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Editorial *Equality must be more than a matter of culture, media and sport*

A major theme emerging from the October DLA conference focused on the need for discrimination practitioners to explore alternative and innovative ways to continue to challenge inequality and abuses of rights in the face of the government's agenda to marginalise the law as a mechanism for promoting equality.

The government has made it clear that it will not bring into force many of the most progressive elements of the EA such as dual discrimination, the socio-economic duty, or pay audits. Undeterred by overwhelming opposition when it consulted on proposals to repeal provision in the EA for 3rd party harassment, the questionnaire procedure and employment tribunals' wider recommendation powers, the government is currently seeking to enact the first two of these repeals with the third still to come. Further, subject to a government review, the public sector equality duty is now at risk. Changes to legal aid, the employment tribunal system and the EHRC will make enforcing equality rights ever harder.

In the current environment we can expect to see cases on the impact of changes to welfare entitlement as a result of economic austerity and cuts to public authority budgets. In *Burnip* the issue concerned the applicants' challenge to a cap on housing benefit applicable to all tenants, but operating to the detriment of severely disabled tenants. Catherine Casserley highlights in her article on the Paralympics the devastating impact of benefit reassessment on disabled people and the negative impact of welfare reform on their quality of life. She contrasts, on the one hand, the positive promotion of Paralympic champions and their amazing successes with, on the other hand, the bleak reality of the lives of many disabled people.

The briefing on *Dordevic v Croatia* raises interesting issues for UK authorities in relation to their positive obligations; this case concerned the state's failure to prevent the persistent harassment of a severely disabled young man, and the European Court of Human Rights held that the positive obligation on the state and public authorities to respect the private and family life of people extended, in certain circumstances, to ensuring the human dignity and psychological integrity of people.

The use of article 14 of the European Convention on Human Rights/Human Rights Act may be increasing in domestic cases and its use is highlighted in the briefings on *Burnip* and *R (on the application of S and KF)*. Using European standards to challenge discrimination is one way to ensure that changes to domestic law do not erode existing standards. The reference in *Burnip* to the potential of the UN Convention on the Rights of Persons with Disabilities to 'illuminate' the court's approach to both discrimination and justification is a helpful steer.

Two briefings describe positive developments in anti-discrimination law in GB. These include the extension of the protection against age discrimination in the provision of goods and services. Furthermore, from September 2012 the requirement on schools to make reasonable adjustments for disabled pupils was extended and all schools are now required to provide such pupils with auxiliary aids and services to enable them to overcome substantial disadvantages which they face in comparison with non-disabled pupils.

Practitioners at the DLA conference were urged to measure domestic law reform against international standards – would a reformed EHRC comply with the level of independence required by the Paris Principles? Would it raise doubts about the UK's compliance with the Racial Equality Directive's and the Gender (Recast) Directive's requirements for a national body or bodies promoting equal treatment? Would changes to the EA be compliant with the EU principle of 'effectiveness' as required by all the European directives? Would the changes reduce the ability of individuals to enforce their EU rights thus raising issues under the directives and the HRA? Would the UN monitoring bodies have concerns about the future effectiveness of UK enforcement mechanisms?

With UK protection for equality rights at a new low, we need to be alert to ways in which we can test domestic changes against international standards and agreements and use whatever opportunities these present to challenge the government's side-lining of legal routes to tackle discrimination and promote equality. A major weapon in the fight must also be the collective bargaining power and education role of the trade unions. The DLA conference gave us a timely and positive reminder that union rights are also underwritten in international law and noted that many trade unions are now better prepared and more committed to challenge discrimination.

Geraldine Scullion, Editor

Please see back cover for list of abbreviations

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Beginner's guide to the ban on age discrimination in goods and services[1]

Daphne Romney QC and Dee Masters provide an accessible introduction to the ban on age discrimination in goods and services. They also highlight issues for advisors, areas where there is likely to be litigation and questions with which the courts will be required to grapple over the coming years.

On October 1, 2012 the provisions within the Equality Act 2010 (EA) which prohibit age discrimination in the field of goods and services came into force.[2] This means that commercial, charitable and public sector organisations are required to eliminate unequal treatment on the grounds of age in respect of the provision of goods and services.

However, there are a myriad of exceptions contained in both the EA and the statutory instrument entitled the Equality Act 2010 (Age Exceptions) Order 2012 (Age Exceptions Order) which also came into force on 1 October. These were formulated following a detailed consultation exercise carried out in 2011 but in our view they introduce uncertainty in various areas which will inevitably lead to litigation.

The Government Equalities Office published guidance on August 3, 2012 to help organisations understand the implications of the change to the existing law.[3] This change in the law is an interesting development because the ban on age discrimination does not have the same European context as other forms of discrimination. There is no directive currently prohibiting age discrimination in the field of goods and services. It is however a well-established and fundamental principle of community law that there should be equality of treatment. This is further enshrined within article 19 of the Treaty of the Functioning of the European Union (TFEU) in the context of age.

This gives rise to a number of challenging but extremely important questions: should the prohibition on age discrimination in goods and services in the EA be construed in the light of the 'European' approach towards discrimination law? Does the approach in cases such as *Seldon v Clarkson, Wright and Jakes*, [see Briefing 636] which relied heavily on the Employment Equality Directive (Directive 2000/78), have any application in goods and services cases? Does the debate concerning 'costs plus' and the test of objective justification, which has arisen in the context of EU derived rights, have any relevance in this context?

The basics

The principle of non-discrimination on the grounds of age in the context of service providers is contained in ss13, 19, 26, 27 and 29 of the EA. Only those over 18 are afforded protection. As explained by the guidance, this means that organisations can continue to operate 'no children' hotels and holidays. However, service providers should proceed with some caution because treating under-18s more favourably might lead to litigation by older age groups.

Service-providers are defined as persons concerned with the provision of services, goods or facilities to the public or a section of the public, regardless of whether or not a payment is provided and regardless of whether or not the relevant persons are exercising a public function. It follows that a wide range of activities will fall within the scope of s29 from the provision of medical treatment by the NHS to the sale of finance products by private banks.

In broad terms, the EA prohibits service-providers from:

- direct or indirect discrimination against a person because of age by withholding a service or in respect of the terms on which a service is provided, the termination of the service or subjecting that person to any other detriment;
- harassing a person because of age who requires the service or uses the service; and
- victimising a person because of age by withholding the service or in respect of the terms on which a service is provided, the termination of the service or subjecting that person to any other detriment.

The scope of indirect age discrimination in the context of age discrimination is not altogether obvious. However, the new guidance offers a useful example,

1. Re-printed with kind permission of the authors Daphne Romney QC and Dee Masters. Originally published by the Law Society on the Law Society Gazette website, September 11, 2012; see www.lawgazette.co.uk/inpractice

2. Equality Act 2010 (Commencement No 9) Order 2012

3. See http://www.homeoffice.gov.uk/publications/equalities/equality-act-publications/equality-act-guidance/

suggesting that indirect age discrimination would arise where an optician restricts eligibility to payment by instalments to those in work, thereby placing pensioners at a disadvantage.

A further common scenario will be the provision of special deals or discounts to students. As they are more likely to belong to a younger age group, this might well give rise to potential claims of indirect age discrimination by older groups. The EA also renders it unlawful to provide a service either in a different way or in an inferior way because of a person's age. An example provided by the new guidance is where a salesperson in a computer store serves an older customer less courteously by making jokes or perhaps offensive comments on the assumption that the customer is less knowledgeable about technology because of his or her age.

Importantly, where an employer organises for a third party to provide a service only to the employer's employees, the third party will be a 'service provider' and the employees will be classed as a *'section of the public'* so as to engage s29 of the EA. The employer would not be classed as a service provider, but any discriminatory activities might fall under part 5 of the EA, which governs the employment relationship. One common scenario caught within this section would be the provision of IT services or occupational health services by an external organisation.

A private club or association would not fall under s29 of the EA, but ss100-102 and s107 of the EA contain similar provisions in respect of access, membership, termination and guests in cases where the association has at least 25 members. There is a long list of exceptions to s29 of the EA, both in the act itself and the Age Exceptions Order. The areas likely to be most relevant to employment and discrimination lawyers and advisors are financial products, concessions, holidays, age verification, sports, charities, schools and positive action.

However, service providers will still be able to defend allegations of age discrimination falling outside of this list of exceptions provided that they can justify the discriminatory treatment pursuant to ss13 and 19 of the EA. However, as we shall explore later, the scope of this defence is presently unclear.

European dimension

Directive 2000/78 which prohibits age discrimination applies in an employment context only. There is at present no directive regulating age discrimination for the provision of goods and services, although the Gender Directive (2004/11) specifically prohibits sex discrimination in that context. In July 2008, the European Community adopted a proposal for a directive which provides for protection from discrimination on grounds of age, disability, sexual orientation and religion or belief beyond the workplace, and consultation continues. Given that the proposal is four years old, progress has hardly been speedy. There remains a perception (voiced by the EHRC in its reply to the consultation) that there is a two-tier hierarchy for EU discrimination – race and sex on the top and the other forms below.

In the absence of a directive, which would require the UK courts to interpret the EA consistently with European law, the question remains open as to the proper approach to be taken by the UK courts in interpreting the new legislation.

Our view is that the law will be developed along one of the following lines:

- a black letter, literal interpretation without any recourse to European law on the basis that the ban on age discrimination in goods and services is entirely home grown. This approach has been adopted by the UK courts with the 2006 TUPE regulations and the home-grown concept of the 'service provision change' where the courts adopted a *'straightforward and commonsense application of the relevant statutory words to the individual circumstances before them'*.
- a 'European' interpretation applying the controversial fundamental principle of equality identified in *Mangold*, and also enshrined in article 13 of the TFEU. To complicate matters further, the use of this form of interpretation may differ dependent upon whether a claim is against an emanation of the state or a private organisation or individual.
- a harmonised interpretation of the discrimination provisions as applied by the CA in *Manchester NHS v Fecitt* where, in reference to whistleblowing anti-victimisation provisions (which did not enact a directive), Elias LJ said: *'However, the reasoning which has informed the EU analysis is that unlawful discriminatory considerations should not be tolerated and ought not to have any influence on an employer's decisions. In my judgment, that principle is equally applicable where the objective is to protect whistleblowers, particularly given the public interest in ensuring that they are not discouraged from coming forward to highlight potential wrongdoing.'* This would have the practical effect that courts would construe ss13 and 19 in the context of goods and services in

exactly the same way as they would when addressing European derived rights such as the principle of non-discrimination in the employment field.
- finally, there is the possibility that the courts will take account of the fact that parliament has enacted the ban on age discrimination in goods and services using the same language for the same ban in the employment field and therefore will apply parity of interpretation on the basis that parliament must have intended there to be consistency.

We are unaware of any prospective or actual attacks on the Age Exceptions Order by way of judicial review based upon incompatibility with European law, but it is not impossible that such a challenge could be brought by aggrieved individuals or pressure groups relying on the fundamental community law principle of equality and its corollary that any differences in treatment should be objectively justified. We will explore the exceptions in greater detail later, but it is arguable that some of the exceptions are not justifiable derogations from the fundamental principle of equality enshrined within European law, as there is no obvious rationale for departing from the principle of equality in those circumstances.

Finally, we should also add that there is possible scope for a 'European' interpretation where goods and services are provided in an employment or quasi-employment context because it is arguable that Directive 2000/78 will be engaged.

General defence of justification

Apart from the specific exemptions from the principle of non-discrimination because of age, it will always be possible to defend direct and indirect age discrimination pursuant to ss13 and 19 of the EA in context of goods and services by showing that the service provider's action was a 'proportionate means' of achieving a 'legitimate aim'.

The guidance provides the following examples of possible legitimate aims: enabling particular social groups to socialise together, to enjoy activities together or to enjoy peace and quiet. The SC in *Seldon* (direct age discrimination) and *Homer v Chief Constable of Yorkshire* (indirect age discrimination) [see Briefing 639] recently addressed the proper interpretation of broadly identical provisions to ss13 and 19 of the EA under the old Age Regulations 2006. However, both of these cases fell within the scope of Directive 2000/78. As explored above, it is at present unclear whether the UK courts will construe the EA in light of the European case law which has developed around this directive or whether they will adopt a literal, black-letter approach.

In the event that the courts adopt the European approach, then notwithstanding the apparently straightforward language of s13 EA, *Seldon* establishes that there is a high burden on defendant organisations to justify direct age discrimination. In broad terms, the burden of proof would be on the defendant to provide positive answers to each of the following questions:
- can the defendant identify a legitimate aim which existed at the time of the less favourable treatment?
- is the aim in fact legitimate in the context of the defendant's business or activities?
- is the measure adopted by the defendant to pursue its legitimate aim appropriate in the context of its business or activities?
- is the measure adopted by the defendant to pursue its legitimate aim necessary in the context of its business or activities

Conversely, should the courts take a more conservative approach, focusing upon the strict language of ss13 and 19 of the EA, we anticipate that defendants will find it easier to justify discrimination treatment, given that, historically, Europe has taken a much more rigorous approach towards discrimination than the UK. There is a great deal of judicial confusion over the degree to which 'costs plus' is necessary and what constitutes the 'plus'. Authorities such as *Cross v British Airways* and *Woodcock v Cumbria PCT* [see Briefing 591] suggest that 'cost' alone cannot be a legitimate aim; instead defendants must be able to identify an element additional to cost.

In *Cross*, Burton J isolated two separate strands of European authorities. In the first, a state with a 'notionally bottomless purse' cannot justify a discriminatory social policy on the basis of cost. See *Roks* as approved in paragraph 60 of *Kutz-Bauer* and paragraph 67 of *Steinicke* and paragraph 85 of *Schonheit*. The other strand is where an employer seeks to justify discrimination against his employees. In *Hill and Stapleton v Revenue Commissioners* the European Court of Justice said that an employer could not rely *'solely on the ground that avoidance of such discrimination would involve increased costs'*.

