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Editorial *Evolving and extending protection to face new challenges*

The range and extent of discrimination set out in this edition of *Briefings* is quite startling reflecting as it does the impact of inequality and discrimination on the quality of life that people experience in the UK in 2014. From schools, to the 'dole' office, to prisons, hotels and workplaces, the lack of equality of opportunity or outcome continues to adversely affect disabled pupils, welfare benefit claimants with mental health problems, women, gay men and other vulnerable social groups.

At the same time it is heartening to note that the law and the courts are being used as intended to protect against abuse and discrimination in relation to the protected characteristics. Successful challenges based on the s149 EA public sector equality duty are encouraging; for example, in *Bracking* where disability campaigners have won a major victory using the duty to challenge the closure of the Independent Living Fund; or in *Griffiths* and *Coll* where the Secretary of State for Justice has been criticised by the court for failing to fulfil his equality duty in respect of approved premises provision for women released from prison on licence. The importance of the equality duty in policy making has been re-iterated in *Bracking* with the Court of Appeal referring to parliament's intention to ensure that *'considerations of equality of opportunity (where they arise) are now to be placed at the centre of formulation of policy by all public authorities, side by side with all other pressing circumstances of whatever magnitude.'*

Successful challenges have also been brought by claimants with particular mental health problems; the Court of Appeal has confirmed that the process of assessing these people for Employment and Support Allowance is in breach of the reasonable adjustment duty and must be changed.

And the law continues to expand and develop: in *IB v Greece* the ECtHR has included 'heath status' as an Article 14 protected ground, while in *L H Bishop Electric Company Ltd* and *others v the Commissioners for Revenue & Customs*, the VAT tribunal required justification for requirements to file VAT returns via the internet since they were indirectly discriminatory against those not computer literate including the elderly, disabled and those living in remote geographical areas.

The lack of success of the Unison challenge to the requirement to pay fees at the ET and EAT is of course disappointing: an appeal is expected. Yet the challenge did expose mistakes in guidance and the Lord Chancellor has agreed to address these. The High Court fired a warning that if the imposition of fees means that tribunals are no longer effective in settling disputes, or has a disparate adverse impact on particular groups, *'the Lord Chancellor [should] change the system without … further litigation'.*

These cases illustrate the role of equality law as a check on the administration. Equality law cannot by itself create the equal and diverse society – so much desired – but it is a powerful tool in building the road to that end and preventing diversions along the way. DLA members will nevertheless be aware of how much there is to be done: legal aid cuts and law centre closures cull the number of advisers working at the sharp end advancing this road to equality. For its part the DLA is proud to announce that in collaboration with Citizens Advice, it will provide three free new training sessions in Birmingham to assist advisers to provide informed equality law advice.

Geraldine Scullion, Editor

Please see back cover for list of abbreviations

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Disability discrimination claims against schools

Beth Holbrook, solicitor with Maxwell Gillott and equalities consultant, explains the role of the Special Educational Needs and Disability tribunal and focuses on disability discrimination claims against schools, highlighting recent key cases which illustrate the approach of the First-tier and Upper Tribunals in this area.

The First-tier Tribunal (Special Educational Needs and Disability) (commonly known as SEND and previously known as SENDIST) is an expert special educational needs (SEN) tribunal whose primary function is to deal with disputes between local authorities (LAs) and parents regarding the special educational provision required by a child.

The SEND's focus is usually on what the child needs and will receive in the future, and little emphasis is placed on what might have gone wrong in the past, what could have been done better or who is to blame. Usually the schools involved are assumed to be trying their best for all their pupils within the constraints of the meagre budget available to them. Great efforts are made by the tribunal and all parties to preserve the close and ongoing relationship between the pupil, parents and school.

The forum is more informal than the other fora hearing Equality Act 2010 (EA) claims. Hearings now take place in tribunal hearing rooms which adds a certain level of formality; historically, hearings outside of London were often held in hotels – I think a function room in the Midland Hotel in Manchester was one of my highlights and a poorly disguised bedroom in a budget hotel on the outskirts of Milton Keynes, a particular low point.

Many parents are unrepresented before the tribunal. Any public funding available for claims or appeals to SEND covers preparation only and only 3 contracts for such work have been awarded in England and Wales by the Legal Services Commission. Some parent pay for legal representation or have representatives trained by education charities. Most LAs are represented in SEN appeals by in-house lawyers who also often represent schools in discrimination claims, although counsel are increasingly being used.

Historically, appeals against SENDIST decisions were made to the High Court but since the SENDIST jurisdiction transferred to the First-tier Tribunal (Health, Education and Social Care) in November 2008, appeals against tribunal decisions are now made to the Upper Tribunal (Administrative Appeals Chamber)(UT).

Disability discrimination claims

The SEND hears all disability discrimination claims under the EA against schools in England and Wales other than those concerning admission decisions to schools maintained by a LA, or academies (depending on the funding agreement). Claims in relation to admission decisions are heard by independent appeal panels under s94 of the School Standards and Framework Act 1998. Until September 2012 any claims relating to the permanent exclusion of a pupil from a maintained school (or academy) were heard by independent appeal panels under s52 of the Education Act 2002; however, such claims are now made to SEND in relation to English schools. The tribunal does not deal with discrimination claims in relation to any other protected characteristic – these are dealt with by the county court.

SEND is an expert tribunal with years of experience of dealing with SEN, and therefore children with disabilities, and the education that such children require. However, disability discrimination claims do present difficulties even for such an expert tribunal. Such claims make up a very small proportion of the 3000 or so cases that the tribunal hears each year and therefore the expertise takes much longer to build up; the definition of disability under the EA is similar to, but differs from, the SEN definition under the Education Acts; the idea of looking at who is to blame and looking at past events rather than future provision is an alien concept as is the confrontational element of such claims particularly between parents and schools. The remedies available in the tribunal are limited and do not include financial compensation so many parents decide that making a claim is not worth the time, effort and upset and some of those who do pursue a claim leave the process feeling dissatisfied.

Key disability discrimination cases

The UT has heard very few appeals against SEND disability discrimination decisions. There have only been a handful of cases reported since the EA came into force. Here is a summary of some of the key cases over the past few years.

694 *P v Governing Body of A Primary School* [2013] UKUT 154 (AAC); [2013] EqLR 666; [2013] ELR 497

This is the first UT decision regarding a permanent exclusion claim. The pupil was excluded following several incidents of violent behaviour which resulted in his teaching assistant having to visit the minor injuries unit of the local hospital with a swollen leg, bruising and broken skin.The pupil had a diagnosis of Asperger syndrome and ADHD which the school was aware of and accepted. The school was at the time trying to work with the two LAs involved (the one which maintained the school and the other which was the pupil's home LA and therefore responsible for assessing his SEN and maintaining any statement of SEN) to get the necessary support in place for the pupil. The parents made a claim of disability discrimination claiming that P had been excluded for reasons arising from his disability and that there had been a failure to make reasonable adjustments. The school's defence was that P was not excluded because of his disability but *'because of repeated, severe behaviour towards children and staff'*.

The First-tier Tribunal held that, whilst P did meet the definition of disability, and this was accepted by the school, in relation to the reasons for the permanent exclusion he was not disabled and therefore the claim was dismissed. The tribunal's reasoning was that the EA excludes from the definition of disability a tendency to physical abuse and the behaviours which led to P's exclusion constituted such a tendency; case law makes it clear that even if such a tendency has arisen out of an impairment, this exclusion still applies. The UT confirmed the approach taken by the tribunal in relation to the definition of disability. However, the case was remitted back to the First-tier Tribunal as it had failed to properly identify the reasons for the exclusion before dismissing the claim.

Governors of X Endowed Primary School v Special Educational Needs and Disability Tribunal [2009] EWHC 1842 (Admin); [2009] IRLR 1007; [2010] ELR 1

The case law referred to by the tribunal, and also followed by the UT in *P v Governing Body of A Primary School,* was a decision of the High Court in *Governors of X Endowed Primary School v Special Educational Needs and Disability Tribunal* [see Briefing 559]. This was an appeal to the High Court from a SENDIST decision under the Disability Discrimination Act 1995 (DDA) which concerned the exclusion of a pupil with ADHD from a primary school for scratching a teaching assistant who was removing him from the classroom following some disruptive behaviour. The tribunal concluded that the school had excluded the pupil for reasons related to his disability; and whilst there were material and substantial reasons for the exclusion, it could not be justified as there had been a failure to make reasonable adjustments, in particular training for staff on ADHD.

The appeal to the High Court was on the ground that the only aspect of the pupil's ADHD in respect of which there was a need to make a reasonable adjustment was his tendency to physical abuse; as such a condition is excluded from the definition of disability then there is no obligation to make a reasonable adjustment. The case made by the respondents was that reg 4(1) of the Disability Discrimination (Meaning of Disability) Regulations 1996 (the Regulations) which excludes from the definition of disability several conditions, including the tendency to physical abuse of other people, refers only to free-standing conditions and not to consequential symptoms or manifestations of an already protected impairment. This position was rejected by the High Court which held that the pupil's conduct did amount to a tendency to physical abuse within the meaning of reg 4(1); the fact that the tribunal found the tendency to be a manifestation of a condition entitled to protection under the DDA did not remove it from the scope of reg 4(1). Although in this case the High Court was considering regulations made under the DDA, provisions to the same effect apply under the EA.

The policy implications in these cases are quite worrying as potentially any violent behaviour presented by any disabled person could be separated from their disability and therefore not covered by the EA. It seems hard to imagine that when the Regulations were drafted the intention was to exclude from protection a primary school pupil with ADHD who, when being physically escorted from a classroom, responded by scratching the adult escorting him.

DR v London Borough of Croydon (SEN) [2010] UKUT 387 (AAC); [2010] ELR 37

This was a claim submitted in April 2009 under the DDA and heard in December 2009. The claim was in relation to events which took place during 2008 and early 2009 but much of the evidence considered by the tribunal related to events which took place after September 2009 and the effects of the child's impairment from September 2009 onwards. Based on this evidence the tribunal determined that the pupil did not meet the definition of disability set out in s1 of the DDA.The tribunal accepted that the effects of the

pupil's impairment had changed significantly between the time of alleged discrimination and the time of the hearing but made its decision based on the effects at the time of the hearing, rather than at the relevant time. It decided that the effects were not long-term as they did not last for 12 months from the date of alleged discrimination and did not take into account evidence indicating that those effects had already lasted for more than 12 months. The appeal to the UT by the parents was successful and the matter was remitted to be re-heard by a different First-tier Tribunal.

CP v M Technology School (SEN) [2010] UKUT 314 (AAC); [2010] ELR 757

This was another claim submitted under the DDA where the SENDIST erred on the issue of disability. In this case the parents claimed that the pupil had mental health issues and as part of the case management process, the school confirmed that it accepted that the pupil met the definition of disability. However, the tribunal decided to consider the matter of whether or not the pupil met the definition as a preliminary matter at the hearing and determined that he did not. The claim was therefore dismissed. The UT determined that whilst the First-tier Tribunal has an inquisitorial function and therefore is entitled to investigate matters itself even if not raised by either party, it must undertake such an investigation fairly. As the parents were unrepresented and taken by surprise at the hearing, and as no mention had been made of the definition point in the pre-hearing case management directions, the UT held that it was possible that the parents did not have a fair hearing and remitted the matter back to a differently constituted First-tier Tribunal.

Gayhurst Community School v ER (SEN) [2013] UKUT 0558 (AAC)

This is a recent and very interesting UT decision regarding the SEND's jurisdiction. One slightly odd aspect to this claim is that the school was unaware of the proceedings before the tribunal and so did not submit any evidence or attend the hearing. One of the grounds of appeal was that the school had not been put on notice of the claim. This ground of appeal failed as the UT found that the tribunal did write to the chair of the school's governing body (as the responsible body for the school). This letter was not opened as it was placed in a separate mail box which the school had for the chair but who was not aware of its existence.

This was another claim relating to the exclusion of a disabled pupil (O) following an altercation with a teacher. Another ground of the school's appeal was the impact of the incident on others and the school's duty of care to children, parents and staff, as well as to O. This was dismissed by Judge Jacobs *'It is right that the school owes duties to teachers and staff, but they have to be implemented in accordance with the duties to O under the EA. The legislation trumps those other rights in the event of a conflict.'*

This is a positive interpretation of the interaction of the school's responsibilities under the EA and the 'health & safety' defence that schools are inclined to use and is in stark comparison with the decisions discussed above in *P v Governing Body of A Primary School* and in *Governors of X Endowed Primary School v Special Educational Needs and Disability Tribunal.*

The UT's conclusions in relation to remedy were very useful and pragmatic, taking into account the fact that O had left the school by the time of the UT hearing. Judge Jacobs determined that the tribunal had not made any error in respect of its order but he made some comments to try and provide guidance to tribunals in the exercise of their powers under paragraph 5 of Schedule 17 of the EA. The powers are that the *'tribunal can make such order as it thinks fit.'* And that this power may be exercised *'with a view to obviating or reducing the adverse effect on the person of any matter to which the claim relates'* but the power does not include the power to order the payment of compensation.

This wide power enables tribunals to be creative when making an order and there have been some interesting and pragmatic tribunal orders. However, most focus on an apology, staff training and changes to practices and policies. Judge Jacobs questions *'what value an apology is likely to have in most cases when made under compulsion'* and advises that tribunals should only order an apology when the school shows a willingness to accept responsibility for what has happened and only if the tribunal is satisfied that the apology will be of some true value. This is interesting advice as many parents are dissatisfied with the apology they receive and some struggle to comprehend that the tribunal can only order the school to write a letter of apology but cannot order any genuine feelings of remorse.

