ISSN 1759-2925

Discrimination Law Association

Briefings 973-986

Volume 73

July 2021

Briefings 973-986

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The publication of the Commission on Race and Ethnic Disparities' report (the Sewell report) on March 31, 2021 created an angry storm of protest. It was rejected by a large number of organisations which demanded that the PM repudiate and withdraw it. Criticisms of the report ranged from selective use of data from expert reports to overlooking evidence from the government's own database which reports racial inequalities in the labour market, criminal justice, healthcare and education systems.

Although the Sewell report does not deny that racism is a 'real force' in the UK, its finding that the *'evidence shows that geography, family influence, socio-economic background, culture and religion have more significant impact on life chances than the existence of racism'* has hurt and offended many people, particularly ethnic minorities who, as Bell Ribeiro-Addy MP reflected on May 27th during a Women and Equalities Committee session on the report, feel 'like their lived experiences are contradicted entirely by the report and that their opinions are not seen as valid'.

In his article on the report, Oliver Lawrence focuses on the definition of the term 'institutional racism' highlighting how the term has different interpretations, which has led to different understandings of the report. The Commission on Race and Ethnic Disparities itself expressed concern about the *'use of imprecise and often misleading language around race and racism'* and considered that *'misapplying the term racism has diluted its credibility, and thus undermined the seriousness of racism'.* Lawrence argues that the Sewell report's definition of institutional racism, although based on the MacPherson concept, is a narrow one which focuses on discriminatory reasons for unequal outcomes, rather than one which addresses discriminatory outcomes. Such an interpretation is difficult to test evidentially and crucially it ignores the consequences of historic discrimination which continue to have an impact today.

The DLA fully acknowledges the continuing institutional and structural racism that BAME people in the UK experience on a daily basis. It is keenly aware of the impact of institutional racism in government and other bodies and in their policies as evidenced, in particular, in the countless successful indirect discrimination and public sector equality duty cases *Briefings* has reported over the years.

The government will respond to the Sewell report and its recommendations in due course. If the report is not to act as a dividing issue which gives 'racists the green light' as many fear, there is first the fundamental question of definition to be addressed. As Laurence states, the definition of institutional racism is critical as it determines the evidence of its existence and *'unequivocal acceptance that the problem of institutional racism actually exists [is] a prerequisite to addressing it successfully'*.[1]

Geraldine Scullion
Editor, Briefings

1 The Stephen Lawrence Inquiry; report of an inquiry by Sir William MacPherson of Cluny; February 1999 (the MacPherson report) paragraph 6.52

The Sewell report and the meaning of institutional racism

Oliver Lawrence, barrister at No5 Chambers, examines the approach taken by the Sewell report to the concept of institutional racism. Drawing on the MacPherson definition, he explores the meaning of the term and the ambiguities within it in order to clarify the findings of the report and the controversy it created. Using the Equality Act 2010 definitions of direct and indirect discrimination, he explains how the Sewell report uses the term to refer to discriminatory reasons whereas many of its critics use the term to refer to discriminatory outcomes. He concludes that without a clear and unambiguous definition of institutional racism, there will inevitably be widespread disagreement about the extent of the problem in the UK.

The definition of terms is the beginning of wisdom.[1] When Socrates said this, he might have added that an undefined term is the beginning of a disagreement. The subject of institutional racism has made headlines recently after the publication of a report (the Sewell report) by the Commission on Race and Ethnic Disparities (the Commission) The Sewell report has been controversial. In particular, the statement by the chair of the Commission that there was no evidence of institutional racism in the UK has been heavily criticised. In one respect this criticism is unsurprising. The term 'institutional racism' is often used to mean different things. People will inevitably disagree about whether and to what extent institutional racism exists, if they disagree on the meaning of institutional racism in the first place. This article explores the various ambiguities which reside within the meaning of the term in an attempt to clarify the findings of the report and the controversy surrounding them. The different concepts of discrimination contained in the Equality Act 2010 (EA) inform this analysis. This article is decidedly neutral as to the merits or shortcomings of the Sewell report. The question whether the report misunderstands the meaning of institutional racism is left entirely up to the reader.

The findings of the Sewell report

The report is an examination of race and ethnic disparities in education, employment, crime and policing and health in the UK. Its aim is to identify any disparities between ethnic groups, why they exist, and what can be done to address them. It gathers data on how different ethnic groups are faring in these areas and then controls for certain variables in an attempt to establish the underlying causes of any disparities. In its opening remarks, the report is careful to emphasise that racism is still a 'real force' in the UK:

> *We do not believe that the UK is yet a post-racial society which has completed the long journey to equality of opportunity. And we know, too many of us from personal experience, that prejudice and discrimination can still cast a shadow over lives. Outright racism still exists in the UK, whether it surfaces as graffiti on someone's business, violence in the street, or prejudice in the labour market. It can cause a unique and indelible pain for the individual affected and has no place in any civilised society.*

Nevertheless, the thrust of the Sewell report is that geography, family influence, socio-economic background, culture and religion have a more significant impact on life chances than the existence of racism.[2] It expresses this conclusion in the following way:

> *Put simply we no longer see a Britain where the system is deliberately rigged against ethnic minorities. The impediments and disparities do exist, they are varied, and ironically very few of them are directly to do with racism. Too often 'racism' is the catch-all explanation, and can be simply implicitly accepted rather than explicitly examined.*

It is worth noting some of the criticisms levelled at the Sewell report which are outside the purview of this article. First, that the data does not support the overarching conclusions of the report. This argument raises the difficult question of when a generalisation is justified by particular facts. Although not quite a contradiction, there is an obvious tension between the conclusion that racism is a real force in the UK and the conclusion that the UK is not institutionally racist. Second, that the report strays into subjective territory in warning against 'fatalistic' and 'unduly pessimistic'

1 Socrates, as quoted in Plato's Apology

2 The Sewell report, page 8

narratives. The report advocates optimism, partly on the basis of its analysis of the data, but also in order to *'highlight minority self-reliance and resilience'*.[3] That consideration is clearly more ideological than scientific. Third, that the data sets in the report are flawed. As one critic argues: *'Statistics are shaped by the assumptions, theories and interests of authors. They aren't neutral, and they can introduce unintended biases.'*[4]

The focus of this article is the approach of the Sewell report to the concept of institutional racism. In the section titled 'The Language of Race', the Commission expresses its concern with what it perceives to be the use of imprecise language around race and racism in mainstream discourse: *'The linguistic inflation on racism is confusing, with prefixes like institutional, structural and systemic adding to the problem.'*[5] The report argues that the term 'institutional racism' should not be used too casually as an explanatory tool and in particular, should not be used to describe any circumstances in which differences in outcomes between racial and ethnic groups exist in an institution. Instead, the term should be applied only when *'deep-seated racism can be proven on a systemic level'*.[6] This explanation of the term aligns with the central message of the report that disparities themselves do not entail discrimination.

The Sewell report adopts the definition of institutional racism given by Sir William MacPherson in the Stephen Lawrence Inquiry, which is as follows:

> *The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.*[7]

Having adopted the MacPherson definition, the Sewell report then appears to construe the words 'because of' narrowly. Institutional racism, in its view, happens when people are treated unfavourably because of their race. The race of the victim acts as a reason for the unfavourable treatment, often by operating on the minds of members of the organisation, consciously or unconsciously, and affecting their decisions or their policies. The report makes this position clear:

> *If accusations of 'institutional racism' are levelled against institutions, these should – like any other serious accusation – be subject to robust assessment and evidence and show that an institution has treated an ethnic group differently to other groups because of their ethnic identity.*

Not everyone agrees with this interpretation of the term. For example, this is the submission made by the Commission for Racial Equality to the Stephen Lawrence Inquiry:

> *Institutional racism has been defined as those established laws, customs, and practices which systematically reflect and produce racial inequalities in society. If racist consequences accrue to institutional laws, customs or practices, the institution is racist whether or not the individuals maintaining those practices have racial intentions.*[8]

This difference of interpretation raises certain questions with regard to the definition of institutional racism. Does the term only refer to the consequences of institutional action? What causal role does race play? To answer these questions, it is necessary to examine the MacPherson report itself and the context in which the definition was formulated.

The MacPherson report

The landmark MacPherson report, published on February 24, 1999, found that the police investigation into the murder of Stephen Lawrence was *'marred by a combination of professional incompetence, institutional racism and a failure of leadership by senior officers'*.[9] The report made 70 recommendations aimed at *'the elimination of racist prejudice and disadvantage and the demonstration of fairness in all aspects of policing'*.[10] While the Inquiry focused on the Metropolitan Police Service (MPS), the report concluded that institutional racism also existed in other police services and other institutions countrywide. It was a watershed moment for race relations in the UK.

The MacPherson report engaged with the meaning of institutional racism at some length. It emphasised that its aim was not to produce a definition that was *'cast in stone'* but just so that its application of the term could be broadly understood. There are three interwoven concepts of racism which appear throughout the analysis: racism, institutional racism and unwitting racism. First, there is the general concept of racism, which is defined in the following way:

> *Racism in general terms consists of conduct or words or practices which disadvantage or advantage people because*

3 The Sewell report, page 31

4 Kalwant Bhopal – 'The Sewell report displays a basic misunderstanding of how racism works' – https://www.theguardian.com/commentisfree/2021/mar/31/sewell-report-racism-government-racial-disparity-uk

5 The Sewell report, page 34

6 The Sewell report, page 8

7 The Stephen Lawrence Inquiry; report of an inquiry by Sir William MacPherson of Cluny; February 1999 (the MacPherson report) paragraph 6.34

8 The MacPherson report, paragraph 6.30

9 The MacPherson report, paragraph 46.1

10 The MacPherson report, Recommendation 2

of their colour, culture, or ethnic origin.

Racism can be subtle or overt. Institutional racism is described as a subtle form of racism and its conceptual relationship to racism appears to be that of a sub-concept. Racism consists of conduct, words or practices. Institutional racism consists of the collective failure of an organisation to provide an appropriate and professional service, a failure which presumably manifests itself through conduct, words or practices. Unwitting racism is another sub-concept of racism. The key element of the concept is the lack of intent to treat a person disadvantageously because of their race. Here is the full explanation of the term in the MacPherson report:

> *Unwitting racism can arise because of lack of understanding, ignorance or mistaken beliefs. It can arise from well-intentioned but patronising words or actions. It can arise from unfamiliarity with the behaviour or cultural traditions of people or families from minority ethnic communities. It can arise from racist stereotyping of black people as potential criminals or troublemakers. Often this arises out of uncritical self-understanding born out of an inflexible police ethos of the "traditional" way of doing things. Furthermore such attitudes can thrive in a tightly knit community, so that there can be a collective failure to detect and to outlaw this breed of racism. The police canteen can too easily be its breeding ground.*[11]

The MacPherson report based its finding that the MPS was institutionally racist on the many instances of unwitting racism within that organisation. The two concepts appear to have a close relationship. Unwitting racism on the part of many members of an institution is an example of institutional racism, although the concept of institutional racism may extend beyond this. At one point, the report describes institutional racism as *'unwitting racism on the organisational level'*.[12]

The MacPherson report draws a clear distinction between the institutional racism of the MPS and conscious acts of discrimination by 'rotten apples' within the service. Members of an institutionally racist organisation do not necessarily know not what they do. They may possess degrees of unconscious bias towards different racial groups. Not all of them may be guilty of racism.[13] Institutional racism shows itself in the implementation of policies and in the actions of members acting together. The prefix 'institutional' identifies the source of the differential treatment, which lies in some sense within the organisation rather than with the individuals who represent it. The culture of the workplace, for example, is the product of individual actions but it is also something that is more than the sum of its parts. It can induce individuals to act in ways which are advantageous or disadvantageous to certain racial groups. 'Institutional racism' does not single out particular individuals; it singles out the net effect of what they do.[14]

MacPherson heard various submissions with regard to the definition of institutional racism. These submissions differed with respect to whether the determinant of institutional racism is the reason why institutional action disadvantages certain racial groups. Some submissions argued that the reason was important:

> *Institutional racism…permeates the Metropolitan Police Service. This issue above all others is central to the attitudes, values and beliefs, which lead officers to act, albeit unconsciously and for the most part unintentionally, and treat others differently solely* ***because of*** *their ethnicity or culture…*[15] (emphasis added)

> *I define institutional racism as the racism which is inherent in wider society which shapes our attitudes and behaviour. Those attitudes and behaviour are then reinforced or reshaped by the culture of the organisation a person works for.* ***In the police service there is a distinct tendency for officers to stereotype people****.*[16] (emphasis added)

Other submissions focused on outcomes:

> *Organisational structures, policies, processes and practices which result in ethnic minorities being treated unfairly and less equally, often without intention or knowledge.*[17]
>
> *If the result or outcome of established laws, customs or practices is racially discriminatory, then institutional racism can be said to have occurred.*[18]

MacPherson's findings of institutional racism were in part based on the fact that race played a causal role in the disadvantageous treatment specified. The Inquiry found that the MPS had failed to undertake an adequate investigation because of the race of the victim, the race of his family and the race of the witness of the murder.[19] Similarly, the Inquiry found that institutional racism was apparent in the countrywide disparity in 'stop and search' figures, not because of the disparity itself, but because there was a *'clear core conclusion of racist*

11 The MacPherson report, paragraph 6.17

12 The MacPherson report, paragraph 6.15

13 The MacPherson report, paragraph 6.25

14 The MacPherson report, paragraph 6.28

15 The MPS Black Police Association – The MacPherson report, paragraph 6.27

16 Chief Constable John Newing, President of the Association of Chief Police Officers – The MacPherson report, paragraph 6.50

17 The Commission for Racial Equality – The MacPherson report, paragraph 6.30

18 Dr Benjamin Bowling – The MacPherson report, paragraph 6.33

19 The MacPherson report, paragraph 6.45

stereotyping'.[20] Elsewhere however, the report implies that institutional racism is a question of outcomes:

> *It is incumbent upon every institution to examine their policies and the outcome of their policies and practices to guard against disadvantaging any section of our communities.*[21]

Reading the MacPherson report as a whole therefore, it is safe to say that its definition of institutional racism embodies different conceptual elements which reflect the different ways in which the term is used today. The definition itself encapsulates these ambiguities. Institutional racism is stated to be the collective failure of an organisation to provide an appropriate and professional service to people because of their race. On one interpretation, race is the reason why the failure takes place. On a different interpretation, racial impact is the reason why the service is a failure.