However, the costs-plus rule has been doubted by Underhill J in *Land Registry v Benson*, although in *O'Brien v MOJ* the ECJ suggested that budgetary considerations could not justify discrimination. It is unclear how, or even whether, those tests would apply in a non-employment context concerning provision of

goods and services as these debates are premised on European concepts of objective justification which, as we have explored, may not be relevant when construing the EA in the context of goods and services.

Healthcare

During the 2011 consultation process, there was a detailed debate concerning the provision of healthcare and whether exemptions should permit organisations such as the NHS to discriminate because of age, but the government decided not to carve out an exception for healthcare providers. As a result, any decisions taken because of age or which place specific age groups at a particular disadvantage will have to be justified under ss13 or 19 of the EA.

We consider that this is one area where there will be significant litigation. As the government acknowledged during the consultation process, evidence suggests that elderly patients can receive poor treatment. Moreover, in an age of austerity, difficult funding decisions will inevitably need to be made which may impact directly or indirectly on older patients. The NHS has already taken preliminary steps aimed at avoiding discrimination claims; for example, the NHS Commissions Board Authority published an Equality Analysis at the beginning of 2012. However, we still anticipate that this will be an area which will prompt claims under the EA.

Financial products

The principle of non-discrimination because of age does not apply to (i) the provision of insurance or (ii) a related financial service or (iii) a service relating to membership of or (iv) benefits under a personal pension scheme if the provision is in furtherance of arrangements made by an employer for the service-provider to provide the service to the employer's employees and other persons as a consequence of employment.

Similarly, it will not apply to the insurance business in relation to existing insurance policies as of 1 October. More radically, it will not apply to the provision of financial services which includes a service of a banking, credit, insurance, personal pensions, investment or payment nature. This proved to be one of the major grounds of contention in the consultation process. However, a risk assessment based on the age of a (potential) customer will only be exempted from the EA in so far as it is carried out by reference to information which is both 'relevant' to the assessment of the risk and from a source which would be 'reasonable' to rely on.

Frustratingly, the new guidance provides no additional detail as to the meaning of either 'relevant' or 'reasonable'. Because of the fluid nature of these concepts, we anticipate that there will be a significant amount of litigation in this sector. Organisations providing these types of services will be well advised to review their operations in this area to ensure that their information is properly sourced and substantiated.

No doubt in order to appease organisations concerned that financial service providers would be broadly exempt from the principle of non-discrimination on the grounds of age, the government has lent its support to voluntary industry-operated schemes which aim to introduce transparency in this area.

Concessions

The principle of non-discrimination because of age does not apply to the provision of concessions to specific age groups. This is defined as *'a benefit, right or privilege'* which means that the service or the terms of the service are offered in a way which is more favourable than that ordinarily offered to the public or a section of the public. The new guidance clarifies that this exception will apply to any sort of discount, special arrangement or offer. For example, it specifically notes that practices such as offering cheaper access to pensioners to museums or theatres will be lawful by virtue of this provision.

Holidays

The principle of non-discrimination because of age does not apply to package holidays which last for at least 24 hours or include the provision of overnight accommodation. However, this is subject to the stipulations that the provider only offers holidays to a certain age group and that an 'essential feature' of the holiday is the bringing together of persons of that age group *'with a view to facilitating their enjoyment of facilities or services designated with particular regard to persons of that age group'*. Moreover, to qualify for the exemption, a written statement must be produced stating that the holiday is only available to a particular age group.

This exemption is much narrower than that originally anticipated in the draft Age Exceptions Order used during the consultation process. In particular, the requirement that the holiday must be *'with a view to facilitating their enjoyment of facilities or services designated with particular regard to persons of that age group'* is new. It is not entirely clear what this will mean

in practice and the guidance provides no additional details. To fall within this provision, does the service provider simply need to demonstrate that it created the package holiday with 'particular regard' to a certain age group?

Or does it need to go one step further and show that objectively speaking the facilities and services are suitable or appeal to a certain age group? Will a package holiday specialising in white-water rafting for the over 60s fall outside of the exemption because that type of activity is not typically associated with the over 60s? These are questions which are bound to be litigated in the coming years.

Bizarrely, the guidance does suggest that a holiday provider can take advantage of this exception even if its age-specific holidays are actually provided to people outside the target audience. However, we consider that if holiday providers were routinely to allow access to their holidays outside the target age range, they will inevitable have difficulties demonstrating that they fell within the exception in the first place.

Lastly, it is important to note that holiday providers which do not fall within the narrow exception can still discriminate on the grounds of age provided that they can show an objective justification for their policy.

Age verification

The principle of non-discrimination because of age does not apply to age challenges where a customer appears to be younger than the particular age group to whom the service can legally be provided. An obvious example is the sale of alcohol or tobacco. However, the retailer must clearly display that they will ask for proof of age in these circumstances.

Sport

The principle of non-discrimination because of age does not apply to certain sports, specifically, sports classed as *'an age-banded activity'*. This is defined as *'a sport, game or other activity of a competitive nature in circumstances in which the physical strength, stamina, physique, mobility, maturity or manual dexterity of average persons of a particular age group would put them at a disadvantage compared to average persons of another age group as competitors in events involving the activity'*. We take the view that this definition is so broad as to apply to almost any sport.

Service providers will be able to do *'anything in relation to participation of another competitor'* if it is necessary to secure fair competition, safety of competitors or to comply with the rules of a national or international competition. Again, this category of safe activities is so broad that it seems service providers would have little difficulty falling within this exception. However, we anticipate that there will be litigation where the rules of a national or international competition are discriminatory and cannot be objectively justified in their own right.

Charities

The principle of non-discrimination because of age does not apply to the provision of benefits to persons of a particular age or age group by a charity provided that the purpose is to prevent or compensate for a disadvantage linked to age. We anticipate that the courts will take a generous approach towards construing this exception so as to ensure that charities will be able to operate without fear of litigation.

Schools

The principle of non-discrimination because of age does not apply to the curriculum, admission, transportation to and from a school or the establishment, alteration or closure of a school. As s29 of the EA does not protect persons under 18, it is difficult to imagine that this exception will be particularly significant.

Positive action

Positive action which has the effect of treating people differently on the grounds of age is acceptable provided that it can be objectively justified in circumstances where the service provider has identified that a particular age group is disadvantaged, that the age group has different needs from other age groups or that there is underrepresentation of that age group. The guidance indicates that positive action in the form of 'silver surfer' sessions at libraries, designed to encourage older people to use the internet, might well be capable of objective justification.

Conclusion

The government was keen to stress that *'the vast majority of businesses and organisations will be able to continue to operate as usual and certain areas will be exempt from the ban altogether'*. In our view, this is probably correct. However, there are a number of industries where there is likely to be a significant amount of litigation and that litigation will be particularly complex and time consuming because of the lack of clarity concerning the way in which ss13 and 19 should be construed in the

647 context of goods and services.

In particular, we predict that the financial services industry will be subject to close scrutiny, especially as the government has so far failed to provide an adequately precise definition of the circumstances in which age discrimination will be permissible. We also anticipate that the provision of healthcare will be another area where there will be a significant amount of litigation around the defence of general justification to age discrimination. It was recognised during the consultation process that there were concerns over the provision of healthcare for older groups. Should these problems continue, litigation is bound to follow.

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Cloisters

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Paralympics – a lasting victory for disabled people?

Catherine Casserley, barrister, Cloisters, contrasts the growing positive public perception of disability following the Paralympics and the extension of rights for disabled pupils with the reality of welfare reform and its negative impact on the quality of disabled people's lives and their ability to fully participate in society.

August 2012 saw the Paralympics and September saw the extension of the duty to make reasonable adjustments in relation to schools to the provision of auxiliary aids and services [see Briefing 649 in this edition]. It is tempting to see the summer of 2012 as a new dawn for disability rights.

The Paralympics, and particularly what was seen as the successful integration of the Paralympics with the Olympics, was hailed as a great success for the future of perceptions of and attitudes towards disability – where at last people would see the person, and not the impairment. More tickets were sold for the 2012 Paralympics than for any other Paralympics. It was broadcast widely; and heroes and heroines were made of its participants. And it certainly seems that, anecdotally at least, attitudes towards disability as well as awareness of it have changed.

But at the same time as record numbers of people were watching Paralympic sport, commentators in the media, such as Melanie Phillips, were using the games to re-inforce the negative messages about 'lazy dole scroungers' languishing on disability benefits. Whilst she said on the one hand of Ellie Simmonds (Paralympic swimmer) *'In the water, she ceased to be a disabled person. She was simply a champion swimmer'*, Ms Philips went on in her column in the *Daily Mail* to state:

> *Nevertheless, what the Paralympics have exposed is the lazy equation of disability with incapacity. They show us that this need not be the case – not just through exceptional talent, but even more importantly through a refusal to be defined by disability and a determination instead to conquer life rather than be conquered by it.*
>
> *This has inevitable implications for official policy on disability. The government is already committed to stop the abuse of disability benefit, under which some people who could work despite their ailments are instead being signed off 'on the sick' to sink into lives of welfare dependency… Of course, if Atos has wrongly assessed claimants who really are too infirm to work, that is a worrying situation which should be addressed.*
>
> *But we know that far too many people have indeed been claiming disability benefit when they are, in fact, fit enough to work. This has long been a scandal. But with the Paralympics it becomes an outrage. For it is an insult to these athletes who have overcome truly terrible disabilities to achieve so much.*
>
> *The point of the government's reform is to enable many people who inappropriately claim these benefits to escape the trap of permanent dependency. It needs to achieve that by distinguishing between disability claims that are true and those that are false. The failure to make that crucial distinction lies at the heart of what is termed 'political correctness', which assumes that any claims made by a designated 'victim' group must be true.*[1]

With the standard riposte of right-wing commentators, she dismissed the valid objections of those protesting against the savage benefit cuts.

1. http://www.dailymail.co.uk/debate/article-2197331/Incredible-Ellie-Simmonds-triumph-culture-victimhood.html#ixzz29TW3HidV

Impact of reassessment and benefit cuts

The government has been carrying out a reassessment of all those 2.6 million people on incapacity benefit – and its successor Employment Support Allowance – and plans to complete this by 2014 in an effort to encourage more people back to work and to cut the welfare bill. The reassessment contract was awarded to Atos Healthcare,[2] and there has been much controversy about the nature of those reassessments.

In a letter to *the Guardian* as long ago as May 2011,[3] the chief executive officers of five major mental health organisations, as well as a senior psychiatrist, warned of the impact of the changes to, and reassessment in relation to, benefits, stating: *'We've found that the prospect of Incapacity Benefit reassessment is causing huge amounts of distress, and tragically there have already been cases where people have taken their own life following problems with changes to their benefits. We are hugely worried that the benefits system is heading in a direction which will put people with mental health problems under even more pressure and scrutiny, at a time when they are already being hit in other areas such as cuts to services.'*

More recently, in June this year, *the Guardian*[4] reported that several coroners' reports into suicides have mentioned benefits decisions as a contributory factor, but ministers have always been careful to avoid acknowledging a link.

The Guardian went on to say that it had spoken to dozens of benefits workers and recipients as part of an investigation into the problems faced by Britons living on the breadline and identified three separate cases of attempted suicide among people where changes to their benefits appeared to have been a factor. Several others claimed to have felt suicidal.

Protests took place against Atos throughout the Paralympics, Atos having been one of the sponsors. Some of those protests focused on Celia Burns, who had cancer, was assessed by Atos as fit to work, and, having successfully appealed against that decision, died just a few weeks after having her benefits re-instated. Disabled People Against Cuts say that 1100 people have died after being assessed as fit for work.

As well as changes to incapacity benefit, Disability Living Allowance (DsLA) is to be replaced with Personal Independence Payments (PIP). This is being rolled out across the country and is due for completion in 2014. PIP is subject to a separate assessment process to incapacity benefit, though Atos is also involved in this. Disability Rights UK has stated of PIP in its factsheet: *'Despite the similarities to disability living allowance Disability Rights UK believes that the main intention behind PIP is to save money and that the tests, as laid out in the draft regulations, are more strict.'*

Many have made the point that without the benefits that had been in place at the time of their training, paralympians may not have been able to train successfully for the games. DsLA, or what is now PIP, for example, can assist with transport, and many of the daily necessities that assist disabled people in getting out and going to work – without this extra support the albeit limited mobility that disabled people enjoy would simply not be feasible.

Universal Credit

The cuts to welfare benefits continue with the proposed introduction of Universal Credit (UC) in October 2013. Following an inquiry led by Baroness Tanni Grey-Thompson, former paralympian, into universal credit and its effects upon disabled people, the report *Holes in the Safety Net: the impact of universal credit on disabled people and their families*, was launched on October 17, 2012. The inquiry found that up to half a million disabled people and their families – including children and disabled adults living on their own – will be worse off under UC if current plans go ahead. The report is supported by the Children's Society, Citizens Advice and Disablity Rights UK. In its press release on the report, the Children's Society stated that:

> *Disabled people and their families have warned that cuts to the child disability additions and to the Severe Disabilty Premium are likely to result in them struggling to pay for basic essentials such as food and heating.*
>
> *Many disabled people who are already finding it difficult to make ends meet face further hardship under the new benefit system, leading to potentially disastrous consequences. This includes up to 230,000 severely disabled people who do not have another adult to assist them getting between £28 and £58 less in support every week. The inquiry report also reveals that:*
>
> - *100,000 disabled children stand to lose up to £28 a week*
> - *116,000 disabled people who work will be at risk of losing up to £40 per week from help towards additional costs of being disabled*

2. Atos Healthcare, a division of Atos, a French multinational IT services and consulting corporation, manages the Work Capability Assessment for the Department of Work and Pensions.

