5,721
Change	346	155	378	-187
Aged 50–64	Total	Employment	Unemployment	Inactivity
Sep–Nov 2007	5,570	3,232	81	2,257
Sep–Nov 2012	5,808	3,542	128	2,138
Change	238	310	47	-119

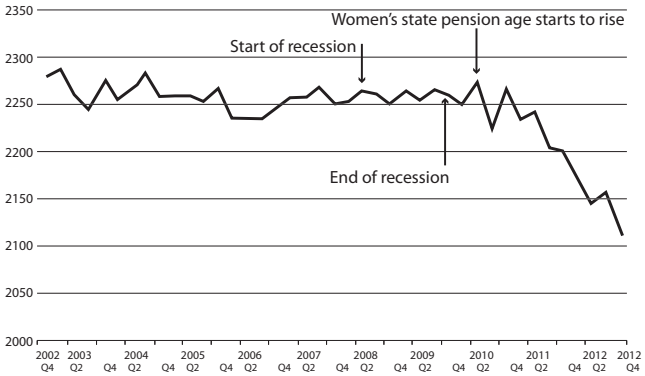
The government has argued that the declining number of 'economically inactive' women is a sign of labour market strength, because *'more women are entering the labour market having previously been inactive'*.[17] There are good reasons for disagreeing with this positive interpretation.

Discussions about what is happening to women's employment are often confused because the age range 16–64 is often described as 'working age'. Of course, for men, this is perfectly accurate, but women's state retirement age is currently 61 and has been rising in stages since 2010. The Office for National Statistics' monthly bulletin *Labour Market Statistics* uses a number of age groups for both men and women, one of which is 50–64. In the case of women, this age group is mainly composed of women under state pension age, but with a declining minority over state pension age.

The chart below looks at what has been happening to the number of economically inactive older women over the past ten years. Economic events – such as the start of the recession in the second quarter of 2008 or the recovery from late 2009 – are not associated with significant changes. The raising of women's state pension age in stages from spring 2010 is a better fit.

17. '*Grayling: Signs of labour market stabilising – big challenge still ahead*', DWP press release, 14 March 2012

Economically inactive women over 50 (000s)



The definition of 'economic inactivity' covers everyone who does not have a job and does not meet the tight definition of unemployment, leaving a large minority (usually about 2 to 2.5 million people) who are 'economically inactive' but say that they want paid work. If the reduction in inactivity were as positive as the government has suggested, one would expect the decline to be concentrated among that group.

Economically inactive women who want & do not want a job (000s):

	Does not want a job	Wants a job	Total
2007 Q4	4607	1280	5887
2012 Q4	4293	1382	5675
Change	-314	102	-212

In fact, the change has been in the opposite direction, with an increase in the number of women who are 'economically inactive' but want a paid job. The final indication that the raising of women's state pension age is the key factor behind the decline in inactivity (and, by extension, the increase in employment for this age group) is to be found in the data on reasons for 'economic inactivity'. In fact, the fall in the number of women under 65 who give retirement as the main reason is equal to more than half the total fall:

Reasons for economic inactivity of women aged 16–64 (000s):

	Total	Students	Looking after family/home	Temp sick	Long-term sick	Retired	Other
2007 Q4	5887	980	2158	99	1072	1045	511
2012 Q4	5675	1070	2102	98	1012	913	449
Change	-212	+ 90	-56	-1	-60	-132	-62

Older women's patterns of employment

The table below shows three broad age groups and the proportions employed in major occupational groups in 2012. Older women are significantly more likely to be employed in administrative and secretarial occupations than other women, but otherwise the similarity to the 25–49 age group is the most noticeable feature.

Women's occupations by age group, 2012:

	16–24	25–49	50–64	Total
Managers, directors and senior officials	2%	8%	8%	7%
Professional	7%	24%	20%	20%
Associate professional and technical	8%	15%	10%	13%
Administrative and secretarial	14%	17%	23%	18%
Skilled trades	1%	2%	3%	2%
Caring, leisure & other	21%	15%	15%	16%
Sales & customer service	25%	9%	9%	11%
Process, plant and machine operatives	1%	2%	2%	2%
Elementary	21%	8%	10%	11%
Total	**100%**	**100%**	**100%**	**100%**

In 2008, 23% of older women were employed in administrative and secretarial occupations and 20% of all women, suggesting that this occupational category has become a less important employer of younger women.

In 2012, 39% of older women worked in the public sector, compared with 33% for all women. On an industrial analysis, older women are heavily concentrated in administration, education and health, dominated by the public sector. Over half of all older women worked in this industry, a significantly higher proportion than for other age groups:

Women's employment by industry and age group, Apr–Jun 2012:

	16–24	25–49	50–64	Total
Agriculture, forestry and fishing	0.4%	0.5%	0.9%	0.7%
Energy and water	0.6%	0.9%	0.5%	0.7%
Manufacturing	3.4%	5.8%	5.1%	5.3%
Construction	0.8%	1.9%	2.0%	1.8%
Distribution, hotels and restaurants	41.5%	16.8%	17.4%	20.3%
Transport and communication	3.7%	4.6%	3.7%	4.2%
Banking and finance	13.3%	17.3%	13.2%	15.7%
Public admin, education and health	25.5%	46.8%	52.0%	45.2%
Other services	10.8%	5.5%	5.2%	6.2%
Total	**100.0%**	**100.0%**	**100.0%**	**100.0%**

Older women's redundancies are very heavily concentrated in this industry, accounting (in the summer of 2012) for 49% of redundancies in this age group, compared with 27% of women overall:

Women's redundancies, by age group, Apr–Jun 2012:

	16–24	25–49	50–64	Total
Agriculture, forestry and fishing	0.0%	1.5%	0.0%	0.8%
Manufacturing	13.0%	13.0%	3.4%	10.6%
Construction	12.5%	5.6%	0.0%	5.7%
Distribution, hotels and restaurants	37.2%	23.3%	18.5%	25.1%
Transport and communication	3.7%	8.2%	6.8%	6.9%
Banking and finance	22.6%	20.0%	12.2%	18.5%
Public admin, education and health	11.1%	23.0%	49.2%	27.1%
Other services	0.0%	5.4%	10.0%	5.4%
Total	**100.0%**	**100.0%**	**100.0%**	**100.0%**

Conclusion

There is strong evidence that discrimination on the grounds of age and gender continues to disfigure the world of work and that older women in addition face multiple discrimination. Furthermore, older women carry a 'double burden' of caring for parents and grandchildren, which can substantially limit their ability to remain in paid employment.

Despite this, older women have made substantial gains in employment over the past twenty years. Older women in this country have high employment rates by European standards. The government's claims for improvements in recent years, however, are exaggerated and the decline in older women's 'economic inactivity' is almost certainly the result of the raising of women's state pension age, rather than any significant improvement in the functioning of the labour market.

Older women are even more likely to be employed in the public sector than younger women. All women are at risk from the government's public sector cuts, but this is an even bigger threat to older women. Redundancies in the public sector are already a bigger threat to older women than to women in other age groups and the majority of cuts have not yet been implemented.

Austerity is a real and serious threat to older women and their families.

Briefing 673

Caste discrimination and prejudice has no place in 21st century Britain

Meena Varma, Director of the Dalit Solidarity Network UK, explains how this deeply entrenched form of discrimination manifests itself within the UK. She describes how the Equality Act 2010 has been amended to provide protection against caste discrimination. She highlights the government's proposal to take 1 – 2 years to consult on definitions of caste and on guidance for stakeholders, and expresses concern about further lengthy delays in implementing the legal protection needed to address this 'hidden apartheid'.

The caste system

The caste system, which has existed for more than 3000 years, mainly in India and Nepal, is a traditional system of social segregation which works on the principle of purity and pollution. The caste system is historically linked to Hinduism but it is also followed by those of other religions and none.

Under the caste system, society is divided into four main hierarchical caste groups: brahmins (wise men or scholars), kshatriyas (warriors), vaishyas (merchants) and shudras (labourers). Beyond this fourfold classification, there is a category of 'untouchables' who are now identified under their own preferred name of Dalit, meaning 'broken people' or 'broken voices'. They occupy the lowest position and are not even deemed worthy of a place within the caste system (literally they are 'outcastes'). There are over 270 million Dalits worldwide with 170 million in India alone.

Caste discrimination is one of the most serious ongoing human rights violations in the world today. Despite the practice of untouchability being formally outlawed in the Indian constitution of 1950, Dalits

continue to suffer discrimination, violence, poverty and a level of exploitation that amounts to modern day slavery.

Caste discrimination affects access to jobs, education, medical care and international aid, as well as resulting in the violent subjugation and humiliation of Dalit communities. This 'hidden apartheid' has been described by the Indian Prime Minister, Manmohan Singh, as *'a blot on humanity'*.

Caste discrimination in modern India

Despite its reputation as 'Shining India', the world's biggest democracy and second fastest growing global economy can only really attest to benefitting 7% of its population. In many rural areas and small towns, the caste system is still very rigid. Caste is also a factor in the politics of India: since Dalits constitute a significant vote bank, timely promises are made and then equally quickly broken. Dalit women (and girls) carry the triple burden of discrimination – gender, caste and poverty – thus their means of economic and social survival is even more restricted.

Caste discrimination in the UK today

Despite the fact that many people of South Asian[1] origin have left their home countries and are highly educated, caste tends to stay within the South Asian diaspora wherever they may settle.

According to the 2011 census figures for England, Wales and Northern Ireland (not Scotland) the South Asian population originating from the Indian sub-continent is in the region of 4.2 million or 4% of the total population. It is impossible to say with certainty how many of these people are Dalits as detailed research of this nature is lacking, but it is accepted that there is a significant 'population pool' of Dalits, numbering up to 400,000 (or 10%) and spanning the various sub-continental religions. This is a conservative estimate as the percentage of 'scheduled-caste' (the legal term used in India to identify those formerly known as 'untouchables') people in India is known to be 16.3%, but this only refers to the Hindu, Sikh and Buddhist populations and does not encompass Dalit Christians or Muslims. In India Dalits make up to 80% of Christians.

While individuals of Dalit origin and their descendants in the UK no longer pursue the culture-specific menial 'polluting' occupations traditionally associated with their caste status, the 'untouchability mind-set' persists in the form of direct and indirect discrimination. Ancestry is identified in a number of ways, including on the basis of name (although names may be changed), place of origin, former occupation, family members' occupations, place of worship, education, social circle and on the basis of community knowledge. Therefore it is of little surprise that such a deeply entrenched form of discrimination also exists within the diaspora communities in the UK - a fact that must be a cause for concern for those who seek equality and justice.

In 2006, the first report into British caste discrimination entitled *'No Escape: Caste Discrimination in the UK'* was published by the Dalit Solidarity Network UK.[2] This study revealed that 50% of Dalits found themselves to be identified by their caste, and 85% of all those questioned believed that Indians *'actively practised and participated in the caste system'*.

A 2009 study commissioned by the Anti Caste Discrimination Alliance[3] researched attitudes and perceptions of caste discrimination among the South Asian community in Britain. Of the 300 people questioned, 71% identified themselves as Dalits, and a shocking 58% claimed to have experienced some form of caste discrimination. The manner by which people had experienced this prejudice varies; with around 45% having experienced negative or discriminatory treatment in the workplace (mostly from colleagues), and 16% facing verbal abuse in school when under the age of twelve. A disturbing statistic also indicated that 10% of the caste discrimination that under-12s had experienced allegedly came from schoolteachers.

Caste discrimination and international human rights law

While the term 'caste' does not appear in the non-discrimination provisions of the Universal Declaration on Human Rights (UDHR) or any of the international human rights treaties, subsequent practice by UN treaty and charter-based bodies has affirmed that caste-based discrimination falls under the purview of international human rights instruments.

Caste discrimination is defined by the UN as discrimination based on work and descent and as such is prohibited by the UDHR and, inter alia, by the International Convention on Civil and Political Rights, the International Covenant on Economic, Social and

1. The term South Asian refers to people from the countries of India, Nepal, Pakistan, Bangladesh, Sri Lanka etc.

2. *No Escape: Caste Discrimination in the UK*, Dalit Solidarity Network UK (2006); see www.dsnuk.org

3. *Hidden Apartheid: Voice of the Community* Anti Caste Discrimination Alliance (2009)

Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child and the International Labour Organization Convention No. 111.[4]

The international treaties unequivocally obligate affected governments to eliminate discrimination.[5] Several UN human rights bodies have expressed grave concern about the persistence of caste discrimination in various country and thematic reviews.[6] Furthermore, UN treaty body committees have reaffirmed in their General Recommendations that discrimination based on caste is prohibited by international human rights law.

