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Government must stop undermining rights of minorities

The coronavirus pandemic has exposed and laid bare some of the glaring inequalities which persist in the UK today. It has shone a light on how individuals or communities are particularly vulnerable to the risk of serious illness and untimely death because of health inequalities, ethnic background, gender, age, disability, poverty, domestic abuse, or a combination of these or other factors. In addition, people working in undervalued jobs, in precarious employment, on zero hours contracts or in food processing plants which often employ mainly migrant low paid workers, have been particularly at risk. The most disadvantaged in society appear to have borne the brunt of the illness.

In its early response to the Women and Equalities Committee's initial inquiry into *Unequal Impact: Coronavirus (Covid-19) and the impact on people with protected characteristics*[1], the DLA highlighted its impact on disabled people and those living in community care. Issues include the lack of potentially life-saving information in accessible formats, the mental impact on some disabled people of physical distancing, having their needs met in congregate care facilities and the failure to provide adequate personal protection equipment and Covid-19 testing for carers meeting their essential care and support needs.

In their article on the changes to the Care Act 2014 brought about when government rushed the Coronavirus Act 2020 through parliament, Catherine Casserley and Chris Fry describe how new policy and guidelines issued as a result had to be changed almost before the ink was dry as they were potentially illegal under the equalities legislation. While an urgent and immediate response was necessary by government to deal with an extraordinary crisis, what is hard to accept is that, after 25 years of legal protection, the decision-makers' approach was so devoid of automatic consideration of disabled people's needs. Years of developing expertise on making equality assessments, creating reasonable adjustments or implementing the public sector equality duty were not evident and the failure to embed equality and human rights principles in policy-making was exposed at the highest level.

The Black Lives Matter campaign seeks to highlight government's failure to address racial injustice in the UK. Institutional racism and structural inequalities which have kept BAME people among the poorest socio-economic groups in the UK, have also resulted in them dying from Covid-19 at a higher rate than white people. The government urges people not to go out and join the protests, yet in the same breath, tells them to go shopping to get the economy moving. At the same time Liberty reports that BAME people were 54% more likely to be fined by the police than white people for a breach of lockdown, further entrenching these inequalities. The DLA plans to support those who demand action through protest, on this or any other issue, by hosting practitioner group meetings on the right to protest and strategising on challenging discriminatory responses by the police.

The principles of equality and non-discrimination are more important than ever if we are to ensure a cohesive society where disadvantaged or vulnerable groups are empowered and protected. The public sector equality duty to eliminate discrimination, advance equality and foster good relations should be the touchstone of all policy responses to the pandemic even as extraordinary steps are taken to keep people safe. It is one of society's tools to ensure that the impact of such steps are balanced and inequality is not exacerbated nor discrimination entrenched.

Geraldine Scullion
Editor

1 The WEC has extended its inquiry and further evidence can be submitted by July 10th on Coronavirus and BAME people, and by July 13th on Coronavirus on disability and gendered economic impact.

The Coronavirus Act 2020 and its impact on disabled people

Catherine Casserley, Cloisters Chambers, and Chris Fry, solicitor, Fry Law, consider the implications for disabled people of the Coronavirus Act 2020 and the government's response to the pandemic. They outline how the Act and policy guidelines have impacted on disabled people, in particular by suspending local authorities' duties under the Care Act 2014. They highlight a range of legal challenges on potential indirect discrimination, failure to make reasonable adjustments or comply with the public sector equality duty. They conclude that, in the development of responses to the pandemic, the rights of disabled people have been an afterthought, if they were considered at all.

Disabled people – as with other minorities – appear to have borne the brunt of crises over many years. Austerity hit disabled people particularly hard; they have borne the brunt of cuts to social care, the imposition of changes to welfare benefits which left many isolated and without the means to support themselves, and have experienced a rate of unemployment higher than that of non-disabled people. The UN's Special Rapporteur on extreme poverty and human rights highlighted how the culmination of government policies had a significant impact on disabled people; at a press conference in November 2018 the Rapporteur stated that the UK government has inflicted 'great misery' on disabled people and other marginalised groups, with ministers in a state of 'denial' about the impact of their policies.[1]

It is perhaps no surprise then that the government's response to Covid-19 has created particular concern for its approach to disabled people and the adverse effect that many aspects of the pandemic, and dealing with it, have had. This article considers the impact on disabled people – not only of the legislation itself but of the general response to the pandemic.

The Coronavirus Act 2020

The Coronavirus Act 2020 (the 2020 Act) passed through parliament extremely speedily. Its primary purpose was to give the government the power to deal with the pandemic by making regulations to impose what was known as 'lockdown' and to provide for, for example, statutory sick pay for reasons related to the pandemic, allow nurses and doctors to return to help with the hospital effort, and to make ancillary provisions.

However it also made significant changes to legislation specifically concerned with disabled people. One aspect of those changes was to the Care Act 2014 (CA 2014).

The CA 2014 overhauled the provision of what was known as 'community care', setting out principles relating to wellbeing which inform the CA 2014 and the assessments under it.

S1 makes provision for an assessment of needs for anyone who appears to be in need of care and support. Once it appears that a person is in need, the duty to assess whether their need meets the eligibility criteria is mandatory. This applies also to carers (see ss9 and 10).

The eligibility criteria are set out in the Care and Support (Eligibility Criteria) Regulations 2015 (the 2015 Regulations). These provide that needs must be met if the needs arise from or are related to a physical or mental impairment or illness; as a result of the adult's needs, the adult is unable to achieve one or more of the specified outcomes; as a consequence there is, or is likely to be, a significant impact on the adult's wellbeing.

Similar criteria are set out in the 2015 Regulations in relation to carers. If the eligibility criteria are met, consideration must be given to how the needs are met; and s18 provides that the assessed needs must be met in prescribed circumstances; broadly – subject to residence, being under the cost cap or any charge meeting relevant pre-conditions; and financial considerations. S8 sets out how the needs may be met.

A local authority also has a duty to prepare a care and support plan setting out the details of how the person's needs will be met (ss24-25 CA 2014); and care plans must be kept under review and revised if the person's care and support needs have changed (s27 CA 2014).

Schedule 12 to the Coronavirus Act 2020, however, suspends a large part of the CA 2014 for those authorities which choose to do so, and where the relevant pre-conditions are met. The most significant of the provisions which can be suspended are:

1 https://www.disabilitynewsservice.com/un-poverty-report-uk-government-has-inflicted-great-misery-on-disabled-people/

- ss8, 9 and 10 – assessment and meeting needs;
- regulations relating to assessments, and written records of assessment (and accordingly, s11 doesn't apply);
- s11 – refusal of assessment – does not apply;
- s13 – determination of whether needs meet the eligibility criteria) or any regulations made under that section;
- ss58 and 59 (assessment of a child's needs for care and support);
- ss60 and 61 (assessment of a child's carer's needs for support);
- ss63 and 64 (assessment of a young carer's needs for support);
- any regulations made under s 65(1) CA 2014 (further provision about assessments under ss58 to 64).
- s17 (assessment of financial resources) (subject to certain qualifications).

Critically, s18, meeting of needs, is amended so that it reads as follows (and see below in respect of this):

(1)A local authority must meet an adult's needs for care and support if—

(a) the adult is ordinarily resident in the authority's area or is present in its area but of no settled residence,

(b) the authority considers that it is necessary to meet those needs for the purpose of avoiding a breach of the adult's Convention rights, and

(c) there is no charge under section 14 for meeting the needs or, in so far as there is, condition 1, 2 or 3 is met. In this subsection 'Convention rights' has the same meaning as in the Human Rights Act 1998.

Local authorities retain a **power** to carry out such assessments of need as they consider appropriate to determine whether services should be provided to a person. They also have the power to meet a person's needs (s19 CA 2014) but, **if they implement the easements**, they will no longer be required to meet needs under the CA 2014, or to prepare and review care and support plans. This applies regardless of whether the duty existed prior to the coming into force of the 2020 Act and whether or not the person is making a financial contribution.

There are also provisions relating to charging for meeting needs during the emergency period.

S18 of Schedule 12 to the 2020 Act gives the Secretary of State power to issue guidance which authorities must have regard to and comply with as the Secretary of State directs. There are separate, though similar, provisions in the 2020 Act for Wales.

Guidance on CA 2014 easements

The government has produced guidance to accompany the revisions to the CA 2014. *Care Act easements: guidance for local authorities,* May 20, 2020 (the guidance) sets out a process to be followed by those authorities which wish to implement the provisions.

In particular, s6 of the guidance states as follows:

A local authority should only take a decision to begin exercising the Care Act easements when the workforce is significantly depleted, or demand on social care increased, to an extent that it is no longer reasonably practicable for it to comply with its Care Act duties (as they stand prior to amendment by the Coronavirus Act) and where to continue to try to do so is likely to result in urgent or acute needs not being met, potentially risking life. Any change resulting from such a decision should be proportionate to the circumstances in a particular local authority.

The guidance also sets out a detailed process for putting an easement into practice, including who should agree the decision to implement an easement and who should be involved and briefed; the detail of the record-keeping necessary; and who should be informed. The guidance states that:

- There should be a report of a decision to the Department of Health and Social Care when local authorities decide to start prioritising services under these easements, explaining why the decision has been taken and briefly providing any relevant detail. This should be communicated to CareActEasements@dhsc.gov.uk.
- Information received will be held and may be shared with the Care Quality Commission (CQC), the Association of Directors of Adult Social Services, the Local Government Association and other relevant parties. Details of which local authorities are operating under easements will be publicly available for transparency.

