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Editorial *Challenging times demand strong, imaginative response*

For anyone concerned with tackling disadvantage and advancing equality these are very challenging times. First, there are the coalition government's proposals to drastically reduce the availability of civil legal aid alongside cuts to local authority funding of advice agencies. Second, there are the proposals affecting access to employment tribunals; third, there are the clauses in the Localism Bill which threaten to undermine established principles of parliamentary scrutiny; fourth, there are proposals for reform of the EHRC's powers and duties and further cuts to the EHRC's budget; and then there is debate on the UK's obligations under the European Convention on Human Rights and whether we need a British Bill of Rights – the list goes on.

The DLA has expressed serious concerns about the scale and magnitude of the proposed legal aid reforms and has submitted to government that these changes are a backward step for equality in that they will have a significant and disproportionate adverse effect upon the ability of disadvantaged groups expressly protected by equality legislation to enforce their rights across most areas of their lives including housing, education, employment and abuse of police powers.

The Localism Bill contains proposals which threaten to undermine the gains won by recent court decisions and reduce the applicability and effect of the public sector equality duties as public services are transferred to private providers. The Bill proposes that a minister may wield powers to repeal any statutory provisions that s/he thinks prevents or restricts local authorities exercising their functions under the Bill. These proposals are dangerously broad and provide inadequate safeguards against abuses of power and, in particular, could be used to revoke or repeal provisions such as the public sector equality duties with minimal parliamentary scrutiny and no public involvement.

The Public Bodies Bill did propose similar powers that a minister would have powers to abolish or drastically reform public bodies by means only of affirmative resolution but following widespread criticism, the government has just announced that these will be dropped.

Press reports indicate that, as well as the proposals to reform the role and function of the EHRC announced in October, additional budget cuts are being considered which will significantly impact on its capacity and effectiveness. The Equality Commission for Northern Ireland is also vulnerable to similar cuts once public sector budgets are agreed and implemented by the Northern Ireland Assembly. After such changes will both bodies meet the requirements for specialised equality bodies under EU legislation? Will the EHRC continue to meet the UN requirements for a national human rights institution?

But while on the one hand attempts are made to whittle away at established rights and freedoms, opportunities to fight back are explored in articles in *Briefings*.

On the theme of changing discriminatory behaviour, Robin Allen QC urges lawyers to use more imaginative approaches and assist tribunals to make recommendations which will have a wider impact on discriminatory behaviour by respondents. He also highlights that the knowledge gained from equality impact assessments is an important asset and, with more engagement with the EHRC, we can assist the Commission to use the full set of tools at its disposal to assess the extent of a public authority's compliance with their public sector duties, to conduct investigations and issue unlawful act notices.

In their examination of the new public sector duty under the Equality Act 2010, John Halford and Saadia Khan chart the progressive stance of the courts in interpreting the old statutory duties and how this might be built upon under the EA. The judicial review of the London Councils' cuts to voluntary sector funding is a good example of how this operates to ensure that such funding decisions are lawful and comply with statutory equality duties. The authors conclude that the new EA public sector duty provides a valuable opportunity to ensure that the voices of the all those in communities, including the disadvantaged and marginalised, are heard when decisions affecting them are taken by public authorities.

All the while, discrimination is still happening, as exemplified by the lack of rights for deaf citizens to fully participate as jurors in criminal trials, or the experience of Mr Hall and Mr Preddy in their attempt to get away for a relaxing break, and then Lord Davies of Abersoch's report confirms that the glass ceiling is firmly in place in that only five of the FTSE 100 companies are run by women.

We need to find new ways to challenge attacks on existing rights. In addition to making full use of the potential of existing legal safeguards, we must continue to challenge laws and policies which undermine established principles and reduce equality rights. We need to seize every opportunity to speak out in debates and consultations on the equality infrastructure which is essential to eliminate discrimination and achieve real change for groups experiencing inequality and disadvantage. As Robin Allen says, 'it's over to us'.

Geraldine Scullion, Editor

Please see back cover for list of abbreviations

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New routes towards more comprehensive remedies for discrimination

Robin Allen QC[1] recommends that lawyers take a fresh look at ways to change discriminatory behaviour and achieve equal treatment in the future. He suggests an imaginative use of underused legal provisions to seek non-financial remedies such as tribunal recommendations which go beyond the individual case. He recommends, in particular, a better awareness among lawyers of the tools to secure equality at the disposal of the Equality and Human Rights Commission.

Introduction

Discrimination law is different from other rights in many ways. One of the greatest differences is the frequency with which clients will say something like 'I am not really (or so much) interested in the money, I just want this to stop, and to be treated no differently from anyone else, so I can get on with a normal life ...'

Given that the equal treatment principle is the premise for all our equality laws it is something of an indictment how rarely equality lawyers force equal treatment for the future as opposed to securing a financial remedy for past unequal treatment.

In this paper I want to discuss what we can do about this. I shall focus on some underused legal provisions that can provide non-financial remedies, and consider what they mean, and how and when they might be used. Of course, central to this is the possibility of a recommendation as a remedy in a discrimination case. However just as important are the Equality and Human Rights Commission's (the EHRC or Commission) associated powers.

Some history

It is worth taking a moment to see how we have arrived at the legislation we have currently.

The first legislative protection against discrimination in the modern era was in relation to discrimination on grounds of race. The original plan was that the remedy for race discrimination should only rarely be the subject of a financial award. Prior to 1976 when the Race Relations Act 1976 (RRA) came into force, race discrimination was supposed to be controlled by two bodies – the Community Relations Council (CRC) and the Race Relations Board (RRB).

When the Race Relations Act 1965 was first enacted it outlawed discrimination in relation to places of 'public resort'[2]. Local conciliation committees were set up under the aegis of the RRB which were supposed to secure an 'assurance' that there would not be a repetition of the discrimination. Where this failed the Attorney General could seek an injunction.[3] The Act also covered discrimination in relation to tenancies.

In 1968 the Race Relations Act 1968 extended the material scope of the legislation to the provision of goods, facilities and services and employment. It also empowered the RRB to litigate on behalf of individuals. The primary remedy remained an injunction, though for the first time it was also possible to get damages and a declaration.

The 1968 Act established the CRC as an advice giving body to complement the work of the RRB and it was hoped thereby, to assist persons not to be on the wrong end of an action.[4]

The role of the CRC, though modest at the outset, was important since it recognised for the first time that people needed to be told how not to discriminate. We can therefore see in the CRC the first realisation that the legislative approach to equality law needed to be educative. There was a need for a public body with a didactic role explaining how this new right had to be applied and understood.

The roles of the RRB and the CRC were highly resented by some the victims of discrimination who found enforced 'conciliation' could be humiliating and

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2. This was a reflection in part that the Act was passed to remedy the humiliating refusal of the Imperial Hotel to give (later Lord) Leary Constantine a bed for the night: see *Constantine v. Imperial Hotels, Ld.* [1944] KB 693. The places of public resort were defined as any hotel, restaurant, cafe, public house or other place where food or drink is supplied for consumption by the public therein; any theatre, cinema, dance hall, sports ground, swimming pool or other place of public entertainment or recreation, any premises, vehicle, vessel or aircraft used for the purposes of a regular service of public transport and any place of public resort maintained by a local authority or other public authority

3. The role of the Attorney General in relation to granting permission for criminal proceedings for incitement to racial hatred can be traced back to this time.

4. For a full discussion of these two Acts see Lester A. and Bindman G, *Race and Law*, Penguin 1972.

did not wish to depend on committee decisions within the RRB as to whether or not their cases would be enforced. So when the Equal Pay Act 1970 (EqPA) was passed this process was not repeated.[5]

In fact despite the title of the EqPA focusing on pay, the mechanism that it introduced – the deeming of an equality clause into all contracts of employment – can be seen as the first step in securing for employees the personal right to something more than a financial remedy. It has been too often forgotten that the equality clause is as relevant to non-financial terms as to financial terms and can be used to secure equal access to matters such as training or promotion where those terms are contractual.

The Sex Discrimination Act 1975 (SDA) provided for a new body which consolidated the roles of teacher and enforcer: the Equal Opportunities Commission (EOC).

The SDA established the template for the provisions for discrimination remedies that was applied in the RRA, and all subsequent legislation in Great Britain. The position in relation to equal pay remained different, and it took some time for an equivalent set of provisions to apply in Northern Ireland.[6]

In relation to non-financial remedies, the SDA

- provided expressly for individual non-financial remedies in the employment field;
- permitted any individual remedy (and therefore any non-financial remedy) which might otherwise be awarded in the County Court; and
- provided special powers for the EOC to secure non-financial remedies.

The powers of the EOC and those of the Commission for Racial Equality (CRE) (which replaced the CRC and RRB in the Race Relations Act 1976) (and later the Disability Rights Commission) were similar. They included addressing discriminatory practices, discriminatory advertisements, instructions to discriminate, pressure to discriminate, and conducting formal investigations and issuing recommendations, making reports and non-discrimination notices which could be backed up with court orders. What I am most interested in is the investigation powers and the accompanying provisions.

The statutory investigation powers

These new investigation powers were condemned in flowery language by Lord Denning MR in his judgment in *Science Research Council v Nassé* [1978] ICR 1124 at p1138:

> *... the immense powers already granted by Parliament to the statutory commissions [are such that they] can conduct 'formal investigations' by which they can interrogate employers and educational authorities up to the hilt and compel disclosure of documents on a massive scale. They can take up the cause of any complainant who has a grievance and, in his name, issue a questionnaire to his employers or educational authorities. They can use his name to sue them, and demand full particulars in the course of it. They can compel discovery of documents from them to the same extent as in the High Court. No plea is available to the accused that they are not bound to incriminate themselves. You might think that we were back in the days of the Inquisition. Now we come to the most presumptuous claim of all. They demand to see documents made in confidence, and to compel breaches of good faith – which is owed to persons who are not parties to the proceedings at all. You might think we were back in the days of the General Warrants.*

Although the House of Lords took a rather different line on appeal in *Nassé* (see [1979] ICR 921) we can see now that these comments on investigations set the tone for future judicial consideration of their use by the commissions. A highly restrictive approach was taken by the courts in judicial reviews of decisions to start formal investigations: see e.g. *Reg. v Commission for Racial Equality, Ex parte Hillingdon London Borough Council* [1982] A.C. 779 and *In re Prestige Group Plc.; Commission for Racial Equality v Prestige Group Plc.* [1984] 1 WLR 335.

The result was that thereafter the commissions largely used their powers to undertake formal investigations on a more general basis. Indeed the EOC barely used the power at all in its latter years.

The CRE did carry out some important formal investigations later on when the memory of the chilling criticisms of these powers had waned. Its last, published in September 2007 just days before the CRE ceased to function, was an investigation into the failure by the Department of Health to carry out any race equality impact assessments. When the Equality Act 2006 merged all the GB equality commissions and created the Equality and Human Rights Commission some of these points were addressed and the EHRC was given special new powers to secure non–financial remedies. It is important to know more about these functions if we are to know what can be done to use them as another route to a more comprehensive remedy for discrimination.

5. Employees could commence cases straight away: section 2.

6. The development of the role of the Fair Employment Agency through to the Fair Employment Commission and ultimately the Equality Commission in Northern Ireland is outside the scope of this paper.

The EHRC's investigative powers in the Equality Act 2006

The Equality Act 2006 has given the EHRC a strong armoury of investigative powers to counter discrimination. It can carry out Inquiries[7], and these can lead to Investigations[8], which in turn can lead to Unlawful Act Notices[9] and ultimately to Injunctions.[10] However the 2006 Act encourages other means of resolving issues prior to an application for an Injunction such as Action Plans[11] and Agreements.[12] In addition, the EHRC has power to carry out Assessments[13] of the extent to which public authorities have complied with equality duties.

In my view not nearly enough use has been made of Action Plans and perhaps not enough of Agreements. These could well be the most useful solution to a number of different typical equality issues. In my view it is essential that the membership of the Discrimination Law Association assist the Commission to deploy this carefully calibrated collection of tools for securing equality by thinking harder about when, and also how, they might be used.

EHRC Inquiries

On the other hand, the Commission has carried out a relatively large number of Inquiries in its 2+ years of existence. They include Inquiries into[14] –

- The Meat And Poultry Processing Sectors,
- Disability related harassment,
- Race in the Construction Industry,
- Sex Discrimination in the Finance Sector, and
- Assessment of Compliance Into JobCentre Plus

Each of these has been (or, in the case of the most recent, the Meat Packing Investigation, is expected to be) very important in changing the relationship between policy and law in their respective areas. The Commission's action has achieved commendable success in demonstrating the power of this kind of intervention.

However as far as I am aware in no case has an Inquiry led to an Investigation. Moreover as this system of 'investigations' and 'unlawful act notices' is relatively new and as also, as far as I am aware, the Commission has only carried out one formal Investigation using its statutory powers,[15] I shall set out in some detail how those powers might be applied.

The Commission's policy on enforcement

DLA members need to be aware first of the Commission's Enforcement and Compliance policy of May 2009[16] which says in summary that *'The Commission will aim to choose an enforcement method which is relevant and proportionate to a particular breach. The principal purpose of enforcement is to change behaviour, to stop actions that are contrary to law and regulation, and to change future behaviour.'*

The policy is much longer and is something of which we should all be aware. Those three purposes are precisely in point for this paper.

How can equality lawyers and NGOs help with this?

The first point is to make better use of the information which the equality duties will produce.

It is to be hoped and expected that increasingly public authorities will comply with their obligations to carry out monitoring in accordance with the equality duties. If this is done properly it seems inevitable that some of the patterns of discrimination which are known to exist nationally or generically will be seen in operation at a micro level. In such a case, real cases should be identifiable.

It is an important role of NGOs, trade unions and other civil society bodies to bring any such patterns of behaviour to the attention of the public authority and to insist on action.

