ISSN 1759-2925

Discrimination Law Association

Briefings 683-693

DISCRIMINATION LAW ASSOCIATION 50th BRIEFINGS 50th EDITION

Volume 50

November 2013

Editorial *Time to draw up equality battle plans in run up to the general election*

The DLA 2013 conference *Equality 2015: Setting the Agenda* was a timely opportunity for discrimination lawyers, advisers, trade unionists, NGO activists and others to consider strategy in the fight for a more equal society. As we mark the 50th edition of *Briefings*, the need for a coherent battle plan could not be more urgent.

The current government policy to dilute protection from discrimination and erode hard won rights and freedoms was a clear concern for many attending the conference. The aim was to focus thinking on the equality agenda in the run up to the 2015 General Election; what are the laws and policies we need to move forward towards – and stop retreating from – a more equal society?

In the context of Conservative propaganda about withdrawing from the European Union, resiling from the ECHR and repealing the Human Rights Act, equality and anti-discrimination practitioners are rightly concerned about government's current policy and its implications for equality rights derived from EU directives and the Convention.

Of equal concern is the fueling of the hate-inspired culture of suspicion towards migrants, highlighted by Barbara Cohen in her briefing on the Immigration Bill currently going through parliament. She reflects on how the rhetoric leading up to the introduction of the Bill has already caused damage in society and argues that, if implemented, it has the potential to widen and deepen that suspicion and hostility.

The 50th edition of *Briefings* does however review the positive developments in discrimination law since 1996. Camilla Palmer and Paul Croft, founder members of the DLA, remind us of the landmark judgments which were covered in the early editions of *Briefings*. They also reflect on the current difficult environment, highlighting in particular, concerns about workers and others not having the means to enforce their rights and the scant support that exists for victims of discrimination. They argue that the introduction of tribunal fees, cuts in legal aid, the recession and the cap on compensation for unfair dismissal has already had a negative impact on the numbers of cases being brought to the Employment Tribunal. They challenge the DLA, the trades unions and others to build effective alliances to fight against reduction in protection and to empower victims of discrimination, by providing them with sufficient tools and knowledge of their rights.

Pam Kenworthy in *Civil Legal Advice – equality before the law?* stresses that in order for publicly funded telephone advice services to provide much needed support, there needs to be much greater awareness among the public and advisors of the existence of the service.

In her speech at the DLA conference Karon Monaghan QC urged victims to litigate. For example, her strategy in relation to the repeal of the 3rd party harassment provisions in the EA is to challenge it using EU law which anticipates that such conduct should in any case be unlawful as either ordinary harassment, direct or indirect discrimination. She argues that EU case law may also be called in aid to address the gap which will be left when the statutory questionnaire provisions are repealed. And she anticipates that the courts and judges who have been robust in the protection of sexual minorities and who hold dear the rule of law, will be pushed by current government policy to become more 'interventionist and proactive'. She referred to Lord Neuberger's (President of the Supreme Court) comments that, should the Human Rights Act no longer exist, the common law might develop to accommodate change. Let's hope that the tribunals and courts take the same approach when implementing rights to non-discrimination and equality.

Recalling that one of the prime motivations for the formation of the DLA and the publication of *Briefings* was to enable people working to combat discrimination to support each other, share knowledge and expertise in order to make more effective interventions in challenging discrimination, we can draw inspiration from our achievements, adapt to meet the need for practical information to support victims litigate, and re-energise for the battle ahead.

Geraldine Scullion, Editor

Please see back cover for list of abbreviations

Briefings is published by the Discrimination Law Association. Sent to members three times a year. Enquiries about membership to Discrimination Law Association, PO Box 7722, Newbury, RG20 5WD Telephone 0845 4786375 E-mail info@discriminationlaw.org.uk
Editor: Geraldine Scullion geraldinescullion@hotmail.co.uk Designed by Alison Beanland. Printed by The Russell Press.
Unless otherwise stated, any opinions expressed in *Briefings* are those of the authors.

Rights without remedies?

This article by Paul Crofts, Vice Chair of Northamptonshire Rights and Equality Council and Camilla Palmer, head of employment at Leigh Day, celebrates the 50th volume of DLA *Briefings*. In 1996 Camilla Palmer was the editor of *Briefings* and Paul Crofts had recently been appointed the first DLA Development Worker. Both were also founder members of DLA. They review the positive changes to both the law and culture and examine how the present government is undermining hard won rights by repealing protection and making enforcement difficult. They set out their views on what the future might hold. They hope that this is just the start of the debate.

Introduction

What is immediately apparent from looking at the early *Briefings* is the range of volunteer contributors, some of whom are still involved with the DLA and writing briefings. Their contribution is invaluable. We would formally like to record our thanks for this personal commitment and loyalty to the DLA over the years – which has been, and hopefully always will be, something to celebrate and be proud of.

Secondly, the range of issues addressed in the early *Briefings* was extensive, with many of the issues reported still with us today, despite important changes to discrimination law since 1996. What has changed (for better or worse) and what has not will be explored more fully below. We will also go on to look to the future and the nature of the agendas that we may need to pursue over the next 17 years or so!

The titles of *Briefings* 3 to 15 (issued in March and June 1996) included:

- **Fighting discrimination: two Steps Backward – the Asylum and Immigration Bill;** this is very much an issue today with the publication of the Immigration Bill on October 10, 2013;
- **Rights during maternity leave:** effect of *Crouch v Kidsons Impey* [1996] IRLR 79; rights during maternity leave still tax the courts, for example, the controversial case of *De Belin v Eversheds*;
- **Implications of *Seymour-Smith*** which challenged as discriminatory the 2-year qualifying period for an unfair dismissal leading to it being reduced to 1-year; now the qualifying period is back to 2-year's service, is another challenge on the horizon?
- **Different appearance codes for men and women not discriminatory:** *Smith v Safeways plc.*, [1996] IRLR 456 CA; still with us today and still being challenged, see *Department for Work and Pensions v Thompson* [2004] IRLR 348;
- **Indirect discrimination – problems of proof;** this is still a developing area and there is a new debate developing about whether direct discrimination should be capable of justification; this must be resisted;
- **Compensation update:** £140,000 settlement for sex discrimination and equal pay claim; there are high settlements for sex discrimination but the number of claims has almost halved over the last two years;
- **Discrimination against transsexuals illegal:** *P v S and Cornwall County Council*; at least now we have clear protection against such discrimination.

One of the prime motivations for the formation of the DLA was to bring discrimination practitioners (lawyers, lay representatives from Racial Equality Councils (RECs) and law centres, trade unions and the statutory commissions etc.) together to support each other, share knowledge and expertise and thereby enable more effective interventions in challenging discrimination locally and nationally.

DLA lawyers, along with others, pushed at the boundaries of discrimination law to extend protection and rights. An example of this was the case of *Jones v Tower Boot* (CA 2All ER 406 1997) which established important principles about harassment and employers' duties to protect employees. The claimant was first supported by the local REC (funded by the CRE) and on appeal he was represented by DLA lawyers. Without this collaboration – from initial advice, providing tribunal representation, and subsequently funding at the EAT and CA – this case might well have fallen by the wayside. A case that initially had no apparent strategic merit (and in today's world might not get any funding or support at all) became one of the most important cases of the decade.

The DLA supported those suffering from discrimination by providing information to enable challenges to be made and identifying test cases. We wanted to change the culture through education and

campaigning so that there was zero tolerance of discrimination. The briefings were an integral part of this and their success is recognised by the wide audience they reach including all Citizens Advice Bureaux.

Improvements in equality law

There have been many improvements in equality law between 1996 and 2010. A major impetus was the EU anti-discrimination directives, including the Race Equality Directive, the Employment Framework Directive, and the Equal Treatment Directive. The directives extended the definition of indirect discrimination, harassment and introduced the reverse burden of proof. To comply with the directives the UK prohibited discrimination in employment on grounds of sexual orientation, religion or belief and age. The Equality Act 2010 (EA) now covers these characteristics and gender re-assignment as well as race, sex, disability, pregnancy and maternity, marriage and civil partnership.

Another major influence was the Stephen Lawrence Inquiry when the importance of institutional patterns of race discrimination was first officially recognised. The legislation that followed established protection from discrimination in the exercise of all public functions and imposed on public authorities a new enforceable race equality duty. The subsequent adoption of equivalent equality duties for disability and gender led to a single public sector equality duty that now applies to eight protected characteristics.

The role of equality law and some recent developments

Disentangling the role of societal pressures for change and the role of the law is no easy task. Generally they are interlinked and complementary. For example, the introduction of two sets of Sexual Orientation Regulations has had a significant positive impact on attitudes to gays and lesbians and how they are treated in employment situations and in relation to the provision of services. There is increasing acceptance that discrimination on this ground is unacceptable and prejudice has been tamed (not eradicated) even though it comes rather late in the day compared to other types of prejudice.

The protection of the rights of disabled people including the important duty to make reasonable adjustments has had a substantial impact on their lives, though the job is nowhere near finished. The prohibition on disability discrimination, which was introduced in 1996, is increasingly being used to improve services to disabled people particularly through the obligation to make reasonable adjustments, such as accessible cash machines for those in wheelchairs, accessibility to museums, restaurants, the provision of tactile paving next to the line on railway stations, ramps on buses etc. There is increasing awareness about employers' obligations to make adjustments for disabled employees enabling them to remain in work. But, we should not be complacent; there is still a way to go.

The introduction of the Employment Equality (Age) Regulations 2006 and the repeal of the default retirement age coincided with the increasing realisation that we are all living longer; we cannot afford to retire at 60 or 65, particularly with the recent cuts in pensions, and that discrimination in relation to the retirement age had to go. However, there is still plenty of prejudice against older workers, particularly in the media, as highlighted by Miriam O'Reilly's successful age discrimination claim against the BBC. At the top of many organisations there are very few 60+ year olds, and we suspect that applies to many law firms: ask around: why not? Progress is slow despite the legislation.[1]

Prejudice against pregnant women is also still very common. The law provides wide protection but the willingness of some employers to talk about the difficulty and irritation of employing pregnant women is depressing. The same issues arise now as 20 years ago: dismissal following the announcement of pregnancy, women being made redundant when on, or on return from, maternity leave, general prejudice that women who have children will lose their commitment to work, so are not worth promoting.

There have been many controversial cases on religion or belief discrimination. In what is perhaps an increasingly secular society the courts have held that the ambit of protection for those with philosophical beliefs is wide enough to cover a belief in man-made climate change, an anti-fox hunting belief, but not thankfully British Nationalism. The courts have robustly, and correctly, held that the rights of those with strong religious beliefs should not trump the rights of those with other protected characteristics, such as gay people and civil partners. For example, it is unlawful discrimination to refuse to provide bed and breakfast to a gay couple.

The public sector equality duty has been used to

1. Orders in 2012 extended protection against age discrimination to services and public functions with some specific exceptions

challenge the implementation of spending cuts by public authorities when no proper consideration has been given to the equality impact.

Great strides have been made in the area of equal pay thanks partly to the unions and partly, dare we say it, to those willing to take on no-win no-fee cases to force local authorities to pay women the same as men (see for example *Abdulla and others v Birmingham City Council* [2013] IRLR 38).

The headline changes: the good, the bad and the awful

The recent good news is limited. There are proposals for the equalisation of parental and surrogacy rights which recognises a cultural change of an increasing number of men (albeit still small) who want to take paternity and parental leave and play a greater role in caring for their children. Although the Flexible Working Regulations are to be repealed (in the Red Tape Challenge) they will be replaced by an ACAS Code which enables all employees, regardless of whether they have caring needs, to ask for flexible working. This should reduce some of the resentment against flexible working mothers and hopefully lead to more harmonious workplaces.

The bad and awful news is plentiful. Not only are rights being diluted but the mechanisms for enforcing them are being stripped away.

Some examples include the:

- increase of the qualifying period for unfair dismissal to 2 years, which was successfully challenged in the *Seymour Smith* case;
- proposal to remove, in April 2014, the EA questionnaire procedure;
- repeal of the provisions on third party harassment;
- proposed repeal of the power for tribunals to award recommendations in order to remedy discrimination in the workplace;
- dilution of the public sector equality duty;
- introduction of pre-termination negotiations which allow employers to have 'frank discussions' about the termination of the employee's contract; it does not apply to discrimination cases but how many employees will even understand what this conversation means let alone understand that it only applies to unfair dismissal cases?
- introduction of employee shareholders with reduced rights.

We could go on and there will be more to follow.

Enforcement of rights

More importantly, for the rights that we still have, including protection from discrimination, what good are they if workers and others cannot afford to enforce them and have no access to affordable advice?

For the first time we have employment tribunal fees. Some will afford them, reluctantly; others will have union backing or legal expenses insurance (which all advisers should check). Although there is a remission scheme for those on benefits or a low income it is fiendishly complex and already there is evidence of employees being out of time for lodging a claim because they could not find their way round the scheme. Many however, will fall outside the remission scheme or have partners with money, so cannot afford the hefty fee of £1,200 for taking a discrimination claim all the way.

Second, cuts in legal aid and local authority budgets have led to many law and advice centres closing, and a resultant reduction in the number of specialist employment advisers. Despite the fact that tribunals were intended to be accessible to unrepresented workers, the increasing complexity in the law and the absence of proper representation makes it all the more difficult for workers to understand and enforce their rights. They rightly fear that getting it badly wrong could lead to a costs award.

Third, the compensation for unfair dismissal cases is now limited to one year's loss of earnings and benefits, subject still to the cap of £74,200.

Fourth, the recession has badly impacted on workers' rights. It is no coincidence that there is a vastly increasing demand for food banks at a time when low paid workers in insecure jobs are having difficulty enforcing their rights. Access to too many jobs is through unpaid internships, which are often only available to those few who can afford to live on no money for what is often quite a long period and with no guarantee of a job at the end. This was successfully challenged by Chris Jarvis who received £4,460 (being the minimum wage) from Sony for work he carried out unpaid over a period of 60 days. Zero-hour contracts recently hit the press through publicity by 38 Degrees.[2] There is a challenge pending against Sports Direct for breach of the Working Time Regulations, a breach of the Part-Time Workers Regulations and indirect sex discrimination.