3. http://www.guardian.co.uk/society/2011/may/31/consequences-benefit-changes-mental-health

4. http://www.guardian.co.uk/society/2012/jun/20/jobcentre-supervisors-suicide-risk-benefit-claimants

One in ten families with disabled children affected by the changes feared losing their homes. 83% of disabled adults living alone or with a young carer said they would cut back on food and 80% said they would cut back on the amount they spend on heating. The findings also point to a greatly increased burden on young carers as a result of the changes to the Severe Disability Premium.

Despite the intention of Universal Credit to make work pay, evidence in the inquiry shows that the changes could make it harder for disabled people to remain in work.'

The report makes a number of recommendations, including protecting children on the middle-rate care component of DsLA. It also recommends disability support in UC should be provided to disabled people who are found to be fully fit for work but who are at significant disadvantage in the workplace.

Community care

And those who are dependent upon local authority care support face savage cuts. Whilst the equality duties have helped to reign in the brutal effects of some of these cuts, the case of *R (on the application of McDonald) v London Borough of Kensington and Chelsea* [2011] UKSC 33 did little to provide comfort in the area of community care provision. Whilst expressing sympathy with Ms McDonald's situation, the SC upheld the decision that though she was not incontinent it was sufficient for the local authority to meet her toileting needs by providing her with incontinence pads for use at night and cutting her care support to four-nights-a-week rather than providing her with someone to take her to the toilet. And most local authorities will no longer meet the needs of disabled people unless they fall within the category of critical – meaning, for example, that where an individual is unable to carry out three to four personal and domestic daily activities or routines such as bathing/ washing, dressing, undressing, oral hygiene, shopping, meal preparation, housework, minor household tasks, laundry, they will have to do so without assistance from their local social services and would have to pay for such assistance.

Employment, education and training

And what of the areas, such as employment, education or training where equality legislation is specifically in place to secure equality for disabled people?

Can we expect an education system that delivers for young disabled people, in the wake of the increased rights afforded by the change brought into effect in September 2012 [see Briefing 649]? Because the statistics are not encouraging in those areas where equality legislation has already been in place for some time. The Labour Force Survey, Quarter 2, 2011 statistics show that:

- disabled people are around twice as likely not to hold any qualifications compared to non-disabled people, and around half as likely to hold a degree-level qualification
- 20% of working age disabled people do not hold any formal qualification, compared to seven per cent of working age non-disabled people
- 14.5% of working age disabled people hold degree-level qualifications compared to 26.8% of working age non-disabled people

Disabled people are significantly more likely to experience unfair treatment at work than non-disabled people. In 2008, 19% of disabled people experienced unfair treatment at work compared to 13% of non-disabled people.[5] Around a third of disabled people experience difficulties related to their impairment in accessing public, commercial and leisure goods and services.[6]

Accessiblity

And as recently as October 15, 2012, in a programme for the BBC, Sophie Christiansen, one of the UK's most successful Paralympians said that London is simply too inaccessible to live in, as BBC cameras followed her struggles with the capital's bus and the underground network.

She said she was unable to travel with another person in a wheelchair because of a lack of space on buses, and had to rely on taxis which were an expensive option.

So regardless of the wave of enthusiasm during and immediately after the Paralympics, and whilst there have undoubtedly been some improvements in the lives of disabled people over the past 20 or so years, the picture is somewhat bleak. One of the Paralympic values is equality; but there is little evidence of this in the everyday lives of disabled people at the moment. And, despite better laws and the Paralympics, the quality of life of most disabled people appears to be getting worse. It will be important to continue to use the law to challenge cuts and their impact where possible – in particular using the UN Convention as well as the equality duties and the Human Rights Act. But ultimately it will take political will: equality for many disabled people cannot be achieved without financial investment and we as a society must be prepared to make that investment.

5. Fair Treatment at Work Survey 2008

6. ONS Opinions Survey 2010

Education and the Equality Act 2010

Catherine Casserley explains the new duty on schools to provide auxiliary aids and services to disabled pupils which came into force on September 1, 2012. The new provisions aim to address gaps in the provision of reasonable adjustments in schools and should provide new rights for disabled pupils.

The Equality Act 2010 (EA) prohibited discrimination in education across all grounds, including disability. As part of that prohibition on discrimination, it imposed a duty to make reasonable adjustments on education providers, including schools. However that duty to make adjustments was limited to the duty to avoid the disadvantage caused by provisions, criteria and practices putting disabled people at substantial disadvantage compared to non-disabled people.

However, on September 1, 2012, in a little heralded change, all schools became subject to the duty to provide auxiliary aids and services to disabled pupils. The introduction of this provision was the culmination of a long campaign by disabled people, and organisations of and for disabled people, to expand the reach of disability discrimination legislation in this field.

Background

When the Disability Discrimination Act 1995 (DDA) was first passed, education was not included in its scope. The Disability Rights Taskforce (DRT) was established by the Labour Government when it took power to consider the scope of the DDA, which was considered to be sorely lacking in many areas. The DRT recommended that this be remedied. The Special Educational Needs and Disability Act 2001 was passed, and this extended the scope of the DDA to cover pre-16 education. However, the reach of the duty to make reasonable adjustments was limited in relation to schools. This was because it was considered that the special educational needs regime met the needs of disabled children who had need of, for example, information in alternative formats, or assistance in a classroom.

The Disability Rights Commission (DRC), established in 2001 – again, by a recommendation of the DRT, and tasked with overseeing the development and operation of disability legislation, conducted a review of the education provisions in late 2006/early 2007. It considered information from its helpline staff and former casework staff, the outcome of discussions with stakeholders, Scotland commissioned research on the new Additional Support for Learning system, and an analysis of its casework was also carried out.

Between 2002 and 2005, the DRC casework team dealt with 487 schools cases. 390 of these cases concerned reasonable adjustments not covered by part 4 of the DDA and which were thus out of scope. There was detailed information on 122 of the cases which were concerned with the provision of auxiliary aids and services in schools. 84% of these cases were in relation to maintained mainstreamed schools. 45% of the children had a statement or record of needs in place and 42% had special educational needs (SEN) but no statement or record of needs. The DRC could not pursue these cases as they were out of scope. In nearly half of the cases children had a statement or record of needs but were nevertheless complaining about a failure to provide auxiliary aids and services.

The DRC therefore concluded there was evidence that the current system was not working. There was nothing that could be done under the equality legislation to assist children challenge the failure to provide them with auxiliary aids and services.

Following a public consultation, the DRC recommended, as one of its last acts before becoming part of the Equality and Human Rights Commission (EHRC) and in a letter to the Minister, that, as the exclusion of auxiliary aids and services had resulted in young disabled people being denied the opportunity to have effective education, thus affecting their life chances in the long run, the exclusion of auxiliary aids and services should be removed in any single equality act.

So now, some 6 years later, that has been done by means of the Equality Act 2010 (Commencement No 10) Order 2012 SI 2012/2184.

The provisions

The overarching duty to make reasonable adjustments, contained in s20 of the EA sets out at sub-section (5) the third requirement, stating *'The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison*

with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.'

S85(6) of the EA provides that schools must comply with the reasonable adjustment duty, whilst Schedule 13 sets out the detail of the application of the duty. The duty applies in relation to deciding who is offered admission as a pupil and to the provision of education, or access to a benefit, facility or service.

The EHRC has produced Technical Guidance on the reasonable adjustment duties for pupils. This is not a statutory code of practice – it seems that the government is not prepared to sanction any more codes and the Commission is thus left to produce simply guidance. It will nevertheless be helpful to both tribunals and advocates.

The guidance describes the potential interaction between the duty and the SEN provision as follows: some disabled pupils will also have SEN and may be receiving support via school-based SEN provision or have a statement of SEN. Just because a disabled pupil has SEN or has a statement does not take away a school's duty to make reasonable adjustments for them. In practice, of course, many disabled pupils who also have a statement of SEN will receive all the support they need through the SEN framework and there will be nothing extra the school has to do. However, some disabled pupils will not have SEN, and some disabled pupils with SEN will still need reasonable adjustments to be made for them in addition to any support they receive through the SEN framework.

The guidance sets out the factors to be taken into account in considering what is a reasonable adjustment to make. These are as follows:

- the extent to which support will be provided to the disabled pupil under part 4 of the Education Act 1996 (the SEN framework)
- the resources of the school and the availability of financial or other assistance
- the financial and other costs of making the adjustment
- the extent to which taking any particular step would be effective in overcoming the substantial disadvantage suffered by a disabled pupil
- the practicability of the adjustment
- the effect of the disability on the individual
- health and safety requirements
- the need to maintain academic, musical, sporting and other standards
- the interests of other pupils and prospective pupils.

The first of those factors is likely to be particularly important and there is considerable space given to it in the guidance, the content of which bears repeating here:

There is a significant overlap between those pupils who are disabled and those who have SEN.

Many disabled pupils may receive support in school through the SEN framework. In some cases the substantial disadvantage that they experience may be overcome by support received under the SEN framework and so there will be no obligation under the Act for the school or local authority to make reasonable adjustments.

***Example:** A disabled pupil has a statement of SEN and attends a maintained mainstream secondary school. Through her statement she receives two hours a week of specialist teaching and uses an electronic notetaker in lessons. Because the support that she requires is provided through her statement the school does not therefore have to make the reasonable adjustments by providing these auxiliary aids and services for her. In other cases a disabled pupil may need reasonable adjustments to be made in addition to the special educational provision they are receiving.*

***Example:** An infant school disabled pupil with ADHD receives some individual teaching assistant support through the SEN framework. He is diagnosed with severe asthma and needs assistance with his nebuliser. Although this is not a special educational need, his asthma is likely to be a disability for the purpose of the Act and so a failure to provide a reasonable adjustment will place him at a substantial disadvantage. The school trains his teaching assistant and she provides him with the assistance that he needs. This would be a reasonable adjustment for the school to make.*

Some disabled pupils are not classified as having SEN but if they are disabled and are suffering a substantial disadvantage they may still need reasonable adjustments to be made.

***Example:** A disabled pupil at an infant school has diabetes and requires daily support with reading blood sugar levels and insulin injections. He is not classified as having SEN and therefore receives no support through the SEN framework. He is, however, disabled and therefore if the lack of daily support places him at a substantial disadvantage the school is under a duty to make the adjustment of providing the support, if it would be reasonable to do so.*

There will be some instances when a disabled pupil is provided with support from another agency. In these cases, it would not be reasonable to expect the school to duplicate this support.

Some further examples of their impact of the provisions are provided in the body of the guidance:

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Example: *A disabled pupil with ME finds moving around a large three storey secondary school very tiring and, despite the school adjusting the timetable and location of classes to minimise the amount she has to move, she is still too exhausted to complete the school day. The school then makes further adjustments of having a 'buddy' to carry her books for her, a dictaphone to record those lessons which she misses and a policy that she will not be penalised for arriving at lessons late. These adjustments enable her to attend more lessons and to be less disadvantaged when she does miss lessons.*

Example: *A visually impaired child requires printed handouts to be prepared in 16 point. This can easily be accommodated by ensuring that this is done prior to any documentation being printed.*

With increasing devolvement of funding to local schools, and the move away from the provision of SEN statements, it may be that these provisions take on greater significance than may originally have been anticipated. In any event, it will give parents the option of asserting a right under anti-discrimination legislation that was not available to them before.

Briefing 650

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DLA annual conference *Equality Act 2010: Keeping the show on the road*

Barbara Cohen, discrimination law consultant, reports on the DLA's conference which took place in London on October 5, 2012. She highlights the discussions on how practitioners, advice workers, trade unions and others can maintain efforts to combat discrimination in the face of major changes by the Coalition Government to equality law and its enforcement.

Speakers, panel members and participants considered the conference topic from three different perspectives. Firstly, speakers discussed recent developments in equality law and, in particular, the coming into force of protection against age discrimination outside the field of employment. Secondly there were presentations and discussions on ways to use the Equality Act 2010 (EA) more effectively including both the anti-discrimination provisions and the public sector equality duty (PSED). Thirdly, reflecting the over-arching theme of the conference, speakers, panel members and participants considered how government measures are dismantling the equality infrastructure and discussed possible responses.

By the end of the day, no one could doubt the serious impact of the overlapping threats to the protections and rights to redress within the EA. Important sections of the EA are to be repealed or never brought into force; imposing employment tribunal fees while cutting legal aid and funding of advice agencies will result in far fewer instances of discrimination being challenged and victims compensated; the EHRC, with key enforcement powers, is to lose certain duties, have significantly reduced resources and will work under a new framework which potentially threatens its independence. While these measures are extremely worrying, especially when other austerity measures are disproportionately affecting the lives of disabled people, women and many ethnic minority groups, speakers and participants had some positive ways to 'keep the equality show on the road'. These included making better use of existing resources, knowledge and experience both to challenge inequalities and discriminatory policies and practices by building networks and coalitions and strengthening trade union involvement. EU law, the ECHR and UN bodies could be used to expose and challenge law reforms, new barriers to justice and changes to the EHRC. It is important to remain focused on and expand understanding of the EA to workers and public and private sector employers and service providers.

Networks to empower complainants

Two keynote speakers, concerned about equality rights from different perspectives opened the conference. Miriam O'Reilly, who, in 2011, won a landmark ageism case against the BBC, described how isolated she felt from the time she began her discrimination claim, even though she had absolute confidence in her legal representative. Her personal experience demonstrated the need for better support for claimants; she has helped to establish the Women's Equality Network[1] and serves as its first patron. This interactive on-line network offers women experiencing discrimination and harassment at work an opportunity to receive support and basic legal

1. Women's Equality Network http://www.womensequalitynetwork.org.uk

advice. She commented that, after giving telephone and face-to-face support to a number of women, she is aware that support which is only on-line will not be able fully to meet the needs which triggered the establishment of the Network.