The International Labour Organisation (ILO) regards caste-based discrimination as falling under the category 'social origin'. The principle of non-discrimination is a core labour standard which is established in ILO Convention 111 on Discrimination (Employment and Occupation). ILO Convention 105 prohibits any form of forced or compulsory labour.

A matter of growing international concern

A number of UN bodies have commented on the lack of legislation against caste discrimination in the UK. The UN Committee on the Elimination of Racial Discrimination (CERD) has on two occasions recommended the UK government to enact a prohibition against caste discrimination. In 2011, CERD explicitly recommended that the minister invoke the clause in the Equality Act 2010 (EA) for *'caste to be an aspect of race'*. [For a full report on the 2011 CERD recommendations, see Briefing 609]

In 2012, the UK was recommended to prohibit caste discrimination during the second examination of its human rights record by the Universal Periodic Review mechanism under the UN Human Rights Council. The UK government decided, however, not to accept the recommendation.

The UN Special Rapporteur on contemporary forms of racism and the former UN Sub-Commission on the Promotion and Protection of Human Rights have also taken note of the existence of caste discrimination in UK diaspora communitie

Legal protection in the UK

In 2010 the House of Lords passed an amendment to the Equality Bill empowering the British government to include 'caste' under the protected characteristic of 'race'. Set out in s9(5) of the EA, the provision was passed by the Commons on April 6, 2010 and the Bill was granted Royal Assent on April 8, 2010. The purpose of the EA was to consolidate and include a complex raft of equality legislation prohibiting discrimination on various grounds.[7]

Baroness Thornton, the government spokeswoman, told the peers, *'We have looked for evidence of caste discrimination and we now think that evidence may exist, which is why we have now commissioned the research.'*

Under s9(5) of the EA *'A Minister of the Crown may by order amend this section so as to provide for caste to be an aspect of race'* should evidence be found that caste discrimination in the areas covered by the EA was taking place in the UK.

Following the passage of this provision, the Labour Government commissioned the National Institute of Economic and Social Research (NIESR) to investigate the extent of caste-based discrimination and harassment in the UK.

The research published in December 2010 found evidence of caste-based discrimination, including in the area of work – particularly in terms of bullying, recruitment, promotion and task allocation.[8]

The report concluded that the government could take either educative or legislative approaches to address the challenge of caste discrimination in the UK. However, it also stated that non-legislative approaches are less likely to be effective in the private sector and would do little to assist those where the authorities themselves are discriminating. The report also found that the EA provisions on religious discrimination cannot cover caste discrimination and harassment as effectively as caste-specific provisions would.

The NIESR report concludes: '*Thus, discrimination legislation through the Act with the exercise of the caste power ought to reduce the extent of caste discrimination and harassment which occurs ... make it easier to address caste discrimination within the organisation when it does occur ... and provide an independent means of redress when these*

4. Draft UN principles and guidelines for the effective elimination of discrimination based on work and descent, paragraph 4 (A/HRC/11/CRP.3)

5. From *Recasting Justice: Securing Dalit Rights In Nepal's New Constitution*. Joint Statement by New York University School of Law Center for Human Rights and Global Justice, Dalit NGO Federation: http://idsn.org/fileadmin/user_folder/pdf/New_files/Nepal/090223-Joint_Statement-Final_ENG__PDF.pdf

6. See compilation of all caste-specific recommendations and observations by UN human rights bodies (Treaty Bodies, Universal Periodic Review, and Special Procedures) here: www.idsn.org/UNcompilation

7. *Hansard*, 11 May 2009, Column 553 (Second Reading Speech)

8. *Caste discrimination and harassment in Great Britain* Home Office – National Institute for Economic and Social Research (2010); see www.homeoffice.gov.uk

approaches are unsatisfactory.'

The Equality and Human Rights Commission (ECHR) also supported the making of an order under s9(5) amending the statutory definition of race to include caste:

> *The Commission notes the findings of the government-commissioned National Institute of Economic and Social Research paper on caste discrimination. In light of this, the Commission would suggest legal protection under the Equality Act 2010 for those experiencing discrimination in Britain should be as comprehensive as possible.*[9]

Amending the Equality Act 2010

After 3 years of waiting for a government response to the NIESR research, Lord Harries of Pentregarth tabled an amendment to the Enterprise and Regulatory Reform Bill which would activate s9(5) of the EA and add caste as an aspect of race under s9(1).

The amendment in March 2013 read as follows:

> *Insert the following new Clause—'Equality Act 2010: Caste discrimination*
>
> *The Equality Act 2010 is amended as follows.*
>
> *After section 9(1)(c) (race) insert—*
>
> *(d) caste;*

In a major parliamentary stand-off, the House of Lords voted twice for legal protection to be given to Dalits who live in the UK. On April 16th, Commons MPs overturned the first Lords vote, sparking a tug-of-war between the two Houses. But after the peers again backed the proposals on April 22nd, it forced the government to re-think.

This was a remarkable victory for the Dalits and the campaigners who have worked alongside them for many years. In an eleventh hour change of heart, the government agreed to 'activate' the ministerial power to provide for 'caste' to be an aspect of race. Furthermore this power was to be used within two months of the enactment of the Enterprise and Regulatory Reform Bill (which received Royal Assent on April 29, 2013).

The power contained in s9(5) will provide an **absolute clear rule** that people cannot be discriminated against because of their caste and we will have the legal clarity required once the legislation is enforced.

This will also help bring about change in behaviours (as equality law has done in the past in areas such as race and gender equality). Anti-caste discrimination law will send out signals about the unacceptability of such behaviour (as with drink driving and race discrimination). It is not simply about prosecutions, it is about people modifying their behaviour. This will only happen when people realise it is against the law. We will not change mind-sets in the short term, but hopefully by changing behaviours, we will help to educate the mind too.

Case studies

The following case studies, similar to the ones identified in NIESR report, illustrate how caste discrimination manifests itself in the UK; they are taken from personal testimonies in the Anti Caste Discrimination Alliance report *Hidden Apartheid: Voice of the Community*:

> An elderly lady in Coventry is discriminated against by her carer who considers herself a higher caste, when the carer refuses to bathe or 'touch' her. As a result her care is neglected and she is not treated with dignity and respect.

With caste a protected characteristic under the EA, the woman and her family have recourse to justice in relation to the prohibition of discrimination in the provision of goods and services. Care may improve as a result of problem being highlighted but if it does not, the elderly lady can take her case to a lawyer to argue that her neglect is because of her and her carer's caste.

> A teenage girl in London is constantly being bullied and being taunted by caste names. This affects her academic achievements and health and wellbeing.

This teenager or her parents can formally report to the school the bullying and the impact it is having on the girl. The school deals with the caste-related bullying like it does other equality issues under the EA because caste is a legally recognised form of discrimination.

> A bus company manager in Southampton who is white and English has to change the shift's rota so that a Dalit bus driver only works with a Dalit bus conductor. This is because the so-called higher castes refuse to work with Dalits on same shift.

Legal protection here will ensure that employers and the workforce know that this form of discrimination is not acceptable under the law i.e. the same adjustments to working practices would not be expected to be made with regard to age, sex, or disability. The bus company manager will be able to argue that choosing to work with a particular caste is legally unacceptable in the work environment. If the case is not resolved internally, the bus conductor could seek resolution via the employment tribunal.

Real time case study: the Begraj case[10]

In a landmark case, an Indian couple belonging to different caste groups became the first in Britain to claim

9.http://www.equalityhumanrights.com/legal-and-policy/equality-act/commission-policy-statement-on-caste-discrimination/

'caste' discrimination in the court system. Vijay Begraj, a former practice manager at the Coventry solicitors firm Heer Manak, and his wife Amardeep, a former solicitor at the same firm, brought complaints to a Birmingham employment tribunal claiming wrongful and constructive dismissal respectively as well as discrimination because of religion and race. They claimed they had been discriminated against because Mr Begraj is a Dalit and his wife is from a higher caste. The complaint is still live – the case collapsed as the judge disqualified herself and dates for a retrial are awaited.

What next

We have clear evidence that caste-based discrimination occurs in the UK. No matter how infrequently this practice occurs, we should not leave those who experience it without clear protection in law. There is no place for caste discrimination in the UK. All other forms of discrimination are covered by statute – caste should be no exception. Victims of caste-based discrimination should be given a similar level of protection accorded to victims of other forms of unacceptable discrimination.

People experiencing caste discrimination may, in some cases, be both the same race and religion as the perpetrator of the discrimination, making it extremely difficult to seek redress via existing racial and religious discrimination laws. Including caste in s9(5) EA provides clear protection against caste-based discrimination in law.

The government's decision to finally use the ministerial power to activate s9(5)(a) of the EA to outlaw caste discrimination in the UK is a welcome step. S9 now reads as follows:

Section 9 Race

(1) Race includes—

(a) colour;

(b) nationality;

(c) ethnic or national origins.

(2) In relation to the protected characteristic of race—

(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular racial group;

(b) a reference to persons who share a protected characteristic is a reference to persons of the same racial group.

(3) A racial group is a group of persons defined by reference to race; and a reference to a person's racial group is a reference to a racial group into which the person falls.

(4) The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group.

(5) A Minister of the Crown ~~may by order~~

(a) must by order amend this section so as to provide for caste to be an aspect of race;

(b) may by order amend this Act so as to provide for an exception to a provision of this Act to apply, or not to apply, to caste or to apply, or not to apply, to caste in specified circumstances.

(6) The power under section 207(4)(b), in its application to subsection (5), includes power to amend this Act.

Delay in implementation

However, while the newly drafted s9 imposes an obligation on the Secretary of State to make caste an aspect of race, it doesn't say when this is to happen. The commencement of the relevant provisions of the Enterprise and Regulatory Reform Act two months after Royal Assent merely triggers the obligation without giving a time limit on it. The legislation will not take effect immediately – it depends on a thorough and proper consultation. The minister in the Commons, Jo Swinson MP, indicated that one to two years was the right ball-park for the necessary consultations on the definition of caste and the drafting of guidance to stakeholders.[11]

Our concern now lies with the government decision to undertake a consultation period of between 1-2 years. According to the government, caste is a complex issue requiring a full and comprehensive process of public consultation including on the definition of caste itself. A 2-year consultation would be unprecedented with parliament's own consultation guidelines recommending a 12-week period except in exceptional circumstances.

This effectively kicks implementation into the long grass.

The government has announced an education project that aims to *'work with local communities to tackle caste prejudice and discrimination'*.[12] We feel that whilst education has a place, it cannot and should not take the place of legal redress. Legislation will help to change behaviours; education will help to change mind-sets, but only when it is clear that certain behaviour is against the law. Statutory protections in law, alongside wider

10. Case of Coventry solicitors accused of caste discrimination hangs in the balance *Coventry Telegraph* (2012)

11. Hansard Official Report April 23, col 796

12. See Department of Media Culture and Sport press release: www.gov.uk/government/news/new-education-package-to-help-stamp-out-caste-discrimination-in-communities, March 2013

673 education, would help those authorities that are responsible for ensuring equality, to recognise and address the challenge of caste-discrimination.

The Governmentt Equalities Office and the Department for Communities for Local Government have appointed 'Talk For A Change'[13] to conduct what appears to be a series of 'community conversations' left to a couple of sections of the community to develop and disseminate. It is not clear who will be educating whom and it will not protect present or future victims of caste discrimination.

There is no problem with a consultation period – and in fact it is welcomed. The anti-legislation lobby, led by the Alliance of Hindu Organisations have expressed *'concerns about the consequences and practicality of [the] legislation and about the impact it may have on communities living within the UK.'*[14] They are concerned that anti-caste discrimination is a direct slight on their religion. It is not – and a well-drafted, fully inclusive consultation would expose this and begin to allay fears.

The research was unequivocal – caste discrimination occurs in the UK. The government has suggested a 'review' of this evidence, but there has been no clear indication of what they believe has changed since the NIESR research was conducted, what was missed out in the original research, or what other areas such a review should cover.