As well as providing a process for implementing the easements, the guidance also sets out the process to be followed when making changes to care – a staged approach should be applied, and appropriate consultation engaged in. Any decision taken to prioritise or reduce support must be reviewed every two weeks and a full service must be restored '*as soon as is reasonably possible*'.

The guidance also provides advice on carrying out alternative means of assessment (such as supported user self-assessment) and emphasises the obligation upon authorities to continue with their duties towards service users.

Implementation of the easements

According to the CQC's website last updated on June 1st, two local authorities were using the easements – Derbyshire County Council and Solihull Council. This contrasts with the position reported in Community Care magazine on April 30, 2020 that eight councils had taken advantage of the easements.[2] Some local authorities had faced legal challenges as a result of what was seen as a rush to implement easements without following the correct procedure and without the basis for implementation.

Derbyshire County Council later reversed its position following a legal challenge based on its failure to follow the guidance, leaving only one council operating the easements.[3]

Impact on disabled people's rights

These provisions have the potential to significantly undermine the provisions of CA 2014 at a time when social care and those in need of it has already suffered significantly as a result of austerity. The amended s18 of the CA 2014 sets a comparatively low bar for meeting care needs by referring to '*avoiding a breach of Convention rights*'. It is acknowledged that challenging a decision on assessment of need is difficult on Convention grounds, as not only is the threshold for Articles 2 and 3 high, but resources will often weigh heavily in the context of a proportionality assessment for the purposes, in particular, of Article 8 (see *R (McDonald) v Royal Borough of Kensington and Chelsea* [2011] UKSC 33, [2011] HRLR 36).

McDonald was cited most recently in a decision regarding the attempt by a hospital to remove the defendant from her hospital bed and her challenge to the proposed care package on the basis of which she was being moved (*An NHS Foundation Trust v MB* [2020] EWHC 882 (QB)); in particular, the judgment repeated the words of Lord Brown in *McDonald:*

> *… the clear and consistent jurisprudence of the Strasbourg Court establishes 'the wide margin of appreciation enjoyed by states' in striking 'the fair balance … between the competing interests of the individual and of the community as a whole' and 'in determining the steps to be taken to ensure compliance with the Convention', and indeed that 'this margin of appreciation is even wider when … the issues involve an assessment of the priorities in the context of the allocation of limited state resources'.* [para 59]

In addition to the impact on meeting needs, and the potential of the use of easements on assessing need, the easements will also create delay in conducting any assessment and the review of needs. This will result in the possibility of service users being faced with backdated charges for care assessed as needed during the Covid-19 period. This may affect in particular those who have additional needs following a stay in hospital due to Covid-19 infection and who have thus had to have a reassessment.

In addition to following the guidance, the Equality Act 2010 (EA) remains relevant, particularly in this context, the duty under s149 to have due regard to the elimination of discrimination, advancement of equality of opportunity and fostering of good relations. Authorities will need to have given consideration to these equality 'goals' in reaching any determination as to the easements (see *R (Bracking & Others) v SSWP* [2013] EWCA Civ 1345; Briefing 702 for a summary of the key principles, and confirmation that regardless of the fact that the decision relates to a specific protected characteristic, that alone does not mean that the duty will have been discharged).

Impact on care

The impact on care of the pandemic and provisions relating to it has been significant: in its May 28 2020 edition, Community Care reported on a broad survey it had carried out into the impact of '*pandemic operating conditions*' on services provided to service users.[4] It asked social workers very broadly whether they believed the coronavirus pandemic, or measures associated with it, had had a negative impact on people they provided services to.

The response was fairly damning, with 96% of people working in mental health, 88% in adult social care and 87% in children's services answering 'yes'.

Adult social care and mental health practitioners warned that being forced to stay at home, with some services suspended due to the need for social distancing, was fuelling clients' social isolation, ramping up distress and heaping pressure on carers.

In June 2020, the Disabled Children's Partnership reported[5] that, amongst other things, parents reported an increased caring load, both for themselves and for their disabled children's siblings. Parents feel exhausted, stressed, anxious and abandoned by society. In 76% of cases, the support families previously received has now stopped. These are just some examples of the impact

2 https://www.communitycare.co.uk/2020/04/30/eight-councils-triggered-care-act-duty-moratorium-month-since-emergency-law-came-force/

3 https://www.communitycare.co.uk/2020/06/09/just-one-council-left-suspending-care-act-duties-authority-subject-legal-challenge-returns-full-compliance/

4 https://www.communitycare.co.uk/2020/05/28/social-workers-say-coronavirus-negatively-affected-services-people-they-support/

5 LeftInLockdown- Parent carers' experiences of lockdown, June 2020

that disabled people are facing.

It is important to note, however, that authorities are not divested of obligations altogether and the guidance provides the framework in which they must approach these. It will be critical for users to remain vigilant and as well as monitoring the effects of the changes to s18 CA 2014, to consider whether an authority operating any easement has followed the guidance – organisations of disabled people have mobilised already to gather information on the impact of these changes.

Other legislative or policy changes impacting on the rights of disabled people

There have been other impacts upon disabled people of Covid-19 as a result of legislation which has been passed and/or practice and procedure which does not appear to have given consideration to the impact upon disabled people. The 2020 Act did not affect the EA, and the guidance on easements, for example, specifically refers to the obligations remaining on authorities to take these obligations into account.

The 2020 Regulations

The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (the 2020 Regulations) came into force on March 26, 2020. These made provision for, amongst other things, the restrictions imposed upon the population of England, otherwise known as 'lockdown' – that no one could leave the place where they were living without reasonable excuse. Regulation 7 set out what the reasonable excuses were, one of which was to leave the house for exercise. The government produced guidance based on the 2020 Regulations which included a requirement that you could only go out once a day for exercise. A failure to adhere to lockdown was (and still is, although the circumstances for leaving the house have changed) punishable by means of a fixed penalty notice (Regulation 10).

A requirement to exercise only once a day, however, put disabled people who needed to leave their house more regularly at a disadvantage – for example, those with autism who needed to leave the house and had a routine of doing so, or those with mental health issues who needed to be outdoors.

Regulation 7 did not specify that leaving the house for exercise could only be done once a day – it stated that the house could be left *'to take exercise either alone or with other members of their household'* – there was no limit on the number of times. As a result, legal action was threatened against the government on behalf of disabled people. It was argued that adults and children with certain health conditions (including those with autism and mental health conditions) were disproportionately impacted by the inflexible policy which required everyone to only leave the house for exercise once per day, and which was therefore unlawful and discriminatory (potentially amounting to both indirect discrimination and a failure to make reasonable adjustments). The restrictions in the policy were also not reflected in Regulation 7 above and so were unlawful on that basis. The guidance was changed following the challenge so that it read instead:

> *You can leave your home for medical need. If you (or a person in your care) have a specific health condition that requires you to leave the home to maintain your health – including if that involves travel beyond your local area – then you can do so. This could, for example, include where individuals with learning disabilities or autism require specific exercise in an open space two or three times each day – ideally in line with a care plan agreed with a medical professional.*[6]

NHS Visitors Guidance

NHS Visitors Guidance, issued in April 2020, prohibited visitors to hospital save in particular circumstances. These did not include where disabled people required carers or personal assistants who might be needed to assist them with their care in hospital. Again, legal action was threatened on the basis that this policy was in breach of the public sector equality duty contained in s149 EA, specifically in relation to disability, in that it failed to have due regard to the need to eliminate discrimination and advance equality of opportunity for disabled people. It was also argued that it was potentially discriminatory under ss19 and 20 EA (indirect discrimination and a failure to make reasonable adjustments).

As a result the guidance was amended in June 2020 so that it made provision for carers/supporters and personal assistants to accompany disabled people (they are no longer to be treated as additional visitors).[7]

Access to information

Access to information – or lack of – has been a recurring theme throughout the pandemic but more so for disabled people. Lynn Stewart-Taylor launched a campaign #where'stheinterpreter[8] to highlight the fact that at the initial PM's briefings from Downing Street regarding the virus and what the public should do in response to it, there was no BSL interpreter to impart the information

6 https://www.bindmans.com/news/government-guidance-changed-to-permit-people-with-specific-health-needs-to-exercise-outside-more-than-once-a-day-and-to-travel-to-do-so-where-necessary

7 https://www.frylaw.co.uk/archives/articles/fleurs-challenge-to-the-nhs-visitor-guidance/

8 http://cfd.org.uk/where-is-the-interpreter-campaign/

provided to the 80,000+ BSL users in England. Some time later, interpretation was provided via the BBC News Channel but there is still no live interpretation as there is in Wales, Scotland and Northern Ireland (the latter providing both Irish sign language and BSL) for the equivalent briefings.

Mass claims have been started on behalf of those deaf people who have not had access to information.[9] In addition, on April 30, 2020 the Equality and Human Rights Commission wrote to the Prime Minister's Office asking the PM to reconsider the decision not to have a live interpreter at the briefings.[10] The EHRC's letter drew the PM's attention to how essential an interpreter was to ensure deaf people were able to understand the information, and the '*potentially significant health or even criminal implications*' if that information was unclear or misunderstood. It is not known whether the EHRC has had a response to its letter.

