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Editorial *Law, public policy and procedures*

This edition of *Briefings* looks at discrimination and equality issues from three different perspectives: law, public policy and procedures. It discusses important recent cases at the domestic and European courts which emphasise the importance of equality and non-discrimination to achieving and maintaining an open democratic society. It examines the cost-benefit analysis supporting the rationing of its services by a major public authority. And, it includes sound practical advice on conducting cases when (unwelcome) changes to employment tribunal procedures come into force.

The long awaited judgment in the cases of *Ewieda*, *Chaplin, Ladele* and *McFarlane* at the European Court of Human Rights is featured in this edition. Catherine Casserley describes the detail of each case as it proceeded through the domestic courts to Strasbourg. In its decision the ECtHR affirmed that the right to freedom of religion is a fundamental right which is essential to a healthy democratic society which sustains pluralism and diversity. It also reaffirmed the principle that state authorities have a wide margin of appreciation in deciding where to strike the critical balance between the individual's qualified right to manifest their religious belief and an employer's interest in securing the rights of other employees not to be discriminated against.

Lucas Fear-Segal highlights serious flaws in guidance for health staff on implementing the ban on age discrimination in the NHS. He outlines a serious contradiction in the Department of Health's guidance which appears to sanction the continued use of unlawful indirectly age discriminatory methodologies in relation to care commissioning decisions. The Equality Act 2010 (EA) seeks to protect patients and health service users from unjustified age discrimination in the provision of healthcare services. This should provide them with redress if decisions about individual treatment are made on the basis of age unless the health service provider's decision is a proportionate means of achieving a legitimate aim. However the guidance on making difficult resource decisions suggests that decision-makers use the inherently age discriminatory 'Quality Adjusted Life Years' (QALY) formula as a justifiable basis for resource rationing decisions.

QALY uses an arithmetic formula which weighs up cost with health gains when deciding whether undertaking a particular treatment is cost-efficient. As the formula counts the number of life years resulting from a treatment, it inherently and disproportionately discriminates against the elderly. The worry is that the Department's guidance undermines the EA's ban on unjustifiable age discrimination in the provision of services, and, instead, institutionalises age discrimination in care commissioning decisions in the NHS.

Discrimination practitioners face many new challenges as changes to the law which undermines accepted standards of access to justice are enacted by a government which purports to make the tribunal system more business like and efficient. ECRI's recent criticism of the UK's failure to consider how to best ensure that legal aid is available in discrimination cases before the tribunals highlights how far we have moved from the ideal of improving access to justice for the most vulnerable. Michael Reed takes a pragmatic approach to the procedural changes at the tribunals and his article sets out positive, practical suggestions to help practitioners achieve the best outcome for their clients, despite the changes.

The increasing reference to the UN Convention on the Rights of Persons with Disabilities in domestic cases is again highlighted in the briefing on *R (South West Care Homes and others) v Devon County Council*. In this case the court referred to article 19 of the Convention which details the measures which should be taken to facilitate full enjoyment by disabled people of their right not to be discriminated against and which would help lead to their full inclusion and participation in the community. Practitioners are encouraged to identify relevant rights under the Convention and incorporate these into their arguments before the domestic courts to assist them interpret the EA, for example, when defining what reasonable adjustments should be made in order to ensure disabled people can lead fully independent lives.

Geraldine Scullion, Editor

Please see back cover for list of abbreviations

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Procedural changes to employment discrimination claims – challenges for practitioners

Michael Reed, legal officer at the Free Representation Unit, identifies some of the important procedural changes in employment discrimination law and the impact they may have. He offers some practical suggestions about tactics practitioners could adopt to deal with them.

At the DLA's recent AGM, we heard from Sadiq Khan MP, Shadow Lord Chancellor, Shadow Justice Secretary and Shadow Minister for London on *'Discrimination Law – Under Threat?'* Some of us thought the question mark unnecessary.

We live in interesting times for discrimination law. The pace of change, both to substantive rights and the procedure to access them, is rapid – and much of the change (although not all) is inimical to equality. Unfortunately, given the extent of the changes, this article cannot aim to be a comprehensive description of all of them. Where possible, I have given some indication of when changes are expected – but this is often difficult because precise implementation dates are yet to be set (and may, in any event, change).

Questionnaires

What is happening?

The government intends to abolish equality questionnaires. This is still being debated in the House of Lords as part of the Enterprise and Regulatory Reform Bill, but, unless defeated there, it is likely to take effect in spring 2013.

The questionnaire process has been part of equality law since the Sex Discrimination Act in 1975. Its absence will leave a significant hole. Wisely deployed, the questionnaire procedure is useful for two main reasons. First, it allows claimants to seek information without starting a claim. Often this makes litigation unnecessary. Sometimes the information provided convinces the claimant that there is no case to answer; or, in answering the questionnaire, the potential respondent recognises error and corrects it; or settlement is offered as a result.

Second, the absence of any power to order answers can, counter-intuitively, put pressure on a respondent to answer it. Since they cannot be sure to what extent the tribunal will draw inferences from a failure to answer, they are pressed to answer fully, rather than simply refusing to answer and leaving the claimant to press the matter by seeking an order.

What is to be done?

The pre-action letter: there is nothing to stop any potential claimant or their representative writing to a prospective respondent and requesting information. This will not be as effective as a questionnaire because there will be no statutory basis for a tribunal to draw an inference from a failure to answer.

Nonetheless, a tribunal might be persuaded to draw a similar inference in the right circumstances. A failure to engage, or a reply that is inconsistent with later evidence, may have strong evidential value. And, where a respondent is willing to engage in good faith, information provided voluntarily may be useful.

To maximise the effectiveness of this strategy the letter should, if possible, set out why the claimant is concerned that there might have been discrimination and explain that they intend to draw the letter and any reply (or failure to reply) to the attention of a tribunal if necessary.

Early requests for further information / written answers: After a tribunal claim has been lodged, a claimant may ask almost any question as part of the tribunal process and, if necessary, ask the tribunal to order the respondent to answer. The claimant should consider using this option at an early stage if they have been unable to obtain information through a pre-action letter.

The Underhill Rules

What is happening?

In 2012 the Department for Business Innovation & Skills invited Mr Justice Underhill to redraft the employment tribunal's procedural rules. A draft was produced and consulted upon. It was announced that new rules, based on that draft and the consultation response, are to be brought in in April 2013 (although time is becoming tight and no final version has yet emerged).

In general the new rules are neither radically different from the old ones, nor hostile to claimants. The main aim has plainly been to simplify and clarify the existing rules, rather than embark on a major rethink of how a

tribunal should work.

There are, however, a number of important points that practitioners should be aware of.

The initial sift: the draft rules include a provision whereby, once both ET1 and ET3 are received, the case will be considered by a judge. The judge may, if they conclude that the claim or response has no reasonable prospect of success, dismiss it. A party whose case is dismissed may apply for an oral hearing (which the other side does not need to attend) to argue that it should be reinstated.

It is hard to see how this is going to work in practice. A small minority of weak claims are simply legally flawed; a claimant is presenting a case where there is no legal remedy. These can be dismissed on the papers. A similar proportion of responses are similarly flawed; they too can be dealt with summarily. But most weak claims (and responses) are weak because a party does not have the evidence to persuade a tribunal of the facts they need to establish. These are notoriously difficult to deal with summarily. The appeal courts have been firm (and rightly so) that it is inappropriate to strike out cases where there are factual issues in dispute and the tribunal has not had the opportunity to consider the evidence fully; see *North Glamorgan NHS Trust v Ezsias* [2007] IRLR 603.

The central problem is that a case may sound implausible on paper; yet, on careful investigation of the evidence, be entirely true. Sifting without considering the evidence may reach the right conclusion nine times out of ten – but does serious injustice to the claimant with a weak-sounding, but justified, case.

There seems to be four possibilities. First, the initial sift power will be used sparingly and have little overall impact. Second, the power will be used freely, but regularly challenged successfully – in which case it will waste a good deal of everybody's time. Third, the power will be used freely and only infrequently challenged – which will mean a significant number of meritorious cases will be wrongly dismissed. Fourth, the power will be used and challenged, but the appeal courts will radically change their approach to strike-out on the evidence (I believe this is unlikely).

Combining case management discussions and pre-hearing reviews: At present, a tribunal's powers are constrained, depending on what sort of preliminary hearing is underway. In particular, tribunals may only determine preliminary matters, order a deposit and strike out all or part of a case at a pre-hearing review and not at a case management discussion. This distinction will be abolished by the Underhill Rules, giving tribunals considerably more flexibility.

In my view, this is a good thing, on balance. The current regime is overly legalistic. Parties, as well as judges, will benefit from greater flexibility. There are, however, dangers. The trend is likely to be for judges to be more interventionist at an early stage and to manage cases more aggressively. When it is respondents being managed, this is likely to please claimants. But claimants will be managed too. Tribunals are likely to seek to narrow the issues in a case sooner – striking out elements they conclude are without merit or making freer use of deposit orders.

What is to be done?

The initial sift: advisers should try to pre-empt the risk of being sifted out. An ET1 that tells a coherent, plausible sounding account is much less likely to be dismissed than a rambling and improbable sounding story. If it is possible to accompany the claim with some supporting evidence, this may also help. This should not be taken too far. A few supporting letters as evidence of the claimant's position may help – a full lever arch file probably will not.

If claims are dismissed on 'the initial sift' on the basis that the claimant will not be able to prove their case, representatives should not be shy about challenging the decision – and, if necessary, taking the point to the EAT and upwards. It is an important point of principle. And it would be profoundly unfortunate if tribunals began, in effect, reaching findings of fact on an, inevitably brief, consideration of the papers, without hearing evidence.

Combining case management discussion and pre-hearing reviews: this is a positive development for claimants – provided they are ready for it. If a representative is well prepared for a case management discussion and ready to engage with the judge's desire to speed the case towards the hearing, things will normally go well. The representative will be able to resist any pressure to cut down the case inappropriately (and hopefully will have been able to submit a disciplined, concise case to begin with, meaning the judge will not wish to cut it down).

Unfortunately, all too often, it will be a litigant in person who is faced with this task – which will be much more difficult.

Fees

What is happening?

The government is introducing fees in employment tribunals from summer 2013.

Jurisdictions are divided into two levels. Level 1 claims, intended to be (in general) simpler more straightforward claims such as wages and breach of contract, will attract lower fees than Level 2 claims, such as unfair dismissal and discrimination claims.

Claimants will be charged two fees. First to issue a claim, and then a hearing fee, required approximately 6–8 weeks before the hearing. For Level 1 claims the issue fee is £160 and the hearing fee £230: a total of £390. For Level 2 claims the issue fee is £250 and the hearing fee is £950: a total of £1,200. There will different rules for claims with multiple claimants, which are too complex to deal with here. There are additional fees for applying to review decisions, for judicial mediation and to lodge a counter-claim.

There will also be fees for appeals to the EAT. It will cost £400 to issue an appeal, with a hearing fee of £1,200: a total of £1,600.

The tribunal will be able to award costs against the respondent to the value of any fee paid. The usual approach, that costs are awarded rarely and as a sanction for unreasonable behaviour, will not apply in relation to fees. It is expected that, where claimants win, tribunals will order respondents to pay the cost of the fees.

Remission of fees: the civil remission system will apply to these fees. This, however, will not be straightforward. There are three types of remission available.

Remission 1, which means that no fee is payable, applies where a claimant is receiving certain state benefits (primarily income support or income-based Jobseekers Allowance). This is likely to be rare in employment cases. At the time a claim must be lodged, either no benefits decision will have been made, or the claimant will be on Contribution-based Jobseeker's Allowance (because, having just left employment, they have made sufficient National Insurance contributions).

Remission 2, which also means that no fee is payable, applies where the claimant (or claimant and partner) have a gross income (in the last year) below a set point. This point depends on whether the claimant has a partner and how many children they have. For a single claimant with no children it is £13,000. For a claimant with a partner and two children it is £23,860. Again the difficulty is that, having just left employment, many claimants will exceed these points even though their financial position post-dismissal is poor.

Remission 3, which applies a discount up to 100% to the fee, applies a test to the claimant's monthly disposable income. To qualify for a full discount this must be no more than £50. If it is between £50 and £250 then a partial discount is applied. There are, of course, complex rules on how to calculate monthly disposable income. This is relatively rarely used within the civil system because most applicants who are entitled to a remission fall within remission 1 or 2. It is likely to be much more common within the employment tribunal system.

Potential impact of fees: employment tribunals do not have the capacity to accept money, so the introduction of fees means that all tribunal claims will be lodged at a central location, either by website or post, together with the fee or an application for remission.

These are substantial fees and the amounts concerned are likely to act as a significant barrier to accessing the tribunal.

They are also likely to have a negative impact on settlement, especially of relatively low-value claims. Many employers will, understandably, be tempted to wait and see whether a fee is paid or a remission is granted before engaging in negotiations. After all, they will think, if the claimant can't manage the fee, this will all go away. Since the larger fee will not be paid until relatively shortly before the hearing, this may delay serious consideration of settlement until shortly before the hearing.

Once, however, substantial fees are paid claimants (also understandably) will want to recover them as part of any settlement agreement. This is likely to push the claimant's bottom-line up and make settlement more difficult.

What is to be done?

Tribunal representatives will have to familiarise themselves with the civil remission system, in particular remission 3.

Because of the short time limits that apply in employment cases, it will be important to gather information about a potential claimant's means at the earliest possible stage. This should also be kept under review. A claimant who was not entitled to a remission at the point they commenced a claim, may be entitled to a remission by the time the hearing fee is due or they are contemplating an appeal. Similarly, a claimant who was entitled to a remission at the beginning of the case must not forget that they will have to obtain a second remission if they are to avoid paying the hearing fee some months later. It is not yet clear how strict an approach will be taken in such cases – but it would be prudent to be able to present up-to-date evidence.

With some respondents the risk that they will be ordered to pay these costs in addition to any award in

favour of the claimant, may be an effective negotiating strategy.

Representatives must also be ready to argue the costs point in relation to fees. In most cases this is likely to be done on the nod, because it is fairly obvious whether the claimant has won or lost. But many cases will have room for argument. Where, for example, the respondent wins decisively, but on the basis of evidence that was not disclosed until after the hearing fee was paid, it would be worth arguing that they should pay some, if not all, of the fee. Similarly, a claimant who wins, but fails to beat an offer or suffers a substantial *Polkey* reduction will probably face an argument before they can obtain an order that the fee be paid.