But these civil society bodies cannot make this happen. If having found relevant evidence of a pattern of indirect discrimination and having been confronted, such a public authority fails to act appropriately, the next step may well be to consider going to the Commission.

That is not to exclude judicial review of course but often that will seem less appropriate where past unequal treatment is revealed. At this point an Assessment by the EHRC may be very important.

7. See section 16 EA. Where an Inquiry leads the Commission to suspect that there has been an unlawful act it must stop the Inquiry and may commence an Investigation: section 16(2) EA.

8. See section 20 EA.This is discussed further below.

9. See section 21 EA. This is discussed further below.

10. See section 24 EA.

11. See section 22 EA.

12. See section 23 EA.

13. See section 31 EA.

14. See http://www.equalityhumanrights.com/legislative-framework/formal-inquiries/

15. Into sexual harassment of female employees in the Royal Mail: see http://www.equalityhumanrights.com/legislative-framework/enforcement/legal-enforcement-case-studies/
This Investigation was terminated on a conditional basis as a result of promises of positive steps to remedy apparent shortcomings.

16. See http://www.equalityhumanrights.com/uploaded_files/enforcement_and_compliance_policy.doc

S31 of the Equality Act 2006 – Public sector duties: assessment:

(1) The Commission may assess the extent to which or the manner in which a person has complied with a duty under or by virtue of section 149, 153 or 154 of the Equality Act 2010 (public sector equality duty).

(2) Schedule 2 makes supplemental provision about assessments.

(3)This section is without prejudice to the generality of sections 16 and 20.

The last year has shown how a judicial review application by the Fawcett Society of the Coalition's Emergency Budget was followed by a decision by the EHRC to undertake just such an Assessment under s31 in the following terms[17]:

The Assessment has the following Terms of Reference (TORs), these explain the scope and the purpose of the Assessment:

1. *Assess the extent to which, and the manner in which, HM Treasury has met the Public Sector Equality Duties [1] in carrying out its functions in relation to the 2010 Spending Review, but having regard to any relevant prior fiscal events and analysis including the Government's emergency Budget, where appropriate.*
2. *Assess the extent to which, and the manner in which, HM Treasury has taken into account equality considerations when assessing policy options in relation to the functions referred to in TOR 1 (above).*
3. *Determine at what stages of policy formation, refinement, development and implementation the Public Sector Equality Duties are relevant and whether HM Treasury has taken proportionate action, within the context of its functions, to:*
   - *gather evidence to enable it to make decisions which have due regard to the need to promote equality of opportunity*
   - *use relevant data to analyse the impact on diversity of public spending, of tax and of policies for promoting productivity and growth*
   - *consider policy options or mitigating actions*
4. *Consider whether and to what extent it is within HM Treasury's functions to assess the cumulative impact of Government policies, and if so, whether it has had due regard to the Public Sector Equality Duties in that function.*
5. *Where HM Treasury relies on any other department to identify and consider any disproportionate impact of any of its proposals or policies in relation to the functions referred to in TOR 1 and take such mitigating steps as are necessary, to assess:*
   - *the extent to which it is proportionate, appropriate and/or timely, to leave that assessment to that other department or departments*
   - *the extent to which within the context of HM Treasury's functions it has aided and facilitated that other department or departments to do so*
6. *Identify areas of good practice, if any, in complying with the Public Sector Equality Duties*
7. *Identify areas of non-compliance, if any, with the Public Sector Equality Duties.*

[1] The general public sector equality duties include the duties under s71(1) of the Race Relations Act 1976, s76A of the Sex Discrimination Act 1975, and s49A of the Disability Discrimination Act 1995 (as amended).

While it is obvious that such an Assessment will take some time it is likely to be something of a 'game-changer' for future budgets.

Reverting to the Commission's policy statement – changing behaviour, stopping the continued use of this process and changing future behaviour – would then be precisely in point. What would an Investigation entail?

Investigations examined

S20 of the 2006 Act provides as follows –

S20 Investigations

1. *The Commission may investigate whether or not a person –*
   (a) has committed an unlawful act,
   (b) has complied with a requirement imposed by an unlawful act notice under section 21, or
   (c) has complied with an undertaking given under section 23.
2. *The Commission may conduct an investigation under subsection (1)(a) only if it suspects that the person concerned may have committed an unlawful act.*
3. *A suspicion for the purposes of subsection (2) may (but need not) be based on the results of, or a matter arising during the course of, an inquiry under section 16.*
4. *Before settling a report of an investigation recording a finding that a person has committed an unlawful act or has failed to comply with a requirement or undertaking the Commission shall –*
   (a) send a draft of the report to the person,
   (b) specify a period of at least 28 days during which he may make written representations about the draft, and
   (c) consider any representations made.
5. *Schedule 2 makes supplemental provision about investigations.*

It can be seen that the critical condition for commencing an Investigation under s21 is that the EHRC *'suspects that the person concerned may have committed an unlawful act'*. The statistics produced from equality scheme monitoring programmes will be important.

As might be expected an 'unlawful' act is defined by s34 to mean any act which is unlawful by reason of being *'contrary to the equality enactments'*. These include all those provisions which an equality lawyer would expect to be included.

The purpose of the Investigation is for the Commission to decide whether or not it is 'satisfied' that there have been one or more unlawful acts. This can be seen in the next section.

Unlawful act notices

By this section the EHRC has power to issue an unlawful act notice under s21 of the 2006 Act which says as follows –

S21 Unlawful act notice

1. The Commission may give a person a notice under this section (an "unlawful act notice") if
(a) he is or has been the subject of an investigation under section 20(1)(a), and
(b) the Commission is satisfied that he has committed an unlawful act.
2. A notice must specify –
(a) the unlawful act, and
(b) the provision of the equality enactments by virtue of which the act is unlawful.
3. A notice must inform the recipient of the effect of—
(a) subsections (5) to (7), (b) section 20(1)(b), and (c) section 24(1).
4. A notice may –
(a) require the person to whom the notice is given to prepare an action plan for the purpose of avoiding repetition or continuation of the unlawful act;
(b) recommend action to be taken by the person for that purpose.
5. A person who is given a notice may, within the period of six weeks beginning with the day on which the notice is given, appeal to the appropriate court or tribunal on the grounds –
(a) that he has not committed the unlawful act specified in the notice, or
(b) that a requirement for the preparation of an action plan imposed under subsection (4)(a) is unreasonable.
6. On an appeal under subsection (5) the court or tribunal may –
(a) affirm a notice;
(b) annul a notice;
(c) vary a notice;
(d) affirm a requirement;
(e) annul a requirement;
(f) vary a requirement;
(g) make an order for costs or expenses.
7. In subsection (5) "the appropriate court or tribunal" means –
(a) an employment tribunal, if a claim in respect of the alleged unlawful act could be made to it, or
(b) a county court (in England and Wales) or the sheriff (in Scotland), if a claim in respect of the alleged unlawful act could be made to it or to him.

The relationship between these powers and ordinary litigation has simply not been explored in any case law.

In my view there is no reason why the Commission should not undertake an Investigation following a reading of an ET judgment which suggests that there are unresolved issues in a work place. Moreover I cannot see any reason why the Commission should not undertake this work if it hears about a case which seems to suggest that there are unlawful acts which are then the subject of a settlement.

Of course Investigations are expensive and time consuming and there are substantial hurdles to their commencement. Yet they offer a very different kind of remedy for discrimination which goes far beyond the individual case.

Recommendations as part of the remedy in an individual action

As noted above, since the SDA was enacted there has been a power given to ETs to make recommendations. The power has to be considered by the ET although in cases where the employer and employee have parted company – in my experience at least – that rarely happens.

The question for the ET is what is 'just and equitable'. Thus for instance s65 of the SDA says –

S65 Remedies on complaint under section 63

1. Where an employment tribunal finds that a complaint presented to it under section 63 is well-founded the tribunal shall make such of the following as it considers just and equitable –
(b) an order requiring the respondent to pay to the complainant compensation of an amount corresponding to any damages he could have been ordered by a county court or by a sheriff court to pay to the complainant if the complaint had fallen to be dealt with under section 66;
(c) a recommendation that the respondent take within a specified period action appearing to the tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of any act of discrimination to which the complaint relates.
(1B)(3) If without reasonable justification the respondent to a complaint fails to comply with a recommendation made by an employment tribunal under subsection (1)(c), then if they think it just and equitable to do so –

(a) the tribunal may increase the amount of compensation required to be paid to the complainant in respect of the complaint by an order made under subsection (1)(b), or

(b) if an order under subsection (1)(b) was not made, the tribunal may make such an order.

'Just and equitable' was interpreted in *Hurley v Mustoe* (No 2) [1983] ICR 422 as referring to the decision as to remedy and not as to the amount of compensation. Thus the ET ought always to ask whether or not it is 'just and equitable' to make a recommendation. But what can it do?

Case law on what can be put into a recommendation

The first question is what is encompassed by the phrase 'adverse effect'? In the most recent reported case on recommendations, *Chief Constable of West Yorkshire Police v Vento* (No 2) [2002] IRLR 177, this point was specifically in issue. It was argued for the police force that following –

... the unreported case of Fasuyi v London Borough of Greenwich (EAT, 9 December 2000)...[the]... adverse effect must be that of the acts of discrimination, not some 'nebulous or general adversity'. They argued that, since the tribunal had reached the conclusion that the respondent acted reasonably in refusing the offer of reinstatement, the suggested interviews and 'invitations' to apologise could not obviate or reduce the adverse effects of the discrimination on the respondent. The 'adverse effects' in s65(1) mean the effect on the respondent's employment, or possibly her prospects of employment. The measures proposed would have no effect on those, and the tribunal did not suggest they would.

The EAT held that it might be recommended that a Deputy Chief Constable should discuss the findings of a serious complaint of sexual harassment, in which the police were found liable, with named officers. However the EAT balked at a further recommendation that these named officers be invited to apologise in writing to the successful applicant.

The EAT, in holding that there was a wide discretion in s65 and that the aim was remedial, can perhaps be said to have gone further than the CA in *Noone v North West Thames Regional Health Authority* (No 2) [1988] IRLR 530.

In that case, the CA held that it would not be right for a tribunal to recommend that an applicant who has been the victim of discrimination in selection for employment should be appointed to the next suitable job that becomes available, because this would be unfair to the other applicants for that post.

Likewise it was held that if a victim of discrimination is promoted automatically in consequence of a recommendation to that effect, without consideration of merit, then other workers who are disappointed might in turn be the victims of sex or race discrimination: *British Gas plc v Sharma* [1991] IRLR 101, [1991] ICR 19, EAT).

The argument in each case was that the legislation did not allow positive discrimination.

However in my view this completely misunderstands the difference between positive discrimination and a remedy. For instance in *Noone,* where Dr Noone had failed in a 'trial by sherry party approach' to recruitment, it was found by the ET that she was far and away the strongest candidate. In effect she had been robbed of her appointment. In that case, in making the recommendation, the ET was doing no more than was necessary for a full remedy.

The case was decided before the full understanding of the obligation in European law to provide an effective and dissuasive remedy for discrimination. In such circumstances it might be argued now that the ET were considering that only such a remedy – ordering in effect the employer to give an applicant that which they should have had – was effective.

Practicability

Harvey addresses the issue of practicability as follows -

..., whilst it has been held that the requirement of 'practicability' that governs the making of any recommendation is to be decided by reference to the effect on the complainant (Fasuyi v Greenwich London Borough Council EAT/1078/99 per Lindsay J at para 24), this does not mean that the practicability of carrying out the recommendation from the point of view of the discriminator should be completely disregarded. A recommendation that was 'completely impracticable' for the discriminator will thus be overruled by the EAT as it would not have been properly made: Leeds Rhinos Rugby Club v Sterling (EAT/267/01, 9 September 2002,) at para 6.1 per HH Judge Reid QC.

This is surely right. However it cannot be used to allow discriminators to avoid their obligations.

Relationship with compensation

There is obviously an issue as to what should be dealt with as a compensation matter and what as a recommendation – which is in many respects a weaker remedy.

In *Irvine v Prestcold Ltd* [1981] IRLR 281 the facts were these. Mrs Irvine was overlooked for promotion

on two occasions in favour of a man. The ET found sex discrimination on the second occasion. The tribunal awarded her by way of compensation the difference between the newcomer's salary and her own for the period down to, and for four months after, the hearing. They also 'recommended' that she '*should be seriously considered as the most suitable candidate for the post as soon as it falls vacant …'* and in the alternative that she should continue to receive the difference in salary until promotion.

However the EAT had held that money compensation should be assessed under s65 SDA para (b) not (c), so the tribunal should not have recommended that she continue to receive the difference in salary. The case was remitted to the ET to reassess compensation. The earlier part of the recommendation *'appeared to give opportunity for further argument'*, but, as no point had been taken on appeal, the EAT did not interfere.

The recommendation in this case seems quite modest and it is surprising no more was considered.

It is plain that the intention of the paragraph was to indicate to the employer other steps which he should take to alleviate the discrimination such as (on these facts) giving the employee access to a promotion-training course. In any event the recommendation should state the precise period for compliance in years, months or days or by date.

The CA agreed that money compensation should be assessed under para (b), and that the tribunal had no power to make the 'recommendation' it did (it was in any event unsatisfactorily expressed). They therefore dismissed the appeal.

Awareness training

A tribunal can recommend an employer make arrangements for appropriate equal opportunities or diversity awareness training for employees who have acted in an unlawfully discriminatory way: *Southwark London Borough v Ayton* UKEAT/0515/03/(2) (September 18 2003).

Harvey argues that would not be an appropriate order in a case where such a recommendation would not obviate or reduce the adverse effect on the claimant, e.g. if he or she had left that employment and was unlikely to return, see *Bayoomi v British Railways Board* [1981] IRLR 431.

In the *Bayoomi* case, the best the tribunal felt able to do was to recommend that a note be placed on Mr Bayoomi's personnel record to the effect that he had been dismissed in circumstances which amounted to racial discrimination. That should prevent prospective employers drawing an adverse inference from his dismissal, should they seek a reference.

