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Editorial *Standing firm on protecting workers' rights*

The gaps in protection for workers' equality rights continue to demand legislative attention and commitment – a major theme in this edition of *Briefings*.

Stephen Heath, a lawyer with Mind, describes the continued lack of adequate protection for people with mental health problems in the workplace, despite the apparent protection of the Equality Act 2010. The 21st century duties on employers to ensure the health and safety of their employees are derived from 19th century legislation. Existing health and safety law, designed to tackle the physical dangers of Victorian coalmines and factories, still focuses mainly on physical rather than mental health. Our modern view of mental health has helped us understand the range and impact of this often-invisible issue – around one in four people in Britain suffer from mental health problems.

The anti-discrimination provisions of the Equality Act 2010 are the only remaining mechanism to protect the rights of workers with mental health problems, and are frequently found to be inadequate by claimants and representatives. The 'horrendous ordeal' of attending and arguing one's case at tribunal is a huge barrier to challenging workplace discrimination but it is not the only one. Many sufferers do not disclose their illness to their employers because of a culture of fear and silence and even if they do, employers lack understanding of the sorts of reasonable adjustments they could make to meet the needs of mentally ill employees. Requiring complainants to find the resources – emotional and physical as well as financial – to fight for their rights at tribunals raises serious questions about whether the EA is an adequate mechanism for vulnerable workers to find justice.

Although the Conservative election manifesto made ambitious commitments to *'transform how mental health is regarded in the workplace…and to extend Equalities Act protections against discrimination to mental health conditions that are episodic and fluctuating'*, these goals were not reflected in the Queen's Speech. It is in everyone's interest to have workplaces where people with mental health problems are supported and protected. The DLA will work with our members, our networks and law-makers to ensure the government delivers on its commitments and improves both the legal protections and the effectiveness and accessibility of the law for those with mental health disabilities.

In her article on intersectional discrimination, Professor Iyiola Solanke argues that the anti-discrimination legislation has failed to deal with the labour market experience of black women workers who are invisible in law because their labour market experiences cannot be attributed to either race or gender alone. Given that black women experience disproportionately high unemployment rates (13% compared to 5% for white women in 2013/14), she makes the case for an 'anti-stigma' principle to be actively researched and developed alongside current regional and European human rights frameworks.

Reviewing the development of vicarious liability under common law, Jason Galbraith-Marten QC and Schona Jolly QC highlight gaps in the EA which does not impose liability on employers for discrimination against a volunteer or discrimination committed by third parties or employees of sub-contractors, among others.

All these gaps leave vulnerable or disadvantaged workers either with impossible hurdles to overcome in accessing justice or no justice at all. It is hard to see where in the current political climate the will and commitment for legislative improvements can be found. Our politicians are focused on their political survival; our minimum demands in the time consuming, energy-sapping Brexit process will be to maintain current equality and human rights protections and to ensure that the UK's new regime will not further diminish workers' rights and equality protections as we move towards an increasingly deregulated labour market.

The DLA will continue to fight for the rights of workers to be protected from abuse and will continually make the case, as the trade union movement does, that strong employment protection for workers goes hand in hand with successful economies.

Geraldine Scullion
Editor

Please see page 35 for list of abbreviations

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Mental health in the workplace

Stephen Heath, a lawyer with Mind,[1] reviews the extent of legal protection for workers with mental health problems under the health and safety legislation and the anti-discrimination protections under the Equality Act 2010. He highlights their shortcomings and makes a case for an anticipatory duty and mandatory positive action as well as cultural change to protect workers with mental health problems.

Introduction

I started this article intending to focus on a pledge in the 2017 Conservative Party manifesto which promised to *'reform outdated laws to ensure that those with mental illness are treated fairly and employers fulfil their responsibilities effectively'*. By the time I finished the article it is not known how much of this manifesto (which incidentally mentioned the term 'mental health' more often than 'strong and stable') can be delivered. We at Mind will be urging whoever governs Britain to do what is necessary to ensure people with mental health problems are protected in the workplace and allowed to flourish. This article examines whether the current law is up to this task.

What laws currently protect those with mental health problems in the workplace?

Currently there is no legislation that specifically relates to mental health in the workplace. However, there are safeguards relating to workers' 'health' provided by health and safety legislation and there are the disability discrimination provisions of the Equality Act 2010 (EA).

Health and safety legislation

The Health and Safety at Work etc. Act 1974 (HSWA) emerged from a hotch-potch of legislation enacted since the 19th century. The old legislation had often been sector specific, addressing the particular hazards to be found in mining, railways, factories and shipping.

The HSWA sets out a general framework of statutory duties, provides for the making of regulations and the publishing of codes of practice, and contains provisions relating to enforcement.

Under s2(1) of the HSWA there is a general duty on every employer *'to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees'*. This general duty extends in particular to *'the provision and maintenance of a working environment for his employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work'* s2(1)(e).

1. Mind – the mental health charity, https://www.mind.org.uk/

The Management of Health and Safety at Work Regulations 1999 (the MHSW Regs) create further obligations on employers, such as, for example, to assess and review risks to the health and safety of their employees while they are at work, to provide health and safety information and training to employees, to prepare a written health and safety policy etc.

The HSWA provides for the appointment of inspectors who have powers to serve improvement and prohibition notices and also creates various offences. The obligations under the HSWA and subordinate regulations do not themselves give rise to civil liability.

The Equality Act 2010

The gateway to all protection under the EA for someone with mental health problems is that they have a disability as defined in s6 which encompasses a physical or mental impairment.[2] If an individual is disabled, and they are in 'employment' as set out in s83, then, (as with all the other protected characteristics) it is unlawful for their employer to discriminate against them directly (s13) or indirectly (s19) or to harass (s26) or victimise them (s27). Additionally there are two further disability-specific forms of discrimination, discrimination arising from disability (s15) and discrimination by failure to make reasonable adjustments (ss 20 and 21).

What are the shortcomings of the existing law?

It is a matter of concern that the health and safety legislation and the EA are effectively the only shows in town when it comes to protecting the interests of people with mental health problems in the workplace.

Health and safety legislation

It is right to say that while the HSWA refers to 'health' in neutral terms, the history of the legislation and the way it is enforced, points to the fact that the focus is very largely on physical health rather than mental health. For

2. The only exception to this is that s13 allows for discrimination against an individual perceived wrongly to have a disability, or discrimination against a non-disabled individual because of an association with disability.

example, the Health and Safety Executive's (HSE) website's guidance section has a drop-down menu of all the topics on which the HSE has published guidance or other written resources. There are around 80 such topics covering matters such as asbestos, metalworking fluids and Legionnaires Disease. Only one of these topics remotely relates to anything approaching mental health, and that is 'stress'.

Perhaps true to its roots in tackling the physical dangers of the Victorian coalmines and factories, it is understood, anecdotally, that the HSE has in recent years only taken out a handful of enforcement actions in relation to stress, compared to many in regard to physical injury.

Stress is by no means the only mental health related issue in the work place. While stress can cause mental health problems, and make existing problems worse, it is only one factor. To protect people with mental health problems in the workplace and help them thrive we need more than a general duty to ensure workers' health supplemented by the obligations under the MHSW Regs.

The Equality Act 2010

It could be argued that there is a problem with the fundamental nature of the approach of British equality law.

Formal versus substantive equality approach

There are different approaches to achieving equality. One has at its centre the concept of 'formal equality' which is based on the equal treatment principle. The argument is that the best way of achieving equality is by treating everyone the same way. This has its superficial attractions, but this approach fails to take account of the realities of life as experienced by disadvantaged groups. If the playing field is not level, due to historic and/or systemic reasons, then treating all individuals the same will not result in equality.

The formal approach to equality underpins British anti-discrimination law. Looking at the employment rates for BME men compared to their white counterparts or the average hourly earnings of women compared to men, one might question how much progress has been made since the appearance of anti-discrimination legislation in the 1970s. In terms of disability, the National Equality Panel reported[3] in 2010 that:

> *Employment rates for disabled people are less than half those of non-disabled people and median hourly wages 20 per cent lower for men and 12 per cent lower for women. The disability employment 'penalty' has grown over the last quarter century, particularly for those with low or no qualifications.*

Most of the 'last quarter of a century' the report spoke of was while the Disability Discrimination Act 1995 (DDA) was in force.

The EHRC's April 2017 report *Being disabled in Britain: a journey less equal* points out that the proportion of disabled adults in employment stood at 47.6% in 2015/16 compared to that of non-disabled people (79.2%), **but that the gap had widened since 2010/11.**[4]

A contrasting approach to equality is the 'substantive approach'. This approach recognises that for a variety of reasons, including historical ones, certain disadvantaged groups merit preferential treatment in order to remedy past discrimination. Proactive measures are required to put members of disadvantaged groups in a position whereby they can take advantage of opportunities. Positive discrimination and positive or affirmative action are examples of the substantive approach. The approach is not without controversy – the notion of treating some groups more favourably than others is, for some, incompatible with the concept of equality.

Nonetheless, in terms of social progress the substantive approach has scored some successes. In Northern Ireland, Catholics had been historically under-represented in the workforce for generations. The Fair Employment (Northern Ireland) Act 1989 followed by the Fair Employment and Treatment (NI) Order 1998 aimed to address this with a series of proactive measures. Employers of more than 10 employees are required to register with the Equality Commission for Northern Ireland (ECNI) and to:

- Monitor the religious composition of the workforce and submit annual monitoring returns to the ECNI
- Review recruitment, training and promotion practices at least once every three years
- Take affirmative action[5] if fair participation is not being secured by members of the Protestant and Roman Catholic communities
- Set affirmative action goals.

Failure to comply with some of these duties is a criminal offence.

3. Report of the National Equality Panel: An Anatomy of Economic Inequality in the UK – Executive summary

4. https://www.equalityhumanrights.com/en/publication-download/being-disabled-britain-journey-less-equal

5. The Code defines this as *'action designed to secure fair participation in employment by member of the Protestant, or members of the Roman Catholic, community in Northern Ireland by means including*
- *the adoption of practices encouraging such participation, and*
- *the modification or abandonment of practices that have or may have the effect of restricting or discouraging such participation.'*

The ECNI's main duties include promoting affirmative action and equality, and working to eliminate discrimination. The Commission advises, on request, employers on their review of practice, and complainants who request help. It also has powers which include:

- Investigating employers at any time
- Issuing legally enforceable directions (including affirmative action measures) with specified goals and timetables
- Auditing employers' monitoring and review functions
- Supporting individuals bringing claims of religious discrimination to the Fair Employment Tribunal (FET)
- Concluding voluntary binding agreements and seeking written undertakings from employers following individuals bringing complaints to the FET.

Perhaps the most notable feature of the Northern Ireland experience of these provisions is its substantial and measurable success in increasing Roman Catholic representation in the workforce. In 2011 the ECNI reported: *'the aggregated Roman Catholic share of all monitored employment now stands at 46.3%...[which] reflects a consistent and gradual change, year-on-year, contributing to a rise of six percentage points in the Catholic share over the last decade'*.[6]

Positive action under the EA and the public sector equality duty (PSED)

S158 of the EA contains general positive action provisions which apply to all people, including employers, and relates to all protected characteristics. Under it, if an employer reasonably believes that a disabled person is suffering a disadvantage, or that he or she has different needs to others, or that disabled people were under-represented, then the section *'does not prohibit'* the employer from taking action which is a proportionate means of dealing with the difficulties.

S159 specifically relates to employers and, again, *'does not prohibit'* them from treating people with protected characteristics more favourably with respect to recruitment or promotion where it is reasonably believed that those people are disadvantaged or under-represented in the workforce. This action is only open to an employer if the 'protected' candidate is equally qualified to the non-protected candidate.

These two sections have the potential to help break down the disadvantage and under-representation of disabled people in the workplace. However, as the quoted words show, the provisions are entirely voluntary, totally unmonitored by a regulating body and lack all the mandatory features which made the Northern Ireland legislation effective.

The PSED contains mandatory requirements on public bodies to have 'due regard' to the need to eliminate discrimination, advance equality of opportunity and foster good relations. The provisions, of course, do not apply in respect of the 80% of the workforce that work in the private sector. For the 20% who do work in the public sector, a recent survey carried out by Mind would strongly suggest that the PSED has had no impact whatsoever on the working experience of those with mental health problems. Mind surveyed over 12,000 employees across the public and private sectors and found a higher prevalence of mental health problems in the public sector, as well as a lack of support available when people do speak up.[7]

A complaints-led process

Another feature of the EA and its predecessors is that the process for dealing with discrimination is reactive and 'complaints-led'. Unlike the Northern Ireland system, which set up an environment which obliged employers to take steps to address inequality, in Great Britain the onus is on the individual who is the victim of discrimination to make his or her own complaint.

The glacially slow progress towards equality under the equalities legislation in Great Britain may indicate that this process is not a good driver of social change. A complaints-led process is problematic for a number of reasons.

First, there are very few who do not find making a complaint a stressful experience. Without trying to create a hierarchy of disadvantage, this can be particularly difficult for someone with mental health problems.

Second, this process can generally only solve one problem at a time. If an employee brings his or her complaint to the ET, that tribunal can only adjudicate on the particular claim brought before it. This does nothing to address systemic equality issues within organisations. This is even more the case since the amendment of s124 of the EA, removing the power of the tribunal to make general recommendations to employers.

Also, the complaints-led process is inherently adversarial. A complaint of discrimination is often

6. A Profile of the Monitored Northern Ireland Workforce – Summary of Monitoring Returns 2011

7. https://www.mind.org.uk/news-campaigns/news/mind-reveals-shocking-differences-in-mental-health-support-for-public-private-sector-workers/#.WUOQl01K2M8

perceived by the complainant to be a nuclear option. It is one which many shy away from; and when it is deployed, it is received badly.

A complaint is not a first step on the road to finding a solution for the aggrieved individual but something to be defended and a source of conflict in itself. To an extent this problem is compounded by the fact that under s207A of the Trade Union and Labour Relations (Consolidation) Act 1992 a worker risks having any award for a subsequent ET complaint reduced if they fail to take out a grievance. This encourages the individual to go down what is very often an unproductive defensively geared process when a more mediation-focused approach would work better. Conflict can be the worst of ways of solving a problem.

Finally, there is some doubt as to whether anti-discrimination legislation is an effective way of overcoming the employment consequences of ill-health and disability. Clare Bambra and Daniel Pope sought to investigate how the DDA affected socioeconomic disparities in the employment rates of people with a limiting long-term illness (LLTI) or disability. In their article *What are the effects of anti-discriminatory legislation on the socioeconomic inequalities in the employment consequences of ill health and disability?* (Journal of Epidemiology & Community Health, BMJ Journals 2007), they reported that in 2005 the disparity of employment rates between disabled and non-disabled people had actually seemed to increase since the coming into force of the DDA.

They concluded that those who benefited the least were people in socio-economic classes III, IV and V. They pointed out that *'the emphasis in the legislation is very much on the individual person with a disability or an LLTI to assert their DDA employment rights in order to gain or retain employment. They are required to show that they are (1) disabled under the terms of the Act and (2) that they were discriminated against on this basis. It is highly possible that people in classes I and II are more aware and articulate about such rights'.*

The authors concluded: '*Our research suggests therefore that anti-discriminatory legislation, at least in the UK context, may not be the most effective way of overcoming the social consequences of ill health and disability, nor a particularly useful policy tool in terms of reducing inequalities. It seems likely that additional legislation, or concurrent public policy interventions such as the more active labour market programmes of Sweden are required if such inequalities are to be addressed in the near future.'*

Definition of disability

Mind is concerned that meeting the EA definition of 'disability' is another obstacle:

- There are inadequate protections more generally for people with mental health problems which fall below that threshold, and
- The definition of disability itself is problematic.