Fees also significantly increase the risk of litigation if there is any risk that enforcement of the award may be difficult or impossible. An unenforceable tribunal award is always frustrating – but a claimant who has paid £1,200, only to obtain nothing, is likely to be more than frustrated. Regrettably, there will be no mechanism for seeking a refund from the government. Advisers will need to be alert to this risk and give appropriate advice before fees are incurred.

Early Conciliation

From some point in 2014, it will become compulsory to refer potential claims to ACAS before bringing a claim in the tribunal. This will be done by completing a short form (normally online) providing details of the claimant and the respondent(s). This will start the Early Conciliation period. Once a form is lodged, ACAS will contact the claimant, offering to help conciliate the claim. If they accept the offer, ACAS will contact the respondent. If the respondent also accepts the offer, ACAS will try to assist the parties to reach an agreement. If either party declines to participate, the Early Conciliation period will come to an end. Similarly, if a settlement is not reached within a month, the period will end. ACAS officers will have discretion to end the period early if settlement appears hopeless or to extend it (for up to 2 weeks) if the parties are close to agreement.

It is hard to say, from this distance, what impact Early Conciliation will have – especially given the many other changes that will occur before it is implemented. It may have positive effects; encouraging decent settlements at an early stage and avoiding the need for litigation.

There are two main risks, however. First, that claimants will find themselves settling cases at an undervalue. Second, that the process will create jurisdictional barriers to bringing claims, similar to the late, profoundly unlamented, statutory dispute resolution procedures.

What is to be done?

Since some form of settlement negotiation is likely to take place at an early stage, advisers should focus their minds (and their claimants') on the value and merits of a potential claim from a similarly early stage.

Advisors will also need to be careful to avoid the potential procedural missteps. In most cases, since the form to ACAS need only identify the claimant and the respondent, rather than the nature of the claim, this will be relatively straightforward. It will not matter, for example, if, during the Early Conciliation period, the claimant does not mention that they feel their dismissal was an act of discrimination. They can still bring a discrimination claim.

Nonetheless, there are potential problems. Particular care will need to be taken where an ACAS form is lodged, but then further events occur that might also form the basis of a claim. Sometimes these may be covered by the first form (it seems likely that some form of continuing act approach will be taken to matters like harassment). But where there are clearly separate acts, such as a dismissal or victimisation, a second (and if necessary third, fourth and so on) form will need to be lodged.

Early Conciliation will also complicate time limits. Sending a form to ACAS will effectively pause the time limit, with the end of the period restarting it. Obviously this would create problems if the form was submitted at the very end of the time-limit. So, if, at the point the period ends, there is less than one month left on the time limit, this will be extended to one month. As ever, the best advice on time-limits will be not to run any risks and get the claim lodged as soon as possible after the Early Conciliation period ends.

Conclusion

As I noted at the beginning, this is very much a grab-bag of issues and developments – many negative. There is no one single problem, and no one single solution. Practitioners will face numerous challenges on numerous fronts and will need to develop different strategies to deal with them. I hope this article is useful in suggesting some possible tactics – but the DLA (and our members) will have much work to do over the coming years.

Crime, rehabilitation and the right to private life: where should the 'bright line' fall?

Shereener Browne, barrister at Garden Court Chambers, reviews the decision of the Court of Appeal in an important case which challenged the compatibility of the Rehabilitation of Offenders Act's requirements on disclosure of past convictions with the right to private life under article 8 of the ECHR.

The passing into law of the Rehabilitation of Offenders Act 1974 (ROA) saw an important principle enshrined in statute: that people who have committed certain offences some time ago should, generally speaking be allowed to keep those misdemeanours in their past. At the heart of this legislation was the recognition that an individual's future should not be blighted by what may often have been a rash decision made in the blush of youth.

A lot has changed since the 70's. But our attitude towards those who have committed criminal offences, even those who have remained law-abiding for years since their first brush with the law, seems stuck in time. The principle of rehabilitation appears politically unattractive, conjuring up as it does notions of soft-touch holiday camps for young offenders. The reality today is that those with previous convictions (whether they be spent or unspent to use the language of the statute) find it difficult to secure employment and so move on with their lives.

In its efforts to protect the young and the vulnerable, has the state caused the pendulum to swing too far away from an individual's privacy in favour of blanket disclosure of old and sometimes minor previous convictions to certain categories of prospective employers?

It was essentially this issue that fell to be decided by the CA in the recent case of *R (on the application of T) v Chief Constable of Greater Manchester & Ors* [2013] EWCA Civ 25.

The CA first had to consider whether article 8 of the European Convention on Human Rights (ECHR) fell to be considered at all. The Master of the Rolls (Lord Dyson) had no hesitation in finding that given the potential of the statutory regime governing the disclosure of convictions, cautions and warnings to limit future employment prospects, article 8 was engaged. In relation to the private life issue Lord Dyson said:

> *In one sense, criminal conviction information is public by virtue of the simple fact that convictions are made and sentences are imposed in public. But as the conviction recedes into the past, it becomes part of the individual's private life. By contrast, a caution takes place in private, so that the administering of a caution is part of an individual's private life from the outset. Secondly, the disclosure of historic information about convictions or cautions can lead to a person's exclusion from employment, and can therefore adversely affect his or her ability to develop relations with others: this too involves an interference with the right to respect for private life. Excluding a person from employment in his chosen field is liable to affect his ability to develop relationships with others, and the problems that this creates as regards the possibility of earning a living can have serious repercussions on the enjoyment of his private life: see Sidabras v Lithuania (2004) 42 EHRR 104, para 48.*

Was the interference proportionate?

The CA then went on to consider whether the interference complained of fell within article 8(2) and so was justified and proportionate. In summary, it was argued on behalf of the Secretary of State for the Home Department that the disclosure of all convictions or cautions was in pursuit of the legitimate aim of protecting the young and the vulnerable. It was legitimate, counsel argued, for parliament to draw a clear distinction between, on the one hand information that an individual has committed an offence, and on the other, information falling short of that. It was argued that this 'bright line' makes good sense and has the merit of being simple and easy to understand. In rejecting this argument Lord Dyson said:

> *37. We accept that the interference with T's article 8 rights pursues both (i) the general aim of protecting employers and, in particular, children and vulnerable adults who are in their care and (ii) the particular aim of enabling employers to make an assessment as to whether an individual is suitable for a particular kind of work. But in our judgment, the statutory regime requiring the disclosure of all convictions and cautions relating to recordable offences is disproportionate to that legitimate aim.*

38. The fundamental objection to the scheme is that it does not seek to control the disclosure of information by reference to whether it is relevant to the purpose of enabling employers to assess the suitability of an individual for a particular kind of work. Relevance must depend on a number of factors including the seriousness of the offence; the age of the offender at the time of the offence; the sentence imposed or other manner of disposal; the time that has elapsed since the offence was committed; whether the individual has subsequently re-offended; and the nature of the work that the individual wishes to do.

39.....The disclosure regime was introduced in order to protect children and vulnerable adults. That objective is not furthered by the indiscriminate disclosure of all convictions and cautions to a potential employer, regardless of the circumstances. A blanket requirement of disclosure is inimical to the ROA and the important rehabilitative aims of that legislation. Disclosure that is irrelevant (or at best of marginal relevance) is counter to the interests of re-integrating ex-offenders into society so that they can lead positive and law-abiding lives.

The CA was clear that consideration must be given to the facts surrounding the conviction, its age, whether the individual concerned had committed any further offences and whether the potential employment necessitated disclosure of the conviction/caution at issue. It was simply not good enough for the state to adopt the position that disclosure of all convictions/cautions was necessary in pursuit of the identified legitimate aim when the potential employment concerned working with the young or the vulnerable.

Impact upon employment law

The decision in this case in fact dealt with three separate cases. One of the two cases that were successful in this appeal (the third case was a renewed application for permission to appeal that was ultimately dismissed) concerned a woman (JB) who, in 2001, when she was in her early 40s accepted a caution for theft of a packet of false nails. In 2009, upon hearing about potential vacancies in the care sector, JB applied and was placed on a 6 week Job Centre training course. She had to be subject to a Criminal Record Bureau (CRB) check upon completion of the course and before she could be put forward for any vacancy. Her 2001 caution was revealed as a result of the check. JB was told that she would not be offered employment as her criminal record rendered her inappropriate for work with vulnerable people. She remained unemployed at the date of the hearing before the CA.

The facts of JB's case highlight the concerns of potential applicants for employment and to employment law advisors. When and how much of one's previous dealings with the police should a prospective employee disclose on an application form or during an interview? Is it unlawful to withhold information about an old caution received while still a youth?

These kinds of questions are not only thrown up before the start of the employment relationship as in the facts of JB. Anecdotally one hears of employers carrying out 'routine' CRB checks following a change in policy and such checks leading to summary dismissals upon the disclosure of a conviction or caution. Could such a dismissal be unfair under s98 of the Employment Rights Act 1996?

The answer would very much depend on the individual circumstances of the case. But if the conviction was old (i.e. significantly pre-dating the employment or post-dating the commencement of an employment relationship that has survived for some years without incident), minor and arguably irrelevant to the role performed, then potentially the answer could be 'yes'.

Article 14

There is another worrying, perhaps unintended consequence of a blanket rule requiring the disclosure of convictions, cautions or warnings to specific categories of potential employers. Such a rule may well operate disproportionately against black minority ethnic (BME) communities.

Article 14 provides that the rights and freedoms guaranteed under the ECHR shall be secured without discrimination on any ground such as, for example, colour. This is not of course a freestanding right but it could be deployed in conjunction with article 8.

Studies show that black people are seven times as likely, and Asians twice as likely as white people to be stopped and searched by the police. In 2009 and 2010, black people were 3.3 times more likely to be arrested than white people. Those from a mixed ethnic group were 2.3 times more likely to be arrested than white people.[1] It is certainly correct that a large proportion of such arrests end in the detained person being released with no further action, however as black and Asian people are more likely to come into contact with the police, it maybe that they are more likely to receive warnings, cautions and convictions as compared to the rest of the population.

Figures published in 2011 show that BME

defendants are more likely to be convicted once they appear before the courts, more likely to receive immediate sentences of custody and those sentences are usually longer than those received by white defendants.[2] This of course impacts upon the effect of the ROA on this group; as the longer the sentence the longer it will take for the conviction to become spent, if at all. There is, therefore evidence that BME ex-offenders are the ones who would be hardest hit by a blanket rule requiring criminal information about them to be disclosed to potential employers.

Perhaps this apparent inequality in the treatment of minorities at the hands of our criminal justice system is yet another reason to welcome this decision of the CA; a decision that reaffirms the principles behind the ROA set out all those years ago and one that affords individuals the chance to put their past firmly behind them.

1. See http://www.irr.org.uk/research/statistics/criminal-justice/

2. *Statistics on Race and the Criminal Justice System* 2010; A Ministry of Justice publication under Section 95 of the Criminal Justice Act 1991

Briefing 662

The Equality Act's false dawn: age discrimination in NHS care commissioning decisions

Lucas Fear-Segal, an LLM student at Queen Mary, University of London, highlights potential flaws in the Department of Health's guidance on the implementation of the ban on unjustifiable age discrimination in the NHS. He points out that while the ban provides patients with the opportunity to challenge age discriminatory individual treatment decisions, the guidance seems to sanction the continued use of an age discriminatory methodology for care commissioning decisions, without making any attempt to justify it. He argues that the guidance may thus undermine the Equality Act's aim of eliminating age discrimination in the provision of services, and will, unless challenged, institutionalise endemic age discrimination in the provision of NHS care.

On October 1, 2012, the Equality Act 2010 (EA) ban on unjustifiable age discrimination in the provision of services finally came into force. [See Briefing 647 for a guide to the ban on age discrimination in goods and services] Its implementation was, of course, anticipated by the Department of Health whose hospitals buckle under increasing demands from Britain's growing pensioner population and whose services have regularly been castigated for discriminating on the basis of 'narrow assumptions' of chronological age.[1] The department promptly issued guidance, informed by consultation with the Equality and Human Rights Commission and a host of age charities, to assist the chief executives of NHS trusts, and others who provide health care services, in ensuring that their commissioning decisions comply with the new law.[2]

If the new law is followed in the mould advocated by the guidance, will elderly patients be free from discrimination in the NHS? It is argued here that they will not, and that any analysis of the efficacy of the new law must draw a distinction between care provision on the micro level (as it pertains to individual treatment decisions) and on the macro level (relating to health care planning and commissioning).

While it is to be applauded that on the micro level the law will now allow claimants to challenge decisions made in relation to their personal care which they believe to have been made on an age discriminatory basis, the rot runs deeper. On the macro level the terms of the guidance mean that the new law may not prevent the use of endemically indirectly age discriminatory methodologies in deciding what kind of treatments will actually made available on the NHS at all. This is because the guidance approves the continued use by health care commissioners of the age discriminatory *'Quality Adjusted Life Years'* (QALY) as a justifiable basis for resource rationing decisions.

The guidance recounts that care providers who choose to discriminate on the grounds of age can legally do so only if they can 'objectively justify' their decisions by showing that they amount to a proportionate means of achieving a legitimate aim. It advises that if age data is used in decision-making for purely financial reasons, it cannot be objectively justified.[3] In attempting to

1. *Achieving age equality in health and social care: a report to the Secretary of State for Health*, by Sir Ian Carruthers OBE and Jan Ormondroyd October 2009

2. *Implementing a ban on age discrimination in the NHS – making effective, appropriate decisions*, Department of Health, Social Care, Local Government & Care Partnerships, September 28, 2012. https://www.wp.dh.gov.uk/publications/files/2012/09/ban-on-age-discrimination.pdf

3. Ibid p14

define 'legitimate', the guidance suggests, by way of example, that public health decisions can be targeted on the basis of 'clinical evidence'. Similarly, it advises that the proportionality test can be met by ensuring that administrative practice is 'evidence based'.[4]

All of this is a fudge. The 'clinical evidence' methodology which the guidance sanctions as an acceptable basis for the justification process is itself inherently age discriminatory. In a small text box, incongruously placed near the end of the guidance booklet, readers will find the subtitle *'Quality Adjusted Life Years (QALYs) – should these still be used?'* It is stated that the use of QALYs has been reviewed, but that *'the alternative methodologies currently available were not practical or would result in even greater differences in treatment by age'*.[5] No further explanation is given.

