ISSN 1759-2925

Discrimination Law Association

Briefings 732-744

Volume 54

March 2015

Editorial *Defending access to justice*

If our society is truly founded on the rule of law, access to justice for everyone, especially for vulnerable and marginalised groups, must be a reality. This principle is reflected not only in the UK's judicial traditions from Magna Carta onwards but in the EU Charter of Fundamental Rights which requires that everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy and that *'legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.'* (A47)

All members of society should have knowledge of their rights, how to seek a remedy and have access to judicial and administrative processes. Obstacles created by the cost of advice and representation, fees to lodge complaints, lack of information about rights and remedies must be addressed and kept under constant review. Rights which are guaranteed by EU and national law but which lack accessible, affordable access to remedies and enforcement are meaningless.

The case reports in *Briefings* reflect some of the struggles particular groups have in accessing justice. In *Moore and Coates*, the High Court rejected the Secretary of State for Communities and Local Government's extraordinary decision to review for himself all the planning applications from one particular ethnic group – Gypsies and Travellers – in relation to the green belt. The High Court found that the Secretary of State's approach amounted to unlawful indirect discrimination and its judgment highlighted his complete failure to pay any regard to the need to eliminate discrimination and advance equality in accordance with his public sector equality duty under s149 EA.

The cases of *Gudanaviciene et Ors* challenged the provision of legal aid to assist vulnerable applicants facing deportation from the UK. The CA explored principles of fairness and effectiveness in relation to guidance on exceptional legal aid case funding under s10 LASPO; fairness was examined in terms of ensuring procedures for asserting or defending rights are effectively accessible, and effective access may require the state to fund legal representation; it found that aspects of the guidance were unlawful. The failure of the Rights of Women's challenge in relation to the provision of legal aid for victims of domestic violence is disappointing and it is likely that there will be further cases attempting to undo the pernicious effect of LASPO.

The provision of telephone based civil legal advice is critically examined by Dr Ben-Cnaan of the Law Centre Network. The MoJ's first-year review of the mandatory telephone gateway to civil legal aid reveals challenges faced by service operators in meeting the specific needs of service users and assessing and advising on discrimination matters over the telephone. There has been a much lower than anticipated uptake in civil legal aid for discrimination cases; as this is unlikely to be because employers, service providers and bodies exercising public functions, such as the police, have stopped discriminating, the effectiveness of delivering legal advice over the telephone is questionable. As it is much cheaper to provide a telephone legal aid service, this is worrying as, unless challenged, the review will inform the expansion of the service to new areas of law as well as further cuts likely to hit legal aid budgets in the future.

Catherine Rayner, the new chair of the DLA's executive committee, reinforces the urgent need for government to address issues related to effective access to justice: *'With numerous studies demonstrating that women, black people and the disabled are more likely to be disadvantaged by cuts and job loss it's clear that the 2015 general election is a crucial one for individual rights and justice. In a year when the 500-year-old rights set out in Magna Carta will be celebrated, I want our politicians and policy makers to focus on protecting and enforcing modern individual rights as well. This means looking again at ET fees and bringing some employment rights back into scope for legal aid, as well as looking for cheap but effective ways of strengthening not only the right to equality, but the ability to enforce the right as well. As well as reinstating EA questionnaires, I want the next government to recognise combined discrimination by implementing s14 EA and introduce an enforceable statutory recognition of responsibility for third party harassment. I hope for rather than expect an early and serious review of the public sector equality duty, and implementation of the duty regarding socio economic equality. These provisions have already been given parliamentary approval, and would be small but effective steps towards recognising the importance of combating all forms of discrimination to a flourishing society'.*

The DLA urges politicians to state clearly in their manifestos what positive steps they will take, if elected, to ensure that access to justice is effective and the right to equality and non-discrimination is enjoyed equally by everyone.

Geraldine Scullion, Editor

Please see page 35 for list of abbreviations

Briefings is published by the Discrimination Law Association. Sent to members three times a year. Enquiries about membership to Discrimination Law Association, PO Box 63576, London, N6 9BB. Telephone 0845 4786375. E-mail info@discriminationlaw.org.uk. **Editor:** Geraldine Scullion geraldinescullion@hotmail.co.uk. Designed by Alison Beanland. Printed by The Russell Press.

Conscience clauses and equality law

Brice Dickson, Professor of International and Comparative Law, Queen's University Belfast[1] examines interesting recent developments in both the Supreme Court (SC) and at the Northern Ireland Assembly concerning the compatibility of conscience clauses with equality laws. The extent to which equality obligations should make allowance for deeply held personal convictions is a concern for some religious believers and presents a challenge to UK anti-discrimination practitioners. Professor Dickson argues that the allowance made should be negligible, not because some convictions are not worth accommodating but because they can be accommodated in other ways which do not impinge upon other people's right to be treated as equals.

The abortion case

In *Greater Glasgow Health Board v Dougan* [2014] UKSC 68, [2015] 2 WLR 126 the SC rejected claims by two Catholic coordinators in the labour ward at the Southern General Hospital in Glasgow that under the Abortion Act 1967 (the 1967 Act) they were entitled to refuse to engage in activities such as booking in patients to have an abortion, allocating staff to care for those patients, or supervising and supporting midwives who are assisting in the abortion. As is well known, the 1967 Act recognised a right of conscientious objection to taking part in an abortion, but the question for the SC was how far that right extends.

Everything turned on the interpretation of s4(1), which reads:

> *No person shall be under any duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by this Act to which he has a conscientious objection.*

The key words are 'participate' and 'treatment'. The 5-judge SC, led on this occasion by Lady Hale Deputy President of the SC, unanimously held that, while 'treatment' should be interpreted broadly, 'participate' should be interpreted narrowly. This meant that the two coordinators could not be said to be 'participating' in treatment if they were merely engaged in various ancillary, administrative or managerial tasks associated with the treatment. In this context, said Lady Hale, 'participate' means taking part in a 'hands-on' capacity, that is, actually performing the tasks involved in the course of treatment (para 38). She also thought that this construction of s4(1) was more likely to be in line with parliament's intention when passing the 1967 Act.

The SC was nevertheless at pains to point out that its decision on the interpretation of the conscience clause in the 1967 Act did not mean that the two women claimants could not claim that their employer should have made more reasonable adjustments to the requirements of their job in order to make allowances for their religious beliefs. That issue, said the SC, was best resolved by an employment tribunal (para 24).

Services v employment

The distinction between the provision of services and the provision of employment is an important one. People who access services – such as those provided by a hospital or by a hotel – expect to be treated as equals because in the vast majority of situations there are no objectively justifiable grounds for denying them access to those services on the same basis as everyone else. But people who are employees – even when they are engaged in the business of providing services to others – may more frequently be able to claim on objectively justifiable grounds that they should not be required to do certain things which their employer wishes them to do. Service provision is an impersonal relationship whereas employment is a personal one. An employee therefore has a better case for requiring an employer to make allowances in his or her favour on account of his or her personal circumstances.

In her Oxfordshire High Sheriff's Lecture delivered on October 14, 2014, entitled *'Are we a Christian country? Religious freedom and the law'*, Lady Hale stressed the importance of the distinction just made:

> *It is one thing to expect employers (and others) to make reasonable adjustments to cater for their employees' religious beliefs. It is another thing to expect the law to make exceptions to generally applicable rules in order to cater for particular religious beliefs. Believers who want it to do this must surely show that it will not cause harm to others, whether members of the religion or outsiders.*

S4(1) of the 1967 Act is a good example of the law making an exception to a generally applicable rule in order to cater for particular beliefs, but we should remember that under s4(2) the exception does not apply

1. b.dickson@qub.ac.uk

if participating in the abortion treatment is *'necessary to save the life or prevent grave permanent injury to the physical or mental health of a pregnant woman'.* In such scenarios the harm that would be caused by allowing the exception would outweigh the benefits to be obtained from granting it. The test referred to in the second sentence of the quote from Lady Hale would not then be satisfied.

Northern Ireland

This point is worth remembering in Northern Ireland, where the 1967 Act does not apply at all. At present, the only situations in which an abortion is legal in Northern Ireland are ones in which, because of s4(2), no right of conscientious objection currently exists even in England, Scotland or Wales.

The law relating to abortion is a devolved matter in Northern Ireland (unlike in Scotland or Wales), but there is minimal prospect of the Northern Ireland Assembly legislating to extend the 1967 Act to Northern Ireland because the vast majority of both unionist and nationalist Members of the Legislative Assembly (MLAs) are opposed to the so-called 'right to choose'. Most unionists, by the way, are also opposed to homosexuality, which means that gay marriage is not yet allowed in Northern Ireland, nor can gay men ever donate blood.

Controversy over the extent to which people of religious faith should be allowed to deny services to gay people in Northern Ireland has recently arisen as a result of a move by the Equality Commission for Northern Ireland (ECNI) to take a bakery to court for refusing to decorate a cake it was baking with the words 'Support gay marriage'. The facts may be trivial, but the case raises important questions concerning the extent to which people of religious faith should be allowed to treat people unequally.

Although the bakery case will not be heard in the county court for a month or two, regardless of its outcome a Democratic Unionist Party politician, Paul Givan MLA, is planning to table a Private Members' Bill at the Northern Ireland Assembly which would have the effect of extending to a person running a commercial business the right to restrict the provision of goods, facilities and services, or the use or disposal of premises, *'so as to avoid endorsing, promoting or facilitating behaviour or beliefs which conflict with the strongly held religious convictions of that person'.*

The Private Members' Bill

The Bill is a thinly veiled attempt to allow people of religious faith to discriminate in the way they provide services to gay people. Most readers will remember the case of *Bull v Hall* [2013] UKSC 73, [2013] 1 WLR 3741 [see Briefing 697], where the SC held (again led by Lady Hale) that the owners of a private hotel had discriminated against a gay couple because they only allowed couples who were married to book a double room in the hotel. All five Justices agreed that the hotel owners' right to manifest their religious belief was justifiably limited within the terms of article 9(2) of the European Convention on Human Rights (ECHR). Mr Givan's *'Northern Ireland Freedom of Conscience Amendment Bill'* would reverse that decision as far as hotels and other service providers in Northern Ireland are concerned. Judging by his comments on a BBC programme broadcast on February 5, 2015, Mr Givan also thinks his Bill would allow hotels to refuse double rooms to unmarried heterosexual couples.

There are at least four serious objections to what his Bill proposes. First and foremost, it would alter the existing delicate balance which has been carefully constructed within UK discrimination law. The Equality Act (Sexual Orientation) Regulations (NI) 2006 are almost identical to the equivalent 2007 Regulations applying in England, Scotland and Wales. Regulation 7 (reg 6 in the 2007 Regs) creates exceptions for things done within a private home or when leased premises are being disposed of, and regulation 16 (reg 14 in the 2007 Regs) creates a further exception for organisations the sole or main purpose of which is to practise, advance or teach a religion or belief and which want to restrict the provision of goods, facilities or services in the course of their activities or to restrict the use or disposal of premises they own or control.

The exception for religious or belief organisations is limited to situations where the provider of the service is itself a religious or belief organisation. Indeed the regulation explicitly states that the exception does not apply to organisations of which the sole or main purpose is commercial (reg 16(2)(a)). Mr Givan's Bill would extend the existing exception to all commercial organisations. That is a radical departure from the 2006 settlement and swings the pendulum hugely in favour of individuals, as opposed to organisations, who wish to have their religious beliefs trump the rights of people not to be discriminated against.

Other objections

Secondly, the Bill, as currently worded, would protect convictions based on religious grounds only. This privileges religious beliefs over other beliefs, again contrary to the 2006 and 2007 Regulations. An individual who wishes to restrict access to goods, facilities and services to gay people purely on grounds of conscience, not based on religion, would not be able to claim the 'protection' provided by the Bill. This is doubtless because it would open the door to the application of all kinds of prejudice supposedly based on moral grounds. But why should faith-based prejudice be any more acceptable than prejudice based on other grounds? Is the former any more objectively justifiable than the latter, or is it just more traditional?

Thirdly, the Bill would allow people with strongly held religious convictions to refuse to provide goods, facilities, services or premises if this would avoid them *'endorsing, promoting or facilitating'* behaviour or beliefs which conflict with their convictions. The phrase *'endorsing, promoting or facilitating'* is nowhere defined or illustrated. It might, for example, mean that a person working in a bank or building society could refuse to arrange a mortgage for a gay couple. Likewise, a person working in an estate agency or a travel agency could refuse to assist a gay person who wants to buy a house, rent a flat or book a holiday. To permit such 'exceptions' would be to allow private prejudice and disapproval to manifest themselves in public ways, thereby intruding into the personal lives of individuals who are otherwise causing no harm to others in society. The logic of the approach is that providers of services could discriminate against people who, for example, drink or smoke, eat too much, gamble or have had an abortion.

Fourthly, the alleged reform is internally contradictory. It purports to protect people's strongly held religious convictions but refuses to protect other people's strongly held non-religious convictions. In an increasingly secularised society it seeks to prioritise one group of beliefs over another. If this prioritisation was based on the harm which contrary non-religious behaviours and beliefs were likely to bring about (such as the practice of female genital mutilation or the cruel treatment of animals) there might be a justification for it. But neither Mr Givan nor others who support the Bill have yet explained what harm is caused (except to their own beliefs) by allowing gay people to get on with their private lives in ways which do not impact in the slightest on the rest of society.

The role of conscience clauses

Mr Givan prefaces the consultation paper accompanying his Private Members' Bill by referring to laws which, throughout the UK, allow Sikhs not to wear crash helmets when driving motorbikes or safety helmets when working on construction sites. These are indeed interesting exceptions to health and safety laws, but they are based on the principle that while, as a general rule, people need to be protected against their own folly in certain situations, they should be permitted to risk their own lives if their religious conviction requires this. A further example would be the unwillingness of Jehovah's Witnesses to accept a blood transfusion. Such individuals are endangering or disrespecting no-one but themselves by adopting such a stance.