The definition is cumbersomely spread across the EA which is supplemented by subsidiary guidance. As the Select Committee on the Equality Act 2010 and Disability put it in their report *The Equality Act 2010: the impact on disabled people*:

> *Section 6(1) of the Act, which defines 'disability', is simple enough: "A person (P) has a disability if (a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities." But this is only the beginning. This subsection has to be read together with the rest of section 6; with the provisions of Schedule 1; with statutory Guidance issued by the Minister; with Regulations made by the Minister; and with a substantial and increasing body of case-law interpreting all of these.* [para 58]

An effective system of protection should be easily understood by employers and employees. At present many employees can be unsure whether they meet this definition and therefore qualify for any protection. This acts as a real barrier.

There is also a question of whether the definition is compliant with the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) which was ratified by the UK in 2008. The UNCRPD contains a non-exhaustive definition of disability in its preamble (e) and at Article 1.

Preamble (e):

> *Recognizing 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*

Article 1:

> *Persons with disabilities include 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.*

It is crystal clear here that the UNCRPD partial definition embraces the social concept of disability. The social concept of disability recognises that it is the barriers and attitudes in society which restrict a disabled person

more than their condition. A person with mental health problems is often less 'dis-abled' from doing a job by his or her condition than by the stigmatisation and discrimination that they encounter in the workplace.

The s6 EA definition of disability does not recognise the social component of disability. The result of this is that there is unwarranted focus on a person's impairment when considering whether or not they satisfy the definition of disability, rather than considering other relevant factors which are equally, or more, 'disabling'.

This approach is usually reflected in the ET when disability has not been conceded by the employer which often means an intrusive scrutiny on a claimant's medical history. Many readers will be aware of what an ordeal this usually is for the claimant.

Mind questions whether any definition of disability needs to include long-term as a requirement as it excludes some mental health conditions which may be severe but are short in duration. True, Article 1 UNCRPD refers to long-term impairments, but the text of Article 1 makes clear that persons with disabilities '**include**' individuals with such impairments. The duration of an impairment is often less significant than the stigma it generates and the barriers that this creates. When duration becomes the focus of employer and tribunal scrutiny, it deflects attention from the social dimensions of the exclusion and disadvantage.

Schedule 1 Part 1 of the EA supplements the definition; paragraph 2 sets out the meaning of long-term as follows: *'if an impairment ceases to have a substantial adverse effect on a person's ability to carry out day-to-day activities, it is to be treated as continuing to have that effect if it is likely to recur'.*

The *Guidance on matters to be taken into account in determining questions relating to the definition of disability* attempts to illuminate this with an example:

> *A woman has two discrete episodes of depression within a ten month period. In month one she loses her job and has a period of depression lasting six weeks. In month nine she suffers a bereavement and has a further episode of depression lasting eight weeks. Even though she has experienced two episodes of depression she will not be covered by the Act. This is because, as at this stage, the effects of her impairment have not yet lasted more than 12 months after the first occurrence, and there is no evidence that these episodes are part of an underlying condition of depression which is likely to recur beyond the 12-month period.*

Swift v Chief Constable of Wiltshire Constabulary [2004] IRLR 540 determined that it must be established that the substantial adverse effect is likely to recur rather than the impairment, which is at odds with the Guidance. Many mental health problems are episodic in nature and unpredictable in their manifestation. The current definition does not allow people who have these fluctuating conditions any clarity on whether or not they meet the definition.

Reasonable adjustments.

With respect to mental health related disability it is most often the case that the individual is substantially disadvantaged not by the physical features of the workplace nor the absence of auxiliary aids, but by *'a provision, criterion or practice'* (PCP).

Properly understood this should allow scope for creativity and imagination in the ways employers seek to accommodate the difficulties faced by those with mental health problems. Sadly it is too often the case that employers struggle to understand what a PCP is; and they are not alone. It is not uncommon in an ET complaint for the parties to propose a number of alternative PCPs which are said to give rise to the substantial disadvantage and for there to be a dispute as to what the correct one(s) should be.[8] If a PCP is incorrectly framed, then it is difficult to show that it led to a substantial disadvantage to the disabled person in comparison to a non-disabled person and thus triggered the duty to adjust.

Difficulty is also caused by the consideration of what constitutes a 'practice' which has been interpreted as involving the need for an element of repetition.[9]

The PCP which causes the disadvantage and thus triggers the duty to adjust should be able to encompass the fact that, more than other types of disability, mental health problems are affected by social interactions. But it can be difficult, however, for a claimant to prove that poor management is something which can be considered as a PCP.[10] This is very often one of the very things that contributes most significantly to the disadvantage and which requires the adjustment.

The return to work after sickness related absence is a crucial and critical period which, if not handled well, can lead to disastrous consequences. Reasonable adjustments could play a valuable role in this period. However, case law has indicated that tribunals view adjustments as being static rather than dynamic; 'steps' to be taken to achieve

8. See *Foster v Cardiff University* [2013] EqLR 718

9. *Foster* again

10. See *Martin v Carphone Warehouse* [2013] EqLR 481

a set result. In one case[11] it was held that *'adjustments that do not have the effect of alleviating the disabled person's disadvantage…are not reasonable adjustments within the meaning of the Act. Matters such as consultations and trials, exploratory investigations and the like do not qualify'.* However, the reality of mental health problems and work is that there is a high degree of interactivity between the individual's condition and the organisation of work. A more dynamic and less static notion of adjustments is more realistic – returning to work may require exploration, negotiation and trial periods and more fluid adjustments have a role to play.

Like the definition of disability, a pragmatic resolution of workplace difficulties by the use of adjustments can get mired in technicality. This is certainly the case when the matter goes to tribunal.

Anticipatory duty

The provisions in the EA relating to services and public functions create an 'anticipatory duty' to adjust. This means that shops and swimming pools etc. have to cater for the needs of disabled people before an individual presents with a disadvantage. The duty to adjust under the employment provisions is contrastingly reactive. That duty only applies when a worker presents with 1) a disability, and 2) a substantial disadvantage in the workplace. It is easy to understand the rationale behind making a duty owed to the public at large an anticipatory one, and one owed to a much smaller class of persons (a workforce) a reactive one. However, given the extraordinarily high prevalence of mental health problems (31% employees say they have experienced mental health problems whilst in employment – CIPD Employee Outlook July 2016[12]) and associated costs to employers and the UK economy, thought should be given to crafting some sort of anticipatory duty. Some issues in the workplace have a pervasive power to impact on people with mental health problems and duties could be created to relieve these pressure points rather than to allow them to disadvantage people.

Disclosure

A linked issue is the question of disclosure. In 2014 48% of people surveyed in Time to Change's *Attitudes to Mental Illness 2014 Research Report* said that they would not feel comfortable talking to a prospective or current employer about their mental health.[13] In a Mind survey in 2014,[14] of those who said they'd taken time off sick with stress, just 5% said the main reason they gave their employer was that they were too stressed to work. The remaining 95% cited another reason for their absence, such as an upset stomach (44%) or a headache (7%).

An employer will be unable to accommodate the needs of a person with mental health problems and make reasonable adjustments if it does not know about them. However, the current situation means that people fear stigma and discrimination if they reveal their mental health problems and so are faced with a choice of disclosing them to access help or concealing them to avoid further discrimination.

It is also the case that an individual will almost certainly have to disclose his or her mental health problem to an employer in order to be protected from discrimination arising from disability. Attitudes towards mental health have improved in recent years, due in no small part to campaigns such as Time to Change and the work of charities such as Mind and Heads Together. However, people with mental health problems feel the stigma attached to their conditions and this makes disclosure difficult.

Enforcement

The final problem with the EA's workplace protections is that enforcement is by way of complaint to the ET. When an individual has a complaint he or she will need to pay the best part of a £1,200 fee and endure what can be a horrendous ordeal for anyone, let alone someone with a mental health problem. If the respondent does not concede disability, this ordeal can be compounded by a scrutiny of their medical history in a public forum.

Conclusion

If one were to draw up from scratch a set of laws to safeguard the interests of people with mental health problems and help them thrive in the workplace one would almost certainly not only produce legislation which:

- Only protected those who satisfied a problematic definition of disability
- Required disclosure of a stigmatised condition as a prerequisite for gaining certain important protections

11. *Salford NHS PCT v Smith* [2011] EqLR 1119

12. https://www.cipd.co.uk/Images/employee-outlook_2016-focus-on-mental-health-in-the-workplace_tcm18-10549.pdf

13. https://www.time-to-change.org.uk/sites/default/files/Attitudes_to_mental_illness_2014_report_final_0.pdf Also, 95% of employees calling in sick with stress gave a different reason for their absence (Time to Change Employer Pledge https://www.time-to-change.org.uk/get-involved/get-your-workplace-involved/employer-pledge)

14. https://www.mind.org.uk/news-campaigns/news/stressed-out-staff-feel-unsupported-at-work-says-mind/%20-%20.VkmGSTYnyP8

- Was complaints-led and formal in nature
- Was enforced by individual complainants through costly and stressful litigation.

Last year the government published *Improving Lives – The Work, Health and Disability Green Paper*[15] and consultation responses are being analysed. Additionally Mind's Chief Executive Paul Farmer and the campaigner Lord Dennis Stevenson were appointed in 2016 to *'lead a review on how best to ensure employees with mental health problems are enabled to thrive in the workplace and perform at their best. This will involve practical help including promoting best practice and learning from trailblazer employers, as well as offering tools to organisations, whatever size they are, to assist with employee well-being and mental health. It will review recommendations around discrimination in the workplace on the grounds of mental health'*.[16]

Although I have indicated above some areas of concern with the current legislation, it must be stressed that both the health and safety and the anti-discrimination legislation are valuable and it is no hyperbole to say that it has both saved and immeasurably improved lives and scored numerous victories for the cause of equality. However this legislation alone does not best serve the interests of people with mental health problems in the workplace.

Mind will certainly not be calling for the scrapping of either pieces of legislation. With regard to the EA there has to be anti-discrimination legislation that prohibits discrimination on the basis of disability and allows people to pursue a judicial remedy. This is mandated by Article 27(a) UNCRPD.

However, Article 27(h) also mandates the safeguarding and promotion of the rights of people with disabilities by taking steps, including through legislation, to promote the employment of persons with disabilities in the private sector through appropriate policies and measures, **which may include affirmative action programmes, incentives and other measures.** It is suggested that the obligations on states in Article 27(h) should complement individual litigation rights with mandatory positive duties to promote equality. The Northern Ireland model is not directly transferable as different equality issues are at play, but it shows how mandatory proactive positive action measures can achieve tangible change quickly in a way that the complaints-led formal approach to equality has not been able to.

The most effective way of safeguarding the interests of people with mental health problems in the workplace is to effect cultural change which allows them to talk about these problems, to seek help when they need it and for employers to be proactive in their support of their staff. This culture can be created by building mental health literacy among employers and their staff, raising awareness of mental health and reducing stigma by changing the way people think and act about mental health. Critical to this is line manager capability and buy-in at the most senior levels. Legislation could support this culture change, learning from Northern Ireland's anti-discrimination model in respect of Catholic under-representation in the workplace, but also not simply addressing disability but mental health more generally.

The current legislation does not give us the right tools to help us achieve this. Mind will be strongly urging the new administration to consider the findings of the Paul Farmer/Lord Stevenson review into workplace mental health support and to reflect these findings in legislation where appropriate.

15. https://www.gov.uk/government/consultations/work-health-and-disability-improving-lives

16. https://www.gov.uk/government/news/prime-minister-unveils-plans-to-transform-mental-health-support

Intersectionality and the 'anti-stigma principle' – disrupting anti-discrimination law

Iyiola Solanke[1] Professor of EU law and social justice, University of Leeds, explores the concept of intersectional discrimination. She argues that, through its conflation with multiple discrimination, the concept has been reduced to accommodate existing anti-discrimination legal frameworks. As a consequence, black women workers continue to remain vulnerable to intersectional discrimination. Using an 'anti-stigma principle' which recasts discrimination as a social and structural problem in which society is complicit, she suggests a way to approach intersectionality so that black women, whose labour market experience differs from both black men and white women, are no longer at the margins of anti-discrimination law.

Introduction

In 1989 Professor Kim Crenshaw wrote about the structural blind spots[2] in anti-discrimination law and civil rights activism that obstructed a remedy for black women workers. She argued that black women workers were invisible in law because their labour market experiences could not be attributed to either race or gender alone. In 2014 she described the purpose of intersectionality as the disruption of dominant discourses to reverse this eclipse of the black female subject in law.

During the intervening 25 years, intersectionality has had a significant impact in disrupting dominant discourses in general – it is now an analytical approach used across many disciplines.[3] The concept has spread far beyond equality law and been welcomed as a general methodological approach. Much less progress has been made in disrupting the dominant narrative of anti-discrimination law – intersectionality has been adapted to fit existing frameworks rather than changing the frameworks themselves.

As intersectional discrimination devoid of the key elements of race and synergy becomes the norm in the UK and Europe, black women workers are paradoxically re-marginalised in law and society. As a consequence, although a successful methodological approach, intersectionality has been unsuccessful in protecting the group for whom it was designed: black women workers.

The theoretical origins of intersectionality

Intersectionality is a complex legal concept embedded within a philosophy of structural inequality. The concept arose from the pursuit by critical race theorists of justice for black women workers. Critical race theory investigates and excavates law, society and legal traditions from the perspective of black people.[4] Its analysis is race conscious as well as gender focused, centralising black men and women as subjects of study.[5]

The term 'intersectionality' was devised to crystallise the particular legal position of a group of black women employed in the 1970s by General Motors (GM) in Louisiana, one of the largest employers in the city.[6] These women complained of employment discrimination arising in the wake[7] of slavery from the combination of social racism, GM's racist employment practices, and the trade-union sanctioned seniority system.

In 1977, 22% of the population in Louisiana were black women, yet prior to 1970, GM employed just one black woman, as a janitor. In total, GM hired just 6 black female workers in 1970, 11 in 1971, none in 1972, and 137 in 1973. By late 1973, GM had 155 black women workers out of a total workforce of 8,500. Yet

1. i.solanke@leeds.ac.uk. This article is drawn from *Discrimination as Stigma: A Theory of Anti-Discrimination Law* (Hart 2017) and *A Method for Intersectional Discrimination in EU Labour Law* in (eds.) Bogg, Costello, Davies *Research Handbook on EU Labour Law* (Edward Elgar 2016).

2. Kimberle Crenshaw *Demarginalizing the intersection of race and sex: a black Feminist Critique of antidiscrimination doctrine, Feminist theory and antiracist politics* (1989) 140 University of Chicago Legal Forum 139.