QALYs were invented in the 1970s before the concept of age discrimination entered the legal vernacular, as an attempted means of quantifying the costs and health gains which can be expected from different treatments, in order to ascertain their relative cost effectiveness.[6] They are an arithmetic product which assesses the impact of treatments on both life expectancy and quality of life. QALY calculations assume that a healthy year of life is worth '1', with death worth '0'. If a patient's current and future quality of life is assessed along the scale and viewed alongside both the predicted post-treatment QALYs of various interventions, and the costs of the treatments, a cost-per-QALY matrix of treatments can be devised. This allows the most 'cost efficient' treatment plans to be rolled out across the NHS, seemingly objectively.

The problem with the QALY scheme is that it assumes that the purpose of a health service is to generate the maximum number of quality adjusted life years at the lowest possible cost. It focuses on aggregate 'health improvements', and completely ignores the fairness of the distribution of the health gains which are made. It favours life-years over lives, *'preferring to save one person for seven years rather than six lives for one year'*.[7] In so doing, it inherently discriminates against the elderly, who are likely to have a lower number of extra life-years that can possibly be achieved through treatment when compared to younger patients with longer natural lives ahead of them.[8] The use of QALYS means that in the eyes of the NHS, the very fact that the elderly are less likely to be healthy means that their lives are determined to be of less value.

The rationale requires that in circumstances where resources are limited, a treatment which will benefit large numbers of elderly people nearing the end of their lives is less likely to be offered on the NHS than an alternative, equally expensive treatment programme which will benefit a small number of younger people over the long term. In other words, it means that an elderly person in good health is always passed over in the allocation of NHS funds for a young person whose outlook is less good.[9] It also leads to what Harris has described as a scenario of 'double jeopardy', in which we abandon those whose quality of life is already poor in order to concentrate resources on the more fortunate; in response to the fact that elderly people are unlucky enough to be more likely to require medical care, they will have a second misfortune visited on them via the refusal of treatment. He notes that maximising QALYs encourages health care providers to choose patients, not treatments, which will generate the most QALYS, resulting in *'a positively Thatcherite preference for the fortunate'*.[10]

In the age of austerity, it is impossible to ignore the political ramifications of endorsing the use of QALYs. The system is reflective of the 'triage' system, developed in the Great War, under which only the injured capable of returning to the frontline were given the benefit of scarce medical resources, whilst those with more serious injuries were left untreated. In a peacetime setting, the objective may be just as stark: get the 'productive' back to work and leave the useless to die.

To the extent that the guidance accepts that the QALY system may be age discriminatory, it argues that this is justified by its cost effectiveness and the unavailability of a fairer system of resource allocation. The guidance references National Institute of Clinical Excellence's maxim that *'no publicly funded healthcare system...can possibly pay for every new medical treatment which becomes available. The enormous costs involved mean that choices have to be made....It makes sense to focus on treatments that improve the quality and/or length of someone's life and, at*

4. Ibid p11-13

5. Ibid p16

6. See R Rosser and P Kind *A Scale of Values of States of Illness: is there a social consensus?* International Journal of Epidemiology Vol 7 (1978) pp 347-58

7. S Jones *The Failure of the NHS? Distributive justice and health care in Britain*, UCL Jurisprudence Review, 1997, pp.163-181, p.9

8. J Harris *More and Better Justice* in J Bell and S Mendus (eds.) Philosophy and Medical Welfare (CUP: Cambridge 1998) 75-96, p.80

9. C Newdick *Who Should We Treat? Law, Patients and Resources in the NHS*, (Clarendon: 2005) p.27

10. J Harris *Unprincipled QALYs: a Response to Cubbon Journal of Medical Ethics*, Vol 17 (1991) pp. 185-188

the same time, are an effective use of NHS resources'.[11]

It posits that rationing decisions should be made on the basis of need and that no metric for the quantification of clinical need has yet been devised which exceeds the objectivity of QALYs. This is a neat argument, but its glib espousal in the guidance does not allow its assertions to be put to proof. What were the 'alternative methodologies' considered during the drafting of the guidance?[12] On what basis were they found to be 'not practical'?[13] What distinguishing features make the alternatives likely *'to result in even greater differences in treatment by age*'?[14]

The continued governmental failure to substantively justify its sanctioning of the use of the obviously age discriminatory QALY system is a fault line which runs right through the Department for Health's guidance. It potentially undermines the whole project of the EA and compromises the coherency of its application. The government may be susceptible under the new law to a challenge in the administrative courts by elderly patients refused treatments on the basis of QALY cost assessments, and forced to prove its assertions that QALYs amount to a proportionate means of achieving a legitimate aim. But until such an action is commenced, and whilst QALYs continue to be used by health care commissioners, we can never be sure that age discrimination in the NHS will ever be eliminated.

11. http://www.nice.org.uk/newsroom/features/measuringeffectivenessandcosteffectivenesstheqaly.jsp

12. *Implementing a ban on age discrimination in the NHS – making effective, appropriate decisions,* Department of Health, Social Care, Local Government & Care Partnerships, September 28, 2012, p16

13. Ibid p16

14. Ibid p16

Briefing 663

Tolerance of religious symbols and the importance of not compromising the rights of others

Eweida and others v United Kingdom European Court of Human Rights, applications nos. 48420/10, 59842/10, 51671/10 and 36516/10, January 17, 2013

The European Court of Human Rights (ECtHR) has at last promulgated its decision in the conjoined cases of *Eweida and others*. The result is perhaps not surprising, in that the ECtHR re-affirms the importance of not compromising the rights of others (in these cases, same sex partners) but also of tolerance for the wearing of religious symbols in certain circumstances.

Eweida – the facts

Ms Eweida (E) is a practising Coptic Christian. From 1999 she worked as a member of the check-in staff for British Airways Plc (BA). [See Briefing 567]

BA required all their staff in contact with the public to wear a uniform. Until 2004 the uniform for women included a high-necked blouse. In 2004 BA introduced a new uniform which included an open-necked blouse for women, to be worn with a cravat that could be tucked in or tied loosely at the neck. A wearer guide was produced which set out detailed rules about every aspect of the uniform. It prohibited the wearing of jewellery.

Until May 20, 2006 E wore a cross at work concealed under her clothing. She then decided to start wearing the cross openly, as a sign of her commitment to her faith. She was asked to remove the cross and chain or conceal them under the cravat. E initially refused, but eventually agreed to comply with the instruction after discussing the matter with a senior manager. She again attended work with the cross visible and again agreed to comply with the uniform code only reluctantly, having been warned that if she refused she would be sent home unpaid. On September 20, 2006 she refused to conceal or remove the cross and was sent home without pay until such time as she chose to comply with her contractual obligation to follow the uniform code. On October 23, 2006 she was offered administrative work without customer contact, which would not have required her to wear a uniform, but she rejected this offer.

Following adverse publicity about its policy, BA reviewed its policy and it was decided that, with effect

from February 1, 2007, the display of religious and charity symbols was permitted where authorised. Certain symbols, such as the cross and the star of David, were given immediate authorisation. E returned to work on February 3, 2007 with permission to wear the cross in accordance with the new policy. However, BA refused to compensate her for the earnings lost during the period when she had chosen not to come to work.

Employment Tribunal

E lodged a claim with the ET on December 15, 2006, claiming, inter alia, damages for indirect discrimination contrary to regulation 3 of the Employment Equality (Religion and Belief) Regulations 2003 (the 2003 Regulations) and complaining also of a breach of her right to manifest her religion contrary to article 9 of the European Convention on Human Rights (the Convention). The ET rejected E's claim. It found that the visible wearing of a cross was not a mandatory requirement of the Christian faith but E's personal choice. There was no evidence that any other employee, in a uniformed workforce numbering some 30,000, had ever made such a request or demand, much less refused to work if it was not met. It followed that the applicant had failed to establish that the uniform policy had put Christians generally at a disadvantage, as was necessary in order to establish a claim of indirect discrimination.

Employment Appeal Tribunal

E appealed to the EAT which dismissed the appeal on November 20, 2008. The EAT held that it was not necessary for E to show that other Christians had complained about the uniform policy, since a person could be put at a particular disadvantage within the meaning of regulation 3(1) of the 2003 Regulations even if he or she complied, unwillingly, with the restrictions on visible religious symbols. Nevertheless, the EAT concluded that the concept of indirect discrimination implied discrimination against a defined group and that the applicant had not established evidence of group disadvantage.

Court of Appeal

E appealed to the CA which dismissed the appeal on February 12, 2010. She argued that the ET and EAT had erred in law and that all that was needed to establish indirect discrimination was evidence of disadvantage to a single individual. The CA rejected this argument which it did not consider to be supported by the construction of the 2003 Regulations. It endorsed the approach of the EAT when it held that:

> *... in order for indirect discrimination to be established, it must be possible to make some general statements which would be true about a religious group such that an employer ought reasonably to be able to appreciate that any particular provision may have a disparate adverse impact on the group.*

Moreover, even if E's legal argument were correct and indirect discrimination could be equated with disadvantage to a single individual arising out of her wish to manifest her faith in a particular way, the ET's findings of fact showed the rule to have been a proportionate means of achieving a legitimate aim.

For some seven years no one, including E, had complained about the rule and once the issue was raised it was conscientiously addressed. In the interim, BA had offered to move the applicant without loss of pay to work involving no public contact, but the applicant had chosen to reject this offer and instead to stay away from work and claim her pay as compensation.

In addition, the CA did not consider that this court's case law under article 9 of the Convention would assist E. It referred to the judgment of the HL in *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, where Lord Bingham analysed the case law of the ECtHR and the European Commission and concluded:

> *The Strasbourg institutions have not been at all ready to find an interference with the right to manifest religious belief in practice or observance where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance and there are other means open to the person to practise or observe his or her religion without undue hardship or inconvenience.*

E's application for leave to appeal was refused.

Chaplin – the facts

Ms Chaplin (C) is also a practising Christian. She has worn a cross visibly on a chain around her neck since her confirmation in 1971, as an expression of her belief. She believes that to remove the cross would be a violation of her faith.

C qualified as a nurse in 1981 and was employed by the Royal Devon and Exeter NHS Foundation Trust from April 1989 to July 2010 where she worked on a geriatric ward. The hospital had a uniform policy based on guidance from the Department of Health. The hospital's uniform policy provided in paragraph 5.1.5 that *'If worn, jewellery must be discreet'*. It prohibited the wearing of necklaces because of risk of injury to patients

but also said that the wearing of particular jewellery or clothes should be raised with a line manager who would not withhold permission for the wearing of same unreasonably.

There was evidence before the ET that, on health and safety grounds, another Christian nurse had been requested to remove a cross and chain and two Sikh nurses had been informed that they could not wear a bangle or kirpan and that they had complied with these instructions. Two female Muslim doctors were given permission to wear close-fitting 'sports' hijab, resembling a balaclava helmet.

In June 2007 new uniforms were introduced at the hospital, which for the first time included a V-necked tunic for nurses. In June 2009 C's manager asked her to remove her 'necklace'. C insisted that the cross was a religious symbol and sought approval to wear it. This was refused, on the ground that the chain and cross might cause injury if an elderly patient pulled on it. C then proposed wearing the cross on a chain secured with magnetic catches, which would immediately break apart if pulled by a patient. However, the health authority rejected this on the ground that the cross itself would still create a risk to health and safety if it were able to swing free; for example, it could come into contact with open wounds. Finally, it was suggested that she could secure her cross and chain to the lanyard which held her identity badge. All staff were required to wear an identity badge clipped to a pocket or on a lanyard. However, they were also required to remove the badge and lanyard when performing close clinical duties and, for this reason, C rejected this suggestion also. In November 2009 C was moved to a non-nursing temporary position which ceased to exist in July 2010.

Employment Tribunal

C applied to the ET in November 2009 complaining of both direct and indirect discrimination on religious grounds. In its judgment of May 21, 2010, the ET held that there was no direct discrimination since the hospital's stance was based on health and safety rather than religious grounds. As regards the complaint of indirect discrimination, it held that there was no evidence that 'persons', other than the applicant, had been put at particular disadvantage. Moreover, the hospital's response to C's request to wear the crucifix visibly had been proportionate.

C was advised that, in the light of the CA's judgment in E's case, an appeal on points of law to the EAT would have no prospect of success.

Ladele – the facts

Ms Ladele (L) is Christian and holds the view that marriage is the union of one man and one woman for life, and sincerely believes that same sex civil partnerships are contrary to God's law. L was employed by the London Borough of Islington and had worked since 2002 as a registrar of births, deaths and marriages. [See Briefing 556]

Islington had a 'Dignity for All' equality and diversity policy which prohibited discrimination and promoted diversity on grounds including that of sexual orientation, and required staff to promote those policies and provided that staff might be subject to disciplinary proceedings should they be in breach of them.

Although L was paid by the local authority and had a duty to abide by its policies, she was not employed by it but instead held office under the aegis of the Registrar General.

The Civil Partnership Act 2004 (the Act) came into force on December 5, 2005. The Act provided for the legal registration of civil partnerships between two people of the same sex and accorded to them rights and obligations equivalent to those of a married couple. In December 2005 Islington decided to designate all existing registrars of births, deaths and marriages as civil partnership registrars. It was not required to do this; the legislation simply required it to ensure that there were a sufficient number of civil partnership registrars for the area to carry out that function. Some other UK local authorities took a different approach, and allowed registrars with a sincerely held religious objection to the formation of civil partnerships to opt out of designation as civil partnership registrars.

Initially, L was permitted to make informal arrangements with colleagues to exchange work so that she did not have to conduct civil partnership ceremonies. In March 2006 however, two colleagues complained that her refusal to carry out such duties was discriminatory.

In a letter dated April 1, 2006 L was informed that, in Islington's view, refusing to conduct civil partnerships could put her in breach of the Code of Conduct and the equality policy. She was requested to confirm in writing that she would henceforth officiate at civil partnership ceremonies. L refused to agree and requested that Islington make arrangements to accommodate her beliefs.