In my view this very old case is ripe for reconsideration as the judgment in *Vento (2)* would suggest.

Backing up the recommendations

Harvey correctly states that *'If the respondent fails without reasonable justification to comply with a recommendation made under sub-section (1)(c), the tribunal may increase any compensation previously awarded (or make such an award where it was not previously made): sub-s (3); note, however, that any increase is still subject to the maximum in sub-s (2).'*

In *Nelson v Tyne and Wear Passenger Transport Executive* [1978] ICR 1183, the EAT concluded that there was a 'reasonable justification' for not complying with a recommendation. The head note accurately sets out the facts of the case –

> *In November 1976 an industrial tribunal made a finding of discrimination by the employers against three female employees and made a recommendation under section 65 (1)(c) of the Sex Discrimination Act 1975 that the employer 'within six months … gives serious consideration, without regard to sex and having regard to the principles of the Act of 1975, to each of the applicants for promotion to depot clerk either full time or part of their duties as cash clerks; in the latter case on the same basis … as the male cash clerks on depot duties.'*
>
> *In August 1977 the employers advertised vacancies in their depots; the three employees applied and, without prior warning, they were required to take a written test. One employee was successful in the test and, after an interview, she was promoted. A number of men were promoted without having been required to sit the test or attend an interview. The employees applied, under section 65 (3) of the Act, for compensation on the ground that the employers had not complied with the tribunal's recommendation. The tribunal found that the employers, in giving serious consideration to promoting the employees, had contrary to the recommendation had regard to the employees' sex but the tribunal dismissed the application on the ground that the employers had reasonable justification for their non-compliance with the order.*
>
> *On the employees' appeal: –*
>
> *Held, dismissing the appeal, that although industrial tribunals should be careful not to allow discrimination, once established, to continue unchecked, it would be unreasonable if the industrial tribunal did not take into account practical realities when they considered the appropriate remedy for an act of discrimination; that*

an order of a tribunal could not instantly eliminate discrimination in every case and the wording of section 65(3) implied that there might be delay before an act of discrimination could be remedied; and that the tribunal had not erred in law and there was evidence to support their finding that the employers had reasonable justification for failing to comply with the order.

The judgment is a very early one and it is unlikely that it would now be accepted that discrimination should not be addressed straight away. It shows well the early distinction between equality as a right and equality as something to be negotiated.

However on the other hand Phillips J's comments on page 1189 indicate the purpose of a recommendation-

What was under consideration was the appropriate remedy, in effect, arising from the decision earlier on, in 1976, that there had been unlawful discrimination. It seems to us that that is quite a different question. In the first place it is obviously not possible by order to end it instantly in every case. In some cases it is. In many cases it is bound to take a little while to ease the orders through the practical realities of industrial relations before it can be an accomplished fact. Certainly, industrial tribunals should not be complacent in the matter; and this industrial tribunal here plainly said that 'Enough is enough; it must stop now' and that has been accepted. But unless it can be said that as a matter of law none of these matters were appropriate to consideration, then the decision lies within the discretionary element of what is matter of fact or opinion for decision by the industrial tribunal.

It seems to us that the whole of section 65 makes it quite clear that it was contemplated that it may take a little while by order to eliminate established acts of unlawful discrimination; and it seems to us that the very terms of section 65 (3) imply as much. The situation, in a way, is not unlike that where a court grants an injunction to prohibit the continuation of a nuisance – say, the pollution of a river – but suspends its operation for a period of 12 months to give a reasonable opportunity for remedial steps to be taken.

New Equality Act 2010 provisions

The Equality Act 2010 has slightly changed the legal landscape as to recommendation.

While the existing powers are not diminished the power to make recommendations has been revisited. It now provides in s124 in relation to disputes in the employment field where unintentional indirect discrimination is established, that in some circumstances a recommendation is a primary remedy –

S124 Remedies: general

1. *This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).*
2. *The tribunal may –*
   (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
   (b) order the respondent to pay compensation to the complainant;
   (c) make an appropriate recommendation.
3. *An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect of any matter to which the proceedings relate –*
   (a) on the complainant;
   (b) on any other person.
4. *Subsection (5) applies if the tribunal –*
   (a) finds that a contravention is established by virtue of section 19, but
   (b) is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the complainant.
5. *It must not make an order under subsection (2)(b) unless it first considers whether to act under subsection (2)(a) or (c).*
6. *The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by a county court or the sheriff under section 119.*
7. *If a respondent fails, without reasonable excuse, to comply with an appropriate recommendation in so far as it relates to the complainant, the tribunal may –*
   (a) if an order was made under subsection (2)(b), increase the amount of compensation to be paid;
   (b) if no such order was made, make one.

These provisions are obviously intended to cause ETs to pause before making any financial award for unintended indirect discrimination.

Conclusion

It is really important that these powers are used. They were enacted to be used and they are intended to be complimentary to litigation. The new government sees the Commission as a regulatory body but to work successfully as one it needs the support of civil society to bring issues to it. The tribunals too can only play their part if they have the key issues brought to them with requests for proactive remedies. So it is over to all of us!

The Equality Act 2010: a source of rights in a climate of cuts?

John Halford and Saadia Khan, solicitors at Bindmans LLP, put in context the courts' approach to the public sector equality duties under the old legislation and examine how this may change as cases are brought under s149 of the Equality Act 2010. They conclude that s149 provides an important opportunity for advocates to ensure that public authorities listen with an open mind to the whole range of views from the communities they serve.

Overview

The Equality Act 2010 (EA) was passed in the final days of the last government. It is largely a consolidating measure, updating the private law remedies to challenge discrimination in most areas of public life such as the workplace, the education system or when someone buys, receives, or is denied a service on an inferior basis on the grounds that they have one or more[1] protected characteristics. These parts of the Act are now in force.

The EA also contains another significant legacy– the consolidation and broadening of the 'positive equality duties' previously found in s71 Race Relations Act 1976 (RRA), s49A Disability Discrimination Act 1995 (DDA) and s76A(1) Sex Discrimination Act 1975 (SDA) so that 'due regard' to eliminating unlawful discrimination, advancing equality and fostering good relations must now be had in the contexts of age, disability, gender reassignment, (explicitly) pregnancy and maternity, religion or belief and sexual orientation. These provisions, set out for the most part in s149 EA, come into effect on April 6, 2011 (the old RRA, DDA and SDA duties remain in force, subject to some minor modifications, in the meantime).

Underpinning the duties will be an Equality and Human Rights Commission (EHRC) statutory code on the provision of services, public functions and associations[2] and there is to be another later in the year focused on s149. The EHRC has also issued detailed guidance on s149[3] as has the Government's Equalities Office (GEO).[4] Regulations have been produced to impose further requirements on some of the public bodies caught by the s149 duties.[5] Their proposed focus is different and in many ways less demanding than the better performance duties formerly imposed by the RRA, DDA and SDA, as discussed below.

Of particular importance to discrimination practitioners is the significant role that the positive equality duties, both current and future, will play in challenging decisions to cut government spending.

Scope of the new s149 duties

As mentioned above, the EA will replace the old ss71 RRA, 49A DDA and 76A SDA duties to have due regard with a new duty that cuts across a number of grounds on which discrimination, inequality and tensions between different groups may occur. There are some gaps in this broadened scope, however, most troublingly around the provision of public services to children. One of the significant elements of s49A DDA – *'the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favorably than other persons'* – has also been removed, although the government has said that this is implicit in s149(4). The protected characteristics of marriage and civil partnership have no linked positive equality duty.

More positively:

- far more policies, proposals and decisions will be subject to the duties – s150 provides that bodies not explicitly identified as being subject to the s149 duties in the schedules appended to the EA will nevertheless be caught, provided that the functions in question are public ones (a definition that is intended to catch all functions of hybrid authorities which are subject to the Human Rights Act 1998);
- due regard must now be had to the need to advance equality of opportunity between those sharing a protected characteristic and those who do not, rather than the need merely to promote it;

1. See s14 which creates the new concept of 'combined discrimination'.

2. http://www.equalityhumanrights.com/uploaded_files/EqualityAct/services_code_-_06.10.10.pdf

3. http://www.equalityhumanrights.com/advice-and-guidance/public-sector-duties/new-public-sector-equality-duty-guidance/

4. http://www.equalities.gov.uk/pdf/110117%20Public%20sector%20Equality%20Duty%20Guide%20-%20FINAL%20ACCESSIBLE.pdf

5. http://www.equalities.gov.uk/equality_act_2010/public_sector_equality_duty.aspx

- having due regard to the need to advance equality of opportunity under s149 EA requires 'in particular' due regard to the need to:
  a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
  b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
  c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
  (These provisions chime with court observations on the different purposes of s71(1) (a) and (b) RRA[6]).
- having due regard to *'the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it'* involves having due regard, in particular, to the need to –
  '(a) tackle prejudice, and
  (b) promote understanding'.
  This specificity is very welcome, given the limited case law on the concept of 'good relations'.
- s149 explicitly recognises that compliance with the duties may involve treating some persons more favourably than others (provided that doing so does not breach the EA in other respects); and
- critically, judicial review remains available to enforce failures to comply with the duties.

Enforcement of positive equality duties – the story so far

The RRA, DDA and SDA provided the legacy commissions and, through amendments, the EHRC, with an arsenal of special regulatory powers to enforce the original positive equality duties. But perhaps more importantly, the courts have taken a principled and purposive approach in many of the cases decided so far, allowing individuals and NGOs to seek judicial review of decisions made without adequate due regard and, in many cases, quashing them thereby returning the decision making process to an early stage and preserving the status quo in the meantime.

In the most cutting edge cases the courts have gone further still, using an unlawful failure to discharge a positive equality duty as the basis for a finding that discrimination that might otherwise be legally justified (such as an indirectly discriminatory policy or a failure to make reasonable adjustments) in fact cannot be.

The range of decisions successfully challenged (including by favourable settlements) is remarkable. They include decisions to:

- award compensation to British civilians interned by the Japanese during World War II, but only if they could establish a 'blood link' to UK soil by their own or an ancestor's birth here *(Secretary of State for Defence v Elias* [2006] EWCA Civ 1293);
- instruct doctors to prescribe Alzheimer's medicines on the basis of a language test that took no account of cognitive impairments or having English as a second language *(R (Eisai) v National Institute for Clinical Excellence & Others* [2007] EWHC 1941 (Admin));
- amend the rules on what forms of forceful restraint of children are permitted in secure training centres *(R (C) v Secretary of State for Justice* [2008] EWCA Civ 882);
- drastically truncate the period of notice given to unsuccessful asylum seekers of the intention to remove them from the UK *(R(Medical Justice) v Secretary of State for the Home Department* [2010] EWCA Admin 1925);
- grant planning permission for a development of chain stores and luxury flats challenged in *R(Harris) v London Borough of Haringey* [2010] EWCA Civ 703 without regard to the impact on a series of small, street front shops where the shops (and the flats above them) were overwhelmingly occupied by traders/residents from BME communities;
- frame a Jewish faith school's admission policy in terms that led to unlawful race discrimination against a child whose ethnic origins were mixed *(R (E) v JFS* [2009] UKSC 15), and
- refuse to license a particular model of taxi for use as a Hackney cab despite disabled groups making representations that this meant many wheelchair users could not travel safely *(R (Lunt and another) v Liverpool City Council* [2009] EWHC 2356 (Admin)).

Decisions to cut state funding have also be successfully challenged on a number of occasions, for instance:

- *R (Talawa) v Arts Council of England* CO/7705/2005 saw the UK's leading black theatre company see off an Arts Council funding cut made without sufficient regard to its track record of developing ethnic minority actors and bringing black productions to

6. See e.g. *Dyson LJ in R (Baker) v Secretary of State for the Environment* [2008] EWCA (Civ) 141 at para 30: '…the promotion of equality of opportunity is concerned with issues of substantive equality and requires a more penetrating consideration than merely asking whether there has been a breach of the principle of non-discrimination…'

diverse audiences;
- *R (Chavda) v Harrow LBC* [2007] EWHC 3064 (Admin) involved a successful challenge to funding cuts that would have disproportionately affected BME and disabled people; and
- Southall Black Sisters overturned a cut in funding for their services in *R (Kaur and Shah) v London Borough of Ealing* [2008] EWHC 2026 (Admin).

What principles emerge from the positive equality duty cases and what difference will the EA make?

As noted above, the most significant changes the EA will make are to the scope of the duties and the bodies to which they apply. The basic structure of the positive equality duties remains the same as those under the RRA, DDA and SDA. It follows that under the EA, as before:

- the positive equality duties remain triggered by the exercise of functions (s149 begins *'A public authority must, in the exercise of its functions..'*) and so potentially catch **any** decision making that has equality implications, certainly from the point of consultation onwards;
- *'regard'* must still be had to particular *'needs'* when those functions are exercised – having equality in mind at a general or policy level is not enough;
- the duties do not require a particular outcome – what the body chooses to do once it has had the required due regard is for it to decide, subject, importantly, to ordinary constraints of public and discrimination law: see *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin) at para 82; and
- specific additional duties are directed at particular bodies, intended to facilitate the better performance of the general duties.

Given this, the following seven key principles that have been developed by the courts will apply in the s149 context.

Principle 1 – the duties are triggered whenever 'an issue arises'

There will be some decisions made by public authorities – and now hybrid ones – exercising public functions which do not have equality implications for s149 purposes. In these circumstances the amount of regard needed will inevitably be negligible.

That said, the threshold for one or more of the duties to be triggered is a low one. In *Elias* at first instance [2005] EWHC 1435 (Admin) it was said to have been crossed because there was an *'issue which needed at least to be addressed'*: see para 98.