Direct and indirect discrimination in the Equality Act 2010

The EA captures this distinction between discriminatory reasons and discriminatory outcomes with the concepts of direct and indirect discrimination. Direct discrimination means treating someone less favourably than others because of a protected characteristic such as age, sex or race.[22] The SC clarified the meaning of 'because of' in *R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors* 2010 IRLR 136, Briefing 555. There are two ways in which direct discrimination can be established. The first is where, whatever the motive and whatever the state of mind of the alleged discriminator, the decision or action was taken on a ground which was 'inherently' discriminatory and the second is where the decision or action was taken on a ground which was 'subjectively' discriminatory. An example of inherently discriminatory treatment was a case in which a local authority allowed pensioners free entry into its swimming pools at a time when the state pension age was 60 for women and 65 for men.[23] The courts held that this policy therefore constituted the application of a criterion which was gender-based and unfavourable to men.

The reason for the less favourable treatment is less obvious in cases of subjectively discriminatory treatment. Here, it is necessary to explore the mental processes, conscious or subconscious, of the alleged discriminator to discover what facts operated on his or her mind. What matters is the reason why the alleged discriminator acted as he or she did. The fact that the race or sex of the claimant was part of the circumstances in which the treatment complained of occurred, or the sequence of events leading up to it, does not necessarily mean that it forms part of the reason for that treatment. The EAT made this point clearly in *Martin v Lancehawk Ltd (t/a European Telecom Solutions)* EAT 0525/03. In that case, M, a female employee was having an affair with L, her male managing director. Problems eventually arose in the relationship and M decided to tell her husband about the affair, despite having told L that she would not do so. L dismissed M as a result. The ET upheld the unfair dismissal claim but dismissed the sex discrimination claim. On appeal, M argued that the reason L had an affair with her was that she was a woman, as he would not have had an affair with a heterosexual man. Therefore, 'but for' her sex there would have been no relationship and consequently no dismissal. The EAT rejected that argument. The reason for the dismissal was not based in any way on the sex of the claimant but on the breakdown of their relationship. The 'but for' test did not capture the important point, which was the reason why L treated M in the way that he did. The sex of the claimant merely formed part of the circumstances in which the dismissal occurred.

The Sewell report interprets the MacPherson definition of institutional racism in a way that is loosely aligned with the concept of subjective discriminatory treatment: race operating on the minds of members of an institution, consciously or unconsciously, inducing them to treat ethnic minorities less favourably than others. This interpretation of institutional racism is difficult to test evidentially. The approach of the Sewell report is to gather data on different racial groups and then control for certain variables in an attempt to identify any disparities that exist between different racial groups 'by coincidence'. For example, the report looks at whether there are any significant disparities between members of different racial groups who are also members of the same socioeconomic bracket, or between members of different racial groups who live in the same area. This approach has been criticised for artificially treating socioeconomic status and race as distinct factors when in fact they are causally interwoven. Historic discrimination created a causal link between race and socioeconomic status which still lasts today. The same could be said of race and geographical location. These factors are themselves products of racism and are not just part of the circumstances in which racism can occur.

20 The MacPherson report, paragraph 6.45

21 The MacPherson report, paragraph 46.27

22 Section 13 EA

23 See *James v Eastleigh Borough Council* [1990] 2 AC 751

This point is also relevant to how institutional racism should be defined. A definition of institutional racism which is aligned with direct discrimination may capture unfavourable treatment by reason of race, but it does not capture the extent to which the consequences of historic discrimination are still yet to be remedied.

A definition of institutional racism which focuses on outcomes, on the other hand, bears certain similarities to the concept of indirect discrimination. Indirect racial discrimination is the application of a provision, criterion or practice (PCP) which puts, or would put, someone at a particular disadvantage when compared to people of a different race, and which is not a proportionate means of achieving a legitimate aim.[24] According to the MacPherson definition, institutional racism can occur as a result of the processes of an organisation. The word 'processes' points away from discriminatory reasons and towards discriminatory outcomes. Processes can be unbiased and their implementation may require little or no human input, but they can also have consequences which affect racial groups differently.

An outcome-based conception of institutional racism appears to underpin the criticism of the Sewell report which was advanced by Shelter, the housing and homelessness charity. Shelter made the following argument in response to the Sewell report:

> *Immigration policy is a key area in which institutionally racist practices persist, and will be contributing to racial exclusions and inequalities within our housing system. Immigration controls principally target a 'global poor' in a way that closely corresponds with people who come from 'former colonies' and therefore people of colour.*[25]

This argument posits that immigration controls are institutionally racist not because of any intent lying behind them but because they create a disparity in outcome. Immigration controls target a non-racial category of people (the global poor) but have a disproportionate effect on a racial category of people (people of colour) because of what Shelter describes as the 'close correspondence' between the two categories. An outcome-based definition of institutional racism is implicit in the argument.

Institutional processes can be indirectly discriminatory on a much smaller scale. Pimlico Academy, a central London secondary school, presented one such example. In March 2021, pupils at Pimlico Academy made headlines by staging a protest against the school's strict new uniform policy, which stated that hairstyles that *'block the views of others'* would not be permitted and hijabs should not be *'too colourful'*. The pupils accused the school's management of racism, claiming that the new policy would penalise Muslims and those with afro hairstyles. In other words, the concern of the pupils was the disparity in outcome between different racial groups.

Institutional processes can lead to both direct discrimination and indirect discrimination. Stop and search is a controversial example. As noted by the MacPherson report, the power to stop and search gives police officers the opportunity to treat people unfavourably by reason of their race through racist stereotyping. There is an on-going debate about whether stop and search leads to this form of discrimination. The Sewell report's analysis of stop and search data presents one worrying statistic in this regard, which is that certain ethnic minority groups are far more likely to be the subject of a stop and search which does not lead to an arrest.[26] Racial profiling is not the only concern, however. Even if the implementation of stop and search was racially unbiased, the process could still create a disparity in outcome between racial groups depending on the racial demographics of the areas where most crime occurs, and where stop and search is used most as a result.

Conclusion

The Home Affairs Select Committee reviewed the legacy of the MacPherson report in 2009. Trevor Phillips, the chair of the Equality and Human Rights Commission at the time, gave evidence to the Committee that as far as the definition of institutional racism was concerned, *'rather than continuing a debate about linguistics, what we need to do is get back to the evidence'*. Unfortunately, the controversy following the Sewell report shows that the linguistic debate is still important. Language matters here because the definition of institutional racism determines what constitutes evidence of institutional racism. There must be agreement as to what institutional racism means before people can agree that it exists and, as the MacPherson report warns, *'there must be unequivocal acceptance that the problem of institutional racism actually exists as a prerequisite to addressing it successfully'*.[27] Currently, the term is often used in a way which is ambiguous as to whether it refers to reasons or outcomes. Unfortunately, how this ambiguity should be cured depends on one's view as to which is the more important problem to address: subjectively racist treatment or disparity in outcome between racial groups. That is a political question which is proving difficult to resolve.

24 Section 19 EA

25 https://blog.shelter.org.uk/2021/04/the-sewell-report-an-example-of-institutional-racism/

26 The Sewell report, page 154

27 The MacPherson report, paragraph 6.52

Where freedoms clash: the Higher Education (Freedom of Speech) Bill

Naomi Cunningham, barrister at Outer Temple chambers, examines the proposed Higher Education (Freedom of Speech) Bill which is currently undergoing its second reading in the House of Commons. She considers whether the Bill, which aims to *'make provision in relation to freedom of speech and academic freedom in higher education institutions and in students' unions'*, if enacted, will have unintended adverse effects on the human rights of staff and students. She concludes that although it is unclear that the Bill is necessary, there is no basis for fears that it will undermine freedom of speech, or make it harder for institutions to protect their staff and students from discrimination.

There is much public debate about whether universities are doing enough to protect academic freedom, or whether they are bowing too readily to pressure to 'no platform' and otherwise limit the careers of academics whose views are unpopular. The Higher Education (Freedom of Speech) Bill appears to be an attempt to stiffen the resolve of higher education providers to resist such pressures. Before considering whether its net effect will be beneficial or harmful to academic freedom and freedom of speech in higher education, it's necessary first to understand the existing legal protections and the extent of the proposed changes.

The current position

S43 of the Education (No.2) Act 1986 (the 1986 Act) requires higher and further education institutions to *'take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers'*, and imposes a number of more specific duties ancillary to that obligation, including maintaining a code of practice for speaker meetings, etc.

By s14 of the Higher Education and Research Act 2017 (the 2017 Act), it is a condition of inclusion on the Office for Students' (OfS) Register of higher education providers that the provider's governing documents guarantee that academic staff of the institution must have freedom within the law:

> *(a) to question and test received wisdom; and*
> *(b) to put forward new ideas and controversial or unpopular opinions*
> *without placing themselves in jeopardy of losing their jobs or privileges they may have at the provider.*

Higher education (HE) providers are bound by s6 of the Human Rights Act 1998 not to act in a way that is incompatible with a right in the European Convention on Human Rights (ECHR), including Article 9 (freedom of thought, conscience and religion, including the freedom to manifest one's religion or belief in worship, teaching, practice and observance), Article 10 (freedom of expression, including the right to receive and impart information without interference by public authorities) and Article 11 (freedom of assembly and association). They are also obliged by the Equality Act 2010 (EA) not to discriminate against their staff or students on grounds of any of the protected characteristics, including religion or belief; and by the s149 EA public sector equality duty, which requires their decision-making to be informed by the need to eliminate discrimination and harassment, and to foster good relations between different groups. They are, of course, also bound by the criminal law, which prohibits things like stirring up racial hatred, incitement to violence, deliberately causing people to fear violence, etc.

What does the Bill do?

S43(1) of the 1986 Act reads:

> *Every individual and body of persons concerned in the government of any establishment to which this section applies shall take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers.*

The new wording to be inserted into the 2017 Act at sA1 reads:

> *(1) The governing body of a registered higher education provider must take the steps that,* ***having particular regard to the importance of freedom of speech****, are*

reasonably practicable for it to take in order to achieve the objective in subsection (2).
(2) That objective is securing freedom of speech within the law for –
(a) staff of the provider,
(b) members of the provider,
(c) students of the provider, and
(d) visiting speakers. [emphasis supplied]

The Bill also specifies that the subsection (2) objective includes securing their academic freedom, which is defined as:

their freedom within the law and within their field of expertise –
(a) to question and test received wisdom, and
(b) to put forward new ideas and controversial or unpopular opinions,
without placing themselves at risk of being adversely affected in the ways described in subsection (7).

The ways described in subsection (7) are:

(a) loss of their jobs or privileges at the provider;
(b) the likelihood of their securing promotion or different jobs at the provider being reduced.

SA2 requires providers to maintain a code of practice setting out their values in relation to freedom of speech, and procedures and criteria for arranging meetings on their premises, and sA3 imposes on providers a duty to promote the importance of freedom of speech and academic freedom.

SsA4 and A5 impose parallel duties on student unions to take steps and to maintain a code of practice.

SA6 provides that a person may bring civil proceedings against an HE provider or a students' union for breach of their respective duties; and sA7 inserts a new schedule 6A into the 2017 Act, creating a free speech complaints scheme to be administered by the OfS, and giving the OfS power (in effect) to award compensation to eligible persons who have suffered harm as a result to the provider's failure to perform its sA1 duty.

To summarise, the main novelties introduced by the Bill are the following:

- the requirement to have 'particular regard' to the importance of freedom of speech when taking the steps (which already have to be taken) to secure freedom of speech;
- the additional objective (for which steps have to be taken) to secure academic freedom alongside faculty members' existing rights to freedom of speech, taken together with the definition of academic freedom as requiring its exercise to be free of detrimental career consequences;
- the duty to promote the importance of freedom of speech and academic freedom;
- the imposition of duties on students' unions to take steps to protect freedom of speech and academic freedom, and to maintain a code of practice;
- the creation of a cause of action in the civil courts for breach of these duties;
- the creation of a free speech complaints scheme with power to award compensation.

Impact of the new requirements

On the face of things, the 'particular regard' requirement is a fairly vacuous qualification: how, after all, could an institution take steps to secure freedom of speech without having particular regard to the importance of freedom of speech? Doesn't the existence of a duty to secure something in itself underline the importance of that something, without imposing an additional duty to have regard to its importance? It may be intended to tip that balance in favour of freedom of speech in marginal cases; but it is impossible construct a situation in which, as a matter of logic or statutory interpretation, it would be bound to have that effect.

The inclusion of academic freedom as one of the objectives that a provider must take reasonably practicable steps to secure may be a more important change to the existing law. Providers already had to include a guarantee of academic freedom in their governing documents, but the Bill will give that guarantee both a longer reach, and sharper teeth. It extends its reach by extending the list of detriments to which academics must not be subject for exercising their academic freedoms to include reduction of the likelihood of their securing promotion or different jobs, as well as the loss of existing jobs or privileges. And it sharpens its teeth first by imposing on providers a positive duty to take steps to secure it (as opposed to merely requiring them to 'guarantee' it in their governing documents); and secondly by the creation of the civil cause of action for breach of the duty, and of a parallel free speech complaints scheme.

The practical implications of the duty at sA3 to *'promote the importance of freedom of speech and academic freedom'* are difficult to predict. When does this duty bite? What must providers do to comply? A new s69A of the 2017 Act suggests that the answers may be found, in due course, in guidance given by the OfS, which is empowered to:

(a) identify good practice relating to the promotion of freedom of speech and academic freedom, and
(b) give advice about such practice to registered higher

education providers.

The imposition of express duties on students' unions to secure freedom of speech and to maintain a code of practice is entirely new. These duties, too, are backed by the possibilities of both civil claims for breach, and complaints to the new free speech complaints scheme. This, like the strengthening of the parallel duties on providers, is an undoubtedly significant development in terms of the likelihood of enforcement.

Will the Bill have adverse consequences?

The Bill has attracted criticism. Jo Grady, general secretary of the University and College Union, told the BBC that it was *'a serious threat to freedom of speech and academic freedom on campus,'* and a joint letter from three campaign groups, Index on Censorship (IoC), English PEN and Article 19, said:

> *Blunt statutory tools may fail to recognise the various rights at play in any given situation, for example the rights of the speaker and the rights of students to protest against that speaker. This is a delicate balancing act that universities are best placed to navigate – not state regulators or courts of law … We are very concerned that additional legislation, including the imposition of a "Freedom of Speech Champion", may have the inverse effect of further limiting what is deemed "acceptable" speech on campus and introducing a chilling effect both on the content of what is taught and the scope of academic research exploration.*

In a column in *The Times* on May 18, 2021, Lord Finkelstein said:

> *One of the biggest threats to free speech, one of the most common reasons for people to watch what they say and keep their views to themselves, is the rise in the ability to complain about each other to the authorities. The more authorities, the more complaints, the less free speech.*

Some may also suggest that the Bill will make it more difficult for HE institutions to protect their students and staff from discrimination or harassment.