The evidence says it all. Tribunal claims were down by 15% in the year up to March 2012 and, in particular, sex discrimination claims (the most frequent

2. See www.38degrees.org.uk

type of discrimination claim) are down from 18,300 to 10,800, though pregnancy claims remain constant at 1,900 per annum. Age discrimination claims are down from 6,800 to 3,700. Fees and the threat of costs will deter many workers who have good claims and poor employers will have less to fear if they discriminate.

The future: what more is in store for us?

Will the positive culture change we have seen over the last 20 years remain when there are fewer effective remedies? Hopefully, the good employers with a strong equality culture and good policies and practices will continue in the same vein on the basis that it is good for business. But will less responsible employers think they can get away with more, as the risk of a challenge is less?

In the current world support for victims of discrimination is scant – limited in most cases to 'advice only'. Support available in 1996 now looks positively generous. RECs are rapidly disappearing (and where they do survive there is no funding for complainant aid work); funding from the current Equality and Human Rights Commission (EHRC) to advice agencies having totally dried up. Legal aid for discrimination cases is very limited and the EHRC only supports (very few) so-called 'strategic' cases, most of them being in the appellate courts. The EHRC itself has had its funding slashed when compared to the funding given the CRE and EOC in 1996.

This makes the role of the DLA even more important. We need to be adapting to a world where there may be rights but the remedies for many are limited, particularly for those cannot afford fees and are just above the remission level. The question is how we encourage, cajole, persuade, shame reticent employers, service providers and others to fear challenges to discriminatory practices? Unions clearly have a key role in holding employers to account and collective action should play a key part, though union membership is not high.

Do we need to rely more on 'naming and shaming'? The survey done by Kira Cochrane on the breakdown between male and female presenters, journalists etc. should have been a wakeup call to the media which has 'issues', particularly with equal representation of older women.[3] Should we be working with organisations like 38 Degrees, who led the charge on highlighting the unfairness of zero hours contracts, and Interns Aware[4] to expose worker exploitation, such as long-term unpaid interns? Perhaps we need more customer and client protests at bad practice. If organisations are boycotted because of tax dodges why not retail organisations with poor employment or customer practices around equality issues?

Of course, there will still be a core of DLA members and others fighting for employee and service users' rights and using whatever funding methods they can to pursue claims, whether through legal expenses insurance, no-win no-fee arrangements or pro bono.

More individuals are likely to rely on the internet and legal briefings for advice and information. It may be that the DLA *Briefings* should include more articles on subject areas in addition to the case summaries. So, for example, it might be useful to have a roundup of recent public sector equality duty cases and tips for identifying challenges. Other difficult areas are indirect discrimination (on all grounds), the practical impact of the change in the tribunal rules and how to obtain information when the EA questionnaire procedure is repealed.

One recent change is the increasing emphasis on resolution, conciliation and mediation. First there is the introduction of pre-termination negotiations; second, there is the change in the tribunal rules, which require tribunals to encourage the involvement of ACAS and other means of resolving their disputes by agreement. Third, the ACAS compulsory conciliation scheme is to be implemented in April 2014, when all claimants must first file a form with ACAS to see if resolution can be achieved before a claim can be lodged.

For those without support there needs to be more emphasis on early resolution of disputes to avoid the litigation that many employees cannot afford and most employers do not want. This means empowering employees with sufficient knowledge of their legal rights to negotiate themselves or with the help of advisers. The DLA has a huge role in taking this forward, probably bigger than ever.

Conclusion

The next few years will be tough for those who suffer from discrimination and those supporting them in exercising their legal rights. The process of winding-back and removing hard won legal rights and protection may depend on the outcome of the next election: if there is a Conservative majority government

3. http://www.theguardian.com/news/datablog/2011/dec/06/women-representation-media

4. Interns Aware campaign for fair, paid internships; see www.internaware.org

there may well be moves to repeal the Equality Act 2010, the Human Rights Act 1998 and withdraw from international obligations in these areas. Building alliances across the political spectrum to fight this will be our greatest challenge. The DLA's role will be central to this to ensure justice for the victims of discrimination.

A comparison of 1996 and 2013 (summary):

1996	2013
Grounds for discrimination (protected characteristics):	**Grounds for discrimination** (protected characteristics under the Equality Act 2010):
• **Race** – including Jews and Sikhs as 'ethnic groups' (decided through case law) • **Sex** (Gender) – including marriage, pregnancy (case law and EU Directives) and Equal Pay between men and women • **Transgender** (case law)	• **Race** • **Gender –** including **Equal Pay** between men and women • **Gender reassignment** • **Pregnancy and maternity** • **Disability** • **Sexual orientation** • **Religion or Belief** • **Age** • **Marriage and Civil Partnership**
Public Sector Equality Duties:	**Public Sector Equality Duties:**
Race Relations Act 1976 only (Section 71). Very weak legislative duty on local authorities only	**EA (Section 149)** covering all protected characteristics, except marriage and civil partnership. Stronger legislative requirements on most public authorities and other carrying out public functions. Regulations impose specific duties.
Support for victims of discrimination:	**Support for victims of discrimination:**
CRE and EOC offer support to individual complainants (although EOC only supported 'strategic' cases).	**Government Office (not EHRC) funds 'advice only' service** under a contract
CRE employs regionally based complainant aid officers (not necessarily lawyers) to offer advice and take cases to tribunals.	**EHRC only funds very limited number of 'strategic' cases**
CRE and EOC support cases to EAT and above	**No funding from EHRC to support local agencies**
CRE funds local advice and advocacy services provided by RECs, law centres, CABx. This includes advice and representation at tribunals	**Near collapse of REC and other advice agencies** through funding cuts
Legal aid available for appeals to EAT and above and county court and above	**Severe limitations to legal aid funding**

Civil Legal Advice – equality before the law?

Pam Kenworthy, Legal Director Howells LLP, has overall responsibility for delivering telephone legal advice services at Howells Solicitors. Between 2007 and 2013 Howells were the largest provider of the Legal Aid Agency's telephone advice service advising on over 200,000 cases. She looks at the history of publicly funded telephone advice services and the strengths and weaknesses of this form of service delivery, highlighting the changes brought about by LAPSO.

The Access to Justice Act 1999 (the Act) was a piece of progressive legislation which established Community Legal Advice and targeted public funding for legal advice on priority areas of need such as debt, employment, welfare benefits & housing.

At that time the removal of legal aid from personal injury cases caused considerable controversy amongst solicitors but looking back, when considering how to spend scarce resources, it seemed to be a good policy.

As part of the brave new world post the Act, the Legal Services Commission (LSC) (as it then was) engaged in a pioneering project to deliver maximum access to advice in social welfare law. Community Legal Services Direct started off with a pilot and then became a full service in April 2007 taking on its new name, Community Legal Advice (CLA), in 2010. The service had 13 different providers providing advice on debt, education, employment, housing and welfare benefits.

At its height CLA was handling about 400,000 telephone enquiries per annum with a target of answering 95% of all calls into the service. (This was a very significant achievement as other advice lines struggled to answer 50% of calls).

Clients calling an 0845 number would be triaged by the operator service. In order to access a specialist advisor, a client would have to meet the financial eligibility criteria on income and capital and their enquiry would have to fall within the scope of the service. Eligible clients were put through to a specialist straight away; those who were not eligible were signposted elsewhere or provided with information.

As the hours were from 9am – 8 pm this meant that workers could get advice outside working hours and it was a very useful service for those with caring responsibilities or mobility issues. The providers also dealt with very challenging clients who had been turned away from other agencies because of their behaviour. In addition there was no waiting for an appointment, and no travelling.

In the year prior to the Legal Aid, Sentencing & Punishment of Offenders Act 2012 (LAPSO), the LSC funded 1.09m specialist 'Acts of Assistance' or new cases (down from 1.29m year before), demonstrating a very significant demand for social welfare law advice.

CLA was very popular at the LSC because it demonstrated significant value for money being at least 45% cheaper than face-to-face advice. To be fair to face-to-face providers, this was due to the fact that a significant percentage of clients only received initial advice and assistance because they did not return a signed legal help form with evidence of means. However the 10% that did, received full casework, a fact that is not well known. CLA was (and in its new guise still is) able to provide a complete service from grievance, via proceedings to settlement, although representation has to be provided pro bono or on a contingency fee or private paying basis as the legal help scheme does not cover representation.

This was a different profile from face-to-face work which is mainly casework but where there is lower volume of enquiries.

Financial breakdown:

Year	Budget	Number of cases	Cost per case
2009/10	£23,845,000	417,440	£57.13
2010/11	£23,288,000	397,191	£58.64
2011/12	£19, 218,000	298,609	£64.35

The fall in calls between 2009/10 and 2011/12 was due to a number of factors:

The introduction of the Financial Inclusion Fund so that more debt work was being done by not-for-profit agencies who did not then refer on to CLA. At the same time there was an increase in the capacity of the national debt line and the Consumer Credit Counseling Service (now known as Stepchange). In addition the CLA providers noted a big fall in calls each time the service changed website. The LSC stopped marketing the service in 2010 and this has continued to be the policy of the Ministry of Justice (which is now responsible for the renamed Legal Aid Agency).

In addition CLA was a quality service; all providers

required a Peer Review 2 (PR2) also known as Competence Plus (long hand for good quality) and did the providers sweat to achieve it! Providers not achieving PR2 had their contracts terminated. The average achieved by most face-to-face providers at that time was PR3 (competence i.e. average quality) and therefore this demonstrated to policy makers that it was possible to cut costs and maintain quality. However, this can only really be achieved with a sufficient volume of work to ensure a sensible financial return.

During the last year of the old service, the employment law providers (Howells and Stephensons, both firms of solicitors) were dealing with 600-800 calls per month. The work was incredibly varied and included whistleblowing, TUPE, a variety of discrimination work as well as ordinary unpaid wages and unfair dismissal claims. Howells recovered over £10.5 million in damages for employment law clients and even before the recent changes to the scope of legal aid we were dealing with complex discrimination cases.

In April 2013, at a stroke, LAPSO virtually removed in its entirety the good work of the Act. All that is left is a rump of a legal aid system and a very reduced telephone service rebranded as Civil Legal Advice (new CLA).

The new Civil Legal Advice service

The new CLA is now the mandatory gateway to certain categories of law, including discrimination law, which are delivered virtually exclusively through telephone advice. Employment law has gone out of scope but clients can still get advice if there is an Equality Act 2010 (EA) issue.

Clients may access the service via the following methods:

By telephone:

- calling 0845 345 4 345
- texting 'legalaid' to 80010 and an operator will call them back
- booking a call back through the web form on www.gov.uk/community-legal-advice

Online:

- accessing www.gov.uk/civil-legal-advice or just search for Civil Legal Advice on www.gov.uk
- completing the online calculator via http://legalaidcalculator.justice.gov.uk

Face-to-face

- clients who meet one of the exemptions (i.e. they are in detention or are a minor) are able to contact providers directly in order to arrange a face-to-face appointment
- the provider can also decide that vulnerable clients are entitled to face-to-face work which must be provided either personally or through an agent.

Reasonable adjustments

The service has been set up to ensure that individuals can access it as easily as possible. Clients who have a hearing disability may obtain advice through new CLA by utilising the Minicom/Text Relay services. There is a specific number (0845 609 6677) on www.gov.uk/community-legal-advice for clients wishing to use these services. There is also a BSL interpreting service.

Clients for whom English is not their first language may obtain advice from new CLA by utilising the Language Line service. Language line provides translation in 170 languages. The operator service will identify clients who need this facility and will contact Language Line to undertake interpretation on a conference call. Once the client has been transferred to a specialist they will be able to continue advising the client using Language Line. The availability of this service has proved very popular as is demonstrated by the fact that 24% of clients calling new CLA are from BME groups. Also, as they can use the 'call me back' facility, an interpreter can be available right from the beginning of the call. Face-to-face providers will know how difficult it is to source interpreters and to arrange for them to be in the office at the same time as a client, particularly when either or both don't turn up for an appointment. This facility therefore means that all these difficulties are done away with and there is no loss of time or cost to the provider and the client gets an immediate service.

Other reasonable adjustments provided include accessible correspondence formats e.g. larger font size, easy read, audio and Braille.

Remit

The remit for new CLA work is widely drawn and includes all work under the EA including employment, goods and services, public services and education.

Exemptions to the mandatory single gateway include where the client is a child, a person in detention or a person who previously has been assessed by the gateway as requiring face-to-face advice, i.e. that the client is vulnerable or in the exempt category.

As part of the requirement for setting up the service the providers had to ensure a face-to-face agent or an office in each of the regions namely: London, Northeast, Midlands and east of England, Southeast, North West, Southwest, Wales.

There are now three providers; Howells and Stephensons have been joined by Merseyside Employment Law, a not-for-profit agency based in Liverpool. Between us we have about 30 solicitors and paralegals/caseworkers advising on discrimination law.

The work remains varied and the vast majority of clients are happy to receive a telephone-based service. This cannot be a surprise, bearing in mind the digital world in which we live and reflects how services are delivered in other industries that are far ahead of the legal sector with innovative delivery mechanisms. Indeed the Low Commission, currently tasked with looking at a sustainable future for legal aid, has recognised in its draft report the part that digital services will play in the future. [See Briefing 686 on the DLA's 2013 conference.]

Telephone services are often criticised as being limited in reach because only a certain type of person can use the service. My experience over the last six years is to the contrary and we have assisted a wide variety of individuals including those traditionally regarded as very vulnerable. Indeed we have represented clients who have been banned from other agencies because of their challenging behaviour. It is frankly much easier to deal with an angry client with mental health difficulties when they are at the end of a telephone than when they are sitting opposite you in an interview room.

Last year we settled a harassment claim for a Lithuanian woman with a severe hearing impairment. She accessed the service through a third party and despite several suggestions that she go to a face-to-face provider she remained at CLA as she said that she found it to be the most convenient way of getting advice.

We also saved the life of a man in Liverpool who was so desperate that he rang and said that he was about to take his own life. We called an ambulance and he was rushed to hospital and survived. We also managed to sort out his case.

We are often asked how we manage with the large volume of documents that often accompany discrimination cases. Face-to-face providers are often faced with large carrier bags. Ours just arrive via the post. We provide a free post service and clients not able to pay can send their documents in at no cost.

