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Please see page 34 for list of abbreviations

Unequal impact of COVID-19

The s149 Equality Act 2010 (EA) public sector equality duty is under particular scrutiny in this edition of *Briefings*. The question is – is it up to the mark? Is it of assistance in the times when we need it most?

Research reports are being published weekly with stark statistics about the adverse impact of COVID-19 on protected groups. Is the PSED and the EA up to the task of providing any legal avenues to address these consequences?

The EHRC's report 'How coronavirus has affected equality and human rights' highlights the effect of the pandemic on particular protected groups and how large numbers of people have been put at risk of living in poverty. The EHRC expresses concern about the disproportionate impact of the pandemic on different ethnic minorities, older people and some disabled people, particularly those in care homes. It considers that the expected rise in poverty will particularly affect young people, ethnic minorities, and disabled people.

The EHRC reviews the repercussions of the pandemic on work, poverty, education, social care, justice and personal security. It calls for a strategy to address the persistent and structural disadvantages faced by certain groups which underline the disproportionate impact as, without a clear strategy to address this, *'the small gains we have made in equality and human rights over the past few years are set to reverse with clear and long-lasting damage to our society and our economy'.* It calls on governments to use the s1 EA socio-economic duty to reduce the most pressing inequalities of outcome which have been exacerbated by the pandemic.

In her review into the disproportionate impact of COVID-19 on Black, Asian and minority ethnic communities 'An avoidable crisis', Baroness Lawrence argues that *'The impact of Covid is not random, but foreseeable and inevitable – the consequence of decades of structural injustice, inequality and discrimination that blights our society'*. She calls for a range of immediate actions to address structural injustice including through the use of equality impact assessments to more effectively shape and inform policy and she repeats the EHRC's demand that s1 EA public sector duty regarding socio-economic inequalities be enacted in England and Wales.

In their article in this edition of *Briefings*, Declan O'Dempsey, Akua Reindorf and Chris Milsom critique Public Health England's COVID-19 Disparities Review through the lens of the s149 EA public sector equality duty which imposes a duty on the government and public authorities to tackle systemic discrimination and disadvantage affecting racial and ethnic groups. They consider how the UK government could be held to account for its handling of the review and in particular, the positive action measures and recommendations made in a second PHE report *Beyond the data: Understanding the impact of COVID-19 on BAME Groups* through challenges brought under s149 EA and under the Human Rights Act 1998. They focus on a failure to provide information which could reduce risk and enable BAME people to make the right health-based choices.

In his review of the decisions in three housing cases, Toby Vanhegan describes the CA's 'very relaxed' approach to the local authority staff members' assessment of the PSED in relation to the rights of disabled tenants. However, in *Bridges* which concerned the challenge to the South Wales Police's trial use of automated facial recognition technology, Megan Goulding highlights the CA's clarification of the rigorous requirements on authorities in relation to the PSED. The CA confirmed that the PSED is a positive and non-delegable duty which sets a high standard for information gathering and decision-making.

The EHRC report makes a wide range of recommendations to the UK, Welsh and Scottish governments including, in relation to social care, ensuring that equality and human rights considerations are built effectively into the ongoing response to COVID-19. This recommendation and the call for careful consideration of the need to respect all rights, guided by equality and human rights principles, applies across the board. Noting that the EHRC has specific powers to enforce the PSED, the DLA calls on the Commission to use all the tools at its disposal to ensure the gains made under the EA in the last decade are not reversed.

Geraldine Scullion
Editor

Where now for the Public Health England *COVID-19 Disparities Review*?

Legal avenues for holding the government to account*

As part of Cloisters' series considering the human rights and equality implications of COVID-19, Declan O'Dempsey, Akua Reindorf and Chris Milsom explore possible avenues for a legal challenge to the government's handling of the Public Health England review and report into Disparities in the risk and outcomes of COVID-19 (the PHE report) in relation to racial disparity in the prevalence of and vulnerability to the disease. They conclude that the most fertile ground on which the government may be held to account in its implementation of the recommendations, is the public sector equality duty (PSED) in the Equality Act 2010 (EA). This duty imposes on the government a responsibility to consider how to tackle systemic discrimination and disadvantage affecting particular racial or ethnic groups. The government will have to justify by reference to the PSED any failure to take the positive action measures recommended in the second report Beyond the data: Understanding the impact of COVID-19 on BAME Groups (the second PHE report) which was published on June 16, 2020. The government must also observe its obligations under the Human Rights Act 1998 to act in a manner consistent with the right to life or the right to respect for private and family life, and/or its duty not to discriminate on grounds of race in relation to those rights. They consider the application of these duties below.

Background

On May 7, 2020 the government announced that an urgent review into *Disparities in the risk and outcomes of COVID-19* would be conducted by Public Health England (PHE). Included in the terms of reference were that the review would '*consider possible explanations*' for its findings and '*suggest recommendations for further action*'.

The announcement of the review stated that it was intended to take evidence from '*a wide range of external experts and independent advisors, representing diverse constituencies including devolved administrations, faith groups, voluntary and community sector organisations, local government, public health, academic, royal colleges and others*'. The PHE report was published on June 2, 2020.

At the time of publication, it was known that almost three quarters of health and social care staff who had died of COVID-19 in the UK were BAME. All but one of the 12 GPs or GP trainees who had died of the disease were BAME. Those are stark statistics which illustrate what was by that time a clear disparity across the board. Indeed, a report on the disparity had already been published by the Institute for Fiscal Studies on May 1 and detailed data had been released by the Office for National Statistics on May 7. Evidence of a racial disparity continued to emerge: an ONS report of June 19 suggested that black men in England and Wales were three times more likely to die from COVID-19 than white men.

In that light, the PHE report cannot be said to contain much in the way of surprises. It concludes, amongst other things, that the risk of death from COVID-19 is higher for BAME people than for white people, taking into account age, sex, deprivation, region and ethnicity. It states that BAME people are more than twice as likely to die from COVID-19 than white people, and that BAME health care workers are particularly at risk of infection. It presents statistics broken down into a number of different ethnic groups. It concludes that *'the impact of COVID-19 has replicated existing health inequalities and, in some cases, has increased them'*.

The report is – and is acknowledged to be – incomplete. For example, in reaching its preliminary

* This article was first published on Cloisters' blog on June 22, 2020. This edited version is reprinted with kind permission of the authors. The original version is available for download as a PDF file at: https://www.cloisters.com/wp-content/uploads/2020/06/Covid-and-BAME-legal-aspects-v12-1.pdf

conclusions on the disparities between different ethnic groups it does not take into account the prevalence of comorbidities, and nor does it take into account the impact of occupation (e.g. working in a public-facing role) on vulnerability to the disease.

Moreover, the review undertook no analysis of the causes of the disparities it identified. The report does no more than to speculate broadly that the disparities are likely to be the *'the result of a combination of factors'*, including for example a higher likelihood that BAME people will acquire the infection due to living in overcrowded households. Other consequences of social inequality are referred to. The increased prevalence of specific comorbidities in certain ethnic groups is also said to be a likely factor.

The executive summary of the report states that the results of the inquiry '*improve our understanding of the pandemic and will help in formulating the future public health response to it'*. However, in addition to containing no serious analysis of the reasons for the ethnic disparity, the report contains no recommendations for a public health response to it, notwithstanding the promise in the terms of reference that it would do so. It contains no action plan to safeguard vulnerable groups, as had been called for prior to publication by chair of the Doctor's Association Dr Rinesh Parmar, amongst others.

Very shortly after publication, allegations emerged in the Health Service Journal that '*Matt Hancock's office*' had redacted from the report the evidence given to the review by more than 1000 stakeholders. This evidence had reportedly been contained in an annex to the original version of the report. It is said that these contributions pointed to systemic and institutional racism and social inequality as causes of the disparity.

After considerable outcry over the deficiencies in the report, Kemi Badenoch MP announced on June 4 that it was '*clear that much more needs to be done to understand the key drivers of the disparities identified and the relationships between the different risk factors*'. She stated that she would be taking 'work' forward on the matter. In response to an urgent question from Gill Furniss MP (Shadow Minister for Equalities), she described this as the government '*reviewing the impact and effectiveness of its actions to lessen disparities and infection and death rates of Covid-19 and to determine what further measures are necessary*'. This assertion suggests that some actions were already underway at that time, although it was not clear what those were.

Kemi Badenoch MP also said that the original PHE report did not contain recommendations because the review was '*not able*' to do so on the basis that '*some of the data needed is not routinely collected, but acquiring it would be extremely beneficial … It is not easy to go directly from analysis to making recommendations, and we must widely disseminate and discuss the report before deciding what needs to be done*'.

No date has been given for the completion of this 'work', but the 'quarterly updates' mentioned in the terms of reference would imply that it is not intended to be expeditious.

Furthermore, the terms of reference do not expressly include the issues of systemic and institutional racism and social inequality which are said to have been raised in the evidence given by stakeholders to the review. However Duncan Selbie, Chief Executive of PHE, has stated in a blog that the '*valuable insights*' gained during the original review from '*engaging with a wide range of organisations within the BAME community*' will inform the work.

On June 5 CORE (the Coalition of Race Equality organisations) wrote to the Health Secretary Matt Hancock MP raising concerns that the further work to be carried out on the review amounted to '*kicking the issue into the long grass*'. CORE called for a full public enquiry into the matter in the longer term, with a list of urgent actions to be taken immediately.[1]

Notwithstanding the government position that insufficient data had been available for any recommendations to be made in the original report, the existence of a previously withheld second PHE report entitled *Beyond the data: Understanding the impact of COVID-19 on BAME Groups* (the second PHE report) was revealed on June 11.

The following week, the prime minister declared in a *Daily Telegraph* article relating primarily to the Black Lives Matter demonstrations and retaliatory far-right disorder that '*it is time for a cross-governmental commission to look at all aspects of inequality – in employment, in health outcomes, in academic* [sic] *and*

1 These are:
- Improving the Test and Track initiative, particularly taking into account language barriers.
- Ensuring that all key workers have access to PPE, in light of a survey conducted by the RCN which showed that only 43% of BAME nurses had reported that they had received eye and face protection equipment compared to 66% of white British nurses.
- Strengthening the social security safety net in recognition of the impact of poverty and disadvantage on access to social and health care.
- Increasing statutory sick pay and widening eligibility for it.
- Scrapping the No Recourse to Public Funds condition imposed on migrants with limited leave or those without leave to remain.
- Scrapping the healthcare charging regulations and data-sharing agreement between the NHS and the Home Office.

all other walks of life'. David Lammy MP described this proposal as having been '*written on the back of a fag packet*'. Dr Zubaida Haque, Director of the Runnymede Trust, tweeted: '*It's as though we're experiencing groundhog day with review after review on racial inequalities – with no implementation of recommendations to address systemic racism and discrimination in policies and structures.*'

The second PHE report on the COVID-19 racial disparity was published on June 16. It reached no firm conclusion as to the causation of the disparity, stating that stakeholders had consistently raised issues of racism and structural disadvantage but that '*no work was done to review the evidence base behind stakeholders comments*'.

In contrast to the first report, which failed to explore the cause of the racial disparity or to make any recommendations to address it, the second PHE report contained a welcome and wide-ranging plan to address both the immediate and the wider longer-term issues.

The second report's far-reaching recommendations[2] arising from the stakeholder contributions have been described by Professor Raj Bhopal of Edinburgh University as '*absolutely excellent*'.

2. These are:
   1. Mandate comprehensive and quality ethnicity data collection and recording as part of routine NHS and social care data collection systems, including the mandatory collection of ethnicity data at death certification, and ensure that data are readily available to local health and care partners to inform actions to mitigate the impact of COVID-19 on BAME communities.
   2. Support community participatory research, in which researchers and community stakeholders engage as equal partners in all steps of the research process, to understand the social, cultural, structural, economic, religious, and commercial determinants of COVID-19 in BAME communities, and to develop readily implementable and scalable programmes to reduce risk and improve health outcomes.
   3. Improve access, experiences and outcomes of NHS, local government and integrated care systems commissioned services by BAME communities including: regular equity audits; use of health impact assessments; integration of equality into quality systems; good representation of black and minority ethnic communities among staff at all levels; sustained workforce development and employment practices; trust-building dialogue with service users.
   4. Accelerate the development of culturally competent occupational risk assessment tools that can be employed in a variety of occupational settings and used to reduce the risk of employee's exposure to and acquisition of COVID-19, especially for key workers working with a large cross section of the general public or in contact with those infected with COVID-19.
   5. Fund, develop and implement culturally competent COVID-19 education and prevention campaigns, working in partnership with local BAME and faith communities to reinforce individual and household risk reduction strategies; rebuild trust with and uptake of routine clinical services; reinforce messages on early identification, testing and diagnosis; and prepare communities to take full advantage of interventions including contact tracing, antibody testing and ultimately vaccine availability.
   6. Accelerate efforts to target culturally competent health promotion and disease prevention programmes for non-communicable diseases promoting healthy weight, physical activity, smoking cessation, mental wellbeing and effective management of chronic conditions including diabetes, hypertension and asthma.
   7. Ensure that COVID-19 recovery strategies actively reduce inequalities caused by the wider determinants of health to create long term sustainable change. Fully funded, sustained and meaningful approaches to tackling ethnic inequalities must be prioritised.