ML v Tonbridge Grammar School [2012] UKUT 283 (AAC); [2012] ELR 508

This appeal concerned two claims against newly converted academies and attracted much interest in the world of education law, probably more in terms of the

694 implications, or lack of, for academies than for the discrimination element. The outcome of these appeals was that in the case of a school which had converted to an academy, any claim made against the governors of the school (as the responsible body under the EA) before the conversion, continues against the LA that formerly maintained the school rather than against the academy.

Parents of C v Stanbridge Earls School [2013] EqLR 304

This is a First-tier Tribunal decision in relation to a disability discrimination claim which was the trigger for investigations into the school and its subsequent closure. The school was a residential special school which excluded an autistic female pupil following sexual encounters with boys at the school. The parents claim was that the school had failed to provide adequate protection for their daughter who was sexually and emotionally vulnerable. The claim was successful and the tribunal ordered the school to send an edited copy of the decision (so that the pupil could remain anonymous) to the Secretary of State for his consideration of whether the registration of Stanbridge Earls School continued to be justified. The tribunal also ordered a copy of the decision to be sent to Ofsted, to every LA which named Stanbridge Earls on a statement, and to the Hampshire County Council's director of children's services. This is an unprecedented step for the tribunal to take and shows the potential impact of the wide powers afforded to the tribunal by the EA. Interestingly the school was also ordered to write a letter of apology.

Future developments

So although claims made under the education provisions of the EA are far fewer in number than those made under the employment provisions, there have been cases of interest and which have implications beyond education such as those on the definition of disability. It is likely that both the First-tier and UTs will be required to clarify when a pupil is excluded from protection under the EA because of a *'tendency to physical abuse'*. Such clarification would be very welcome given that the behaviour that has to date been classified as falling within this exclusion is much more common place in the school rather than work setting. It will be interesting to see if the bold approach to its wide powers taken by the tribunal in the Stanbridge Earls case will encourage other tribunals to be more creative in the use of its powers.

695 Briefing 695

Justice is not blind: judgment on the niqaab in *R v D (R)*

Nick Fry, solicitor, Bindmans LLP, considers the implications of HH Judge Peter Murphy's judgment in relation to the wearing of the niqaab by defendants during proceedings in the Crown Court. The judgment was handed down after a preliminary hearing addressed this specific issue on September 13, 2013 at Blackfriars Crown Court. He expresses concerns that although the judgment does not set a precedent for other courts to follow, it sends a message that the wearing of the niqaab during court proceedings is incompatible with the proper administration of justice.

Introduction

The defendant in this case was a Muslim woman accused of witness intimidation. She attended the initial plea and case management hearing on August 22, 2013 wearing a burq'a and niqaab which covered her whole face except for her eyes. When asked to remove her niqaab for the purposes of identification she declined; she said her Muslim faith prohibited her from revealing her face in the presence of men. Judge Murphy adjourned the hearing and asked counsel to submit skeleton arguments so that the issue of whether the defendant should be required to remove her niqaab during the proceedings could be dealt with at the outset.

The judgment

The judgment is, according to the judge, the first of its kind in the UK criminal courts. It contains a review of related case law from the domestic and European courts and additionally draws on the judgment of the Supreme Court of Canada in *R v NS 2012 SCC 72,* [2012] 3

S.C.R. 726, which directly addressed the question in relation to prosecution witnesses. In the 35-page judgment Judge Murphy seeks to decide the extent to which a defendant's right to wear the niqaab under Article 9 of the European Convention of Human Rights can be limited in the context of criminal proceedings in the Crown Court. Article 9(2) provides:

> *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.*

The judgment asserts that it is in the public interest and in the interests of the proper disposal of adversarial trials for the defendant's face to be visible; it specifically refers to *'the protection of public order'* and *'the protection of the rights and freedoms of others'* asserting that it is unfair on jurors, witnesses and judges to expect them to fulfil their roles in the proceedings without being able to '*observe the demeanour of the witness*'.[1]

The judgment asserts that while the potential '*discomfort*' caused to a defendant cannot be overlooked *'the invasions of the procedure of the adversarial trial'* that would be caused if the niqaab could not be removed would *'drive a coach and horses through the way in which justice has been administered in the courts of England and Wales for centuries'*.[2] Although the whole judgment is not couched in such dramatic terms – and the full legal test is applied to the lawfulness of the proposed restriction (i.e. is the restriction prescribed by law? is it in pursuit of a legitimate aim? is it necessary in a democratic society? and is it proportionate?) – the prevailing objective appears to be justifying a decision to restrict the wearing of the niqaab in criminal proceedings.

The judgment's starting point is that requiring the removal of the niqaab is a legitimate aim and this is before any explanation has been given as to why. It would certainly be unusual for a Crown Court judge to hear evidence from a defendant wearing a niqaab but it does not follow that the wearing of the niqaab impairs the effectiveness of the proceedings. The judgment refers to the long history of *'adversarial trial in open court'* in England and Wales and asserts that *'the wearing of the niqaab necessarily hinders'* the openness and communication demanded by adversarial trial and has an *'adverse effect'*.[3] However, as the judgment points out there is no specific law requiring an individual to show their face while giving evidence in their defence in the Crown Court, and the question of the importance of observing a witness's facial expressions in evaluating the veracity of their evidence remains problematic. There is in fact much evidence suggesting that observing a person's demeanour is not generally a reliable means of assessing whether they are telling the truth (for example, see Professor Hazel Genn's paper *Assessing Credibility*[4]). This is not to say that observing a witness's demeanour is not important, but the position is overstated in the judgment and based significantly on convention rather than direct analysis.

The ruling on principles to be applied in Crown Court proceedings

Perhaps unsurprisingly the judgment concludes that it is lawful to limit a defendant's Article 9 right by requiring her to remove her niqaab while giving evidence. It prescribes a set of principles to be applied whenever a defendant in the Crown Court asserts the right to wear the niqaab during the proceedings. In general terms, they are:

a) the defendant should be asked to remove the niqaab for identification purposes and, if she refuses, an officer or other reliable female witness can examine the defendant's face in private and give evidence to the court;
b) the defendant should be permitted to wear the niqaab during the trial, except when giving evidence, but should be advised of the possible consequences of not removing the niqaab and invited to remove it; and
c) the defendant must remove the niqaab for the duration of her evidence and if she refuses should not be permitted to give evidence. Where a defendant agrees to give evidence the court may use its inherent powers to alleviate discomfort, for example with the use of screens.[5]

Equal Treatment Bench Book

Although the judgment clarifies that there may be circumstances where it is not necessary to require the defendant to remove the niqaab while giving evidence, it strongly disagrees[6] with the guidance in the Equal Treatment Bench Book (ETBB) (Judicial Studies Board 2004, Chapter 3.3, 2007) that *'the best way of proceeding comes down to basic good judge craft'*. That guidance goes

1. R v D (R) [2013] EqLR 1034, para 47 and 59
2. Ibid, para 58-59
3. Ibid, para 58 and 78
4. http://www.judiciary.gov.uk/Resources/JCO/Documents/Tribunals/17%20Assessing%20credibility%20-%20Genn.pdf
5. R v D(R) [2013] EqLR 1034, para 80-84

on to say:

> *When an issue relating to the wearing of the niqab does arise, the judicial office-holder must reach a decision on how to proceed having regard to the interests of justice in the particular case. This will include combining sensitivity to any expressed wish not to remove the niqab with a clear explanation, where appropriate, of the reasons for any request for its removal, and the disadvantages for the judge of not removing it. In many cases, there will be no need for a woman to remove her niqab, provided that the judge is of the view that justice can be properly served.*

It is disappointing that the judgment departs from the spirit of this guidance to establish a different principle weighted against the wearing of the niqaab. While it is correct to assert that the lawfulness of any restriction on the Article 9 right is a question of law and not just a matter of 'judge craft'[7] the guidance in the ETBB does not advocate a different approach; it merely emphasises that judges should consider the issue on a case by case basis and must have good reason to interfere with the right.

Legal implications of the judgment

The direct legal implications of the judgment are limited; the judgment is not binding on other criminal courts so judges are free to ignore the principles. However, in practice we may find that the principles are adopted more widely and possibly by higher courts. There is a risk if the principles are more widely adopted that the interests of justice will be negatively affected. The fairness of trials could be damaged where defendants forego their right to give evidence because they feel unable to compromise their religious practice, or where a defendant's evidence becomes distorted on account of the impact on their behaviour of having to expose their face in public.

The judgment is not binding on employment tribunals, family or civil courts and is unlikely in my view to influence those proceedings directly where, as Judge Murphy points out, very different sets of judicial and procedural considerations are likely to apply.[8]

Cultural implications of the judgment

However, the judgment is likely to have cultural implications. Legal conflicts around the wearing of the niqaab remain a sensitive and divisive issue within politics and the media and those who absolutely and strongly oppose the wearing of the niqaab are likely to feel encouraged by this judgment.

Whilst the judgment clearly distances itself from any kind of prejudice against the wearing of the niqaab,[9] the message that the public, large parts of the media and parts of the wider legal and political community will take away is that the wearing of the niqaab is incompatible with the proper administration of criminal justice because to assess a defendant's evidence we must be able to see her face. Evidence suggests this is not the case and therefore that removing the niqaab is not necessarily a legitimate aim in every case.

Conclusion

The law adequately sets out the approach to be taken by the criminal courts in these circumstances; a defendant is permitted to manifest their religion in so far as that manifestation does not unlawfully conflict with the interests of public safety, the protection of public order, health or morals, or the protection of the rights and freedoms of others, and the ETBB guidance on the issue reflects that law.

The first question to be answered, as stated in the ETBB guidance, is what are the reasons for requesting the removal of the niqaab and the disadvantages of not removing it? If a judge is satisfied that in the circumstances of the particular proceedings it is necessary for the defendant to reveal their face for a specific legitimate aim, it should then proceed to determine what is the least restrictive means of achieving that aim with regard to the nature of the particular proceedings.

It would have been preferable for the Crown Court in the present case to concentrate on this question as it applied to the issues to be determined in the case, instead of seeking to establish a rule to be applied in all cases. The fact that this is the first judgment of its kind is an indication of the frequency with which this situation arises in the criminal courts. Given the controversy surrounding the wearing of the niqaab it would have been preferable for the matter to have been addressed by one of the higher courts on appeal or better still by parliament following proper consultation.

At the trial of this case on January 30, 2014 the defendant decided not to give evidence to avoid having to remove her niqaab, but subsequently reversed her plea and admitted the charge of witness intimidation. Only time will tell whether the principles set down in *R v D (R)* will be more widely adopted and if so, how many defendants will forgo their right to give evidence in their defence to protect their religious integrity.

6. Ibid, para 11

7. Ibid

8. Ibid, para 7

9. Ibid, para 67

Discrimination based on state of health

I.B. v Greece European Court of Human Rights, Application 552/10, October 3, 2013

Facts

IB worked in a jewellery factory since 2001. In 2005, he confided in three colleagues that he believed that he was HIV positive, which was later confirmed to be true. Those colleagues subsequently wrote to the employer indicating that he had AIDS. As the news spread amongst the workforce of 70 employees, there was pressure on the employer to dismiss IB. The employer brought in an occupational health doctor to provide reassurance to the employees about the means of transmission of HIV and precautions that could be taken. Nevertheless, 33 employees wrote to the employer asking her to remove IB in order to *'preserve their health and their right to work'*. Two days later, the employer dismissed IB.

Domestic proceedings

IB brought an action to the Athens Court of First Instance which held that the dismissal was unlawful. It found that the dismissal was solely motivated by IB's health and that the employer acted wrongfully in seeking to assuage the majority of the employees. The court declined, however, to order reinstatement of IB because he had found another job in the meantime. Both IB and the respondent employer appealed against the decision, but a similar conclusion was reached by the Athens Court of Appeal. It awarded additional moral damages for the injury to his status, both social and professional. Upon a further appeal, the Court of Cassation held that the dismissal was justified by the interests of the employer in re-establishing harmonious relations within the workforce and the good functioning of the business, which would be jeopardised if IB had been retained. Moreover, in its reasoning the Court of Cassation referred to the employees being disturbed by IB's *'extremely serious and contagious'* illness.

European Court of Human Rights

The ECtHR noted that there were seven states with explicit legislative provisions protecting HIV positive individuals from discrimination at work. In addition, 23 states had general provisions that could provide protection in such circumstances. The applicant's case rested upon the failure of the national authorities to protect him from an interference by his employer in the private sphere of his life. The ECtHR accepted that the dismissal of an individual because of their HIV status would have stigmatising effects (paragraph 72). It could have serious repercussions on IB's personality and private life, thereby engaging state responsibility under Article 8. Citing its earlier decision in *Kiyutin v Russia* (application 2700/10, [2011] EqLR 530), the ECtHR confirmed that differences of treatment based on HIV status fell within the prohibition of discrimination in Article 14. The latter is non-exhaustive in its enumeration of protected characteristics and state of health could be regarded as falling under *'or other status'*. Interestingly, the ECtHR indicated that HIV status could be either '*a form of disability or alongside with it'* (paragraph 73).

Justification

It was clear that IB had been treated less favourably because of his HIV status, so the ECtHR focused upon whether his treatment could be justified. It started from the point made in *Kiyutin* that, in relation to particularly vulnerable social groups with a history of discrimination, the margin of appreciation is greatly reduced and very strong reasons are needed to justify a restriction in rights (paragraph 79). The ECtHR noted that the Athens Court of Appeal had recognised that the disturbance within the workforce was not such as to threaten the life of the business. It held that the Court of Cassation had not sufficiently demonstrated why the interests of the employer should prevail over those of the applicant and the balance struck between the rights of the parties was not in conformity with the ECHR (breaching Article 14 combined with Article 8). Moreover, the ECtHR criticised the Court of Cassation's characterisation of IB's health status as *'contagious'*, which tended to reflect the subjective perception of the other employees in the enterprise.

