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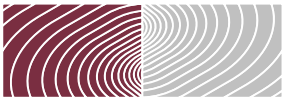

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Editorial

Call to widen the fight against unlawful discrimination

Access to justice is at the heart of the struggle to eliminate unlawful discrimination and to create a more equal society. Laws which protect human rights but which are unenforceable may as well not exist. The social and historical context for discrimination against disabled people and the struggle they face in enforcing legal protections was the main focus of the DLA's annual conference in October 2019. This theme is echoed in this edition of *Briefings*.

The disproportionate impact of welfare reforms on disabled people which have hindered aspects of their right to live independently and be included in the community was a critical issue highlighted at the conference. As important was the analysis of the almost insurmountable barriers to justice facing many disabled people. Disabled activists highlighted how the impenetrable complexity of the court process, its physical inaccessibility, the lack of legal aid and available lawyers, the financial, mental and emotional health risks, among other factors, inhibit disabled victims of discrimination from bringing legal cases. And they pointed out that successful legal challenges don't inevitably bring about practical changes on the ground.

In their article on Leigh Day's group claim challenge against the Department for Work and Pensions on behalf of thousands of severely disabled people who suffered financial loss following the introduction of Universal Credit, Ryan Bradshaw and Niall Byrne set out some of the difficulties of challenging discriminatory acts by public bodies in the field of welfare rights. As DLA conference participants confirmed, the EA is limited in its scope in the first place; and enforcing judgments is overwhelmingly difficult when austerity policies have reduced support available to enforce rights and the legal aid and Equality and Human Rights Commission budgets have been slashed.

The impact of austerity in relation to cuts to housing benefit and the difficulty vulnerable claimants have in demonstrating that such cuts discriminate against them and are *'manifestly without reasonable foundation'* is bleakly illustrated in the SC's dismissal of the challenge in *R (on the application of DA and others) v SSWP* and *R (on the application of DS and others) v SSWP*.

However, even where such judicial review challenges are successful, Bradshaw and Byrne highlight the failure of government to respond to findings of unlawful discrimination and in particular its failure to compensate all the victims and its reluctance to reverse its discriminatory policy. They condemn this attempt to limit government's financial exposure at the cost of particularly vulnerable disabled people. They are exploring the ECHR's provisions regarding 'just satisfaction' and the right to damages in order to try to ensure the claimants obtain financial compensation and a just remedy.

In his analysis of *Forward v Aldwyck Housing Group* Toby Vanhegan highlights other difficulties in enforcing equality rights. In this housing case there had been an admitted breach of the s149 EA public sector equality duty. The CA decided that, if on the facts of the case, it was highly likely that the relevant decision would not have been substantially different if the breach of the PSED had not occurred, the court would ordinarily not quash the decision – an outcome which, he argues, severely undermines the PSED.

The DLA conference provided a useful reminder to practitioners that legal challenges are not the only avenue to seek redress; legal cases must be run alongside other forms of awareness-raising, including lobbying, protests and direct action. The DLA conference called for collaboration around shared values and interests rather than around identity. Case law should be amplified and explained in simple accessible language and the law made more 'democratic'. There is also a need to develop strategic communications painting a hopeful vision of the world we want to live in and the solutions required to get there.

The DLA will continue to support its members to collaborate on improving access to justice through awareness raising and lobbying to highlight and challenge the government's appalling record. It aims to harness members' abundant potential to challenge discriminatory policies and inaccessible legal processes, and to ensure that legal avenues of redress are available to as wide a group of people as possible in order to change practice and achieve just satisfaction for victims of unlawful discrimination.

Geraldine Scullion
Editor

Please see page 33 for list of abbreviations

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Using the European Convention on Human Rights to challenge discrimination

Ryan Bradshaw and Niall Byrne, solicitor and paralegal respectively with Leigh Day, are building a group claim against the Department for Work and Pensions (DWP). They are seeking to enforce the judgments in *R (TP and AR) v Secretary of State for Work and Pensions* [2018] EWHC 1474 (Admin) *(TP & AR)* and *R (TP, AR & SXC) v Secretary of State for Work and Pensions* [2019] EWHC 1127 (Admin) *(SXC)* on behalf of the thousands of severely disabled people who have lost significant sums of money having been migrated to Universal Credit (UC) from legacy benefits (such as Employment Support Allowance or Income Support). They outline the difficulties of challenging discriminatory acts by public bodies and argue that the European Convention on Human Rights (ECHR) provides an under-utiilized route to obtain damages for claimants. The action is intended to open up a new avenue to gain redress, particularly for those who are most at risk of suffering because of poor decisions by state actors, which will not only lead to better outcomes in the courts but also to better policies and decision-making.

Introduction

Recent cases, particularly those focused on the chaotic implementation of UC, have spurred Leigh Day to consider how the government's ongoing failure to adequately protect the most vulnerable people in society can be best challenged. While the EA has had its limitations exposed, particularly in respect of goods and services claims, the ECHR has been under-utilised as a potential route to achieve the types of remedies that one might expect to see if Equality Act 2010 (EA) claims were being pursued to their conclusion in the civil courts.

Limits of the Equality Act 2010

The EA was fêted as '*Labour's biggest idea for 11 years. A public sector duty to close the gap between the rich and poor will tackle the class divide in a way that no other policy has.*'[1]

In practice the EA has fallen short of this lofty rhetoric and the failure to implement the s1 socio economic duty is a particular cause for deep regret and an opportunity missed. From the outset there have been issues with enforcing rights under the EA which have only been exacerbated by government cuts to the Equality and Human Rights Commission (EHRC) and legal aid budgets, under the guise of austerity. This issue of enforcement is of fundamental importance, as Lord Neuberger makes plain:

> *At its most basic, the expression [the rule of law] connotes a system under which the relationship between the government and citizens, and between citizen and citizen, is governed by laws which are followed and applied. That is rule by law, but the rule of law requires more than that... the laws must be enforceable: unless… a right to protection against abuses or excesses of the state, or a right against another citizen, is enforceable, it might as well not exist …*[2]

In addition to problems enforcing EA protections, the act is also limited in its scope. Although it provides protection for a wide array of protected characteristics, the ECHR has a clear advantage over the EA in offering the catch-all protection for 'other status'. Where the EA disappointingly fails to protect the rights of migrants and refugees[3] or guard against caste-based discrimination,[4] the ECHR has no such limit. An ECHR claim presents discrimination lawyers with another tool to challenge the government, whose acts of discrimination are often subtle and discreet but no less damaging than those which would fit squarely within the scope of domestic legislation.

Limits to the effectiveness of judicial review (JR)

In recent years longstanding issues of enforcing the EA have been joined by issues with JR. A number of forceful and important judgments, such as *RF v*

1. *The Guardian* January 13, 2009 *Harman's Law is Labour's biggest idea for 11 Years* (Toynbee)

2. Lord Neuberger: Tom Sargant Memorial Lecture, 2013

3. *Taiwo (Appellant) v Olaigbe and another (Respondents), Onu (Appellant) v Akwiwu and another (Respondents)* [2016] UKSC 31

4. See Briefing Paper 06862, August 3, 2018 *The Equality Act 2010: caste discrimination* (Pyper) where the government removed an EA requirement to legislate to prohibit caste discrimination not least due to concerns that to comply with this requirement would risk making social class a protected characteristic.

Secretary of State for Work and Pensions [2017] EWHC 3375 (Admin) (*RF*), have been effectively ignored by government. It was stated in *RF* that: '*… the 2017 regulations introduced (and I emphasise introduced) criteria … which were blatantly discriminatory against those with mental health impairments and which cannot be objectively justified. The wish to save nearly £1 billion a year at the expense of those with mental health impairments is not a reasonable foundation for passing this measure*'.[5]

Although the discriminatory practices in *RF* were found to be unlawful, they continue to be carried out by civil servants with impunity. Some two years after the *RF* judgment, the EHRC is again considering bringing the same challenge. When the same case against the government has to be brought twice by the national equality body, something is amiss.

TP & AR

TP & AR were the particular cases which caused Leigh Day to review the present state of the law and seek to achieve justice by a path less travelled.

In the *TP & AR* cases the government was held to have discriminated against people who had been migrated to UC, thus losing their entitlement to enhanced payments covering the extra costs of living associated with their disabilities. In each case, the government was found to have unlawfully removed these essential disability premiums from over 13,000 people, contrary to ECHR Article 14 which prohibits discrimination where Convention rights are engaged.

Despite this widely publicised victory for disabled people, a remedy was only immediately made available to two people, or less than 0.015% of those affected. Some six months later, a statutory instrument,[6] ostensibly aimed at heading off future litigation, came into force. In the interim, the government had continued to implement the discriminatory policy. In doing so, the government not only committed thousands of further acts of discrimination against disabled individuals (in breach of a widely publicised High Court judgment) but then also saw its new regulations held to be discriminatory in *SXC*.

After the milestone judgment in *SXC*, the government began soft pedaling the idea of paying back only a portion of the disability premiums which had been removed and attempting to quietly insert the details of the reduced backdated payments into other legislation aimed at slowing down the roll out of UC. Those familiar with litigation in the field of welfare benefits will not be surprised by this routine; judgments in this area are either ignored by the government or policy makers engage in delay and complex salami slicing (where incremental concessions are made rather than accepting that the policy needs wholesale revision). Eventually, over a year after the initial *SXC* judgment, and after losing two JRs, the government began to make backdated payments to some of those affected by its discriminatory policy. In contrast with the settlement reached in *TP & AR*, no compensation has been offered to individuals for the non-financial losses; and the DWP is paying back only a portion of the financial losses, while also imposing stringent eligibility criteria to restrict payments to as small as possible a group. One of the groups excluded from receipt of backdated payments are those who have had their personal independence payment (PIP) entitlement removed following migration to UC. This is despite them having provable losses and that 75% of the decisions to remove entitlement to PIP are overturned on appeal.[7]

This is an attempt to limit financial exposure at the cost of the most severely disabled people in society and is made possible by the lack of adequate enforcement of judgments, particularly in relation to remedy, in both ECHR-based JR proceedings and under the EA.

Where next?

The UK's uncodified constitution relies on the government respecting the decisions of the courts. A failure to do so sets a dangerous precedent, despite what the Judicial Power Project (a think tank committed to undermining the power of the courts) would have us believe. The JR mechanism is one of the few vehicles through which checks and balances on state power and executive dominance can be realised. Without a clear separation of powers, 'constitutional statutes'[8] or other specific provisions to ensure that judgments are complied with, one is left to rely on a convention that government will respect the decision of the courts. Enforcing this convention requires a great deal of time, effort and expenditure on behalf of both claimants and their representatives. On some occasions the government will gamble that it can ignore a decision, as there is simply not the will to continue to doggedly pursue the issue, as Leigh Day's clients and colleagues have in the *TP & AR* litigation. While the EA and

5. Mostyn J at para 59 *RF v Secretary of State for Work and Pensions* [2017] EWHC 3375 (Admin)

6. The Universal Credit (Transitional Provisions) (Managed Migration) Amendment Regulations 2018

7. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/830965/Tribunal_and_GRC_statistics_Q1_201920.pdf

8. Amy Street *Judicial Review and The Rule of Law: Who is in Control* page 38

JR remain important tools for holding government to account, their limitations lead us to question whether there might be a more effective way to challenge government practices so that the maximum number of people benefit from any decision. The Leigh Day team considers it has found a way to potentially bolster the impact of any ECHR linked JR.

The Leigh Day group claim is seeking to claim damages under the ECHR for all those individuals affected by the issues complained of in *TP & AR* in order to ensure that those impacted by the removal of their disability premiums get the same level of compensation as the *TP & AR* claimants. Not only is this obviously just and equitable but if it is established that such challenges are capable of being brought on behalf of groups of claimants, this should concentrate minds within government and ensure that the prospect of a human rights based JR acts as a serious deterrent to poor policy making.

The reasons why this type of claim is unusual are extensive and daunting. The law is complex; group claims require a great deal of time to manage; there are conflicting authorities; public funding is not available; the courts are naturally inclined to be deferential to the government; and, the right to claim the damages sought is far from securely established.

Establishing liability

Discrimination and justification

A four-part test must be applied to establish that an act of discrimination contrary to ECHR has been committed.