It is to be assumed that the recommendations made in the second PHE report will dovetail in some way with the work announced by Kemi Badenoch MP (see above) and/or the cross-governmental review announced by the Prime Minister (see above).

We consider below what legal recourse may be available in the event that the government fails properly or expeditiously to implement the recommendations in the second report, or in the event that it persists in what appears to be an unfortunate tendency to seek to supress information that is relevant to this pressing matter.

Legal analysis

The following legal rights are engaged:

- The public sector equality duty (PSED) in s149 of the Equality Act 2010 (EA)
- S6 and Articles 2, 8 and 14 of the Human Rights Act 1998 (HRA).

The public sector equality duty

Scope of the duty

The legislation imposes a general equality duty on public authorities, including the government. This means that the government must, when it is exercising its functions, have due regard to the following three aims:

- The need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the EA.
- The need to advance equality of opportunity between persons who share a relevant protected characteristic (e.g. a particular race or ethnicity) and persons who do not share it.
- The need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Having 'due regard' means consciously considering the three aims. This must be done at the time that the functions are being exercised; it is not enough to say in retrospect that the aims have been met, if they were not demonstrably in the mind of the public authority at the time that the relevant function was being exercised. The consideration of the aims must be meaningful, rigorous and substantial, and not a tick box exercise.[3] Equality should be at the centre of policy making, side by side with all other pressing circumstances of whatever magnitude.[4]

3 *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158

4 *Stuart and others v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, McCombe LJ at para 60

It is a duty to have due regard, rather than to meet the needs directly. However, and particularly in a political environment, the ability of a public body to show that it has had due regard will be important in maintaining public confidence in it (as well as demonstrating legal compliance). It is an area in which leadership is important. Thus when Eric Pickles in his former capacity as Secretary of State for Communities and Local Government told local authorities in 2013 and 2014 that they no longer needed to collect diversity data (a policy which itself was not properly assessed under this duty), it ran the risk of reducing the effectiveness of the duty in society generally.

The duty will include a duty to make further inquiries where there is evidence that a disadvantage may be due to a protected characteristic.[5]

Equality of opportunity

The second aim of the PSED, the need to have due regard to the need to advance equality of opportunity, appears to be most relevant.

The EA[6] mandates that, in order to comply with this aim, a public body must pay particular attention to the need to:

1. Remove or minimise disadvantages suffered by people who share a relevant protected characteristic that are connected to that characteristic. 'Disadvantage' is not defined in the EA, but the EHRC Technical Guidance on the PSED explains that it may include exclusion, rejection, lack of opportunity, lack of choice or barriers to accessing services. This would include lack of choice for individuals as to how to take steps to protect themselves based on information as to health risks.

2. Take steps to meet the needs of people who share a relevant protected characteristic that are different from the needs of people who do not share it. This includes ensuring that there is an opportunity for those who share a protected characteristic to receive information of relevance to their situation. Thus, evidence about the reasons why BAME individuals have a greater risk from COVID-19 may affect their life and/or health prospects.

Importantly, the Technical Guidance makes the point that this aim addresses the issue of *historic disadvantage* in a way that the first aim (the need to eliminate discrimination) cannot.[7] In making policy or decisions, the government must take into account the fact that people of a particular race may experience disproportionately poor health (amongst other things) by comparison to people of other races as a result of historic disadvantage, and it must pay due regard to the need to rectify that disadvantage or to meet the particular needs which arise because of it.

A public body may consider the use of proportionate positive action measures to remove or minimise disadvantage or to meet the particular needs of a disadvantaged group. The Technical Guidance spells out that if the public body has identified such positive action measures, but nevertheless decides not to take the action, it should be able to explain how it complied with the general equality duty in reaching that decision.[8]

The second PHE report contains recommendations aimed specifically at removing or minimising racial disadvantage and meeting the health needs of people of particular races. Those recommendations amount to positive actions, which the government initially appears to have deliberately decided not to take forward, but has now announced an intention to implement. If it fails to do so it will have to show how it has complied with the general equality duty in making that decision.

Thus, by releasing the second report, the government has now put itself in a position which requires it to consider taking positive action measures and to justify any decision not to do so.

There is some indication in the report and in the announcement made by government that it might argue that it needs to collect further data before it can proceed to take these positive action measures.

However, the Technical Guidance makes clear that having insufficient data about a relevant issue is not an acceptable reason for non-compliance. If it does not have sufficient data to have due regard, the authority should collect it. It should do this by collecting new data if there is sufficient time and it is proportionate to do so.[9] Where people are dying in a pandemic, there is no time for long-winded, apparently open-ended further evidence gathering. It is also plainly arguable that it is not proportionate to enter into *another* data gathering exercise when the second report as well as various other reviews, reports and recommendations are available.

Enforcement

An individual cannot bring a private law claim against the government for failing to comply with the PSED,[10]

5 See the disability case of *Pieretti v Enfield Borough Council* [2010] EWCA 1104

6 S149(3)

7 Para 3.10

8 Para 3.17

9 Para 5.20

10 S156 EA

although a breach may be relevant in evidence in private law claims based on other causes of action (such as a claim for indirect race discrimination).

An individual can make a claim directly against the government in relation to its compliance with the PSED as part of an application for judicial review in the administrative courts.

The Equality and Human Rights Commission (EHRC) can also bring a claim as part of its enforcement powers.[11] The EHRC has specific powers to enforce the PSED: assessment and compliance notices.[12] If, following an assessment, it concludes that the authority has not complied with the PSED it can give it a notice requiring compliance and written information about the steps that have been taken or are proposed to be taken. Ultimately the EHRC can seek to enforce the compliance notice by court order.[13] It can also enter into an agreement as an alternative.[14]

An individual or BAME organisation might be able to bring a judicial review of an administrative decision which adversely affects them. The administrative court has a discretion to declare a decision unlawful and to render it of no effect (or to require the decision-maker to take specific actions).

The Human Rights Act 1998

The government is prohibited by s6 HRA from acting in a way which is incompatible with rights conferred by the various articles of the European Convention on Human Rights and Fundamental Freedoms (ECHR). A body such as Public Health England acts as part of the state and therefore also has obligations under s6 HRA.

Article 8 ECHR

Article 8 ECHR confers on individuals a right to respect for private life.

Case law of the European Court of Human Rights (ECtHR) in Strasbourg has consistently recognised that the right to respect for private life guaranteed by Article 8 encompasses the right to the protection of one's physical, moral and psychological integrity, as well as the right to choose, or to exercise one's personal autonomy – for example, to refuse medical treatment or to request a particular form of medical treatment.[15]

Article 8 also gives rise to both negative and positive obligations. The ECtHR has found states to be under a positive obligation to secure the right to effective respect for physical and psychological integrity.[16]

In addition, these obligations may require the state to take measures to provide effective and accessible protection of the right to respect for private life through the implementation, where appropriate, of specific measures.[17]

It is no great leap from these decisions to suggest that in order for Article 8 rights to be properly fulfilled, individuals must be equipped with the information they need to make health-based choices. If there remains information which has been suppressed by the government relating to the causes of the health disparity and recommendations, it could be argued that disclosure and proper discussion of that information would enable members of the BAME groups affected to make decisions on matters such as appropriate social distancing and other risk management steps.

The decision of *Vilnes and others v Norway*[18] is illustrative. There, the applicants were former divers who as a consequence of their professional activities suffered damage to their health resulting in disability. The ECtHR accepted that there was a strong likelihood that their health had deteriorated as a result of decompression sickness, due to the use of too-rapid decompression tables. Standardised tables, which could suitably be viewed as an essential source of information for divers enabling them to assess the health risks involved, had not been achieved until 1990. Thus, with hindsight at least, it seemed probable that if the authorities had intervened to forestall the use of rapid decompression tables earlier, the risk could have been averted sooner. Diving companies were not under an obligation to produce decompression tables to obtain authorisation to carry out individual diving operations, but had instead enjoyed wide latitude to opt for tables that offered competitive advantages serving their business interests. There was also no scientific consensus at the time regarding the long-term effects of decompression sickness. In such circumstances, it would have been reasonable for the authorities to take the precaution of ensuring companies observed full transparency and that divers received the information they needed in order to be able to assess the risks and give informed consent. The fact that these steps were not taken and the necessary information provided

11 See Chapter 7 Technical Guidance.

12 Ss31 and s32 of the Equality Act 2006 (EA 2006)

13 S32(8) EA 2006

14 S 23 EA 2006

15 *Glass v the United Kingdom* no. 61827/00, 9 March 2004 §§ 74-83; *Tysiąc v Poland* no. 5410/03, 20 March 2007

16 *Sentges v the Netherlands* no. 27677/02, 8 July 2003; *Pentiacova and Others v Moldova* no. 14462/03, 4 January 2005; *Nitecki v Poland* no. 65653/01, 21 March 2002

17 *Tysiąc* at [110]

18 Nos. 52806/09 and 22703/10, 5 December 2013

meant that the respondent state had not fulfilled its obligation to secure the applicants' right to respect for their private life as guaranteed by Article 8.[19]

Similarly, in *Guerra and Others v Italy*[20] the applicants waited for a number of years for essential information that would have enabled them to assess the risks they and their families ran by continuing to live in their town, which was particularly exposed in the event of an accident at the factory. The ECtHR found that the state had failed to fulfil its positive obligation to provide the local population with information about the risk factors and how to proceed in the event of an accident. This failed to accord respect for their private and family life and was in breach of Article 8.

It could be argued that the circumstances of the COVID-19 pandemic are similar to a known environmental risk, and that information concerning the reasons why BAME individuals are more at risk of death would fall under that positive obligation. Thus, the decision taken by the government and/or PHE to withhold the annex to the original report and/or the second report may amount to a breach of Article 8 ECHR.

Article 10 ECHR

It might be thought that a claim under Article 10 might be made rather than using Article 8 arguments. Freedom of expression does not, however, without more, confer on the individual a right of access, nor does it embody an obligation on the government to impart information to the individual: see *Leander v Sweden*.[21]

So whilst Article 10 rights may not be engaged by the state's actions, there is a stronger argument that there is a known health risk against which BAME communities have been less able to protect themselves as a result of not having full information (thus infringing their Article 8 rights). The context of this argument leads us to Article 14 non-discrimination rights.

Article 14 ECHR

Article 14 ECHR provides that the enjoyment of the rights and freedoms in the ECHR shall be secured without discrimination on any ground such as (amongst others) race.

The flexibility of Article 14 as recently illustrated in *Gilham v Ministry of Justice* [22] is worthy of emphasis. There are four applicable principles for the present context:

- Article 14 is not a freestanding provision but instead is parasitic upon the substantive Convention rights;
- Article 14 does not require a breach of the substantive Convention right before there can be a breach of it;
- a case may fall within the ambit of a substantive Convention right even if the state has voluntarily chosen to go beyond its express requirements; and
- the ECtHR's concept of discrimination encompasses not only the need to treat like cases alike but different cases differently.[23]

Article 14 ECHR with Article 8 ECHR

Even if there is no substantive breach of Article 8 here (discussed above) is there an argument that BAME individuals have been the subject of discrimination in relation to their right to respect for their private and family life? If so, there may be an argument that the government has breached Article 14 taken together with Article 8.

There may be an arguable case to be made that access to information which would explain mortality rates is available to non-BAME racial groups, but is not provided to BAME groups (as it concerns the reasons for the statistics relative to their group). This could form the basis of an argument that there has been discrimination in the field of respect for private and family life.

The purported justification given by Kemi Badenoch MP for the difference in treatment appears to hinge upon the quality of the data that is available in each case. However, the actions of the state must be seen within its framework of laws, and this will include the rights conferred on any citizen to bring a judicial review of state functions because due regard was not had to advancement of equality of opportunity (i.e. the PSED in s149 EA, discussed above). In those circumstances the government would have to justify its failure to supply the information against the background of its own failure to comply with the s149 duty. If it has failed to comply with that duty, it would seem unlikely that it could justify the difference in treatment for the purposes of Article 14. Given also that the difference in treatment is based on race, very weighty reasons would be needed before it could be justified.

Article 14 ECHR with Article 2 ECHR

Article 2 ECHR confers the right to life. It encompasses two positive duties of note:

- The requirement to make regulations compelling

19 See to similar effect in the context of exposure to asbestos *Brincat and Others v Malta* nos. 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11, 24 July 2014

20 [1998] 2 WLUK 442

21 9 EHRR 433

22 [2019] UKSC 44

23 *Thlimennos v Greece* (2001) 31 EHRR 15

hospitals to adopt appropriate measures for the protection of patients' lives.[24] The court reviewed its position in the *Lopes de Sousa Fernandes* case[25] on state negligence in medical cases. A substantive violation of Article 2 would only be found if the relevant regulatory framework failed to provide proper protection for the individual's life. The second type of exceptional circumstance the ECtHR envisaged was where a structural or systemic dysfunction in hospital services results in a patient being deprived of life saving treatment.[26] That dysfunction must be objectively identifiable as systemic or structural to be attributable to the state, and not simply individual instances of failure.[27] Third, the harm must have resulted from the failure of the state to meet its obligation to provide a regulatory framework. Establishing that third stage might prove difficult in the current situation.