Similarly, there is little information available in BSL on government websites; infographics on government's twitter feeds are not available in alternative formats for those who are visually impaired; printed coronavirus warning leaflets alongside a letter from No 10 Downing Street have been sent all households in the country, including to blind people in a format that they cannot access. These are also the subject of a number of challenges on the basis that there has been a failure to make reasonable adjustments in according with s20 EA – a duty which is anticipatory in nature.[11]

Access to services

Many will have seen the chaotic scenes at supermarkets as the virus first began to spread, with empty supermarket shelves and crowded stores. As lockdown began, disabled people found it harder to access services that they had been reliant upon before the pandemic – such as online deliveries. One of the difficulties with the way in which the government has focused on those who are '*extremely clinically vulnerable*' is that it potentially provides another definition of disability – and one which is very different to s6 EA. Service providers may consider that they are complying with obligations to those who are disabled if they provide services to those on this list and neglect those who have needs because of their s6 disability.

The Research Institute for Disabled Consumers has been monitoring the experiences of disabled consumers during the pandemic. It reports that disabled people have had concerns about obtaining food from supermarkets, with difficulties such as not being able to get a delivery at all because they are not on the government list, despite relying on deliveries for the past 13 years; having to queue for long periods to obtain entry to the shops when queuing is difficult; and waiting eight weeks before the supermarket would accept that they were shielding.[12]

Legal action has been mounted over some of the failures of service providers in these circumstances.[13]

Medical treatment

At the outset of the pandemic disabled people and organisations of and for disabled people were extremely concerned by guidance from the British Medical Association (BMA) and the National Institute for Health and Care Excellence (NICE) on treatment in respect of Covid-19, and particularly triaging. There were, in addition, reports of patients being pressured to sign *Do Not Attempt Resuscitation Notices*. This led to a statement by disabled people and their allies, and a response from NHS leaders in which they stated that the NHS will '*always seek to fully protect*' the rights of disabled people during the coronavirus pandemic.[14]

Nevertheless, concerns remain. NICE Covid-19 rapid guideline: critical care in adults published on March 20, 2020 and updated on April 29, 2020, encourages staff to use the Clinical Frailty Scale (CFS) in relation to decisions on whether to admit patients to intensive care units (ICU) only in the case of persons over 65. The Covid-19 rapid guideline flowchart provides that for a patient aged over 65, without stable long-term disabilities (for example, cerebral palsy, learning disabilities or autism), the CFS score should be used as part of a holistic assessment. CFS allocates a series of frailty scores to a person based on their report (or the report of others) of their needs. Above a score of five, there is little chance of ICU treatment being given to the person.

The BMA guidance, 'Covid-19: ethical issues; a guidance note' endorsed by NICE says that where the consequences of age or a pre-existing disability mean that the patient is significantly less likely to survive, these become relevant factors. It is not clear how the 'consequences' of age or disability are established. The

9 https://www.frylaw.co.uk/archives/articles/why-are-deaf-people-excluded-from-live-national-addresses-on-coronavirus/

10 https://www.equalityhumanrights.com/sites/default/files/letter-to-prime-minister-british-sign-language-bsl-coronavirus-briefings-30-april-2020.pdf

11 https://www.leighday.co.uk/News/Press-releases-2020/May-2020/Blind-woman-issues-legal-challenge-to; and https://www.frylaw.co.uk/archives/articles/second-discrimination-case-launched-against-the-pm/

12 https://www.ridc.org.uk/sites/default/files/uploads/Research%20Reports/Covid19_050620/RiDC_Covid19_Survey3_Summary.pdf

13 https://www.disabilitynewsservice.com/coronavirus-supermarkets-face-mass-legal-action-over-discrimination/

14 https://www.disabilitynewsservice.com/coronavirus-joint-action-from-disability-movement-secures-nhs-treatment-pledge/

guidance moves from criteria related to the chances of survival, to using a criterion based on speed of recovery.

Though the guidance has now been amended so that it addresses the duty to make reasonable adjustments, the conclusion is that this duty should not substantially affect clinical decision-making governing access to such treatment under a *'capacity to benefit quickly'* test. The view is described as 'provisional' (though no indication is given as to when this will be reviewed) and is on the basis that:

- the disability suffered by many disabled persons will have no relevance to their ability to benefit quickly from life-saving or life-sustaining treatment and thus no adjustment appears to be needed to deliver equality of access; and
- where a person's disability does, or may have, some relevance to their ability to benefit quickly from life-saving or life-sustaining treatment, as far as the BMA is aware, there is no clear body of clinical evidence which could set out the nature or extent of the adjustments to make it fairer in representing a proper balance between the interests of disabled and non-disabled persons.

It remains unclear how detailed a consideration has been given to this duty, and on what basis the conclusions have been reached.

In addition, the guidance also includes the potential for both direct and indirect discrimination on the basis of age and disability. Whilst the pressure of the pandemic may now have receded, it may come into play if there is a second wave. For further discussion of the legal implications see Resuscitation and the value of a disabled person's life: Triaging and Covid-19.

Conclusion

This article has outlined only some of the issues which have arisen over the past few months. It does not touch on other very significant issues such as deaths of those with learning disabilities, an already extremely marginalised group; nor the lack of personal protection equipment for those who are shielding with carers; nor the most recent conclusion by the Office for National Statistics that disabled women are 2.4 times more likely to die from the virus than non-disabled women. Some other issues just emerging include, for example, issues relating to track and trace, and in particular the accessibility of the testing system which has been rolled out. In this regard, a number of disability activists have prepared an open letter to the NHS questioning it and Public Health England about disability access to the track and trace and testing system.[15] Inevitably, as the response to the pandemic brings new challenges, other issues will doubtless emerge.

The pandemic and reaction to it may have brought some benefits – for example, home working may benefit disabled people to some extent, and the apparent ease with which this adaptation has been made will undoubtedly assist requests of this nature in future.

However, in many areas, disability has been an afterthought, if it has been considered at all. In the public sector, it is not clear that the s149 equality duty is being complied with as it should, regardless of the urgency of the necessary response. Its consideration is critical in ensuring that disabled people are not left isolated and disadvantaged by rapid changes which do not take their needs into account.

On March 30, 2020 the Women and Equalities Committee launched its inquiry into the impact of Covid-19 on people with protected characteristics; subsequently, and perhaps unsurprisingly, it launched three sub-inquiries, including one on disability and access to services. This sub-inquiry is looking at access to food, health, social care and education. It is also considering how the government could improve its communications and consultation with disabled people about guidance and policies which are having substantial effects on their daily lives. Submissions can be made up until July 13, 2020.[16]

If there is a broader public inquiry into government responses, it is critical that the impact upon disabled people specifically must be taken into account.

On a positive note, it is obvious that when innovative changes such as the establishment of online systems need to be done quickly – they can be. This should mean that in the future, if reasonable adjustments need to be made to, for example, information systems, the speed of response in these times can be used as an example of what can be done with commitment and a willingness to respond to the need.

But disability discrimination legislation has now been in place since 1995 – 25 years. Disability and the need to make adjustments where necessary should be built into the fabric of our society; resources necessary to support disabled people should be seen as enabling society to function equitably and, to that end, disability and the needs of disabled people should be embedded in the mindset of decision-makers, both in the public and the private sector. The pandemic and the processes and procedures associated with it have exposed even more crudely that this is far from the case. This cannot, and should not, continue.

15 https://twitter.com/natalyadell/status/1268641910555660299

16 https://committees.parliament.uk/call-for-evidence/168/unequal-impact-coronavirus-disability-and-access-to-services/

‘Vegan discrimination’ in eating disorder units

Stephen Heath,* lawyer with the mental health charity Mind, examines human rights and discrimination arguments in relation to the treatment of vegans with anorexia nervosa in eating disorder units. He highlights the complexity of balancing the therapeutic aims of providing non-vegan nutrition to patients whose veganism is a protected belief and who consider that such treatment is unlawful discrimination or a breach of their human rights.

Many commentators have questioned whether *Costa v The League Against Cruel Sports*, Nottingham Employment Tribunal, Case Number 3331129/2018, January 2020 (*Costa*) is quite the ‘landmark case’ that the press have built it up to be. But one thing is for sure, it certainly has gathered more press attention than most ET cases and has caused ripples which have been felt by the legal line advisors at Mind. However, the inquiries that Mind advisors have fielded have had nothing to do with employment law, but feature allegations of discrimination in another setting altogether – eating disorder units. In the wake of the *Costa* judgment a number of people have contacted Mind’s legal line to ask what they can do about not being given vegan options in their eating disorder treatment plans. This article will examine the human rights and discrimination arguments which might arise in these settings. It will begin with a brief examination of the factual landscape to illuminate the legal issues by showing the context in which potentially discriminatory decisions are being made.