By May 2007 the atmosphere in the office had deteriorated. L's refusal to carry out civil partnerships was causing rota difficulties and putting a burden on

others and there had been complaints from homosexual colleagues that they felt victimised. In May 2007 Islington commenced a preliminary investigation, which concluded in July 2007 with a recommendation that a formal disciplinary complaint be brought against L that, by refusing to carry out civil partnerships on the ground of the sexual orientation of the parties, she had failed to comply with their Code of Conduct and equality and diversity policy. A disciplinary hearing took place on August 16, 2007. Following the hearing, L was asked

to sign a new job description requiring her to carry out straightforward signings of the civil partnership register and administrative work in connection with civil partnerships, but with no requirement to conduct ceremonies.

Employment Tribunal

L complained to the ET of direct and indirect discrimination on grounds of religion or belief and harassment. On December 1, 2007 the Statistics and Registration Act 2007 came into force and, instead of remaining an office holder employed by the Registrar General, L became an employee of Islington which now had the power to dismiss her. It was advanced before the ET that if the applicant lost the proceedings, it was likely that she would be dismissed.

The ET upheld the complaints of direct and indirect religious discrimination, and harassment, holding that Islington had *'placed a greater value on the rights of the lesbian, gay, bisexual and transsexual community than it placed on the rights of L as one holding an orthodox Christian belief'*. Islington appealed to the EAT which reversed the decision of the ET. It held that Islington's treatment of L had been a proportionate means of achieving a legitimate aim, namely providing the registrar service on a non-discriminatory basis.

Court of Appeal

The EAT decision was appealed to the CA which upheld the EAT's conclusions. It stated, at paragraph 52:

> *...the fact that Ms Ladele's refusal to perform civil partnerships was based on her religious view of marriage could not justify the conclusion that Islington should not be allowed to implement its aim to the full, namely that all registrars should perform civil partnerships as part of its Dignity for All policy. Ms Ladele was employed in a public job and was working for a public authority; she was being required to perform a purely secular task, which was being treated as part of her job; Ms Ladele's refusal to perform that task involved discriminating against gay people in the course of that job; she was being asked to perform the task because of Islington's Dignity for All policy, whose laudable aim was to avoid, or at least minimise, discrimination both among Islington's employees, and as between Islington (and its employees) and those in the community they served; Ms Ladele's refusal was causing offence to at least two of her gay colleagues; Ms Ladele's objection was based on her view of marriage, which was not a core part of her religion; and Islington's requirement in no way prevented her from worshipping as she wished.*

The CA concluded that article 9 of the Convention and the ECtHR's case law supported the view that L's desire to have her religious views respected should not be allowed *'...to override Islington's concern to ensure that all its registrars manifest equal respect for the homosexual community as for the heterosexual community.'* It further noted that from the time the 2007 regulations came into force, once L was designated a civil partnership registrar, Islington was not merely entitled, but obliged, to require her to perform civil partnerships.

L's application for leave to appeal to the SC was refused on March 4, 2010.

Mr McFarlane – the facts

Mr McFarlane (M) is a Christian. He holds a belief that the Bible states that homosexual activity is sinful and that he should do nothing which directly endorses such activity. [See Briefing 568]

Relate Avon Limited (R) is part of the Relate Federation, a national private organisation which provides a confidential sex therapy and relationship counselling service. R and its counsellors are members of the British Association for Sexual and Relationship Therapy (BASRT). BASRT has a Code of Ethics and Principles of Good Practice which R and its counsellors abide by. Paragraphs 18 and 19 of the Code provide as follows:

> *Recognising the right to self-determination, for example: Respecting the autonomy and ultimate right to self-determination of clients and of others with whom clients may be involved. It is not appropriate for the therapist to impose a particular set of standards, values or ideals upon clients. The therapist must recognise and work in ways that respect the value and dignity of clients (and colleagues) with due regard to issues such as religion, race, gender, age, beliefs, sexual orientation and disability.*

Awareness of one's own prejudices, for example:
The therapist must be aware of his or her own prejudices and avoid discrimination, for example on grounds of religion, race, gender, age, beliefs, sexual orientation, disability. The therapist has a responsibility to be aware of his or her own issues of prejudice and stereotyping and particularly to consider ways in which this may be affecting the therapeutic relationship.

R also has an equal opportunities policy which emphasises a positive duty to achieve equality. Part of it reads:

Relate Avon is committed to ensuring that no person – trustees, staff, volunteers, counsellors and clients, receives less favourable treatment on the basis of personal or group characteristics, such as race, colour, age, culture, medical condition, sexual orientation, marital status, disability [or] socio-economic grouping. Relate Avon is not only committed to the letter of the law, but also to a positive policy that will achieve the objective of ensuring equality of opportunity for all those who work at the Centre (whatever their capacity), and all our clients.

M worked for R as a counsellor from May 2003 until March 2008. He initially had some concerns about providing counselling services to same sex couples, but following discussions with his supervisor, he accepted that simply counselling a homosexual couple did not involve endorsement of such a relationship and he was therefore prepared to continue. He subsequently provided counselling services to two lesbian couples without any problem, although in neither case did any purely sexual issues arise.

In 2007 M commenced R's post-graduate diploma in psycho-sexual therapy. By the autumn of that year there was a perception within R that he was unwilling to work on sexual issues with homosexual couples. In response to these concerns, R's general manager, B, met with M in October 2007. M confirmed he had difficulty in reconciling working with couples on same sex sexual practices and his duty to follow the teaching of the Bible. B expressed concern that it would not be possible to filter clients, to prevent M from having to provide psycho-sexual therapy to lesbian, gay or bisexual couples.

On December 5, 2007 B received a letter from other therapists expressing concerns that an unnamed counsellor was unwilling, on religious grounds, to work with gay, lesbian and bi-sexual clients. On December 12, 2007 B wrote to M stating that he understood that he had refused to work with same sex couples on certain issues, and that he feared that this was discriminatory and contrary to R's equal opportunities policies. He asked for written confirmation that M would continue to counsel same sex couples in relationship counselling and psycho-sexual therapy, failing which he threatened disciplinary action.

M responded by confirming that he had no reservations about counselling same sex couples. His views on providing psycho-sexual therapy to same sex couples were still evolving, since he had not yet been called upon to do this type of work. Mr B interpreted this as a refusal by M to confirm that he would carry out psycho-sexual therapy work with same sex couples and he therefore suspended him, pending a disciplinary investigation.

M was summarily dismissed for gross misconduct; the investigation concluded that M had said he would comply with R's policies and provide sexual counselling to same sex couples without having any intention of doing so.

Employment Tribunal

M lodged a claim with the ET claiming, inter alia, direct and indirect discrimination, unfair dismissal, and wrongful dismissal. The ET found that M had not suffered direct discrimination contrary to Regulation 3(1)(a) of the 2003 Regulations. He had not been dismissed because of his faith, but because it was believed that he would not comply with the policies which reflected R's ethos.

With regard to the claim of indirect discrimination under Regulation 3(1)(b), the tribunal found that R's requirement that its counsellors comply with its equal opportunities policy would put an individual who shared M's religious beliefs at a disadvantage. However, the aim of the requirement was the provision of a full range of counselling services to all sections of the community, regardless of sexual orientation, which was legitimate. R's commitment to providing non-discriminatory services was fundamental to its work and it was entitled to require an unequivocal assurance from M that he would provide the full range of counselling services to the full range of clients without reservation. He had failed to give such an assurance. Filtration of clients, although it might work to a limited extent, would not protect clients from potential rejection by M, however tactfully he might deal with the issue. It followed that his dismissal had been a proportionate means of achieving a legitimate aim. The discrimination claim, therefore, failed.

Finally, the tribunal rejected the claim of unfair

dismissal, finding that R had genuinely and reasonably lost confidence in M to the extent that it could not be sure that, if presented with same sex sexual issues in the course of counselling a same sex couple, he would provide without restraint or reservation the counselling which the couple required because of the constraints imposed on him by his genuinely held religious beliefs.

Employment Appeal Tribunal

The EAT rejected M's appeal, and the CA refused permission to appeal on the basis that there was no realistic prospect of success in the light of the CA judgment in *Ladele*.

Following the refusal by the SC to allow leave to appeal in *Ladele*, M renewed his application for permission to appeal. After a hearing, that application was again refused on April 29, 2010, on the basis that the present case could not sensibly be distinguished from *Ladele*.

European Court of Human Rights

E, C and M, complained that the sanctions they suffered at work breached their rights under article 9 of the Convention, taken alone or in conjunction with article 14. L complained of a breach of articles 14 and 9 taken together.

Article 9 provides:

1. *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*
2. *Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.*

ECtHR decision

In considering the cases, the ECtHR observed that an analysis of the law and practice relating to the wearing of religious symbols at work across twenty-six Council of Europe contracting states demonstrates that in the majority of states the wearing of religious clothing and/or religious symbols in the workplace is unregulated.

In the USA, for civil servants and government employees, the wearing of religious symbols is protected under both the United States Constitution (the Establishment Clause and the Free Exercise Clause) and the Civil Rights Act 1964. In Canada, Canadian employers, in general, are expected to adjust workplace regulations that have a disproportionate impact on certain religious minorities. The standard applied by the courts in this connection is that of 'reasonable accommodation' (see *R v Big M Drug Mart Limited* (1985) 1 SCR 295).

General principles under article 9 of the Convention

The ECtHR set out the following general principles:

- Freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.[1]
- Religious freedom is primarily a matter of individual thought and conscience. The right to hold any religious belief and to change religion or belief under article 9(1) is absolute and unqualified.
- Article 9 (1) encompasses the freedom to manifest one's belief, alone and in private and also to practice in community with others and in public. The manifestation of religious belief may take the form of worship, teaching, practice and observance. Bearing witness in words and deeds is bound up with the existence of religious convictions.[2] This aspect of the right is qualified in the manner set out in Article 9(2).
- The right to freedom of thought, conscience and religion denotes views that attain a certain level of cogency, seriousness, cohesion and importance.[3] Provided this is satisfied, the state's duty of neutrality and impartiality is incompatible with any power on the state's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed.[4]

1. See *Kokkinakis v Greece* May 25, 1993, § 31, Series A no. 260 A

2. See *Kokkinakis*, and also *Leyla ahin v Turkey* [GC] no. 44774/98, § 105, ECHR 2005 XI

3. See *Bayatyan v Armenia* [GC] no. 23459/03, § 110, ECHR 2011; *Leela Förderkreis E.V. and others v Germany* no. 58911/00, § 80, 6 November 2008; *Jakóbski v Poland no*. 18429/06, § 44, 7 December 2010

4. See *Manoussakis and Others v Greece*, judgment of September 26, 1996, Reports 1996-IV, p. 1365, § 47; *Hasan and Chaush v. Bulgaria* [GC] no. 30985/96, § 78, ECHR 2000 XI; *Refah Partisi (the Welfare Party) and Others v Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 1, ECHR 2003-II

Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a 'manifestation' of the belief.[5] In order to count as a 'manifestation' within the meaning of article 9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question.[6]

The ECtHR agreed, as observed by Lord Bingham in *R (SB) v Governors of Denbigh High School* (cited above) that there is case law which indicates that, if a person is able to take steps to circumvent a limitation placed on his or her freedom to manifest religion or belief, there is no interference with the right under article 9(1) and the limitation does not therefore require to be justified under article 9(2).

For example, in the *Cha'are Shalom Ve Tsedek* case, the ECtHR held that *'there would be interference with the freedom to manifest one's religion only if the illegality of performing ritual slaughter made it impossible for ultra-orthodox Jews to eat meat from animals slaughtered in accordance with the religious prescriptions they considered applicable'*. However, this conclusion can be explained by the ECtHR's finding that the religious practice and observance at issue in that case was the consumption of meat only from animals that had been ritually slaughtered and certified to comply with religious dietary laws, rather than any personal involvement in the ritual slaughter and certification process itself.

More relevantly, in cases involving restrictions placed by employers on an employee's ability to observe religious practice, it had been held in several decisions that the possibility of resigning from the job and changing employment meant that there was no interference with the employee's religious freedom.[7]

However, the ECtHR has not applied a similar approach in respect of employment sanctions imposed on individuals as a result of the exercise by them of other rights protected by the Convention, for example the right to respect for private life under article 8; the right to freedom of expression under article 10; or the negative right, not to join a trade union, under article 11.[8]

Given the importance in a democratic society of freedom of religion, the ECtHR considered that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.

According to its settled case law, the ECtHR leaves a certain margin of appreciation to state parties to decide whether and to what extent an interference is necessary. This margin of appreciation goes hand in hand with European supervision embracing both the law and the decisions applying it. The ECtHR's task is to determine whether the measures taken at national level were justified in principle and proportionate.[9]

Where, in the cases of E and L, the acts complained of were carried out by private companies and were not therefore directly attributable to the state, the ECtHR considered the issues in terms of the positive obligation on the state authorities to secure the rights under article 9 to those within their jurisdiction.[10]

In considering the boundary between the state's positive and negative obligations regard must be had in particular to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, subject in any event to the margin of appreciation enjoyed by the state.

5. See *Skugar and Others v Russia* (dec.), no. 40010/04, 3 December 2009 and, for example, *Arrowsmith v UK*, Commission's report of October 12, *1978, Decisions and Reports 19, p. 5; C. v UK*, Commission decision of December 15, 1983, DR 37, p. 142; *Zaoui v Switzerland* (dec.), no. 41615/98, January 18, 2001

6. See *Cha'are Shalom Ve Tsedek v France* [GC], no. 27417/95, §§ 73-74, ECHR 2000 VII; *Leyla Şahin; Bayatyan; Skugar; Pichon and Sajous v France* (dec.), no. 49853/99, Reports of Judgments and Decisions 2001-X

7. See, for example, *Konttinen v Finland,* Commission's decision of December 3, 1996, Decisions and Reports 87-A, p. 68; *Stedman v UK*, Commission's decision of 9 April 1997; compare *Kosteski v 'the former Yugoslav Republic of Macedonia'* no. 55170/00, § 39, April 13, 2006

8. See for example, *Smith and Grady v UK* nos. 33985/96 and 33986/96, § 71, ECHR 1999 VI; *Vogt v Germany* September 26, 1995, § 44, Series A no. 323; *Young, James and Webster v UK* August 13, 1981, §§ 54-55, Series A no. 44.