This test states that there is an actionable claim for discrimination if there is:

1. a difference in treatment
2. of persons in relevantly similar positions
3. if it does not pursue a legitimate aim; or
4. if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised. (*R (SG) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449)

The approach to be taken to this initial set of principles is not required to be overly technical. However, the approach to justification is rather more complex and rigorous, particularly for claims brought on the basis of 'other status'. It is another four-part test which considers whether:

1. the measure complained of has a legitimate aim sufficient to justify the limitation of a fundamental right
2. the measure is rationally connected to that aim
3. a less intrusive measure could have been used
4. bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, whether a fair balance has been struck between the rights of the individual and the interests of the community.[9]

In order to ensure that the challenge is successful the court must be persuaded that the view taken by the government, for elements one to three, is '*manifestly without reasonable foundation*' and that, for number four, the benefits outweigh the disbenefits.[10]

While there is a high threshold to establish liability, the courts are more than willing to fully engage with these cases and scrutinise government decision-making in the context of ECHR derived challenges:

> *Cases about discrimination in an area of social policy… will always be appropriate for judicial scrutiny. The constitutional responsibility in this area of our law resides with the courts. The more contentious the issue is, the greater the risk is that some people will be discriminated against in ways that engage their Convention rights. It is for the courts to see that this does not happen. It is with them that the ultimate safeguard against discrimination rests.*[11]

Manifestly without reasonable foundation

Generally speaking, in relation to matters of economic and social policy the government will be afforded a wide *'margin of justification'* when assessing whether its actions and/or policies are manifestly without reasonable foundation:

> *… a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation".*[12]

The margin is adjusted where there has been no consideration of the issues in question and its breadth is dependent on the context and extent to which the view can be said to have been informed or considered. A particular failure to appreciate equality impacts mean it is more difficult for the court to justify giving the government a wide margin of appreciation.[13]

9. Para 33 *R (Tigere) v Secretary of State for Business, Innovation & Skills* [2015] 1 WLR 3820 SC
10. Lewis J at para 60 *TP& AR*
11. Lord Hope at para 48 *re G (Adoption: Unmarried Couple)* [2009] 1 AC 173
12. Para 52 *Stec v United Kingdom* [2006] 43 EHRR 47
13. Para 175 *Elias v SSHD* [2006] 1 WLR 3213 CA

Although there is no hard and fast rule to guide what may be considered to be '*manifestly without reasonable foundation'*, useful guidance was provided by Lord Neuberger:

> *The fact that there are grounds for criticising, or disagreeing with, these views does not mean that they must be rejected. Equally, the fact that the line may have been drawn imperfectly does not mean that the policy cannot be justified. Of course, there will come a point where the justification for a policy is so weak, or the line has been drawn in such an arbitrary position, that, even with the broad margin of appreciation accorded to the state, the court will conclude that the policy is unjustifiable.*[14]

Conflicting High Court decisions

There are conflicting High Court decisions in relation to the correct approach to be taken when adjudicating on the government's implementation of UC and its liability under the ECHR. On one side there are the positive judgments of Lewis J and Swift J in *TP & AR* and *SXC* respectively; on the other, there is the negative judgment of May J in *R (TD, AD & PR) v Secretary of State for Work And Pensions* [2019] EWHC 462 (Admin) [*TD & AD*].

The *TD & AD* decision indicates that it is sufficient for the government to show that consideration was given to the position of those who would be affected by its policies in order to show that its decision-making was not manifestly without reasonable foundation. Should that decision become the established orthodoxy, it would render ECHR based discrimination claims more or less obsolete.

Thankfully May J is in a minority in the High Court as the judgments of Lewis J and Swift J, one prior and one post *TD & AD*, establish a more equitable test that requires the government to do more than simply consider the impact of its policy:

> *The parties before Lewis J, and those before me, were in agreement that the applicable standard for justification (if justification comes to be in issue for the purposes of a claim under the Human Rights Act) was whether or not the decision taken was manifestly without reasonable foundation. That threshold is low but it must still be crossed. May J's judgment essentially concerned the same general point about trigger events. On the evidence before her she was satisfied that the distinction drawn in the case before her was justified.*[15]

These cases are awaiting hearing in the CA and confirmation that the low, but crucially rigorous, threshold applied by Lewis J and Swift J is appropriate is eagerly awaited.

Remedy

The right to damages

S8 Human Rights Act 1998 (HRA) requires the court to award such damages as it considers are '*just and appropriate*'[16] in order to '*afford just satisfaction*'[17]. Further, the court is required to consider Article 41 ECHR,[18] which is also concerned with ensuring the claimant receives just satisfaction.

It has, historically, proved difficult to apply principles elucidated in Strasbourg in a domestic setting:

> *Given the differing traditions from which the [European Court of Human Rights] judges are drawn, and bearing in mind that the court has not regarded the award of just satisfaction as its principal concern, it is not altogether surprising that it has generally dealt with the subject relatively briefly, and has offered little explanation of its reasons for awarding particular amounts or for declining to make an award.*[19]

Compensation will only be awarded if a clear causal link can be established between the damages sought and the alleged violation. There is no entitlement to punitive, aggravated or exemplary damages. Despite this explicit lack of entitlement to punitive damages, there has long been a suspicion that, as with EA cases, the Strasbourg court *'uses punitive damages implicitly'*, and it has been advocated that it 'should' do so even more frequently in the future in order to prevent repetition of wrongful conduct by states.[20]

The three type of damages awarded include pecuniary, non-pecuniary, and costs and expenses. Pecuniary damages concern provable financial losses which have been suffered or can be expected in the future. Non-pecuniary damages are intended to cover non-material harm and can broadly be considered analogous to injury to feelings under the EA. Costs and expenses cover legal costs and the other associated expenses of pursuing a judgment.

The key battlegrounds are what is 'just satisfaction' and the extent of the right to non-pecuniary damages.

14. Para 56 *R (RJM) v Secretary of State for Work and Pensions* [2009] AC 311
15. Swift J at para 23 *SXC*
16. S8(1) HRA
17. S8(3) HRA
18. S8(4) HRA
19. Lord Reed at para 34 *R (Faulkner) v Secretary of State for Justice and another* [2013] UKSC 23
20. Pinto de Albuquerque and van Aaken *Punitive Damages in Strasbourg* in A. van Aaken and I. Motoc (eds), *The ECHR and General International Law* (2017) p230

Just satisfaction

Alseran v Ministry of Defence [2018] 3 WLR 95 (QBD) provides a helpful authoritative domestic judgment on just satisfaction. Unhelpfully, the principles, set out by Leggat J, come in eight parts which present ample opportunity for opponents to concoct arguments seeking to limit any entitlement to damages. The eight major principles are as follows:

1. the award of just satisfaction is not an automatic consequence of a finding that there has been a violation of an ECHR right; a finding of a violation may in itself be sufficient just satisfaction reducing or eliminating the need for financial compensation
2. a clear causal link between the damage claimed and the violation found must be established before financial compensation is awarded
3. where pecuniary loss is shown, the court will normally award the full amount of the loss as just satisfaction
4. it is the court's practice to award financial compensation for non-pecuniary loss, such as mental or physical suffering, where such damage is established
5. the purpose of an award is to compensate the applicant and not to punish the state responsible
6. in deciding what, if any, award is necessary to afford just satisfaction, the court takes into account the overall context in deciding what is just and equitable in all the circumstances of the case
7. the court may take into account the state's conduct as part of the overall context
8. the court also takes account of the applicant's conduct and may find reasons in equity to award less than the full value of the actual damage sustained or even not to make any award at all.[21]

Additionally this judgment stated that:

> *There is a powerful argument of principle that in cases where the violation of an ECHR right has an outcome for the claimant which is akin to a private wrong, the claimant should receive similar compensation for the harm suffered to that which would be awarded on a parallel claim in tort. Otherwise, this would be treating breach of a fundamental right in the ECHR as less serious than breach of the equivalent right protected by the common law of tort. This is particularly the case for non-pecuniary loss for which any amount awarded in compensation can only be symbolic of the value which our society attributes to harm of the relevant kind.*[22]

Given these principles it is difficult to see any justification why an ECHR-based discrimination claim should not attract the same level of non-pecuniary damages as a discrimination claim under the EA.

Non-pecuniary damages

The starting point is that non-financial remedies, such as declarations or changes in policy, do not provide just satisfaction. In many cases involving a discriminatory breach of ECHR rights, there will be a period of time where distress will have been caused to the claimant, therefore non-pecuniary damages should follow in every case. By the time declaratory relief is obtained the damage has already been suffered.

This is a crucial point as emphasised by Lord Bingham in *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14:

> *Even in a case where a finding of violation is not judged to afford the applicant just satisfaction, such a finding will be an important part of his remedy and an important vindication of the right he has asserted.*[23]

Where a non-pecuniary remedy is deemed appropriate Leggat J in *Alseran* provides a test to be applied:

1. identify the injuries suffered as a result of the violation of the ECHR
2. assess the amount of compensation which would be awarded in accordance with English law principles for similar issues (in discrimination cases this will be the Vento bands)
3. consider whether there is good reason for departing from the amount that would be required by English law having regard to wider considerations of what is just and equitable in all of the circumstances
4. consider whether there is any reason to think that the sum arrived at by this process is significantly more or less generous than the amount which the Strasbourg court could be expected to award if the English courts provided no redress.[24]

The major hurdle here is the fourth part of this test. The Strasbourg court does not have a history of making high awards in cases of ECHR-based discrimination and is 'ungenerous'[25] in comparison to our domestic tort based damages system.

The case that is most directly analogous to the *TP & AR* type litigation is perhaps *Solodyuk v Russia* (App no 67099/01) (July 12, 2005) which concerned the delayed payment of a state pension where the non-pecuniary award was €1,500. However it should be

21. Paras 909 – 916 *Alseran v Ministry of Defence* [2018] 3 WLR 95 (QBD)
22. Ibid at para 931; this position was endorsed by the CA in *Gilham v Ministry of Justice* [2018] ICR 827 (CA)
23. Para 19 *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14
24. Paras 937 – 948 *Alseran v Ministry of Defence* [2018] 3 WLR 95 (QBD)
25. Para 64 *Watkins v SOSHD* [2006] 2 AC 395

noted that this case was decided some 19 years ago, involved compensation to people based in Russia and was merely for a delay in making a payment.

The *TP & AR* case does not concern a delayed payment but the removal of crucial payments from a group of people who are very likely to suffer severe adverse consequences. As evidence will be available to the courts, it will not be necessary to infer that distress has been caused.

Of concern is that the domestic courts have often taken a restrictive view on the award of damages based on Article 41 ECHR, modest as those awards may be. In *R (Faulkner) v Secretary of State for Justice and another* [2013] UKSC 23 Lord Reed persuasively argued that when looking at the question of damages the domestic courts are not bound by Strasbourg but merely guided. The HRA was not intended to ensure that better remedies are available for people bringing proceedings under ECHR in the domestic courts but to offer an opportunity to gain an ECHR-based judgment without having to bring the claim before the Strasbourg court.

However, if ever there was a case which ought to establish the principle that Vento type damages should be made widely available to victims of ECHR-based discrimination, this is it. The facts and the law come together and offer an opportunity to pursue a comprehensive remedy judgment that could set a precedent for some time to come.

Conclusion

The courts are willing to award substantial ECHR-derived damages in other areas where there are consistent issues with the decision-making of public bodies, such as care proceedings.[26] As the volume of cases related to UC is likely only to rise as the number of people migrated from the previous social security delivery system increases, a strong decision now would be a welcome rejoinder to the government that it must be more mindful of its ECHR-derived obligations when enacting policies in the area of welfare benefits.

The behavioural economists suggest that the idea that any enhanced damages regime will change state behaviour is wishful thinking[27] and that state actors will continue to flout the law despite a system of damages (or fines) being in place. However, given that these cases attract negative attention from the public and media, Leigh Day is optimistic and hopes that establishing a new, and potentially unpredictable, damages regime will:

> *… encourage [the government] to conduct a cost-benefit analysis and conclude that it is best to get rid of structural/systemic problems than to continue the violation.*[28]

If this is correct then the consequence of a victory in this case will not just be a strengthening of the rule of law but a step towards a more just and equitable society.

26. *Northamptonshire County Council v AS and Ors* (Rev 1) [2015] EWHC 199 (Fam)

27. Gneezy and Rustichini *A Fine Is a Price* 29(1) Journal of Legal Studies (2000) 1, at p14

28. Veronica Fifkak *Changing State Behaviour: Damages Before The European Court of Human Rights* European Journal of International Law, Volume 29, Issue 4, November 2018, pages 1091–1125

Calls for reform of 'legally sanctioned secrecy' – the use of non-disclosure agreements in discrimination cases

Leila Moran, solicitor, and Kiran Daurka, partner, Leigh Day review the key proposals for reforming the use of non-disclosure agreements in discrimination settlements. They highlight the EHRC's recently published guidance on the use of confidentiality agreements which explains the law and good practice on using such agreements.

Practitioners will of course be aware of the increased public interest in the use of non-disclosure agreements (NDAs) or confidentiality provisions in settlement agreements following the #metoo movement. This has led to a wider scale review, perhaps for the first time, of the use of these often prohibitively restrictive confidentiality clauses in settlement agreements in discrimination and harassment cases.

Those acting for claimants will be only too cognisant of how routine it is for restrictive confidentiality clauses to form part of even the most straightforward settlement agreements and that, up until very recently, push back on these clauses has been met with firm resistance. Such that the question for your client ends up being: how far do you want to push this? Are you willing to risk your settlement and take your claim to tribunal because we are unable to agree the wording of this confidentiality clause? The answer is almost always a negative thereby forcing claimants into agreeing not to discuss the discrimination or harassment they have experienced.

We are aware that this in itself causes problems – one such example may be the client who finds herself in the awkward position of having to explain why she left a 'well-respected' employer. Without a clear explanation, potential employers can easily leap to the wrong conclusion that she was at fault somehow in the termination of her employment.

The Women and Equalities Select Committee (WESC), in reviewing the evidence on the use of confidentiality clauses, suggested that employers and legal advisors, on both sides, have been complicit in using confidentiality clauses to cover up unlawful discrimination and harassment by way of '*legally sanctioned secrecy*' and for far too long.

Where are we now?

Both the WESC and the Department for Business, Energy and Industrial Strategy (BEIS) undertook their own reviews of the use of confidentiality clauses in discrimination and harassment complaints in the workplace this year. The outcomes were broadly similar in many respects – calling for reform and agreeing that it was, and is, unacceptable that these clauses have been used to intimidate complainants into silence. The initial public calls for these kinds of confidentiality clauses to be completely outlawed is a drastic measure which, it seems, is now agreed to be unnecessary and that the more proportionate step is reform to prevent their misuse.

WESC made a total of 42 recommendations and concerns in its report published in June. On July 21, 2019, the government published its response to the BEIS consultation. Although the government has yet to respond in full to the WESC report, its response to the BEIS consultation covers a lot of the same ground as the WESC recommendations.

We consider below the key proposals put forward by WESC and the government's response.