- The 'procedural obligation' to undertake an adequate, independent and timely investigation into occasions which give rise to a potential infringement of the substantive Article 2 right.[28] The essential purpose of an investigation under Article 2 is to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility.[29] The procedural obligation extends to the investigation of negligent acts endangering or resulting in loss of human life.[30] The observations of the ECtHR in *Rantsev v Cyprus and Russia*[31] may be of assistance. The court determined that the failure of Cyprus to conduct an effective investigation into R's death constituted a procedural violation of Article 2. As the ECtHR observed:

  > *Article 2 enjoins the state … to take appropriate steps to safeguard the lives of those within its jurisdiction. In the first place, this obligation requires the state to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. However, it also implies, in appropriate circumstances, a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.'*[32]

That case concerned protection from criminal acts, but it is plain that the same logic applies to other wrongful acts.

Plainly, from consideration of the substantive and the procedural aspects of Article 2, the right to life is at the least engaged. Whilst a freestanding complaint under Article 2 is unlikely to succeed, in our view the interplay between Articles 2 and 14 is a more fertile basis of challenge. If the state is aware of a heightened risk to the enjoyment of the Article 2 rights by those within an Article 14 category, we are of the view that there is a positive obligation to investigate, at least. This must extend beyond stating the problem; it must instead translate into identifying causes and potential solutions.

Enforcement

An individual wishing to bring a claim that their human rights have been breached can bring a claim under s6 HRA. Proceedings would be started in the civil courts, either as a claim for breach of the Act or as an application for judicial review.

Conclusion

In terms of the applicable law, the public sector equality duty in s149 EA appears to be the strongest challenge. However, it is subject to a very short time limit (without undue delay and in any event within three months). The remedy would also simply be that the government should consider whether to publish the information and justify why it would not be appropriate to do so, if that was the conclusion to which it came.

Underlying all of this is the link between the socio-economic duty under s1 EA, (implemented in Scotland, promised in Wales but never implemented in England) and advancement of equality of opportunity in respect of historical (and current) economic disparity for BAME groups.

There is an opportunity, in the form of the proposed cross-governmental commission, for the government to look again and strengthen the public sector equality duties. The risk otherwise in the 'second wave' of the pandemic, is that BAME groups will find, again, that the chronic neglect of their specific health concerns will leave them exposed.

24 *Calvelli and Ciglio v Italy* [GC] at 49; *Vo v France* at [89]; *Lopes de Sousa Fernandes v Portugal* at [166]; *Trocelier v France* at [4]

25 at [185ff]

26 at [192]

27 at [195]

28 *İlhan v Turkey* at [91]-[92]; *Šilih v Slovenia* at [153]-[154]

29 *Hugh Jordan v the United Kingdom* at [105]; *Nachova and Others v Bulgaria*, at [110]; *Al-Skeini and Others v the United Kingdom* at [163]

30 *Banel v Lithuania* at [70]

31 (2010) 51 EHRR 1

32 at [218]

Justifying Article 14 discrimination

Discrimination is lawful under Article 14 of the European Convention on Human Rights (ECHR) if it is justified. In recent years there has been a great deal of case law about what approach courts should take to determining the issue of justification, and the Supreme Court and Grand Chamber are due to consider this question in pending cases. In this article Adam Straw and Tayyiba Bajwa, Doughty Street Chambers, identify key recent developments and how these might be used most effectively by those representing claimants in public law cases.

Background

Article 14 provides that the enjoyment of ECHR rights shall be secured without discrimination on a range of grounds. It prohibits direct and indirect discrimination, unless they are justified.

At Strasbourg, the question of whether discrimination (or whether an interference with another qualified ECHR right) is justified, depends on whether it pursues a legitimate aim and whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

In domestic courts, a more detailed four-stage test has been developed to the question of justification. This is as follows:

> *(i) does the measure have an legitimate aim sufficient to justify the limitation of a fundamental right;*
> *(ii) is the measure rationally connected to that aim;*
> *(iii) could a less intrusive measure have been used; and*
> *(iv) bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair balance been struck between the rights of the individual and the interests of the community?* [1]

The reasons why this test was adopted were explained by Lord Reed in *Bank Mellat v. HM Treasury (No. 2)* [2014] AC 700, [72]. They include that this accords with the analytical approach to legal reasoning characteristic of the common law, and this derives from case law under Commonwealth constitutions and Bills of Rights.

Manifestly without reasonable foundation

In certain contexts, domestic courts have applied an ostensibly different test: was the discrimination '*manifestly without reasonable foundation*' (MWRF)?

In *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18 at [22] Lady Hale warned that the application of the MWRF standard did not mean that the relevant policy or practice should '*escape careful scrutiny*'. However, domestic courts have generally been much less anxious in their scrutiny of the justification of discriminatory measures where the MWRF test has been applied.

MWRF was originally thought to be appropriate only in a narrow range of cases. There are a large number of Article 14 discrimination cases in many contexts, and up to the highest level, which did not apply that test. For example, *Tigere* concerned a challenge to legislation regarding student loans as being discriminatory on the grounds of immigration status. In assessing whether the discriminatory impact was justified, Lady Hale (with whom Lord Kerr concurred) found that the MWRF test did not apply in the sphere of education: [27] – [28], [32]. Moreover, MWRF does not normally apply when deciding whether an interference with other qualified ECHR rights, such as Article 8, was justified, even though that question may involve legislation and sensitive areas of economic or social policy.

However, the use of MWRF has expanded in recent years in discrimination cases. In *R (DA) v Secretary of State for Work and Pensions* [2019] 1 WLR 3289; Briefing 912, a majority of the SC held that this test applies to legislation concerning welfare benefits. *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2020] EWCA Civ 542; Briefing 944, concerned a challenge to legislation which required landlords to take steps to ensure that they did not rent accommodation to those disqualified as a result of their immigration status. On appeal, it was argued that MWRF did not apply, as this case did not concern welfare benefits. The CA found that there was:

1 *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] 1 WLR 3820 [33]

> *no apparent logic or rationale for restricting the socio-economic policy areas in which Parliament and the executive, as democratically-responsible bodies are uniquely qualified to assess the public interest as against other interests, to welfare benefits. There are other sensitive areas, such as social housing and immigration, in which it may equally be said that they are the most appropriate assessors of what is in the public interest and whether the adverse impacts of any proposed or actual measure are proportionate to the benefits in the public interest.* [133]

In *R (Drexler) v Leicestershire County Council* [2020] EWCA Civ 502 the CA applied the MWRF test to age discrimination in the context of a decision of a local authority to amend the Special Educational Needs home to school transport policy in a way that disproportionately impacted on those aged 16 – 18. The CA noted this was a polycentric issue in an area where the government had to make difficult choices in straitened financial circumstances as to the priorities for public expenditure.

In *R (Adiatu) v Her Majesty's Treasury* [2020] EWHC 1554 (Admin), the claimant challenged the availability of financial support via statutory sick pay and the Coronavirus Job Retention Scheme during the COVID-19 pandemic. He argued that the exclusion of 'limb b workers'[2] from the job retention scheme and the failure to amend the statutory sick pay scheme without including such workers was discriminatory on the grounds of race and/or sex. The High Court held that the restrictions challenged were justified by the wide margin of discretion accorded to the government in making difficult decisions about resource allocation in trying financial times. The court noted that eligibility for statutory sick pay was analogous to a welfare benefit and as such the MWRF test applied.

It is the government's position that the MWRF test applies to all areas of public expenditure, in particular where decisions are made in relation to the allocation of scarce public resources.[3] But at the time of writing, applications for permission to appeal in *JCWI* and *Adiatu* have been made.

On the other hand, there are a number of recent decisions in which the courts have declined to apply the MWRF test outside the welfare benefits context, such as *R (Leighton) v Lord Chancellor* [2020] EWHC 336 (Admin) at [194], concerning a decision whether or not to extend qualified one-way costs shifting; and *R (Bloomsbury Institute Ltd) v Office for Students* [2020] EWHC 580 (Admin) at [259], concerning regulatory decisions about a higher education provider.

The circumstances in which the MWRF test will be applied remain unclear. There is a recent Strasbourg authority which indicates those circumstance should be limited.

JD v United Kingdom

In October 2019 the ECtHR revisited the MWRF test in *JD v United Kingdom* [2020] HLR 5. The application was brought by two of the unsuccessful claimants in *R (MA) v Secretary of State for Work and Pensions* [2016] 1 WLR 4550; Briefing 817. They argued that the cap on housing benefit in the Housing Benefit Regulations 2006, which applied to those who had more bedrooms than was deemed necessary for their needs, was indirectly discriminatory on grounds of disability and gender.

The ECtHR held that the MWRF test is limited to circumstances where '*an alleged difference in treatment resulted from a transitional measure forming part of a scheme carried out in order to correct an inequality*'. The court was clear that outside that context, at least in relation to gender and disability, '*very weighty reasons*' would have to be put forward before different treatment would be compatible with the ECHR [89].

In a number of recent decisions, claimants have sought to rely upon *JD* and argue that the MWRF test ought to be limited to the context articulated by the ECtHR.[4] However, to date, those attempts have not been successful. As *JCWI* and *Adiatu* noted, insofar as *JD* differs from binding SC jurisprudence, the lower courts must follow the latter, although it may be necessary to give leave to appeal: *Kay v Lambeth* [2006] 2 AC 465, at [43]. *JD* is itself due to be heard by the Grand Chamber in the near future.

MWRF and proportionality: spot the difference

But whether or not MWRF is adopted more broadly, there are arguments that claimant lawyers may use to prevent it being used as a rubber stamp for laws or government decisions.

The courts have adopted a 'flexible' approach to the application of MWRF. In *R (C) v Secretary of State for Work and Pensions* [2019] 1 WLR 5687, the CA considered legislation on child tax credit. It noted that '*just as in ordinary judicial review proceedings where a test of reasonableness is applied the intensity of*

2 A 'limb b worker' is a worker who falls within s230(3)(b) of the Employment Rights Act 1996 which covers an individual who has entered into or works under or worked under *'any other contract... whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer...'*.

3 *Adiatu*, at [57] – [58]; *JCWI*, paragraph [133].

4 *Drexler*, at [60]; *JCWI*, at [131]; and *Adiatu*, at [54] – [58].

the court's review will vary according to the context (see e.g. Kennedy v Information Comr (Secretary of State for Justice intervening) [2015] AC 455, paras 51–55), so too it is clear that, in assessing proportionality, the intensity with which a court will scrutinise a policy justification for a difference in treatment will depend on the circumstances'.

The CA identified three of the factors which '*will affect the intensity with which the court will scrutinise the proffered justification and hence the readiness with which the court will conclude that there was manifestly no reasonable foundation for the difference in treatment*':

1. The nature of the ground on which the difference in treatment is based, in particular whether discrimination is based on a 'suspect ground' of race, nationality, gender, religion or sexual orientation.
2. Whether the measure has been approved by parliament and, if so, with what degree of scrutiny. The CA noted that particular weight would be attached to the democratic basis for the decision where it is enacted as primary legislation.
3. Finally, to what extent, or whether, the values and interests relevant to the assessment of proportionality were considered when the policy choice was made.

For example, if the measure involved sex discrimination and the government or parliament[5] did not recognise there was discrimination or decide whether it was justified, a stricter intensity of review would be appropriate. Other factors which may be relevant to the intensity of review in public law include the importance of the rights at stake and gravity of the adverse effects of the decision at issue (*Kennedy* [53-54], and *R (Bourgass) v Secretary of State for Justice* [2016] A.C. 384, [129]).

This flexible approach was consistent with previous authority. For example, in *Re. Brewster* [2017] UKSC 8; 1 WLR 519; Briefing 841, the SC held that Northern Irish legislation regarding a survivor's pension was incompatible with Article 14. It held that the need for reticence by a court is diminished where the:

- question of the impact of a particular measure on social and economic matters had not been addressed by the government department responsible for a particular policy choice;
- impugned measure was sought to be defended on grounds that had not been present to the decision-maker at the time the decision was made; and
- where a purpose of the law at issue was to remove a difference in treatment.