3. Sally Hines, Yvette Taylor and Mark E Casey *Theorizing Intersectionality and Sexuality* (Palgrave Macmillan 2010); Angelia R Wilson *Situating Intersectionality: Politics, Policy, and Power (The Politics of Intersectionality)* (Palgrave Macmillan 2013); Sarah E Zemore and others *Racial Prejudice and Unfair Treatment: Interactive Effects With Poverty and Foreign Nativity on Problem Drinking* (2011) 72 J Stud Alcohol Drugs 361; Greta R Bauer *Incorporating intersectionality theory into population health research methodology: Challenges and the potential to advance health equity* (2014) 110 Social Science & Medicine 10; Morgan Gardner *Linkage Activism: ecology, social justice and education for social change* (Routledge 2005).

4. Francisco Valdes, Jerome, McCristal Culp and Angela P Harris (Eds): *Crossroads, Directions and a New Critical Race Theory* (Temple University Press 2002) 4; Edward Taylor *A Primer on Critical Race Theory* (1998) 19 Journal of Blacks in Higher Education 122.

5. C Jones and K Shorter-Gooden *Shifting: The Double Lives of Black Women in America* (Harper Collins 2003); PM Caldwell *A Hair Piece: Perspectives on the Intersection of Race and Gender* (1991) 40 Duke Law Journal 365, 366.

6. *Degraffenreid v General Motors* 413 F Supp 142 (E D Mo 1976)

7. C Sharpe *In the Wake: On Blackness and Being* Duke University Press, 2016)

by January 1974, all of GM's black women workers had been made redundant: as the most recent recruits ('last in'), they were the first to be fired ('first out'). Only the black female janitor remained.

However, during this time, GM hired black men and white women and thus a claim of race or sex discrimination alone would have been unsuccessful. The only way to secure a remedy was to ask the court to recognise that the situation of black women was qualitatively different from both of these groups because of a synergy between race and gender. Although the law looked at race and sex separately, they argued that in their existence as black women, racism and sexism converged.

The women therefore asked the courts to recognise them as Black women per se, as an '*integrated, undifferentiated, complete whole*',[8] who lived in society as '*twice-stigmatised … twice kin to the despised majority of all the human life that there is*'.[9] Judy Scales Trent describes this as a 'synergistic' combination of two degraded statuses: *'the disabilities of blacks and the disabilities which inhere in their status as women resulting in a condition "more terrible than the sum of their two constituent parts"'*.[10]

A similar argument was raised in *Jefferies v Harris County Commission*,[11] where a black woman employee claimed discrimination when she was refused promotion to a job that had previously been held by a white woman and a black man. *Jeffries* was not denied employment or threatened with dismissal – her job was secure – and there was no evidence of sex discrimination or race discrimination. However, she argued that she was subject to a 'cement ceiling' created by discriminatory stereotypes based on her race and gender.

The US District Court was hostile to both claims, rejecting the *Degraffenreid v GM* argument as seeking a 'super-remedy'. However, in *Jeffries*, the US Federal Appeal Court instructed the District Court to reconsider the intersectional race and sex discrimination aspects of the complaint. The Federal Appeal Court refused to accept a result that left black women workers – a significant proportion of the active labour force – vulnerable and without a remedy for discrimination.[12] It acknowledged that Title VII[13] was capable of:

> *prohibiting employment discrimination based on any or all of the listed characteristics thus discrimination against black females can exist even in the absence of discrimination against black men or white women.*[14]

Thus the concept of intersectionality was neither an abstract matter nor simple identity politics. The demand for legal recognition of the labour market position of black women workers arose from a structural critique of political, economic and social organisation.

Philosophy of inequality

This critique did not begin in 1989, but can be traced to the intellectual thought of women like Sojourner Truth or Harriett Tubman, women enslaved, sexually mutilated through rape, and forced to give birth to children who would also be slaves.[15] Truth and Tubman analysed the slave plantation economy from the perspective of the enslaved women at its centre – women denied bodily integrity and autonomy, economic power and political voice. They also recognised that their social position was not the same as white women, who enjoyed racial superiority and could at least fight for sexual equality,[16] nor black men who despite their racial oppression could enjoy some of the privileges of patriarchy. Tubman, Truth and other black women created the philosophy of inequality from which intersectionality drew in the 20th century. To overlook this inherent structural critique is to misunderstand the philosophy of intersectionality and the task of intersectional discrimination.

The challenge for law is therefore to find a way to remedy intersectional discrimination that reflects this philosophy, and that disrupts prevailing frameworks of discrimination. The goal is not to create a new hierarchy of mutually exclusive categories or to reify identity, but to disrupt dominant discourses in anti-discrimination law, especially those that make certain forms of discrimination invisible.[17]

8. R Austin *Sapphire Bound!* (1989) 3 Wisconsin Law Review 540

9. J Jordan *Where is the Love?* in J Jordan Civil Wars (New York, Simon and Schuster, 1981)

10. J Scales-Trent *Black Women in the Constitution: Finding Our Place and Asserting Our Rights* (1989) 24 Harvard Civil Rights-Civil Liberties Law Review 10.

11. *Jefferies v Harris Cty Community Action Association* 615 F 2nd 1025 (5th 1980).

12. These claims were brought under Title VII 42 USC 2000e-2(a) (2004) which prohibits workplace discrimination.

13. Title VII of the Civil Rights Act of 1964 is a federal law that prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and religion. It generally applies to employers with 15 or more employees, including federal, state, and local governments.110 Congressional Records 2728 (1964).

14. *Jeffries* (n11) [23]–[24].

15. Toni Morrison's *Beloved* tells the story of a slave woman who would rather kill her children than see them enslaved.

16. Anna Julia Cooper *A Voice From the South: By A Woman From the South* (first published 1892, OUP 1988).

17. Crenshaw (n 1). Helma Lutz, Maria Teresa Herrera Vivar and Linda Supik (ed) *Framing Intersectionality: Debates on a Multi-Faceted Concept in Gender Studies* (Ashgate 2011) 230.

Practicing 'disruption'

Despite the popularity of the concept of intersectionality, there is no explicit legal protection from intersectional discrimination.[18] In *Bahl v The Law Society* [2004] EWCA Civ 1070, the first case of intersectional discrimination in the UK, senior judges mirrored the *Degraffenreid* court in rejecting the possibility of combining two separate grounds. A few recent UK cases suggest a more sympathetic approach. For example, in *Hewage*[19] [see Briefing 653], the SC accepted the use of a white male comparator in a case concerning race and gender discrimination in the NHS. *Hewage* was not required to prove sex and race discrimination separately thus, although not stated explicitly, an intersectional approach was allowed in this case. An ET also found race and sex discrimination in *Howard v Metropolitan Police Service* [see Briefing 731]. Carol Howard was the only black woman in an exclusively male and white firearms unit. The tribunal concluded that her manager had formed a negative conclusion of her because she was a black woman, and had targeted her for over a year *'because she was black and because she was a woman.'*[20]

Intersectionality does not appear in any case law before the CJEU in Luxembourg, although *Parris v Trinity College Dublin* C-443/15 [see Briefing 816] is arguably a missed opportunity.

It has been mentioned by the ECtHR in Strasbourg in *BS v Spain*[21], where the court referred to research on intersectional discrimination to highlight a procedural failure similar to that highlighted by the US Federal Court of Appeals in *Jeffries*. The ECtHR accepted evidence that the police had allegedly called BS a 'black whore' [para 61] and held that the absence of an investigation into racism indicated a failure by the domestic courts to *'take account of the applicant's particular vulnerability inherent in her position as an African woman working as a prostitute.'*[22] The court acknowledged the procedural impact of intersectional discrimination and the failure to ascertain the role of discrimination in the complaint amounted to a breach of Articles 3 and 14 ECHR.

Focus on multiple discrimination

The limited use may be because international and regional legal systems, as well as research and policy papers often focus on 'multiple discrimination'[23] (additive and cumulative) rather than intersectional discrimination per se. For example, the EU Race Directive[24] and the Equal Treatment (Employment) Directive[25] both incorporate the idea of 'multiple discrimination' as a facet of gender. Likewise, the Declaration issued after the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR) in Durban speaks of *'multiple or aggravated forms of discrimination'* rather than intersectionality.

By not explicitly mentioning intersectionality[26] the Directives and the WCAR Declaration bring intersectional discrimination within the context of multiple discrimination.[27] This is a problem for two reasons: first, multiple discrimination anchors intersectional discrimination within the traditional single dimension consciousness of anti-discrimination law rather than 'disrupting' anti-discrimination law. Multiple discrimination places intersectionality upon a continuum informed by the single-dimension approach – it sits alongside additive (as in *Nwoke*[28]) and

18. On Section 14 of the Equality Act 2010, see Iyiola Solanke *Infusing the silos in the Equality Act 2010 with synergy* (2012) 40 ILJ 336.

19. *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] 4 All ER 447.

20. *C Howard v Metropolitan Police Service* ET Case No 2200184/2013 & 2202916/2013 [157]–[158].

21. *BS v Spain* App no 47159/08 (ECtHR, 24 July 2012). See Kenia Yoshida *Towards intersectionality in the European Court of Human Rights: the case of B.S. v Spain* (2013) 21 Feminist Legal Studies 195

22. *BS v Spain* (n20) paras 56–62.

23. See for example Susanne Burri and others *Multiple Discrimination in EU Law Opportunities for legal responses to intersectional gender discrimination?* (European Commission 2006); European Commission *Tackling Multiple Discrimination Practices, policies and laws* (European Commission 2007); Colleen Sheppard, 'Multiple Discrimination in the World of Work' (2011) ILO Working Paper no 66 <www.ilo.org/wcmsp5/groups/public/—-ed_norm/—-declaration/documents/newsitem/wcms_170018.pdf> accessed 4 October 2015; ENAR *The legal implications of multiple discrimination* (2011); Dagmar Schiek and Anna Lawson *European Union Non-Discrimination Law and Intersectionality* (Ashgate 2011); European Union Agency for Fundamental Rights *Inequalities and multiple discrimination in access to and quality of healthcare* (Publications Office of the European Union 2013); Coyote's Special Edition on Intersectionality (2014) <http://pjp-eu.coe.int/en/web/youth-partnership/issue-22-december-2014 > accessed 4 October 2015; Council of Europe: *Multiple discrimination against Muslim women in Europe* (2012).

24. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22 (Race Directive).

25. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16 (Equal Treatment Directive).

26. This idea was not found in drafts of the directive – The New Starting Line proposal mentioned only direct and indirect discrimination; Isabelle Chopin, *The Starting Line Group: a Harmonised Approach to fight racism and promote equal treatment* (1999) 1 European Journal of Migration and Law 111.

27. S Hannett *Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination* (2003) 23 OJLS 65.

28. *Nwoke v Government Legal Service and Civil Service* Commissioners (1996) 28 Equal Opportunities Review 6. Discussed in A. McColgan, *Discrimination Law: Texts, Cases and Materials* (Oxford: Hart, 2005) 34

cumulative (as in *Al Jumard*[29]) discrimination as another mode by which discrimination can occur on more than one proscribed ground.

The juxtaposition of these concepts has led to an erroneous conflation – intersectionality has gradually become multiple discrimination – and the two terms are used as synonyms even though they do not mean the same thing: intersectionality refers to a philosophy of inequality whereas multiple discrimination describes the occurrence of discrimination on two or more grounds.[30] Intersectional discrimination is also treated as a single wrong whereas in multiple discrimination cases separate evidence is required to support each complaint.

Second, additive and cumulative discrimination lack the 'synergy'[31] that is central to intersectional discrimination. Synergy is the key element that differentiates intersectional discrimination from multiple discrimination:

> *synergy highlights "cooperative effects, the effects produced by two or more elements, parts or individuals … that operate together": synergistic effects are always codetermined and interdependent, the elements work together so that if one is removed it becomes something else. The elements themselves need not be pre-determined: the synergy arises from the effects of their combination, although history and contingency are both important factors. Synergetic intersections are like chemical compounds: just as the mixing of oxygen and hydrogen results in water not 'oxydrogen', or tin and copper together make bronze, not 'tinper', intersectionality creates a new compound subject.*[32]

The conflation of intersectionality into multiple discrimination therefore has a significant consequence – it strips the idea from its philosophical roots in critical race theory, denuding it of its black feminist perspective and the idea of synergy, rendering it meaningless. Without this intellectual DNA, multiple discrimination (as additive and cumulative discrimination) can be accommodated within existing frameworks for anti-discrimination law – no legal change is required. Thus, when subsumed within multiple discrimination, intersectionality has no point. It becomes, as argued by some scholars, a 'bankrupt' concept.[33] Intersectional discrimination – that is, discrimination which is non-additive and non-cumulative – has therefore not 'disrupted' traditional frameworks of anti-discrimination law; rather the concept has been adapted to accommodate these frameworks.

It has been argued,[34] that intersectionality had to lose its 'baggage' of slave history to conquer the academy. However, this has not helped it to conquer law – the majority of legal systems in Europe do not even mention multiple discrimination and most have no intention of doing so.[35] The paradigm group of workers – black women – who comprise a significant minority of the labour market remain vulnerable to intersectional discrimination.

How can the hollowing out of intersectionality be reversed, and in particular, how can intersectionality be systematically incorporated into anti-discrimination law? Needless to say, the legal approach must match the philosophy – it must reflect the synergy that is at the core of intersectional discrimination[36] as well as take into account the *'historical, social and political context'* [37] within which discrimination occurs. Truth and Tubman neither enjoyed the luxury to determine which attribute caused their suffering nor to separate the macro from the micro. There was no 'either-or proposition' giving them a choice over which one would haunt their lives and which one they would be free of. They had to manage both.[38] The legal approach must therefore link the *'material with the discursive and the structural (or macropolitical) with the lived (or micropolitical).'* [39]

Intersectional discrimination therefore calls for a pursuit of social justice that is both local and universal, for disruption in a non-dichotomous way, resistance of dominant rationalities and discovery of '*nondominant resisting rationalities*.'[40] I suggest in the next section that

29. *Al Jumard v Clywd Leisure Ltd & ors* [2008] UKEAT 0334_07_2101, [2008] IRLR 345

30. See European Commission *Tackling Multiple Discrimination: Practices, Policies and Laws* (Office for Official Publications of the European Communities 2007) 17.

31. J Scales-Trent *Black Women in the Constitution: Finding Our Place and Asserting Our Rights* (1989) 24 Harv CR-CL L Rev 9; I Solanke, *'Infusing the silos in the Equality Act 2010 with synergy'* (2012) 40 ILJ 336.

32. Solanke (n 18)

33. E Grabham and others *Intersectionality and Beyond: Law Power and the politics of location* (Glasshouse 2007).

34. V M May *"Speaking into the Void"? Intersectionality Critiques and Epistemic Backlash* (2014) 29 Hypatia 94; CA Aylward, *Intersectionality: Crossing the Theoretical and Praxis Divide* (2010) 1 Journal of Critical Race Enquiry 1.

35. See country reports http://www.equalitylaw.eu> accessed 9 June 2017.

36. Solanke *Infusing* (n 18).

37. CA Aylward *Intersectionality: Crossing the Theoretical and Praxis Divide* (2010) 1 Journal of Critical Race Enquiry 1.

38. C Jones and K Shorter-Gooden *Shifting: The Double Lives of Black Women in America* (New York, Harper Collins, 2003) 59.

39. May (n 32) 96–97.

40. SL Hoagland *Resisting rationality* in N Tuana and Sandra Morgen, *Engendering rationalities* (SUNY Press 2010) 129, 140, cited in May (n 32).

the 'anti-stigma principle' offers a logic to facilitate non-dominant disruption.