● **Proposal 1: Ensure that confidentiality clauses are not used to cover up and do not prevent legitimate discussion of allegations of unlawful discrimination or harassment while still protecting the rights of complainants to move on with their lives.**

The government agreed that it is of course right that individuals are not prevented from taking steps to report a crime but also went further and agreed that it would legislate to ensure that no provision in a contract or settlement agreement can prevent someone from making a lawful disclosure to the police or regulated healthcare or legal professional.

Weight was attached to the importance for those involved in such allegations to be able to speak openly with healthcare professionals, such as during therapy or counselling sessions. However, consideration was

given to the fact that therapists and counsellors are not regulated professions in the same way as doctors or psychologists are and therefore this extension would only apply to **regulated** legal and healthcare professionals.

● **Proposal 2 and 3: Require standard, plain English to be used in drafting confidentiality and other clauses used in settlement agreements, and ensure that such clauses are suitably specific about what information can and cannot be shared and with whom.**

The government agreed that it was important that employees were aware of their rights when agreeing to confidentiality clauses and, to ensure this was the case, it would legislate to require that confidentiality clauses clearly set out their limitations.

The government considered the proposal for a set form of wording for all confidentiality clauses. However, it was decided that this would not allow the necessary flexibility needed for different situations and specific wording would also require frequent updates and could be constricting. Therefore the government plans to legislate to ensure the clarity of the wording used should be sufficient to address the recommendation.

Various other stakeholders, such as the Equality and Human Rights Commission (EHRC), ACAS and the Solicitors Regulation Authority, are also being consulted to ensure that suitable guidance is available for solicitors and professionals drafting these clauses and to set out good practice.

● **Proposal 4: Legal advice to cover the nature and limitations of any confidentiality clauses.**

Government is proposing to extend the legislation to ensure that individuals receive advice on both the nature and limitation of confidentiality clauses, legislating to ensure that legal advisors provide clarity on the details in the settlement agreement in order for it to be valid.

From a practical perspective, considering how to advise a client about whether the specific disclosure they wish to make will qualify as a protected disclosure (and therefore be excluded from the remit of the confidentiality clause) can cause difficulties. Disclosures of information which fall within the framework of protected disclosures can be difficult to define and establish, and substantial case law has arisen on this one point.

● **Proposal 5: Make it an offence to propose a confidentiality clause designed or intended to prevent or limit disclosure of a criminal offence or protected disclosure.**

The government will legislate to introduce new enforcement measures for confidentiality clauses which are non-compliant with legal requirements. It is likely that the confidentiality clauses in settlement agreements which do not comply will be made void without voiding the whole agreement, in line with basic principles of contract law.

● **Proposal 6: Requiring employers to collect data and report annually on the number and type of discrimination and harassment complaints as well as the outcomes and the number of settlement agreements and the type of dispute to which they relate.**

Perhaps the punchiest of the recommendations by the WESC which conceivably has the most power for widespread change, Proposal 6 was not received so favourably by the government – mostly for practical considerations as to how this reporting would be done, to whom and to what degree to ensure that the data provided was meaningful and useful. The government also considered that such enforced reporting may deter the use of these clauses in situations where they are warranted or even welcomed.

The government believes that efforts should be focused on preventing discrimination and harassment in the workplace. To that end, the Government Equalities Office (GEO) has launched a consultation on sexual harassment in the workplace, the results of which will be published later this year. The GEO consultation does ask for responses about collection of data and reporting about discrimination complaints – it will be interesting to see if there has been any movement on the need for internal reporting overview to ensure that employers understand how to deal with any systemic problems.

What's next?

While the government seems to have provided a positive, considered response to the consultation and agreed with most of the WESC recommendations, there does seem to have been a missed opportunity in respect of driving positive wholesale changes in workplace culture in how these allegations are treated and responded to. Much of the government's proposals for legislative reform in this area seem to simply confirm the situation as it has been; however, it is right that this is clarified and

highlighted for complainants who are under pressure and in difficult situations.

Some recommendations made by the WESC have been left in limbo for the time being, such as the recommendation to strengthen corporate governance requirements to require employers to meet their responsibilities to protect those they employ from discrimination and harassment; and to require named senior managers at board level or similar to oversee anti-discrimination and harassment policies and procedures and the use of confidentiality clauses in discrimination and harassment cases.

In its response the government referred to various employer responsibilities which already exist, such as under the UK Corporate Governance Code and the legal duty under s172 of the Companies Act 2006 for directors to promote the success of the company for the benefit of shareholders (and in so doing to have regard to the interests of the company's employees) which should ensure sufficient protections for employees and prevent discrimination in the workplace. But this seems to be a gloss: these obligations and responsibilities have been in place for some time already and the protections they offer have not been sufficient. The GEO consultation may shed more light on how corporate governance can provide greater accountability of employers.

One suggestion by the WESC was that the government should consider requiring employers to investigate all discrimination and harassment complaints regardless of whether a settlement is reached. This is of course a positive suggestion and one which should already be the policy in place within organisations. However, as practitioners will know, the time and cost incurred by the employer in conducting such investigations often forms part of the employer's consideration when in negotiations for settlement. The WESC expressed disappointment and surprise that provision of a reference (something on which the majority of employees will be entirely reliant to be able to move on in their career) formed part of negotiations and that, necessarily, the threat of withholding a reference adds further to the imbalance of power between the parties. The WESC proposed that the government should legislate to impose a duty on employers to provide, as a minimum, a basic reference. The government has not yet responded to this recommendation.

The WESC also renewed its calls to the government to place a mandatory duty on employers to protect workers. The enforcement of this duty would have been assisted by the proposal (which is not being implemented) for monitoring and collection of data on discrimination and harassment allegations. Furthermore, the WESC proposed in its report on sexual harassment, that there would be value in the EHRC being added to the prescribed person's list, so that disclosures relating to sexual harassment could be made to the EHRC. The government agreed with this notable proposal. It is our view that it is important not to have a piecemeal approach to updating and reforming this area; reforms in respect of confidentiality clauses or the making of a protected disclosures for sexual harassment should not be reformed separately but should be considered together with discrimination and other forms of harassment. It is hoped that the government will be cognisant of this in any reforms.

The outcome of the GEO consultation will be published later this year but we would suspect that any proposals are likely to be similar to those already suggested and go no further.

On October 17, 2019, using its powers to provide information and advice under s13 Equality Act 2006, the EHRC launched its guidance for employers on using confidentiality agreements in discrimination cases. The guidance sets out good practice when using NDAs including guidance that these agreements should not be used to prevent a complainant from discussing discrimination or harassment **unless** the complainant has requested confidentiality around their experiences.

The EHRC has agreed with WESC that allegations of discrimination should still be investigated even if the matter has been settled by agreement. An employer should then implement steps to prevent future occurrences; inaction of an employer in this respect would limit the possibility and effectiveness of any 'reasonable steps' defence an employer may seek to raise when faced with further allegations.

The guidance is not a statutory code issued under s14 Equality Act 2006; however, although an employment tribunal is not obliged to take the guidance into account, it can still be used as evidence or, perhaps more practically, to assist practitioners and claimants when negotiating terms of settlement agreements.

Unfortunately, it seems as though the promised legislative reforms may not happen for some time as the timetable offered by the government is when '*parliamentary time allows*'. On a positive note, the WESC report noted that some organisations now routinely settle employment disputes without the use of confidentiality clauses – perhaps indicative that public discussions in this area are having an influence and resulting in wider wholesale changes.

Disability in society - the law and the lived experience: the DLA's annual conference, October 4, 2019

This year's annual conference focused on the struggle for human rights and justice which many disabled people face; it highlighted the practical as well as the legal obstacles to justice and gave space to disabled activists to articulate their lived experience of challenging a disabling world.

History of the social model and its relationship with (industrial) capitalism

Roddy Slorach opened the conference by challenging the concept of the social model of disability which, although widely adopted, was in his view '*empty of meaning*'. He argued that the Industrial Revolution had segregated people into those who were fit to work in the developing machine-driven era and those who were not. As the labour power of disabled people was more expensive to purchase, the development of industrial capitalism led to the very concept of 'disability', the marginalisation of disabled people in society and the rise of workhouses or asylums to house them.

In the modern era, capitalism is still concerned about the social and economic cost of disability and employers continue to avoid the additional cost of employing or providing services for disabled people. There are scientific, technological and medical developments which could assist disabled people's inclusion, yet capitalism undercuts this enormous potential.

Recent UK governments' policy has been to reduce dependency and pass on these costs to individual disabled people; rights and services which disabled people fought for have been dismantled – one example given was the change from Disability Living Allowance to Personal Independence Payments which has reduced access to benefits for thousands of disabled people. Roddy criticised the confusing definition of disability in the Equality Act 2010 (EA) which focuses on the individual. Many disabled people, he said, have little faith in the laws designed to equalise their access to services and protect their rights.

Capitalism promotes independence and individualism, but it hides our interdependence and denies our individuality, he argued. He concluded by demanding that we defend existing laws, but fight for better laws and services and put an end to our disabling society.

Changing the lived world together

Neil Crowther outlined the journey of disability rights from the 1970s when disabled activists criticised the development of welfare benefits for disabled people as nothing more than '*a programme to obtain and maintain in perpetuity the historical dependence of physically impaired people on charity*'.

He traced the tension between the demand for full civil rights which is rooted in the social welfare/gift model and which '*supports anti-discrimination policy and civil rights reforms*' and the '*human rights model of disability [which] is more comprehensive in that it encompasses … civil and political as well as economic, social and cultural rights*'. The focus on civil rights, he argued, has meant that social security policy, social care, continuing healthcare, mental capacity law, mental health law and practice have remained peripheral and largely unchallenged; and in education, '*special educational needs*', not equality, has remained the dominant paradigm.

Often developing on a parallel track with equality law and sometimes arousing hostility between protagonists, the human rights approach to disability rights was finally given its rightful place with the UK's ratification of the UN Convention on the Rights of Persons with Disabilities (UNCRPD) in 2009. The UNCRPD is a reaffirmation of disabled people's existing rights and a programme of action for their full implementation. Far broader in scope and ambition than claims for 'civil rights', it blends civil and political rights with economic, social and cultural rights such as independent living or freedom from violence, exploitation and abuse. The UNCRPD aims for societal change and demands non-legal action such as investment in research to promote inclusive design, or the development of rights-based practice in health and social care, among others.

Although the UNCRPD brought the schism between human rights and the anti-discrimination/civil rights approaches to an end, he questioned the

Convention's impact to date in the UK. It has been used for interpretive effect in key cases and provides the baseline for national disability action plans in Scotland, Wales and Northern Ireland; but is not incorporated into UK law and the impact on policy of the UNCRPD committee's position papers and its 2015 UK inquiry into the impact of austerity on independent living was doubtful.

What is needed is implementation of the s1 EA socio-economic duty, stronger rights to independent living, reform of mental capacity law and full implementation of the Equality and Human Rights Commission's (EHRC) general duty under s3 Equality Act 2006 to '*change the world*'.

Neill concluded by reminding the audience that the law is not in charge; '*for legal intervention to be successful it must concentrate on improved communication and engagement*' with the market, the workplace and the administration. As well as government and non-government action, we need strategic communications painting a hopeful vision of the world we want to see and the solutions required. We need to build movements and pan-political engagement with new alliances around shared values rather than identity, and we need to harness consumer power to demand change.

The lived experience, an ongoing multidirectional battle

Doug Paulley outlined some of the campaigning issues of Disabled People Against Cuts (DPAC) such as challenging the work capability assessments which have led to suicides, or the closure of the Independent Living Fund which has forced disabled people back into residential care. Its campaigning mechanisms include legal action, research and non-violent direct action.

High on the DPAC agenda are the concerns highlighted by the UNCRPD's 2017 report; these included Brexit, the decimation of the UK disabled people's organisations, austerity's disproportionate effect on disabled people and barriers to access to justice such as Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) or the lack of personal assistance or interpreters in court.

Stating '*the EA doesn't work for me*', Doug acknowledged that legal action is just one tool to (attempt to) push equality issues up the agenda of organisations, to redefine issues as illegal discrimination rather than customer service ones and to force change, publicise concerns and obtain some form of redress. However it is not the only tool, and certainly not risk free! Although in one of his cases Doug successfully sued FirstGroup plc (*Firstgroup Plc v Paulley* [2017] UKSC 4; Briefing 818) for a failure to make reasonable adjustments in relation to accommodating wheelchair users on its buses, he objects to his experience being used as evidence that the EA is enforceable by any disabled person. The SC case didn't work he said; he lost money taking it, experienced considerable hate reaction as a result, and it hasn't changed practice on the ground.

Although Doug has initiated more than 50 cases against a wide range of defendants since 2000, the barriers to accessing justice are almost insurmountable for many disabled people. These include the impenetrable complexity of the court process and the couts' physical inaccessibility, the lack of legal aid and available lawyers, the financial, mental and emotional health risks, insufficient social care for disabled people and a general lack of familiarity with the EA and relevant case law.

But legal challenges aren't an answer in themselves, he argued; as a form of campaigning, they need to be run alongside other forms of awareness-raising, lobbying, protests and direct action. *'We need the 99% to stand up and say "We will not let this happen".'*

Doug concluded by highlighting the importance of peer support for disabled activists (available from the DPAC, Transport for All and Reasonable Access), the need for allies including legal allies, and the Disability Conciliation Service.

Discrimination law and cases update

Robin Allen QC delivered a joint paper written by Catherine Casserley and himself which analysed key employment and disability cases and outlined challenges for advisers contesting disability discrimination.

The disability employment gap has not changed for more than a decade, despite 25 years elapsing since the implementation of the Disability Discrimination Act 1995. Research in May 2019 found that half of businesses surveyed said it is easier to recruit a non-disabled person than a disabled one, and a over a quarter of businesses claimed that they never had a disabled candidate for a job interview, despite there being 7.7 million disabled people of working age in the UK.