We have always held that caste discrimination is not religion specific – it affects all religious groups and those who hold no particular faith. The enactment of s9(5) is therefore not intended to target any specific religious community, but simply to provide clearer protection in law for those who experience caste-based discrimination. The legislation will protect many thousands of UK citizens from a form of discrimination that is contrary to the UK's firm belief in 'equality and dignity for all'.

So let us not delay further – even with a detailed consultation with the communities affected, the implementation of the regulations should be enforced no later than December 31, 2013.

13. Talk for a Change is a community interest company with offices in London and Newcastle; see www.talkforachange.co.uk

14. See the Hindu Forum of Britain website: www.hfb.org.uk

674 Briefing 674

CJEU considers broader definition of disability in line with UNCRPD

HK Danmark acting on behalf of Ring v Dansk Almennyttigt Boligselskab; HkDanmark, acting on behalf of Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S Cases C-335/11 and C-337/11 [2013] EqLR 528, April 11, 2013

Implications of case

This case sees the CJEU looking again at the definition of disability but taking a much broader approach than in *Chacon Navas*. There were a significant number of questions referred, covering in addition direct discrimination, failure to make reasonable adjustments and indirect discrimination. It is also the first time that the CJEU has had cause to consider the UN Convention on the Rights of Persons with Disabilities (UNCRPD).

Facts

Mrs Ring (R) had been employed since 1996 by a housing association which was taken over by Dansk Almennyttigt Boligselskab in 2000. She was absent on several occasions between June 2005 and November 2005. The medical certificates stated that she was suffering from constant lumbar pain which could not be treated. No prognosis could be made as regards the prospect of returning to full time employment. She was dismissed in accordance with Danish law which provides that an employee may be dismissed with one month's notice to expire at the end of a month if the employee has received his salary during periods of illness for a total period of 120 days during any period of 12 consecutive months. R started a new job as a receptionist working for 20 hours a week. Her workstation included an adjustable height desk.

Ms Werge (W) sustained whiplash injuries in a road accident in 2003 and was absent in 2003 and 2004 subsequently. As a result, she was dismissed with the

requisite one month's notice in May 2005. W underwent an assessment at a Jobcentre which concluded that she was capable of working for about eight hours a week at a slow pace.

The trade union HK Danmark took up both applicants' cases.

National court

In both proceedings the employers disputed that the applicants' state of health was covered by the concept of disability within the meaning of the Framework Employment Equality Directive 2000/78 (the Directive) since the only incapacity that affected them was that they are not able to work full time. They also disputed that reduced working hours are among the measures contemplated by Article 5 of the Directive (reasonable accommodation). They submitted finally that in the case of absence on grounds of illness caused by a disability, the dismissal of a worker with a disability pursuant to Danish law does not constitute discrimination and is not therefore contrary to the Directive.

Reference to the Court of Justice of the European Union

The court stayed the proceedings and referred the following questions to the CJEU:

1. a) *Is any person who, because of physical, mental or psychological impairments, cannot or can only to a limited extent carry out his work in a period that satisfies the requirement as to duration specified in paragraph 45 of the judgment [in Chacón Navas] covered by the concept of disability within the meaning of [the Directive]?*
   b) *Can a condition caused by a medically diagnosed incurable illness be covered by the concept of disability within the meaning of the Directive?*
   c) *Can a condition caused by a medically diagnosed temporary illness be covered by the concept of disability within the meaning of the Directive?*
2. *Should a permanent reduction in functional capacity which does not entail a need for special aids or the like but means solely or essentially that the person concerned is not able to work full-time be regarded as a disability in the sense in which that term is used in [the Directive]?*
3. *Is a reduction in working hours among the measures covered by Article 5 of [the Directive]?*
4. *Does [the Directive] preclude the application of a provision of national law under which an employer is entitled to dismiss an employee with a shortened notice period where the employee has received his salary during periods of illness for a total of 120 days within a period of 12 consecutive months, in the case of an employee who must be regarded as disabled within the meaning of the Directive, where*
   a) the absence is caused by the disability, or
   b) the absence is due to the fact that the employer has not implemented the measures appropriate in the specific situation to enable a person with a disability to perform his work?

CJEU

The President of the Court on August 4, 2011 ordered that the cases were joined for the purposes of the written and oral procedure and the judgment. As a preliminary point, the CJEU noted that the:

- EU has approved the UNCRPD
- its provisions are an integral part of the European legal order
- the Directive is one of the EU acts which refer to matters governed by the UNCRPD; and the
- Directive must as far as possible be interpreted in a manner consistent with that convention.

Questions 1 and 2

So far as questions 1 and 2 were concerned, the CJEU held that the purpose of the Directive is to lay down a general framework for combating discrimination as regards employment and discrimination. The concept of disability must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life [paragraph 36, and see *Chacon Navas*].

The UNCRPD acknowledges in recital (e) that *'disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others'.*

Thus the second paragraph of Article 1 of the UNCRPD states that persons with disabilities includes '*those who have long-term physical mental intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.'*

The concept of disability must thus be understood as referring to a limitation which results in particular from physical, mental or psychological impairments which, interacting with various barriers, may hinder the full and effective participation of the persons concerned in

professional life on an equal basis with other workers [paragraph 38]. In addition, it follows from the second paragraph of Article 1 of the UNCRPD that the physical, mental or psychological impairments must be 'long-term'. The Directive is not intended to exclude those disabilities that are caused by illness – this would be counter to its aim.

Further a finding that there is a disability does not depend on the nature of the measures taken to accommodate it, such as the use of special equipment [paragraph 45].

Question 3

So far as question 3 was concerned, neither Article 5 nor recital 20 of the Directive mentions reduced working hours. However the concept of patterns of working time mentioned in that recital must be interpreted in order to determine whether the concept may cover an adaption of working hours.

Article 2 of the UNCRPD prescribes a broad definition of the concept of reasonable accommodation which is defined as '*necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'.*

Thus under the Directive that concept must be understood as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers.

'Patterns of working time' must be understood as the rhythm or speed at which the work is done; it cannot be ruled out that a reduction in working hours may be accommodation measures referred to in Article 5 of the Directive. It is for the national court to assess whether a reduction in working hours as an accommodation measure represents a disproportionate burden on employers.

Question 4(a)

The CJEU concluded that the provision in Danish law permitting dismissal in the circumstances described in question 4(a) is only precluded so far as it constituted discrimination within the meaning of the Directive. It did not constitute direct discrimination, as those who are ill, but not disabled, might also be dismissed under it. However, the court went on to state that a worker with a disability is more exposed to the risk of application of the shortened notice period than a worker without a disability as they have the additional risk of an illness connected with his or her disability. Thus the provision was liable to place disabled workers at a disadvantage and so to bring about a difference of treatment indirectly based on disability within the meaning of Article 2(2)(b) of the Directive. It was for the referring court to determine whether the provision in the Danish legislation, as well as pursuing a legitimate aim, did not go beyond what is necessary to achieve that aim.

Question 4(b)

So far as question 4(b) was concerned, the court held that the Directive must be interpreted as precluding national legislation under which an employer can terminate the employment contract with a reduced period of notice if the disabled worker concerned has been absent because of illness, with his salary being paid for 120 days during the pervious 12 months, where those absences are the consequence of the employer's failure to take the appropriate measures in accordance with the obligation to provide reasonable accommodation under Article 5 of the Directive.

Comment

This case is significant for not only the reference to the UNCRPD, which is rapidly finding its way into the domestic and European legal order, but also for reinforcing that it is the effect of an impairment upon an individual's professional life which is important. This may mean that the guidance on the definition of impairment in the UK needs to be revisited. The case has already had an impact on our case law – see, for example, the EAT decision of *Sobhi v Commissioner of Police for the Metropolis* [UKEAT/0518/12/BA] where the EAT held that incident specific amnesia (recollection of a conviction) was sufficient to have an adverse effect on day-to-day activities.

Catherine Casserley
Cloisters

Decision on judges' pensions highlights objective justification defence

O'Brien v MOJ [2013] UKSC 6, [2013] ICR 499, February 6, 2013

Facts

Mr O'Brien (OB) is a retired judge who has been fighting since his retirement in 2005 for his entitlement to a judicial pension. As all judges are excluded from the protection of the Part-Time Workers Regulations 2000 (PTWR) by virtue of Regulation 17, OB brought a claim against the Ministry of Justice (MOJ) relying upon the Part-Time Workers Directive 97/81/EC (PTWD) to argue that he was entitled to a pension. Regulation 17 of the PTWR states:'*These Regulations do not apply to any individual in his capacity as the holder of a judicial office if he is remunerated on a daily fee-paid basis'.*

Supreme Court

By the time the case reached the SC in November 2012 there were two key issues for determination on liability:

- were part-time fee-paid judges, such as Recorders, 'workers' within the PTWD?
- if so, was it unlawful for the PTWR to exclude Recorders from access to the Judicial Pension Scheme (JPS)?

A preliminary SC judgment ruling that part-time judges were part-time workers had been handed down in July 2012 after the earlier ruling of the CJEU in OB's favour.

The 2012 finding by the SC that *'judicial office partook of most of the characteristics of employment'* was developed in February 2013 in Lord Hope's judgment.

The CJEU had decided that Recorders were in an employment relationship within the meaning of the Framework Agreement on Part-Time Work. Thus they had to be treated as 'workers' under the PTWR, rather than persons who were truly 'self-employed'.

The MOJ had tried to argue that Recorders were free agents able to work as and when they chose, who were not subject to direction or control over the decisions that they took in the performance of the responsibilities of their office. The SC found the fact of judicial independence did not deprive Recorders of the protection against discrimination that the PTWD and the Framework Agreement was designed to provide.

In contrast to the MOJ's stance, the SC ruled that Recorders were expected to observe the terms and conditions of their appointment, and that they could have been disciplined if they had failed to do so. That historically judges had always been office-holders did not make a difference to the above analysis. An expansive approach to the question of worker status was foreshadowed in *Perceval Perceval-Price v Department of Economic Development* [2000] IRLR 380 and continued in *Percy v Church of Scotland Board of National Mission* [2006] IRLR 195 HL.[1]

Objective justification (OJ)

The SC decided that the correct test to use for assessing OJ was that used in para 64 of CJEU judgment in *O'Brien*: *'. . . the concept 'objective grounds' . . . requires the unequal treatment at issue to respond to a genuine need, be appropriate for achieving the objective pursued and be necessary for that purpose.'*

The two key parts of the OJ debate centred on ex post facto justification and 'costs plus'.

Ex post facto justification

The MOJ only set out a justification for Regulation 17 PTWR in 2012. This was a difficulty in their defence, as whilst this did not preclude them from **now** advancing a justification for maintaining their policy, the actual reason relied on back in 2000 when the PTWR came into force was to save cost. This could not constitute justification.

The other difficulties with retrospective justification were identified by the SC as being:

- a court /tribunal was likely to treat with greater respect a justification for a policy which was carefully thought through by reference to relevant principles at the time when it was adopted;
- proportionality difficulties arose since the alternatives were not examined nor was relevant evidence gathered;
- a legitimate aim must **in fact** be pursued by the measure in question.

Purported aims

Three inter-related aims were relied upon by the MOJ:

1. 'fairness' in distribution of state resources that are available to fund judicial pensions;
2. attracting a sufficiently high number of good quality candidates to salaried judicial office;

1. Note that this trend was not followed in *Preston (formerly Moore) v President of the Methodist Conference* [2013] UKSC 29 SC, where the majority of the SC found that a Methodist minister was not an employee for constructive dismissal purposes. No finding was made on her worker status.

3. keeping the cost of judicial pensions within limits which are affordable and sustainable.

The fairness argument suggested there were alternative opportunities available to part-timers, but denied to full-timers, to make provision for their retirement; and further that a greater contribution was made by full-timers to the working of the justice system. The MOJ said: *'The full-timers need them [pensions] and the part-timers do not.'*

The SC roundly rejected the fairness defence relying on the *pro rata* principle. Recorders were paid an equivalent daily rate *(pro rata temporis)* to the salary of full-time circuit judges, but without the pension element in the package. Secondly it was unjustifiable to separate out the pension element in the remuneration package and refuse to apply the *pro rata temporis* principle to it. Thirdly the 'need' argument was rejected as there were no precise, concrete or transparent criteria to support it.