Eating disorders

Eating disorder charity BEAT believes that there are 1.25 million people in the UK who have an eating disorder. Seventy five % are women. Figures suggest that there is a trend of increasing prevalence of eating disorders with a 34% increase in in-patient hospital admissions since 2005-06 (approximately 7% each year).[1]

Anorexia nervosa (AN) is the condition which people who potentially experience ‘vegan discrimination’ are most likely to have. AN is a serious mental illness affecting over a quarter of a million people in England who limit their energy intake by restricting the amount of food they eat or doing lots of exercise (or indeed both). Very often, they have a distorted image of themselves which can be entirely at odds with how others might see them. Food, and how to avoid calorific intake, can dominate their thoughts. Dr Tara Porter, a clinical psychologist working in non-in-patient settings who specialises in eating disorders in children and young people, states that people with AN ‘*are thinking about how they cannot eat 24/7*’.[2]

AN has the highest mortality rates of any psychiatric disorder. AN, as with other eating disorders, can occur alongside other problems such as depression, alcohol or substance misuse and physical issues such as amenorrhoea, loss of muscle and bone strength due to starvation of the body.

AN can be treated and research suggests that around 46% of AN patients recover; a further 33% improving, while 20% remain chronically ill.[3] The National Institute for Health and Care Excellence (NICE) has produced detailed guidance for the recognition and treatment of eating disorders.[4] Patients can be treated within primary care (i.e. the GP) or may require more specialist treatment and support. There are a range of recommended psychological interventions which depend on a variety of factors including the age of the patient. The aims of these treatments variously include to ‘*encourage healthy eating and reaching a healthy body weight*’, to ‘*encourage the person to develop a “nonanorexic identity*”’ and to ‘*include self-monitoring of dietary intake and associated thoughts and feelings*’. For children and young people, family therapy should be considered.

* The author is a lawyer and not a clinician, and while he has sought to expand his knowledge through research and discussion with those with expertise, he acknowledges the limitations of his own perspective.

1. Information about eating disorders, including these statistics, and support for those who experience them is available on BEAT’s excellent website https://www.beateatingdisorders.org.uk/.

2 Dr Porter has provided invaluable help to the author in the writing of this article.

3 These percentages are from the BEAT website. They add up to 99% presumably because of rounding down of component percentages

4 https://www.nice.org.uk/guidance/ng69

When the physical health of someone with an eating disorder is severely compromised, they can be admitted for in-patient or day patient treatment. Generally, if this is necessary, the patient may have been eating so little that re-introducing food suddenly could be life-threatening, due to severe fluid and electrolyte shifts, something referred to as refeeding syndrome. The purpose of hospital treatment is therefore to stabilise the patient's medical condition and initiate a process of slow but steady 'refeeding', by the carefully calibrated reintroduction of nutrition. This can be done orally either by eating or drinking, either normal food or food supplement drinks. If this is too difficult for the patient, they may have a naso-gastric (NG) tube inserted, or a tube passed 'parenterally' i.e. bypassing the gut, and introduced intravenously.

The default position is that the patient must consent to any refeeding programme, and, in fact, to treatment in general. There are, however, two exceptions to this.

Treatment under the Mental Health Act 1983 (MHA)

A person can be compulsorily detained (often termed 'sectioned') under the MHA for assessment and/or treatment if they have a mental disorder and there is either a risk to their own health or safety or a need for the protection of others.[5] Once detained (and ignoring some detail) they can be given 'medical treatment' for their mental disorder, or for manifestations or symptoms of that disorder, without their consent.[6] Case law has determined that feeding can amount to medical treatment under the MHA for those with AN.[7] In short, a person with AN who is detained under the MHA can be fed without their consent.

Treatment under the Mental Capacity Act 2005 (MCA)

The other framework under which someone with an eating disorder can be effectively fed without his or her consent is under the MCA. If a person lacks the capacity to make a decision, such as one concerning their own nutrition or treatment, then it is possible for another person, for example a clinician, to make a decision for them if it is in their best interests. S2 MCA sets out what constitutes the inability to make a decision, which includes an inability to '*(a) to understand the information relevant to the decision*' and *'(c) to use or weigh that information as part of the process of making the decision'*.

A number of cases have determined that individuals with AN did not have the capacity to make decisions about nutrition and treatment.[8]

In *Re E* Jackson J observed:

> *There is strong evidence that E's obsessive fear of weight gain makes her incapable of weighing the advantages and disadvantages of eating in any meaningful way. For E, the compulsion to prevent calories entering her system has become the card that trumps all others. The need not to gain weight overpowers all other thoughts.*

In *Re L* King J observed L's '*inappropriate indifference to matters of life and death*' preventing her from being able to weigh up the risks and benefits of medical treatment.

Finally, in *Ms X,* the evidence of the medical expert showed that Ms X was able to understand the medical information but:

> *… due to ongoing severe body dysmorphia, false beliefs about her weight shape and nutritional state and absolute fear of weight gain from her anorexia, she was and is unable to apply the information to herself or believe in the need for it. The reality and importance of the associated risks including death of her malnourished state are therefore not truly appraised which means she is unable to weigh up the information provided in the decision making process'.*

Once it is decided that a person lacks capacity to make decisions regarding their own nutrition, it has to be decided whether imposing a feeding regime on them is in their best interests. Under s4 MCA the person's best interests must take into account, so far as is reasonably ascertainable, the person's past and present wishes and feelings, the beliefs and values which would be likely to influence their decision if they had capacity, and other factors they would be likely to consider if they were able to do so. The cases of *Re E*, *L* and *Ms X* demonstrate that these are issues of some complexity and that while the preservation and sanctity of life is granted a high priority, it is not an absolute one. In *Re E* the court decided that re-feeding the patient was in her best interest while in the latter cases it decided that it was not.

Perceived coercion/leverage

While it is certainly the case that people with AN have been treated against their will under section and under the MCA, it is probably more common that patients agree, or perhaps acquiesce, to treatment under the real or perceived threat of sectioning.[9]

5 Ss2 and 3 MHA

6 S63 and the definition section s145 MHA

7 *Riverside Health NHS Trust v Fox* [1994] 1 FLR 614

8 *NHS Trust v L* [2012] EWHC 2741 (COP), *Re E (Medical treatment:* Anorexia) [2012] EWCOP 1639; *An NHS Foundation Trust v Ms X* [2014] EWCOP 35

9 *Attitudes of patients with anorexia nervosa to compulsory treatment and coercion* Tan et al https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2808473/

Veganism and eating disorders

A link between vegetarianism and eating disorders has been '*well established*' by research, according to the RCPsych, The British Dietetic Association and BEAT's *Consensus statement on considerations for treating vegan patients with eating disorders.*[10] However, there has been little research to date on patients following vegan diets. The *Consensus statement* goes on to say that '*anecdotal evidence from clinicians working in this specialty suggests that a significant proportion of patients requiring in-patient admission for their eating disorder had been following a vegan diet on admission*'. Dr Porter notes that this is on the increase in her child and adolescent patients.

While it is undoubtedly the case that there are vegans with AN who have adopted veganism as principled choices based on compassionate, ethical, environmental and other concerns, the *Consensus statement* (again supported by Dr Porter) points out that the:

> *… adoption of a vegan diet coinciding with the development of anorexia nervosa could be part of the disorder, rather than a reflection of the individual's vegan beliefs.*

Vegan diets are naturally low in calories, and very popular amongst social media influencers on health and fitness, popular with the young women who tend to get eating disorders, and are often seen as more climate friendly. Dietary restriction of any kind, be it cutting out a particular food group, only eating organic or locally sourced food, 'clean eating,' veganism or others can be a very effective way of limiting calorific intake: if a few of these restrictions occur together, as is not uncommon in AN, it becomes difficult to eat enough calories for weight maintenance. It is less a case of veganism being consciously exploited by the patient as a 'strategy' and more that the eating disorder[11] manipulates the patient to believe that they want to be vegan (and, for example, do not like sweets; cannot eat oil; and do not need carbs; etc.). The veganism becomes part of the 'anorexic identity', being incorporated into the patient's mental disorder.

From a clinician's perspective, veganism can present challenges in treating the patient effectively. The NICE guidelines for treatment of eating disorders include encouraging healthy eating and reaching a healthy body weight. For some patients this will mean gaining a significant amount of weight and taking on a lot of calories. Put simply, it can sometimes be hard to consume enough calories when eating a vegan diet, especially if the patient has other food rules and restrictions. Another issue is that addressing an anorexic person's obsession with food and calories involves encouraging flexibility in eating. Having rules and restrictions, including veganism, can be a barrier to getting better.

Another more practical problem when it gets to the critical end of treatment is that currently there are no vegan feeds available for those requiring NG feeding.

10 https://www.rcpsych.ac.uk/docs/default-source/members/faculties/eating-disorders/vegan-patients-eating-disorders-mar19.pdf?sfvrsn=be96d428_2

11 In eating disorders treatment the disorder is often spoken of as though it were 'externalised' or separate from the person, so as clinicians can unpick what is their patient's pre-existing view and what belongs to the eating disorder.

The law

Recent developments in the law on religion or belief discrimination have been covered by Catherine Casserley's excellent article *Belief – a new frontier or the same thing re-packaged?* Briefing 922, so this article will try not to tread over too much of the same ground.

Is the patient protected?