9. See *Leyla Şahin* cited above; *Bayatyan*, cited above; *Manoussakis*, cited above

10. See, mutatis mutandis, *Palomo Sánchez and Others v Spain* [GC], nos. 28955/06, 28957/06, 28959/06 and 28964/06, §§ 58-61, ECHR 2011; see also *Otto-Preminger-Institut v Austria* judgment of 25 November 1994, Series A no. 295, § 47

11. See, for example *Thlimmenos v Greece* [GC] no. 34369/97, § 40, ECHR 2000 IV

General principles under article 14 of the Convention

For article 14 to become applicable it suffices that the facts of a case fall within the ambit of another substantive provision of the Convention or its Protocols.[11]

Only differences in treatment based on an identifiable characteristic, or 'status', are capable of amounting to discrimination within the meaning of article 14 (*Carson and Others v UK* [GC] no. 42184/05, § 61, ECHR 2010). 'Religion' is specifically mentioned in the text of article 14 as a prohibited ground of discrimination.

Generally, in order for an issue to arise under article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations (*Burden v UK* [GC], no. 13378/05, § 60, ECHR 2008).

However, this is not the only facet of the prohibition of discrimination in article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when states, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different.[12]

Such a difference of treatment between persons in relevantly similar positions – or a failure to treat differently persons in relevantly different situations – is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

The state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (*Burden* cited above). The scope of this margin will vary according to the circumstances, the subject matter and the background (*Carson and Others* cited above).

Application of the principles to the cases

Eweida

The ECtHR considered that the refusal by BA between September 2006 and February 2007 to allow E to remain in her post while visibly wearing a cross amounted to an interference with her right to manifest her religion.

It went on to consider whether the state had sufficiently protected her right to manifest her religious belief. As she had been able to bring proceedings for religious discrimination and to raise article 9 during those proceedings, the ECtHR did not consider that the lack of specific protection i.e. being able to bring a claim under article 9 against a private body under domestic law in itself meant that the applicant's right to manifest her religion by wearing a religious symbol at work was insufficiently protected.

When considering the proportionality of the steps taken by BA to enforce its uniform code, the national judges at each level agreed that the aim of the code was legitimate, namely to communicate a certain image of the company and to promote recognition of its brand and staff. The ET considered that the requirement to comply with the code was disproportionate, since it failed to distinguish an item worn as a religious symbol from a piece of jewellery worn purely for decorative reasons. This finding was reversed on appeal to the CA, which found that BA had acted proportionately.

In reaching this conclusion, the CA referred to the facts of the case as established by the ET and, in particular, that the dress code had been in force for some years and had caused no known problem to the applicant or any other member of staff; that E lodged a formal grievance complaint but then decided to arrive at work displaying her cross, without waiting for the results of the grievance procedure; that the issue was conscientiously addressed by BA once the complaint had been lodged, involving a consultation process and resulting in a relaxation of the dress code to permit the wearing of visible religious symbols; and that E was offered an administrative post on identical pay during this process and was, in February 2007, reinstated in her old job.

It was clear to the ECtHR that these factors combined to mitigate the extent of the interference suffered by E and must be taken into account. Moreover, in weighing the proportionality of the measures taken by a private company in respect of its employee, the national authorities, in particular the courts, operate within a margin of appreciation.

Conclusion

Nonetheless, the ECtHR reached the conclusion in the present case that a fair balance was not struck. On one side of the scales was E's desire to manifest her religious belief. As the ECtHR noted, this is a fundamental right: because a healthy democratic society needs to tolerate

12. See *Thlimmenos* cited above; see also *D.H. and Others v the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007; *Runkee and White v UK* nos. 42949/98 and 53134/99, § 35, 10 May 2007

and sustain pluralism and diversity; but also because of the value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others. On the other side of the scales was the employer's wish to project a certain corporate image. The ECtHR considered that, while this aim was undoubtedly legitimate, the domestic courts accorded it too much weight. E's cross was discreet and cannot have detracted from her professional appearance. There was no evidence that the wearing of other, previously authorised, items of religious clothing, such as turbans and hijabs, by other employees, had any negative impact on BAs' brand or image. Moreover, the fact that the company was able to amend the uniform code to allow for the visible wearing of religious symbolic jewellery demonstrates that the earlier prohibition was not of crucial importance.

The ECtHR therefore concluded that, in these circumstances where there was no evidence of any real encroachment on the interests of others, the domestic authorities failed sufficiently to protect the first applicant's right to manifest her religion, in breach of the positive obligation under article 9. In the light of this conclusion, it did not consider it necessary to examine separately E's complaint under article 14 taken in conjunction with article 9.

Chaplin

The ECtHR found that C's wearing of the cross was a manifestation of her religious belief and that the refusal by the health authority to allow her to remain in the nursing post while wearing the cross was an interference with her freedom to manifest her religion.

C's employer was a public authority, and the ECtHR thus had to determine whether the interference was necessary in a democratic society in pursuit of one of the aims set out in article 9(2). In this case, there does not appear to be any dispute that the reason for the restriction on jewellery, including religious symbols, was to protect the health and safety of nurses and patients. The evidence before the ET was that C's managers considered there was a risk that a disturbed patient might seize and pull the chain, thereby injuring herself or C, or that the cross might swing forward and could, for example, come into contact with an open wound. There was also evidence that another Christian nurse had been requested to remove a cross and chain; two Sikh nurses had been told they could not wear a bangle or kirpan; and that flowing hijabs were prohibited. C was offered the possibility of wearing a cross in the form of a brooch attached to her uniform, or tucked under a high-necked top worn under her tunic, but she did not consider that this would be sufficient to comply with her religious conviction.

The ECtHR considered that, as in E's case, the importance for E of being permitted to manifest her religion by wearing her cross visibly had to weigh heavily in the balance. But that the reason for asking her to remove the cross, namely the protection of health and safety on a hospital ward, was inherently of a greater magnitude than that which applied in respect of C. Moreover, this is a field where the domestic authorities must be allowed a wide margin of appreciation. The hospital managers were better placed to make decisions about clinical safety than a court, particularly an international court which has heard no direct evidence.

Conclusion

The ECtHR could not therefore conclude that the measures of which C complained were disproportionate and therefore the interference with her freedom to manifest her religion was necessary in a democratic society and that there was no violation of article 9 in respect of C.

In addition it considered that the factors to be weighed in the balance when assessing the proportionality of the measure under article 14 taken in conjunction with article 9 would be similar, and there was no violation of article 14 either.

Ladele

The ECtHR found that L's objection to participating in the creation of same sex civil partnerships was directly motivated by her religious beliefs. The events in question fell within the ambit of article 9 and article 14 was applicable.

The ECtHR further considered that the relevant comparator was a registrar with no religious objection to same sex unions. It agreed with L's contention that the local authority's requirement that all registrars of births, marriages and deaths be designated also as civil partnership registrars had had a particularly detrimental impact on her because of her religious beliefs. In order to determine whether Islington's decision not to make an exception for L and others in her situation amounted to indirect discrimination in breach of article 14, ECtHR had to consider whether the policy pursued a

13. See, for example, *Karner v Austria*, no. 40016/98, § 37, ECHR 2003 IX; *Smith and Grady*; *Schalk and Kopf v Austria*, no. 30141/04, § 97, ECHR 2010

legitimate aim and was proportionate.

Differences in treatment based on sexual orientation require particularly serious reasons by way of justification.[13] Same sex couples are in a relevantly similar situation to different sex couples as regards their need for legal recognition and protection of their relationship, although since practice in this regard is still evolving across Europe, states enjoy a wide margin of appreciation as to the way in which this is achieved within the domestic legal order. Against this background, it is evident that the aim pursued by the local authority was legitimate.

Proportionality

So far as proportionality was concerned, the consequences for L were serious: given the strength of her religious conviction, she considered that she had no choice but to face disciplinary action rather than be designated a civil partnership registrar and, ultimately, she lost her job. Furthermore, it cannot be said that, when she entered into her contract of employment, L specifically waived her right to manifest her religious belief by objecting to participating in the creation of civil partnerships, since this requirement was introduced by her employer at a later date.

On the other hand, however, Islington's policy aimed to secure the rights of others which are also protected under the Convention. The ECtHR generally allows the national authorities a wide margin of appreciation when it comes to striking a balance between competing Convention rights (see, for example, *Evans v UK* [GC] no. 6339/05, § 77, ECHR 2007-I).

Conclusion

In all the circumstances, the ECtHR did not consider that the national authorities exceeded the margin of appreciation available to them. There was therefore no violation of articles 14 and 9.

McFarlane

The ECtHR accepted that M's objection was directly motivated by his orthodox Christian beliefs about marriage and sexual relationships, and held that his refusal to undertake to counsel homosexual couples constituted a manifestation of his religion and belief. The state's positive obligation required it to secure his rights under article 9.

The ECtHR took into account that the loss of his job was a severe sanction with grave consequences for M. On the other hand, M voluntarily enrolled on R's post-graduate training programme in psycho-sexual counselling, knowing that R operated an equal opportunities policy and that filtering of clients on the ground of sexual orientation would not be possible

While the ECtHR did not consider that an individual's decision to enter into a contract of employment and to undertake responsibilities which he knows will have an impact on his freedom to manifest his religious belief is determinative of the question whether or not there been an interference with article 9 rights, this is a matter to be weighed in the balance when assessing whether a fair balance was struck.

Conclusion

However, for the ECtHR the most important factor to be taken into account is that the employer's action was intended to secure the implementation of its policy of providing a service without discrimination. The state authorities therefore benefitted from a wide margin of appreciation in deciding where to strike the balance between M's right to manifest his religious belief and the employer's interest in securing the rights of others. In all the circumstances, the ECtHR did not consider that this margin of appreciation was exceeded in M's case and thus there was no violation of articles 9 and 14.

Comment

When dealing with manifestations of religious belief such as the wearing of clothing or jewellery employers will need to consider carefully the objective justification that they put forward when such policies are not obviously interfering with the rights and freedoms of others. Where such manifestations interfere with other protected characteristics such as sexual orientation, then it is extremely unlikely that a proportionate limitation upon them will be unlawful.

Catherine Casserley
Cloisters

Political beliefs – discrimination – membership of BNP

Redfearn v United Kingdom European Court of Human Rights, application no 47335, November 6, 2012

Facts

Mr Redfearn (R) worked as a driver for Serco, a company that provided transport services for Bradford City Council. The majority of R's passengers were Asian in origin and there had never been any complaints about his work.

In 2004, it was announced that R was standing as a candidate for the British National Party (BNP) in the forthcoming local elections. The BNP is *'wholly opposed to any form of integration between British and non-European peoples'* and aims to restore the *'overwhelmingly white makeup of the British population that existed in Britain prior to 1948'*.

Serco transferred R to another post, so that his work did not involve contact with the public. R was duly elected as a local councillor and, as a result, was dismissed by Serco.

Employment Tribunal

R brought a race discrimination claim alleging both direct and indirect discrimination (he did not have the necessary length of service to bring an unfair dismissal claim). R's claim was unsuccessful. The tribunal's reasoning was that Serco had not dismissed R because of race, but because of health and safety concerns (including attacks on buses driven by R and anxiety felt by his passengers).

Appeals

R appealed to the EAT which allowed the appeal, holding that 'on racial grounds' had been construed too narrowly.

Serco appealed to the CA which restored the order of the ET. Mummery LJ held that the reason for dismissal was not that R was white, but his membership of the BNP. This membership was a criterion shared by only a small minority of the white population. The 'dividing line' of race was introduced by the BNP, not Serco.

R was refused leave to appeal to the House of Lords.

European Court of Human Rights

R brought a claim in the European Court of Human Rights (ECtHR) alleging breaches of articles 9, 10 and 11 – freedom of religion, freedom of expression, and freedom of assembly and association respectively.

The ECtHR held that R's article 11 rights had been infringed.

The right to freedom of association meant that the UK had a positive obligation to provide protection against dismissals motivated solely by membership of a political party, or at least to ensure that such dismissals were proportionate. The ECtHR acknowledged that their role was not to judge the BNP's views ('obnoxious or otherwise') and noted that employing a BNP member could impact upon Serco's ability to provide services to the Council. However, those interests of the employer must be balanced against the fact that no complaints had been made about R's job performance and that he was not given any opportunity to transfer to a non-customer facing role.

In particular, the ECtHR considered that a claim for unfair dismissal would have been the appropriate mechanism for challenging a dismissal on grounds of membership of a political party, so that the competing interests under article 11 could be considered. That challenge should be able to take place regardless of an employee's length of service. While the UK had provided a number of exceptions to the one-year qualifying period necessary to bring an unfair dismissal claim, those exceptions did not include membership of a political party, and that infringed R's article 11 rights.

R's claims under articles 9 and 10 were unsuccessful.

Three judges gave a dissenting opinion, stating that they did not think that article 11 required protection from dismissal on grounds of political membership – a member state should be free to limit the protection to (for example) race, sex and religion. Their reasoning is that protection on grounds of 'immutable characteristics' require weightier justification that those characteristics or statuses that require an element of choice.

Analysis

R's victory was partial – the ECtHR did not decide that R should not have been dismissed, but rather that he should have been able to use unfair dismissal legislation to challenge his dismissal on grounds of membership of

664 a political party.

It is not clear that R would have been successful in any unfair dismissal claim, even if he had been able to bring one – the possibility of a dismissal for *'some other substantial reason'* means that a tribunal could well have found that Serco was entitled to find that the damage to its reputation, and the provision of services to a council with a majority of residents from an Asian background, entitled them to dismiss because of BNP membership. It is also clear that Serco would have been on far firmer ground if there had been any evidence that R's ability to do his job was affected by his BNP membership.

It is perhaps telling of the contradictory nature of the BNP's beliefs that a member of the party could receive an award for being a first-class employee in transporting Asian people with disabilities around Bradford. Integration is not something that can be avoided, let alone 'stemmed' or 'reversed' as the BNP would wish.

Practical implications

Dismissal on grounds of membership of a political party is a rare occurrence. When it does occur, individuals should be aware that their employer should consider how their membership affects their ability to do their job, and also that alternative positions should be considered. In circumstances where an individual's political membership is fundamentally at odds with the ethos of their employer's organisation (or that of their customers and clients), it is going to be difficult to mount a successful unfair dismissal challenge.

R was forced into using race discrimination as a means of airing his dispute before the tribunal, but one possible consequence of the decision might be further attempts to widen religious and philosophical belief discrimination.

Two ET cases have seen tribunals refuse to hold that membership of the BNP or similar organisations is part of a philosophical belief system (*Baggs v Fudge* ET/1400114/05 and *Finnon v Asda Stores Ltd* ET2402142/05) whereas the ECtHR confirms that freedom of association should extend to those beliefs that 'offend, shock or disturb'.