There is also a noble legal tradition whereby people who conscientiously object to serving in military forces should be allowed to do so. Even at a time when serving soldiers who deserted during World War I were being executed for failing in their promise to serve, the Military Service Act 1916 allowed individuals not to serve in the first place if they could satisfy a Military Service Tribunal that they had a conscientious objection to doing so. In many instances, however, they were required to undertake some form of alternative service. A similar scheme was created under the National Service (Armed Forces) Act 1939, where many were exempted from service in the armed forces if they could demonstrate that they were opposed to using warfare as a means of settling international disputes. The right to conscientious objection is based not so much on religious belief as on a moral abhorrence at the use of potentially lethal force, even in the defence of one's country.

The view of the European Court of Human Rights

The first sentence of article 9(1) of the ECHR states that *'everyone has the right to freedom of thought, conscience and religion'* and it continues by saying that this right includes the freedom *'to manifest one's religion or belief, in worship, teaching, practice and observance'*. Article 9(2) allows this latter freedom to be limited if the limitations *'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'.*

No case has ever been successfully brought against the UK for failing to protect a person's belief that homosexuality was in some way wrong. In *Eweida v UK*

(2013) [see Briefing 663] one of the four applicants (Ms Ladele) was a registrar of marriages in Islington who refused to register civil partnerships and was disciplined for adopting that stance. When she complained that she was being discriminated against on the basis of her Christian beliefs she succeeded at the ET but her employers won at both the EAT and the CA. Ms Ladele was refused leave to appeal to the SC but she lodged an application with the European Court of Human Rights (ECtHR). She was joined in Strasbourg by Mr McFarlane, a counsellor for Relate who had been dismissed for refusing to give sex counselling to gay couples and who had lost his claim for discrimination and unfair dismissal at both domestic tribunal levels.

The ECtHR found against both of these applicants. In the case of Ms Ladele it held that the UK's law was within the wide margin of appreciation allowed to national authorities when it comes to striking a balance between competing ECHR rights (the right on one side to manifest a religious belief and the right on the other side not to be discriminated against because of one's sexuality): Islington Borough Council was entitled to require its registrars to register civil partnerships and to cease to employ someone who refused to do so. Likewise, in the case of Mr McFarlane the ECtHR held that UK law did not violate article 9(1) by allowing Relate, a private company, to dismiss an employee who would not implement its policy of providing a service without discrimination. It is clear, therefore, that the ECtHR gives greater priority to the right not to be discriminated against than it does to the right to manifest religious belief.

As regards the right of conscientious objection to military service, the Grand Chamber of the ECtHR *has* required states to recognise such a right (*Bayatyan v Armenia*, 2011). In coming to that conclusion the Court turned away from the position previously adopted by the European Commission of Human Rights (last set out in 1995) and held that imposing a criminal sanction on a conscientious objector was a violation of article 9(1). It cited findings reached by the UN's Human Rights Committee in 2006 in two complaints made against South Korea (*Yeo-Bum Yoon v Korea* and *Myung-Jin Choi v Korea*) and also article 10 of the EU Charter on Fundamental Rights, in force for all EU countries since 2009, which explicitly recognises the right to conscientious objection albeit *'in accordance with the national laws governing exercise of this right'*. The ECtHR considered that:

> *Opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9.*

It is safe to assume that if the Private Members' Bill coming before the Northern Ireland Assembly were to be considered by the ECtHR it would not be deemed acceptable. The Court would be likely to conclude either that the proposed law falls outside the state's margin of appreciation or that the conviction or belief in question (that the behaviour or beliefs of homosexuals should not be endorsed, promoted or facilitated) does not have the requisite cogency, seriousness, cohesion and importance to attract the protection of article 9.

Freedom of expression

There is, however, another relevant principle which may at times come to the aid of those whose conscience does not allow them to endorse, promote or facilitate homosexuality. It is the principle that no-one should be required to manifest his or her religious beliefs by declaring what they are. Thus, in *Alexandridis v Greece* (2008) the ECtHR found a violation of article 9(1) when the applicant, in order to begin practising as a lawyer in Greece, was required to reveal that he was not an Orthodox Christian.

To return to the case coming before the Northern Ireland county court concerning the words to be iced on a cake, it would surely be common ground between all parties that on occasions a supplier of a cake should be entitled to refuse to write words on a cake which might give the impression that the supplier of the cake shares the views expressed on the cake. It would obviously be unlawful, for example, for anyone to write words on a cake which are threatening or abusive and likely to stir up racial hatred – so much is clear from s18 of the Public Order Act 1986 and from the wider provision in article 9 of the Public Order (NI) Order 1987 (which is not limited to racial hatred and extends to arousing fear as well).

But there may also be situations where the supplier of a cake should be able to refuse to write words on a cake which, while not illegal, are, objectively speaking, very distasteful. *'The IRA were right'*, *'Hands off paedophiles'* and *'Hitler had the answer'* are all messages which no-one should be required to write on pain of any sanction whatsoever. Admittedly people eating a cake will not necessarily assume that the suppliers of the cake

agreed with the sentiments expressed on it, but they would surely have assumed that any supplier at least had a choice under the law not to express the sentiments without suffering any loss other than the withdrawal of the custom of the particular person requesting the cake.

The bakery in the Northern Ireland case might therefore make the argument that it should not be required to express words, even if they are just icing on a cake, in a way which contravenes its right to freedom of expression under article 10 of the ECHR. Whether 'Support gay marriage' is a statement which the supplier of a cake has the right not to have to make will depend on whether, in and of itself, the item supplied would give the impression that the bakery actually shares the view expressed and also on whether the view expressed is so outrageous that no service provider should be required even to give an impression that it endorsed the view. I do not myself think that those two tests are met in this case and so the ECNI should still be successful in its complaint that the bakery has discriminated against a customer on grounds of sexual orientation regardless of the article 10 implications.

Discrimination on grounds of political opinion

An additional argument raised by the ECNI is that the bakery discriminated against its customer on grounds of political opinion, the assumption being that 'Support gay marriage' is a statement of political opinion, which, given the recent controversies throughout the UK on the subject of legalising same-sex marriage, it probably is. In England, Scotland and Wales the law protects people against discrimination on the basis of religion or belief, with belief being defined as *'any religious or philosophical belief'* (Equality Act 2010, s10(2)). But in Northern Ireland the law also extends protection to persons on the basis of political opinion (Fair Employment and Treatment (NI) Order 1998, art 3). The term 'political opinion' is not defined, except to the extent that it excludes an opinion which *'consists of or includes approval or acceptance of the use of violence for political ends connected with the affairs of Northern Ireland'* (art 2(4)).

In the context of political opinion it does not seem plausible to allow the right of conscientious objection to be raised as a defence to a claim based on discrimination. No-one, surely, has the right to conscientiously object to someone else's political opinion? The only argument the bakery might perhaps raise in this context is a corollary to the one based on the right to freedom of expression, namely that the bakery should not be forced to express a political opinion if it can be reasonably assumed that the bakery is thereby endorsing that opinion. For the reasons given above in relation to freedom of expression, I do not think that any objective observer would deduce from the words iced on a cake that the bakery which produced the icing was endorsing the opinion expressed in those words or that it was being forced to suppress its own political opinion. The observer would deduce that the bakery was a commercial concern that was merely satisfying its customer's wishes.

Conclusion

Reconciling 'conscience' with the right to equality is difficult because, in the context of the commercial activities in particular, it is rather challenging to conceptualise equality in a way which allows for someone to 'conscientiously' object to the concept. Equality is itself a matter of conscience and to imagine that it could be a matter of conscience to believe that some people should be treated differently merely on the basis of what they do when they are in bed with another person seems as irrational as to imagine that the state should deny those people the right to privacy, to liberty, or to a fair trial. Where does conscience stop? I would argue that it stops at the door marked *'unlawful discrimination against other people'.*

Gateway or gatekeeper? Some findings from the civil legal aid telephone gateway review

Dr Nimrod Ben-Cnaan, Head of Policy and Profile at the Law Centres Network, the national membership body for Law Centres, examines findings arising from the review of the civil legal aid telephone gateway. He considers issues of concern arising from the user and provider accounts and from the service's overall performance and assesses the review's significance for discrimination law practitioners and agencies supporting vulnerable people. The review acknowledges a markedly lower uptake than predicted: in discrimination; in other telephone gateway areas of law; and across civil legal aid as a whole. As this drop could be used to justify further cuts, it is important to account for flaws in service design or delivery that might contribute to it. Dr Ben-Cnaan urges practitioners to seize the opportunity to raise concerns over some of the review's findings, seek assurances for their remediation and monitor any consequent negative impact on access to justice.

Introduction

The first-year review of the mandatory telephone gateway to civil legal aid was published in December 2014. In its response to the research, the Ministry of Justice (MoJ) has reaffirmed its satisfaction with the service and its performance. The response has also identified several areas for improvement and MoJ had already started addressing them. However, the four research reports about the service document a range of findings and detail that warrants a closer look. These shed light on particular problems arising from the delivery channel – a telephone-based service – and the specific needs of its target population.

Background

The Civil Legal Advice telephone gateway (CLA) was introduced in April 2013 as part of the reforms legislated in the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO). A telephone helpline had been a part of civil legal aid provision before, branded 'CLS Direct' and then 'Community Legal Advice'. The telephone helpline and its sister website provided information and general advice on matters covered by civil legal aid under the broader scope of the Access to Justice Act 1999.[1]

CLA was a categorical departure from its predecessors in that it was intended not as one of several channels of delivery but as the mandatory gateway service: a necessary first point of contact to access civil legal aid. The idea was met with extensive resistance: access to justice organisations have raised concerns about its accessibility to disadvantaged and vulnerable groups, from non-native English speakers, through to people with mental health problems, to people with hearing loss. These concerns were echoed by mounting criticism in the House of Lords, where the government was losing votes on LASPO amendments while also trying to progress two more complex bills with which it had more at stake – the prospective Health and Social Care Act 2012 and Welfare Reform Act 2012.

Faced with this opposition, the MoJ made two concessions on the gateway. Firstly, it was to start out as a pilot, being mandatory for only three areas of law from the decreased scope of civil legal aid: debt, discrimination and special educational needs (SEN). Secondly, the Ministry undertook to publish a review of the gateway after its first year of operation. This review, published on December 9, 2014, consists of four research reports by MoJ Analytical Services and contracted researchers and of a fifth report, the government response, from the MoJ's legal aid policy unit.

Telephone: a more challenging channel

The research has found that service providers find assessing and advising on discrimination over the telephone more challenging than the other mandatory areas. This is particularly pertinent among CLA's first-line operators, who have highlighted two problems. Firstly, as non-lawyer call centre operators instructed to pick up keywords in callers' accounts, they felt that they simply did not have enough information about discrimination law to make some scope decisions. Secondly, operators are charged with exploring issues with callers to clarify scope and eligibility, but they found them difficult to tease out without crossing the line to

1. See Briefing 684, November 2013 *'Civil Legal Advice – equality before the law?'* in which Pam Kenworthy explored the strengths and weakness of publicly funded telephone advice services, highlighting the changes brought about by LASPO.

actual advice.[2]

To the credit of the MoJ and the Legal Aid Agency (LAA), they have chosen to err on the side of caution and operators are instructed to pass on cases in doubt to telephone-based discrimination specialists, who would need to conduct their own case assessment anyway. However, this results in inefficiency: the rate of discrimination 'determinations' – rejections by the telephone-based specialist lawyers based on scope or legal merit – is the highest among the mandatory areas of law, at 32% instead of the projected 5%.[3] The lawyers have also felt under pressure to reach a scope decision about cases over the telephone within the allotted 18-minute target, and were frustrated that in the end a 'substantial proportion' of calls 'did not translate into casework'.[4]

Along with discrimination scope assessments, providers have also spoken of the particular challenge of identifying and addressing caller needs over the telephone. For obvious reasons, a face-to-face encounter would have made it much easier for them to pick up additional, non-verbal cues indicating user vulnerabilities that they needed to accommodate. Moreover, providers have acknowledged that a face-to-face interaction was more likely to prompt users to disclose vulnerabilities or needs, if not initially, then over time, as reassurance and sympathy arise and ultimately trust is won.[5]

Nevertheless, these limitations, contingent on the medium of communication, cannot fully account for evidence that callers were not offered available adjustments, or were offered them by CLA operators at triage stage (in 25% of calls) but not by lawyers later on (in only 11% of calls). It is important to note here that the MoJ and LAA use 'adjustments' more broadly than accommodating vulnerability or functional impairment: one of the three most commonly used adjustments was calling users back so that the LAA pays the cost of the long telephone conversation (the other two were allowing for a third party to call on a user's behalf, and providing advice in writing, online).[6]

Aside from providers' tendency to choose from a narrow range of the adjustments available, there is also evidence of users with specific needs asking for adjustments but being refused: a man with hearing loss was struggling to hear the CLA operator over the call centre's background noise. He asked that the operator speak with him from a quieter room but was refused and was not provided with available alternatives such as type talk or webcam chat.[7] The research report did not specify whether he was ultimately able to access the service.

Telephone advice vs. face-to-face advice

Concerns about the telephone gateway during the passage of LASPO have focused on accessibility issues of a 'telephone by default' first point of access, but extend to the delivery of legal advice entirely over the telephone. Indeed, the service was designed to refer to face-to-face advice only in exceptional cases deemed unfit for telephone advice. The decision was left to telephone-based legal advice providers, a situation that arguably creates a disincentive for them to refer cases on to face-to-face advice, given the increased amount of time and effort they expend on assessing discrimination cases, much of it rejected and thus not resulting in casework. It is perhaps unsurprising, then, that in the first year of CLA only five discrimination cases were referred to face-to-face advice.[8]

The trend remains stark across CLA's other mandatory areas, with only 172 debt cases and no SEN cases referred to face-to-face advice in the first year of operation – altogether a referral rate of 3.1% of eligible cases. Among callers referred to face-to-face advice several groups were prevalent, specifically people with learning difficulties, mental health problems and mobility impairment. Among these referrals older and BME users were more prevalent, and complex disability and language barriers seemed to be recurring reasons as well.[9]

But what are the actual criteria for face-to-face referral and are they appropriate? This remains unclear as the report authors admit that they have no detailed

2. Ash Patel and others, *CLA Mandatory Gateway: Findings from interviews with service providers,* MoJ Analytical Series, December 2014, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384310/cla-provider-research.pdf, p. 20 (below: Providers).

