Discrimination Law Association

Briefings 3-28

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3	FIGHTING DISCRIMINATION: Two Steps Backward - The Asylum & Immigration Bill	Barbara Cohen
4	NO RIGHTS UNDER ARTICLE 119 TO FULL PAY DURING MATERNITY LEAVE	Camilla Palmer
5	RIGHTS DURING MATERNITY LEAVE AND ABSENCE: Effect of Crouch v Kidsons Impey [1996] IRLR 79	Camilla Palmer
6	THE IMPLICATIONS OF SEYMOUR SMITH for other employees who may consider that they were unfairly dismissed but who have less than two years' service at the date of their dismissal	Robin Allen QC
7	DIFFERENT 'APPEARANCE' CODES FOR MEN AND WOMEN NOT DISCRIMINATORY: Smith v Safeway plc the Times, 5 March 1996, CA	Camilla Palmer
8	EQUALITY CODE FOR THE BAR	Murray Hunt; Rabinder Singh; Helen Mountfield
9	INDIRECT DISCRIMINATION - Problems of Proof	Camilla Palmer
10	IS THE ECJ CHANGING TACK ON INDIRECT DISCRIMINATION? The implications of Nolte v Landesversicherungsanstalt Hannover, [1996] IRLR 225 and Megner and Scheffel v Innungskrankenkasse Vorderpfalz [1996] IRLR 236	Camilla Palmer
11	COMPENSATION UPDATE	Camilla Palmer
12	EAT OVERRULE IT WHICH FAILED TO MAKE INFERENCE OF DISCRIMINATION	Camilla Palmer
13	CONTRACT WORKERS: Section 7 of the Race Relations Act / Section 9 of the Sex Discrimination Act	Sandhya Drew

14	ASSESSMENT OF COMPENSATION: Ministry of Defence v Hunt [1996] IRLR 139	Karon Monaghan
15	DISCRIMINATION AGAINST TRANSSEXUALS ILLEGAL: P v S and Cornwall County Council	Robin Allen
16	UK PROCEDURAL RULES DEFEAT PENSION EQUALITY CLAIMS: The Equal Pay Act, time limits and backdating of pay	Camilla Palmer
17	DISABILITY DISCRIMINATION ACT UPDATE	Robin Lewis
18	UPDATE ON FORTHCOMNG DECISIONS/APPEALS	Camilla Palmer
19	TIME LIMIT FOR INDIRECT DISCRIMINATION CASES: Cast v Croydon College; unreported EAT 161/95	Camilla Palmer
20	ACTUAL PENSION LOSS OF £60,635 AWARDED IN PREGNANCY DISMISSAL- Ministry of Defence v Mutton [1996] ICR 590	Camilla Palmer
21	DEFINITION OF 'EMPLOYMENT' WIDENED: *Mrs. J. Ravindran v Texaco Ltd* [ref: IT/39417/95]	Legal Strategy Unit Commission for Racial Equality
22	DUTY OF EMPLOYERS IN HARASSMENT CASES CLARIFIED? *Burton & Rhule v De Vere Hotels* [EAT 109/96] Unreported	Karon Monaghan
23	COMPENSATION IN RACE DISCRIMINATION CASES: HM Prison Service & Others v. CA Johnson EAT 1033/95	Karon Monaghan
24	TIME LIMITS: *General Medical Council v Dr Elena Rovenska* - CA [unrep - but should be in the Times LR shortly]	Heather Williams
25	DISCRIMINATION BY POLICE IN THE PROVISION OF SERVICES: Farah -and- Commissioner of Police for the Metropolis	Camilla Palmer
26	UPDATE ON FORTHCOMING DECISIONS/APPEALS	
27	HARASSMENT AT WORK: EMPLOYER'S LIABILITY CLARIFIED Raymondo Jones v. Tower Boot Co. Ltd., Court of Appeal, December 1996	Robin Allen QC
28	QUESTIONNAIRES UNDER THE EQUAL PAY ACT	Camilla Palmer

DISCRIMINATION LAW ASSOCIATION

MARCH 1996

BRIEFING No. 3: FIGHTING DISCRIMINATION:
Two Steps Backward
The Asylum & Immigration Bill

The Government's proposals for the "Prevention of Illegal Working" will open the door to racial discrimination. These proposals form part of a package of measures, including immigration scrutiny by public officials and withdrawal of benefit and housing entitlement, intended to tighten immigration control and to make the UK a far less attractive destination for "*bogus asylum seekers and other illegal immigrants*".

The proposals in detail

Clause 8 of the Asylum and Immigration Bill would make it a criminal offence, punishable by a fine of up to £5,000, to employ an immigrant over 16 unless the immigrant is lawfully in the UK and is not subject to any conditions which prohibit him/her from taking up the employment in question. The offence will therefore apply to the employment of illegal immigrants, overstayers, and those in breach of immigration conditions relating to employment. The offence is one of strict liability. A statutory defence is available if an employer proves that s/he had produced to her/him, with a view to establishing that the employment would not be an offence, a document of a type specified in an order which appeared to relate to that employee, and the employer either retained the document or a copy.

Crucial to the implications of this measure is the definition of "immigrant" in Clause 12 as "a person who under the 1971 Act requires leave to enter or remain in the UK (whether or not such leave has been given)." This definition includes approximately 25% of the ethnic minority population of Britain, the vast majority of whom have been lawfully here for many years. The wide definition will bring within the scope of unnecessary suspicion many thousands of people who are fully entitled to work.

Is this measure needed?

The Government has defined the problem on the basis of an estimate that in 1994 some 10,000 people were detected working while either in the U.K. illegally, or while not entitled to work. No evidence has been produced to support that figure. Further there is no evidence to show that unauthorised workers are taking jobs from the domestic workforce, one of the key arguments supporting these proposals. Nor is it known what jobs unauthorised workers are doing, why they have been recruited to such jobs (e.g. are they more willing than domestic workers to accept low wages, poor conditions, non-payment of

NI contributions.)

There are currently provisions under the Immigration Act 1971 enabling the prosecution of employees who have committed immigration offenses including illegal entry, overstaying, failing to observe a condition of leave (including a condition prohibiting all or certain types of employment) etc. Employers could also be prosecuted if they commit offences under the 1971 Act, such as harbouring or aiding and abetting a person committing an immigration offence, although, in practice, such prosecutions are rare.

Immigration control functions assigned to employers

It is the Government's view that the only way to tighten the loophole of unauthorised working is to impose on employers an immigration control function. Employers will be expected to identify persons who have entered illegally, overstayed, or who are lawfully here but are not entitled to do work of the type offered. These are policing functions which arguably should continue to be carried out by the Immigration and Nationality Department. Not only are employers not trained to carry out this function but also they lack any public accountability for taking on this function on behalf of the state.

The other side of the argument is that the proposed control envisaged in the legislation is unlikely to be effective. Employers are meant to rely on one or more of the documents specified in an order by the Home Secretary to check on an immigrant's entitlement to work. The list of documents which are to provide employers with the statutory defence are listed in a draft order. These include a document which contains a National Insurance number, a UK birth certificate, a passport with certain endorsements, an EEA passport or ID card, a letter from the Home Office giving permission to take the employment in question.

- National Insurance numbers do not confirm entitlement to work. Further there are an estimated 20 million surplus NI numbers in circulation. There are also many people who are entitled to work who may, for valid reasons, not have a NI number.

- False birth certificates are easily available. A Home Office spokesperson in 1995 attributed most of the 10,000 "illegal workers" to persons who had obtained false birth certificates.

- ID cards from EEA countries are reportedly easily obtainable on the black market and thus not reliable as evidence of entitlement to work.

The proposal effectively makes it an offence for an employer not to take a positive role in immigration control. The Bill provides that not only is there potential corporate liability for prosecution and fine but also that any individual director or manager or any person purporting to act in the capacity of a director or manager can be personally guilty and liable for prosecution and punishment if the offence was committed with their consent or connivance or due to their neglect.

Discrimination is an inevitable consequence

Racial discrimination in recruitment continues to be a serious problem. The Commission for Racial Equality has recorded that in the first eleven months of 1995 nearly 1 in 6 of the employment-related cases where assistance was sought were concerned with racial discrimination at the point of recruitment. Additionally, the Commission receives complaints from job centres across the country that employers have asked them not to refer job seekers from particular ethnic groups. There is widespread belief that the Prevention of Illegal Working proposals will make the situation worse.

- From the first 43 responses to the Home Office consultation a strong consensus is apparent: of the first 43 responses 16 respondents said that:

"there was a considerable danger that employers would tend to play safe" [by not offering employment to anyone who appears to be an immigrant] and 8 respondents said that "the measures would adversely affect race relations." (Standing Committee on the Asylum and Immigration Bill 1 February)

- During the Third Reading of the Bill MPs referred to a letter to The Times signed by leaders of the CBI, the Association of British Chambers of Commerce, the Federation of Small Businesses, the Institute of Directors, the Institute of Management, the Institute of Personnel and Development and the TUC which stated, "the proposal threatens to damage race relations. There would be every incentive not to hire black staff or people with foreign sounding names; and to concentrate checks on ethnic minority employees." (HANSARD 21 February 1996, 395)

The Government in its consultation document proposes that "Employers should not make assumptions about entitlement to work based on personal characteristics of the job applicant". It recommends that where employers decide to make checks on entitlement to take work the same checks should be applied to "all applicants whatever their background". However, the Bill itself does <u>not</u> require documents to be produced for all prospective employees. On the contrary, the Bill simply makes it a criminal offence to employ certain groups of immigrants and provides a statutory defence. To come within the statutory defence an employer would merely need to carry out checks on prospective employees who are "immigrants" as defined in the Bill.

Any employer who takes the obvious shortcut to avoid criminal conviction, namely to carry out checks only on those prospective employees who appear to be "immigrants", puts him/herself at risk of Industrial Tribunal proceedings for unlawful racial discrimination. In practice, many employers are likely to avoid both the administrative burden of making checks and the risk of prosecution by simply not offering employment to any person whose immigration status might, in their view, be uncertain, in particular, people of visible ethnic minority origin. Such an approach again could be challenged under the Race Relations Act.

It is understood that a few respondents to the consultation exercise specifically proposed that there should be some form of exemption to protect employers from complaints of

racial discrimination.

The experience in the United States where similar legislation has imposed criminal sanctions on employers supports these fears. In their response to the Government's consultation the Institute for Public Policy Research quoted research on the effectiveness of the Immigration Reform and Control Act in the USA

"Significant numbers of employers overreacted to the fear of potential sanctions and established employment policies and practices that were in violation of other IRCA provisions such as by hiring only US citizen or rejecting job applicants who were foreign-looking or -sounding yet legally authorised to work in the U.S." (Lessons from Immigration Law Reform in the United States, John Fraser

The evidence is strong that this measure cannot be implemented without increasing discrimination on grounds of race. Where there appears to be no real justification and little prospect of effectiveness, it is all the more worrying that the Government remains committed to its enactment.

Barbara Cohen

DISCRIMINATION LAW ASSOCIATION

MARCH 1996

BRIEFING No. 4: NO RIGHTS UNDER ARTICLE 119 TO FULL PAY DURING MATERNITY LEAVE

Gillespie and others v Northern Health and
Social Services Board & others ECJ 13 February 1996

The long-awaited European Court of Justice (ECJ) decision in Gillespie is now out. Like many equal pay and discrimination cases it raises more questions than it answers.

The facts

The calculation of maternity pay (under the collective agreement) was based on the last two pay cheques received by the women for the two months preceding the 15th week before the expected week of childbirth. No provision was made for an increase if there was a subsequent pay rise.

The applicants claimed that, during their maternity leave, their pay should not have been reduced at all. Alternatively, they should have received the benefit of the backdated pay rise.

The ECJ held that:

a. maternity pay does not constitute 'pay' under Article 119, whether it is statutory or contractual; the Equal Treatment Directive did not apply, but

b. women are not entitled to full pay during their maternity leave. This is because, say the ECJ, there is only discrimination where there is the 'application of different rules to comparable situations or the application of the same rule to different situations'. In other words 'like must be compared with like'. The ECJ went on to hold that the special protection given to women (ie their right to maternity leave) is not comparable either with that of a man or with that of a woman actually at work; as no comparison can be made there is no discrimination;

c. the amount of the benefit, however, must include any pay rise awarded after the calculation period (i.e. under the present statutory scheme, the eight weeks prior to the 15th week before the expected week of childbirth). This means that the calculation of pay

for the purposes of assessing contractual maternity pay or the earnings-related part of statutory maternity pay (payable for the first six weeks) should be revised should there be a pay increase between the 15th week and the end of maternity leave. This would include a pay increase which was backdated to this period.