Further, it may be obvious that issues arise in relation to s149 in the particular circumstances of the particular proposal or the decision contemplated. In some cases third parties – such as campaigners and affected persons such as service users – may draw the matter to a decision-maker's attention. However, the responsibility to identify whether there is an issue and to discharge the duty remains that of the decision-maker: see *Eisai* at paras 92-96.

Principle 2 – the duties arise before a decision is made or a proposal is adopted, and are ongoing

In *Elias* both the first instance court and the CA stressed:

> *It is the clear purpose of section 71 to require public bodies … to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them…*

Compliance should therefore never be treated as a *'rearguard action following a concluded decision'* but exists as an *'essential preliminary'*, inattention to which 'is both unlawful and bad government': see *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139 per Sedley LJ at para 3. In *Brown* at paras 91–92, the Divisional Court emphasised the need for conscientiousness, rigour and an open mind when due regard is had. Its contribution to decision making will therefore have much in common with a proper consultation process.

However, once triggered, the obligation is an ongoing one, see *Brown* at para 95. There may be an unlawful failure to frame a policy with equality considerations in mind followed by a failure to consider them when applying it to an individual's circumstances. For example in *R (Watkins-Singh) v Governing Body of Aberdare Girls High School* [2008] EWCA 1865 (Admin) not only did the uniform policy ignore equality issues, but the school compounded that when refusing to make an exception to it for a Sikh girl who wished to wear her kara.

Principle 3 – the decision-maker must be aware of the s149 needs

It might be thought uncontroversial that those responsible for having due regard must be aware of their obligations. This was the first principle enunciated by the Divisional Court in *Brown* at paras 90 and 91 picking up on *Chavda* at para 40. This principle is, however, not easy to square with Dyson LJ's comment in *Baker* at para 40 that it was *'immaterial'* whether the planning inspector whose

decision had been challenged was aware of the existence of the duty because she had adequately grappled with the equality implications of allowing a Gypsy encampment.

This conflict was resolved in *Harris*. Here the Council accepted s71 was engaged in the planning decision under challenge but contended it had been discharged through a process of *'mainstreaming'* whereby all Council policies, including its development plan, were said to have been audited for equality purposes with the result that any decision made consistently with them would 'automatically' discharge the duty. The CA rejected this argument and in doing so explained what was different about the Planning Inspector's decision in *Baker* and the other Gypsy and Traveller cases that took a similar approach.

> *The case is distinguishable from Baker and Isaacs where policies had been adopted in a Circular whose very purpose was to address the issues addressed in section 71(1). It cannot be said that the policies cited in this case were focused on specific considerations raised by section 71.*

Principle 4 – responsibility for discharging the duties cannot be delegated or sub-contracted

Although that process of assessment need not be undertaken personally by the person or persons actually taking the decision in question and can thus be undertaken by officers or others, the decision-maker must be sufficiently aware of the outcome of the assessment properly to enable them to personally discharge the s149 duties: see Eisai at paras 92-96.

Principle 5 – the impact of the proposal or decision must be properly understood to enable due regard to be had

The amount of regard that is 'due' (that is, the degree of attention demanded by the needs set out in s149) will depend on the circumstances of the case: the greater the potential impact of a decision, the greater the regard that must be had. The CA stressed in *Baker* at para 27 that mere recitation of a mantra will not, by itself, show that a positive equality duty has been discharged, but the *'substance and reasoning'* of the decision must be examined.

The courts have stopped short of holding formal assessments are necessary to establish the extent of any impact, however. In *Brown* there was said to be a *'wealth of evidence'* demonstrating due regard, but no formal assessment had been carried out. The Divisional Court noted that the absence of one did not make the decision unlawful. Assessments were not explicitly required by s49A or under the better performance regulations. The Disability Rights Commission guidance on what they should contain is not mandatory. In such circumstances, it noted at para 89:

> *[a]t the most it imposes a duty on a public authority to consider undertaking a DEIA, along with other means of gathering information, and to consider whether it is appropriate to have one in relation to the function or policy at issue, when it will or might have an impact on disabled persons and disability.*

Of course, where the body has given a commitment to undertake such an assessment and/or to consult in connection with it (for example through a policy, in an equality scheme or by a commitment to comply with the guidance of some other body such as the EHRC) it will be unlawful not to honour it unless there are compelling reasons not to do so: see *Kaur and Shah* at para 27.

More importantly however, there can be no due regard at all if the decision-maker, or those advising it, make a fundamental error of fact as a result of failing to properly inform themselves about the impact of a particular decision. This was one of the flaws of the taxi licensing decision in *Lunt*; the licensing committee could not lawfully exercise its discretion if it did not *'properly understand the problem, its degree and extent'* and s49A compelled it to do so: see para 44.

It follows that regardless of whether or not there is an impact assessment or, to use the phraseology of the new EHRC guidance, 'impact analysis', due regard will entail:

- collection and consideration of data and information in relation to the people directly and indirectly affected by the decision, policy or proposal in play;
- ensuring that data and information is sufficient to enable the body in question to assess whether the decision might amount to unlawful discrimination and/or might impact on the promotion of equality of opportunity and/or might impact on the promotion of good relations, and;
- if there may be an impact, proper appreciation of the extent, nature and duration of that impact.

Principle 6 – where negative effects are identified, potential mitigation must be considered

If the authority concludes that unlawful discrimination will be the result of a proposal, it cannot lawfully proceed with it. Where a proposal under consideration potentially could have negative effects (in that it **may** lead to unlawful discrimination, undermine equality of opportunity or good relations between persons of different racial groups) due regard, as required by s149, would entail evaluating the extent of such effects on

affected persons and considering whether there are any means (in the proposal itself or available to the authority itself as part of its functions) by which they may be mitigated.

For example, in *Kaur and Shah* at para 43 the court noted that once Ealing had:

> *identified a risk of adverse impact, it was incumbent upon the borough to consider the measures to avoid that impact before fixing on a particular solution.*

Principle 7 – the process of having due regard should be documented and transparent

These issues were first considered in *BAPIO*. The Home Office asserted that it had turned its mind to s71 before drafting changes to immigration policy on foreign doctors but accepted that there was no formal record. Stanley Burnton J directed that any note or memorandum that existed to evidence this *'informal assessment'* having taken place should be put in evidence. Nothing was produced, provoking this comment at para 69:

> *If there had been a significant examination of the race relations issues involved in the change to the Immigration Rules, there would have been a written record of it. In my judgement, the evidence before me does not establish that the duty imposed by section 71 was complied with.*

He went on to declare that s71 had been breached in these circumstances. Similarly, Moses LJ commented in *Kaur and Shah* at para 25:

> *The process of assessments should be recorded … Records contribute to transparency. They serve to demonstrate that a genuine assessment has been carried out at a formative stage. They further tend to have the beneficial effect of disciplining the policy maker to undertake the conscientious assessment of the future impact of his proposed policy, which section 71 requires. But a record will not aid those authorities guilty of treating advance assessment as a mere exercise in the formulaic machinery. The process of assessment is not satisfied by ticking boxes. The impact assessment must be undertaken as a matter of substance and with rigor.*

Enforcing section 149

S149 presents a number of new challenges for public authorities and equality lawyers:

No equality schemes

First, at present, the government has decided against better performance duties of the kind imposed under the existing positive equality duties. For example, Article 2 of the Race Relations Act 1976 (Statutory Duties) Order 2001 (SI 2001/3458) required certain public authorities to periodically publish, assess and monitor a Race Equality Scheme which identified each function the authority considered engaged s71. Instead, assuming the draft Equality Act 2010 (Statutory Duties) Regulations 2011 are finalised in their current form, there will be two lesser duties to publish:

- *'sufficient information to demonstrate compliance'* with s149 at a general level; and
- *'objectives that further one or more of the aims set out in s 149(1)'*

The old duty focused the minds of at least some public authorities on the functions to which the positive duties applied. Many constructive schemes were produced in consultation with affected groups. Now the requirement (thought by the coalition government to be too administratively burdensome and costly) is gone, there will be a temptation for public bodies to be far less proactive.

Further, when schemes identified functions that authorities accepted were caught by one of the existing duties, this would eliminate any dispute about whether they in fact were caught, thereby narrowing the argument to the question of whether due regard had been had in the particular circumstances.

Limited emphasis on impact assessment

The coalition government has also said that there should be a shift away from process and towards substantive 'outcomes'. This is difficult to understand in the context of a process-based set of duties, especially as the monitoring obligations proposed are so limited. There are also no plans for any specific duty that would require an impact assessment on, say, a major decision to cut a particular public service or the funding of a charity or NGO that advocated for women's rights.

Subject to the courts taking into account the GEO and EHRC guidance (both of which encourage impact assessment and analysis), at best, impact assessments will be a non-mandatory **means** to help discharge the duty which the more conscientious authorities will continue to use. Interestingly, the GEO seems to suggest that 'equality analysis' (at least at the policy formulation stage) is required by the better performance duties. It has said:

> *Under the specific duties, they must publish evidence of equality analysis they have undertaken to establish whether their policies and practices would further, or have furthered, the three aims of the general duty. They must also publish details of the information they considered in conducting that analysis.*

The courts?

The courts have been generally supportive of the duties to date, save in the Gypsy and Traveller context. However, in some of early cases (*Elias, BAPIO* and *Eisai*), even where a breach of a duty was established, the policy or decision might be allowed to stand, especially if an ex post facto impact assessment had taken place.

This trend was reversed by the child restraint case, C, where the CA held the failure to produce an assessment at the proper time was *'a defect... that is of very great substantial, and not merely technical, importance'* and the rule of law itself therefore required that the restraint rules be quashed (paras 54-55). *Harris* illustrates this principle in play: permission for a multi million pound development was quashed despite the openly expressed reluctance of Pill LJ giving the lead judgment of the court.

There is likely to be an increase in litigation once the new duties are in force, particularly around cuts to public services, especially as awareness of the duties is high amongst advisers, campaigners and activists. It remains to be seen how much additional leeway the courts will allow decision-makers when they are obliged to make invidious decisions about increasingly restricted resources.

There are already some unsettling signs of some judges backing away from the progressive stance taken in the past when decisions of this kind are challenged e.g. permission was recently twice refused to the Fawcett Society's judicial review of the emergency budget. On the other hand, nationwide family legal aid contracting arrangements were quashed in *R (Law Society) v Legal Services Commission*[2007] EWCA Civ 126 because the implications of reduced provision had not been properly anticipated; and in *R (Hajrula) v London Councils* [2011] EWHC 151 Calvert Smith J allowed a judicial review challenge to London Councils' decision to cut £10 million of funding from 200 voluntary sector organisations in London. In the most recent positive equalities duty case, *R (Luton Borough Council and others) v Secretary of State for Education* [2011] EWHC 217 (Admin) Holman J ruled that the coalition government's cancellation of the previous administration's school building programme was unlawful, holding that there had been inadequate consultation and a *'complete failure'* to have due regard to the equality duties.

The last paragraph of the *Luton* judgment contains a note of caution: even though the Secretary of State would be obliged to reconsider and consult, provided he did so with his equality duties in mind, the final decision on the buildings programme would be one for him to take. *'No one should gain false hope from this decision'*, the judge concluded at para126.

That is right, but it helps to underscore perhaps the most important thing about s149: at best it will ensure public and hybrid authorities are willing to listen with an open mind to voices that are unlikely to be those of the majority. But substantive changes to proposals and policies will only occur if those voices speak up collectively.

Legal Aid reform – a backward step for equality

Ulele Burnham, chair of the Discrimination Law Association (DLA) summarises the DLA's concerns with the Ministry of Justice's (MOJ) consultation paper *'Proposals for the reform of legal aid in England and Wales'* and argues that these radical reform proposals are likely to have a disproportionate adverse impact on the most disadvantaged.

The proposals contained in the MOJ's consultation paper issued on November 15, 2011 would appear to indicate plans for the most radical reform of the civil legal aid system since its inception. The proposals have been responded to by several of those involved in the provision of legal services which are in turn dependent upon the civil legal aid funding regime. What is clear both from the MOJ's own equality impact assessments of the changes, and from the consultation responses of other interested bodies, is that the proposed changes will have a significant and disproportionate effect upon disadvantaged groups expressly sought to be protected by equality legislation.

The DLA has responded to the proposals focusing on their impact on the very advancement of equality in and through the law with which the DLA is concerned. The DLA submitted its response on February 14, 2011; below is a brief outline of its representations.

The DLA expressed serious concerns about the scale and magnitude of the proposed changes. These changes include the proposals to exclude from the scope of civil legal aid, funding for the following areas of legal advice and representation:

1. welfare benefits law
2. debt legal aid, save where an individual's home is at immediate risk of repossession
3. housing law, save where there may be potential homelessness
4. employment law, save in respect of discrimination
5. immigration law, save in relation to those seeking release from detention or those involved in proceedings before the Special Immigration Appeals Commission
6. asylum law: the removal from scope of advice and appeals on applications for asylum support
7. consumer law, save for discrimination cases
8. family law: all private law children and family matters are excluded from scope for all levels of service other than mediation save where domestic violence is present or in cases of child protection, abduction and forced marriage
9. clinical negligence law
10. compensation for criminal injuries
11. actions against the police, save that there will possibly be legal aid for judicial review matters
12. administrative law: all appeals to the Upper Tribunal will be taken out of scope.

In its assessment, the Legal Services Commission indicates that the proposals will save some £274m annually. That 'saving', if it were indeed to materialise, will likely leave many belonging to disadvantaged groups in society without any or any adequate legal advice or representation. In addition the DLA noted that many of the proposed changes were justified by reference to the existence of alternative sources of funding or advice which simply will not continue to exist given the associated cuts being made to funding for the voluntary sector. So for example, the consultation paper presumes that advice and representation on wholly excluded areas, such as compensation for criminal injury and debt, can be adequately provided by Citizens Advice and other voluntary sector providers. The DLA regards this as a cynical and disingenuous assumption made by the very executive that has already indicated its intention to impose drastic funding cuts likely to deny such bodies the resources and the capacity to provide support for those most in need. The DLA therefore sought to highlight the importance of access to justice by reference to the European Convention on Human Rights and the EU Charter of Fundamental Rights.