This flexible approach to the MWRF test has been adopted in a number of subsequent cases. In *Drexler* the CA noted that, at least in the context of that case, '*there is no material difference between application of the conventional proportionality test, giving appropriate weight and respect to the judgement of the executive or legislature, and the "manifestly without reasonable foundation" test*'.[6]

A similar approach was taken by the CA in *JCWI*. It found that there was no '*binary*' choice between the MWRF test and proportionality. There is a flexible standard of review. The CA held:

> *the manifestly without reasonable foundation test is not met simply because the measure has a legitimate aim and is rationally connected to that aim: it must also be a proportionate means to achieving that aim. It thus still requires a balancing exercise of the end and means… The greater the element of economic and/or social policy involved, the greater the margin of judgment and the greater the deference that should be afforded. That is, for obvious reasons, particularly so when that body is Parliament. However, if the measure involves adverse discriminatory effects, that will reduce the margin of judgment and thus the degree of deference. That will be particularly so where the ground of discrimination concerns a core attribute such as sex or race… whether seen in terms of the application of the manifestly without reasonable foundation criterion or simply in terms of the usual balancing exercise inherent in the assessment of proportionality, the result should be the same…'* [139 - 141]

The underlying rationale

The recent CA decisions indicate that the approach to proportionality under Article 14 is similar to that in domestic public law. There is a principled basis for aligning these approaches. MWRF was developed by Strasbourg to reflect the '*margin of appreciation*' (see e.g. *Stec v United Kingdom* (2006) 43 EHRR 57, at [52]). This margin may be wider where there is no consensus between member states about the issue in question, or where national authorities are better placed than the international judge to appreciate what is in the public interest on social or economic grounds. But that concept does not apply directly in the national courts. If an issue falls within the margin of appreciation, the local courts must nevertheless examine which of the national authorities – parliament/the government, or the courts – is best placed to decide the issue.

5 *R (Animal Defenders) v Secretary of State for Culture, Media and Sport* [2008] 1 AC 1312 at [33]. The question for the court is whether the discrimination is justified. If parliament has fully considered that question and decided it is justified, considerably greater weight should be accorded to parliament's view, than if it has not done so.

6 *Drexler* at [77]

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This depends on domestic concepts of weight and institutional competence (see, e.g. Lord Reed in *Bank Mellat* at [71] and *In re G* [2009] 1 AC 173 at [37 and 130]) which have been developed and applied in public law cases such as *Kennedy*.

Other relevant factors to whether a measure is MWRF

It is also important to bear in mind other case law about justification which applies when examining whether the measure was MWRF.

To pick a few examples, firstly, in a discrimination case, what must be justified is the difference in treatment and not merely the underlying policy: *A v Secretary of State for the Home Department* [2005] 2 A.C. 68, at [68].

Secondly, it is for the government to prove, ordinarily with evidence, that a discriminatory measure is justified: *R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1995] 1 AC 1. *Brewster* held that a claim that the administrative advantages of a bright-line rule mean it is not MWRF, would require evidence to that effect. This contrasts with Lord Wilson's approach in *DA* at [66]. He held that the state need only put forward its reasons for the adverse treatment, and it will then be for the complainant to demonstrate it was not MWRF.

Thirdly, cost alone does not justify a difference in treatment. If the government or parliament wish to reduce costs, they must do so in a way which is not discriminatory: *R (TP) v Secretary of State for Work and Pensions* [2020] EWCA Civ 37, [170-173].

Fourthly, the court must examine whether the discrimination was a proportionate means of achieving a legitimate aim. Where the aim is not in fact advanced by the rule in question, or does not strike a fair balance, the discrimination will not be justified by that aim: *Brewster; Re McLaughlin* [2018] 1 WLR 4250 and *Langford v Secretary of State for Defence* [2020] 1 WLR 537 [67].

Conclusion

Resolution of the debate about the type of case in which the MWRF test applies is likely to take some time. But even if it does apply in the particular case, claimant lawyers may wish to argue that the intensity of the court's scrutiny, and its willingness to intervene, should depend on a range of relevant factors. Those factors may include:

1. whether the ground of discrimination is a 'suspect ground';
2. the gravity of the adverse impact of the discrimination;
3. the extent to which the government or parliament recognised the measure was discriminatory and decided whether it was justified;
4. whether the justification now being put forward is different from that originally relied on; and
5. whether a central purpose of the measure or decision is inconsistent with its discriminatory effect.

It is always important to consider these questions at an early stage, and to decide whether to seek relevant evidence during pre-action correspondence.

950 Briefing 950

Disability discrimination – hierarchy of treatment?

VL v Szpital Kliniczny im. dra J. Babińskiego, Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie Court of Justice of the European Union, Case C-16/19; June 18, 2020

Introduction

S13(3) of the Equality Act 2010 (EA) provides that if the protected characteristic is disability and B is not a disabled person, A does not discriminate against B only because A treats disabled persons more favourably than A treats B – i.e. a person without a disability cannot complain of more favourable treatment towards disabled people. This preserves the asymmetrical nature of disability discrimination, as not everyone has a disability, whereas everyone has a race, gender etc.

S13 does not, however, prohibit a person with a particular disability bringing a claim of direct discrimination on the basis that A has treated them less favourably, because of their particular disability, than A has treated someone without that *particular* disability. In the case of indirect discrimination, the provisions make clear (see ss6(3) and 19) that the focus is on people with particular disabilities as against those

without those disabilities – who could be non-disabled or people with different disabilities.

This means that potentially a disabled person could complain of their treatment as compared to someone with a different disability. So if, for example, a person with a mental health issue considered that they were being treated less favourably because of their mental health issue than an employee who was a wheelchair user, they could potentially bring a claim. This might arise where an employer had a scheme aimed exclusively at disabled people, but there was a 'hierarchy' within this scheme.

To the author's knowledge, there has not as yet been a domestic case involving a disabled person bringing a case based on their less favourable treatment as compared to another disabled person.

The CJEU Advocate General (AG), in considering the Employment Equality Directive (Council Directive 78/2000/EC) (the Directive) considered the approach to discrimination between people of different disabilities, subject to ratification by the full court. In Case C-16/19, the AG had to consider the applicability of the prohibition of (direct or indirect) discrimination to the conduct of an employer who treats two groups of disabled individuals differently on the basis of an apparently neutral criterion (in this instance, the date of submission of a disability certificate).

Facts

The subject of the case was the payment of an allowance. VL was employed as a hospital psychologist. She submitted a certificate to her employer in 2011 which confirmed that she had a moderate, permanent disability. Following a meeting with the staff in 2013, the hospital director decided to pay, in addition to salary, a monthly allowance of 250 Polish złoty (approximately €60) to employees who submitted a certificate confirming a disability. The relevant date for the grant of the allowance was the date on which the certificate was submitted to the hospital's director, rather than the date on which the certificate was obtained, and that date was after the staff meeting. The employer wanted to bring about an increase in the number of disabled workers it employed, so as to obtain a reduction in its contribution to a state disability fund (which was calculated according to worker numbers).

Thirteen employees were eligible. However, employees who had already submitted a disability certificate prior to the staff meeting – some 16, including VL – were not eligible and so were not paid the allowance.

Court of Justice of the European Union

VL brought a claim of discrimination which was initially rejected, and the Polish appellate court referred a preliminary question to the CJEU as follows (see para 26):

> *Is article 2 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation to be interpreted as meaning that the differing treatment of the situations of individual members of a group distinguished by a protected characteristic (disability) constitutes a form of breach of the principle of equal treatment where the employer treats individual members of that group differently on the basis of an apparently neutral criterion and that criterion cannot be objectively justified by a legitimate aim and the means of achieving that aim are not appropriate and necessary?*

Advocate General's opinion

The AG considered the scope of the Directive. He confirmed that the Directive has the potential to prohibit direct discrimination between two workers with different disabilities:

> *The example comes to mind of situations in which an employer treats disabled workers differently one from another, according to the type or degree of disability which each has. In such cases, the relation between the difference in treatment and the protected characteristic is unequivocal and we would, therefore, in my view, be squarely within the scope of Directive 2000/78, even though the comparison is made within the group of disabled workers.* [para 46]

But he found that the treatment was not direct discrimination, as direct discrimination is normally found in situations where the unfavourable treatment is of 'one person' by comparison with '*another … in a comparable situation*'. In the present case, however, the unfavourable treatment was of a 'group of persons' and so there was no 'direct causal nexus' between the employer's measure and disability.

He also rejected the argument that the treatment was positive action, as the employer had contended. Whilst it might have been positive action on the part of the Polish legislature, the objective of the adopted measure by the employer was to make a saving by way of a reduction in the contribution to the fund; it was not a positive measure for the benefit of disabled workers. Secondly, providing for an allowance that is reserved exclusively to a group of disabled workers who are distinguished from non-beneficiaries not by characteristics related to their employment relationship but solely by the date on which they submitted to their

950 employer their disability certificate, could not amount to positive action.

The AG went on to invite the court to find that the provision contained in Article 2(2)(b) of the Directive should not be restrictively interpreted and that it was necessary to prevent two 'like groups' from being treated differently because of an apparently neutral criterion intrinsically linked to (though not caused by) a protected characteristic (a potential breach of the equal treatment principle) (see para 81). Consequently, the AG considered that the Directive should be interpreted as allowing a comparison group for the purpose of establishing indirect discrimination to be another group of workers sharing the same protected characteristic (in this case, disability); the criteria was 'apparently neutral' though related to disability in that only a disabled person could obtain a certificate. It would be for the national court to determine justification.

Comment

Though not strictly speaking new territory, given the approach to direct and indirect discrimination in the EA, this opinion – if followed by the CJEU – may encourage litigators to think more creatively about disability discrimination cases and may raise awareness of potential discrimination solutions by those in particular with non-visible disabilities which may be treated less seriously, for example, by employers and service providers. It is also worth noting that the 'apparently neutral' policy was applicable only to disabled people – making it easier to bring indirect discrimination cases in disability specific situations.

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Court of Appeal reaffirms the significance and stringency of the public sector equality duty

R (on the application of Edward Bridges) v The Chief Constable of South Wales Police [2020] EWCA Civ 1058; August 11, 2020

Implications for practitioners

The CA restated the positive and non-delegable nature of the public sector equality duty (PSED), and clarified the rigorous requirements on public authorities, especially in relation to information gathering. This case will be of assistance to those seeking to hold public authorities to account when they have not fulfilled their PSED obligations, especially authorities trialling new technologies or contracting with private companies to provide services which potentially discriminate.

Facts

South Wales Police (SWP) began trialling live automated facial recognition (AFR) in May 2017 and deployed it over 50 times by April 2019. AFR works by extracting from CCTV images of people's faces and using their facial biometrics to compare them to a watchlist.

The claimant (EB), a civil liberties campaigner from Cardiff, was scanned by AFR in December 2017 and at an anti-arms fair protest in March 2018.

EB brought a claim for judicial review against SWP on the basis that its use of AFR (i) was not compatible with the right to privacy under Article 8 of the European Convention on Human Rights, (ii) breached data protection legislation, and (iii) breached the PSED contained in s149 of the Equality Act 2010 (EA).

As to the PSED, EB claimed that SWP had never had 'due regard' to the need to eliminate discrimination on the grounds of race and sex which may arise from its use of AFR. Despite evidence showing higher rates of AFR misidentification for people of colour and women, according to EB, SWP had not investigated the potential for its technology to discriminate.

Divisional Court

On September 4, 2019, the DC dismissed EB's claim on all grounds. The DC held that SWP had not breached the PSED since, when the AFR trial commenced, SWP had not recognised nor should it have recognised that its technology might discriminate.

Court of Appeal

By a unanimous CA decision, EB's appeal was allowed on three grounds, including that the DC had been

wrong to hold that SWP had complied with the PSED. The CA's PSED reasoning can be considered in three parts:

1. Public authorities cannot rely on a lack of evidence or information to discharge the PSED

This was formulated in two ways by the CA. First, the DC was wrong to be persuaded by the fact that when the AFR trial commenced, there was no evidence before SWP that its software may have had any racial or gender bias. In the CA's words, this was '*to put the cart before the horse*' since the purpose of the positive duty is '*to ensure that a public authority does not inadvertently overlook information which it should take into account*'. The CA thus observed that the PSED required public authorities to take reasonable steps to make enquiries and ascertain what may not yet be known to them.

Second, SWP could not rely on the fact that the private manufacturer of the software would not reveal (for confidentiality reasons) the demographic composition of the dataset of faces on which the software was trained. It was EB's argument that the only way to determine whether the software was biased towards a particular demographic group was to evaluate this dataset. While recognising that it was understandable for the manufacturer to withhold the dataset, the CA nonetheless held that SWP should have sought to satisfy itself (either directly or by way of independent verification) that the software was not biased. SWP could not rely on the manufacturer's broad reassurances about the dataset. The PSED is '*non-delegable*', the CA confirmed.

2. PSED requirements for trials are no less stringent

SWP had argued before the DC that it would continue to review events against the criteria in s149(1) EA, which the DC accepted as the correct approach in the context of a trial. The CA categorically rejected this view, clarifying that the '*PSED does not differ according to whether something is a trial process or not*'. If anything, the CA observed, it is more important in trials that public authorities gather the relevant information to conform to the PSED and avoid discrimination.