The ECJ said that 'to deny such (a pay increase) to a woman on maternity leave would discriminate against her purely in her capacity as a worker since, had she not been pregnant, she would have received the pay rise';

d. there were no provisions for determining the adequacy of maternity pay (as the Pregnant Workers Directive did not apply to the facts of the case) provided the amount was not so low as to undermine the purpose of maternity leave.

Other implications

- the decision also means that if there is a pay rise while a woman is on maternity leave she should not only get the benefit of it through increased Statutory Maternity Pay (SMP) (for the first 6 weeks), but immediately she returns to work;

- Gillespie was only concerned with the amount of pay awarded, not the conditions of entitlement. It is not clear whether, if a woman were not entitled to SMP at all, because her earnings were below the threshold during the eight-week period (presently £58 per week), she would subsequently become entitled to SMP as a result of her earnings being increased to above the £58 threshold;

- the reference to the need for maternity pay to be adequate so as not 'to undermine the purpose of maternity leave' adds strength to the argument that the exclusion of women from any statutory maternity pay because their earnings are less than £58 per week (in the relevant period) is a breach of European law;

- the question of what other benefits should continue during maternity leave was not resolved. Arguably, any benefit which is not actually 'maternity pay' should continue to be provided. This is on the basis that to deny it would discriminate against a woman purely in her capacity as a worker since, had she not been pregnant, she would have received it - i.e., the test applied in Gillespie to the pay rise.

This is separate from the Employment Protection (Consolidation) Act EP(C)A) right to maintenance of contractual rights - apart from remuneration - during maternity leave;

Claims under the Equal Pay Act (EqPA) and Sex Discrimination Act (SDA)

Where there is a more favourable sick pay scheme (than maternity pay scheme) arguably a woman could still argue that it is discriminatory under the SDA or a breach of the EqPA to refuse to allow her to take advantage of it when she is away from work having a baby. There have been a number of tribunal decisions where women have successfully argued this (see Todd v Eastern Health & Social Services Board [Case 1149/88EP, 1150/88SD

Belfast IT 16.10.89], Coyne v Export Credits Guarantee Dept [1981] IRLR 51, IT). However, this comparison is now more difficult given the ECJ finding in (b) above.

Comparison with Webb

There seems to be a logical inconsistency between Webb (see D.L.A. December Newsletter) and Gillespie. In Webb the House of Lords (HL) held that because pregnancy was a condition unique to women, there was no need for comparison with a man in a similar situation and less favourable treatment on grounds of pregnancy is per se discriminatory. Yet in Gillespie the ECJ held that there can be no comparison between a woman on maternity leave and a man/woman at work, so there can therefore be no discrimination.

Contributions to the Newsletter on this debate would be welcome.

Camilla Palmer

DISCRIMINATION LAW ASSOCIATION

MARCH 1996

BRIEFING No. 5: RIGHTS DURING MATERNITY LEAVE AND ABSENCE
Effect of Crouch v Kidsons Impey [1996] IRLR 79

The statutory and contractual rights of pregnant employees and women on maternity leave is a maze. These rights consist of:

a. the statutory maternity right to 14 weeks maternity leave for all employees, irrespective of service, and the right to extended maternity absence of up to 29 weeks after the beginning of the week of the birth for women with two continuous years service with the same employer at the 11th week before the expected week of childbirth;

b. contractual rights (contained in the contract or the subject of verbal agreement);

c. the automatic protection against dismissal on pregnancy or maternity related grounds for all women irrespective of length of service;

d. the right not be unfairly dismissed, under the ordinary unfair dismissal provisions;

e. the right to protection against discrimination (under the Sex Discrimination Act (SDA), Equal Pay Act (EqPA), Equal Treatment Directive)

Failure to comply with the statutory notice provisions means that the woman loses her statutory right to maternity leave and her statutory right to return after maternity absence. This does not mean that she then loses her job.

Contractual rights
A woman may have more favourable contractual rights - either contained in the contract or because the employer has waived the strict statutory notice requirements. An employee who has both a statutory right to return and a contractual right may take advantage of whichever right is, in any particular respect, the more favourable.

Protection from unfair dismissal
The fact that the woman has gone on maternity leave without giving the appropriate statutory notice does not mean that the contract automatically comes to an end. If the contract continues, the woman still has a right not to be unfairly dismissed (either for an automatically unfair pregnancy/maternity related reason or an ordinary unfair dismissal).

Does the contract subsist

The statute provides that the contract subsists during the 14 weeks general maternity leave. During the maternity absence (which commences at the end of the 14 weeks) the continuation of the contract will depend on the circumstances.

In Institute of the Motor Industry v Harvey [1992] ICR 470 the Employment Appeal Tribunal (EAT) held that if a woman gives a notice of intention to take maternity leave her contract of employment is likely to continue when she goes on maternity leave unless it is terminated by agreement, resignation or dismissal. Ms. Harvey was therefore able to claim constructive dismissal during her maternity absence.

In Hilton International Hotels (UK) Ltd. v Kaissi [1994] ICR 578 the EAT held that the fact that Mrs. Kaissi failed to give notice of her intention to return did not mean
that her contract was to be treated as terminated when she left for maternity leave. She was paid sick pay until the birth and then statutory maternity pay. She was dismissed after informing her employers she could not return to work because of pregnancy related illness. As her contract continued during this period she could claim ordinary unfair dismissal, dismissal due to pregnancy and sex discrimination.

However, in Crouch v Kidsons Impey [1996] IRLR 79 the EAT held that the contract did not continue after Ms. Crouch left work in order to have a child, where she had failed to comply with the statutory and contractual notice requirements. The EAT held there was no presumption that the contact remains in existence; if the employer consents to the employee leaving work and remuneration ceases, the appropriate inference is that there has been an agreed termination. The concept of a 'ghost' contract, where all the ordinary rights or obligations of such a contract have ceased to exist, was, the EAT said, 'fanciful'.

We now have three decisions from the EAT with different emphases. Tribunals can choose which to follow but Crouch is arguably wrong because:

- there should not be a presumption that there is a consensual termination of the contract when it is clear the employee did not consent;

- the courts have been generally reluctant to assume consensual termination where this will deprive the employee of her statutory rights (see Igbo v Johnson Matthey Chemicals Ltd. [1986] IRLR 215 CA);

- in no other situation would there be implied an agreed termination where an employee is absent from work; the employer would still need to dismiss the employee.

Note that the Pregnant Workers Directive prohibits the dismissal of workers from the beginning of their pregnancy to the end of the maternity leave 'save in exceptional cases not connected with their condition which are permitted under national legislation'. This exception was interpreted very strictly in Ozkan-Quaynor v Optika (Ltd) Optician (Case No. 25564/95/LN/C 11.12.95 London).

Summary

- There should be a presumption that the contract continues during maternity absence unless the employee genuinely wants to leave;

- If there has been a failure to comply with the statutory notice provisions, the dismissal of a woman or refusal to allow her to return may be an automatically unfair or an ordinary unfair dismissal; it may also be discriminatory.

Note this is only a brief summary of a complex area of law.

Camilla Palmer

DISCRIMINATION LAW ASSOCIATION

MARCH 1996

BRIEFING No. 6: THE IMPLICATIONS OF SEYMOUR SMITH for other employees who may consider that they were unfairly dismissed but who have less than two years service at the date of their dismissal

Implications for other Employees

1. The effect of the Court of Appeal's (CA) judgment will differ according to the date of dismissal and the nature of the employer.

Those dismissed in 1991

a. Employees of emanations of the State (state employees proper, local authority and health authority employees etc.) can rely on the Equal Treatment Directive and bring their claims now relying on the declaration by the CA in Seymour Smith. No time limits will apply because in Emmott v Minister for Social and The Attorney-General [1991] IRLR 387 the European Court of Justice (ECJ) held that

> "...that so long as a directive has not been properly transposed into national law individuals are unable to ascertain the full effect of their rights and consequently until the Directive has been properly transposed, a defaulting Member State may not rely on an individual's delay in initiating proceedings against it in order to protect rights conferred upon him by the provisions of the directive and that a period laid down by national law within which proceedings must be initiated cannot begin to run before that time..."[1]

b. Those (like the Applicants in Seymour Smith) who are not employed by emanations of the state will need to rely on their rights under Francovitch v Italian Republic [1995] ICR 722 to sue the State for damages[2]. At present it has not been determined what is the time limit for such claims. The best bet is that it will not be less than 6 years, though it could be longer on the Emmott principle. In Emmott it was held

"It is for the domestic legal system of each member state to determine the

[1] Reaffirmed in Johnson No.2 [1995] IRLR 157 para. 25

[2] See also the opinion of the Advocate General in Firma Brasserie du Pecheu SA v The Federal Republic of Germany and The Queen v The Secretary of State for Transport ex parte Factortame Limited on the 28 November 1995

procedural conditions governing actions at law intended to ensure that protection of the rights which individuals derive from the direct effect of Community law provided that such conditions are not less favourable than those relating to similar actions of a domestic nature..."[3]

Those dismissed after 1985 and before 1991

c. The decision of the CA did not directly concern this group but given the "persistency and consistency" of the figures referred to in the judgment it is likely that a similar approach would be taken to that set out above.

Those dismissed after 1991

d. As yet it has not been determined whether the impact of the two-year rule is unjustifiably indirectly discriminatory after 1991. This will need to be determined by consideration of the up-to-date figures and any fresh arguments on justification (if any). Equal Opportunities Review has published the most up to date figures on the impact of the rule drawing on the Labour Force Survey.

Year	Males (less than two years)	Females (less than two years)	Males (two or more years)	Females (two or more years)	Ratio of males to females (two or more years)
1992	23.5	31.5	76.5	68.5	89.6%
1993	22.9	29.6	77.1	70.4	93.3%
1994	24.5	29.9	75.5	70.1	92.9%

Practical Action

2. In practical terms anyone who has been dismissed with less than two years service, and who considers that they may have been unfairly dismissed, should consider commencing their action in the Industrial Tribunal (IT) naming their employer as soon as possible. They should probably ask the IT to adjourn the hearing until after the decision of the House of Lords HofL in Seymour Smith unless they are employed by an emanation of the state and their claim relates to a dismissal in the period between 1985 and 1991. Even in that latter case they may well find that the Respondent asks for the case to be adjourned pending the outcome of the appeal in Seymour Smith.

Warning about Time Limits

3. It should be recalled that the Employment Appeal Tribunal (EAT) has decided that if an employee relies upon Article 119 and the Employment Protection (Consolidation) Act

[3] See [1991] IRLR 390 at para 16.

(EPCA) to found a claim for unfair dismissal the domestic ime limit for commencing the claim applies (see Biggs v Somerset County Council [1995] IRLR 452). The effect of this (if Biggs is upheld on appeal, and the HofL adopt the reasoning of Mediguard in Seymour Smith) is that employees will have to seek to take advantage of the escape clause in Section 67(2) of the EPCA concerning whether it was "reasonably practical" for the claim to have been presented in time. Obviously the earlier a claim is made the easier that will be.

Claims already Brought and Dismissed

4. Where a claim has been brought already but has been unsuccessful then the employee may well be in difficulty in re-opening the case by attempting to obtain leave to appeal out of time (see Setiya v East Yorkshire Health Authority [1995] IRLR 348). Though it may well be possible in such a case to seek Francovich damages against the state or perhaps where an emanation of the state is the Respondent to seek a review of the earlier decision. In either case it would seem that the State could not take advantage of its own default to protect itself (see Emmott).

Robin Allen QC

DISCRIMINATION LAW ASSOCIATION

MARCH 1996

BRIEFING No. 7: DIFFERENT 'APPEARANCE' CODES FOR MEN AND WOMEN NOT DISCRIMINATORY.
Smith v Safeway plc
The Times, 5 March 1996, CA

We had to wait eight years for the European Court of Justice to overrule the English courts' decisions on pregnancy discrimination. It looks as though we will also have to be patient with 'dress' and 'appearance' discrimination. This is another example of a decision which defies logic.

The applicant, a male delicatessen assistant, was dismissed because the length of his hair contravened the employers' rules for the appearance of male delicatessen staff. There was no rule banning women from wearing their hair long. But, said the Court of Appeal, there was no problem with a code, governing appearance, where conventional standards were applied, provided there was an even-handed approach between men and women.

The whole point of discrimination law is that it is meant to challenge conventional and traditional views about men and women's roles. This is even accepted by the Court of Appeal (CA). Phillips LJ admits: "one of the objects of the prohibition of sex discrimination was to relieve the sexes from unequal treatment resulting from conventional attitudes". Convention is all too often an excuse to maintain the status quo when there is no good reason to do so.

The employers considered that the appearance of their staff could have an important effect on attracting or repelling customers. Are people really frightened away from the deli counter by a man with long hair? The CA harped back to the 1978 EAT decision of Schmidt v Austicks Bookshops Ltd where the EAT held it was not discriminatory to require women to wear skirts. Even women lawyers are now allowed to wear trousers.