An important point noted by the DLA was the apparent short-sightedness of some of the proposals. The proposal to exclude debt advice from the scope of legal aid, for example, is very likely to increase the numbers made homeless as a result of debt and therefore to increase the call on the legal aid budget in relation to homelessness. In fact, the costs of possession proceedings will far outstrip the costs of timely debt advice and the proper funding of early intervention is far more likely to avoid the catastrophic social cost of the threat or the actual loss of a home.

Many of the proposals to retain legal aid in important areas of social protection appear to ignore

585 obvious practical realities. A good example of this are the proposed changes to the provision of legal aid in family cases. The retention of legal aid in family cases where there is 'physical harm' does not, in fact, cover the full extent of what 'domestic violence' is now considered to entail. Retention only for cases of 'physical harm' appears to exclude aspects of domestic violence such as threatening behaviour, psychological, sexual, financial and emotional abuse and is likely to lower levels of legal protection for vulnerable women. Further, as many legal advisers will immediately recognise, many of those who suffer domestic violence and abuse tend not to describe their problems as 'domestic violence' on initial consultation. The proposals may therefore have the very damaging consequence of denying actual victims of domestic abuse legal advice and representation merely because they have failed to articulate their problems as such. The DLA believes, and has submitted, that the proposals contained in the consultation paper were far too often characterised by a lack of appreciation or analysis of the true social costs of the intended reform.

The DLA considered carefully the MOJ's equality impact assessment and expressed grave concern about the absence of detailed consideration of ameliorative measures to address areas of profound disparate impact. The DLA's response highlighted the following areas of significant disparate impact on the MOJ's own analysis:

a. clinical negligence: 30% of those affected are ill or disabled
b. education: 73% of those affected will be female and 31% are BAME parents
c. housing: the proportions of women, BAMEs and disabled persons affected are 60%, 3% and 27% respectively
d. welfare benefits: 85% impact on BAME groups
e. family law: 65% impact on women, 11% impact on BAMEs and 21% impact on disabled or ill persons.

The DLA regards it as a cruel irony that groups intended to be protected by the new Equality Act 2010 are likely to be highly, and disproportionately, represented in the category of persons who will be unable to seek legal redress if the proposals are implemented. The DLA also indicated its support for the retention of legal aid in discrimination cases but was careful to point to the fact that the absence of an opportunity to obtain specialist legal advice at an early stage would in fact leave many potential discrimination complainants unaware that they had an arguable discrimination complaint. The DLA urges the government to act on its concerns and to avoid taking the backward step for equality which will result from full implementation of its proposals.

586 Briefing 586

Novel legal questions in age discrimination cases

Bulicke v Deutsche Buro Service GmbH (Case C-246/09)
Ingeniorforeningen i Danmark, acting on behalf of Ole Andersen v Region Syddanmark (Case C-499/08)
Gisela Rosenbladt v Oellerking Gebäudereinigungsges. mbH (Case C-45/09)

Introduction

Council Directive 2000/78/EC (the Employment Equality Directive) introduced a prohibition on age discrimination. Since then age discrimination has been a fertile source of litigation particularly in the European Court of Justice (ECJ).

Bulicke v Deutsche Buro Service GmbH

Facts

Deutsche Buro Service (DBS) advertised for job applicants between the ages of 18 and 35. Ms Bulicke (B) applied. She was 41 at the time; her application failed. She presented a direct age discrimination complaint to the Hamburg Labour Court two months and ten days after she was notified by DBS that her application had been unsuccessful. B's claim was presented just outside the two-month limitation period under German law. The court sought a preliminary ruling from the ECJ as to whether or not the limitation period was compatible with the Employment Equality Directive and in particular whether or not the limitation period breached the following principles of EC law:

- the principle of effectiveness: domestic procedural rules must not render it practically impossible or excessively difficult for individuals to exercise rights conferred by EC law;
- the principle of equivalence: domestic procedural

rules relating to the enforcement of rights conferred by EC law must not be less favourable than the domestic procedural rules relating to comparable causes of action arising under domestic law;
- the principle of non-regression: the implementation of a directive must not be used as an occasion to reduce the protection against discrimination already offered by domestic law.

European Court of Justice

The ECJ held that there was no breach of the principle of effectiveness: a two-month limitation period was unobjectionable, particularly since under the relevant provisions of German law, time runs from the date of knowledge of the discriminatory decision rather than the date of the decision itself. Further, there was no breach of the principle of equivalence: the ECJ was unable to identify any domestic cause of action which had a more generous limitation period although it held that this is ultimately a matter for the national court which is better placed to determine whether a given domestic cause of action is comparable to one arising under EC law.

Finally, there was no breach of the principle of non-regression: although it was argued that the implementation of the Employment Equality Directive was used as an occasion to reduce the limitation period for sex discrimination claims from six months to two months, that could not amount to regression. Since the Directive does not cover the characteristic of 'sex' (which is covered by other directives), any reduction in the protection against sex discrimination could not be regarded as within the field protected by the Directive.

Ingeniorforeningen i Danmark, acting on behalf of Ole Andersen v Region Syddanmark

Facts

Under Danish law employees with over twelve years service with a particular employer are entitled to a severance payment of one to three months salary upon the termination of their contract of employment. However, that entitlement to a severance payment is subject to an exception. Employees who would otherwise qualify for a severance payment, but who are (i) entitled to an old age pension on termination of their employment and (ii) joined the pension scheme in question before turning 50, are not entitled to a severance payment.

Mr Anderson (A) had over twelve years service when he was dismissed, but was not entitled to a severance payment under Danish law since he was a member of a pension scheme which he had joined before the age of 50. He brought proceedings alleging that the applicable Danish law was discriminatory on grounds of age and thus contrary to the Employment Equality Directive.

European Court of Justice

The ECJ held that since the entitlement to draw a pension depended upon the individual being at least 60 years of age, the treatment A complained of was both less favourable and inextricably linked to age. Thus, subject to *justification*, it was directly discriminatory on grounds of age.

Under Article 6 of the Employment Equality Directive less favourable treatment on grounds of age is permitted if it is objectively and reasonably justified by a legitimate aim and if the means of achieving the aim are appropriate and necessary.

The ECJ held that the aim pursued was, firstly, to facilitate workers with long service to move to new employment upon the termination of their existing employment relationship. It appears to have been accepted that it is more difficult for such workers to find fresh employment (as they have been out of the labour market for a long time and tend to be older). Secondly, the aim was also to confine the entitlement to a severance payment to those not entitled to a pension, because those entitled to a pension tend to leave the labour market. Thus without some restriction there would be a risk of double recovery in some cases: some employees might receive a severance payment but, instead of then finding fresh employment, simply retire and draw their pension. These aims were legitimate.

However the ECJ held that the provisions of Danish law went beyond what was necessary to achieve the aims pursued. The problem was that Danish law deprived workers, who had been made redundant but who wished to remain in the labour market, of their entitlement to a severance payment merely because they *could*, on account of age and circumstances, draw a pension. However, some workers in that category would not in fact draw their pension; for example, because they wished to exercise their right to work (e.g. in order to improve their ultimate pension entitlement by adding additional years, or a better final salary, to a final salary scheme).

By implication, it would appear that had the restriction on entitlement to severance payments been narrower and limited to those employees who could draw a pension and *in fact did so*, there would have been no breach of the Employment Equality Directive.

Gisela Rosenbladt v Oellerking Gebäudereinigungsges. mbH

Facts

Mrs Rosenbladt (R) had worked as a cleaner for 39 years. Her contract of employment incorporated the terms of a collective agreement for the commercial cleaning sector in Germany which provided for automatic termination at the end of the calendar month in which she could claim a retirement pension, or, at the latest, at the end of the month in which she reached the age of 65. An agreement of this kind was expressly permitted under German law.

In accordance with that provision, her employer, Oellerking (O) issued her with an automatic notice of termination when she turned 65. She brought proceedings in the Hamburg Labour Court, claiming direct age discrimination. The Labour Court made a reference to the ECJ on the question of whether a national law permitting the automatic termination of an employment contract at normal retirement age was consistent with the prohibition on discrimination on grounds of age laid down by the Employment Equality Directive.

European Court of Justice

The ECJ agreed that there was a difference in treatment based on age and went on to consider whether that difference could be justified.

It held that the arrangements in question did not establish a regime of compulsory retirement but allowed employers and employees to agree, individually or collectively, on a means (other than resignation or dismissal) of ending employment relationships on the basis of the age of eligibility for a retirement pension. The aim of such a measure, the court continued, was to strike a balance between *'political, economic, social, demographic and/or budgetary considerations, and the choice to be made between prolonging people's working lives, or conversely, providing for their early retirement'* and, as such, was legitimate.

The ECJ went on to consider whether such a measure was 'appropriate and necessary' within the meaning of Article 6(1) of the Employment Equality Directive. The ECJ held that it was, especially having regard to the following factors:

- the clause applicable to R was not based solely on a specific age;
- it took account of the fact that the employees concerned were entitled to financial compensation in the form of a retirement pension;
- it did not authorise employers to terminate an employment relationship unilaterally – the mechanism had its basis in an agreement;
- its basis in agreement made for considerable flexibility in the use of the mechanism, allowing the social partners to take account of the overall situation in the labour market concerned and of the specific features of the jobs in question; and
- the legislation contained a further limitation in that it required employers to obtain or confirm the consent of workers to any clause on automatic termination of an employment contract on the ground that the employee has reached the age at which he is eligible for a pension, where that age is less than the normal retirement age.

Accordingly, the less favourable treatment could be justified. The Employment Equality Directive did not preclude automatic termination clauses of the sort authorised under German national law. The implementation of that authorisation by means of a collective agreement is not, however, exempt from any review by the courts but, in accordance with Article 6(1) of the Directive, must itself pursue a legitimate aim in an appropriate and necessary manner.

Comment

The key point of principle that emerges from *Bulicke* is that it will rarely be possible to use EC law to challenge short limitations periods, which are imposed by domestic law, for enforcing equality rights. Although decided in the age discrimination context, that principle will apply generally to all strands protected by equality laws.

Age continues to generate novel legal questions to which there are no easy answers as the decisions in *Andersen* and *Rosenbladt* demonstrate. This is because, uniquely in the context of direct discrimination, direct age discrimination can be justified. This means that as a matter of policy, the legislature (both at the national level and the European level) permits, arguably even encourages, less favourable treatment on grounds of age in some, but not all, forms. Courts across Europe, including the ECJ, are in the process of testing the boundaries of what is permissible, and what is not, essentially on a case-by-case basis.

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Time limits in equal pay saved by 'stable employment relationship'

North Cumbria University Hospitals NHS Trust v Fox [2010] EWCA Civ 729
[2010] IRLR 804

Introduction

The six month time limit in the Equal Pay Act 1970 (EqPA), which runs from the last day the woman is employed and has no extension, is revisited in this welcome judgment. The context is the continuing flood of equal pay claims from claimants in local authority and health service employment. The factual context on this occasion was the change in terms and conditions arising from Agenda for Change, a national agreement resulting in a change to the terms and conditions of many thousands of health service workers. The issue was whether this agreement terminated existing contracts and replaced them with new contracts or was a variation so that time did not run for the purpose of limitation.

Implications for practitioners

The CA judgment utilised the stable employment relationship concept, also relied upon in *Slack v Cumbria County Council* [2009] IRLR 463,CA, to hold that even though the contractual terms under Agenda for Change did constitute a new contract, the new terms imposed following Agenda for Change did not interrupt the stability of the employment relationship. Therefore under s2ZA EqPA the limitation period was six months after the end of the stable relationship.

In this case, the effect was to permit the claimants to claim equal pay for periods of service prior to the introduction of Agenda for Change. The wider implications for practitioners are that, combined with the judgment in *Slack*, there has been a significant relaxation of the statutory six-month time limit.

S2ZA EqPA and the concept of a stable employment relationship, was introduced into the EqPA following the ECJ's judgment in *Preston v Wolverhampton Healthcare NHS Trust,* C-78/98 [2000] IRLR 506 ECJ. As *Preston* was concerned with a series of short-term contracts with breaks between contracts, it was thought that a stable employment relationship only prevented time running for the purpose of an equal pay time limit in those circumstances. This restrictive approach was abandoned in *Slack* where it was also applied to an uninterrupted termination and renewal of contract where the variation between the two contracts was minor. Now the concept of stable employment relationship has been clarified to introduce a broad non-technical test so that 'employment' refers to the nature of the work, rather than the legal terms under which it is carried out.

Facts

The claimants were some of the many nurses and other employees who had brought equal pay claims against their employers, North Cumbria University Hospitals NHS Trust (the Trust). They were claiming for the period prior to the contractual changes resulting from Agenda for Change. The particular issue arose when their representatives sought to add additional comparators. The ET disallowed the amendments on the grounds that the adding of comparators was a new cause of action and if they had been brought as fresh claims they would be out of time as time ran from the introduction of the Agenda for Change terms in the claimants' contracts. The ET concluded that the introduction of those terms constituted a termination of the employment contracts of the claimants and their replacement by new contracts.

The EAT reversed that finding, holding that Agenda for Change resulted in a variation of the claimants' contracts, not a termination, so that time did not run.

Court of Appeal

On the Trust's appeal the claimants introduced a new argument that, irrespective of whether Agenda for Change had resulted in new contracts, the claimants had a 'stable employment relationship' under s2ZA. The limitation period was therefore six months after the end of the stable employment relationship.

The Trust accepted that this issue made the appeal effectively a test case and did not resist the amendment. The CA reviewed how s2ZA had been applied so far. It considered, in particular, two judgments of Judge McMullen QC in the EAT; firstly the *Preston* case itself when it returned to the EAT after the ECJ, EAT [2004] IRLR 96, and secondly *Thatcher v Middlesex University* [2005] All ER (D) 82.