Collective bargaining essential for workplace equality

The second keynote speaker, John Hendy QC, drawing on his many years as an advocate in industrial relations and trade union litigation, emphasised the importance of collective bargaining to reduce inequality in its broadest sense – inequality between rich and poor. He discussed the rapid decline in the number of workers covered by collective agreements in the UK as a result of restrictive legislation and the impact this has had on incomes and rights at work. He reminded the conference that trade union rights are underwritten in international law. He warned of the implications for equality if the EU approves the World Trade Organisation General Agreement on Trade in Services Mode 4 (temporary migration of workers to provide services); this would enable EU employers to pay migrant workers employed to provide services at the same rate as such workers would be paid in their country of origin.

In the discussion that followed the two presentations, participants reinforced from their experience the isolation of claimants and lack of access to justice, lack of connection between lawyers and people needing advice but also, despite increased restrictions hampering their role, many trade unions are better prepared and more committed to challenge discrimination in individual cases and across an organisation.

Equality Act 2010 update

The first of the main speakers, Robin Allen QC, began by citing a Government Equalities Office (GEO) report *Changing Attitudes to Equality* which showed degrees of prejudice against groups within certain protected characteristics by different groups. Despite variations, the evidence was of continuing prejudice within British society. For some groups, the report showed more than 50% being prejudiced against certain other groups.[2] He then offered one item of 'good news' the coming into force of the EA prohibition of age discrimination in relation to the provision of goods and services, the exercise of public functions and clubs and associations [see Briefing 647 in this edition]. He drew attention to the long list of exceptions in the EA and the new Order[3] permitting age discrimination which sit alongside the s13 exception enabling direct age discrimination to be justified. He suggested that the first cases are likely to be in relation to age discrimination in health and social services. He went on to the much longer list of 'bad news' items, including the proposed[4] repeals of the statutory questionnaire procedure, the liability of employers for third party harassment of their employees and wider recommendation powers of employment tribunals.

Public sector equality duty

Martin Westgate QC referred to the government's review of the PSED; although the terms of reference have not been published, the government has indicated that there no promises as to what the recommendations will or will not contain. Anticipating possible removal of the PSED as a result of the forthcoming review, Westgate explored whether decisions by public authorities which are now challengeable on grounds of a breach of the s149 EA duty could be challenged under general principles of public law. Turning to cases decided in 2012 under s149 and the earlier equality duties, he outlined some themes or guidance points which have emerged, but he emphasised that the outcomes of equality duty cases are acutely fact sensitive. Among these themes are the following:

- the duty will be engaged whenever one of the elements of s149 might apply
- where the authority has engaged with interested parties, the courts will not intervene if an interested party applies to challenge the decision relying on a point which they had not previously raised
- where decisions are made at board or cabinet or council level the decision-makers themselves must fully address the duty, although they can rely on adequate summaries from officers
- as stated in earlier cases, the duty must be discharged before the relevant decision is taken, but this does not require a full Equality Impact Assessment (EIA) at every stage

In his view, despite recent decisions, there remains some uncertainty as to the role of the court in determining whether 'due regard' to the elements of the duty has been given. He referred to the approach suggested by Elias, LJ in *Hurley*[5]: *'the decision maker must be clear precisely*

2. http://www.homeoffice.gov.uk/publications/equalities/research/changing-attitudes?

3. Equality Act 2010 (Age Exceptions) Order 2012

4. Now incorporated into amendments to the Enterprise and Regulatory Reform Bill 2012

what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors.' Westgate queried whether this is a workable solution, since 'due regard' implies some evaluation of the importance of a factor, since in many cases decision-makers have not needed to consider the detailed implications, which may not always be certain at the decision-making stage.

Threats to equality rights

Karon Monaghan QC, brought together the wide range of government measures in the last 12 months which, when taken together, represent a serious threat to the protection and enforcement of equality rights. In addition to the repeals mentioned by Robin Allen and the threat to the PSED illustrated by Martin Westgate, she reminded the conference that the EA included new concepts of discrimination and equality duties which are being shelved before they had seen the light of day. These include the socio-economic duty which would have required public authorities to have regard to socio-economic inequalities when making strategic decisions, which the Coalition Government's first Minister for Women & Equalities described as 'ridiculous' and said would be 'scrapped for good'.[6] Also scrapped is the prohibition of direct discrimination because of a combination of two protected characteristics, an EA provision for which many had campaigned. Referred to the decision by the Coalition Government not to introduce the minimum provision in the EA on employer pay auditing but instead to introduce a wholly voluntary framework 'Think, Act, Report', she queried why, 40 years after enactment of the Equal Pay Act the government thinks voluntary reporting will work now when it has not before. In her view still far less satisfactory than generally applicable mandatory pay auditing, she mentioned the government's intention to give ETs power to impose pay audits on employers who are found to have discriminated because of sex in contractual or non-contractual pay matters.

Monaghan then added to her list the government's plans for changes to legal aid, removing from scope employment cases, closure of community based legal advice services as a result of 'austerity measures', imposition of fees which are not insignificant to institute and continue a claim in the ET, and major changes to the EHRC which will make enforcement of equality rights even harder; she warned: *'rights without enforcement opportunities are no rights at all'.*

Monaghan stressed the significance of the government's plans for the EHRC which, with its enforcement powers, is the *'custodian of the EA.'* She catalogued the changes that have been imposed, including a budget cut in 2011-12 resulting in a 30% reduction in the EHRC's work programme and from March 2012 an end to government funding of the EHRC grants programme, causing hardship in particular to local race equality bodies. Following a consultation the government announced in May 2012 its final plans including repeal of s3 of the 2006 Equality Act, which sets out the EHRC's general duty, on the basis that it '*creates unrealistic expectations about what an equality regulator and National Human Rights Institution (NHRI) can achieve'*[7] as well as repeal of the EHRC's good relations duty under ss10 and 19. The helpline is to be replaced by a contracted-out Equality Advisory and Support Service.[8] The GEO has agreed with the EHRC a new 'Framework Document' intended *'to establish… tighter financial controls'* and to *'increase the EHRC's transparency to Parliament and the public about how it operates'* accompanied by what could be regarded as a threat that if 'sufficient progress' is not made the government will *'seek to implement more substantial reform … could include some functions being done elsewhere or splitting its responsibilities across new or existing bodies'.*[9] The cuts in budget will require the EHRC to reduce it staff from 420 to between 150 – 180.

How do we fight back?

Answering the question in the title to her talk, 'how do we fight back' Monaghan indicated that opportunities for effecting change through domestic courts are likely to be reduced. Without the EHRC as an effective enforcer there will be a greater role for trade unions. The UN's treaty monitoring bodies, including CERD, CEDAW and CRPD, which permit NGO submissions within their reporting procedures may recognise the inadequacy of domestic enforcement schemes. There will

5. R (on application of Hurley) v Secretary of State for Business, Innovation and Skills [2012] EqLR 447

6. see http://www.guardian.co.uk/society/2010/nov/17/theresa-may-scraps-legal-requirement-inequality

7. Building a fairer Britain: Reform of the Equality and Human Rights Commission (March 2011)

8. Under the terms of the contract, the Equality Advice and Support Service is restricted in ways that did not apply to the EHRC in relation to whom it can advise and the advice and/or referrals it can make.

9. Building a Fairer Britain: Reform of the Equality and Human Rights Commission: Response to the Consultation (May 2012) paras 3.8, 4.11

be questions as to whether the EHRC will still be sufficiently compliant with the Paris Principles to retain its status as a NHRI.

Monaghan also suggested that the combination of cuts could raise issues as to whether the UK is compliant with the EU equality directives and EU law more generally. As she explained, the EU principle of effectiveness requires that, in giving effect to EU law which confers rights on individuals, member states must introduce the measures necessary to enable victims to pursue their claims by judicial processes and those measures must be effective in achieving the aims of the relevant EU law. As all of the EU equality directives include an 'effectiveness' provision, a failure to comply could form a basis for action in the domestic courts and a complaint to the European Commission. Further, following CJEU decisions, member states must ensure that domestic rules of procedure for the exercise of rights derived from EU law are not less favourable than those governing similar domestic actions, she posited that the required ET fees for some discrimination cases may be less favourable than those applicable in the county court, having regard to levels of compensation awarded. Finally referring to the government's Equality Strategy, which individualises rights to equality, she saw a risk that if the law is marginalised as a means of promoting equality this could serve to legitimise the cuts to legal advice provision. The government's austerity measures therefore need to be met by a strong legal framework alongside political action.

The discussion that followed raised a number of issues. As the concession on ET fees for people on low income is likely to be at the level of benefit entitlement, it is likely that people in low-paid jobs will be unable to bring cases. The need for collaboration in bringing strategic cases was emphasised; the EHRC will continue to support strategic cases, although not at first instance and there is to be a 'practitioners' hotline' for cases to be brought to the attention of the EHRC. Practitioners were recommended to think through the 'what ifs' – what are the likely legal and policy consequences if the case is unsuccessful? Often it will be better to have two or three claimants, which could strengthen the argument and the case could proceed if one claimant drops out. Regarding the PSED, at a time when resources are inadequate, does the duty simply redistribute poverty or disadvantage between competing groups? If the duty were abolished there would be no structure to which public bodies would turn their minds; the obligations under the duty are more compelling than public law concepts. To make the duty effective, authorities need to break down data to understand the implications for particular groups, for example people with different mental health disabilities.

The afternoon workshops covered developments in discrimination law in employment, on disability and new provisions on age discrimination, rights during pregnancy and maternity, the PSED, changes to employment tribunal procedure and combating employers' use of illegal contracts or other means to avoid non-discrimination obligations.

Potentially most relevant to the theme of the conference was the workshop on *'The impact of legal aid reforms, cuts to law centres etc: how to support victims of discrimination, exploring different ways to collaborate to achieve success'*. Steve Hynes, Director of the Legal Action Group, raised a capacity issue since it is not known how many firms will stop doing legal aid when the changes come into force in April 2013. He expects that there will be a large number of applications for judicial review to define what constitutes an 'exceptional case' under the new rules, with the possibility that most human rights and discrimination cases could come within 'exceptional cases' and thereby be eligible for legal aid funding. He is aware of law centres looking at ways to remain viable including setting up trading companies, considering using conditional fee agreements (CFAs) and insurance-funded cases, but needing to be mindful of restrictions as charities. Chez Cotton, solicitor at Bindmans LLP, described ways in which, in civil actions against the police, she used CFAs and insurance company funding; in some instances funding of cases was provided by trade unions when their members were involved. In cases involving a group of clients often the group and their supporters have raised funds to meet the costs of their case.

'How do we keep the equality show on the road'?

The conference chair asked each speaker to suggest three answers to this question. Jonathan Rees, Director-General of the GEO, said it was important to remember how far we have come and referred to the EA as a major achievement, 95% of which has been implemented. He said the GEO was evaluating how the EA is working, concerned that small employers don't understand the law and don't know where to go for advice. While agreeing that the PSED was introduced with the best of intentions, with concerns that it had become a post-hoc 'box-ticking' exercise the review had been brought forward, with terms of reference to be announced in the

next 2- 3 weeks. The government will repeal the parts of the EA which it considers overly bureaucratic. His third point was the need to ensure people can take advantage of the law and to this end the Equality Advice and Support Service has been launched.

Bronwyn McKenna, Director of Organising and Membership at Unison, stressed the importance of continuing to make a case for the EA as the stakes are much higher now than in 'good times'. Her first point was to maintain confidence in the PSED which was now at risk; public sector decision makers needed to be guided by the duty. Secondly, the refashioned EHRC must be well resourced with clear priorities. Thirdly, there needs to be a sensible approach to law making. The statutory questionnaire procedure had helped to identify cases that should not proceed. The national minimum wage made the biggest change to the equal pay gap. Now ET fees are likely to mean fewer good cases are heard.

Omar Khan, head of policy research, Runnymede Trust, made three succinct points: insist that equality matters; ensure data which are used include data on racial inequalities; establish coalitions to combat discrimination and promote equality.

Julian Taylor, partner at Simmons & Simmons, queried whether employers do want to keep the equality show on the road; they want the lightest touch possible. They are concerned about millions of pounds wasted on unmeritorious claims leading to redundancies and cuts to hiring. Agreeing that education is needed for smaller employers and that equality law has been responsible for changing culture, he said that many employers now support the business case for greater diversity; he expressed doubts about whether many employers are interested in the social case.

Omar Khan responded saying *'a business case could be made for slavery'* and we need to make the social case, in order to improve community cohesion and to avoid the cost of wasted talent.

Briefing 651

Tyrolean Airways and *Hornfeldt*: age discrimination and the Employment Equality Directive

Introduction: legal context

Since April 6, 2011 it is no longer automatically lawful to retire an employee at the age of 65. The 'default retirement age' (DRA) in England and Wales has been abolished through amendments to key employment legislation including the Equality Act 2010 (EA) and the Employment Rights Act 1996 by the coming into force of the Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011.

The purpose of the change was to implement the European Employment Equality Directive 2000/78/EC (the Directive) which clearly states that the principle of equal treatment means that *'there shall be no direct or indirect discrimination whatsoever...'* on prohibited grounds including age. Indirect age discrimination under the Directive occurs when an apparently neutral provision, criterion or practice (PCP) would put persons of a particular age at a particular disadvantage. England and Wales' DRA of 65 was therefore prima facie indirectly discriminatory and contrary to the principle of equal treatment. Abolishing the DRA was relatively straightforward. What hasn't been straightforward is the application of the defence to indirect discrimination which allows employers and member states to discriminate on the grounds of age in limited circumstances.