The development of digital services does not mean that there is no future for face-to-face services. A mixed economy of advice providers ensures that everyone has access to assistance. It is recognised that the most vulnerable clients do need to be able to access face-to-face advice but if others can access advice in other ways this frees up scarce resources for those who need it the most.

Discrimination cases

Six months into Howells' most recent contract, there have been no court or tribunal decisions. We have however been able to advise on a wide variety of claims including:

- failure to provide reasonable adjustments in a Post Office for a disabled client with mobility problems who had to wait in line when he had previously been allowed to go to another counter and get served immediately;
- failure to make reasonable adjustments for a disabled motorist who was fined for not returning to his car in time for when his parking ticket ran out. There has been litigation over this issue and it is therefore a surprise that local authorities are still fining disabled motorists in these circumstances;
- direct discrimination against transgendered individuals who were variously excluded from a public house/a casino/a beauty salon. Prior to the EA, transgendered individuals did not have protection in goods and services claims and it is likely that organisations still remain unfamiliar with their duties in this respect;
- failure to make reasonable adjustments for students with learning difficulties in further education. Despite quite sophisticated approaches to responding to learning difficulties it still remains a challenge for some students to get the right reasonable adjustments to get them through their degrees and other courses.

Future of new CLA

New CLA continues to be an incredibly accessible, specialist service. The concentration of specialist advice in a small group of providers should ensure that clients receive a high quality service in what is an exceptionally complicated area of law which in the past has not always been delivered in a consistent way.

Other benefits of the service include root cause analysis; for example, reporting on why we are getting so many cases on a particular element of a category of law and, where appropriate, making suggestions to address the cause of the problem at source.

However, the main problem is that no one really knows about new CLA. As Steve Hynes reported recently in Legal Action Group *'figures from the Legal Aid Agency (LAA) obtained by LAG and released [Monday September 9, 2013] show dramatic shortfalls of up to 77% in the number of civil legal cases. LAG believes this has been caused by a number of factors, including the government's failure to properly advertise the availability of civil legal aid. Using the LAA figures, LAG has calculated that in*

April, May and June, there were shortfalls against the estimated number of cases of 34% in housing, 68% in debt and 77% in discrimination. There was a total of 52% fewer cases than the government had predicted for initial help and advice (known as Legal Help cases) in debt, housing, education and discrimination law.'

It is certainly true that prediction of nearly 7000 cases per annum in the invitation to tender have not materialised; providers can only speculate that this is due to the fact that a lot of advisors/solicitors, those who are 'problem noticers', let alone members of the public do not know that legal aid is still available for discrimination law advice including employment cases.

Furthermore, finding out about the service on the web is extremely difficult. Google 'discrimination advice' and you get CAB, Equality Advisory Support Service and Gov.UK with no mention of new CLA. As there is no marketing, the low profile of new CLA cannot be a surprise. It is a very significant concern for access to legal advice but one that suits the government's current agenda on cutting legal aid.

That telephone advice is here to stay as part of a suite of advice services cannot be denied. Making sure that those who need it can find it is the challenge for the future in order to keep the spirit of the Access to Justice Act alive.

Employment claims issued prior to LASPO include:

Cuthbertson v MacIntyre Care, Watford Tribunal 3300669/2013:

The claimant worked in a special school and was seriously sexually assaulted by one of the pupils. She went off sick with post assault stress. Prior to the assault, the claimant had raised serious concerns about the risks posed by the pupil who had attacked her and warned that some one was going to get hurt. She had been promised more male staff but this did not happen. Her proposal was not taken seriously and no training was provided to deal with the particular difficulties of working with this pupil.

After a month off work the respondent proposed options for a return to work at the school despite the fact that the pupil remained there. The claimant refused to return but suggested as an alternative working at a different site. She eventually returned to work seven months after the assault.

The tribunal found that the claimant had suffered indirect sex discrimination. The provision, criterion or practice (PCP) was the requirement to work with the particular pupil who had assaulted her. The tribunal also found that the respondent knew that detriment to female employees could result from that PCP and as a result it was not possible to find that the PCP was not applied with the intention of discrimination against the claimant. The respondent's justification defence was unsuccessful.

The tribunal awarded £10,000 injury to feelings which recognised the seriousness of the assault, the fact that the claimant had suffered abuse as a child and had felt let down by the actions of her employer and their failure to apologise. In addition the tribunal recommended that the respondent issued a written apology for failing to provide a more substantial response to the risks identified on an interim basis pending a full reassessment of risk and strategy. The judgment of the tribunal is quite far ranging but it did decline to make specific recommendations with regard to working practices in the school.

Siddiqui v Marks & Spencer PLC, London Central Tribunal 2203983/2011:

The claimant is disabled. He had a bad back and suffered from chronic lower back pain as a result of an accident at work. He worked for the respondent on the tills/ checkouts which required standing for a continuous period of 8 hours per day which was very difficult for him. He was told he could not have a chair as the chairs the respondent had were not suitable and the checkouts in his store were not adaptable. The respondent offered the claimant a return to work on a strict rotation basis of one hour standing, one hour sitting down which the claimant declined as his back pain and the requirement to sit down did not follow a pattern. The claimant was signed off sick on July 28, 2010 and remained off work until mid-2011 when he was dismissed as no reasonable adjustment was made.

The tribunal found that the claims for unfair dismissal, indirect discrimination, discrimination arising from disability and a failure to make reasonable adjustments were well founded. The PCP for both the indirect discrimination and failure to make reasonable adjustments was the requirement to stand all day which put him at a particular disadvantage compared to non-disabled employees. The case subsequently settled.

It was a surprise that such a straight forward case would result in a contested hearing when in reality the only thing the claimant wanted to do was to sit down from time to time whilst at work, which could not have been a more reasonable adjustment.

Recently issued claims include more disability discrimination claims, harassment and a number of cases where the claimant has pursued the case to tribunal and now wants advice on EAT and appeals to the Court of Appeal so the future looks very interesting from a casework point of view.

A wider and deeper culture of suspicion

Barbara Cohen, discrimination law consultant, highlights her concerns about main parts of the Immigration Bill, in particular the immigration control functions to be imposed on landlords, GPs, employers, banks and marriage registrars. She refers to the damage already done by the rhetoric leading up to the introduction of this Bill and warns of the creation of a hate-inspired and groundless culture of suspicion that will follow if the Bill is implemented as drafted.

On October 22, 2013, after six hours of debate, 303 MPs agreed and 18 disagreed that the Immigration Bill (the Bill) should have its second reading; this means that approximately half of the total number of MPs (including members of the Shadow Cabinet) did not vote at all.

Turning the clock back 15 years, in 1998 the Commission for Racial Equality (CRE), with the Joint Council for the Welfare of Immigrants and the Refugee Council, published *'A Culture of Suspicion'* summarising research into the impact of the immigration checks that employers, local authorities and hospitals were then required to carry out. The research found many examples of people legally entitled to work who were refused employment or dismissed and others wrongly refused social housing or disability benefits because of faulty assessment of their immigration status; it also found employers and officials confused regarding people's entitlements to work or to receive benefits or services. Some officials regarded the new burden as conflicting with their role as service providers. The adverse impact was felt by settled ethnic minorities as well as immigrant and refugee communities.

Looking back only a few months, the DLA spent much of the summer of 2013 responding to consultations on three of the headline features of the Bill: *'Tackling illegal immigration in private rented accommodation', 'Strengthening and simplifying the civil penalty scheme to prevent illegal working'* and *'Migrant access and their financial contributions to NHS provision in England'*.

Drawing parallels with the recent consultation on legal aid about which Stephen Sedley[1] commented *'The trouble is that there are so many … objectionable proposals… it's not easy to know which, if any, of them are kites',* that is, those outrageous proposals which the government expects to abandon after distracting attention from other objectionable proposals. Certainly I have not been able to find other than wholly objectionable any of the proposals now embodied in the Bill, not all of which have been subject to public consultation.

In commending the Bill to the House the Home Secretary said *'It is ridiculous that the odds are stacked in favour of illegal migrants. It is unacceptable that hard-working taxpayers have to compete with people who have no right to be here. The Bill will begin to address those absurdities and restore balance'*.[2] Yvette Cooper, Shadow Home Secretary, stated that while some of the measures in the Bill are 'sensible' others are *'confused and some are of serious concern'* adding *'the Opposition will not oppose the Bill as we believe it should go to Committee so we can amend and reform it….'*[3]

The Bill is in four main parts, all of which raise significant legal, human rights and equality issues: in this short article my focus is on Part 3 – [denying!] access to services which includes residential tenancies, the NHS, bank accounts, employment and driving licences, and Part 4 – marriages and civil partnerships. These two parts take further than ever the imposition of immigration control duties onto people wholly outside the Home Office Directorate of Immigration Enforcement (formerly the UK Border Agency).

The measures within Part 3 were heralded as intended to *'stop abuse of public services'*, *'encourage those with no rights to be here to leave'* and, as ever, *'to address the concerns of hardworking people'*, from the start implicitly excluding migrants as hardworking. This is to be done by imposing immigration control functions, reinforced by financial penalties, on private landlords and strengthening the penalties on employers already burdened with immigration control functions. It is also to be done by making GPs and NHS hospitals, the DVLA and the banks check immigration status to determine entitlement to services. Part 4 strengthens the duties on marriage registrars to examine the status and

1. *'Beware Kite-Flyers'* London Review of Books, page 13, Vol. 35 Number 17, September 12, 2013

2. Hansard Col 168

3. Hansard Col 176

credibility of migrants intending to marry or enter into civil partnerships.

Some Labour MPs said they felt compelled to oppose the Bill at second reading, primarily, but not solely, those whose constituencies include substantial numbers of ethnic minority households and migrants from the EEA and elsewhere. They spoke about different aspects of Parts 3 and 4 of the Bill but generally concluded that these provisions will cost more than they will gain; this could be costs in terms of negative impact on communities, wrongful denial of access to services and discrimination, and disproportionate financial costs of implementation weighed against still unclear benefits of creating a hostile environment for irregular migrants, reducing them to homelessness and poor health to encourage them to leave, and possibly an unreal expectation that such measures will reassure (and gain votes from) those 'hard working families' so often used to justify harsh treatment of migrants and other vulnerable groups.

Some Conservative MPs recognised inherent problems *'The issue of potential discrimination… is a real one...'* [4]

David Lammy MP warned the House, *'I am afraid that whatever the damage that is done by the detail of the Bill when, I dare say, it is ultimately passed, some of the worst damage has been done in our debate in the lead-up to it. The language with which this was brought forward is what really causes the damage in terms of community relations.'* [5]

The remarks by Nigel Mills, MP for Amber Valley illustrate David Lammy's point regarding the impact of the rhetoric leading up to the Bill and the language of politicians and much of the media in their regular vilification of migrants:

> *Immigration remains among the issues that most concern my constituents; that was the case in the run-up to the last general election, and it is still the issue most raised on the doorstep. Not totally surprisingly, perhaps, my constituency does not experience huge immigration – according to the last statistics I saw, I had two of the five most ethnically English towns in the country – but there remains a fear of immigration. What people see, perhaps in neighbouring towns, causes them concern, perhaps over and above the real extent of the problem (my emphasis). Nevertheless, they are concerned...* [6]

4. John Howell MP, Hansard Col 192

5. Hansard Col 184

6. Hansard Col 212

Imposition of immigration control functions on private landlords

Approximately one quarter of the Bill, 16 out of 66 clauses, is devoted to the immigration control functions to be imposed on private landlords. More than half of consultation respondents disagreed with this proposal.

One would laugh if the reality of the proposed landlords' checks were not so ominous, as the Residential Landlords' Association points out: *'For a government committed to reducing the burden of red tape it is ironic that they are now seeking to impose a significant extra burden on landlords making them scapegoats for the UK Border Agency's failings'.* [7] There is a further lack of fit between the government's intentions to simplify requirements on small businesses and the additional potentially complex obligations it is placing on private landlords, the vast majority of whom are small or micro businesses.

Private landlords will face a substantial financial penalty if they take on as tenants (or sub-tenants or paying lodgers) anyone not entitled due to their immigration status to be living in that place; they can avoid the fine if they check the immigration status documents of every tenant and other adult occupiers. The Home Office consultation document listed 15 different immigration documents a landlord might need to check: four of eight for non-EEA citizens must be verified by calling the Home Office advice line, and one for UK citizens is only valid if checked with one of eight others. During the second reading debate several MPs explained that because of different procedures for the issue of identity cards in certain EU member states, there are more than 400 documents any one of which could be presented to a landlord, untrained in immigration matters, to verify.

No landlord wants to risk incurring financial penalties. As the DLA and many others pointed out, one obvious way to avoid such risk is not to take on a tenant who might be a foreign national or lack a UK passport. The current 'sellers' market' means very little chance of a less risky tenant not being found. Anyone seen as likely to pose a risk is less likely to be offered a tenancy, and disproportionately these will be people from BME and migrant communities. That this measure will bring renewed race discrimination – a grim reminder of 'no blacks, no dogs, no Irish' signs we thought were long gone – was highlighted in many MPs' speeches. During the consultation the DLA had strongly urged that this

7. http://news.rla.org.uk/landlords-oppose-governments-immigration plans

proposal should be dropped. We warned that without evidence that it would be effective in achieving the government's aims or even workable, the likely negative outcomes are clearer: it would impose a disproportionate burden on private landlords, it is likely to incentivise landlords to discriminate unlawfully, to drive irregular migrants and others into unfit accommodation at exploitative rents and to heighten the climate of suspicion towards all migrants already affecting communities.

Three days after the Bill was introduced the BBC broadcast the results of its testing of estate agents in London.[8] Without any incentive other than making a quick profit, 10 estate agents in London did not hesitate to discriminate against African-Caribbean prospective tenants when they understood that is what the landlord would have wanted. This suggests that if this proposal is enacted and brought into force, landlords keen to avoid any risk of a penalty should have no difficulty in finding agents who would comply with their request not to show a property to anyone who looks or sounds foreign or cannot produce a UK passport.

One small glimmer of hope, one major positive outcome of the recent consultation, is the recognition by the government of the need to try to prevent the discrimination which is so likely to be the result of this proposal (although without acknowledging any obligation under the PSED in this regard). Clause 28 of the Bill requires the Home Secretary to issue a statutory code of practice, after consultation, which will specify what a landlord or agent should do to avoid race discrimination[9] when taking steps to avoid liability to pay a penalty.