Comment

This decision reflects an existing trend within the case law of the ECtHR. It is increasingly clear that where discrimination occurs by a private sector employer then

696 there may be duties on the state to take measures to protect the right to respect for private life of the employee, in particular where the discrimination entails dismissal. National tribunals and courts need to ensure that the manner in which they apply national legislation, such as that on unfair dismissal, conforms with the requirements of the ECHR.

This decision is also significant because of its willingness to accept that *'state of health'* forms a characteristic protected under Article 14. The ECtHR does not limit this to the concept of disability. This is especially interesting in the context of domestic law if an individual's state of health falls outside the definition of disability within the Equality Act 2010. Furthermore, the Court of Justice of the EU has recently reiterated its view that not all forms of illness meet the definition of disability for the purposes of Directive 2000/78 (paragraph 42, Cases C-335/11 and 337/11 *Ring and Skouboe Werge* [2013] ICR 851)[See Briefing 674]. The ECtHR has, at least, left open the possibility that its approach to *'state of health'* may offer a broader scope of protection than the existing legal definitions of disability.

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Provision of goods and services – sexual orientation discrimination – manifestation of religious belief – direct and indirect discrimination

Bull and another v Hall and another [2013] UKSC 73, [2014] EqLR 76, November 27, 2013

The SC's judgment is the latest in a series of cases in which English courts have been required to consider whether an individual's manifestation of their religious beliefs can be allowed to impact on the rights of gay people to access goods and services without discrimination. Although chiming the same clear message as earlier courts that it cannot, the SC's discrimination analysis was far from clear or uniform.[1]

Facts

The appellants in the case, Mr and Mrs Bull (B&B) are Christians who own and run a hotel in Cornwall. B&B are devout Christians who believe that sex other than between a man and woman who are married to each other is sinful. In 2008, Mr Hall and Mr Preddy (H&P), who are civil partners, booked a double room at B&Bs' hotel by phone. B&Bs' online booking form stipulated that *'out of a deep regard for marriage'* double rooms were to be let only to *'heterosexual married couples'*. When the telephone booking was taken, Mrs Bull did not check whether the reservation was for a man and his wife. On arrival at the hotel, the rule was explained to H&P who were turned away.

County Court

In 2009, H&P brought a claim before Bristol County Court (BCC) arguing that B&B had directly (or, in the alternative, indirectly) discriminated against them in contravention of the Equality Act (Sexual Orientation) Regulations 2007 (the Regulations)(the relevant law at the time, now superseded by the Equality Act 2010). HHJ Rutherford found that they had suffered direct discrimination and awarded them each £1,800 for injury to feelings. He stated that, if he had not so found, he would have found indirect discrimination. [See Briefing 593 for a case note on the BCC decision.]

Court of Appeal

B&B appealed to the CA denying both direct and indirect discrimination. As to the first, they argued that there was no direct discrimination as the policy was directed toward sexual practice not sexual orientation. As to the second, they argued that, due to their religious beliefs, if they were not entitled to enforce the policy they would be required to close the hotel. They had a right to manifest their religious beliefs and the policy was justified.

The CA unanimously rejected B&Bs' appeal and agreed with the BCC that B&B had directly discriminated against H&P. In her leading judgment, Lady Justice Rafferty considered that the case of *James v*

1. The summary of the facts and the SC decision are based upon a case summary published by the Equal Rights Trust on December 6, 2013. All commentary is the author's own.

Eastleigh Borough Council [1990] 2 AC 751 was fatal to B&Bs' case. The criterion at the heart of the policy on staying in a double room, that the couple should be married, was *'necessarily linked to the characteristic of an heterosexual orientation'* and so there was less favourable treatment on grounds of sexual orientation in violation of reg 3(1) and reg (3)(a) together with reg 4 of the Regulations.

The CA also held that its finding of direct discrimination was not incompatible with B&Bs' rights under Article 9 of the European Convention Human Rights and Fundamental Freedoms (ECHR), as B&B were free to manifest their religious beliefs in many ways outside the professional sphere. [See Briefing 626 for a case note on the CA decision.]

Supreme Court

On further appeal to the SC, B&B were again unsuccessful with the SC unanimously rejecting their appeal. However, there was some disagreement amongst the SC as to the discrimination analysis to be applied.

Direct discrimination

By a 3-2 majority the SC found that the treatment amounted to direct discrimination, albeit with differing reasoning.

Lady Hale, who gave the leading judgment, considered that *James* was distinguishable because there was no exact correspondence between the disadvantage suffered and the protected characteristic here, unlike in *James*. Unmarried heterosexual couples were also disadvantaged by the policy. However, it was relevant that H&P were civil partners. With or without reg 3(4), discrimination between a married person and a civilly partnered person could not be anything other than direct discrimination on grounds of sexual orientation. B&B were not only applying a criterion that couples be married but also that the legal relationship be one between a man and a woman. This was direct discrimination.

By contrast, Lord Kerr relied solely on the application of regs 3(1) and 3(4) in finding direct discrimination, stating that reg 3(4) meant that civil partners were *'to be treated as being not materially different from a married couple'*. Lord Toulson took the view that reg 3(4) made the current case analogous to that of *James*.

Indirect discrimination

On considering the alternative proposition, the SC unanimously agreed that, if this were indirect discrimination, it could not be justified. Lady Hale justified this stance by reference to numerous factors including that:

- civil partnership was created so same sex couples can have the same legal rights as opposite sex couples and are worthy of equal *'respect and esteem'*;
- both marriage and civil partnership rights exist to encourage committed relationships and it was *'very much in the public interest that intimate relationships be conducted in this way';*
- to permit a class of persons to discriminate on grounds of sexual orientation would be to create a class of people who are exempt from discrimination legislation;
- parliament was aware of deep religious objections when passing the Regulations and, had it intended an exemption for private religious individuals, it would have stated this; and
- B&B were free to manifest their religion in many other ways – they could choose not to offer double bedrooms to any couples.

ECHR rights analysis

The SC unanimously held that the finding of discrimination was not incompatible with B&Bs' rights under the ECHR. B&Bs' Article 9 right to manifest their religious beliefs could be limited under Article 9(2) by *'such limitations as are prescribed by law and are necessary in a democratic society … for the protection of the rights and freedoms of others'.*

This required a proportionality assessment between the aim of the law and the means employed to achieve that aim. The reasons for finding a limitation justified under the indirect discrimination analysis also apply to the question of whether the limitation on B&Bs' right to manifest their religion was a proportionate means of achieving a legitimate aim. The protection of H&Ps' rights was a legitimate aim and the means in this case were proportionate. This was not a case of replacing legal oppression of one community with legal oppression of another:

> *If Mr Preddy and Mr Hall ran a hotel which denied a double room to Mr and Mrs Bull, whether on the ground of their Christian beliefs or on the ground of their sexual orientation, they would find themselves in the same situation that Mr and Mrs Bull find themselves today.*

Comment

The outcome in the case is welcome and this is the latest in a line of judgments in which courts have been clear that, in areas of life which come within the remit of UK

697 discrimination law – including the provision of goods and services – short shrift will be given to the argument that a provider may discriminate on grounds of their customers' sexual orientation because of their own religious beliefs. As Lady Hale rightly points out, there are other ways for a person to manifest their religious beliefs.

However, whilst the position in relation to the indirect discrimination analysis in such cases seems reasonably clear, the judges' varying analyses of direct discrimination will leave practitioners scratching their heads. Internal contradictions are likely to remain a feature of judgments in which UK judges have to grapple with direct/indirect discrimination formulations which are out of step with the discrimination analysis applied under Article 14 ECHR.

Furthermore, there are elements of the right to non-discrimination which require further consideration. Of particular note, whilst Lady Hale stated that *'reasonable accommodation'* for religious beliefs may be relevant in some cases, there remains a need for further exploration of how the concept applies. Faced with ever mounting case law in which limitations on the right to manifest religious beliefs have been found to be justified in order to protect gay people's rights to non-discrimination, individuals seeking to protect their religious rights are likely to continue to develop and employ a reasonable accommodation analysis under Articles 9 and 14. Eventually, national courts and the ECtHR will have to give reasonable accommodation arguments greater attention.

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698 Briefing 698

Employers' requirements when satisfying knowledge of disablity

Gallop v Newport City Council [2013] EWCA Civ 1583, December 11, 2013

Facts

Mr Gallop (G) had depression brought on by work related stress. In 2004, he was referred to the employer's external occupational health advisers (OH) for an assessment for stress counselling. Subsequently, G was 'signed off' work due to sickness on a number of occasions. In 2007, OH wrote to the employer advising that G was likely to remain unfit for the foreseeable future and that he was not 'covered' under the Disability Discrimination Act 1995 (DDA)

G subsequently returned to work, but was suspended following allegations by other members of staff of bullying.

Employment Tribunal

G brought legal proceedings alleging, inter alia, direct discrimination and a failure by the employer to make reasonable adjustments. At a preliminary stage, the ET found that G was a disabled person for the purposes of the DDA. However, at a substantive hearing, the tribunal held that employer did not know he was disabled because OH had informed them that G did not meet the legal definition of disability. His claim for disability discrimination was therefore dismissed. This decision was upheld by the EAT [see Briefing 669].

Court of Appeal

The CA rejected this finding and ruled that it is for the employer to look carefully at the impact of the particular impairment and decide for themselves whether the definition of disability is satisfied.

The employer may seek guidance from OH or other medical advisers but could not simply rubber stamp their opinion. In this case, OH's opinions as to whether G was or was not a disabled person amounted to no more than an assertion with no supporting reasoning provided. It was therefore of no assistance to the employer.

The case will return to the ET to decide whether the Council knew, or should have known, that G met the legal definition of disability and whether he was subject to disability discrimination.

The CA suggested that, when seeking outside advice from clinicians, employers should not simply ask whether the employee is a disabled person within the meaning of the legislation, but pose specific practical questions directed to the particular circumstances. The

answers to such questions would then provide real assistance to the employer in forming its judgment as to whether the criteria for disability are satisfied.

Comment

The issue of the employer's knowledge of a person's disability is fundamental to establishing a breach of their duty to provide a reasonable adjustment, as well as for establishing discrimination for a reason connected to disability. This CA decision is to be welcomed as it prevents employers claiming ignorance on the basis of inadequate advice from medical advisers.

Caroline Gooding
Legal consultant

Briefing 699

Indirect discrimination: group disadvantage and proportionality

Mba v Merton London Borough Council [2013] EWCA Civ 1562, [2014] EqLR 51, December 5, 2013

Facts

Ms Mba (M), a Christian care worker, worked for Merton London Borough Council (MBC) in its residential home for children with serious disabilities and complex needs. Whilst care workers were required to work two weekends in three as part of a rota, MBC agreed on an informal basis not to include M on the rota on Sundays. This continued for about two years. Thereafter, MBC required her to work the full rota. Disciplinary proceeding ensued when she refused to work Sundays, leading to a final written warning. Her subsequent appeal was rejected, following which M resigned claiming constructive dismissal and indirect religious discrimination under what was then reg 3(1)(b) of the Employment Equality (Religion or Belief) Regulations 2003 (now covered by s19 Equality Act 2010 (EA)).

Employment Tribunal

M contended that by requiring her to work Sundays, MBC applied to her a provision, criterion or practice (PCP) which put persons of her religion or belief at a particular disadvantage when compared with persons who did not share that belief. MBC, having conceded group disadvantage, argued that the requirement to work two weekends in three was a proportionate means of achieving a legitimate aim. That being the aim of ensuring:

- an appropriate gender and seniority balance on each shift
- a cost effective service in the face of budgetary constraints
- fair treatment of its staff, and
- continuity of care for service users.

Weighing the discriminatory impact on M against the reasonable needs of MBC, the ET found that since MBC was prepared to enable her to attend church on Sundays, and since her belief that Sunday should be a day of rest was not a core component of the Christian faith, rostering M to work some Sundays was a proportionate means of achieving a legitimate aim.

Employment Appeal Tribunal,

Appealing the ET's decision to dismiss her claim for indirect discrimination, M argued, amongst other things, that by focussing on whether or not working Sundays was a core component of the Christian faith, the ET took irrelevant considerations into account when considering proportionately.

The EAT dismissed the appeal holding that on the facts of this particular case, MBC had established a legitimate aim, and the ET had not erred in concluding that it had justified a PCP relevant to achieving that aim. [See Briefing 670]

Court of Appeal

M appealed contending that the ET wrongly took into account three factors that were irrelevant to the question of objective justification, namely that:

- MBC made efforts to accommodate her wish not to work on Sundays for two years;
- MBC was prepared to arrange shifts in a way that enabled her to attend church each Sunday; and
- her belief that Sunday should be a day of rest was not

a core component of the Christian faith.

The CA agreed that the ET erred by considering the above factors but nonetheless dismissed her appeal. The court was of the view that the un-appealed finding that MBC had no viable and practicable alternative but to require M to work on Sundays in accordance with her contract, meant that the ET's conclusion in respect of justification was inevitable.

The interesting point concerned what the CA had to say generally in respect of group disadvantage and justification/proportionality. In so far as group disadvantage was concerned, May LJ found that it was not necessary to establish that all or most Christians would be put at a particular disadvantage. He said that use of the disjunctive 'religion or belief' demonstrates that it was not necessary to pitch the comparison at a macro level. Accordingly, he concluded that ET erred by construing the comparative group too widely.

As for proportionality, he agreed that the ET had taken into account irrelevant factors. He found that by describing M's sabbatarian belief as *'not a core component of the Christian faith'* opened the door to a quantitative test on far too wide a basis.