Defending indirect age discrimination

The Directive contains provisions relating to the defence against indirect discrimination in two parts. Article 2 sets out the general conditions of the defence and Article 6 sets out the defence as it should apply to member states specifically. In both parts, the defence is formulated on equivalent legal terms: broadly speaking indirect age discrimination will not be unlawful if it can be *'objectively justified as an appropriate and necessary means of achieving a legitimate aim.'*

However, there are differences between the general and the specific defence conditions. In the context of a member state raising the defence – for example to a claim that a DRA is indirectly discriminatory – the member state must show that the treatment is objectively and 'reasonably' justified *'within the context of national law'* by a legitimate aim, including employment policy and

labour market and training objectives. The Directive goes on to list some examples of the kinds of different treatment that might be justified, including *'the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities...'* (my emphasis).

The 'objective justification' defence in the Directive is reflected in s19(2) of the EA where it is incorporated into the conditions in which a PCP will be discriminatory amounting to unlawful indirect discrimination. S19(2) formulates the defence as the final of four conditions that *'A [the employer] cannot show it [the PCP] to be a proportionate means of achieving a legitimate aim'*. Practitioners will note the inclusion of proportionality in the wording of the test in our domestic law.

I will explore two recent decisions of the ECJ concerning claims of indirect age discrimination: the first claim related to the remuneration arrangements of a private airline, the second, to Sweden's compulsory retirement age. In both cases the ECJ returned to the Directive to determine whether the provisions against age discrimination had been breached.

Tyrolean Airways v Betribsrat Bord der Tyrolean Airways C-132/11 [2012] EqLR 834

Facts

Several members of Tyrolean Airway's (TA) cabin crew maintained that they had been disadvantaged by the operation of a collective agreement which they said indirectly discriminated on the grounds of age. TA is a wholly owned subsidiary of Austrian Airlines together with another company called Lauda Air. The cabin crew of TA were subject to a collective agreement which linked their pay to a category A or B which itself was linked to how many years of service they had completed. The agreement stated that an individual could advance to grade B *'on the completion of 3 years service, that is, exactly three years after the recruitment of the employee as a member of the cabin crew'*.

The agreement did not clarify whether 'recruitment' meant recruitment with TA alone or with any airline within the group. The employees' contracts, however, stated that *'the date of commencement of employment, whenever relevant to the application of any rule or entitlement, shall mean the date of commencement of employment with Tyrolean Airways'* (my emphasis). Accordingly, TA maintained that in order to progress to grade B the employee must have 3 years service with TA and any period of service with another airline in the group was disregarded.

The issue was disputed and the TA work's council brought a claim arguing that the policy was indirectly discriminatory on the grounds of age and seeking a declaration that crew members with 3 years service with TA, Austrian Airlines and or Lauda Air should automatically advance to grade B. The work's council was successful at the court of first instance; however the decision was appealed and the appellate court subsequently referred the matter to the ECJ for determination.

The two questions were (1) do the relevant anti-discrimination provisions render a collective agreement of the kind in dispute unlawful and (2) can a national court treat as void and disapply a clause of an individual employment contract which breaches the relevant anti-discrimination law?

ECJ

The ECJ determined the first question in favour of TA and therefore declined to address the second question. It held that the provisions of the collective agreement were to be considered under the Directive because they related to employee's pay thereby falling within the scope of Article 3. The ECJ's judgment was succinct in finding that in the present case '*It is the experience which may have been acquired by a cabin crew member with another airline in the same group of companies which is not taken into account for grading, irrespective of the age of that cabin crew member at the time of his or her recruitment. That provision is therefore based on a criterion which is neither inextricably ... nor indirectly linked to the age of employees*' even if it was conceivable that as a result of the agreement some individual employees may be older when they advance to category B.

Accordingly the provision did not amount to different treatment on the grounds of age under Articles 1 and 2(2)(b).

The ECJ's decision seemed to turn on its observation that the provision itself was not 'extricably ... nor indirectly' related to age instead of whether the effect of the provision would disadvantage persons of a particular age. Strictly speaking, whether or not a PCP is discriminatory does not depend on whether the provision itself is linked to age, but rather whether it puts persons of a particular age at a particular disadvantage. Clearly the ECJ considered that the provision in this case did not, but the decision may have been fruitful if the ECJ had gone further than simply stating this.

Hornfeldt v Posten Meddelande AB, C-141/11 [2012] EqLR 892

Facts

In 1974 Sweden introduced a compulsory retirement age of 67. Although this was changed to 65 during the 1980s the 67-year rule, as it is known, was reinstated in the early 1990s. Provided the employer gives the employee at least one month's written notice, the employee's employment can be forcibly terminated at the end of the month in which they reach their 67th birthday.

After 20 years' service with the postal service Mr Hornfeldt (H) was served notice to retire. He was concerned that his pension would be insufficient because it would be based on the total income he had received in his career and he had worked part-time. To attempt to extend his employment by a few years and increase his pension he brought proceedings seeking an annulment of his dismissal on the basis that the 67-year rule was discriminatory on the grounds of age.

The Swedish court subsequently asked the ECJ for a preliminary ruling on two questions: (1) can a national rule, like Sweden's compulsory retirement age, be lawful where it was not possible to clearly determine from the context or origins of the rule what aim or purpose the rule was intended to serve? (2) Did such a rule, to which there was no exception and which did not take into account factors such as pension, go beyond what is appropriate and necessary to achieve the aim in contravention of Article 6?

ECJ

It was accepted by the parties that a compulsory retirement age did amount to different treatment on the grounds of age. The 67-year rule was therefore prima facie a PCP disadvantaging persons of a particular age. The ECJ therefore applied itself directly to whether the rule was objectively and reasonably justified within the context of national law by a legitimate aim.

First, it asked was the rule justified by a legitimate aim? The legislation providing the rule itself did not refer to any aims so the ECJ looked elsewhere. It considered the aims cited in the preparatory documents relating to the domestic legislation and a list of aims presented to it by the Swedish government. Crucially these aims included *'freeing up employment posts to make it easier for younger people to enter the labour market'* and this was accepted by the ECJ as a legitimate aim.

The ECJ also accepted a number of other legitimate aims. From the preparatory documents these included: increasing retirement pension by allowing employees to work after the age of 65; and, counteracting the shortage of labour which would result from large numbers of forthcoming retirements. From the aims put forward by the Swedish government it accepted: protecting older staff from potential humiliation; enabling the effective adjustment of retirement pensions; reducing obstacles for those wishing to work beyond 65; and, allowing the government to adapt to demographic developments and anticipate the risk of labour shortages. It was also significant to the ECJ that the rule established a right to work until 67, not an obligation.

The ECJ followed the previous ECJ decisions in *Georgiev v Technicheski universitet – Sofia, filial Plovdiv* (C-250/09; C-268/09) and *Fuchs and another v Land Hessen* IRLR 1043, which established that encouraging recruitment, especially for younger workers, is a legitimate aim to justify a compulsory retirement age. Accordingly it was established that the 67-year rule did have a legitimate aim.

The ECJ then turned to the question of whether the rule was appropriate and necessary. In determining this issue it followed the principles laid down in the previous ECJ decision of *Rosenbladt v Oellerking Gebaudereinigungsgesellschaft mbH* [2011] IRLR 51. That case established that member states have a wide discretion to pursue particular aims in the sphere of social and employment policy and determine the means of achieving those aims. Compulsory retirement rules were a well established means of striking a balance between social, economic, political, demographic and or budgetary considerations. The ECJ was satisfied therefore that the 67-year rule was an appropriate and necessary means of achieving the legitimate aim.

With regard to the alleged detrimental impact on H's pension, the ECJ considered that it was necessary in determining whether the rule was appropriate and necessary to balance the aims of the rule against any hardship it could cause and its benefits to individuals and society. However, it held in the circumstances of H's case that it was not necessary for the rule to take into account the level of pension affected employees would receive.

Implications for practitioners

The somewhat curt approach taken by the ECJ in *Tyrolean* is perhaps an indication of the general approach of the ECJ and other courts to claims of indirect age discrimination; there being a tendency to come down on the side of the employer where there is no clear evidence that the PCP would put persons of a particular age at a particular disadvantage. If there is any implication of

651 *Tyrolean* on practitioners it is simply to ensure when bringing claims of indirect age discrimination that there is clear rational indication or otherwise actual evidence that the PCP being challenged does or would put persons of a particular age at a particular disadvantage.

Hornfeldt strongly endorses the existing principles in the previous ECJ decisions of *Rosenbladt* and *Fuchs*. Member states are given a wide discretion to establish legitimate aims in the sphere of employment policy and the labour market and wide discretion in determining the means of achieving those aims. Moreover, applying a mandatory national retirement rule as a means of encouraging the recruitment of younger workers is generally to be regarded as a necessary and appropriate means of achieving a legitimate aim.

It is perhaps significant that the ECJ accepted the Swedish government's explanation of its aims irrespective of the fact that some of those aims did not appear to be in contemplation at the time the 67-year rule was implemented. Practitioners may find that employer litigants use *Hornfeldt* to rely on 'legitimate aims' conjured up *ex post facto* in response to claims of indirect discrimination. However, ECJ and domestic case law already shows that there is a fairly wide scope for what can constitute a legitimate aim. Establishing that a PCP is necessary and appropriate is more difficult; and especially so in the context of the courts and tribunals in England and Wales where far greater emphasis is placed on proportionality, which although absent from Articles 2 and 6, forms a crucial component of section 19(2) of the EA.

It is questionable therefore how much strength employers can draw from this decision in their attempts to justify PCPs that are *prima facie* indirectly discriminatory. To give claimants the best chance of succeeding in claims of indirect discrimination, practitioners should concentrate on (a) showing that the PCP puts or would put persons of a particular age at a disadvantage and (b) showing that the PCP is not proportionate because there is a less discriminatory or non-discriminatory means of achieving the same aim.

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652 Briefing 652

Too close to home

Dordevic v Croatia European Court of Human Rights, Application no. 41526/10, July 24, 2012

Implications for practitioners

This decision has important implications for practitioners in considering what type of claims may be appropriate to bring in relation to harassment of disabled people and those associated with them such as close family. In this case both the Human Rights Act 1998 (HRA) and the Equality Act 2010 (EA) could be applied.

In relation to the HRA, the case highlights that where the level of disability related harassment is of sufficient severity, state authorities may be in breach of their positive obligations to protect people from inhumane and degrading treatment under article 3 of the European Convention on Human Rights (ECHR), as well as protecting their right to privacy and family life under article 8.

In addition, it will be important for UK practitioners to consider whether it would be appropriate to bring an additional or alternative claims under the EA for disability related discrimination, harassment and a breach of the public sector equality duty.

Facts

The first applicant (FA) is a person who is severely physically and mentally disabled and as a result does not have legal capacity. The second applicant (SA) is his mother who takes care of and lives with the FA.

The applicants live in a ground floor flat in a neighbourhood of Zagreb in Croatia. Their flat is in the same neighbourhood as the AK Primary School (the School).

Between July 2008 and February 2011, the applicants were repeatedly harassed by pupils from the School, all of whom were minors. The pupils would gather in front of the applicants' balcony and subject them to a wide range of harassment including shouting obscenities, writing insulting messages on the pavement, tearing up

the flower beds, and most seriously, subjecting the FA to cigarette burns on his hands. The harassment was linked to the FA's mental disability.

Over several years, the SA made numerous complaints to the police as well as to the Ombudsperson for Disabilities. The police had also informed the Social Welfare Centre about the harassing conduct of several of the pupils at the School. Despite the complaints, no formal action was taken by the various authorities to ensure that the constant harassment ended.

As a result the applicants made a written complaint to the Zagreb Municipality State Attorney's Office in relation to the harassment and the fact that there was no effective remedy in the Croatian legal system for the protection of violent acts by children.

The applicants then filed a petition in the European Court of Human Rights (the Court) alleging breaches of articles 2, 3, 8, 13 and 14 of the ECHR.

European Court of Human Rights

Article 3 Article 3 provides an unqualified right to be free from inhumane and degrading treatment. The Court firstly held that given there was credible evidence that the FA had been subjected to prolonged threats to his physical and mental integrity, the state had a positive obligation to protect the FA from the violence of the children involved. Secondly, the harassment of the FA was of sufficient severity to engage article 3 given all the relevant circumstances of the case. Thirdly, the relevant authorities were aware of the harassment and failed to take all reasonable steps to ascertain the extent of the problem and prevent the harassment. As a result there was a breach of article 3.

Article 8 Article 8 provides a positive obligation on the state and public authorities to respect the private and family life of people. This may extend to measures even in the sphere of relations between individuals, such as this case. The obligation may also extend to ensuring the human dignity and psychological integrity of people.

The Court found that the acts of ongoing harassment had affected the private and family life of the SA and that the state authorities had failed to put in place adequate measures to prevent that harassment and as a result there was a breach of article 8 in relation to the SA.

Article 14 The applicants also claimed a breach of the article 14 right to be free from discrimination in the enjoyment of their ECHR rights on the basis of their Serbian ethnic origin and the FA's disability.

The Court found that the applicants had failed to exhaust all their domestic remedies in relation to article 14. They could have claimed a breach of the Prevention of Discrimination Act which could have resulted in an award of damages, but they had failed to do so.

Article 13 The applicants complained that there was no effective domestic remedy in relation to their claims under articles 3, 8 and 14.

In relation to articles 3 and 8, the Court found that none of the remedies relied on by the Croatian government could have addressed the applicants' situation and as a result there was a breach of article 13.

In relation to article 14, as the Court had found there was a domestic remedy but it had not been used; this part of the claim was ill founded and it was rejected.

Comment

The case highlighted a disturbing failure in the systems of the Croatian state authorities to address disability related harassment from a human rights perspective.