Will the Bill damage freedom of speech?

The suggestion that the Bill will have the effect of undermining freedom of speech on campuses is difficult to understand. It is true that where a speaker is invited whose views are sufficiently unpopular that her presence attracts student protests, the students' rights to freedom of expression are engaged as well as the speaker's. That means that in securing the speaker's ability to speak, the provider must not suppress the students' right to protest.

But the duty at sA1 to take steps to secure freedom of speech expressly encompasses that of staff and students as well as visiting speakers. There is nothing in the Bill to suggest that speakers' or academics' freedom of speech trumps or excludes that of students; the duty to have particular regard to the importance of freedom of speech – which is the only real novelty in sA1 – probably won't have any discernible effect. Protests must not be suppressed; at the same time, they must not be allowed to take a form that makes it impossible for an academic to teach or for a visiting speaker to speak. There is no reason to expect achieving that to be especially difficult either in principle or in practice. Freedom of speech doesn't encompass the freedom to make others' speech impossible; so it was, and remains, lawful to prevent, for example, noisy protests inside a lecture theatre making it impossible for a speaker to be heard. That is simply an instance of the commonplace – and common sense – observation that freedom of speech doesn't mean freedom to speak anywhere, at any time. The right of protesters to protest doesn't mean they are entitled to invade the dental surgery and chant slogans at the dentist while she's trying to drill a tooth, or interrupt a religious service by blowing whistles and banging drums, or hold a protest march on the football pitch during a game.

The letter from the IoC and others fails to clarify by what mechanism it is thought the Bill might have a chilling effect on the content of what is taught or the scope of research. Lord Finkelstein's objection at least offers a mechanism: regulation will in itself limit freedom of speech, he says, because the more authorities there are to complain to, the more individuals will feel the need to self-censor.

That can't be right. It is true that the Bill creates two new avenues of complaint for those aggrieved by infringements of their freedom of speech. But if Finkelstein's fears were well-founded, it would seem to follow that the best way of protecting freedom of speech would be to disband all the courts, tribunals, ombudsmen, regulatory bodies etc, and leave speech to be regulated by peer pressure, consensus, or violence; anarchy, in other words. One is put in mind of suggestions – from the other end of the political spectrum – that 'carceral feminism' is to blame for violence against women.[1]

It may not be self-evident that the Bill will achieve results that could not be achieved by a proper application and enforcement of the existing law; but there does not seem to be any good reason to think that it will actively suppress freedom of speech.

1 See e.g. Phipps, Alison: *Me Not You: the Trouble with Mainstream Feminism*, Manchester University Press 2020.

Will the Bill expose students or staff to discrimination or harassment?

Slightly more sophisticated questions arise in relation to the suggestion that in securing the freedom of academics or visiting speakers to speak in a manner that some students or other academics find profoundly offensive, providers may infringe the latters' rights not to suffer discrimination or harassment on grounds of a protected characteristic.

An example of this arose in 2019 when Professor Jo Phoenix was invited by the Centre for Criminology at Essex University to give a talk on the subject *'Trans rights, imprisonment and the criminal justice system'* - one of the incidents considered by Akua Reindorf in her May 2021 report[2] to the University on the circumstances surrounding the talk. On December 18, 2019, the University's LGBTQ Forum and allies had published an open letter (appended to Ms Reindorf's report), asserting that the University's obligation to safeguard the safety, health and welfare of its students and comply with the EA meant that the invitation had rightly been withdrawn:

> *Discrimination against those who fall under the protected characteristic "Gender Reassignment" … can be direct, indirect, harassment and victimisation. The debate around the "legitimacy" of Trans/nonbinary people is direct discriminative speech. Hailing academic freedom of speech as a justification for introducing such a party into the University environment is directly creating an offensive and unsafe environment for those who are Trans/nonbinary.*
>
> *The University states a zero-tolerance approach to hate crime: this is inclusive of hate speech. We believe that the talk, as well as the speaker presenting this seminar, was conducive to hate speech and bigotry: not academic freedom. As a zero-tolerance approach, this "debate" is not welcome here at our campus. The safety and wellbeing of a marginalised community, our Trans/nonbinary community, is paramount above that of the need to express bigoted views.*

As Ms Reindorf pointed out in her report [para 189], 'hate speech' *per se* is not a legal concept and is not prohibited by UK law. Speech can be criminal, of course: for example *'threatening or abusive'* words in specified circumstances under s5 of the Public Order Act 1986, or *'indecent or grossly offensive'* messages under s1 of the Malicious Communications Act 1971. The Bill has no impact on offences of that kind: in the unlikely event that a proposed academic event crosses or threatens to cross the high threshold for criminality, the criminal law will remain available to deal with it. The attempt by Essex University's LGBTQ Forum to paint Professor Phoenix's proposed talk as 'hate speech' was ill-judged.

Discrimination and harassment on grounds of gender reassignment are prohibited in various contexts, of course. So the question raised by objections of this kind is whether allowing a visiting speaker (or a member of academic staff) to express controversial views amounts to discrimination against or harassment of those with opposing views.

It's easiest to consider this by way of concrete examples, so let's imagine a proposed talk by a visiting speaker on whether there are measurable racial differences in intelligence. That's a subject that can be expected to rouse passions; indeed, to be widely condemned as inherently racist. But permitting the talk is not in any meaningful sense 'treatment' of any individual or group of individuals at all, and certainly not less favourable treatment because of a protected characteristic. Even if the speaker concludes that a particular racial group is markedly less intelligent than others, that is still not in any plausible sense 'treatment' (by the authority that permits the talk) of members of that racial group. Direct discrimination seems to be ruled out.

Is permitting this talk indirect discrimination? At a stretch, perhaps, it could be said to be a provision, criterion or practice which puts members of the group or groups characterised as less intelligent at a particular disadvantage compared to others. Even that is doubtful: it's not clear that having a generalisation made – somewhere in the institution in which you are studying – about a group of which you are a member is something that in itself puts you at a real disadvantage. But even if it does, that disadvantage will be justified without difficulty as a proportionate means of achieving the undoubtedly legitimate aims of fostering academic freedom and freedom of speech. It is a proportionate means because it is the only means by which freedom of speech may be protected. There is no middle way: either the talk is permitted, with any particular disadvantage to protected groups that that entails; or the legitimate aims of academic freedom and freedom of speech are simply sacrificed. Moreover, while there is no way of protecting freedom of speech while cancelling the talk, the converse does not hold: any disadvantage to a protected group is better dealt with by refuting bad arguments than by silencing them.

That leaves harassment. Is permitting the talk harassment – is it unwanted conduct related to a protected characteristic that has the purpose or effect of violating anyone's dignity or creating an intimidating,

2 Available at: https://www.cloisters.com/reindorf-review-on-no-platforming/

hostile, degrading, humiliating or offensive environment for them?

The Equality and Human Rights Commission (in *Freedom of expression: a guide for higher education providers and students' unions in England and Wales*) has this to say:

> *The courts generally say that the right to free expression should not be restricted just because other people may find it offensive or insulting. The police, Crown Prosecution Service and courts have to protect Article 10 rights when deciding whether an act or speech breaks the law. This decision usually depends on a number of factors, including the context of the speech and its purpose, as well as the actual spoken or written words.*
>
> *Speech that is intended to inform rather than offend attracts greater protection, even if it could be seen as discriminatory. An intolerant point of view, which offends some people, is likely to be protected if it is expressed in a political speech or a public debate where different points of views are being exchanged and are open to challenge. However, speech may lose the protection of Article 10 if it is used to abuse the rights of others, for example by inciting hatred.*

This must be right. It would be a different matter if the institution required students or staff to attend such a talk: that requirement might well amount to indirect discrimination. But *'someone has been allowed to say something on campus that I profoundly disagree with and find offensive'* is no more a well-founded complaint of harassment under the EA than *'someone is wrong on the Internet'*.[3]

Conclusion

There have been too many high-profile incidents of 'no-platforming' of unpopular speakers over the last couple of years, of which the Essex University incidents dealt with in the Reindorf Report are only two.[4] While it is not clear that the Bill is necessary to deal with the problem, given the existing obligations of HE providers to defend academic freedom and freedom of speech, I do not believe that there is any good reason to think that it will either inflict fresh damage on anyone's freedom of speech, or make it harder for institutions to protect their staff and students from real (as opposed to imagined) discrimination. The Bill will do no harm; at best, it may do some modest good in providing institutions with some assistance in finding their collective backbones when faced with demands to cancel events and rescind invitations, and in providing academics whose careers have been harmed by such demands with new avenues of redress.

3 https://xkcd.com/386/

4 Professor Michael Biggs has compiled and maintains a list of academics who have been targeted for questioning the prevailing orthodoxy on gender identity https://sex-matters.org/academics-targeted/ and Dr Kathleen Stock has compiled testimonies from 26 anonymous academics in British universities, describing limitations on their ability to explore such questions: https://medium.com/@kathleenstock/are-academics-freely-able-to-criticise-the-idea-of-gender-identity-in-uk-universities-67b97c6e04be.

The complexity of public law challenges during the pandemic – seeking priority access to the Covid-19 vaccine for people with learning disabilities

Elizabeth Cleaver, solicitor in Bindmans LLP's public law team, describes her experience of attempting, on behalf of two learning disabled clients, to challenge the Secretary of State for Health and Social Care's decision on priority access to the Covid-19 vaccine. As she demonstrates, such challenges can be extremely complex as the regulations, guidance and expert opinion change quickly, and the courts are often reluctant to intervene in decisions based on expert clinical opinion. However, challenging government decisions which have a disproportionately negative impact on disabled people is an extremely important area of public law which is necessary to ensure their rights are protected.

Background

People with learning disabilities have faced significant health inequalities for decades, since well before the Covid-19 pandemic. The life expectancy of women with learning disabilities in the UK is a shocking 18 years lower than the general population, with a gap of 14 years for men.[1] Those with learning disabilities are much more likely to suffer from a number of health conditions, including epilepsy, dementia and mental health conditions. People with learning disabilities are also more likely to be either underweight or overweight,[2] and they are more prone to respiratory infections.

The poor health outcomes seen within this group are thought to be caused by poor access to health care, as well as a poor understanding of learning disability amongst health professionals.[3]

It will therefore come as no surprise that those with learning disabilities are also at significantly greater risk of complications, and death, from Covid-19 infection. The first wave of the pandemic had a devastating impact within this group. On November 12, 2020 Public Health England (PHE) published a very sobering report in relation to Covid-19 deaths of people with learning disabilities during the first wave of the pandemic.[4] During the first wave, people with learning disabilities were between three and six times more likely to die from Covid-19 than the general population. For those under 30, individuals with learning disabilities were, shockingly, 30 times more likely to die than their peers.

1 NHS digital 2017

2 NHS digital 2019

3 https://www.mencap.org.uk/learning-disability-explained/research-and-statistics/health/health-inequalities

4 https://www.gov.uk/government/publications/covid-19-deaths-of-people-with-learning-disabilities

Disabled people were also more likely to be significantly impacted by the restrictions imposed to manage the spread of Covid-19. Those living in care homes and supported accommodation saw significant restrictions on contact with their families, and access to their usual community activities and support was curtailed. Those residing in care settings were also at greater risk of contracting the virus due to the congregate nature of such settings.

When positive news began to spread about the efficacy of the Covid-19 vaccine, those with learning disabilities and their families hoped for some level of priority access, alongside other clinically vulnerable individuals. This could have been a small step towards addressing the significant health inequalities faced by this group.

The first vaccine prioritisation list published by the Secretary of State for Health and Social Care on December 2, 2020 was, however, almost entirely based on age, with no reference to those with learning disabilities at all. It was also remarkable that no priority access was granted to those residing in care settings other than care homes for older adults. Those with learning disabilities were particularly poorly served by this guidance, in light of their reduced life expectancy. The sad reality is that many people with learning disabilities simply do not live long enough to be admitted to care homes for older adults.

The priority list was amended on December 30, 2020 to include some priority access to vaccination for individuals with certain health conditions in priority groups four and six. Individuals within priority group four included *'clinically extremely vulnerable'* individuals, those who had been advised to shield during the pandemic, such as people with Down Syndrome for

example. Priority group six included individuals '*with underlying health conditions which put them at higher risk of serious disease and mortality*', which included those with severe and profound learning disabilities.

Critics immediately noted that the mortality figures from the PHE report had not differentiated between *'mild to moderate'* or *'severe and profound'* learning disabilities. All individuals with learning disabilities were found to be at greater risk of dying from the virus. In addition, the prioritisation list created significant practical gatekeeping difficulties for those responsible for the roll-out of the vaccination programme. Levels of learning disability are very rarely neatly defined in GP records as either *'mild to moderate'* or *'severe and profound'*. Indeed some GP records would not even record whether an individual had Down Syndrome.

The judicial review proceedings

In January 2021 Bindmans LLP was instructed by two individuals with learning disabilities in a proposed judicial review of the Secretary of State's failure to grant priority access to all individuals with learning disabilities. The clients became known as 'X' and 'Z'.

X was a 19-year-old young person with a severe learning disability, epilepsy and autism, who resided within a specialist supported living placement, with 24-hour care.

Z, X's mother, was a 47-year-old woman with a mild learning disability and osteoarthritis, who resided at home with her mother (X's grandmother and litigation friend in the proceedings). X and Z were significantly impacted, on a personal level, by the coronavirus restrictions, since they had been unable to see each other face-to-face since March 2020, causing great distress. X's care provider had stopped all visits to her supported living placement. X was said to be unable to socially distance due to her autism spectrum disorder, making even outdoor contact with others impossible. X's community activities had all been stopped, and she remained indoors for most of the year, leading to a deterioration in her mental health and an increase in her challenging behaviours. X was clearly extremely vulnerable to complications from Covid-19, both as a result of her health conditions, but also her living arrangements, as well as her inability to socially distance. Her family were very anxious when an outbreak of Covid-19 was reported at her placement, although X avoided infection.

The family desperately hoped that priority access to the vaccination would be granted to both X and Z, and that this could enable them to safely resume face-to-face contact with each other. It was also hoped that X would be able to resume outdoor activities and access the community.