The anti-stigma principle

In classical Greece a stigma referred to a mark or 'stain' that set an individual apart from others. Those with this mark were discredited, shunned and unable to participate in everyday society. The stigmatised had no control over the powerful meaning attributed to the stigma by society. The stigma tarnished their whole identity. Slaves and their offspring were stigmatised. Like the Dalits today, theirs was a status that was inescapable - inheritable and all consuming.

Critical scholars of stigma have moved the concept beyond the behavioural approach pioneered by Erwin Goffman[41] and now identify it as a concept with multiple components[42] that is multi-level[43] and structurally embedded[44] drawing attention to the social power that perpetuates stigma. Critical stigma studies offer the building blocks of the anti-stigma principle.

Link and Phelan argue that stigma is antecedent to discrimination. They describe a process that begins with an arbitrary attribute, continues with deliberate labeling by powerful parties in society, followed by stereotyping that separates persons with the element from others, and reduces their status making them targets of discrimination. Herek emphasises that the key characteristics of stigma include embeddedness, endurance and negative evaluation by powerful actors who have means of control over the powerless (who have no access to such means). Hannem and Bruckert stress that stigmatisation links the macro and micro: it involves low social power **and** low interpersonal status – stigmatisation is not just a process of what people do to each other (interpersonal power) but also what society entertains and allows people to do (institutional power). From this perspective, discrimination is therefore a direct consequence of stigmatisation, understood as an expression of socio-cultural power as well as a manifestation of individual behaviour.

Stigma is not new to legal systems[45] but it is rarely used. It has recently appeared in cases before the ECtHR[46] and the CJEU.[47] Clearly not all stigma leads to discrimination but by thinking about discrimination as stigma, we disrupt existing categories – we are no longer thinking about identity per se but about arbitrary social meaning attached to certain attributes, statuses and conditions in a way that strips away the right to equal regard. It may be that there is just one attribute, status or condition that stigmatises or it may be that there are many which intersect. Synergy is thus inherent in the anti-stigma principle.

The anti-stigma principle not only provides the synergy that is a prerequisite of intersectionality but also recasts discrimination as a social and structural problem – the emphasis does not fall solely on the individual victim and perpetrator: the individual remains responsible but society is held complicit. Individual freedom to act is linked with the social context and structure within which that individual acts.[48] The restoration of this link locates responsibility for discrimination in society. If society supports the perpetuation of discrimination, then society also bears the responsibility to address this. This perspective creates a potential for remedies such as positive action to be seen as a norm in anti-discrimination law rather than an exception.[49] It can therefore provide a framework for the legal protection from intersectional discrimination that is true to the intellectual heritage of the concept.

The anti-stigma principle can bring light to the blind spots of anti-discrimination law. Its application can help anti-discrimination law to both see existing problems differently as well as to see different problems. In relation to new problems that can be addressed by anti-discrimination law, the anti-stigma principle is helpful to focus where this law should be active for generations whose lives are distant from slavery, apartheid and the Holocaust.

Ten questions can be posed in order to distinguish

41. Erwin Goffman *Stigma: Notes on the Management of Spoiled Identity* (Penguin 1990); Robin Lenhardt Understanding the Mark: Race, Stigma, and Equality in Context (2004) 79 NYU L Rev 803.

42. Bruce Link and Jo Phelan *Conceptualizing Stigma* (2001) 27 Annual Rev Sociol 363.

43. Bernice A Pescosolido and others *Rethinking theoretical approaches to stigma: A Framework Integrating Normative Influences on Stigma* (FINIS) (2008) 67 Social Science & Medicine 431, 433.

44. S Hannem and C Bruckert (eds) *Stigma Re-visited: Re-examining the Mark* (University of Ottawa Press 2012).

45. Iyiola Solanke, *Discrimination As Stigma: A Theory of Anti-Discrimination Law* (Hart Publishing 2017).

46. *BS v Spain* App no 47159/08 (ECtHR, 24 July 2012). See Kenia Yoshida *Towards intersectionality in the European Court of Human Rights: the case of B.S. v Spain* (2013) 21 Feminist Legal Studies 195.

47. Case C 83/14 *Chez Razpredelenie Bulgaria* (CJEU, 16 July 2015; Briefing 762).

48. J Turner American *Individualism and Structural Injustice: Tocqueville, Gender and Race* (2008) 40 Polity 2.

49. N Bamforth, M Malik and C O'Cinneide *Discrimination law: Theory and Context* (Sweet and Maxwell 2008) 340ff.

which stigma should be protected in anti-discrimination law:

1. Is the 'mark' arbitrary or does it have some meaning in and of itself?
2. Is the mark used as a social label?
3. Does this label have a long history? How embedded is it in society?
4. Can the label be 'wished away'?
5. Is the label used to stereotype those possessing it?
6. Does the stereotype reduce the humanity of those who are its targets? Does it evoke a punitive response?
7. Do these targets have low social power and low interpersonal status?
8. Do these targets suffer discrimination as a result?
9. Do the targets suffer exclusion?
10. Is their access to key resources blocked?

Using intersectionality in anti-discrimination case law

Disruption of existing frameworks is not synonymous with destruction – intersectional discrimination should not replace single-dimension discrimination but complement it. It would undermine the potential of the remedy if every complaint became intersectional – it should not be approached as a panacea, offering a single answer to all problems of discrimination.

It would be rational to reserve the remedy of intersectional discrimination to those cases where a remedy would otherwise be impossible, as in *Degraffenreid v GM*. A strict application would focus only on those cases where a non-intersectional approach would deny access to justice. Thus, in cases such as *Feryn* before the CJEU an intersectional approach would be unnecessary as the racist statements of the employer affected black applicants alone. Likewise, it is questionable whether an intersectional remedy was actually necessary to secure justice in *Hewage* or *BS*.

Intersectional discrimination could also be used to demonstrate a stronger rejection of the discriminatory behaviour, to apply a harsher sanction and/ or educate the public, as in *Baylis-Flannery v DeWilde*. In this case, the Ontario Human Rights Commission[50] chose to find intersectional discrimination, even though a single dimension approach would have sufficed, to stress the gravity of the complaint: that Bayliss Flannery was subjected to sexual solicitation, sexual harassment, racial harassment and discriminatory treatment by her employer because of his *'stereotypical view of attractive, young, Black women over whom he can assert economic power and control'*. The Commission acknowledged therefore that Bayliss-Flannery was *'not a woman who happens to be Black, or a Black person who happens to be female, but a Black woman'*. It used intersectional discrimination to send a strong message to society not only about discrimination but also about the relationship between power and discrimination.

Conclusion

Intersectionality is a concept that now has global resonance but as yet only limited impact in anti-discrimination law. Few countries have given intersectional discrimination statutory form and the concept hardly appears in case law. Where it is used, it often refers to additive or cumulative discrimination. It is therefore hard to ascribe more than a minimal impact to intersectional discrimination in EU labour law.[51]

One reason why the application of intersectional discrimination does not mirror the reception may be that the current (mis)interpretation has reduced intersectionality to multiple discrimination, replacing its potential for disruption[52] with a more traditional approach. The promotion of a wide list of intersectional differences[53] ultimately erodes the difference that intersectionality makes.

Intersectionality as per *Degraffenreid* remains an important concept. Although the labour market may now be a precarious space for the majority of workers, evidence shows that as work disappears this is felt more by black workers.[54] Data also shows that during economic downturn in the UK, black women experience disproportionately high unemployment rates (13% compared to 5% for white women).[55] A remedy for intersectional discrimination thus remains necessary not

50. Ontario Human Rights Commission *An Intersectional Approach To Discrimination - Addressing Multiple Grounds in Human Rights Claims* (Discussion Paper Policy and Education Branch 2001).

51. I Solanke *A Method for Intersectional Discrimination in EU Labour Law* in (eds.) Bogg, Costello, Davies Research Handbook on EU Labour Law (Edward Elgar, 2016).

52. U Erel and others *On the Depoliticisation of Intersectionality Talk: Conceptualising Multiple Oppressions in Critical Sexuality Studies* in Hines, Taylor and Casey (n 4).

53. Sirma Bilge *Recent Feminist Outlooks on Intersectionality*' (2010) 225 Diogenes 58; D Stasiulis *Feminist Intersectional Theorizing* in P Li (ed) *Race and Ethnic Relations in Canada* (OUP 1999) 347; GA Knapp *Race, Class, Gender: Reclaiming Baggage in Fast Travelling Theories* (2005) 12 European Journal of Women's Studies 249; AM Hancock *When Multiplication Doesn't Equal Quick Addition: Examining Intersectionality as a Research Paradigm* (2007) 5 Perspective on Politics 63.

54. David W Johnston and Grace Lordan When Work Disappears: Racial Prejudice and Recession Labour Market Penalties (2014) CEP Discussion Paper No 1257 <http://cep.lse.ac.uk/pubs/download/dp1257.pdf> accessed 5 October 2015.

55. Figures for October 2013 to October 2014. This holds for new entrants as well as older workers.

827 only in the UK but across Europe where there are migrant and non-migrant, skilled or unskilled, documented and undocumented black women whose labour market experience differs from both black men and white women.

The anti-stigma principle can bring together the philosophy of inequality in intersectionality and the framework of anti-discrimination law. The principle would restore the original goal of intersectionality to disrupt existing frameworks for anti-discrimination law without destroying them. This is important because just as intersectional discrimination should not be over-extended, it should not be over-applied. Intersectional discrimination would exist alongside single dimension discrimination, as it would not be used in every case. Where it is not necessary, a decision would have to be made whether there are broader public policy or social education reasons to use an intersectional rather than single dimension remedy.

The anti-stigma principle may also be useful in regional legal frameworks for anti-discrimination law. Intersectional cases will increasingly arise in both the European Union and the Council of Europe legal systems. Future research should be conducted by both or either of these bodies to explore the potential for the principle to assist them as they seek to tackle intersectional discrimination. As the EU will accede to the ECHR – despite the negative opinion of the CJEU[56] on the draft accession agreement, co-ordinated action would be sensible avoid any future conflicts. Such research will be indispensable to the future protection of black women workers and their families in the EU. It will inform both harmonising and social policy measures that promote well-being in line with the human rights values of the EU and ECHR. It would also help to entrench intersectionality – rather than multiple discrimination – in a human rights instrument for the first time.

56. Opinion 2/13 (CJEU, 18 December 2014)

Professor Iyiola Solanke's book *Discrimination as Stigma, A Theory of Anti-discrimination Law* published in January 2017 will be reviewed in the next edition of Briefings

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Vicarious liability under the Equality Act 2010 and at common law

Jason Galbraith-Marten QC and Schona Jolly QC, practising barristers at Cloisters Chambers, trace the development of the scope of vicarious liability, an area of law which is on the move. They argue that although the scope of vicarious liability under equality legislation has been broad, at common law its scope now arguably extends further than under the EA. Reviewing the decisions in the cases of *Mohamud* and *Cox* they ask whether it is time for the employment tribunal to look again at the scope and extent of vicarious liability under equality legislation.

'The law of vicarious liability is on the move' Lord Phillips of Worth Maltravers PSC[1]
… 'it has not yet come to a stop' Lord Reed JSC[2]

In *Jones v Tower Boot*,[3] the scope of vicarious liability under equality legislation was broadened from the-then rather strict common law position. Over time, the common law position has not only caught up; but now, after *Mohamud v WM Morrison Supermarkets plc*[4] and *Cox v Ministry of Justice*,[5] common law arguably extends further than under the EA. After all, if the facts in *Ministry of Defence v Kemeh*[6] had given rise to a tortious claim capable of being brought in the civil courts now, it may have succeeded in that forum. It illustrates perfectly the gap in protection which has arisen as the concepts and structures of employment continue to evolve at pace.

1. In *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56
2. *Cox v Ministry of Justice* [2016] 2 WLR 80
3. [1997] ICR 254
4. [2016] IRLR 362
5. [2016] 2 WLR 80
6. [2014] ICR 625

Jones v Tower Boot

In the few weeks in which 16 year old Raymondo Jones at the Tower Boot Co. Ltd was a last operative, he was subjected to an horrific course of bullying and harassment, summarised by Waite LJ in the CA[7] as follows:

> *From [the] outset he was subjected by fellow-employees to harassment of the gravest kind. He was called by such racially offensive names as 'chimp' and 'monkey'. A notice had been stuck on his back reading 'Chipmunks are go'. Two employees whipped him on the legs with a piece of welt and threw metal bolts at his head. One of them burnt his arm with a hot screwdriver, and later the same two seized his arm again and tried to put it in a lasting machine, where the burn was caught and started to bleed again.*

S32(1) of the Race Relations Act 1976[8] provided that anything done by an employee *'in the course of his employment'* was to be treated as also done by the employer, whether or not it was done with the employer's knowledge or approval. The tribunal found that Jones had been treated less favourably than other employees on racial grounds and that the acts of his fellow employees had been done in the course of their employment for the purposes of s32(1).

At that time, at common law, an employer was only vicariously liable for the tortious acts of his employees if the acts were either:

a. wrongful acts expressly authorised by the employer, or
b. a wrongful and unauthorised mode of doing an act which had been authorised by the employer: a master is liable for acts which he has not expressly authorised, if they are 'so connected' with acts which he has authorised, that they may rightly be regarded as modes – although improper modes – of doing them.

Tower Boot argued that the common law test had to be read into s32(1) and that in no sense could the actions of its employees be regarded as a 'mode' of doing the work that they had been authorised to perform. This was accepted by the EAT in allowing the employer's appeal. However the CA allowed a further appeal by the employee and restored the decision of the ET. As Waite LJ observed an inevitable result of construing *'course of employment'* in the sense contended for by the employer would be that *'the more heinous the act of discrimination, the less likely it will be that the employer would be liable.* He concluded:

> *It would be particularly wrong to allow racial harassment on the scale that was suffered by the employee in this case at the hands of his workmates … to slip through the net of employer responsibility by applying to it a common law principle evolved in another area of the law to deal with vicarious responsibility for wrongdoing of a wholly different kind. To do so would seriously undermine the statutory scheme of the discrimination Acts and flout the purposes which they were passed to achieve.*
>
> *The tribunals are free, and are indeed bound, to interpret the ordinary, and readily understandable, words "in the course of his employment" in the sense in which every layman would understand them. This is not to say that when it comes to applying them to the infinite variety of circumstances which is liable to occur in particular instances – within or without the workplace, in or out of uniform, in or out of rest-breaks – all laymen would necessarily agree as to the result. That is what makes their application so well suited to decision by an industrial jury. The application of the phrase will be a question of fact for each industrial tribunal to resolve, in the light of the circumstances presented to it, with a mind unclouded by any parallels sought to be drawn from the law of vicarious liability in tort.*

Therefore, under the EA whether the perpetrator of an act of unlawful discrimination is acting in the course of his or her employment is a question of fact to be determined by the ET in each case, giving those words their ordinary meaning, but bearing in mind the purpose behind the legislation and in particular that the seriousness of the allegedly discriminatory conduct is not determinative.