Disability related harassment is also a serious problem in Britain, as was highlighted by the Equality and Human Rights Commission's Inquiry on Disability Harassment in 2011 – *Hidden in Plain Sight*. It examined harassment in a range of contexts, some of which were similar to the *Dordevic* case. The Inquiry report recommended:

Recognition: senior managers need to recognise this as an issue and show leadership; better information on the harassment of disabled people needs to be collected by all agencies; and a more positive attitude towards disabled people needs to be encouraged across society.

Prevention: agencies must share best practice; staff should be given training and guidance on how to deal with disability-related harassment; research should be done into perpetrators and how to deter them.

Redress: the criminal justice system must become more accessible and responsive to disabled people; police must routinely consider disability as a motive where a victim is disabled; victims must be better supported and perpetrators brought to justice.

Significant work remains to be done to ensure that the dignity of disabled people is fully respected in Britain and that the tragic results of the Croatian case are not repeated at home in the future.

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SC rules on comparators and inferences

Hewage v Grampian Health Board UKSC 37, [2012] EqLR 884, July 25, 2012

A tribunal can draw inferences from how a claimant is treated compared to other employees. Such inferences may shift the burden of proof to the respondent – even if the circumstances involved are not identical.

Facts

Mrs Hewage (H) was a consultant orthodontist working as Head of Service at Aberdeen Royal Infirmary. She alleged that she had been bullied by two colleagues: Helen Strachan (S), the service manager and Mrs Munro (M), the clinical nurse manager. Both had been verbally abusive and hostile to her.

H complained to Mr Cumming, the chief executive, and, when she did not receive a satisfactory reply, resigned.

Employment Tribunal

H brought complaints for sex and race discrimination, as well as unfair dismissal. Her discrimination complaint, in essence, was that two white, male consultants had not been treated in the same way she had.

Professor John Forrester had previously held H's post as Head of Service. He too had had difficulty with S, who challenged his clinical decisions. He resigned, arguing that his position was untenable. In response the department was reorganised. The Head of Service was provided with a deputy, so as to remove day-to-day contact with S, and Professor Forrester was then reinstated as Head of Service.

After H resigned Mr Larmour took over. H had, for some time, been seeking to agree with M that there be a consultant involved in the interview process for dental nurses, but M had consistently resisted this suggestion. Mr Larmour also wished to have a consultant on the interview panel. Within days of his appointment M had suggested a meeting and, shortly after, agreed a consultant should be on the panel.

At the start of his appointment, Mr Larmour had received assurances of support from members of the Health Board. They told him that if he had any problems with S, he should come to them. H had sought support from the same members of the Board when she experienced problems with S, but had not received it.

In part on the basis of this evidence, the ET found in H's favour, concluding that she had been discriminated against on the basis of her sex and race.

Employment Appeal Tribunal

The Board appealed. The EAT allowed the appeal, concluding that the tribunal had misapplied the test in *Igen v Wong* [2005] ICR 931. They concluded that, in order to shift the burden of proof to the respondent, a claimant must establish facts from which the tribunal could properly infer that she had been discriminated against. The ET had not done this, the EAT found, because they had relied on comparators where the circumstances were sufficiently different that no 'like for like' comparison was possible.

Court of Session

H appealed to the Court of Session, who overturned the EAT. They found that the ET had concluded that the Board had treated H differently to the proposed comparators – to her detriment. Combined with their criticisms of how her complaints had been handled, this was sufficient to justify an inference of discrimination. It was then for the respondent to rebut that presumption.

Supreme Court

The Board then appealed to the SC. The SC emphasised that whether two situations were sufficiently similar to be comparable for the purposes of a discrimination case was a matter of fact and degree.

In this case there were differences between H and her comparators. This did not, however, prevent them being appropriate comparators. There were also key similarities. Furthermore, there was a marked contrast between the Board's treatment of H and that of Profesor Forrester and Mr Larmour. The tribunal referred to this as 'astounding and inexplicable'. This was a relevant factor to consider when relying on the comparison. Therefore the SC dismissed the Board's appeal.

The SC was asked to provide further guidance on the burden of proof, but declined. They endorsed the guidance previously given by the CA in *Igen v Wong* and *Madarassy v Nomura International plc* [2007] ICR 867. Further guidance, they suggested, would not assist. In any event, they suggested, it was important not to make

too much of the burden of proof, which had nothing to offer where the tribunal was able to make positive findings on the evidence.

Comment

The SC's clear finding that inferences can be drawn when a claimant is treated differently to those in similar situations, notwithstanding minor differences of circumstances, is welcome.

In practice, it is often possible to highlight some significant difference between a claimant and a proposed comparator. The SC's judgment means that this may not matter – provided there is sufficient similarity of circumstances, the tribunal can still properly draw an inference.

Practitioners should also note the SC's endorsement of the tribunal's finding that the dramatic contrast between the treatment of H and her comparators was relevant. The more stark the difference in treatment, the less important minor differences in circumstances may be.

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Briefing 654

Indirect sex discrimination justified in state benefit rules

Humphries v Commissioners for HM Revenue and Customers [2012] UKSC 18, [2012] EqLR 714, May 16, 2012

In this case the SC considered the test to be applied in relation to discrimination under the European Convention on Human Rights (ECHR) – article 14 having been relatively rarely used in the courts and certainly having been relatively rarely found to have been breached (however see *Burnip*, [Briefing 655 reported in this issue], for a finding of its breach).

Facts

Mr Humphries (H) was separated from the mother of his two children. Although they lived with their mother, the children received substantial care from their father, spending at least three days a week with him as well as half their school holidays. H received various benefits, including income support, which did not take into account the children's needs. He claimed Child Tax Credit (CTC) but his application was refused on the basis that the person with main responsibility for the children was their mother.

CTC is a means tested benefit introduced by the Tax Credits Act 2002. The circumstances in which a person is or is not responsible for a child are prescribed by rules found in reg 3(1) of the Child Tax Credit Regulations 2002, as amended, which say that ordinarily a person is responsible for a child who is *'normally living with him'*. Where a child normally lives with two persons in different households, the rules provide that s/he shall be treated as the responsibility of only one of them and that that one should be whichever has the 'main responsibility' for the child, judged comparatively. This was referred to as the 'no splitting rule'.

H challenged the decision on the grounds that the CTC rules restrict entitlement to benefit to one household and this discriminated in favour of women. He was successful in the appeal tribunal but overturned in the Upper Tribunal; the CA dismissed the appeal.

Court of Appeal

It was accepted that entitlement to CTC fell within the ambit of article 1 of protocol 1 of the ECHR (right to protection of property); and it was accepted that where the child's parents have separated, the rules for eligibility for CTC discriminated indirectly against fathers since they are more likely than mothers to be looking after children for a comparatively smaller number of days in a week and therefore to fail the 'main responsibility' requirement.

The SC had to consider whether the discrimination was justified. So far as the test for justification was concerned, Lady Hale, giving the lead judgment, stated that the proper approach to justification in cases involving discrimination in state benefits is to be found in the Grand Chamber's decision in *Stec v United Kingdom* (2006) 43 EHRR 1017, a case about state

pensions, where the ECtHR repeated the well known general principle that '*A difference of treatment is however discriminatory if it has no objective and reasonable justification; in other words if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.'*

Whilst very weighty reasons have to be put forward in sex discrimination cases before the ECtHR would regard a difference in treatment based exclusively on the grounds of sex as compatible with the ECHR, by contrast, the margin of appreciation was explained in that case however, as being wide when it comes to general measures of economic or social strategy. It was said that because of their direct knowledge of their society and its needs, the national authorities are, in principle, better placed than the international judge to appreciate what is in the public interest on social or economic grounds and the court will generally respect the legislature's policy choice unless it is *'manifestly without reasonable foundation'.*

Lady Hale concluded that it seems clear from *Stec* that the normally strict test for justification of sex discrimination in the enjoyment of ECHR rights gives way to the manifestly without reasonable foundation test in the context of state benefits.

The fact that the test is less stringent than the weighty reasons did not mean that the justifications put forward for the rule should escape careful scrutiny however as, on analysis, the rule may lack a reasonable basis.

The rule in the present case was held to be justifiable, although it indirectly discriminated against fathers, as it was a reasonable one for the state to adopt. The state was entitled to conclude that it would deliver support for children in the most effective manner to the one household where the child principally lives. This will mean that that household is better equipped to meet the child's needs. It also happens to be a great deal simpler and less expensive to administer, thus maximising the amount available for distribution to families in this way.

The rule was also linked to the move from tax allowances and social security benefits into a 'seamless' tax credit system. Once the benefit is payable on a means tested basis it becomes much harder to split it between two householders who may move in and out of work at different times and whose incomes may be very different. The ideal of integrating the tax and social security systems so as to smooth the transition from benefit to work and reducing the employment trap has been attractive to policy makers for some time. The introduction of CTC was a step in that direction, and it was reasonable for government to take that step and to regard the targeting of child support to one household as integral to it. It was also reasonable to regard the way in which the state delivers support for children, and indeed for families, as a separate question from the way in which children spend their time.

Comment

Whilst making clear that benefit rules are subject to article 14 of the ECHR, this case does re-inforce the lower threshold of justification that the state must meet in order to justify indirect discrimination arising from the impact of such rules. Any challenge to such rules will need to amass considerable evidence of the lack of their 'reasonable foundation'.

Catherine Casserley
Cloisters

Disabled tenants and discrimination in allocation of Housing Benefit

Burnip v Birmingham City Council and Secretary of State for Work and Pensions (EHRC intervening); *Trengove v Walsall Metropolitan Borough Council and another* (Same intervening)*; Gorry v Wiltshire County Council and another* (Same intervening) [2012] EWCA Civ 629; [2012] WLR (D)150; [2012] EqLR 701, May 15, 2012

This case, brought under the Human Rights Act 1998 (HRA), has significant implications for discrimination cases under the HRA, and also the use of the UN Convention on the Rights of Disabled People (the UN Convention).

Facts

Because of their severe disability Mr Burnip and Ms Trengove required carers throughout the night and therefore each of them lived in two-bedroomed rented accommodation. They received housing benefit but this was capped at the one-bedroomed rate which would apply to all tenants. Mr Gorry lived with his wife and three children in a four-bedroomed rented house. Two of the children – girls – were disabled and, as a result of their disabilities, they were unable to share a bedroom. Their housing benefit was limited to the three-bedroomed rate based on what it would have been had they not been disabled and the girls shared a room.

A claim was brought by the claimants to the Upper Tribunal on the basis that their treatment by the local authorities in their limitation of housing benefit amounted to a breach of article 14 of the European Convention on Human Rights/HRA – *'The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'*

The provisions at issue were those in the Housing Benefit Regulations 2006 (the regulations), specifically regulation 13D(3), which provided that the claimant would be entitled to one bedroom for each category of occupier; overnight carers in the Burnip and Trengove cases did not qualify as occupiers because they lived elsewhere and only stayed overnight when working on the rota; and the Gorry sisters were two children of the same sex and so one bedroom was the prescribed provision for them under the regulations.

It was not disputed that 'disability' constituted 'other status', nor that housing benefit was within the scope of article 14, because housing benefit falls within the 'ambit' of article 1 of the protocol 1 of the ECHR as a 'possession'.

Court of Appeal

The judgment focused on: (1) whether there was discrimination on the ground of disability; and, if so, (2) whether any such discrimination was justified.

So far as discrimination was concerned, the claimants submitted that, whilst the statutory criteria provided for an able-bodied person to be given housing benefit which would be an adequate contribution towards his accommodation needs, they failed to make equivalent provision in relation to the severely disabled. The Secretary of State sought to rely on the Disability Discrimination Act's (DDA) definition of discrimination (as expounded in *Lewisham Borough Council v Malcolm* [2008] 1 AC 1399) [see Briefing 479], under which the appropriate comparator would be an able-bodied person who is in an otherwise identical position – for example, someone who needs an overnight carer during an unexpected but finite period of ill-health.

The CA rejected this interpretation of discrimination, commenting that *'one of the attractions of article 14 is that its relatively non-technical drafting avoids some of the legalism that has affected domestic discrimination law.'*

Instead the CA relied on the interpretation of discrimination in *Thlimmenos v Greece* which extends to situations where states fail to treat differently persons whose situations are significantly different without an objective and reasonable justification. It rejected the argument that this principle was limited to instances concerning exclusionary rules rather than a positive obligation to allocate resources. The CA stated:

> *Whilst it is true that there has been a conspicuous lack of cases post-Thlimmenos in which a positive obligation to allocate resources has been established, I am not persuaded that it is because of a legal no-go area. I accept that it is incumbent upon a court to approach such an*

issue with caution and to consider with care any explanation which is proffered by the public authority for the discrimination. However, this arises more at the stage of justification than at the earlier stage of considering whether discrimination has been established. I can see no warrant for imposing a prior limitation on the Thlimmenos principle.

With regard to justification, the claimants argued that 'very weighty reasons' would be needed to justify discrimination on grounds of disability. The CA disagreed in a case such as the present one. *'Weighty reasons may well be needed in a case of positive discrimination, but there is no good reason to impose a similarly high standard in cases of indirect discrimination, or cases where the discrimination lies in the failure to make an exception from a policy or criterion of general application, especially where questions of social policy are in issue.'*

States enjoy a margin of appreciation in assessing whether, and to what extent, differences in otherwise similar situations justify a different treatment, and courts have been particularly reluctant to interfere if this would entail special treatment for a group which affects the distribution of national resources, even if the sums involved are relatively small.