Obviously the patient will only acquire the protection from discrimination under the Equality Act 2010 (EA) if their veganism is a protected belief. As has been pointed out by commentators, *Costa* most certainly did not hold in blanket terms that veganism is a protected belief. It held that Mr Costa's ethical veganism was a protected belief. It is suggested that any patient in the community or in an eating disorder unit who wishes to complain of 'vegan discrimination' would have to show that *their* veganism qualifies for protection using the test in *Nicholson v Grainger plc* [2010] IRLR 4. To qualify for protection:

1. the belief must be genuinely held;
2. it must be a belief and not an opinion or viewpoint based on the present state of information available;
3. it must be a belief as to a weighty and substantial aspect of human life and behaviour;
4. it must attain a certain level of cogency, seriousness, cohesion and importance;
5. it must be worthy of respect in a democratic society, not incompatible with human dignity and not conflict with the fundamental rights of others.

Given the consensus among experts that the veganism of some who experience AN could be part of their disorder, it is therefore highly likely that the genuineness of, at least some, patients' belief might be challenged, as *Grainger* makes it clear that a philosophical, as opposed to a religious, belief is likely to be subjected to more scrutiny by the court or tribunal.

A consideration of whether vegan beliefs are genuinely held by a vegan with AN is likely to be a complex question. Perhaps it might even be said

that 'genuineness' is inapt in this context. In eating disorder treatment the disorder is often spoken about as 'externalised', so examining the extent to which the beliefs are integral to the patient him or herself and which 'belong' to the disorder may help shine a light on the question of whether the beliefs are 'genuinely held' for the purposes of the *Grainger* test. Expert evidence is highly likely to be required if this issue is considered by a court. In determining whether the belief satisfies the first *Grainger* limb important factors might be:

- when the patient adopted the veganism, in terms of its correspondence or otherwise with the development of the eating disorder;
- whether veganism is part of any religious or other philosophical belief system of the patient;
- whether veganism extends beyond the purely dietary (see paragraphs 20-23 of *Costa* for examples of how Mr Costa's vegan beliefs permeated his lifestyle).

These issues may also have a bearing on other limbs of the test also. If veganism is considered part of a disordered mechanism for restricting calorific intake it is unlikely to be considered as being directed towards a weighty or substantial aspect of human life and behaviour. Equally it may not be considered to have attained a certain level of cogency, seriousness, cohesion and importance, and arguments might be raised about whether, if veganism is part of an approach which is making the patient seriously ill, whether it is worthy of respect and compatible with human dignity.

As can be seen, a consideration of whether the veganism of someone with AN qualifies for protection involves some difficult questions. It is anticipated that preparing a client for a challenge to whether his or (statistically more likely) her vegan beliefs are genuinely held, serious or important or worthy of respect is unlikely to be easy. The *Grainger* test is a clunky fit with the realities of AN, but it is the test which a court would apply in the circumstances.

Discrimination

If a vegan patient's veganism qualifies for protection, then what is likely to be the act or acts of discrimination, and how will they be characterised? The most common complaint that Mind legal line advisers have encountered is complaints that vegan patients in in-patient settings have not been given a vegan option in their meal plans, be they drinkable food supplements or NG ones.

Medical providers in both the NHS and the private sector are 'service providers' and thus come under Part 3 of the EA. As such, relevantly under s29(2) EA, these providers:

> *must not, in providing the service, discriminate against a person (B) –*
>
> *a) as to the terms on which A provides the service to B;*
>
> *b) by terminating the provision of the service to B;*
>
> *c) by subjecting B to any other detriment.*

The giving of non-vegan supplements to patient would almost certainly be best understood in terms of indirect discrimination. The provider could argue that the reason why it is giving the patient such supplements had nothing to do with the patient's beliefs and that they would have done the same to a non-vegan patient. So rather than being direct discrimination, the provision of these supplements would more naturally be seen as a provision, criterion or practice which was apparently neutral, but which would adversely impact on both vegans in general and the patient in particular. The provider would thus be given scope to justify the action.

There are a range of potential scenarios in which a vegan might be given non-vegan nutrition, and a range of potential justifications for that action. On the one hand (and simplifying things for the sake of illustration) there could be a situation where a dangerously malnourished individual is fed, under section, by way of NG tube in what is deemed to be a life-saving situation. There are currently no vegan liquid feeds suitable for NG feeding. In such a situation one can imagine a provider mounting strong justification arguments, such as its aim was to preserve life and health, which a court would undoubtedly hold to be legitimate.

In terms of proportionality, the provider could probably argue that a high risk of death or seriously adverse health consequences was on its side of the proportionality ledger, and that no non-vegan options were available. This would carry considerable weight.

However, while the cases of *Re L, Re E* and *Ms X*, were about the separate issue of capacity and concerned feeding regimes *per se* rather than their content, these might be worth reading to show how courts balance the views of AN patients against treatment options. Even though all three courts held that the individuals in question did not have capacity to make decisions about nutrition and treatment for their AN, the court carefully examined, and accorded significant (and in two cases, decisive) respect to their views about feeding in situations where not doing it carried significant risk of death.

Thankfully not all nutritional decisions are quite as stark as the above. For example, a young person not in an in-patient setting might find themselves being very, very strongly urged (perhaps with the 'threat' of detention in a psychiatric hospital) to follow a meal plan

936 which does not cater to his or her veganism. No doubt a medical provider's therapeutic aims would be considered legitimate, but a less urgent medical imperative may mean that more can be said for following the patient's philosophical beliefs and upholding their autonomy. Obviously, such a balancing act is highly fact sensitive and is one that, if the matter became litigious, would require expert evidence to examine both the therapeutic aims, and the less intrusive alternatives to non-vegan nutrition.

Human rights

Both NHS and private hospitals are also subject to the Human Rights Act 1998 and must respect patients' right to freedom of thought, conscience and religion and their qualified right to manifest their religion or beliefs. Cases involving the provision of vegan or non-vegan nutrition concern the manifestation of the vegan beliefs (by not eating animal derived products) and therefore the provider is given scope to justify its actions in much the same way as with indirect discrimination.

Conclusion

AN is a complex condition which has the highest mortality rate of all psychiatric disorders. Many of those who experience AN adopt veganism, which can be seen by clinicians as a barrier to their recovery, and which is poorly catered for when it comes to refeeding in in-patient settings. Veganism will be protected under s10 EA if is satisfies the *Grainger* test, which can appear to be somewhat clunky when applied to those with AN. Application of this test will probably centre on determining the extent to which veganism is part of the mental disorder itself, which is a complex question requiring expert evidence if the matter comes to court. Whether the provision of non-vegan nutrition is indirectly discriminatory to a patient whose veganism is protected, or in breach of their human rights, will involve a careful balancing of the therapeutic aims of the nutritional treatment and the wishes and beliefs of the patient. Again, these are issues of some complexity.

937 Briefing 937

Sex discrimination and pension equalisation

Simon Cuthbert (Leigh Day), Henrietta Hill QC and Preetika Mathur (Doughty Street Chambers), examine the legal principles applicable to equality between men and women in pension provision. They review the courts' apparently contradictory decisions in recent pensions equalisation cases. The authors anchor these decisions in their historic principles, explain why such apparently different outcomes were achieved in each and look ahead to further possible developments.

Introduction

In the space of a week in October 2019, the female claimants in two pensions equalisation cases received very different news. In *Delve*, the High Court ruled that the 'levelling down' of the state pension age was permissible; but in *Newton*, the Court of Justice of the European Union (CJEU) held that the 'levelling down' which had occurred in an occupational pension scheme was unlawful.

The *Barber* principles

In *Barber v Guardian Royal Exchange* [1990] 2 All ER 660 the CJEU held that occupational pensions constituted 'pay' for the purposes of Article 119 of the Treaty of Rome (now Article 157 Treaty on the Functioning of the EU) as they derived from the employment relationship. This meant that the principle of equal pay for equal work between men and women, enshrined in that article, was applicable to occupational pensions. As a result, it was unlawful to impose an age condition distinguishing between men and women for the purposes of entitlement to benefits under the scheme.

In *Barber*, the CJEU also held that Article 119 had direct effect in relation to occupational pension schemes. This meant that a member of a pension scheme could immediately require the trustees or managers of that scheme to give effect to the member's rights under Article 119 and did not have to wait for the transposition of the 1986 Equal Treatment Directive

into UK law.

The CJEU acknowledged that its judgment would have difficult practical implications if it was to have retrospective effect. Accordingly, the court held that, apart from those who had already brought proceedings, workers could not claim in respect of pensionable service before May 17, 1990.

Application of the *Barber* principles

The *Barber* principle applies to benefits which are not linked to retirement age. Schemes therefore need to provide spouses' and dependents' pensions for both men and women or not at all.

In *Ten Oever v Stichting Bedrijfspensioenfonds Voor Het Glazenwassers-En Schoonmaakbedrijf* [1993] IRLR 601, the CJEU applied the *Barber* principles, including the temporal limit on equalisation, to a survivor's benefit in an occupational pension scheme. Mrs Ten Oever was a member of an occupational pension scheme. At the time of her death on October 13, 1988, the rules of the occupational pension scheme provided that only widows would be entitled to the survivor's pension. Mr Ten Oever's request for a widower's pension was refused on the grounds that it was not provided for in the rules of the scheme at the time when Mrs Ten Oever had died. The CJEU held that, while survivors' pensions fell within the ambit of the 'equal pay' principle in Article 119, following *Barber*, the obligation to equalise benefits for men and women in occupational pension schemes only applied to benefits arising from service after May 17, 1990. Therefore, Mr Ten Oever was not eligible for a widower's pension.

