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Editorial *Government must act to end racism and racial violence*

The articles in this edition of *Briefings* highlighting the stark reality of race hatred should be read in the context of the government's new integration strategy which totally fails to challenge such racism or the underlying causes of the increasing numbers of racially motivated criminal attacks.

The conviction in January of two men who murdered Stephen Lawrence provides an opportunity to review how police practice has changed following the 1999 Macpherson Report. Jon Burnett of the Institute of Race Relations finds that the last two decades have *'been marked by the development of new forms of racism, intermeshed within the structures of government policies and practices and manifested in popular form'*. Reported incidents of racial violence have increased dramatically and increasingly appear outside the major cities. Dr Burnett criticises the development of policy which characterises the problem as one of mistrust between segregated communities. This view of the problem of racism undermines Macpherson's progressive recommendations and leads to the development of the Department for Communities and Local Government's integration strategy which is wholly inadequate and totally fails to address racial hatred and rising racially motivated crime, institutionalised discrimination, or government policies which have *'underpinned and exacerbated racism'*. Described by Runnymede as *'a dangerous and ill-advised reversion to assimilationist policy'* the strategy is, at best, seriously naive in its approach when it suggests that the consequences of government policies or rising numbers of racial or religious hate crime can be overcome by initiatives such as the 'Big Lunch' – described as a means of *'encouraging people to interact by sitting down and having lunch with their neighbours, helping… to overcome tensions and conflicts'*. Focusing the resolution of national problems on local participation and activism, the strategy fails to address institutional problems highlighted by Dr Burnett in relation to policing, and also existing in other areas such as national immigration policy or responses to the accommodation needs of Gypsies and Travellers.

The decision of the European Court of Human Rights in *VC v Slovakia* brings into focus another government stance which, under the guise of 'reform', seeks to limit the role of the ECtHR in supervising access to justice for British citizens and making public decision-makers accountable. The Prime Minister David Cameron is arguing that the court should not be allowed to intervene when national decisions have been properly made – i.e. where issues have been *'subjected to proper, reasoned democratic debate'* and *'to detailed scrutiny by the national courts in line with the Convention'*.[1] In his analysis of the background to the *VC* decision, Lucas Fear-Segal challenges Mr Cameron's trivialisation of the cases before the ECtHR, arguing that it is the *'only arena in which in which fundamental rights violations committed against marginalised minorities can be effectively challenged'*. The UK government does not like the idea that its decisions might fall into the same category; its attempt to undermine the court's role though does nothing to encourage respect in other countries for the implementation of fundamental human rights.

The DLA supports the call for the reinvigoration of anti-racist politics and for the fight against institutional racism to be brought again to the top of the political agenda. Now is the time for determination and the forging of new *'collective movements and solidarities'* to defend our human rights and to continue to challenge the government to take up its responsibilities and act to combat racism and racial hatred.

Geraldine Scullion, Editor

1. www.guardian.co.uk/law/2012/jan/25/cameron-speech-european-court-human-rights-full

Please see back cover for list of abbreviations

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Have the lessons of the Macpherson Report really been learned?

Dr Jon Burnett,[1] researcher at the Institute of Race Relations, examines the terrible litany of racist violence in Britain in the light of the recent and long delayed criminal conviction of two participants in the murder of Stephen Lawrence. He questions whether the recommendations of the Macpherson report to tackle institutional racism have, in reality, permeated to all levels of police practice; he reviews the development of government policy and concludes that little has changed.

The conviction in January 2012 of two of the men involved in the brutal racist murder of black teenager Stephen Lawrence went some way towards vindicating the tireless campaigning of his parents who, for almost 19 years, battled to bring to account the perpetrators of one of the most notorious killings in recent British history. Since that night in 1993 when 17-year-old Stephen was stabbed to death in south London, theirs was a campaign which has, by confronting official incompetence and denial, laid bare the institutional racism embedded within the practice and processes of British justice. And such was the tenacity of their campaigning that the conviction was celebrated almost as a shared national victory: by the press who along the way had come to back the Lawrences, by the politicians who had pushed for an inquiry into the death and, significantly, by the same criminal justice agencies which had initially so cruelly failed the Lawrence family.

For many, the conviction of Gary Dobson and David Norris signified redemption. The perception is that much has changed. The police say that many of the 70 specific recommendations made in the Macpherson Report – established to investigate the murder and the failings in the police investigation and published in 1999 – have now permeated criminal justice practice. Cressida Dick, acting deputy of the Metropolitan Police, has stated that the Force *'can be proud of how it has been transformed in attitudes, practice, training and professionalism*'.[2] Prime Minister David Cameron, meanwhile, states that there is still a *'problem of people from different racial backgrounds being disadvantaged in Britain*', but claims that the UK is 'less racist' than at the time of Stephen's death.[3]

Yet despite this surge of congratulatory rhetoric, the issues of routine racist attacks, harassment, abuse and violence experienced by thousands of people from black and minority ethnic (BME) communities each year have remained almost entirely absent from the political agenda. The number of racist incidents reported by the police increased almost five-fold between 1993 and 2011, from 10,997 to 51,187, with almost no acknowledgment, apart from claims by the police that this is simply a reflection of better recording practices. Of these, at least 96 (about five per year) have been murders with a known or suspected racial element, and 40 people have lost their lives as Stephen did – as a result of unprovoked racist attacks on the streets. Overwhelmingly, those killed in racist attacks have been males under the age of 30. Nineteen people relatively 'new' to the UK – such as asylum seekers, migrant workers, international students or visitors – have been murdered. Seven people (including a 4-year-old child) have been killed in their homes in arson or firebomb attacks and 16 people have died as a result of being attacked at work. Of the total number of people who have lost their lives as a result of racial violence, some, such as the savage axe-murder of Anthony Walker in Liverpool in 2005, made national headlines, but the vast majority passed virtually unnoticed except by the families whose lives were torn apart by their loss.[4]

Shifting patterns of racial violence

Rather than stumbling onwards to a 'less racist' country, the years following the death of Stephen Lawrence have been marked by the development of new forms of racism, intermeshed within the

1. Jon@irr.org.uk

2. Cressida Dick, 'Stephen Lawrence murder: nothing in the Met's history had a greater impact', *Guardian* (3 January 2012)

3. Donna Bowater, 'David Cameron: Britain "still has a problem with racism"', *Daily Telegraph* (9 January 2012)

4. Institute of Race Relations, '96 murders since Stephen Lawrence's', (5 January 2012). All of the murders cited in this article are detailed further in: Institute of Race Relations, 'Deaths with a (known or suspected) racial element 1991-1999', *IRR Factfile* (22 April 2010), and Institute of Race Relations, 'Deaths with a (known or suspected) racial element 2000 onwards', *IRR Factfile* (5 January 2012)

structures of government policies and practices and manifested in popular form on the streets, in work-places and against people in their homes. In almost two decades, the parameters of racial violence have broadened, both in terms of scope and geography. And whereas a few decades ago the majority (although by no means all) of those attacks which took place were concentrated in larger urban areas, racial violence appears increasingly to have extended to smaller cities, towns and rural districts.

Of course, this is not to deny the long history of racial violence in rural areas. In the early 1990s, for example, the Commission for Racial Equality (CRE) documented in painstaking detail the grim day-to-day reality of racism in the south-west.[5] But as demographics have changed and particular areas have become more 'diverse', racist attacks, in some localities, have become entrenched. For many politicians the answer to this is simple: more diversity means more 'tension' and therefore setting limits on the number of people from BME communities is necessary for the purpose of better 'race relations'.

> '... dispersal policies, in practice, were leading to the dispersal of xenophobia'

Yet this is misleading. For it ignores the way that as racism shifts nationally, it impacts locally in places underpinned by their own specific contexts and histories. In Stoke-on-Trent, for instance, a city ravaged by deindustrialisation and with over half of its residents defined as living in the most deprived quintile in England, the proportion of residents from a BME background has more than doubled in the last two decades. This swift population change occurred as many white families, with the resources and wherewithal, left the city. And, in turn, the racist attacks which began to occur with increasing regularity and ferocity at the beginning of the 21st century (by 2005, a third of those residents from BME communities had experienced some form of racial harassment in the previous three years) have to be understood in terms of an increasingly hostile political climate exploited by local politicians for electoral gain. Stoke provides a stark illustration of the consequences of what happens when mainstream politics actively accommodates the messages of the far right, while at the same time effectively abandoning those communities which the far right frequently targets to garner support. By 2008, there was a credible possibility (eventually not realised) of the city becoming the first in the UK controlled by the British National Party (BNP).

In Plymouth, meanwhile, in the south-west, the increasing number of attacks, especially on asylum seekers, overseas students and BME families moving into hitherto white neighbourhoods, have been met by official denial, according to local activists. In a military city where the local economy has been decimated as a result of its declining dockyards, racist attacks reached such a point that, in 2003, one investigation by *The Observer* dubbed the locality as the 'city of hate'.[6]

In such contexts, the developments of new forms of racism have proved fatal. Take, for example, the case of Firsat Dag, an asylum seeker who, in 2001, was stabbed to death in a racist attack as he was walking to his house in Glasgow. Firsat had been sent to the Sighthill estate, an impoverished area of the city (now demolished and rebuilt) then used as a dumping ground for the poor and the dispossessed and well known at the time for racist attacks, especially against the increasing numbers of asylum seekers who were being dispersed there in an attempt to reduce the financial and social 'burden' of providing accommodation in the south-east of Britain. His death has to be seen against the backdrop of the concerted media campaign against the presence of 'parasitic' asylum seekers, which both reinforced and was reinforced by a political climate within which mainstream parties vied with each other as to which could be the toughest 'on asylum'. According to one investigation, dispersal policies, in practice, were leading to the dispersal of xenophobia.[7] And such was the level of concern about the danger facing asylum seekers that in 2004 the government effectively disbanded the policy, temporarily stopping sending people to certain towns and cities on the advice of local police.[8] This action came far too late for Firsat. As it did for Peiman Bahmani, stabbed to death in Sunderland in 2002; Mohammed Isa Hassan, beaten to death in Southampton in 2003; and Kalan Kawa Karim, a man who arrived in the UK disabled as a

5. Eric Jay, *'Keep them in Birmingham': challenging racism in south-west England* (London, Commission for Racial Equality, 1992)

6. For information on racial violence in both of these cities see Jon Burnett, *The new geographies of racism: Plymouth* (London, Institute of Race Relations, 2011); and Jon Burnett, *The new geographies of racism: Stoke-on-Trent* (London, Institute of Race Relations, 2011)

7. Liz Fekete, *The dispersal of xenophobia* (London, Institute of Race Relations, 2000).

result of torture in Iraq and was murdered in Swansea in 2004.