The more wide ranging implications concern changes to the qualification period for unfair dismissal claims, recently increased to two years. The current government proposal, contained in an amendment to the Enterprise and Regulatory Reform Bill, proposes no qualification period if the reason (or, if more than one, the principal reason) for the dismissal is, or relates to, the employee's political opinions or affiliation.

In the meantime, *Redfearn* is of far more use to public sector employees dependant on unfair dismissal law (who will be able to directly rely on Convention rights) than those employed in the private sector.

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Editor's note: discrimination on the grounds of political opinion and religious belief is unlawful in Northern Ireland under the Fair Employment and Treatment (NI) Order 1998. Political opinion is not limited solely to Northern Ireland constitutional politics and may include political opinions relating to the conduct or government of the state, or matters of public policy.

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Equal pay – jurisdiction – civil court proceedings

Birmingham City Council v Abdulla [2012] ICR 1419, [2012] EqLR 1147, October 24, 2012

Facts

Abdulla (A) was employed by Birmingham City Council (Birmingham) as a lunchtime supervisor, and left her employment in November 2007. In 2010, A brought a claim for equal pay, along with 174 other claimants, mostly women.

High Court

A relied upon the provision in the Equal Pay Act 1970 (EqPA) which inserts an equality clause into her contract of employment. Accordingly, the claims were brought in the High Court (HC) as breach of contract claims.

Before filing a defence, Birmingham made an application to strike out the claims, on the grounds that the HC had no jurisdiction to hear them. Alternatively, even if the HC did have jurisdiction, they should not exercise it. Both of these arguments were raised under s2(3) EqPA which gives a court the power to strike out a claim or refer it to the ET, so long as it is 'more convenient' to do so.

Although the court did not examine the individual circumstances of the claimants, they assumed that all of the claims would be outside the six-month limitation period in the ET.

Mr Colin Edelman QC, sitting as a deputy High Court judge, dismissed Birmingham's application. The deputy judge stated that it could not be more convenient for a claim to be referred to the tribunal in circumstances where the tribunal was bound to refuse jurisdiction.

The deputy judge also said that if the court had a discretion as to whether to hear the claims, he would have exercised this by refusing to strike out the claims. This was because it would be a 'windfall benefit' to Birmingham to strike out the claims when they had been brought within the six-year breach of contract limitation period.

The deputy judge also said that the EU principle of equivalence meant that the claims should not be struck out.

Birmingham appealed to the Court of Appeal.

Court of Appeal

Lord Justice Mummery, giving the sole judgment, dismissed Birmingham's appeal.

It was common ground between the parties that courts had jurisdiction to hear equal pay claims, just like any other breach of contract claim. The issue was about the courts' discretion to strike out the claims under s2(3) EqPA on the basis that it was 'more convenient'.

Birmingham argued that the phrase 'more convenient' included circumstances in which a claim would be struck out on limitation grounds in the ET. They also referred to the specialist nature of the ETs and their experience in dealing with large numbers of multi-party equal pay claims. Birmingham argued that when s2(3) used the word 'dispose', this included disposal through the procedural application of a limitation defence, as well as disposing of a claim on its merits.

Birmingham also said that the court should look at whether it was reasonable of the claimants not to pursue their claims in the ET within the limitation period.

Mummery LJ rejected Birmingham's arguments. If there is dual jurisdiction, it is not a question of reasonableness; a claimant is entitled to bring their claim in either venue, provided the claim was brought within the six-year limitation period for breach of contract claims. An exception would be abuse of process, but this could not be the situation with A's case, given that she was '*simply exercising [her] undoubted right to institute claims in the High Court in time*'. In addition, Birmingham had not sought to argue that any of these claims were an abuse of process.

The emphasis was that although s2(3) EqPA gave the courts a discretion, this must be exercised properly *'for the purpose for which it was conferred and in accordance with the principles of relevance'*. Mummery LJ described it as 'draconian' to strike out a claim which had been brought within time, and where there was nowhere else available for a claim to be brought.

When considering circumstances in which s2(3) could be successfully invoked, Mummery LJ thought a good example would be a mixed claim, in which there are multiple claims, only one of which had concurrent jurisdiction with the ET (such as equal pay).

Mummery LJ thought that domestic law dealt adequately with the appeal and so did not consider the position under the EU principle of equivalence.

Birmingham appealed to the Supreme Court.

Supreme Court

The SC, by a three to two majority, rejected Birmingham's appeal.

Lord Wilson, giving the majority judgment on their behalf, stated that parliament had a clear intention to give the ETs concurrent jurisdiction with the civil courts for breach of contract claims. This possibility meant that concurrent jurisdiction was also possible for the equality clause. One pointer to this was the fact that the six-month limitation period was not extendable (unlike so many other ET claims).

Lord Wilson also relied upon the wording of the original EqPA, which talked about the courts referring a 'question' to the tribunals, and attaching significance to the fact it was not a 'claim' that was referred (even though other provisions referred to a 'claim' being struck out).

Lord Wilson agreed with the CA that it was inappropriate to compare concurrent jurisdiction to the question of whether a claim could be brought in this jurisdiction as well as (or instead of) a foreign jurisdiction. Convenience was about the distribution of judicial business, not effectively shortening the limitation period.

Lord Wilson agreed with the deputy judge that simply bringing a claim in the courts could never, by itself, be an abuse of process (although this did not remove the courts' inherent powers to strike out a claim for abuse of process where appropriate).

Lord Sumption's dissenting judgment did not appreciate the classification of limitation as a 'procedural

665 technicality', and stated it was an important feature of justice that stale claims should not be permitted to be brought. A limitation defence was as valid, and meritorious, as a claim being heard on its merits and dismissed.

Lord Sumption also placed emphasis on the specialist knowledge of the ETs, making them far more appropriate a venue for equal pay claims.

Analysis

The SC divided along whether the question was to be decided by examining the language of the statute and parliamentary intention, or whether a broader view of the most appropriate policy should be adopted. Both approaches are convenient fictions – it is difficult to see how a parliament of diverse voting blocs and individuals could form an 'intention', and policy is equally hard to separate from the judge's personal view of the most just result.

However, the stricter black letter approach won through, perhaps because it makes the most obvious concession to objectivity. It is questionable whether the different uses of 'claim' and 'question' in the EqPA had the intention of making clear the issue of concurrent jurisdiction, but perhaps the overriding concern was that it should only be in limited circumstances that an individual does not have the opportunity to have their claim heard on the merits. The alternative reading would have been that a discretion (whether a claim could be struck out in the civil courts) was effectively upgraded to an absolute rule.

Practical implications

The most immediate implication of *Abdulla* is that claimants have six years, instead of six months, from the date of any contract coming to an end to bring an equal pay claim. Of course, the civil courts have a costs jurisdiction and so such a claim will only be appropriate where a claimant is protected from the risks of adverse costs.

The greater limitation period may mean that people are more inclined to bring claims in sectors where such a claim may be considered 'career suicide' – there will now be a far longer 'cooling off' period from the end of the employment relationship.

Previous issues that have arisen in equal pay cases surrounding limitation – for example, TUPE transfers and whether there is a 'stable employment relationship' – will now be less of an issue, as the previous period of employment will now no longer be time-barred.

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666 Briefing 666

Discrimination on grounds of religious belief and/or political opinion – victimisation

Northern Ireland Fire and Rescue Service v McNally Court of Appeal in Northern Ireland Ref HIG8545; [2012] EqLR 821; June 29, 2012

Facts

Mr McNally (McN), a Catholic, was employed by the Northern Ireland Fire and Rescue Service (the FRS) as a Fire Officer.

In October 2006 McN tendered his resignation to the FRS, stating that his position within the service was no longer tenable because he believed that there was a *'long running plot by elements within the organisation'* to have him sacked or 'at best' to impede his progress due to his perceived religious beliefs. The FRS did not accept his resignation and McN invoked a grievance against his employer alleging that he had been subjected since 1996 to discrimination on the grounds of his religion/political opinion.

McN's grievance was not upheld and he lodged an internal appeal against this decision in February 2007. In March 2007 McN lodged a case with the Fair Employment Tribunal (FET) alleging discrimination on the grounds of religion/political opinion under article 3(4) of the Fair Employment and Treatment (Northern Ireland) Order 1998.

McN's internal appeal was heard by the Chief Fire Officer (CFO) in May 2007 and was not upheld. He lodged an appeal to the Northern Ireland Fire and Rescue Service Board (the Board) in June 2007 against the decision not to uphold the grievances.

McN lodged a second claim with the FET in September 2007 alleging discrimination on the grounds of religious and political opinion by the FRS in the manner in which his grievances had been heard.

The Board convened a sub-committee to hear McN's appeal and a hearing took place in early 2008. At this hearing the FRS's response to McN's allegations was made by the CFO. The appeal was not upheld.

In September 2008 McN lodged a third claim with the FET alleging victimisation. He alleged that during the Board hearing the CFO unfairly victimised him by telling the panel that he had told blatant lies and by making defamatory remarks about his character which were totally unjustified.

Fair Employment Tribunal

The FET dismissed McN's first two claims. It found that the third claim of victimisation relating to the remarks made by the CFO at the Board hearing was well founded.

The FET found that the CFO had made unfair comments and asserted that McN had made inaccurate statements because he had made allegations of religious and/or political discrimination in the tribunal claims.

The FET found that the CFO's statement to the Board reeked of anger and retaliation. The CFO's statement had 'gratuitously' referred to and dwelled upon an act of indiscipline which McN had carried out 14 years previously and that this was designed to humiliate him. It found that the CFO had regarded McN's allegations of discrimination as an affront to the 'entire Service'.

The FET found that the CFO was implicitly inviting the Board not to engage with the discrimination allegations as the matter would ultimately be determined by the tribunal where McN had lodged two claims.

The FET found that the CFO's statement to the Board constituted unreasonable treatment of McN and went far beyond the taking of *'honest and reasonable steps'* in connection with the proceedings or allegations. It held that it was unnecessary for the CFO to castigate McN for making the allegations or to refer in humiliating terms to his disciplinary offence of so many years beforehand.

The FET decided that this was detrimental treatment of McN in that he had been disadvantaged in the circumstances in which he would have to work. It held that the allegations of religious and political bias were an important reason for the detrimental treatment of McN and that if he had raised less controversial grievances not alleging religious or political bias, he would not have been subjected to the mistreatment at the Board hearing.

The FRS appealed the victimisation decision to the Northern Ireland Court of Appeal.

Court of Appeal

The FRS requested the CA to consider the question as to whether, on the facts and evidence before it, the FET erred in law and reached a decision which no reasonable tribunal could have reached in holding that McN had been unlawfully victimised by the CFO in the course of the Board hearing.

The CA noted that the FET did not appear to have considered the CFO's statement in the context of the serious allegations made by McN, which the tribunal had dismissed as untrue. The CA did not accept that the CFO's statement was an invitation to the Board not to engage with the allegations of discrimination. Rather the CA described the CFO's statement as a very strong refutation of McN's allegations against the FRS. It concluded that a fair reading of the entire CFO's statement did not bear out the conclusions reached by the FET. Lord Justice Higgins held that considering McN's allegations of discrimination were untrue, the CFO was justified in defending himself in robust terms and that McN had exposed himself to this by bringing allegations which the tribunal decided to be unfounded. The CFO's statement did not constitute unreasonable treatment of McN and did not go beyond the taking of honest and reasonable steps in defence of false claims. It had not been suggested that the CFO was anything other than honest. The CFO was entitled to tell the Board the information about McN so that they could know his character.

In relation to the issue of detriment, the CA found it difficult to see how the FET reached the conclusion that McN could reasonably believe that his standing among his colleagues would be reduced as a consequence of the FRS taking honest and reasonable, albeit robust, steps to refute allegations against his fellow officers which were unfounded or that he would be disadvantaged in carrying out his work. The FET had made no express finding relating to whether McN had felt that he was disadvantaged in the circumstances in which he would have to return to work. The CA held that there was a requirement for objective evidence to that effect which was reasonable in the circumstances and in this case there was no basis in fact and law for

666 finding that McN suffered a detriment. The question of whether McN had suffered a detriment had to be looked at from his viewpoint and the reasonableness of this opinion.

The CA decided that no reasonable tribunal properly directing itself in fact and law could have reached the conclusion that the McN had been unlawfully victimised by the CFO in the course of the Board hearing.

Commentary

S27 of the Equality Act 2010 (EA) provides that A victimises another person B, if A subjects B to a detriment because B has brought proceedings under the EA.

This wording is different from article 3(4) of the Fair Employment and Treatment (Northern Ireland) Order 1998 which provides that A discriminates against B by way of victimisation if A treats B less favourably than A treats or would treat other persons and does so because B has brought proceedings against A.

However, the CA referred to case law which preceded the EA where the words used in the legislation at that time were 'by reason that' in relation to why the employer acted as he did. The CA held that nothing much turned on the difference in the wording of the legislation. The proper approach to the question of victimisation was twofold:

1. the court must look at why the employer has taken the particular act from his standpoint; **and**
2. whether the act has caused detriment from the point of view of the alleged victim.

Positive evidence and findings of detriment would be required. Any claim of distress would have to be objectively justified.

Mary Kitson
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667 Briefing 667

Did a dismissal for a racist comment amount to direct discrimination and victimisation for a protected act?

Woods v Pasab Ltd t/a Jhoots Pharmacy and Another [2012] EWCA Civ 1578, [2013] EqLR 124, October 24, 2012

Facts

The claimant employee Ms Woods (W) brought a claim for unlawful direct discrimination, harassment and victimisation under the Employment Equality (Religion and Belief) Regulations 2003 (the Regulations). The ET dismissed her complaints of direct discrimination and harassment but held that her complaint of victimisation was well founded.

W was a trainee pharmacist for Pasab Ltd (P). The workforce at the pharmacy was multi-faith and multi-racial. W described herself as a 'white Irish' practicing Muslim. She was dissatisfied with her training and uncomfortable that her manager and the trainee dispenser spoke in Punjabi which was not familiar to her. W complained to the Royal Pharmaceutical Society about this, unbeknown to P.

W's manager made complaints about W's attitude and timekeeping and there was a meeting at which she was informed that she may face disciplinary action. At this meeting there was discussion about arrangements for W to pray at work and she was informed she would need to reduce her lunch break by 30 minutes. The meeting became heated and the ET found, as a matter of fact, that W described P as *'a crap company and a crap pharmacy'* and that her manager and P was *'a little Sikh club which only look after Sikhs'*.