In *Coloroll Pension Trustees v Russell* [1995] All ER (EC) 23, the CJEU held that benefits under occupational pension schemes only had to accrue equally for men and women for service after the date of the *Barber* judgment, and not for service before that date.

In *Smith v Avdel Systems* [1995] All ER (EC) 132, the pension scheme attempted to equalise the entitlements of men and women by levelling down women's entitlement under the scheme on July 1, 1991. Until June 1991, the retirement age was set at 65 for men and 60 for women. From July 1, 1991 onwards, the scheme purported to adopt a common retirement age of 65 for both men and women in relation to all service, including service by women before July 1, 1991.

The CJEU held that this retroactive approach was not permissible under EU law; rather, during the *Barber* window (i.e. the period between the *Barber* judgment and the date of equalisation by the scheme) Article 119 required *'the scheme to grant persons in the disadvantaged class the same advantages as those enjoyed by the persons in the advantaged class'*. In other words, this meant 'levelling up' and not 'levelling down' during the *Barber* window. In *Smith,* this also meant that, for the period between May 1990 and June 1991, the pension rights of men were to be calculated on the basis of the same retirement age as that for women. The CJEU also affirmed that, for the period before the *Barber* judgment, retroactive equalisation was not permissible.

In terms of service *after* the date of equalisation (July 1, 1991 in *Smith*) Article 119 did not preclude equalisation by levelling down and so it was open to the scheme to reduce the benefits of both men and women – the reduction merely had to be equal.

Smith was applied domestically in *Harland & Wolff Pension Trustees v Aon Consulting Financial Services* [2006] EWHC 1778 (Ch). In this case, the rules of the relevant occupational pension scheme permitted the retrospective amendment of retirement age for men and women. On September 7, 1993, the power of retrospective amendment was exercised to purportedly adopt a common retirement age of 63 for men and women (with retroactive effect from May 17, 1990). The retirement age had previously been 63 for men and 60 for women. The High Court held that this was impermissible under EU law: following *Smith*, male scheme members had acquired a right to a retirement age of 60 during the *Barber* window – equal to the women's entitlement during this same period. This right could not be removed retroactively for either the men or women under the scheme through the exercise of a power of amendment.

R (on the application of Delve) v Secretary of State for Work and Pensions [2019] EWHC 2552 (Admin); Briefing 934

Delve concerned equalisation in state, as opposed to occupational, pensions.

Parliament had legislated to equalise the state pension age for men and women by way of a staggered increase to the state pension age for women, by reference to age cohorts. The relevant age was initially to be increased from 60 to 65 years, before subsequent changes raised it to 66 and 68 for some women, depending on age. All women born on or after April 6, 1950 were affected.

The claimants were women, born in the 1950s, who were affected by the pension changes. They relied on evidence, drawn from official statistics, to the effect that the cohort of women born in the 1950s are disadvantaged by comparison to men of the same age. Average incomes are lower as is the likelihood of being in work; they are also more likely than men to be in part-time, rather than full-time, employment. The loss

of state pension therefore represented a much larger proportion of average income for those women than it did for men of the same age.

The claimants claimed sex discrimination contrary to EU law. However their reliance on the principle of equal treatment in the Social Security Directive (Directive 79/7/EEC) failed because the court held that the derogation at Article 7 of that Directive (permitting members states to exclude from its scope the determination of pensionable age) extended to all aspects of the determination of pensionable age, whether equal or unequal. It was not applicable only to discrimination caused by a member state maintaining unequal state pension ages as between men and women, but applied also to discrimination caused by *equalising* the state pension age: its overall purpose was to exclude decisions relating to pensionable age from the scope of EU law.

The claimants also claimed sex discrimination contrary to the European Convention on Human Rights (ECHR). The court accepted that entitlement to a state pension was a possession for the purposes of ECHR, Protocol 1, Article 1.

However, the new legislative scheme was not discriminatory because even if Article 14 was engaged:

1. case law established that it was permissible for a state to change the law at a single point in time and so logically it had to be permissible to effect the change by a series of changes at different points in time;
2. the underlying objective of the legislation was to ensure that the state pension regime remained affordable while striking an appropriate balance between state pension age and the size of the state pension; and
3. the changes were not manifestly without reasonable foundation (that being the applicable test as the legislation related to macro-economic policy where the elected arm of government has a very great decision-making power).

The court held that women had previously enjoyed an advantage now being removed, but that did not treat women less favourably than men so as to amount to direct sex discrimination against them: rather, it corrected prior direct sex discrimination against men. The claimants' indirect sex discrimination claim also failed applying the criteria set out in *Essop v Home Office (UK Border Agency)* [2017] UKSC 27, [2017] 1 WLR 1343, [2017] 4 WLUK 75; Briefing 830. The claimants' similar arguments on age discrimination also failed.

The claimants also argued forcefully that the government had not given them sufficient notice of the changes to the pension age. They provided compelling accounts of how they had made their own personal financial arrangements based on what they had understood their pension age to be, and due to the lack of proper notice had not been able to change their arrangements in time to avoid individual financial hardship. Their arguments in this regard sit within the wider 'Back to 60' campaign. The court dismissed the claimants' claim relating to legitimate expectation and common law fairness on the basis that:

1. no promise or representation in relation to consulting with the individuals effected was ever made; and
2. there was not a clear and unambiguous undertaking that the individuals would be given individual notice of the changes to the state pension age affecting them.

Finally the court considered that there had been substantial delay by the claimants in bringing their challenge, given the dates on which the various legislative changes had been implemented.

Safeway Ltd v Newton and another (2019] C-171/18; [2019] IRLR 1090; Briefing 938

A few days after *Delve*, on October 7, 2019, the CJEU handed down its decision, on a referral from the CA, in *Newton*.

Newton concerned whether an amendment by Safeway (S) to its occupational pension scheme to equalise pension benefits (by way of levelling down) between men and women, could be lawfully backdated from May 1996, when the amendment was eventually validly made to the scheme, to December 1991, when S had first purported to make the same amendment.

The CJEU in *Newton* noted the following principles from its own post-*Barber* case law (summarised above):

1. for periods of service between the *Barber* decision and the date of the subsequent adoption by the pension scheme concerned, of '*measures reinstating equal treatment*', Article 157 required that the persons in the disadvantaged category, the men in this case, must in the meantime be granted the same advantages as those enjoyed by the persons in the favoured category, here the women, or in other words, levelling up was required during that interim period; and
2. for periods of service completed after the adoption, by the pension scheme concerned, of '*measures reinstating equal treatment*', Article 157 did not preclude the advantages of the persons previously

favoured from being reduced to the level of the advantages of the persons previously within the disadvantaged category. Article 157 only required that men and women should receive the same pay for the same work but did not impose any specific level of pay, or in other words, the measures reinstating equal treatment could do so by way of levelling down going forwards.

The first issue in *Newton* was that S contended that certain measures which it took in 1991, namely making two announcements to change the scheme's pension age universally to 65 from December 1991 and stating an intention to later correspondingly amend the relevant trust deed, constituted '*measures reinstating equal treatment*' and so levelling down was permissible from then onwards.

However the CJEU observed that in order to be capable of being regarded as '*measures reinstating equal treatment*' in compliance with Article 157, the measures in question had to be both (1) immediate and full; and (2) legally certain. The CJEU held that these requirements were not satisfied by the 1991 measures. It was not until the 1996 amendment to the trust deed that valid measures reinstating equal treatment were implemented.

The second and main issue in *Newton* was whether a purported retroactive amendment by S in 1996, to backdate levelling down to 1991, was valid in view of Article 157 and the associated caselaw. The CJEU noted that, until such time as measures reinstating equal treatment were adopted, the principle of equality under Article 157 required granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category. Furthermore, there was no support under EU law for a power to, in effect, retroactively level down in the circumstances.

Finally, the CJEU considered whether there may be any exceptions to the general position above, whereby retroactive amendment may be permissible in some circumstances. It observed an exception might arise only where both (1) an overriding reason in the public interest demands one, and (2) where the legitimate expectations of those concerned were duly respected. The CJEU observed that a risk of seriously undermining the financial balance of the pension scheme concerned may constitute an overriding reason in the public interest, although there had been no such finding by the national court in the present case.

Rationalising the outcomes in *Delve* and *Newton*

Delve concerned changes to anticipated benefits pursuant to state pensions. The rights of the women concerned, in terms of pension age, were being levelled down to those of male state pensioners. The amendments were set out in national legislation and were not retroactive and were, in the view of the High Court, permissible. In effect, the court construed the case as an advantage being removed.

Newton also involved levelling down the rights of the women in the scheme, here an occupational scheme. This was also permissible, provided that the measures in question were immediate and full and legally certain. However what was not permissible was to purport to level down retroactively; rather, until a valid amendment to the scheme was made, the women in the scheme were entitled to continue to benefit from the more favourable pension age they had enjoyed, and the men in the scheme were consequently required to be levelled up, so as to also benefit from that pension same more favourable age.

The future

As it happens *Delve* and *Newton* are both shortly back in court, days apart, in July 2020: *Delve* as the claimants have been granted permission to appeal to the CA and *Newton* as the resumed CA hearing after the CJEU referral.