So the SC said: '*Some part-timers will need this provision as much as, if not more than, some of the full-timers. On examination, this objective amounts to nothing more than a blanket discrimination between the different classes of worker, which would undermine the basic principle of the PTWD.'*

Next the SC found that the MOJ had failed to demonstrate that the class of fee-paid part-timers made a lesser contribution to the justice system than their comparators. Again this was blanket discrimination between two classes of workers rather than a precise means of justifying different treatment.

The MOJ had failed to appreciate the benefits to its system in having a cadre of fee-paid part-timers who were flexibly deployed to meet changing demands. Instead, decided the SC, a proper approach to differential contributions was to make special payments for extra responsibilities. This is an important conclusion which will be extremely useful in future discrimination cases.

Turning to recruitment arguments, the MOJ failed to show that denying pensions to Recorders increased the attractions of full-time appointment. Whilst it was accepted that promoting a high quality judicial system **was** a legitimate aim, this applied as much to part-timers as to full-timers.

So *O'Brien* makes retrospective justification more difficult and also reinforces the need for 'means' to relate precisely to 'aims', which themselves have to be transparent.

Costs plus

This was the first time the SC had examined 'costs plus'. The CJEU had said at [66] *'It must be recalled that budgetary considerations cannot justify discrimination'*.

The SC found that depriving part-time Recorders of pensions was in reality discriminating against part-time workers in order to save money. The following statement by Lady Hale will be apt for many 'cuts' cases going forward, in this particular financial climate:

> *Of course there is not a bottomless fund of public money available. Of course we are currently living in very difficult times. But the fundamental principles of equal treatment cannot depend upon how much money happens to be available in the public coffers at any one particular time or upon how the state chooses to allocate the funds available between the various responsibilities it undertakes. That argument would not avail a private employer and it should not avail the state in its capacity as an employer. Even supposing that direct sex discrimination were justifiable, it would not be legitimate to pay women judges less than men judges on the basis that this would cost less, that more money would then be available to attract the best male candidates, or even on the basis that most women need less than most men. [74]*

The SC did not comment on the CA *Woodcock v Cumbria Primary Care Trust* decision (which was decided before the CJEU judgment in *O'Brien*) but the general view is that *Woodcock* was very much a case on its own particular facts. [See Briefing 640]

Implications

So where are the 8,000 other part-time judges left following this decision? The SC concluded that *'Although this case is concerned only with the case of a recorder, it seems unlikely that the Ministry's argument could be put any higher than it has been'.* There will be further worker and objective justification arguments to come, but not for most legal part-time judges, such as employment or immigration judges. Meanwhile Recorders are awaiting the determination of OB's remedy hearing which is ongoing.

On a wider scale where are we left with 'costs plus' in the future? The fact that a social policy aim is affected by budgetary considerations does not invalidate it, if it is otherwise justified. But it is usually difficult to avoid infecting the non-costs element with budgetary considerations. Whilst member states have the autonomy to decide what they will spend upon their areas of social policy, the spending choices made within that system must be '*consistent with the principles of equal treatment and non-discrimination.'* [Paragraph 69 of the SC judgment]

Rachel Crasnow
Cloisters

Reasonable adjustments by police when dealing with the public

ZH v Commissioner of Police for the Metropolis [2013] EWCA Civ 69, [2013] EqLR 363, February 14, 2013

Facts

ZH is a severely autistic, epileptic young man who suffers from learning disabilities and cannot communicate through speech. The claim centres around a visit to a swimming pool by ZH and four other pupils, conducted by their school. The purpose of the visit was only 'familiarisation', not to swim or be in close proximity to the water.

During the visit ZH, who was 16 years of age, broke away from the group and made his way to the poolside. Once there, he became fixated by the water. One of the classroom assistants tried to distract ZH by offering him crisps but he did not touch ZH, knowing that if he did so, the boy was likely to react adversely.

After around 30 minutes, with ZH still next to the pool, the manager decided to call the police. When two police officers arrived, one spoke to the classroom assistant present, but only to take his name. The officer was informed that ZH was autistic. One officer then lightly touched ZH on his back which was the catalyst for him jumping into the pool.

Once in the pool, ZH appeared to be enjoying himself. The lifeguards also entered the pool and tried to encourage ZH to move towards the shallow end. Three more police officers then arrived and forcibly removed ZH from the pool. ZH's carers were trying to calm ZH down at this stage, but were told by the police to move away. Two pairs of handcuffs and a set of leg restraints were applied to ZH. Soaking wet, he was then taken out of the building and placed in a cage in the rear of a police van.

As a result of the incident, ZH suffered post-traumatic stress disorder and an exacerbation of his epileptic seizures.

High Court

ZH brought several claims: battery, assault, false imprisonment, discrimination by a public authority in carrying out its functions (including a failure to make reasonable adjustments) and breaches of the Human Rights Act 1998 (HRA) (including the prohibitions on inhuman or degrading treatment, the right to liberty and the right to respect for private life).

Sir Robert Nelson, giving judgment in the Queen's Bench Division of the High Court, found that all the claims were successful. [See Briefing 646 on the HC judgment]

In relation to assault and battery, it was found that although the police officers considered that ZH was in potential danger and that they were acting to protect him, it was not a reasonable belief that there was an emergency that required them to act before consulting ZH's carers.

The reasonable adjustments claim was also successful. The practice or procedure was the use of force against ZH and his detention – the usual methods of control and restrain would have an adverse effect on ZH because of his disabilities. The reasonable adjustments that were identified included:

- the police trying to find out from the carers the best way to communicate with ZH
- discussing with the carers a plan for approaching ZH
- allowing ZH an opportunity to communicate with his carers
- giving ZH the opportunity to move away from the poolside at his own pace and
- recognising that the use of force should be a last resort.

The HRA claims were also successful. The concluding remarks of the judgment are worth quoting in full:

> *Whilst I am clear in my conclusion that the case against the police is established, I am equally clear in concluding that no one involved was at any time acting in an ill intentioned way towards a disabled person.*
>
> *The case highlights the need for there to be an awareness of the disability of autism within the public services. It is to be hoped that this sad case will help bring that about.*

Court of Appeal

The lead judgment, given by the Master of the Rolls, was a resounding confirmation of the HC judgment. The CA said that they recognised that 'operational discretion' was important to the police, and that this importance had been recognised by ECtHR. However, it is not sacrosanct, and cannot be invoked in circumstances where two police officers behaved as if they were faced with an emergency when there was no emergency. Given

676 the lack of any immediate danger, there was no reason why ZH's carers could not have been consulted.

Analysis

The comprehensive rejection of the police authority's arguments on appeal show how powerful the duty to make reasonable adjustments can be.

The reach of the duty is far wider than the workplace, and still applies in circumstances where decisions have to be made quickly and under pressure, just as they apply in more relaxed circumstances, when a fuller and more leisurely consideration can be given to the issues.

The real lesson here is about how fact-sensitive the duty to make reasonable adjustments is. The shape of the duty will only be known when there is enough information, and in the case of ZH, that information was only going to be obtained by the police asking questions of ZH's carers, rather than making assumptions.

Practical implications

The implication at the level of the HC was that public authorities needed to have a bespoke attitude in adapting processes to a disabled person's needs.

At the CA this lesson has been magnified – there will be emergency situations where the duty to make reasonable adjustments becomes more restricted in scope, but a situation does not become an emergency simply by the public authority declaring that it is the case. The fact that the courts have shown how willing they are to examine the scope of reasonable adjustments in every individual cases should mean that disabled people's needs feature at every level of decision-making, and not just those (such as the workplace) where we are more familiar with seeing adjustments being made.

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677 Briefing 677

Important case explores the limits of free speech

Core Issues Trust v Transport for London Case No: CO/7284/2012 [2013] EWHC 651, [2013] EqLR 508, March 22, 2013

Implications of case

This important case explores the limits of free speech about sexual orientation in public spaces. It shows how far the recognition of the rights of the LGBT community has come as a result of the Equality Act 2010 (EA) and how the court will enforce decisions of public authorities to protect them from unavoidable abuse.

Facts

The Core Issues Trust (CIT), a Christian charity which describes its aim as *'supporting men and women with homosexual issues who voluntarily seek change in sexual* preference and expression' sought judicial review of the decision by Transport for London (TfL) on April 12, 2012 to ban an advert from London buses.

The advert was placed by Anglican Mainstream, a Christian charity, on behalf of CIT; the wording of the proposed advertisement was: 'NOT GAY! EX-GAY, POST-GAY AND PROUD. GET OVER IT!'

It was intended as a response to another advert placed on London buses earlier in 2012 by Stonewall, the gay rights campaign group, which had the wording 'SOME PEOPLE ARE GAY. GET OVER IT!'

The order for the advert was referred to TfL's Committee of Advertising Practice (the committee) for its advice. The committee said that it appeared to comply with the British Code of Advertising and the advert was accepted. Shortly afterwards *the Guardian* ran an article on its website saying that this advert was due to appear on the TfL buses. This article triggered a number of complaints to TfL which then decided not to proceed with the advert. TfL concluded that it fell within the following categories set out in paragraph 3.1 of its advertising policy:

- *The advertisement is likely to cause widespread or serious offence to members of the public on account of the nature of the product or service being advertised the wording or design of the advertisement or by way of inference; and/or*
- *The advertisement contains images or messages which relate to matters of public controversy and sensitivity.*

CIT was not consulted or informed before this decision was reached nor was it given an opportunity to modify the wording so as to make it acceptable (as provided for in the committee's code).

CIT sought a judicial review of this decision. CIT considered that TfL's decision was irrational and breached its right to freedom of expression under Article 10 of the European Convention of Human Rights (ECHR). The trust also claimed that TfL had discriminated, contrary to Article 14 of the ECHR against ex-gays who, it contended, were a protected class under the EA falling within the definition of sexual orientation in s12.

High Court

The HC considered that TfL's decision-making process had been unsatisfactory, procedurally unfair, in breach of its own procedures, and demonstrated a failure to consider the relevant issues. Nevertheless the HC dismissed the application for a judicial review.

The court noted that consideration of Article 10 requires a staged approach:

a) a claimant must establish that his right to freedom of expression has been interfered with by a public authority;
b) the public authority must establish that the interference is:
   i) prescribed by law;
   ii) in furtherance of a legitimate aim; and
   iii) necessary in a democratic society i.e. justified by a 'pressing social need' and proportionate to the legitimate aim relied upon.

Thus the actions of TfL engaged Article 10(1) as an issue of freedom of expression did arise. However, the advertising policy adopted by TfL was justified because:

- it was prescribed by law and met the requirements for legal certainty;
- its aim to protect the rights and freedoms of others who might be adversely affected, namely gay people who might be offended or upset, or who might be prejudiced, by the promotion of an anti-gay message, was legitimate;
- it was necessary in a democratic society as the proposed advertisement *'encourages discrimination, and does not foster good relations or tackle prejudice or promote understanding, between those with same-sex sexual orientation and those who do not.'*

Consequently, this interference was not in breach of Article 10(2) as it was a justified and proportionate restriction on the right to freedom of expression, in pursuit of the legitimate aim of protecting the rights of others.

TfL had not discriminated against CIT contrary to Article 14 and CIT was not protected under the EA because it was not an individual with sexual orientation and the individuals it represented (ex-gays) were not a protected category of persons under the Act.

Article 9 was not engaged because CIT was not an individual, religious community or church and in seeking to express its perspective on a moral/sexual issue it was not manifesting a religious belief.

Additionally, under the EA, TfL was a public body and was under a duty to eliminate discrimination and harassment against gays and to 'foster good relations' 'tackle prejudice' and 'promote understanding' between those who have same-sex orientation and those who do not. Displaying the advertisement would have been in breach of its equality duty.

TfL's decision was not irrational and the claim for judicial review was dismissed.

Gay Moon
Equality consultant

Briefing 678

Landmark judgment on EA's anticipatory duty and ESA assessment process

MM & DM v Secretary of State for Work & Pensions [2013] UKUT 0260 (AAC), May 22, 2013

Implications for practitioners

This case represents a victory for disabled groups who have long been arguing that the Employment and Support Allowance (ESA) process is seriously deficient. It is also a landmark judgment on the Equality Act 2010's (EA) anticipatory duty to provide reasonable adjustments for disabled people to public functions (and will also apply to goods facilities and services).