P's head of human resources, the second respondent Ms Jhooty (J), was told about the comment and she wrote to W to inform her that she was suspended due to her racist and offensive comments. At an investigation meeting with J, W later denied making the comments. She was dismissed for poor timekeeping and a failure to follow procedures.

Employment Tribunal

At the ET, although W initially denied making the remark, she argued that if the remark was made then it amounted to a complaint of direct religious discrimination and was a protected act contrary to regulation 4 of the Regulations.

Rejecting J's evidence that she had dismissed W for poor timekeeping and failing to follow absence recording procedures, the ET upheld the complaint and found that W had made the comment, that she felt that she was being treated less favourably on religious grounds, and that it was that comment which prompted J to dismiss her. W did not appeal the finding that she had made such comments.

At a later remedy hearing W was awarded £34,748.21 (the irony being that this was on the basis of a remark which she had denied making).

Employment Appeal Tribunal

P appealed to the EAT which overturned the ET decision. Relying on *Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, the EAT held that on the ET's own findings W was not dismissed because she was claiming to be the victim of discrimination, and that the Regulations did not therefore apply.

Court of Appeal

W appealed to the CA which dismissed her appeal. Delivering the leading judgment, Lady Justice Hallet analysed the thought process of the EAT, and found it was right to conclude that the ET had erred in law. Having found that W had been dismissed because J believed the comment to be racist, it was wrong to then find that W had been dismissed because she was claiming that P and J were themselves racist or discriminatory. A protected act therefore played no part.

The EAT was correct in its analysis and did not substitute its own findings of fact. The ET's reasoning was flawed because it failed to follow the principles in *Khan*, attributed to J its own understanding of the disputed comment and made a leap from that to a finding of victimisation.

The whole of the ET's judgment was premised on the basis that J dismissed W because she thought she had made a racist remark; she did not dismiss consciously or unconsciously because of a protected act, therefore there was no need to accede to W's request to remit the matter for a fact-finding exercise as all the necessary facts had been found.

Analysis

In *Khan*, the House of Lords explained that, in the context of victimisation, the phrase 'by reason that' focuses on the reason why the alleged discriminator acted as they did. In other words, what (consciously or unconsciously) was their reason? This is clearly a subjective test and a question of fact.

The ET had not rejected J's evidence that she thought W had been racist and found that was the real reason for the dismissal; therefore the ET's own findings excluded the possibility of conscious or unconscious reliance upon the protected act as the reason for the dismissal.

In this case the dismissal occurred before October 1, 2010 and the Equality Act 2010 (EA), which repealed the Regulations, did not therefore apply. Under the EA the victimisation regime is very similar but not identical. The phrase 'by reason that' was replaced with 'because' but the intention was not to change its meaning and *Khan* remains good law.

Tribunals considering victimisation claims will have to assess whether the employer knows that a protected act has occurred. There is therefore some potential for an employer to avoid liability by showing that it did not realise that the employee had in fact made the complaint. This runs contrary to the purpose of the legislation which exists to protect an employee who does a protected act. It is important to note that the facts in the instance case are unusual. In the majority of cases employers will probably not have the opportunity to defend a claim against them for victimisation by attempting to persuade the tribunal that they were not aware that the allegations of discrimination had been made.

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Independent living and the UN Convention

R (South West Care Homes and others) v Devon County Council [2013] EqLR 50, [2012] EWHC 2967 (Admin), November 7, 2012

The s149 equality duties continue to be used to challenge spending cuts by local authorities. In addition, the UN Convention on the Rights of Persons with Disabilities 2006 (the UN Convention) – which has featured in past editions of *Briefings* [e.g. see Briefings 513 & 527]– broke the mould of conventions in a number of ways – for example, it is the first to be ratified by the EU. It has been increasingly used in legal argument and this case sees it being cited positively by the court to explain the meaning and the importance of the concept of independent living when considering the provision of care services by local authorities and their obligations under the Human Rights Act 1998 (HRA) and the equality duties.

Facts[1]

South West Care Homes Ltd runs residential care and nursing homes, providing assisted care to residents placed in those homes by Devon County Council (the Council). All of the homes have residents who are elderly or have a disability, or both. The Council has an obligation under s21 of the National Assistance Act 1948 to provide residential care to elderly and infirm persons. Every year in the spring, the Council sets fee rates in respect of those people placed in private care homes. The rates are banded according to the care needs.

In April 2012, the Council issued a decision letter setting its fees for the financial year 2012/13. The claimant argued that those fees provided for an effective nil rate of return on capital, which meant that some of the homes would no longer be financially viable, resulting in unplanned closures and deteriorating conditions and quality of care for the residents.

Judicial Review

The claimant brought judicial review proceedings, arguing that the Council had failed to comply with its duty under s149 of the Equality Act 2010 (EA) to have due regard to the need to eliminate discrimination and to advance equality of opportunity among elderly and disabled persons. An equality impact assessment had been carried out by the Council to inform the decision but was, according to the claimant, flawed.

1. Facts and summary of the court proceedings are based on the EqLR report.

The Council accepted that the public sector equality duty was engaged in the exercise of determining the usual cost of providing care, as part of the process of setting rates of fees payable, but argued that that exercise was remote from the provision of accommodation and care.

The application for judicial review was upheld and the decision quashed.

Administrative Court

The court held that in deciding whether or not a public authority has, when exercising its functions, complied with its duty under s149 EA to give due regard to the need to eliminate discrimination and advance equality of opportunity, the court must first identify the function in question.

In the present case, the Council was reviewing the usual cost of providing residential accommodation for a person whom it had assessed as requiring such accommodation and it was this exercise that it was engaged upon. The assessment of the person's needs had to be carried out in order to discharge a statutory duty imposed on the Council to provide residential care to elderly and infirm persons. The exercise of reviewing the usual cost of providing accommodation was one which the Council carried out in order to ascertain whether or not there was a requirement to provide a person, in respect of whom their duty to provide accommodation arose, with their preferred choice of accommodation, for example at one of the residential homes run by the claimant. It could not be accepted that this exercise was remote from the duty to provide residential care (as the authority had argued).

Having considered the elements of the equality duty, the court went on to state that the CA in *Burnip & Ors v Secretary of State for Work & Pensions* [2012] EWCA Civ 629 [see Briefing 655] confirmed that the UN Convention is relevant in illuminating what was meant by disability discrimination and justification for it (see per Maurice Kay LJ at paragraphs 19-22).

Moreover, where a group, recognised as being in need of protection such as the severely disabled, is significantly disadvantaged by the operation of ostensibly neutral criteria for enjoyment of a benefit, discrimination was established, subject to justification. In addition, rights for

people with a disability, such as the right to choose where they live and to have support so as to prevent isolation or segregation from the community, are enshrined in the UN Convention and the European Convention on Human Rights. In the present case, the result of the costs review exercise might affect those rights, and it should have been carried out having the specific provisions of s149 EA in mind so as to have due regard to the need to eliminate discrimination and to advance equality of opportunity.

The court stated further that the approach of the Council to its decision to set fees paid to privately run residential care and nursing homes for the financial year 2012/13 did not involve the assessment of needs or the cutting of services or curtailment of choice, but merely the calculation of cost. That approach failed to have due regard, in substance or with rigour or with an open mind, to the need to eliminate discrimination and to promote equality of opportunity among elderly or disabled residents. The Council, in carrying out this cost review exercise, failed to ask itself what it could do in respect of those needs. It was not good enough to say that the needs of individual residents had been or would be assessed under the relevant statutory provisions in order to decide that residential accommodation should be provided to them. Compliance with that duty in the case of any individual cannot obviate the need for the Council in setting fees to have regard to the specific equality duties. In particular, in setting the fees, there was no proper consideration of mitigation measures or proper management of any anticipated home closures, whether or not those closures would happen regardless of the level at which the fees were set. The equality impact assessment should have been reconsidered once the risk of home closure was particularised. Furthermore, there was no proper consideration of the staff costs of engaging and interacting with those residents with greater levels of need, such as those suffering from dementia.

Comment

The importance of this judgment lies not only in its robust approach to the s149 equality duty in relation to disability but also in its approach to the UN Convention and in particular the breadth of the approach to independent living in that Convention. It is worth setting out what the court said about the UN Convention:

> *Amongst the most pertinent provisions of the UN Convention for present purposes are Article 4, 5 and 19. Article 4 requires states parties to 'ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability', and to take a number of specific steps to this end. Article 5(3) provides that 'in order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided'.*
>
> *Article 19 provides that:*
>
> *'States Parties to this Convention recognise the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that*
>
> *a. Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;*
>
> *b. Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;*
>
> *c. Community services and facilities are available on an equal basis to persons with disabilities and are responsive to their needs.'*
>
> *Section 2 of the HRA requires case law of the European Court of Human Rights to be taken into account whenever relevant to determining an issue before the domestic court. Section 3 requires public authorities to read and give effect to all legislation which is compatible with rights under the European Convention on Human Rights (the European Convention) so far as it is possible to do so. Section 6 provides that it is unlawful for a public authority to act in a way which is incompatible with a European Convention right unless required to do so by a provision made by or under primary legislation which cannot be read compatibly with the European Convention.*

Implications for practitioners

Practitioners should consider the use of the UN Convention not only in HRA cases but also in other cases where it may be used as an aid to interpretation e.g. in considering what is a 'reasonable' adjustment to have to make. Courts are increasingly becoming aware of it as setting a benchmark for the treatment to be afforded to disabled people and this case is a very good example of that.

Catherine Casserley, Cloisters

Relevance of employer's knowledge of disability

Gallop v Newport City Council [2012] EqLR 999, UKEAT/0586/10/DM, July 19, 2012

This EAT case was decided under the Disability Discrimination Act 1995 (DDA). Since the disability discrimination provisions of the Equality Act 2010 (EA) differ in relevant ways from those of the DDA, the potential implications of this decision for future disability discrimination claims are discussed seperately below.

Background

Mr Gallop (G), who had been dismissed following sickness absences arising from a stress related condition, brought claims of unfair dismissal and disability discrimination (direct, disability-related and failure to make a reasonable adjustment). G, who had worked for the respondent from April 1997, had been promoted in February 2004 to the post of technical officer. From May 2004 he complained to the respondent of stress manifesting itself in the form of significant symptoms including lack of sleep, nausea, lack of appetite, irritability, headaches, eye strain, bouts of comfort eating, an inability to concentrate, an inability to cope with simple tasks and tearfulness.

G's dismissal for gross misconduct in May 2008 was found to be unfair by the ET (the disciplinary proceedings were described by the tribunal as a 'sham'), but the disability discrimination claims were all dismissed.

Employment Appeal Tribunal

The central point of the appeal related to 'without prejudice' discussions. However, in addition the disability claims were dismissed on the basis that the employer did not have the necessary knowledge, actual or constructive, of the claimant's disability. The EAT rejected a submission that it was enough that the employer was aware of the elements of an employee's impairment and it was not necessary that the employer knew that it fulfilled the statutory definition of a disability. Furthermore, the employer was held to be entitled to rely on advice from external health advisers that G's stress related condition did not meet the statutory definition.

This decision presents little rationale for these conclusions and no reference to previous case law. The DDA's prohibition against less favourable treatment for a reason related to a person's disability did not contain an explicit requirement that the alleged discriminator knew about the complainant's disability. It was the House of Lords, in the case of *Lewisham v Malcolm* [2008] UKHL 43 [see Briefing 497], which interpreted the relevant provisions as requiring knowledge of a person's disability. In two of the judgments in that case (Lord Brown and Lady Hale), this requirement for knowledge was said not to require knowledge that the person in question satisfied the DDA's precise legal definition of disability: *'it is necessary to show that the alleged discriminator either knew or ought to have known of the disability (not, of course, that in law it amounted to disability within the meaning of the Act).'* (para 86)

And para 113: *'A meaningful comparison requires also that treatment cannot be discriminatory unless the supposed discriminator knows of the disability (although obviously he need not know that it satisfies the statutory definition of disablement).'*

The decision also failed to reference the EAT case of *Farnsworth v London Borough of Hammersmith & Fulham* [2000] EAT 461_99_1506, in which an applicant had her job offer withdrawn following an external occupational health physician's report. This judgment held that, because the external medical adviser was aware of '*evidence of ill-health over a number of years, which at times has been severe and necessitated hospital admission*' this fulfilled the knowledge of disability requirement under the DDA This knowledge was then imputed to the employer.

Implications

What are the implications of this decision for the interpretation of the EA's provisions regarding disability discrimination?

S15(1) of the EA prohibits discrimination arising from disability. S15(2) disapplies this provision where the alleged discriminator did not know and could not reasonably be expected to know that the claimant had a disability. (Similar knowledge requirements are imposed by the schedules of the EA relating to reasonable adjustments. The knowledge requirement does not apply in relation to direct disability discrimination.)

Therefore, if *Gallop* had been decided under the EA, the tribunal would need to decide if the employer could

be said to 'reasonably' rely on this medical advice. It is certainly arguable that this is because the issue of whether a person is disabled under the EA is legal as opposed to medical.

It would therefore be unwise to rely on this decision in interpreting the EA's protection against disability discrimination. As Michael Rubenstein pointed out in Equality Law Reports (November 2012): *'it is surely not appropriate for an employer to be able to use what it is told by an outside medical examiner as a 'get out of jail free' card.'*

Caroline Gooding
Independent consultant

Briefing 670

Indirect religious discrimination – Sunday working justifiable

Mba v London Borough of Merton UKEAT/0332/12/SM, December 13, 2012

In this particular case required Sunday working was justified, notwithstanding that it put Christians at a disadvantage.

Facts

Ms Mba (M) was a care worker in a children's home. She was also a Christian who did not wish to work on the Sabbath. Her contract with the London Borough of Merton (LBM), however, required Sunday working as part of a rota system.

During the first two years of her employment, M was able to arrange to avoid Sunday working. Ultimately, however, LBM insisted that she be scheduled on the normal rota. She refused and resigned.

Employment Tribunal

M brought a claim for indirect discrimination. She argued that requiring Sunday working put Christians, including herself who wished to keep the Sabbath, at a disadvantage.

The ET accepted this - but concluded that LBM's policy was justified. LBM had the legitimate aim of ensuring an appropriate gender/seniority balance on each shift, maintaining a cost-effect service without relying on expensive agency staff, treating all of its staff fairly and ensuring continuity of care.