But, of course, the thousands of racist attacks taking place each year have not been confined to those seeking asylum. In the first decade of the 21st century, with Muslims in the UK cast as a new enemy within in the context of the 'war on terror', they became, according to sociologists Simon Pemberton and Christina Pantazis, a new suspect community.[9] And this is a community which has been subjected to a surge of violence and harassment. One person targeted just a few days after the 7/7 terrorist bombings in London was Kamal Raza Butt, a man visiting friends and family in Nottingham. On his way to a shop to buy cigarettes he was set upon by youths who reportedly shouted 'Taliban' at him before beating him to death. Attacks against Muslims increased by 500 per cent in the immediate aftermath of the 7/7 bombings, according to the Muslim Safety Forum, with over 170 incidents recorded in two weeks.[10] And this campaign of harassment and abuse has shown few signs of abating. Of 1,200 anti-Muslim attacks reported to the police in 2010, examples included the desecration of gravestones, the petrol-bombing of mosques and serious assaults.[11]

Forty-four Muslims have lost their lives since 1993 in murders with a known or suspected racial element. Some, such as Kamal, were killed as a direct result of the Islamophobia and specific anti-Muslim racism exacerbated through the 'war on terror'. Many others were murdered in alcohol-fuelled racist attacks while at work in the night-time economy. Over the past four decades, this section of the economy has grown substantially as towns and cities devastated by deindustrialisation have encouraged new forms of investment, frequently through a relaxation of licensing laws. As such, a form of economic restructuring has taken place within which those from certain BME communities are often employed in subsidiary industries – as cab drivers, in takeaways, in fast food outlets and in service stations. These are industries characterised by flexible, non-unionised working conditions, with workers isolated, vulnerable to abuse and bearing some of the true costs of politicians' boasts of light-touch regulation. Israr Hussain, for example, was stabbed through the neck and killed in his taxi in 2002 after an altercation with a customer in Oldham. Mohammed Pervaiz died in 2006 in Huddersfield after being set upon in his cab by, according to witnesses, a gang of youths shouting racist abuse. And it is not just Asians and Muslims at risk of attack in such industries. Paul Rosenburg, a South-African taxi driver on the Isle of Wight died in 2003 after being stamped on repeatedly by a man who later confessed to a friend that *'I only did it because he is black'*.

> Particular economic, political, domestic and international paths taken by governments ... have both underpinned and exacerbated the formation of emerging patterns of racism and racial violence

A new framework for 'race' policy

The point here is not just to show that different groups of people face risk of attack, but to argue that the particular economic, political, domestic and international paths taken by governments in the nineteen years since Stephen Lawrence was killed, have both underpinned and exacerbated the formation of emerging patterns of racism and racial violence. However, just when it was necessary to analyse racism in terms of the construction and formulation of state policies and practices, the new preferred policy framework defines the problem as mistrust and antagonism and their cause as communities which 'self-segregate'.

In the aftermath of a series of urban disorders in 2001, predominantly between Asian youths, white people and the police, a new policy agenda of community cohesion was established which, essentially, argued that racism surfaced in a context of communities leading 'parallel lives'. The Asian and white communities in towns and cities like Burnley, Bradford and Oldham, where rioting had taken place, lived, it was said, in enclaves where they never met each other in any meaningful way. As a result, what was required was a set of core values and a common, shared vision which would create the capacity for more cohesive communities. What was at stake was a

8. Blaise Tapp, 'Curb on the asylum seekers', *Manchester Evening News* (15 November 2004)

9. Christina Pantazis and Simon Pemberton, 'From the "Old" to the "New" Suspect Community: Examining the Impacts of Recent UK Counter-Terrorist Legislation', *British Journal of Criminology* (Vol. 49, No. 5, 2009), pp. 646-666.

10. BBC, 'Hate crimes "rise after UK bombs"', BBC *News* (28 July 2005)

11. Andrew McCorkell, 'Muslims call for action against hate crimes', *Independent* (12 June 2011)

recasting of citizenship. One in which rights had to be matched with responsibilities and the government had to refocus its energies into promoting integration so as to counter the effects of a country which, it was said, was marred by segregation.[12] And so it was only a natural progression for this to emerge as a call for the championing of Britishness: popularised first by Gordon Brown when he was Prime Minister, and more recently by an array of political commentators and policy think-tanks eager to assert a 'new' national identity. It was also a natural progression for this to become an attack on multiculturalism. Thus, according to Mr Cameron, *'the doctrine of state multiculturalism'* has failed – it is a divisive ideological project which has led to communities self-segregating, the undermining of national identity and, ultimately, to a growth of extremism which has been left unchecked.[13]

Policing in the aftermath of the Macpherson Report

What this shift means today is that the progressive message within the Macpherson Report has been undermined and any political gains rolled back at exactly the time that new forms of racism have emerged and been diffused into government policy. On the ground, this has impacted upon a police force which, despite being lauded as radically transformed as a result of Macpherson, in rank-and-file reality resents the term 'institutional racism' according to research conducted on behalf of the Home Office.[14] And in this context, many of the aspects of policing which were critiqued most vocally by Macpherson have continued regardless.

The most visible of these is stop-and-search. Macpherson was not against the use of stop-and-search per se, but did highlight that the discriminatory use of the power increased tensions between particular communities and the criminal justice system. Regardless of this, stops have massively increased. In 1999, black people were 5.9 times more likely to be stopped and searched than white people under powers contained within s1 of the Police and Criminal Evidence Act 1984 (PACE). In 2009/10, this disparity had risen to seven times more likely.[15] Moreover, with regard to powers where the police are not required to prove reasonable suspicion of a person having committed an offence, disproportionality is much, much starker. In 2011, black people were nearly thirty times more likely than white people to be stopped and searched under s60 of the Criminal Justice and Public Order Act 1994 leading to accusations of increasing 'racial profiling':[16] an accusation that has been increasingly difficult to prove with regard to stop-and-search, yet no less real because of this, after several police forces took advantage of the Home Office's removal of the requirement to record 'stop-and-accounts' (where police stop people and require them to account for their whereabouts) in order to cut back on police bureaucracy.[17]

'Many of the aspects of policing which were critiqued most vocally by Macpherson have continued regardless'

And what of racial violence? Cressida Dick says that more than half of the racist incidents recorded in the UK are now detected by the criminal justice system and that BME communities now have nearly as much confidence in the police as other communities. Moreover, earlier this year the Crown Prosecution Service (CPS) released figures showing that successful prosecutions of racially aggravated crimes are increasing. But has the police's understanding of racism, how it manifests itself in populist violence and how the police themselves contribute to racism, undergone change throughout the entire force?

The family of Shahid Aziz, a 30-year-old man in Armley prison who was murdered in 2004 by his cell-mate who slit his throat and beat him with a chair leg as he lay dying, faced a police alleging that there was no racist element to the killing. And this despite the fact that the killer had objected to Shahid speaking in his own language and of having to share a cell with an Asian man. Or what about the partner of Mi Gao Huang Chen, who claims that the campaign of racial abuse to which they were subjected in Wigan was

12. Ted Cantle, *Community cohesion: a report of the independent review team* (London, Home Office, 2001).

13. David Cameron, *Speech to the Munich Security Conference*, (5 February 2011)

14. Janet Foster, Tim Newburn and Anna Souhami, Assessing the impact of the Stephen Lawrence Inquiry, *Home Office Research Study 294* (London, Home Office, 2005)

15. Mark Townsend, 'Abuse of stop-and-search powers is a crime, says Lawrence advisor', *Guardian* (7 January 2012)

16. Mark Townsend, 'Stop-and-search "racial profiling" by police on the increase, claims study', *Guardian* (14 January 2012)

17. Vikram Dodd, 'Police forces cease recording race of people they stop', *Guardian* (22 September 2011)

ignored by the police in 2004 until finally, her partner was killed? These are not the only cases where families, in chilling echoes of the Lawrences' long fight for justice, have had to confront an official denial of racism. And surely, the starkest reminder of just how antagonistic relations are between the police and many people from BME communities is the riots which swept through England in the summer of 2011. One of the most common explanations for the actions of those who took part was the inequities of stop-and-search and a sheer hatred of the police.

Ultimately, if the fight for justice over the murder of Stephen Lawrence forced British society, for the first time, to confront the reality of institutional racism, the conviction of two of his killers needs to force its existence back onto the political agenda. Institutional racism may be off the political agenda now, racial violence may be a non-issue in the popular imagination, the targets of violence may have changed and the areas in which they take place, but the fight still goes on. What is necessary is a re-emergence and re-invigoration of anti-racist politics which recognises how racism is changing and understands, at the same time, how it is exacerbated by the construction and implementation of government policies and practices. This anti-racist politics needs to hold to account those agencies tasked with the delivery of justice. It needs to take its lessons from the parents of Stephen Lawrence who showed, in the most tragic circumstances, just how collective movements and solidarities can be forged.

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European Court of Human Rights and the battle to right injustices

Lucas Fear-Segal,[1] a graduate law student at London City University, examines the background to the European Court of Human Rights' judgment in *VC v Slovakia*. He outlines in stark detail the double burden of race and gender discrimination faced by Slovakian Roma women and highlights the critical role of the Court in challenging these injustices.

Prime Minister David Cameron was wrong when he said in a speech[2] to the Council of Europe that the European Court of Human Rights (the Court) has become a *'small claims court'* which fails to deal with real human rights issues. The Court has repeatedly proven itself as the only arena in which fundamental rights violations committed against marginalised minorities can be effectively challenged. And it has recently begun the crucial mission of helping the victims of a 21st century European genocide gain access to justice.

In November 2011, the Court gave judgment on a case brought by VC, see Briefing 625. VC is a Roma woman from Slovakia. On August 23, 2000, then aged 20, she went into labour at Prešov Hospital with the words *'patient is of Roma origin'* emblazoned on her medical history records. Like countless other Roma women before her, she was forcibly and illegally sterilised during childbirth.

When VC attempted to review her medical records she was denied access to them. She managed, eventually, to obtain a judicial order for their release. She brought a case but the Slovakian courts dismissed it at every stage. It was only in the European Court of Human Rights that VC was able to challenge her government. She won her case and was awarded €31,000 in damages.

Most Britons know that Hitler's holocaust hit the Romani hardest and are aware that a higher percentage of the Romani population was exterminated than of any other group, including Jews. But few realise that the genocide continued after the liberation of the camps and that this story of European genocide continues in the 21st century.

Under Communist rule in what is now Slovakia, the Nazi practice of sterilising Roma women continued as an avowed but unacknowledged government policy. Roma women during the course of a Caesarean section or abortion were subject to the procedure without their knowledge, or without having given their informed consent. Many more underwent the operation out of desperation, in response to threats from social workers that refusal to consent would result in their welfare payments being stopped.

Documents obtained by Human Rights Watch in the 1990s show that extinguishing the Roma

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communities' reproductive capacity became a concerted administrative goal of the Slovakian government. The government deliberately sought to reduce what it termed the 'high, unhealthy' Roma population. Though sterilisations were technically offered with racial blindness, a disproportionate number of Roma women were availed of the 'service'. The bias was further exaggerated after 1988, when the government began offering furniture coupons as an incentive to undergo the procedure. In the area which is now the Czech Republic, it is estimated that 25% of all sterilisations in the late 1980s were carried out on Roma women, who constituted 2% of the population. VC claims that in her home area 60% of sterilisations were carried out on Roma women, though they comprised only 7% of the district's population.