Immigration checks for access to NHS services

The DLA explained in detail in its consultation response that the proposal to require non-EEA migrants to pay a health-surcharge in order to access NHS services was not only unworkable, detrimental to public health and control of communicable diseases, expensive and likely to cost more than it saves, but also such a scheme was likely to incentivise unlawful discrimination, delay or exclude irregular migrants and their families from access to medical care and heighten the climate of suspicion towards all migrants and others who may be perceived as migrants. *'GPs must not be the Border Agency'* was the response from the Royal College of GPs.[10]

Employers to face stiffer penalties

The matters relating to the prevention of illegal working on which the DLA was consulted are mainly to be dealt with by amending secondary legislation. The DLA submitted that to increase the maximum penalty for employing an illegal worker is more likely to lead to discrimination than to more rigorous checking by employers. From DLA experience it is clear that many employers take an extremely risk adverse approach to the existing regime, including accepting only EU nationals, accepting only familiar documents, moving quickly to dismiss if there is any doubt about an existing employee's right to work or engaging workers subject to immigration control as 'self-employed contractors' rather than employees. This risk adverse behaviour means that those with the right to work, but who appear to pose risk are less likely to be employed and more likely to be dismissed than those who do not appear to present that risk. Inevitably, these negative consequences are visited disproportionately on those who are BME or from outside the UK.

The DLA was appalled to find that before proposing increased sanctions the Home Office had done nothing to assess the equality impact of the current system. We commented that the substantial risk of race discrimination arising out of the sanctioning of employers is first, obvious and second, has been the subject of discussion and government guidance for many years. The government's bland statement that the scheme will only disadvantage those who do not have the right to work plainly ignores this risk.

Increased immigration control duties on marriage registrars

There was no public consultation on proposals to tighten the immigration control duties of marriage registrars now in Part 4 of the Bill. The DLA is aware that many registrars find an unwelcome conflict between the service they have been appointed to provide to all members of the public and the ever stricter obligations on them to be suspicious of couples' intention to marry or to become civil partners. Under the Bill when either or both are not UK, EEA or Swiss nationals, registrars will be expected to make more detailed enquiries, to demand and scrutinise additional information, and in many such cases to refer the proposed marriage or civil partnership to the Home Secretary to investigate.

8. http://www.bbc.co.uk/news/uk-england-london-24372509

9. Under the EA or the Race Relations (Northern Ireland) Order 1997

10. Dr Clare Gerada, quoted in *The Guardian*, 22.10.13 p.4

Altogether a wrong and dangerous way to go

Not unrelated is the government's intention to exclude from access to legal aid anyone not able to satisfy a two-pronged residence test. Thus at about the same time as migrants will begin to find themselves required to justify themselves and their entitlement to housing, employment, banking services, a driver's licence or a peaceful marriage or civil partnership, any migrant without substantial means will be unable to seek legal redress when they are wrongly denied any of these services and rights.

We are now on a downhill roller coaster towards a far wider and more oppressive regime of internal immigration controls initiated and reinforced by a far more ruthless, hate-inspired, groundless culture of suspicion than most people would have envisaged when the CRE raised concerns in 1998. Would that those who govern and those who make the laws realise that what they are proposing and the rhetoric with which they are doing so will harm the whole of our society, including those 'hardworking people' in whose purported interests these proposals are being promoted.

Briefing 686

Equality 2015: Setting the Agenda

Barbara Cohen, chair of the DLA, and Michael Newman, vice-chair of the DLA, report on the DLA's 2013 conference *'Equality 2015: Setting the Agenda'.*

More than 100 people attended the DLA conference on October 21st. A main aim of the conference was to encourage participants to think about policy initiatives to achieve a more equal society looking towards to the General Election in 2015.

The importance of greater equality was clear from the start of the day. A warm welcome was given by Daniel Ellis, partner at Baker & McKenzie. He referred to his firm's work to improve the equality and diversity performance of their international corporate clients.

Lord Colin Low gave the keynote address. He used his long involvement with the RNIB and his wider campaigning experience to illustrate the three essential demands of disabled people: consultation and representation; inclusion; and, non-discrimination. Not so many years ago the RNIB was led, managed and staffed wholly by sighted people and operated as a paternalistic charity for blind people. Gradually, blind people were represented on the board and the views of blind people began to shape RNIB policies. Lord Low expressed his concerns regarding definitions of disability and that in at least some cases in applying the social model of disability the fact of impairment should not be ignored.

Lord Low previewed some of the likely recommendations of the *Low Commission on the Future of Advice and Legal Support*. His four items for the 2015 equality agenda were the UK to remain fully committed to the ECHR, to retain the Human Rights Act, to maintain an effective EHRC and to protect the PSED.

Karon Monaghan QC opened the morning plenary session. She considered a number of trends emerging from recent case law in answering *'Are the courts protecting us?'* She began with examples of the courts filling gaps caused by poor drafting of the EA or anticipated gaps following repeal of certain sections of the EA by the Enterprise and Regulatory Reform Act 2013 (ERRA). While the ERRA has repealed s40(2) – (4) of the EA, Monaghan suggests that this will not relieve an employer of liability for harassment of their employees by third parties, it will only make the circumstances in which such liability arises much less clear. The EU anti-discrimination directives do not explicitly prohibit harassment by third parties but they anticipate that it should be outlawed at the least where it might have been foreseen or prevented – see *Sheffield CC v Norouzi*.[1]

The ERRA repeal of the statutory questionnaire procedure seems to conflict with the government's encouragement of early resolution. Monaghan explained how in this regard as well we will be able to rely on the courts, referring to *Meister v Speech Design Carier Systems BmBH*. [See Briefing 638][2]

An example of the courts stepping in to fill gaps in EA drafting is the omission in the EA of protection against post-relationship victimisation (a matter the DLA raised with the GEO nearly three years ago). In the employment context *Onu v Akwiwu*[3] [see Briefing 681]

has been able bring post-termination victimisation within the EA by extending the meaning of employer and employee. This leaves a gap for non-employment areas and former students, former members of associations, and former service users still unprotected against victimisation.

Referring to the general lack of success of cases challenging 'austerity measures', Monaghan would put first in setting the equality agenda the bringing into force of s1 EA, the socio-economic duty on certain public authorities. This would recognise the close link between poverty and discrimination, and the experiences of disadvantage associated with the protected characteristics. Her next priority is that we should continue to litigate. She postulates that the courts may in future take on a greater role in developing the common law in the sphere of human rights. *'If we can't trust the legislature to protect us, we may have to fall back on the judges'.*

Professor Mark Bell considered the very topical questions, *'Can we rely on Europe? Is Europe the answer?'* He suggested that in relation to equality and other employment-related protections the EU provides a floor of rights below which no member state's national laws may fall. Further, the EU has in the past served as an engine for change – taking initiatives which, on their own, legislatures in many member states would not take. The most recent EU initiative in relation to equality was the proposed directive which would have extended the scope of protection going beyond employment on grounds of disability, religion or belief, sexual orientation and age. This was proposed by the European Commission in 2008 and considered by the European Parliament, but has since been trapped in a political deadlock. Bell also mentioned other EU initiatives, including maternity leave and the draft directive to improve the gender balance among non-executive company directors. Recent cases illustrate ways in which the CJEU has offered a wider interpretation of provisions in the anti-discrimination directives. Bell's conclusion was that at a minimum Europe serves to hold back the tide of deregulation.

The public sector equality duty was the final topic for the morning. Professor Aileen McColgan began by looking back at the enactment in 2000[4] of the race equality duty which, replaced an earlier duty on local authorities in the RRA. The essential difference was that the new s71 was to be enforceable. In McColgan's view it is a matter of real concern that the specific duties (for England) imposed under the EA *'have been watered down from those imposed by the predecessor provisions'*, and that now even these weakened duties may be under threat. McColgan provided an overview of the case law under the race, disability and gender equality duties and the PSED. She began with *Elias*[5] which had paved the way for s71 to become a *'valuable tool in public lawyers' toolkit and had radically expanded the parameters of British discrimination law'.*

McColgan commented that in the early cases challenges often succeeded because public authorities had flagrantly failed to pay any attention to the equality implications of their actions. Now it is more common for a public authority to have paid some regard and the issue between the parties is whether such regard is sufficient.

In recent cases the courts have reminded applicants that the PSED is not a duty to achieve a particular result, and it is for the decision-maker to decide what weight should be given to the equality implications when they are put into the balance with countervailing factors. The decision-maker must conduct a rigorous examination of a proposed measure, but is not required to undertake a minute examination of every possible impact. Overall the cases emphasised the need for public authorities to mainstream equality analyses in its decision-making processes. Where a public authority has gathered the right information and asked the right questions its decision is unlikely to be challengeable.

John Halford then took us through the recent months of the PSED which, 13 months after coming into force, became subject of a government review, based on the government's Red Tape Challenge. A 'subtext' to this review was the Prime Minister's speech to the CBI in November 2012 *'calling time on Equality Impact Assessments'*. As Halford explained, the review was carried out along several parallel lines: by GEO officials, by the so-designated independent steering group and by qualitative research conducted by NatCen. This last involved on-line consultation and in-depth interviews with 91 individuals from 83 public sector organisations. Halford highlighted the NatCen conclusions, which differed in many ways from the conclusions of the steering group. The general view expressed to NatCen was that the PSED was either working well or had the

1. [2011] IRLR 897

2. Case C-415/10

3. [2013] IRLR 523

4. Race Relations (Amendment) Act 2000

5. *R (Elias) v Secretary of State for Defence* [2005] EWHC 1435 (Admin) and [2006] EWCA Civ 1293

potential to work well. Research participants identified many ways within their organisations in which the PSED had made a positive difference.

The steering group acknowledged lack of evidence in reaching different, tentative conclusions on which they based their commendations involving actions by the EHRC, regulators/inspectors/ombudsmen, public bodies, government and contractors. The Minister for Women and Equalities accepted all of their recommendations. She also agreed to undertake a full evaluation in 2016.

In looking towards the future, Halford's vision was quite bleak: equality considerations to be played down in procurement, and better guidance but only for 'minimal' compliance. He asked whether a greater role by regulators and inspectors would be a trade-off for an ouster clause for judicial review other than by the EHRC. Would the specific duties be abolished? Might the courts move to establish equality as a mandatory consideration at common law? What will public authorities do now?

During the afternoon more than a dozen speakers led workshops on nine current topics offering opportunities for debate and discussion amongst the participants.

A panel discussion, *'Equality 2015: options for the way forward'*, brought the conference to a lively end. Chaired by Ulele Burnham, panel members began by stating their priority equality options. Paul Harrison, from the Employment Department at Baker & McKenzie, expressed the concerns of his corporate clients. These included weeding out unmeritorious discrimination claims, which seemed to be increasing, at an early stage, and wanting to protect employers from onerous equal pay audits. Ben Moxham from the TUC Equality and Employment Rights Department had four items on his list of priorities; abolish ET fees, make the PSED work properly, require equal pay audits and provide statutory rights for trade union equality reps. Sandra Kerr OBE from Business in the Community/Race for Opportunity used her slot to highlight the decreasing levels of participation of ethnic minorities at different stages of life chances: 1 in 4 at primary school, 1 in 8 in employment and 1 in 16 in senior employment positions. When ethnic minority students leave university they are more likely to be unemployed than their white counterparts, and currently the BME employment gap is 12%. Ali Harris, who leads on equality strategy at Citizens Advice, wanted to see implementation of the socio-economic duty under s1 EA; she wanted the PSED to become an effective negotiating tool; at local level she wanted to see a re-thinking of relationships within workplaces, and at national level she wanted to reframe the 'reform' agenda to stop the erosion of a safety net of rights.

Participants then entered into discussion with panel members, some more optimistic than others with regard to the future prospects for equality, but most energised to *'keep up the fight'* towards 2015 and beyond.

Briefing 687

A giant step forward for protection against sex discrimination

Eremia and Others v Moldova European Court of Human Rights, Application No 3564/11, [2013] EqLR 911; May 28, 2013

The European Court of Human Right's (ECtHR) judgment in *Eremia and Others v Moldova* represents a significant step forward for protection against sex discrimination specifically by recognising the 'gendered' and discriminatory nature of domestic violence. However its implications may reach further.

Facts

The main applicant (E) was a woman who had been subjected to domestic violence by her husband. Significantly, her husband was a serving police officer. Their two daughters were also applicants.

E made numerous criminal complaints. However one of the criminal investigations was suspended for one year provided that her husband did not commit any further offences. She also requested an urgent examination of her request for divorce but this was refused.

Ultimately the Moldovan court granted a protection order requiring E's husband to stay away from the family home and prohibiting contact with E and their daughters for 90 days. That order was repeatedly

breached and the authorities did very little. Indeed it was alleged that on one occasion, an official suggested E reconcile with her husband, as she was *'not the first nor the last woman to be beaten up by her husband'.*

E claimed that her rights under Articles 3 (freedom from torture and inhuman and degrading treatment) and 14 (freedom from discrimination) had been breached. Her daughters also brought claims under Article 3 but the court re-categorised their claim as a complaint under Article 8 (right to private and family life).

Judgment

The ECtHR held that Moldova had failed in its positive obligations to protect E from domestic violence, specifically failing to take effective measures to prevent a recurrence of the violence. They noted that E was particularly vulnerable because her husband was a serving police officer.

The court considered that the suspension of one criminal investigation had the effect of shielding him from criminal liability, rather than deterring him from committing further violence. This, they said, resulted in him having virtual impunity for his actions.

As to their daughters, they had repeatedly witnessed their father being violent towards their mother in the family home. The court held that the state's failures towards their mother also resulted in failures towards them in light of the context of domestic violence occurring within the family home.

The part of the judgment which is of real significance for discrimination practitioners relates to the Article 14 claims.

Firstly the court recalled its judgment in *Opuz v Turkey* (No 33401/02, 2009) which held that the state's failure to protect women against domestic violence breaches their right to equal protection under the law.