Under the prioritisation list updated on December 30, 2020, X was eligible for vaccination within priority group six, as a result of her severe learning disability and epilepsy. She would therefore be able to access the vaccination alongside 75-year olds, and individuals with certain health conditions. Back in December 2020, in the very early stages of the vaccination programme, despite having some priority access it seemed unlikely that X would be vaccinated for many months. This was despite the fact that, according to the PHE statistics, her risk of dying from the virus was estimated at around 30 times higher than her non-disabled peers.

For Z, the picture was even more bleak since she did not fall within any of the priority groups. Her learning disability was mild and she had no underlying health conditions which would grant her any form of priority. It seemed unlikely that she would be able to access vaccination until the summer of 2021.

After some delay in obtaining legal aid, judicial review proceedings were issued at the end of January 2021 by X and Z, against the Secretary of State for Health and Social Care. The claimants challenged the Secretary of State's decision to adopt the guidance of the Joint Committee on Vaccination and Immunisation (JCVI), which afforded no priority access to the vaccination for individuals residing in care settings other than care homes for older adults, and no universal priority access to vaccination for individuals with learning disabilities.

It is important to note that the JCVI, an independent statutory body, and the Secretary of State, are two separate legal entities, with the former advising the latter in relation to the vaccine rollout. The JCVI was named as an interested party to the claim.

Grounds of review

In pre-action correspondence the Secretary of State admitted that he had mistakenly believed that he was bound by the recommendations of the JCVI in relation to the proposed priority list. In other words, in the claimants' view, the JCVI recommendations had effectively been 'rubber-stamped' by the Secretary of State, with little or no scrutiny. X and Z submitted that this was unlawful, and that this fettering of the Secretary of State's discretion should in and of itself lead to a review of the vaccine prioritisation list.

Secondly, it was submitted that the decision not to grant priority access to all individuals with learning disabilities, and all working adults resident in care settings other than care homes for older adults, was in breach of the public sector equality duty under s149 of

the Equality Act 2010 (EA). The Secretary of State had failed to consider any of the relevant factors under s149 EA, not least because he did not believe that he had a choice in relation to whether or not he should accept the JCVI recommendations.

Thirdly, it was argued that the failure to prioritise all individuals with learning disabilities, as well as adults of working age residing in care settings, was in breach of Article 14 (non-discrimination), Article 2 (right to life) and Article 8 (right to private and family life) of the European Convention on Human Rights (ECHR). By adopting the JCVI recommendations, it was submitted that the Secretary of State had discriminated against people with learning disabilities, and failed to protect their right to life and their right to a private and family life under the ECHR.

Fourthly, for similar reasons, it was submitted that the Secretary of State had discriminated against people with learning disabilities under the EA.

Finally, it was argued that the decision to adopt the JCVI recommendations was irrational. In the face of clear evidence that those with learning disabilities were at greater risk of dying from Covid-19, the decision to adopt the JCVI recommendations was outside the range of reasonable responses to the position of people with learning disabilities and working age adults in care settings which were open to the Secretary of State.

Supporting expert evidence

In support of their application for judicial review the claimants submitted evidence from Professor Chris Hatton, an expert on the health inequalities faced by people with learning disabilities. In a blog on the topic of access to vaccination, Professor Hatton made the following arguments in support of prioritising people with learning disabilities:

1. Most adults with learning disabilities do not live in the care homes (especially care homes for older people) targeted in the Covid-19 vaccination priority groups, and would not therefore be prioritised at all.

2. Health information systems do not reliably record the type of information that would be needed to decide whether a person with learning disabilities should be included in the Clinically Extremely Vulnerable or Underlying Health Conditions vaccination priority groups (groups four and six).

3. The existing health system discrimination experienced by people with learning disabilities gets worse when health systems are under intense pressure. The prioritisation list adopted by the Secretary of State would incentivise complicated eligibility policing for people with learning disabilities, which rarely ends well.

4. There was already an existing infrastructure to support the rollout of Covid-19 vaccinations for all adults with learning disabilities, in particular learning disability nurses, who were in an ideal position to mobilise a national Covid-19 vaccination effort for people with learning disabilities.

5. Compared to the scale of the national vaccination rollout, the population of adults with learning disabilities was relatively small. Professor Hatton estimated there to be around 240,000 people with learning disabilities known to GPs in England.

The claimants argued that the application was extremely urgent, in light of the progress already made with the vaccination rollout, as well as the alarming figures which were continuing to emerge about the death rate within the learning disabled population, during the second wave of the pandemic.

In response to the claim, the Secretary of State argued that the JCVI is a panel of experts, and that it would have been irrational to ignore its recommendations. The Secretary of State had already asked the JCVI to consider the PHE report on the deaths of people with learning disabilities. The claimants were seeking to judicially review the clinical judgment of a group of experts, which was unarguable. Should the court set aside the prioritisation list, this would halt the vaccination programme pending a fresh decision, which would lead to an increase in deaths. It was also argued that to include all people with learning disabilities in priority group four, as suggested, would disrupt the rollout of the whole of the vaccination programme, putting lives at risk. A quashing order would result in the Secretary of State having to make a fresh decision in relation to the vaccine priority groups, and there was insufficient evidence to suggest that a different decision would be made second time around, in light of the expert opinion provided by the JCVI.

The claimants responded that any decision to set aside the current priority list could be dealt with by way of a delayed quashing order, enabling the rollout to continue pending a fresh prioritisation decision. To include all people with learning disabilities in priority group four would not lead to significant disruption, and indeed would be less onerous than undertaking the complex gatekeeping assessment that was currently

required, in order to determine which people with learning disabilities should be prioritised based on the severity of their disability.

High Court's decision

The Administrative Court refused permission to apply for judicial review *'on the papers'* (i.e. without a hearing). The judge held that even if the Secretary of State had been aware that he was not required to adopt the JCVI recommendations, this would have been highly unlikely to have affected his decision to adopt the prioritisation list as the JCVI recommendations were based on expert clinical opinion. The court also found that the EA, human rights and irrationality grounds were not arguable, including because the Secretary of State had now filed a copy of the impact assessment conducted ahead of the decision to adopt the JCVI prioritisation list.

The claimants applied to renew their application for permission at an oral hearing, on the basis that the judge was wrong to have held that their claim was unarguable. By this stage, this issue had attracted significant public attention, most notably after the BBC radio presenter Jo Whiley reported that she had been offered a Covid-19 vaccination ahead of her sister, who had a learning disability and resided in a care home. Frances Whiley had sadly contracted the virus and required hospital treatment, before a vaccination had become available to her.

In addition to the increasing public attention, the practical difficulties in applying the prioritisation list had become evident, with some Clinical Commissioning Groups choosing to prioritise all individuals on the learning disability register of their own volition, instead of trying to distinguish between levels of learning disability. It was soon apparent that Professor Hatton's predictions were correct, and that GPs did not hold records in relation to the severity of patients' learning disabilities, or even in some cases, any record of which patients had Down Syndrome (which would place them in priority group four).

On February 24, 2021 the JCVI recommended that all individuals on the learning disability register should be prioritised for vaccination. This recommendation was subsequently adopted by the Secretary of State. Following this announcement, both X and Z received their vaccinations, and their renewed application for permission to seek judicial review was withdrawn.

Conclusion

The challenges faced by X and Z in obtaining permission to apply for judicial review of the Secretary of State's decision illustrate the difficulties faced by many claimants seeking to challenge decisions made by the government in response to the pandemic. Disabled people have arguably suffered the most as a result of Covid-19, both in terms of their health outcomes and the impact of the measures brought in to manage the pandemic. Challenging government decisions in response to this unprecedented event remains extremely complex, when the regulations, guidance and expert opinion change almost as quickly as the infection rate itself. Furthermore, in this case as well as many others, the Administrative Court has shown great reluctance to interfere with decisions made by the government in response to the pandemic. As long as these decisions continue to disproportionately impact disabled people, such challenges will continue to be necessary.

The government is proposing to hold a public inquiry in 2022 into its handling of the Covid-19 crisis. The DLA would like to highlight in the forthcoming editions of *Briefings* discrimination issues caused or exacerbated by government or other bodies' responses to the pandemic. We invite readers to contribute articles on Covid-19 related discrimination issues they are working on, for example in relation to protected groups' unequal access to services, the disproportionate impact of Covid-19, the discriminatory outcome of policy decisions, or other topics. This expertise and knowledge will not only inform other practitioners but could act as a source of evidence for those contributing to the inquiry.

If you would like to write an article on this topic for publication in *Briefings*, please contact the Editor Geraldine Scullion to discuss your proposal by emailing geraldinescullion@hotmail.co.uk

Equal pay – comparability

Asda Stores Ltd v Brierley & Ors [2021] UKSC 10; March 26, 2021

Facts

More than 40,000 Asda Stores Ltd workers are bringing claims for equal pay against their employer, comparing themselves to male warehouse colleagues who work in Asda's distribution centres. At the time of the hearing before the ET in June 2016, Asda had around 630 retail stores and employed approximately 133,000 hourly-paid retail employees.

Before an ET gets to the question of whether there is equal work, there has to be a valid comparator: someone who either works at the same establishment as the claimant, or who is employed on common terms. This is referred to as 'comparability'.

Asda argued that because the terms of the claimants and comparators were different, and that they worked in different locations, the claimants failed at the first hurdle. Asda set retail and distribution terms by different processes; in particular, the remuneration of the distribution employees is arrived at by collective bargaining.

Common terms involves two potential situations – common terms applying generally (an example would be a collective agreement that covered both claimant and comparator), or the '*North* hypothetical', used in situations where there is no set of terms applicable to both claimant and comparator, and the question is about what terms the comparator would be on if he was to work at the store (and whether they would be broadly similar to the terms he is employed on at the distribution centre).

There are both domestic and European law tests for comparability. As the SC only considered the domestic test (unlike all the previous judges looking at the issue), this case note will confine itself to looking at the domestic test (common terms). The European test was separately considered as part of a reference to the CJEU in another supermarket equal pay case involving Tesco, which will be subject of a forthcoming article in the November edition of *Briefings*.

Employment Tribunal

Employment Judge Tom Ryan decided comparability in favour of the claimants. He did so by making findings on both common terms generally, and by applying the *North* hypothetical. The former was considered though a line-by-line comparison of the specific terms and conditions of employment of the distribution employees on the one hand and the retail employees on the other hand.

The *North* hypothetical was dealt with by resolving a conflict on the evidence, as Asda's witnesses said that a distribution worker at a store site would be paid the same as a claimant if they were doing store work, and the same as a comparator if they were doing distribution work.

Employment Appeal Tribunal

Kerr J rejected Asda's appeal. He held that the *North* hypothetical was still good law following the Equality Act 2010 (EA), that there was no error of law, and nor were the ET's findings perverse.

Court of Appeal

The CA (Lord Sales JSC, Underhill VP and Peter Jackson LJ) rejected Asda's further appeal. The CA decided that the ET had reached the right conclusion, but that it only needed to address the *North* hypothetical. It was wrong to try to compare the claimant and comparator terms directly.

Supreme Court

The SC agreed with the outcome of all of the previous decisions, and Lady Arden gave the leading judgment.

Lady Arden said the aim of the common terms test was simple: to make sure cross-establishment comparators were possible, and to exclude comparisons where the comparator's terms of employment '*cannot be transposed in fact or in theory*' to the claimant's establishment.

The three leading cases on comparability before *Brierley* were *Leverton v Clwyd County Council* [1989] AC 706; *British Coal Corpn v Smith* [1996] ICR 515 and *Dumfries and Galloway Council v North* [2013] UKSC 45. Tellingly, in all three of them the claimants succeeded on comparability.

Leverton is important because it makes clear that comparability is not about comparing the claimant and comparator terms. It is instead looking at the two establishments, and seeing if terms would alter if the

individual was moved between the two establishments.

In *Leverton*, the claimant and comparator were governed by the same collective agreement, whereas in *Smith*, there were different collective agreements for the claimants and comparators. Again, the test was not whether the claimant and comparator were on common terms, but whether the comparator working at the claimant's establishment was on broadly similar terms to the comparator who worked at an establishment with no claimants.

North went a step further – no comparators worked at the same establishment as the claimants. When considering what comparison should be made, one issue was whether it had to be a 'realistic possibility' that the comparators would work at the claimant's establishment. The House of Lords concluded that there was no test of realism, or even feasibility – the aim was to weed out cases where the terms were different because of geography or history, rather than working in different establishments. The case has now lent its name to the '*North* hypothetical', asking what terms the comparators would be on if they were to work at the claimant's establishment.

Lady Arden, rejecting Asda's arguments, was clear that common terms is a 'threshold test' – it is just to ensure 'sufficient commonality' so that the case can go to the next stage. The only cases that should be excluded are those where the difference in terms is clearly because of the physical separation of the comparator's establishment.

Lady Arden also agreed with the CA that the ET reached the correct conclusion on the *North* hypothetical, but did not need to compare the claimant and comparator terms against one another. She gave practical guidance to ETs considering the matter, saying that they should not *'countenance a prolonged enquiry into this threshold test'* and that *'appeals are to be discouraged'*.

Analysis

One remarkable feature of this case was that the SC was willing to deal with the case entirely on a domestic basis, despite the European underpinnings to this whole area of law. This perhaps reflects a desire to build a strong set of equal pay laws independent of European law, while clearly retaining its influence. There is also a potentially more prosaic explanation, which is that during the hearing it was revealed that the CJEU reference in the Tesco case was proceeding without a hearing, perhaps saving the SC from having to determine the issue itself.

Another feature is that *Asda* is different to the previous leading cases on comparability, as it is the first case where both claimant and comparator terms have not been governed by a collective agreement. This shows how equal pay cases are advancing out of the wholly unionised workforces, such as local authorities, and into the private sector.

The general direction of the case law was recognised by Lady Arden, who reviewed the legislative history before remarking that the EA was '*inconsistent with any notion that Parliament thought it was time to take its foot off the pedal'*.

The reason why this is important is that the mischief being addressed in the public sector was, in part, gender segregation – jobs being dominated by men and women. This is no less an issue in the private sector, but for gender segregation to be effectively tackled, there needs to be an easy route to allow cross-establishment comparison. Otherwise an employer can all too easily evade the legislation by organising its workforce in a way that means predominately male and female groups of employees are at different sites. The *North* hypothetical is a way of levelling the playing field, and shows that it should not be harder for a claimant to succeed just because their comparator is in a different establishment.

Despite the ET judgment in 2016, this is remarkably only the first hurdle in these cases, with equal value and the material factor defence still to be determined. If the law needs to keep its foot on the pedal, then so do the claimants, if they are to ensure that there is a proper examination of whether there is equal work in these cases.