The Slovakian government insists that these practices came to a halt following the Velvet Revolution and the advent of democracy. But the Center for Reproductive Rights' 2003 report suggested otherwise. It contains interviews with over 100 women who were sterilised after the fall of the Communist regime. The stories told by the interviewees mirror those of VC. A common complaint is of having been erroneously informed by a doctor that if consent to sterilisation was not given, they would be risking their own deaths. In other cases Roma women were only told of their sterilisation after it had been carried out by the tying of their fallopian tubes during what they thought were routine Caesarean sections.

The Slovakian government claimed that VC gave her full and informed consent to the procedure. To evidence this, it relied on a statement of consent. The statement consists of a shaky signature written under the typed words *'PATIENT REQUESTS STERILISATION'*. The signature is timed at 10:30am on her delivery day when VC lay supine, almost three hours into her labour.

VC did not know what the word 'sterilisation' meant. Her judgment was impaired by fatigue and labour pains. She signed because medical personnel at the hospital told her that if she did not, and had another child, either she or the baby would die. While she recovered, VC says that she was confined to Roma-only wards and was not allowed to use the same bathrooms and toilets as white women.

Slovakian Roma women continue to face the double burden of race and gender discrimination in their attempts to access healthcare, education, and the criminal justice system. Although NGO and campaign group work helped to prompt a Public Health Act in 2005 which grants greater protections to minority groups, as yet no independent commission has been established to provide compensation, or even an apology, to the victims of illegal sterilisation.

VC's victory in the Court represents an important staging post in the war against blatant abuses of fundamental human rights. It exposes the limitations in David Cameron's insistences in Strasbourg. It serves as a reminder that despite the regular focus on struggles for human rights in the developing world, there are crucial battles still to be won on our doorstep in Europe. And it demonstrates the importance of the Court as a vehicle for both exposing these injustices, and righting them.

1. lucas.fearsegal@gmail.com

2. January 25, 2012

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Briefing 624

Delegitimising the cultural defence to 'honour'-based crimes

In February 2012, the Discrimination Law Association convened a discussion on *'Equality, human rights and the 'honour' code'*. Katherine Watson of the UK legal feminist group[1] summarises the discussion.

The DLA's powerhouse panel included Aileen McColgan, professor at King's College and lawyer at Matrix Chambers; Pragna Patel of Southall Black Sisters; Jacqueline Rose, professor of feminist theory at Queen Mary, University of London; and Jasvinder Sanghera, co-founder of Karma Nirvana, a Derby-based organisation that supports victims of forced marriage.

The DLA moderator, Ulele Burnham, opened the panel with an imperative: *'we must reclaim 'honour' and return it to those practices that are worthy of the term'*. The panel discussion centred on the need to delegitimise the cultural defence to 'honour'-based crimes – a defence which they believe is still widely

accepted within the legal and law enforcement professions.

Professor Rose explained the transportation of 'honour'-based traditions from countries such as Pakistan, Bangladesh and India to the UK. In the 1950s, when families from South Asia arrived in the UK seeking work, hardening their cultural and religious positions was a defence mechanism – a protection or shield from all that they thought to be wrong in British society, particularly the hyper-sexualisation of women. 'Honour' has been, in essence, the barrier constructed to prevent the state from interfering in the private and family affairs in communities where 'honour'-based crimes and abuse are prevalent.

Jasvinder Sanghera's personal experience as an 8-year old British national promised to a man in her parents' country of origin spoke to Professor Rose's analysis. She escaped her impending forced marriage at the age of 14, but it did not come without a price. Jasvinder has been disowned by her family but, now, is able to proudly state after 29 years of disownment that *'my honour is my family's shame.'*

For women like Ms Sanghera and the thousands of young women in the same position in the UK, there is little recourse to justice or help other than that offered by community-based organisations such as Karma Nirvana.

Ms Sanghera further explained that a forced marriage follows years of 'honour'-based abuse. It is, she says, all a matter of learnt behaviour for young women which begins at a very young age with being taught not to look men in the eyes, to stay away from boys at school and, of course, not to date. In the words of the moderator:

> *A young woman is expected to enact honour with every bone of her body, because she is thought to carry the seeds of its destruction.*

However deplorable these acts and however sensationalised they become in the media, Pragna Patel argued that they are still shrouded by a veil of silence that is perpetuated by both communities and the state. Perpetrators of abuse within the home and family use 'honour' as a silencing mechanism forcing victims, including male victims, to internalise the violence and abuse they suffer. She suggested that perhaps this is why suicide rates are three times higher within the Asian community.

The state, fearing interference in the 'private' affairs of the Asian community, fails victims of 'honour'-based abuse time and time again. Although pontificating about the heinousness of forced marriage, female genital mutilation and 'honour'-based crimes, the state is doing very little to prevent such acts or to support victims.

All four panelists mentioned the Forced Marriage (Civil Protection) Act 2007 (the Act) which provides protection orders to prevent forced marriages; the main problem with the Act is enforcement. Currently, the Act does not criminalise breaches of such orders, although amendments are proposed to address this.

Agreeing that criminalisation of such breaches would be a symbolic step, Professor McColgan questioned what difference it would make for victims. It may actually deter reporting of the crime by female victims who do not wish to criminalise their family and friends and may mean that victims are even further silenced.

Despite 'honour'-based abuse happening within the private sphere, the home and the family still seem to be the 'cure of choice' for the state. Professor McColgan and Ms Sanghera both expressed concern that protection orders often return young women to the house where the perpetrator is living.

Professor Rose perhaps best articulated the sentiment shared by all panelists when she said that the state views the *'family as the place where everything can be made right.'* Rose believes this lies behind the current government's decision to cut welfare and public funding, including for groups like Karma Nirvana which are addressing the root of the problem in the communities where it exists.

The panelist agreed that the answer lies in de-linking 'honour'-crimes from the culture debate and re-linking them to the human rights debate. A failure to do so, they argue, means that they remain the crimes of 'the other' – misunderstood, under-reported, unenforced, silenced and hidden.

1. http://www.legalfeminist.org

Forced sterilisation amounts to inhuman or degrading treatment

VC v Slovakia, European Court of Human Rights, Application 18968/07, November 8, 2011

Facts

VC, who is of Roma ethnic origin, was sterilised while hospitalised during the delivery of her second child by Caesarean section.

VC was admitted to hospital shortly before 8am on August 23, 2000, already in labour. At around 10:30am staff asked VC whether she wanted more children, and VC said she did. VC was then told that if she had one more child, either she or the baby would die, and so VC responded *'Do what you want to do'*. She then signed a delivery record under the heading *'patient requests sterilisation'*.

VC was hospitalised in a room that was exclusively for Roma patients and she was forbidden to use bathrooms and toilets used by women who were not of Roma origin.

VC subsequently suffered serious medical and psychological effects following the sterilisation; she had symptoms of a false pregnancy, and her husband left her because of her infertility.

Legal proceedings

Once VC learned that the sterilisation process was not life-saving, she requested to review her medical records, and subsequently brought civil proceedings.

VC was unsuccessful at both first instance, on appeal and at the Constitutional Court, where the national court held that the procedure was performed on medical grounds and was necessary.

European Court of Human Rights (the Court)

VC brought a claim that her Article 3, 8, 12, 13 and 14 rights had been breached (i.e. the right not to be treated in an inhuman or degrading way; the right to respect for private and family life; the right to marry and found a family; no effective remedy and, enjoyment of convention rights without discrimination).

VC relied upon publications that indicated a history of forced sterilisation of Roma women. For example, in VC's local district, 60% of sterilisation operations between 1986 and 1987 were on Roma women, who represented only 7% of the population.

The Court also referred to the report of the Council of Europe Commissioner for Human Rights who expressed the opinion that the Slovakian government had failed to put in place adequate legislation or to exercise appropriate supervision of sterilisation practices, despite the number of allegations of improper sterilisations made.

The Court found that VC's Article 3 right had been breached. Treatment that drove a person to act against their will or conscience was capable of raising an Article 3 issue, although there would not be a breach if the treatment was medically necessary. The Court held that the sterilisation was not medically necessary, as there was no emergency involving an imminent risk of irreparable damage to VC's health.

The Court further held that VC's informed consent to the sterilisation had not been obtained; she had been in labour for two and half hours and was in a supine position when her consent was requested. In particular, there was no attempt to inform VC about her health status, or the proposed procedure and the alternatives to it.

The Court rejected arguments that because of VC's previous pregnancy and failure to undergo regular check-ups, the hospital was entitled to assume that she would act in an irresponsible manner with regard to her health in future.

The Court also found that there had been a breach of Article 8. The lack of legislation providing safeguards for VC's reproductive health as a Roma woman meant Slovakia had failed in its positive obligation to secure protection to enable VC to enjoy her right to respect for her private and family life.

As a result of the Court's findings under Article 8, it did not consider it necessary to make any findings under Article 12. It also found that the failure of the two appellate courts to uphold VC's claim could not, in itself, found a successful Article 13 claim.

As for Article 14, although the Court commented that the legislative shortcomings in Slovakia were liable to particularly affect members of the Roma community, it did not consider it necessary to make a finding, given that the Article 8 breach was substantiated. This Article 14 finding, unlike the other unanimous findings, was made by six judges, with Judge Mijovic dissenting.

The Court awarded VC €31,000 under Article 41 concerning just satisfaction to applicants whose convention rights have been breached.

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Commercial ventures must be compliant with discrimination law

Bull & Bull v Hall & Preddy [2012] EWCA Civ 83, February 10, 2012

Refusing a double bed to a homosexual couple because they were not married was direct sexual orientation discrimination.

Facts

Mr & Mrs Bull are a married couple who run the Chymorvah Private Hotel in Cornwall. They are devout Christians, who believe that *'monogamous heterosexual marriage is the form of partnership uniquely intended for full sexual relations and that both homosexual sexual relations and heterosexual sexual relations outside marriage are sinful'.*

In accordance with these beliefs their hotel would only offer double beds to married couples.

Mr Hall and Mr Preddy (H&P) are a homosexual couple in a civil partnership. They booked a room with a double bed. But when they arrived and it was apparent they were not a married couple, they were turned away.

County Court

H&P sued for sexual orientation discrimination in the provision of goods and services. They won. The court finding that, if a heterosexual married couple were permitted a double bed but a homosexual couple in a civil partnership were not, that was direct discrimination on the grounds of sexual orientation. The court placed particular reliance on regulation 3(4) of the Equality Act (Sexual Orientation) Regulations 2007 (the Regulations) which provided that *'the fact that one of the persons (whether or not B) is a civil partner while the other is married shall not be treated as a material difference'.*

Court of Appeal

Mr and Mrs Bull appealed. First, they argued that the judge had misunderstood the requirements of direct sexual orientation discrimination, and reg 3(4) in particular. Second, they argued that the court's finding did not take proper account of the Human Rights Act, in particular Article 8 (respect for private and family life) and Article 9 (freedom of thought, conscience and religion). The Regulations, the appellants argued, should have been read so as to be compatible with their human rights.