Robin argued we need to be proactive and plan to meet the needs of disabled people, whether in accessing employment, services or physical spaces, in order to avoid problems arising in the first place. Despite the legal requirement for anticipatory

reasonable adjustments when planning services and buildings, the needs of disabled people still tend to be an afterthought. A failure to make disabled people aware of their rights in a manner which is clear and adapted to their needs only exacerbates the problems they experience.

Robin urged the audience to be creative and thoughtful in ensuring that the protections of the law are made accessible to a wider group of people.

The problem with access to justice: panel discussion

Chris Fry (Fry Law) opened the panel discussion by reminding the audience of the devastating impact of LASPO which has taken away rights and reduced access to justice.

John Horan (Cloisters Chambers) spoke powerfully of his experience as a disabled barrister – the only disabled qualified barrister advising on disability rights in the UK. For him being disabled was '*all about prizes or disciplinary proceedings*'. He explained that as a disabled barrister he experiences a completely different world compared to his non-disabled colleagues. John provides pro bono support for 100s of disabled clients who, because of the last three UK government's policies which have stripped away advisers, legal aid and advice centres, have run out of options.

He argued that Brexit will further undermine disabled people's rights as it threatens the UNCRPD which was implemented under the European Communities Act 1972 which will be repealed once the UK has left the EU.

Esther Leighton who set up Reasonable Access to provide practical support to disabled people to assert and enforce their access rights spoke about the numerous legal challenges she has undertaken. Many of her access cases concern steps into shops and other premises – one of the most blatant and on-going failures to make reasonable adjustments. Highlighting costs' risks she described '*the law as an imperfect tool*'. She is exploring 'associative disability' actions in order to expand the number of people affected by disability discrimination and able to challenge it.

Joanna Owen (EHRC) advised that the Commission is following up its formal inquiry into legal aid to see if access to justice for victims of discrimination can be improved. It has recommended to the Ministry of Justice that there need to be changes to the regulations governing the merits of the case. The EHRC's transport project is offering advice and assistance on challenges to transport systems on grounds of age and disability.

Members of the audience raised concerns about the 'man made' costs regime, deliberate government policy to block access to justice by imposing costs and eliminating legal aid, the absence of solicitors experienced in discrimination law in the county courts, and the need for the Disability Rights Commission's successful goods and services conciliation scheme to be revived.

Geraldine Scullion
Editor, Briefings

Supreme Court dismisses appeals against housing benefit cap

R (on the application of DA and others) (Appellants) v Secretary of State for Work and Pensions (Respondent); and *R (on the application of DS and others) (Appellants) v Secretary of State for Work and Pensions (Respondent)* [2019] UKSC 21; May 15, 2019

Introduction

This case note reviews the SC's hearing of appeals by DA and by DS in relation to their housing benefit claims. The claimants in DA were four lone parents and three children. The claimants in DS were two lone parents and nine children.

The claimants' housing benefit payments were reduced following amendments made by the Welfare Reform Act 2016 and the Benefit Cap (Housing Benefit and Universal Credit) (Amendment) Regulations 2016 creating the '*revised welfare benefit cap*'. The revised welfare benefit cap is not imposed if a claimant is entitled to claim working tax credit, which for lone parents would mean that they were working at least 16 hours per week. The issue was whether the revised welfare benefit cap was unlawfully discriminatory for lone parents of children under school age (and the children) who were unable to work and take advantage of the exception.

In DA, the claimants' housing benefit payments were capped so that there was a significant shortfall between their housing benefit and their contractual rent. The claimants received discretionary housing payments (DHPs) from local authorities. Payments were unreliable. The High Court allowed their claim for judicial review. This decision was reversed on the Secretary of State's appeal to the CA.

In DS, the claimants' claim for judicial review was dismissed and they were granted permission to appeal to the SC. The SC dismissed the appeals and held that the revised welfare benefit cap was lawful.

Legal background

Housing benefit

S123 of the Social Security Contributions and Benefits Act 1992 makes provision for the scheme of housing benefit to be provided by local housing authorities, by way of rent rebate where rent is payable to a local housing authority or, in any other case, rent allowance. Detailed provision is under the Housing Benefit Regulations 2006 (SI 2006/213) (the 2006 Regulations).

Benefit caps

S96 of the Welfare Reform Act 2012 gives the Secretary of State power to introduce a cap on the amount of welfare benefits payable to a claimant, to be determined by reference to estimated average earnings.

In exercise of this power, the Benefit Cap (Housing Benefit) Regulations 2012 (SI 2012/2994) (the 2012 Regulations) were made. They came into force on April 15, 2013.

The 2012 Regulations amended the 2006 Regulations so as to introduce the 'relevant amount', the maximum total amount of specified welfare benefits payable to a claimant.[1] Subject to exceptions, if a person's total entitlement to welfare benefits exceeds the relevant amount, his housing benefit is reduced so that the amount of benefits payable to him does not exceed the relevant amount.

The amendments made by the 2012 Regulations initially set the relevant amount at £350 per week for single persons and £500 per week for couples.[2]

The benefit cap does not apply where the claimant or their partner is entitled to working tax credit.[3] To be eligible for working tax credit, a single parent must work for at least 16 hours a week.[4]

The annual limit for the relevant amount is set by s96 of the Welfare Reform Act 2012 (as amended by S8 of the Welfare Reform and Work Act 2016). It was £23,000 for claimants living in Greater London and £20,000 for other claimants: s96(5).

In *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 WLR 1449; Briefing 748, the claimants contended that the benefit cap unlawfully discriminated against women as they were more likely than men to be single parents and were unable in the circumstances to gain work. The SC held that any discrimination against women was not manifestly without reasonable foundation because the benefit cap

1. Regulation 75D 2006 Regulations
2. Regulation 75G
3. Regulation 75E(1)(2)
4. S10 Tax Credits Act 2002 and regulation 4 Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002 (SI 2002/2005).

pursued the legitimate aims of reducing expenditure on benefits and encouraging work.

European Convention on Human Rights

Article 14 of the European Convention on Human Rights (ECHR) provides:

> *The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

To establish discrimination under Article 14, a complainant must show that his claim is within the ambit of an ECHR right: (*R (Clift v Secretary of State for the Home Department* [2006] UKHL 54; [2007] 1 AC 484).

To establish discrimination, an applicant must show he was treated differently from others on the basis of a prohibited ground: *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42; [2008] 1 WLR 1434. A difference in treatment is not discriminatory if it has an objective and reasonable justification – if it pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised: *Stec v UK* [2006] 43 EHRR 1017.

Article 1 of the First Protocol to the EHRC provides as follows.

> *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

The right to receive a social security or welfare benefit is a 'possession' for the purposes of Article 1 of the First Protocol: *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63; [2009] 1 AC 311.

In *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18; [2012] 1 WLR 1545, the SC held, in the context of the payment of state benefits, that a difference of treatment amounting to discrimination is justified unless it is manifestly without reasonable foundation.

Local authorities

Local authorities have power to provide childcare and to make discretionary payments towards housing costs.

Local authorities in England must ensure that childcare is available free of charge for eligible children aged three or four for 570 hours each year, across a minimum of 38 weeks in each year.[5] An eligible child is one whose parent is entitled to claim working tax credit and whose income does not exceed the relevant threshold (reg 1(2)). Certain children aged two must also be provided with free care but there is no duty to secure that free care is available for a child under two (reg 2).

A local housing authority may make DHPs to persons who appears to require additional assistance to meet housing costs.[6] The total amount of DHPs that an authority can make in any year is capped.[7]

Supreme Court

The SC dismissed the appeals (Baroness Hale of Richmond PSC and Lord Kerr JSC dissenting). The court held that the government's decision to treat those in the claimants' position similarly to all others subjected to the revised benefits cap was not manifestly without reasonable foundation. The claimants had not entered any substantial challenge to the government's belief that there were better long-term outcomes for children who lived in households in which an adult worked. The SC held that that belief was not manifestly without reasonable foundation, particularly when accompanied by the various provision for local authorities to make DHPs which addressed particular hardship which the similarity of treatment might cause. Accordingly, there had been no discrimination under the ECHR. [Paras 88, 89, 92, 124]

Dissenting judgments

Lady Hale disagreed with the court on the issue of justification. Firstly, on the test which should be applied, she made the important point that the deferential test of manifestly without reasonable foundation originated from an international context:

> *Lord Kerr is surely right to question whether the test which the Strasbourg court will apply in matters of socio-economic policy should also be applied by a domestic court. The Strasbourg court applies that test, not because*

5. S7 Childcare Act 2006, and regulation 4 of the Local Authority (Duty to Secure Early Years Provision Free of Charge) Regulations 2014 (SI 2014/2147)
6. S69 of the Child Support, Pensions and Social Security Act 2000, and the Discretionary Financial Assistance Regulations 2001 (SI 2001/1167)
7. Article 7 of the Discretionary Housing Payments (Grants) Order 2001 (SI 2001/2340)

it is necessarily the proper test of proportionality in this area, but because it will accord a "wide margin of appreciation" to the "national authorities" in deciding what is in the public interest on social or economic grounds. The national authorities are better able to judge this because of their "direct knowledge of their society and its needs" (see Stec at [52]). It does not follow that national courts should accord a similarly wide discretion to national governments (or even Parliaments). The margin of appreciation is a concept applied by the Strasbourg court as part of the doctrine of subsidiarity. The standard by which national courts should judge the measures taken by national governments is a matter for their own constitutional arrangements. [Para 147]

Secondly, an essential element in justification is that the measures adopted should be rationally related to their legitimate aims (*Bank Mellat v HM Treasury (No 2)* [2014] AC 700, para 76). That meant the measures had to be suitable to achieving the legitimate aim. Lady Hale considered that the evidence had comprehensively demonstrated that the revised benefit cap was not suitable to achieving any of its declared aims.

Thirdly, even if it could be shown that the benefit cap met the government's aims of achieving (modest) fiscal savings and incentivising people to work, the weight of the evidence demonstrated that a fair balance had not been struck between the public interest and the damage done to the family lives of young children and lone parents. [Paras 153 – 157]

Lord Kerr disagreed with the majority's approach to the '*manifestly without reasonable foundation*' test.

I have concluded, therefore, that, certainly so far as concerns the final stage in the proportionality analysis, the manifestly without reasonable foundation standard should not be applied. Quite apart from the imperative provided by the authorities, I consider that to impose on the appellants the obligation of showing that a measure is manifestly without reasonable foundation is objectionable for two reasons: firstly, it requires proof of a negative; secondly, and more importantly, much, if not all, of the material on which a judgment as to whether there is a reasonable foundation for the measure will customarily be in the hands of the decision-maker and not readily accessible to the person who seeks to challenge the proportionality of the measure which interferes with their Convention rights. The proper test to apply in relation to the final stage of the proportionality assessment is whether the government has established that there is a reasonable foundation for its conclusion that a fair balance has been struck. [Para 177]

He considered that the government had not adequately answered criticisms made against the benefit cap nor had it struck a fair balance between competing interests.

DHPs are not tailored to deal with the spectrum of difficulties which the appellants face, merely one aspect of them: housing costs. They do nothing to alleviate problems with childcare costs and complications in obtaining childcare, even if it could be afforded. And, of course, there is, as Lord Wilson pointed out in [31], scant, indeed, virtually no, information as to the extent by which the difficulties encountered by the DA and DS cohorts are mitigated by DHPs. There is simply no warrant for the claim that refusal to extend exemption from the cap to the DA and DS cohorts will improve the fairness of the social security system or increase public confidence in its fairness. That sweeping statement partakes of a declamation for which no tangible evidence is proffered. To the contrary, a proper understanding of the impact on those whom the appellants represent, so far from increasing public confidence in the social security system, is likely to lead any right-thinking person to the opposite conclusion. [Para 189]

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Court of Appeal gives limited guidance on accommodating the needs of vulnerable litigants

This briefing focuses on the guidance the courts have given in *J v K* and *Anderson v Turning Point Eespro* on how to respond to the needs of vulnerable litigants. It does not examine the procedural aspects of the cases but highlights steps practitioners should take to prevent vulnerable parties in court proceedings from suffering disadvantage.

J v K [2019] EWCA Civ 5; [2019] 1 WLUK 145; [2019] ICR 815; [2019] IRLR 723; January 22, 2019

Facts

J's claim in the ET had been struck out and he had been ordered to pay the respondent's costs of £20,000. At 3.55 pm, five minutes before the deadline expired, he attempted to email his notice of appeal to the EAT but the communication failed because the attachments were too large. He re-sent smaller attachments, but these were not received until around an hour after the deadline.

Employment Appeal Tribunal

The EAT notified J that his appeal was out of time and invited him to apply for an extension, which he did. The registrar refused his application on papers and so he appealed to the judge under rule 21 of the EAT Rules of Procedure 1993. At the oral hearing he additionally made reference to his poor mental health. His application for an extension was dismissed.

Court of Appeal

The CA allowed the appeal on the basis that J had a satisfactory explanation for missing the deadline. With some hesitation, the court provided guidance '*for the registrar and Judges of the EAT*' on the discretion to extend time limits because of an applicant's mental ill-health:

- The starting point is to decide whether the available evidence shows the appellant has a mental health problem at the time in question. This will generally be on medical evidence rather than the appellant's say-so.
- If so satisfied, the court must then decide whether the mental health problem explains or excuses the failure to institute the appeal in time. Medical evidence specifically addressing whether the condition in question impaired the applicant's ability to make decisions relating to the appeal would be useful but not essential.
- If the first two questions are resolved in the applicant's favour this will usually require an extension except in exceptional circumstances.