Employment Appeal Tribunal

M appealed arguing that the ET erred in its approach to justification. But the EAT upheld the tribunal's decision.

President Langstaff held that, in approaching justification, tribunals should focus on the impact of the protected group as a whole, not the impact on a particular claimant. It was appropriate to consider how many Christians would be affected by a Sunday working policy. This was relevant to considering the impact on the protected group.

He was careful to point out, however, that investigating the extent of a belief, and thereby the impact of a policy, should not be confused with theological consideration of the importance of a belief in religious terms. The only proper matter for a tribunal was the proportion of believers who would be affected by a policy.

Comment

In one sense, this is a conventional indirect discrimination appeal. The ET weighed the issue of justification and reached a conclusion. The losing party appealed, but the EAT refused to overturn the ET's judgment.

Several of the president's comments, however, may be important in the future. First, that tribunals dealing with indirect discrimination justification should consider the disadvantage to the protected group, rather than the individual. Second, in religious discrimination cases, this consideration may involve considering the extent that a particular religious group holds a belief. Both of these principles are likely to be further explored, if not challenged, in future cases.

Michael Reed
Free Representation Unit

Indirect effects of an impairment on definition of disability

Sussex Partnership NHS Foundation Trust v Norris UKEAT/0031/12/SM, [2012] EqLR 1068, October 30, 2012

Facts

Ms Norris (N) has elective IgA deficiency, which causes an increase in susceptibility to infection. She brought a claim of disability discrimination after an offer of a job from the respondent was withdrawn when a referee referred to her disability.

Employment Tribunal

This case, as so often with disability discrimination claims, focused on whether or not N was a disabled person within the meaning of the Equality Act 2010 (EA). N had had intermittent periods of sickness absence as the result of infections arising from her damaged immune system. At the time of the alleged discrimination this indirect effect of her impairment was controlled by daily doses of antibiotics to fend off such infections. As a result she was unable to demonstrate a substantial adverse impact on her normal day-to-day activities. However, she invoked the provision of EA (Schedule 1 Part 1 paragraph 5) which requires the impact of an impairment to be assessed ignoring the postive effects of medication.

The majority of the ET held that, applying this provision, N had established that the impact of her impairment could be considered as substantial and adverse for the purposes of the EA. Whilst these substantial adverse effects were intermittent, the ET held that they were likely to recur (if the effects of medication were ignored) – in the sense of 'could well happen'. The respondent appealed.

Employment Appeal Tribunal

The EAT upheld the legal approach taken by the ET but held that the evidence did not support a conclusion that such an increased rate of infection would, in this case, have a substantial adverse effect on normal day-to-day activities. Furthermore, the evidence did not support the conclusion of the majority of the ET that any substantial adverse effects caused by the impairment in the past were likely to recur.

The case was remitted to a fresh tribunal for a re-hearing.

Comment

Whilst N lost the appeal beause of inadequate evidence about the impact of her particular impairment, other claimants may find this decision helpful as illustrating the requirement to take into account the indirect effects of an impairment – such as increased susceptibility to infections.

Caroline Gooding
Independent consultant

ECRI's 2013 interim follow-up report on the UK raises concerns

Concern about the impact on ethnic minorities of the lack of legal aid before employment tribunals in the UK has been expressed by the European Commission against Racism and Intolerance (ECRI).

In its conclusions on the implementation of its recommendations to the UK which are subject to interim follow-up, ECRI highlights the government's failure to fully implement its recommendations on legal aid for discrimination cases before the tribunals.

In its 2010 monitoring report on the UK, (the 2010 report), ECRI recommended that the authorities consider how to best ensure that legal aid is available in discrimination cases before the tribunals.

In its 2013 interim report which follows up the 2010 report, ECRI points out that the Legal Aid, Sentencing and Punishment of Offenders Act 2012 does not provide for free legal aid for representation in respect of 'discrimination-in-employment claims' before the ET and only provides for free legal aid for representation before the EAT.

It also refers to Northern Ireland where legal aid is not available for representation before the Industrial and Fair Employment Tribunals and where the NI Assembly and a review of access to justice commissioned by the Department of Justice for NI did not recommend making full legal aid available to tribunal users.

As a result, ECRI concludes that its interim recommendation has only been partially implemented in England, Wales and Northern Ireland.

ECRI is concerned that this situation is likely to have significant impact on ethnic minorities who currently represent about one quarter of the beneficiaries of the legal-aid scheme in employment cases (the percentage of the economically active population they represent is much lower).

Disadvantages faced by Gypsies and Travellers in accessing adequate accommodation in England

In the 2010 report ECRI strongly encouraged the authorities in their efforts to address the disadvantages faced by Gypsies and Travellers in access to adequate accommodation. It strongly recommended that the authorities take all necessary measures to ensure that the assessment of accommodation needs at local level is completed thoroughly and as quickly as possible.

In respect of England, ECRI notes in its 2013 follow-up report that the Gypsy and Traveller Accommodation Assessments required under the Housing Act 2004 and Circular 01/06 have been completed by all local authorities. The second part of the recommendation has, therefore, been implemented (in so far as England is concerned).

As regards the first part of the recommendation, ECRI notes that in March 2012 the government published a new planning policy for Traveller sites, which replaces Circular 01/06. This followed the abolition of regional strategies. Decision-making has been decentralised to local authorities whose policies will be tested by an independent inspector.

Noting concerns expressed by Gypsy and Traveller organisations that the new planning policy could lead to a reduction of needs estimates and make accommodation provision more difficult, ECRI shares some of these concerns, *'especially since it recognises (on the basis of its experience) the risk that local decision-makers might encounter greater difficulty in overcoming objections to the development of traveller accommodation than decisions-makers at a higher level of government'*.

In the light of this ECRI considers that the first part of the recommendation has only been partially implemented in England. Noting different developments in Scotland, Wales and Northern Ireland, ECRI considers that the recommendation has been partially implemented in these countries.

Under-representation of ethnic minorities in the police

In the 2010 report ECRI encouraged the authorities to continue their efforts to address the under-representation of ethnic minorities in the police, and to monitor progress in recruitment, retention and career advancement. Noting improve- ments in statistics showing, for example, a small rise in the proportion of ethnic minority police officers in England and Wales, ECRI concludes in its 2013 follow-up report that its recommendation has been partially implemented in England and Wales. It reaches the same conclusion in respect of Scotland and Northern Ireland where various initiatives have been taken to increase diversity in their police forces. These include SEMPERscotland (a Scottish-wide organisation representing minority ethnic officers and staff in the police service) and the Scottish Police Muslim Association.

A copy of the follow-up report, which was published on February 19, 2013, is available from www.coe.int/ecri.

Public sector equality duty review update

As reported in the last issue of *Briefings* the government has set up a review of the public sector equality duty (PSED) to establish whether the duty is operating as intended.

Its objectives are to provide a report for ministers by June 2013 on:

- how both the general and specific duties are working;
- how effectively the duty supports delivery of the UK government's equality strategy; and
- options and recommendations for changes or improvements in the way the duty operates.

The review will:

- examine evidence about the effectiveness of both the general duty and the specific duties, drawing on views from public bodies with first-hand experience of fulfilling the duty, as well as from practitioners, voluntary bodies and private sector organisations upon whom the duty has had an impact;
- explore the impact of the duty in terms of costs, burdens and a range of benefits (including policy improvements, efficiencies and equality outcomes);
- consider comparative models internationally to understand the range of levers available to help public bodies deliver equality of opportunity;
- consider how the duty functions in the context of the UK government's equality strategy and its new approach to achieving change, including transparency; devolving power to people; supporting social action; and integrating equality considerations into policy and programmes;
- examine the role of support and guidance given to public bodies and how legal risk is managed within different types of public bodies; and
- consider what further measures could be taken to improve operation of the duty.

Parameters

The review will:

- look at Great Britain in terms of the general duty, but will take account of the different specific duties and implications for the devolved administrations and specific evidence arising from their experiences;
- consider the breadth of protected characteristics within the context of the PSED;
- the review will take account of the budgetary position facing public bodies;
- consider the duties and powers conferred on the Equality Human Rights Commission (EHRC), by the Equality Act 2006.

The costs of the review will be met from existing budgets.

Governance

A steering group – with Robert Hayward as its independent chair – will oversee the review. The group includes senior level figures with experience in the public sectors of policing, education, health, local and central government. The Government Equalities Office (GEO) and EHRC are represented. The steering group, which held its first meeting on December 12, 2012, will meet every four to five weeks.

The steering group will consider how best to develop and gather evidence that will inform the review findings. Throughout the process, members will be expected to both challenge and support an effective review, and ensure the findings are backed up by robust and credible evidence.

The GEO has officially announced that the timetable for the review has been extended:

> *We are now extending the timetable for the review at the request of the Chair and the steering group to help ensure that the review and its recommendations are robust. We expect the review to be concluded by June 2013, rather than the previous announced date of the end of April.*

In addition, the GEO website states that activities include:

> *Inviting selected organisations with experience of the duty's operation to submit evidence to the Review. These will provide insight into organisations' experiences of working with the duty. We will not be conducting a full public consultation as part of this review. The bulk of the review's evidence gathering will focus on organisations that have experience of the Duty's operation.*

The DLA will be submitting evidence to the review.

The GEO has published a 'synopsis' of the group's first and second meetings. At its second meeting the following was agreed:

> *Submitting Evidence – the Group agreed that organisations should be invited to submit evidence on the Duty and how it is operating. Members agreed that the aim is to select a range of organisations that represent different viewpoints and expertise, particularly those not captured by the roundtables.*

See www.homeoffice.gov.uk/equalities for more information on the review.

Mental Health (Discrimination) Bill

On February 11, 2013, the House of Lords gave its final approval to the Mental Health (Discrimination) Bill.

The Bill, which was supported by MIND, Rethink Mental Illness and the Royal College of Psychiatrists, will remove legal barriers which contribute to a stigmatised view of mental health problems. The Bill will:

- repeal section 141 of the Mental Health Act 1983, under which a member of the House of Commons, Scottish Parliament, Welsh Assembly or Northern Ireland Assembly automatically loses their seat if they are sectioned under the Mental Health Act for more than six months
- amend the Juries Act 1974 to remove the blanket ban on 'mentally disordered persons' undertaking jury service
- amend the Companies (Model Articles) Regulations 2008 which states that a person might cease to be a director of a public or private company 'by reason of their mental health'.

According to MIND, the new law will send a wider message that prejudice against people with mental health problems will not be tolerated. *'These three pieces of legislation feed into the discriminatory and outdated idea that people with mental health problems can never recover, and cannot be trusted to participate in social, political or economic life. [MIND] sees the Bill as a very important step in creating a society where people can participate fully, free from the prejudice that currently surrounds mental health.'*

Campaign for job-sharing in the Commons

The Representation of the People (Members' Job Share) Bill is currently being debated in parliament. The aim of the Bill is to allow two people to stand for the Westminster Parliament on a job-share basis so that two candidates can be elected as MPs in a constituency instead of just one. John McDonnell, the Labour MP for Hayes and Harlington presented the Bill on November 20, 2012.

Campaigners for the Bill hope it will make parliament more representative of women and disabled people as job-sharing would enable more disabled people, many of whom can only work part-time, and more carers (mainly women) to stand. Currently 22% of MPs are women and there are only four MPs with a declared disability. To be representative of an estimated 10 million disabled people in the UK, there should be around 65 disabled MPs.

In November 2008 then Prime Minister Gordon Brown asked the Speaker of the House of Commons to establish a Speaker's Conference to:

> *Consider and make recommendations for rectifying the disparity between the representation of women, ethnic minorities and disabled people in the House of Commons and their representation in the UK population at large.*

The Fabian Women's Network and the Liberal Democrat Campaign for Gender Balance submitted evidence to the Conference asking for job-sharing for MPs. Anne Begg MP, vice chair of the Conference, said they had discussed job-sharing for MPs and decided not to recommend it.

Dealing with the practicalities of job-sharers casting one vote, legal advice from Karon Monaghan QC (obtained by the EHRC) on the issue of MPs job-sharing advises that:

> *The easiest and most satisfactory arrangement would seem to me to be one which permitted each of the partners to a job-share to hold half a vote each but each with authority to exercise the other partner's half vote where there was consent so to do and when both were not available to exercise a vote at the same time. Most votes are still heavily Whipped and exercised in accordance with manifestos so, though there are rebellions from time to time, most party members vote in the same way on every issue.*[1]

Disability Politics UK is now calling for the Speaker's Conference on Parliamentary Representation to be re-opened to hear expert evidence on job-sharing for MPs and for the EHRC's legal advice to be considered. In May, the TUC Disabled Worker's conference will hear a motion from the Chartered Society of Physiotherapists in support of job-sharing for MPs. Disability Politics UK is seeking trade union support for the motion.

More information on the campaign can be obtained at: www.disabilitypolitics.org.uk.

Briefings

Abbreviations

ACAS	Advisory, Conciliation and Arbitration Service
AGM	Annual general meeting
BASRT	British Association for Sexual and Relationship Therapy
BME	Black, minority ethnic
BNP	British National Party
CA	Court of Appeal
CRB	Criminal Records Bureau
DDA	Disability Discrimination Act 1995
DLA	Discrimination Law Association
EA	Equality Act 2010
EAT	Employment Appeal Tribunal
ECHR	European Convention on Human Rights
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
EHRC	Equality and Human Rights Commission
EHRR	European Human Rights Reports
EqLR	Equality Law Reports
EqPA	Equal Pay Act 1970
ET	Employment Tribunal
ET1	Employment Tribunal claim form
ET3	Employment Tribunal response form
EU	European Union
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
FET	Fair Employment Tribunal
GC	Grand Chamber of the ECtHR
GEO	Government Equalities Office
HC	High Court
HL	House of Lords
HRA	Human Rights Act 1998
ICR	Industrial Case Reports
IRLR	Industrial Relations Law Report
J	Justice
LJ	Lord Justice
MP	Member of Parliament
NHS	National Health Service
PSED	Public sector equality duty
QC	Queen's Counsel
QALYs	Quality Adjusted Life Years
ROA	Rehabilitation of Offenders Act 1974
SC	Supreme Court
SCR	Supreme Court Reports (Canada)
TUPE	Transfer of Undertakings (Protection of Employment) Regulations 2006
WLR	Weekly Law Reports