Facts

The applicants, with the support of charity interveners, argued that where a claimant for ESA has mental health problems (MHP), those assessing entitlement should request further medical evidence from doctors and mental health services who had worked with the claimant. Failure to do so was, they argued, a breach of the duty to make reasonable adjustments under the EA.

Upper Tribunal

The claim for judicial review had been transferred to the Upper Tribunal (Administrative Appeals Chamber) when permission was granted to bring the claim, on the basis that it would be advantageous for the case to be heard by a tribunal with experience of the benefits system.

The Upper Tribunal made a declaration that the first limb of the statutory test set by s20(3) EA was satisfied on the basis that a significant number of claimants with MHPs are put at a substantial disadvantage and/or suffer an unreasonably adverse experience by current assessment practice. It adjourned the case for further investigation into what steps it would be reasonable for the government to take to avoid this disadvantage.

The case is particularly interesting in that, for the first time, a claim used the duty to make reasonable adjustments to challenge a generic feature of government policy.

Ss20 and 21 of the EA create the reasonable adjustment duty and Schedule 2 sets out how it operates in relation to services and public functions.

S20 sets out the three categories of requirements that constitute the reasonable adjustment duty, of which the first is relevant to this claim: a requirement, where a provision, criterion or practice puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled, to take reasonable steps to avoid the disadvantage. The judgement ruled that this comparison was between a group sharing broadly the same impairment compared either with non disabled persons or, as in this case, where the service is targeted purely at disabled people, the comparison can be with people with different disabilities. The substantial disadvantage suffered by a broad group of claimants with mental and cognitive impairments (the fact that all people with such diagnoses did not experience was held to be no bar to success) was the result of a failure by DWP to proactively seek further medical evidence, in too many situations relying on the claimant to do this, even where their impairment made this particularly difficult.

S21 states:

(1) a failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) a provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

It is the drafting of Schedule 2 that makes the reasonable adjustment duty anticipatory in relation to a generic group of disabled people. Specifically, paragraph 2 states: *'For the purposes of this paragraph, the reference in section 20(3), (4) or (5) to a disabled person is to disabled persons generally.'* (This distinguishes the operation of the reasonable adjustment duty from that which applies in relation to work under Schedule 8)

The significance of this is explained in the Statutory Code of Practice on Services, Public Functions and Associations: the adjustment duty is *'anticipatory in the sense that it requires consideration of, and action in relation to, barriers that impede people with one or more kinds of disability prior to an individual disabled person seeking to use the service, avail themselves of a function or participate in the activities of an association. Service providers should therefore not wait until a disabled person wants to use a service that they provide before they give consideration to their duty to make reasonable adjustments. They should anticipate the requirements of disabled people and the adjustments that may have to be made for them.'* (Paragraphs 7. 20 and 21)

This approach gives the adjustment duty in relation to services and public functions a broader reach than the equivalent duty in respect of work, where the duty on applies to individuals

To bring a claim a disabled claimant has to establish:

- a generic test: that there is a failure to comply with the requirements set out in s20 and so a failure to comply with a duty to make reasonable adjustments to disabled people (or a section of disabled people), and then
- an individual test: that there was a breach of that duty in relation to him or her.

The first stage itself has two limbs:

- a comparative test by reference to two classes of persons to establish the existence of a substantial disadvantage; so it is a generic test, and
- the second is directed to whether there are steps that it is reasonable to take to avoid that disadvantage, and so a disadvantage founded on a generic test.

A key issue in the case was whether or not the applicants were entitled to seek a declaration on the basis that the DWP had failed to make reasonable adjustments to the generic group of people with mental health problems – as opposed to the tribunal only being capable of making rulings in relation to the specific circumstances of the individual claimants. DWP relied on s21(3)'s provision

that failure to comply with the generic anticipatory duty was 'not actionable'. However the judgment concluded that this was *'free standing and could found declaratory relief.'*

S113(2) of the EA states that whilst proceedings relating to a contravention of the Act must be brought *'in accordance with this Part'*, this does not prevent a claim for judicial review. The tribunal also took a purposive approach, asserting that, if the DWP's argument is right, a claim for judicial review relating to the duty to make reasonable adjustments could only be brought by an individual who could satisfy s21(2). The judgment comments that *'this would be a very strange result and one that would fly in the face of the underlying purpose of the Equality Act 2010'*.

Comment

The government has indicated it intends to appeal against the decision. If this judgment is upheld it will significantly strengthen the practical ability of disability groups to challenge unreasonable barriers to access in relation to both public functions and services more generally.

Caroline Gooding
Legal consultant

Briefing 679

Obesity and disability

Walker v Sita Information Networking Computing Ltd [2013] UKEAT/0097/12/KN [2013] EqLR 476, February 8, 2013

Introduction

Mr Walker (W), an obese man suffering from various symptoms, appealed against the judgment of the ET which had found that he was not disabled. The key factor in the ET's decision was its finding that there was no identifiable cause of W's impairment. The EAT's decision addressed the correct approach to establishing disability and set out guidance as to obesity and disability.

Facts

W weighed 21 and a half stone and suffered from a large number of health problems including asthma, diabetes, high blood pressure, chronic fatigue syndrome, bowel and stomach problems, anxiety and depression. These conditions gave rise to various symptoms including various pains, bowel symptoms, shortness of breath, constant fatigue and poor concentration, the genuineness of which were not challenged by the respondent.

The occupational health specialist who examined W for the purposes of the claim said there was no evidence of any pathological cause of W's conditions, apart from, to some degree, his obesity. W claimed he was disabled for the purposes of the Disability Discrimination Act 1995 (DDA).

Employment Tribunal

The ET accepted that W suffered from functional overlay compounded by obesity. However, because there was no identifiable physical or mental cause for his symptoms, the ET found that W was not disabled for the purposes of the DDA.

Employment Appeal Tribunal

W appealed against the ET's findings as to disability. In a relatively short judgment, the EAT accepted the majority of the submissions made on W's behalf. The EAT stated that when considering whether an individual is disabled a tribunal must concentrate on whether he has a physical or mental impairment. As a result of the unchallenged evidence before the ET, the EAT found that on any view, W was substantially impaired and had been for a long time.

The EAT then went on to criticise the ET's approach of considering it necessary to identify a physical or mental cause in order to establish a physical or mental impairment. The EAT confirmed:

> *The question is whether the individual has the impairment, and whether the impairment may properly be described as physical or mental. The Act does not require a focus upon the cause of that impairment.*

The EAT did recognise that a lack of an apparent cause may be of significance, but this is of evidential, rather than legal, significance:

> *Where an individual presents as if disabled, but there is no recognised cause of that disability, it is open to a tribunal to conclude that he does not genuinely suffer from it. That is a judgment made on the whole of the*

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evidence. The effect of it, if made, is that there is no such impairment as the litigant claims.

This, however, did not impact on W as there was no challenge to his account of what he suffered.

It was also put forward on W's behalf that obesity is a clinically recognised condition which in itself would justify a finding of disability. The EAT disagreed, but did say that whilst obesity does not render a person disabled of itself:

> *…it may make it more likely that someone is disabled. Therefore on an evidential basis it may permit a tribunal more readily to conclude that the individual before them does indeed suffer from an impairment, or for that matter, a condition such as diabetes, if that diabetes is such as to have a substantial effect upon normal day to day activities. It may also be relevant evidentially to ask whether the obesity might affect the length of time for which any impairment was to be suffered.*

This did not affect the main findings of the EAT, and as a result of the above the EAT allowed the appeal and substituted a finding that W was disabled for the purposes of the DDA.

Implications for practitioners

This is a helpful judgment insofar as the EAT clearly confirms that it is not a legal requirement to identify the cause of an impairment in order to establish that an individual is disabled. However, claimant practitioners will need to be aware that if an impairment does lack an identifiable cause, this could create evidential problems if the existence of the impairment is in dispute.

This case will also be of interest to those advising in relation to obese employees regardless of which side they act for. Whilst the EAT found that obesity itself is not a disability, it did say that obesity may make it more likely that someone is disabled. As such, whilst it should not be assumed all obese employees are disabled (which itself could damage the employment relationship) obesity mixed with other health issues should prompt consideration as to whether an employee is disabled.

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680 Briefing 680

Victimisation – false complaints and the 'reason why' revisited

Woodhouse v West North West Homes Leeds Ltd UKEAT/0007/13, June 5, 2013

Implications for practitioners

This is an important case limiting the effect of the EAT's decision in *Martin v Devonshires Solicitors* [2011] ICR 352 EAT. [See Briefing 608]

It is a welcome reminder to ETs that the *Martin* case was *'exceptional'* and should not be used as a *'template'*. The EAT recognised the concept of victimisation was at risk of being seriously undermined if the irrationality and multiplicity of grievances could lead, as a matter of routine, to the case being placed outside the scope of s27 of the Equality Act 2010 (EA).

Facts

Mr Woodhouse (W) worked for West North West Homes Leeds Limited (WNWHL) as project manager. Throughout a 5-year period W brought 10 grievances and 9 claims to the ET complaining of direct discrimination, harassment and victimisation. His initial complaint concerned an allegation of racial harassment against a colleague, which WNWHL rejected on the basis that there had been no race discrimination.

W brought a further grievance about the inadequate investigation into his complaint of race discrimination which was also rejected by WNWHL. Thereafter, and following a period of absence from work due to workplace stress, W raised a series of complaints of race discrimination and victimisation in relation to a number of matters and the manner his complaints of race discrimination/victimisation were investigated.

Matters came to a head in October 2010 when W was placed on 'precautionary suspension' and invited to a disciplinary hearing. The purpose of the hearing was to consider whether a *'productive employment relationship was sustainable in light of, amongst other things, the numerous allegations he had made about numerous staff members over the last 5 years'*. W was suspended prior to October 1, 2010 (pre-EA) and dismissed with 12 weeks notice on October 2, 2010 (post-EA). On November 1, 2010 W submitted his ninth complaint to the ET.

Employment Tribunal

W brought complaints of direct race discrimination, harassment, victimisation and unfair dismissal. He contended that a work colleague subjected him to race

specific harassment and thereafter WNWHL victimised him contrary to s2 of the Race Relations Act 1976 (RRA) and/or s27 of the EA when he brought a series of grievances complaining of race discrimination, by failing to investigate his grievances properly and subsequently suspending and dismissing him on October 2, 2010.

As to W's first grievance, the ET made findings of racial harassment against WNWHL and held the conduct of the investigation and the conclusions reached, namely that there had been no discrimination by reason of race, itself amounted to direct race discrimination. The ET also found WNWHL's investigation into W's second grievance inadequate to the extent that the burden of proof shifted calling for an explanation from WNWHL, which was found to be unsatisfactory. His remaining claims concerning grievances 3-10 were rejected out of hand.

As to his dismissal, the ET found that the act of suspending and subsequent dismissal called for an explanation by WNWHL, but were satisfied by the respondent's witnesses' evidence when they said it was the extent of W's loss of trust and confidence in WNWHL which concerned them. The ET was persuaded that WNWHL's decision was not tainted by race discrimination or victimisation.

The ET held, dismissing W's complaints of direct race discrimination and victimisation, that another employee who had made non-racial grievances would have been treated in the same way. It concluded that the case was on 'all fours' with Martin in that:

- *there was a repeated pattern of grievances, which were thoroughly and exhaustively investigated and objectively demonstrated to be false;*
- *each time W's grievances were resolved, it fuelled his belief (accepted by all parties as sincere), that managers and the organisation itself were racist in treating him that way;*
- *those grievances led to W becoming obsessed in pursuing further complaints.*

The ET accepted that continuing his employment would result in further allegations in future, themselves damaging and taking considerable time, a risk WNWHL was entitled to guard against by dismissing W.

W's complaint for unfair dismissal was upheld on the basis that WNWHL had not acted reasonably in dismissing him because they failed to warn him or give him sufficient opportunity to 'mend his ways'. His award was reduced by a 90% *Polkey* deduction.

Employment Appeal Tribunal,

Appealing the ET's decision to dismiss his claim for unlawful victimisation, W argued, amongst other things, that the ET failed to ask itself the right question: namely whether the dismissal had been because W had done a protected act. Instead it sought to distinguish how WNWHL had reacted to W by comparison with how it might have reacted to a hypothetical comparator, which obscured any analysis of the relative weight to be given to the protected act as a cause of the detriment.