In relation to direct sexual orientation discrimination, the appellants argued that the judge had confused discrimination on the grounds of marital status with sexual orientation discrimination. Their policy was on the basis of sexual practice, not sexual orientation. It applied to all and affected anyone, regardless of their sexual orientation, who was not married.

This argument was rejected by the CA. A homosexual couple could not comply with the appellants' requirement, because they could not marry. Therefore, applying a criterion of marriage was direct discrimination on the grounds of sexual orientation.

The court also rejected the human rights arguments. The protection of private and family life did not apply to the running of a hotel, which was a commercial activity. Similarly, the appellants held genuine religious views, the manifestation of which was protected. There was, however, an important difference between manifestation of those beliefs in private and manifestation in the professional or commercial sphere.

In the professional or commercial sphere a balance had been struck by the Secretary of State in the Regulations, approved by affirmative resolution in parliament. This balance included exceptions in relation to religious beliefs – for example allowing religious organisations to restrict membership on the grounds of sexual orientation. But there was nothing in the Regulations that would assist the appellants. The CA refused to extend the exceptions in the Regulations to provide greater protection for religious views than had been intended by parliament.

Comment

Balancing conflicting rights is a controversial area. But the CA has upheld a sensible and workable approach – one may manifest whatever beliefs one wishes in the private sphere, but those choosing to operate a commercial venture must comply with discrimination law.

Michael Reed
Free Representation Unit

Equal pay – jurisdiction – civil court proceedings

Birmingham City Council v Abdulla [2011] EWCA Civ 1412; [2012] EqLR 81

Facts

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

High Court

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

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

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

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

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

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

Birmingham appealed to the Court of Appeal.

Court of Appeal

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

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

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

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

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

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

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

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

Analysis

Mummery LJ regards s2(3) as a tool for the allocation of judicial work between the courts and tribunals, rather

than a strict rule about which venue should be preferred. This fits with the legislative history of the EqPA, and dual jurisdiction is something that employment lawyers are intimately familiar with, given the deployment of contract law through employment law more generally.

Given the purpose of s2(3), the convenience is to the courts, and not to Birmingham (it would clearly always be 'more convenient' for a defendant if claims were struck out).

The CA honed in on the precise wording of the legislation, and concentrated less on the practical effect that permitting equal pay claims in the courts may have. As permission to appeal is being sought to the Supreme Court, it may well be that the ramifications of permitting dual jurisdiction are still relied upon to dampen down the 'black letter' interpretation of the High Court and CA to date.

Practical implications

On the CA's reasoning, many previous issues with equal pay claims (TUPE transfers, stable employment relationship) fall away, as there is effectively a dual jurisdiction in equal pay, with either a six-month or six-year limitation period dependent on the venue chosen. One important difference is the application of the costs regime in the civil courts, which may mean that a tribunal is still the more suitable venue for claimants without adequate protection from adverse costs.

The CA made it clear that although the case was brought under the EqPA, the legal position has not changed under the Equality Act 2010.

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Briefing 628

No injury to feelings award for air passenger discrimination

Stott v Thomas Cook Tour Operators Ltd, Hook v British Airways plc, Secretary of State for Transport [2012] EWCA Civ 66, February 7, 2012

Facts

Mr Stott (S), who is a disabled person, flew to Zante on holiday. Prior to his holiday, he twice contacted the defendant to confirm that he had booked and paid to sit next to his wife on both flights. His complaint arose from his treatment on the return journey. On check-in at Zante airport he was told he would not be sitting next to his wife. Despite assurances, this arrangement was not altered at the gate of the aircraft. He was upset by this (and by his wheelchair overturning on transfer to the plane) and felt humiliated, embarrassed and angry. S was seated in an aisle seat in front of his wife, who was also upset by the situation. It was therefore difficult for her to assist with his catheterisation and other personal needs during the flight.

Manchester County Court granted a declaration that the defendant had breached S's rights under the EC Disability Regulation, but dismissed his claim for damages for injury to feelings due to the limits imposed by the terms of the Montreal Convention.

Similarly, Mr Hook (H) flew to Paphos on holiday with family in the summer of 2008. He too had made seating arrangements prior to the flights. These did not materialise and therefore his needs as a disabled person were also not met. This was distressing to him and his family.

The Central London County Court granted an application to strike out H's claim for damages. The appeal to the High Court was dismissed by Supperstone J [2011] EWHC 379.

Court of Appeal

These two cases were heard together in the CA.

The legal issue was whether the limits of the Montreal Convention for the Unification of Certain Rules for International Carriage by Air (28 May 1999) (Montreal Convention)[1] should be applied to prevent a claim for damages for injury to feelings by a disabled traveller, or whether the Regulation (EC) No107/2006 (the EC Disability Regulations) and the Civil Aviation (Access to Air Travel for Disabled Persons and Persons with Reduced Mobility)

1. As incorporated into EU Law by Council Regulation (EC) No 2027/97, October 9, 1997 and amended by Regulation (EC) NO 889/2002 (Montreal Regulations)

Regulations 2007 SI 2007/1895 (the UK Disability Regulations) should prevail to allow such an award.

Essentially, the question which the court had to ask itself was whether they should follow *Sidhu v British Airways PLC* [1997] AC 430, as proposed by the defendants Thomas Cook and British Airways (the Ds), or *IATA v Department of Transport* [2006] 2 CMLR as relied upon by H and S.

It was submitted by H and S that there were two strands of legislation: that from the Montreal Convention and that from the EU and UK regulations, and that there was no incompatibility between them. In fact H and S submitted that the Montreal Convention did not deal with the rights of access to air travel for disabled passengers and therefore the UK Disability Regulations were supplementary protection in relation to matters not addressed under the Montreal Convention.

H and S relied upon *IATA v Department of Transport* as this case dealt with another regulation providing common rules on compensation and assistance to passengers in the event of delays and cancellations. There it was held that damages could be awarded as these regulations covered matters which was not covered by the Montreal Convention.

The Ds submitted that various authorities from different international jurisdictions followed the Montreal Convention and prevented damages from being awarded, if not available under the Convention itself.

The Ds also submitted that neither the EC Disability Regulation, nor the UK Disability Regulation can override the Montreal Convention, as it is an integral part of the European legal order. They also pointed out that the Montreal Convention is enacted in the UK by the Carriage by Air Act 1961(as amended) and this too cannot be overridden by UK regulations.

It was also submitted by the Ds that the right to a remedy in Article 16 of the EC Disability Regulation refers to an '*effective, proportionate and dissuasive*' remedy and this is satisfied by the provision of criminal and administrative sanctions and does not necessitate there being damages for injury to feelings.

The judgment

The CA held that *IATA* deals with situations which *'operate at an earlier stage than the system which results from the Montreal Convention*', i.e. delays and cancellations occurring before embarkation, whereas H and Ss' claims occurred during the period when the Montreal Convention is said to apply, i.e. between embarkation and disembarkation.

The CA also held that Article 10 of the EC Disability Regulations does not make a compensatory remedy mandatory. It refers to penalties being '*effective, proportionate and dissuasive*'. The referral to 'could include' in recital 18 to the regulation indicates that it is merely discretionary. As a result, the UK Disability Regulations which include a criminal sanction and the EHRC as the designated complaints body in the UK, are not required to provide a civil compensation remedy.

The CA also held that the EU is a party to the Montreal Convention and therefore it is incumbent upon it to avoid a conflict between that and its own legislation. The proper construction of reg 9 of the UK Disability Regulations was to read it in a manner which is consistent with the Montreal Convention.

The CA concluded that the EU Disability Regulations and the UK Disability Regulations do not represent a second strand of legislation at the point where they overlap with the time period and issues covered by the Montreal Convention and thus no compensation is recoverable for injury to feelings under the UK Disability Regulations, due to the Montreal Convention limits.

Comment

The decision of the CA leaves disabled air passengers without recourse to damages for injury to feelings when their EU and UK rights are breached with regard to flights. This is clearly very disappointing and renders both these limbs of legislation impotent to try to move forward into the 21st century. The purpose of the UK Disability Regulations was at least in part to impose upon air carriers a penalty for the injury they inflict upon customers by failing to treat them fairly and with dignity.

It is also disappointing that the CA did not see fit to refer the issue of interpretation and compatibility of legislation to the Court of Justice of the European Union as this may have cast light on the issue, not just for disabled air passengers, but other UK regulations which have been drafted since 1999 when the Montreal Convention was signed.

Implications for practitioners

Representatives of disabled air passengers will have to manage their clients' expectations in relation to what they can hope to achieve by bringing an action under the UK Disability Regulations. A declaration may be satisfying but compensation, which is likely

to be the ultimate aim of most clients, remains out of reach.

Given that the government is in the process of drafting similar regulations in relation to ship passengers, it raises the question of what can be done to ensure that a parallel situation can be avoided with the Athens Convention, which dictates the standard terms and levels of damages for accidents and damage on board passenger ships.

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Briefing 629

Public sector equality duty and the need to consult

R v Isle of Wight Council, ex p JM and NT [2011] EWHC 2911 (Admin) November 11, 2011; [2012 EqLR 34; *R (on the application of Sefton Care Association) v Sefton Council* [2011] EWHC 2676 (Admin) November 9, 2011

Implications for practitioners

This casenote explores the approach in two judgments on compliance with the public sector equality duty under s49A of the Disability Discrimination Act 1995 (DDA). Both cases concerned the impact of local authority decisions on the provision of care for people with 'protected characteristics'. Together, the cases highlight the need for practitioners to analyse carefully the effect of a failure to consult.

R v Isle of Wight Council, ex p JM and NT

Facts

In the Isle of Wight Council case two severely disabled individuals brought a claim against the respondent local authority (IWC) for its decision in February 2011 to alter its criteria for determining who was eligible for adult social care. They contended that the decision was unlawful as (i) it failed to comply with the requirements of the statutory guidance governing the provision of adult social care; and (ii) it failed to comply with the public sector equality duty in s49A DDA.

Under relevant legislation, the IWC had previously provided social care to adults whose needs fell into either the 'critical' or 'substantial' categories and some of those whose needs fell into the 'moderate' category, but not the remainder in the 'moderate', or the 'low' risk categories. This was in line with the Fair Access to Care Services Criteria and Guidance (FACS guidance) issued by the Department of Health in 2003 under s7(1) of the Local Authority Social Services Act 1970. In 2010 new guidance was issued: *Prioritising Need in the context of Putting People First: A whole system approach for eligibility for social care*. The basic requirement was for an assessment of the needs of an individual, and then a determination made as to whether social care should be provided.

In an attempt to cut costs, the IWC considered and introduced a new system for determining eligibility locally, drawing on *Prioritising Need*. The proposals went through a number of incarnations, but essentially altered the eligibility criteria so that those whose needs fell into the critical category were still to be afforded social care, but those whose needs were substantial would only be afforded social care where the areas of substantial need were those that placed them at *'greatest risk of not being able to remain at home and be safe'*. Although it was thought that somewhere in the order of £1.5 million would be saved by the alterations to the eligibility criteria, it transpired that a saving of only £54,627.45 was made.