Elias LJ (with whom Vos LJ agreed) took a different view. Leaving aside the application of Article 9 of the ECHR, he agreed with view espoused by Langstaff P (EAT), that any evaluation of the impact must include its extent. Having quoted paragraph 46 of the EAT's judgment, he said

> *In my view, the potential extent of the impact is a factor which a tribunal was entitled to consider, giving it such weight as it deemed appropriate. In practice, I find it difficult to imagine that once a prima facie group disadvantage has been established – as it was in this case and must be in order for justification to be required – a court will give much weight to the fact that the size of the pool adversely affected is in principle potentially large if that is not in fact the case in relation to the particular employer.* (paragraph 33)

However, the same cannot be said when one has regard to M's Article 9 rights:

> *However, in my judgment the same analysis does not hold sway where the right to religious freedom under Article 9 is engaged… The protection of freedom of religion conferred by that Article does not require a claimant to establish any group disadvantage; the question is whether the interference of that individual right by the employer is proportionate given the legitimate aims off the employer (see Eweida v UK 2013 IRLR paras 79-84). In substance the justification is likely to relate to the difficulty or otherwise of accommodating the religious practices of the particular individual claimant.* (paragraph 34, emphasis added)

Elias LJ concluded that whilst it is not possible to interpret the concept of indirect discrimination so as to ignore the need to establish group disadvantage, he was of the view that the concept of justification should be read compatibly with Article 9 where that provision was in play.

In that context it does not matter whether the claimant is disadvantaged along with others or not. And it cannot in any way weaken her case with respect to justification that her beliefs were not widely shared or did not constitute a core belief of any particular religion. Accordingly, he agreed with Kay LJ to dismiss the appeal but by a different route.

Comment

It seems that the effect of the CA decision in *Mba* is to make it easier for claimants to establish group disadvantage, whether that be under domestic law (minority view *per* Kay LJ) or by virtue of Article 9 EHRC (majority viewpoint). Instead the courts are more likely to consider the impact of group disadvantage when assessing justification and proportionality. As Elias LJ stated *'if the belief which results in the disadvantage is a core principle or belief of a particular religion, a PCP which interferes with the manifestation of that belief will impinge upon a greater number of potential adherents than would otherwise be the case; and in general the greater impact, the harder it is to justify the provision'*. The key finding in this case was that there was no viable and practicable alternative but to require M to work on Sundays for the stated reasons. Accordingly, practitioners need to identify alternative and more practicable ways of achieving the legitimate aim put forward by the employer, which is likely to have less adverse impact on the particular group in question.

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Reasonable adjustments by the police when executing a search warrant

Finnigan v Chief Constable of Northumbria Police [2013] EWCA Civ 1191, [2013] EqLR 1201, October 8, 2013

Facts

Northumbria Police suspected Mr Finnigan (F) of selling drugs. In March 2010, officers executed a search warrant at F's home. Despite knowing that F was profoundly deaf, they were not accompanied by a British Sign Language (BSL) interpreter. Some of the officers who searched his home had had previous dealings with him and had previously been able to communicate by lip reading and writing questions and answers. In November 2010, F made a sale of cannabis from his home to undercover police officers. (The police later used this to argue that effective communication with F was possible without an interpreter). The police returned to search F's home in February and March 2011 and were again not accompanied by an interpreter.

F alleged that, in conducting these searches without a BSL interpreter, the Chief Constable of the Northumbria Police breached her duty to make reasonable adjustments under s21 of the Disability Discrimination Act 1995 (DDA) and s20 of the Equality Act 2010 (EA). (Because the EA provisions came into force on October 1, 2010, the DDA applied to the first search and the EA applied to the second and third searches. There were no material differences between the two statutes in relation to the issues in the case.)

County Court

The judge at first instance held that there was no breach of the duty to make reasonable adjustments since the police had in practice achieved effective communication with F during the searches.

Court of Appeal

The CA held that the judge had erred in ignoring the anticipatory nature of the reasonable adjustment duty in relation to public services.

Both the DDA and the EA provide that a public authority has a duty to provide reasonable adjustments for disabled persons where a provision, criterion or practice (PCP) (or the equivalent term in the DDA – policy, procedure or practice) puts such persons at a substantial disadvantage in comparison with persons who are not disabled. It is only after establishing that this anticipatory duty has been breached, that a court should consider whether in the particular circumstances of the case the effect of that failure had made it unreasonably difficult for the disabled claimant.

Here the relevant PCP was held to be *'communicating in spoken English during the course of searches of premises'*. The judge had made no finding as to whether the Chief Constable had made any anticipatory changes to this PCP in relation to deaf people, focusing solely on the specific reasonable adjustments needs of F.

Such evidence as there was suggested that any changes involved no more than ad hoc decisions as to how effectively to communicate with individuals. Because the duty on the police is to take reasonable steps to eliminate or reduce the detrimental effect of their PCPs on deaf persons **generally**, the police could not rely on discharging this duty in such a reactive way. The CA therefore did not uphold the first instance finding that there had been no breach of the reasonable adjustment duty

Nevertheless, the CA found that having established on the facts that the absence of a BSL interpreter did not affect the ability of F and the officers to communicate with each other effectively, the judge was entitled to conclude that the Chief Constable's failure to adjust her PCP caused no detriment to F. The appeal was therefore dismissed.

Comment

Whilst these particular facts were not strong and hence the case was lost, the CA decision helpfully reaffirms the need for public authorities and service providers to address the need for adjustments in advance of an individual customer's need in order to comply with the reasonable adjustment duty.

Caroline Gooding
Legal consultant

ESA assessment process for people with mental health differences and the EA anticipatory duty

Secretary of State for Work and Pensions (Appellant) v R (on the application of MM & DM) (Respondents) (MIND and others intervening) [2013] EWCA Civ 1565, [2014] EqLR 34, December 4, 2013

Summary

In July 2013 the Upper Tribunal (Administrative Appeals Chamber) (the UT) held that the current process for assessing entitlement to Employment Support Allowance (ESA) caused substantial disadvantage to claimants with mental health problems [see Briefing 678]. The Secretary of State for Work and Pensions (S) has been unsuccessful in his appeal against this decision.

Implications of the case

This is a key case, relevant to both lay and practitioner members, on both the ESA assessment process and the anticipatory duty to make reasonable adjustments in the exercise of public functions for disabled people generally. In particular, it sets a precedent by recognising the difficulties that a class of people with mental health differences may face in meeting the burden of proof as to the effect of disability, due to the disability. It can therefore now be used as evidence of disadvantage to that class as a subset of disabled people.

Background

The Welfare Reform Act 2007 introduced ESA as a new benefit replacing Incapacity Benefit and other disability benefits. The process of assessing eligibility for the new benefit typically required the completion of a questionnaire and a face-to-face interview with the burden of proof being placed upon applicants.

The claimants, with the support of charity interveners, argued that the limitations of the process, including the burden of proof, put some claimants with mental health differences (MHD) at a disadvantage or caused them to suffer an unreasonably adverse experience whilst trying to prove their eligibility. In essence, this was because the nature of *'impaired mental, cognitive or intellectual difficulties'* could cause decision-makers utilising evidence obtained from such limited contact, to miss relevant elements of the effect of the disability on claimants' ability to work and cause the applications to be rejected on a false basis. Further, it was submitted that the process of completing the questionnaire and undergoing the interview itself causes some claimants disproportionate stress.

The claimants therefore submitted that there was an anticipatory duty to make a reasonable adjustment on the basis that the adverse consequences could be minimised and in some cases eliminated.

The minimum reasonable adjustment put forward was that S make an amendment to the procedures so as to require decision-makers to at least formally consider obtaining further medical evidence (FME) from professionals with longer-term experience of the claimant's difficulties, in every case, before a decision could be reached. It was submitted that in some cases such evidence would make it clear that the questionnaire and/or interview could actually be dispensed with.

High Court and Upper Tribunal

The High Court referred the matter to the UT on the basis of its direct expertise and to establish whether there was a duty to make a reasonable adjustment under the Equality Act 2010 (This required the tribunal to determine two matters. The first was whether the current process did in fact place claimants with MHD at a substantial disadvantage when compared to other claimants. And secondly, if it did, was it was reasonable for S to make the adjustments sought.

The tribunal concluded the first issue in the claimants' favour. In relation to the second limb, the tribunal adjourned the matter seeking further evidence from S as to the reasonableness of the proposals.

S appealed on four grounds.

Court of Appeal

Three of the grounds of appeal related to the finding that the current procedures gave rise to substantial disadvantage. The fourth was on the basis that the UT had exceeded its jurisdiction in issuing directions for the purpose of a remedies hearing.

In determining the appeals the CA reiterated both the law and findings of fact determined by the tribunal. As the underlying issue is one of access by disabled people

to basic support and the anticipatory nature of the duty alleged, it is worth repeating this in detail.

The difficulties facing claimants with MHD

Both the claimants and the interveners provided evidence about the difficulties facing claimants with MHD as a class. In particular, the claimants pointed out that they would have to go through the process repeatedly and that as it stood, there was a real concern of incorrectly losing benefits. One of the claimants had previously been so traumatised by the process, that they had suffered a relapse and been re-admitted to hospital.

The interveners, with their *'vast experience in the field'*, provided evidence of the breadth of the problem. Whilst recognising that the extent to which any particular claimant with MHD will suffer from these problems will vary, the tribunal identified the following problems affecting the class of people with MHD:

1) In relation to completing the questionnaire and seeking additional evidence themselves:
   a) insufficient appreciation of their condition to answer questions on the questionnaire without help;
   b) failure to self-report due to lack of insight into their condition;
   c) inability to self-report because of difficulties with social interaction and expression;
   d) inability to self-report because they are confused by their symptoms;
   e) inability because of their condition to describe its effects properly;
   f) difficulty in concentrating and in understanding the questions asked;
   g) unwillingness to self-report because of shame or fear of discrimination;
   h) failure to understand the need for additional evidence because of cognitive difficulties;
   i) problems with self motivation because of anxiety and depression which may prevent them approaching professionals for help and assistance;
   j) false expectations that conditions will be understood without them needing additional help; and
   k) lack of understanding that professionals named in the form will not automatically be contacted in the assessment process.
2) In terms of the further assessment (e.g. the face-to-face interview):
   a) particular conditions (e.g. agoraphobia and panic attacks and autistic spectrum disorder) make attending and/or travelling to face-to-face assessment difficult;
   b) finding the process itself intimidating and stressful, and in some cases, that having a long lasting negative effect on their condition;
   c) a desire to understate conditions;
   d) masking of mental health problems as physical problems;
   e) dealing with assessors who have little or no experience of mental health problems;
   f) difficulties of identifying many symptoms of a condition and its impact on what a person needs without proper training and knowledge;
   g) lack of time during a short assessment to identify a person's needs;
   h) fluctuation in condition; and
   i) scepticism about the condition

The CA identified that these fell into two categories with some overlap. The first related to the adverse experience due to stress, embarrassment or confusion (adverse experiences). The second lead to the decision-maker having inadequate or false information about the nature and extent of the condition, thereby causing a false negative outcome (outcome effects).

Despite argument from S that the procedures had been modified or otherwise catered for claimants with MHD, such as their applications being flagged, the tribunal was satisfied that the difficulties faced by such claimants *'placed them at a substantial disadvantage when compared to other disabled persons who do not experience mental health problems.'*

In particular the tribunal found that seeking FME earlier in the process for the group would certainly ameliorate the problems in a significant number of cases with respect to both adverse experiences and outcome effects.

Reasonable adjustment and the Equality Act 2010

Identifying that the purpose of the law is to enable disabled people to enter as fully as possible into everyday life, the CA usefully set out the law as follows:

S20 EA sets out in generic terms the duty to make reasonable adjustments. In this case the relevant elements were ss 20(1) to (3):

S20 Duty to make adjustments

1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

2) The duty comprises the following three requirements.

3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

The generic terms are then to be read in conjunction with the relevant part of the EA along with any Schedule. In this case the relevant part was Part 3, applying to those providing services and exercising public functions.This meant that the applicable schedule was Schedule 2. Paragraph 2 of Schedule 2 gives effect to s20(3) above but also modifies the concept at ss 2(2) and 2(5):

2) For the purposes of this paragraph, the reference in section 20(3), (4) or (5) to a disabled person is to disabled persons generally.

And:

5) Being placed at a substantial disadvantage in relation to the exercise of a function means –

a) if a benefit is or may be conferred in the exercise of the function, being placed at a substantial disadvantage in relation to the conferment of the benefit, or

b) if a person is or may be subjected to a detriment in the exercise of the function, suffering an unreasonably adverse experience when being subjected to the detriment.

It is the modification at sub-paragraph 2(2) of Schedule 2 that the CA referred to as an anticipatory duty. This anticipatory duty is also set out in the *Statutory Code of Practice on Services Public Functions and Associations* [see Briefing 678]. The term 'substantial' is defined in s212(1) as *'more than minor or trivial'.*

S21 establishes that failing to make a reasonable adjustment amounts to discrimination.

S21 Failure to comply with duty

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

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

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

Finally, s29(6) provides that a person exercising a public function *'must … not do anything that constitutes discrimination, harassment or victimisation.'*

The CA held: *'Accordingly, by section 29(6) there is a duty not to discriminate, by section 21(2) discrimination includes, amongst other matters, a failure to make reasonable adjustments; and by section 21(1) this in turn arises where there is a failure to comply with any of the three requirements. In this case the alleged failure is only in respect of the first requirement in section 20(3).'* (Paragraph 45)

Grounds of the appeal

S submitted that (1) the tribunal had no jurisdiction to grant the declaration of substantial disadvantage; (2) that it was not open for the tribunal to conclude that claimants with MHD were in fact placed at a substantial advantage; (3) that adverse experiences could not be a substantial disadvantage as a matter of law; and (4) that the tribunal went beyond its judicial remit in requiring S to carry out an investigation and disclose information in relation to remedies.