Even so, the CA in this case came to the conclusion that the failure to treat the disabled claimants differently (i.e. the failure to reflect their need for an extra room) was not justified. The extra assistance which could be provided by discretionary housing payments was not an adequate solution to the problem – they were discretionary, their duration was unpredictable, they were payable from a capped fund and their amount, if paid at all, could not be relied upon to cover even the difference between the one and two-bedroomed rates and still less the full amount of the shortfall. The benefits rule was neither fair nor proportionate.

The defendants had sought to rely on the approach to justification set out in *AM (Somalia) v Entry Clearance Officer* [2009] EWCA Civ 634. That case concerned the impact on disabled immigrants of the requirement to maintain themselves without recourse to public funds.

However, that decision was distinguished from the *Burnip* situation, primarily on the basis that it related to immigration control where the courts are particularly reluctant to interfere in matters of policy. Secondly, it did not involve a general exception from the rule for disabled people of all kinds. The exception sought was for only a very limited category of claimants, namely those whose disability is so severe that an extra bedroom is needed for a carer to sleep in (or, in cases like that of Mr Gorry, where separate bedrooms are needed for children who, in the absence of disability, could reasonably be expected to share a single room). Such cases were said to be likely to be relatively few in number, easy to recognise, not open to abuse, and unlikely to undergo change or need regular monitoring. The cost and human resource implications of accommodating them would therefore be modest.

Relevance of the UN Convention on the Rights of Persons with Disabilities

The CA also said that if the correct legal analysis of article 14 in the circumstances of the case had been uncertain (which it was not), the court would have resorted to the UN Convention. This Convention would have resolved the uncertainty in favour of the claimants. *'It seems to me that [the UN Convention] has the potential to illuminate our approach to both discrimination and justification'.*

Comment

This is a helpful over-ruling of *Reg (NM) v London Borough of Islington* [2012] EWHC 414 (Admin), in which Sales J, obiter, was inclined to disregard the UN Convention as an aid to ascertaining the scope of article 14 (see paragraphs 99-108). Indeed, the UN Convention has already been cited in European Court of Human Rights decisions, such as *Stanev v Bulgaria* 36760/06 (2012) ECHR 46.

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Cloisters

High Court considers article 14 ECHR in indirect discrimination challenge

R (on the application of S and KF) v Secretary of State for Justice [2012] EWHC 1810 (Admin) Case No CO/10573/2011 [2012] EqLR 796, July 3, 2012

Implications of case

This case challenged regulations issued to prison governors giving them discretion to make deductions from the earnings of prisoners when they are employed outside the prison. It was argued that the rules were indirectly discriminatory against women prisoners contrary to article 14 of the European Convention on Human Rights (ECHR) and that the Secretary of State for Justice had not complied with the equality duty when he issued these instructions.

Facts

Prisoners have deductions made from their earnings from employment outside the prison. These deductions are used to fund Victim Support. Two prisoners challenged the lawfulness of these deductions. The first was a male prisoner, S, who challenged the deductions on the grounds that they were contrary to article 1 of protocol 1 ECHR and the second was a female prisoner, KF, with children who asserted that the rules on deductions had an indirectly discriminatory impact on women prisoners and she challenged them as being contrary to article 14 ECHR read together with article 1 of protocol 1. This briefing concentrates on this second challenge. KF also argued that in deciding upon and communicating these instructions, the Secretary of State had failed to have due regard to the need to promote equality for women contrary to the equality duty.

High Court

Mr Justice Sales in giving judgment said that in considering the application of article 14 to indirect discrimination, it was first necessary to establish whether the groups of persons in question (here men and women prisoners) were in a relevantly analogous position or not. Then if they were not in such a comparable situation, the court would need to decide whether treating members of these two groups in the same way is objectively justifiable. He concluded that in this case '*as a matter of practical reality and justice, female prisoners are not in a significantly different position from male prisoners*'.

KF had failed to show that there was any significant differential impact of the deductions regime on female prisoners. There was no statistical evidence to show that these deductions had a greater detrimental impact on women prisoners in practice. He noted that whilst statistical evidence is not always required, an applicant does need to be able to point to other forms of evidence to show that the application of the rule or practice involves a substantially different detrimental effect on one group compared to the other. In any event, Prison Governors have a discretion to grant relief from the deduction regime where there were exceptional circumstances falling within the guidance in the Prison Service Instructions.

The legitimate objective of the deductions was to raise funds to assist in providing support for the victims of crime. Even if indirect discrimination could be shown to have taken place the Secretary of State and the Prison Governors are entitled to a wide margin of appreciation in showing that the practice is objectively justified.

Public sector equality duty

The Secretary of State for Justice was not in breach of s149 of the EA as he had not failed to have due regard to the impact of these regulations on women when he introduced them. The judge concluded that:

> *there was no breach of the section 149 equality duty on the part of the Secretary of State when he promulgated the Prison Service Instructions. The implementation of the deductions regime proceeded in steps, from bringing the PEA [Prisoner's Earnings Act 1996] into force (with consultation with relevant bodies involved with prisons, prisoners and penal policy directed to that question), to promulgating rule 31A (with a further EIA at that stage) to promulgating the Prison Service Instructions (with yet further EIAs at that stage as well). As is clear from the documents and from the evidence… on this part of the case, the Secretary of State plainly sought to have regard to the equality impacts of the deductions regime before bringing it into effect. In the course of consultation there was no major objection raised based on alleged disproportionate impact upon female prisoners as opposed to male prisoners… The Secretary of State reviewed such information as was reasonably available regarding*

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possible equality impacts. The assessment cannot be described as perverse or unreasonable: the Secretary of State was entitled to conclude that, while in the absence of available evidence the potential for disproportionate impact in relation to sex could not be ruled out…overall the indications were that there would not be a significant differential impact of the Prison Service Instructions on female prisoners as opposed to male prisoners.

Comment

There are not many cases that consider indirect discrimination in the context of article 14 of the ECHR and this one sets out clearly the steps to be taken in bringing such an indirect discrimination case.

Gay Moon

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Disability discrimination – harassment – suspension

Prospects For People With Learning Difficulties v Harris UKEAT/0612/11/DM, [2012] EqLR 781; April 27, 2012

Facts

Ms Harris (H) was a support worker for the appellant national organisation, which provided supported living services for people with disabilities (Prospects). H has a rare congenital musculoskeletal condition known as arthrogryposis, which results in weakness and stiffness.

Prospects knew about H's disability and that she could not undertake cardio-pulmonary resuscitation (CPR), heavy lifting and many manual tasks. She had knee-replacement surgery in January 2009, and upon her return to work in February 2009, she fell into dispute with her line-manager.

In November 2009, H's first aid certificate expired. Prospects knew in December 2009 that first aid certificates now required the person trained to demonstrate CPR (previously H's inability to perform CPR had never prevented her from obtaining a certificate).

In March 2010, H attended a course to renew her first-aid certificate, and as she could not perform CPR, she was not granted a renewal. As a result, Prospects informed her at a meeting, without any prior warning, that she was suspended on full pay. H returned to work in April 2010, only to be suspended again in August 2010 on grounds of 'her own safety'. Following an occupational health report, H returned to work, only to be dismissed in November 2010. This was because of her inability to conduct CPR and limitations on her manual handling.

Employment Tribunal

H brought claims of disability discrimination, including harassment, and unfair dismissal, under the Disability Discrimination Act 1995. The ET upheld the claim of unfair dismissal, and part of her harassment claim.

The ET found that although it would be rare for the act of suspension itself to amount to harassment, this did not mean this could never be the case. In the circumstances of this case, the particular consequence of the disability (not being able to perform CPR) had been known by H's line manager for almost a year, and Prospects had also known for at least four months that she was extremely unlikely to obtain a first aid certificate. In those circumstances, suspending her because she did not obtain a first aid certificate, which was a consequence of her disability, had the ability to violate H's dignity.

The tribunal went on to find that although there were acts of harassment, it did not mean that the dismissal was an act of disability discrimination, as there were no reasonable adjustments that would have allowed H to continue her employment as a support worker at Prospects. They also found that the dismissal was procedurally unfair, but that it was likely to be inevitable that, had a fair procedure been adopted, H would have been dismissed in any event.

Employment Appeal Tribunal

Prospects appealed, arguing that the ET's reasoning was perverse, or that they had disregarded their own findings.

The EAT, led by His Honour Judge David Richardson, dismissed the appeal.

It held that it is not harassment when an employer acts reasonably in suspending an employee on full pay, and this will be the situation in most cases. However, this case was far removed from most cases; Prospects

knew that a first aid course was going to be difficult for H to pass, and yet there was no discussion before or after the course about the likely result of her failing to get a first aid certificate. Regarding the second suspension, the EAT held that the ET was entitled to find harassment in circumstances where the only reason a person was suspended was because a risk assessment shows that some part of their job creates a moderate risk for them.

Analysis

The EAT's judgment is not a major development in the law relating to harassment, but it confirms one discrete point in relation to suspensions. Generally a suspension alone will not create the atmosphere or environment necessary for a finding of harassment. However, this generality does not prevent there being circumstances where the test will be met. In particular, when a suspension is routine and has been acted upon without any forethought, then this makes it more likely to form the basis of a harassment claim.

Practical implications

The result in Harris should come as no surprise, but it acts as a reminder that even ordinary management decisions, of the kind that would not normally warrant any kind of discrimination claim, can form the basis of a successful action in the right circumstances. It should be stressed that H's circumstances were unusual in that Prospects had known for a long time (the duration of her employment) that her manual handling ability was limited, and yet had taken no action; and similarly had known for months that she was unlikely to gain her first aid certificate.

Perhaps the tribunal were given the impression that the employer had seized upon circumstances that were already present to justify a fairly harsh sanction. Suspension is normally an immediate reaction to a situation that has just arisen and needs investigating, which was not the case here, where Prospects had plenty of opportunity to consult with H, and yet refused to avail themselves of this opportunity.

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Limits to employer's reasonable adjustment duty

Olenloa v North West London Hospitals NHS Trust [2010] EAT/0599/11/ZT, June 29, 2012

The key question considered by the EAT in this case was whether an employer's duty to make reasonable adjustments stopped when a disabled employee was on sick leave.

Law

The duty imposed on an employer to make reasonable adjustments stems from the Equality Act 2010 (EA) and the Disability Discrimination Act 1995 (DDA). S20 of the EA imposes a duty on employers to make reasonable adjustments to premises or working practices to help disabled job applicants and employees. Under s21 a failure to comply with this duty to make reasonable adjustments is a form of discrimination.

Likewise the DDA imposes a duty to make reasonable adjustments in three circumstances:

1. where a provision, criterion or practice (PCP) puts a disabled person at a substantial disadvantage in comparison with those who are not disabled (s20(3));
2. where a physical feature puts a disabled person at a substantial disadvantage in comparison with those who are not disabled (s20(4)), and
3. where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in comparison with those who are not disabled (s20(5)).

In characterising this duty, the EAT in previous judgments, emphasised that the duty to make reasonable adjustments is not a general duty *'to assist a disabled person or to help the disabled person overcome the effects of their disability'* (para 15, *Royal Bank of Scotland v Ashton* UKEAT/0542/09/LA). The duty is rather an imposition upon the employer to make reasonable adjustments to premises and working practices to help disabled job applicants and employees overcome substantial disadvantages as set out in s20 of the EA.

The EHRC's Equality Act 2010 Employment Statutory Code of Practice gives the following as an example of a likely reasonable adjustment – an employer who has a policy that designated car parking spaces are only offered to senior managers, extends the offer of a designated car parking space to a worker who is not a manager, but has a mobility impairment and needs to park very close to the office.

Facts

Mr Olenloa (O) appealed from an ET judgment on a pre-hearing review. He was a disabled person who alleged that the respondent had failed in their duty to make reasonable adjustments for him as required by the DDA. O suffered from an adjustment disorder with mixed anxiety and depressive reaction. He went on sick leave on September 29, 2010.

On October 29, 2010, O submitted a grievance to the respondent under the trust's grievance procedure, in which he outlined five reasonable adjustments that would enable him to go back to work. Following this grievance he was referred for an occupational health assessment in January 2011. It was noted by the occupational health doctor that a successful return to work would not be likely until the grievance process had been completed; however, her view was that O was well enough to work temporarily in a different role.

Reasonable adjustments: extending the duty

The EAT decided that an employer's obligations to make reasonable adjustments do not come to an end when employees go on sick leave. Its reasoning was that in this case O was asserting a continuous omission by the respondent to make reasonable adjustments: it was the very failure to make adjustments that kept him away from work.

The EAT was careful to distinguish the Olenloa case from its sick leave related predecessors, namely *Home Office v Collins* [2005] EWCA 598 and *NCH Scotland v McHugh* UKEATS/0010/06/MT. In *Collins* the claimant could not return to work at all and in McHugh the claimant *'at all relevant times presented no willingness or ability to return to work, nor was that the medical evidence'* (paragraph 30, EAT judgment). In essence, the EAT concluded, *'it could be said that it would not be reasonable to require adjustments as they would not achieve any purpose'*. In this sense, *Collins* and *McHugh* indicated that neither claimant was willing or even medically able to return to work.

The case of O was not the same. O had indicated in a clear and explicit manner the adjustments required in order for him to return to work and provided medical evidence to support his ability to return to work. The EAT was clear in its judgment that a factual finding is required to be made by a tribunal of whether the claimant would not have remained or returned to work even if such adjustments had been made when considering reasonable adjustments.

A central discussion within the judgment was how to determine when time starts to run in accordance with section 123(4)(b) of the EA. Specifically, what determines when an employer might reasonably have been expected to make a reasonable adjustment.