It was argued in the alternative, that in so far as s27 EA requires a comparative exercise to be conducted, the ET, by holding that another employee who made non-racial grievances would have been treated the same, identified the wrong comparator. W argued that the comparator should be someone who had not complained.

The EAT, in allowing W's appeal, substituted a finding of victimisation on the basis that the ET wrongly concluded that the evidence amounted to 'genuinely separable features'. The EAT confirmed that 'less favourable' treatment was no longer a component of victimisation under the EA. Having found that bad faith was not in issue between the parties, HHJ Hand QC referred to Mr Justice Underhill's (as he then was) note of caution set out in paragraph 22 of *Martin*:

> *Of course such a line of argument is capable of abuse. Employees who bring complaints often do so in ways that are, viewed objectively, unreasonable. It would certainly be contrary to the policy of the anti-victimisation provisions if employers were able to take steps against employees simply because in making a complaint they had, say, used intemperate language or made inaccurate statements. An employer who purports to object to 'ordinary' un-reasonable behaviour of that kind should be treated as objecting to the complaint itself, and we would expect tribunals to be slow to recognise a distinction between the complaint and the way it is made save in clear cases.*

The real question as far as HHJ Hand QC was concerned was whether the features in the instant case could properly be said to be 'genuinely separable' in the *Martin* sense? In answer to this question he resoundingly said:

> *In our judgment, Martin cannot be regarded as some sort of template into which the facts of cases of alleged victimisation can be fitted. There are no doubt exceptional cases where protected acts have not caused the dismissal or whatever other detriment is at issue, Martin is an example of such an exceptional case but we emphasised the word exceptional; very few cases will have*

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grievances based on paranoid delusions about events that never happened…sIt is a slippery slope towards neutering the concept of victimisation if the irrationality and multiplicity of grievance can lead, as a mater of routine, to the case being placed outside the scope of s27 of the EA. All the more so when the origin of the problems established, as here, to have been a real, as opposed to imaginary, race discrimination.

Comment

This is an important decision providing clarification as to when a feature is 'genuinely separable' from the protected act and warns ETs of the danger of victimisation cases being seriously undermined. This case is a helpful reminder that ETs should not permit a respondent to illegitimately advance the distinction identified by the EAT in *Martin* as an instrument of oppression. Practitioners must remain alive to such attempts.

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681 Briefing 681

Post-employment victimisation, race discrimination and migrant workers

Rowstock Ltd v Jessemey UKEAT/0112/12 [2013] EqLR 438, March 5, 2013; *Taiwo v Olaigbe* UKEAT/0285/12 [2013] EqLR 446, November 27, 2012; *Akwiwu v Onu* UKEAT/0285/12 [2013] EqLR 577, May 1, 2013

Implications for practitioners

This case note looks at three recent cases which give rise to two points of considerable public importance due to be considered by the CA later this year namely: (1) whether post-employment victimisation is prohibited under the Equality Act 2010 (EA) and (2) in what circumstances will the systematic mistreatment of migrant workers constitute unlawful race discrimination.

Rowstock Ltd v Jessemey

Facts

Rowstock was the first case to be decided. Its facts are straightforward. Mr Jessemey (J) commenced employment with Rowstock Ltd (R) as a car body repairer in March 2008. He was 65 years old when he was informed that R did not wish to employ men over 65. On January 10, 2011, J was dismissed on grounds of retirement. He was paid 2 weeks wages in lieu of notice and did not return to the workplace. On February 8, 2011 R gave a poor reference about J to an employment agency from which he was seeking work.

Employment Tribunal

J brought claims for unfair dismissal and direct age discrimination under s98ZG of the Employment Rights Act 1996 (ERA) and s13 of the EA respectively. He brought a further claim for unlawful victimisation under s27 EA for the unfavourable reference. R relied upon 'retirement age' as the principal reason for J's dismissal and conceded that it had not (by reason of alleged ignorance) complied with the statutory retirement procedures contained in paragraph 2 of Schedule 6 to the Employment Equality (Age) Regulations 2006. R's case was that J would have lost his job some six months after his dismissal even if lawful procedures had been followed.

The ET held that the dismissal was contrary to s98ZG and was manifestly and automatically unfair. It rejected the argument that the company could have dismissed in any event. It was satisfied that dismissal amounted to an act of unlawful discrimination and made an award for injury to feelings.

However, the ET rejected the victimisation claim, holding that s108(7) EA does not provide a remedy for post-employment victimisation.

The problem

Victimisation is defined at s27 EA, and is prohibited in the course of employment by s39(4) of that act. However, the EA does not deal at all with victimisation which takes place after the employment relationship has ended. S108(1) prohibits post-employment

discrimination; and s108(2) prohibits post-employment harassment but the statute is silent on post-employment victimisation.

The prohibition of post-employment victimisation existed prior to the EA. The HL in *Rhys-Harper v Relaxion Group* [2003] IRLR 484 found that this was what parliament had intended in the Race Relations Act 1976 (RRA), and it was 'palpably absurd' to suggest otherwise.

The European directives are also quite clear that post-employment victimisation should be unlawful. However, the EA is not specifically a consolidating statute and the issue was not debated by parliament so, despite the position in case law and in Europe, a lacuna was created by the EA. It was into that lacuna that J's victimisation claim fell.

Taiwo v Olaigbe and Onu v Akwiwu

Both Taiwo and Onu are Nigerian women who were employed under migrant domestic worker visas in the UK. Both claimed:

- breach of National Minimum Wage Act 1999;
- unlawful deduction from wages under the Working Time Regulations 1998;
- failure to provide written particulars of employment under s1 of the ERA;
- direct and indirect discrimination on grounds of race/national origin under s13 and 19 EA (and/or s1(1)(a) and s1(1A) RRA; and
- post-employment victimisation under s27 EA.

Facts in *Taiwo*

Taiwo (T) was employed by Mr and Mrs Olaigbe (the Os) as a live-in nanny/housekeeper working under a migrant worker's visa from February 2010 until January 2011, when T fled their employment alleging abusive treatment by them.

T's claims concerning matters that occurred during her employment were heard on October 3 and 4, and on November 17, 18 and 23, 2012. During the adjournment, the Os sent a file to the UK Border Agency requesting that they revisit T's immigration status. Accordingly, T brought a further claim for unlawful victimisation under s27 EA in respect of the Os' post-employment actions.

Employment Tribunal

T argued that she was mistreated because she was on a migrant worker's visa, and this was indissociably linked to her national origin and amounted to direct discrimination. T contended that a domestic worker of British national origin would not have been subjected to the same immigration controls and would not have been under the control of his or her employer in terms of whether their visa was renewed or not.

The ET found that:

- T was systematically and callously mistreated, not on grounds of her racial/national origin, but because she was vulnerable;
- her vulnerability arose because she was a migrant worker subject to immigration control and from a poor background;
- the appropriate comparator was someone who was not Nigerian but was a migrant worker whose employment and residence in the UK was governed by immigration control and by the employment relationship itself;
- T was treated as she was because she was a vulnerable migrant worker who was reliant on the Os for employment and UK residence;
- whilst being a migrant worker was part of the background of her vulnerability, in itself, it was not a reason for the mistreatment.

Accordingly, her claim for direct discrimination was dismissed.

The ET dismissed T's indirect discrimination claim because neither party gave any evidence as to whether persons of Nigerian origin in the UK workforce were more likely to be employed on a migrant domestic worker's visa compared with persons of non-Nigerian origin in the UK workforce.

In relation to the victimisation claim, the matter was listed for a pre-hearing review to determine, amongst other things, whether the ET had jurisdiction to hear T's claims for post-employment victimisation. The Os argued that the claim should be struck out because s108(7) of the EA does not provide any protection for post-employment victimisation.

The ET applied a purposive construction and held that post-employment victimisation was intended to be protected under the EA. The ET considered the HL's decision in *Rhys-Harper* and linked appeals, paragraph 10.62 of the EHRC Code of Practice, and a statement by the Government Equalities Office (GEO) in correspondence with the Discrimination Law Association in which the GEO stated that '*protection from post-employment victimisation is maintained under the Act read together with the relevant case law (as underpinned by EU Directives, including the Equal Treatment Directive)*'.

Facts in *Onu*

Ms Onu (O) worked with Mr and Mrs Akwiwu (the As) as a domestic worker. The As applied for a worker's visa for O, who arrived in the UK on July 29, 2008. On four or five occasions she returned to Lagos and then came back to London. While in London her passport was held by the As.

The working relationship deteriorated in December 2009 when O informed the As that she no longer wished to continue in their employment. The As were angered by this and matters came to a head in late June 2010 when O was verbally abused by the As. On June 28, 2010, O retrieved her passport, some of her possessions and fled, never to return.

O brought claims for unfair dismissal, direct race discrimination and failure to pay the national minimum wage. Six months later (post the EA) Mr A telephoned O's sister in Nigeria stating that O had sued him and that *'if she thought things would end there she was wrong'* and that *'she would suffer for it'*. He asked the sister to get O to stop. As a result O brought a further claim of victimisation.

Employment Tribunal

The ET found that the As had treated O less favourably because she was a migrant worker and upheld her claim for direct discrimination on the basis that the burden of proof had shifted to the As and no sufficient explanation was forthcoming. It upheld her claim for harassment under s26 EA on the same basis.

Her claim for indirect race discrimination was dismissed as it was pleaded in the alternative.

The ET dismissed O's victimisation claim on the basis that O had not established that the reason for the threats was because she had commenced proceedings under the EA/RRA. It did not consider the relevance of the victimisation being post- employment.

The As appealed against the finding of direct race discrimination and harassment and O cross appealed against the finding that she had not been indirectly discriminated against nor unlawfully victimised.

Employment Appeal Tribunal

EAT's different approaches to post-employment victimisation

Rowstock:

In *Rowstock* the EAT applied a literal approach to the EA, stating that it could only apply the legislation as drafted. The Explanatory Note's different approaches between post-employment victimisation on the one hand, and post-employment harassment and discrimination on the other, were used as evidence that the lacuna was intentional, if unexplained.

The judgment acknowledged the pre-EA case law and the requirements of the directives but noted that it was not the role of the EAT to address the situation. Accordingly, the EA was to be taken as read, notwithstanding any error or 'blunder' inherent in its drafting.

The EAT found that, despite the UK's obligations under the directives, parliament had legislated deliberately when it drafted s108(7): *'But conduct is not a contravention of this section in so far as it also amounts to victimisation'*; it concluded that post-employment victimisation was now outside the jurisdiction of the ET.

Onu:

In *Onu* HHJ Langstaff, president of the EAT, considered the literal approach adopted in *Rowstock* as a starting point, and then discussed the hypothetical scenarios that would result in this approach debarring otherwise meritorious claims against plainly unlawful conduct. The judgment also introduced s108(7) into its discussion at an early stage. The implications of the opaque drafting of the section are therefore given proper consideration, which perhaps is missing from the discussion in *Rowstock*:

> *A claim for harassment (H) is worth £30,000 because it relates to three acts, each of which is worth (£10,000). The effect of s108 (7) is that if one of those acts is* ***also*** *an act of victimisation (V), the claim for (H) could only be for £20,000, because one of the acts which would otherwise have been compensated would be taken out of consideration altogether.… It would be perverse to hold that the worse the conduct might be described as being (consisting now of two wrongs – (H) and (V) – arguably being done, rather than one alone (H)), the less the compensation overall should be.*
>
> *Next, since what is being considered is conduct in respect of relationships which have ended, it is difficult to see why that conduct should 'also' amount to victimisation if victimisation were not litigable post-termination. The word 'also' is of significance. It indicates that conduct can amount to victimisation in respect of a relationship which has ended.* [Paragraphs 79 & 80]

Discussion of the word 'also' in s108(7) continues: 'also' meaning 'as well as' (in which case, the respondents' representative accepted, his clients can be answerable to a claim of victimisation); or 'also' meaning 'furthermore' (in which case they cannot).

The EAT concluded the former, and therefore that post-employment victimisation is prohibited under the EA. The logic of s108(7) lies in preventing double recovery, not in preventing post-employment victimisation.