This decision is clearly inconsistent with the Equal Treatment Directive (which is enforceable against public sector employers). The Directive provides that there shall be no discrimination whatsoever on grounds of sex ... with regard to working conditions. This means that 'men and women shall be guaranteed the same conditions without discrimination on grounds of sex'. To allow discrimination in the name of what is conventional for men and women is surely discrimination. Or have I missed the point?

Camilla Palmer

DISCRIMINATION LAW ASSOCIATION

JUNE 1996

BRIEFING No. 8: EQUALITY CODE FOR THE BAR

The Bar Council's recognition, in its Code of Conduct, of the importance of equal opportunities, is extremely welcome; however, amendments to the Code in respect of the Equality Code, announced in April's Bar News (Issue No. 82, p.7), fails to transpose into the Bar's professional code of ethics the standards of conduct now expected of barristers by the general law.

Section 35A of the Sex Discrimination Act 1975 and section 26A of the Race Relations Act 1976 (inserted by ss. 64(1) and (2) respectively of the Courts and Legal Services Act 1990) make unlawful certain kinds of discrimination by or in relation to barristers. Discrimination bears the meaning given to it elsewhere in those Acts, in short (i) less favourable treatment ("direct discrimination"); (ii) the equal application of a requirement or condition which has a disproportionate impact on members of a relevant group which is not capable of objective justification ("indirect discrimination"); and (iii) victimisation.

The amended paragraph 204(1) of the Bar's Code of Conduct faithfully reflects, indeed goes further than, those provisions by making it a requirement of the Code that a practising barrister must not discriminate directly or indirectly or victimise on a number of specified grounds.

The effect of paragraph 204(2), however, for all practical purposes, removes indirect discrimination from the scope of the Code altogether. By that paragraph, there is no breach of para. 204(1) if the barrister complained against proves that the act of indirect discrimination was committed <u>without any intention of less favourable treatment</u> on one of the specified grounds.

The language of para. 204(2) reflects the language of section 57(3) of the Race Relations Act and (until recently amended) section 66(3) of the Sex Discrimination Act, but there is one crucial difference. Sections 57(3) and 66(3) operate at the <u>remedial level</u>: they restrict the remedies available in respect of indirect discrimination by providing that no award of damages shall be made in respect of an unlawful act of indirect discrimination, if the respondent proves that the requirement or condition was not applied with the intention of treating the claimant unfavourably on the relevant ground. Para. 204(2), by contrast, operates at the level of the <u>substantive definition of the disciplinary offence</u>: if absence of intention to treat unfavourably can be proved. That could only be said to reflect the statute if the statute said that the act of indirect

discrimination "shall not be unlawful" if absence of intention can be provided, which it does not say. Thus, the effect of para. 204(2), as presently worded, is that the Code does not reflect the statutory position.

This discrepancy between the Code and the general law is even more marked in the field of sex discrimination, now that an industrial tribunal can award compensation in a case of indirect sex discrimination, even where that discrimination was unintentional:

see the Sex Discrimination and Equal Pay (Miscellaneous Amendments) Regulations 1996 SI 1995/438 which came into force on 25th March 1996.

The argument that the amended provisions of the Bar Code do cover indirect discrimination, because, whereas the old para. 204 prohibited only less favourable treatment (i.e. direct discrimination), the new para. 204(1) extends to disproportionate impact of an objectively unjustifiable requirement or condition, subject only to the qualification in para. 204(2) that such indirect treatment must have been intended to treat less favourably. The application of a requirement or condition intending such application to treat an individual unfavourably on a particular ground (which is what para. 204(2) requires) will always amount to direct discrimination. The effect of the qualification therefore is, in respect of indirect discrimination, to take away with one hand what para. 204(1) appears to give with the other.

Para. 204(2) explicitly places the onus on the barrister complained against to prove that the act complained of was committed without any intention of less favourable treatment. In practice, however, those against whom such a complaint of indirect discrimination is made (who rely on para. 204(2) in their defence) are likely to be the beneficiaries of the understandable indulgence shown by tribunals to those required to prove a negative.

The combined effect of paras. 204(1) and (2) is therefore to require no more than that barristers do not directly discriminate or victimise, which fails to reflect the position under the general law that an individual barrister acts unlawfully if he or she indirectly discriminates regardless of their intention. Thus, conduct which is unlawful under the general law is not a breach of the Bar's Code of Conduct.

The likely and reasonable motivation for the insertion of para. 204(2) is a concern that barristers do not find themselves disciplined for a breach of the Code of Conduct for an act the consequences of which may be unintentional. However, the way to give effect to that concern is not to qualify the very definition of the substantive requirement, which is what the Code has done, but rather to make lack of intention relevant to sanction, which is what the Acts themselves have done.

The Code could make special provision in Part VIII, for example, that in respect of an act of indirect discrimination, which is a breach of para. 204(1) of the Code, the appropriate sanction is declaratory and of prospective effect only, perhaps giving rise to further disciplinary proceedings only in the event of non-compliance with a recommendation as to what is required to avoid similar indirectly discriminatory conduct in future. It is possible to draft an appropriate disciplinary provision which reflects the concern underlying para. 204(2), without removing indirect discrimination from the

scope of the Code altogether which is the effect of the provisions as presently drafted.

It is to be hoped that serious consideration will be given to amending the Bar's Code of Conduct, so as to avoid the present unfortunate position whereby the standards of conduct expected of the profession by its professional body fall short of the standards expected by the law.

D.L.A. would encourage barristers (and others concerned about this issue) to write to the Chairman of the Bar (David Penry-Davey Q.C.) c/o The General Council of the Bar, 3 Bedford Row, London WC1R 4DB

Murray Hunt; Rabinder Singh; Helen Mountfield

DISCRIMINATION LAW ASSOCIATION

JUNE 1996

BRIEFING No.9: INDIRECT DISCRIMINATION - Problems of Proof

Indirect discrimination is about practices which have the effect, without necessarily the intention, of discriminating against women and racial groups, either because of past direct discrimination or existing social conditions.

Definition

Where a person applies to (a woman) (a person of one racial group) a **requirement or condition** which applies or would apply equally to (a man) (persons not of the same racial group) but

i. which is such that the **proportion** (of women) (of persons of the same racial group as the applicant) **who can comply** with it **is considerably smaller** than the proportion (of men) (of persons not of that racial group) who can comply with it;

ii. which the employer cannot show to be **justifiable** irrespective of the (sex) (colour, race, nationality or ethnic or national origins) of the person to whom it applies; and

iii. which is to the **detriment** of the applicant because s/he **cannot comply** with it.

There are 8 main questions:

1. [race only] **Does the applicant belong to the racial group(s) s/he claims?**
Racial group may be defined by colour, race, nationality or ethnic or national origins (RRA s3). It is for the applicant to define the group(s); alternative groups may be put forward. The choice of group may affect the outcome. A requirement for a woman to wear a skirt will affect Muslim women from Pakistan. The racial group should be Pakistanis[4]. For problems involved in choosing the racial group see *Orphanos v Queen Mary College*[5].

2. **Has the respondent applied any requirement or condition to the applicant which was also applied to persons not of the same sex/racial group as the applicant?**

* The words 'requirement' and 'condition' should be interpreted widely (*The Home Office v Holmes*)[6] and includes:

[4] There is some doubt whether Muslim is a 'racial' group as opposed to a 'religious' group.
[5] [l985] IRLR 349, HL.
[6] [l984] IRLR 299 EAT.

- requirement to work full-time, or long hours or during religious holidays;[7]
- requirement for specified experience, qualifications (e.g. UK), culturally based testing;
- age requirements;
- dress requirements.

* Requirements/conditions may be explicit or implicit and may be found in a job description, contract of employment, collective agreement, notice, letter, custom and practice etc.

* EU law (which applies only to sex discrimination) does not require proof of 'requirement or condition'. ECJ has held that a 'practice' which affects more women than men infringes Art 119 unless justified. [8]

* The CA held in *Perera v Civil Service Commission (No 2)*[9] that where none of several criteria constituted **an absolute bar** to getting the job (which the employers had taken into account when deciding who to appoint) there was no requirement or condition; an applicant's inability to meet one criterion, said the CA, could be offset against the ability to meet another. This is clearly a breach of the Equal Treatment Directive which provides that 'there shall be no discrimination whether direct or indirect; it should be sufficient to show that a factor **disadvantages** an applicant.

3. **When was the requirement/condition applied (material time)**

The test is whether the applicant could comply with the requirement or condition when it was applied to her/him.[10]

4. **Within what section of the community does the proportionate comparison fall to be made - the pool**

* In *Jones v University of Manchester*[11] the CA held (in relation to an age limit for a job) that the pool was those otherwise qualified for the post, excluding the discriminatory requirement - the age limit.

* In *London Underground v Edwards* [12] the applicant, a train driver, challenged

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[7] The decision in *Clymo v London Borough of Wandsworth* [l989] IRLR 241 EAT, that the employers had not 'applied' a requirement (of full-time working) because it was 'in the nature of the job' must be wrong and has not generally be followed (see Briggs v North Eastern Education and Library Board.

[8] see *Bilka-Kaufhaus v Weber von Hartz* [l986] IRLR 317 ECJ and *Enderby v Frenchay Health Authority and Sec State for Health* [l993] IRLR 591.

[9] [l983] IRLR 166 which was followed in *Meer v LB Tower Hamlets* [l988] IRLR 399, CA.

[10] *Clarke v Eley (IMI) Kynock Ltd* [l982] IRLR 482 EAT.

[11] [l993] IRLR 218 CA.

[12] [l995] IRLR 355.

rostering arrangements. The EAT held that the pool was all train drivers to whom the rostering arrangements applied; it should not be restricted to train drivers who were lone parents.

* It is important to avoid incorporating discrimination in the pool. The comparison is between the 'advantaged' group and 'disadvantaged' group. If the pool was limited to lone parents or those with responsibility for children they are equally "disadvantaged".[13]

* The pool does not have to be a statistically perfect match of persons who would be capable of filling and interested in the post offered. [14]

5. **Proving disparate impact:** is the proportion of women (or persons of the same racial group as the applicant) who can comply with the requirement considerably smaller than the proportion of men (persons of a different racial group) who can comply?

* Under UK law the test is a proportionate not an absolute comparison. Thus, in a sex discrimination case

a. take the number of women in the pool;

b. take the number of women in the pool who can meet the challenged requirement;

c. divide (b) by (a) and this gives the proportion of women in the pool who can satisfy the requirement.

The same calculation is done for men in the pool and the comparison is between the two proportions.[15]

* In addition, disparate impact can be measured by comparing predicted result with actual result. If women are found to be under-represented in the group that can meet the requirement and over-represented in the group which cannot meet the requirement there is disparate impact (*R v Secretary of State for Employment ex parte Seymour Smith and Perez*).

* Where the relative position of men and women, or of different racial groups, is relatively clear, tribunals will take account of 'ordinary behaviour' [16](e.g., it is well known that the vast majority of part-timers are women.)

* There is no rule as to when one proportion should be viewed as 'considerably' smaller

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[13] see *R v Secretary of State for Eduction ex parte Schaffter* [l987] IRLR 53 DC.
[14] *Greater Manchester Police Authority v Lea* [l990] IRLR 372 EAT.
[15] Under EU law the ECJ often compare the numbers of men and women who are disadvantaged by a practice
[16] *Meade-Hill and another v British Council* [l995] 478 CA.

than another. [17]

* In *Seymour-Smith* the CA was impressed by the persistency and consistency of the statistics. The proportion of men who had 2 or more years' service with their current employer ranged from 72% to 77.4%. The percentage of women in this category ranged between 63.8% to 68.9%.

* The court will always look at the statistical significance of figures (see *Enderby v Frenchay Health Authority and Secretary of State for Health* [l993] IRLR 591 ECJ.
Where absolute numbers are small a greater disparity may be required.

* Although the test is 'considerable difference' the Equal Treatment Directive provides that there shall be 'no' discrimination whatsoever on grounds of sex. Thus, the weight to be attached to the word 'considerable' must not be exaggerated (*Seymour Smith*).

6. **Justification**

* The employer will have a defence if s/he can justify the requirement/condition.
* The test is whether

- the means chosen meet a necessary aim (of the business where it is an employer) or of the government's social policy (in the case of a statutory provision);
- the means chosen are suitable for attaining that aim;
- the means chosen are requisite or necessary for achieving that aim (see *Bilka* and *R v Secretary of State for Employment ex parte EOC*[18]).