In both judgments a restrictive approach had been adopted as to when a stable employment relationship existed. In *Preston* it had been held that it was confined to applicants who had worked regularly, but periodically

587 or intermittently, for the same employer under successive legally separate contracts, paras 113-114. In *Thatcher* in addition it was held that a stable employment relationship ceased to apply where the terms of new contract or work under it radically differed.

In contrast the CA, adopting the approach in *Slack*, held that the term 'stable employment relationship' as used by the ECJ introduced '*a broad non-technical test, looking at the character of the work and the employment relationship in practical terms. …in stipulating that a succession of contracts must be in respect of 'the same employment', the court could not have intended to use the word 'employment' in the legal sense of a contract of employment, ..The natural alternative is a reference to the type of work or 'job'.'* (per Carnworth LJ, paras 31/32).

Conclusion

For practitioners with long memories the wheel has almost come full circle. For many years the six-month time limit was applied so that irrespective of the number of contracts during the course of employment, it only ran when the claimant's employment relationship with her employer ceased. The incidence of temporary or short-term contracts was far lower in the early years and the technicalities, which are sadly commonplace now in equal pay litigation, was absent. By the time of *National Power v Young* [2001] IRLR 32, the contractual test was being applied and in the context of the employer arguing that time ran from the end of a particular job, the CA confirmed that the test was a strictly contractual one, so that time ran from the termination of a particular contract. The significant relaxation of that approach should prevent employers avoiding equal pay claims by reliance on contractual changes of little practical importance to assert that claims are time barred.

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588 Briefing 588

CA rules that anti-discrimination legislation does not protect volunteers

X v Mid Sussex Citizens Advice Bureau & Ors [2011] EWCA, Civ 28, January 26, 2011

Implications for practitioners

The Court of Appeal has ruled that volunteers are not protected under discrimination law. This case concerned a volunteer worker with the Citizens Advice Bureau (see Briefing 548) and whether she was protected under discrimination law and whether the effect of the Employment Equality Directive, Council Directive 2000/78 EC (the Directive) extends protection to voluntary workers without a contract. The CA ruled that a reference to the ECJ on this point was unnecessary.

Facts

X applied to be a volunteer with the Mid Sussex Citizens Advice Bureau on April 28, 2006. She indicated that she would work for 4-5 hours per week. She signed a volunteer agreement on May 12, 2006 which was described as being *'binding in honour only...not a contract of employment and not legally binding'.*

It was emphasised to her that she was under no legal obligation to attend work but that it was anticipated that there would be a level of trust and a hope that the expectations reflected in the agreement would be honoured.

Following a nine-month training period, X carried out a wide range of advice work duties as a voluntary advisor. No attendance records are kept for volunteers, but X frequently did not attend on the days she was expected, approximately 25-30 per cent of the time. No objection was ever taken to this or to her changing her working days. X was asked to cease to attend as a volunteer and consequently she brought a discrimination claim under the Disability Discrimination Act 1995.

Court of Appeal

The CA rejected the premise underpinning the submissions of both X and the Equality and Human Rights Commission (EHRC)(interveners) that because the principle of non-discrimination is so important in EU law, the only reasonable inference is that the Directive was intended to apply to volunteers. They commented that the logic of this would be that the

principle should apply to all fields of human activity, but no one suggests that this is the case. They agreed that a broad and generous interpretation of the Directive should be given, consistent with the purposive approach which EU law requires. However, even taking this into account the CA did not doubt that this case fell outside its scope. The reasons they gave were:-

- It is far from obvious that it would be thought desirable to include volunteers within the scope of the discrimination legislation relating to employment. There is a genuine debate about this. Hence when this was specifically addressed by the European Commission and a proposed amendment was introduced, the EU Council of Ministers chose not to introduce it.
- It is inconceivable that the draftsman of the Directive would not have dealt specifically with the position of volunteers if they had intended to include them. Volunteers are extensively employed throughout Europe, and it is unrealistic to believe that they were intended to be covered by concepts of employment and occupation which would not naturally embrace them. The concept of worker has been restricted to persons who are remunerated for what they do. The concept of occupation is essentially an overlapping one, and the CA saw no reason to suppose that it was intended to cover non-remunerated work. Moreover, it is plain that the views of the Community institutions have been that the voluntary sector is not covered by the Directive; hence the attempt specifically to include them by amendment.
- The concept of 'occupation' was intended to refer to a class or category of jobs, and that the concept of 'employed' and 'self employed' was intended to refer to particular jobs. That would explain why the Directive in terms forbids discrimination with respect to access to an occupation but does not, for example, provide that there should be no discrimination with respect to the terms of the occupation. In other words, it is concerned with rules or practices imposed by professional or other collective bodies which can, by granting qualifications or licences of some sort, restrict the right of someone to enter into a particular job, be it described as a profession or occupation. It is concerned with access to a particular sector of the job market rather than with the particular job which someone seeks or holds.
- This analysis is consistent with the fact that the concept of worker under EU law is not defined by reference to those with a contract; it is capable of embracing all those who perform work for another for remuneration, whether pursuant to a contract or some other relationship. There is no need for a concept of occupation to capture those employed in a particular job.
- Even if that analysis is wrong and the concept of occupation is capable of identifying a particular post falling outside the definition of employment or self-employment, the CA did not consider that it would include volunteers.

The appeal therefore failed and the CA concluded that they did not accept that there is sufficient doubt as to the outcome to merit a reference to the ECJ on the substantive issue.

X has applied to the Supreme Court for leave to appeal.

Gay Moon

Briefing 589

EAT confirms Wethersfield v Sargent test for discrimination

Lisboa v (1) Realpubs Limited, (2) Mr NN Pring (3) Mr M Heap [2011] UKEAT/0224/10/RN

Implications for practitioners

Companies must ensure that, when trying to broaden the appeal of the clientele base, they must be sensitive in the way they implement such a policy or change so as not to discriminate against their current clientele base.

Facts

Realpubs Limited (R) bought the Coleherne pub, London's first openly gay pub, in September 2008. R recruited Mr Lisboa (L) as an assistant manager. In line with their business model R refurbished the pub and re-launched it as a gastro-pub. As part of the re-launch R decided to broaden the pub's appeal to attract a wider

clientele base.

During L's employment a number of incidents occurred such as: he was asked under instruction from a director to place a sign outside the pub claiming 'this is not a gay pub'; staff were encouraged to seat customers who did not appear to be gay in prominent places so that they could be seen from outside the pub; the gender balance of the staff was changed to favour female bartenders; and a number of comments were made to, or in the presence of L, such as calling customers 'queens', L *'is gay but another kind of gay'* and that L's fellow assistant manager *'walked too camp'*.

L resigned because he felt that R was discriminating against gay customers and he did not want to be a part of that.

L, who did not have one year's continuous service, brought a common law claim for constructive dismissal. He also brought claims under regulation 3 of the Employment Equality (Sexual Orientation) Regulations 2003 for discrimination on the grounds of sexual orientation: (1) on the grounds of his own sexual orientation and (2) following the case of *Wethersfield v Sargent* [1999] IRLR 94 (CA), a course of conduct by R which pressurised him to work in and co-operate with a policy of making the pub less welcoming to gay customers than to straight customers.

Employment Tribunal

The ET decided that L had suffered less favourable treatment on the grounds of his sexual orientation due to the three discriminatory remarks and made an award for injury to feelings of £4,500.

In relation to L's second discrimination claim, which the ET referred to as the *'Wethersfield v Sargent claim'*, it decided that as R's policy to broaden the appeal of the pub was lawful, the steps taken were merely the manifestations of that policy and were therefore not unlawful. The ET dismissed his claim.

The ET found that L had resigned due to a mistaken perception that R was a homophobic organisation in pursuit of a homophobic policy and not in relation to the repudiatory comments; accordingly, the ET dismissed his claim for unfair dismissal.

Employment Appeal Tribunal

The EAT, led by Mr Justice Clark, allowed L's appeal. The EAT found that the ET was required to make a judgment as to whether the factual matrix as a whole, as stated by Mummery P in *Qureshi v Victoria University of Manchester* [2001] ICR 863 and approved by the CA in *Anya v University of Oxford* [2001] ICR 847, as they found it showed that R had implemented their legitimate policy in such a way that the old gay clientele was less favourably treated on grounds of their sexual orientation than the desired straight/family customer base.

The EAT held the ET had erred in stopping their enquiry at the point where they decided that the policy was lawful. The ET should have considered the effects of the policy and whether that would amount to less favourable treatment.

The EAT held that, based on the ET's finding of facts, gay customers were *'plainly and unarguably'* treated less favourably on the grounds of their sexual orientation. Following the *Wethersfield v Sargent* and *Showboat Entertainment Centre Ltd v Owens* [1984] IRLR 7 cases, L was therefore treated less favourably on the grounds of sexual orientation.

The EAT having found that R's re-positioning policy was discriminatory against gay customers, L's claim for constructive dismissal was made out and it reversed the ET's decision.

The EAT stated that, in any event, L had shown that the three repudiatory remarks were a contributing factor in his decision to resign and that was sufficient to succeed in his claim for constructive dismissal, referring to *Notts CC V Miekle* [2004] IRLR 702 (CA), paragraph 33, per Keene LJ, and *Abbycars (West Horndon) Ltd v Ford* UKEAT/0472/07/DA, 23 May 2008, paras 33-36 per Elias P.

The EAT set aside the original award for injury to feelings and remitted the claim to a fresh ET to assess compensation.

Comment

On the basis of the facts as found by the ET, the EAT judgment is a welcome decision.

The EAT judgment re-emphasises that the whole factual matrix must be taken into consideration when deciding whether the effect of a legitimate policy is discriminatory.

The EAT also re-stated that in constructive dismissal cases the claimant does not need to show that the repudiatory conduct was the only or principal reason for their decision to resign, merely one of the factors. This will help individuals win such cases.

Finally, it reiterates that staff can rely on discrimination against customers as potentially founding a case.

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When does office gossip amount to sex-based discrimination and harassment?

Nixon v Ross Coates Solicitors & Anor UKEAT/0108/10, August 6, 2010

Facts

Ms Nixon (N) brought a claim for constructive unfair dismissal, sex and pregnancy related discrimination and harassment against her employer Ross Coates Solicitors (RCS) following office gossip about her pregnancy.

N was in a relationship with Mr Perrin (P), a solicitor at the firm. At a rather raucous staff Christmas party, N was observed by other members of staff flirting with and kissing the office IT manager, Mr Wright (W). W had booked a room in the hotel where the function was taking place and N was seen accompanying him to the room.

On her return to work following a period of annual leave and illness N informed the firm's senior partner, Mr Coates (C) that she was pregnant. He told the Human Resources Manager Ms O'Hara (H) who, it was alleged, told other members of staff and speculated over the paternity of the child. The rumours spread to W who speculated as to whether he was the father.

N was embarrassed and concerned by these rumours and asked to be moved to a different office, away from H. She submitted a formal grievance about H's behaviour and management's failure to stop it. N did not attend work for the whole of February 2008 and was not paid during this time.

C wrote to her insisting that she return to work at the same office as H. On March 15, 2008 N resigned citing H's behaviour and C's refusal to deal with her formal grievance. N issued proceedings in the employment tribunal.

Employment Tribunal

The ET found that N had been constructively dismissed and applied *Bournemouth University Higher Education Corporation v Buckland* [2009] IRLR 606. N had not affirmed the contract by delaying her resignation. It was held that there was:

> *a clear failure by Mr Coates and the first Respondent by its duty of care (before investigation had been completed) to its employee……..what we must see is a clear and focused breach of the implied term of trust and confidence*

The ET dismissed N's claims for discrimination and harassment concluding that the issues raised by N did not fall within either the pregnancy or gender provisions of the Sex Discrimination Act 1975. In reference to H's conduct the tribunal commented that:

> *It might have been that [H] was indiscreet in a minor way but certainly we perceive nothing … which could possibly be regarded as intimidating, hostile, degrading or humiliating.*

As to N's rejected request that she work at an alternative office being an act of sex discrimination, the tribunal did not support that assertion, seeing no taint of sex discrimination in C's decision.

The ET made a compensatory award for the unfair dismissal but reduced it by 90% due to N's conduct. The tribunal judge described N as:

> *almost exclusively the author of her own misfortune … by acting so publicly, so foolishly and so irresponsibly.*

The tribunal made it clear that in considering the level of compensation they had taken into account N's behaviour at the Christmas party *'in the gaze of both the first and second respondents'*.

They also considered *'the claimant's conduct before, and possibly even during and after, these proceedings'.*

Employment Appeal Tribunal

Both the claimant and respondent appealed the decision. The claimant appealed on the ground of alleged bias and asked that the judgment be set aside in its entirety and the case reheard. The respondent on the grounds that the tribunal erred in law asking that the EAT should decide on the contended decisions.

The EAT considered how the ET had reached its conclusion that H's gossiping about the paternity of N's child did not amount to harassment. The EAT noted that in H's mind there were *'at least two contenders'*, and that this was uncomfortable for N and it was related to her pregnancy. They noted that N's discomfort was unchallenged by the respondents. The EAT concluded that:

> *It does constitute a course of unwanted conducted, meeting the definition of harassment, and the tribunal was wrong not to see this.*

They added that they believed that the tribunal's disapproval of N's conduct at the Christmas party had *'leaked into its judgment on the law'*.

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The EAT also held that C's refusal to allow N to work at a different location away from H, pending the outcome of her grievance, was not harassment but discrimination on the grounds of pregnancy.

> *The tribunal's simple finding that the [alternative office] issue was not related to her sex or pregnancy is wrong. It was related to Debbie O'Hara and the content of her gossip was unarguably related to pregnancy and pregnancy is related to her sex.*

The EAT held that the ET was right in its application of the authorities dealing with constructive unfair dismissal but its application in terms of remedy was flawed.