The CA made clear the high standard to which public authorities would be held when trialling new technology:

> *We would hope that, as AFR is a novel and controversial technology, all police forces that intend to use it in the future would wish to satisfy themselves that* ***everything reasonable which could be done had been done*** *in order to make sure that the software used does not have a racial or gender bias.* (emphasis added)

3. The PSED requires proper process

In reaching its decision, the DC had emphasised the significance of having a 'human failsafe', whereby two people would review any potential AFR matches. The CA held that this 'human failsafe' was insufficient to discharge SWP's PSED, noting that mistakes were easily made in the context of identification. Further, the CA found that the 'human failsafe' was not material to the PSED as a matter of principle, since the PSED was '*a duty as to the process which needs to be followed, not what the substance of the decision should be*'.

Comment

After the apparent dilution of the PSED requirements in the DC's judgment, the CA's decision is undoubtedly a welcome one. It is notable that the PSED section of the CA judgment began with a robust defence of the historical and continuing importance of the duty.

The CA's decision serves as an important reminder that the PSED is positive and non-delegable, and that it sets a high standard. Particularly useful is the CA's observation that even when private manufacturers refuse to release information, public authorities must investigate bias. This finding will inevitably have a knock-on effect on other public use of privately manufactured technology, and will result either in manufacturers releasing more information or, more likely, more rigorous testing of bias by public authorities. Either way, discrimination will hopefully be exposed and mitigated before new technologies are rolled out.

It is also significant that the CA rejected SWP's claims of compliance. It dismissed SWP's reliance on the 'human failsafe', as well as SWP's statistical analysis of bias as off-point and non-expert. This shows the courts will not accept claims of compliance out-of-hand, but rather will apply a careful scrutiny, in turn bolstering the PSED.

One hopes that this decision will both encourage public authorities to adopt a robust approach to the PSED, even when contracting with a private company. It should also ensure that they are held to account when they do not.

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Did the Court of Appeal kill the PSED?

Luton Community Housing Limited v Durdana [2020] EWCA Civ 445; March 26, 2020

McMahon v Watford Borough Council & Kiefer v Hertsmere Borough Council [2020] EWCA Civ 497; [2020] PTSR 1217; April 8, 2020

The public sector equality duty (PSED) is contained in s149 of the Equality Act 2010 (EA). It was introduced to tackle systemic racism in public institutions. It is a preventative measure. It is designed to stop discrimination before it happens.

There have been two recent very important CA cases on the PSED in the context of housing law. They have both severely limited the impact of the PSED in this area. One of the cases concerns a possession claim; the others concern homelessness applications.

Luton Community Housing Limited v Durdana

The case of *Luton Community Housing Limited v Durdana* [2020] EWCA Civ 445 was the possession claim. Luton Community Housing Limited (LCHL) relied upon ground 17 in Schedule 2 to the Housing Act 1988 which applies where the landlord was induced to grant a tenancy by a false statement. The county court judge found that the ground was satisfied. The appellant had lied about where she was living, her bank accounts and the family income. However, the judge did not make a possession order because she found a breach of the PSED and therefore dismissed the claim. She said that she did not need to go on and consider whether it was reasonable to order possession, but had this been necessary, she decided that the breach of the PSED meant that it was not reasonable. LCHL appealed to the CA.

Court of Appeal

The appeal was allowed. Patten LJ gave the leading judgment, with which Moylan LJ and Newey LJ agreed. The CA found that the judge had been right to decide that there was a breach of the PSED, per Patten LJ at [26]. The appellant suffered from PTSD, and her daughter from cerebral palsy; however LCHL had not taken into account the likely effect of these disabilities on them in relation to the proposed eviction although it knew what the disabilities were at the time of its decision, knew they were being relied upon as a defence and had copies of the medical reports.

However, the CA then went on to ask, applying the Senior Courts Act 1981 s31(2A) by analogy, and following *Aldwyck Housing Group Ltd. v Forward* [2019] EWCA Civ 1334 at [25], whether it was highly likely that the outcome would not have been substantially different had no breach of the PSED occurred, see [29]. It was held that it was highly likely that LCHL would have made the same decision to seek possession, if it had paid due regard to the evidence and complied with the PSED, see [35].

The CA ordered a remittal of the case to the judge to decide whether, in light of the court's findings in relation to the PSED, it is reasonable to order possession.

Supreme Court

The appellant is applying for permission to appeal to the SC. This is on two main grounds. First, she argues that the 'highly likely' test should not apply in cases such as this. It was aimed only at minor procedural breaches, and not designed to create such a huge constitutional shift. Secondly, she says that the CA wrongly applied the test in this case, especially given the absence of any evidence from LCHL as to what their decision would have been had it complied with the PSED.

As matters stand, even if there is a breach of the PSED, this may have no consequence if the court is satisfied that it is highly likely that the decision-maker would have reached substantially the same decision if he had complied with the PSED. This would seem to significantly limit the PSED's ability to prevent discrimination.

McMahon v Watford Borough Council & Kiefer v Hertsmere Borough Council

In *McMahon v Watford BC*, and *Kiefer v Hertsmere BC* [2020] EWCA Civ 497; [2020] PTSR 1217, the CA revisited the PSED but in relation to homelessness law.

In both appeals, the respondents had applied for

homelessness assistance but their applications had been refused on the basis that they were not in priority need. That decision was upheld on review, and the respondents appealed against those review decisions to the county court under s204 of the Housing Act 1996. Both appeals were successful. The judges in the county court held that although the reviews had correctly concluded that the respondents were not vulnerable, there was a breach of the PSED. The local housing authorities then appealed to the CA.

Court of Appeal

Both appeals were allowed. Lewison LJ gave the leading judgment, with which both Floyd LJ and Coulson LJ agreed. The CA found that there had been no breach of the PSED, and therefore did not go on and decide whether, as per *Durdana*, the 'highly likely' test applied in the homelessness context.

The judges below had allowed the appeals on the basis that the review officers had not made clear findings as to whether the respondents were disabled and therefore had breached the PSED. The CA disagreed and said that an express finding was not necessary. Instead, the court held that it was clear from the review decisions that the authorities were finding that the respondents' medical conditions were not so serious as to impact on their daily living activities and therefore that they were not disabled even though that was not expressly stated in the decision letters.

However, what is significant about this decision is the CA's very relaxed approach to compliance with the PSED. In many ways, this was a stark contrast to the decision of the SC in *Hotak v Southwark LBC* [2015] UKSC 30 [2016] AC 811. In particular, the SC had set out a four-stage test to help authorities comply with the PSED in the context of homelessness vulnerability decisions. This requires review officers to focus very sharply on (i) whether the applicant is under a disability (ii) the extent of such disability (iii) the likely effect of the disability and (iv) whether the applicant is, as a result, vulnerable for the purposes of homelessness law.

The CA held that it was important to avoid an arid debate, not to force review officers into a straitjacket and to adopt a test that was practical, see [44] of the judgment. The PSED is not a freestanding duty and is not a duty to achieve a result, but a duty to have due regard to achieve the goals identified in s149 EA, see [48]. It was held that Lord Neuberger's test was not sequential, and not a rigid test to be applied in all PSED cases, see [53]. It was not a fatal flaw in a decision if no finding as to disability was made. What matters is the substance of the assessment, not its form. Provided that a review officer appreciates the actual mental or physical problems from which the applicant suffers, the task will have been properly performed, see [68]. The CA warned of the real danger of the PSED being used as a peg on which to hang highly technical arguments, and was not a disciplinary stick, see [89].

The CA did agree that when considering whether a person suffered from an impairment of their abilities to carry out normal day-to-day tasks, it was necessary to concentrate on what a person could not do, rather than on what they could do. This includes tasks at work, as well as in and about the home. However, it was also held that this was not the role of the review officer whose function was primarily to carry out an assessment of vulnerability for homelessness purposes, see [56].

This judgment appears to demonstrate a shift away from a more strict approach to compliance with the PSED as illustrated by the SC in the *Hotak* case. The statement by the CA at [68], that provided a review officer appreciates the actual mental or physical problems from which the applicant suffers, the task will have been properly performed, does not sit comfortably with the PSED jurisprudence. However, it is a statement which is confined to homelessness decision-making.

Both respondents are trying to obtain public funding to appeal to the SC on the basis that the decision is inconsistent with *Hotak* for the reasons set out above.

Toby Vanhegan
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Unlawful indirect associative disability discrimination

O'Donnell v Department for Communities [2020] NICA 36; August 10, 2020

Introduction

The Court of Appeal in Northern Ireland recently made a decision with far reaching consequences for the spouses and children of deceased disabled individuals. *O'Donnell* concerned bereavement support payment (BSP). The Social Security Tribunal to which that appeal was made had referred the question of whether s29 and s30(1) - s30(3) of the Pensions Act (Northern Ireland) 2015 (2015 Act) were incompatible with ECHR Article 14, read with Article 8 and Protocol 1 Article 1. Those provisions stipulated that, in order for a claimant to receive BSP, their deceased spouse must have paid Class 1 or Class 2 National Insurance Contributions (NICs).

Facts

Mr O'Donnell's wife had been unable to work throughout her life because she suffered from Friedreich's Ataxia, a rare degenerative disorder. Mrs O'Donnell suffered from ataxia and weakness which worsened over time and affected her heart function. This culminated in her being severely neurologically impaired, using a wheelchair from the age of 18. It was clear that Mrs O'Donnell had been unable to accrue any NICs and so Mr O'Donnell's application for BSP was refused.

Court of Appeal

The appeal was allowed; the CA found that the provisions had resulted in unlawful indirect associative disability discrimination, and were incompatible with ECHR Article 14, read with Article 8 and Protocol 1 Article 1.

Article 14 and indirect associative discrimination

Interestingly, the CA made clear that Mr O'Donnell was not required to establish a stand-alone form of status. Mrs O'Donnell could not pay the requisite NICs because of her disability, and the direct effect of that was that she could not provide BSP for her husband – and their four children – upon her death [56]. Mr O'Donnell and the children were indirectly affected by this discrimination by association and that was enough [57]. As a result, both Mr O'Donnell and his children had established 'other' status under Article 14: the former as the spouse of a severely disabled deceased individual unable to work and pay NICs, and the latter as the children of a severely disabled deceased individual unable to work and pay NICs [87].

The discrimination: failing to treat different people differently

In line with *Thlimmenos v Greece* (2001) 31 EHRR 15, the court recognised that Article 14 rendered it unlawful for states to *fail to treat differently* persons whose situations are *significantly different* [42]. The provisions of the 2015 Act had led to Mr O'Donnell and his children being treated similarly to those whose situations were different [49]. In that respect, the comparator was a deceased spouse *without* a disability who was able to work and pay NICs but who did not work [60]. The provisions applied to both disabled spouses who could not work and able-bodied spouses who could work. A distinction needed to be made between each in order to ensure disabled spouses were treated differently, and their spouses and children as a result.

Justification

The Department of Communities sought to justify the discrimination on the basis of (a) incentivising work (b) protecting the contributory principle and (c) simplifying the benefits system. But the court found these relevant to the underlying policy only; those aims did not justify the discriminatory treatment resulting from that policy [93]. As applied to the discrimination these objectives were manifestly without reasonable foundation because:

1. a severely disabled person cannot be incentivised to work if they cannot work due to their disability;
2. a disabled person unable to work cannot make work pay; and
3. the NICs requirements as a manifestation of the contributory principle would not be undermined by their removal in certain circumstances, given the contribution required for BSP was modest (75% of potential claimants would satisfy the NICs requirements) [98].

The remedy

The court made use of its ability under s3 of the Human Rights Act 1998 to interpret the provisions in accordance with the ECHR. The following was read into the 2015 Act:

> *For the purposes of section 29(1)(d) the contribution condition is to be treated as met if the deceased was unable to comply with section 30(1) throughout her working life due to disability.* [102]

Comment

BSP claimants

O'Donnell has profound ramifications for spouses, and children, of deceased individuals unable to work due to their disability. The CA's broad approach to associative discrimination opens the door for claimants who have been refused BSP in Northern Ireland on the same basis as Mr O'Donnell to have those refusals reviewed. New claimants in the same situation will be able to apply without being barred due to their deceased spouse's inability to work.

Importantly, there are also possible ramifications for similar claimants in England, Wales and Scotland. The CA alluded to the principle of parity as between the social security systems of Northern Ireland and Great Britain [10]. Whilst minor differences have emerged over time between each jurisdiction's social security regimes, any differences between ss 29 and 30(1) – (3) of the 2015 Act and ss 30 – 31(1) – (3) of Great Britain's Pensions Act 2014 (the 2014 Act) were deemed immaterial. These provisions of the 2014 Act include the same NICs requirements in relation to BSP as the 2015 Act. The significance of this parity is stark, and the CA went as far as it could without explicitly impugning the 2014 Act:

> *The policy of parity may explain why in Northern Ireland the relevant provisions have been adopted given that they were adopted in England and Wales but that policy does not serve to justify the impugned difference in treatment. Unjustifiable discrimination is not justified by parity.* [98]

UK's international obligations

The CA also took a robust view of the 2015 Act when set against the UK's international obligations. It found that that Act's provisions breached the UK's obligations under the United Nations Convention on the Rights of the Child (UNCRC) and UN Convention on the Rights of Persons with Disabilities (UNCRPD). In doing so, the court took the view that these obligations incorporated the need – as part of any equality impact assessment – to consider the indirect associative impact of any measures on able-bodied spouses, children or partners of deceased disabled individuals who were unable to work due to their disabilities [12]. Further, obligations under the UNCRC and UNCRPD also informed the court's view of the need for the UK to make necessary distinctions between groups or persons whose circumstances are '*relevantly and significantly different*' under the ECHR [49] and [99].