• The burden of proof is on the employer. Generalised statements, such as the view that part-time workers are not sufficiently integrated, are not sufficient. [19]

7. **'Can comply'**

***** Can comply means 'can in practice' or 'can consistently with the customs and cultural conditions of the racial group' (*Mandla and Another v Lee and others*). [20]The employer cannot argue that a Sikh could take off his turban in order to comply with a 'no hats' rule. Nor should an employer be able to say that a woman can employ a childminder or nanny to look after her children in order that she can work full-time.[21] In *Briggs v North Eastern Education and Library Board* [22] the NICA said that it was relevant to take into account the current usual behaviour of women and their responsibilities for children.

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[17] *McCausland v Dungannon District Council* [l993] IRLR 583.
[18] *McCausland v Dungannon District Council* [l993] IRLR 583.
[19] *Rinner-Kuhn v FWW Spezial-Gebaudereinigung BmbH* [l989] IRLR 493 ECJ.
[20] l983] 2AC 548, HL.
[21] This was held to be justification in *Clymo* but must be wrong in the light of *Mandla* and ECJ decisions.
[22] l990] IRLR 181 NICA.

* The relevant time for deciding if an applicant can comply with a requirement is the time it has to be fulfilled or the time the detriment is suffered; it is not relevant that the applicant could have complied with it in the past or could do so in the future. [23]

8. **Has the applicant suffered a detriment?**

The applicant must show that the requirement is to her/his detriment because s/he cannot comply with it. Detriment simply means disadvantage.

New regulations on compensation for indirect sex discrimination

The SDA has been amended to allow compensation to be awarded for unintentional indirect sex discrimination where it would not be 'just and equitable' to make only a declaration and/or recommendation (The Sex Discrimination and Equal Pay (Miscellaneous Amendments) Regulations l996 SI l996 No. 438).

This does not apply to unintentional indirect **race** discrimination. Applicants will still have to show that the employer intended to discriminate or was aware of the discriminatory effect of a requirement or condition.

Camilla Palmer
Consultant with Bindman and Partners, working exclusively in the field of discrimination law.

ABBREVIATIONS USED:

CA	=	Court of Appeal
EAT	=	Employment Appeal Tribunal
ECJ	=	European Court of Justice
EOC	=	Equal Opportunities Commission
EU	=	European Union
HL	=	House of Lords
IRLR	=	Industrial Relations Law Reports
NICA	=	Northern Ireland Court of Appeal
RRA	=	Race Relations Act 1976
SDA	=	Sex Discrimination Act 1976
SI	=	Statutory Instrument

[23] *Clarke v Eley (IMI) Kynock Ltd* [l982] IRLR 482 EAT.

DISCRIMINATION LAW ASSOCIATION

JUNE1996

BRIEFING No. 10: IS THE ECJ CHANGING TACK ON INDIRECT DISCRIMINATION?

The implications of Nolte v Landesversicherungsanstalt Hannover, [1996] IRLR 225 and Megner and Scheffel v Innungskrankenkasse Vorderpfalz [1996] IRLR 236

The question was whether the exclusion of workers in 'minor' employment from the statutory old-age insurance scheme (which includes invalidity and sickness benefit) is indirectly discriminatory. 'Minor' employment is defined, under German law, as employment involving less than 15 hours per week and pay of up to l/7th of the average wage.

The first important point is that these related cases involved statutory contributory social security schemes. Different principles should apply to employment cases (particularly where there is no challenge to a statutory provision) and, arguably, non-contributory social security schemes.

The German government argued that:
- as contributory schemes require equivalence to be maintained between the contributions paid by employees and employers and the benefits paid out, the structure of the scheme could not be maintained if the provisions in questions had to be abolished;
- the only way of meeting the demand for minor employment was to exclude it from compulsory insurance;
- the jobs lost as a result would not be replaced by full or part-time jobs, but there would be an increase in unlawful employment and a rise in circumventing devices.

The Advocate General adopted the well established *Bilka* test for justifiability, i.e. that the 'means chosen must correspond to a real need, be appropriate with a view to achieving the objective in question and be necessary to that end'.

The ECJ, moving away from its strict test of justifiability, held that 'Member States have a broad margin of discretion' and the German policy aim was unrelated to sex discrimination. Thus, the government was entitled to consider that the legislation was necessary in order to achieve their aim.

Such an approach was rejected by the HL in the EOC challenge to the statutory exclusion of part-time workers from employment rights. The HL said that there was no

evidence that the threshold provisions actually resulted in a greater availability of part-time work. Similarly, in **Rinner-Kuhn the ECJ held that 'generalised** statements' were not sufficient justification. Yet there was no empirical evidence to support the German government in Nolte and Megner.

Does this may mean that any challenge to the UK national insurance lower earnings limit is likely to be more successful in our House of Lords than then ECJ?

Camilla Palmer
Consultant with Bindman & Partners; working exclusively in the field of discrimination law

DISCRIMINATION LAW ASSOCIATION

JUNE 1996

BRIEFING No. 11: COMPENSATION UPDATE

£140,000 settlement for sex discrimination and equal pay claim

A former personnel director of QS Familywear plc has accepted £140,000 for lost earnings, pension and other benefits together with back pay. £20,000 was paid to enhance her pension rights. The case was supported by the EOC.

Camilla Palmer

DISCRIMINATION LAW ASSOCIATION

JUNE 1996

BRIEFING No. 12: EAT OVERRULE IT WHICH FAILED TO MAKE INFERENCE OF DISCRIMINATION

In Bakshi v Falkirk District Council (EAT/1161/95) the tribunal held that the reason for the decision not to shortlist the applicant was because she was a Councillor. This was despite the fact that employer's witness said that this was not the reason. The EAT held that:

- where an explanation (for, say, failure to recruit) is put forward but is not acceptable, it does not automatically mean that there has been discrimination. However, where there is no explanation to justify what otherwise appears to be less favourable treatment 'it is very difficult to avoid drawing the relevant inference that such discrimination on racial grounds has occurred';

- even though the IT may have reached the conclusion positively that there was no discrimination, and that belief may be genuine, it does not take account of the possibility that race discrimination can be subconscious;

- the IT substituted their view for that of the witness so their reasoning was flawed.

The EAT said they were faced with the position of a clear demonstration of unfavourable treatment, no explanation justifying it, and discrimination in fact as between the applicant and other shortlisted persons. They, therefore, found that there had been discrimination. The case was remitted back to the same IT to consider remedies.

Camilla Palmer

DISCRIMINATION LAW ASSOCIATION

JUNE 1996

BRIEFING No. 13: CONTRACT WORKERS: Section 7 of the Race Relations Act/Section 9 of the Sex Discrimination Act

In the cases of Harrods Ltd v Seeley (EAT/397/95; Harrods Ltd v Remick (EAT/838/94) and Elmi v Harrods Ltd (EAT/567/95) the EAT held that the workers were entitled to rely on s7 of the RRA in claims against Harrods. Mummery J held that work done was for the benefit of Harrods and ultimately under their control. The fact that the workers worked for their employers did not prevent the work they did from being work "for" Harrods within the meaning of s7: "it was work from which Harrods derived direct benefit without themselves having to employ a person to do the work available". For the section to be relied on by a worker there must be an employer as well as a principal. It must also be possible to identify, as well as a contract of employment, a contract between the employer and the principal under which the individuals are supplied for the work available. It was held that whether s7 is applicable is a question of fact and degree in each case.

Leave has been granted to Harrods to appeal.

Sandhya Drew
Barrister

DISCRIMINATION LAW ASSOCIATION

JUNE 1996

BRIEFING No. 14: ASSESSMENT OF COMPENSATION: Ministry of Defence v Hunt [1996] IRLR 139

This is the most recent of the Ministry of Defence (MOD) appeals and follows the EAT's earlier guidance in Cannock v MOD [1994] IRLR 509.

The judgment of the EAT in Hunt was reported in March of this year and covered six appeals.

In the obiter part of its judgment in CANNOCK the EAT held that the question "what might have happened but for the dismissal" is not a question of fact to be determined on the balance of probabilities but is the evaluation of a loss of a chance. In HUNT the EAT affirmed this as the proper approach and made it clear that the "chance" can be assessed as 100%. Thus the EAT held that it was not necessarily perverse nor tantamount to a finding of fact for a Tribunal to have assessed the chance at 100%.

Further, and of considerable importance, is their judgment that it was not proper in law to argue that the totality of an award was "excessive". To the extent that CANNOCK suggested otherwise it was therefore wrong. If a Tribunal determines that an Applicant is entitled to £x for injury to feelings and £y for loss of wages, then the Applicant is entitled to £x + £y interest. If it were otherwise the Tribunals would not be giving effect to MARSHALL No.2 and the need to give an effective remedy to an Applicant.

The burden is on the party alleging it to prove failure to mitigate and HUNT again reminds us of that. It is not for the Tribunal to fill in "evidential gaps" relating to mitigation, it is for the Respondent to bring forward evidence that a particular step should have been taken. Where a Tribunal finds a failure to mitigate, and the chance of completing a certain number of years service at less than 100%, then the proper approach is to deduct the failure to mitigate figure before applying a percentage deduction in respect of loss of a chance, i.e. the failure to mitigate figure must be applied to the compensation assuming a full 100% chance. This must be the right approach.

Where a woman remains out of employment for a period after the birth of her child it does not necessarily follow that an assessment of her chances of returning to work should be less than 100%. A woman might well have remained in employment had her employment not been interrupted by a dismissal.

Where the assessment is not dependent upon a number of "chances" (e.g. chance she

would take maternity leave and come back to work; chance she would have remained in service for x years) the proper approach is cumulative so that if there was an 80% chance of her taking maternity leave and a 40% chance of her completing her period of engagement afterwards, one needs to calculate the first period by applying the 80% figure and for the second period applying 40% of the 80% figure (not 100%).

Finally, the EAT took the view that £500 was to be taken as at or near the minimum for injury to feelings.

Karon Monaghan
Barrister

DISCRIMINATION LAW ASSOCIATION

JUNE 1996

BRIEFING No. 15: DISCRIMINATION AGAINST TRANSSEXUALS ILLEGAL: P v S and Cornwall County Council

On the 30 April 1996 the European Court of Justice (ECJ) gave its judgment in respect of a reference by the Truro Industrial Tribunal in the above case.

THE FACTS

P was taken on by Cornwall County Council to work in an educational establishment in April 1991. A year later he informed S the Director of Studies and Chief Executive of the establishment that he intended to undergo "gender reassignment". This process began with a period of life testing in which P would dress as a woman followed by surgery to give him the physical attributes of a woman. At the beginning of September 1992 after undergoing minor surgery he was given three months notice to expire on 31 December 1992. He was informed that the reason for this dismissal was redundancy but he challenged this in the industrial tribunal (IT). The ECJ concluded that the IT did not consider that redundancy was the reason for his dismissal rather that it was the process of gender reassignment. The IT considered that the Sex Discrimination Act 1975 (SDA) did not cover this situation but asked the ECJ whether the Equal Treatment Directive (ETD) gave him any rights. The ECJ interpreted the questions posed by the IT as follows:

"Whether having regard to the purpose of the directive Article 5(1) precludes dismissal of a transsexual for a reason related to his or her gender reassignment"

The UK asserted that it appeared from the order of reference that Cornwall would still have dismissed P if P had previously been a woman and had undergone an operation to become a man.

THE JUDGMENT

In a very important judgment the ECJ held

"20. ..... the scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex...the scope of the directive is also such as to apply to discrimination arising as in this case from the gender reassignment of the person concerned.

"21. Such discrimination is based essentially if not exclusively on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo or has undergone gender reassignment he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.

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22. To tolerate such discrimination would be tantamount as regards such a person to a failure to respect the dignity and freedom to which he or she is entitled and which the Court has a duty to safeguard."

Accordingly, the ECJ held that the dismissal of such a person must be regarded as in breach of Article 5(1) of the ETD unless the dismissal could be justified under Article 2(2).

COMMENT

It is important to note that the case concerned employment by a County Council. Only employees of emanations of the state can rely on the ETD to have vertical direct effect. Hence transsexual or transvestite employees suffering discrimination by private employers will take no immediate comfort from this decision until the Government changes the last to bring the Sex Discrimination Action 1975 into line with the ETD or an industrial tribunal (IT) is persuaded to interpret the SDA consistently with the ETD. It seems unlikely that they would be able to establish a claim to damages against the State for failing to transpose the ETD as the wording of the directive was by no means clear and it had been widely assumed that the directive did not protect transsexuals.

The position of transsexuals may be compared with that of gays and lesbians. In practice many transsexuals and transvestites suffer worse discrimination than gays and lesbians. It is, perhaps, not surprising that this case was brought by a transsexual because many employers are more disturbed by a transvestite or a true transsexual than someone who, happy with their gender of birth, was either gay or lesbian.

However, a key question raised by this case is whether it provides any hope to gays or lesbians dismissed on grounds of their sexuality that they too might be protected under the ETD. It is arguable that it does. The word "sexuality" could easily be substituted in paragraph 20 and the subsequent paragraphs of the judgment cited above without distorting the meaning.