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Date for determining disability

All Answers Ltd v (1) Mr W (2) Ms R [2021] EWCA Civ 606; April 30, 2021

Implications for practitioners

In this judgment, the CA has reinforced what practitioners already knew – that when determining disability as a preliminary issue, the tribunal's focus should be on whether the criteria under s6 Equality Act 2010 (EA) are satisfied at the date of the alleged discrimination and not the date of the preliminary hearing.

Facts

The claimants, W and R, were employed by the respondent. Their employer decided to move their seating positions so that they were sat apart from each other. That decision took place and took effect on August 21-22, 2018. W and R brought wide-ranging claims stemming from that decision, including the full gamut of disability discrimination claims available under the EA. Both W and R claimed to be disabled as a result of depression and anxiety (with R also claiming to suffer from post-traumatic stress disorder (PTSD)). A preliminary hearing was listed to determine disability.

Employment Tribunal

The tribunal found both claimants disabled. The judgment is expressed in the present tense and relies in part on medical notes post-dating the events alleged to be the acts of discrimination and on descriptions of symptoms and effects also post-dating those events. It focuses on the position as at the date of the preliminary hearing rather than when the alleged discrimination took place.

Employment Appeal Tribunal

All Answers Ltd appealed on the basis that the ET had focused on the date of the hearing rather than the date of the impugned acts when determining whether the 'long-term effect' factor of the statutory definition of disability was satisfied. *McDougall v Richmond Adult Community College* [2008] EWCA Civ 4, [2008] ICR 431 was relied upon in support.

The EAT's decision was surprising. Lord Summers held it acceptable to rely on evidence post-dating the allegedly discriminatory acts to see what light it shed on both the existence of the impairment at the material time and also the likelihood of its effects lasting for more than 12 months. He did not qualify what sort of evidence might be acceptable in that context, and hence did not limit it to, for example, later medical reports which indicate what the position was at the material time. Lord Summers upheld the ET's decision to find both claimants disabled at the date of the acts complained about.

He found the ET was entitled to conclude W was disabled, having been satisfied that symptoms started four months prior to the alleged discriminatory acts and continued to the date of the hearing and hence must have existed at the material time. In respect of R, Lord Summers found the claimant suffered from depression, anxiety and PTSD at the time of the hearing. Whilst he acknowledged the absence of supporting reasoning on the question of whether R was disabled at the point of the acts complained about, he did not remit the matter back to the tribunal, considering the judge was in a difficult position and that in the absence of medical evidence the decision was bound to be *'oracular'* (i.e. difficult to understand). In his view, remittal would serve no purpose given it would require the judge to try to explain something which may not be susceptible of explanation. He dismissed the appeal.

Perhaps the most extraordinary part of the judgment appeared to come as an afterthought. Having referred to *McDougall* earlier on in the judgment, Lord Summers noted at its end *'for completeness'* that he accepted the tribunal had asked whether the impairment was long-term at the date of the hearing rather than by reference to what was known at the date of the alleged discriminatory acts. He described that as an immaterial *'inaccuracy'*.

Court of Appeal

Unsurprisingly the CA allowed the respondent's appeal. The principal grounds of appeal were that the tribunal had erred in failing to consider whether the claimants' impairments had long-term effects on August 21-22, 2018, and had also erred in taking into account matters occurring after that time.

Lewis LJ (with whom Newey and Lewison LJJ agreed) explained that the question of whether an

impairment's effects are likely to last at least 12 months is to be assessed by reference to facts and circumstances existing at the date of the alleged discriminatory act, with the tribunal predicting whether at that date the effect of the impairment was likely to last for at least 12 months. Whilst *McDougall* concerned the question of likelihood of recurrence rather than likelihood of lasting twelve months, the same principle applied to both scenarios.

The ET had failed to ask that question. It had considered disability in the present tense, indicating it was answering the statutory question on the basis of an analysis of the facts as they existed at the date of the preliminary hearing rather than the date of the acts complained about. Notably, the tribunal had failed to relate its conclusions at all to the time of the allegedly discriminatory acts. The EAT had been wrong to overlook the tribunal's error. Lewis LJ also gave short shrift to the suggestion that it would have been pointless to remit. He emphasised it is a tribunal's duty, as a judicial body, to identify the relevant issues, to make findings of fact and reach conclusions on them and to give adequate reasons for those conclusions.

Comment

The CA's decision will come as no surprise. The EAT's labelling of the tribunal's failure to focus on the right point in time as being a mere immaterial inaccuracy was surprising, and the court has now put that right, highlighting once more the need to focus on the date of the allegedly discriminatory acts rather than the date of the preliminary hearing. In doing so, the CA usefully notes that *McDougall* applies both to questions of likelihood of recurrence under schedule 1 para 2(3) of the EA as well as to the more general question of whether an impairment's effect is long-term under para 2(1).

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Briefing 979

CA rules that failure to pay London allowance during maternity leave is not direct sex discrimination

Commissioner of the City of London Police v Geldart [2021] EWCA Civ 611; April 28, 2021

Implications for practitioners

The CA disagreed with the ET and the EAT that a failure to pay an additional London allowance (LA) during maternity leave was direct sex discrimination. While the claimant was owed the shortfall upon proper consideration of the Police Regulations 2003 (the Regulations), the failure to pay her was due to her 'absence', rather than her 'maternity absence' so the reasoning for any non-payment was not relevant.

Facts

The claimant (CG) is a serving police constable in the City of London Police. She was on maternity leave between December 2016 and October 2017 and received Police Occupational Maternity Pay (OMP) equivalent to 18 weeks' pay, and a further 16 weeks' statutory maternity pay. Under the Regulations, CG was also in receipt of LA (not to be confused with London weighting) which was paid for the duration of her OMP, but not for the following 23 weeks.

CG brought a claim for direct sex discrimination in the ET under s13 Equality Act 2010 (EA). She subsequently sought permission to amend her claim to rely in the alternative on indirect discrimination and withdrew an additional claim for pregnancy and maternity discrimination.

The Commissioner argued that the LA was part of CG's pay and under the Regulations was only payable for the time that she was entitled to OMP, a period of 18 weeks.

Employment Tribunal

The ET upheld CG's complaint of direct sex discrimination.

The ET accepted CG's argument that there was a clear distinction in the Regulations between 'pay' and *'allowances and expenses'*. As the LA was paid to reflect the market conditions of recruiting and retaining officers in London, rather than a part of remuneration, CG was entitled to it throughout her leave.

The Commissioner initially argued that CG should have brought her claim as one of equal pay, under

Chapter 3 Part 5 of the EA. However, this point was conceded on the basis that there was a contractual entitlement to the allowance, so the claim could proceed under s39 EA.

On the issues of whether a comparator was required, and if CG's treatment was 'because of' sex, the ET rejected the Commissioner's argument that the introduction of s18 EA meant the extended definition of direct sex discrimination adopted in *Webb v EMO Air Cargo (UK) Ltd* C-32/93, [1994] QB 718 no longer applied, and that a comparator was required.

The ET concluded that CG's treatment was on the basis of her maternity leave and so, following *Webb* and other cases, it was inescapably 'because of' her sex. An award of £4,000 for injury to feelings in addition to the shortfall of £1,941.60 was made.

As CG succeeded in her direct discrimination claim, all other points, including the claim for indirect discrimination, fell away.

Employment Appeal Tribunal

The Commissioner appealed to the EAT on four grounds. The first two grounds were against the 'contractual claim' findings; the third was whether the claim should have been brought as an equal pay claim; and the fourth was on the comparator point.

The appeal, and a precautionary cross-appeal for indirect discrimination by CG, were dismissed on November 29, 2019.

Lavender J agreed with the ET that the complaint of direct sex discrimination was well founded; CG was entitled to the allowance on a contractual basis and ordered that all other claims (including the cross-appeal) be dismissed.

Permission to appeal was granted on March 3, 2020, with CG also permitted to raise her cross-appeal of indirect discrimination.

Court of Appeal

The CA dismissed the Commissioner's appeal against the 'contractual' findings. However, the appeal against the ET's finding of direct discrimination on the grounds of sex was allowed. Underhill LJ delivered the unanimous judgment.

CG argued that the reason for the non-payment was 'maternity absence' and following *Webb* 'because of' her sex and as such was direct discrimination.

The Commissioner argued that the reason for the non-payment was because of CG's absence, regardless of the reason. It was understood that the LA formed part of pay, so was only due to those officers willing and ready to work, aside from where the Regulations specified otherwise, such as during OMP.

The CA agreed with the Commissioner. The classification of the allowance was incorrect however: *'The absence in question happened to be because of maternity, and to that extent the Claimant's sex was part of the cause of the non-payment, but 'but for' causation of that kind is not determinative.'*

Underhill LJ distinguished from *Webb* (and others) as cases concerned with dismissal, rather than pay. These did not determine how much a woman should be paid during a period of maternity absence and it was not an issue of sex discrimination to pay a woman less during that leave to which she is entitled.

As the reason for the non-payment was simply absence, the findings of the ET in respect of a comparator were incorrect.

Underhill LJ then turned to CG's cross-appeal, and the following issues:

- was the claim for indirect discrimination out of time?
- was it debarred by s71 EA (exclusion of sex discrimination provisions in relation to contractual pay)?
- was it well-founded in substance?

Upon consideration of the EA Explanatory Notes the CA concluded that s71 did not apply, and the claim could proceed. As the two other points had not been considered by the ET (or EAT) Underhill LJ made no finding and remitted the case to the ET.

Comment

While the facts of this case were specific, the judgment could have an impact on a wider range of serving London-based police officers entitled to LA, such as those on long-term sick leave.

Underhill LJ's comments on the issue of causation are of note, as is his distinction between cases of dismissal due to maternity, and those related to entitlement to maternity pay. He also passed comment on the value of the claim, and the choice of venue. It was open to the claimant to pursue the shortfall in the county court as a debt claim (albeit with no provision for an injury to feelings award) and Underhill LJ urged the parties to consider a compromise before returning to the ET.

CG was refused permission to appeal to the SC, but it remains to be seen whether this is the final word on the matter.

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No victimisation when magistrate removed from office following his allegation of discriminatory treatment

Page v The Lord Chancellor and the Lord Chief Justice [2021] EWCA Civ 254; February 26, 2021

Facts

Richard Page (RP), a Christian, was appointed as a (lay) magistrate in Kent in 1999. In 2014 he was a member of a family panel hearing an unopposed same-sex adoption application which was supported by a comprehensive social work report. RP expressed objections based on his Christian beliefs to the other panel members about same-sex adoption and refused to sign the Adoption Order made.

Dr Taylor, the deputy chair of the Advisory Committee for Kent, referred RP to a conduct panel. The panel found him guilty of judicial misconduct because he had adjudicated on the basis of his beliefs rather than on the evidence before the court. He was sanctioned with a reprimand and required to receive remedial training before returning to sit as a magistrate.

RP reacted by giving press interviews to the *Daily Telegraph* and the *Daily Mail* indicating his views were unchanged. He appeared on BBC television where he was introduced as a magistrate who had been disciplined because he had expressed a view about a gay couple adopting a young child, and in an interview stated: *'My responsibility as a magistrate, as I saw it, was to do what I considered best for the child and my feeling was therefore that it would be better if it was a man and a woman who were the adopted parents.'* These media interviews were contrary to advice previously circulated to magistrates advising that they should avoid public comments which might cast doubt on their impartiality, and should speak to the judicial press office before speaking to the press.

He was referred to a second disciplinary panel which found he had brought the magistracy into disrepute and he was removed from office.

Employment Tribunal and Employment Appeal Tribunal

RP brought ET proceedings claiming unlawful discrimination on the grounds of religion or belief, victimisation and a breach of his freedom of expression rights under Article 10 of the European Convention on Human Rights (ECHR). The ET dismissed his discrimination and victimisation claims finding he had not been removed because he had complained about being discriminatorily disciplined; the sole reason for the dismissal was his refusal to discharge his functions as a magistrate according to the law and the evidence. The ET found the interference with his Article 10 rights was justified.

RP lodged an appeal and was granted leave to appeal the finding on victimisation; the EAT dismissed the appeal.

Court of Appeal

RP further appealed to the CA. The CA identified the main issue was whether the respondents subjected him to a detriment because he had done a protected act i.e. made an allegation of discrimination against them.

A person is victimised if the doing of the protected act is a significant part of the alleged discriminator's reason for doing the act complained of. The CA considered three main issues:

1. whether there was a protected act
2. whether RP's removal from office was because he had made an allegation that he had been subject to discrimination, and
3. the relevance of Article 10.

The CA accepted there was a protected act – this was based on a broad approach to the BBC broadcast which had reported RP saying he had been disciplined because of his religious views as a Christian.

The CA found that the ET had dismissed the victimisation claim because he had made it clear that, in the context of adoption, he was not prepared to discharge his functions as a magistrate according to the law and the evidence. The CA specifically identified Dr Taylor's concern about RP deliberately generating publicity to put pressure on the respondents which had brought the judiciary into disrepute.

Underhill LJ stated that the essential point in the reasoning in *Martin v Devonshires Solicitors* [2011] ICR 352 was dismissal (or any other detrimental act) in response to a complaint of discrimination does not constitute victimisation if the reason for it was not

the complaint as such, but some feature of it which can properly be treated as separable. He distinguished separable from severable, holding 'severance' or 'severability' is not an apt paraphrase because it brings in unhelpful echoes of completely different areas of the law. Where the principle in *Martin* is applicable, the complaint is the context in which the reason for dismissal (or other detriment) arises, but it is not the reason itself. The judge rejected the idea that the principle was only to be applied exceptionally, contending *'employment tribunals can be trusted to recognise the circumstances in which the distinction [described in Martin] …. can be properly applied'.*

Applying the principle here, the real reason for the removal was not the doing of a protected act but a separable feature i.e. whilst he had complained about discrimination, the real reason for his removal was his explanation as to how he would perform his duties in a same-sex adoption. It was open to RP to show that this was not the real reason and the respondents were motivated consciously or subconsciously by the fact that he had complained of being discriminated against, but he had failed to show this.

The CA carefully scrutinised the reason for the second referral to the conduct committee. Three reasons had been given by Dr Taylor in his witness statement:

a) RP had failed to follow the advice which he had been given regarding contact with the media
b) this had led to negative publicity, involving criticism of the respondents, which could bring the judiciary into disrepute, and
c) RP appeared to be in breach of his judicial oath.