The common law catches up: *Lister v Hesley Hall*

Shortly after this, the approach of the common law to the issue of vicarious liability came under scrutiny, first in *Lister v Hesley Hall Ltd*[9] and then in *Dubai Aluminium Co Ltd v Salaam*,[10] both House of Lords decisions. In *Lister* the claimants were residents in a boarding house attached to a school owned and managed by the defendants. The warden of the boarding house, employed by the defendants but without their knowledge, systematically sexually abused the claimants.

7. [1997] ICR 254

8. Now s109(1) of the Equality Act 2010 but see also s47B(1B) of the Employment Rights Act

9. [2001] ICR 665

10. [2003] 2 AC 366

The first-instance judge and the CA held that the defendants could not be held vicariously liable for the warden's torts; they could not be regarded as an unauthorised 'mode' of carrying out his authorised duties.

The Lords allowed the claimants' appeal. The common law test had been misunderstood and misinterpreted and the question was simply whether the warden's torts were so 'closely connected' with his employment that it would be fair and just to hold the employers vicariously liable. On the facts of that case the Lords unanimously concluded that it would be. Lord Millett stated that it is:

> *… no answer [to a claim against the employer] to say that the employee was guilty of intentional wrong doing, or that his act was not merely tortious but criminal, or that he was acting exclusively for his own benefit, or that he was acting contrary to express instructions, or that his conduct was the very negation of his employer's duty …*

The common law pulls back?

However, in subsequent years, it sometimes appeared that the civil courts were pulling back from the broad scope of the 'closer connection' test. For example, in *Weddall v Barchester Healthcare Ltd* and *Wallbank v Wallbank Fox Designs Ltd*,[11] Pill LJ was clearly reluctant to impose liability on an employer for the acts of its employee because of the outrageous nature of the acts in question. He cited a passage from *Bernard v Attorney General of Jamaica*:[12]

> *Vicarious liability is a principle of strict liability.…This consideration underlines the need to keep the doctrine within clear limits…* [para 21]
>
> *… the Board is firmly of the view that the policy rationale on which vicarious liability is founded is not a vague notion of justice as between man and man. It has clear limits… The principle of vicarious liability is not infinitely extendable.* [para 23]

He added: *'That guidance must be kept in mind when the expression "course of employment" is applied to facts found.'*

In *Vaickuviene v J Sainsbury Plc*[13] a Lithuanian national, Roman Romasov (RR) was tragically murdered by a fellow employee, McCulloch, whilst at work. RR and McCulloch worked as shelf-stackers. McCulloch was a member of the British National Party and known to hold extreme and racist views about Eastern European workers coming to the UK. In the days immediately prior to the murder, fellow employees had discussed hearing a threat by McCulloch to the effect that he was going to kill RR.

On April 13, 2009, McCulloch told the deceased that he did not like immigrants and that the deceased should go back to his own country. RR wrote a letter of complaint to his team leader which was passed on to the nightshift manager. No action was taken in response to the complaint, of which McCulloch became aware. Two days later, while the two employees were working on night duty, McCulloch stabbed and killed RR in one of the supermarket aisles with a kitchen knife from the kitchenware section of the supermarket.

RR's relatives brought a claim for harassment under the Protection from Harassment Act 1997. The defendant applied to strike the case out. The application was rejected at first instance but allowed by the Court of Session (Inner House). Lord Carloway, the Lord Justice Clerk giving the leading judgment said:

> *The court has been provided with no basis upon which it could hold it just and reasonable for all employers to become vicariously liable for all acts of harassment solely on the basis of such engagement. Using Lord Millett's formula in Lister …, which found favour with the court in Various Claimants (supra, Lord Phillips at paragraph 72), the defender's objectives did not carry with them a serious risk of their employee committing the kind of wrong which he in fact committed.*

Mohamud v WM Morrison Supermarkets plc

Mohamud v WM Morrison Supermarkets plc looked like being just another example of this retrenchment. Amjid Khan (AK) worked in a Morrisons' supermarket kiosk which served the petrol station. A customer, Ahmed Mohamud (AM), of Somali descent, entered the kiosk and asked AK if it was possible to print off some documents which were stored on a computer memory stick. AK responded in an abusive fashion, using racist language. After AM left the kiosk, AK followed him and subjected him to a vicious physical attack. AM brought proceedings against the supermarket.

The trial judge found that AK's duty was *'not to keep public order in the sense of a doorman, but to ensure that the shop was in good running order and that petrol pumps were in good running order, to assist people if at all possible, but no more than that.'* On that basis he concluded that AM had failed to show a sufficiently close connection between (a) AK's tortious conduct and (b) his employment, and dismissed the claim.

11. Reported together at [2012] IRLR 307

12. [2004] UKPC 47

13. [2013] IRLR 792

The CA dismissed AM's appeal against that judgment.[14] Reviewing the modern authorities, Treacy LJ stated:[15]

> *The authorities from Lister onwards make clear that very careful attention must be given to the closeness of the connection between the tort of the employee and the duties he is employed to perform viewed in the round. In my judgment, the cases cited earlier in this judgment show that the mere fact that the employment provided the opportunity, setting, time and place for the tort to occur is not necessarily sufficient. They demonstrate that some factor or feature going beyond interaction between the employee and the victim is required. The decided cases have examined the question of close connection by reference to factors such as the granting of authority, the furtherance of an employer's aims, the inherence of friction or confrontation in the employment and the additional risk of the kind of wrong occurring.*

He added:[16] *'... in my judgment, our law is not yet at a stage where the mere fact of contact between a sales assistant and a customer, which is plainly authorised by an employer, is of itself sufficient to fix the employer with vicarious liability.'*

Supreme Court

The SC allowed a further appeal. AM's lawyers who argued that in place of the close connection test, the courts should apply a broader test of 'representative capacity'. In the case of a tort committed by an employee, the decisive question should be whether a reasonable observer would consider the employee to be acting in the capacity of a representative of the employer at the time of committing the tort.

The SC rejected that argument[17] and held that the established test, albeit imprecise and requiring the court to make an evaluative judgment in each case having regard to the circumstances, remained good and without need of further refinement. However, it nonetheless allowed the appeal.

The SC held that there was a sufficient connection, because it was MK's job to attend to customers and respond to their inquiries; he had not *'metaphorically taken off his uniform'* when he came out from behind the kiosk counter and followed AM onto the forecourt. What happened was an *'unbroken sequence of events'* ... a 'seamless episode'. Although the court did not say it, it seemed as though the 'something more' than context provided by opportunity and setting of employment – here the interaction with a customer – was not required in this case.

A clear parallel between common law and the Equality Act

Whilst the language is different, there is now a clear parallel between the approach to an employer's liability for the act of his employee under the EA (giving a purposive interpretation to the words *'in the course of employment'*) and the approach of the courts to vicarious liability at common law (a wrongful act 'so closely connected' with the employee's employment that it would be fair and just to hold the employer liable). In the light of the SC decision, cases such as *Graham v Commercial Bodyworks Limited* [2015] EWCA Civ 47 (in which one employee sprayed paint thinner on a colleague then set it alight causing serious injury, and for which the employer was held not to be liable) might now be decided differently.

But for whose acts is a party liable?

In *Various Claimants v Catholic Child Welfare Society*[18] (the Christian Brothers case), the SC considered the general approach to be adopted in deciding whether a relationship other than one of employment can give rise to vicarious liability (subject of course to the question, whether there was a sufficiently close connection between that relationship and the wrongdoing). The SC imposed vicarious liability on a body which did not employ the wrongdoers, in circumstances where another body did employ them and was vicariously liable for the same tort.

In what was subsequently described by Lord Reed in *Cox* as a *'modern theory of vicarious liability'*, Lord Phillips set out five criteria by which liability could be imposed:[19]

> *There is no difficulty in identifying a number of policy reasons that usually make it fair, just and reasonable to impose vicarious liability on the employer when these criteria are satisfied:*
>
> *i. the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability;*

14. [2014] IRLR 386

15. At para 46

16. At para 49

17. *'I do not see that the law would now be improved by a change of vocabulary'* (per Lord Touson at para 46) and '*... the proposed new test is hopelessly vague'*(per Lord Dyson at para 53).

18. [2013] 2 AC 1

19. Para 35

ii. *the tort will have been committed as a result of activity being taken by the employee on behalf of the employer;*
iii. *the employee's activity is likely to be part of the business activity of the employer;*
iv. *the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee;*
v. *the employee will, to a greater or lesser degree, have been under the control of the employer.*

Lord Phillips added: *'Where the defendant and tortfeasor are not bound by a contract of employment, but their relationship has the same incidents, that relationship can properly give rise to vicarious liability on the ground that it is "akin to that between an employer and an employee"'* [para 47].

Cox v Ministry of Justice: pushing the boundaries

In *Cox v Ministry of Justice*,[20] heard at the same time as *Mohamud*, the issue was whether the Prison Service, an executive agency of the defendant Ministry, was vicariously liable for the negligence of a prisoner in the course of the prison work which he was required to do pursuant to Prison Rules.

The trial judge found that the Prison Service was not liable. He focused on whether the relationship between the Prison Service and the prisoner was akin to that between an employer and employee and concluded that it was not. He reasoned that the bargain made between employer and employee was missing; the provision of work was a matter of prison discipline, of rehabilitation, and possibly of repayment by prisoners to the community.

The CA took a different view. McCombe LJ, with whom Beatson and Sharp LJJ agreed, applied Lord Phillips's analysis in the *Christian Brothers* case. McCombe LJ observed that the work performed by prisoners in the kitchen was essential to prison functioning. If not done by prisoners it would have to be done by someone else. In short, the Prison Service took the benefit of this work, and there was no reason why it should not take its burdens. McCombe LJ agreed with the trial judge that the relationship differed from a normal employment relationship in that the prisoners were bound to the Prison Service not by contract but by their sentences. Their wages were nominal. But those differences rendered the relationship, if anything, closer than one of employment: it was founded not on mutuality but on compulsion.

Supreme Court

The SC upheld the CA. Lord Reed endorsed Lord Phillips's five factors from the *Christian Brothers* case, but stated that they were not all of equal significance. The first factor, on the insurance means to compensate the victim, is unlikely to be of independent significance. A deeper pocket or insurance cover is not a principled justification for imposing vicarious liability – *'employers insure themselves because they are liable: they are not liable because they are insured'*. However, Lord Reed did not rule out circumstances in which the availability of insurance might be a relevant consideration.

The fifth factor, relating to control of the defendant, no longer has the significance that it was sometimes considered to have in the past. It is not realistic in modern life to look for a right to direct how an employee should perform his duties as a necessary element in the relationship between employer and employee. The significance of control is that the defendant can direct what the tortfeasor does, not how he does it. It is therefore a factor which is unlikely to matter in most cases, although the absence of even a vestigial degree of control might negate any vicarious liability.

As Lord Reed observed, the remaining factors are interrelated. The essential idea is that the defendant should be liable for torts that may fairly be regarded as risks of his business activities, whether they are committed for the purpose of furthering those activities or not. He will not be liable where the tortfeasor's activities are entirely attributable to the conduct of a recognisably independent business of his own or of a third party.

It is sufficient that there is a defendant which is carrying on activities in the furtherance of its own interests. The individual for whose conduct it may be vicariously liable must carry on activities assigned to him by the defendant as an integral part of its operation and for its benefits. The defendant must, by assigning those activities to him, have created a risk of his committing the tort. A wide range of circumstances can satisfy those requirements.

Lord Reed agreed that *Christian Brothers'* requirements were met in the present case. He rejected the argument that the primary aim of setting prisoners to work in a prison was not to advance any enterprise of the prison, but to support the rehabilitation of the prisoners as an aim of penal policy. The activities of prisoners were of benefit to themselves, but also to the

20. [2016] 2 WLR 806

Prison Service. It was not essential to liability that a defendant should seek to make a profit; nor did it depend upon an alignment of the objectives of the defendant and of the individual tortfeasor. Nor did it depend on the fact that the Prison Service was under a statutory duty to provide useful work for prisoners and had a restricted choice of workers to exclude vicarious liability.

Furthermore, where the *Christian Brothers* criteria are satisfied, it should not generally be necessary to assess the fairness, justice and reasonableness of the result in the particular case.[21] However where a case concerns circumstances which have not previously been the subject of an authoritative judicial decision, Lord Reed said that it may be valuable to consider whether the imposition of vicarious liability would be fair, just and reasonable. The present case fell into that category; and it was neither just nor reasonable that Mrs Cox's right to compensation should depend on whether the member of the catering team who dropped the bag of rice which injured her happened to be a prisoner or a civilian.

Coming full circle

The reach of vicarious liability at common law now extends to an extremely wide range of environments and circumstances (subject, always, to the *Lister* 'close connection' test). It will apply to temporary workers and agency staff – unless they are truly independent contractors operating on their own account. It is likely also to cover many volunteers. And the nature of the organisation which uses the labour of the wrongdoer is neither here nor there. It is sufficient that the organisation is carrying on activities which are in furtherance of its own interests (something which applies to virtually all bodies) and that it has assigned some integral part of those activities to the wrongdoer.

In *Kemeh v Ministry of Defence*, the CA held that an employer was not liable[22] to its own employee for an act of race discrimination committed by the employee of a third party sub-contractor. Elias LJ recognised that because of the different sets of rules relating to contract workers and employees, the claimant had fallen through a gap in the statutory protection since the legislation conferred rights on contract workers to bring a claim against the employer but it does not impose liabilities on that person for the acts of a contract worker. *'Parliament may wish to consider this lacuna, although, if it provides a remedy, it will have to decide whether it is the immediate employer rather than the end user of the services who should bear the legal responsibility.'*[23]

Whilst, following *Jones v Tower Boot*, the scope of vicarious liability under equality legislation was broadened beyond the scope of tortious liability at common law, ironically we have now come full circle and vicarious liability at common law arguably extends further than under the EA. For example employers are not, in general, liable for third-party discriminatory conduct under the EA, following the repeal of s40 EA by the Enterprise and Regulatory Reform Act 2013 as from October 1, 2013 (effectively re-instating the position established in *MacDonald v Advocate General for Scotland*; *Pearce v Governing Body of Mayfield Secondary School* [2003] ICR 937). However they could well be held liable for such conduct at common law.

If the facts of *Kemeh* had given rise to a tortious claim capable of being brought in the civil courts, the Ministry of Defence may well have been held liable. Legal advisers must therefore be alert to the possibility of a common law claim where the EA gives no remedy.

21. Paras 39-41

22. For the purposes of s32(2) Race Relations Act 1976, the predecessor of s109(1) EA

23. At para 48

Striking a balance between religious freedom and neutrality in the workplace

Achbita v G4S Secure Solutions NV C-157/15, March 14, 2017; *Bougnaoui v Micropole SA* C-188/15, March 27, 2017

Introduction

In recent years women's dress and in particular the right of Muslim women to wear a headscarf to work has been at the forefront of media coverage with a series of controversial cases and incidents in the UK and in Europe. [See Briefing 814 on dress codes.] The two recent cases of *Achbita v G4S Secure Solutions* and *Bougnaoui v Micropole SA* brought this issue sharply into focus before the CJEU. Contrasting opinions of the Advocates General have grappled with the extent to which the principle of secularism or political neutrality in states such as France and Belgium mean that religious freedom in the workplace can be legitimately curtailed. The decisions of the CJEU were more nuanced than the lurid headlines in the tabloids suggested.