In practice many local and other public authorities have equal opportunities policies which prohibit discrimination on grounds of sexuality. They are likely to fear that a dismissal on that ground would expose them to a case of unfair dismissal. However, it must be only a matter of time before a gay or lesbian brings a claim against an emanation of the state relying on this decision in respect of a dismissal because of their sexuality.

It is possible that a gay or lesbian not employed by an emanation of the state could also try to rely on this judgment to persuade the IT to construe the SDA consistently with the ETD.

The judgment of the ECJ underlines the broad commitment to human rights taken by it in the interpretation and application of the ETD. That can only be welcomed.

Robin Allen
Barrister

DISCRIMINATION LAW ASSOCIATION

JUNE 1996

BRIEFING No. 16: UK PROCEDURAL RULES DEFEAT PENSION EQUALITY CLAIMS: The Equal Pay Act, time limits and backdating of pay

Tensions between far reaching European decisions on equal treatment and the problems of enforcing these rights in reality have been highlighted in the pensions cases.

I. Barber

In *Barber v Guardian Royal Exchange Assurance Group* [24] *Ltd* the ECJ held that a contracted-out occupational pension falls within Article 119 and so equal pension benefits must be paid to men and women at the same age.

In *Barber* the ECJ accepted that, until their decision (on 17 May l990) Member States and employers might well have assumed that the European Directives on Social Security [25] allowed them to differentiate between men and women in relation to pensionable age. Thus, pension schemes and redundancy arrangements were often based on men retiring at 65 and women at 60. This resulted in different benefits being available to men and women who retired at the same age. This, said the ECJ, was a breach of Article 119.

Retrospectivity and *Barber*: The ECJ, being aware of the enormous financial implications of their decision, limited its effect so that service prior to the decision (i.e. 17 May l990) was outside article 119. The Maastricht Treaty, Protocol 2, subsequently enacted this.

II. Access to pension schemes can be backdated to April l976

Subsequent ECJ decisions decided that the *Barber* limit on retrospectivity did not, however, apply to access to occupational pension schemes. In two cases, *Fisscher* and *Vroege* [26] the ECJ held that it had been clear since the *Defrenne* decision in April 1976 and *Bilka* in l986 that there must be equal **access** to pension schemes. There was,

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[24] [l996] IRLR 484

[25] No 79/7/EEC and No. 86/378/EEC

[26] see *Fisscher v Voorhuis Hengelo BV* and *Stichting Bedrijfspensioenfonds voor de Detailhandel* [l994] IRLR 662 ECJ and *Vroege v NCIV Institut voor Volkshuisvesting BV* and *Stichting Pensioenfonds NCIV* [l994] IRLR 651 ECJ

therefore, no excuse for not giving men and women equal access. There was one caveat to the decision. If women could claim they were entitled to backdate their membership they, as well as the employers, must pay their share of the contributions back to the date they joined.

III. *Biggs*

The problems for women trying to enforce their rights started with *Biggs v Somerset County Council* [27] when the Court of Appeal held that national time limits applied to claims under Article 119. The CA distinguished the ECJ decision in *Emmott*[28], which held that, in relation to claims under a **Directive** against a state body, time did not run until the Member State had implemented the Directive. The rationale for this was that a Member State could not rely on its own default to defeat a claim. However, the position under Article 119 was different.[29]

Otherwise (apart from the *Emmott* situation), the ECJ held, domestic procedural conditions applied to claims under Community law, provided such conditions:

(1) are not less favourable than those relating to similar actions of a domestic nature, and

(2) are not framed so as to render virtually impossible the exercise of rights conferred by Community law.[30]

IV. Time limits and backdating of pay under the Equal Pay Act (EqPA)

Under the Equal Pay Act there are two procedural rules which have so far defeated women's rights to backdated membership of a pension scheme.

(a) a claim must be brought within 6 months of the termination of the applicant's contract. There is no power to extend the time limit - unlike the position under the SDA and RRA;
(b) an employee can only recover back pay for a period of two years prior to the issue of proceedings.

V. *Preston and others v Wolverhampton Healthcare NHS Trust* [31]

In *Preston* the EAT held that both procedural rules applied to claims under Article 119.

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[27] [l996] IRLR 203. Leave to appeal to the HL has been refused.
[28] *Emmott v Minister for Social Welfare and Attorney-General* C-208/90 [l991] IRLR 387 ECJ
[29] The EAT also held that a claim could not be brought under a Directive (in order to take advantage of the Emmott decision) if there was an article 119 claim.
[30] see also *Rewe-Zentralfinanz EG v Landwirtschaftskammer fur das Saarland* 33/76 [l976] ECR l989 ECJ
[31] [l996] IRLR 485.

VI Six-month time limit

First, the EAT held that the time limit under EqPA s2(4) was **not** less favourable than domestic law claims of a similar nature (see III (1) above). The EAT said that an article 119 claim is made through the EqPA; there is no free-standing right to bring a claim under article 119. The EAT then went on to say that the comparison (for the purpose of looking at comparable domestic law claims) was with the Equal Pay Act. How can an Equal Pay Act claim be compared to an Equal Pay Act claim? It is a circular argument.[32] Surely, it should be with other claims, such as those for breach of contract, particularly as the Equal Pay Act operates through the mechanism of implying a contract term, namely the equality clause, into employment contracts.[33] This was the approach adopted by the majority in *Levez v T H Jennings (Harlow Pools) Ltd*.[34]

Secondly, the EAT holds that the time limit did not make it impossible in practice or excessively difficult to exercise the Community law right. [35]The EAT said that an individual's knowledge of their legal position was not relevant to whether it was impossible for them to exercise their rights in community law. Compare this to the approach of the ECJ in *Barber,* where the court said that employers and Member States were entitled to rely on a reasonable assumption that they were not acting in breach of article 119 by adopting different pensionable ages (even though it proved they had been acting unlawfully). Although these principles were not applied to access to pension schemes (in *Fisscher* and *Vroege*) it is an acknowledgement of the difficulties of understanding European law, particularly when there are conflicting national provisions. Are individuals really expected to understand the effect of EC law when it clear that the government does not?

VII Series of fixed term contracts

The EAT also held that where there was a series of fixed term contracts the time limit runs from the end of each particular fixed term contract, so an applicant can only bring a claim in respect of a contract which had expired within the previous 6 months. It is a pity the EAT did not adopt the robust approach it took in *Caruana v Manchester Airport plc* [36] when it pointed out the dangers of encouraging employers to impose a series of short-term contracts, with the object or collateral advantage of avoiding the impact of the discrimination law. The EAT, in *Preston*, did acknowledge that the position may be different if there was no break between contracts or where there was an 'umbrella' contract.

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[32] This was pointed out by the EAT in *Levez* (see below).
[33] A comparison could also be made with the SDA and RRA where there is discretion to extend the time limits where it is 'just and equitable'.
[34] [l996] IRLR 499.
[35] 'Article 119 has provided directly enforceable and effective rights since l976. There was no legal bar to proceedings by the applicants. Inconsistent provisions of domestic law do not establish a bar to the enforcement of Community law rights.'
[36] [l996] IRLR 379 - a pregnancy dismissal case

VIII Limit on backdating arrears of pay

The EAT held that the two-year rule was not incompatible with Community law and the limitation is on backdating, not quantum. This makes no sense. If an applicant has suffered a loss, of say £10,000 (at £1,000 p.a.), because she has been excluded from a pension scheme for 10 years, it is clearly imposing an upper limit by restricting her right to damages to 2 years - i.e. £2,000. The upper limit may differ from case to case but that does not mean it is not a limitation on compensation.[37] Note also that in *Prestone* the EAT held that there was no entitlement to actual damages but only for rights of access. The same principle applies.

IX Refusal to refer to ECJ

Finally, the EAT refused to refer the question to the ECJ on the basis that 'there was no real doubt about the correct interpretation of the relevant provisions of Community law'.

In a parallel case, *Levez v T H Jennings (Harlow Pools) Ltd* [38] the lay members decided that the two-year rule should be referred to the ECJ, particularly in the light of *Marshall (no.2*).[39] *Preston* is to go to the CA.

Although it is difficult to know the full implications of article 119, there is no sign of the government having made any effort to analyse whether UK law is in breach. After the decision in *Gillespie*[40], regulations were passed which arguably still do not comply with the ruling.

If *Preston and Levez* are upheld, it will give the government an incentive not to implement the provisions of Article 119. They can just hope that no one will understand the effect of Article 119 - a fairly safe bet - and rely on the fact that if someone does get it right, it is only worth two years pay.

Camilla Palmer
Bindman and Partners

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[37] In two ECJ decisions (*Steenhorst-Neerings* [l994] IRLR 244 and *Johnson v Chief Adjudicator (No 2)* national limits on claiming arrears of benefits were upheld. However, these were social security decisions in which the ECJ stress the importance of the finances of social security systems.

[38] [l996] IRLR 499

[39] *Marshall v Southampton and South-West Hampshire Area Health Authority (No 2)* [l993] IRLR 445 ECJ.

[40] and the implementing regulations - see DLA newsletter June/July 1996.

DISCRIMINATION LAW ASSOCIATION

OCTOBER 1996

BRIEFING No. 17: DISABILITY DISCRIMINATION ACT UPDATE

The timetable for implementation of the Disability Discrimination Act has now been set and the employment provisions will come into force on December 2nd.

Discrimination lawyers will find a mixture of the familiar and the unfamiliar. There is first the basic structure of direct discrimination. The Act applies to less favourable treatment 'for a reason which relates to disability' in the usual range of employment events: recruitment, the terms of employment, opportunities and access to benefits, and dismissal or any other detriment. Those who suffer victimisation are also protected. The enforcement mechanism is through the Industrial Tribunal, with a three-month time limit unless it is just and equitable to extend. The Tribunal has powers to make a declaration and recommendation and to award compensation for loss, and for injury to feeling. So far, so familiar.

Now look at the unfamiliar. The Applicant must show, in a way that is unusual under the 1975 and 1976 Acts that s/he is in fact a person covered by the provisions of the Act. In many cases, this will be obvious, but in others, an Applicant will have to take the Tribunal through intimate medical details, perhaps with the support of expert evidence. In doing so s/he will often fall into one of the main traps of the Act: to show that you are covered, you have to prove the extent of your medical disability; by proving that, you may, to many Tribunals, show that you cannot do the job.

There is no provision for indirect discrimination. Instead, cases may be brought under a wholly novel and difficult area, that of section 6 duties. Discrimination occurs where an employer has failed to carry out a section 6 duty in relation to a specific individual with a disability. The duty is owed to employees and candidates for employment, and not to the population at large. The general duty under section 6 is to take reasonable steps to adjust any arrangement or physical feature of the workplace so as to eliminate the disadvantage that it causes the disabled candidate or employee. The Act gives examples of the types of adjustment that may be needed; they may involve adjusting the premises or changing the way in which work is done. The problems of proof should not be underestimated: an Applicant is in effect called upon to prove to the Tribunal what the employer could and should have done for him or her. There may again be need of expert evidence, this time in relation both to the premises and to the disability.

In either case, whether the claim is one of direct discrimination or under section 6, the employer may raise a defence that the treatment (or the failure to make the adjustment) is 'justified.' This is likely to be a major new battleground, and the test need not be the

same as 'justifiable' under the RRA and SDA. One might want Tribunals to approach the defence by balancing discriminatory impact as against the rationale put forward by the employer. The fear must be that Tribunals will instead simply ask whether the employer had good and substantial reason for the treatment, in which case, it is by definition justified.

A new area of law, creating new rights, based on a difficult statute which is riddled with occasion for value judgment: one can only hope that the first cases to proceed are strong on their merits and well presented to thoughtful Tribunals.

Meanwhile, the 'Meaning of Disability Regulations' (1996 No 1455) present an interesting stroll through the undergrowth of Peter Lilly's subconscious. They helpfully confirm first that the Act does not cover any addiction, other than one arising from a prescribed medicine. The Act therefore does not extend to alcoholism or smoking, nor does it protect (Regulation 4(1)) kleptomaniacs or pyromaniacs, exhibitionists and voyeurs, or anyone with a tendency to physical or sexual abuse of another person. Hayfever isn't covered either. A tattoo that has not been removed does not count as a statutory disfigurement, although presumably one that has been removed badly and therefore leaves serious scarring could do. Non-medical body piercing (including any object attached as a result of body piercing) is also out. Where does the DSS think of them. If only as much thought had been given to what goes in as to what is kept out.

Robin Lewis
Bindman & Partners

DISCRIMINATION LAW ASSOCIATION

OCTOBER 1996

BRIEFING No. 18: UPDATE ON FORTHCOMNG DECISIONS/APPEALS

This will be a regular feature on forthcoming appeals with a very brief summary of the case. Comments, additions and suggestions to the editor would be very welcome.