EAT's approach to direct and indirect race discrimination

Both T and O appealed to the EAT and their cases were heard by the same constituted EAT. The central grounds of appeal common to both cases were:

- The ET was wrong not to follow *Mehmet v Aduma* UKEAT/0573/06 and *R (on the application of E) v JFS Governing Body* [2010] 2 AC 728 UKSC; [see Briefing 555]
- The ET was wrong to conclude that the hypothetical possibility, that a Ugandan worker might have been equally mistreated, precluded the race discrimination claim from succeeding;
- The ET erred in determining that immigration status was dissociable from nationality or national origin;
- In the alternative, the ET erred when determining the claims for indirect discrimination by failing to recognise that the provision, criterion or practice (PCP) of mistreating migrant domestic workers was inherently liable to put non-British nationals at a particular disadvantage.

In both T's and O's cases the EAT rejected the argument that they were treated less favourably because, as migrant workers, they were vulnerable, and that being a migrant worker was indissociably linked with race. The EAT found that being a migrant worker was a 'background circumstance' and not a cause of the treatment. Accordingly, it found that the ET had erred.

The EAT held that the ET adopted the wrong approach to indirect discrimination as it had not identified the PCP it thought might have been applied; the conclusion that there was no such discrimination was unsustainable. The EAT held that the PCP of the *'treatment of the claimant as a migrant worker'* or the *'mistreatment of migrant domestic workers'* were unacceptable because *'the definition of this PCP inevitably answers the question to be posed'*. The EAT was persuaded that the group arguably contained disproportionately more of those who would be disadvantaged because of their vulnerability than those who were not working on such a visa; however, it held that this was no basis for remission in this case in which no tenable PCP had been proposed or argued.

Comment

It seems likely that the CA will confirm the prohibition against post-employment victimisation. The alternative is that parliament legislated in breach of the EC Equal Treatment Directive (No.76/207) when enacting the EA. It would perhaps be preferable for the s108 confusion to be cleared up by means of amending regulation from parliament, rather than relying on the judiciary to resolve the matter. In the meantime, practitioners should pursue post-employment victimisation claims and, if necessary, request that they are stayed pending the outcome of the combined appeals.

Less clear is the extent to which the CA will entertain the vexed question of how one defines the appropriate comparator and whether vulnerability and migrant status are merely part of the background circumstance, as suggested by the EAT, or 'indissociably' linked to one's racial identity. The issue in respect of indirect discrimination will be whether the PCP of mistreating workers perceived to be vulnerable would put non-British workers at a particular disadvantage compared with British workers because non-British workers are not subject to migration control – a tool which the employers could use to enforce the PCP more effectively in both T's and O's cases.

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Reasonable adjustment duty applies despite EA exclusion

Campbell v Thomas Cook Tour Operations Ltd Sheffield County Court, Case No.1SE 09178, May 23, 2013

Implications for practitioners

This judgment is noteworthy in that it represents a successful claim of discrimination under the Equality Act 2010 (EA) in respect of a service delivered overseas. A key issue in this case was whether liability for such discrimination is excluded by operation of certain provisions of Regulation (EC) No 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air (the EU Regulation).

Facts

Ms Campbell (C) has arthritis and is prone to migraines. She bought a winter holiday in Tunisia from Thomas Cook (TC) commencing on January 2, 2011. Civil disturbances led C to cut short her holiday, and she was taken to Monastir Airport on January 15, 2011 but she was not able to board a flight that day and so was taken back to the hotel. On January 16, 2011 C was once more taken to Monastir Airport. This time she did board a flight and flew home.

The claim arose from incidents on January 15th at Monastir airport which was very crowded, with long queues at the check-in desks. Despite the fact that C's resort representative, Mr Ben, was present at the airport and had express knowledge of C's mobility difficulties and in spite of her repeated requests, nothing was done to try to alleviate C's pain and discomfort arising from standing in queues.

After 4 hours all passengers were returned to their hotel. C felt exhausted, her legs and hips were aching and she felt a migraine developing. She awoke the next day with a severe headache and throughout the day had bouts of projectile vomiting.

County Court

The judgment accepted that C's condition was precipitated by the arthritic pain she had suffered on the previous day. It was accepted that TC was a service provider within s29 of the EA and as such was under a duty not to discriminate against C, including a duty to make reasonable adjustments by the provision of auxiliary aids, such as provision of some form of seating or seeking to facilitate her check-in procedure or both. It was held that TC had clearly failed to provide such auxiliary aids and thus discriminated against C.

Schedule 3 to the EA provides that s29 does not apply to anything governed by the EU Regulation. In this case, the key question was whether the obligations placed upon TC by the EU Regulation displaced the reasonable adjustment duties under the EA.

The provisions of the EU Regulation apply to disabled persons and persons with reduced mobility, using or intending to use commercial passenger air services on departure from, on transit through, or on arrival at an airport, when the airport is situated within the EU (article 1.2). A more restricted range of provisions (articles 3, 4 and 10 of the EU Regulation) apply to passengers departing from an airport situated in a third country to an airport situated within the EU, if the operating carrier is a Community air carrier (article 1.3).

Given that Monastir Airport was not in a member state, but that C was travelling to a member state airport and being carried by a Community air carrier, article 1.3 applied to the situation in this case.

However, it was ruled that articles 3 and 4 of the EU Regulation do not relate to airport services. Those articles are directed to the issue of ensuring that a person who is disabled is permitted to board an aircraft. When the airport of departure is in a third country, the only bodies subject to the duty are a Community air carrier (and its agent) and a tour operator. Article 10 requires the Community air carrier to provide, without additional charge, the assistance specified in Annex ll. Such assistance is limited to matters connected with the flight itself and items of luggage which must be carried. It does not cover matters concerning the provision at the airport of departure of such auxiliary aids as a chair. Nor does it cover the check-in procedures at the airport.

The EU Regulation's provisions were therefore held not to apply, and C's claim of discrimination was upheld. The award for injury to feelings was a substantial one (£7,500) reflecting the humiliation and pain suffered by C as a result of what the judgment described as the failure to act *'with common humanity towards a person in obvious difficulty and distress.'*

Caroline Gooding Legal consultant

Enterprise and Regulatory Reform Act 2013

The Enterprise and Regulatory Reform Act (the Act) received Royal Assent on April 25, 2013. The Act will amend the powers of the EHRC. While it does not remove the EHRC's general duty, the Act:

- removes the EHRC's duty to promote good relations between groups;
- removes its power to monitor crime related to protected groups;
- removes its power to offer conciliation services for discrimination disputes;
- changes the requirement to monitor progress on changes in society so that the EHRC only has to report every 5 years (previously it was every 3 years).

Among other reforms, the Act will:

- remove the 2 year qualification period for protection from unfair dismissal where the main reason for dismissal is the employee's political opinions or affiliation; [due to be implmented on June 25, 2013; this implements the EctHR decision in *Redfearn v UK*, see Briefing 664];
- remove provisions outlawing third party harassment under the EA; [due to be implemented on October 1, 2013];
- repeal the provisions on the questionnaire procedure whereby an individual can apply to obtain information about discrimination from the employer or alleged discriminator and use this as evidence in proceedings; [due to be implemented on April 6, 2014];
- make provisions to ensure that caste is included as an aspect of race discrimination; [no implementation date, see Briefing 673].

Public Sector Equality Duty Review

As we reported in the March 2013 edition of *Briefings* the government is currently carrying out a review of the public sector equality duty to see if it is 'operating as intended'. The DLA made a substantial response to this review which is available on our website.

The current position is that the steering committee of the review has received evidence and is considering its draft report to the government. The committee proposes to deliver its draft report to the government at the end of June so that ministers can consider it and report on the outcome either before the close of the current parliamentary session or in the autumn. There are serious concerns that ministers will seek to water down or even disapply the duty.

On June 11, 2013 Sandra Osborne MP, chair of the All Party Group on Equalities in the House of Commons tabled an Early Day Motion (EDM) in support of the PSED. This states:

> *That this House notes the review of the Public Sector Equality Duty now in progress; believes the Duty, albeit only recently introduced, has considerable potential to achieve the goals of eliminating all forms of discrimination, harassment or victimisation, advancing equality of opportunity and fostering good relations; recognises the value placed on the Duty by public bodies, non-governmental organisations and others; and calls on Ministers to reaffirm their commitment to the Duty and to supporting public bodies in implementing it effectively.*

You can see the EDM here:
http://www.parliament.uk/edm/2012-13/1279.

The DLA believes it is important to demonstrate that you care about the equality duty. There are a number of actions that you can take to help to protect it.

1. Urge any sympathetic MPs with whom you are in contact to sign the EDM;
2. Sign a Race on the Agenda petition urging the government to protect the equality duty. The petition, which was launched to coincide with the anniversary of the murder of Stephen Lawrence, can be signed at: http://www.change.org/en-GB/petitions/the-british-government-keep-the-public-sector-equality-duty-2;
3. Email, tweet and/or facebook the link to the petition to your friends and colleagues asking them to sign the petition; if you are tweeting, use the hashtag #savetheequalityduty;
4. Mention the petition in any upcoming newsletters or e-bulletins that you may be sending out.

DLA Autumn conference

The DLA's annual conference will be entitled: **Equality 2015: setting the agenda**. The conference will be held at a date in October or November in a London venue to be decided.

Employment Tribunals – new rules of procedure

The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 will come into force on July 29, 2013. The regulations implement the Underhill reforms and will apply to claims where the respondent receives a copy of the claim form from the tribunal on or after that date.

Key changes include:

- fees for ET and EAT claims;
- initial sifts of all claim and response forms to determine whether there is an arguable claim and defence;
- changes to the rules on default judgments;
- combining case management discussions and pre-hearing reviews;
- changes to the costs rules.

See Briefing 660 for a detailed explanation of how the new rules will affect procedures in employment discrimination claims, and for practical suggestions to deal with these changes.

UNISON challenge on ET and EAT fees

UNISON announced on June 17, 2013 that it is applying for a judicial review of the MOJ's decision to bring in fees for claims in the ET and EAT. UNISON will argue that the application of fees is contrary to EU law as it *'will make it virtually impossible for a worker to exercise their rights under employment law. The new fee regime will impose fees which will often be greater than the expected compensation, even if the claims were successful'*. The union will also argue that there has been no proper public sector equality duty assessment of the potential adverse effect of introducing fees on individuals with protected characteristics, and that the policy will have a disproportionate adverse impact on women.

EU challenge UK's 'right to reside' test

The European Commission has decided to refer the UK to the CJEU because, in breach of EU law, it fails to apply the 'habitual residence' test to EU nationals who reside in the UK and claim social security benefits. Instead, the UK applies a so-called 'right to reside' test, as a result of which EU citizens cannot receive specific social security benefits to which they are entitled under EU law. The Commission set out its reasons for seeking a ruling from the CJEU on May 31, 2013; these are available at www.europa.eu.

According to the Commission EU law requires that the social security benefits in question have to be granted to people from other EU member states on condition that their place of habitual residence is in the UK. This condition, and the criteria for the determination of habitual residence, were unanimously reaffirmed by member states at EU level in 2009 as part of an update of EU rules on social security coordination (Regulation EC/987/2009 laying down the implementing rules for Regulation EC/883/2004 on the coordination of social security systems). According to these criteria, in order to be considered genuinely habitually resident in a member state, a person has to show that his or her habitual centre of interest is located there.

However the UK imposes an additional 'right to reside' test as an extra condition for entitlement to benefits. UK nationals meet this requirement automatically on the basis of their British citizenship, whereas other EU nationals have to meet additional conditions in order to pass this 'right to reside' test. This means that the UK discriminates unfairly against nationals from other member states. This contravenes EU rules on the coordination of social security systems which outlaw direct and indirect discrimination in the field of access to social security benefits.

The UK social security benefits concerned are:

- child benefit
- child tax credit
- jobseeker's allowance (income-based)
- state pension credit
- employment and support allowance (income-related)

In welcoming the decision to refer the UK to the CJEU, Migrants' Rights Network rejected the DWP's argument that the issues in question concerned the provision of benefits to people who had neither worked in the UK nor had any other means to support themselves.

In MRN's view the issue at stake is whether or not the UK authorities should be allowed to discriminate against EU nationals who had worked and paid taxes and who were habitually resident in Britain. The case is unlikely to be heard by the CJEU until after the next general election in 2015.