3. Ash Patel, *CLA Mandatory Gateway: A secondary analysis of management information*, MoJ Analytical Series, December 2014, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384311/cla-mandatory-gateway-secondary-analysis-management-information.pdf, pp. 11-12 (below: Secondary analysis).

4. Providers, p. 29.

5. Providers, pp. 18-19.

6. Ash Patel and Catherine Mottram, *CLA Mandatory Gateway: Overarching research summary,* MoJ Analytical Series, December 2014, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384307/cla-gateway-research-summary.pdf, p. 16 (below: Summary).

7. Caroline Paskell and others, *CLA Mandatory Gateway: Findings from interviews with users,* MoJ Analytical Series, December 2014, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384308/cla-gateway-users-interviews.pdf, p. 16 (below: Users).

8. Summary, p. 17 (in note 13).

9. Ibid.

understanding of the circumstances where face-to-face referrals were made. This is due primarily to lack of more detailed data, which the report authors suggest should be captured in the future.[10] Nevertheless, lawyers have told researchers that they *'should be given more flexibility about when to offer face-to-face advice such as for people with particular disabilities or for situations where face-to-face delivery could expedite the delivery of help.'*[11]

Given this strong bias in favour of telephone delivery, researchers have found evidence that callers '*are not being diverted to face-to-face advice even though this is the most suitable service for them, and that some people are not being offered appropriate adjustments.'*[12] This is a worrying statement that requires a closer look.

The research finds that some callers wanting to use CLA have found the practicalities of explaining themselves over the telephone challenging. Some have felt that *'engaging remotely had compromised their ability to present the required information. These included people with disabilities, communication and mental health difficulties.'*[13] To some callers the problem was actually about trust, as they '*expressed doubts as to whether specialists take remote cases seriously, or emphasised that seeing the person would add credibility to the engagement.'*[14]

Similarly, the second-line lawyers have also found telephone-based delivery challenging. They have acknowledged that remote services are not for everyone or for every problem, and that some face-to-face advice was still needed. Some have admitted that local face-to-face advice services commanded trust levels that *'could not be easily replicated through a national telephone service.'*[15] Curiously, though, lawyers have commented that *'difficulties in delivering the service stemmed from the nature of the client group, and not the delivery mode.'*[16] This is an interesting statement because it reflects a struggle with an essential element of the service: civil legal aid is by definition targeted at disadvantaged people, many of them vulnerable, who may not be eloquent or even fluent English speakers and who, more often than not, have mental health problems that make interactions with them more challenging.

It may be that the channel of delivery is not the only or primary challenge with the CLA service, but managing expectations of it certainly was a significant problem, and one that the MoJ is currently seeking to address. Callers interviewed have spoken of feeling disoriented and frustrated with the uncertainty of the process.[17] Some had thought that they would get advice from CLA operators, and were dismayed when they were referred on to telephone-based lawyers, who then assessed them again before giving any advice. Some callers had expected to be signposted to local face-to-face legally-aided advice; this was not unreasonable given that it had been a core element of the previous telephone service, Community Legal Advice. Some callers seemed to have no clear awareness of the nature of the telephone gateway or its potential benefit to them, even after they have used it.[18]

Gateway or gatekeeper?

Nearly two years after the implementation of LASPO, uptake of civil legal aid is markedly lower than predicted, and the telephone gateway's performance reflects this trend. In discrimination law, it was estimated in 2011 that after the cuts there would still be some 6,408 cases helped through legal aid. However, in the first year after the cuts, only 3,506 people have passed the scope and means tests and were referred from frontline telephone operators (non-lawyers) to telephone-based legal advice providers. Nearly a third of those (1,122) were rejected. Debt and SEN have seen similarly dramatic drops in uptake.[19]

The researchers admit that they cannot explain these markedly lower volumes, nor can they isolate and assess the impact of CLA on overall figures.[20] Due to its methodology, the research also could not reflect the experience of people who were eligible for legal aid but did not engage with the gateway. One wonders how it could hope to account for people who were excluded from the service at the first hurdle – people who, for whatever reason, did not even get to make the first telephone call.

These limitations are perhaps unsurprising when one considers the integrity of the data involved. The MoJ estimates (at the time of the legal aid green paper in late 2010) were based on 2009-10 service figures as a baseline, whereas post-cuts delivery was measured in 2013-14. Service records were in many cases incomplete and prone to error: 15.6% of cases recorded missed data

10. Summary, p. 22.
11. Providers, p. 29.
12. Users, p. 31.
13. Users, p. 25.
14. Users, p. 25.
15. Providers, p. 24.
16. Providers, p. 23.
17. Users, p. 13.
18. Users, p. 6.
19. Secondary analysis, pp. 11-12.
20. Summary, p. 20.

on disability/illness, 13.6% on ethnicity, 31.4% did not specify whether users were suitable for phone advice.[21] Being a sample, and a small one at that – interviewing 36 individual users, 17 provider personnel and seven representatives of agencies that signpost people to CLA – in some cases there was insufficient direct evidence gathered on areas of concern: for example, none of the seventeen operators and lawyers interviewed had direct experience of referring callers to face-to-face advice.[22]

These findings should concern equality and diversity organisations and ones supporting vulnerable people. The significance of the gateway review is threefold.

The review is the first comprehensive account of the telephone gateway since its launch in April 2013. It is unlikely to be held again, certainly not at this level of detail, although some gateway figures have just started to be included in the quarterly legal aid statistical releases. Practitioners and groups would do well to seize the opportunity to raise concerns over some of these findings, seek assurances for their remediation and track the review's implementation.

This is all the more urgent because flawed service design or delivery are probably contributing to legal aid being underused, making further cuts more likely. The review cannot explain the marked drop in the volume of help across civil legal aid and especially in the three mandatory areas of law (debt, SEN, discrimination). With the last Civil and Social Justice Survey – the definitive legal need snapshot in England and Wales – conducted in 2009 – 11, there is little up-to-date official evidence to counter official claims that legal aid stats simply reflect dropping demand – even though there is no reason to believe need has reduced given, for example, the effects of welfare reform.[23]

The next government, whatever its political make-up, will make further budget cuts, which in turn will likely hit legal aid spend. Already in the last quarter reported on (July-September 2014) telephone-based specialists have taken up just under one in seven non-family civil legal aid matters.[24] It is not unlikely that the MoJ will be tempted to move other areas of law onto telephone gateway provision in the 2016 civil legal aid contracts, simply because it is significantly cheaper to deliver than face-to-face advice. This could potentially put many more potential users at risk of exclusion or disadvantage by the CLA terms of service.

21. Secondary analysis, p. 5.

22. Users, pp. 2-3; Providers, pp. 21, 32-33.

23. Pascoe Pleasance and others, *Civil Justice in England and Wales,* Legal Services Commission, 2011, http://webarchive.nationalarchives.gov.uk/20130128112038/http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/2011/civil-justice-wave1-report.pdf.

24. *Legal Aid Statistics in England and Wales: July to September 2014,* MoJ Statistics Bulletin, 18 December 2014, https://www.gov.uk/government/statistics/legal-aid-statistics-july-2014-to-september-2014, compare pp. 20, 29.

Briefing 734

Obesity and disability – the view from the Court of Justice of the European Union

Fag og Arbejde (FOA), acting on behalf of Karsten Kaltoft v Kommunernes Landsforening, acting on behalf of the Municipality of Billund Case C 354/13, December 18, 2014

One difficulty with a closed list of classes of prohibited discrimination such as those set out in the EU directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (the Directive) and the UK Equality Act 2010 (EA) is that any unnamed characteristic, such as obesity, will not be protected unless it can be fitted into one of the existing characteristics. In the context of the protected characteristic of disability, the Court of Justice of the European Union (CJEU) has previously accepted, for example, that associative discrimination is within the ambit of the Directive but that mere sickness is not. (See *Chacón Navas*, EU:C:2006:456) The recent ruling from the CJEU in *FOA v Karston Kaltoft* in December 2014 has now determined that obesity is not a characteristic protected by the Directive, nor is it of itself a disability.

Court of Justice of the European Union

In a clear and concise judgment the CJEU notes that firstly, article 6 of the Treaty of the European Union

(TFEU) does not refer to obesity at all and it cannot be interpreted as providing protection to those who are obese from discrimination generally; secondly that since article 19 of the TFEU does not refer to obesity as a separate category, it cannot be considered of itself to protect obese people from discrimination in employment and occupation unless it falls within the existing definition of disability. This, the court underlines, remains a question for national courts to decide.

Whilst the judgment is short, it does provide some pithy and helpful guidance to UK lawyers and advisors by setting out the circumstances in which a person will be considered to be disabled within the meaning of the Directive.

CJEU case law on the meaning of disability

The Court reminds member states that CJEU case law[1] defines disability as:

> *referring to a limitation which results in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.*

The Court goes on to state that the meaning of disability must therefore be understood to encompass three additional principles:

1. Because the objective of the Directive is to enable disabled people to have access to or participate in employment, the concept of disability is not confined to those who cannot undertake employment at all, but also includes situations where there is a *'hindrance to the exercise of economic activity'*.
2. Disability is not defined by reference to its origin; to do so would be contrary to the aim of the Directive (see judgment in *HK Danmark*, EU:C:2013:222, paragraph 40).
3. The concept of 'disability' within the meaning of the Directive does not depend on the extent to which the person may or may not have contributed to the onset of his disability.

Definitions of disability under the Equality Act 2010

Most of the substance of these three concepts are ones which UK lawyers and advisors will be familiar with, as they are intrinsic to the definitions of disability within the EA.

1. Including HK Danmark, EU:C:2013:222, paragraphs 37 to 39; Z., C-363/12, EU:C:2014:159, paragraph 76; and Glatzel, C-356/12, EU:C:2014:350, paragraph 45

However, the term *'hindrance to the exercise of economic activity'* is arguably a wider term that that used in the EA at s6(1) which states:

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

The courts have considered the meaning of the term substantial and have stated that it means the adverse effect on someone's ability to carry out the day-to-day activities must be *'more than minor or trivial'* rather than very large (See *Goodwin v The Patent Office* [1999] IRLR 4, [1999] ICR 302, EAT).

In determining whether a person is disabled, the UK courts have distinguished specialist skills required for particular employment and have focused on normal day-to-day activities raising the question of whether an impairment which *hindered the economic activity* of a disabled person, but had only a minor or trivial impact on day-to-day activities, would satisfy the UK definition.

An example would be a person who required very fine motor skills for work, because of the close and technical nature of their work – the classic example being a jeweller or watch maker, or a person doing fine hand painting of china. A small shaking caused by a physical impairment may not have any impact on day-to-day activities, but would render a person unable to carry out their job to the standard required.

Practitioners will remember that whatever the language, the statutory test is a functional one, directed towards what a claimant cannot, or can no longer, do at a practical level (see *Ministry of Defence v Hay* [2008] IRLR 928, [2008] ICR 1247, EAT). In determining whether the disadvantage is substantial, the guidance from the EAT is that the tribunal must compare the way that the claimant is able to do the task now, with the impairment, compared to how they would do the task without the impairment. This difference in ability must then be compared with how most people would do the task. The final determination depends on how much of a variation exists between the person with the impairment and others without the impairment, and whether it is substantial; (see *Paterson v Metropolitan Police Commissioner* [2007] IRLR 763, [2007] ICR 1522, EAT).

The test set out by the CJEU in *Kaltoft* appears far more straightforward. It is arguably as simple as asking

a) Does the impairment hinder economic activity?
b) If it does, then the impairment has a disabling effect and the person is disabled.

Of course, UK legislation must be interpreted to give effect to the Directive where possible, and in so far as there is any difference, it may be possible to do this by including *economic activity* within the term *day-to-day activities*, and by reading *substantial* as including the term *hindrance*. Whether this is to stretch the statutory language too far remains to be seen.

The case of *Kaltoft* is not a case about reasonable adjustments to the work place, although many commentators have suggested that this case will lead to additional pressures on business because of an additional need to make adjustments for obese employees.

In fact, the obligation to make adjustments remains as before. If the employee who is obese is disabled, either because of the impact of obesity on his or her health, or because it is the result of a condition which has an impact on health, then the question the organisation or employer will need to consider is whether or not the impairment has the statutory effect set out in s20 EA, i.e. that a provision, criteria or practice, or a physical feature, or the non-provision of an auxiliary aid, puts the disabled person at a significant disadvantage compared to others.

Implications for practitioners

The question for practitioners must be does this judgment make any difference for the legal rights of obese employees?

The answer is that it probably will not. However, the case has raised awareness of a serious workplace issue. Obesity is a well recognised health problem in the UK population. At least two successive governments have supported schemes in health and education to encourage individuals to manage their own obesity, to raise awareness of it, and to support national and local health services to manage obesity to avoid future health risks. Being obese raises the likelihood of serious illness at some time in the future, and in addition obesity is often the indicator of existing serious health problems.

These factors coupled with some very worrying statistics demonstrating that obese people are less likely to be in work at all, but if they are, are more likely to be bullied or singled out, raises some real concerns about the treatment of obese people in the workplace. Mr Kaltoft's claim was that he was the only childminder selected for redundancy after 15 years of employment, and after being told he had to lose weight. This despite him arguing, ironically, that his obesity did not affect his ability to do his job. Reports that he could not bend down to tie shoelaces are apparently simply wrong, say his lawyers.

Comment

The case and its wide reporting have raised awareness of difficulties faced by obese workers and would-be workers, and may encourage them to ask for support from their workplace representatives and trade unions over issues such as bullying and harassment, unfair selection for redundancy or loss of promotion and of course, for help with adjustments if they are required. For advisers and trade unionists the focus is likely to be less on whether or not a person has a disability, and more on the need to treat all workers fairly, and focus on a person's ability to do a job regardless of personal characteristics.