R V SECRETARY OF STATE FOR EMPLOYMENT EX PARTE SEYMOUR SMITH & PEREZ [1995] IRLR 464 CA

(Newsletter April/May 1996, briefing No. 6 and current newsletter)

Appeal to be heard in HL November 1996

Challenge to the two-year qualifying period for claiming unfair dismissal and redundancy as being indirectly discriminatory on the grounds of sex.

TOWER BOOT COMPANY PTD V JONES [1995] IRLR 529 EAT

(Newsletter Sept/Oct 1995)

Appeal to be heard in CA in October 1996

The majority o the EAT Held that the appalling racial abuse could not be described as 'improper mode of performing authorised tasks', so was not done 'in the course of employment'. As a result, the employer was not liable for the discrimination carried out by the employee on the appellant.

BROWN V RENTOKIL [1995] IRLR CS

Appeal to HL heard in July. Case has been referred to ECJ. No date fixed.

The Court of Session held that it was not discriminatory to dismiss a woman for a pregnancy related illness occurring in her pregnancy as a man absent for a similar period would also have been dismissed. The decision came before the HL decision in Webb v EMO Cargo Ltd (Newsletter December 1995/January 1996)

CREES v THE ROYAL LONDON MUTUAL INSURANCE SOCIETY LTD

Decision of EAT due in Oct 1996

The applicant was unable to return to work at the end of her maternity absence because she was sick. The question is whether her contract continued and in what circumstances it would have come to an end, whether she was obliged to attend work in order to return (in accordance with her statutory right) and whether she has a claim for unfair dismissal.

THE POST OFFICE v ADEKEYE (No 2) [1995] IRLR 297

Appeal to be heard by CA Oct 1996

The EAT held that the RRA does not cover a former or ex-employee seeking reinstatement on appeal. The application could not therefore bring a complaint relying upon s4(2)(c) RRA (which covers dismissal and subjecting a person to a detriment).

LONDON UNDERGROUND LTD v EDWARDS [1995] IRLR 355 EAT

Appeal to EAT to be heard in November 1996

This is the second appeal to the EAT about whether London Underground indirectly discriminated against the applicant, a lone parent by changing her shifts to anti-social hours.

LEVEZ V TH JENNINGS

Case has been referred to ECJ. No date fixed.

The EOC are representing the applicant who is claiming that the limitation of 2 years on back pay awards under the Equal Pay Act is a breach of EU law on two grounds:
It does not meet the European test for procedural rules which requires that limitation periods should be the same in European law claims as the nearest similar domestic action; the comparison should be made with a contract law claim where a claimant would be able to claim up to 6 years back pay loss.

It was contrary to Marshall No 2 to limit the amount of compensation available in an equality claim.

COOTE v GRANADA HOSPITALITY

The EAT has referred the case to the ECJ.

The Applicant, represented by the EOC, alleged that the respondents refused to [provide her with a reference because she had earlier taken a sex discrimination case against them. The applicant is arguing that under the Equal Treatment Directive 'victims' of discrimination had to have access to a proper judicial remedy.

COMPENSATION UPDATE

£35,000 for refusal to allow a woman to return to work part-time
Sarah Rolls won a settlement of £35,000 from her employers (IPC) who refused to allow her to work part-time.

Kelly French received £20,000 after not being allowed to return to work part-time after maternity leave.

A Black Council Worker who was dismissed from his job with the London Borough of Southwark in 1993 was awarded £40,000 for racial discrimination on August 13th. This included £20,000 for "injury to feelings". Mr. Williams was "mace redundant" after complaining about senior managers. Goolam Meeram the tribunal Chairman, said "This was a sham redundancy situation engineered for the purpose of affecting this applicant."

Camilla Palmer
Bindman & Partners

DISCRIMINATION LAW ASSOCIATION

OCTOBER 1996

BRIEFING No. 19: TIME LIMIT FOR INDIRECT DISCRIMINATION CASES: Cast v Croydon College; unreported EAT 161/95

Mrs Cast, a full-time employee, wanted to work part-time when she returned from maternity leave. In March l992, before going on leave, she asked her employer whether this would be possible. The request was refused. Mrs Cast made several further requests and these were considered and again refused. She asked for written reasons and these were provided two and a half months after her return from maternity leave, in May l993. In June Mrs Cast resigned. She put in her IT claim on 13 August l993.

The EAT, dismissing the appeal, held that time ran from the first refusal to allow Mrs Cast to return part time, i.e. March l992. This was 'when the act complained of was done' - the statutory definition of the date from which time begins to run. The claim was therefore out of time as it was thirteen and a half months after the initial refusal.

The applicant argued that in cases of indirect discrimination the discrimination only occurs when the victim cannot comply with the requirement - in other words on her return from maternity leave. It is only at this stage that the act of discrimination is complete. The EAT said that on the applicant's argument, proportionality, justification and detriment would have to be complied with before a 'cause of action' arose. That, said the EAT, equates with total liability and it would be a bizarre conclusion if before dealing with a point on jurisdiction it was necessary to hear the entire case. But there is no discrimination until a detriment is suffered. The employer has simply indicated that s/he intends to discriminate in the future.

The situation is the same as an anticipatory breach of contract. The innocent party has a right to sue for breach of contract at the time when the intention to breach the contract is made clear but she can also elect to continue with the contract. It may be (on the EAT's argument) that Mrs Cast could have resigned when she was first told she could not return part-time, but she should also have had the right to continue. There is no actual breach of contract until a woman is not allowed to return part-time.

There is power to extend the time limit where it is just and equitable to do so (SDA s76 (5)). The EAT refused to do this.

For women wanting to return from maternity leave on a part-time basis the EAT decision is likely to lead to enormous practical problems. Clearly, the timing of the request to job-share or work part-time is crucial. If made too early and refused, a

woman may have to issue proceedings within weeks of giving birth - not a realistic prospect. Should then a woman be advised to wait until after the birth to make her request? One possibility would be to raise the issue and see whether the employer is likely to refuse. If the employer is opposed, a formal request should not be made until later.

Another practical question is what happens if, on appeal, the CA holds that the act of discrimination is not complete until the woman is due to return. It may be advisable for women to lodge a further IT1 within three months of the date of return (explaining that it is a precautionary measure) to avoid the first application being struck out because there is no cause of action.

From an employer's point of view, it is clearly better to know before an employee goes on leave if she is likely to want to return part-time. Different arrangements may then be made for cover during the woman's maternity leave. An employer faced with a later request by a woman to return part time may well be less amenable as it will mean a further change in working arrangements. This does not mean to say that a refusal to allow part-time work will be justified (and so provide the employer with a defence), but that it may be met with more resistance.

Another practical consideration is that the employer's and employee's circumstances may change during the woman's maternity leave. The woman may decide she wants to return full-time, because, e.g., her partner has been made redundant. The employer may undergo staff changes, such as another employee wanting to job-share a similar job. These are good reasons why it only makes sense for a decision to be made after a woman's return to work when the parties can take account of the circumstances at the relevant time.

In Cast the applicant also argued, unsuccessfully, that there was a continuing act of discrimination, relying on Owusu v London Fire Brigade & Civil Defence Authority [l995] IRLR 574. The EAT held that it was a single act with continuing consequences. Arguably, it was a continuing act of discrimination. The employer did review Mrs Cast's request from time to time. It is not the same as a one-off decision, such as refusal to promote or appoint, as the decision can always be reviewed, whereas a decision not to appoint a person to a particular job is usually final as someone else has got the job.

In constructive dismissal claims the effective date of termination, from when the time limit runs, is the date of resignation. Mrs Cast resigned because her employers allegedly discriminated in refusing to allow her to work part time, thus leading to a breakdown in the relationship. It is not advisable for a worker to resign prematurely where the employer has not finally decided to commit a breach of contract and, where possible, attempts should be made to resolve the matter without resort to resignation and/or the IT. According to the EAT, Mrs Cast apparently made the mistake of doing all she possibly could to negotiate an amicable settlement with her employer. Surely this decision is not one that can be welcomed by employers or employees.

Camilla Palmer
Bindman and Partners

DISCRIMINATION LAW ASSOCIATION

OCTOBER 1996

BRIEFING No. 20: ACTUAL PENSION LOSS OF £60,635 AWARDED IN PREGNANCY DISMISSAL: Ministry of Defence v Mutton [1996] ICR 590

Although this is an MOD pregnancy dismissal case, with the decision turning on its special facts, the EAT sets out very important principles for assessing pension loss in discrimination cases.

The Applicant argued that her pension losses should be calculated according to the value of the benefits lost - i.e. £60,635. The MOD argued that the tribunal should follow the guidelines prepared by a committee of chairmen of industrial tribunals, in consultation with the government Actuary's Department.[41] This is an unsophisticated method based on the employers' contributions, which is treated as a weekly loss in the same way as a weekly loss of earnings. For the future, the same contribution rate is used and the same multiplier applied as had been applied to the future loss of earnings.

Expert evidence was given by a fellow of the Institute of Actuaries, on behalf of the Applicant, and the directing actuary in the Government Actuary's Department, on behalf of the MOD.

The EAT held that in Mrs Mutton's case there was a volume of evidence emphasising the likelihood that she would have been an exceptional long-term prospect in the army, together with expert evidence which the tribunal preferred. A distinction was made between general unfair dismissal claims where the statutory ceiling on compensation 'is such as to cry out for an unsophisticated approach to the computation of pension losses in many cases'. However, the EAT said that in discrimination cases, where there is no statutory ceiling upon compensation, the tribunal was entitled to compensate the applicant for the full loss of pension.

With an increasing loss of jobs in the public sector and a decreasing number of full-time, permanent pensionable jobs, loss of pension rights can be a significant head of compensation. Applicants should seriously consider instructing an expert to assess the actual pension loss instead of relying on the old rough and ready method. The only snag, of course, is the cost.

Camilla Palmer, Bindman & Partners

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[41] "Industrial Tribunals: Compensation For Loss of Pension Rights", 2nd ed. (l991) HMSO.

DISCRIMINATION LAW ASSOCIATION

OCTOBER 1996

BRIEFING No. 21 DEFINITION OF 'EMPLOYMENT' WIDENED:
***Mrs. J. Ravindran v Texaco Ltd* [ref: IT/39417/95]**

On 1 May 1996 the Stratford Industrial Tribunal decided that it had jurisdiction to hear the applicant's complaint of racial discrimination.

Mrs Ravindran and her husband operated two petrol stations under agreements with Texaco. Under the terms of these agreements they had a number of obligations including to keep the forecourt and the shop open 24 hours daily, seven days a week. They were also required to supervise the operation of the forecourt and the shop, to purchase uniforms acceptable to the company and to ensure that uniforms were worn by themselves as well as any staff whenever they were on duty, and to keep the shop fully stocked, clean and tidy.

The applicant argued that this amounted to "a contract personally to execute any work or labour" (Section 78, Race Relations Act) and that the contractual relationship with Texaco therefore fell within the 'employment' provisions of Section 4 of the Act. This would mean that any discrimination by Texaco against her or her husband would be covered by the Act. Section 78 of the Act provides that:

"employment" means employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour, and related expressions shall be construed accordingly;

The Tribunal accepted that the couple was clearly not employees under a contract of service. The Tribunal also accepted that the contract could not have meant that they had to operate or supervise the business personally all day every day. (Apart from being physically impossible, the contract specifically makes requirements regarding their employees). However, the Tribunal rejected the Respondents' contention that the responsibility was only "to have things done but not personally to do them".

They concluded rather that "The agreements do not...suggest in any way that their intention was that the Applicant and her husband could sit at home and allow employees to operate the forecourt and the shop on their behalf but required them to be involved in the business to an extent compatible with reasonable hours for sleep and rest and were thus obliged personally to execute any work or labour for the respondents". The type of contract that Mrs Ravindran and her husband have with Texaco therefore brings them within the scope of the Race Relations Act and accordingly the Tribunal has jurisdiction to hear their complaint of racial discrimination against Texaco.

The period for a possible appeal expired on 12 June 1996 and the Employment Appeal tribunal subsequently advised that they had received no communication from the respondents on this matter.

Whilst the particular terms of the agreements in this case were decisive factors for the Tribunal in reaching their decision, nevertheless this case is helpful in establishing the extent to which the definition of employment in the Act can extend to at least some franchise arrangements. For those advising other potential complainants, it is important to note the way in which the tribunal analysed the agreements between Texaco and the applicant and her husband and in particular the Tribunal's view that it was necessary to identify the dominant purpose of the contractual relationship. Other franchise arrangements will need to be examined on their particular facts, but this case is very helpful in at least opening the door to bringing such arrangements within the scope of Part II of the Act.