Anderson v Turning Point Eespro [2019] EWCA 815, [2019] 5 WLUK 199, [2019] IRLR 731; May 15, 2019

Employment Tribunal

In April 2008 Ms Jade Anderson (JA) brought proceedings against the respondent charity Turning Point Eespro alleging race discrimination, racial harassment and sex discrimination. By a judgment sent to the parties on November 3, 2009 her race claims failed but her sex discrimination claim succeeded, and so a remedy hearing was listed.

Following the judgment on liability JA experienced a serious breakdown in her mental health which delayed progress on remedy. JA claimed that her breakdown was caused or contributed to by the discrimination she suffered, for which she sought compensation; her claim required the provision of expert evidence. Thereafter the procedural history was not straightforward.

The remedy hearing

Over four years after the judgment on liability, a remedy hearing was listed for three days. Several expert witnesses, who did not agree on the question of causation, were to give live evidence; JA attended unrepresented. The ET considered that as JA was likely to be a disabled person under the Equality Act 2010 (EA) it was appropriate to make adjustments to facilitate her involvement. It considered that the appropriate course was to adjourn the remedy hearing and make a referral to the Bar Pro Bono Unit (as it then was) for JA to be represented at the hearing.

JA secured representation from a barrister for the re-listed remedy hearing at which both experts gave evidence. She was awarded £36,130.93 compensation.

Employment Appeal Tribunal

JA drafted her own grounds of appeal to the EAT which focused on her being a vulnerable person who had been subjected to oppressive cross-examination with no special measures used to protect her. Her appeal was not allowed to proceed under rule 3(7), but she proceeded to an oral hearing under rule 3(10) at which she was

represented under the Employment Law Appeal Advice Scheme. At this hearing her appeal focused on the fact that she had been unrepresented at the time that the experts had been instructed. However, HHJ Eady concluded that the appeal raised no arguable point of law.

Court of Appeal

Singh LJ gave JA permission to appeal on a number of grounds relating to the failure to make reasonable adjustments to accommodate her needs as a disabled person, including that the ET failed to:

- conduct a ground rules hearing
- instruct an independent expert to inform the ET as to what reasonable adjustments were needed for the hearing
- properly discuss with JA the various options for representation.

The grounds also set out that JA contended that:

- there is a link between the domestic duty to make reasonable adjustments and Article 13 of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)
- principles of international and European law are relevant in determining this duty
- the Equal Treatment Bench Book (ETBB) is material in determining this duty.

The Equality and Human Rights Commission (EHRC), the mental health charity Mind and the Lord Chancellor intervened in the appeal.

Very shortly before the hearing of the appeal the CA shared with the parties a copy of the judgment in *J v K* which it was due to hand down the week after the hearing of JA's appeal.

The CA therefore confined its attention to the facts of the instant appeal. It observed:

- in the generality of cases it is appropriate for a tribunal to leave it to professional representatives of vulnerable parties to take the lead in suggesting measures to prevent them from suffering any disadvantage
- it is not necessary in every case involving a vulnerable party for there to be a ground rules hearing, or for a check-list to be gone through
- what fairness requires depends on the circumstances of the particular case.

Comment

The *J v K* judgment seems to be clear that it is giving broad guidance for EAT registrars and judges when considering applications to extend time for appealing to the EAT. It is disappointing, therefore, that the CA in *Anderson* used *J v K* as a reason for not considering the broader submission of the parties.

It is of particular disappointment to the author, as instructing lawyer for the charity Mind, that the CA did not consider Mind's observations about how court and tribunal forms do not properly enable litigants or their witnesses to flag up their disadvantage. Box 12 on the ET1 form simply asks whether the claimant has a disability. In a recent employment survey conducted by Mind around half of people surveyed did not even know that a mental impairment could amount to a disability, and in follow-up questions many respondents with mental health problems, for a variety of reasons, did not identify with the label 'disabled'. The Ministry of Justice has indicated that some sort of a review is to be carried out on court forms, but has not been able to elaborate further on this.

The CA in *Anderson* also had little time for the suggestion that tribunals should be more proactive in taking the lead to suggest measures to prevent vulnerable parties from suffering disadvantage, saying this is a matter best left to the professional representatives. This is a fair point if the party is actually represented but does nothing for the vast numbers of vulnerable litigants-in-person coming before courts and tribunals.

That said, there are a couple of useful points arising from these two cases.

- *J v K* makes clear that when asking the court to grant indulgence to a vulnerable party this is best done with expert evidence tailored to the specific situation where the party was at a disadvantage (e.g. in complying with a time limit)
- *Anderson* makes clear that what fairness requires depends on the particular circumstances of each case and that ground rules hearings are very unlikely to be the norm
- both cases make clear that the duty to accommodate the needs of vulnerable parties does not simply arise from the EA, and therefore a party will not be required to demonstrate that they are disabled in order for the court or tribunal to address their disadvantage.

The final point for practitioners to bear in mind is that as the professional representative you have a responsibility to take steps to identify how vulnerable parties (including witnesses) are disadvantaged in litigation and to suggest to the court how they can be addressed. We would urge practitioners who are not yet familiar with the ETBB to look here for help in this difficult yet vitally important task.

Stephen Heath
Lawyer, Mind

Indissociability and comparators in direct disability discrimination claims and assessing reasonable adjustments

Robert Owen v (1) Amec Foster Wheeler Energy Limited and (2) James Shaughnessy [2019] EWCA Civ 822; May 14, 2019

Introduction

The appeal concerned the ET and EAT's findings that the appellant Robert Owen (RO) was not subjected to disability discrimination.

Dismissing his appeal on all his claims, the CA gave guidance on comparators in claims of direct disability discrimination, the application of indissociability arguments and correct assessment of whether adjustments are reasonable.

Facts

Amec Foster Wheeler Energy Limited (AF) employed RO as a chemical engineer in the UK. James Shaughnessy (JS) was AF's Operations Director. RO is a disabled person with multiple conditions including double below knee amputations, type 2 diabetes, hypertension, kidney disease, and ischaemic heart disease. He was one of a number of employees that a client of AF selected to work on a project in Dubai.

Before moving to Dubai, RO completed a medical questionnaire disclosing some of his medical conditions; Dr Sawyer, who was appointed by Occupational Health (OH), conducted a medical assessment. Dr Sawyer assessed RO to be *'temporarily unfit for onshore location duties – pending discussion with company's OH's physician'*. AF corresponded with JS and OH about the risks of sending RO to Dubai.

JS made a decision not to allow RO to be sent to Dubai. He informed RO of this decision on November 17, 2015.

On March 13, 2016 RO lodged claims against AF and JS for direct and indirect disability discrimination and failure to make reasonable adjustments.

Employment Tribunal and Employment Appeal Tribunal

Both the ET and EAT dismissed all claims/appeals respectively brought by RO. The reasoning of both tribunals is summarised in the CA judgment. The CA considered the key issues on appeal.

Court of Appeal

RO appealed all three heads of claim. His appeal on the indirect discrimination claim was dismissed on the grounds that he had not properly read the ET's decision regarding indirect discrimination, the relevant evidence was considered and the CA agreed with the ET's reasoning.

Direct discrimination

RO advanced two arguments in respect of direct discrimination.

Firstly, that the ET incorrectly focused on AF and JS's motives for refusing to send RO on the project, as opposed to the reason itself which was the conclusion of the medical assessment. RO claimed that the results of the medical assessment were 'indissociable' from his disability and so both the respondents were guilty of direct discrimination by treating him differently because of the results.

Secondly, RO argued that the ET's construction of the hypothetical comparator as being at 'high risk' if sent to Dubai was incorrect. ET constructed a hypothetical comparator of an employee without a disability who had been medically assessed as being of the same high risk if sent on the project as RO was; it found no evidence that such a comparator would be treated differently.

RO argued that an individual cannot be 'high risk' without having a disability. Therefore being 'high risk' is indissociable from being disabled, and it was incorrect to give the comparator the relevant protected characteristic of the claimant.

The CA dismissed this appeal stating that it would have been incorrect to not ascribe the 'high risk' element to the comparator. It held a comparator who was not in 'high risk' when going abroad would have been in materially different circumstances than RO and therefore would not be an appropriate comparator. The CA confirmed that a comparator, whilst not sharing the relevant protected characteristics, must be in materially the same circumstances as the claimant including having their abilities.

However the CA acknowledged RO's argument that the quality of being at 'high risk' was indissociable from being disabled. RO further submitted that there could realistically be no suitable comparator because of this. CA reasoned that this indicated that this was not therefore a claim of direct discrimination. The CA suggested that a claim for discrimination arising from disability would have been more appropriate, as there is no requirement for a comparator.

The CA then considered the issue of indissociability. The CA cited *Essop v Home Office* [2017] UKSC 27; Briefing 830 for an explanation of indissociable facts. In *Essop* it was held that if a criterion exactly corresponds with a protected characteristic so as to be a proxy for it, the protected characteristic is the real reason for the treatment and therefore direct discrimination would be the correct claim to bring. The CA stated that *'the concept of indissociability… cannot be readily translated to the context of disability discrimination'*. The CA made a distinction between claims based on race and sex and claims based on disability, stating that in the latter a person's health may be relevant to their ability to do their job. Therefore, disability is not as simple or as *'binary'* as sex or race.

Reasonable adjustments

RO argued that requiring him to pass a medical examination to a certain level before being sent on the assignment was the provision, criterion or practice (PCP) which put him at a disadvantage. His reasonable adjustment appeal was based on grounds that the ET, in its reasoning, had shifted from the identified PCP to an unstated different one.

The CA dismissed this finding that the ET had not addressed an unstated PCP. The CA upheld the ET's decision that no reasonable adjustment could be made to avoid the disadvantage caused to the claimant by the PCP; the medical assessment was necessary because of RO's medical conditions. Further, the assessment and the procedure followed by the respondents were fair and reasonable.

The CA gave some further commentary regarding the nature of reasonable adjustments. Citing *Royal Bank of Scotland v Ashton* [2011] ICR 632, the CA noted that the duty to make reasonable adjustments is about outcome and not about process. The question of whether an adjustment is reasonable is an objective one; therefore it is incorrect to focus on decision-making processes of the employer or whether a good reason is given for not making an adjustment. Rather, the focus should be on the result of the measures. On this basis, the CA dismissed a submission by RO that there should have been consultation with him, as this related to process not outcome.

Comment

The CA provided some useful commentary on the correct construction of comparators in direct disability discrimination claims. Namely, that it is correct to ascribe to hypothetical comparators the quality of health risk, even if this is a risk resulting from disability. Where it is difficult to construct an appropriate comparator, claimants should consider bringing alternative claims for discrimination arising from disability. However the disadvantage of such claims is that the respondent can seek to justify its conduct.

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The way forward for the PSED?

Forward v Aldwyck Housing Group Limited [2019] EWCA Civ 1334; July 29, 2019

This case note discusses *Forward v Aldwyck Housing Group Limited* and the legal implications of breaching the s149 Equality Act 2010 (EA) public sector equality duty (PSED).

Implications for practitioners

The CA decision has made it clear that a breach of the PSED will not necessarily result in the grant of relief. The implications for practitioners are therefore obvious. A breach of the PSED may not result in the grant of any remedy to the person affected.

In summary, it was held that, if on the facts of the particular case, it is highly likely that the relevant decision would not have been substantially different if the breach of the PSED had not occurred then, subject to any other relevant considerations, there will be no need to quash the decision, per Longmore LJ at para 25.

The case concerned a possession claim in respect of social housing where the tenant had behaved in an anti-social manner. The CA left open the possibility that the same approach may not be taken in other areas, such as major governmental decisions affecting numerous people.

Facts

In 2013 Aldwyck Housing Group Limited (AHG) granted Mr Forward (F) an assured tenancy of a flat in Watford (the property). In early 2017 anti-social behaviour became a problem. The main issue was drug use and dealing, but there were also complaints of fighting and noise.

On April 7, 2017 AHG served on F a notice seeking possession of the property which relied upon grounds 12 and 14 in Schedule 2 to the Housing Act 1988. These grounds relate to breach of tenancy and anti-social behaviour and, if proved, give the court the power to order possession if it is reasonable to do so.

On May 23, 2017 the police executed a warrant at the property and found evidence of Class A drugs and drugs paraphernalia. Subsequently the police obtained a Closure Order in respect of the property, which was later extended for a further three months. F has not lived at the property since the Closure Order was made. Even after it expired, he did not return, because he gave an undertaking to the court not to do so.

County Court

AHG issued the claim for possession on July 19, 2017. The trial took place in January 2018. Prior to the trial on September 21, 2017, AHG's witness Ms Savage, conducted an assessment of the case in order to attempt to show compliance with the PSED. However, at the trial, she admitted that it was inadequate for several reasons. She was aware of F's disability but had not obtained any medical evidence; she had not approached the assessment with an open mind because she had not considered alternatives to the possession proceedings, and had preferred the neighbours' evidence to that of the police which was that F was vulnerable and being exploited by drug dealers.

In light of this evidence, it was common ground between the parties that AHG had breached the PSED. AHG argued successfully that it did not matter because the case was so serious. The county court judge agreed and, on March 12, 2018, made a possession order. The judge found that F had a physical, but not a mental, disability.

High Court

F's appeal was heard by Cheema Grubb J who rejected an application by AHG to adduce new evidence to show subsequent compliance with the PSED. She did not allow F to adduce evidence of mental disability either.

Grubb J decided that the county court judge was wrong not to have permitted the defence based on the PSED, and wrong to have decided whether relief should have been granted for breach of the PSED by reference to the concept of proportionality. She held that compliance with the PSED involved more than a proportionality assessment. However, she found that those errors were immaterial because the court could be satisfied that AHG could and would legitimately make the same decision, if now required to do a proper PSED assessment. She therefore dismissed the appeal.