Catherine Rayner
Barrister, 7 Bedford Row

Briefing 735

Shortcomings in appointment of County Court assessors exposed

David Cary v Commissioner of Police for the Metropolis [2014] EWCA Civ 987, July 17, 2014

Facts

David Cary (C) was subjected to homophobic abuse by his neighbour, which he reported to the Metropolitan Police Service (MPS). The MPS decided to take no action after investigating the report. C lodged a complaint with the MPS about the way it had treated his report. The complaint was dismissed.

C issued a claim of direct discrimination against MPS on grounds of sexual orientation. His complaint was that, when they handled his complaint, the MPS treated him less favourably on the grounds of his sexual orientation than they would have treated a heterosexual person who had complained of discrimination and/or a person who had complained of a matter where homophobic abuse was not the key injury suffered.

The county court appointed an assessor (B) to assist the trial judge.

735

The law

S 63(1) County Courts Act 1984 provides that:

> *In any proceedings the judge may, if he thinks fit, summon to his assistance, in such manner as may be prescribed, one or more persons of skill and experience in the matter to which the proceedings relate who may be willing to sit with the judge and act as assessors.*

The Civil Procedure Rules Part 35 rule 15 provides that:

> *2) An assessor will assist the court in dealing with a matter in which the assessor has skill and experience.*
>
> *3) An assessor will take such part in the proceedings as the court may direct and in particular the court may direct an assessor to –*
>
> *a) prepare a report for the court on any matter at issue in the proceedings; and*
>
> *b) attend the whole or any part of the trial to advise the court on any such matter.*

The Equality Act 2010 (EA) makes provision for the appointment of assessors in county court discrimination cases. S114(7) provides that:

> *In proceedings in England and Wales on a claim within subsection (1), the power under section 63(1) of the County Courts Act 1984 (appointment of assessors) must be exercised unless the judge is satisfied that there are good reasons for not doing so.*

The effect of this provision is to make the appointment of assessors in county court discrimination cases mandatory unless there are good reasons not to do so. The EA is silent on specialist knowledge or experience.

County Court proceedings

C objected to B on the grounds that she lacked sufficient expertise on same sex sexual orientation discrimination. The trial judge overruled C's objection. The judge held that B was a suitable assessor '*by virtue of her appointment as a lay member of the ET.*'

B had been a lay member of the ET for twelve years where she held a position on the Race Panel. She had sat on a couple of sexual orientation cases. She had also been appointed a race discrimination assessor in the county court under the Race Relations Act 1976. Her professional experience was in management and she had dealt with grievances, which included complaints of race and sex discrimination.

Court of Appeal

C appealed against the trial judge's decision. The Equality and Human Rights Commission (EHRC) were interveners in the appeal.

C argued that prejudice towards gays and lesbians may be subconscious and the assessor should be someone with skill and experience in sexual orientation issues in the community who could bring an insight into the claim. Simply being a lay member of the ET was not a sufficient qualification: their employment experience does not make them suitable for non-employment discrimination cases.

The EHRC submitted that parliament had intended that assessors should have special skills and experience in relation to the protected characteristic in issue; this is evident from the fact that discrimination, in part, is defined differently according to the protected characteristic. Also, groups sharing a particular protected characteristic often experience discrimination differently from other protected groups.

The CA said that it would be wrong to lay down any rule that assessors should have specific expertise in relation to the type of discrimination at issue without which they were necessarily unqualified to act. The test for appointing assessors is whether the person has the skill and experience *in the matter to which the proceedings relate*. To answer this question it is first necessary to identify 'the matter' and then decide whether the person has the required skill and experience in relation to it.

In most discrimination cases, the matter which must be decided is whether the respondent would have treated differently another person in the same or similar circumstances as the claimant but without his or her protected characteristic; in this case, a heterosexual person who had complained of discrimination and/or a person who had complained of a matter where homophobic abuse was not the key injury suffered. The court found that since homophobia plays no part in this consideration the value of special knowledge in sexual orientation issues is limited. If the respondent would have treated another person differently, then the skill and expertise in identifying a discriminatory reason does not differ according to the protected characteristic.

Thus, the skills and experience which an assessor brings to a discrimination case are:

- an ability to discern whether people are deceiving the court when they say they would have behaved no differently
- an understanding of how unconscious bias and stereotyping operates, and
- evaluation and analysis skills, honed by the experience of dealing with discrimination complaints.

The CA agreed that lay membership of an ET of itself was not a sufficient qualification but B was an appropriate assessor because of her experience, professionally and as an ET lay member. It also recognised that there might be

cases where special knowledge is required, such as on reasonable adjustments or religion or belief discrimination where knowledge of a belief might be needed.

The CA dismissed the appeal.

Procedure

Despite C's solicitors' efforts, the procedure for appointing an assessor in this case had not run smoothly. B's name was disclosed to the parties only six days before the hearing and her qualifications on the second day of the hearing. Since this was in breach of a practice direction, the CA gave the following guidance:

1. The court should appoint one or more assessors unless satisfied that there is good reason not to.
2. It is desirable that the court should, at an early stage, address the questions:
   a. whether there is any reason not to have one or more assessors;
   b. in respect of what matter the assistance of the assessor should be sought;
   c. what sort of assessor that should be;
   d. his or her identity.
3. In their preparation for trial, the parties should consider those questions and if possible agree on all or some of them. They should be in a position to make representations or suggestions to the court on each of those issues with appropriate reasoning related to the matters in issue in the particular case.
4. When the court is considering directions for trial, if not before, the parties should appraise the court of the need to address questions (1) to (4) and, where there is agreement, the matter could be put before the court for its approval.
5. Where the parties invite the court to nominate a proposed assessor, the court should satisfy itself as to the appropriateness and availability of the person in question and notify the parties and provide details of the proposed assessor's qualifications, which are most likely to be in the form of a CV.
6. Part 35 of the Civil Procedure Rules requires this to be done 21 days before any appointment. This should not be left to within 2 months of the trial since, if the objection is upheld, it will be necessary to select another assessor and give a new notification.
7. In selecting an assessor, the court is entitled to seek assistance from any source that it might think valuable, including the parties, the regional employment judges, the EHRC and others.

Implications for practitioners

The CA judgment was premised on a direct discrimination case. Specialist knowledge might be needed in some cases of indirect discrimination or harassment, to show how a provision, criterion or practice puts or would put persons sharing a protected characteristic at a particular disadvantage; or how words, language, gestures or other behaviour might violate a person's dignity or create an intimidating, hostile etc. environment.

To secure an assessor with specialist knowledge, a practitioner may need to be proactive in assisting the court to select a suitable assessor. Practitioners should:

1. identify at an early stage any issues which require specialist knowledge and reasons;
2. identify suitable assessors and obtain their CVs;
3. try to reach an agreement with the other side on:
   - the matter on which the assessor's skills and experience is needed, including specialist knowledge;
   - the number of assessors;
   - the names of any proposed assessors;
   - whether a report is required from the assessor;
4. before, or at the case management hearing, present the court with the agreement or if none, be prepared to make representations or suggestions to the court on each bullet point above.

Comment

This case exposes the shortcomings in the current arrangements for appointing assessors: the limited supply, the narrow range of expertise and the general lack of awareness and transparency on appointments. It is conceivable that the central issue would not have arisen had the pool of assessors available to the court included someone with experience of sexual orientation discrimination. As it was, the pool comprised only race and disability assessors. The Ministry of Justice, Government Equalities Office and/or the EHRC might wish to consider promoting a better awareness of assessors and maintaining a central list which is available to courts and the parties.

Razia Karim
Equality Consultant

Issue estoppel – psychiatric injury and discrimination

Nayif v The High Commission of Brunei Darussalam [2014] EWCA Civ 1521, November 27, 2014

Facts

Mr Nayif (N) was employed by the High Commission of Brunei Darussalam as a chauffeur from 2003. He alleged he was bullied, harassed and abused in his employment between 2003 and 2010, and that he suffered psychiatric injury as a result.

Employment Tribunal

In 2011 N presented a complaint of race discrimination. His claim was dismissed because it was out of time. All of the acts had occurred more than three months previously and the tribunal did not consider that it was just and equitable to extend time.

Employment Appeal Tribunal

N applied for permission to appeal the ET decision, but was refused on paper at the sift stage, and he did not seek a further oral hearing.

High Court

In 2012 N issued a claim in negligence and breach of contract in respect of the same alleged psychiatric injury. It was the same catalogue of complaints as in the earlier ET proceedings, but there was no allegation that N had been discriminated against on grounds of race.

The High Commission raised the defence of issue estoppel; that is, the ET claim was dismissed and the High Court claim relied upon the same facts. In essence, the defence is that if the court decides something once, you are not permitted to ask another court to decide the same point again.

Master Leslie upheld the High Commission's defence, and struck the claim out. Bean J concluded that Master Leslie was correct to strike the claim out.

Court of Appeal

N appealed to the CA. Elias LJ gave the only judgment, upholding the appeal. It was held that there was no possibility of issue estoppel when the ET had no jurisdiction to hear the claim.

A distinction was drawn between a claimant forgoing an opportunity to have a case decided, and the complaint not being considered at all. If the complaint is not considered by the court or tribunal, then there cannot be a determination, and there can be no estoppel.

An example of the former could be found in cases where an individual has brought an ET case, and then withdraws it with the result that the tribunal dismisses the claim.

If the claim has been dismissed, it is irrelevant why this has happened (for example, the claimant is no longer pursuing the claim because they view an alternative venue as preferable). It is also irrelevant that there has been no argument on the merits, provided that there has been a formal adjudication by the court or tribunal.

The key factor in this case was that N's complaint was unable to be heard by the ET because it was out of time. Limitation goes to jurisdiction, and as the ET never had any power to hear the case, there could be no decision that issue estoppel could latch on to. At no stage had N's complaints about mistreatment been decided, nor had he conceded the issue by choosing not to have the matter formally determined in the ET.

Elias LJ also considered the article 6 European Convention on Human Rights (ECHR) right to a fair trial, and held that the point did not arise, given the court's decision that N's negligence claim should be permitted to proceed. However, Elias LJ went on to find that if issue estoppel was wide enough to deny someone the right to have the merits of his case determined without good cause, there would be a disproportionate interference with that individual's article 6 rights.

Analysis

Previously, the case law surrounding issue estoppel had stopped short of saying that a finding on the substance of the case was necessary for the doctrine to apply. Here the CA comes a lot closer to that conclusion, and perhaps the invocation of the ECHR makes the difference.

It is important to note that this case is not simply saying that if your discrimination claim is unsuccessful in the ET that you can have another go in the High Court. It is only if the ET has no jurisdiction to hear the claim that a subsequent defence of issue estoppel will successfully be avoided. If, for example, an ET claim was struck out at a preliminary hearing for having no reasonable prospect of success, then it would not be open

to that individual to argue the case again in the civil courts.

Practical implications

Choosing the venue for claims that can be brought in either the tribunals or the civil courts is of vital importance. Understandably, there are occasions on which the individual might decide that, although they have started in one venue, it will be more favourable for them to pursue a claim in the other. The usual example is wishing to continue the claim in the civil courts because of favourable time limits, or the lack of any ceiling for recovery in breach of contract claims.

In those situations, it is vital that the claim is only withdrawn, and not dismissed by the tribunal. This is achieved by making sure that any withdrawal is done on the express basis that the claimant is contemplating bringing proceedings in an alternative venue.

Michael Newman
Solicitor, Leigh Day
mnewman@leighday.co.uk

Briefing 737

Challenge to exceptional case funding for legal aid

R (Gudanaviciene et Ors) v the Director of Legal Aid Casework and the Lord Chancellor
[2014] WLR (D) 547, December 15, 2014

Proceedings and facts

This case, which is being appealed to the SC, concerns challenges to decisions about exceptional case funding under s10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).

The Director of Legal Aid Casework (the Director) and the Lord Chancellor (LC) appealed to the CA against the High Court judgment in six immigration cases, which had been joined, challenging the operation of the exceptional funding scheme. The cases:

- Ms Gudanaviciene (G), a mother with a young child, convicted of wounding her abusive partner with intent, challenging the decision to deport her;
- Mr Reiss (R), a EEA national facing deportation whose appeal turned on the calculation of his length of residence in the UK under EU law for the purpose of determining whether he benefited from enhanced protection against deportation;
- Ms Edgehill (E) who was appealing to the CA against her deportation;
- IS who lacked capacity and was blind and was applying for leave to remain;
- B a refugee who sought reunion with family members overseas; and
- LS, a trafficked person.

Two points raised by IS: that the practical operation of the exceptional cases scheme frustrates the legislative intention and breaches the Equality Act 2010, i.e. systemic challenges to the exceptional funding scheme, were severed from the direct challenge to the individual refusal of funding in IS's case. These parts of IS's case will be heard after Easter 2015.

High Court[1]

Mr Justice Collins had held that the LC's guidance on exceptional funding was unlawful and failed correctly to state the law. He quashed the refusals of exceptional funding in all six cases and directed the Director of Legal Aid Casework to fund four of them and make fresh decisions in the other two.

He held that paragraph 30 (Asylum) of Part 1 of Schedule 1 to LASPO covered refugee family reunion because, in the words of that paragraph, family reunion is a matter 'arising from' the Refugee Convention. He held that this wording was not ambiguous and therefore declined to look at the parliamentary record (see *Pepper v Hart* 3 WLR 1032).

Finally, he held that the UK's obligations toward a trafficked person do not give rise to an obligation to provide legal aid for a trafficked person's immigration case prior to a decision under the National Referral Mechanism that there are reasonable grounds for thinking that the person is a victim of trafficking.

Stays were granted on the individual grants of exceptional funding, but the Director and the LC agreed that in giving effect to the judgment as far as refugee family reunion was concerned, they would undertake not seek to claw back funding granted were the judgment

1. *R (Gudanaviciene et Ors) v The Director of Legal Aid Casework et anor* [2014] WLR(D) 266, [2014] EWHC 1840 (Admin) June 13, 2014

overturned in the CA. In the event it took a long time for the Director to issue detailed guidance on refugee family reunion cases and some lawyers remained hesitant to take them on for a long time after the judgment.