Ground 1 – Could the court grant a remedy to these claimants?

Whilst S accepted that the case involved a public duty and was therefore in principle amenable to judicial review, the challenge focused on whether this claim was brought by someone actually suffering a breach of the duty. The argument therefore sought to rely on the combination of s21(2) and (3) above, to oust both the claimants and the interveners and thereby the creation of the class of claimants with MHDs.

The CA rejected this, finding that the individual claimants had an interest in the reasonable adjustment itself because the adjustment would require FME to be sought earlier, possibly removing the stress of the questionnaire or face-to-face interview, and reducing the risk of accidental omission. This was an anticipatory duty. The tribunal therefore had jurisdiction to find discrimination and was entitled to declare the creation of a substantial disadvantage. It was therefore not necessary for the CA to determine whether the interveners would have had standing in any instance.

Ground 2 – Was there evidence to justify the finding of substantial disadvantage?

The tribunal identified both the risk of incorrect decisions and the greater stress and anxiety for this group compared to others. S relied on statistics showing no significant difference in either the proportion of claimants with MHD appealing or the outcome on

appeal for this group as compared to others, the key factor being that the FME was almost always obtained on appeal. Further reliance was placed on the anecdotal nature of the broader evidence.

The CA identified that the tribunal had considered both of these factors, finding that the statistics were of limited value because it was not known why different groups succeed on appeal. Further, the evidence provided by the interveners was not too generalised as it came from witnesses with considerable expertise. S could have provided similar evidence of his own if he did not feel that the evidence was representative.

The CA therefore rejected the challenge that there was no proper factual basis sustaining the conclusion, highlighting that the tribunal included two specialists who are dealing daily with practices in the social welfare field and that the tribunal as a whole only had to be satisfied that the disadvantage was more than trivial. There was no perversity.

Ground 3 – Is an unreasonably adverse experience a relevant substantial disadvantage?

This challenge focused on whether paragraphs 2(5)(a) and 2(5)(b) of Schedule 2 above were mutually exclusive. The impact being that the words *'suffering an unreasonably adverse experience'* only appear in (b). The CA rejected this argument, agreeing with the tribunal that the exercise of a public function could be both a benefit and detriment depending on the circumstances. Consequently, there may be substantial disadvantage in the process whether or not the benefit is in fact conferred. Paragraph (b) is therefore complimentary to paragraph (a). Disadvantage applied to both the outcome and unreasonably adverse experience occurring in the process leading up to it.

Ground 4 – Did the tribunal overstep its powers?

The CA found that the tribunal had acted under the misapprehension that its task was to determine what a reasonable adjustment would be. The actual task was to determine whether any of the adjustments proposed by the claimants would be reasonable. That however did not affect the substance of the decision in relation to the substantial disadvantage.

> *by s.136 of the Equality Act 2010, if the facts adduced before the court establish a prima facie case of an act of discrimination, then the court must find discrimination unless the defendant proves otherwise. In this case the Upper Tribunal held in a decision on remedies promulgated in writing on 24 May, that a prima facie case had been established…*

Accordingly whilst the tribunal was not wrong to adjourn to allow further evidence to be adduced on the reasonableness issue, it was for S to adduce such evidence and advance such arguments as he thinks appropriate. Accordingly the directions in relation to the further evidence were quashed.

Comment

This is an important case that sets out the anticipatory duty in the exercise of public functions. In doing so it makes clear that not having the reasonable adjustments in place in advance, can itself cause an unreasonable adverse experience. It is arguable therefore that, in the case of functions, the anticipatory duty may compliment or be an alternative to a claim of a breach of the public sector equality duty under s149 EA.

Whilst the language may be objectionable to some, a key feature of the case is the acceptance of people with *'mental health problems'/'mental health patients'* as a subgroup to the broader category of disability.

On a personal note and as a member of the affected group, it is pleasing to see that problems with establishing the nature, impact and satisfying the burden of proof in relation to some expressions of non-visible disability have been captured in the senior courts.

In this particular case, the underlying issue has undoubtedly been a circular problem. Establishment of eligibility to benefits is a matter of fundamental importance. But having to focus on one's disability can itself be traumatic and, in order to cope, group members inevitably 'learn' not to do so. Having to prove one's disability, despite being hampered by the disability, without the statutory support and in the face of scepticism, can clearly cause trauma and this in turn causes apprehension about re-assessment.Reliance on the appeal process was insufficient. There will be much un-expressed gratitude to all those involved. There is probably much more to say about the statistics.

The earlier provision of medical evidence may now also be applicable for the group in other judicial arenas where accessibility, the difficulties in capturing the effects, shame, embarrassment and fear of discrimination, amongst other factors, are also particularly important in establishing proof.

Peter Kumar
Lay executive committee member
Discrimination Law Association

Equality considerations must be at the centre of public authorities' policy formulation

Bracking and others v Secretary of State for Work and Pensions, Equality and Human Rights Commission (Intervener) [2013] EWCA Civ 1345, [2014] EqLR 60, November 6, 2013

Implications for practitioners

Challenges to government decisions based on the public sector equality duty (PSED) have had varying degrees of success recently. The *Bracking* decision saw a major victory for disability campaigners in using the duty to challenge the closure of the independent living fund (ILF). Importantly, the Court of Appeal has re-iterated the significance of the equality duty in policy making.

Background

The ILF is a non-departmental government body operating an independent discretionary trust, funded by the DWP and managed by a board of trustees. In its original form the ILF was set up in 1988; it was re-constituted in 1993. It operates in partnership with local authorities to devise and provide joint care packages of services and direct payments to assist disabled people to lead independent lives, away from full-time residential care, and as fully as possible in the community.

Applications to the ILF were received through local authority social services departments and are considered, after the intervention of the fund's own social workers in assessing the position of the individual applicants. The terms of the ILF trust prevents payments out of the fund in excess of funding received from the DWP. ILF played an important role in supplementing the provision for disabled people over and above provision made by local authorities under its community care provision.

In December 2010 a Ministerial Statement was issued indicating that the existing arrangements for the fund were considered to be financially unsustainable and that in due course a consultation would be conducted to develop a new model for future care and support of present users.

In July 2012 the DWP launched its consultation upon the future of the ILF. Its stated preferred option for the future support of existing ILF users was that the ILF is closed in 2015, and that ILF funding is devolved to local government in England and to the devolved administrations in Scotland and Wales. The consultation was said to be designed to obtain the views of fund users, their families and carers, interested individuals and organisations on the proposal and on how best to meet the future needs of ILF users.

So far as equality impact is concerned, the document said that it would publish a full impact assessment alongside the response to the consultation and that it would be premature to attempt to conduct a full impact and equality assessment at this stage because the details of the provisions had not yet been fully developed. With regard to disability, the paper said:

> *In general, ILF payments are not paid on the basis of a particular impairment or health condition, but according to support needs. Nonetheless, we know that current users have a range of primary and secondary disabilities and we will be assessing how the closure of the ILF would impact particular groups of users on the basis of their impairments.*

On the same day as the publication of the DWP's consultation document, the Secretary of State for Health published a White Paper *Caring for the Future*, reforming care and support. In its foreword that paper stated that the desire was to promote *'a full and active life'* for all, with *'independent living'* and ability to *'play an active part in our local communities'.*

High Court

On October 4, 2012 the claimants issued proceedings for judicial review on the basis of the lack of consultation and inevitable failure to comply with the equality duty.

On December 18, 2012, the Minister for Disabled People issued a statement announcing the decision to close the ILF on March 31, 2015.

On January 18, 2013, the claimants presented amended grounds of claim challenging the Minister's decision on the basis of inadequacy of the equality impact assessment (EIA) and the failure by the Minister to discharge the PSED. Subsequently the Equality and Human Rights Commission sought and obtained leave to intervene in the proceedings.

A draft EIA had been presented to the Minister on October 31, 2012 and a final version was presented with further Ministerial submissions of November 12 & 16, 2012.

The High Court dismissed the claim for judicial review in April 2013. The claimants appealed.

Court of Appeal

The CA upheld the appeal. The following (uncontroversial) principles with regard to the application of the equality duty were set out:

1) As stated by Arden LJ in *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293 at 274, [2006] IRLR 934, [2006] 1 WLR 3213, equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.
2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision-maker in seeking to meet the statutory requirements: *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2006] EWCA Civ 1293, [2006] IRLR 934, [2006] 1 WLR 3213 (Stanley Burnton J (as he then was)).
3) The relevant duty is upon the Minister or other decision-maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision-maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice: *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 at 26-27] per Sedley LJ.
4) A Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a 'rear guard action', following a concluded decision: per Moses LJ, sitting as a Judge of the Administrative Court, in *Kaur & Shah v LB Ealing* [2008] EWHC 2062 (Admin) at 23-24.
5) These and other points were reviewed by Aikens LJ, giving the judgment of the Divisional Court, in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), [2009] PTSR 1506, as follows:
   i) The public authority decision-maker must be aware of the duty to have 'due regard' to the relevant matters;
   ii) The duty must be fulfilled before and at the time when a particular policy is being considered;
   iii) The duty must be *'exercised in substance, with rigour, and with an open mind'*. It is not a question of 'ticking boxes'; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;
   iv) The duty is non-delegable; and
   v) Is a continuing one;
   vi) It is good practice for a decision-maker to keep records demonstrating consideration of the duty.
6) *'[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria.'* (per Davis J (as he then was) in *R (Meany) v Harlow DC* [2009] EWHC 559 (Admin) at 84, approved in this court in *R (Bailey) v Brent LBC* [2011] EWCA Civ 1586 at 74-75.)
7) Officials reporting to or advising Ministers/other public authority decision-makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision-maker what he/she wants to hear but they have to be *'rigorous in both enquiring and reporting to them'*: *R (Domb) v Hammersmith & Fulham LBC* [2009] EWCA Civ 941 at 79 per Sedley LJ.
8) The CA recalled and agreed with the words of Elias LJ, in *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) (Divisional Court) as follows:
   (i) At paras 77-78:
   I do not accept … that it is for the court to determine whether appropriate weight has been given to the duty. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then as Dyson LJ in Baker (para 34) made clear, it is for the decision-maker to decide how much weight should be given to the various factors informing the decision.
   The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision-maker. In short, the decision-maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors. If Ms Mountfield's submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public

decision-making.

(ii) At paras 89-90:

It is also alleged that the PSED in this case involves a duty of inquiry. The submission is that the combination of the principles in Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014 and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean than some further consultation with appropriate groups is required. Ms Mountfield referred to the following passage from the judgment of Aikens LJ in Brown (para 85):

. . . the public authority concerned will, in our view, have to have due regard to the need to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration.

The CA rejected the appellants' criticism of the High Court's decision on the consultation process.

So far as the PSED was concerned, the appellants submitted that there was nothing in the Ministerial papers that showed that the Minister personally had a full appreciation of the real threat to independent living for ILF users, which was posed by the suggested change, and no indication that the Minister specifically considered this threat 'through the prism' of the particular provisions of s149 EA. The court upheld the appeal on the basis *'(admittedly with some reluctance)'* that too much of the DWP's case depended upon the inferences that they were invited to draw from the facts as a whole rather than upon hard evidence. There was insufficient evidence merely in the circumstance of the Minister's position as a Minister for Disabled People and the sketchy references to the impact on ILF fund users by way of possible cuts in the care packages in some cases, to demonstrate to the court that a focussed regard was had to the potentially very grave impact upon individuals in this group of disabled people, within the context of a consideration of the statutory requirements for disabled people as a whole. What was put before the Minister did not give to her an adequate flavour of the responses received indicating that independent living might well be put seriously in peril for a large number of people.

Comment

This case provides a useful summary of the principles of the application of the PSED. In addition, it provides a helpful basis for challenging the decisions of policy makers in its paragraphs 60 and 61 which state as follows:

In the end, drawing together the principles and the rival arguments, it seems to me that the 2010 Act imposes a heavy burden upon public authorities in discharging the PSED and in ensuring that there is evidence available, if necessary, to demonstrate that discharge. It seems to have been the intention of Parliament that these considerations of equality of opportunity (where they arise) are now to be placed at the centre of formulation of policy by all public authorities, side by side with all other pressing circumstances of whatever magnitude.

It is for this reason that advance consideration has to be given to these issues and they have to be an integral part of the mechanisms of government, to paraphrase slightly the words of Arden LJ in the Elias case. There is a need for a 'conscious approach' and the duty must be exercised 'in substance, with rigour and with an open mind' (per Aikens LJ in Brown). In the absence of evidence of a 'structured attempt to focus upon the details of equality issues' (per my Lord, Elias LJ in Hurley & Moore) a decision- maker is likely to be in difficulties if his or her subsequent decision is challenged.

Catherine Casserley
Cloisters

Breach of gender equality duty in lack of approved premises for women leaving prison

Linda Griffiths v Secretary of State for Justice (Defendant) & Equality and Human Rights Commission (Intervener): Isobel Coll v Secretary of State for Justice (Defendant) & Equality and Human Rights Commission (Intervener) [2013] EWHC 4077 (Admin), December 19, 2013

Introduction

Two women serving indeterminate prison sentences challenged the failure of the Secretary of State for Justice (SSJ) to make adequate provision for approved premises to accommodate women released from prison on licence. Approved premises (also known as probation hostels) are *'a criminal justice facility where offenders reside for the purposes of assessment, supervision and management, in the interests of protecting the public, reducing reoffending and promoting rehabilitation.'* Securing a place is often a condition of release on licence for medium to high-risk offenders.