Decision on compliance with statutory guidance

Regarding whether the *Prioritising Need* statutory guidance had been followed, the claimants alleged that there had been an unlawful departure from the guidance by the IWC by (i) impermissible band-splitting, creating a hierarchy of needs within the 'substantial' category, and (ii) impermissible band-splitting on the basis of how likely and frequently a need would arise. Lang J went through the authorities on what would, and what would not, amount to an unlawful departure from the guidance, but noted that the IWC was not attempting to argue any departure from the guidance was lawful because, it said, IWC's case was that it was not departing from the guidance at all. Instead, IWC argued that its criteria (i.e. the

'hierarchy of needs' and the consideration of how likely and frequently the need arose) were firmly within the remit of the *Prioritising Need* guidance. Lang J disagreed with this argument and found that both of these attempts to 'band-split' were not permitted by the guidance.

Decision on the equality duty

Moving on to a consideration of whether the equality duty had been complied with, Lang J reviewed the existing authorities, one of which – *Pieretti v Enfield London Borough Council* [2010] EWCA Civ 1004 [2011] PTSR 565 – noted that the equality duty is there to 'complement' the statutory schemes which exist to benefit disabled individuals, i.e. to be read alongside them. Lang J also referred to the principle that due regard to the duty must be an *'essential preliminary'* to any important decision, not a *'rearguard action following a concluded decision' (R (BAPIO Action Ltd) v SSHD* [2007] EWCA Civ 1139).

The claimants criticised the IWC for not having sufficient information before it in relation to the impact of the change in the eligibility criteria, and that both the Equality Impact Assessment (EIA) and the consultation were flawed.

The IWC submitted that the decisions taken could not descend into detailed examination of the proposed changes on individual users, and that its duty under s49A would apply at that later stage too – thus implying that it would have been impossible and/or futile to attempt a greater level of consultation prior to the changes coming into effect.

Lang J determined on this point that there was a clear need for the IWC to cut the costs of its adult social care programme, and it was entitled to factor this into its decision to alter the eligibility criteria. However both the *Prioritising Needs* document and its predecessor – the FACS guidance – required consultation with service users, carers and appropriate local agencies. Lack of consultation had not been included as a freestanding ground for judicial review but was considered as a part of the s49A DDA duty. Lang J concluded that insufficient information had been given to those consulted to enable them to *'give intelligent consideration and an intelligent response'*. He went on to say that *'Council members were therefore deprived of important information as to the potential impact of the proposed changes, which meant that they had insufficient information when they were discharging their s49A DDA 1995 duties.'* Criticism was also made of the EIA and, not only was it found that the IWC breached its own guidance on EIAs, which required an *'evidence based assessment'*, but Lang J also concluded that the EIA '*did not provide the analysis and the information which members of the Council needed in order to discharge adequately their s49A DDA 1995 duty'*.

Implications for practitioners

This case provides guidance on the issue of the level of information – and in particular the level of consultation required – to enable a local authority to discharge its equality duty. The argument that the full impact of the decision would not be known until the relevant provision was put into effect, and that therefore this somehow excused the defendant authority from carrying out a comprehensive (or informative) consultation exercise when determining whether it had discharged its duties under the equality duty or in relation to an EIA, was quite firmly rejected. The need for local authorities to save costs cannot be doubted and should be taken into account, but this case highlights the point that decision-makers need to consider the equality duty and EIA in the context of clear and cogent information. Any consultation exercise undertaken with the aim of informing the decision-makers about the likely effect of the decision, and whether the duties will be complied with, must be made upon the basis of adequate details of the proposed changes and their likely impact on the affected class of person.

R (on the application of Sefton Care Association) v Sefton Council

Facts

Determined two days prior to the *Isle of Wight* case, this case considered broadly similar issues but had a different outcome on the equality duty point. The claimants in this case were the Sefton Care Association and four homes providing residential and nursing care which were members of the Association. All five claimants complained that for the year 2011/12, the fees payable to care homes in respect of residents placed in the homes by Sefton Council (SC) were not to be increased. This was the second year in a row in which there had been no increase.

The issues raised by the claimants were that SC had failed to have due regard to the actual costs of care when setting its budget; that the decision had been driven by budgetary constraints alone; that it had failed to consult; and that it had failed to comply with the general equality duty.

Up until the financial year 2009/10 there had been

a good dialogue between the claimants and SC regarding the costs of providing care. It appeared that this had been in line with SC's duty under the FACS guidance in relation to the exercise of its social services functions (i.e. here, fixing of fees payable to residential and nursing care homes), and further under the 'Agreement' issued in October 2001 by the Department of Health between the statutory and independent social care, health care and housing sectors entitled *'Building Capacity and Partnership in Care'*. Although SC denied that it was bound by the Agreement, Judge Raynor, giving judgment, pointedly noted that no one had suggested that SC was free to ignore it.

Decision on compliance with statutory duty

Going through the factual history in relation to the lack of consultation process, Judge Raynor noted that both the FACS guidance and the Agreement did not contemplate that there was any difference between the actual cost of care and the usual cost of care. It followed that SC's argument – that the defendant, by virtue of its dominant market position, could obtain provision of care for less than the actual cost of care and that this lower sum would then stand as *'the usual cost of care'* – was contrary to the FACS guidance: the *'actual cost of care'* was a factor that had to be contemplated and taken into account by the local authority (paragraphs 6.2 and 6.7 of the Agreement). SC had clearly not done so in this case. As a consequence, SC was found to have failed to follow the statutory guidance.

There was a further failure in that SC was found to have failed to consult with providers – a duty that they had quite clearly known about and complied with prior to 2010. The judge set out a number of clear defaults with regard to consultation: a failure to communicate the freeze in fees to the claimants; the failure to initiate any dialogue with the claimants; the failure to engage with the claimants once concerns had been expressed; the lack of any evidence to indicate that the claimants' views and concerns were taken into account; and the clear contrast with the procedure that had been adopted in the years up to and including 2009.

The finding of a lack of consultation also led to further findings of a failure to undertake a proper risk assessment and a failure to take into account local factors.

Due to these failures the decision was quashed, and he directed SC to revisit the issue this time undertaking consultation and taking into account the actual cost of care. The judge felt that the issue of whether or not the level of fees set would, in itself, amount to a breach of the statutory guidance could not be determined until the matter had been revisited by SC.

Decision on the equality duty

The judge rehearsed the principles set out in *R (W) v Birmingham* [2011] EWHC 1147 in relation to the s49A DDA equality duty, and then looked at the steps taken by SC. An EIA had been completed in relation to proposed costs savings measures. It was also noted that the EIA included information about 'initial stress tests' that SCs' officers were asked to complete in relation to various proposed activities, and that in the case of the freeze of payments for residential and nursing care places, the initial stress test had resulted in a score of 2, as there would be no drop in the quality of care delivered such as to have a disproportionate and discriminatory affect on disabled residents protected by the DDA. Essentially this decision was made on the basis that although SC was proposing, in real terms, to reduce the sum paid towards the costs of residential and nursing home places for individuals, it made no changes to threshold criteria and it fully expected that there would be no drop in the numbers or quality of places available.

The judge went on to determine that despite the failure to consult, there was no failure to comply with the equality duty in this case as SC had not made a decision to alter the quality or number of places available, and therefore it could not be said that the decision had adversely impacted upon any individual with a protected characteristic. It was noted that this position might alter when it came to annual reviews of individual care plans (required under s47 of the National Health Service and Community Care Act 1990) but that no claim in the present case had been brought on behalf of an individual. The judge noted that if SC did correctly assess the usual cost of care in accordance with the Agreement and FACS guidance, there would probably be compliance with the equality duty in those individual cases.

Implications for practitioners

Although, as in the *Isle of Wight* case there was a clear lack of consultation, the judge in the *Sefton* case looked pointedly at whether the decision had a potential impact on those with protected characteristics, and whether the EIA had been effective in assessing that impact. He found that it had and therefore the equality duty had been complied with.

629

There are many similar situations arising at the moment with most local authorities looking to cut their budgets drastically, but the difference in these two cases highlights the need to look carefully at the decision itself to see whether the authority is actually intending that the level of services provided to those with protected characteristics is going to be reduced or not.

Arguably, the point made in the *Isle of Wight* case – that the real impact would not be known until the cuts were put into effect – might have affected Judge Raynor's decision, but this argument was not run, and the comment that in all likelihood the equality duty would have been complied with in individual cases had the FACS guidance and Agreement been followed, shifts the emphasis onto the decision itself. These two cases together highlight the need for practitioners to analyse carefully the effect of the failure to consult; where it comes in the decision-making or EIA process; and what the impact of the actual decision will be on those with protected characteristics when assessing the merits of a potential claim of failure to comply with the equality duty.

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630 Briefing 630

Disability discrimination – direct discrimination – reasonable adjustments – deaf diplomat and lipspeakers

Cordell v Foreign & Commonwealth Office UKEAT/0016/11/SM October 5, 2011; [2011] EqLR 1210

Facts

Jane Cordell (C) is profoundly deaf and since 2001 was employed by the Foreign & Commonwealth Office (FCO). At first her postings were in London, but in 2006 she was posted to Warsaw, on all occasions with the support of lipspeakers.

In 2009 C was offered the post of deputy head of mission in Astana, the embassy for Kazakhstan and Kyrgyzstan. This offer was subject to an assessment of reasonable adjustments, including the cost of lipspeakers. As a result, C's appointment could not proceed.

The FCO had a reasonable adjustments policy, which meant that any adjustments with an annual cost over £10,000 were subject to a requirement of reasonableness. C had lipspeakers when she was posted in London, at an annual cost of around £60,000-£70,000. However, for postings abroad, there were the additional costs of flying out and accommodating lipspeakers (the intensity of the work meant that a rotating team of lipspeakers, rather than just one, was required). The costs for C's posting in Warsaw, which took place before the FCO's reasonable adjustments policy was introduced, were estimated to be around £146,000 a year.

Employment Tribunal

C presented a claim to the ET for direct disability discrimination and failure to make reasonable adjustments. In both claims C relied on the fact that the FCO paid comparable sums to the cost of her lipspeakers by way of the continuity of education allowance (CEA). The CEA provided for diplomats overseas to send their children to boarding schools, at a cost of up to £22,000 to £25,000 per year per child (depending on their age). The CEA is not subject to any reasonableness requirement. Some diplomats overseas had up to six children, although C had no children herself.

C disputed the annual cost of adjustments reached by the FCO in their analysis under the reasonable adjustments policy. In particular, the cost would depend on how large the team of lipspeakers was and whether its shifts would be on a two or four weekly basis.

The ET dismissed C's claims. As a finding of fact, the tribunal found that C's costings for the reasonable adjustments were unrealistic, and that they would have been at least £249,500 per year.

However, the critical issue was the whether an FCO employee in receipt of CEA was the correct comparator for the purposes of the direct

discrimination claim. The tribunal held that they were not – the fact that C did not have children herself was a 'material difference' which meant that the employee with a large number of children was not a suitable comparator.