Secondly the court held that the authorities in this case were well aware that E was being subjected to violence from her husband. They noted the refusal to speed up the divorce process, the pressure she had come under to drop her criminal complaints and the failures to enforce the protection order. They also noted the effective impunity that her husband had been given. Consequently they held that the authorities' actions were not a simple failure or delay in dealing with the violence. Rather they amounted to *'repeatedly condoning such violence and reflected a discriminatory attitude towards the first applicant as a woman'.*

Thirdly the court explicitly recognised the findings of the UN Special Rapporteur on violence against women in relation to Moldova and held that they *'only support the impression that the authorities do not fully appreciate the seriousness and extent of the problem of domestic violence in Moldova and its discriminatory effect on women'.* (Paragraph 89)

Implications for practitioners

There are three key implications of this judgment for practitioners.

Firstly the ECtHR explicitly recognised the 'gendered' nature of domestic violence and specifically recognised the discriminatory attitude of the state.

The difference between the judgments in *Eremia* and *Opuz* lies in the approach taken by the court.

In *Opuz* the ECtHR had considered extensive material before finding a breach of Article 14. In particular, it had considered the provisions of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the findings of the CEDAW committee that gender based violence was discriminatory, the Council of Europe recommendations relating to domestic violence, the Inter-American system and other comparative law material. The court then considered a variety of reports and statistical analyses relating to domestic violence that were highly critical of the situation of women in Turkey, including criticisms of Turkey by the CEDAW committee. It was only on the basis of this wealth of material that the ECtHR found that *Opuz* had:

> *been able to show, supported by unchallenged statistical information, the existence of a prima facie indication that the domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence.* (Paragraph 198)

The necessity in *Opuz* for such extensive material in order to establish discrimination is in stark contrast to the approach in *Eremia*. In *Eremia* the court simply accepted that domestic violence was in and of itself 'gendered'. Therefore a failure to protect a woman from such violence could constitute discrimination. There was not the same extensive and painstaking examination of material in *Eremia* to show that domestic violence mainly affected women.

The second point to draw from the judgment is the reliance on CEDAW and the CEDAW committee report. CEDAW is a very under-used convention but it contains very powerful rights for women. At the very least as practitioners we should be aware of those rights

and seek to use the convention in the interpretation of domestic legislation.

Thirdly, it is important to recall that Article 14 is a parasitic right and only comes into play where other rights, such as Articles 3 or 8 are in play. However there are many other issues which are 'gendered' issues and thus may bring Article 14 into play, together with, for example, Articles 3 or 8. A case involving female genital mutilation or an 'honour' killing or attack may benefit from applying Article 14 where domestic law arguments are difficult or where there has been a failure of protection by public authorities. It may be that this could be extended to cases involving issues such as gender based hate speech or fake rape videos on social media. Another area to be aware of in which Article 14 may be of assistance relates to access to services which are predominantly required by women. Examples may be a failure to provide access to abortion clinics or screening for cervical cancer.

Conclusion

Eremia represents a giant step forward in the recognition of domestic violence as a 'gendered' issue. It is not denying that some men are subject to domestic violence but it is an important recognition of its disproportionate impact on women. It is also a wake up call for practitioners to use the tools available to them in the shape of international conventions including Article 14 and CEDAW.

Sarah Fraser Butlin
Cloisters
sfb@cloisters.com

Briefing 688

Identifying discrimination embedded in bureaucratic processes

Horváth v Hungary European Court of Human Rights, Application No 11146/11; [2013] EqLR 835; [2013] ELR 102, January 29, 2013

Facts

Summary

This case concerns the discriminatory treatment of two Roma children within the schools' system in Hungary. The Hungarian authorities diagnosed both children as mentally disabled and moved them out of mainstream schooling into a remedial school. They started legal proceedings in their late teens claiming that they had been discriminated against because of their Roma origin. Ultimately they argued in the European Court of Human Rights (ECtHR) that their placement in the remedial school breached Protocol 1, Article 2, read with Article 14 of the European Convention on Human Rights (ECHR) by unlawfully interfering with their right to education.

Social and cultural context

Historically a high percentage of Roma children in Hungary were moved out of mainstream education following IQ tests and other assessments of their mental abilities; 40 to 50% of pupils at the remedial school attended by the complainants were Roma. According to statistical information published in 2007/2008 less than 1% of students identified as having special educational needs had the opportunity to enter mainstream secondary education offering the Baccalaureate. The complainants argued that their opportunities had been limited by discrimination because they had been unable to pursue their preferred occupations via Baccalaureate, which was not offered in the remedial school system.

Scholarship on the education of Roma children in Hungary indicated that systemic misdiagnosis of Roma children had been used to segregate Roma children from non-Roma children in schools since the 1970s. Because of this, in 2003 the Hungarian Minister of Education commenced a programme of re-diagnosing students in remedial schools.

The complainants

István Horváth (IH) was born in 1994 and first assessed as having a mild mental disability by the County's Expert and Rehabilitation Panel (Expert Panel) in 2001 when he was 7 years old. He was subsequently moved to a remedial primary and vocational school. Interestingly the Expert Panel informed his parents that he would be moved before the test had taken place. He was examined by the Expert Panel again in 2002, 2005 and 2007 and each time the diagnosis was confirmed.

András Kiss (AK) was born in 1992 and was also assessed at a young age as having a mild mental disability and transferred to the same remedial school. Despite AK's' outstanding accomplishments in the remedial school the Expert Panel repeatedly confirmed the diagnosis.

In 2005 both complainants underwent an assessment by independent experts while at a summer camp. IH was assessed as not mentally disabled or unfit for mainstream education. AK was assessed as having learning difficulties but was otherwise found to be of sound mind. The independent experts criticised the fairness of previous assessments and pointed to cultural prejudice within a number of the intelligence tests.

Court of First Instance

On November 13, 2006 the claims were filed in the county court against the Expert Panel, the County Council (the Council) and the remedial school. The complainants alleged that their misdiagnoses and placement in remedial school was discrimination on the basis of their ethnicity and social and economic background. They argued: some of the tests were culturally biased and the whole diagnostic process applied by the Expert Panel failed to take into account social and cultural differences; the procedure was conducted in breach of their constitutional rights because their parents had not been properly involved; the Council had failed to control the Expert Panel; and the school had failed to recognise they were of normal mental ability.

They sought a finding that the principle of equal treatment had been violated and their rights to education under national law had been infringed. The court ordered the complainants to be examined by the National Expert and Rehabilitation Committee (NERC), and in May 2009 ordered damages of 1,000,000 Hungarian Forints (HUF) (approximately £2,879) to be paid to each complainant. The Expert Panel had failed to individualise their assessments or properly justify the continued findings of 'mental impairment' and the Council had failed to control the Expert Panel to ensure its activities were carried out properly and lawfully.

Court of Appeal

The county court decision remained enforceable against the Expert Panel, which did not appeal. The Council and the school successfully appealed and the decision against them was reversed in November 2009. The CA accepted the school's defence that it was the Council's responsibility to control the operations of the Expert Panel and the remedial school, not theirs. It also accepted the Council's defence which was effectively that the Expert Panel had conducted itself properly with the diagnostic tools available (although those tools required updating) and its actions and decisions had not therefore been discriminatory.

Supreme Court

The complainants petitioned for review to the SC arguing that the well-known flaws in the diagnostic system and the disregard for social and cultural differences within the system had led to a disproportionately high number of Roma children being diagnosed with 'mild mental disability'. They sought a finding that the misdiagnoses and placement amounted to direct or indirect discrimination based on ethnic, social and economic status.

On August 11, 2010 the SC decided that the CA was right to find that the respondents had not violated the complainants' right to equal treatment and accordingly there had been no direct or indirect discrimination. However, it went on to consider whether a general tortious liability could be established, and found that it could in respect of the Expert Panel's breach of the law regulating its activities and the Council's failure to supervise the legality of the panel's actions. The remedy of 1,000,000 HUF for each complainant was upheld but the SC decided that the Council must pay 300,000 HUF of the total sum on account of its contribution to the damage, leaving the Expert Panel with liability for 700,000 HUF. No liability was identified in respect of the school.

Significantly the SC noted in its judgment that issues around the state's wider obligations in respect of the systemic failures identified were beyond its competence. It noted: *'the applicants may seek to have a violation of their human rights established before the ECtHR'*, and this was precisely the action subsequently pursued.

European Court of Human Rights

The ECtHR carried out a comprehensive review of relevant domestic and international law and other texts regarding the placement of children in remedial schools and the wider context. The central issue was whether the complainants' education in remedial school represented ethnic discrimination in the enjoyment of their right to education, in breach of Article 2 of Protocol 1 read in conjunction with Article 14. The former provides *'No*

person shall be denied the right to education…' while Article 14 provides *'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…'*

The ECtHR observed that having regard to the historical overrepresentation of Roma children among the pupils of remedial schools because of systemic misdiagnosis of mental disability, it was apparent that the general policies and measures applied by Hungary had had a disproportionately prejudicial effect on the Roma. Accordingly there was a *prima facie* case of indirect discrimination. It was then for the ECtHR to consider whether there was any '*objective and reasonable justification*' for the discrimination on the basis of the state 'proportionately' pursuing a 'legitimate aim'. Before examining this, the ECtHR identified that in the circumstances of this case *'the state has specific positive obligations to avoid the perpetuation of past discrimination or discriminative practices disguised in allegedly neutral tests.'* (Paragraph 116) It needed to be shown that adequate safeguards were in place to mitigate against the risk of discrimination.

The ECtHR found that the respondents had not provided the necessary safeguards to prevent the misplacement of children in remedial schools, which was historically more likely to affect Roma children. In fact, not only were the safeguards wholly inadequate but serious failings were identified: Hungary had set the borderline value of mental disability at IQ 86, which was significantly higher than the WHO guideline of IQ 70; at least part of one of the tests applied was culturally biased, while some of the other tests were found to be obsolete; and the Expert Panel had failed to individualise the complainants' diagnoses and specify the cause and nature of their special educational needs, which violated their right to equal opportunity. It was also acknowledged that the constant reorganisation of the social services administering the placement of children in remedial schools had contributed to the dysfunction of the Expert Panel.

Noting that where the fundamental rights of a particularly vulnerable group are concerned, the margin of appreciation will be much narrower (*Alajos Kiss v Hungary* (No 38832/06, May 20, 2010), the ECtHR found that the state had failed to *'ensure that, in the exercise of its margin of appreciation in the education sphere, the state took into account their [the complainants] special needs as members of a disadvantaged class'* (Paragraph 127). The state's failures had led to the complainants being incorrectly diagnosed as mentally disabled and educated outside of ordinary schools. As a result, the complainants' life chances had been adversely impacted and their segregation as part of a vulnerable group had been perpetuated. The ECtHR found that the complainants had been unlawfully discriminated against and consequently there had been a violation of their ECHR rights as alleged.

Comment for practitioners

This case serves as a valuable illustration of how discriminatory prejudice and practices can be embedded within, and obscured by, seemingly innocuous bureaucratic processes. It is vital in discrimination cases concerning the complex administration of state functions to consider if the wider administrative and societal context of the alleged discrimination points towards an institutionalised discriminatory trend.

Paragraph 101 of the judgment is a useful reminder of the continued and vital importance of combating all forms of race discrimination:

> *Racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a rigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment.*

Nick Fry
Solicitor
Bindmans LLP

Guidance on managing nervous claimants at tribunal

Duffy v George [2013] EWCA Civ 908; [2013] EqLR 879; July 23, 2013

The CA has given guidance to tribunals when dealing with discrimination cases where claimants feel intimidated by the prospect of being cross examined. The need for tribunals to balance the interests of the parties was emphasised.

Facts

The claimant in this case, a sales executive for Taylor Wimpey, brought a claim of sex discrimination and sexual harassment against her employer and a fellow employee, Mr Duffy (D), a project manager. The allegations against D involved numerous incidents including text messages with a sexual content and giving her a vibrator as a Valentine's Day present. The claim against the employer was compromised leaving outstanding the claim against D who represented himself. His defence to all allegations was that the matters complained of were merely consensual mutual banter during which the claimant *'gave as good as she got'*. Shortly before the date originally set for the final hearing D sent the claimant a copy of her horoscope with a comment implying that she had made up the allegations and that she would suffer for it. As a result, the claimant's solicitors wrote to the tribunal saying that she was scared of being cross examined by D in person and did not want to attend the hearing. An order was sought that the claimant should not be required to attend. D objected.

Tribunal's pre-hearing direction

The ET declined to make the order and did not direct a pre-hearing review to determine how best to deal with evidential issues. In its written response it was noted that the claimant did not need to attend the final hearing, in which case the decision would be determined on the basis of the written documents alone and that her statement would carry less weight than it would have had she attended and been cross examined.

Employment Tribunal

At the hearing D attended but the claimant did not appear and was not represented. Nevertheless the ET determined that she succeeded in relation to two of the allegations: one relating to a text with explicit sexual content, and one relating to the vibrator incident. No full written judgment was given as D did not request one.

D appealed on the grounds that the claimant's evidence should not have been preferred over his and that to allow the evidence of a claimant, who had chosen to bring the claim and yet was not present, to be preferred over that of a respondent who had no choice as to whether to attend, created a dangerous precedent.

Employment Appeal Tribunal

The EAT dismissed D's appeal on the grounds that no question of law arose from the ET's handling of either the procedural or substantive parts of the case. There was no error of law in finding against a respondent where the claimant had not attended and was not cross examined. In such circumstances, the tribunal was not bound to dismiss the claim. In this case significant admissions had been made, which gave sufficient grounds for the ET to rely upon in reaching its conclusions.

Court of Appeal

The CA set out and considered the relevant rules of procedure including the overriding objective; the general power to manage proceedings; the power under r.10(1) to require the attendance of a party and to require written answers; the ability of the judge to act on his own initiative; the power of the judge to conduct proceedings in any manner he sees fit; the entitlement to call and question witnesses; and the power to dismiss or dispose of proceedings in the absence of parties.

It was noted that the lack of opportunity to cross examine a witness can potentially provide grounds for remission of a case for rehearing as the cross examination might have led to a different conclusion on the facts.

It was argued on behalf of the appellant D that he was faced with real difficulties in defending himself in this claim where conversely, a failure on his part to attend would mean he would almost certainly fail. The implications of the tribunal being able to make findings against respondents in discrimination cases based purely

on a written statement from the claimant were potentially grave.