Legal Strategy Unit
Commission for Racial Equality

DISCRIMINATION LAW ASSOCIATION

OCTOBER 1996

BRIEFING No. 22 **DUTY OF EMPLOYERS IN HARASSMENT CASES CLARIFIED?: *Burton & Rhule v De Vere Hotels* [EAT 109/96] Unreported**

The judgment of the Employment Appeal Tribunal in *BURTON & RHULE v DE VERE HOTELS* (EAT No 109/96) is a welcome development in clarifying the duty of employers to protect their staff against racial harassment at work.

The judgment of the Employment Appeal Tribunal (Smith J) followed an appeal brought by Ms Burton and Ms Rhule against a decision of the Industrial Tribunal sitting in Nottingham. The brief facts giving rise to their complaint are as follows. Ms Burton and Ms Rhule were employed as casual waitresses by the Pennine Hotel (owned by the Respondents). On 1 November 1994 the Derby Round Table held a charity dinner at the Pennine Hotel and this "Gentlemen only" event included Bernard Manning as its guest speaker. Ms Rhule and Ms Burton worked that evening. Both women are Black.

As Manning began his act Ms Rhule and Ms Burton were in the banqueting hall clearing tables having volunteered for this task as overtime. They heard Manning's act. His act included references to the sexual organs and abilities of Black men and he used explicitly racist and sexist language. Worse still Manning spotted Ms Rhule and Ms Burton going about their work and directed further vicious racist and sexist abuse at them directly. The two women were then harassed by some of the "guests" who joined in the abuse.

The women brought a complaint against their employers under the employment provision of the Race Relations Act to the Industrial Tribunal. The women complained that their employers should not have put them in a position where they were going to be the subject of such racist conduct. Though their cases were brought under the Race Relations act 1976 they could equally well have been brought under the Sex Discrimination Act 1976 in respect of the sexual harassment they endured from Manning and the guests.

The Tribunals have long held that racial abuse and harassment can amount to a "detriment" under Section 4(2)(c). Whether any particular harassment or abuse amounts to "detriment" is a matter of fact to be decided by the Tribunal but most racial harassment amounts to a "detriment" for the purposes of the Act.

The question in this case was whether Ms Rhule and Ms Burton's employers, the Hotel,

could be said to have "subjected" them to the "detriment" complained of. They could not be vicariously liable because Manning and indeed the guests were not employed by the Hotel and nor could they be said to have been acting as agents of the Hotel.

Following the hearing in Nottingham the Industrial Tribunal expressed "their sympathy to both applicants for what was plainly a horrible experience on the night of 1 November" but held that the Hotel were not liable under the Race Relations Act. The Tribunal held that whilst the women were subject to racial harassment and accordingly a "detriment" under the Race Relations act "it was not...the (hotel) which subjected them to it" and accordingly dismissed their cases. The two Applicants appealed to the EAT.

The EAT overturned the decision of the Tribunal primarily on the basis that the Industrial Tribunal had imposed an additional burden on Ms Rhule and Ms Burton and one which did not appear in the Act. The Tribunal had required that Ms Rhule and Ms Burton establish that they had suffered the detriment of racial harassment on racial grounds. In so doing they were requiring Ms Rhule and Ms Burton to show that racial bias or animus affected them themselves. This is clearly wrong and the authorities on racial/sexual harassment and motive/intention make that clear.

More significantly than that, however, the Employment Appeal Tribunal accepted the parties' invitation to lay down principles that would apply to the facts. In particular, what is meant by the term "subjecting" in Section 4(2)(c), the section under which racial harassment claims at work fall.

The EAT held that where an employer has actual knowledge that racial harassment of an employee is taking place or deliberately or recklessly closes his eyes to it, if he does not act reasonably to prevent it, he will be readily found to have subjected his employee to it. But foresight and culpability are not the means by which the employer's duty is defined.

It was successfully argued that the source of the harassment was not the test. Manning was not an employee and the *TOWER BOOT* decision (EAT 56/94; [1995] IRLR 529) makes narrow the circumstances in which an employer will be vicariously liable for the serious harassment by its employees. The Employment Appeal Tribunal held that the word "subject" connotes "control" and a person "subjects" another to something in circumstances where he can control whether it happens or not. An employer therefore subjects an employee to the detriment of racial harassment if he causes or permits the racial harassment to occur in circumstances in which he can control whether it happens or not.

The EAT further indicated that they thought it "undesirable that concepts of the law of negligence should be imported into the statutory torts of racial and sexual discrimination" - a message for *TOWER BOOT*?

Karon Monaghan Barrister

DISCRIMINATION LAW ASSOCIATION

OCTOBER 1996

BRIEFING No. 23 Compensation in Race Discrimination Cases: HM Prison Service & Others v. CA Johnson EAT 1033/95

On 27 November 1996, the EAT gave judgment in the above case and upheld the decision of the IT which awarded the Applicant £21,000 in compensation for injury to feelings (the highest award for injury to feelings that we know of) and £7,500 in aggravated damages[42].

The very brief facts of the case are as follows. Mr. Johnson was employed as an auxiliary officer in Brixton Prison. He presented an application against the prison, a colleague and a senior officer alleging that he had been "harassed, victimised and shunned" since he "innocently spoke out about racism at the prison". Following a seven-day hearing the Tribunal found that the Applicant suffered a course of treatment over a period of more than eighteen months:

"That treatment included ostracism, redirection of duties, a warning regarding sickness absences, the reporting of his leaving the barrier early and the subsequent warning.... The Tribunal finds that there was indeed a campaign against him from mid 1991...."
(IT decision paragraphs 27 and 28).

The Tribunal found that these acts amounted to unlawful discrimination contrary to Section 1(1)(a) and 4(2)(c) of the Race Relations Act 1976 ("the RRA"). The Tribunal further found that Mr. Johnson was refused the benefit of overtime as a result of a complaint made on his behalf and Mr. Johnson was given a verbal warning because in the past he had complained of race discrimination and he was thereby victimised (IT decision, paragraphs 33 and 34).

The Tribunal described the treatment as "appalling" and stated that the treatment by one of the individual respondents was done "out of sheer malice" (Decision, paragraph 32). The Tribunal further found that Mr. Johnson formally complained about the treatment afforded him on 4 March 1992 (IT Decision, paragraph 9); and 18 November 1992 (IT Decision, paragraph 12)). His complaints led to an investigation which the Tribunal described as "a travesty of an investigation" (IT Decision, paragraph 16). The Tribunal stated that:

"Whenever he tried to complain, internally or externally, his complaints were

[42] *At the time of writing the official judgment had not been received.*

dismissed and were put down to defects in his personality"
(IT Decision, paragraph 40).

This was therefore a fairly serious case and the Tribunal made an award of compensation for injury to feelings of £20,000 against the prison and then separate awards of £500 each against the named officers, making a total of £21,000.

The removal of the cap on compensation for sex and race discrimination in the employment field has put this issue into the centre stage.

Recently and prior to *JOHNSON*, there had been some less than sympathetic judgments regarding compensation, in particular *ORLANDO v DIDCOT POWER STATION SPORTS AND SOCIAL CLUB*[43] which apparently approved the CA judgments on compensation in *NOONE v NORTH WEST THAMES REGIONAL HEALTH AUTHORITY*[44] and which upheld an award of £750.

In *NOONE*, a consultant microbiologist successfully complained of race discrimination when she was not appointed to a vacant post in the Respondent Health Authority. The Court of Appeal reduced the Tribunal's award of £5,000 to £3,000, which they considered to be "at the top end of the bracket"[45]. In *HM PRISON SERVICE v JOHNSON* Smith J. stated of the £3,000 awarded to Dr. Noone,

"That award would be worth about £4,250 at today's values. We remind ourselves that at that time there was a limit of £7,500 on compensation in race discrimination cases. The maximum had to include all heads of damage including pecuniary loss. We think the award in *NOONE* might well have been higher had there been no statutory limit."

This makes it absolutely clear that the EAT take the view that the cap affected the level of awards and (as advisors in the area know from experience) had the effect of keeping awards artificially low.

Smith J. extracted the following principles from the authorities:

"(i) Awards for injury to feelings are compensatory. They should be just to both parties.

(ii) Awards should not be too low as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and

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43 *[1996] IRLR 262, see, in particular, para. 6.*

44 *[1998] ICR 813 - a case decided while the limitation* on *compensation existed. Note, however, that on a fair reading of ORLANDO the EAT were not suggesting it should necessarily be used as a guide to the level of compensation post the lifting of the cap.*

45 *@ 836 B - C per Balcombe LJ*

awards must ensure that it is seen to be wrong. On the other hand, awards could.... be seen as the way to untaxed riches.

(iii) Awards should bear some broad similarity to the range of awards in personal injury cases. We do not think this should be done by reference to any particular type of personal injury award, rather to the whole range of awards.

(iv) In exercising their discretion in assessing a sum, tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.

(v) Finally, tribunals should bear in mind .... the need for public respect for the level of awards made."

The EAT further rejected a submission that awards should not be made against individual respondents where appropriate.[46]

Prior to the judgment in *JOHNSON* there was no definitive ruling on the availability of aggravated damages for discrimination. Where judicial comment had been made it was either obiter[47] or following a concession by counsel[48]. Smith J. stated that "as a matter of principle, aggravated damages ought to be available to plaintiffs or applicants for the statutory torts of sex and race discrimination" and that they were "satisfied that aggravated damages are available in discrimination cases".

KARON MONAGHAN
Barrister

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[46] *In JOHNSON an award of £500 had been made against each of two individual Respondents*

[47] *ALEXANDER v HOME OFFICE*

[48] *MINISTRY OF DEFENCE v MEREDITH [1995] IRLR 534*

DISCRIMINATION LAW ASSOCIATION

DECEMBER 1996

BRIEFING No. 24 **TIME LIMITS**: ***General Medical Council v Dr Elena Rovenska*** **- CA [unrep - but should be in the Times LR shortly]**

Dr Rovenska claimed race discrimination against the General Medical Council ("GMC"). She was born in Czechoslovakia, where she qualified and practised as a doctor of medicine. In 1982 she came to this country and successfully applied for political asylum. She wanted to continue to pursue her profession here. The GMC is responsible for deciding whether to register overseas doctors (other than EEC nationals) in accordance with the terms of section 22 of the Medical Act 1983. In order to determine whether some of the criteria set out in this provision are satisfied the GMC has decided that applicants for registration must pass an oral and written test. They have also determined that persons qualifying at certain specified overseas universities are exempt from the sitting the test.

Dr Rovenska contended that the exemption scheme discriminated against doctors from certain countries, including Eastern European countries.

She had unsuccessfully applied for an exemption from the test on a number of occasions. The first was in 1982. The fourth was in November 1991 shortly after she was awarded a MSc degree in medical microbiology. When this was refused, she sought help from the Greenwich Council for Racial Equality who wrote a letter on her behalf in December 1991, arguing that her new qualification should entitle her to an exemption and enclosing a new reference. This letter met with the same response.

Dr Rovenska's Originating Application was lodged with the Industrial Tribunal on 31 March 1992. At a preliminary hearing they decided that her claim was presented out of time and they refused to extend the time limits.

Dr Rovenska successfully appealed to the EAT. They accepted that as her complaint related to the scheme or policy of exemptions operated by the GMC it concerned a continuing act, as defined in section 68(7)(b) Race Relations Act, and therefore the three-month time limit had not started to run against her.

The Court of Appeal left open the question of whether her claim could succeed on this basis. They said it was unnecessary to decide this as Dr Rovenska's complaint was in any event presented within the three-month time limit.

Because Dr Rovenska's complaint was that the policy of exemptions operated by the GMC was discriminatory, every time there was a further refusal of her application in accordance with that policy, she had a fresh claim for discrimination and therefore a fresh period of three months in which to present her claim. Accordingly, the letter from the Greenwich Council for Racial Equality constituted a further application and the three-month time limit therefore ran from the refusal of that request.

The effect of this decision seems to be that wherever it is possible to formulate a complaint of discrimination as being against a policy in accordance with which discriminatory decisions are taken from time to time, a fresh complaint of discrimination, and so a new three-month time limit for presenting it, arises each time such a decision is made. Thus, if a client seeks advice after three months have already elapsed since the last adverse decision, the time limits can be revived by making a further application.

It is unclear from the Court of Appeal's decision whether or not the further application needs to include new circumstances or fresh material. Obviously, it would be advisable to formulate subsequent applications in this way wherever possible.

However, this approach will not be available where the original decision is by its nature a one-off decision, for example a failure to appoint someone to a particular job vacancy.

The approach may be particularly helpful where the statutory wording of the particular type of prohibited discriminatory conduct complained of does not lend itself to a complaint of a continuing act. For example, in Dr Rovenska's case she brought her complaint under section 12 - discrimination by qualifying bodies - and the GMC argued that the type of conduct prohibited by this section did not include continuing acts. The Court of Appeal was able to avoid this difficulty (and expressly left that question open) by taking the approach set out above.