Achbita v G4S Secure Solutions

In *Achbita* the CJEU had to consider the requirement that a Muslim woman not wear a headscarf at work. Samira Achbita (SA) worked at G4S in Belgium as a receptionist. There was an unwritten rule within the company that workers could not wear visible signs of their political, philosophical or religious beliefs in the workplace. SA had abided by this restriction for some three years before returning from sick leave stating that she intended in the future to wear a headscarf at work. She was subsequently dismissed from her job. The Belgium court referred to the CJEU the question of whether a prohibition on wearing an Islamic headscarf as part of a general ban on visible political, philosophical or religious signs at work amounted to direct or indirect religious discrimination.

Advocate General Kokott's opinion

Advocate General Kokott advised that the court should reject the claim noting that, unlike earlier British Airways dress policy (*Eweida*, see Briefing 663), all religions were treated equally by G4S and the dress code did not make allowance for any religious attire at all in the workplace. The claim for direct discrimination was deemed to be very weak. The Advocate General gave primacy to religious neutrality in a multicultural society as a legitimate aim which ensures respect for all religions while not supporting or encouraging the promotion of any particular faith. AG Kokott was no doubt influenced by the fact that SA had previously worked at G4S for several years without wearing a headscarf. She posited that, unlike skin colour or sex, religion was not innate and could be left at the door of the workplace.

Court of Justice of the European Union

The CJEU decided that a general ban which applied to all staff and which referred to the wearing of visible signs of political, philosophical or religious beliefs did not amount to direct religious discrimination because it applied to all staff equally and there was no evidence that it was applied differently to SA.

However it was possible that such a rule might amount to indirect discrimination unless it could be objectively justified. The employer had argued that it needed to display political, philosophical and religious neutrality in relation to both its private and public sector customers and this was a perfectly legitimate aim. The court concluded that such policy might be perfectly reasonable in so far as a member of staff was working front of house and the policy was applied to all such staff in a fair and transparent way. Greater justification might be needed where the member of staff had limited or no contact with the public. These were all matters for the referring court to decide and in particular whether, before dismissing SA, G4S should have offered her a role which did not bring her into direct contact with customers.

Bougnaoui v Micropole SA

Asma Bougnaoui (AB) is an engineer who had been dismissed following a customer's complaint that she had worn a hijab on site at their premises and a request that she not do so again as it had upset a number of their employees. Her employer said that it respected AB's right to a religious or political opinion but had specifically requested that she not wear her headscarf again when in contact with customers internally or on customers'

premises. AB refused and was subsequently dismissed. The matter was referred by the French court to the CJEU on the question of whether a prohibition on wearing a headscarf might be viewed as a genuine occupational requirement.

Advocate General Sharpston's opinion

Advocate General Sharpston noted wryly that wearing a headscarf did not prevent AB from performing her job as an engineer and indeed the letter of dismissal spoke particularly of her professional competence. She considered that AB's dismissal from her post as an engineer amounted to direct religious discrimination.

She also considered that the employer's policy could not be deemed proportionate if one applied the relevant provisions for indirect discrimination. Equally important she rejected the idea that a person's religion was not an intrinsic part of their make-up. In a thorough analysis of the key principles, AG Sharpston noted that while proselytising was unacceptable in the workplace, employers need to respect the individual's right to expression of cultural and religious freedom. For many religion is as intrinsic to their being as the colour of their skin and making that kind of distinction between protected characteristics was a false dichotomy. AG Sharpston stated that *'two protected rights – the right to hold and manifest one's religion and the freedom to carry on a business – are potentially in conflict with one another. An accommodation must be found so that the two can coexist in a harmonious and balanced way'*. She noted that while an employer buys a worker's time, he does not buy his soul. Her conclusion emphasised the need for proportionality and compromise in the workplace.

Court of Justice of the European Union

The CJEU concluded that the concept of a genuine and determining occupational requirement under Article 4(1) of the Equal Treatment Directive refers to a requirement that is objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out. Customer preference was a subjective issue and could not therefore be considered as an objective requirement of the job. The question asked here was therefore different to the question asked by the Belgian court. It focused in particular on whether a customer's objection to an Islamic headscarf should be taken into account by the employer. The court clearly did not like the idea of a prejudiced customer being able to influence an employee's rights or ability to earn a living. It could not be said that not wearing a veil was a genuine occupational requirement for an IT design engineer. While it was a matter for the national court to decide, it was clearly possible that a rule which was specifically aimed at a Muslim employee could amount to indirect religious discrimination unless it were objectively justified.

The brief decision of the court did not touch on direct discrimination; reading the two decisions together makes it clear that a rule which applies to only one individual or religion would be directly discriminatory.

Implications for English courts

The principle of secularism or political neutrality is not as entrenched in the UK as it is some continental countries such as France or Belgium as evidenced by the fact that Jewish men, Sikh men and Muslim women freely go to work wearing symbols of their religion without too much difficulty. Where objection has been taken it has generally been given a more nuanced treatment where the employer and the court looks at the situation on a case-by-case basis. These cases do not mark a dramatic departure from existing case law. It should be obvious to a reasonable employer by now that dress codes should be clearly set out, preferably in writing and consistently applied without singling out a particular religion or practice. Where a request has been made or an issue arises the circumstances should be clearly reviewed. While, for instance, Advocate General Sharpston made special pleading for what amounts to reasonable accommodation or compromise, this was not adopted by the full court. However, it was highlighted that an employer should see what action short of dismissal could be taken to resolve such concerns. It is certainly worth emphasising that customer prejudice is not a valid consideration and cannot be considered to be a genuine occupational requirement. Such cases will continue to attract controversy but close examination of the context and legal principles married with flexibility on both sides should reduce the sense of outrage and injustice that such cases provoke.

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Indirect discrimination goes back to its roots: disparate impact approach upheld in *Essop*[1]

Home Office (UK Border Agency) v Essop [2017] UKSC 27; April 5, 2017

Implications for practitioners

In *Essop* the SC, overturning a decision of the CA (and the original ET) has held that indirect discrimination concerns provisions, criteria or practices (PCPs) which have disparate impact on those with protected characteristics, by comparison with those who lack those characteristics. Differing from the CA, the SC held that the reason why they have that disparate impact is relevant only to the question of justification. Lady Hale applied the same reasoning to Mr Naeem's claim against the SS for Justice albeit to different facts. There will be a briefing on this aspect of the judgment in the next edition of *Briefings*.

Law

Under s19 of the Equality Act 2010 (EA), indirect discrimination may arise where an apparently neutral PCP puts people who share a protected characteristic at a comparative disadvantage. Put shortly, a claimant has to show that the PCP applied by the respondent:

- puts persons with whom the claimant shares the characteristic at a particular disadvantage when compared with persons with whom the claimant does not share it (s19(2)(b)), and
- puts the claimant at that disadvantage (s19(2)(c)).

If the claimant shows this, he succeeds unless the respondent can show the PCP to be a proportionate means of achieving a legitimate aim (s19(2)(d)).

The question in *Essop* concerned the meaning of the s19(2)(c) requirement that the claimant show he was put *'at that disadvantage'*.

Background

In the Civil Service all candidates for promotion to certain grades must pass a generic Core Skills Assessment (CSA), whatever their particular role. Mr Essop (E) is the lead claimant in a group of 49 Home Office employees who argue that this requirement indirectly discriminates against black and minority ethnic (BME) and/or older candidates.

According to a 2010 study the pass rate for BME candidates was 40.3% of the pass rate for white candidates, and for candidates over 35 it was 37.4% of the rate for candidates under 35. Although not all older and BME candidates failed, larger proportions did so. The likelihood that this difference in pass rates could have arisen by chance was 0.1%, but the reason for the difference is unknown.

At a pre-hearing review in the ET, the employment judge held that s19(2)(c) requires a claimant to identify the reason why the PCP disadvantages members of a group and show that his own disadvantage had the same cause as the group disadvantage.

E appealed arguing that the ET had interpreted s19(2)(c) incorrectly and created an unnecessary additional hurdle for claimants.

The EAT overturned the ET decision. It held that the wording of the statute does not require a claimant to show the reason **why** he suffered the disadvantage, merely the **fact** that he suffered the group-based disadvantage. The judge's finding that *'…the mere fact of failure of the CSA test… is not determinative of whether the claimant has been put at that disadvantage'* was therefore incorrect. The particular disadvantage was failing the test, and E suffered precisely that disadvantage.

On appeal by the Home Office, however, the CA overturned the EAT decision. It held that, under s19(2)(c), a claimant who is a member of a disadvantaged group must show that the reason for his individual disadvantage is the same as the reason for the group disadvantage.

The CA rejected the suggestion that statistical evidence under s19(2)(b) of the group disadvantage could automatically suffice as proof under s19(2)(c) that the individual claimant suffered the same disadvantage. It pointed out that a woman claiming indirect discrimination must show why a PCP requiring full-time work disadvantages women as a group – for instance, because of caring responsibilities – and must show that she is disadvantaged because of her caring responsibilities. Otherwise, a claimant whose disadvantage is unrelated to the group disadvantage – for instance, because she wishes to play golf – could succeed *'on the coat-tails'* of claimants who face a genuine group disadvantage. In *Essop*, the 'coat-tailer' might be someone who was late for the CSA and then failed because he did not finish the questions.

1. This case comment first appeared on the Devereux Chambers' employment blog.

It was therefore held that, having first established group disadvantage under s19(2)(b), a claimant must then show under s19(2)(c) that he was personally disadvantaged by the PCP in the same way as the group as a whole. E was unable to do that because he could not establish the reason for the disadvantage. (See Briefings 730 and 752 for an analysis of the EAT and CA judgments.)

Supreme Court

The judgment in E's appeal was given by Lady Hale, with whom all the other justices agreed. After reviewing the evolution of indirect discrimination provisions in UK and EU law she identified six salient features which have characterised the concept of indirect discrimination throughout its development:

1. It is not necessary to explain why a PCP has a disparate impact: it is enough to show that it does [para 24].
2. The causal link which a claimant must demonstrate is between the PCP and the particular disadvantage. This distinguishes indirect discrimination from direct discrimination, where the claimant must demonstrate a causal link between the protected characteristic and the less favourable treatment [para 25].
3. There are many different kinds of reasons why one group may find it harder to comply with a PCP than another: for instance, height requirements impact differently on men and women as a result of genetics; restrictions on part-time working have a disparate impact on women because of the expectation that women will be primary care-givers [para 26]. In some cases, there will be no generally accepted explanation for the disparate impact.
4. The PCP need not put everyone who shares the protected characteristic at a disadvantage: it is enough that it puts a greater proportion of that group at a disadvantage [para 27].
5. Statistical evidence, which establishes correlations rather than causal links, can be sufficient to establish that there is particular disadvantage, or disparate impact [para 28].
6. If a respondent can show that there is good reason for the PCP then there will be no finding of unlawful discrimination [para 29].

The SC held that E did not have to establish the reason why the PCP placed BME and older candidates at a disadvantage. There is no express requirement for him to do so in s19 and these six features support the conclusion that no such requirement should be read in.

Lady Hale addressed the CA's 'coat-tailing' concern, observing that any harm suffered by the 'coat-tailer' who failed to prepare or did not turn up to take the test is not the result of the PCP but of his own conduct. In that context, *'it must be permissible for an employer to show that an employee has not suffered harm as a result of the PCP in question'.* [para 32]

The claims are now remitted to the ET to proceed with a final hearing.

Comment

The concept of indirect discrimination in Anglo-American law can be traced back to the US case of *Griggs v Duke Power Co* (1971). In that case, a North Carolina employer required employees to hold a high school diploma or pass an intelligence test, although neither requirement measured ability to learn to perform a relevant job. African Americans were much less likely to hold high school diplomas and had much lower pass rates for the kinds of tests used. The US Supreme Court held that such an arbitrary and unnecessary barrier was prohibited:

> *The [Civil Rights Act 1964] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation… [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability.*

In the Sex Discrimination Act 1975 and the Race Relations Act 1976 the concept of indirect discrimination was used to capture this form of discrimination. The purpose of such provisions is to *'achieve a level playing field'* (*Essop* [para 25]) by requiring that PCPs which cause disparate impact be objectively justified.

The CA judgment in *Essop* placed a significant additional hurdle in the way of a claimant by requiring that the reason for the group disadvantage be established in order to show that the individual disadvantage had the same cause. In *Essop* this was impossible, because nobody knew why the pass rates for different groups were so different. The CA judgment would have the effect that in such cases the justification stage would never be reached even though the disparate impact on the group had been established. The SC's decision in *Essop* confirms that the law of indirect discrimination remains true to its roots.

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Indirect age discrimination – assessment of justification to be based on the respondent's legitimate aim

Harrod & Ors v Chief Constable of West Midlands Police & Ors [2017] EWCA Civ 191; [2017] IRLR 539; March 24, 2017

Implications for practitioners

The CA emphasised that when considering justification, the ET should focus upon the manner in which the provision criterion or practice (PCP) occasioned potentially discriminatory disparate impact. Further, that as an employer's decision as to how to allocate its financial resources constituted a 'legitimate aim', it was that aim which fell to be assessed for proportionality, not alternative objectives identified by the ET.

Facts

The case concerned a class action arising from the compulsory retirement of police officers by five police forces needing to accommodate budget cuts. Police officers are not employees and they can only be required to retire in limited circumstances; there is no general power to make them redundant. In this instance retirements were required by application of regulation A19 of the Police Pension Regulations 1987 (A19) under which officers can be retired *'in the general interests of efficiency'* if they have accrued an entitlement to a pension worth 2/3 of average pensionable pay; an entitlement which an officer receives after 30 years of service. The forces decided to retire the vast majority of their officers who fell into this category. The claimants did not wish to retire and complained that in consequence they had been indirectly discriminated against on grounds of age (as younger officers who did not meet the A19 criteria were not retired).

Employment Tribunal

The ET found that the police forces were aware they were likely to obtain greater savings than required by the budget cuts through the near universal application of A19 and that there was little or no consideration given to the possibility of exploring whether sufficient savings could be made through voluntary retirement of officers; or to the possibility of some officers moving to part-time working or taking career breaks. If after these alternatives had been exhausted, a limited number of officers still needed to be compulsory retired to achieve the budgeted cuts, a selection process between A19 eligible officers could have taken place, thus avoiding the widespread use of A19. For these reasons, the ET found that the forces had failed to justify requiring the retirement of nearly all officers who could be required to retire under A19.

Employment Appeal Tribunal

The EAT allowed the police forces' appeal: part of their aim was to achieve certainty of reduction in budgetary expense and there was no way of achieving that certainty other than by using A19. It was not for the ET to substitute a scheme other than the one adopted by the forces to achieve that aim, but rather to consider whether the application of A19 was reasonably necessary and appropriate in securing that objective. As certainty of budget reduction could not be achieved other than through use of A19, the inevitable conclusion was that it was appropriate and reasonably necessary. The appeal was therefore allowed and the claims dismissed.

Court of Appeal

The officers' appeal to the CA was dismissed. Agreeing with the EAT, the CA held that the ET had posed the wrong question. The decision to reduce officer headcount to the fullest extent available was taken in the legitimate interests of achieving certainty of costs reduction; and it was not for the ET to devise an alternative scheme involving fewer posts. The police forces had to justify the selection of officers with more than 30 years service, since it was this which had produced the disparate impact in age terms. The forces had done so by reference to A19, the only lawful means by which they could make officers redundant and thus it was a proportionate means of achieving a legitimate aim. The respondents did not have to also justify the numbers of officers made redundant under this process.