Before the CA heard the cases, the Director and the LC conceded IS's application for exceptional funding.

Court of Appeal

The CA held that the LC's guidance on exceptional funding was unlawful and failed accurately to state the law, including the effect of articles 6 and 8 of the European Convention on Human Rights (ECHR) and article 47 of the EU Charter of Fundamental Rights (the Charter).

The questions under article 6(1) ECHR and under article 47 of the Charter are whether:

- the applicant's appearance before the court or tribunal in question is effective;
- he or she is able to present the case properly and satisfactorily without the assistance of a lawyer.

The appearance of fairness is also relevant. Equality of arms must be guaranteed to the extent that each side is afforded a reasonable opportunity to present his or her case under conditions that do not place them at a substantial disadvantage vis à vis their opponent. The Home Office conceded that the procedural protections of article 8 ECHR apply in immigration cases and the standards are in practice the same as those under article 6. Whether legal aid is required to avoid a breach of article 8 will depend on the facts of the case including the importance of the issues at stake and complexity.

The LC's guidance sent a signal that the refusal of legal aid would amount to a breach of article 6(1) ECHR only in rare and extreme cases. This was wrong. The question for the Director in making a decision under s10 was whether there would be a risk of a breach of a person's human rights, applying principles derived from case law. There was no gloss on the phrase *'would be a breach'* and insofar as Mr Justice Collins had added one, of a '*high level of probability*' of a breach, his judgment was not upheld. If the Director considers that there would be a breach, then the Director must grant legal aid. If the Director is unsure whether there would be a breach, all the circumstances of the case must be considered, including but not limited to, the seriousness of the breach. 'Exceptionality' is not a test; it does not require that grants be rare.

The CA overturned Mr Justice Collins on the question of whether legal aid for family reunion was within the scope of paragraph 30, although the individual challenge on article 8 grounds to the refusal of exceptional funding in the case of B succeeded and the appeal of the Director on article 8 was dismissed. The CA considered that the parliamentary debates were *'…not just the **executive** expressing a view about the meaning of the legislation. It was **Parliament's** understanding of that meaning.'* [emphasis in original]

The judgment has profound implications for the application of *Pepper v Hart*. If a parliamentarian sees that the government's wording is flawed to the advantage of individuals, and keeps quiet about that rather than point it out and give the government a chance to change it, the CA's approach is to treat that parliamentarian as having agreed with the government. The effect of this aspect of the judgment if upheld would be to consolidate the power of the executive over parliament.

The CA upheld Mr Justice Collins' finding that there is not an enforceable right to legal aid prior to a 'reasonable grounds decision,' under Directive 2011/36/EC on trafficking interpreted in the light of the Charter. It allowed the appeal in the case of LS.

The CA dismissed the Director's appeals in the cases of G and R. It allowed the appeal in the case of E because her case had been joined in the CA with another case, HB, raising the same legal point and therefore it was not a breach of her rights that she did not benefit from separate representation.

The LC has so far failed to issue revised guidance on the operation of the scheme. Ministry of Justice officials told the author in a meeting on February 10, 2015 that the issuing of revised guidance was a matter of *'weeks or months, not days.'*

While the amount of work that needs to be done at risk to make an exceptional funding application, and the poor success rate in such applications to date, makes many practitioners reluctant to apply for exceptional funding, the full effect of the CA judgment has yet to be felt. It is likely to be important both to the appeal before the SC and to the systemic challenge in the case of IS, that applications for exceptional case funding have continued to be made so that the way in which such applications are being dealt with can be examined. It is of particular importance that pro bono efforts in cases outside the scope of legal aid be directed at securing exceptional case funding to respect the requirement that work is done pro bono where public and alternative means of funding are not available.

Alison Harvey, Legal Director,
Immigration Law Practitioners' Association

Room for all to get on board?

FirstGroup plc and Paulley [2014] EWCA Civ 1573, December 8, 2014

Facts

Mr Paulley (P) is a wheelchair user. In February 2012 he was travelling to meet his parents for lunch in Stalybridge. The first part of his journey involved taking a bus from Wetherby to Leeds, where he would then catch a train. However on arrival at the bus stop where the bus was already waiting, he was unable to board the bus because a woman with a child in a pushchair was occupying the only designated wheelchair space. She refused the driver's request that she move (on the basis that the pushchair did not fold) and P was forced to wait for the next bus, thus missing his train and arriving at his destination an hour later than planned.

He sued FirstGroup plc (FG), the parent company of the bus operator, for disability discrimination in respect of a failure to make reasonable adjustments.

The ensuing litigation centred on FG's policy in respect of wheelchair users, some amendments to which were made between the incident and trial. By the time of trial, the policy stated that wheelchair users had priority use of the 'designated wheelchair area' and that if there was space elsewhere on the bus, any passengers occupying this area (including those with buggies) would be asked to make way for the wheelchair user, but that the driver had no power to compel passengers to move and was reliant on their good will.

County Court

P succeeded at first instance. As a service provider, FG was subject to the duty to make reasonable adjustments where applicable (s29(7) Equality Act 2010). Recorder Isaacs found that FG's policy was a provision, criterion or practice (PCP) which placed P at a substantial disadvantage, thereby triggering the duty to make reasonable adjustments as described in s20 EA. He agreed with P that requiring (rather than merely requesting) non-wheelchair users to vacate the wheelchair space when it was needed was a reasonable adjustment which FG had failed to make, and awarded P £5,500 in compensation. FG appealed.

Court of Appeal

The appeal was unanimously allowed, with LJ Lewison giving the lead judgment.

Provision, criterion or practice

Under s20 EA the duty to make adjustments arises where a PCP places a disabled person at a substantial disadvantage as compared with those who are not disabled. It was common ground in the appeal that the correct comparator for these purposes was any non-wheelchair user (not, for example, a non-wheelchair user with a child in a buggy).

In formulating the PCP so as to include FG's policy of asking but not requiring non-wheelchair users to vacate the wheelchair area, the County Court judge had wrongly incorporated into the PCP an adjustment aimed at ameliorating the disadvantage it caused. Properly construed, the PCP was FG's policy of accommodating passengers on a first come first served basis (which applied to all passengers, wheelchair using or not), with the question then following from this as to whether the adjustment of merely asking non-wheelchair using passengers occupying the wheelchair space to move, supplemented by signage in similar vein, was sufficient.

(In relation to the question of whether the PCP thus formulated put wheelchair users at a substantial disadvantage as compared with non-wheelchair users, LJs Underhill and Arden disagreed with LJ Lewison's analysis, but this was not material to the outcome of the appeal.)

Reasonable adjustment

P contended that FG had not done enough, and that compelling non-wheelchair users occupying the wheelchair space to make way for a wheelchair user was a reasonable adjustment FG was obliged, and had failed, to make.

Disagreeing with Recorder Isaacs, the CA held that requiring such an adjustment was a step too far. In so finding, it was influenced by a number of considerations, including that:

- the Public Service Vehicles (Conduct of Drivers, Inspectors, Conductors and Passengers) Regulations 2000 (Conduct Regulations) provide only that the wheelchair user has priority entitlement to use of a wheelchair space where this is unoccupied. If anyone is already using the space and cannot reasonably move

to another part of the bus (e.g. because of crowding, or having heavy baggage), then the space is 'occupied' and the wheelchair user does not have priority;

- the need to balance the interests of passengers who use wheelchairs with those who do not is emphasised in the guidance accompanying the regulations;
- the EHRC Code of Practice (which courts must take into account) includes among the factors to be considered in deciding whether a particular adjustment is reasonable such things as whether it would be effective in removing the disadvantage, disruption to others if the adjustment is made, and practicability;
- the adjustment of automatically requiring non-wheelchair users to vacate the space in all circumstances would not be effective given the lack of any legal authority giving bus drivers carte blanche to remove passengers; the power under the Conduct Regulations allowing drivers to remove passengers who 'unreasonably impede' others did not provide the necessary leverage given the considerable scope for disagreement as to the reasonableness of a passenger's reasons for refusing to vacate the space;
- given that parliament has not chosen to give bus drivers effective powers to compel people to vacate wheelchair spaces, an absolute requirement for non-wheelchair users to make the wheelchair space available for a wheelchair user, as contended for by P, would be practically unworkable;
- even if an element of discretion were allowed to drivers as to when it was necessary to evict non-wheelchair users from the space and when not, this would place them in the impossible position of having to adjudicate between the competing demands of the wheelchair user and of others (let's say a woman with a sick child in a buggy needing to get to an urgent hospital appointment, or a blind person whose dog was in the wheelchair space, or the possibly several non-disabled people that might be standing in the wheelchair space when the bus is full, and so on); drivers are not trained or equipped to deal with these kinds of dilemma;
- bus companies should not be made liable for the selfish behaviour of some passengers when they are not realistically in a position to prevent it.

The CA did, however, make it clear that simply asking a passenger to move once was unlikely to be sufficient to discharge the duty to make reasonable adjustments, and that drivers faced with recalcitrant passengers should be ready to apply a degree of moral pressure in urging them to make way.

Comment

It is easy to see why this ruling is a disappointment to those campaigning for the rights of those with disabilities. Many disabled people rely on the availability of designated assistance in order to facilitate independent (or in some cases, any) travel. Crucially, this is a vulnerability which non-disabled people do not share. There is realistic concern, therefore, that in deciding that FG need only request that its wheelchair spaces be made available for wheelchair users in order to comply with its legal duties, the court has provided comfort to transport companies, and service providers more generally, seeking to do less rather than more for their disabled users.

P is seeking permission to appeal and, if granted, the writer understands that he will be supported by the EHRC to take his case to the SC. Whatever the outcome, a key element in achieving progress may involve pressing for change in the design of the buses themselves so that there is room for all to get on board.

Emma Satyamurti
Employment and discrimination solicitor, Leigh Day
esatyamurti@leighday.co.uk

Application of EA to disability discrimination in provision of services abroad

Thomas Cook Tour Operations Ltd v Campbell (No.1) [2014] EWCA Civ 1668, October 30, 2014; *Campbell v Thomas Cook Tour Operations Ltd* (No.2) Sheffield County Court, Case No.2 YK 74402 [2014] EqLR 655, September 29, 2014

The Equality Act 2010 (EA) contains no territorial limitation, either express or implied, unlike some of its predecessors, such as the Disability Discrimination Act 1995. Whilst there has been considerable case law on territorial limitations in the employment sphere, there has been none until the Campbell cases regarding non-employment. *Campbell* (No. 1) concerns the exclusion from the EA of certain matters in respect of air transport when a disability claim is concerned. *Campbell* (No. 2) concerns the application of the EA to matters outside the UK. Both, unusually, involved the same claimant, the same defendant and the same country – but were a year apart.

Thomas Cook Tour Operations Ltd v Campbell (No.1)

Background

Janice Campbell (C) has a mobility impairment making it difficult for her to walk. She usually uses a wheelchair but can walk short distances. She had booked a package holiday in Tunisia with Thomas Cook (TC) which was interrupted by civil disturbances in that country necessitating her repatriation. Her complaint concerned her treatment during her evacuation in January 2011. The Circuit Judge held that TC staff failed to provide C with reasonable adjustments in the form of a chair or holding her place in the queue at Monastir airport in Tunisia. Damages of £7,500 were awarded. [See Briefing 682]

Court of Appeal

TC appealed on the basis that the claim was excluded by virtue of Schedule 3 to the EA. The central question in the appeal was whether the provisions of paragraph 33(2) of Schedule 3 EA are sufficient to exclude the application of the duties contained in s29 EA to the provision of airport services at an airport outside the EU.

Paragraph 33(2) provides that the anti-discrimination provisions in s29 EA do not apply to anything governed by regulation (EC) No 1107/2006 of the European Parliament and of the Council of July 5, 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air (the Regulation).

The county court judge had held that the discrimination concerned in this case relating to airport services at non-EU airports was outside the provisions of the Regulation and therefore not 'governed by' the Regulation. Accordingly, s29 EA applied to the alleged discrimination and TC was liable for it.

TC argued that the judge was wrong because the Regulation provides a high level of disability protection for air travellers across EU Member States. Just because the particular circumstances of this case were not covered by the specific provisions of the Regulation, since they related to a non-EU airport, did not mean that the circumstances generally were not *'governed by the Regulation'*. If this were not the case, it was said that the efficacy of EU law would be lost.

The CA dismissed the appeal, holding that the Regulation *'cannot on any sensible analysis be said to be a complete code that relates to disability provision in respect of airport services provided outside the EU. In this case, there is nothing in the Regulation that provides that rights established by it are to exclude all rights in respect of travel at third country airports, rather the reverse.'* [para 23]

Further, that *'s29 does not apply to anything governed by the Regulation. Since the provision of airport and check-in services in third countries is not governed by the Regulation, paragraph 33(2) does not exclude the application of s29 to the facts of this case.'* [para 25]

Campbell v Thomas Cook Tour Operations Ltd (No.2)

Facts

In this case, C booked a TC package holiday for 2012 in Tunisia which included accommodation at the Tej Marhaba hotel. The hotel had an indoor swimming pool which was important to C because of her disability.

Shortly before the holiday, TC notified C by letter

that the swimming pool at the hotel would not be available, but that she could use a pool at a nearby hotel instead. C visited the travel agents to have a look at where the other hotel was and she was satisfied that she would be able to use that pool as it was within a distance she was able to walk from the Tej Marhaba hotel.

Once C was on her holiday, TC did not provide use of the alternative pool at the nearby hotel. Instead, TC offered C use of a different pool at a third hotel which was further away and accessible by taxi. However, C has difficulty using standard taxis and needed to use taxis equipped for disabled access. TC refused to make alternative taxi arrangements for her. C was unable to make use of swimming pool facilities for the duration of her holiday.

County Court

C issued a claim for damages against TC for breach of contract and a claim that TC had failed to make reasonable adjustments under the EA. The claim was allocated to the fast track and tried before a district judge who held that, subject to the county court having jurisdiction to hear the claim, TC had discriminated against C by failing to make reasonable adjustments. He assessed damages in the sum of £3,500 However, he ruled that, as a matter of law, the relevant provisions of the EA did not apply because the discrimination had taken place outside the territorial ambit of the Act. Leave to appeal to the circuit judge was granted. C appealed against the decision.