Consultation on legal aid

The DLA has responded to the MOJ's consultation *Transforming Legal Aid*. We believe that the right to legal representation paid for by the state where necessary is fundamental to a fair, just and humane democratic society. The consultation raises issues which are critical to the maintenance, or otherwise, of the rule of law and access to justice. The DLA is concerned that in putting together its proposals the MOJ has failed to give substantive consideration to its duty to have due regard to the need to advance equality of opportunity. Among our specific concerns regarding civil legal aid is the proposal to exclude legal aid for prisoners on matters such as their treatment in prison, discrimination, or cases concerning their categorisation, segregation, or resettlement. We also strongly object to the proposed UK residence test for eligibility for legal aid which, with the envisaged assessment process, will make it increasingly difficult for any person without UK nationality to obtain legal advice regardless of their period of lawful residence in the UK. The proposal that legal aid will not be available for applications for permission for a judicial review, affecting applications to challenge the PSED etc., will limit this process to those who can afford it. It will exclude many people from asking the courts to scrutinize public authorities' decisions on issues which directly affect their lives on matters relating to their housing, health, personal liberty, family life, rights to remain in the UK, etc. We are also concerned that the criminal legal aid proposal for price-based competition and denial of choice of lawyer will lead to the likely demise of most black, Asian and minority ethnic firms and other small firms providing specialist criminal law advice to children and young people, and people with mental health and learning disabilities. A copy of the DLA's response to the consultation is available on our website. The government will respond to the consultation in autumn 2013.

Cases update

Ladele and others v UK

The ECtHR has denied a request by Ms Ladele, Ms Chaplin and Mr McFarlane for its ruling to be referred for reconsideration to the Grand Chamber. In January 2013, the court decided that the UK had not violated the rights of the three practicing Christians under Article 9 (freedom of religion) and Article 14 (prohibition of discrimination).

Ms Chaplin, a nurse, claimed her rights had been violated when her employer prohibited her from wearing a small cross visibly at work. Mr McFarlane and Ms Ladele, a relationship advisor and a civil registrar respectively, claimed that they were unfairly dismissed when they refused to provide their services to same-sex couples. [See Briefing 663]

Seldon v Clarkson Wright & Jakes

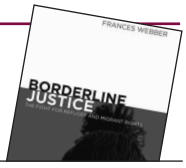
The ET has rejected an age discrimination claim by Mr Seldon (S) against his former firm Clarkson Wright & Jakes. S was forced to retire at age 65 in line with the firm's partnership agreement. S's claim was rejected by the CA and the SC and had been referred back to the ET to consider whether the retirement age of 65 was justified. [See Briefings 578 and 636]

The ET held that the retirement age struck a proportionate balance between the needs of the firm and the individual partner taking into account *'that the partners had consented to the mandatory retirement age and that the default retirement age at the relevant time was 65'*.

Book review

Borderline Justice – the Fight for Refugee and Migrant Rights

Pluto Press, ISBN: 9780745331638, 265pp, £17.50 paperback, £58.50 hardback



In response to heated public debate about Romanian and Bulgarian immigration, the coalition government has now pledged to introduce a series of tough legal and policy measures reducing the entitlement of some migrants to welfare benefits, housing and healthcare in the near future. In many respects these proposals follow a well-trodden path for politicians in dealing with immigration, combining emotive language with policy proposals likely to invite discrimination against ethnic minorities and foreign nationals.

Frances Webber's new book *Borderline Justice – The Fight for Refugee and Migrant Rights* forcefully makes a case for how law and policy affecting migrants and asylum seekers over the past thirty years has frequently been driven by a xenophobic agenda.

She draws on decades of experience as an immigration

and human rights barrister as well as her long-standing involvement with the Institute of Race Relations to give a lively account of legal and policy developments in this area from the perspective of a lawyer on the frontline. Her book also lays out the importance of this work for the wider fight against discrimination on grounds of colour, national or ethnic origins and nationality in the UK.

Borderline Justice certainly has plenty of ground to cover here. UK asylum and immigration law has rapidly developed since the 1971 Immigration Act, with the introduction of increasingly restrictive measures aimed at 'managing' (often 'reducing') immigration. Webber offers a particularly comprehensive account of developments in UK asylum policy since 1997, which she refers to as *'informed by a non-colour-coded but just as virulent "xeno-racism"'*. From the early 1990s, the Labour government, keen to address – and be seen to address – the rising numbers of asylum seekers in the UK, introduced an arsenal of legal and policy measures aimed at restricting their entry and stay in the UK.

Tougher border controls, return agreements with third countries and operation of carrier sanctions were quickly introduced, and criticized for preventing many asylum seekers from seeking protection. The design and implementation of these measures was on occasion overtly discriminatory, driven by the desire to reduce numbers of asylum-seekers entering the UK.

Once in the UK, asylum seekers were subject to a system which was permeated by a general 'culture of disbelief' regarding their protection claims, and within which decision-making among civil servants and judges all too often appeared to be informed by assumptions based on applicants' race, ethnicity or nationality. Just two out of 1,495 asylum applications made by Nigerian nationals in 1995 were successful, for example, despite the ongoing violent suppression of dissent in the country known to be underway following the coup of General Abacha in 1993. Limited access to the welfare state, accommodation and cash support cemented the marginalisation of many asylum-seekers, some of whom experienced harassment and exclusion within their local communities.

The significance of race within the design and implementation of immigration policy has extended well beyond the asylum system. Webber gives a particularly strong account of the ways in which subsequent family migration policies have been accused of racial discrimination since the 1970s when immigration officers were found to be 'virginity-testing' Indian brides arriving at Heathrow airport.

Perhaps the most explicitly discriminatory piece of policy in this area was overturned by Labour in 1997 – the 'primary purpose rule' – which required that migrants coming to join their UK-resident spouses demonstrate that their primary objective was not to settle here. The operational assumption of officials was that applicants were seeking to come to the UK for immigration purposes, particularly if they were arranged marriages. As such, spouses from the Asian sub-continent were often subject to humiliating questioning and particularly high refusal rates.

The divisive impacts of ongoing efforts to clamp down on irregular migration are also described here. Webber reports the spread of in-country immigration controls, including the introduction of ID cards for migrants (but not British citizens), the development of document checks and immigration raids in workplaces, and efforts to engage NHS and welfare staff in the business of monitoring immigration status. These are presented as symptoms of a state control system with the underlying aim of embedding discrimination and suspicion within everyday interactions between citizens and non-citizens.

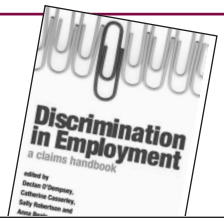
Lawyers representing migrant and asylum seeking clients in the UK, such as Webber, have often found themselves fighting both for the interests of their clients and to combat the exercise of discrimination within the system. However, challenges to 'institutional racism' exhibited in the exercise of immigration controls have been limited since the amendments to the Race Relations Act in 2000 which banned race discrimination across the public sector, included an exception (replicated in the Equality Act 2010) which permits immigration officials to discriminate on grounds of nationality or ethnicity.

Overall, the account given in *Borderline Justice* of the past thirty years is of an ongoing battle against the inherent xenophobia often displayed within the workings of the immigration system towards non-citizens. As Webber states from the outset: *'The hallmarks of a free society… have all been called into question, have had to be fought for repeatedly and are increasingly fragile and conditional when applied to migrants and asylum seekers.'*

All this has particular relevance for today's public debate and policy agenda on immigration, which remains as highly charged as ever. *Borderline Justice* is a useful and timely reminder that those without citizenship are particularly prone to be subject to policies which purport to be 'acceptable discrimination', and is a call to challenge this by advocating equality, humanity and dignity, regardless of citizenship or immigration status.

Discrimination in Employment: a claims handbook

Declan O'Dempsey, Catherine Casserley, Sally Robertson, Anna Beale; Legal Action Group, £55



This book describes itself as a comprehensive yet accessible and practical guide covering every aspect of workplace discrimination. It has been edited and authored by barristers from Cloisters, a leading employment, discrimination and equality chambers, who have kindly agreed to donate their royalties to the Discrimination Law Association. It is dedicated to the memory of James Casserley and Clare Cozens.

The law is stated as at February 28, 2013 and Robin Allen QC writes in the foreword that as the law in this area changes frequently, the website www.cloisters.com will carry developments to keep readers up to date. This is welcome news as there will certainly be a number of changes to employment law over the coming months, particularly as relevant sections of the Enterprise and Regulatory Reform Act 2013 are brought into force. The book also refers to aspects of the law that will be changing in the not too distant future, including the removal of the statutory questionnaire procedure under s138 of the Equality Act 2010 (EA).

Each of the book's 19 detailed chapters begins with a 'key points' section and many end with a 'practical points' summary. The topics covered include protected characteristics, direct discrimination, indirect discrimination, disability discrimination, harassment, victimisation, maternity and parental rights, discrimination in employment, occupational requirements and other exceptions related to work, equality of terms, pensions, the public sector equality duty, practice and procedure, remedies, international sources of discrimination law, and others.

Perhaps as expected, the bulk of the statutory references in this book are to the EA and there are frequent references to the Equality and Human Rights Commission's Employment Statutory Code of Practice. The footnotes include numerous case references and there is a table of cases at the start of the book, as well as a table of statutes, a table of statutory instruments, and a table of European and international legislation.

The book's first chapter explains all of the nine protected characteristics under the EA, including age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. This chapter goes into particular detail about the definition of disability, which is useful.

Gender equality is a recurring theme in the book and as well as a comprehensive chapter on equal pay claims, which includes two practical flowcharts to assist claimants and advisers, much of the chapter on pensions is devoted to examining gender equality. It is helpful that a chapter on maternity and parental rights has been included, although some important issues such as flexible working are not covered in detail and anyone bringing or advising on a flexible working claim would be better placed consulting a specialist book focusing specifically on maternity and parental rights at work.

The focus of this book is on information relevant for claimants and their advisors but the avoiding discrimination in recruitment and positive action chapters would be of particular use to employers and their employment law advisors.

A number of useful templates are appended, including a claim form, particulars of claim, a list of issues, and a schedule of loss; these will be of particular use to readers who are representing themselves in employment tribunal proceedings and who may not be as familiar with these types of documents as employment law practitioners. The chapter on practice and procedure and the chapter on remedies are also likely to be useful for litigants in person and/or people who are considering whether to bring a discrimination claim.

This book is reasonably priced and would make a good companion to other useful books published by the Legal Action Group, including *Employment law: an adviser's handbook* by Tamara Lewis and *Employment Tribunal Claims: tactics and precedents* by Michael Reed and Naomi Cunningham. Helpfully, it is available as an eBook at www.lag.org.uk/ebooks. Essential reading for judges, lay tribunal members, lawyers and advisers, trade union representatives, human resources and equality officers in public, private and voluntary sector organisations, the book will be an accessible and much-appreciated source of information.

Briefings

Abbreviations

CA	Court of Appeal
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CERD	UN Committee on the Elimination of all Forms of Racial Discrimination
CJEU	Court of Justice of the European Union
DDA	Disability Discrimination Act 1995
DLA	Discrimination Law Association
DWP	Department of Work and Pensions
EA	Equality Act 2010
EAT	Employment Appeal Tribunal
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EDM	Early day motion
EHRC	Equality and Human Rights Commission
EHRR	European Human Rights Reports
EqLR	Equality Law Reports
ERA	Employment Rights Act 1996
ESA	Employment and Support Allowance
ET	Employment Tribunal
EU	European Union
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
GEO	Government Equalities Office
HC	High Court
HHJ	His/Her Honour Justice
HL	House of Lords
HRA	Human Rights Act 1998
ICR	Industrial Case Reports
ILO	International Labour Organisation
IRLR	Industrial Relations Law Report
LGBT	Lesbian, gay, bisexual and transgendered
LJ	Lord Justice
LLP	Legal liability partnership
MHP	Mental health problems
MOJ	Ministry of Justice
MP	Member of Parliament
MRN	Migrant Rights Network
NHS	National Health Service
NIESR	National Institute of Economic and Social Research
OJ	Objective justification
PCP	Provision, criterion or practice
PTWD	Part-Time Workers Directive 97/81/EC
PTWR	Part-Time Workers Regulations 2000
PSED	Public sector equality duty
QC	Queen's Counsel
RRA	Race Relations Act 1976
SC	Supreme Court
TUC	Trades Union Congress
UDHR	Universal Declaration on Human Rights
UNCRPD	UN Convention on the Rights of Persons with Disabilities
UKUT (ACC)	UK Upper Tribunal (Administrative Appeals Chamber)
WLR	Weekly Law Reports