Although reasons (a) and (c) were clearly lawful, in relation to (b) the CA found as follows:

> *The position about (b) is less straightforward, because the 'criticism of the Respondents' to which it refers can only be his criticism of their previous conduct in (as he says, discriminatorily) reprimanding him. In most circumstances there could be no real distinction between objecting to a complaint of discrimination and objecting to the negative publicity that that complaint would generate. However, I do not think that that is a fair characterisation of the Tribunal's findings in this case. Although the threefold analysis of Dr Taylor's reasons derives from his own witness statement, categorisations of that kind can be over-neat, and it is necessary to read para 65 of the Reasons as a whole and together with what the Tribunal says at para 145. I understand its essential finding (as regards this aspect) to be that Dr Taylor was genuinely not motivated by the Appellant having made a complaint, or by his having done so publicly, but by what he perceived as potentially a deliberate attempt to put illegitimate pressure on the Respondents of a kind inappropriate to a judicial office-holder. In my view it was open to the Tribunal to regard that a separate reason for his action, and there is no basis for our interfering with that assessment.* [para 65]

Plainly in relation to (b) the court has drawn a very fine distinction.

Article 10

The ET found RP's removal justified under Article 10 whereas the EAT found Article 10 was not engaged. ECHR law protects the right of judges to make public statements in certain circumstances. The CA cited the judgment of the Grand Chamber in *Baka v Hungary* [2016] EHRR 389 which emphasised the expectation that judicial officers exercise discretion and show restraint *'in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called in question'.*

At the same time, the ECtHR acknowledged that questions about the functioning of the justice system were matters of public interest and as such enjoy a high degree of protection under Article 10. It is to society's detriment to restrict judges from participating in public debate on issues related to the administration of justice and the judiciary and *'any interference with the freedom of expression of a judge … calls for close scrutiny on the part of the Court'.* [paras 166, 167]

The ET held that whilst judges have an Article 10 protected right to make public pronouncements, this only extends to the making of moderate and proper statements and does not extend to the making of statements which compromise the office holder's judicial impartiality.

The EAT considered the decision of the ECtHR in *Harabin v Slovakia* [2012] App No 58688/11 where the President of the Supreme Court of Slovakia was removed following his expression of controversial views on constitutional issues. In that case, the court found his removal was prompted by the appraisal of his suitability for his role and held that Article 10 was not engaged. Applying this, somewhat controversially, the EAT found it was RP's views that he would not be impartial which led to his removal and consequently Article 10 was not engaged.

Article 10 justification

Addressing justification, the CA noted that the feature which the respondents regarded as bringing the judiciary into disrepute and justifying RP's removal, was his public statement that he would be biased in the execution of his judicial duties. Distinguishing

the ECtHR authorities on the facts, the CA held the ET was right to find that his media statements had compromised judicial impartiality and accordingly that proportionate sanctions were justified in accordance with the principles summarised by the Grand Chamber in *Baka*: RP was speaking directly about *'the exercise of [his] adjudicatory function'* and he was *'required to exercise maximum discretion'* in order to preserve the appearance of impartiality.

Underhill LJ found RP's removal proportionate:

> *He had already been reprimanded for putting his own preconceptions before his duty to decide cases in accordance with the law and the evidence, and had undergone re-training. He had also disregarded the advice that he had received about the procedure to follow before speaking to the media.'*

As Underhill LJ upheld the ET's findings on justification, he did not find it necessary to decide whether the EAT was right to conclude that Article 10 was not engaged in the first place.

In summary RP was removed as a magistrate because he declared publicly that in dealing with cases involving adoption by same-sex couples he would proceed, not on the basis of the law or the evidence but on the basis of his own preconceived beliefs about such adoptions. He was not, which was the only issue on this appeal, removed because he had complained about the earlier disciplinary proceedings against him. The basis on which he was dismissed was entirely lawful and involved no breach of his human rights.

The strength of opinion of the court is reflected in the judgment of Jackson LJ who added a couple of paragraphs which concluded:

> *Our system of justice owes a great debt to those who, like the Appellant, give so much time and commitment when they sit as magistrates. The fact that the magistracy contains individuals with differing backgrounds and beliefs is one of its strengths. But once a private individual takes on a judicial role, he is subject to the same obligations as any other judge. … [The Appellant] was not dismissed for complaining about his treatment but because he had shown himself incapable of honouring his undertaking, … to act as a magistrate in a way that was free from bias. His inability to see any harm in relying on 'evidence' acquired outside the court hearing was rightly described by the Disciplinary Panel as 'a remarkable lack of judgment' … His belief that he was entitled to insert his personal views on same-sex adoption into the performance of his judicial functions led to conduct at the adoption hearing on 2 July 2014 that has no place in the Family Court ... A child's future is to be decided on the evidence before the court and in accordance with the law. In passing the Adoption and Children Act 2002, Parliament has decided that a child may be adopted by a couple or by a single person, regardless of sexual orientation and without hierarchy. It is not open to individual judges to superimpose their own beliefs, however sincerely held.*

Conclusion

Judges must act impartially or recuse themselves from cases. It is not compatible with the judicial role for a magistrate to insist his Christian beliefs should be a relevant factor in decision-making, making him unsuitable to discharge the judicial function.

Notwithstanding, under prevailing legal principles the case was not without merit.

1. The 'why' question considers the reason for the alleged discriminatory decision.
2. Discrimination occurs where the doing of the protected act forms a significant part of the employer or principal's reason for doing the act complained of.
3. The law draws a distinction between detrimental acts done because of a complaint of discrimination and those done because of some feature of the complaint which can properly be treated as separable. The making of the complaint may be the context in which the reason for dismissal (or other detriment) arises, but not the reason itself.
4. In this case, in respect of one aspect of Dr Taylor's evidence the CA drew a very fine distinction between *'objecting to a complaint of discrimination'* and *'objecting to the negative publicity that that complaint would generate'*.

Whilst as a matter of public policy, appellants such as RP should not succeed in discrimination claims, the statutory scheme provides a basis for a claim and the court has plainly struggled to articulate why this was not victimisation. Arguably the legislation and the principles based on *Martin v Devonshires Solicitors* require refinement to ensure the law only protects those deserving of legal protection.

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Claimants with pre-settled status under the EU Settlement Scheme can claim Universal Credit

Fratila & Anor v Secretary of State for Work and Pensions & Anor [2020] EWCA Civ 1741; December 18, 2020

Facts

The appellants applied for Universal Credit (UC) as Romanian nationals who had lived in the UK for less than 5 years at the time of applying. The respondent, who is responsible for administering and awarding UC, was the Secretary of State for Work and Pensions (the SSWP).

Both appellants had acquired pre-settled status (PSS) under the EU Settlement Scheme as of the date of claim. PSS is a form of immigration status which provides *'limited leave to remain'* to EU nationals who have lived in the UK for less than five years at the time of, and subsequent to, the UK's secession from the EU on December 31, 2020. An award of PSS lasts for five years, after which EU nationals with PSS are entitled to apply for settled status and thus obtain *'indefinite leave to remain'*.

Under the Social Security (Income Related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019, regulation 9 of the Universal Credit Regulations 2013 (the 2013 Regulations) was amended, which gave rise to regulation 9(3)(c)(i) – the provision subject to this appeal.

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. However, 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); the net result being that claimants with PSS are barred from claiming UC.

High Court

The decision under appeal was *Fratila and Tanase v SSWP* [2020] EWHC 998 (Admin). Swift J had dismissed the appellants' application for judicial review of the legality of regulation 9(3)(c)(i) on the basis of the following:

a) the appellants could rely on Article 18 of the Treaty on the Functioning of the European Union (TFEU) and its prohibition of discrimination because PSS created a free-standing right of residence in domestic law: *Trojani v Centre Public d'Aide Sociale de Bruxelles* [2004] 3 CMLR 38 was still good law; however
b) because some non-UK EU nationals can be awarded UC if they have lived in the UK for 5 years or more, whilst the provision is discriminatory, it was indirectly discriminatory; and
c) this discrimination could be justified.

Court of Appeal

The appellants' case was relatively simple. Article 18 TFEU applied, and under that provision, it was settled that once an EU citizen is granted a right of residence in another member state in accordance with that state's domestic law, that citizen is entitled to the same benefits as nationals of that state. Thus, failing to provide for that entitlement is discriminatory [para 17].

The SSWP maintained the position she relied upon in the High Court: no free-standing right of residence could be recognised by Article 18 TFEU because all such rights arise under Directive 2004/38/EC, the Citizens' Rights Directive (CRD). This would mean the only non-discrimination provision in this context would be found within the CRD, specifically within Article 24(1). If correct, that would allow the SSWP to avail herself of the derogation from that prohibition on discrimination as provided for by Article 24(2) of the CRD. In the alternative, the SSWP argued that any discrimination under regulation 9(3)(c)(i) of the 2013 Regulations was indirect, and thus it could be objectively justified.

Article 18 TFEU

McCombe LJ found that, in light of the more recent CJEU decision of *Jobcenter Krefeld v JD* C-181/19, and the CJEU's failure to impugn *Trojani*, the latter case was still good law. Interestingly, in *Krefeld* it had been argued by the German Government and Jobcentre before the CJEU that Article 24(2) *'regulates exhaustively the issue of equal treatment with regard to social assistance benefits'*, whilst also arguing that there was a need to discourage *'benefit tourism'* through the use of Article 24(2)'s derogation (as the SSWP had argued before the

High Court and CA) [para 42].

The CA rejected those arguments without altering the position set out by the CJEU in *Trojani* [para 73]. That matters because *Trojani* addressed entitlement which was derived from national rights of residence within the host state, as opposed to those derived from EU law. For that reason, McCombe LJ rejected the SSWP's argument that a person cannot rely upon Article 18 TFEU in relation to social assistance unless he/she has a right of residence under the CRD [para 52]. This was because the CJEU in *Krefeld* had made clear that the CRD was not exhaustive in relation to rights of residence that gave rise to entitlement to benefits.

Direct discrimination

McCombe LJ differed to Swift J on direct discrimination. Given the appeal fell within the confines of *Trojani*, the discrimination must necessarily be direct and thus unlawful. Justification was therefore not in issue. That differed from the direct/indirect distinction addressed by the SC in *Patmalniece v Secretary of State for Work and Pensions* [2011] 1 WLR 783; Briefing 600, which Swift J had relied upon [para 58]. The key difference being that in *Patmalniece*, the court asked whether the right to reside requirement itself was unlawfully discriminatory on nationality grounds (habitual residence being needed so as to obtain pension credit), whereas the *Fratila* appellants were challenging a provision which excluded persons who had already acquired a right to reside by way of PSS [para 61].

Furthermore, the CA noted that the SC in *Patmalniece* reached its conclusion in reliance on the CJEU decision's in *Bressol v Gouvernement de la Communauté Française* [2010] 3 CMLR 559. In *Bressol* there was no domestic right of residence in issue and only rights conferred by EU law were at play. For that reason, the court found that *Bressol* was not a *Trojani* case at all [para 64].

Dissenting judgment

Whilst Moylan LJ agreed with McCombe LJ on this issue, Dingemans LJ dissented from that majority. He agreed that Article 18 applied but was of the view that the discrimination was indirect and could be justified [para 106]. In noting that the direct/indirect distinction was well known in UK domestic law and that EU law has developed slightly differently in that arena, Dingemans LJ relied upon the fact that the CJEU in *Bressol* found the discrimination to be indirect because it was *'intrinsically'* liable to affect non-nationals more than nationals of a host state [para 102]. For that reason, the test to be applied under Article 18 was the test for indirect discrimination applied in *Bressol*. Not only that:

a) given claimants needed to be habitually resident under the 2013 Regulations, the measure would also affect UK nationals returning from abroad who were not yet habitually resident. In that regard, a person with PSS does not have a right to reside and so cannot establish habitual residence [para 103];
b) those with settled status are treated as being habitually resident under the 2013 Regulations, meaning the measure does not directly target the protected characteristic of nationality because it does not affect all EU citizens [para 104]; and
c) no workable comparator could be identified which would assist in determining whether there had been direct discrimination [para 105].

Implications for practitioners

1. Firstly, claimants with PSS are no longer precluded from obtaining UC. The CA quashed regulation 9(3)(c)(i) and initially refused the SSWP's application for permission to appeal to the SC. However by order dated February 22, 2021 the SC allowed the SSWP permission to appeal and the CA granted a stay of its decision pending the appeal. However, that appeal is no longer being pursued and so the CA's decision stands. That means that those claimants with PSS who had their decisions on entitlement or subsequent appeals stayed following the CA decision should have those stays lifted.

   The most obvious outcome of this decision is that those with PSS who have had their claims for UC rejected on that basis should have those decisions revised by the SSWP. Going forward, claimants with PSS should be encouraged to apply for UC (assuming the other relevant criteria are met).

2. Secondly, the decision entrenches Swift J's broad approach to the prohibition on discrimination due to nationality under EU law: Article 18 TFEU's prohibition can be engaged as a result of a right to reside which is grounded in domestic law. That right need not be derived from EU law under the CRD.

3. Thirdly, the practical outcome of the court's analysis is that once a right of residence has been established, discrimination due to nationality *'was prohibited outright'* [para 72]. In stark terms, McCombe LJ went on to say that this *'ends the debate'* about direct and indirect discrimination in such a context [para 73]. Further, the discrimination need not impact on all EU citizens in order to be direct; it is sufficient that the appellants and others like them are discriminated

against [para 74]. This shifts the question away from the intricacies of the SC's analysis in *Patmalniece* and the CJEU's in *Bressol*. By drawing a factual distinction between those cases (addressing a right of residence requirement) and this appeal (right of residence established), the court disapplied CJEU jurisprudence pertaining to indirect discrimination under Article 18. As Dingemans LJ's dissent makes clear, narrowing the issue to that of direct discrimination only is not without its problems.

4. In light of the CJEU's decision in *Krefeld* and that decision's failure to impugn *Trojani*, and the fact that there will be no appeal to the SC, the CA's decision will remain good law in relation to its interpretation of Article 18 as it applied before the UK seceded from the EU and during the transition period. It remains to be seen whether or not a post-transition-period appeal that addresses the same CJEU jurisprudence will lead to the same outcome.

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EAT reviews the employer's reasonable steps defence

Allay (UK) Ltd v Gehlen UKEAT/0031/20/AT(V); February 4, 2021

Implications for practitioners

If an employer wants to argue that it took reasonable steps to protect an employee from discrimination, then it must clear a high hurdle. The EAT's decision in *Allay (UK) Ltd v Gehlen* explains what is required to make out the employer's defence under s109(4) Equality Act 2010 (EA). It is a reminder to employers that any staff training must be thorough, regularly refreshed and, above all, effective.