As for the reasonable adjustments claim, the tribunal took into account a number of factors: the cost of adjustments to C's salary; the proportion of the FCO's reasonable adjustment budget; the highest known cost to an individual under the CEA; and, the costs of employing local and diplomatic staff at the Astana embassy.

It concluded that the costs of lipspeakers for C were not a reasonable adjustment.

Employment Appeal Tribunal

C appealed the ET's decision on both direct discrimination and the failure to make reasonable adjustments. The EAT dismissed the appeal.

C argued that the CEA comparator was suitable as in both cases the FCO was making an allowance to enable an employee to work overseas – in one case it was educational allowance for children, in C's case – lipspeakers.

The EAT disagreed. The reason C was unable to take up the Astana posting was the cost of providing the support necessary to do her job, and not on grounds of her disability, and so the treatment complained of was not on grounds of C's disability. Underhill P said that C's argument relied upon looking at her material circumstances at '*too high a level of generality*'.

Underhill P, giving judgment on behalf of the EAT, referred to the case of *Aylott v Stockton-on-Tees Borough Council* [2010] EWCA Civ 910 [see Briefing 573] in examining the correct comparator for direct discrimination. This meant that the relevant circumstances of the comparator had to be relevant to the treatment complained of. The FCO did not have a policy of providing any assistance to overseas diplomats to enable them to take up their posting, just the more specific CEA in relation to education. The EAT held that the CEA was of relevance to the question of reasonableness in relation to the reasonable adjustments claim, but not to direct discrimination.

In relation to reasonable adjustments, C's appeal was that the tribunal took into account irrelevant factors and their ultimate decision was perverse. The EAT dismissed the appeal, noting that there was *'no objective measure for calibrating the value of one kind of expenditure against another'*. It followed that the range of factors the tribunal considered were relevant, in so much as they provided a context for the cost of the reasonable adjustments C was requesting.

The EAT also noted that the cost of the adjustments was not the only reason cited by the FCO for refusing the adjustments; there was also the unreliability of being able to provide constant lipspeaker support.

Analysis

Although the case includes a reasonable adjustments claim, the real focus on the EAT judgment is on the issue of comparators, and which features of the claimant should be incorporated into the comparator. It is clear that C would have received CEA for any number of children (if she had chosen to have any), and the EAT was persuaded that this was relevant.

The difficulty with Underhill P's *'level of generality'* analysis is that it is almost always possible to rephrase a question about less favourable treatment so that it is specific enough to exclude disability; there will never be any objective measure of what the correct level of generality should be.

C was making the point that employees with children do not face the same kind of scrutiny when their allowances are looked at, when compared to employees requiring reasonable adjustments. It remains to be seen whether this kind of policy decision can fit within a discrimination claim, which by its very nature focuses far more on individual circumstances.

Practical implications

The case is a lesson in how a tightly drafted comparator can be critical. If a factor (such as the CEA) is going to be relied upon, it should be highlighted at an early stage in the claim, and specific disclosure requests made around this point. What makes the case of less general application is that the FCO is unique in the amount of money it provides employees to enable overseas postings, and so even if the case is eventually successful (permission to appeal is being sought in March), the result may not transfer well to other employees.

Michael Newman
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Sex discrimination when married to a particular individual

Dunn v The Institute of Cemetery and Crematorium Management
UKEAT/0531/10/DA, December 2, 2011; [2012] EqLR 100

Facts

Mrs Dunn (D) was a technical services manager for the Institute of Cemetery and Crematorium Management (the Institute). She was married to Mr Dunn, who was also employed by the Institute.

There was a dispute between D and the Institute over changes to her contractual sick pay and the possibility that she would be made redundant. At the same time, there was a separate dispute between Mr Dunn and the Institute. Matters culminated in D resigning.

Employment Tribunal

D made a claim of sex discrimination on the basis that she was being treated less favourably because she was married to Mr Dunn. She argued that his dispute with the Institute had been allowed to affect hers.

The tribunal broadly accepted D's factual case – she had been treated less favourably because of her marriage with Mr Dunn. They concluded, however, that this was not sex discrimination on the grounds of marriage. The Institute's actions were not on the basis that she was married, but because she was married to Mr Dunn in particular. They concluded that the Sex Discrimination Act 1975 protected against discrimination on the basis that someone was married, but not on the basis that they were married to a specific individual.

Employment Appeal Tribunal

D appealed. The EAT identified the question of law as *'does an employer act unlawfully if he treats an employee less favourably, not because she is married, but because she is married to a particular man?'*

This question, the EAT noted, had been asked in a number of previous first instance cases. In *Ganhao v ICM Support Service Ltd* (2005) the claimant was dismissed because her husband had resigned. In *Watkins v Jubilee Club* (1982) a husband and wife were dismissed because of stock irregularities – but the wife had no involvement in the stock. In both cases the wives' sex discrimination claims on the basis of marital status succeeded.

In addition, the EAT had previously considered the issue in *Chief Constable of the Bedfordshire Constabulary v Graham* [2002] IRLR 239. Mrs Graham was an Inspector, married to a Chief Superintendant serving in the same force. She was given a job in the division commanded by her husband, but the appointment was reversed. The Chief Constable felt that it was untenable for her to serve in the same division, because she would not be a *'competent and compellable witness against her spouse'*. Her claim for marriage discrimination succeeded.

The EAT concluded that *Graham* established that a married person is protected by reason of her being married to her husband, rather than simply being married.

On that basis, the EAT concluded that the tribunal had erred in law. It was clear that D had been treated less favourably because of her marriage to Mr Dunn. Following *Graham*, this was sex discrimination.

Michael Reed
Free Representation Unit

Sex, pregnancy and maternity discrimination – disciplinary hearings

Chief Constable of Hampshire Constabulary v CE Haque [2011] UKEAT/0483/10/CEA October 13, 2011; [2012] EqLR 113

Implications for practitioners

The central issues in this case are whether an employer's conduct in pursuing a disciplinary hearing while an employee is on maternity leave and the lack of arrangements/ facilities for her as a breastfeeding mother may amount to discrimination on the grounds of sex and/or pregnancy and/or maternity leave.

The EAT was very critical of the approach taken by the ET in the first instance, and in particular the ET's failure to consider the issues before it in light of the provisions of statute and case law as well as provide reasons for the decisions reached.

Facts

Mrs Haque (H) was a police officer for the Hampshire Constabulary (HC). She and her husband (who was also a police officer) were subject to disciplinary proceedings arising out of an incident in August 2006.

Following the determination of criminal proceedings at which H was acquitted, a preliminary disciplinary hearing was listed on July 17, 2008. H had a baby on April 5, 2008 and at the time of the hearing she was breastfeeding. She complained that the facilities provided for her at the venue for the hearing were woefully inadequate for her and her baby.

Representations were made on H's behalf that the substantive disciplinary hearing should be postponed until her maternity leave had come to an end in March 2009. The disciplinary tribunal disagreed and decided that a 2-week hearing was to take place from January 6, 2009 to January 23, 2009.

H complained to HC that the decision to proceed with the disciplinary hearing in January 2009 was in breach of HC's own maternity policy and would amount to sex discrimination.

H complained of direct and indirect sex discrimination and harassment on the grounds of her sex. The central complaints were that she had been compelled to attend the preliminary hearing on July 17, 2008, no appropriate facilities were provided at the hearing for her and her young baby, and HC's refusal to postpone the disciplinary hearing in January 2009 until after her maternity leave was over. H also advanced complaints about the manner of HC's conduct prior to and during the proceedings in that HC did not offer her access to occupational health and in respect of comments made by HC's counsel at the preliminary hearing, which H found offensive. She did not complain about the outcome of the disciplinary proceedings at which she was found guilty of misconduct and was required to resign.

Employment Tribunal

The ET upheld H's complaints of sex discrimination in respect of her claims that the provisions made by HC for H on July 17, 2008 were inadequate, and in respect of the decision to proceed with the disciplinary hearing while H was still on maternity leave. The ET concluded that postponing the final hearing to April 2009 would not have made any difference to HC in presenting its case.

The ET held that HC was entitled to bring disciplinary proceedings within appropriate timescales but that HC must recognise that female officers who become pregnant are entitled to a significant period of maternity leave.

In referring to the case of *Fletcher and others v NHS Pensions Agency and another* [2005] ICR 1458, the ET stated that pregnant workers or women on maternity leave are in a 'protected period' in which they are entitled to be treated in a different and more 'privileged' manner than those who are not pregnant or on maternity leave.

The ET also stated that it must also have regard to the general concept of proportionality.

While the ET accepted that there was no specific statutory or other obligation on HC not to proceed with the disciplinary proceedings while H was on maternity leave, it held that once the decision was made to do so HC had a duty in so far as practicably possible to preserve H's rights during maternity leave, to have regard to any representations made by

her as to the manner and timing of the proceedings, to carry out appropriate risk assessments and to make necessary and appropriate arrangements for the proper provision of facilities for H and to minimise any interference with the protected period of maternity leave.

Employment Appeal Tribunal

HC appealed and H cross-appealed in respect of aspects and some arguments of her case that were not successful.

The EAT was critical of the ET's approach, in particular its failure to apply the statutory test for direct discrimination as set out in s1 of the Sex Discrimination Act 1975 (SDA) and in respect of its understanding of *Fletcher*.

The EAT correctly observed that direct discrimination on the grounds of sex cannot be justified and the issue of proportionality is not relevant. While proportionality may be relevant when considering justification for indirect sex discrimination claims, the EAT found that the ET had made no distinction as to whether its findings were in respect of direct or indirect discrimination or harassment.

In respect of the ET's findings that it could see no valid reason not to postpone the hearing and that HC's refusal to do so amounted to 'unnecessary interference' with her rights while on maternity leave which amounted to direct sex discrimination, the EAT found that the ET appeared to have taken the view that once H had demonstrated disadvantage related to the fact that she was breastfeeding and which was caused by HC's conduct, it was inevitably sex discrimination.

The EAT observed that when determining direct sex discrimination, s1(1)(a) SDA requires that there is less favourable treatment and that the treatment is on the grounds of sex. It is established in pregnancy and maternity cases that the question is one of unfavourable treatment thus no male comparator would be required.

The EAT referred to the comments made by Cox J in *Fletcher* that treatment of a pregnant woman or woman on maternity leave is not more favourable but merely remedial of an existing disadvantage. Unfavourable treatment would still need to be on the grounds of sex. If the reason for the treatment is pregnancy then the detriment arising is unlawful sex discrimination even if other employees are in the same circumstances.

The issue in *Fletcher* was that midwives had their bursaries withdrawn when they were absent from training because they were on maternity leave. Therefore, the ground for the less favourable treatment was not an issue. The EAT found that in this case the ET had not understood *Fletcher* in this light and the question in this case was did H receive the less favourable/unfavourable treatment on the grounds of sex or for some other reason?