Circuit Court

Circuit Judge Robinson upheld the appeal.

He held that there is no academic commentary which objects to the relevant duty under the EA applying to acts done outside Great Britain. The Code of Practice supports wide application.

The scope of the duty (under s20 of the EA) is simply one to make reasonable adjustments, and there is no breach of duty if relevant adjustments cannot reasonably be made.

In order for the duty to be applicable in any particular case, it is not enough simply to show that both service provider and disabled person are based in Great Britain. In common with the employment cases, a greater connection with Great Britain must be shown.

In this case, the discrimination arose out of the failure to make reasonable adjustments to enable C to enjoy a facility which TC had contractually agreed to supply. Furthermore, the evidence accepted by the judge showed that TC had agreed to make the indoor swimming facilities of the nearby hotel available for her. As such, TC had assumed a contractual obligation to provide that service for a person it knew to be disabled. This obligation was assumed as an alternative to providing the facilities which, it had been discovered, would not now be available at TC's accommodation hotel.

In addition, TC had employees based in the location where C took her holiday

On a proper interpretation of the relevant provisions of the EA, and in the circumstances of this case, the court was satisfied that there is sufficient connection with Great Britain to rule, as a matter of law that TC was under a duty to make reasonable adjustments. The duty was to make reasonable adjustments to enable C to enjoy the alternative indoor swimming facilities in the nearby hotel, which TC had promised to her, or alternatively to make reasonable adjustments to enable her to enjoy alternative indoor swimming facilities elsewhere.

The following factors were held to be of significance in determining that the duty to make reasonable adjustments applied in this case:

1. The discrimination related to a failure to provide alternative swimming facilities which had been offered to a person known to be disabled once it was realised that the accommodating hotel could not provide such facilities during C's stay;
2. TC employed staff located in Tunisia who were able to discharge the duty.

Conclusion

Disabled people may experience considerable difficulty when holidaying. These cases illustrate that there is scope for bringing successful claims outside the UK despite the limitations of the *Stott* decision (see Briefing 712) in relation to what happens on board an aircraft. It is unfortunate that there is a patchwork of legislative provision – the Regulations, the EA – and it is important to establish which provision governs the situation before embarking on a claim.

Catherine Casserley
Cloisters

Complex interlocking contracts excludes challenge to act of discrimination

Halawi v WDFG UK Ltd t/a World Duty Free [2014] EWCA Civ 1387, October 28, 2014

Facts

Mrs Halawi (H) worked as a beauty consultant in a duty free outlet that was 'airside' i.e. beyond the security gates, at Heathrow Terminal 3.

The contractual background to this work was somewhat complex. But, at the relevant time, H was engaged, through a personal service company, by Caroline South Associates (CSA). CSA, in turn, provided management services to the cosmetic companies whose products were sold – who, in their turn, leased space from World Duty Free (WDF), who ran the retail outlets.

Because she worked airside, where there were security considerations, H required two authorisations: one from WDF and one from the British Airports Authority.

H's authorisation was withdrawn by WDF. She regarded this as a dismissal and an act of race/religious discrimination, leading to her claim.

Employment Tribunal

H's claim failed because the ET concluded that she was not employed by WDF. Although the parties gave differing accounts of the amount of day-to-day involvement and control by WDF, the tribunal concluded that they did no more than control the premises. If anyone provided work, they found, it was CSA.

Employment Appeal Tribunal

The ET's decision was upheld by the EAT as having properly considered the law and facts. However the judge confessed to an 'uneasy feeling' that the setup meant that someone in H's position could be discriminated against by WDF, yet would have no claim against them because they were not an employer.

Court of Appeal

At the CA a number of arguments were run, but rejected by the court.

The CA concluded that some form of economic dependence or subordination was normally required for there to be an employment relationship. In some circumstances this approach would need to be 'fine-tuned', such as in relation to partners in an LLP (see *Bates van Winkelhof v Clyde & Co LLP* [2014] 1 WLR 2047). But this was not a situation where such adjustments to the basic test were necessary or appropriate. And H did not have the necessary relationship of subordination with WDF.

The CA also found that, for any form of employment to exist, there must be some obligation on the worker to do work personally. The ET had found that this did not exist in this case, and that decision could not be challenged on appeal.

Conclusion

From a legal point of view, the CA's decision is difficult to fault. It applies a conventional legal analysis to a case where the claimant had primarily lost on the facts before the tribunal.

Many of us will, however, share the EAT's unease that complex systems of interlocking contracts between commercial enterprises can, too easily, create situations where discrimination cannot be effectively challenged.

If Mrs Halawi was correct to think that WDF's decision to deny her airside authorisation was an act of discrimination, should they really have escaped liability?

Michael Reed
Free Representation Unit

Indirect discrimination against Gypsies and Travellers and breach of PSED

Moore and Coates v The Secretary of State for Communities and Local Government and London Borough of Bromley and Dartford Borough Council and Equality and Human Rights Commission [2015] EWHC 44 (Admin), January 21, 2015

Facts

Charmaine Moore (CM) and Sarah Coates (SC) are Romani Gypsies who were seeking planning permission for single pitch sites for themselves and their families – in CM's case from London Borough of Bromley and in SC's case from Dartford Borough Council.

CM had previously been refused planning permission by a planning inspector but had had that decision quashed by the High Court – a decision upheld by the CA. Following the CA's quashing of the planning inspector's decision, CM's case was returned to another planning inspector.

SC had also applied for planning permission which had been refused by the local planning authority. She had also appealed to a planning inspector. The Secretary of State for Communities and Local Government (SSCLG) decided to recover their appeal cases to make the decisions himself.

Appeal recovery procedure

The Town and Country Planning Act 1990 Schedule 6 paragraph 3(1) states that:

> *The Secretary of State may, if he thinks fit, direct that an appeal which would otherwise fall to be determined by an appointed person shall instead be determined by the Secretary of State.*

The previous policy for recovering appeals was amended, with regard to Gypsy and Traveller planning appeals to the planning inspector, by a written ministerial statement of July 1, 2013 (WMS1) which stated that in the case of Traveller sites, the SSCLG was *'revising the recovery criteria issued on 30 June 2008 and will consider for recovery appeals involving Traveller Sites in the green belt'.*

A further WMS was issued on January 17, 2014 (WMS2) and this stated that:

> *The Secretary of State remains concerned about the extent to which planning appeal decisions are meeting the Government's clear policy intentions, particularly as to whether sufficient weight is being given to the importance of green belt protection. Therefore, he intends to continue to consider for recovery appeals involving traveller sites in the green belt.*

CM's and SC's appeals were recovered under these WMSs so that the inspector who was appointed to determine the appeals then became the reporting inspector and the decision rested with the SSCLG.

Judicial review

CM and SC made JR applications to challenge the decision of the SSCLG to recover their planning appeals. The Equality and Human Rights Commission intervened in these cases.

S19 Equality Act 2010 (EA) deals with indirect discrimination and s149 with the public sector equality duty (PSED). In terms of both s19 and s149, the relevant protected characteristic in the circumstances of this case was 'race'. Romani Gypsies are recognised as 'ethnic groups' under the EA.

The two cases were heard together and judgment was delivered by Mr Justice Gilbart on January 21, 2015. Gilbart J quashed the SSCLG's decisions to recover these two appeals. In reaching his conclusion, he stated:

> *117… It is entirely clear that the effect of the policy or practice to recover all appeals relating to Travellers' pitches put ethnic Gypsies and Travellers at a disadvantage, namely that their appeals would take far longer to determine …*
>
> *126. I accept that as written, WMS 1 did not seek to recover all appeals in the category, but only to consider them for recovery…. I do not therefore consider that WMS 1 is itself discriminatory within the terms of s19(1). But the application of WMS 1 was in fact a practice whereby all appeals were recovered, despite the clear terms of WMS 1 that it did not imply that. In my judgment, the practice therefore adopted after its publication was discriminatory within the meaning of s19.*

134. The fact is that this [is] in truth not a case whether the regard the Secretary of State and his Ministers had was 'due regard'. The fact is that, on the evidence filed by the SSCLG, they had no regard at all… The Court is unable to assume that due regard was had simply because Counsel for the SSCLG asserts that it was, however engagingly…

180. What was unlawful was the application of the policies in WMS 1 and WMS 2 in such a way as to recover all traveller's pitch appeals, which, due to the way the practice was approached, amounts to a breach of ss19 and 149 of the 2010 Act. I have also found that the practice of recovering all appeals, or an arbitrary percentage thereof, was and is unlawful. The effect of the approach of the Secretary of State was also to breach Article 6 so far as Mrs Moore and Ms Coates are concerned.

The SSCLG had argued that there was no indirect discrimination because ethnic Gypsies and Travellers were treated in the same way as non-ethnic Gypsies and Travellers, which were, in their view, the proper comparator group, and that the policy or practice was in pursuit of a legitimate aim and was proportionate.

Gilbart J held that the decision to recover their appeals indirectly discriminated against Gypsies and Travellers as the effect of the policy or practice to recover all appeals relating to Travellers' pitches put both ethnic Gypsies and Travellers at a disadvantage because their appeals would take far longer to be determined.

The judge also held that the SSCLG had breached his PSED and the policy or practice delayed the decision-making process in breach of article 6 of the ECHR.

Implications for practitioners

The implications of this judgment are not just restricted to these cases. The SSCLG has recovered and determined many other cases since WMS 1 was issued, and there are many which have been recovered and are waiting to be determined.

There are approximately 100 Gypsy and Traveller cases which have been recovered by the SSCLG under the WMSs. Gilbart J indicated that a review of these cases should be carried out and, if it appeared that other appeals were recovered because they were cases of Traveller sites in the green belt and not because of their merits, then the legality of those particular recoveries could be called into question.

Practitioners should be writing to the SSCLG regarding such cases and asking for a review to be carried out and for the decision to recover the appeals to be quashed. If a decision has not yet been issued by the SSCLG, then practitioners need to make submissions relying on this case and asking for the decision to recover to be withdrawn and for the jurisdiction to be passed back to the planning inspector.

Gypsies and Travellers are a severely disadvantaged ethnic group when compared with the general population in terms of accommodation, health, life expectancy, infant mortality and education. The PSED is vital in relation to such matters involving Gypsies and Travellers. The purpose of the PSED is to integrate considerations of equality and good relations into the day-to-day decision making of public authorities. Failure to have due regard can contribute to greater inequality and poor outcomes and, therefore, there is a need for special efforts to be made to support Gypsies and Travellers in their fight for equality.

Parminder Sanghera
Community Law Partnership
parminder@communitylawpartnership.co.uk

Effects of anxiety and depression were not substantial or long-term

Saad v University Hospital Southampton NHS Trust and Health Education England
[2014] UKEAT/0184/14/DM, December 4, 2014

Summary

The appellant, a surgeon, challenged the ET's decision that he was not disabled for the purposes of the Equality Act 2010 (EA) at the time his employment with University Hospital Southampton NHS Trust (UHS) ended. He suffered with depression and general anxiety disorder. He argued in the EAT that the ET had made an error of law in failing to consider the effect of his condition on his ability to work. The EAT did not agree.

Facts

Mr R A Saad (RS) was employed by UHS as a specialist registrar in cardiothoracic surgery under a series of fixed term contracts starting in 2003. The last of the contracts ended on September 20, 2012 and was not renewed. ('Cardiothoracic' concerns the organs in the chest, including the heart and lungs).

In July 2011 RS made a number of grievances and was then signed off from work by his general practitioner because of pain and insomnia. He was subsequently diagnosed with reactive depression and anxiety and, apart from a short period in or around February 2012, remained on sick leave until the end of his employment in September 2012.

UHS effectively dismissed RS by not renewing his fixed term contract when it expired. RS contended that the real reason for his dismissal was that he was disabled and accordingly that UHS had discriminated against him because of disability in breach of the EA.

Employment Tribunal

The first question for the ET to decide was whether RS was disabled within the meaning of s6 and sch1 EA, considering the four questions in *Goodwin v The Patent Office* [1999] ICR 302:

1. *Did the claimant have a mental or physical impairment?*
2. *Does the impairment affect the claimant's ability to carry out normal day-to-day activities?*
3. *Is the effect substantial?*
4. *Is the effect long-term?*

The tribunal was required by the case law to consider the effect of the impairment on RS's ability to cope in his particular job. In this case the dispute focused on: communication with colleagues, ability to access the workplace and concentration.

The ET concluded, mainly with reference to RS's own evidence (and not the medical evidence of two experts) that he had suffered from a mental impairment in the form of anxiety and depression during the relevant period of September 2011 to September 2012. However, it was not satisfied that the effect of the impairment was substantial or long-term under questions 3 and 4 above. Accordingly RS was not disabled for the purposes of the EA and his claim had to fail.

Employment Appeal Tribunal

The EAT identified two main issues arising from the appeal.

Effect on work place related activities

The first issue was: did the ET misdirect itself in law by failing to consider the effect of the impairment on RS's ability to work?

RS argued that the effects of lack of concentration, inability to communicate with colleagues and access to the work place had not been properly considered, and had they been, they would have tipped the balance towards a finding that they were *'substantial and long-term'*. RS said that the ET had disregarded the work-specific effects, preferring instead to observe that similar effects were not apparent in contexts unrelated to work, for example RS could use his email and telephone outside of work on non-work related matters.

RS also argued that the ET had considered RS's aversion to certain colleagues but had not resolved for itself whether the inability to communicate with colleagues was a matter of choice or an effect of the impairment. Again, this issue needed to have been resolved properly.

Finally, RS argued that insufficient weight had been given to the tribunal's finding that there was a problem with RS's concentration and the finding in this regard

pointed towards the impairment having a substantial and long-term effect.