In arriving at this conclusion the CA cited with approval the EAT's earlier decision in *HM Land Registry v Benson* [2012] ICR 627, an unsuccessful age discrimination challenge to a process under which employees under 50 were given preference for a voluntary redundancy/retirement scheme (which the older claimants had wished to take advantage of). In *Benson*, having emphasised that justification required the

employer to establish that the PCP was 'reasonably necessary' as opposed to 'absolutely necessary' – the court stated that an employer's decision as to how to allocate financial resources should constitute a legitimate aim, even if it is shown that a different allocation with a lesser impact on the class of employee in question could have been made. Underhill LJ put it as follows:

> *It is not open to an employment tribunal to reject a justification case on the basis that the respondent should have pursued a different aim which would have had a less discriminatory impact. The forces were entitled to decide how many officers they needed to lose.*

Comment

The CA considered it instructive to draw an analogy with the limited extent to which it would be open to the ET to investigate the commercial and economic reasoning behind an employer's decisions to make redundancies or their assessment of how many employees should be made redundant.

The CA's decision confirms that the objective selected by the employer is to be respected by the ET provided it falls within the relatively wide concept of a legitimate aim. In this particular case, once it was accepted that the objective was legitimate, there was only one way – A19 – of implementing it, so justification was inevitably established. However, as the observations of Baroness Hale in *Naeem v Secretary of State for Justice* [2017] UKSC 27 underscore, this does not relieve an ET in other situations from considering whether and to what extent alternative means are available to an employer to secure the aim in question.

The CA's decision also provides a reminder that justification is an objective evaluation, focused upon the allegedly discriminatory impact in question; rather than on the employer's subjective decision-making process (which the ET had critiqued in this case).

Lastly, the CA gave a welcome endorsement of the EAT's earlier observation that it is generally unhelpful to analyse the measure in question to see if it was a 'practice', a 'provision' or a 'criterion'; the question was whether apparent discrimination resulted from something which might properly be described by any or all of those labels.

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Briefing 832

Denying heterosexual couples civil partnerships is not a violation of Article 8

Steinfeld and anor v Secretary of State for Education [2017] EWCA Civ 81; [2017] Fam Law 389; 167 NLJ 7736; February 21, 2017

Implications for practitioners

The CA has held by majority that restricting the availability of civil partnerships to same-sex couples is a proportionate interference with the Article 8 rights of heterosexual couples who are opposed to marriage but who wish to formalise their relationship. In reaching its decision the CA departed from the decision in the Administrative Court, which had held that Article 8 was not engaged at all.

Background

Since the coming into force of the Marriage (Same-Sex Couples) Act 2013, same-sex couples have had two options available to them to create legal status for their relationship: a civil partnership or a marriage. Heterosexual couples, however, do not have the option of entering into a civil partnership. This difference in treatment is a hangover from the legislative history of securing legal status for same-sex couples, which began with the Civil Partnership Act 2004 (CPA).

What then are the options for heterosexual couples who are genuinely ideologically opposed to marriage? Cohabitation agreements do not provide the same legal security as marriage. If they want the rights and legal security associated with marriage, their only option available is to swallow their principles and get married. This was not an option for the appellants, Rebecca Steinfeld and Charles Keiden (the As), whose ideological opposition to marriage and their wish to become heterosexual civil partners has taken them to the CA.

Administrative Court

The As commenced judicial review proceedings after their request to be made civil partners was refused by a registry

office. They claimed that the inability of different-sex couples to enter into a civil partnership was incompatible with their rights under Articles 8 and 14 of the European Convention on Human Rights (ECHR). They could not simply get married because they had, what was found by Andrews J at first instance, to be *'deep-rooted and genuine ideological objections to the institution of marriage, based upon what they consider to be its historically patriarchal nature'.*

Their application was dismissed. Andrews J held that the prohibition on different-sex civil partnerships did not fall within the *'ambit'* of Article 8. The As could marry and thus enter into a legal relationship according full protection to all the core values of Article 8. She concluded:

> *This is not a case where [the As] cannot achieve formal state recognition of their relationship, with all the rights, benefits and protections that flow from such recognition: on the contrary it is open to them to obtain that recognition by getting married.*

She also held that any interference with their private life was even more tenuous as there was no evidence that they were subjected to humiliation, derogatory treatment or any other lack of respect for their private lives. *'The only obstacle to [the As] obtaining the equivalent legal recognition of their status and the same rights and benefits as a same-sex couple is their conscience.'*

Court of Appeal

All three members of the CA disagreed with the analysis in the Administrative Court. Following a wide-ranging review of Strasbourg and domestic case law, the CA unanimously held that Article 8 was engaged and that it was not necessary for them to point to any humiliation, derogatory treatment or lack of respect for that to be the case. They also unanimously agreed that the prohibition on different sex civil partnerships was, *prima facie*, discriminatory. The decision on this issue is helpfully summarised by Briggs LJ:

> *To my mind the essence of the difference in treatment which engages Article 14 is not that all same-sex couples have two ways of obtaining state recognition of their relationship, whereas all difference sex couples have only one, although that is of course true. Both ways confer substantially the same benefits… The fact that different-sex couples can only obtain them by one route does not of itself infringe their human rights on the grounds of differential treatment, any more than those of a disabled person in a wheel-chair who can only access a building by a ramp whereas the able-bodied person can use the ramp or an adjacent staircase.*
>
> *The significant difference in treatment arises from the fact that there is a special group of couples for whom marriage is simply not an available alternative, because of their sincerely held view that marriage has not escaped its supposedly patriarchal origins… That special group includes both same-sex couples and different-sex couples. The same-sex couples can still obtain state recognition of their relationship by civil partnership. The different-sex couples cannot obtain state recognition of their relationship at all. Thus within the special group of those for whom marriage is simply not an option, there is differential treatment on the grounds of sexual orientation because only the same-sex couples within the group can obtain any form of state recognition of their relationship, with all the very important social and economic (including fiscal) advantages which that brings. This is why, in my view, the "can marry" argument is misconceived.*

However, by majority (Beatson and Briggs LLJ, Arden LJ dissenting) the CA found that the interference with Article 8 was proportionate. The Secretary of State had not set out a deliberate policy of narrowing the options for heterosexual couples; the current situation was born of the legislative history relating to same-sex partnerships. Following the legalisation of same-sex marriage, the Secretary of State's approach had been to *'wait and evaluate'* and to collate statistics on the impact of same-sex marriage on the numbers of civil partnerships, in order to decide whether to eliminate, phase out or widen access to civil partnerships. That policy was justified.

Comment

It is notable that the majority of the court was willing to find that a *'wait and evaluate'* approach was a proportionate and therefore justified interference with the As' Article 8 rights, despite a clear finding that there was a *prima facie* case of discrimination. As observed by Arden LJ, in her dissenting opinion, the Secretary of State's current policy is that she will not make any changes to the CPA until she has more data on the number of same-sex couples choosing to take up or remaining in civil partnerships, rather than electing to marry. Arden LJ criticised the policy as *'open-ended'* and, more to the point, only addressed questions going to the number of civil partnership formations and dissolutions. It does not, therefore, address the more important social question of whether heterosexual couples could have the right as a matter of principle.

The As have sought permission to appeal to the SC.

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'Self-employed contractor' establishes worker status under the ERA and is entitled to bring disability discrimination claims

Pimlico Plumbers Ltd and another v Smith [2017] EWCA Civ 51; February 14, 2017

Background

The appeal concerned whether the ET was correct to hold that a plumber was a worker within the meaning of s230(3)(b) of the Employment Rights Act 1996 (ERA) and whether his working situation fell within the definition of 'employment' in s83(2)(a) of the Equality Act 2010 (EA).

The law

An employee is defined in s230(1) ERA as *'an individual who has entered into or works under…a contract of employment'.*

A worker is defined under s230(3)(b) ERA as an individual who has entered into or works under a contract of employment or '*any other contract, whether express or implied…whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual'.*

An extended definition of 'employee' is found in s83(2)(a) EA, which defines an employee to include an individual who is employed *'under a contract of employment…or a contract personally to do work'.* A contract personally to do work has been held by the SC in *Clyde and Co and another v Bates van Winkelhof* 2014 ICR 730 to mean the same as the definition under s230(3)(b) ERA. This definition opens ups possibilities for some workers to bring discrimination claims in the ET.

Facts

The case concerned Pimlico Plumbers Limited (PP) which engaged Gary Smith (GS) as a plumber between August 25, 2005 and April 28, 2011. In January 2011, GS suffered a heart attack. Following this, he requested PP to reduce his working days from five days to three days a week. PP terminated its arrangement with GS on May 3, 2011.

GS issued proceedings in the ET bringing claims for disability discrimination and failure to make reasonable adjustments, along with unfair dismissal, wrongful dismissal, and entitlement to pay during medical suspension, holiday pay and unlawful deduction of wages.

The contractual documentation between GS and PP consisted of a 2009 agreement and a company manual. The 2009 agreement stated GS was an independent contractor of PP in business on his own account. Some of the other key provisions of the contractual documentation were as follows:

- GS was under no obligation to accept work from PP and PP was not obliged to offer him any work
- GS was personally obliged to complete a minimum of 40 hours per week
- GS was obliged to wear company branded uniform, to use a company provided van (which he hired) and carry a company issued ID card
- GS had to provide his own materials and tools and he was responsible for procuring liability insurance.

Restrictive covenants were imposed by PP, including one which prevented GS from being a plumber in the Greater London area for three months after termination.

In addition, GS was registered for VAT, raised invoices to PP and filed his tax returns on the basis that he was self-employed.

Employment Tribunal

The preliminary issue for the ET was to decide whether GS was an employee, a worker or a self-employed contractor.

The tribunal found that GS was not an employee for the purposes of the s230(1) ERA and therefore it lacked jurisdiction to hear his unfair dismissal and wrongful dismissal claims. The tribunal did however find that GS was a worker.

The ET found that GS had to perform work personally in line with s230(3)(b) ERA. Whilst there was no express right of substitution, the tribunal found that in practice PP's engineers occasionally swapped jobs between them and used each other to provide additional help when more than one person was required for the job. In addition, external contractors were sometimes brought in to assist with a job. However it was found that GS remained under an obligation to perform a minimum number of hours per week. Whilst the contractual documents stated that PP was not obliged to offer work to GS and GS was not obliged to accept

work offered to him, the fact that PP might choose not to insist on the full 40 hours work or that the 40-hour week was not enforced, did not take away from the contractual obligations placed on GS.

Furthermore, the ET found that PP could not be considered to be a client or customer of GS's business as GS was not in business on his own account and was subordinate to PP. One factor that the tribunal placed a good deal of weight on was that PP exercised a high degree of restriction on GS's ability to work after his termination; these restrictive covenants were found to be inconsistent with GS being in business on his own account.

The ET found that it had jurisdiction to hear GS's claims for disability discrimination, unauthorised deductions from wages and statutory holiday pay.

Employment Appeal Tribunal

PP appealed to the EAT on the worker status and GS cross-appealed on the employee status. The ET's decision was upheld and GS's appeal was rejected.

Court of Appeal

PP appealed further, asking the CA to consider whether GS was a worker. The Master of the Rolls gave the leading judgment in which he ruled that GS was a worker and an employee in the extended sense. The judgment turned on two main issues: firstly, whether GS was obliged to provide his services personally; and secondly, whether PP was a customer of a business operated by GS.

On the first issue, the CA found that GS was obliged to provide his services personally. When arguing that GS was not required to provide personal service, PP relied on the ET's findings of fact that the plumbers could swap jobs between themselves and occasionally bring in an external contractor, and that the tribunal had incorrectly interpreted the terms of the contract between it and GS.

The Master of the Rolls stated that whether an individual is required to provide personal service turns entirely on the terms of the contract, and that in this case, the written contractual terms were clear that there was no express right of substitution. PP required personal service to the minimum of 40 hours per week. The applicable principles were summarised as to the requirement of personal service at paragraph 84 of the judgment:

> *…. an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally…a conditional right to substitute another person may or may not be inconsistent with personal performance depending on the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution, or using a different language, the extent to which the right of substitution is limited or occasional…*

The ET judge had been correct to conclude that on proper interpretation of the 2009 agreement, GS undertook to provide his services personally, and the findings of fact as to what happened in practice were not inconsistent with the written contractual terms, but rather a *'general practice by way of purely informal concession'* which was *'perfectly consistent with both the express terms of the 2009 Agreement and with the provision of the Manual…'.*

As to the second issue, PP argued that even if GS was contractually required to provide personal service, it was on a genuinely self-employed basis. This argument was also rejected. The CA agreed with the ET's findings that GS was required to work a 40-hour week, which was found to be inconsistent with the notion that GS was running his own business under which he could fully control his own work. The provisions in the agreement that GS could reject work offered to him did not reflect reality in light of the minimum contracted hours: *'the evidence before the ET was clear and consistent…that the relationship between PP and its operative would only work if the operative was given and undertook a minimum number of hours' work'.*

The CA further considered the degree of control exercised by PP over GS, stating that the ET was right to place weight on the restrictive covenants placed on GS. The degree of control exercised by PP was inconsistent with PP being a client or customer of a business run by GS.

Subject to any appeal by PP to the SC, the case will be remitted back to the ET in relation to his claims for disability discrimination and failure to make reasonable adjustments,

Comment

At the outset of this judgment the CA states that the case '*puts a spotlight*' on business models where individuals are intended to appear as working for the business, and where the business seeks to maintain those individuals are independent contractors rather than workers or employees. Whilst the decision is fact-sensitive, it provides useful guidance on the personal service

requirement under s230(3)(b) ERA, in particular where a contractual right of substitution might be inconsistent with personal service. The complex issue of worker or employee status is currently evolving, but the recent case law demonstrates that many that considered themselves as self-employed contractors may well be in fact workers who are entitled to bring claims for discrimination. This has been highlighted by the recent gig economy cases such as *Aslam and others v Uber BV and others*, London Central Employment Tribunal, 2017 IRLR 4.

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Briefing 834

Type 2 diabetes can be a disability for the purposes of the EA 2010

Taylor v Ladbrokes Betting and Gaming Ltd UKEAT/0353/15/DA; December 16, 2016

Introduction

The appeal concerned whether the appellant, who suffered from type 2 diabetes, was disabled for the purposes of the Equality Act 2010 (EA) due to his progressive condition.

Facts

Mr Taylor (T) was dismissed from his position at Ladbrokes Betting and Gaming Ltd (LBG) on November 4, 2013. T suffered from haemochromatosis and type 2 diabetes.

Employment Tribunal

T alleged unfair dismissal and unlawful disability discrimination. Representing himself, he claimed he had been disabled for almost a year before his dismissal due to his type 2 diabetes.

At a preliminary hearing on the issue, the ET found that T was not disabled. The ET was assisted in this decision by two written medical reports/letters prepared by Dr Steven Hurel, a consultant physician with a special interest in diabetes. Dr Hurel had been asked to consider the period from November 7, 2012 to the date of T's dismissal, but was also asked some questions about the future.