Court of Appeal

F appealed, arguing that a breach of the PSED should give rise to the grant of a remedy. He identified two categories of cases where relief had been denied for a breach of the PSED. The first group of cases was where there was a breach of the PSED, but later compliance. The second was where there was a promise of later compliance.

AHG wanted to withdraw the concession that there had been a breach of the PSED, and argued that the court had a discretion as to whether to grant relief, and that discretion was not confined to the two categories of cases.

Longmore LJ gave the leading judgment, with which Bean LJ and Moylan LJ agreed. The CA did not permit AHG to withdraw its concession that it had breached the PSED. Accordingly, it dealt head on with the question of whether a breach of the PSED should give rise to the grant of relief.

The CA rejected the submission that, as a general rule, a breach of the PSED should necessarily result in relief, para 21.

It was said that it may well be right that major governmental decisions affecting numerous people may be liable to be quashed if the government has not complied with the PSED, para 22. But the situation was different where a decision is made affecting an individual tenant of a social or local authority landlord.

The notion that the court should act as some sort of mentor or nanny to decision-makers was resisted. The CA accepted that the case law did show that relief had only been refused where there was subsequent compliance with the PSED or a convincing undertaking that the duty would be complied with in the future, thus compensating for the earlier breach, para 26. However, it was held that the cases were not authority for the proposition that, as a matter of law, it is only in those categories that there is a discretion to refuse relief, para 31.

It was held that there was only one answer to the claim for possession, and that was for the court to grant possession, para 32.

There was another ground of appeal which concerned whether the High Court judge had wrongly taken account of the fact that F had no mental disability when reaching her decision. The fact was that F's lack of mental disability was irrelevant because he had a physical disability and that was all that was necessary to engage the PSED. The CA rejected this ground on the basis that it did not impact on Grubb J's decision.

Conclusion

This decision severely undermines the PSED. It demonstrates a lack of concern by the CA with respect to breaches of an important part of anti-discrimination legislation. The CA's statement that it did not want to mentor or nanny the PSED is a retrograde step. The courts exist precisely to ensure compliance with primary legislation. It may be that the decision can be confined to social housing, but it is difficult to see why social housing tenants are less worthy of protection from breaches of the PSED than other persons. The EA is supposed to protect all victims of discrimination, not only some. The case is already being used by social landlords to justify breaches of the PSED. They no longer feel the need to even attempt later compliance, or promise later compliance.

F has applied for funding to appeal to the SC. Permission to appeal was refused by the CA. In the meantime, AHG applied for a warrant for possession, which F applied to suspend or set aside. F's application has recently been adjourned to a longer hearing.

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The author acted for Mr Forward in the High Court and the CA, and continues to act for him in his attempt to appeal to the SC.

Principles of open justice and a vulnerable disabled litigant's request for anonymity

L v Q Ltd [2019] EWCA Civ 1417; August 7, 2019

It was not open to an employment tribunal to decide that its judgment should not be included on the online register of decisions.

Employment Tribunal

L brought a number of claims relating to disability to the ET. Shortly before the hearing he asked the tribunal to make a number of adjustments to accommodate his disability. These included adjustments relating to the conduct of the hearing; that the hearing be heard in private; that the parties (and other individuals) be anonymised and that the judgment not be placed on the online register of ET judgments.

A key element of L's argument was that, without these adjustments, he might not feel able to continue with the litigation. The applications for adjustments were granted and, in due course, L succeeded in some, but not all, of his claims.

Employment Appeal Tribunal

Q Ltd appealed, challenging the substantive judgment against them, but also the orders for anonymity and that the judgment not be placed on the register.

The EAT upheld (with some modification) the anonymity orders, but decided that the judgment should be placed on the register.

Court of Appeal

L appealed. Since the nature of the issues required a prompt decision, the appeal was dealt with as a rolled up permission/appeal hearing.

The CA reviewed the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the ET rules) and the relevant case law. The court noted the importance of open justice and the absence of any explicit power in the ET Rules to prohibit publication of a judgment.

Lord Justice Bean, giving judgment for the CA, was particularly unconvinced of the argument that non-publication of a judgment might be necessary in order to allow a claimant to bring a claim. This was described as '*the thin edge of an enormous wedge, not confined to cases in employment tribunals nor to claims for disability discrimination*'.

Open justice, the court found, must prevail, and it was hard to imagine circumstances in which it would be proper to withhold a judgment from the register.

Comment

In many ways this case highlights the difficult tensions between the principles of open justice and the needs of vulnerable litigants. Here the CA is plainly on the side of open justice. And the statements of principle Bean LJ recites are compelling when applied to the justice system as a whole.

But it is also all too easy to imagine a vulnerable and disabled litigant who feels they cannot proceed with their claim if there is any possibility of being identified. Of course, often, even usually, the use of anonymity orders and restricted reporting orders may be sufficient. Certainly, looked at coolly in an appellate court, the risk of an anonymised judgment being available online may seem remote.

It may not seem that way to someone struggling with mental health issues, such as serious anxiety. It may also not seem that way to someone where the specifics of their employment or claim mean that it is hard to conceal their identity – especially from those familiar with an employer or industry. People in those circumstances, may feel their immediate, individual, rights are being sacrificed. And they may hope that the court looks again at this important issue.

Michael Reed
Free Representation Unit

Perceived disability: looking at the future

Chief Constable of Norfolk v Coffey [2019] EWCA Civ 1061, [2019] IRLR 805, June 21, 2019

Facts

On C's application in 2011 to become a police constable in Wiltshire she was found to have some bilateral sensori-neural hearing loss and tinnitus. Wiltshire Constabulary followed the Medical Standards for Police Recruitment and the guidance in the accompanying Home Office circular. It arranged a practical functionality test. C passed and worked as a police constable on front-line duty with no adverse effect.

In 2013, C wanted to move back to Norfolk, where she had previously worked as a police constable for four years. She applied to Norfolk, disclosing her functionality report and explained no adjustments had been required. Having been successful at interview, she was sent for a medical. Her hearing loss was very similar to the 2011 test. An ear nose and throat specialist later confirmed her hearing loss was stable: his report was sent to Norfolk. Both audiograms were just outside the range for recruitment. The medical adviser recommended an 'at-work test'.

Norfolk Constabulary refused her application. Acting Chief Inspector Hooper did not read the standard as a whole, nor the accompanying guidance but said simply C's hearing was '*below the acceptable and recognised standard for recruitment*'. She said she did not consider it appropriate to '*recruit a non-disabled officer who would, by virtue of the medical standards, be a restricted officer*'.

Employment Tribunal

By the time of the ET hearing, C accepted her condition did not amount to a disability. Instead, she put her case as direct disability discrimination on the basis that ACI Hooper perceived her as disabled.

The ET upheld C's claim of direct perceived disability discrimination. It held that the decision-maker perceived C to have a disability which could not be accommodated by reasonable adjustments and that that amounted to less favourable treatment because of perceived disability. ACI Hooper believed that C's hearing loss might in due course become a disability, if it had not already done so.

Employment Appeal Tribunal

The EAT dismissed the chief constable's appeal. S13 of the Equality Act 2010 (EA) did not require that a claimant has the protected characteristic, only that the respondent had treated him or her less favourably because of the characteristic. The EAT held that the test was whether the respondent perceived the claimant to have an impairment with a long-term adverse effect on her ability to carry out '*normal day-to-day activities*', including activities relevant to participation in professional life. It also held that a perception that an impairment which did not currently have an adverse impact but might well do so in the future also came within s13(1).

Additionally, the EAT held that, although the ET had not considered Sch 1 para 8 of the EA, the effect in law of its findings was that ACI Hooper believed C had a progressive condition coming within Sch1 para 8. So, by para 8(2), C would be treated as already having an impairment with a substantial adverse effect. C did not have to show she *in fact* had a progressive condition, it was enough that ACI Hooper believed she did. [Para 58]

Court of Appeal

Norfolk Constabulary appealed and lost again: refusing employment because of a perception of a risk of future inability to work as a front-line police officer comes within the protection of the EA.

Neither party challenged the view that in a claim of perceived discrimination, the putative discriminator had to believe that all the elements of the statutory definition of disability were present – even if they did not attach the label 'disability' to those elements. The CA agreed: *'What is perceived must, as a simple matter of logic, have all the features of the protected characteristic as defined in the statute.'* [Para 35]

The CA discussed the distinction between s13 direct discrimination and s15 discrimination arising. It concluded that direct discrimination does not cover cases which are really about '*the application of a performance standard to a disabled person who lacks a relevant ability. But that provision does not protect an employer who wrongly perceives a person to lack an ability*

which that person actually has.'

This also affects the construction of the hypothetical comparator. The CA agreed with the EAT that the comparator would be someone with the same abilities as the claimant but who was not perceived to be disabled. In this case it would be a person whose condition was not perceived as likely to get worse so that they would be put on restricted duties. The ET was 'fully' entitled to conclude that such a person would not have been treated as C was. [Paras 66 and 77]

Comment

This is a useful decision. In particular, it is suggested that the approach taken in *Coffey* to distinguishing between s13 and s15 and to constructing the hypothetical comparator is to be preferred to that taken by the CA in *Owen v Amec Foster Wheeler Energy Ltd* [2019] EWCA Civ 822, May 14, 2019; Briefing 914. *Owen*, like C, was able to do his job. The reason for his adverse treatment was the risk of a medical emergency if he was sent abroad, not his abilities.

Implications for practitioners

- Perception discrimination covers all forms of discrimination. [Para 59]. So a mistaken but genuine belief that someone has cancer, HIV infection or multiple sclerosis should be enough to satisfy Sch 1, para 6.
- S15, discrimination arising from disability covers cases where the reason for adverse treatment is a respondent's belief about the actual things a claimant cannot do.
- S15 also covers cases where the reason for the treatment is a performance standard which a claimant cannot meet.
- S13, direct discrimination, in contrast covers cases where a respondent wrongly perceives a claimant as lacking an ability they in fact possess.
- S13 also covers cases where there is an 'additional element', where a misperception flows from a stereotypical assumption about the effect of disability.
- Keep things simple to avoid getting tangled up in what you have to prove to establish perceived disability discrimination. You just have to show a belief in the broad elements of the test. If what the putative discriminator believes satisfies those core elements, it should make no difference, for example, that the adverse effects are more extensive or varied.

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Cloisters Chambers

Reasonable adjustments in relation to immigration detention of mentally ill detainees

R (ASK) & R (MDA) v Secretary of State for the Home Department and Ors [2019] EWCA Civ 1239; July 19, 2019

Facts

This case concerned challenges brought by two individuals, MDA and ASK, to the legality of their detention under Schedule 3 of the Immigration Act 1971 (the 1971 Act).

Both appeals involved the exercise of the Secretary of State for the Home Department's (SSHD) power to detain individuals under the 1971 Act. When exercising powers under the Act, the SSHD must comply with a number of statutory criteria, and with obligations under the Mental Health Act 1983 (MHA 1983), which empowers public authorities to admit to hospital individuals with mental health conditions.

MDA is a Somalian national who arrived in the UK on September 15, 2008. MDA was first admitted to hospital under the MHA 1983 in October 2008, was repeatedly discharged from and readmitted to hospital between 2008 and 2017 and was diagnosed in 2013 with dissocial personality disorder and mental and behavioural disorders due to the use of illicit substances.

ASK is a Pakistani national who arrived in the UK in 2010. ASK was first admitted to hospital under the MHA 1983 in 2012, and expert psychiatrists recorded at the time that ASK's condition was not a psychotic condition but rather a personality disorder exacerbated

by cannabis and drug use. ASK was also repeatedly discharged and readmitted to hospital between 2012 and 2016.

MDA and ASK were both held in immigration detention under the 1971 Act intermittently following their arrival and prior to the commencement of proceedings. They contended that, given their respective mental illnesses, the SSHD acted unlawfully in detaining them for these intermittent periods under the 1971 Act, instead of hospitalising them under the MHA 1983.

High Court

Neil Cameron QC sitting as Deputy High Court Judge (the Deputy Judge) found the whole period of MDA's detention unlawful because of the SSHD's failure to enquire into MDA's mental capacity, which was held to be a breach of the common law duty of fairness.

Green J refused ASK's claim that his detention had been unlawful on all grounds.

Court of Appeal

On appeal, MDA submitted that the Deputy Judge had erred in not determining in his favour that:

1. there had been a breach of Article 3 of the European Convention on Human Rights (ECHR)
2. there had been a breach of ss 20 and 29 of the Equality Act 2010 (EA), and
3. in refusing to rule on whether damages ought to be substantive or nominal.

ASK appealed Green J's decision submitting that he had erred in a number of ways:

1. his detention had been unlawful because the SSHD had failed to consider and properly apply its own policies
2. the SSHD had breached its common law duties under *R v Governor of Durham Prison ex parte Hardial Singh* [1984] 1 WLR 704 and had continued to detain ASK after accepting that he should be transferred out of an immigration removal centre into hospital

ASK further submitted that there had been a breach of Article 3 ECHR, a breach of s149 EA's public sector equality duty and a failure to make reasonable adjustments under ss 20 and 29 EA.

The CA refused all challenges brought by ASK and MDA **except** the EA challenge brought on the basis of *VC v Secretary of State for the Home Department* (*VC*) [2018] EWCA Civ 57; [2018] 1 WLR 4781. [Paras 134, 243]

Implications for practitioners

ASK confirms *VC*, which gives strong grounding to s20 and s29 EA arguments.