The CA did not stop there. Perhaps most importantly in terms of the UK's international obligations, it went one step further than Lord Wilson in *R (DA and DS) v Secretary of State for Work and Pensions* [2019] 1 WLR 3289 who stated that a:

> *… decision not made in substantial compliance with article 3.1 [of the UNCRC] might well be manifestly unreasonable.* [78]

The CA extended this approach to the UNCRPD and made clear that Articles 4(1)(b), 5(3) and 28(2) of that Convention should also inform any interpretation of the ECHR. That is, a decision that is not in '*substantial compliance*' with those provisions might well be manifestly without reasonable foundation [73-74].

In short, *O'Donnell* has reinforced, and indeed expanded, the domestic application of the UK's obligations under the UNCRC and UNCRPD as they apply to both disabled claimants as well as the families who survive them.

Elaine Banton & **Joshua Yetman**
7BR Chambers

Discrimination arising: tighter focus on causation

Robinson v Department for Work and Pensions [2020] EWCA Civ 859; [2020] IRLR 884; July 7, 2020

Facts

The claimant, Elaine Robinson (ER), worked as an administrative officer in the debt management department of the Department for Work and Pensions (DWP). After suffering a hemiplegic migraine in 2014 she developed blurred vision in one eye. This made it impossible for her to use the specialist debt management software required. Technical difficulties and partial fixes did not resolve her disadvantage. Working under considerable stress, she took periods of leave and sick leave, eventually being diagnosed with depression.

ER lodged a grievance in March 2016 and agreed to work in a paper-based role in another department. Her grievance was upheld in July 2016. She later brought a second grievance seeking an apology and compensation. The apology was forthcoming but not the compensation.

In August 2017, ER filed an ET1 claiming a failure to comply with the duty to make reasonable adjustments, contrary to s20 Equality Act 2010 (EA), and four instances of unfavourable treatment contrary to s15 EA:

- her removal from the debt management department
- failure to deal with her grievances fully and in a timely manner
- failure to implement the reasonable adjustments recommended by occupational health and the DWP's Reasonable Adjustments and Support Team
- failure to provide her with suitable work.

Employment Tribunal

The ET allowed her s15 claim of discrimination arising in consequence of disability. It found the DWP had failed in its duty of care to protect her from undue stress because of the delays in dealing with her grievance, and that it had failed to provide her with a suitable work station. However, the ET also rejected her reasonable adjustments claim. It found that no adjustments would completely remove any disadvantage. DWP had tried to find and implement a solution. The adjustments it had undertaken were reasonable in light of the available technical data. DWP continued to look for a solution which would allow ER to return to her original role until it had become clear that was not possible. She was reassigned, enabling her to stay in employment at the same pay and grade.

Employment Appeal Tribunal

Kerr J, who heard the case in the EAT, allowed the DWP's appeal and substituted a finding that there was no discrimination arising from disability. It rejected ER's cross-appeal against the ET's decision on reasonable adjustments.

On the s15 claim, the EAT held the ET had impermissibly applied a 'but for' test of causation. Although ER's treatment was in principle capable of being contrary to s15, the ET's actual findings were equivocal.

Following *Dunn v Secretary of State for Justice* [2018] EWCA Civ 1998, [2019] IRLR 298, a case concerning delays in handling an ill-health retirement, the 'treatment' cannot have been 'motivated' (in the sense used in *Dunn*) by the consequences of the disability.

Applying the reasoning in *Dunn,* the ET's reliance on delays in finding a technical solution and in dealing with ER's grievances were not capable of amounting to a breach of s15. The ET's findings were only that attempts were made to deal with the consequences of disability and that those attempts did not succeed. Only by applying the forbidden 'but for' test could it be said that ER's symptoms caused her to be treated as she was. Additionally, the ET's rejection of the DWP's justification defence was inconsistent with its rejection of ER's reasonable adjustments claim. On the facts found, only one conclusion was possible, so the case was not remitted to the ET.

Kerr J rejected the cross-appeal on reasonable adjustments: the ET's factual findings were sound, supported by evidence and not perverse. There was no basis for interfering with the ET's decision to dismiss the s20 claim.

Court of Appeal

The CA dismissed ER's appeal, holding the ET had erred in allowing her s15 claim. Agreeing with Underhill LJ's view in *Dunn,* Bean LJ observed:

Both s13 and s15 use the same phrase 'because of'.

One requires A to have treated B less favourably than a comparator would have been treated because of a protected characteristic (s13), the other to have treated him unfavourably because of something arising in consequence of a disability (s15).

Both sections, in using 'because of', require a tribunal to look at the thought processes of the decision-makers concerned. [para 55]

Bean LJ also agreed with Simler P in the EAT in *Dunn*, where she said: '*just as with direct discrimination, save in the most obvious case, an examination of the conscious and/or unconscious thought processes of the putative discriminator is likely to be necessary*' if a s15 claim is to succeed.

The ET had failed to engage with the thought processes of the relevant managers and there were no findings of fact which could have established, even on a prima facie basis, that the delays or technical difficulties were *because of* ER's disability or the symptoms arising from it.

Although there was no finding that moving her from the debt management role was 'unfavourable treatment', the CA found it was '*plainly reasonable and proportionate … given the difficulties being caused by the computer software*' and '*an incontestably legitimate aim*'. [para 58].

Comment

In neither *Dunn* nor *Robinson* was the CA's decision in *City of York Council v Grosset* [2018] EWCA Civ 1105 [2018] IRLR 746 cited. *Grosset* is helpful because it clearly separates and distinguishes between the two causative issues at play in s15. The thought processes of those involved are relevant only for the first causative issue: '*did A treat B unfavourably because of an (identified) 'something'?*

Those thought processes are not relevant for the second causative issue: '*did that "something" arise in consequence of B's disability*'? That approach was not changed by the SC in *Williams v Trustees of Swansea University Pension and Assurance Scheme and Another* [2018] UKSC 65; [2019] IRLR 306; Briefing 843. The focus in *Williams* was on the first causative issue: whether the reduced early pension was 'unfavourable' treatment in the first place.

However, unless *Grosset* helps in the approach to the facts of a particular case, with this settled view at CA level about causation in s15 cases, the only way to change it will be through an appeal to the SC.

Implications for practitioners

- Claims stemming from procedural or technical difficulties, or delays, require some care.
- In s15 cases, it is crucial to identify precisely the unfavourable treatment said to be at issue. The treatment must be **because of** *'something arising in consequence of'* the claimant's disability. How one characterises the treatment can mean the difference between success and failure.
- Remember that examination of the thought processes of those involved is in relation to the 'something arising' and not to the link between the 'something arising' and the disability (or symptoms) itself, nor indeed to the disability.
- If in doubt, go back to *Grosset*. It may also help to read Simler P's summary of the approach to s15 in *Pnaiser v NHS England* [2016] IRLR 170 at para 31.
- Where delays, procedural or technical difficulties are in play, identify the operative provisions, criteria and practices. What disadvantage was the claimant subject to because of disability? What adjustments could have been made to mitigate that disadvantage? Certainly consider claiming under s20 (reasonable adjustments) and, if a group disadvantage can be shown, also claim under s19 (indirect discrimination).

Sally Robertson
Cloisters

Adjournment for further medical reports refused

Rose Morton v Eastleigh Citizens Advice Bureau [2020] EWCA Civ 638; May 15, 2020

Implications for practitioners

This case stems from an employee's application to adjourn a hearing on the basis that she needed more time to obtain her own medical report and had not had adequate time to prepare due to her mental health issues. The CA rejected her appeal on the grounds that she had had enough preparation time and did not require medical evidence, and made some interesting comments on the ability of EJs to interfere (or not!) with each other's case management orders.

Facts

The employee Rose Morton (RM) brought a claim for disability discrimination against her employer, Eastleigh CAB, relying on her eating disorder, depression anxiety and agoraphobia as disabilities under the Equality Act 2010.

Employment Tribunal

Eastleigh CAB disputed RM was disabled and an employment judge (EJ1) ordered that a joint medical report would be required if the employer did not concede on disability. After receiving some medical evidence from RM, the employer conceded she was disabled in relation to her eating disorder.

RM applied for an order that a joint medical report was still needed in relation to her other disabilities; the employer resisted this. EJ1 directed that a medical report was still required if she intended to rely on her other disabilities.

Her letter confirming that she did so intend came before another employment judge (EJ2) who decided that a report was not necessary and listed a preliminary hearing to determine the issue on the basis of evidence already before the court (namely RM's witness evidence, contemporaneous medical records and a report by an occupational therapist).

RM requested a postponement to obtain her own report, stating that she needed more time to prepare for the hearing due to her mental health issues and because she had only just received Eastleigh CAB's reasons for disputing disability.

RM's request for an adjournment was refused by a regional employment judge (EJ3), on the basis she had adequate time to prepare, and then by the judge on the day of the hearing (EJ4), on the grounds that a medical report would not be of assistance and the bundle contained documents that RM was already familiar with. RM appealed to the EAT and then to the Court of Appeal.

Court of Appeal

The CA rejected her appeal on the following grounds:

1. Preparation time

Although the employer's bundle was late, RM was already familiar with the content given most of the material had flowed from her. She knew what the issue was (namely whether her other conditions amounted to disabilities), the only witness evidence was hers, and she had a good grasp of the facts and medical evidence which she had provided. EJs routinely make determinations in respect of disability on the basis of medical records and a claimant's own evidence, rather than a joint report, and therefore the decision was not perverse.

2. Appealing against case management order

RM had not appealed against EJ2's case management order and her reasoning that EJ2 should not have interfered with EJ1's decision applied equally to her argument in respect of EJ4's ability to interfere with EJ2's order.

In any event, the fact that the employer had conceded on disability in relation to RM's eating disorder amounted to a material change in facts allowing for a departure from EJ1's order. Furthermore, it was not acceptable, having failed in an application before one EJ, to make an identical application to another EJ in order to facilitate what was essentially an appeal against the decision of the first judge. Finally, EJ4 had taken into account the different conclusions of the judges (two of whom had very recently considered the facts) and had reached his own decision that the remaining issues could be fairly resolved without a joint report. There was no error of law in that approach.

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Leigh Day

EAT rules DWP's disability discrimination is justified

DWP v Boyers UKEAT 0282_19_2406; June 24, 2020

Implications for practitioners

When considering whether discrimination on the basis of disability is justified, the tribunal must properly balance the needs of the employer against the discriminatory effect of the decision. A flawed internal procedure and an accepted finding of unfair dismissal does not change the test which must be applied, and this must be the focus of the tribunal.

Facts

Mrs Boyers (B) had been employed on a permanent basis by the Department of Work and Pensions (DWP) as an Administrative Officer since September 15, 2006. She suffered from migraines and following a referral to Occupational Health in September 2013, had been accepted as disabled under the meaning of s6 of the Equality Act 2010 (EA).

B's condition deteriorated; she developed anxiety and depression, and was on long-term sickness absence. She raised several grievances of bullying and harassment which the DWP investigated and dismissed. A trial period at another office was proposed which B accepted, but it was ultimately deemed unsuccessful and B was dismissed on January 9, 2018.

Employment Tribunal

B brought claims of unfair dismissal and disability discrimination in the ET. She also brought claims of disability-related harassment, and a failure to make reasonable adjustments for a disability recognised under s6 EA.

The DWP accepted that B was disabled and that the dismissal was unfavourable treatment arising from her disability. The DWP confirmed that B was dismissed for reasons of capability and submitted that the discrimination was justified on the basis of legitimate aims: i.e. the protection of scant public resources and or/ the strain placed on B's colleagues by her continued absence.

The DWP submitted that it had expended huge resources in managing B during her illness and that her absence had impacted on her colleagues who were required to cover B's duties while still providing adequate customer service in their own work. As such, the decision to dismiss was justified.

The ET accepted that B had been dismissed for a potentially fair reason, namely her capability, and that the reasons for the dismissal were the aims identified by the DWP. It also accepted that the aims were legitimate ones.

However, the ET found that the decision to dismiss was not proportionate, and focused upon the process which led to the dismissal, highlighting the following:

a. DWP's failure to seek up-to-date medical evidence which would confirm the reason for B's absence and her ability to return to work.
b. DWP's failure to apply its own policies in respect of consultation and periods of review.
c. The conclusion that B was deliberately not complying with absence procedures and was being intentionally obstructive was unreasonable.
d. DWP's failure to give any serious thought to the alternatives to dismissal.