In *Delve* the claimants' sex discrimination arguments remain focused on EU and ECHR law. Their arguments on age discrimination are now limited to ECHR law, but they also received permission to argue that the court below erred in its approach to notice and delay. As well as engaging with the fact-specific arguments on sex and age discrimination, the CA judgment in *Delve* may also result in clarity as to whether the '*manifestly without reasonable foundation*' test is in fact the appropriate one in Article 14 cases of this nature.

In *Newton* it remains to be seen whether S will seek to argue that the 'exceptional circumstances' provision applies to the changes they made, given the amount of money involved: the potential cost to S of the difference between a normal pension age of 60 years as opposed to 65 between December 1991 and May 1996 was said to be the region of £100 million.

Guaranteed Minimum Pensions

A closely-related issue is whether pension schemes need to equalise guaranteed minimum pensions (GMPs) which have accrued after the date of the *Barber* decision.

GMPs are, in summary, the minimum pension which

937 a UK occupational pension scheme has to provide for those employees who were contracted out of the State Earnings-Related Pension Scheme between April 6, 1978 and April 5, 1997. Since GMPs are payable at the state pension rate, they are, as a result, unequal as between men and women.

Whilst one view is that GMPs should be equalised in line with *Barber*, another view is that since GMPs are a replacement for state benefits they do not need to be equalised, because the *Barber* decision itself did not require state pension benefits to be equalised. It has also been argued that GMPs are merely calculation factors and are not pension benefits at all.

In July 2015, the Pension Ombudsman gave a determination in a claim bought by a Mr Kenworthy (Campden RA Pension Scheme PO-4579). The Ombudsman held that it was reasonable for scheme trustees to postpone taking action to equalise GMPs until the government had confirmed its position on this issue. This determination was reached in spite of the fact that on January 28, 2010, the pensions minister, Angela Eagle MP, had issued a statement confirming the government's conclusion that European law required that any inequality in scheme rules resulting from the legislative provisions governing GMPs should be removed.

Subsequently, in *Lloyds Banking Group Pensions Trustees Limited v Lloyds Bank plc* [2018] EWHC 2839 (Ch), the High Court held that benefits payable *in excess of GMPs* must be adjusted in order that the total benefits received by male and female members with equivalent age, service and earnings histories are equal. Morgan J referred to this process, namely adjusting overall benefits to remove the inequality caused by GMPs, as 'GMP equalisation'. Morgan J took the view that as GMPs are in effect statutory benefits, they themselves cannot be amended or equalised. This litigation is still ongoing in the High Court and so further clarification on issues relating to GMPs will hopefully be forthcoming.

Conclusion

On closer analysis, *Delve* and *Newton* are not inconsistent. However it will be interesting to see how both cases play out before the CA, and whether the ongoing Lloyds litigation will lead to further changes in the equalisation of GMPs.

938 Briefing 938

Equal pay and pensions

Safeway Ltd v Newton Case C 171/18; [2019] IRLR 1090; October 7, 2019

[**Editor's note:** This case note was first published in Briefings, Volume 69, Briefing 926, March 2020. Due to a production error, the columns were transposed. The full case note is re-printed here with apologies to the author.]

This case essentially concerns whether an amendment by Safeway (S) to its occupational pension scheme (the scheme), to equalise pension benefits (by way of levelling down) between men and women, could be lawfully backdated from May 1996, when the amendment was eventually validly made to the scheme, to December 1991, when S had first purported to make the same amendment.

Facts

In May 1990, the Court of Justice of the EU (CJEU) gave its decision in *Barber v Guardian Royal Exchange* (Case C-262/88). It was held in *Barber* that having different occupational pension ages for men and women ran contrary to Article 119 of the EC Treaty (now Article 157 Treaty on the Functioning of the EU and referred to as such below), which enshrines the principle that men and women should receive equal pay for equal work.

At that time, the scheme had a normal pension age (NPA) of 65 years for men and a more favourable 60 years for women. In 1991, S sought, by way of two written announcements, to change the NPA in the scheme to 65 for both men and women with effect from December 1, 1991, so levelling down the rights of female scheme members to those of the men. S also stated an intention to subsequently amend the trust deed governing the scheme to the same effect.

It was not, however, until May 2, 1996 that the trust

deed and rules of the scheme were formally amended. The 1996 amendment purported to be retroactive as of December 1, 1991, and such a retroactive amendment was permitted under the scheme rules.

The potential cost to S of the difference between an NPA of 60 years as opposed to 65 between December 1991 and May 1996 was said to be the region of £100 million.

High Court

S brought proceedings in the High Court seeking a declaration that the NPA of 65 had been validly established as of December 1, 1991. Mr Newton, a member of the scheme, was designated as a representative beneficiary in the proceedings, on behalf of all of the scheme members.

The High Court held that the purported retroactive amendment of the scheme infringed Article 157 and that, therefore, the pension rights of the members had to be calculated on the basis of an NPA of 60 for both men and women, thereby levelling up the rights of the men, in respect of the relevant period between 1991 to 1996.

Court of Appeal and CJEU referral

S appealed to the CA. The CA held that the 1991 announcements alone could not validly amend the scheme and that the only valid amendment was that resulting from the trust deed in 1996. However, it then went on to hold that the scheme rule permitting retroactive amendments and the 1991 announcements had the effect under national law, of rendering the rights acquired by the scheme members, in respect of the period between December 1,1991 and May 2,1996, 'defeasible', or in other words open to revision, such that those rights could subsequently, at any point, be **reduced with retroactive effect.**

The CA did, however, then refer on to the CJEU the question as to whether, whilst under the national law it was possible for the amended trust deed of May 2, 1996 to have retroactively set the NPA of both women and men at 65, in respect of the 1991 to 1996 period, such an approach complied with Article 157.

Court of Justice of the European Union

The CJEU found in essence that, in the absence of objective justification, S's levelling down of the women's pension age was contrary to Article 157, notwithstanding that such a measure was otherwise permissible under the national law. Its reasoning was, in summary, as follows.

By way of the backdrop to the issues in the present case, the CJEU noted the following principles from its case law (*Coloroll Pension Trustees Ltd v Russell* (C-200/91); *Smith v Avdel Systems Ltd* (C-408/92) and *van den Akker v Stichting Shell Pensioenfunds* (C-28/93)):

- for periods of service **between** the *Barber* decision and the date of the subsequent adoption by the pension scheme concerned of '*measures reinstating equal treatment*', in light of the *Barber* decision, Article 157 required that the persons in the disadvantaged category, the men in this case, must in the meantime be granted the **same advantages** as those enjoyed by the persons in the favoured category, here the women, or in other words, levelling up was required during that interim period
- for periods of service completed **after** the adoption, by the pension scheme concerned, of '*measures reinstating equal treatment'*, Article 157 did not preclude the advantages of the persons previously favoured from being **reduced** to the level of the advantages of the persons previously within the disadvantaged category. Article 157 only required that men and women should receive the same pay for the same work but did not impose any specific level of pay (*Coloroll*), or in other words, the measures reinstating equal treatment could do so by way of levelling down going forwards.

Turning to the present case, S had firstly contended in essence, that the measures it took in 1991, namely making two announcements to change the scheme's NPA universally to 65 from December 1991 and stating an intention to later correspondingly amend the trust deed, constituted '*measures reinstating equal treatment*' and so levelling down was permissible from then onwards. The CJEU observed, however, that in order to be capable of being regarded as '*measures reinstating equal treatment'* in compliance with Article 157, the measures in question had to be:

1. immediate and full, and
2. legally certain.

The CJEU held that in the present case, the initial measures taken by S in 1991 to purportedly reinstate equal treatment, did **not** satisfy these two requirements. It was not until the 1996 amendment to the trust deed that valid measures reinstating equal treatment were implemented.

The CJEU then considered the second main issue, namely whether the purported retroactive aspect of the amendment in 1996 was valid in view of Article 157. The CJEU again noted that, until such time as measures reinstating equal treatment were adopted, the principle of equality under Article 157 required

938 granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category. However, it needed to consider whether, in a situation where the national law regarded the pension rights in issue as defeasible and open to retroactive amendment, the same principle of equality **precluded** a pension scheme from eliminating discrimination contrary to Article 157 by removing, with retroactive effect, the advantages of the persons within the advantaged category.

In answer, the CJEU held that there was no support under EU law for a power to, in effect, retroactively level down in the circumstances. Such a power would deprive the case law noted above of its effect. Furthermore any measure seeking to eliminate discrimination contrary to EU law constituted an implementation of EU law and so must observe its requirements. Neither national law nor the retroactive provisions of the trust deed could circumvent those requirements.

Finally, the CJEU considered whether there may be any exceptions to the general position above, whereby retroactive amendment **may** be permissible in some circumstances. It observed an exception might arise only where both

1. an overriding reason in the public interest so demanded, and
2. where the legitimate expectations of those concerned were duly respected.

The CJEU observed that a risk of seriously undermining the financial balance of the pension scheme concerned may constitute an overriding reason in the public interest, but noted that in the present case there had been no finding in the national court that such a risk existed and so there appeared to be no objective justification, although this would ultimately be for the national court to verify.