The claimant did not attend and was not represented but had filed a respondent's notice to the appeal relying on the ET and EAT's reasons. Her skeleton argument noted that she was still unemployed and suffered on-going illness due to D's conduct and that she was traumatised at the thought of being cross examined by him in person.

The CA (leading judgment from Mummery LJ) found that there was a procedural error of law. It noted that although the ET had refused to order her attendance, it should have held a pre-hearing review to consider what options were open to it to ensure that the hearing was fair and just. The questions that the tribunal should have asked at such a hearing were:

1) Was the ET satisfied by evidence that the claimant had grounds for and was fearful of attending the inter partes hearing to be cross examined by the appellant?

2) If so, should the ET dispense with an inter partes hearing?

3) If so, whether the ET should hold separate hearings at which they each gave their evidence to the ET in the absence of the other?

4) If so, whether the parties should be invited to submit to the ET in advance questions for the ET to put to the other party at the separate hearing?

The ET would then be in a position to give directions about the conduct of the case which would best achieve the overriding objective.

Pitchford LJ also gave a full judgment, drawing comparisons with criminal cases involving sexual offences and the various provisions in the Youth Justice and Criminal Evidence Act 1999 and the Criminal Justice Act 2003 that allow vulnerable witnesses to give evidence via live or recorded video links or for evidence to be given via hearsay statements. He noted that upon receiving the claimant's solicitor's request before the hearing, the ET should have considered (assuming they were satisfied that the claimant's fear was genuine)

i) whether there were any means by which the claimant could give oral evidence without being subjected to cross examination by D in person; and

ii) the status that would be afforded to the claimant's evidence if she did not attend in person.

A pre-trial review was necessary to explore these issues properly: for measures such as evidence being given from behind a screen, or questions being asked by the tribunal, could be explored and objected to by the respondent if so wished. In any event, it was open to the tribunal to accept her evidence in writing. The options were such in relation to her evidence that it was not accepted that a suitable and adequate course of action could not have been found had the ET turned its mind to it in a pre-hearing review.

Implications for practitioners

It is not uncommon for claimants in discrimination claims to be fearful about giving evidence and facing those they have accused. Reliving situations in which they felt that they were discriminated against or were harassed can quite clearly be traumatic. Knowing that claimants will find it difficult to attend a hearing is a point that respondent's representatives routinely rely upon when negotiating settlements. The CA in *Duffy* has placed some formality to the process that a claimant can expect to receive if their concerns are raised pre-hearing. Given that the new rules give perhaps an even wider discretion to employment judges to regulate their own proceedings, it is open to parties to suggest a variety of means to enable nervous clients to give the best evidence they possibly can, but to ensure that the respondent also receives a just and fair hearing.

Sophie Garner
St Philips Chambers

Housing Benefit changes – disability discrimination and the public sector equality duty

R (on the application of MA & Ors) v Secretary of State for Work and Pensions [2012] EWHC (2213); [2013] EqLR 972; July 30, 2013

In July the High Court issued its judgment in a discrimination case in which the legality of the popularly – if misleadingly – named 'bedroom tax' was challenged. The court, rejecting the discrimination claims, interpreted its role narrowly, cautioning against interference by the courts in matters of social and economic policy. It stated that the legislature should be given a broad discretion, even where policies have a disproportionate adverse impact on people with disabilities. Further, the court adopted a narrow interpretation of the scope of the public sector equality duty, stating that the only consideration for the court is the process followed by policy-makers and not the outcome of that process.

Background

The case related to changes to the regulation of housing benefit brought about by the Housing Benefit (Amendment) Regulations 2012 (the Regulations). Housing benefit is a means-tested benefit intended to assist with the cost of renting accommodation. Under the Regulations, one of the criteria for determining how much housing benefit payment is due to people in public rental properties is the number of bedrooms in a property. A cap is placed on the permitted number of bedrooms and there is a reduction in the payment to people living in a property with more bedrooms than permitted by the Regulations.

The bedroom criterion policy was first announced in the June 2010 budget, which included numerous welfare reforms as part of the government's *'deficit reduction strategy'*. Following the announcement, advice was sought and received by government from various officials and the Children's Commissioner. This advice referred to the fact that the policy may negatively impact on households occupied by people with certain disabilities. An equality impact assessment of the policy was carried out in June 2012. It acknowledged that people with disabilities were more likely to be negatively affected by the measure and predicted that they would account for 56-63% of those affected. Concern about the impact on people with disabilities was expressed during parliamentary debates on the proposal.

A similar bedroom criterion had been introduced in 2010 in relation to regulating housing benefit in the private rental sector. This was challenged in *Burnip & Ors v Secretary of State for Work and Pensions* [2012] EWCA Civ 629 [see Briefing 655]. In May 2012 the CA found that the criterion unlawfully discriminated against people who required the presence of a carer throughout the night or in whose household a child with disabilities could not share a room because of their disability. The government did not initiate secondary legislation but issued guidance to local authorities on the impact of the judgment on the payment of housing benefit in cases such as the claimants. A circular issued in 2013 expressly stated that the *Burnip* judgment did not provide for an extra bedroom in circumstances which, although connected with a disability, were not the same as the circumstances of the *Burnip* claimants.

Facts

The claimants are all members of families in which one or more family member's disability means they require more bedrooms than the cap permits; for example, because the disabled person is unable to share a bedroom or needs it to store equipment. The claimants are not exempted from the Regulations and have had their housing benefit payments reduced.

Under s69 of the Child Support, Pensions and Social Security Act 2000, local authorities may make discretionary housing payments (DHPs) to people entitled to housing benefit who they consider need further financial assistance. On the introduction of the Regulations, the government increased the funds available for such payments, stating that this increase was intended to support those affected by the benefit cap who *'as a result of a number of complex challenges, cannot immediately move into work or more affordable accommodation'*. However, there is no guarantee that the claimants, or people in their position, will receive such payments or that such payments will cover the shortfall in their housing benefits. At the time of their claims, not all of the claimants had received such a payment.

The claimants claimed the:

- measures unlawfully discriminate against people in their position in the enjoyment of their possessions in violation of Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Article 1 of the First Protocol to the ECHR
- Secretary of State has not complied with the public sector equality duty (PSED) under s149 Equality Act 2010 (EA)
- deployment of guidance in a circular by the Secretary of State was unlawful as it should have been done using secondary legislation and, in any event, the guidance could not cure the discriminatory effect of the measures.

High Court

The HC rejected the claims of unlawful discrimination and a violation of the PSED. It accepted that the deployment of the 2013 circular was insufficient to comply with the requirements of the *Burnip* judgment.

Discrimination

In relation to the discrimination claim, the HC acknowledged that housing benefit was a 'possession' under Article 1 of the First Protocol to the ECHR and so must be provided in a non-discriminatory manner under Article 14. The court held that even though it was difficult to precisely define the group adversely impacted by the Regulations, as it was not all persons with disabilities, Article 14 applied.

The claimants claimed that they were subjected to three forms of discrimination prohibited under Article 14: direct discrimination, indirect discrimination and *Thlimmenos* discrimination. However, the court found that the claim was best regarded as asserting an instance of *Thlimmenos* discrimination – a failure to treat differently people whose situations are significantly different. Accepting that the Regulations adversely impacted a certain albeit difficult to define group of people with disabilities, the court determined that the only question was one of justification, namely:

> *whether the refusal to exclude (some) disabled persons from [the regime which includes the bedroom criterion], and the provision made and to be made by way of access to DHPs, constitutes a proportionate approach to the difficulties suffered by such persons in consequence of the housing benefit policy.*

The HC noted that the breadth of the discretion to be afforded to the Secretary of State in determining what was a proportionate approach varied according to the circumstances. It drew a distinction between different types of discrimination case. It identified previous jurisprudence where courts have required *'very weighty reasons'* to justify discrimination and stated that discrimination on grounds such as race and sexual orientation – *'which civilised opinion condemns as a basis of legal distinction'* – were cases where the court would take a stricter approach. But the present case was not such a case. And where a matter relates to a determination of state policy, the court should be particularly cautious. The difference in treatment in this case would only be struck down if it was *'manifestly without reasonable foundation'*.

The HC stated that the issue of whether discrimination was justified and that of complying with the PSED were *'very close'* as they both related to the decision-making process. Accordingly, before reaching its conclusion on justification it went on to consider the PSED.

Public sector equality duty

The HC stated that s149 EA required public authorities (including the Secretary of State) to have *'due regard'* to the need to achieve the equality goals set out in the section. This required him to conduct a *'rigorous examination'* of the Regulations' effects on people with disabilities but not to undertake *'a minute examination of every possible impact and ramification'*. The court emphasised that the examination was for the decision-maker not the courts and that *'judicial restraint'* was required as the courts were there to assess the process not the outcome of the decision-making.

In assessing whether the Secretary of State had conducted a rigorous examination, the HC referred to the claimants' submission that the history of the policy's evolution disclosed *'nothing like the focussed analysis which s149 requires'* and to their submission that the Secretary of State had not complied with the provisions of both the UN Convention on the Rights of Persons with Disabilities (CRPD) and the UN Convention on the Rights of the Child (CRC). The court, stating that unincorporated treaties should not be seen as a source of substantive domestic legal rights, felt that the conventions had little to add to this case. Rejecting the submission that the equality impact assessment of 2012 and the various parliamentary debates demonstrated a lack of due regard, the court found that *'the PSED was fulfilled'*.

690

Justification

Returning to the issue of justification, the HC went on to say that *'the effects of the housing benefit cap were properly considered in terms of the discipline imposed by the requirement of proportionality'*, and that the making of provisions in relation to access to discretionary housing payments for such persons was a proportionate approach unless it was manifestly without reasonable foundation. It 'plainly' was not. Although the absence of a clearly identifiable class of persons did not stop the case falling within Article 14, it was a *'very powerful factor'* in considering justification. The approach that had been applied in *Burnip* where the class of persons was clearly definable, could not be applied here. The Secretary of State's use of the funding for discretionary housing payments to aid individuals such as the claimants was proportionate and the difference in treatment justified.

Deployment of guidance

The *Burnip* decision required the Secretary of State to regulate to ensure that there was no deduction in housing benefit where an extra room was required for children unable to share because of their disabilities. This required secondary legislation, not simply a circular. The HC said the current *'state of affairs [could not] be allowed to continue'* and that it assumed *'that the new Regulations [would] be made very speedily'*.

Comment

The judgment has been met with heavy criticism for failing to ensure that the needs of people with disabilities are met. Lawyers for the claimants have indicated that it will be appealed. In the meantime, adults with disabilities who are unable to share a room due to their disability will not be protected against a reduction in their housing benefit under the Regulations. Practitioners seeking to enforce the rights of people with disabilities will wish to rely on more useful precedents on the fulfillment of the PSED and the justification of measures which adversely impact on their clients, including judgments which have taken interpretative guidance from the CRPD.

Joanna Whiteman
Legal Officer, The Equal Rights Trust

691 Briefing 691

Disability discrimination – decision-maker's knowledge – burden of proof

IPC Media Limited v Ingrid Millar UKEAT/0395/12/SM; [2013] EqLR 710; April 26, 2013

Facts

Ingrid Millar (IM) was a journalist working on Chat magazine as an editor; she had osteoarthritis of the knees.

In 2009 and 2010 IM underwent four operations, for each of which she was off for three to four weeks. IM's line manager was also aware that she was due to have a further operation in May 2011.

In early 2011 IPC Media Limited (IPC) started a redundancy exercise, primarily conducted by its Publishing Director.

There were two jobs that could have been considered suitable alternative employment for IM: Associate Editor and Group Associate Head of Features. The first role was only mentioned to IM in her appeal meeting, where she was told that the vacancy had not yet been authorised; it was then only advertised in May 2011, after IM's employment had terminated. The second role had been offered to another employee who had rejected it in advance of IM's appeal meeting. IM was not notified of this second role at her appeal meeting; it was also only advertised in May 2011, after IM's employment had been terminated.

During the redundancy consultation, IM continued to assert that her position was not redundant, and also asked whether her age and health were a factor in the decision to put her at risk of redundancy. There were several consultation meetings, along with an appeal meeting, which resulted in IM being dismissed in April 2011, aged 59.

Employment Tribunal

IM brought claims of direct disability discrimination, and discrimination arising in consequence of disability (ss13 and 15 of the Equality Act 2010 (EA) respectively).

The claim for direct discrimination was dismissed, but the claim under s15 succeeded. The tribunal held that IPC's failure to consider IM for the Associate Editor and Group Associate Head of Features roles was because of her *'past and anticipated future absences'*. These absences were a consequence of IM's disability and so the claim was successful.

In particular, the ET relied on the burden of proof provisions: these state that if the claimant shows circumstances from which the tribunal can make a finding of discrimination (a prima facie case), it then falls to the respondent to show why there is no discrimination. In this case, the lack of evidence about why IPC did not invite IM to apply for the two roles, coupled with the decision to advertise those roles only after IM had been made redundant and IM's past significant absences, gave rise to evidence from which the tribunal could conclude there was disability discrimination. IPC failed to show why its decision not to invite IM to apply for the posts had nothing to do with her past absences, and so the s15 claim succeeded.

IPC raised no evidence, nor made any submissions, about its lack of knowledge of IM's disability at this hearing.

Employment Appeal Tribunal

The appeal focused on the fact that the ET made no findings of fact that the person who was responsible for not inviting IM to apply for the two suitable roles (the Publishing Director) did not know about IM's absences from work. IPC's argument was that the decision-maker could not be influenced by something (consciously or unconsciously) if they are not aware of it.

IPC also drew attention to the lack of questions put to the Publishing Director about her knowledge of IM's absences. IM's argument was that the bar should not be set so high: she had to prove facts from which it could be inferred that the Publishing Director had the relevant knowledge, and it was then for IPC to prove that she did not have that knowledge.

The EAT, the Honourable Mr Justice Underhill giving judgment, preferred IPC's argument, and held that the tribunal had made no explicit finding about the Publishing Director's knowledge, and so no claim of s15 disability discrimination could stand.