In *VC* the court held that the fact that mentally ill detainees were given no assistance in understanding the reasons for, or making representations in respect of, decisions to detain or segregate them was a '*provision, criterion or practice*' which put them at a substantial disadvantage compared to detainees who were not mentally ill. [Paras 148 – 153]

The court took into account that, in immigration detention, a bail application has to be initiated by the detainee to obtain an independent review of their detention; so detainees who lacked the ability because of their mental illness to initiate such a process were at a substantial disadvantage.

The SSHD was under a duty to make reasonable adjustments such as '*the implementation of a system … in which an advocate would assist mentally ill detainees in making representations in respect of decisions*' concerning their detention. [*VC* para 154,156]

The CA concluded that the SSHD had not discharged her burden of proof under s136 EA to demonstrate compliance with '*her duty to make reasonable adjustments for mentally ill detainees in respect of their ability to make representations on decisions regarding their continued detention and segregation*'. [*VC* para 171]

Besides confirming *VC*, *ASK* underlined the centrality of expert evidence. In *ASK*, internal detention reviews and expert assessments of the detainees while in detention were contradicted by externally sourced expert reports. Throughout the judgment, the CA emphasised that the SSHD is '*generally entitled to rely on opinion of clinicians or to rely upon any one of the opinions* ***insofar as it appears sincerely and reasonably held***'. [Para 219, emphasis added]

It is thus insufficient to source expert evidence contradicting internal reviews and assessments. Rather, the focus must be on challenging the reliability and reasonableness of the latter.

Expert evidence is fundamental in determining whether mental illness can be 'satisfactorily managed' in detention. In *ASK*, the CA rejected submissions seeking to stringently interpret the phrase 'satisfactorily managed'; the term 'satisfactory' was a '*word of extreme and appropriate elasticity*', it said.

Comment

Despite the CA's welcome confirmation of *VC*, its decision on both appellants' Article 3 ECHR (prohibition of torture) complaints is concerning. The court held that the threshold of severity of suffering

required to engage Article 3 was not met. There was no evidence that either man had suffered during periods of segregation and although both had been the subject of rule 41 force or restraint, there was no evidence to suggest that they had suffered any injuries or psychological harm or distress as a result which reached the Article 3 level.

These conclusions appear contrary to the European Court of Human Rights (ECtHR)'s jurisprudence on the applicability of Article 3 in the context of immigration detainees who suffer from mental illness. In *Sławomir Musiał v Poland*, January 20, 2009, the ECtHR held that:

> ***In particular, the assessment of whether the particular conditions of detention are incompatible with the standards of Article 3 has, in the case of mentally ill persons, to take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment*** *... The Court accepts that* ***the very nature of the applicant's psychological condition made him more vulnerable than the average detainee and that his detention in the conditions described above … may have exacerbated to a certain extent his feelings of distress, anguish and fear.*** *In this connection, the Court considers that the failure of the authorities to hold the applicant during most of his detention in a suitable psychiatric hospital or a detention facility with a specialised psychiatric ward has unnecessarily exposed him to a risk to his health and* ***must have*** *resulted in stress and anxiety.* [Paras 87-88, 96, emphasis added]

The ECtHR's jurisprudence suggests that the assessment of severity in cases of detainees suffering from mental illness differs from other Article 3 cases. Suffering is inferred from the gravity of the mental illness concerned, and the assessment turns primarily on the conditions of detention.

As in *Sławomir Musiał*, also in *Dybeku v Albania* December 18, 2007 and *Romanov v Russia* October 20, 2005, the ECtHR places *no* or little importance on whether suffering reached the threshold of severity required to engage Article 3, focusing instead on the conditions of detention and adequacy of treatment.

The rationale for this approach is clear and as formulated in *Sławomir Musiał*: detainees who suffer from mental illness are more vulnerable to further suffering *and* often unable to communicate such suffering. For these reasons, the emphasis in mental illness cases shifts *away from severity of suffering* (which is, in appropriate cases, assumed) to the conditions of detention and adequacy of treatment.

The CA's approach in *ASK & MDA* appears to contradict the ECtHR's treatment of Article 3 in cases where detainees suffer from mental illness.

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Guidance on whether a measure can be said to 'correct' a visual impairment for the purposes of establishing whether someone is a disabled person

Mart v Assessment Services Inc UKEATS/0032/18/SS; May 16, 2019

Facts

M (M) brought a claim for indirect discrimination on the grounds of disability against her employer Assessment Services (AS). She pleaded the disability of diplopia (double vision).

Employment Tribunal

M claimed that the contact lens prescribed to correct her diplopia had other side effects. She told the tribunal that the contact lens restricted her peripheral vision and that it was disfiguring, in that it was cosmetically unattractive – it visibly blacked out the eye when she wore the lens. She argued that as a result the lens had not corrected her diplopia.

At the preliminary hearings, there had been some discussion about whether M's other disabilities were part of her case and whether she was seeking to rely on any other impairment aside from diplopia. These disabilities were anxiety, depression and facial difference. She did not seek to rely on any of the other conditions from which she suffered and her ability to rely on these conditions was therefore excluded in

the preliminary discussions. AS prepared for the final hearing on that basis.

Under the Equality Act 2010 visual impairments which are correctable by glasses or contact lenses, or in such other ways as may be prescribed, will not be deemed to be a disability for the purposes of the act.

The ET held that, because M's double vision could be corrected with contact lenses, it would not amount to a disability.

Employment Appeal Tribunal

M appealed on the grounds that the ET judge had taken an excessively narrow view of her case. The EAT upheld the ET's decision and refused the appeal.

The EAT held that the ET had not been required to consider whether the cosmetic issue of disfigurement or M's consequential anxiety and depression were disabilities, because she had not pleaded them as disabilities. As a result, the only question that the tribunal was obliged to consider was whether or not diplopia was a disability.

If M had wanted to broaden her claim to plead these conditions as disabilities, she would have been required to amend her claim and disclose supporting evidence at the preliminary hearings stage.

The EAT found that whether an impairment should be considered to be correctable is a practical issue that should be decided on the facts of a case. The judge noted that unacceptable adverse consequences of the measures to correct the impairment should be taken into account when considering whether the impairment was resolved by the use of the measures (in this case, the contact lens).

However, in this case, there was no dispute that the lens corrected the diplopia and there was no evidence to suggest that the side effects made the solution unacceptable or unworkable. Therefore, the diplopia was correctable and so was not a disability, even though the correction came at a cost to M.

Conclusion

It is important for practitioners acting for claimants in a disability discrimination claim to decide at the commencement of a claim what conditions the claimant is relying on to argue that they are a disabled person and to plead them accordingly. Unless a condition has been expressly pleaded as a disability during the claim, a tribunal is unlikely to allow the claimant to rely on that condition at a hearing.

Practitioners should note the EAT's comment that these cases will turn on their own facts. The EAT decided that a tribunal should consider the existence and seriousness of any negative consequences of any measures to correct an impairment when considering whether the impairment has been corrected.

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Briefing 920

Victimisation claim falls outside the scope of s108 EA protection

Aston v The Martlett Group Ltd (formerly Jim Walker and Company Limited T/A I-Ride, UKEAT0274/18/BA; May 21, 2019

Implications

In this case, the EAT considered the correct legal test required for victimisation claims under s108(1)(a) of the Equality Act 2010 (EA) and whether the issue of estoppel could prevent a re-opening of a finding of fact by the ET in the claim under s15 EA.

S108 addresses relationships which have ended and states that:

S108 (1) A person (A) must not discriminate against another (B) if:
(a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and
(b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act.

The EAT decision is a reminder to practitioners of the two limbs of s108(1)(a) which have to be satisfied before establishing a victimisation claim against a former employer. The conduct must be something that *'arises out of'* and is *'closely connected with'* the past relationship. These words are deliberate and more is required to explain the close connection.

The doctrine of estoppel can apply to previous decisions made in the same litigation. However, there was no abuse of process under the doctrine when the

claim under s15 was remitted to a fresh tribunal to re-open the issues. The tribunal on the merits had erred in law by relying on a finding of fact which had not been a necessary ingredient. The preliminary hearing was to decide on whether the claim was submitted in time and not the merits of the claim under s15 EA.

Facts

Mr C Aston (CA) commenced employment with the Martlett Group Ltd (MG) in 2005. He was an operations manager from June 2011; he became absent from work due to depression in June 2015.

MG arranged a home visit with CA in September 2015, and meetings in February 2016 and April 2016 to discuss his health and return to work. CA was not able to return to his role as operations manager due to his disability. MG offered CA an alternative role but this was refused.

MG sent CA an email on May 10, 2016 advising that the company was not able to offer another role but was willing to pay him £4,000 as a gesture of goodwill. CA responded to this email as he was unsure whether he was being fired or made redundant.

Subsequent email exchanges between MG and CA on May 16th and 17th were significant. MG explained that CA was not able to return to his substantive post, and as he did not accept the alternative role, this meant, with regret, that it seemed that their working relationship had come to an end. CA responded to this email on May 17, 2016 requesting his P45 and accepting the offer of £4,000 as a goodwill gesture. This sum was not paid to him.

On December 6, 2016, CA sent a grievance to MG who did not take action as he was no longer an employee. CA wrote to MG on January 7, 2017 arguing that he was resigning with effect from that day due to MG's refusal to deal with his grievance.

Employment Tribunal

CA brought claims for unfair dismissal and discrimination claims for failure to make reasonable adjustments and discrimination arising from disability. The time point was taken. CA argued that his employment ended on January 7, 2017 but MG contended that the effective date of termination was May 17, 2016. The ET heard evidence from MG and CA. During the course of giving evidence, MG maintained that the purpose of the £4,000 was a goodwill gesture to CA and it was willing to pay this sum. The ET allowed the parties an adjournment to reach a settlement but this was not possible. CA subsequently brought a claim for victimisation on the basis that MG had failed to pay £4,000 which was offered at the preliminary hearing (PH).

The PH tribunal found that CA's claim for unfair dismissal was out of time but it allowed the discrimination claims to proceed to the merits hearing. The PH tribunal found as a fact that CA did not want to return to the role as operations manager, but this finding was not an integral part of the issues necessary for the determination of the time limit point.

At the full hearing, all claims were dismissed.

Employment Appeal Tribunal

CA appealed on 5 grounds, namely that the ET:

1. did not apply the correct legal test when considering the victimisation claim (grounds 1 & 2)
3. made an error by not re-opening the PH's finding of fact that CA did not wish to return to his job as operations manager
4. failed to properly determine the defence of proportionality
5. was legally incorrect in concluding that MG's conduct towards CA was not unfavourable treatment.

The EAT held that although the ET had not applied the correct legal test, the decision to dismiss the victimisation claim should not be disturbed. The offer of £4,000 was made in the course of giving evidence and judicial proceedings immunity applied. The victimisation claim should not have been entertained but nevertheless, the conduct was outside the scope of protection of s108 EA and as envisaged in *Rhys-Harper v Relaxation Group plc* [2003] ICR 867 (HL). The 'but for' test is not sufficient for victimisation claims against ex-employers. Both the words *'arises out of'* and *'is closely connected with'* tests must be satisfied.

The EAT held that the merits tribunal was *'only bound by an issue which was necessary for the court to determine'*[1] but the findings of fact on this case were not a necessary ingredient for a decision on the extension of time at the PH and so could be re-opened.

By accepting the earlier findings, the merits tribunal did not determine whether CA would have accepted the alternative role if he knew his employment was at risk. The denial of this opportunity or choice could be unfavourable treatment but as to whether this treatment was 'because of' the claimant's sickness absence was not considered by the tribunal.

Grounds 3 - 5 were allowed and the case was remitted to a fresh tribunal of the re-hearing of the s15 claim.

1. *Bon Groundwork Limited v Foster* [2012] ICR 1027, para 4

Comment

The facts of this case were relatively straightforward but the legal issues were complicated. The EAT had to unravel the correct legal tests which had presented difficulties for the tribunal. Practitioners should be alert to the legal tests when advising on victimisation claims when the relationship has ended. The alleged conduct in these circumstances has to meet the 'but for' and the statutory test. The concept that the discrimination *'arises out of'* and *'is closely connected'* to the relationship will be given its strict interpretation. The second limb of the s108 test is fundamental to these types of victimisation claims.

Practitioners should avoid letting the tribunal stray into areas which are not necessary for it to determine at the preliminary stage as it will not be an abuse of process for these findings of fact to be re-opened.

Judicial proceedings immunity is a safeguard and practitioners should not be formulating claims based on what was said in evidence by witnesses.

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Briefing 921

Right to rent scheme declared unlawful as it causes discrimination in the provision of housing

R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department; Interveners: (1) Residential Landlords Association (2) Equality and Human Rights Commission (3) Liberty [2019] EWHC 452 (Admin); March 1, 2019

Facts

When Theresa May MP was at the helm of the Home Department, the government introduced the Immigration Act 2014 (IA 2014) to create a 'hostile environment' with the aim of reducing immigration. The IA 2014 created a system in which citizen-on-citizen immigration checks became part of daily life in the areas of renting private accommodation, offering jobs, using the NHS, opening a bank account and other areas.

This judgment concerns the lawfulness of the right to rent scheme introduced by the IA 2014. The Joint Council for the Welfare of Immigrants (JCWI) brought a judicial review against the Secretary of State for the Home Department (SSHD) seeking a declaration that ss20 – 37 of the IA 2014 were incompatible with Articles 14 and 8 of the European Convention on Human Rights (ECHR). As the SSHD expressed an intention to roll out the 'right to rent' scheme to Scotland, Wales and Northern Ireland, JCWI further sought an order that this alleged decision be quashed.