Facts

Linda Griffiths (G) and Isobel Coll (C) are both prisoners assessed as medium-risk approaching the date on which they can be considered for release on licence. G, currently in HMP Askham Grange near York, becomes eligible for release on licence in February 2016 and will be required to live in approved premises for a period after release. She is a Welsh speaker and wishes to return to Wales to be with her husband and children. C is also in HMP Askham Grange and when released on parole would like to live near her children and grandchildren in or just outside London. All approved premises are now single-sex. Across England and Wales there are 94 male approved premises and 6 for women, none of them in Wales. The nearest women's approved premises to Cardiff are in Birmingham, the nearest to London are in Bedford and Reading. Thus both G and C face a significant likelihood of being in approved premises many miles from their homes and families, with detrimental effects on their rehabilitation and reintegration into the community.

G and C brought claims of direct and indirect sex discrimination (in exercise of a public function under s29 Equality Act 2010 (EA)) and breach of the public sector equality duty (s149 EA) against the SSJ. The Equality and Human Rights Commission intervened.

High Court

Cranston J rejected the sex discrimination claims but found that the SSJ had not complied with the public sector equality duty and ordered that he must now do so. The sex discrimination decision is being appealed by C.

The SSJ had argued that the claimants could not demonstrate that he had engaged in any treatment of them in exercising the relevant functions under the Offender Management Act 2007. The judge disagreed, saying that in light of *R v Birmingham City Council Ex p. Equal Opportunities Commission* (No.1) [1989] A.C. 1155, *'it seems impossible for the Secretary of State to contend that there is no treatment involved in his provision of approved premises.'* However, the judge could not accept that there was less favourable treatment because this required comparing like with like, and the many significant differences in the population of women offenders compared with men, and differences in the criteria for admitting women to approved premises prevented such comparison.

The judge said the case could therefore be distinguished from the Birmingham school's case as *'there was no evidence that residence in approved premises was valued by offenders, as a grammar school education was, even if objectively it might benefit the inmates. More importantly, there was a roughly equal number of girls and boys in that case, and girls with comparable marks did not have the same chance of obtaining a grammar school place.'*

The female prison population differed in many ways from that of men, including the fact that proportionally fewer women were sentenced to 12 months or more, the legal prerequisite to the imposition of licence conditions on release. Thus proportionally more women than men had the advantage of release without any licence, least of all a licence condition of residence within the strict regime of approved premises. If the judge was wrong about this, then he was *'not persuaded that these two claimants can demonstrate any relevant treatment by the Secretary of State'*. As prisoners serving indeterminate sentences, the claimants' release is subject to Parole Board recommendation and conditions so until then the lack of approved premises did not arise. The extent to which this might operate as a Catch 22 for the women was not considered.

Indirect sex discrimination

The judge went on to reject the claims of indirect sex discrimination. He was not convinced that the SSJ was applying to G and C a provision, criterion or practice which applies to men and which by comparison puts women, or these claimants, at a particular disadvantage. If that was wrong however, it would be a proportionate means of achieving a legitimate aim. One factor was the cost of approved premises, and another was local community opposition to the establishment of more approved premises in different places. Further, female approved premises were under-occupied so that women released on licence would find a place, albeit not with the advantage of proximity to home, and anyway the average stay in such accommodation was relatively short.

Public sector equality duty

Having rejected the individual sex discrimination claims, the judge was critical of the SSJ for failing to fulfil his equality duty in respect of approved premises provision. Although the number of women affected is small, the rehabilitation of each could have large benefits.[1] The duty is a continuing one and requires ongoing review and assessment.The fact that, in the government's submission, the development of approved premises had been an organic rather than a planned process did not detract from the obligation. The SSJ should address possible impacts, assessing whether there was a disadvantage, how significant it was and what steps might be taken to mitigate it. He should take the opportunity to see whether more might be done for women, having regard to their particular circumstances. Nothing even approaching that had been done. The judge said the equality duty is an important standard for public decision-making and in this case the SSJ had not met the standard. He needed to undertake the analysis necessary to fulfil his equality duty under the EA.

Comment

The disadvantages women experience in the criminal justice system have been the focus of extensive inquiry and comment for many years, perhaps most comprehensively in the Corston Review of 2007, and most recently in the House of Commons Justice Committee report on progress for women offenders (2013).

Although the finding on the equality duty is welcome, the High Court's judgment on the sex discrimination claims exemplifies the misunderstanding and confusion about what constitutes equality for women in the justice system. The fact that there are fewer women offenders, that they mainly commit much less serious offences than men, have a different profile, and receive much shorter sentences, is no excuse for continuing neglect.[2] The geographical displacement of women from home and sparse distribution of approved premises for them is one aspect of this neglect, with direct consequences for the women in this case. The discrimination judgment betrays poor understanding of women's resettlement needs and opportunities, as well as a misunderstanding of equality law and little appreciation of the disadvantage women experience.[3]

The Offender Rehabilitation Bill,[4] which has almost completed its passage through parliament, will extend post-release supervision to all short-sentenced prisoners, in pursuit of a 'rehabilitation revolution'. It will introduce additional post-release licence and supervision periods for all prisoners, however short their custodial sentence.[5] The government has refused to publish any equality impact evaluation of this new law, which will disproportionately affect women as they are more likely than men to receive sentences of less than 12 months. Post-custody statutory supervision is an extension of sentence and unless accompanied by appropriate support may result in recall to prison. There is widespread concern about this, especially as the bulk of probation services are being put out to market at the same time. The government itself estimates an additional 13,000 people being either recalled or committed to custody but has not provided a gender breakdown of this figure. Clause 10 of the Bill, *Arrangements for supervision and rehabilitation: female offenders,* introduced after sustained pressure from the Prison Reform Trust and others, reiterates the equality duty as it applies to women in the criminal justice system.[6] It should help to focus the SSJ's mind on what is needed to ensure the new supervision regime does not result in an increase in women's imprisonment.

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1. Robust evidence of the positive rehabilitative outcomes achieved by Adelaide House, approved premises for women in Liverpool can be found in *Justice Data Lab Statistics*, Ministry of Justice, February 2014.

2. See the Prison Reform Trust briefing, *Why focus on reducing women's imprisonment?* December 2013 http://www.prisonreformtrust.org.uk/ProjectsResearch/Women

3. Barton A & Cooper V, *Hostels and community justice for women*, in *Women, punishment and social justice*, edited by Malloch M & McIvor G., Routledge 2013

4. http://services.parliament.uk/bills/2013-14/offenderrehabilitation.html

5.http://www.prisonreformtrust.org.uk/Portals/0/Documents/PRT%20Briefing%20Offender%20Rehabilitation%20Bill%20HoL%20Second%20Reading.pdf

6. http://www.prisonreformtrust.org.uk/PressPolicy/News/vw/1/ItemID/192

Judicial review of ET and EAT fees

The Queen on the Application of UNISON v The Lord Chancellor and The Equality and Human Rights Commission (Intervener) [2014] EWHC 218 (Admin), February 7, 2014

Summary

Following hearings in October and November 2013, the High Court rejected Unison's challenge to the government's decision to introduce a fees regime in the ET and EAT under the *Employment Tribunals and Employment Appeal Tribunal Fees Order 2013 (S.I. 2013 No. 1893)* (the Fees Order). Unison plans to appeal the decision.

Implications for practitioners

Although the status quo remains, the decision brought up a number of issues in relation to the implementation and effect of fees. Of particular interest to practitioners will be the significant concession by the Lord Chancellor (LC) to reimburse the fees of successful claimants. The rules will most likely have to be amended to take account of this.

The judgment also refers to errors in the Fees Order and the Guidance on the Order which the court has now highlighted to the LC, as follows:

> *Certain claims are wrongly described as falling under Type A, although Mr Latham, Deputy Director of Tribunals for HM Courts and Tribunals Service, has accepted they should be corrected. The published Guidance fails to correspond with the Order. The Guidance wrongly states that complaints as to equality clauses and for failure to inform and consult under TUPE fall within Type B, and ascribes Working Time Directive claims as falling under Type A.*

The judgment

The court rejected all four of Unison's grounds of claims.

Principle of effectiveness

The first ground was a well established principle of EU law that procedural rules imposed by domestic law are subject to the *'principle of effectiveness'* (See *Levez v TH Jennings* [1999] ICR 521, ECJ at [23]). The principle means that *'the procedural requirements for domestic actions must not make it virtually impossible, or excessively difficult, to exercise rights conferred by Community law'.*

Unison argued that the new fee regime will impose fees which will often be greater than the expected compensation, even if such claims were successful. They are set at a level which is prohibitive even to those entitled to partial remissions. Reasonable people will not litigate to vindicate their EU rights in such circumstances.

This argument was rejected on the basis of insufficient evidence and that '*hypothetical examples of claimants proposed by Unison were not yet sufficient to show the principle had been breached'*. This is despite *'a fall in all claims of 56%, of claims in the North West region of 82%, in Wales of 88%, in all Equality Act discrimination claims, including equal pay, of 78%, of sex discrimination claims of 86%, and of unfair dismissal claims of 81%'.*

The court said that if the figures *'are anything like accurate then the impact of the fees regime has been dramatic'* and suggested:

> *Far better, we suggest, to wait and see whether the fears of Unison prove to be well-founded. The hotly disputed evidence as to the dramatic fall in claims may turn out to be powerful evidence to show that the principle of effectiveness, in the fundamentally important realm of discrimination, is being breached by the present regime. If so, we would expect that to be clearly revealed, and the Lord Chancellor to change the system without any need for further litigation.*

Principle of equivalence

The second ground of claim is the principle of EU law that procedural rules are subject to a *'principle of equivalence'* or a *'principle of non-discrimination'* (*Levez v TH Jennings* [1999] ICR 521, ECJ). The principle means that *'the rules of procedure laid down by domestic law for the exercise of rights derived from Community law must not be less favourable than those governing similar domestic actions'.*

Many of the proceedings that will now be covered by the new fees regime and subject to the requirement to pay fees are intended to permit the exercise of rights derived from Community law; e.g. TUPE claims, discrimination claims etc. Other tribunals which do not derive their jurisdiction from EU law, and which hear claims founded on domestic law, charge significantly lower fees and in some cases no fees at all.

Again the court rejected this argument mainly because of the LC's concession that successful claimants would

now be permitted to recover their fees and so this was not less favourable than the County Court regime.

Public sector equality duty

The third ground was that the LC had breached the public sector equality duty. Unison argued that an assessment should have been made of the potential adverse effect of introducing fees in terms of the numbers and proportions of claims brought by individuals with protected characteristics which would previously have been brought and will now not be pursued. Despite the court contending that the *'there may be substance in the complaint that the proposals fail properly to take into account the impact on women bringing discrimination claims'*, this ground also failed.

Indirect discrimination

Finally Unison argued that the Fees Order was indirectly discriminatory. However, despite *'a strong suspicion that there will be some disparate impact on those who fall within a protected class'* the court said it was *'not possible to weigh the impact with anything approaching precision'*.

The court went on to consider objective justification and the test in *R (Elias) v Defence Secretary* [2006] 1 WLR 3213. Both Unison and the EHRC argued there could be no justification in imposing fees on claimants *'particularly in the context of the low level of awards and the woefully inadequate enforcement system'*. Unison argued that median awards are low; and even where individuals are successful, research commissioned by the Ministry of Justice in 2009 found that of those awarded compensation by the ET, 39% had received nothing from the employer 42 days after judgment. One year after judgment 31% had still been paid nothing. Unison argued that charging prohibitively high fees to pursue such claims will therefore have a disproportionate adverse impact on women. Given that women will not (if they earn an average income) be entitled to any remission of fees in the ET, it is difficult to see how that impact could be said to be a proportionate means of achieving a legitimate aim.

The court again suggested that it was too early and *'that it is not possible as yet to gauge the extent of the impact'*. The court made clear that:

> *Quite apart from the continuing obligation to fulfil the duties identified in the Equality Act, the Lord Chancellor has himself undertaken to keep the issue of the impact of this regime under review. If it turns out that over the ensuing months the fees regime as introduced is having a disparate effect on those falling within a protected class, the Lord Chancellor would be under a duty to take remedial measures to remove that disparate effect and cannot deny that obligation on the basis that challenges come too late'.*

The court makes clear that it expects *'the Lord Chancellor to change the system without any need for further litigation'* should Unison's and the EHRC's claims be borne out.

The court also pointed to *'a significant feature of these claims, namely, that they are brought at the very outset of the introduction of this scheme with little opportunity to see how the scheme for payment of fees and remission will work in practice. Unison and the Commission say that if they waited it would be too late to challenge the Order, whilst the Lord Chancellor says that these claims are premature'.*

It remains to be seen whether any such future claim would be accepted by a High Court, although it may be that this matter will be considered by a higher court before such an opportunity arises.

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Clarity required in identifying the elements of reasonable adjustments

Croft Vets Ltd v Butcher UKEAT/0562/12, [2013] EqLR 1170, October 2, 2013; *Environment Agency v Donnelly* UKEAT/0194/13, [2014] EqLR 13, October 18, 2013; *Secretary of State for Work and Pensions v Higgins* UKEAT/0579/13, [2013] EqLR 1180, October 25, 2013

Implications for practitioners

This case note reviews three recent cases, each decided within three weeks of one another at the EAT. The cases provide useful clarity on the EAT's current approach to the question of reasonable adjustments.

Croft Vets Ltd v Butcher

Facts

Ms Butcher (B) was a receptionist for Croft Vets Limited (C). Following a reorganisation her responsibilities were extended. She was signed off sick and was diagnosed with work related stress and depression. C offered a return to work either with her newly increased responsibilities, or alternatively with her original, core functions but a reduced salary. B declined. C referred B to a private psychiatrist (P) to aid a return to work.