Analysis

The burden of proof provisions offer a huge advantage to a claimant in a discrimination case, if deployed correctly. Arguably, the employer's lack of knowledge is only a defence to a claim of disability discrimination if it is raised by the employer. However, in this case, despite the employer's knowledge not being raised as an issue at tribunal, the EAT still allowed an appeal based on this point. This looks a lot like allowing an employer to decide what shape their defence is going to take after the tribunal has made its findings – the appeal should have only been allowed if IPC had explicitly previously relied on its (or its decision-maker's) lack of knowledge as a defence.

The case also offers worrying implications for the threshold required to surmount the first stage in the burden of proof provisions: namely, establishing a prima facie case of discrimination. The provisions are designed to smooth the path to a positive finding for the claimant by not requiring specific facts to be proven; instead, the claimant is allowed to rely on the generality of the evidence, taken as a whole, to show that there are circumstances that could give rise to discrimination. The EAT, in effectively requiring IM to prove that the Publishing Director did know about her disability, has subtly but significantly altered the emphasis within the burden of proof provisions.

Practical implications

The lesson from IM's case is that the claimant should take great care in forcing the respondent to be explicit about its defence. If an assumption appears to have been made, it may be wise to seek a written admission from the employer before deciding not to lead particular evidence at tribunal.

In this case, both parties (and the tribunal) appeared to assume that the Publishing Director did know about IM's disability, with the result that the tribunal made no specific findings of fact. Given the parties' apparent agreement, and the fact that there was no issue over knowledge, this would seem to have been a safe assumption, only for IPC to rely upon this point at appeal – and succeed.

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

Application of the reasonable adjustment duty to redeployment

Redcar and Cleveland Primary Care Trust v Lonsdale [2013] UKEAT/0090/12/RN; [2013] EqLR 791; May 9, 2013; *Wade v Sheffield Hallam University* [2013] UKEAT 0194/12/1504; [2013] EqLR 951; April 15, 2013

Two recent cases in the EAT highlight the application of the duty to make reasonable adjustments to redeployment situations.

Redcar and Cleveland Primary Care Trust v Lonsdale

Facts

Ms Lonsdale (L) was initially employed as a grade 6 senior occupational therapist. Unfortunately, her vision deteriorated to the point that she was unable to carry out this job. She was redeployed as a grade 4 workplace development co-ordinator.

This role later became at risk of redundancy. L wished to apply for alternative employment at grade 6. She was prevented from doing so by the Trust's human resources framework, which only permitted redundant employees to apply for a grade one level higher than their existing job. Therefore L could apply for a grade 5 role, but not a grade 6 role.

Employment Tribunal

The tribunal concluded that this was a failure to make a reasonable adjustment. L should have been permitted to compete with other employees for grade 6 roles.

Employment Appeal Tribunal

The EAT agreed. The refusal to allow employees to apply for a role more than one grade above their existing one was a provision, criteria or practice that placed L at a substantial disadvantage. But for her disability, she would not have been redeployed to a lower grade and would therefore have been able to apply for grade 6 roles. Reasonable adjustments will often require disabled employees to be treated more favourably than those who are not disabled; this was the case for L.

Wade v Sheffield Hallam University

Facts

Ms Wade (W) worked for the university as a librarian. She suffered from an allergic condition and arrangements were made for her to work from home.

In 2004 the university underwent a restructure. In December 2005 W was placed on gardening leave while the university sought to place her in a new role.

W was interviewed for a potentially suitable role in 2006 and 2008. She was unsuccessful on both occasions.

Employment Tribunal

W argued that she should not have been in competition with other candidates, but should have been appointed to the role without an interview.

The tribunal disagreed. The tribunal accepted that the university was under a duty to make reasonable adjustments, but found that this had been met by its adjustments to the interview process.

Employment Appeal Tribunal

The EAT upheld the tribunal's decision. The EAT concluded that W did not meet the essential criteria of the role. The duty to make reasonable adjustments could not extend to appointing an unappointable candidate.

Comment

These cases reinforce two important elements of the duty to make reasonable adjustments. First, it is a powerful duty that can be deployed to great effect. Redcar and Cleveland Primary Care Trust had acted well in initially redeploying L. And their desire to treat all potentially redundant employees equally was understandable. But neither of these factors could override the plain fact that L was at a disadvantage because of her disability. The Trust needed to remedy that disadvantage if they could do so reasonably.

Both employers and employees must bear in mind that the duty to make reasonable adjustments generally means treating disabled employees more favourably than others. Often despite policies or rules that may, ordinarily, be there for a good reason.

Second, however, the reasonable adjustment duty it is not a duty without limits. It did not mean that Sheffield Hallam University had to appoint an employee to a post that they had concluded she was unable to perform. Regrettably, there are some disadvantages that cannot reasonably be overcome.

Michael Reed
Free Representation Unit

Reasonable adjustments for disabled bus passengers

Paulley v First Group plc, Leeds County Court, Case 2YL85558, September 16, 2013; *Black v Arriva North East Ltd* [2013] EqLR 555, May 1, 2013

Two similar county court cases concerning reasonable adjustments to policies required to enable wheelchair users to travel on buses are described in this case note; the different outcomes are compared and contrasted.

Paulley v First Group plc

Facts

Mr Paulley (P), a wheelchair user, sought to board a bus owned and operated by First Group (FG). He was unable to do so because the wheelchair space within the bus was occupied by a passenger with a pushchair. The driver of the bus, in accordance with FG's policy, asked the passenger to move. However, when she refused to do so the driver took no further action and told P that he would not be able to travel. P then had to wait more than 15 minutes for the next bus and arrived at the next stage of his journey more than half an hour late, causing him to miss his train. He arrived at the family lunch which was the goal of his journey more than an hour late.

In defending P's claim of discrimination FG argued that the driver had no power to compel the recalcitrant passenger to move or, if this is not possible (because of lack of space where a buggy cannot be folded), to leave the bus.

P claimed discrimination on the basis that FG had failed to comply with its duty to make a reasonable adjustment, specifically with the requirement, where a provision, criterion or practice puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage, s20 Equality Act 2010 (EA). Substantial disadvantage is defined as meaning *'more than minor or trivial'* (s212 EA). Schedule 2 of the EA imposes an anticipatory duty to make reasonable adjustments on providers of services.

County Court

The judgment starts by establishing that the relevant provision which was said to require adjustment was the policy adopted by FG at the material time of *'first come, first served'* whereby a non-wheelchair user occupying the wheelchair space on the bus would be requested to move but if they refused would not be compelled to do so.

It then goes on to assess whether the anticipatory duty to make reasonable adjustments had been met: had this provision assessing whether such a practice placed wheelchair users in general at a substantial disadvantage. P submitted that the comparison should be between disabled people who are wheelchair users and those non-disabled people wishing to travel on the bus, who are not wheelchair users. It was argued that while non-wheelchair users would be able to board a bus if there were any seats available, the wheelchair user is unable to sit in such vacant seats and can only use the wheelchair space. Unless he has an enforceable priority over non-disabled passengers for the wheelchair space, he cannot travel.

FG argued that the appropriate comparator is not with any non-disabled user of its bus service but, more particularly, non-disabled persons with buggies or prams who, like the wheelchair user, need special provision to accommodate their journey. If this was the appropriate comparator then no substantial disadvantage would be caused because each has the same opportunity to occupy the space based on who gets to it first.

The judgment then went on to consider if there were reasonable steps that could have been taken to avoid the substantial *disadvantage to wheelchair users* and, if so, whether FG had failed to take such steps. The judgment held that what was required was a clear practice/policy which not only paid lip service to the giving of priority to the wheelchair user, but actually enforced such priority.

It was argued by FG that such a step was not reasonable as it would be likely to cause confrontations and difficulties. However, the driver admitted that he did evict passengers for other reasons, such as eating smelly food. Moreover, there were a number of other bus companies, such as Lothian and London Transport, which had adopted a policy that a non-disabled passenger was not merely requested to move from a wheelchair space but was required to do so.

Finally the judgment considered whether the failure by FG to meet its anticipatory duty by adjusting it policy in this way had placed P in particular at a substantial disadvantage. In establishing whether or not the

disadvantage was substantial, the disadvantage is not to be gauged merely by reference to the length of time that the disabled person is delayed but the fact that he is delayed at all by reason of his disability.

It concluded that the failure to make such an adjustment resulted in P being subjected to a detriment: *'there can be little doubt that the delay suffered by Mr Paulley amounted to more than an unjustified sense of grievance'.* He was awarded £5,500 in compensation and FG was given six months to change its policy. FG has sought permission to appeal and to have the appeal leapfrogged to the CA.

Black v Arriva North East Ltd

The facts in this case were broadly similar to those in *Paulley*, but the judgment was different in virtually every respect.

Facts

Ms Elliott and Mr Ward (the claimants) are two wheelchair users who had been unable to travel on buses because a pushchair was occupying the wheelchair space and the owner refused to move it. They brought claims of disability discrimination against Arriva on the basis that it had failed to make reasonable adjustments.

County Court

This judgment took a fundamentally different approach to understanding whether the claimants had suffered disadvantage in comparison to non-disabled passengers. In both cases the claimants were said to have been able to take another bus about ten minutes after the incident. The judge concluded that such a disadvantage was not more than 'minor or trivial.' He commented that *'It is a fairly common experience when using public transport to find a bus full'.* The *Paulley* judgment in contrast recognised that the discriminatory impact of such incidents in itself distinguished them from the common experience. The fact that the bus driver had been 'intemperate', did not, in the judge's eyes, make a distinction.

Furthermore, an adjustment to policy so that bus drivers should enforce the requirement to vacate the wheelchair space in the same way as other policies (such as smoking bans) was not accepted as reasonable. Refusing to move the bus unless the direction was complied with would cause inconvenience to other passengers and unnecessary disruption to the bus service.

The Public Service Vehicles (Conduct of Drivers, Inspectors and Conductors and Passengers) Regulations 1999 (as amended) were accepted as being of assistance to the court when considering the reasonableness of any proposed adjustment. These regulations make it a criminal offence if a driver does not allow a wheelchair user to use an unoccupied wheelchair space; in this context *'a wheelchair space is to be regarded as occupied if there is a wheelchair user in that space; or passengers or their effects are in that space, and they or their effects, cannot readily and reasonably be vacated by moving to another part of the vehicle.'* However, the judge in *Paulley* took the opposite view about the relevance of these regulations: that there is an enormous difference between imposing a criminal sanction upon a driver and the obligation upon a service provider not to discriminate by a failure to take reasonable steps to adjust a present policy.

Comment

In part the judge's approach in *Arriva* may reflect his failure to address the issue of the anticipatory nature of the duty towards disabled customers, but instead concentrating only on the specific facts concerning the two individual incidents, saying: *'It is regrettable that the suggested adjustments did not focus on the particular circumstances of the incidents with which we are concerned, but formed part of a broader attack upon the policy of the Defendant [Arriva] as a whole'.*

However, the reason for the difference with the *Paulley* judgment may also stem from a weaker appreciation of the meaning of discrimination as it affects disabled people – and the overall purpose of these provisions (as enunciated in *Roads v Central Trains Limited* [2004] EWCA Civ 1541) to provide a service as close as possible to that experienced by non-disabled passengers. This deficiency in understanding is illustrated by the judge's suggestion that Arriva might publish a telephone number allowing wheelchair users to notify the company at least an hour in advance of their intention to catch a bus!

Caroline Gooding
Legal consultant

Proposal to limit the powers of employment tribunals

The DLA and others are particularly concerned about Clause 2 of the draft Deregulation Bill which proposes to limit the powers of employment tribunals to give non-binding recommendations to employers to tackle discrimination. Currently under s124 of the EA an ET can only make a recommendation if it:

- has found the employer liable of discrimination, harassment or victimisation;
- considers, based on the evidence, that the recommendation is appropriate to protect the complainant or other workers from future similar unlawful treatment; and it
- also considers that it is reasonably practicable for that particular employer to comply with the recommendation.

The draft Deregulation Bill contains a broad range of measures which claim to reduce the burden of regulation on business, civil society, other organisations (including public sector bodies) and individuals.

The DLA does not believe that the removal of ETs' power to make wider recommendations will contribute in any way to reducing the regulatory burden on business. On the contrary, the experience of DLA members suggests that tribunal recommendations, which are intended to assist employers to adopt improved equality practices and thus to avoid future litigation, are often welcomed by employers. The DLA argues that Clause 2 is misconceived and that the current power must be retained because:

- no one benefits from discriminatory practices in the workplace;
- there is no evidence that wider recommendations are ineffective or disproportionate; often employers agree that the steps recommended will be beneficial;
- tribunals' powers to make wider recommendations can reduce 'red tape' for employers; if implemented such recommendations should save employers the cost and time burdens of further complaints and litigation; and
- it is irrational for the powers of an independent judicial body to be delineated, in effect, by whether or not the complainant is still employed.

The Parliamentary Joint Committee on the draft Deregulation Bill has been taking oral evidence and it is required to report to parliament by December 16, 2013.

Judgment awaited in judicial review of employment tribunal fees

UNISON's judicial review of the introduction of fees at the ET commenced on October 22, 2013 at the High Court. The EHRC is intervening in the proceedings.

UNISON considers that the new fee regime is contrary to EU law which requires that national courts must not make it virtually impossible, or excessively difficult, to exercise individual rights conferred by European Community law.

The fees will often be greater than the expected compensation, even if such claims were successful, and they are set at a level which is prohibitive even to those entitled to partial remissions. The union argues that reasonable people will not litigate to vindicate their EU rights in such circumstances.

UNISON also considers that it is a breach of the principle of equivalence to require significant fees to be paid to vindicate EU rights where no fees are required to vindicate similar rights derived from domestic law. The union also argues that there has been no proper assessment of the PSED which should have included an assessment of the potential adverse effect of introducing fees in terms of the numbers and proportions of claims brought by individuals with protected characteristics which would previously have been brought and will now not be pursued. Finally, it argues that charging prohibitively high fees to pursue claims will have a disproportionate adverse impact on women and amounts to indirect discrimination. The new fee regime cannot be said to be a proportionate means of achieving a legitimate aim as women will not (if they earn an average income) be entitled to any remission of fees in the ET.

(The MOJ has agreed to re-imburse any fees paid by any applicants if they are later found to have been unlawfully imposed.)