These points were addressed principally on the evidence and in a manner consistent with UHS's submission that the judgment should be read as a whole. The EAT found that the evidence presented in relation to the effects of the impairment was inconsistent and this was reflected in the judgment. The ET had reasonably based its judgment on evidence that indicated that the effects of the impairment were not substantial or long-term. The EAT held that the ET had been *'entitled to reach that conclusion on the evidence before it'* (paragraph 29).

The EAT observed that RS's aversion to his colleagues was probably a contributory factor to his illness but not a symptom of it. RS had informed his GP in February 2012 that he felt well enough to return to work but chose not to because he did not want to work with his former colleagues. The EAT also noted that there was evidence that RS's concentration was adequate to enable him to engage in a range of activities, including exercise, holidays and shopping, and these facts contradicted his claims.

Counsel for RS made reference to a number of European cases to argue that the ET should take a wider approach to interpreting '*normal day-to-day activities*' to give effect to the purpose of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation; he submitted that reference to a disability should be understood as a:

> *limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers (see paragraph 76 of the judgment of the CJEU in Z v A Government Department [2013] IRLR 563), (paragraph 10, EAT judgment)*

The EAT did not see the need to decide this point, which was linked to the contention that RS was unable to read medical text books because of his impairment. It found that RS had not claimed that his inability to read medical textbooks was a hindrance in his professional life; rather, this effect was relied on as evidence of his inability to concentrate.

The EAT held that the ET had been entitled to find on the evidence that any effect on RS's concentration was not substantial.

Meaning of 'long-term'

The second issue was: did the ET misdirect itself in law as to the meaning of 'long-term' in s6 EA.

RS argued that the ET had failed to appreciate that the effects of an impairment may still be long-term, even if they are fluctuating. The ET had observed among other things that RS's impairment appeared to have shown *'substantial improvement by November 2011 which, with some ups and downs, was maintained to August 2012'* (paragraph 41, ET judgment).

The EAT agreed that an effect could be long-term even though it fluctuated. However it did not agree that the ET had misdirected itself. It observed that the ET had found that the impairment had had an effect on RS's concentration but then determined that the effect was not *a substantial adverse effect* for the purposes of s6. Therefore the ET did not consider the requirement '*that any substantial effects had to be long-term*', or misdirect itself as to the meaning of s6. The appeal was therefore dismissed on both grounds.

Implications for practitioners

On this occasion the EAT was not inclined to consider RS's question as to the scope of *'normal day-to-day activities'* and whether, contrary to *Chief Constable of Dumfries & Galloway* [2009] IRLR 612 [see Briefing 534] and paragraphs D8 and D10 of the current guidance to the EA, specialist skills such as those particular to certain kinds of highly skilled or specialised work, should be treated as part of day-to-day activities for the purposes of s6. Practitioners bringing similar cases should be mindful of this question, and where the opportunity arises they can challenge the scope of *'day-to-day activities'* in a similar way.

The ET noted in this case that the evidence taken together with the pleaded case did not present a coherent picture of RS's condition. It would be wise in these kinds of cases, which concern a mental health problem with fluctuating and complex symptoms, to review as much of the medical evidence as possible before pleading the detail of the claimant's condition and symptoms. This may, as far as possible, avoid problems with evidence that can lead to more important legal questions being disregarded.

Nick Fry
Bindmans LLP
n.fry@bindmans.com

Caste discrimination

Chandhok and another v Tirkey [2014] UKEAT/0190/14/KN, December 19, 2014

Introduction

At the time of writing, the Equality Act 2010 (EA) does not expressly prohibit caste discrimination.[1] Caste does not feature amongst the 'protected characteristics' in s4 EA. However, the definition of race in s9(1) EA is non-exhaustive and includes *'colour; nationality; and ethnic or national origins.'* There has been some debate as to whether caste falls within this definition.

Case law suggests that 'ethnic origin' under s9(1) should be given a wide meaning. For example, in *Mandla v Dowell Lee* [1983] ICR 385 (a case decided under the Race Relations Act 1976 (RRA)) the House of Lords held that the term 'ethnic' is wider in meaning than strictly 'racial' or 'biological'. Further, in *R(E) v Governing Body of JFS* [2010] 2 AC 548 (another case decided under the RRA) [see Briefing 555], the Supreme Court held that 'origin' encompasses a person's descent and lineage.

The Enterprise and Regulatory Reform Act 2013 (ERRA) amended s9(5) EA to state that the government *'**must** by order amend [s9 EA] so as to provide for caste to be an aspect of race'* (emphasis added).

On July 29, 2013, the Government Equalities Office announced that there would be a consultation in relation to the introduction of caste discrimination legislation. It seems likely that a draft order will be introduced around the summer of 2015.

The key issue in *Chandhok* was whether a claim for caste discrimination should have been allowed to proceed despite the government not having amended the EA so as to expressly prohibit caste discrimination.

Facts

Ms Tirkey (T) worked for Mr and Mrs Chandhok (C) as a domestic worker between 2008 and 2012, initially in India and later in the UK. Her caste (traditionally considered inherited and immutable) was Adivasi. According to Minority Rights Group International's World Directory of Minorities and Indigenous Peoples, Adivasis *'are at the lowest point of almost every socio-economic indicator'.*

T brought various claims in the ET asserting, amongst other things, that C had treated her badly and in a demeaning way, and (by amendment) that this was in part because of her low status which was affected by considerations of caste.

Employment Tribunal

C applied to strike out the amendment on the ground that caste does not fall within the definition of race in s9 EA, and that the enactment of s9(5) EA (both initially and as subsequently amended by the ERRA) demonstrated that parliament recognised it was excluded from the definition in s9(1) EA.

The ET rejected C's application to strike out the amendment. It held, amongst other things, that:

> *There is no comprehensive and exhaustive definition of race in [s9(1) EA]. It "includes" ethnic origin. This in itself is a wide concept, as is clear from the authorities. It can therefore be argued that "caste" is already part of the protected characteristic of race, purely by reference to [s9 EA]. Further, the domestic case law – in particular the cases of Mandla and the Jewish Free School case – provide authority for the proposition that discrimination by descent is unlawful…*

Employment Appeal Tribunal

C appealed to the EAT on the following grounds:

1. Caste was not included as a protected characteristic within the definition of race in s9(1) EA. It was deliberately omitted, as shown by s9(5) EA as originally enacted and s97 ERRA which amended s9(5) EA (see above). S97(5) ERRA provided for the government to review the effect of the amended s9(5) EA and any orders made under it at a later date, whilst s97(7) ERRA gave the government the power to repeal or amend section 9(5) EA.
2. *Mandla v Dowell Lee* and *R(E) v Governing Body of JFS* were distinguishable from T's case, since the judgments adopted a purposive interpretation to the meaning of 'ethnic origin' under the RRA. That legislation had no specific provision for the racial groups in question (Sikhs and Jews respectively) whereas caste had been singled out for specific statutory provision by s9(5) EA, rendering those authorities inapplicable.

1. See Briefing 673, July 2013 *Caste discrimination and prejudice has no place in 21st century Britain*, Meena Varma

3. Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the Racial Equality Directive)(to which the EA gives effect) was inapplicable because a directive could only have direct vertical effect (not horizontal effect) and the present case was brought between individuals and not against the state. Furthermore, the International Convention on the Elimination of All Forms of Racial Discrimination (to which the Racial Equality Directive gives effect) included race, colour, national and ethnic origin as well as descent within its definition of race. Caste discrimination fell within the scope of descent, as opposed to race, colour, national and ethnic origin. Neither descent, nor caste as an aspect of descent, could be conflated with the latter characteristics. However, the Racial Equality Directive made no reference to either descent or caste based discrimination.
4. The ET erred in holding that caste could come within the scope of discrimination on the grounds of religion and belief.

Langstaff P (sitting alone) dismissed the appeal and allowed T's claim to proceed to a full hearing in the ET.

According to him, there were two central questions: (i) whether discrimination law under the RRA would have provided a remedy on the facts of T's case, as pleaded; and (ii) if so, whether the fact that the EA (both as originally enacted and as amended by the ERRA) envisages the addition of caste to s9(1) means that discrimination claims based on caste are precluded, such that the law no longer provides a remedy for them.

In answer to the first question, he suggested that the RRA would have provided a remedy on the facts of T's case. Contrary to C's submissions, he considered that *Mandla* and *JFS* remained *'fully applicable'* and held that the effect of the principles expressed in those authorities '*give a wide and flexible scope to the meaning of "ethnic origins".'* He stated that:

> *Given the stress to be placed on the word "origins"… descent is, as JFS shows, clearly to be included within it, at least where it is linked to concepts of ethnicity.*

Further, he referred to *'the close link between descent and caste'.*

In answer to the second question, Langstaff P held that C's first three grounds of appeal depended on the effect of s9(5) EA (both as originally enacted and as amended by the ERRA) upon the interpretation of s9(1). He stated that *'this places a weight upon [s9(5)] which it cannot bear'* and drew a distinction *'between the intention of Parliament when it enacts legislation, and its subsequently displayed understanding of the effect of the legislation'.* He held that once statute is enacted it has the meaning that courts assign to it, applying the tools at their disposal.

Langstaff P held that the answer to the question of whether caste exists as a separate strand in the definition of race is not determinative. If the answer is 'no', this does not prevent the words in s9(1) from bearing their usual interpretation. He stated that:

> *Since "ethnic origins" is a wide and flexible phrase (Mandla) and covers questions of descent (JFS) at least some of those situations which would fall within an acceptable definition of caste would fall within it.*

He went on to hold that:

> *… there may be factual circumstances in which the application of the label "caste" is appropriate, many of which are capable – depending on their facts – of falling within the scope of [s9(1) EA], particularly coming within "ethnic origins", as portraying a group with characteristics determined in part by descent, and of a sufficient quality be described as "ethnic".*

Lastly, he noted that s9(5) EA contains a power to supplement or clarify s9(1) EA, not to restrict it, and that the ERRA leaves open the possibility that there may yet be no formal introduction of caste as a separate, and separately defined, species of the genus which is race.

Langstaff P did not address the fourth ground of appeal directly.

Comment

It is useful for practitioners that there is now an EAT authority which suggests that, depending on the specific facts of a case, caste can come within the definition of race in s9(1) EA. It also resolves the conflict between this case's first instance decision and the ET's decision in *Naveed v Aslam* (ET/1603968/2011). In *Naveed*, the ET rejected the claimant's caste discrimination claim partly, on the basis that the government has not yet exercised the power in s9(5) EA to provide expressly for caste to be an aspect of race.

Caste is an inherently complex and often multifactorial concept, and it will be interesting to see how the law in this area develops, particularly when the government exercises its power under s9(5) EA. However, it seems unlikely that this will be before the General Election in May 2015.

Peter Nicholson
Stewarts Law LLP

Complexity of determining employment status in practice

Windle v Secretary of State for Justice UKEAT/0339/13 [2014] EqLR 662; September 16, 2014

Facts

Dr Windle and Mr Arada (the claimants) worked as HM Courts and Tribunal Service (HMCTS) interpreters. They argued that they were employees in two senses. First, that they worked under contracts of employment for the purposes of unfair dismissal. Second, they were employees within the wider definition applicable to their race discrimination claims.

Employment Tribunal

The ET accepted that, during each assignment, the relationship between the claimants and HMCTS was governed by a contract to personally do work. Indeed, the contracts specifically prohibited them from sending a substitute.

However, between engagements there was no mutuality of obligation. They were not required to accept further engagements; nor was HMCTS obliged to offer any. This, the tribunal concluded, precluded a contract of employment that persisted between assignments.

In relation to employment status for their discrimination claims, the ET concluded that the claimants were not in a 'subordinate relationship' with HMCTS and therefore not employees under the Equality Act 2010 (EA). Furthermore, they concluded that the lack of mutuality of obligation between assignments indicated that there was unlikely to be a contract.

Employment Appeal Tribunal

The EAT concluded that the ET had erred by considering the lack of mutuality of obligation between assignments to be relevant to the question of whether there was a contract to personally do work.

Mutuality of obligation between assignments was relevant to employment status. It might shed light on whether an individual was in business for themselves. If, for example, an individual worked for many different clients, this would tend to suggest they were an independent provider of services to the world at large and therefore not an employee in any sense. But it was not relevant to deciding whether someone was working under a contract for personal service.

Comment

Although this appeal does not shed a great new light on the law employment status, it is likely to be of great interest to practitioners because of the parties.

It is also a reminder of the complexities involved in employment status issues in practice. Here, the ET fell into error by failing to keep clearly separate the legal tests applying to different types of employment status. In hindsight, that may seem clear — but it is all too easy for considerations to become blurred during a hearing.

Michael Reed
Free Representation Unit

Notes and news

Outcome of UNISON fee challenge

Employment tribunal practitioners will be aware that, on December 17, 2014, the High Court rejected Unison's challenge to the employment tribunal fees.

The DLA shares Unison's view that the fees represent an unjustifiable barrier to individuals accessing their employment rights, including equality rights. They also have a disproportionate impact on those from vulnerable groups, including women. We hope, regardless of the outcome of the ongoing appeal to the CA, that the government will recognise the harm being done by this policy and act urgently to reverse it.

Counter-Terrorism and Security Act 2015

The Counter-Terrorism and Security Act 2015, rushed through both houses of parliament with no pre-legislative scrutiny, received Royal Assent on February 12, 2015. Parts 1 and 2 of the Act apply immigration policing measures to the policing of thoughts, intentions, opinions and attitudes of British and foreign citizens, including travel bans, temporary exile and (re-introduced) internal exile, providing limited judicial safeguards. These measures will operate in the present climate in which the Muslim community is suspect, and thus the brunt of this new national security policing will be met by the Muslim community.[1]

Totally new and even or more likely to impact disproportionately on Muslim men, women and children as well as potentially permitting direct political involvement in the operation of local public services, are the provisions within Part 5. This Part, headed *'Risk of being drawn into terrorism'* – imposes anti-terrorism obligations onto the wide range of bodies which provide services to the public. The list of 'specified authorities' in Schedule 6 includes all local authorities, all providers of education from early childhood, nursery, maintained and private schools, pupil referral units, childcare providers, colleges and universities, NHS trusts, police, prisons and providers of probation services. The duty on all specified authorities (s26) is *'to have due regard to the need to prevent people from being drawn into terrorism'.* The Home Secretary may issue guidance regarding the exercise of this duty, and specified authorities must have regard to the guidance. Existing monitoring and inspection bodies will be expected to monitor compliance with this duty. Unlike the equality duty (s149 EA), if the Home Secretary is satisfied that a specified authority has failed to discharge its duty under s26, she may give directions to that authority for the purpose of enforcing the performance of that duty and can apply for a mandatory order to enforce her directions. The Act does not define or restrict how far such directions could involve direct government involvement in the operation of a body subject to this duty.