Facts

Mr Gehlen (G) brought a claim for racial harassment. He was of Indian origin and had been employed by Allay UK Ltd (AUL) as a senior data analyst. One of his colleagues subjected him to racist 'banter' on a regular, monthly basis. When G reported this to managers, they simply told him to go to human resources. Beyond that, no real action was taken.

AUL tried to resist the claim on the basis of s109(4) EA, known as the 'employer's defence'. It argued that it had taken reasonable steps to prevent the harassment. Specifically, it pointed to the fact that it had put in place policies on equal opportunities and anti-harassment. It also highlighted that it had arranged training for its staff. In fact, the individual harasser himself had attended two training sessions, around 20 months prior to the material events.

Employment Tribunal

The ET rejected the employer's defence. Whatever training there might have been, it had clearly become stale by the time of the material events. It had little effect on the person making the racist remarks. Similarly, the managers had failed to follow their training: although aware of the racist banter, they had taken no real steps to address it. The tribunal held that AUK's failure to arrange refresher training meant that it could not make out the statutory defence. The claim for racial harassment was upheld and AUK was ordered to pay damages. It appealed.

Employment Appeal Tribunal

The EAT took a closer look at the statutory defence. Insofar as relevant, s109 EA provides as follows:

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.
(2) […]
(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.
(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—
(a) from doing that thing, or
(b) from doing anything of that description.

The EAT reviewed case law under the previous legislation, including *Canniffe v East Riding of Yorkshire Council* [2000] IRLR 555 and *Croft v Royal Mail Group plc* [2003] ICR 1425. The law was simple enough and the key points were as follows:

1. The burden of proving the defence is on the employer and the threshold is a high one ('**all** reasonable steps').

2. Considering whether the defence is made out requires a three-stage inquiry:
   i. identify the steps actually taken by the employer;
   ii. consider whether they were reasonable; and
   iii. consider whether any further steps should reasonably have been taken.

3. When assessing whether a particular step is reasonable, relevant factors include the time, effort, expense and likely effectiveness of that measure.

The EAT commented specifically on the issue of equal opportunities training, stating:

> *…. Brief and superficial training is unlikely to have a substantial effect in preventing harassment. Such training is also unlikely to have long-lasting consequences. Thorough and forcefully presented training is more likely to be effective, and to last longer.... If training involved no more than gathering employees together and saying "here is your harassment training, don't harass people, now everyone back to work", it is unlikely to be effective, or to last.* [paras 35-37]

On the facts of the case before it, the EAT held that whatever training had been completed, it had likely faded in the minds both of the harasser and the managers alike. It had been ineffective to prevent the harassment. The EAT dismissed AUL's appeal and upheld the original decision.

Comment

This decision showcases why in practice the statutory defence is so rarely run by employers. Firstly, as a matter of law, s109(4) EA sets a high legal hurdle: the employer must show that it took **'all'** reasonable steps. Secondly, as a matter of evidence, the employer often starts 0-1 down: if discrimination has in fact occurred in the first place, then that is a probably an indicator that any preventative measures taken up to that point were dubious. Thirdly, consider the psychology: once a tribunal has found that a claimant was the victim of discrimination, then there is an impulse to do justice and order redress. Upholding the statutory defence would mean withholding a remedy from a proven victim. How attractive is that?

The *Gehlen* decision also puts the spotlight on the need for **effective** training. In some workplaces it has come to be regarded as a tick-box exercise for employers or just another chore for busy employees. However, the decision in *Gehlen* illustrates that *'brief and superficial'* training simply adds no value. It neither prevents discrimination in the first place, nor provides a shield for the employer in court.

The best training forces people to question and challenge their own assumptions. In reality, for a defence to succeed under s109(4), an employer will have to demonstrate that it had a robust **system** in place: solid training, regularly refreshed and continually reviewed or measured for its effectiveness. If training is worth doing at all, it is worth doing well.

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Matching the evidence to the pool for comparison: a cautionary tale

Cumming v British Airways plc [2021] UKEAT/0337/19/2201;[1] January 22, 2021

Background

Tanya Cumming (TC) was a member of British Airway's (BA) Eurofleet air crew. The standard full-time pattern of work was 10 paid rest days and either 20 or 21 work days each month (9 paid rest days and 19 work days in February). That meant air crew worked roughly 2/3 of the time and had paid rest 1/3 of the time.

Under Part III of the Maternity and Parental Leave etc. Regulations 1999 (SI 1999/3312) (MAPLE Regulations) employees who have been continuously employed for not less than a year and have responsibility for a child under 18 are entitled to take up to four weeks' unpaid leave each year to care for that child.

The details of BA's written policy are not set out, but it provided for at least this level of leave. In addition, however, BA operated a policy (apparently an unwritten one) of removing one paid rest day for every three days of parental leave taken in a month. In effect, then, 2/3 of parental leave days were treated as taken from work days and 1/3 were treated as taken from paid rest days.

TC claimed that this unwritten policy indirectly discriminated against her on the basis of her sex.

Law

Under s19 of the Equality Act 2010 (EA), indirect discrimination may arise where an apparently neutral provision, criterion or practice (PCP) puts people who share a protected characteristic at a comparative disadvantage. Put shortly, a claimant must show that the PCP applied by the respondent:

- is applied to persons who do not share the relevant protected characteristic (s19(2)(a)),
- puts persons with whom the claimant shares the characteristic at a particular disadvantage when compared with persons with whom the claimant does not share it (s19(2)(b)), and
- puts the claimant at that disadvantage (s19(2)(c)).

If the claimant shows this, she succeeds unless the respondent can show the PCP to be a proportionate means of achieving a legitimate aim (s19(2)(d)).

The purpose of s19 is to tackle group disadvantage, sometimes referred to as 'disparate impact'. It therefore requires a comparison between the effects of the PCP on the group of people with the protected characteristic and the effects on the group without it. Under s23(1) EA, there must be no material differences in the circumstances of the two groups.

The people in the two groups used for the comparative exercise are often called the '*pool for comparison*'. According to the Equality and Human Rights Commission Statutory Code of Practice for employment:

> *In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively…*
>
> *Example: A marketing company employs 45 women, 10 of whom are part-timers, and 55 men who all work full-time. One female receptionist works Mondays, Wednesdays and Thursdays. The annual leave policy requires that all workers take time off on public holidays, at least half of which fall on a Monday every year. The receptionist argues that the policy is indirectly discriminatory against women and that it puts her at a personal disadvantage because she has proportionately less control over when she can take her annual leave.*
>
> *The appropriate pool for comparison is all the workers affected by the annual leave policy. The pool is not all receptionists or all part-time workers, because the policy does not only affect these groups.* [paragraph 4.18]

The first step, then, is to identify the pool of people affected by the PCP. The second step is to divide that pool into two groups, according to whether they share the protected characteristic with the claimant. The third step is to compare the effect of the PCP on the two groups.

Employment Tribunal

In the ET the parties agreed that the correct pool for comparison was all the members of the Eurofleet air crew with childcare responsibilities, both male and female.

There was evidence before the ET that of the 2,500 members of the Eurofleet air crew 1,725 (69%) were

1 [2021] IRLR 270

women and 775 (31%) were men. The ET was also told that over a certain period 417 women took parental leave and 92 men took it.

The ET found that 100% of the men who took parental leave had rest days deducted and so did 100% of the women. On that basis it held that there was no particular disadvantage to women, and dismissed TC's claim.

Employment Appeal Tribunal

TC appealed, arguing that because women bear the bulk of childcare responsibilities they are more likely to apply to take parental leave and so are more likely to be put at a disadvantage by the PCP.

The EAT agreed with her that the ET's reasoning was flawed. The fact that anyone who took parental leave had the rest day deducted did not automatically mean men and women with childcare responsibilities were equally likely to have a rest day deducted, because not all those with childcare responsibilities necessarily apply for parental leave.

The only evidence available was that 417/1,725 women took parental leave (24.2%) and 92/775 men took parental leave (11.9%), but that was a comparison within all air crew and not just air crew with children of the relevant age.

Applying the three steps above:

1. The pool was air crew with at least one child under 18.
2. The comparison was between women in the pool and men in the pool.
3. The evidence required was evidence about how many men and how many women had children of the relevant age, and of those how many in each group actually applied for parental leave.

Without that evidence, it was not possible to make a direct comparison between the effects of the PCP on women in the pool with the effects on men in the pool.

The EAT allowed TC's appeal (and BA's cross-appeal) and remitted the case back to the ET.

Comment

It is worth noting that the language used, of *'having childcare responsibilities'*, may have contributed to the confusion. Entitlement to parental leave depends on having parental responsibility for a child or being registered as a child's father (MAPLE Regulation 13), but that is not the same thing as having the practical day-to-day responsibility for carrying out most of the childcare. The ET's reasoning appeared to run the two together. TC's point was that among those with formal parental responsibility, women are more likely to bear the burden of practical day-to-day responsibility and therefore more likely to need to take parental leave.

The case is a useful reminder of just how important it is to specify the PCP at an early stage in order to identify the likely pool (or pools) for comparison. Unless the pool is identified it is difficult for claimants to ensure that they seek disclosure of the information they may need to prove their case.

Lady Hale noted in *Essop v Home Office, Naeem v Secretary of State for Justice* [2017] UKSC 27; Briefing 830, that there is a social expectation *'…that women will bear the greater responsibility for caring for the home and family than will men.'* As the EAT observed, TC may yet be able to persuade the ET to find in her favour on the basis of Lady Hale's observation together with statistics relating to the whole of the crew; however, that remains to be seen.

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No discrimination in providing different shared parental leave and adoption leave pay

Mr B Price v Powys County Council [2021] UKEAT/0133/20/LA; March 31, 2021

Facts

Mr B Price (BP) was employed by Powys County Council (the Council). BP's wife was expecting a baby and the couple decided that BP would care for it at home while Mrs Price would return to work after two weeks' compulsory maternity leave.

In order to make a decision on their joint income if his wife were to receive two-weeks' compulsory maternity leave (ML) pay and they split any shared parental leave (SPL) entitlement, BP made enquiries about the Council's SPL policy, requesting a monthly breakdown of the pay he would receive if he were to take 37 weeks' SPL.

The Council's SPL policy was to pay an amount equivalent to statutory maternity pay to employees taking SPL, whereas those on adoption leave (AL) were entitled to full pay. After some delay, BP was informed that he would only receive pay at the statutory rate for maternity pay.

BP lodged claims at the ET for direct and indirect discrimination on the grounds of gender. He contended that the Council's policy was directly discriminatory in that employees on statutory ML and on AL were entitled to pay at higher rates during their leave periods than those on SPL.

The indirect discrimination claim was made on the basis that the delay in processing his pay entitlement disadvantaged men.

Employment Tribunal

(1) The direct discrimination claim – pay disparity

BP relied on two comparators for his direct discrimination claim: the first being a female worker receiving ML pay, the second being a female worker receiving AL pay. The ET considered whether these comparators were in materially different circumstances.

In relation to the first comparator, the ET was referred to *Ali v Capita Customer Management Ltd; Hextall v Chief Constable of Leicestershire Police* [2019] EWCA Civ 900; Briefing 942, which addressed the differences between SPL and ML pay. The tribunal determined without discussion that, based on these cases (which had been heard together), BP could not *'establish that he has been treated less favourably or would have been treated less favourably than this comparator'.*

In relation to the second comparator, BP argued that as neither a male employee on SPL nor a female employee on AL undergo childbirth, a female employee on AL was an appropriate comparator. The Council argued that AL was materially different because:

1. AL could be taken at any age before maturity of the adopted child
2. SPL could only be taken with the partner's agreement, whereas AL did not need the consent of the other adopter
3. SPL could be *'dipped in and out'* of, and
4. The adopter had to deal with third parties including for screening, interviews, and counselling.

For these reasons, the ET concluded that a female employee on AL was materially different to a male employee on SPL, adding that AL *'was in part compulsory, whereas SPL was entirely optional'* and AL could begin before placement with the child.

The correct comparator was a female worker who had applied for SPL and this comparator would have been paid at the same rate as the equivalent male employee.

(2) The indirect discrimination claim – processing delay

The provision, criterion or practice (PCP) under discussion was the processing time of 13 weeks for BP to receive notice of his SPL pay entitlement. The Council argued that the delay had been an error rather than a PCP. The tribunal decided that while it was *'clearly very unsatisfactory'* for BP to be put in such a difficult position, the delay had been the result of genuine errors and not a PCP.

The ET therefore dismissed both claims.

Employment Appeal Tribunal

BP's appeal to the EAT proceeded on two grounds relating to the pay disparity claim, namely that the:

1. ET had erred in that it failed to have regard to the underlying purpose of AL, which was the same as or similar to that of SPL, namely the facilitation of childcare

2. ET's reasons for stating there was a material difference between BP and the comparator were *'either immaterial or irrelevant'*.

The underlying purpose of AL

BP referred to the CA's reasons in *Ali* for the material difference between ML and SPL, which were that the predominant purpose of ML was *'not childcare but other matters exclusive to the birth mother resulting from pregnancy and childbirth and not shared by the husband or partner'*.

By contrast, BP submitted, the predominant purpose of both AL and SPL is childcare and therefore directly comparable. The joint purpose of AL and SPL, he argued, is to *'allow parents to be at home to care for the child and develop their bond'*.

BP also argued that there was a similar element of choice in both SPL and AL; for SPL, parents could choose to allocate the period of leave; for AL, the choice involved the period they are matched with the child and which one of the couple would be the adopter.

The EAT rejected the argument that the predominant purpose of AP and SPL was facilitating childcare. It held that the purpose of AL went beyond just the facilitation of childcare; rather it included *'forming a parental bond, becoming a family, and the taking of steps to prepare and maintain an appropriate and safe environment for the adopted child'*. Other differences included the fact that adoption could take place when the child is older than an infant, and before the child is placed with the adopter.

The EAT also stated that the element of choice in AL was *'different in character'* to that of SPL because the choice of who would be the adopter was made by both parents whereas *'once that choice is made and one of them is elected the adopter, the adopter then has the right to curtail AL so as to enable the adopter's partner to take [SPL]'*.

Irrelevant reasons for material difference

The EAT looked at each of the points the ET made to differentiate SPL and AL. The first point was that *'AL was "in part compulsory", whereas [SPL] was entirely optional'*. The EAT agreed with BP that AL is not compulsory and that the ET erred in relying on this factor, but decided that this did not vitiate the ET's conclusion overall.