P suggested that B undergo further treatment and that C continue to pay privately for this, though P acknowledged that there was no guarantee that this would result in B being able to return to work. C did not follow P's recommendation and declined to pay for further treatment. B resigned and claimed, among other claims, that the refusal to pay for private treatment was an unlawful failure to make a reasonable adjustment.

Employment Tribunal

The ET found in favour of B. The tribunal:

1) identified the provision, criteria or practice (PCP) as the requirement for B to return to work to perform the essential functions of her job which had caused her disability.
2) found that C had not complied with the requirements set out in *SofS for Work and Pensions v Alam* [2010] ICR 665 [see Briefing 561] when considering whether to make reasonable adjustments to the PCP.
3) held that failing to pay for private medical treatment was a failure to make a reasonable adjustment.
4) found that there was a duty to consult with B during her absence, which C had ignored.

Employment Appeal Tribunal

C appealed on the basis that the ET had identified the wrong PCP. The EAT found that:

1) the ET was entitled to identify the PCP and the reasonable adjustments finding against C was upheld.
2) C had failed to properly implement *Alam*: P's report put C on notice of B's disability and the PCP would put her at substantial disadvantage.
3) the reasonable adjustment was job related in the required sense, notwithstanding that P had identified that further treatment might not be successful and result in a return to work; it was enough that there was a reasonable prospect that the treatment would be successful.
4) there was no statutory duty to consult. The duty arose from the mutual term of trust and confidence.

Environment Agency v Donnelly

Facts

Ms Donnelly (D) was disabled by osteoarthritis and spondylitis. She worked flexitime hours for the Environment Agency (EA). She was assessed as being unable to carry out her job. She returned on varied hours, with the effect that the car park closest to her office was often full when she arrived to work. She therefore had to park further away and walk, which was problematic because of her disability. It was agreed she could use a disabled parking bay close to the office if it was free on the basis that she would give it up if a blue badge holder required it. After two weeks, D was absent again, due to stress. Approximately a year later D was dismissed by reason of capability due to absence and poor prospects of a return to work. A capability procedure had been followed.

D lodged several claims, including a failure to make reasonable adjustments in respect of the parking arrangement and unfair dismissal.

Employment Tribunal

The ET found in favour of D. The parking arrangement was identified by the tribunal as a PCP. The ET found

that EA ought to have provided a space to D in the main car park near the office and it was a failure to make a reasonable adjustment not to have done so. It also found that D was unfairly dismissed.

Employment Appeal Tribunal

EA's appeal was that the correct PCP ought to have been whether or not D should have come to work earlier when the car park was less busy. The EAT disagreed. D's contract was clear; she was entitled to flexitime. Accordingly, the ET was entitled to identify the PCP.

The EAT did however find that the ET failed to apply the range of reasonable responses test to the dismissal and accordingly the finding of unfair dismissal could not stand. It remitted the case back tot the ET on this point.

Secretary of State for Work and Pensions v Higgins

Facts

Mr Higgins (H) had a heart condition and chronic obstructive pulmonary disease, a disability under the Disability Discrimination Act 1995 and the Equality Act 2010 (EA). Following a lengthy forced absence a disagreement arose about his return to work. The employer (S) wanted H to phase his return over 13 weeks back to his normal contractual hours of 23 hours per week. H said he thought it would take 26 weeks. S dismissed him on the basis of capability.

Employment Tribunal

The ET found in favour of H. S had failed to make a reasonable adjustment by refusing to adjust the 13-week period. It also found that S had not been reasonable in citing capability as the reason for the dismissal.

Employment Appeal Tribunal

S appealed and was successful. The EAT found that the ET identified the wrong PCP. The ET's PCP was the ability of H to undertake work. The correct PCP was H's need to get back to his contractual hours. The EAT found that although the ET's reasoning was based on this PCP, the ET was not explicit about this in its reasons. Accordingly, it could not make the finding that the PCP placed H at a substantial disadvantage in comparison with non-disabled persons, because it had not properly considered this question, and therefore its finding that S had behaved unlawfully could not stand.

The EAT also rejected the ET's approach to unfair dismissal. The ET had considered whether S was reasonable in dismissing H for rejecting the 13-week offer. However, the EAT found that the correct question was whether S was entitled to dismiss H for remaining absent following H's rejection of the 13-week offer. This question had not been addressed by the ET and therefore the finding of unfair dismissal could not stand.

Comment

On the face of it, the unsuccessful reasonable adjustment in *Higgins* – a phased return to work – might seem less onerous on an employer than the successfully-pleaded adjustment of paid private medical treatment in *Croft*. The finding that paying for a private psychiatrist is a reasonable adjustment is eye catching.

In *Donnelly*, even though the EAT found against the ET's handling of some elements of the D's case, including the unfair dismissal claim, it approved of her reasonable adjustments claim because of the ET's focus on the correct PCP.

These cases are a lesson for claimants in taking extreme care over how they identify the component parts of s20(3) EA when making reasonable adjustments claims. The statute is straightforward – the PCP, the adjustment, and the significant disadvantage all need to be clearly identified.

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Requirement to file VAT returns on-line results in direct and indirect discrimination

L H Bishop Electric Company Limited (1), Allan Frederick Sheldon T/A Aztec Distributors (2) Winston Robert Duff Tay T/A Rhos Filing Station (3) Brinklow Marina Limited (4) v The Commissioners For Her Majesty's Revenue & Customs First-Tier Tribunal Tax Chamber, Appeal Numbers: TC/2010/2825, TC/2010/2719, TC/2010/3004 & TC/2010/5291, September 30, 2013

Implications for practitioners

This case is unusual in that it concerned the VAT tribunal; in a very detailed and thorough judgment, it found that the regulations governing electronic filing of tax returns were in breach of the Human Rights Act 1998 (HRA).

VAT Regulations

S132 of the Finance Act 1999 confers power on the Commissioners of Customs and Excise to make regulations authorising the use of electronic communications. S135 of the Finance Act 2002 permits the provision of mandatory e-filing and this was carried into effect by means of regulation 25A of the Value Added Tax Regulations 1995/2518 (the VAT Regulations).

As a result of these regulations, compulsory VAT online filing was introduced for all businesses with a turnover of over £100,000 – any newly registered business with effect from April 1, 2010, and for all businesses with effect from April 2012.

Facts

All four appellants were served with notices by HMRC mandating them to file their VAT returns online and pay VAT electronically. They appealed against these notices.

Two appealed on the basis that they were disabled and elderly; one that they lived in a rural area where access to the internet was difficult; and the fourth on the basis that it was not safe to make a payment online and so he should not be mandated to do so. The challenges were based on breaches of the HRA.

The hearing was in the nature of a test case. Approximately 100 taxpayers have filed appeals against notices to file online, mostly in VAT cases but also in PAYE cases.

Tribunal decision

There were lengthy jurisdictional arguments as to the powers of the tribunal to determine matters of public law in which the appellants succeeded. The first three appellants succeeded in their challenge, with the tribunal holding that the VAT Regulations were in breach of the HRA; the fourth appellant failed on the basis that payment online was not insecure (this case report will only deal in depth with the first three appellants).

The tribunal made a number of findings of facts in relation to older and disabled people, including the following:

- As recognised by the various reports referred to, computers might help many persons with disabilities. Nevertheless, the Office of National Statistics (ONS) report on internet access noted that disability is cited as the reason that 1-3% of the population have no internet access. And as the HMRC's equality impact assessment recognised, some disabilities make it hard to use a computer. So if a person has a disability that makes it difficult or painful to use a computer, such a person is less likely to use, own, or know how to use a computer.
- Irrespective of the relative abilities of older and young people to learn new skills, it is the case that persons under a particular age are very likely already to know how to use a computer because they will have been taught at school; while persons over a certain age cannot have been taught how to use one at school because home computers simply didn't exist when they were at school. Indeed, HMRCs own reports recognised this. So, in order to make their VAT return online, an older person is more likely than a young person to need to be taught how to use a computer and to use the internet. As years pass, and the computer literate generation become old, this will cease to be the case. But it is not the case yet.
- The surveys and reports presented by the joint appellants all seemed consistent in saying there was less computer and internet usage by older people. The 2012 ONS survey showed that 82% adults below 65 years use a computer every day while only 29% of

adults about 65 years did so. It showed that only 36% of households of people over 65 years of age had internet access. The 2010 ONS survey showed that internet usage increases with education and with managerial/professional jobs and income. The most marked difference in users was however determined by age. The ONS report also showed (as one would expect) that lack of internet access was associated with lack of computer skills.

- Older people are less likely to own a computer than members of the population at large.
- There is statistical evidence that it is harder for older people to learn to use computers than younger people.
- Telephone filing is not a very convenient option for submitting a time sensitive document, the late submission of which will incur penalties.

Telephone filing

The tribunal found that telephone filing would be very inconvenient to all three taxpayers and HMRC's contention that they were being unreasonable in rejecting this option was dismissed.

It went on to find that the telephone filing concession in the form in which it was given was not a concession which HMRC had, as a matter of public law, power to give (particularly because it was a concession the terms of which were not published; it was in fact a different form of filing rather than assistance with online filing).

If HMRC relied on it in the tribunal, they would be relying on an unlawful act. As a matter of law they could not do this. The same secrecy criticism was made of an enquiry office concession and so that could also not be relied upon by HMRC.

Human Rights Act

In relation to the substantive HRA rights the tribunal held as follows:

Article 1 Protocol 1 – protection of property

The prospect of having to purchase a computer and internet contract, and engaging an agent involved possessions within the meaning of Article 1 Protocol 1 (A1P1). If the VAT Regulations required taxpayers who did not possess an online computer to purchase one, then that the measure would be outside the state's margin of appreciation as it imposed on those taxpayers an individual and excessive burden. Unless it could be justified, it would be a breach of A1P1 and a breach of their rights.

However, the taxpayers affected could employ an agent. Employing an agent would engage A1P1 and would impose an individual burden on those without a computer or unable to use a computer, however it was not an excessive burden.

Nevertheless, that does not necessarily mean that employing an agent is within the state's margin of appreciation. The measure also must not discriminate – or at least it must not discriminate without justification. The tribunal found that whether there was a breach of A1P1 came down to a question of whether there was discrimination and if so whether it could be justified. Ultimately, it found that it could not (see below).

Article 8 – the right to respect for private and family life and correspondence

The tribunal found that the legal obligation on the appellants to use a computer belonging to a friend or family member in order to file returns would interfere with their private life in breach of Article 8. HMRC's justification of cost saving was not accepted.

The use of an agent was not of sufficient gravity to interfere with their right to respect for correspondence.

Article 14 – non-discrimination

The tribunal looked at the fact that the first and fourth appellants were companies; they held that being incorporated was irrelevant to their cases – they had the same human rights as their owners would have had had they chosen to conduct their business without incorporation.

The tribunal held that disability, age and computer illiteracy come under *'or other status'* for the purposes of Article 14.

Indirect discrimination

The tribunal went on to find that the methods of filing online all involved indirect discrimination against the elderly, disabled and those living remotely.

In so far as the obligation to file online caused an appellant to incur financial expenditure, the VAT Regulations came within the ambit of A1P1 and therefore should not discriminate unlawfully and without justification.

In so far as the obligation to file online forced an appellant to use their friends and family to file online on their behalf, or to use the computer of their friend or family member, the tribunal considered that this was a breach of A8 without justification and the question of discrimination did not arise.

The tribunal held that there was indirect discrimination in breach of A1P1 and A8 in relation to using a public library or an agent; the VAT Regulations indirectly discriminated against old people who, because of their age were computer illiterate, and against disabled people who, due to their disability, were unable to use a computer or only able to use one with difficulty.

There was also discrimination against those who lived in too remote an area for broadband access. This could not be justified because no exemption had been made for them. The tribunal found that it would have to disapply reg 25A as it could not be read in such a way as to be compatible with the HRA.

The tribunal rejected arguments that the VAT Regulations were in breach of the EU Charter; but upheld the appellants' claim that they were unlawful under the European Treaty and the European Communities Act of 1972, on the basis that they were disproportionate (on the same grounds essentially as the HRA claim).

Comment

There is an increasing tendency towards computerisation without necessarily considering the full impact – as occurred in this case – upon those with limited access to broadband services – either because of their geographical location or because their disability makes it harder for them to use computers. This case illustrates how this may fall foul of the HRA. Whilst this case only has implications for public authorities, the discrimination provisions in the Equality Act 2010 might well achieve the same result in respect of private service providers requiring customers to access services solely by means of the internet.

Catherine Casserley
Cloisters

Adviser training

The DLA is aware of the increased burden on advisers due to the severe cuts to legal aid, reduced funding of advice services and closure of law centres. This training programme has been planned to assist advisers working in law centres, CABx, advice centres, Racial Equality Councils and trade unions to be better prepared to deal with cases of discrimination.

The DLA, in collaboration with Citizens Advice, is providing training consisting of three sessions aimed at assisting advisers to provide informed advice to clients on discrimination issues. This interactive training will be based around hypothetical case studies, each of which will include:

- one or more protected characteristics,
- in an employment or non-employment situation, and
- realistic facts that could involve one or more forms of discrimination, harassment or victimisation, and
- recognising a viable case and discussing the evidence.

This training for non-lawyers should be of value to anyone who provides advice to clients regarding possible claims under the Equality Act 2010.

The first session will take place on Tuesday March 25, 2014 from 11:00 to 16:00 at St. Philips Chambers 55, Temple Row, Birmingham B2 5LS. The second and third sessions will take place on Monday April 28th, and Wednesday May 28th 2014 at St. Philips Chambers at the same times.