Heather Williams
Barrister, Doughty Street Chambers

DISCRIMINATION LAW ASSOCIATION

DECEMBER 1996

BRIEFING No. 25 **DISCRIMINATION BY POLICE IN THE PROVISION OF SERVICES: Farah -and- Commissioner of Police for the Metropolis**

In this case the Court of Appeal had to consider the potential liability of police forces for discrimination in the provision of services.

The Plaintiff, a Somalian refugee, had called 999 following an attack on her by some white teenagers. The police arrived but, instead of helping her, arrested her on various charges which some months later were dropped. She brought proceedings in the county court not only for the more familiar civil actions against the police (false arrest, malicious prosecution and assault) but also for race discrimination. She has alleged that their response to her call for help was discriminatory. She named the Metropolitan Police Commissioner as defendant, but not individual officers.

The Commissioner applied to the county court to have the claim of race discrimination struck out. He was unsuccessful and appealed to the Court of Appeal.

The Race Relations Act prohibits racial discrimination by any person concerned with provision (whether for payment or not) of goods, facilities or services to the public or a section of the public. The Commissioner argued that this did not include the police. They were, he said, specifically referred to in the Part of the Act concerning employment but not in the Part concerning services. In detecting and investigating crime, police officers had to exercise discretion and judgment and what the police

officers did was different in kind from any act which would ever be done by a private person. The House of Lords has previously held that government services (such as the Immigration Service) were not covered by the prohibition on discrimination.[49]

Striking out the discrimination claim would also be consistent with the immunity which police officers generally have for actions in negligence.

The Court of Appeal rejected these arguments. The Act used wide words in prohibiting discrimination in the provision of services and at least some of the services provided by the police were included. Protection to members of the public could be provided by either the police or private security firms and so the position of police officers was not comparable to that of the Entry Clearance and Immigration Officers in Re Amin.

[49]Re Amin [1983] 2 AC 818

The wider public policy grounds were also rejected. Lord Justice Hutchison said:

"I do not find the spectre of claims of racial discrimination against the police, with the inconvenience and expense that that may involve, to be more disturbing than the prospect that a member of the public who, seeking assistance in dire need, has been the subject of racial discrimination, should be without a remedy."

Consequently, individual police officers could be liable for racial discrimination in the provision of these types of services.

The Commissioner had been named as the defendant because the Police Act provides that chief officers of police shall be liable for the torts of the officers in their force where the torts are committed in the performance or purported performance of their duties in the same way that employers are vicariously liable for the torts of their employees. So although police officers are not technically employees this technicality does not prevent plaintiffs suing an institutional defendant for the usual torts in cases against the police.

The difficulty for the Plaintiff was that the Race Relations Act appears to provide a self-contained code of remedies. The Act prohibits discrimination on racial grounds but for these unlawful acts there are only the remedies which the statute itself lays down. Employers are made vicariously liable for discrimination by their employees[50], but here the technicality that police officers were not strictly employees became important.

The Plaintiff argued that the Race Relations Act had been passed against a legal back-drop which included the Police Act and its treatment of chief officers as equivalent to employers for the purpose of vicarious liability in tort. It was therefore obvious that Parliament intended them to be liable as well for the new "tort" of racial discrimination. The Court rejected this argument saying that the special position of police officers was catered for in the Part of the Act dealing with employment, but only for that Part. Discrimination in the provision of services appears in a different Part.

The court also dismissed the argument that the modern-day management and organisation of police forces meant that individual officers should be seen as the agents of their chief officers.

Because of the Court's conclusion on vicarious liability the Commissioner's appeal was successful and the claim of discrimination was struck out. However, the Court described it as a Pyrrhic victory since future Plaintiffs could bring discrimination claims as long as individual police officers were identified as the defendants.

Camilla Palmer

[50]s.32 of the Act

DISCRIMINATION LAW ASSOCIATION

DECEMBER 1996

BRIEFING No. 26 UPDATE ON FORTHCOMING DECISIONS/APPEALS

* R v Secretary of State for Employment ex parte Seymour Smith & Perez [1995] IRLR 464 HL
The House of Lords decision is due any day. It is possible that there will be a reference to the ECJ.

* Preston and others v Wolverhampton Healthcare NHS Trust
Fletcher & others v Midland Bank [l996] IRLR 484
These cases have now been heard by the Court of Appeal.

* Greaves v Kwiksave
A decision is due shortly from the EAT as to whether the requirement for a woman physically to return to work after maternity absence is sex discrimination. See Crees (Briefing 18) where the EAT held that, under the Employment Rights Act, a woman must go into work in order to exercise her statutory right to return.

* Cast v Croydon College; unreported EAT 161/95 (see briefing 19)
Leave is being sought to appeal to the Court of Appeal.

DISCRIMINATION LAW ASSOCIATION

DECEMBER 1996

BRIEFING No. 27 HARASSMENT AT WORK: Employer's Liability Clarified Raymondo Jones v. Tower Boot Co. Ltd., Court of Appeal, December 1996

The CA gave judgment on the 11 December 1996 in this important case on the extent to which an employer is liable for acts of racial harassment by their employees on a fellow employee. Although the case was one of race discrimination the principles in play are the same for sex, disability, and (in Northern Ireland) religious and political discrimination.

To what will be the relief of all DLA members[51], the CA held that the case of Irving and Irving v. Post Office [1987] IRLR 289, which had hitherto been thought to limit employer liability, had been wrongly decided and should not be followed.

The welcome message of the judgment is absolutely clear: employers will be liable for all acts of racial (or sexual) harassment of their employees committed during employment unless the employer can show that they have acted conscientiously using best endeavours to prevent the harassment.

While the judgments of the CA emphasise the width of the potential liability of employers, they also emphasise that there is a defence available. The emphasis on that defence should do much to encourage employers to take the necessary steps to promote equal opportunities in the workplace.

The facts were nasty but simple. Raymondo Jones was of mixed race. His first job at age 16 was with Tower Boot. He stayed only a few weeks. During the time that he was there he was physically and verbally ill-treated. The physical incidents were: burning his arm with a hot screwdriver; whipping him on the legs with a welt; throwing bolts at him; and trying to put his arm in a lasting machine. The verbal incidents including calling him "chimp" "monkey" and "baboon". The Industrial Tribunal found that he was never referred to in any other way.

His complaint of racial harassment succeeded before the Industrial Tribunal who awarded him £5000 compensation. However, by a majority the EAT overturned this decision. With the support of the CRE and the encouragement of all the other Commissions[52] he appealed to the CA.

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[51]*It is of more than historical interest that this case was won in the IT by Jenny Sebastian, an employee of the Wellingborough REC, the home of DLA!*

[52]*The skeleton argument was shown to the EOC, the Northern Ireland EOC and the*

Before both the IT and the EAT the employers had argued that section 32(1) of the RRA meant that an employer was only to be found liable for the acts of racial harassment of his employees if the employees acted in a way which would attract "vicarious liability".

Section 32(1) of the RRA says that

"Anything done by a person in the course of his employment shall be treated for the purposes of this Act (except as regards offences thereunder) as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval."

The words "in the course of employment" are often used to define the circumstances in which vicarious liability arises. This doctrine of vicarious liability was developed in the law of tort in respect of acts of negligence by employees for which the employer could be held liable. To succeed against the employer, a Plaintiff in such a case had to establish that the wrong-doing employee had acted in a way which was authorised by the employer or in a way which could be rightly described as a mode, although an improper mode, of acting in a way which was so authorised.

Thus, in ordinary tort law the more outrageous the act the less likely that the Court will hold that it occurred in the course of employment and the less likely the employer will be held vicariously liable for it.

Accordingly, the employers argued (and the EAT had accepted) that since they never authorised anything like the physical violence that Jones suffered they could not be held to be vicariously liable.

However, the CA rejected the approach of the employers that had found favour with the EAT: they held that section 32 of the RRA did not require the employee to prove that the acts of harassment came within the technical common law concept of vicarious liability.

The CA pointed out that section 32 provided for liability irrespective of whether the acts were approved whereas for the doctrine of vicarious liability to apply the acts had to be closely allied to authorised acts.

The CA specifically rejected the proposition that the more heinous the acts of harassment the less likely that the employer will be liable under the RRA or SDA. They pointed out the policy of the RRA and the SDA was to:

"Work on the minds of men and women and thus to affect their attitude to the social consequences of difference between sexes or distinction of skin colour. Its general thrust was educative, persuasive and (where necessary) coercive. The relief accorded to the victims (or potential victims) of discrimination went

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Fair Employment Commission. They all indicated their approval of the approach taken by the CRE to the issue.

beyond the ordinary remedies of damages and injunction - introducing, through declaratory powers in the court or tribunal and recommendatory powers in the relevant Commission provisions with a pro-active function, designed as much to eliminate the occasions for discrimination as to compensate its victims or punish its perpetrators. These were linked to the Code of Practice of which Courts and Tribunals were to take cognizance."

They held that the purpose of the Act required section 32 to be given a broad construction.

They held that the policy of section 32 was to:

"Deter racial and sexual harassment in the workplace through the widening of the net of responsibility beyond the guilty employees themselves, by making all employers additionally liable for such harassment, and then supplying them with the reasonable steps defence under section 32(3) which will exonerate the conscientious employer who has used his best endeavours to take the steps necessary to make the same defence available in their own workplace"

It will be remembered that the defence in section 32(3) is in these terms

"...it shall be a defence [for the employer] ... to prove that he took such steps as were reasonably practicable to prevent the employee from doing ... [an unlawful] ... act, or from doing in the course of his employment acts of that description..."

Accordingly, the Commissions and all those who work in the field of equal opportunities will be able to encourage employers to be pro-active in securing that proper steps are taken to prevent discrimination.

DLA members should also remember that in cases where the employer has taken steps to prevent the discrimination which either do or arguably do come within the section 32(3) defence the individual employee responsible for the discrimination can be sued (see section 33). This means that it will always be sensible to consider joining the actual wrongdoer as Respondent or Defendant to the proceedings.

The CA held that for the purposes of discrimination legislation the words "in the course of employment" are to be given their ordinary and readily understandable meaning in the sense that every layman would understand them. This will be a question of fact for every tribunal. In short harassment of all kinds while at work is likely to be "in the course of employment".

Finally, the CA approved the judgment of the EAT in Burton and Rhule v. De Vere Hotels (the Bernard Manning case).

Robin Allen QC
12 December 1996

DISCRIMINATION LAW ASSOCIATION

DECEMBER 1996

BRIEFING No. 28 QUESTIONNAIRES UNDER THE EQUAL PAY ACT

Under s74 of the Sex Discrimination Act l975 a person who considers she has been discriminated against can serve a questionnaire on the employer. The victim can ask any relevant question in order to try and find out why she has been treated less favourably. There are standard forms which can be used. [53]

Can a questionnaire be served in an equal pay case? The answer must be Yes. SDA s74 explains the purpose of the questionnaire which is to help a person 'who considers he may have been discriminated against in contravention of this Act to decide whether to institute proceedings and if he does so to formulate and present his case in the most effective manner.'

The Equal Pay Act is a schedule to the SDA (Schedule 1). A schedule is part of a Statute. [54] In addition, the provisions of the SDA and EqPA are intended to 'be construed and applied as a harmonious whole and in such a way that the broad principles which underlie the whole scheme of legislation are not frustrated by a narrow interpretation or restrictive application of particular provisions' (Shields v Coombes (Holdings) Ltd).

The questionnaire procedure is vital in discrimination cases. Although an employer is not obliged to reply to a questionnaire, failure to do so may result in an adverse inference being drawn.

Note also that if the employer does not reply it is generally possible to ask the same questions under the procedure for written answers (Industrial Tribunals (Constitution etc) Regulations l993, Schedule 1, rule 4(3). The test is whether the answer may help to clarify any issue likely to arise for determination in the proceedings, and it would be likely to assist the progress of the proceedings.

However, the written answer procedure is not available prior to issuing proceedings

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[53] *For useful guidance on questionnaires see Tamara Lewis' guides: SDA Questionnaires (l996) and RRA Questionnaires (l994) available from Central London Law Centre*.

[54] *See Bennion on Statutory Interpretation (p491) and A-G v Lamplough where it was held that 'A schedule in an Act is a mere question of drafting, a mere question of words. The schedule is as much a part of the statute, and is as much an enactment, as any other part'.*

whereas a questionnaire can be served either:

- within 3 months of the act of discrimination; or
- within 21 days of lodging the originating application.

Conclusion: it is advisable to serve a questionnaire in all sex discrimination and equal pay cases and generally before the issue of proceedings.

Camilla Palmer
Bindman & Partners