The right to rent scheme imposes obligations on landlords to ensure that they do not provide private accommodation to disqualified persons. A person is 'disqualified' if he/she are not a relevant national, meaning a British, EEA state or Swiss citizen, and does not have the right to rent, because the person requires, but does not have, leave to enter or remain in the UK (s21 IA 2014). In addition, the scheme prohibits landlords from authorising disqualified adults to occupy premises under a residential tenancy agreement, which extends to persons not named in the tenancy agreement (s22). If a landlord, or agent of the landlord, contravened s22, this would give rise to both a civil penalty notice and a criminal offence. If convicted, the sentence would be up to five year's imprisonment and/or an unlimited fine.

In February 2017 JCWI published a report on the impact of the right to rent checks based on surveys of landlords, letting agents and organisations working with or for affected groups. It also included a 'mystery shopper exercise', which involved six different 'mystery shopper' housing applicants who were as similar to each other as possible save for certain key characteristics relating to citizenship, ethnic/national origin, migration status and the types of documentation they needed to produce. The research supported the conclusion that the scheme had the effect of causing discrimination on the grounds of nationality and race.

High Court

Mr Justice Spencer decided that the scheme did come within the scope of Article 8 ECHR, the qualified right to respect for private and family life, home and correspondence and for the purposes of the right not to be discriminated against under Article 14 EHCR.

As the evidence on the right to rent scheme showed that people who were discriminated against would find it harder to get housing, the judge inferred that there would be some individuals who have been unable to find accommodation at all or for such a long period that their family life has been interfered with. [Para 60]

Spencer J stated:

> *Although Article 8 does not give anyone the right to a home, in my judgment it gives everyone the right* ***to seek*** *to obtain a home for themselves and their family even if they are eventually unsuccessful, and the playing field should be even for everyone in the market for housing, irrespective of their race and nationality.* [Para 68]

He held that where the state interferes with the process of seeking housing, which engages or comes within the scope of Article 8, it must do so without causing discrimination.

The judge considered causation. The evidence of discrimination included:

- A survey of 6,584 private landlords conducted by the Ministry of Housing, Community and Local Government which found that 25% of landlords who responded would not be willing to let to non-UK passport holders.
- The Residential Landlords' Association (RLA) survey in November 2017 which found:
  - 42% of landlords reported that they were now less likely to consider letting to someone without a British passport
  - 49% of landlords reported that they were now less likely to consider letting to someone who had permission to stay in the UK for a limited time period, and
  - 6% had refused a tenancy application as a result of the right to rent checks

The judge also considered the evidence of the homelessness charity Crisis, a survey by Shelter, a second RLA report dated December 2018, JCWI's *Passport please: the impact of the right to rent checks on migrant and ethnic minorities in England* report of February 2017, and the mystery shopping exercises. The judge concluded the evidence strongly showed that landlords were discriminating against potential tenants on the grounds of nationality and ethnicity and that they are doing so because of the scheme.

The SSHD argued that the government could not be held responsible for any discrimination occurring in association with the scheme, because any such discrimination is due to landlords acting independently and inconsistently with the law. The statutory codes instruct landlords on how to avoid race discrimination. Spencer J was of the view that the scheme did not merely provide an opportunity for private landlords to discriminate but it *caused* them to discriminate when otherwise they would not. [Para 105]

Spencer J considered whether the interference with the Articles 8 and 14 rights was justified. It was accepted by both parties that the state was entitled to a large margin of appreciation, in part because the scheme is from primary legislation, that it had the support of parliament and the control of immigration is a political issue.

The factors in favour of justifying the scheme were counter-balanced by the abhorrence of racial discrimination, in the judge's view. In particular, discrimination did not feature as part of the necessary 'cost' to achieve the aim of the scheme. Instead, the government was anxious to avoid discrimination when introducing the scheme. The judge found parliament's policy is manifestly without reasonable foundation on the basis that there was no balance of competing interests, i.e. between discrimination and immigration control, to be performed. In the alternative, if that conclusion was wrong, the judge concluded that the policy has been outweighed by its potential for race discrimination.

> *… the measures have a disproportionately discriminatory effect and I would assume and hope that those legislators who voted in favour of the Scheme would be aghast to learn of its discriminatory effect as shown by the evidence…* [Para 123]

Further, the evidence demonstrated that the scheme has had little or no effect in playing its part in controlling immigration and the SSHD had not put a reliable system in place for evaluating its efficacy.

In conclusion, Spencer J made:

1. an order declaring pursuant to s4 Human Rights Act 1998 that ss 20-37 of the IA 2014 are incompatible with Article 14 ECHR in conjunction with Article 8 EHCR, and
2. an order declaring that a decision by SSHD to commence the scheme in Scotland, Wales or Northern Ireland without further evaluation of its efficacy and discriminatory impact would be irrational and would constitute a breach of s149 Equality Act 2010 (EA).

Comment

This case is a landmark blow to the hostile environment policy of the IA 2014 and further progressed in the IA 2016. The Discrimination Law Association participated with others in the consultation on the second code of practice (see *Briefings* Volume 55, July 2015, p35), warning that the right to rent scheme would likely cause discrimination on the basis of ethnicity and nationality. Unfortunately, those risks became a hostile reality for immigrants and BAME renters. In its evidence, Crisis shared the story of one of their clients who was forced to find new accommodation after a fire. She was from the Windrush generation and new landlords would not accept her as a tenant because she did not have a British passport. [Para 94]

This case was heard by Spencer J in conjunction with another judicial review of the application of the right to rent scheme. *R (Goloshvili) v SSHD* [2019] EWHC 614 (Admin) concerned a Notice of Letting to a Disqualified Person (NLDP) (s33D IA 2014) issued to a tenant who had leave to remain pending a decision of the SSHD.

Spencer J initially decided that the claim should not be entertained because it was academic (the NLDP had been withdrawn) and there was no good reason to do so in the public interest, for example, a large number of similar cases awaiting the outcome, or outstanding claims between the parties. However, he gave a judgment on the substantive claim in any event. He held that although the right to rent scheme gave rise to direct race discrimination, because the IA 2014 expressly authorised that discrimination, the SSHD was exempted from liability under the EA.

Goloshvili is awaiting permission to appeal and permission has been granted to *R (Joint Council for the Welfare of Immigrants)*, so there are likely to be further developments on the legality of the right to rent scheme.

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Abbreviations

AC	Appeal Cases	ET1	Employment Tribunal claim form	PH	Preliminary hearing
ACAS	Advisory, Conciliation and Arbitration Service	ETBB	Equal Treatment Bench Book	PIP	Personal Independence Payment
BAME	Black Asian and Minority Ethnic	EWCA	England and Wales Court of Appeal	PCP	Provision, criterion or practice
BEIS	Department for Business, Energy and Industrial Strategy	EWHC	England and Wales High Court	PSC	President of the Supreme Court
CA	Court of Appeal	GEO	Government Equalities Office	PSED	Public sector equality duty
DHP	Discretionary Housing Payment	HHJ	His/her honour judge	QBD	Queens Bench Division
DLA	Discrimination Law Association	HL	House of Lords	QC	Queen's Counsel
DPAC	Disabled People Against Cuts	HRA	Human Rights Act 1998	RLA	Residential Landlords Association
DWP	Department for Work and Pensions	IA	Immigration Act 2014	SC	Supreme Court
EA	Equality Act 2010	ICR	Industrial Case Reports	UC	Universal Credit
EEA	European Economic Area	ILJ	Industrial Law Journal	UKEAT	United Kingdom Employment Appeal Tribunal
EAT	Employment Appeal Tribunal	IRLR	Industrial Relations Law Report	UKHL	United Kingdom House of Lords
ECHR	European Convention on Human Rights 1950	JR	Judicial Review	UKSC	United Kingdom Supreme Court
ECtHR	European Court of Human Rights	J/JSC	Judge/Justice of the Supreme Court	UNCRPD	United Nations Convention on the Rights of Persons with Disabilities
EHRC	Equality and Human Rights Commission	LASPO	Legal Aid, Sentencing and Punishment of Offenders Act 2012	WESC	Women and Equalities Committee
EHRLR	European Human Rights Law Review	LCJ/LJ	Lord Chief Justice/ Lord Justice	WLR	Weekly Law Reports
EHRR	European Human Rights Reports	LLP	Legal liability partnership		
EJ	Employment Judge	MHA	Mental Health Act 1983		
ET	Employment Tribunal	NDA	Non-disclosure agreement		
		NHS	National Health Service		
		OH	Occupational Health		

Universities challenged on tackling racism

The EHRC's report of its inquiry into racial harassment in publicly funded universities in Britain Tackling racial harassment: universities challenged has criticised universities for being oblivious to the scale of racial abuse on campus.

The inquiry found that racial harassment is a common experience for a wide range of students and staff at universities across England, Scotland and Wales.

Around a quarter of students from an ethnic minority background (24%), and 9% of White students, said they had experienced racial harassment since starting their course. This equates to 13% of all students. Twenty per cent of students had been physically attacked. Fifty six per cent of students who had been racially harassed had experienced racist name-calling, insults and jokes. Other common experiences included:

- subtle and nuanced acts, often known as microaggressions
- being ignored or excluded from conversations or group activities, and
- being exposed to racist material or displays.

In most cases students said their harasser was another student, but a large number said it was their tutor or another academic.

However, two thirds of students and less than half of all staff who responded to the survey and had experienced racial harassment said that they had not reported the incident to their university. The reasons for not reporting included a lack of confidence that the issue would be addressed, or fear of reprisals - two thirds of staff said that better protection from personal repercussions would have made it easier for them to bring a complaint.

Published on October 23, 2019, the report found that universities are over confident that individuals will report harassment, with 43% of universities believing that every incident of racial harassment against students was reported, and 56% believing that all incidents against staff were reported.

The report also warned that universities are reluctant to admit the prevalence of racial harassment on campus for fear of reputational damage or putting off potential students.

Highlighting the impact that racial harassment has on mental health, the EHRC also warns that 8% of students who had experienced racial harassment admitted to having felt suicidal.

The EHRC has made a series of recommendations to the government and higher education providers to address racial harassment, including:

- **mandatory duty on employers:** the UK government must reinstate third party harassment protections and introduce a mandatory duty on employers to increase protections for staff from harassment
- **adequate powers for regulators:** governments across Britain should ensure the sector regulator and funding councils have adequate powers and that these are used to hold universities to account on their performance to prevent and tackle harassment
- **effective complaints procedures:** higher education providers must enable students and staff to report harassment and ensure their complaints procedures are fit for purpose and offer effective redress
- **senior-level action on inclusive cultures:** senior leaders should take steps to embed an inclusive culture where staff and students feel confident and supported when making complaints.

The bedroom tax and justifying state discrimination – the story continues

The European Court of Human Rights (ECtHR) has upheld a challenge under ECHR Article 14 in conjunction with Article 1 Protocol I to the UK's housing benefit policy. In *JD & A v United Kingdom* 32949/17 34614/17, October 24, 2019, the court concluded, in a 5/2 split decision, that it was not justified discrimination to impose the bedroom tax on a woman (A) who, as a result of domestic violence, had had her home modified under the sanctuary scheme to render the attic as a 'panic room'. The SC had held in *MA & Ors, R (on the application of) v SSWP* [2016] UKSC 58; Briefing 817, that she had not suffered sex discrimination as a result of the policy.

A was affected by two state schemes; the first was the bedroom tax which aimed to incentivise social housing tenants to move into smaller accommodation, and the second was the sanctuary scheme under which A had received a three-bedroomed home and the adaptation to a safe room, to ensure her safety as a victim of domestic violence. The two schemes have contradictory aims and operation.

Given these two legitimate but conflicting aims, the ECtHR considered that the impact of treating A:

> *… in the same way as any other Housing Benefit recipient affected by the impugned measure, was disproportionate in the sense of not corresponding to the legitimate aim of the measure. The Government have not provided any weighty reasons to justify the prioritisation of the aim of the present scheme over that of enabling victims of domestic violence who benefitted from protection in Sanctuary Schemes to remain in their own homes safely. In that context, the provision of [discretionary housing payments] could not render proportionate the relationship between the means employed and the aim sought to be realised where it formed part of the scheme aimed at incentivising residents to leave their homes, as demonstrated by its identified disadvantages.*

As a result, discrimination against A was unjustified and she was awarded €10,000 in respect of non-pecuniary damage.

This is a significant decision as the ECtHR appears to have redefined the definition of the application of *'manifestly without reasonable foundation'* as the test for the justification of discrimination. That could have a major impact far beyond this specific case. The joined case of JD – on disability discrimination in respect of the needs of a tenant's disabled adult daughter given major adaptations to the property – fell at the last hurdle. A full report of the judgment will be included in the March 2020 edition of *Briefings*.

ET upholds 88-year old's discrimination complaints

An 88-year-old woman who was dismissed from her job with the NHS is believed to be the oldest person in the UK to win an age discrimination claim. In *Jolly v Royal Berkshire NHS Foundation Trust* January 29, 2019 Mrs Jolly told the ET that she felt *'humiliated and degraded'* by the way she was treated by the Royal Berkshire NHS Foundation Trust.

As a medical secretary she assisted in managing the hospital's waiting list for surgery. When an electronic patient record system was introduced in 2015, Mrs Jolly's role changed to that of patient pathway co-ordinator. She was promised training on the new system, but this never materialised. In September 2016, the director of operations summoned her to say she was being investigated for breaches of the hospital's 52-week waiting time limit as the waiting list had not been managed effectively and standard processes had not been followed. Mrs Jolly was told she was being placed on special leave and was escorted off the premises.

A trust manager carried out an investigation which included feedback from Mrs Jolly's colleagues about her age and frailty. She was then dismissed for failing in her duties to manage the waiting list.

The ET upheld her complaints of age discrimination, disability discrimination, unfair dismissal, and breach of contract.

Briefings