> 'The central question that was not answered in this case was *'what was the reason for the employer's treatment'* '

Essentially, the EAT found that it was not enough to show that a pregnant woman or woman on maternity leave may have a disadvantage, which others would not, in attending disciplinary proceedings. It would also be necessary to show that the reason the proceedings are being progressed is because she is a woman and/or she is on maternity leave and/or she is breastfeeding. The EAT found that the ET had failed to examine HC's motivation for the treatment. The EAT concluded that the ET could not have had regard to the provisions of s1 SDA as it would not have failed to address the 'reason why' question.

In respect of the facilities at the hearing, the ET had accepted that the facilities were inadequate but did not set out its reasons for such findings. The reasons given for the poor arrangements identified by the ET appear to be that the HC had not appreciated that H would be there. Therefore the EAT held that there could be no direct discrimination on the grounds of sex on that finding of fact as there was nothing to show that the reason for the treatment was related to her maternity leave, pregnancy or being a woman.

The EAT concluded that there had been no explanation and examination of the facts as to why submissions upon central issues were rejected and the factual basis for the conclusions reached. The EAT ordered that such were the failings of the ET the case should be remitted to a fresh tribunal to consider the reason why HC treated H as it did in respect of the arrangements made and the timing and location of the disciplinary hearing and whether that constituted either direct or indirect discrimination.

Comment

Given the approach taken by the ET in the way in which conclusions were drawn it is not difficult to see why the EAT decided that the matter needed to be remitted to a fresh Tribunal.

The EAT judgment should not be treated as suggesting that employers do not need to make adequate provisions for pregnant women or women on maternity leave when they are invited to attend hearings. Further, regard still needs to be given to the requirements of female employees who are invited to attend hearings while they are still breastfeeding. The central question that was not answered in this case was *'what was the reason for the employer's treatment'* and decisions were made without regard to this crucial question.

The fresh tribunal will now need to examine the reasons for HC's treatment of H in accordance with the correct statutory test providing clear reasons and the factual basis for its conclusions. The reason for treatment will have to be shown to be on the grounds of sex, pregnancy and or maternity leave for direct discrimination to be determined.

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Briefing 633

Claiming discrimination compensation awards against multiple respondents

Bungay & Paul v Saini, Chandel & All Saints Haque Centre UKEAT/0331/10, September 27, 2011

Facts

Mr Chandel (C) and Mr Saini (S) were employed by the All Saint Haque Centre (the Centre) which was a limited company. Following an ET hearing and a subsequent appeal, both succeeded in unfair dismissal and religious discrimination claims.

The ET concluded that both had been unfairly dismissed and that C had been discriminated against because of his faith. C had brought his claim against the Centre and also its chairman, Mr Bungay, and a member of the board, Mr Paul. Both were directors of the Centre.

Employment Tribunal

At a remedies hearing, the ET made awards in favour of both claimants. These were made on a joint and several basis against all three respondents – in other words, each respondent was liable for the whole of the award.

The tribunal also awarded aggravated damages, in part because, after the claimants' employment had ended and claims brought in the tribunal, Mr Bungay and Mr Paul had reported them to the police. The tribunal found that this had been a malicious complaint, without any foundation, which had resulted in the 'humiliating' experience of being arrested.

Employment Appeal Tribunal

Mr Bungay and Mr Paul appealed against the ET's decision (the Centre, by this time, was in compulsory liquidation). They argued that the tribunal was wrong to conclude that they had acted as agents within the meaning of reg 22 & 23 of the Employment Equality (Religion or Belief) Regulations 2003. If they had not acted as agents, the claims against them should have failed. And, even if they were agents, they argued, the tribunal should not have made the award on a joint and several basis.

In relation to their agent status, the appellants argued that they were directors of the Centre and acting in that capacity. They were not, therefore, acting as agents but as emanations of the company. The EAT rejected this argument, concluding that the test was whether the appellants' were exercising authority conferred by the Centre. Since they were, they were liable as agents.

In relation to the joint and several liability for the award, the EAT followed the previous cases of *London Borough of Hackney v Sivanandan* [2011] IRLR 740 [see Briefing 621] and *Gilbank v Miles* [2006] IRLR 538. The default position in tort, where two or more people were liable for the same act, was that they were each liable for the whole of the damage caused by that act. The ET had concluded that both appellants had

conducted a single cause of action and this had properly led to a joint award.

> In most cases tribunals should make discrimination awards against multiple respondents on a joint and several basis

The appellants also appealed the aggravated damage award. They argued that tribunals should not consider post-dismissal conduct in making such awards. They also argued that the respondents were not responsible for the arrest, which was a matter for the police. Furthermore, they suggested, the claimants had other possible causes of action, such as malicious falsehood if they wished to pursue the matter.

The EAT rejected this part of the appeal. There was a wide range of circumstances in which aggravated damages might be awarded. The primary reason for the award was the highhanded treatment of the claimants during the disciplinary process. This mistreatment had continued after employment had ended and it was proper for the tribunal to take this into account. There was no general rule that the existence of another right of action could defeat a claim for aggravated damages. Indeed, where the post-dismissal treatment was the continuation of a campaign of harassment begun during employment, it was desirable that it be dealt with by the tribunal rather than in separate litigation.

Comment

This case continues the EAT's journey away from the flawed decision in *Way v Crouch* [2005] IRLR 603. It is now clear that in most cases tribunals should make discrimination awards against multiple respondents on a joint and several basis. It should not, as has often been the case previously, make only token awards against individual respondents.

This has significant consequences for tribunal litigation in practice. Often it will be easier for claimants to enforce an award against individual respondents, who are less likely to become insolvent or become a mere shell – common problems with small companies. Employees and their advisors therefore need to consider at the point of bringing the claim whether there are potential individual respondents and whether they should be included in the claim.

The EAT's approach to the aggravated damages is also welcome. Such awards are uncommon and relatively modest. It is sensible for tribunals to have regard to the totality of a situation when considering them, rather than allowing an artificial split between pre and post-employment.

Michael Reed
Free Representation Unit

Role and remit of the Equality and Human Rights Commission under threat

Serious concerns have been raised by the Public and Commercial Services Union (PCS) about how proposed cuts to the budget of the EHRC will threaten its ability to fulfil its statutory remit and provide public services to victims of discrimination in the future. According to the union, the EHRC is facing a 63% cut to its original budget which will leave it with an annual budget of £26 million and a projected headcount of between 150 -180 staff.

PCS is concerned that the EHRC's Organisational Design (OD) for the senior management team for the new, reformed commission will have a negative impact on its frontline services. This follows the loss of most of the EHRC's existing frontline services in 2012 (closure of helpline, grants, regional offices, casework, and mediation). PCS is concerned that the marked absence of frontline services in the new OD means that the EHRC will lose even more of its programme budget which is ring fenced for frontline services. This raises the very real prospect that the EHRC's budget will shrink to less than £20 million by or before 2015.

In total, the government has set aside £46.5 million for the Government Equalities Office (GEO) and the EHRC by 2015. While the EHRC's budget falls each year until then, the budget for the GEO rises to £20.6 million in the same period. PCS argues that the GEO will take the lion's share of the resources committed to eliminating discrimination in Britain, with the EHRC surviving on £26 million and 150-180 staff.

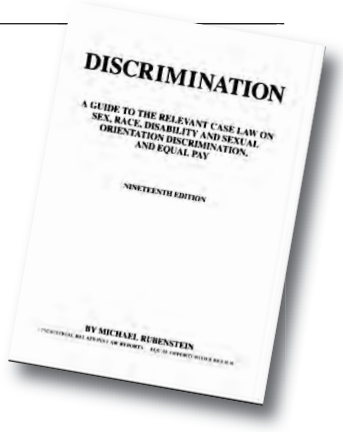
In comparison, the budget of the legacy commissions which the EHRC replaced in 2006 was:

- EOC: budget £9.2m; staff: 165
- DRC: budget £21.2m; staff: 216
- CRE: budget: £19m; staff: 195

Natasha Burgess, Campaign Officer with the PCS urges all stakeholders to consider the merits and financial implications of the EHRC's OD proposals as part of the union's campaign to save the budget and remit of the EHRC. You can make your views known by emailing Home Office Minister Theresa May MP directly at public.enquiries@homeoffice.gis.gov.uk and by signing the online petition to save the EHRC at http://epetitions.direct.gov.uk/petitions/29879. Natasha can be contacted at natasha@pcs.org.uk.

Discrimination – A Guide to the Relevant Case Law

Michael Rubenstein's 25th edition of *Discrimination – A Guide to the Relevant Case Law* has been published and is available from Michael Rubenstein Publishing by emailing subs@rubensteinpublishing.com or by telephoning 08448001863. Free to subscribers to Equal Opportunities Review and Industrial Relations Law Reports, copies of this essential up-to-date guide to key discrimination principles can be purchased for £95.



Launch of the Women's Equality Network

Between March 2009 and April 2010, 18,200 sex discrimination cases and 5,200 age discrimination cases were accepted by the Employment Tribunal and Employment Appeals Tribunal.[1] Overall, there was a 56% rise between 2008-09 and 2009-10 in the number of discrimination cases accepted by the ET and EAT.[2]

Television presenter Miriam O'Reilly's experience during her claim for age and sex discrimination against the BBC really brought home to her how important it was to have the support of other women as she went through the process. She took strength from this and the support of her family and friends. Since the success of her case, she has spoken to several women, some suffering discrimination at work, others in the middle of litigation, to offer support and advice which they have found invaluable.

A Women's Equality Network (WEN) has been launched to provide peer-to-peer support and advice for women facing workplace discrimination. Miriam is a patron. The aim of the network is to provide women with a safe forum where they can share their experiences.

Many women feel isolated when faced with discrimination at work, whether because of gender, age, race, and sexual orientation and discrimination can affect their confidence, make them question their abilities and can be immensely stressful.

The format of the WEN is a website providing online fora and information. The website provides:

- blogs and fora where women can confidentially and anonymously discuss their concerns at work and seek reassurance from others and exchange information about what to do in different situations
- basic legal information about the law and time limits
- 'signpost' other organisations providing professional advice or information

The website is open to all women and is free and confidential.

The network has been launched with the financial support of Leigh Day & Co solicitors. However, in the long term, the objective is to develop an independent management team of volunteers who will be willing to take the site forward and apply for charitable status or join up with an existing charity.

The website is at www.womensequalitynetwork.org.uk and you can follow it on twitter @WomenENet

1. http://www.justice.gov.uk/publications/docs/tribs-et-eat-annual-stats-april09-march10.pdf

2. http://www.personneltoday.com/articles/2010/09/08/56506/employment-tribunal-statistics-2010-whichdiscrimination-claims-get-the-largest-awards.html

Government's first transgender equality action plan

The Government Equalities Office has published the first ever cross government action plan to advance transgender equality. *'Advancing transgender equality – a plan for action'* includes reforms to health services, including clearer guidance to doctors; changing how gender identification is represented in passports; support for transgender pupils in schools; and new steps to protect privacy at work. The official figures show that 88% of transgender employees experienced discrimination or harassment at work, and that hate crime against transgender people is on the rise. The action plan is available at www.homeoffice.gov.uk/equalities.