The EAT held that in looking at the award a tribunal must focus on conduct up to dismissal, in this case March 15, 2008. For the basic award it can be any conduct and it would include N's behaviour at the Christmas party. For the compensatory element it is only conduct causing or contributing to the dismissal which should be considered. The ET therefore erred in taking into account N's behaviour after March 15, 2008, before and even after the proceedings. The judgment on compensation was therefore set aside.

Implications for practitioners

The implications of this case should be considered in a wider context than the tabloid take on the issues would imply. It goes beyond simply reminding employers of their potential liability for failure to quell salacious office gossip.

The failures on the employer's part were:

- not dealing with an employee's grievance in a timely manner (or at all),
- failure to accommodate the employee's request that she be re-located pending the outcome of the grievance and
- unlawfully deducting her wages when she refused to be cajoled into attending work at an office where, potentially, she was being harassed.

These failures, together and individually, amounted to sex-based discrimination.

Furthermore, in considering reductions in awards due to the contributory fault of the claimant, practitioners (and indeed tribunals) are reminded that only the claimant's behaviour up to the date of dismissal should be considered.

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Briefing 591

Age discrimination – justification and the cost argument

Woodcock v Cumbria Primary Care Trust [2011] IRLR 119, [2010] UKEAT 0489/09/1211, November 12, 2010

Facts

Mr Woodcock (W) was a chief executive of the respondent trust (the Trust) who was made redundant following the reduction of primary care trusts (PCTs) in the northwest from 42 to 24.

W's position as chief executive ceased to exist in February 2006, but he was seconded to a local strategic health authority. He was informed that he had not been successful in applying for a chief executive role with any of the new PCTs on August 11, 2006, when he was also placed at formal risk of redundancy. W continued a series of secondments on time-limited projects.

A redundancy consultation meeting was scheduled for June 6, 2007, and at some stage the Trust realised that W was due to turn 49 on June 17, 2007. As W had a twelve-month notice period, that would mean he would still be employed aged 50, which would cost the Trust between £0.5-1m in funding a retirement pension. The Trust decided to give notice of termination on May 23, 2007, and, as no alternative employment was found, W's employment was terminated on May 23, 2008.

Employment Tribunal

W brought proceedings of age discrimination under the Employment Equality (Age) Regulations 2006. The ET found that although there was prima facie direct age discrimination, this was justified.

The ET found that the Trust's legitimate aim was to prevent W from receiving a windfall, supplemented by

another legitimate aim of avoiding a significant cost. The Trust's act of giving notice of termination before the consultation meeting was a proportionate means of achieving this legitimate aim.

Employment Appeal Tribunal

W appealed arguing that cost alone could never be the only legitimate aim relied upon to justify discrimination. Even if cost was a legitimate aim, it was impossible to justify depriving an employee of the procedural safeguard of a consultation meeting, whatever the cost.

The EAT, led by Mr Justice Underhill (President), dismissed the appeal.

The EAT held that preventing a windfall (defined as receiving any benefit which one had no legitimate right to expect) was a legitimate aim. The windfall in this case was W *'getting within striking distance'* of his 50th birthday when his job had, in practice, disappeared in early 2006, when W was aged 47.

The EAT was clear that it would not be in every case that an employer was justified in cutting procedural corners, but that there were key factors in this case that placed the loss of consultation in a different light. One of these factors was that W had a year when he was placed at risk of redundancy, and had known that there was no permanent position available for him. This was consultation in substance, if not in form.

The EAT also commented that the redundancy consultation meeting scheduled for June 6, 2007 was only pushed back so late due to scheduling difficulties – the employer had wanted to hold it as early as March 30, 2007. There was also the 12 month notice period during which alternative employment could be explored.

The EAT also observed that if a factor was capable of providing justification, that must be the case whether on its own, or in conjunction with, other factors. It would be artificial to recognise a 'cost plus' defence, and yet refuse a justification on cost alone. This was the EAT showing its disapproval of the previous authority of *Cross v British Airways plc* [2005] IRLR 423, where Burton J stated that:

> *an employer seeking to justify a discriminatory PCP cannot rely solely on considerations of cost. He can however put cost into the balance, together with other justifications if there are any.*

Analysis

The EAT's decision is not significant for the finding of justified direct age discrimination – a predictable conclusion given the protracted circumstances of W's redundancy – but rather for the comments on the role of cost considerations when seeking to justify discrimination.

The EAT was clear that it was not saying that an employer would be able to justify discrimination simply by saying that 'it costs too much', but rather that the focus should be on proportionality, rather than the category of legitimate aim required. There will be some forms of discrimination that it can never be too expensive to avoid or rectify, but similarly there will be cases where the impact of the prima facie discrimination is trivial, and the cost of removing it enormous.

As for the proportionality of the Trust giving notice of termination before the consultation meeting, the EAT held that the additional pension costs needed to be weighed up against the detriment to W of shortening the redundancy process. One important factor to be considered in that proportionality exercise was that W had already had a far longer redundancy process than he was entitled to expect. It is interesting to speculate on how short the redundancy process would have to be to justify an additional pension liability of £1m, but it is likely that any redundancy process would have to be so short as to not allow for any genuine consultation to stand a chance of success.

Practical implications

Advisers will have to consider whether the result of any successful claim being successful is that their client would receive a 'windfall', as broadly defined by the EAT. This is particularly an issue when considering the relationship between pension entitlement and redundancy payments. W's case may have been a clear example of a windfall, but there will be other cases where it will be far harder to argue that an employee had no legitimate right to an increased pension payment, especially if those provisions were longstanding.

Another implication is that *Woodcock*, despite the obiter nature of the comments on 'cost plus', will potentially encourage respondents to run more arguments in relation to cost. Advisers should ensure that any costs argument is thoroughly scrutinised, not only for the detail of the cost it would take to remove the discrimination, but also in comparison with treatment that it is being sought to justify – remember that some acts of prima facie discrimination may be so serious that no cost can justify them.

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Unreasonable behaviour alone is not enough to reverse the burden of proof in discrimination cases

Hammonds LLP v Mwitta UKEAT/0026/10

Facts

Ms Mwitta (M) was employed as a solicitor at Hammonds in the Corporate Strategy and Finance Department in the Leeds office. She was of mixed Tanzanian and Russian ethnicity. This made her the only non-white member of the department.

Work within the department was assigned by the five partners within the group. Their decisions were based on the prior involvement of a junior lawyer with the work or the client, as well as the difficulty of the work and the experience of the lawyer. There was also an element of 'serendipity' in that a lawyer might receive work because they were free when it came in or happened to be visible when a partner was looking for assistance.

From spring 2008 the economic downturn reduced the amount of work available in the department. Ultimately this led to redundancies and M was one of those dismissed.

Employment Tribunal

M brought a claim for direct race discrimination. This had two parts. Firstly, she said that the partners had allocated her less work because of her race. Secondly, she said that she was dismissed because of her race. There were a number of other claims, but these are outside the scope of this summary.

The ET rejected the dismissal element of the race claim. They concluded that the only reason for dismissal was the reduction in overall work and the redundancy situation to which this led.

In relation to the allocation of work, the ET concluded that two of the partners had not treated M less favourably in the work that they had given her but the remaining three had.

The tribunal's reasoning was substantially based on the shifting burden of proof.

They concluded that there was *'very great disparity'* between the quantity of work given to the claimant and that given to the other juniors. This, the tribunal found, was sufficient to establish a prima facie case for discrimination and to place the burden of proof on the partners concerned to provide a convincing explanation to rebut the presumption.

Employment Appeal Tribunal

Hammonds appealed to the EAT. They argued that the ET had misapplied the reverse burden of proof. They should have decided whether the claimant had established facts that could, in the absence of any explanation, support a conclusion that she had been discriminated against. Instead they had decided whether the claimant had established facts that could, in the absence of any explanation, support a conclusion that she could have been discriminated against.

The EAT agreed. The foundation of the ET's conclusion was that the way work had been allocated to the claimant was unreasonable. That unreasonable conduct was enough to show that the partners could have discriminated against her. But, without more, a reasonable tribunal could not conclude that the discrimination did occur.

Comment

In theory whether there is evidence that something could have happened is very different to evidence that something did happen.

In practice, the distinction between a tribunal deciding that there is sufficient evidence that they *could* conclude that something *did* happen; and the same tribunal deciding that something could have happened may be difficult to identify.

The more practical point to take away from the case is that it confirms that unreasonable conduct alone is not enough to sustain a discrimination claim. The 'bastard defence' remains an effective one.

Michael Reed
Free Representation Unit

Bed and breakfast for all? Conflicts between sexual orientation and religion or belief in the provision of services

Martin Hall and Steve Preddy v Peter Bull and Hazel Bull, Bristol County Court Case No 9BS02095 and 9BS02096

Implications for practitioners

This landmark case is the first to test the law relating to discrimination on grounds of sexual orientation in the provision of services. It raises difficult issues relating to the conflict between the right not to be discriminated against on grounds of sexual orientation and the rights of religious groups to manifest their religion both as a justification for discrimination and as a human right.

The decision highlights that if people use their home as a business and provide a service to the public, they must offer those services in a manner that that does not discriminate against persons on grounds of their sexual orientation, even if this is contrary to their genuine religious beliefs. The decision and legislation reflects that in our society it is no longer acceptable to deny someone services because of their sexual orientation.

Facts

In September 2008, Steven Preddy and Martyn Hall (P&H) planned a short break in Penzance at the Chymorvah Hotel which is owned by Mr and Mrs Bull (B). P&H are homosexual men in a civil partnership. On arrival at the hotel, they were informed that they could not have a double room as these were for married couples only. Upon telling the receptionist that they were legal civil partners, P&H were further informed that the hotel's policy was to let double rooms to heterosexual married couples only.

The couple issued a claim in Bristol County Court for direct and indirect discrimination under the Equality Act (Sexual Orientation) Regulations 2007 (the Regulations) and were supported in their claim by the Equality and Human Rights Commission (EHRC). These Regulations, implemented in April 2007 under powers contained in the Equality Act 2006, outlaw discrimination in the provision of goods, facilities, services, education and public functions on the grounds of sexual orientation.

B's defence was that they had a religious belief that *'monogamous heterosexual marriage is the form of partnership uniquely intended for full sexual relations between persons'*. They denied direct or indirect discrimination on the basis that their restriction on double rooms has nothing to do with sexual orientation but to do with 'sex' and that the restriction applied equally to heterosexual couples who are not married.

In the event that their policy did nevertheless amount to indirect discrimination, B claimed that the discrimination was justified under the Regulations. They also claimed breaches of Articles 8, 9 and 14 of the European Convention on Human Rights implemented by the Human Rights Act in that their Article 8 right to privacy and their Article 9 right to manifest their religion had been breached and that they had been discriminated against in the enjoyment of those rights under Article 14.

As the facts of the case were not in dispute, the task of Judge Rutherford was to interpret and apply the Regulations. He noted that the Regulations must be read and given effect in a way compatible with Convention rights. If it is impossible to interpret them in such a way, the Regulations still had to be applied by the County Court as only the higher courts can make a declaration of incompatibility.

County Court

The judge ruled that both claimants had experienced direct discrimination in relation to their sexual orientation. He also said that had it been necessary, he would have found indirect discrimination.

The judge stated that the:

> *only conclusion which can be drawn is that the refusal to allow them to occupy the double room which they had booked was because of their sexual orientation and that prima facie they fall within the provision of regulation 3(1) and that this is direct discrimination.*

The judge then considered whether the Regulations are incompatible with the Convention and held that they were not. While it was easy to recognise Article 8 rights for the claimants, the similar rights of the defendants are *'inevitably circumscribed by their decision to use their home in part as a hotel'*. In other words, the defendants' right to privacy cannot be argued to have been breached when they had decided to provide an

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accommodation service to the public.

In relation to freedom of religion, the judge held that while the defendants had an absolute right to hold a religious belief under Article 9, their right to manifest that belief is not absolute and can be limited to protect the rights and freedoms of others. The Regulations were held to be a legitimate and proportionate means of protecting the rights of the claimants.

P&H were both awarded £1,800 compensation for injury to feelings. The judge granted permission to the defendants to appeal and they are appealing to the Court of Appeal.

Comment

The decision highlights the difficulties that are faced in reconciling conflicts between the rights of different groups in society.

Looking to the future, leadership is required nationally and internationally by the government, the EHRC and international networks such as Equinet (the network of European Union Equality Bodies) to develop guidance and principles to help employers and service providers resolve such conflicts.

Peter Reading
Director of Legal Policy, EHRC

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Allowing deaf people to serve as jurors – an Irish perspective

DPP v Gerry O'Brien, unreported, Central Criminal Court [Ireland] CC3/09, November 29, 2010; *Clarke v Galway County Registrar & Others,* unreported, High Court [2006/1338JR], July 14, 2010

Michael Farrell is a solicitor with the Free Legal Advice Centres (FLAC) in the Republic of Ireland. FLAC is an independent human rights organisation dedicated to the realisation of equal access to justice for all. It has a particular focus on legal aid, social welfare, credit & debt and public interest law. To this end it campaigns on a range of legal issues but also offers some basic, free legal services to the public through its network of part-time Legal Advice Centres, including 23 centres in Dublin and two in Cork. FLAC also operates specialist advice centres in immigration, family and employment law. Michael Farrell recently represented two deaf jurors to challenge their exclusion from jury service because of their hearing impairment.

Implications for practitioners

In Ireland deaf people cannot be automatically excluded from serving on juries; each case must be decided individually by the court (*Clarke* case). Objections that allowing a sign language interpreter into the jury room would infringe jury confidentiality could be met by the interpreter taking a specific oath of confidentiality (*O'Brien* case).

The cases also potentially raise important equality and human rights issues for deaf people in the UK where similar issues arose in 1999 in the Woolwich Crown Court involving Jeff McWhinney, then head of the British Deaf Association, see *R v a Juror* (Jeffrey McWhinney) (Woolwich Crown Court, U19990078, Anwyl J, 9 November 1999, unreported).