Draft guidance,[2] which was open for consultation between December 17, 2014 and January 30, 2015, illustrates for each type of function or type of authority what actions will be required to demonstrate compliance with the duty (referred to as the '*Prevent* duty'). Common to all specified authorities is the need to adopt counter-terrorism policies and procedures and to train all staff so they are able to identify individuals (children as well as adults) *'at risk of being drawn into terrorism'* and to 'challenge extremist ideas'. Authorities should ensure that their premises or resources, including IT equipment, are not used to disseminate or access extremist material or views. For universities and colleges the draft guidance prescribes policies and procedures for the management of events on their premises, including period of notice, advance notice of the content and a system for assessing whether an event should or should not be permitted to proceed.

The second half of Part 5 sets out the procedure for offering support to individuals for the purpose of reducing their vulnerability to being drawn into terrorism. This involves referral of an individual by the police to a panel established by a local authority but only if there are reasonable grounds to believe that the individual is vulnerable to being drawn into terrorism. The role of the panel is to assess the extent to which individuals referred by the police are vulnerable to being drawn into terrorism, to prepare a support plan, and, with the consent of the individual (or their parent if they are under 18), to arrange for the support to be provided.

At the date of writing, none of the main provisions of the Act are yet in force. It is likely that the Home Secretary's guidance will be issued to coincide with the commencement of Part 5. It will be important to note whether that guidance recognises far more than the draft version the risk of conflict with the public sector equality duty that could arise, especially as parliament has provided far greater means for enforcement of the '*Prevent* duty'.

1.See Frances Webber, "Farewell Magna Carta: The Counter-Terrorism and Security Bill" http://www.irr.org.uk/news/farewell-magna-carta-the-counter-terrorism-and-security-bill/

2. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/388934/45584_Prevent_duty_guidance-a_consultation_Web_Accessible.pdf

Irish government to introduce 'income source' as new ground of discrimination

The Irish government has announced plans to amend legislation to broaden the definition of discrimination, where housing is concerned, to prevent discrimination against people in receipt of social welfare payments.

Under current Irish equality legislation, landlords are free to refuse accommodation to tenants who are in receipt of rent supplement or other social welfare payments. Minister of State for Justice and Equality, Aodhán Ó Ríordáin announced last month that the government has approved plans to expand the definition of discrimination, where housing is concerned, to include 'income source' alongside the other nine specified grounds of discrimination. Amendments will be made to the Equal Status Acts to prohibit discrimination in relation to residential tenants, or prospective tenants, on the basis that they are assisted with their payments through rent supplement or social welfare payments. It is expected that the changes will cover those in receipt of housing assistance payment, rent supplement, or the person's income coming in whole or in part from social welfare payments. The amendments are due in the current parliamentary term.

Update from the DLA executive committee

The DLA committee meets once a month to discuss the running of the organisation, events and services for members, work with other organisations and contributions to debates and consultations. In February, the committee agreed to respond to the Law Society consultation on the future of the employment tribunals. A pithy response was coordinated by Michael Reed setting out views regarding the handling of discrimination cases. The response can be accessed on the website.

In March, the committee will be meeting with the President of the Employment Tribunals to discuss our observations and concerns and possible improvements in the management of discrimination cases by the ETs from a claimant perspective. A new initiative for active members has been launched (see monthly e-news) aiming to draw on the expertise of the wider DLA membership to support the committee. We are starting to think about our annual conference which is likely to be in the Autumn when a new government is in place. Suggestions for themes and speakers should be sent to Chris Atkinson, the DLA administrator, at info@discriminationlaw.org.uk.

Court deals blow to right of domestic violence survivors to access justice

The Divisional Court has rejected a challenge brought by the Public Law Project on behalf of Rights of Women and supported by the Law Society to the lawfulness of civil legal aid changes introduced by the government in April 2013 by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). The issue in *Rights of Women v the Lord Chancellor and the Secretary of State for Justice* [2015] EWHC 35 (Admin), January 22, 2015 was whether regulations which set out what evidence victims of domestic violence have to provide to get legal aid had unlawfully introduced more restrictive criteria for eligibility than those found in LASPO, and whether they frustrated the statutory purpose, by prescribing the acceptable types of supporting evidence too rigidly and narrowly, thus excluding many women who ought to be eligible for legal aid under LASPO.

Rights of Women argued that this evidence can be extremely difficult for many people to get and in many cases is subject to a 24 month time limit – although perpetrators may remain a life long threat to their victims. They argued that their most recent research shows that about 40% of women affected by violence do not have the required evidence in order to apply for family law legal aid.

In a disappointing judgment, the court dismissed Rights of Women's claim, finding that the Secretary of State for Justice acted within his powers in making the regulations. Rights of Women is applying for permission to appeal the decision.

Hate crime reporting initiatives

Two initiatives have been announced which aim to encourage reporting of hate crime.

The first is the EHRC's 16-month-long project to tackle significant under-reporting of hate crime against lesbian, gay, bisexual and transgender (LGB&T) people in Great Britain. Recent figures in England and Wales show less than 4,500 homophobic and transphobic incidents and crimes reported to police between 2012 and 2013, with just under 750 reports in Scotland. However, the Crime Survey for England and Wales indicate 39,000 homophobic incidents took place in the same period. A major issue in relation to LGB&T hate crimes are that victims are not reporting incidents because they fear the authorities will not take them seriously, but also that people's accounts are not being recorded in the first place

The EHRC is working with LGB&T organisations, the government, criminal justice and other agencies to improve recognition, reporting and prevention of these crimes and its project will seek to develop alternative channels for reporting incidents for people who do not wish to go to the official authorities. Particular attention will be paid to rural communities where reporting is especially low.

The second initiative is that of the Organisation for Security and Cooperation in Europe's Office for Democratic Institutions and Human Rights (ODIHR) which is preparing its annual hate crime reporting data; ODIHR is encouraging civil society to submit information by April 30, 2015.

Every year on 16 November, International Tolerance Day, ODIHR releases its hate crime reporting data which provides an overview of hate crimes and incidents, and of responses by governments and civil society in the 57 OSCE participating states. Information provided by civil society is essential to its reporting as it complements official data submitted by states. The ODIHR defines hate crimes as criminal acts motivated by bias or prejudice towards particular groups of people. To be considered a hate crime, the offence must meet two criteria:

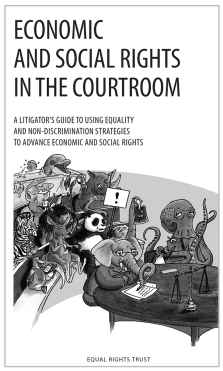
1. the act constitutes an offence under criminal law
2. the act must have been motivated by bias.

If you or your organisation are considering submitting information, the ODIHR provides guidance in its factsheet on how to assess whether an incident was motivated by bias, what information is required, and how the data will be used. The factsheet is available on the OSCE ODIHR hate crime reporting website.

High Court finds apparent bias in NI Health Minister's decision

The High Court in Belfast concluded in January 2015 that Health Minister Edwin Poots' decision to ban gay men from giving blood was *'infected with apparent bias'.* On October 11, 2013, Mr Justice Treacy ruled that Mr Poots' decision to ban gay men from giving blood was irrational. Mr Poots lodged an appeal against the decision. In advance of the appeal hearing, the CA indicated that it was desirable to have the first instance judge's view on the matter of apparent bias; the matter was listed again before Mr Justice Treacy.

In reaching his decision, Mr Justice Treacy considered fresh evidence in support of the claim of apparent bias. This included, among others, comments made by Mr Poots in his capacity as Health Minister to the Northern Ireland Assembly on November 5, 2013 following the delivery of the October judgment. It was submitted that the Minister had interpreted the judgment as part of an assault on Christian principles, ethics and morals and that he considered he would not get a fair hearing on appeal because of what he perceived to be judicial antipathy towards Christian principles; the Minister's previous opposition to gay rights legislation, and a BBC news article in 2001 which reported comments made by Mr Poots in his capacity as the elected representative for Lagan Valley which suggested that he displayed a predetermined view of the issues which later came before him for decision in his capacity as Health Minister.



Economic and social rights in the courtroom

by the Equal Rights Trust

December 2014, 171 pages, free (available at www.equalrightstrust.org)

Much litigation is reliant on re-treading familiar paths: harnessing a mixture of domestic statutes and cases with enough similarity to your own client's circumstances to ensure victory. How welcome then is a publication which is explicit in its aim of encouraging 'strategic litigation', defined as the *'attitude [of] wishful thinking about social change combined with the talent to turn a social problem into a vision of an actionable court case'.*

Economic and social rights (ESRs) are broadly construed, but are defined in the guide as those contained in the International Covenant on Economic, Social and Cultural Rights. These are many, but primarily consist of the right to social security, health, education, and an adequate standard of living. With the language and policies of austerity being embraced throughout the political spectrum, the guide recognises that the courtroom is often not the most hospitable environment for these rights, given that they are so notorious to enforce. The unique purpose of this guide is to propose that ESRs do not have to be enforced directly, but can be realised by using equality and non-discrimination principles. This provides one means of eroding the difference between negative rights (the right not to be discriminated against), usually seen as justiciable, and positive rights (the right to healthcare), which are often seen as 'mere aspirations'.

The guide is split into three parts. First is an introduction to ESRs; second, the case is made for why equality and non-discrimination arguments should be employed when challenging violations of ESRs; and third, taking up the bulk of the guide, the practical guidance. The first two sections are brief, and do no more than set the scene for the practical guidance. They provide a useful context, but I did wonder if they were strictly necessary outside of an academic environment.

The practical guidance is particularly valuable. It acknowledges that the global coverage of the guide means that it cannot be a comprehensive litigation strategy. Instead, it looks at eight distinct areas that should be considered before embarking on litigation: available forum; 'appropriateness'; goal setting; claimants; claims; respondents; remedies; and, proof/evidence. For example, under the first heading there is consideration of regional, national and international approaches. Appropriateness looks at whether a legal approach fits with the broader social and political strategies that are being pursued, and whether there are other, less burdensome options to litigation. It is also this section of the guide that has the most examples of cases brought in previous jurisdictions, as well as the academic references that are found throughout.

The remedies section is particularly enlightening on the remedies that are available in other jurisdictions, including: severance or striking down of a particular piece of legislation; structural injunctions (dictating how government officials must act) and symbolic remedies (including public acts to acknowledge responsibility). While not of any practical use in a jurisdiction that does not allow these forms of remedy, it is a reminder that there are still targets for reform.

The guide is also accompanied by an online compendium of useful cases in which equality and

non-discrimination concepts and approaches have been employed to advance ESRs. This is particularly useful in finding useful precedents in other jurisdictions, and covers various international bodies as well as key cases in Australia, Canada, Colombia, India, Ireland, South Africa and the USA (jurisdictions selected because of the presence of justiciable ESRs or detailed anti-discrimination or equality legislation).

The positive aspect of the guide is that, as it spans many jurisdictions, it is likely to offer a refreshingly new perspective on litigation. The lack of any specific legal systems frees up the authors to consider those features that are truly common to a good piece of strategic litigation. It is also unapologetic about encouraging activists to agitate for social justice, and not to accept the *'unhelpful and inaccurate ripostes'* from governments saying they are doing everything to uphold ESRs. The key conclusion is that equality is at the heart of ESRs, as it is the most historically and socio-economically disadvantaged groups who do not enjoy ESRs.

If I had one quibble about the guide (and I would not want to detract from its laudable aims), it is that it might be said to suffer from an identity crisis. It is neither a practitioner text, nor as practical as it hopes to be (at over 150 pages there will be few advisors who can digest its contents amongst their cramped schedules). However, it does have many useful tips dotted around its pages, and so it is hoped that even those who can only sample its substance will take the time to do so. If nothing else, it provides a useful checklist for what should be considered at the start of every piece of strategic litigation. Most of these principles are so central that perhaps we should be considering all cases as strategic, in the sense that they may have implications about how equality and discrimination law is viewed as a whole.

Michael Newman
Solicitor

Abbreviations

CA	Court of Appeal
CJEU	Court of Justice of the European Union
CLA	Civil Legal Advice
DLA	Discrimination Law Association
EA	Equality Act 2010
EAT	Employment Appeal Tribunal
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EEA	European Economic Area
EHRC	Equality and Human Rights Commission
EHRR	European Human Rights Reports
EqLR	Equality Law Reports
ERRA	Enterprise and Regulatory Reform Act 2013
ESRs	Economic and social rights
ET	Employment Tribunal
EU	European Union
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
HM	Her Majesty
GP	General practitioner
ICR	Industrial Case Reports
IRLR	Industrial Relations Law Report
JR	Judicial review
LAA	Legal Aid Agency
LASPO	Legal Aid, Sentencing and Punishment of Offenders Act 2012
LGB&T	Lesbian, Gay, Bisexual and Transgender
LJ	Lord Justice
LLP	Legal liability partnership
MLA	Member of the Legislative Assembly (of Northern Ireland)
MoJ	Ministry of Justice
NHS	National Health Service
OSCE	Organisation for Security and Co-operation in Europe
ODIHR	Office for Democratic Institutions and Human Rights
P	President (of the EAT)
PCP	Provision, criterion or practice
PSED	Public sector equality duty
QC	Queen's Counsel
RRA	Race Relations Act 1976
SC	Supreme Court
SSCLG	Secretary of State for Communities and Local Government
TFEU	Treaty on the Functioning of the European Union
UKSC	United Kingdom Supreme Court
WLR	Weekly Law Reports

Briefings