The ET considered that other steps could have been taken before dismissing B (such as the positive trial period at another site which was abandoned) and pointed to a lack of care and compassion by the decision-makers in B's case.

B's claims of unfair dismissal and discrimination arising from disability (s15 EA) were upheld. Her additional claims of harassment and a failure to make reasonable adjustments were dismissed.

Employment Appeal Tribunal

The DWP appealed the findings of unfair dismissal and disability discrimination to the EAT.

At the sift stage, Judge Gullick considered that there was no merit in the grounds of appeal against the finding of unfair dismissal; but that there were reasonable prospects of success against the finding of unjustified discrimination

The DWP submitted that the ET had focused on the process of the investigation, rather than the proportionality exercise: balancing the employer's legitimate aims against the discriminatory decision to dismiss. The DWP also highlighted that the ET had accepted the decision to dismiss was based on the legitimate aims identified, yet still found that the discrimination was not justified.

B submitted that the critical evaluation of the DWP's

956 dismissal process was essential in order to determine whether the outcome of dismissal was necessary to achieve the legitimate aims. However, she accepted that the ET had not addressed the impact of her continued employment on public resources or on her colleagues.

The appeal was upheld. The EAT agreed with the DWP and ruled that the ET did not address the issue from the correct perspective. In order to decide whether the discriminatory measure (in this case, dismissal) is proportionate in the context of the legitimate aim being pursued, a tribunal must weigh the real needs of the undertaking against the discriminatory effect of the proposal. An objective balance is required.

The EAT noted that the decision of the ET did not set out the evidence of justification provided by the DWP. The DWP claimed such evidence was produced in the hearing but was not acknowledged in the judgment. B submitted that it was never provided.

As the parties could not agree whether justification evidence had been produced, the EAT remitted the decision to the ET, in light of the judgment, to decide whether the dismissal was proportionate.

Comment

The ET's focus must now be whether the DWP can justify the decision to dismiss B, and substantiate its justifications of an excessive burden on B's colleagues, and the constraints of the public purse.

The EAT did not find that the dismissal was proportionate; rather it ruled that the ET must consider the issues from a different perspective. The issue of whether evidence for the justification of B's dismissal can be produced (and relied upon) will be crucial. The EAT did note in its decision that while the DWP claimed such evidence was submitted to the ET, it could not identify this evidence in the appeal.

If the DWP cannot provide satisfactory evidence to support their defence, B's claim of disability discrimination will again be upheld.

However, the EAT's decision is a reminder that a flawed investigation process (where the dismissal was accepted as unfair and based on the claimant's disability) does not negate the need for a proper balancing exercise of aims and proportionality.

In an era of economic recession and rising redundancies, the proposition that public bodies can use the limitations of the public purse, and the perceived burden on other employees, to justify dismissing disabled employees is a worrying one.

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957 Briefing 957

Recommendations in reasonable adjustment cases

Hill v Lloyds Bank [2020] UKEAT/0173/19/LA, UKEAT/0174/19/LA, UKEAT/0233/19/LA; March 6, 2020

Implications for practitioners

The EAT in this case found that giving an employee an undertaking can be a reasonable adjustment for an employer. The EAT also provided insight into what recommendations ETs can give pursuant to s124 Equality Act 2010, ruling that there is no valid objection to the making of recommendations with financial implications. The EAT also set out some guidance on how recommendations should be formulated.

Facts

The claimant (SH) was disabled suffering from reactive depression which she alleged arose from bullying she experienced at the hands of two line managers whilst working for the respondent (R). After a period of sick leave it was agreed that SH would return to work in a separate office away from the managers. However, SH was anxious at the possibility of having to work with the managers again and the thought of this prospect caused her severe distress and physical sickness.

SH therefore requested an undertaking from R that at no point in the future would she be required to work with the managers. SH requested a further undertaking that, if there was no alternative, she would be offered a severance package equivalent to a redundancy payment to terminate her employment. R stated that it could not provide an absolute guarantee that she would not work with the managers in the future. Further, it would not

offer a redundancy payment as an alternative as SH would not be made redundant.

Employment Tribunal

SH brought a claim for failure to make reasonable adjustments on the basis that:

- R had a practice of not giving undertakings in such circumstances
- that practice put SH at a substantial disadvantage of working in constant fear in comparison to others not suffering a disability
- the giving of the undertakings would have alleviated this disadvantage, and
- it would have been reasonable for R to provide the undertakings requested.

The ET found for SH on each of these points and upheld the reasonable adjustments claim. The ET also made a recommendation for R to give undertakings to:

> *ensure that the Claimant does not work or interact in any capacity with [the managers] and that in the event that this not possible that the Respondent and the Claimant explore suitable alternative employment with the Respondent and if this fails that the Respondent uses its best endeavours to ensure that the Claimant can leave the Respondent with a severance package equivalent to its redundancy payment scheme applicable at the time of her departure.*

However, the recommendation did not accord with the recommendation requested by SH. Upon reconsideration, the ET set aside the recommendation altogether on the basis that it was not appropriate to make recommendations relating to remuneration and it was not possible to place a time limit on the recommendation in this case.

Employment Appeal Tribunal

R appealed the ET decision to uphold the reasonable adjustments claim, and both R and SH appealed on the issue of the recommendation.

Appealing the reasonable adjustments finding, R submitted that not offering an undertaking was a one-off decision arising from R's dealings with SH and not a provision, criterion or practice (PCP). The EAT rejected this argument on the basis that the ET made a finding of fact, based on evidence provided by R and one of its witnesses, that R had a practice of not giving undertakings that people would not have to work together.

R further appealed the ET decision on the aspect of substantial disadvantage. R submitted in its appeal that the root cause of the disadvantage of fear was the two managers as opposed to the PCP. R also submitted that the ET did not provide adequate reasons for the decision on this issue.

The EAT rejected this argument, stating that R's original argument before the ET was that there was no substantial disadvantage and the ET had addressed this argument adequately in its judgment. R had argued that SH had no difficulties working day-to-day away from the managers and that the potential disadvantage of working for the managers had not yet happened. The ET disagreed with this, stating that the substantial disadvantage was the constant fear of the possibility of working for the managers.

R argued that it would be unreasonable to require the bank to give the undertaking to make a substantial redundancy payment at some time in the future because SH may not in fact be made redundant.

Further, R referred to the EAT decision in *Tameside Hospital NHS Foundation Trust v Mylott* [2011] UKEAT/0399/10/1304 in which it was stated that the purpose of a reasonable adjustment should be to keep an employee in work and not to make provisions for the employee to leave.

The EAT rejected this submission, finding that the purpose of the undertaking to make a redundancy payment if there was no alternative in the future was to enable SH to work without fear that the main undertaking to prevent her working for the managers would be breached. The second undertaking incentivised R to commit to the first undertaking and therefore did not conflict with the decision in *Mylott*. The fact the adjustment would amount to a special benefit was not a valid objection, as giving special benefits was inherent to making reasonable adjustments.

The EAT set out the problems with the ET's original recommendation, namely that:

- there was no time limit on the requirement for R to give the undertaking
- there was no requirement that it should be in writing
- the undertaking to ensure that SH did not interact with the managers in any capacity was too wide an undertaking to require
- the undertaking required action by SH to seek alternative employment and it was not appropriate for R to make such an undertaking
- the provision for the use of 'best endeavours' was vague.

The EAT then turned to the two reasons the ET had provided for revoking the recommendation on reconsideration. The first reason was that the recommendation included matters relating to remuneration which was not appropriate. The EAT found no valid objection to making recommendations

957 with financial implications, citing the example of an adjustment to carry on an employee's sick pay at a full rate.

The second reason was that it was not possible to specify a time period for application of, or compliance with, the recommendation. However, this was not a valid reason, as the time limit would have been on the giving of the undertaking. Further, the EAT had no concern with the recommended provisions remaining in place indefinitely as this is likely to be the nature of many straightforward recommendations, for example a change of place of work would continue indefinitely. The EAT also noted that if the undertaking was breached this would constitute a separate matter, for example it may give rise to a constructive dismissal claim or a contractual claim. The only concern for the ET would be whether the undertaking was given in compliance with the recommendation.

Comment

The EAT ruling provides clarity on a number of issues relating to undertakings being given by employers as reasonable adjustments. Its guidance on ET recommendations on employer undertakings and how these recommendations should be formulated is particularly useful. Significantly, the EAT held that there is no valid objection to the making of recommendations relating to remuneration.

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958 Briefing 958

No entitlement to Universal Credit for EU citizens with pre-settled status under the EU Settlement Scheme

Fratila and Tanase v Secretary of State for Work and Pensions; the Advice on Individual Rights in Europe (intervener) [2020] EWHC 998 (Admin); April 27, 2020

Facts

The appellants are two Romanians who reside in the UK. Their appeal raised important questions in relation to the EU Settlement Scheme (EUSS), and EU citizens who have pre-settled status (PSS) under that scheme.

PSS means EU citizens who have lived in the UK for less than 5 years are granted limited leave to remain in the UK. That is, they have a right to reside in the UK for up to 5 years only. The appellants had PSS but were refused Universal Credit (UC) because the Universal Credit Regulations 2013/376 (the Regulations), as amended, bar claimants with PSS from obtaining UC.

Specifically, Regulation 9(1) provides that claimants must be *habitually* resident in the UK. Regulation 9(2) provides that claimants will not be deemed habitually resident unless they have a right to reside in the UK. The offending provision - Regulation 9(3)(c)(i) – then states that those with a right to reside derived from PSS do not have a right to reside for the purposes of Regulation 9(2). This excludes claimants with PSS from the definition of a right to reside and so habitual residence.

The practical implications under the EUSS are stark. It means that those with settled status under the EUSS – non-UK EU nationals who have lived in the UK for 5 or more years – can establish a right to reside and thus habitual residence. That is, had the claimants been Romanian nationals who had lived in the UK for 5 years or more, they would not have fallen foul of this provision.

High Court

The appeal argued that Regulation 9(3)(c)(i) contravened Article 18 of the Treaty on the Functioning of the European Union's (TFEU) prohibition of discrimination on the basis of nationality. The appeal was dismissed. The court held the following:

Right of residence: whilst the appellants did not have a right of residence in the UK, their right of residence in Romania enabled them to rely on Article 18 TFEU for the purposes of proceedings within the UK. This was because PSS as an extension of their non-UK EU nationality created a free-standing right of

residence under domestic law. As a result, the court considered that *Trojani v Centre Public d'Aide Sociale de Bruxelles* [2004] 3 CMLR 38 was still good law [23].

Indirect discrimination: because some non-UK EU nationals may be awarded UC if they have lived in the UK for 5 years or more, whilst the provision is discriminatory, it was deemed indirectly discriminatory (thus, opening the door to justification being raised). It was premised on the basis that for direct discrimination to be evident, there must be an indissociable connection between the requirement (the right to reside) and the protected characteristic (nationality) [28]. However, in this case the requirement could be dissociated from the appellant's nationality, because other Romanian nationals could satisfy the right to reside requirement by establishing settled status under the EUSS [29].

Justification: the habitual residence requirement underpinned Regulation 9(3)(c)(i)'s exclusion and this justified that Regulation's indirectly discriminatory effect. The court noted that the rationale behind habitual residence is rooted in the desire to make non-contributory benefits such as UC available to those who come to the UK to work. It has at its focus those who are economically active and integrated within the UK; claimants who had a sufficiently close connection with the UK [31]. The SSWP also referenced the principle that non-UK EU nationals should contribute before receiving taxpayer support, as well as the fact that the provision maintained that status quo – in that PSS gave rise to the same rights of residence as the appellants would have had under the EEA Regulations. The court considered these reasons lawful justification for the discriminatory treatment.

Comment

The court's approach to a right of residence under EU law is of note. In viewing PSS as a standalone domestic right of residence derived from a right to reside in another EU state, it leaves the door open for a broad approach to the prohibition on discrimination due to nationality under EU law. That is, non-UK EU nationals without a right to reside, and who are not workers or jobseekers (as would have been required under 2004/38/EC should the SSWP's position on this matter have succeeded) can nonetheless benefit from the protection of Article 18 TFEU.

As far as the court's characterisation of indirect discrimination under EU law is concerned, the court relied heavily on Lord Hope's judgment in *Patmalniece v Secretary of State for Work and Pensions* [2011] 1 WLR 783. *Patmalniece* itself sought to apply the CJEU's decision in *Bressol v Gouvernement de la Communaute Francaise* [2010] 3 CMLR 20.

Bressol gave little by way of analysis in terms of explaining why a provision similar to that raised in *Fratila* gives rise to indirect, as opposed to direct, discrimination. Other than *Bressol,* there is little CJEU jurisprudence that addresses whether residence conditions of the sort in issue constitute direct or indirect discrimination under EU law. On that basis, *Fratila* highlights a lacuna in EU law that remains insufficiently remedied.