Determining the date on which a respondent's duty to make reasonable adjustments ceases is a notoriously difficult exercise for a judge. It, in some senses, results in an 'artificial date' being selected of when an employer is to be treated as having failed to comply with the reasonable adjustment duty (per Lloyd LJ in *Kingston Upon Hull City Council v Matuszowicz* [2009] ICR 1170). To avoid the selection of an arbitrary date, the EAT in *Olenloa* supported the approach that a tribunal, in determining the date, should consider all the relevant evidence and make a finding of fact as to when the employer is to be treated as having failed to comply with a duty to make a reasonable adjustment. Such a careful consideration will then allow the tribunal to move on to consider when time starts to run in accordance with s123(4)(b) of the EA.

The EAT in their judgment was clear: time does not start to run for the purposes of s123 when the claimant goes on sick-leave. There is an on-going duty placed on the respondent to make reasonable adjustments, even when the employee is on sick leave.

Jessica van der Meer
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Worker supplied by an agency is a contract worker protected by DDA

London Borough of Camden v (1) Pegg (2) Randstad Care Ltd Trading as Beresford Blake Thomas Limited (3) Hays Specialist Recruitment Ltd T/A Camden Agency for Temporary Supply [2012] UKEAT/0590/11/LA, April 13, 2012

Background

Whether a worker supplied by an agency is able to claim a remedy for discrimination depends on whether or not they can bring themselves within s4B of the Disability Discrimination Act 1995 (DDA), now s41 of the Equality Act 2010. In this case, the EAT had to consider whether an agency worker was within the provisions so that she could claim disability discrimination under the DDA.

The EAT also considered whether the liability of the respondent, LBC, was affected by s68(1) of the DDA. This section defined employment as *'employment under a contract of service or of apprenticeship or a contract personally to do any work ...'* The LBC argued that the contract worker provisions could only apply if the person was in employment under s68(1).

Law

The DDA states that a principal must not discriminate against a contract worker:

- in the terms on which the work is offered, s12(1)(a) [now s41 EA]
- by not allowing a person to do, or to continue to do the work, s12(1)(b)
- in the way the principal affords the worker access to benefits, s12(1)(c), or
- by subjecting the worker to any other detriment, s12(1)(d)

A contract worker is a worker who is supplied to the principal under a *'contract personally to do any work'* as defined by s12(6) and s68(1) of the DDA.

A principal means a person (A) who makes work available for doing by individuals who are employed by another person who supplies them under a contract made with A, s12(6). The principal is commonly an organisation which is using an employment agency to supply workers to it.

Facts

Ms Pegg (P) was supplied as a temporary School Travel Planner to the London Borough of Camden (LBC) in September 2008 by Randstad Care Limited trading as Beresford Blake Thomas Limited (BBT).

P was paid by BBT but worked under the direction of LBC. P worked until the summer of 2009 when her mental health started to deteriorate. Her contract was terminated in early August 2009. She successfully claimed disability discrimination before the ET.

Employment Tribunal

The ET found that P was supplied to LBC under a contract by an agency and that LBC was therefore a principal within the meaning of the DDA. The ET made a number of key findings about the nature of P's contract:

- she was fully integrated into LBC's organisation
- she was expected to attend for work and to request leave like any other member of staff
- she could not choose her hours
- there was no question of her being able to send a substitute
- she made contracts on behalf of LBC
- she sat on an interview panel to recruit a member of the School Travel Team.

The ET found that the contract was one which required P to do the work personally, and, taking account of all the facts, was therefore 'employment' within the meaning of s4B of the DDA. LBC could therefore be held liable for any discriminatory conduct, including terminating her contract for a disability reason.

Employment Appeal Tribunal

On appeal to the EAT, LBC argued that P was not party to a contract personally to do any work, as required by s68(1) of the DDA, because she was not bound to accept any particular assignment offered to her by the BBT. It was argued that this meant that there was a crucial element of the contract missing, putting P outside the protection of the DDA.

LBC drew comparisons with a taxi driver, Mr Mingley who brought a claim under the Race Relations Act 1976. The EAT in *Mingley v Pinnock and Anor*

(Trading as Amber Cars) 2004 ICR 727, determined that Mr Mingley could not bring a discrimination claim because he could not show that he had a contract personally to execute any work. One reason why the EAT made that determination was because of the lack of any obligation to accept any particular work assignment. Despite various controls on him as a taxi driver, such as an obligation to wear a uniform, he could decide to accept or reject any particular job, and thus was not in employment, but was self-employed.

The obvious difference between the two cases is that P claimed protection under anti-discrimination legislation because of her status as a contract worker. There was no suggestion that she was self-employed.

The contract worker protections provide protection for a particular class of worker doing a particular type of work. It is part and parcel of agency work that any particular assignment may or may not be accepted, but the EAT drew a distinction between refusing an assignment, and the relationship which comes into existence once a worker agrees to accept an assignment and a contract is entered into.

The EAT rejected LBC's suggestion that P's ability to reject an offer of a contract meant that when she did accept a contract, she was still excluded from the protections. The EAT distinguished *Mingley* pointing out that once P accepted an assignment, she owed an express and contractual duty to do the work personally, and thus was clearly within the provisions.

The EAT also noted that *'the arrangements under which Ms Pegg came to work for Camden are common arrangements, and we have no doubt that parliament intended the protection for contract workers to apply to such workers.'*

Comment

The form of engagement entered into by P is a common one, where a temporary vacancy is covered by a person who then works for the organisation as if they are an employee in all but the method of payment. Advisors must note that whilst *LBC v Pegg* provides useful reaffirmation of the statutory principles as far as discrimination is concerned, there are significant differences when it comes to the question of employment protections such as unfair dismissal and contractual rights. Whilst the *Agency Workers Regulations* 2010 SI 2010/93 provide protections in specific circumstances, many agency workers are not protected from the wider scope of employment protection legislation because they are not employees of the end user organisation.

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Review of the Public Sector Equality Duty

On May 15, 2012 the Secretary of State for the Home Department announced as part of the outcome of the Red Tape Challenge that they proposed to review the effectiveness of the public sector equality duty (PSED) and would include both the general and specific duties in order *'to establish whether the PSED is operating as intended'*. Since the duty only came into effect in 2011, and the specific duties in 2012, any such review seems, at the least, premature. The DLA believes that this review poses a serious risk to the equality duty which could lead to it being watered down or removed.

Scope of the review

According to the GEO, this is not a new review; it brings forward planned reviews of the specific duties and combines it with a planned review of the general due-regard equality duty which would, in any event, form part of the review of the EA in 2015. The terms of reference of the review and the members of the steering group are not expected to be announced until November. It is expected that the steering group will be made up of representatives of public authorities, not of user groups. GEO staff have indicated that the scope of the review would include the:

- effectiveness of both the general and specific duties
- impact of the duty – costs, burdens and benefits
- comparative international models
- how the duty supports delivery of the government's equality strategy
- role of support and guidance given to public bodies
- how legal risk is managed
- what would improve operation of the duty

The broad parameters for the review are that it will:

- look at Great Britain in terms of the general duty, but will take account of the different specific duties and circumstances for the devolved administrations
- consider the breadth of protected characteristics within the context of the PSED
- consider the budgetary position facing public bodies
- take account of the duties and powers conferred on the EHRC by the Equality Act 2006

On October 17, 2012 Culture Secretary and Equalities Minister Maria Miller announced that the GEO will *'shortly commence the gathering of evidence more broadly especially from those who have knowledge and experience about the operation of the duty within their organisations'*. Their evidence gathering will consist of desk-based research, a series of roundtables (none of which have been fixed yet), online questionnaires which are expected to be released shortly, as well as case studies of public bodies to 'test emerging findings'. The aim is to complete the review by April 2013.

The DLA will be holding a meeting early in the new year to discuss our response to the review and to encourage others to respond.

EHRC's new chair

Baroness Onora O'Neill of Bengarve has been appointed chair of the EHRC. Baroness O'Neill is a cross-bench peer in the House of Lords and Honorary Professor of philosophy at the University of Cambridge.

On her appointment Baroness O'Neill referred to the central role the EHRC plays *'in countering the sometimes inflationary rhetoric around us and help everyone in this country understand the important place equalities and human rights have in shaping the successful society and economy we want to live in.'*

Enterprise and Regulatory Reform Bill 2012

The report stage reading of the Enterprise and Regulatory Reform Bill had its report stage and 3rd reading in the House of Commons on October 17 and 18 and is now going to the House of Lords. It contains proposals to:

- remove the EHRC's general duty
- remove the EHRC's duty to promote good relations
- remove provisions to protect people from third party harassment, and
- remove the formal questionnaire procedure which enables applicants to ask questions of an alleged discriminator.

The DLA is particularly concerned about the proposal to repeal the questionnaire procedure provisions. This proposal was opposed by 83% of respondents to the government's own consultation on its abolition. The DLA strongly believes that the questionnaire procedure facilitates access to justice, helps both parties to assess whether a claim lies and enables them to reach an early settlement where this is appropriate. Readers are urged to lobby for its retention.

Lawyers Referrals Helpline

The EHRC has launched a new Lawyers Referrals Helpline. This service is being made available exclusively to professional advisers and representatives to enable them to get rapid advice about referring legal cases to the Commission.

The EHRC is interested in hearing from solicitors, barristers and others who are involved in cases that explore policies or practices which lead to widespread or serious breaches of equality laws or the Human Rights Act. The legal team will advise whether the issues in a case might fall within the EHRC's strategic priorities or if the case is one in which the EHRC is interested in becoming involved using its powers under ss28 or 30 of the Equality Act 2006. They will also advise on how to request legal assistance or an intervention from the Commission.

The telephone number for the Lawyers' Referrals Helpline in England is **0161 829 8407** on Tuesdays, Wednesdays and Thursdays, 10am to 1pm.

New COE guidance on combating racial discrimination in employment

The European Commission against Racism and Intolerance (ECRI) of the Council of Europe issued its General Policy Recommendation No.14 on September 25, 2012 which calls on the COE's 47 member states to stop racism and racial discrimination in employment.

ECRI recommends that governments launch national plans promoting equality and preventing discrimination in employment, in both the public and private sector. Recommendation No.14 also urges governments to enact and apply laws which afford genuine protection against direct and indirect discrimination, harassment and victimisation. The guidance addresses improving access to justice including the establishment of procedures which require employers to provide complainants with an explanation of the facts in dispute, and strengthening the powers and role of the specialised bodies. The full text of the Recommendation can be found at www.coe.int/ecri.

Fees to bring employment complaints

From summer 2013, fees will be introduced into ETs and the EAT. Two main fees will be introduced, the first payable at the issue of the claim (£250 for discrimination claims) and the second, the hearing fee (£950), payable around four weeks prior to the hearing taking place.

One of the government's aims in introducing fees is to *'encourage businesses and workers to mediate or settle a dispute rather than go to a full hearing.'* However, the new fees regime may not assist this as employers may not feel inclined to mediate a dispute before an applicant has shown s/he is serious by applying to the tribunal. Mediation by a judge will cost £600. Most types of fee will only apply to the claimant, although, the tribunal will have the power to order the unsuccessful party to reimburse the fee to the successful party.

There will be a remission scheme for people on low incomes – similar to the civil court scheme. The government plans to review the remission scheme across both courts and tribunals and publish a consultation later this year as part of a wider review required by the introduction of Universal Credit in late 2013.

Discrimination Law Association

The DLA congratulates the women of Birmingham on their recent equal pay victory in the Supreme Court. They have waited a long time for this result and we are delighted that they have triumphed.

NI adoption law is held to be discriminatory

Following an application by the NI Human Rights Commission for judicial review of the compatibility of the Adoption Order (NI) 1987 with the ECHR, on October 18, 2012, the High Court held that preventing someone from even being considered to adopt because of their relationship status is a discriminatory practice.

The current law in Northern Ireland means that married couples, and single men and women regardless of their sexual orientation, can apply to adopt. However, unmarried heterosexual couples, same sex couples, and couples in civil partnerships are not eligible to be considered for adoption. Mr Justice Treacy held that this was contrary to the ECHR. Confirming that the best interests of the child is the fundamental principle in adoption cases, he held that *'issues relating to the sexual orientation, lifestyle, race, religion or other characteristics of the parties involved … cannot be allowed to prevail over what is in the best interests of the child.'* There are currently more than 2,500 children in the care system in Northern Ireland. Health Minister Edwin Poots has said he will appeal the judgment.

Briefings

Abbreviations

ADHD	Attention deficit-hyperactivity disorder
CA	Court of Appeal
CEDAW	UN Committee on the Elimination of Discrimination against Women
CERD	UN Committee on the Elimination of Racial Discrimination
CFAs	Conditional fee agreements
CJEU	Court of Justice of the European Union
COE	Council of Europe
CPR	Cardio-pulmonary resuscitation
CRPD	UN Committee on the Rights of Persons with Disabilities
DDA	Disability Discrimination Act 1995
DLA	Discrimination Law Association
DRA	Default retirement age
DRC	Disability Rights Commission
DRT	Disability Rights Taskforce
DsLA	Disability Living Allowance
EA	Equality Act 2010
EAT	Employment Appeal Tribunal
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
EHRC	Equality and Human Rights Commission
EHRR	European Human Rights Reports
EIA	Equality Impact Assessment
EqLR	Equality Law Reports
ET	Employment Tribunal
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
FET	Fair Employment Tribunal
GEO	Government Equalities Office
HRA	Human Rights Act 1998
ICR	Industrial Case Reports
IRLR	Industrial Relations Law Report
J	Justice
LJ	Lord Justice
LLP	Legal liability partnership
NGO	Non-governmental organisation
NHRI	National human rights institution
NHS	National health service
PCP	Provision, criterion or practice
PIP	Personal Independence Payment
PSED	Public sector equality duty
QC	Queen's Counsel
SC	Supreme Court
SEN	Special educational needs
TFEU	Treaty of the Functioning of the European Union
TUPE	Transfer of Undertakings (Protection of Employment) Regulations 2006
UC	Universal Credit
WLR	Weekly Law Reports