The training is open to anyone whose work includes advice to clients on discrimination. The training is being offered free of charge, and St. Philips Chambers has generously offered to provide lunch for all participants. Priority will be given to advisers working in not-for-profit organisations. Early booking is recommended, since places are limited. To book a place, contact Chris Atkinson, the DLA administrator on info@discriminationlaw.org.uk. Participants need to be able to attend all three sessions and it is not possible to book for one session only.

Enforcement of ET awards

Claimants don't bring tribunal claims just to get judgment in their favour. They want to obtain the remedy set out by the tribunal as well – normally a sum of money.

But all too often, obtaining judgment is only the first step in a long, frustrating and sometimes unsuccessful process.

The Department of Business, Innovation and Skill's research *Payment of tribunal awards: 2013 study* is the latest research setting out a rather bleak picture. Only 49% of claimants surveyed in England and Wales had been paid in full. 16% more had been paid something. Leaving 35% who had received nothing at all. And these numbers are for those claimants who took action to enforce their awards.

These figures reflect similar research conducted by BIS in 2008 and by Citizens Advice (which has published *The cost of a hollow victory: CAB evidence on enforcement of employment tribunal awards*) to coincide with the BIS report. The situation appears substantially unchanged since 2008, despite the introduction of fast-track enforcement in 2010.

The difficulty in enforcing awards will create particular injustice now that ET fees are in place. Fees can only be recovered through an award of costs against the respondent. Such awards will no doubt face the same difficulties in enforcement, leaving too many technically successful claimants out of pocket.

Caste discrimination

An ET has allowed a claim for caste discrimination to proceed on the basis that the definition of 'race' in the Equality Act 2010, which includes 'ethnic origin', is wide enough to encompass caste. Domestic case law supports the proposition that discrimination because of descent is unlawful and constitutes direct race discrimination. Caste discrimination is generally thought to be descent-based as caste is dictated by birth and cannot be changed. [See Briefing 673 for an account of the caste system, caste discrimination and its manifestation in the UK.]

In *Tirkey v Chandok and another* (ET/3400174/2013) the ET also found that Article 14 of the ECHR is wide enough to include caste discrimination, and upheld the claimant's arguments based on the EC Race Directive (2000/43/EC) which outlaws descent-based discrimination.

New ACAS guidance

Handling requests to work flexibly in a reasonable manner: an Acas guide is a new revised draft Code of Practice which aims to help employers prepare for the forthcoming changes in the law; it includes advice on: making a request to work flexibly; handling such requests fairly; avoiding discrimination; and dealing with appeals. The right to request flexible working is one of a series of measures in the Children and Families Bill 2013. The Code of Practice forms part of the Bill which is anticipated will come into effect in April 2014.

Accommodating breastfeeding employees in the workplace is a new Acas guide which sets out what employers are required to do by law. The guidance will assist employers and employees with managing requests to breastfeed in the workplace. The guidance identifies employers' legal requirements in relation to employees' requests for facilities to express and store milk and time away from work to do so. It also provides examples of good practice for employers to support employees who are still breastfeeding by facilitating their return to work.

Judicial review – proposals for further reform: the government response

The government published its response to the consultation on reform of JR in February 2014. It plans to introduce reforms to:

- create a Planning Court to speed up the consideration of planning and related JRs and statutory challenges;
- make changes to how the courts deal with JRs which are unlikely to affect the outcome for the applicant by amending the current test of 'inevitable' to ensure JRs cannot proceed on the basis of minor 'technicalities';
- reduce the potential for delay to key projects and policies by increasing the scope of leapfrogging appeals (where a case can move directly from the court of first instance to the SC);
- strengthen the implications of receiving a wasted costs order by placing a duty on the courts to consider notifying the relevant regulator and/or the Legal Aid Agency (LAA) when one is made;
- set out the circumstances in which a court can make a protective cost order in non environmental JRs to ensure they are only used in exceptional cases properly in the public interest;
- establish a presumption that interveners in a JR will have to pay their own costs and any costs that they have caused to either party because of their intervention;
- introduce new requirements for all applicants for JR to provide information about how the JR is funded in the courts and Upper Tribunal and how the courts should use this information.
- restrict payment of legal aid for work on permission applications unless permission is granted subject to discretionary payment by the LAA.

The proposal to reconsider whether the public sector equality duty should be susceptible to JR has been referred back to the Government Equalities Office.

In its response to the consultation, the DLA highlighted a number of concerns including that:

- the government's intention is to reduce the opportunities for individuals and organisations to have access to the courts in order to challenge abuse or misuse of powers by state institutions;
- the proposals will weaken the constitutional protection afforded by JR and will also mean poorer policy development and decision-making in the public service;
- the government's rationale and arguments for reform were misconceived and were unsupported by any reliable evidence.

Longer-term future of the ECHR and ECtHR system

The DLA has submitted a response to the Council of Europe's call for information, proposals and views on the issue of the longer-term reform of the system of the European Convention on Human Rights and the European Court of Human Rights.

The DLA views the Convention system as a vital part of the protection of the interests of unpopular minorities; for this reason it needs to be protected from challenges both direct and indirect from those whose interests are not served by the recognition of minority rights. It highlights specific challenges to that system which arise from the current backlog of cases, the relationship between the ECtHR and the CJEU and the negative approach to court rulings by member states such as the UK. The DLA makes a number of suggestions to deal with these challenges and to ensure that access to justice is sufficiently swift and targeted.

The results of this call will be included in a report by the Steering Committee for Human Rights to be submitted by April 15, 2015 to the Council of Europe Committee of Ministers.

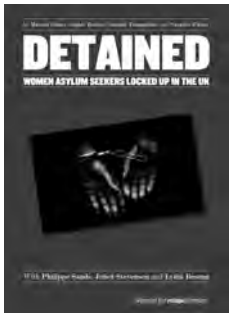
Review of the balance of competences between the UK and EU

The DLA has responded to the Department of Business, Innovation and Skills' call for evidence on the review of the balance of competences between the UK and the EU. The review aims to provide an analysis of what the EU does and how it affects the UK. There were two aspects to the call for evidence – fundamental rights, and social and employment policy. In relation to fundamental rights, the DLA confirms that the Charter of Fundamental Rights of the EU and the EU's broader framework of fundamental rights has been and continues to be advantageous to all parties within the UK, including individuals generally, individuals with particular characteristics or identities, public, private and voluntary sector bodies. It draws attention to what it perceives to be a serious lack of knowledge regarding the EU Charter amongst the UK population; it expresses doubts that the call for evidence will provide sufficient reliable objective evidence to enable a fair assessment of the balance of competences in relation to fundamental rights, since the current knowledge base amongst all sectors is still extremely limited.

In relation to social and employment policy, the DLA confirms its view that EU action in social policy has not disadvantaged the UK; EU anti-discrimination law and policies favour the UK economy and free movement of people. The DLA gives examples of where the quality of UK anti-discrimination law has been improved by pioneering judgments of the CJEU.

You can view the DLA's responses to these on the website.

Detained: women asylum seekers locked up in the UK



In its new report *Detained: Women asylum seekers locked up in the UK* Women for Refugee Women (WRW) provide new qualitative research on the experiences of women who have been detained in the UK, as well as previously unpublished Home Office (HO) statistics on numbers of women detained and the outcomes of detention.

In 2012, 6,071 women came to the UK seeking asylum in their own right and 1,902 women who had sought asylum were detained. For this report, WRW talked to 46 women who had sought asylum and had been detained, mainly in Yarl's Wood Immigration Removal Centre, about their experiences.

Despair

All of the women in the sample told WRW that detention made them unhappy, 93% felt depressed, 85% felt scared, and more than half thought about killing themselves. Ten women, more than one in five, had tried to kill themselves. One third had been on suicide watch in detention. *'Living is not worthwhile anymore. Being dead would be much better.'*

Time

Within the sample, the shortest stay in detention was three days, the longest stay was 11 months and the average was nearly three months. HO statistics show that of the 1,867 women who had sought asylum and left detention in 2012, 735, or 40%, had been detained for more than a month. *'The most depressing thing is that you don't know how long you're going to be here or if you'll still be here tomorrow.'*

Outcomes

HO statistics released for this report show that of the 1,867 women who had sought asylum and who left detention in 2012, only 674, or 36%, were removed from the UK. The others were released into the UK. The WRW research suggests that this unnecessary detention has an ongoing impact on the mental health of vulnerable women.

Recommendations

WRW believes that detention has no place in the asylum process and that women who seek sanctuary in the UK should not be detained while their cases are being considered. Their cases can be heard while they are living in the community at much less cost and with less trauma to the asylum seekers themselves.

The full report is available at www.refugeewomen.com.

Employment tribunal claims: tactics and precedents

Naomi Cunningham and Michael Reed

4th edition, December 2014, Legal Action Group, 448 pages, £38 (£28.50 Kindle edition, Amazon)

Employment Tribunal Claims is aimed primarily at claimants or non-lawyers who are advising or representing claimants in the ET. It began as a collection of sample documents for volunteers at the Free Representation Unit, but it has developed into a remark-
able repository of practical good sense.

At the start of the first chapter is a section on whether to bring a claim at all. This is, of course, a vital question, and one which a prospective claimant will find hardest to consider rationally at just the moment when it's most important to stay rational. So the section sets out factors a prospective claimant should take into account in a cost-benefit analysis, including, for instance, that most awards for injury to feelings in discrimination cases are of a few thousand pounds and the median award for unfair dismissal in 2012/13 was £4,832. Crucially, however, it also emphasises the curious emotional position of an employee:

> *The importance of the employment relationship is not symmetrical. Most employees have a considerable emotional investment in their jobs. Employers don't as a rule have any particular emotional attachment to their employees…* ***Being an employee can have something in common with being the child of a psychopathic parent: you have a large emotional investment in a relationship with something that does not care about you at all.*** (pp7-8, emphasis added)

This passage beautifully articulates something which is in constant tension with sensible and civil conduct of a case. Legal jargon and baffling bureaucracy are frustrating at the best of times: people whose employment has been disrupted or lost, and who are already under stress, sometimes experience them as a personal affront. The rest of *Employment Tribunal Claims* functions in part as a response to this, translating jargon, explaining procedure and reminding claimants (and advisers) that charm should always be tried before aggression.

The book's structure follows the process of bringing a claim, from tribunal fees and the new requirements for early ACAS conciliation, through drafting the ET1, getting information from the other side and preparing witness statements, to the conduct of the hearing itself. There are also chapters on negotiation, remedies and pursuing appeals.

Most chapters are structured around precedents which suggest appropriate content for a wide range of forms and documents. The hypothetical cases of Saifur Rahman (claim for unfair dismissal) and Pauline Phelps (claim for disability discrimination) are used for illustration, so readers can follow these cases at each stage of the process. Each precedent is explained or annotated so the principles can be extracted and applied when drafting documents. The book is also full of practical tips which have much wider application. My favourite deals with responding to a 'long quarrelsome letter':

> *If you get a long quarrelsome letter from the other side, try not to get drawn in… highlight the bits of the letter that ask you to do something. Decide whether or not you're prepared to do it… approach that question with the attitude 'Is there any reason why not?' rather than 'Why should I?' Write a short letter back telling them what you have decided – or doing what you're asked… Ignore the rest of their letter. (pp27-8)*

What is particularly helpful, and unusual, is the inclusion of less formal texts such as a note recording a telephone call ('attendance note' p32) and a letter proposing a joint bundle (pp218-9). In the context of an unfamiliar and forbidding legal process, apparently simple tasks can suddenly become strangely difficult, but an unrepresented claimant or a volunteer in a busy advice centre might not feel able to ask for help with drafting something which an experienced lawyer could dash off in three minutes.

If you are looking for an employment law handbook or a guide to procedural rules, then *Employment Tribunal Claims* is not for you; but if you're involved in an ET claim and you want a book which holds your hand and gives you some calm, realistic advice, you can't do better.

Katya Hosking
Student, Cardiff University

The contents, introduction and chapter 1 can be downloaded from http://etclaims.co.uk in PDF format.

Briefings

Abbreviations

ACAS	Advisory, Conciliation and Arbitration Service	DWP	Department of Work and Pensions	EWHC	England and Wales High Court	PAYE	Pay as you earn tax
ADHD	Attention deficit hyperactivity disorder	EA	Equality Act 2010	FME	Further medical evidence	PCP	Provision, criterion or practice
AIDS	Acquired immunodeficiency syndrome	EAT	Employment Appeal Tribunal	HHJ	His/Her Honour Justice	PSED	Public sector equality duty
BIS	Department of Business, Innovation and Skills	ECHR	European Convention on Human Rights	HIV	Human immunodeficiency virus	SEN	Special Educational Needs
BSL	British Sign Language	ECtHR	European Court of Human Rights	HMRC	Her Majesty's Revenue and Customs	SEND/SENDIST	Special Educational Needs and Disability Tribunal
CA	Court of Appeal	ECJ	European Court of Justice	HRA	Human Rights Act 1998	SC	Supreme Court
CJEU	Court of Justice of the European Union	EHRC	Equality and Human Rights Commission	ICR	Industrial Case Reports	TUPE	Transfer of Undertaking (Protection of Employment) Regulations 2006
ELR	Education Law Reports	EIA	Equal impact assessment	IRLR	Industrial Relations Law Report	UT	Upper Tribunal (Administrative Appeals Chamber)
ESA	Employment Support Allowance	EqLR	Equality Law Reports	JR	Judicial review	VAT	Value Added Tax
DLA	Discrimination Law Association	ET	Employment Tribunal	LJ	Lord Justice	WLR	Weekly Law Reports
		EU	European Union	LLP	Legal liability partnership		
		EWCA	England and Wales Court of Appeal	MHD	Mental health differences		
				P	President (of the EAT)		