Review of the public sector equality duty

The report of the Independent Steering Group tasked with the review of the PSED was published on September 6, 2013.[1] The review came out of the government's Red Tape Challenge and was established to examine whether the PSED is operating as intended. The review team gathered evidence on the effectiveness of the PSED from public bodies, voluntary and community sector organisations, trade unions, claimant lawyers, equality and diversity practitioners, procurement experts, businesses and inspectorates and regulators. It also held a series of roundtable discussions with stakeholders in England, Wales and Scotland which involved a wide range of public bodies, private sector and NGOs. The government commissioned independent research (in-depth telephone interviews) with public bodies and received over 100 submissions in response to its call for evidence.

The steering group has concluded that it is too early to make a final judgment about the impact of the PSED, as it was only introduced in April 2011 and evidence, particularly in relation to associated costs and benefits, is inconclusive. While the steering group found broad support for the principles behind the duty, the review found the main challenges lie in its implementation, which varies considerably across the public sector. The report commented *'The nature of a 'due regard' Duty is that it is open to interpretation by public bodies. What amounts to 'due regard' depends on particular circumstances and only a court can confirm that a public body has had due regard in a particular case. This uncertainty has on many occasions led to public bodies adopting an overly risk averse approach to managing legal risk in order to rule out every conceivable possibility. This has been a recurring theme throughout the review.'* The report's recommendations, among others, included:

- clearer guidance from the EHRC on the minimum requirements placed on public bodies;
- public bodies must ensure they adopt a proportionate approach to compliance and not seek to 'gold plate';
- government should consider whether there are quicker and more cost-effective ways of reconciling disputes relating to the PSED;
- public bodies should be challenged where their procurement processes creates barriers for small businesses and charities;
- government should consider conducting a formal evaluation of the duty in three years' time

Responding to the report the EHRC criticised it for drawing more definite conclusions than the *'fairly light evidence presented justifies'*.[2] It expressed disappointment that the extensive and widely used guidance it had already produced on the PSED was not considered fully during the review. The EHRC argues that the best way to reduce bureaucracy and over-engineering of compliance with the PSED would be to publish a statutory code. This would allow public bodies to be clear about what is legally required and to depend on the code in defending challenges, because the courts place far greater weight on a code than on guidance. The EHRC referred also to the guidance it has already produced on procurement, which underlines the importance of a proportionate approach, the need to remove barriers for SMEs and the value of a diverse supplier base.

The Minister for Women and Equalities has confirmed that there will be a full evaluation of the PSED in 2016 when the duty has been in force for 5 years. She stated that she would like, in particular, to see implemented the recommendation to reduce *'procurement gold-plating by the public sector'* and *'we accept the recommendation to consider what complementary or alternative means, other than judicial reviews, there may be to enforce the PSED. Recognising that many of the concerns identified in the report are not unique to the PSED, we will take account of this recommendation in the wider work, led by the Justice Secretary, to ensure that disputes are resolved in the most proportionate way possible and in the most appropriate setting.*[3]

1. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/237194/Review_of_the_Public_Sector_Equality_Duty_by_the_Independent_Steering_Group.pdf

2. http://equalityhumanrights.com/news/2013/october/commission-responds-to-psed-review-report/

3. Department of Culture, Media and Sport, Ministerial written statement, September 6, 2013 PSED Review

Balance of competences review – social and employment review

On October 29, 2013 the government launched a call for evidence for the Review of the Balance of Competences between the UK and the EU. This call for evidence follows through on the Coalition's commitment in relation to social and employment competence. The review will provide an analysis of what the UK's membership of the EU means for the UK national interest. It aims to deepen public and parliamentary understanding of the nature of the UK's EU membership and contribute to the national and wider European debate about modernising, reforming and improving the EU in the face of collective challenges.

Competence in this context is about everything deriving from EU law that affects what happens in the UK. A response form can be found on the BIS website and should be returned to balanceofcompetences@bis.gsi.gov.uk by January 17, 2014.

Ministry of Justice consultation on further reform of judicial review

The government is consulting on potential measures for the further reform of judicial review (JR), including exploring the potential for reform in the test for standing (who is able to bring a judicial review) and *'the use of JR to resolve disputes relating to the public sector equality duty and whether there are suitable alternatives'*. According to the Public Law Project, these proposals, taken together with those made in *Transforming Legal Aid*,[4] represent '*a profound and constitutionally significant attack on the ability of individuals, charities and NGOs to access judicial review. Their effect will be to insulate executive action from judicial scrutiny, weakening the rule of law.'*[5]

In its draft response to the consultation, which closed on November 1, 2013, the EDF expressed its members' concern that the proposed changes would have a seriously chilling and adverse effect on the availability of JR.

The EDF argues that JR is a vital remedy and one of the most important ways for citizens to hold government and other public bodies to account. Noting that the MOJ itself recognises that JR is *'a crucial check to ensure lawful public administration'*, it refers to Lord Dyson's, Master of the Rolls, statement that *'there is no principle more basic to our system of law than the maintenance of rule of law itself and the constitutional protection afforded by judicial review'*.[6] The power to judicially review public decisions is an important reserve power enabling citizens to ensure good governance. The EDF considers that any further constraints on the application of JR are undesirable.

Forthcoming DLA practitioners' group meetings

Wednesday, November 20, 2013
Alternatives to the Questionnaire procedure in discrimination claims:
Speaker: Kiran Daurka, Slater & Gordon Solicitors

Wednesday, December 11, 2013
EHRC's current priorities for funding strategic cases
Speaker: Sarah Lowe, Senior Lawyer, EHRC

4. In its response to *Transforming Legal Aid*, the government confirmed on September 5, 2013 that it will implement cuts to prison law legal aid and a residence test for civil legal aid.

2. www.publiclawproject.org.uk/data/resources/143/JR_Proposals_for_further_reform_briefing.pdf

3. *R (in the application of Cart) v Upper Tribunal* [2011] UKSC 28 at para 122

CEDAW's concluding observations on the UK

The UK's 7th report to the UN Committee on the Elimination of Discrimination Against Women was examined in Geneva on July 17, 2013.

In the concluding observations, the CEDAW Committee urged the UK government to ensure that its review of the public sector equality duty enhances the gender equality component. It urged the government to bring into force the provisions of the Equality Act relating to (a) the introduction of a new public sector duty on socio-economic inequalities; (b) the recognition of multiple forms of discrimination; and (c) the need to publicise gender pay information.

The Committee expressed concern about the impact of austerity measures on women and services provided to women and urged the government to mitigate this impact, particularly on women with disabilities and older women. It should also ensure that its spending reviews continuously focus on measuring and balancing the impact of austerity measures on women's rights.

Noting the impact of LAPSO on women's access to legal aid, the Committee stressed the need for effective access by women to courts and tribunals, in particular women victims of violence, and the protection of women from informal community arbitration systems, particularly those which violate their rights under CEDAW.

The Committee made strong reference to the need for dedicated measures to fight domestic violence including against black and minority ethnic women. It also made a number of specific recommendations that relate to Traveller women, asylum-seeking women, women with insecure immigration status, disabled women and women experiencing poor mental health, black and minority ethnic women, and women with experience of the criminal justice system.

ECRI urges governments to address trends in racism and intolerance

European countries need to come to terms with their multicultural identity and acknowledge the important role that immigration plays in the economy, asserted ECRI in its annual report published on October 25, 2013.

Acute financial instability and a subsequent increase in resentment and prejudice against immigrants, Muslims and Roma people in particular, are some of the worrying trends identified during ECRI's country visits in 2012. ECRI notes that xenophobic parties have attracted increasing support and representation in the parliaments of several European countries, and a marked rise in racially motivated hate speech via the Internet.

The report regrets that, in certain countries, Roma children face obstacles accessing education and are segregated in schools. ECRI considers the EU Framework for National Roma Integration Strategies an opportunity to strengthen social inclusion of Roma, and encourages all member states of the Council of Europe – not just the EU members – to implement similar strategies.

ECRI also calls for states to pursue a constructive dialogue with representatives of Muslim communities and the media, to encourage debate and foster inter-religious dialogue.

'Combating racism and intolerance can only be effective if the message filters down to society in general. Awareness-raising and a communication strategy are, therefore, essential', said ECRI Chair Eva Smith.

APOLOGY

Unfortunately, in the July 2013 edition of DLA *Briefings* the reference to the authors of the two book reviews was omitted. Alice Ramsay, solicitor at Leigh Day, reviewed the Legal Action Group's handbook *Discrimination in Employment: a claims handbook* by Declan O'Dempsey, Catherine Casserley, Sally Robertson and Anna Beale. Ruth Grove White, Policy Director of the Migrants' Rights Network reviewed *Borderline Justice – the Fight for Refugee and Migrant Rights* by Frances Webber. We apologise to the authors for this omission and would like to thank them again for writing the reviews and for their contributions to *Briefings*.

Monaghan on Equality Law

Karon Monaghan QC, 2nd edition, 2013, Oxford University Press, 755 pages, £145.00 hardback; £101.05 Kindle edition

Monaghan on Equality Law pursues two distinct goals in a single volume and, in my view, it is largely successful: it is a comprehensive practitioner's textbook which also engages with fundamental normative and conceptual questions.

The book is divided into four parts. Part I provides a fairly substantial introduction to the historical context of UK equality law and its relationship with EU and human rights law. Part II sets out the protected characteristics and the types of prohibited conduct. Part III addresses the various areas of activity within which the prohibited conduct is unlawful – including work, education, services, transport, housing, clubs and political parties, and the exercising of public functions by public authorities – and also gives an overview of remedies and enforcement procedures. Part IV returns to the broader outlook of the introduction with a discussion of the history and role of the Equality and Human Rights Commission, the statutory equality duties and the positive action provisions.

At least two thirds of the book is devoted to the exploration of the Equality Act 2010 in Parts II and III, and this practical side of it is clear, careful and thorough. I regularly find myself stumped by some aspect of law I thought I understood; most recently, it was the question of comparators in direct discrimination, but the relevant eleven pages in this book got me unstuck in record time. From a practical point of view, chapter 3 on interpretation is also a particularly useful reminder of the principles.

The more theoretical parts of the book include a nice summary of various aims which equality law has been said to pursue, including (among others) equal treatment, equal opportunity, dignity, respect for diversity, democratic participation and social justice. According to Monaghan, *'[a] 'dignity' model… is increasingly recognized [as] a helpful way to address inequality…'* (Paragraph 1.43, p.15) and that seems right, as far as it goes. What I found more helpful is the way she draws together the idea of dignity as an underlying principle and the capabilities approach as developed by Martha Nussbaum. Although the discussion of this point is quite brisk, following up the references in the footnotes would provide a decent grounding in a fairly abstract normative debate.

Monaghan does not pretend to be neutral about difficult areas of equality law or about what its goals should be. So there are a number of places in the book where she expresses clear views about controversial matters, and their content will not surprise readers of *Briefings*. For instance, on judicial diversity:

> *The oft-repeated suggestion that gender, race, class and other defining personal characteristics are irrelevant is wrong. These factors inform the life experiences and world-views of judges no less than they do society at large.* (Paragraph 2.06, p.25)

On the power to make regulations requiring publication of information about gender pay gaps:

> *Gender inequality in pay is entrenched and has proved particularly difficult to address… any positive duty would therefore be welcome.* (Paragraph 16.38, p.705)

She also flatly rejects the arguments which led to the exclusion of sexual orientation and religion or belief from the harassment provisions (outside employment) and is critical, among other things, of insurance provisions which continue to permit discrimination connected to gender, and of children's lack of protection from age discrimination in provision of services. Expressing such strong views may be unusual in a text like this, but authors who claim to be neutral make me suspicious: I would rather know what an author thinks so I can decide for myself whether I agree (and whether I think it has affected their interpretation of the law). It also makes this a genuinely interesting book to read.

Over the last couple of months, in various contexts, I have found find myself turning first to Monaghan's book. It has suggested new ways to organise my thinking about discrimination law, given me new references to follow up on some of the more academic debates, and has been very useful for last-minute checking of case names which I've inexplicably forgotten. And I am lucky that, as a student, I have access to a wide range of legal databases and commentary: without such access, I would have relied on this book even more heavily. Whether you need to refresh your memory about a familiar part of discrimination law or look up a new point for the first time, *Monaghan on Equality Law* is going to be a very good place to start.

Katya Hosking
Student, Cardiff University

Briefings

Abbreviations

ACAS	Advisory, Conciliation and Arbitration Service
BME	Black and minority ethnic
BSL	British Sign Language
CA	Court of Appeal
CEDAW	UN Convention on the Elimination of all Forms of Discrimination against Women
CERD	UN Committee on the Elimination of all Forms of Racial Discrimination
CBI	Confederation of British Industry
CJEU	Court of Justice of the European Union
CRC	UN Convention on the Rights of the Child
CRE	Commission for Racial Equality
CRPD	UN Convention on the Rights of Persons with Disabilities
ECRI	Council of Europe's European Commission against Racism and Intolerance
EDF	Equality and Diversity Forum
DLA	Discrimination Law Association
DVLA	Driver and Vehicle Licensing Agency
EA	Equality Act 2010
EAT	Employment Appeal Tribunal
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEA	European Economic Area
EHRC	Equality and Human Rights Commission
EHRR	European Human Rights Reports
EOC	Equal Opportunities Commission
EqLR	Equality Law Reports
ERA	Employment Rights Act 1996
ET	Employment Tribunal
EU	European Union
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
GEO	Government Equalities Office
GP	General practitioner
HC	High Court
HHJ	His/Her Honour Justice
ICR	Industrial Case Reports
IRLR	Industrial Relations Law Report
JR	Judicial review
LAG	Legal Action Group
LAPSO	Legal Aid, Sentencing and Punishment of Offenders Act 2012
LJ	Lord Justice
LLP	Legal liability partnership
LSC	Legal Services Commission
MOJ	Ministry of Justice
MP	Member of Parliament
NGO	Non-governmental organisation
NHS	National Health Service
OBE	Order of the British Empire
PCP	Provision, criterion or practice
PSED	Public sector equality duty
QC	Queen's Counsel
REC	Racial Equality Council
RNIB	Royal National Institute of Blind People
SC	Supreme Court
TUC	Trades Union Congress
TUPE	Transfer of Undertaking (Protection of Employment) Regulations 2006
WHO	World Health Organisation
WLR	Weekly Law Reports