Practically speaking, as it stands, *Fratila* means that non-UK EU nationals with PSS will continue to be precluded from obtaining UC. However, it is important to note that the claimants in *Fratila* were granted permission to appeal to the CA and the hearing took place on October 27 and 28, 2020. We await the decision with interest.

Elaine Banton & **Joshua Yetman**
7BR Chambers

Effect of legislative definition of terminal illness was unlawful discrimination

Re Cox's application for judicial review [2020] NIQB 53; High Court of Justice Northern Ireland (QBD); July 7, 2020

In order to qualify automatically and immediately for certain welfare benefits on the basis of terminal illness, an applicant had to demonstrate that their death could be '*reasonably expected within 6 months*', (the 6-month rule): Universal Credit Regulations (Northern Ireland) 2016, Reg 2 and the Welfare Reform Northern Ireland Order 2015 Part 5 Article 87 (the Regulations). The 6-month rule is comparable to the requirements of Universal Credit Regulations 2013, Reg 2 and the Welfare Reform Act 2013, s82(4).

The claimant Lorriane Cox (LC) sought to challenge the Regulations on the basis that the 6-month rule was discriminatory within the meaning of the European Convention on Human Rights (ECHR) Article 8 and Article 1 Protocol 1 read in the light of Article 14.

Facts

LC was diagnosed in September 2018 with motor neuron disease, a progressive illness, and medical practitioners estimated that her life expectancy was 2 to 5 years, with her mobility and independence deteriorating in that time and her care needs increasing. Had the medical practitioners certified that her death would occur within 6 months, she would have qualified automatically for enhanced rate payments for daily living and would not have had to undergo testing and delays in her claim to entitlement. So although her illness was diagnosed in September 2018, her claim was not approved until April 2019.

High Court

The facts brought the claim within the ambit of Article 8 and Article 1 of the first Protocol; the assessment process was invasive and the benefits were designed to ameliorate challenges in an applicant's family and private life [92].

LC's status for the purposes of Article 14 was 'other', determined by personal and intrinsic characteristics, on the basis of her survival expected to be beyond 6 months [94-96].

For the purposes of Article 14, the correct comparator was held to be a person who initially qualified under the 6-month rule but lived beyond that point. For such an individual, there was no application retrospectively of any qualifying period and they were deemed to be functionally impaired without assessment. The comparator need not be identical [97-99].

The respondent (the Department for Communities and the Secretary of State for Work and Pensions) (R) sought to argue that if there was a difference in treatment it was justified. The court applied the test appropriate to welfare benefits and the question was whether the difference in treatment was manifestly without reasonable foundation (see *R (on the application of DA) v SSWP* [2019] UKSC 21); Briefing 912. The court had to make its own assessment of justification, and apply that test (see *R(TD) v SSWP* [2020] EWCA Civ 618).

The justification offered by R was essentially that there must be a clear definition of terminal illness in order to safeguard public funds. However, the court recognised the distinction between justification of the legislative scheme and justification of the discriminatory effect – the court had to focus upon the latter rather than policy objectives. The court held there was nothing to justify the difference in treatment between LC and her comparator and no explanation had been given for why she was not entitled from the date of diagnosis [100-104]. There was no stand-alone breach of Article 1, Protocol 1, because the rules had been followed by R [107].

The discrimination was without justification – leave was granted and the claimant succeeded in her application for judicial review [106].

Rea Murray
4 – 5 Gray's Inn Square

'No DSS' policy ruled unlawful

Stephen Tyler v Paul Carr (a sole trader, trading as Paul Carr Estate Agents); County Court at Birmingham; September 8, 2020

Implications for practitioners

'No DSS' policies, under which landlords and letting agents refuse to let to tenants in receipt of benefits, have been widespread in the private rental sector for many years. A recent survey found that 41% of landlords operated an outright ban on letting to tenants on Housing Benefit, whilst a further 22% preferred not to do so.

Since 2018, Shelter has been assisting claimants to challenge these policies on the ground that they are unlawfully indirectly discriminatory under the Equality Act 2010 (EA). Such policies put women and disabled people at a particular disadvantage because they are more likely than men and non-disabled people to be claiming Housing Benefit.

This case was the first to come to a contested trial.

It follows on from another case in the County Court at York, *'J' v An Estate Agent*, where, with the consent of the defendant, the Court declared another such policy to be unlawful.

Facts

Mr Tyler (T) suffers from mental and physical disabilities and uses a wheelchair. In February 2018 he was living in private rented accommodation with his wife and two children. After his landlord refused to make disability-accessible adaptations to the property, he had to leave. He spent the next six months searching for accommodation without success. During this period, his wife and children stayed with her parents, but he slept in his car as there was no room for him in the property.

On September 7, 2018, T telephoned the defendant estate agent to enquire about three properties which it was advertising as being to let. His case was that he was told that benefit recipients were not accepted as tenants in respect of any of the properties and then that it was '*company policy that we do not accept DSS'*.

T subsequently sent a message to the defendant on Facebook asking if tenants on Housing Benefit were accepted. The defendant responded that, although it could consider applications from applicants in receipt of Housing Benefit provided that the affordability threshold was met, unfortunately Housing Benefit was not considered as part of the household's income for referencing purposes.

T then instructed solicitors who wrote to the defendant setting out his account of events. The defendant responded saying that it had 'reviewed' its procedure and that applicants were now advised in accordance with the terms set out in the Facebook message.

County Court

Proceedings were issued in March 2019. T alleged that the defendant had applied to him the provision, criterion or practice (PCP) of refusing to consider letting to applicants in receipt of Housing Benefit and that this amounted to unlawful indirect discrimination on the grounds of disability. The defendant's defence asserted, inter alia, that:

- no telephone call had taken place; or
- if it had, it was not as the claimant described; and
- there was no PCP; or
- if there was, it did not put disabled people at a disadvantage; and
- in any event could be justified.

The trial took place on September 8, 2020 in front of (then) HH Judge Stacey (now a High Court Judge).

Decision

The judge accepted T's evidence of the telephone call on September 7, 2018 and found that there had been a blanket policy, in respect of the three properties about which he had enquired, not to accept Housing Benefit applicants.

The judge noted that the legal issues had '*crumbled to dust'* throughout the day as a result of various concessions by the defendant. She found that the criteria at s19(2) EA were met, namely that:

- there was a PCP;
- it was of neutral application;
- it put disabled people at a particular disadvantage;
- it put the claimant at that disadvantage; and
- the defendant had not shown that it was a proportionate means of achieving a legitimate aim.

The judge made a declaration that:

> *The Defendant unlawfully indirectly discriminated against the Claimant by applying to him the provision, criterion, or practice of refusing to consider applicants in receipt of Housing Benefit for three private rented properties that were being marketed by the Defendant.*

T was awarded £6,000 damages, plus interest. The defendant was also ordered to pay T's costs on an indemnity basis, on the basis that its case was hopeless and could not possibly have succeeded.

Comment

'No DSS' policies exclude some of the most vulnerable in society from private rented accommodation at a time when social housing is in short supply. They put disabled people and women – who for a multiplicity of reasons are more likely to have to rely on benefits – at a significant disadvantage.

This case represents a significant milestone for those seeking an end to this practice. Moreover, although it was the first, and so far only, contested trial, it does not exist in isolation. It follows upon not just a series of successful settlements but, most significantly, a similar judicial declaration made in the case of *'J' v An Estate Agent*[1] in which the County Court at York declared that a 'No DSS' policy put the female, disabled claimant at a particular disadvantage when compared with men and non-disabled people

In addition,the decision forms part of what appears to be a developing consensus that such policies cannot be justified, with organisations from the Residential Landlords' Association to the Property Ombudsman criticising the practice.

As celebrations take place to mark the tenth anniversary of the Equality Act 2010, this case provides a fitting reminder of the important role this statute plays in ending even the most entrenched discriminatory practices.

Tessa Buchanan
Garden Court Chambers

1 County Court at York, Claim No: F00YO154; July 2, 2020

Notes and news

Ethnic disparities and inequality in the UK: call for evidence

The Cabinet Office's Commission on Race and Ethnic Disparities is reviewing ethnic disparities and inequality in the UK, focusing on the following 4 areas:

- education
- employment and enterprise
- health
- crime and policing.

On October 26, 2020 it published a call for evidence on ethnic disparities and inequality in the UK seeking to understand why such disparities exist, and what works and what does not. It is inviting submissions of evidence to provide answers to ten questions.

The DLA will form a members' working group to coordinate its response. The deadline for responses is Monday, November 30, 2020 at 11:45pm.

EHRC investigation into antisemitism in the Labour Party finds unlawful acts of discrimination and harassment

The Labour Party has been served with an unlawful act notice after an investigation into antisemitism by the EHRC found it responsible for unlawful acts of harassment and discrimination.

The investigation has identified serious failings in the Labour Party leadership in addressing antisemitism and an inadequate process for handling antisemitism complaints.

The party is responsible for three breaches of the Equality Act (2010) relating to:
- **political interference in antisemitism complaints**
- **failure to provide adequate training to those handling antisemitism complaints**
- **harassment.**

Recommendations

The EHRC has set out recommendations to the party to incorporate in their legally binding action plan which include, among others:

- Commission an independent process to handle and determine antisemitism complaints, as soon as rule changes allow.
- Acknowledge the effect that political interference has had on the handling of antisemitism complaints.
- Implement clear rules and guidance that prohibit and sanction any inappropriate interference in the complaints process.
- Put in place long-term arrangements for independent oversight of the complaint handling process, to make sure that standards are monitored and enforced, and adequate resources are in place.
- Audit its complaint handling process to address any ongoing issues.
- Measure staff and stakeholder confidence in the complaint handling process.
- Publish a comprehensive policy and procedure, setting out how antisemitism complaints will be handled and how decisions will be made.
- Review and update its 'Code of Conduct: Social Media Policy' to make it clear that members may be investigated and subject to disciplinary action if they share or like any antisemitic social media content.
- Within six months, commission and provide mandatory education and practical training for all individuals involved in the antisemitism complaints process.
- Make sure that all members found to have engaged in antisemitic conduct undertake an educational course on identifying and tackling antisemitism, regardless of the level of sanction applied.
- Engage with Jewish stakeholders to develop and embed clear, accessible and robust principles and practices to tackle antisemitism and to instil confidence for the future

In his response, Sir Keir Starmer QC, leader of the Labour Party, accepted the report without qualification and promised to implement the recommendations in full. The party will provide the EHRC with an action plan to implement the recommendations and will establish an independent complaints procedure. Acknowledging the need for a culture change, he asserted the party's zero tolerance of antisemitism and his commitment to making the party a welcome place for people from all backgrounds and communities.

Have your say in the future of *Briefings*

***Briefings* is undertaking a consultation with the readership to get your thoughts and views on how we can improve the publication – make it more relevant, more readable and more accessible. Please complete this short Briefings readers' survey to tell us what you think. All responses will be fed into our redesign programme in 2021 but will, of course, remain confidential. Please submit responses to the survey by November 30, 2020.**

Abbreviations

AC	Appeal Cases
AG	Advocate General
AFR	Automated facial recognition
All ER	All England Law Reports
BAME	Black, Asian and Minority Ethnic
BSP	Bereavement support payment
CA	Court of Appeal
CCTV	Closed circuit television
CJEU	Court of Justice of the European Union
CMLR	Common Market law reports
DC	Divisional Court
DLA	Discrimination Law Association
DSS	Department of Social Security (now abolished)
EA	Equality Act 2010
EAT	Employment Appeal Tribunal
ECHR	European Convention on Human Rights and Fundamental Freedoms 1950
ECR	European Court Reports
ECtHR	European Court of Human Rights
EHRC	Equality and Human Rights Commission
EHRR	European Human Rights Reports
EJ	Employment Judge
ET	Employment Tribunal
ET1	Employment Tribunal claim form
EUSS	European Union Settlement Scheme
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
GP	General practitioner
HC	High Court
HHJ	His/her honour judge
HRA	Human Rights Act 1998
ICR	Industrial Case Reports
IRLR	Industrial Relations Law Report
J/JSC	Judge/Justice of the Supreme Court
LJ	Lady/Lord Justice
LLP	Legal liability partnership
MWRF	Manifestly without reasonable foundation
NHS	National Health Service
NICA	Northern Ireland Court of Appeal
NICs	National Insurance Contributions
NIQB	Northern Ireland Queen's Bench
ONS	Office for National Statistics
P	President of the EAT
PCP	Provision, criterion or practice
PHE	Public Health England
PSED	Public sector equality duty
PSS	Pre-settled status
PTSD	Post-traumatic stress disorder
PTSR	Property and Third Sector Reports
QBD	Queens Bench Division
QC	Queen's Counsel
SC	Supreme Court
TFEU	Treaty on the Functioning of the European Union
UC	Universal Credit
UKEAT	United Kingdom Employment Appeal Tribunal
UKSC	United Kingdom Supreme Court
UNCRC	United Nations Convention on the Rights of the Child
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities
WLR	Weekly Law Reports

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