Overrepresentation of minorities in the criminal justice system

Runnymede Collection: Criminal Justice v Racial Justice, *Minority ethnic overrepresentation in the criminal justice system*; edited by Kjartan Páll Sveinsson, January 2012

This essay collection focuses on solutions to the over-representation of ethnic minorities in the criminal justice system.

The overall theme of the collection is that whilst tackling institutional and individual racism should still be a priority, it is crucial that wider inequalities in employment, pay, education and housing are tackled in order to reduce the numbers of black and minority ethnic people in the criminal justice system.

Due to the impact deprivation and inequality has on participation in crime, over-representation in the criminal justice system will only be defeated once these issues are tackled.

The introduction and foreword argues that now is the time for a new approach to tackle race inequalities in the criminal justice system.

Delay in implementing age discrimination ban in the provision of services and public functions

The government is delaying a decision on implementation of its proposed ban on age discrimination in the provision of services, which it had envisaged bringing into force in April 2012. This means that any ban is unlikely to come into effect before October 2012.

The Government Equalities Office has said that ministers are still considering the scope for and content of any exceptions from the ban, in the light of responses to the consultation in 2011. They consider it *'preferable to take a little more time both to get the decision right and to give businesses and others affected more time to prepare and adjust as necessary'.* No date for any decision has been given.

First prosecutions for sexual orientation hatred offence

In January 2012 the first prosecutions for the offence of stirring up hatred on the grounds of sexual orientation resulted in prison sentences for three Derby men. The men had distributed leaflets in the build-up to a gay pride event calling for homosexual people to be executed.

Part 3A of the Public Order Act 1986 (the 1986 Act) was amended by the Criminal Justice and Immigration Act 2008 so as to create offences of intentionally stirring up hatred on the grounds of sexual orientation. These complement existing offences under the 1986 Act of intentionally stirring up hatred on religious grounds. It is the first prosecution of its kind since the provisions came into force in March 2010.

Statistics from the Crown Prosecution Service show that there were 15,284 prosecutions for hate crime in England and Wales in 2010-11. This is the highest number since the statistics were first complied in 2005-6. The vast majority of prosecutions, 12,711, were for racially motivated offences.

Employment Tribunal and Employment Appeal Tribunals Fees Consultation

The Ministry of Justice (MOJ) is consulting on charging fees in ETs and the EAT. The MOJ's aim is to set up a simple system that is:

- effective
- maintains access to the courts, and
- encourages settlement at as early a stage as possible.

In the ET, two alternative options are put forward.

Option 1 – fees for putting in an application and a later set of fees for the hearing. These are graded according to the claim: level 1 – simple applications such as for unpaid wages or notice pay; level 2 applications – unfair dismissals, and level 3 applications – discrimination claims, whistle-blowing claims and equal pay claims.

Fee:	Initially payable by:	Amounts:
Issue fee	Claimant	Level 1 – £150 Level 2 – £200 Level 3 – £250
Hearing fee	Claimant	Level 1 – £250 Level 2 – £1000 Level 3 – £1250

There would then be further fees payable for certain specific applications:

Fee:	Initially payable by:	Amounts:
Request for written reasons	Party who applies	Level 1 – £100 Level 2 – £250 Level 3 – £250
Review application	Party who applies	Level 1 – £100 Level 2 – £350 Level 3 – £350
Dismissal of case after settlement or withdrawal	Respondent	£60
Set aside default judgment	Respondent	£100
Counter-claim	Respondent	£150
Mediation by judiciary	Respondent	£750

Option 2 – a single set of fees for putting in an application – no further fees payable as the case progresses. Once again a different fee is payable according to the 'level' of the claim. However, an additional level has been added – a level 4 claim is included if an applicant wishes to make a claim for over £30,000.

Fee:	Initially payable by:	Amounts:
Level 1 claims (up to an award of £29,999.99)	Claimant	£200
Level 2 claims (up to an award of £29,999.99)	Claimant	£500
Level 3 claims (up to an award of £29,999.99)	Claimant	£600
Level 4 claims – Any type of claims where the award sought is unlimited	Claimant	£1750

Fees at the EAT are proposed to be:

Fee:	Initially payable by:	Amounts:
Issue fee	Appellant	£400
Hearing fee	Appellant	£1250

The cost of introducing the system is estimated to be £2m and the annual cost of administering it will be £1m per annum.

For low-income claimants there is to be a system of remission of fees which may be applied to those in receipt of certain benefits or via an assessment of means.

The DLA is submitting a response to the consultation which closed on March 6, 2012. In its draft response the DLA includes among its concerns:

- the fee is payable at the time of application, or any remission must have been granted during the 3 month time limit for lodging proceedings; there is no proposal to extend the time limit
- proposals could have a detrimental impact on a high number of low-income claimants, on disabled people and minorities
- all discrimination cases are to be charged the higher fee – potentially, this could be indirect discrimination
- proposals are contrary to EC Directives requiring judicial procedures to be available to all
- the level of claim pre-determines the level of award at the outset – particularly likely to affect disability and age claims
- high levels of pregnancy dismissals – could have a differential equality impact
- fees payable by the respondent under option 1 may be disproportionately low compared to applicants' fees
- remission provisions could have an adverse impact on refugees and migrant workers; and an assessment of means based on household income could result in remission not being available to dismissed individuals whose partner is still earning
- in practice, fees may never be refunded
- cumulative effect of the proposals – will lead to employers thinking that they can ill treat employees with impunity

The DLA's final response will be published on the DLA website at www.discriminationlaw.org.uk

Challenges facing older ethnic minority people in retirement

Runnymede has produced a short documentary looking at the specific needs of ethnic minority older people, and the challenges they face in retirement. Called *'Facing Financial Futures: Birmingham 2012'* the film captures the views of 50 older people who took part in a deliberative assembly debate for Runnymede. The key concerns highlighted by participants include:

- feeling that pensions are meagre and that people cannot afford to heat their homes
- feeling that they are not fairly repaid for the contributions made throughout their working lives
- resentment of having to work for even longer, especially for those who are ill
- barriers to overseas retirement, such as frozen pensions abroad, and
- concern for younger relatives struggling to find work and get by.

The film can be viewed at www.runnymedetrust.org.

Government's integration strategy

The Department for Communities and Local Government has published *'Creating the conditions for integration'* which sets out the government's approach to integration in England – stating it also raises issues of wider relevance to the UK. There are five key factors in the strategy – common ground, social mobility, participation, responsibility and tackling extremism and intolerance. The strategy emphasises *'shared aspirations and values'*, the important role of Christianity and faith in national heritage and culture, and stresses that integration is predominantly a local issue, putting the focus on participation and action at the local level. The strategy defines some of the barriers to integration as *'rapid, poorly managed immigration, long-term unemployment and crime and anti-social behaviour'* but it does not specify government action to address these or other issues such as justice and policing, racial violence or racial inequality.

Discrimination Law Association

Notice of Annual General Meeting

The DLA's AGM and annual social event will take place on Thursday, March 22, 2012 beginning at 6:00pm in Doughty Street Chambers, 54 Doughty Street, London WC1N 2LS. Wine, soft drinks and nibbles will be provided. Non-members are welcome to attend the AGM but only DLA members will be eligible to vote at the meeting.

The keynote address will be given by Tim Newburn, Professor of Criminology and Social Policy at the London School of Economics and one of the key players in the Guardian's *Reading The Riots* project, who will be speaking on the subject: *'Riots of summer 2011 – was social inequality the main cause?'*

Employment Law: An Advisers Handbook

Tamara Lewis, 9th Edition LAG 2011, £38

In the preface to the latest edition of her book, Tamara Lewis reminds us that what she has set out to do – as in previous editions – is to provide a self-contained guide to the wide range of employment issues that lay advisers, trade union officials and lawyers deal with on a day-to-day basis. This is obviously somewhat of a tall order given the breadth and depth of knowledge required in order to competently handle a claim of unfair dismissal, discrimination or other related minor claims. Nevertheless Ms Lewis manages to fulfil this aim admirably.

As this is not just another law book – the Advisors Handbook obviously contains substantially more than just law. So although it may not be the book you reach for when finalising that tricky point of your EAT skeleton argument, it does contain a whole host of checklists and useful evidential pointers. This makes it an obvious choice for those who have limited time and resources and who are faced with multiple issues in employment cases that can be dealt with in less depth.

Each chapter starts with a *'Key Points'* section and the appendices contain a myriad of useful information, most if not all of which is sensible and useful (e.g. a checklist for running an ET claim) and some of which is simply not easily found elsewhere (e.g. a list of suggested questions for first interviews with clients who have a variety of claims). The sample questionnaires are particularly useful and serve as a helpful reminder of the availability of the questionnaire procedure which is often overlooked.

Given the remit of the book and its stated aim, it is not surprising that respondents' representatives may find the slant put on the legislative interpretations to be distinctively pro-claimant. But it's no less helpful for that, as it's always useful to know what arguments the opposition will be running.

The Equality Act 2010 is comprehensively covered in chapter 12 with a good helicopter overview of the legal framework. This chapter also includes a short section on EU legislation and how it fits together with the domestic framework.

The last section, *Remedies and procedures*, has chapters on the running of an unfair dismissal claim and a discrimination case, and a rather helpful one on running grievance and dismissal procedures. This makes the book an undoubted winner for employers' advisers and human resources teams as well.

Comprehensive and clearly written, *'Employment Law: An Advisors Handbook'* is an essential reference source to those involved with employment claims.

Briefings

Abbreviations

ACAS	Arbitration, Conciliation and Advisory Service	EA	Equality Act 2010	EWHC	England and Wales High Court	PACE	Police and Criminal Evidence Act 1984
BME	Black and minority ethnic groups	EAT	Employment Appeal Tribunal	FACS	Fair Access to Care Services Criteria and Guidance	PCS	Public and Commercial Services Union
BNP	British National Party	EC	European Commission	GEO	Government Equalities Office	PTSR	Public and Third Sector Law Reports
CA	Court of Appeal	ECHR	European Convention on Human Rights	HH	His/Her Honour	QC	Queen's Counsel
CEA	Continuity of Education Allowance	ECtHR	European Court of Human Rights	HO	Home Office	RRA	Race Relations Act 1976
CMLR	Common Market Law Reports	EHRC	Equality and Human Rights Commission	ICR	Industrial Case Reports	SDA	Sex Discrimination Act 1975
CPS	Crown Prosecution Service	EHRR	European Human Rights Reports	IRLR	Industrial Relations Law Report	TUPE	Transfer of Undertaking Regulations
CRE	Commission for Racial Equality	EIA	Equality Impact Assessment	J	Justice	WLR	Weekly Law Reports
DDA	Disability Discrimination Act 1995	EqLR	Equality Law Reports	LGBT	Lesbian Gay Bisexual Transgendered		
DLA	Discrimination Law Association	EqPA	Equal Pay Act 1970	LJ	Lord Justice		
DRC	Disability Rights Commission	ET	Employment Tribunal	NGO	Non-governmental organisation		
		EU	European Union	P	President of the Employment Appeal Tribunal		
		EWCA	England and Wales Court of Appeal				