The ET found that T's diabetes was controlled by medication. The ET then found that the principal purpose of the medication was to prevent type 2 diabetes *'from progressing to the serious and debilitating condition of Type I Diabetes'*. In disregarding the effects of medication on T's condition, the ET noted:

> *Dr Hurel's opinion is that even absent the medication the claimant's current condition would have no adverse impact on his ability to carry out normal day-to-day activities. He is of the view that the claimant could easily control the condition by means of lifestyle, namely diet and exercise. (Dr Hurel's opinion was that the claimant has not taken basic steps in this regard which might reasonably have been expected of him)…. even if the claimant were not using medication and [sic] there is only a small possibility of his condition progressing to Type I Diabetes; especially if the claimant were to follow advice with regard to his lifestyle; diet; and exercise regime.* [paras 14 & 15]

The ET considered paragraph 8 of Schedule 1 to the EA which deals with progressive conditions. Paragraph 8 applies if a person (P) has a progressive condition:

> *8(b) as a result of that condition P has an impairment which has (or had) an effect on P's ability to carry out normal day-to-day activities, but (c) the effect is not (or was not) a substantial adverse effect.*
>
> *(2) P is to be taken to have an impairment which has a substantial adverse effect if the condition is likely to result in P having such an impairment.*

The ET accepted Dr Hurel's view was that there was only a small possibility of T's condition progressing, particularly if T were to follow lifestyle advice, and therefore found that T's condition was not progressive.

Employment Appeal Tribunal

T, now represented by a member of the Bar Pro Bono Unit, appealed the ET decision on the following grounds:

1. The ET erred in relation to the provisions of paragraph 8 of Schedule 1 to the EA;
2. There was no evidence to support the conclusion that there was only a small possibility of progression;
3. The ET erred by taking into account wrong lifestyle choices by T and these were not measures under paragraph 5 of Schedule 1 to the EA; and

4. There was no evidential support for the conclusion reached that in the absence of medication, T's condition would not suffer any deterioration.

The appeal only concerned T's diabetes.

Ground 1

T argued that Dr Hurel's had shown that he had a progressive disease. T and LBG agreed that the ET reached a conclusion not open to it on the factual material, namely that the ET considered the progression of type 2 diabetes is that it becomes type 1 at some point. They agreed this was incorrect.

The EAT commented that Dr Hurel's evidence however was unclear as to the extent to which the longer-term effects of diabetes would have an adverse effect on day-to-day activities. The ET considered Dr Hurel's answers to questions concerning the impact of T's condition related to the period under consideration, namely November 7, 2012 to November 4, 2013, rather than any future period.

Ground 2

Here the issue was whether 'small possibility', was within the concept of *'likely to result'*. The EAT referred to *Boyle v SCA Packaging Ltd* [2009] ICR 1056 [see Briefing 540] where the House of Lords decided the phrase meant *'it could well happen'*.

The question to ask in this context was simply whether a doctor would consider there is a chance of something happening (i.e. the progression of the condition). The EAT undertook a detailed analysis of a doctor's likely approach to progressive conditions and concluded that even if there is a small possibility of deterioration in a population, that is enough to make it likely that it might result in a particular individual having such impairment.

The EAT considered government guidance issued under the Disability Discrimination Act 1995 (the Guidance) which stated that where a person is able to eliminate or reduce future deterioration by taking steps or keeping to a regime, this must be taken into account. If they fail to take such steps they must be presumed not disabled.

T argued that the ET had interpreted Dr Hurel's evidence to say that if he modified his lifestyle his condition would not likely result in the impairment having a substantial adverse effect, and by not modifying his lifestyle, this was unreasonable conduct. T further argued that, in accordance with the Guidance, where a person is unable to keep to a regime which would eliminate or reduce deterioration, this ought to be taken into account and, as T was unable to do so, this applied to him.

Grounds 3 and 4

T claimed the ET erred by taking into account wrong lifestyle choices and these were not measures within the meaning of paragraph 5 of Schedule 1 to the EA. T also claimed there was no evidence to support the conclusion that T's condition would not deteriorate in the absence of medication.

The EAT found that Dr Hurel had not expressed a clear view on the future of T's condition, concluding that he had either not been asked the right questions or the preliminary hearing would have benefited from Dr Hurel being present to answer questions arising. In any event as neither of these occurred, the EAT found that the ET undertook an unsound analysis on plainly deficient and unclear expert medical evidence. The EAT further found that the ET's finding that the progression from type 2 diabetes was to type 1 diabetes was an error and not supported by Dr Hurel's reports.

The EAT allowed the appeal on ground 1. The ET had not properly addressed the question of progressive condition. The EAT considered that Dr Hurel's written evidence did not relate to a progressive condition, rather the progressive condition was analysed in terms of a particular historic period of time, which was an erroneous approach.

The EAT also allowed the appeal on ground 2, on the basis that a small possibility was not what was actually stated by Dr Hurel in his evidence.

The EAT did not allow the appeal on grounds 3 and 4. The ET was unsure whether grounds 3 and 4 amounted to errors given that the evidential material was not sufficiently clear. It did not want to make a decision in principle that an ET cannot take into account the reasonableness of the conduct of a claimant whose disability is under scrutiny. As the evidence was not sufficiently clear, the EAT did not consider that it was right to conclude that it was inadequate.

The matter was remitted back to the ET.

Implications for practitioners

Practitioners should be advising and reminding their clients, both employers and employees, that persons with type 2 diabetes can be deemed disabled for the purposes of the EA, even if their ability to carry out day-to-day activities isn't currently affected.

The EAT dissected and analysed the language and

syntactical structure of the medical expert's reports in quite some detail in order to draw its conclusions. Finding that the evidence was not sufficiently clear, this case is a reminder of the importance of crafting the right questions for experts to ensure their answers are clear, relevant and ultimately serve to advance the case one way or another. Live evidence could have also saved the parties the detour to the EAT.

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Briefing 835

Salutary reminder of EAT's jurisdiction

Government Legal Service v Brookes [2017] UKEAT 0302/16; March 28, 2017

Ms Terri Brookes (TB) has Asperger's Syndrome. She wished to join the Government Legal Service (GLS) as a trainee solicitor. The GLS requires candidates to complete an extensive recruitment process. The first stage of this was the situational judgment test, a multiple choice exercise.

TB argued that her Asperger's meant that she was disadvantaged by the multiple choice format of this test and requested that she be allowed to answer the questions in a short narrative answer instead. This was refused. She took and failed the test; she brought claims for indirect disability discrimination and failure to make reasonable adjustments.

Employment Tribunal

The GLS accepted that TB had a disability and that the application of the situational judgment test amounted to a provision, criteria or practice (PCP) which applied to her.

The focus of argument before the tribunal was on whether the PCP put TB at a particular disadvantage. The medical evidence was described by the tribunal as 'inconclusive' and some people with Asperger's do better on multiple choice tests than the general population.

But the tribunal concluded that, in TB's case, there had been a disadvantage. It therefore considered justification. The GLS argued that there was a legitimate aim in securing the best candidates and that the test was a proportionate means of doing so.

The ET rejected both arguments finding that, on the balance of probabilities, TB had been disadvantaged and that the test was not a proportionate means of achieving GLS's legitimate aim. The tribunal concluded that reasonable adjustments should have been made, including allowing TB to answer questions in a different format. This would, the tribunal accepted, not be ideal because of the difficulties in comparing candidates assessed using different methods. But this difficulty had to be balanced against the need to accommodate TB's difficulties with the assessment method.

Employment Appeal Tribunal

The GLS appealed but were rebuffed by the EAT. The appeal argued that the ET had been wrong to rely on 'inconclusive' medical evidence. The EAT however, found that this was a fundamentally flawed criticism. The tribunal had heard evidence from the claimant and had considered the medical evidence before it. That evidence had been nuanced and inconclusive, in that it did not entirely support the claimant. This was to be expected and the tribunal's task was to reach factual findings by assessing the evidence before it.

Similarly, the GLS's arguments in relation to the justification for the test were sensible ones to put before the tribunal, as GLS had done. But the tribunal had rejected them and they could not be re-litigated on appeal.

Conclusion

This case is a salutary reminder that most cases are won on the facts before the tribunal and that the EAT's jurisdiction to interfere is limited.

It is also a useful guide to how tribunals should deal with inconclusive or ambiguous evidence. There is sometimes a tendency to see evidence that fails to point to a single conclusion or that contains cautions or caveats as somehow inherently flawed. As the EAT points out, this is simply not the case. Much evidence and, in particular expert evidence, will be ambiguous. It is for the tribunal to resolve such issues by reaching findings of fact.

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Humanist wedding challenge

A couple intending to have a humanist wedding have successfully challenged the Northern Ireland General Register Office's refusal to officially authorise the ceremony which was to be conducted by a British Humanist Association celebrant.

The wedding of Laura Lacole, a model and public speaker, and Eunan O'Kane, a Leeds United and Republic of Ireland soccer midfielder, is the first legal humanist ceremony in Northern Ireland and the first in the UK outside of Scotland.

On June 9, 2017 the Belfast High Court found that the ban on the recognition of humanist weddings was discriminatory and in breach of the couple's ECHR rights. Northern Ireland's Attorney General John Larkin QC appealed this decision. On June 19th, the NICA upheld the High Court's decision but stayed the wider question as to the future recognition of humanist marriages in Northern Ireland until a further NICA hearing in September.

Humanist marriages are legally recognised in Scotland and the Republic of Ireland. In Northern Ireland, England and Wales a humanist marriage ceremony must have a separate civil registration for the marriage to be legally recognised.

The case was supported by the Northern Ireland section of Humanists UK who explained: *'A humanist wedding is a non-religious ceremony that is deeply personal and conducted by a humanist celebrant. It differs from a civil wedding in that it is entirely hand-crafted and reflective of the humanist beliefs and values of the couple, conducted by a celebrant who shares their beliefs and values.'*

The couple were married on June 22nd, 2017.

Avoiding erosion of workplace rights

A TUC study published May 5, 2017 warns that working people in both the UK and the EU are at risk from the erosion of workplace rights after Brexit – especially those in low-skilled jobs.

The TUC commissioned the report *Could a bad Brexit deal reduce workers' rights across Europe? Estimating the risks of a 'race to the bottom'* by Monica Andriescu and Lesley Giles, from the Work Foundation.

According to Frances O'Grady, General Secretary, Trades Union Congress, *'What is really new in this report is that as well as the race to the top and the race to the bottom, there is a third, more likely outcome of a deregulation strategy – what the authors call the 'polarised race' where the labour market becomes more and more divided between those who benefit and a potentially growing pool of those who do not, delivering poor pay and lousy jobs for many in both Britain and the rest of Europe. Growing inequality, a low productivity equilibrium for many businesses and workers, and competitive deregulation across Europe are a serious possibility if we get Brexit wrong, and this report is a balanced and evidence-based contribution to the debate about how we avoid that.'*

For a copy of the report see: www.tuc.org.uk/sites/default/files/TUC_BrexitWorkersRights.pdf

General Election June 2017

Following the election, both the Government and the Labour Party have reshuffled their ministerial and shadow posts.

The new Lord Chancellor and Secretary of State for Justice is David Lidington MP. David Lidington is not a lawyer and has, according to theyworkforyou.com been unsupportive of the advancement of equality and human rights. In 2013 he voted to remove the duty on the Commission for Equality and Human Rights *'to work to support the development of a society where people's ability to achieve their potential is not limited by prejudice or discrimination and there is respect for human rights'.* In 2013 he voted against making caste discrimination illegal and in 2016 voted in favour of repealing the Human Rights Act 1998.

Dominic Raab MP is appointed as Justice Minister; he has a legal background, having qualified as a solicitor and worked in business law at Linklaters. He was seconded to Liberty, as well as spending time in Brussels, advising on EU law and the World Trade organisation.

Justine Greening MP remains as Secretary of State for Education and as the Minister for Women and Equalities.

In the shadow cabinet, Richard Burgon MP remains as shadow Justice Minister, and Dawn Butler MP is newly appointed as the shadow Minister for Diverse Communities.

Regional support

The DLA executive committee recognises that there is a demand for greater regional support for members outside of London. It considered that regional meetings combined with legal and best practice updates would be the most effective way of delivering a service, attracting new members and encouraging greater involvement in its work. Following a motion for regional support passed at the 2016 AGM, the committee sought partners to work with and is delighted that the first of, what it hopes will be many successful regional practitioner group meetings, is taking place on July 3rd in Birmingham at No5 Chambers.

As with all DLA meetings, these meetings are open to all members at no charge; non-members are charged £20.00. The meetings will be advertised via eNews, the DLA's website, and locally in Birmingham.

The DLA has expressed thanks to David McBride, solicitor at Slater Gordon, and Helen Barney, barrister at No5 Chambers, as well as the staff at No5 for working so hard to get the first event up and running.

Regional groups will be part of the overall DLA and all administration, finance and membership will be handled centrally by its administrator and overseen by the executive committee. The DLA executive encourages regional groups to plan and manage practitioner groups locally through a small steering committee.

If other claimant-focused discrimination law practitioners in other parts of the country would be interested in helping to set up similar regional meetings, please contact Chris Atkinson, the DLA administrator, info@discriminationlaw.org.uk.

New sentencing guidelines for children and young people

From June 1, 2017, new sentencing guidelines for children and young people have placed increased focus on the background, circumstances and vulnerability of children in the youth justice system. They also require courts to consider the over-representation of BME children in the system and to take into account particular factors arising in the cases involving children from these groups. The Traveller Movement has published notes for practitioners to assist them bring relevant factors relating to Gypsy, Roma and Traveller children to the court's attention.

See http://travellermovement.org.uk/wp-content/uploads/Sentencing-Gypsy-Traveller-and-Roma-children.pdf

Abbreviations

AC	Appeal Cases	ET	Employment Tribunal	NICA	Northern Ireland Court of Appeal
BME	Black and Minority Ethnic	EU	European Union	NLJ	New Law Journal
CA	Court of Appeal	EWCA	England and Wales Court of Appeal	NYU L	New York University Law Review
CJEU	Court of Justice of the European Union	EWHC	England and Wales High Court	OJLS	Oxford Journal of Legal Studies
CEP	Centre for Economic Performance	FET	Fair Employment Tribunal	OUP	Oxford University Press
CPA	Civil Partnership Act 2004	F Supp	Federal Supplement	PCP	Provision, criterion or practice
DDA	Disability Discrimination Act 1995	HHJ	His/Her Honour Judge	PSC	President of the Supreme Court
DLA	Discrimination Law Association	HSE	Health and Safety Executive	PSED	Public Sector Equality Duty
EA	Equality Act 2010	HSWA	Health and Safety at Work etc. Act 1974	QC	Queen's Counsel
EAT	Employment Appeal Tribunal	ICR	Industrial Case Reports	SC	Supreme Court
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms 1950	ILJ	Industrial Law Journal	UNCRPD	United Nations Convention on the Rights of Persons with Disabilities
ECNI	Equality Commission for Northern Ireland	IRLR	Industrial Relations Law Report	UKPC	United Kingdom Privy Council
ENAR	European Network Against Racism	J	Judge	UKSC	United Kingdom Supreme Court
EqLR	Equality Law Reports	JSC	Justice of the Supreme Court	WLR	Weekly Law Reports
ERA	Employment Rights Act 1996	LJ	Lord Justice		
		LLP	Legal liability partnership		
		MHSW	Management of Health and Safety at Work Regulations 1999		

Briefings