For each of the other points the EAT did not consider the factors referred to by the ET to be immaterial or irrelevant.

As a result, the EAT decided that the ET has been correct to reject the comparator of a female on AL. The correct comparator, it stated, would be a female on SPL, who would receive the same pay as BP and there was therefore no *prima facie* discriminatory treatment. The appeal was dismissed.

Comment

The outcome of this judgment is to extend the reasoning in *Ali* to a comparison of SPL with AL as well as ML. That case was heavily relied on and the tribunals at both stages felt bound to transpose much of the reasoning of the CA to this case.

However, much of the reasoning that purports to distinguish between AL and SPL is less clear cut than suggested. There are clear differences between AL and SPL listed and discussed at length in these judgments, but the determination that the predominant purpose of both is not *'the facilitation of childcare'* seems narrow-minded. Differentiating AL from SPL by saying that a key purpose of AL is *'forming a parental bond'*, as if parents on SPL are not forming an initial bond with their child, is a weak argument. So is the argument that AL is different to SPL because AL can be claimed when the child is older than an infant – although there will be slightly different needs at different ages of the child's development, it is unclear why caring for a slightly older child is not also *'facilitation of childcare'*.

The argument that AL can be taken before the placement of the child means that the predominant purpose is more than the facilitation of childcare because at that point *'there is no child to look after'*, is equally narrow. Childcare is not an exercise that must happen only in the presence of the child – shopping for the child, preparation of food, and other activities where the child does not have to be in the room are necessary for the provision of care.

Whereas a key purpose of ML is recovery from childbirth, there is no similar clear-cut distinction in the judgments in this case. This said, even if the tribunals had taken a broader approach to the purposes of these types of leave, it seems unlikely that BP would have succeeded in proving sex discrimination because the types of leave in question can be taken by male or female parents.

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High Court stresses importance of monitoring, including collection and capture of data, and evaluation in PSED disability challenge

R (on the application of DMA, AHK, BK and ELN) & R (AA) v Secretary of State for the Home Department [2020] EWHC 3416 (Admin); December 14, 2020

Implications for practitioners

This case highlights the importance of public authorities collecting adequate information about disabled people in order to discharge their s149 Equality Act 2010 (EA) public sector equality duty (PSED) and avoid discrimination against them. The judge's reflections on monitoring obligations underline the need to collect, capture and evaluate data to ensure a government body knows what reasonable adjustments to make and avoids discriminating against disabled people.

Facts

The claimants were five failed asylum seekers who remained in the UK awaiting consideration of further representations. They sought what is known as *'asylum support accommodation'*. The Secretary of State for the Home Department (SSHD), the defendant, accepted that each claimant was eligible for accommodation under the Immigration and Asylum Act 1999, Part 1, s4(2) on the basis that they were destitute and that provision of accommodation was necessary to avoid breach of their Article 3 European Convention on Human Rights (ECHR) rights (the right to freedom from torture and inhuman and degrading treatment). However, there were substantial delays in providing accommodation pursuant to s4(2) and the Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005. The claimants experienced delays of 45 days to 151 days, with nine months in the case of AA.

The defendant used private contractors to provide accommodation on her behalf, managing the contractors using key performance indicators (KPIs). Their performance was monitored on a monthly basis and, where persistent failures occurred for three consecutive months, the defendant would ask for a service improvement plan.

One of the claimants (AA) had chronic kidney disease, hypertension and other serious conditions. His disabilities gave rise to a need for single person ground floor or lifted accommodation with easy access to bathroom and self-catering kitchen facilities. He also needed to be able to access his clinic in North London for dialysis three times a week.

The claimants sought judicial review of the SSHD's approach to her duty to provide or arrange for the provision of accommodation for destitute failed asylum seekers.

AA focused on the discrimination arising from the lengthy delays in accommodating him as a severely disabled person, which were much longer than the target times set in the contracts. AA claimed that the defendant's failure to accommodate him within a reasonable time amounted to disability discrimination under s15 EA, indirect disability discrimination under s19 EA, a breach of the duty to make reasonable adjustments under s20 EA, and a breach of the PSED under s149 EA.

High Court

Knowles J gave judgment as follows. First, the defendant failed to provide accommodation within a reasonable period of time. The defendant accepted that, in the absence of an express time limit, she was obliged to provide support within a reasonable period but had not accepted that the periods in the claimants' cases were unreasonable. Although her guidance in *'Asylum Accommodation and Support Transformation Service Delivery Guide'* specifies the provision of accommodation within 24 hours up to nine days, that bore no relation to what the claimants had experienced and there was evidence that such experiences were not confined to the claimants.

Second, the defendant failed to capture data properly and, using that data, to monitor properly, in order to know whether she was acting lawfully and in accordance with her duty, and could act immediately if there was a sign that either was not the case. However suitable the monitoring scheme might be in other contexts, it was not suitable in the context of vulnerable destitute people. The defendant did not have information about the true position and there was evidence of a real risk of a breach of her statutory duty in a significant number of cases. The court outlined a number of features

which could contribute to a proper monitoring system, including having regard to the context, following the progress of each case, and alerting cases which were at risk of exceeding a reasonable period in sufficient time for that to be addressed. There was a real risk of a breach of the SSHD's duty to provide accommodation under s4(2) in a significant number of cases, and the court declared the SSHD to be in breach of that duty and of s6 of the Human Rights Act 1998 (in light of the real risk of breaches of Article 3 ECHR).

Third, the defendant unlawfully discriminated against AA under s15(1)(a)EA. Medical dietary needs and access to a clinic providing kidney dialysis were things arising in consequence of AA's disability. The huge delays and failure to meet the necessary dietary requirements amounted to *'unfavourable treatment'* [paras 264 - 267].

The court rejected the defendant's argument that there was no unfair/particular disadvantage because non-disabled asylum seekers who are pregnant and have small children would be similarly disadvantaged. That simply identified another group which may be placed at a comparative disadvantage. The defendant could not justify this treatment by reference to the interests of immigration control. There was no rational connection between immigration control and the unfavourable treatment of disabled people, as the defendant tried to argue. That was not a basis to justify treating disabled people less favourably.

Fourth, in failing to monitor the numbers of disabled applicants and failing to have an effective system for prioritising claims, the defendant had failed to make reasonable adjustments for severely disabled people as required under s20 EA. She had failed to take the steps it was reasonable to take to avoid the disadvantage they faced. The defendant could not show that the treatment was a proportionate means of achieving a legitimate aim. The judge refused to accept that limited resources justified the position: it was impossible to accept that single room, ground floor accommodation which allowed for self-catering and was in a location suitable for travel to the dialysis clinic was not available.

Finally, the defendant was in breach of the PSED in failing to monitor the provision of accommodation to individuals who had a disability. The consequences of delays for people with complex health problems were serious and could result in deterioration of their conditions. The defendant failed to have due regard to the need to eliminate discrimination and to advance equality of opportunity.

Comment

This judgment is a rare example of the court finding several systemic breaches of the disability discrimination provisions under the EA, with a detailed focus on monitoring. The court said that the scheme's failure to monitor *'goes to the heart of things'* because *'if you do not monitor disability and the needs of those with a disability then you will not know the needs and the problems (and, I would add, the solutions)'* [para 298]. The court identified not only straightforward disability discrimination in the treatment of AA but went onto identify two clear reasonable adjustments (monitoring and prioritisation of accommodation claims) which could and should have been made to reduce the disadvantage for disabled people of having to wait longer for their accommodation because of the needs arising from their disability.

This judgment thus underlines the importance for public authorities of having an adequate evidence base to assess whether they are complying with both their general public law duties, and specifically their duties towards disabled people under the EA including the PSED.

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Matrix

Discriminatory impact of a council's adult social care charging policy

SH v Norfolk County Council Case No: CO/1640/2020 [2020] EWHC 3436 (Admin); December 18, 2020

Implications for practitioners

SH v Norfolk is an important judgment for practitioners assisting clients to challenge the impact of charging policies for adult social care in other local authority areas. The court found that Norfolk's policy had a disproportionate impact on severely disabled people, by charging them a higher proportion of their income for their care than those without such severe disabilities. The judgment contains an interesting analysis of what amounts to *'other status'* for a claim of discrimination under Article 14 European Convention on Human Rights (ECHR), as well as a robust critique by the judge of the aims put forward to justify the discrimination.

Facts

The claimant (SH) is a 24-year-old woman with Down Syndrome with associated physical disabilities and severe learning disabilities. She had never been able to work to earn money and had no prospect of doing so in the foreseeable future. Her income consisted of: Employment Support Allowance (ESA) at the support group rate with the enhanced disability premium; Personal Independence Payment (PIP) daily living component at the enhanced rate; and PIP mobility component at the higher rate. Her total income in July 2019 was £277.30, rising to £282.05 in April 2020.

Statutory regime

Councils can charge adults for care and support under s14 Care Act 2014. S14(7) provides that councils cannot levy charges which would cause SH's remaining income to fall below the minimum income guarantee (MIG).

The Care and Support (Charging and Assessment of Resources) Regulations 2014 (the 2014 Regulations) set the MIG and impose other constraints on councils' power to charge. The 2014 Regulations prohibit councils from taking certain income into account (e.g. earnings from employment or self-employment (regulation 14)), but councils have the discretion whether to include other elements in calculating income (regulation 15(2)).

The Care and Support Statutory Guidance (the guidance) emphasises councils' discretion to charge and requires them to consider whether it is appropriate to set a maximum percentage of income above the MIG.

Charging policy

Norfolk Council (the Council) introduced a new non-residential charging policy, under which SH was initially charged for care (including day services, respite care and a personal assistant) at a rate of £16.88 per week. This increased to £20.58 in April 2020 and was to become £50.53 when the next phase was introduced.

The key changes to Norfolk's policy were to: (a) reduce the MIG to the statutory minimum; and (b) exercise its discretion to include the daily living component of PIP at the enhanced rate.

SH argued that the charging policy:

1. discriminated against severely disabled people contrary to Article 14 read with Article 1 of Protocol 1 (A1P1) and/or Article 8 ECHR; and
2. indirectly discriminated against adults with Down Syndrome, contrary to ss19 and 29 Equality Act 2010 (EA).

High Court

It was common ground that the changes to the charging policy fell within the ambit of A1P1. The *'other status'* relied on by SH was being *'severely disabled'*. The judge considered that to be exactly the sort of personal characteristic which has always been recognised as protected from unjustified discrimination under Article 14. That *'other status'* could be understood by reference to her entitlement to ESA at the support group rate with the enhanced disability premium, and to her entitlement to the PIP daily living component at the enhanced rate, by virtue of her *'severely limited ability to carry out daily living activities'*.

There was a difference in treatment between, on the one hand, severely disabled service users (with needs which result in higher assessable benefits and no realistic prospect of accessing earnings from employment or self-employment) and, on the other hand, everyone else receiving council services covered by the charging policy. Their treatment was different because the

charging policy meant that a higher proportion of SH's earnings than theirs (and of other severely disabled people in the same position) was assessed as available to be charged, and the result was that she was charged proportionately more than they were.

The Council relied on the following aims to justify the effect of the charging policy on SH as not being manifestly without reasonable foundation, namely to:

1. apportion the Council's resources in a fair manner;
2. encourage independence;
3. have a sustainable charging regime;
4. follow the statutory scheme.

The court found that there was no evidence that the Council had considered the differential impact on SH's cohort or the alternative approach of setting a *'maximum percentage of disposable income'* over and above the MIG (as the guidance required them to consider). The outcome for SH was overlooked and not considered or consciously justified at all. None of the proposed mitigations structurally addressed the discriminatory impact.

No real effort was made in the proceedings to justify the discriminatory impact of the charging policy on severely disabled service users (as opposed to explaining the sums sought to be raised by the policy overall) by reference to the Council's stated aims. The impact directly contradicted the stated aim of encouraging independence because SH would have less money for a personal assistant or other independent activity. A less intrusive measure, namely the alternative approach above, had not been considered and there could be other ways of achieving the same balance between cost and revenue.

Comment

While SH's challenge only targeted the policy in Norfolk, it has potential wider significance because, across the country, different local authorities have a range of charging regimes pursuant to the 2014 Regulations. Many may be the same or similar to Norfolk's. It will be necessary for local authorities to consider whether:

1. their regimes have a disproportionate impact on severely disabled people
2. they have considered the alternative approach of setting a maximum percentage of disposable income; and
3. whether the discriminatory impact of their policies can in fact be justified by stated aims.

It seems likely that further challenges are on the horizon.

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Abbreviations

A1PI	Article 1 of Protocol 1, ECHR	EU	European Union	OfS	Office for Students
AC	Appeal Cases	EWCA	England and Wales Court of Appeal	OMP	Occupational maternity pay
BAME	Black, Asian and Minority Ethnic	EWHC	England and Wales High Court	PCP	Provision, criterion or practice
CA	Court of Appeal	HC	High Court	PHE	Public Health England
CJEU	Court of Justice of the European Union	HE	Higher education	PIP	Personal Independence Payment
CMLR	Common Market Law Reports	ICR	Industrial Case Reports	PSED	Public sector equality duty
CRD	Citizens' Rights Directive	IoC	Index on Censorship	PSS	Pre-settled status
DLA	Discrimination Law Association	IRLR	Industrial Relations Law Reports	PTSD	Post traumatic stress disorder
EA	Equality Act 2010	JCVI	Joint Committee on Vaccination and Immunisation	SC	Supreme Court
EAT	Employment Appeal Tribunal	J/JSC	Judge/Justice of the Supreme Court	SPL	Shared parental leave
ECHR	European Convention on Human Rights and Fundamental Freedoms 1950	KPI	Key performance indicator	TFEU	Treaty on the Functioning of the European Union
ECtHR	European Court of Human Rights	LGBTQ	Lesbian, gay, bisexual, transgender, queer/questioning	UC	Universal Credit
EHRR	European Human Rights Reports	LJ	Lord Justice of Appeal	UKEAT	United Kingdom Employment Appeal Tribunal
ESA	Employment Support Allowance	LLP	Legal liability partnership	UKSC	United Kingdom Supreme Court
ET	Employment Tribunal	MIG	Minimum income guarantee	VP	Vice President
		MPS	Metropolitan Police Force	WLR	Weekly Law Reports

Briefings is published by the Discrimination Law Association. Sent to members three times a year. Enquiries about membership to Discrimination Law Association, PO Box 63576, London, N6 9BB. Telephone 0845 4786375. E-mail info@discriminationlaw.org.uk.
Editor: Geraldine Scullion; geraldinescullion@hotmail.co.uk. Designed by Alison Beanland.
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