Facts

Joan Clarke (C) was summoned for jury service in 2006. When she told court officials she was deaf but wanted to serve, she was informed that she had been excused, even though she had not asked to be. Senan Dunne (D) is also deaf. He was called for jury service in the Central Criminal Court in Dublin in November 2010, after the judgment in C's case had removed the blanket ban on deaf jurors. The judge ruled that he could serve on the jury in the case of *DPP v O'Brien*, but he was challenged by the defence. Both C and D were represented by FLAC.

High Court

The Juries Act 1976 had expressly excluded deaf people from juries, although the specific reference to deaf people had been removed by amendment in 2008 and replaced by a test of *'practicability'* by the time judgment was given in C's case.

However, C's exclusion had taken place under the original Act and O'Keeffe J held that the County Registrar had acted *ultra vires* in purporting to excuse

C when she had not asked to be excused. He also held that where there was an issue as to the capacity of a potential juror to serve, it should be determined by the court. He added that, in his opinion, the presence of a sign language interpreter in the jury room would breach the confidentiality of the jury's deliberations, but this did not form part of his order.

Central Criminal Court

D attended for jury service and was selected for the case of *DPP v O'Brien*. He wanted to challenge the ban on deaf jurors and came to court with his own solicitor who indicated that D was deaf and outlined the change that had occurred in the law and the decision in C's case.

Counsel for the Director of Public Prosecutions (DPP) objected to D being empanelled, citing the English case of *Re Osman* [1996] 1 Cr App R 126, where the judge had held that it would be *'an incurable irregularity'* for an interpreter to accompany a deaf person in the jury room – the so-called *'13th juror'* objection.

Carney J held that the *'13th juror'* objection could be met by the jury foreman ensuring that the interpreter confined herself strictly to interpreting and did not engage in discussion with jury members, and by the interpreter taking an additional oath to keep the proceedings confidential. He said:

> *I would be entirely prepared to have the signer participate in this case as an interpreter on taking, first of all, the ordinary interpreter's oath and then going on to take a further oath in relation to confidentiality.*

However, defence counsel had indicated before the ruling that he intended to challenge D on different grounds and duly did so, rendering the decision technically moot. D had to stand down and since then the DPP has instructed prosecutors to oppose the empanelling of deaf jurors, relying on the *'13th juror'* argument.

Comment

The Irish equality legislation exempts any act required by statute or by order of a court from the scope of protection from discrimination in the provision of goods and services and defines 'service' in a way which does not include jury service.

The Disability Discrimination Acts 1995 and 2005 require the UK Court Service not to discriminate against disabled users, to have due regard to the need to eliminate unlawful discrimination against disabled people, and to promote equality of opportunity for disabled people. This requires them to make reasonable adjustments to enable disabled users to fully participate and/or benefit from services available to non-disabled users. The HM Court Service advertises that it will provide reasonable adjustments, such as induction loops or computer aided transcription, for hearing impaired jurors. However, as criminal law does not permit there to be an 'extra' person (the *'13th juror'* argument) in the jury deliberation room for any reason, only deaf jurors who can lip-read will be able to participate in such deliberations.

According to the Equality and Human Rights Commission, the UK criminal courts do not currently have the power to take the steps required to fully enable a deaf person to sit on a jury.

In Ireland, with the express ban on deaf jurors removed, courts now have to determine whether it is 'practicable' for an individual deaf person to serve on a jury. Carney J in D's case rejected any argument that a deaf person, aided by an interpreter, could not follow the evidence, which been suggested in *Re Osman*. He said: *'I can see that signing is clearly working'*. And the DPP did not raise that objection.

The only argument remaining for excluding deaf people is the *'13th juror'* one. The Irish Law Reform Commission in a consultation paper in 2010 rejected the idea that properly trained and accredited sign language interpreters would compromise the integrity or confidentiality of jury discussions. It stated: *'the presence of an interpreter will not impinge upon the secrecy of jury deliberations'*, Law Reform Commission, Jury Service (LRC CP 61-2010), Dublin, March 2010. A final report from the Commission is expected later this year.

In the meantime, other deaf people are likely to be called for jury service and the issue will have to be considered again. Carney J is the senior criminal trial judge in the Irish courts. While his views in D's case may not be binding per se, they are likely to be very influential. It may not be long before the first deaf person sits on an Irish jury, to be followed shortly afterwards by the first blind juror.

Michael Farrell
Senior Solicitor, Free Legal Advice Centres

EC criticises UK on the 'right to reside test' and on pay discrimination for non-UK seafarers

The European Commission (EC) has requested that the UK government end discrimination in relation to the 'right to reside test' and in relation to pay discrimination for non-UK seafarers.

Right to reside test

The EC has requested that the UK ends discriminatory conditions on the right to reside as a worker which currently excludes from certain social benefits nationals from the A8 countries (Czech Republic, Hungary, Slovakia, Slovenia, Latvia, Lithuania, Estonia and Poland) which joined the EU in 2004.

The EC considers the discriminatory rules to be in breach of transitional arrangements on free movement of workers, as well as the obligation to ensure equal treatment on the basis of nationality.

According to the UK Worker Registration Scheme, nationals from the A8 countries who stop work before completing one year with an authorised employer do not have the right to reside as a worker. Without this right to reside, nationals from the A8 countries are currently excluded from receiving Housing Benefit, Council Tax Benefit, Crisis Loans, and allocation of social housing and provision of homelessness assistance.

The EC considers that this is contrary to the transitional arrangements on the free movement of workers which allow the UK to restrict the right of nationals from the A8 countries to move to the UK to work until the end of April 2011. These transitional arrangements allow the UK to restrict the right to reside as workers under certain conditions but they do not allow discrimination when paying benefits.

Non-UK seafarers

On January 27, 2011, the EC requested the UK put an end to discriminatory provisions in the race relations legislation allowing for differential pay for non-UK seafarers linked directly and indirectly to their nationality. The EC considers the legislation to be in breach of the obligation to treat EU migrant workers in the same way as national workers in employment-related aspects such as pay.

The RRA explicitly allows for direct and indirect pay discrimination on the basis of nationality of non-UK seafarers hired abroad to work on UK ships, or working on UK ships outside the UK. These provisions continue to apply to non-UK seafarers because, even though the Equality Act 2010 prohibits pay discrimination, the UK government has not yet adopted the further provisions that are necessary to extend this prohibition of pay discrimination to seafarers and work on ships.

The requests take the form of 'reasoned opinions' under EU infringement procedures. The UK has two months to bring its legislation into line with EU law. No information was available about a response to the 'right to reside test' criticism where the deadline for action ended on January 28, 2011. In the absence of satisfactory action, the EC can decide to refer the UK to the ECJ.

Judicial review finds London Councils' funding cuts to be unlawful

The judicial review challenged the London Councils' plans to cut £10m from the £26.4m funding it provided to voluntary sector organisations in London. The cuts would have affected more than 200 voluntary and community sector organisations in London, and tens of thousands of Londoners.

The judge held that London Councils' consultation process was flawed and that they had failed to meet their statutory equality duties. He quashed all the funding cut decisions for the 200+ projects and said that London Councils must re-run the process, this time with full equality impact assessments.

The case establishes that even in the current economic climate, it remains of paramount importance that public sector funding cut decisions are properly assessed for their gender, disability and race equality impacts. Public sector funding cut decisions will be unlawful if they are not properly assessed.

London Councils simply did not consider the full effect of their £10 million cuts on the hundreds of voluntary sector groups and tens of thousands of members of the public who would be affected. They will now be required to do so.

Public Bodies Bill

This Bill, currently going through the House of Lords, aims to abolish, merge or amend a wide variety of public bodies including the Judicial Appointments Committee, the Charities Commission, the National Land Registry, the EHRC, the Children's Commissioner for England and the Women's National Commission as part of the government's reduction of the number of quangos.

One major cause for concern was the far reaching powers set out in clause 11 of the Bill which gave the minister power to abolish, merge or modify the constitutional arrangements in respect of 151 public bodies by means only of the affirmative resolution procedure. This provision was widely criticised and the government has now responded to public pressure and removed it.

Equality and Human Rights Commission

The EHRC is one of the bodies affected by the Public Bodies Bill. At the moment the Government Equalities Office is saying that the government wishes to 'radically reform' the EHRC and strip it of some of its responsibilities. They said: *'the EHRC's work will be refocused on its core functions of regulating equality and anti-discrimination law in Great Britain, of fulfilling EU equality requirements and of being a National Human Rights Institution. As part of our drive to increase the accountability of public services … ministers are considering the scope for transferring some of EHRC's functions and services to government departments or contracting with private or voluntary sector bodies to undertake them'.*

Trevor Phillips, chair of the EHRC, said: *'the aim here is to spend less on our own bureaucracy, and more money on ensuring that government and business act according to the highest standards of equality and human rights'.* However, with a reported 60% cut in its budget cutting bureaucracy alone is unlikely to be enough. The government is expected to issue a consultation document on the role and functions of the EHRC shortly.

Localism Bill

This Bill, currently going through the House of Commons, sets out to decentralise decision-making and to shift power from central government back into the hands of individuals, communities and councils. Amongst other things it will enable citizens to veto 'excessive' council tax rises, and give residents the right to instigate local referendums on *'any local issue'*, '*save local facilities threatened with closure'*, and *'bid to take over local state-run services'*.

Groups protected by the Equality Act 2010 are currently underrepresented in decision-making processes so there is clearly a need to ensure that local decision-making promotes equality of participation and voice by involving diverse communities. This raises the concern that with more private bodies and community groups taking on public service provision, there is a risk that these services may not in future be subject to the fundamental protections contained in the Human Rights Act 1998 and the new public sector equality duty under the Equality Act 2010.

The Bill contains far-reaching powers in clause 5 that permit the minister by order to *'amend, repeal, revoke or disapply'* any statutory provision that he thinks *'prevents or restricts local authorities from exercising the general power'*. This extensive power is dangerously broad and could be used to revoke or repeal a number of important statutory provisions, such as the public sector equality duties with minimal parliamentary scrutiny.

Implementation date for the public sector equality duty

The government has announced that the new public sector equality duty under s149 of the Equality Act 2010 will be brought into force on April 6, 2011. New draft regulations have been published setting out new specific duties which will promote better performance of the equality duty. The EHRC has also published guidance on the duty, explaining the responsibilities of public sector bodies in England and non-devolved bodies in Scotland and Wales.

Default retirement age to be abolished

From April 6, 2011, subject to parliamentary procedures, employers will no longer be able to issue notifications of retirement using the default retirement age procedure. Where notifications have already been made prior to April 6, employers will be able to continue with the retirement process as long as the retirement is due to take place before October 1, 2011. No retirements using the default retirement age procedure will be possible after October 1, 2011.

Age discrimination in goods, facilities and services

The government has just published a consultation paper on how it intends to implement s197 Equality Act 2010. It proposes to implement these provisions in April 2012. The DLA will be responding to this consultation.

Commission on a British Bill of Rights

The coalition government is due to announce the setting up of a commission to examine the possibility of enacting a British Bill of Rights. This has undoubtedly been brought forward because of the recent debates about the prisoners' right to vote and the sex offenders' register. The terms of reference have not yet been agreed; however, it will consider the relationship between the European Convention on Human Rights (ECHR) and a British Bill of Rights. Secretary of State for Justice Kenneth Clarke has recently re-affirmed that he considers that there is no question of the UK withdrawing from the ECHR but he is clearly considering whether there are ways in which the European Court of Human Rights (ECtHR) could be reformed. In November the UK takes over the chair of the Council of Europe and they are likely to want to ensure that issues concerning the ECtHR are addressed.

Reform of workplace disputes

In January the Department of Business Innovation & Skills (BIS) published its proposals for *Reform of Workplace Disputes*, including raising the qualification period for unfair dismissal from one to two years, requiring all claims to be submitted first to ACAS for pre-claim conciliation, increasing the power to strike out claims and introducing fees for lodging claims in employment tribunals. In a 177 page impact assessment, five pages contain the BIS equality impact assessment which identifies differential periods of employment of different groups but nevertheless concludes *'…the proposed changes are unlikely to create any barriers to equality in terms of gender, race and disability'.* The DLA will be responding to these proposals.

Discrimination Law Association

Dates for your diary

DLA Practitioner Group Meetings – venues to be notified

March 22, 2011:	**Ulele Burnham on Mental Health Cases**
April 14, 2011:	**Caroline Gooding and Bela Gor on s60 Equality Act 2010 and pre-employment health questionnaires**

Briefings

Abbreviations

ACAS	Advisory, Conciliation and Arbitration Service
BAME/BME	Black and minority ethnic groups
BIS	Department of Business, Innovation and Skills
CA	Court of Appeal
CRC	Community Relations Council
CRE	Commission for Racial Equality
DDA	Disability Discrimination Act 1995
DEIA	Disability equality impact assessment
DLA	Discrimination Law Association
DPP	Director of Public Prosecutions
EA	Equality Act 2010
EAT	Employment Appeal Tribunal
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EHRC	Equality and Human Rights Commission
EHRR	European Human Rights Reports
EOC	Equal Opportunities Commission
EqPA	Equal Pay Act 1970
ET	Employment Tribunal
EU	European Union
GEO	Government Equalities Office
HH	His/Her Honour
ICR	Industrial Case Reports
IRLR	Industrial Relations Law Report
J	Justice
LJ	Lord Justice
LLP	Limited Liability Partnership
MOJ	Ministry of Justice
MR	Master of the Rolls
NGO	Non-governmental organisation
P	President of the Employment Appeal Tribunal
PCT	Primary Care Trust
PCP	Provision, criterion or practice
QC	Queen's Counsel
RRA	Race Relations Act 1976
RRB	Race Relations Board
SDA	Sex Discrimination Act 1975
TOR	Terms of Reference
UN	United Nations
WLR	Weekly Law Reports