Comment

The decision affirmed the principles of CJEU case law on levelling down during the 'Barber window' and in addition dealt with the specific conflict between an express retroactive power of amendment on the face of the pension scheme rules and EU law, indicating that only in exceptional cases might such a power be objectively justified.

It is not known whether S may still seek to raise an argument that the exceptional circumstances may apply, given the amount of money involved.

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939 Briefing 939

Reconciling freedom from discrimination and freedom of expression

NH v Associazione Avvocatura per i diritti LGBTI — Rete Lenford (C-507/18); April 23, 2020

The CJEU has confirmed that having regard to the circumstances in which the statements were made, comments made in the course of a radio interview can constitute discrimination under the Equal Treatment Framework Directive 2000/78 (the Directive).

Implications

The CJEU's decision followed the opinion of Advocate General (AG) Sharpston in October 2019 (see Briefings 925) and the two are largely in alignment.

The decision allows a wide remit for comments capable of falling within the scope of the Directive, namely those related to employment opportunities. The defence that such remarks are protected by Article 10 was given short shrift – a positive indication for future discrimination claims.

It also presents an opportunity for the Equality and Human Rights Commission (EHRC) to bolster its enforcement powers and to rely on this decision when considering cases where the Directive is engaged.

Facts

The Associazione Avvocatura per i diritti LGBTI (AA) – an Italian association of LGBTI lawyers – brought a discrimination claim against NH, a senior lawyer, who remarked during an interview on an Italian radio programme that he would never hire a homosexual person to work at his firm.

The Tribunale di Bergamo confirmed that the comments constituted discrimination and NH's subsequent appeal was dismissed by the Corte d'Appello di Brescia on January 23, 2015.

NH appealed to the Corte Supreme di Cassazione which made a referral to the CJEU on the following points:

1. Does the scope of Article 3(1)(a) of the Directive, which prohibits discrimination in access to employment, extend to comments such as those made in the interview?
2. Can an association seek enforcement of the prohibition of discrimination in employment where there is no identifiable victim?

In AG Sharpston's preliminary opinion dated October 31, 2019 she confirmed that associations, such as AA, could bring a claim, provided there was a legitimate interest. Secondly, she confirmed that the comments were capable of falling within the scope of the Directive.

Court of Justice of the European Union

The CJEU confirmed that AA had standing to bring proceedings. While the Directive does not specifically allow for groups to bring a claim in the absence of an individual victim, it does not prevent member states allowing for this in national law. It is for the member state to decide what conditions any group must meet to bring such a claim.

On the second point, the CJEU emphasised the importance of both uniformity in the interpretation of EU law, and of the rights that the Directive protects:

> *… the concept of 'conditions for access to employment … or to occupation' within the meaning of Article 3(1)(a) of the directive ... cannot be interpreted restrictively.*

Adopting a broad interpretation of the Directive the CJEU dismissed NH's arguments that recruitment was not on-going, and that his comments were simply expressions of a personal opinion. The test for whether such comments are connected to employment opportunities and thus fall within the scope of Article 3(1)(a), is that the link '*must not be hypothetical'.*

Both findings were consistent with AG Sharpston's opinion.

The CJEU acknowledged and extended the AG's criteria when assessing the link between the comments and employment, including as relevant factors: the nature and content of the statements; the status of the person making them; whether that person has or is capable of having a decisive influence over any recruitment policy – or at least could be perceived as having one; that the statements intended to discriminate on the basis of one of the criteria in the Directive, and the context of the statements and the manner in which they were made.

NH strenuously denied that he was an employer; he had presented himself as a private citizen and as such submitted the Directive could not apply. The AG and the CJEU both rejected this proposition – considering his position within the firm. The court stated that the:

> *expression of discriminatory opinions in matters of employment and occupation by an employer* ***or a person*** *[emphasis added] perceived as being capable of exerting a decisive influence on an undertaking's recruitment policy is likely to deter the individuals targeted from applying for a post.* [para 55]

The CJEU also emphasised that freedom of expression is not an absolute right. It ruled that the Directive specifically allows for its limitation, and between the two competing freedoms – namely of expression and from discrimination – the latter must prevail. If not, '*the very essence of the protection afforded by that directive in matters of employment and occupation could become illusory'.*

Comment

By stating that the concept of conditions for access to employment or to occupation in Article 3(1)(a) '*must be interpreted as covering statements made by a person during an audiovisual programme according to which that person would never recruit persons of a certain sexual orientation to his or her undertaking … even though no recruitment procedure had been opened, nor was planned',* the CJEU has broadened the range of individuals 'caught' by the scope of the Directive.

Time and future caselaw will tell how far this can be interpreted – it need not be the Chief Executive Officer or recruitment manager making such comments, but what about a human resource officer? A junior lawyer? An assistant?

While this is a positive step for the protection of minorities, practical questions will undoubtedly arise, and it will be interesting to see how this judgment will be applied in practice. The possibility of a broader interpretation of the EHRC's enforcement powers could be another benefit, and could lead to action to ensure employers act fairly, and mindfully, complying with their duties under the Equality Act 2010.

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Gypsy and Traveller freedom to travel upheld in the Court of Appeal

The Mayor and Burgesses of the London Borough of Bromley v Persons Unknown [2020] EWCA Civ 12; January 21, 2020

Implications for practitioners

Since 2015, the High Court has granted a spate of applications by local authorities for district-wide injunctions against *'persons unknown'* which prohibited the establishment of unauthorised encampments in their areas. This had led to nomadic Gypsies and Travellers being prevented from camping in large swathes of the country. However, in *Bromley v Persons Unknown* the CA not only dismissed Bromley's appeal against the refusal of its own application but gave general guidance which may represent the death knell for other such cases. Holding that wide injunctions are *'inherently problematic'* and a potential breach of both the Equality Act 2010 (EA) and the European Convention on Human Rights (ECHR), the CA emphasised the important but often ignored principle that *'the Gypsy and Traveller community have an enshrined freedom not to stay in one place but to move from one place to another'*. [para 109] This case will be of assistance to all those seeking to defend the rights of Gypsies and Travellers to live in accordance with their traditional way of life.

Facts

The first district-wide injunction was granted to Harlow District Council in 2015. Over the next few years, in what the CA described as *'something of a feeding frenzy'* [para 11], nearly 40 such orders were sought and made. In August 2018, Bromley made its own application for a borough-wide injunction and on August 15, 2018, a without notice interim injunction was granted prohibiting persons unknown from (in summary) occupying or bringing vehicles onto 171 parcels of land within its borough. At this point, London Gypsies and Travellers (LGT) – a charity which has worked with Gypsies and Travellers in London for over 30 years, and which had been observing the increasing trend for wide injunctions with concern – applied to intervene.

High Court

On May 15, 2019 Deputy Judge Mulcahy QC heard Bromley's substantive application. The case against the grant of a borough-wide injunction was advanced by LGT. The judge rejected Bromley's application and instead granted the council a much more limited order, specifically targeting the disposal of waste and fly-tipping on its land.

Court of Appeal

Bromley appealed the judge's decision, arguing that she had:

1. erred in finding that the order sought was disproportionate;
2. applied too high a threshold of harm;
3. erred in her approach to the cumulative effect of such injunctions; and
4. been wrong to find it had failed to comply with its S149 EA public sector equality duty.

In the CA, LGT was joined as interveners by Liberty, also opposing the making of wide injunctions, and by seven other local authorities which were concerned about the implications of the case for the injunctions they themselves had obtained or were seeking.

Bromley's appeal was dismissed on all grounds. The CA held that Deputy Judge Mulcahy QC had not erred as Bromley had alleged, and gave the following general guidance on wide injunctions:

1. There is an *'inescapable tension'* between the Article 8 ECHR rights of the Gypsy and Traveller community and the common law of trespass. The obvious solution to this is the provision of more designated transit sites. [para 100]
2. Government guidance presupposes that unlawful encampments will exist and does not suggest that they be closed down, save as a last resort and unless there are specific reasons for doing so. There is no hint in the guidance that a wide injunction is a satisfactory solution and indeed much of the guidance would be irrelevant if that were the answer. [para 101]
3. Local authorities must regularly engage with the Gypsy and Traveller community. Through a process of dialogue and communication, and following the guidance, wide injunctions should be avoidable. [para 102]
4. Even if a local authority did consider that a *quia timet* injunction was the only way forward, it must still engage with the Gypsy and Traveller community, carry out welfare assessments, and undertake an up-

to-date Equality Impact Assessment. [para 103]

5. Local authorities considering a *quia timet* injunction against persons unknown, where the injunction is directed towards the Gypsy and Traveller community, should be aware that:
   a. injunctions against persons unknown are exceptional measures;
   b. the culture, traditions, and practices of Gypsy and Traveller communities must be understood and respected;
   c. the vulnerability of such communities would be given weight in any proportionality assessment;
   d. local authorities may be required to demonstrate they have complied with their general obligations to provide sufficient sites; and
   e. the court would have regard to the cumulative effect of other injunctions granted. [para 104]

The CA concluded:

> *Finally, it must be recognised that the cases referred to above make plain that the Gypsy and Traveller community have an enshrined freedom not to stay in one place but to move from one place to another. An injunction which prevents them from stopping at all in a defined part of the UK comprises a potential breach of both the Convention and the Equality Act, and in future should only be sought when, having taken all the steps noted above, a local authority reaches the considered view that there is no other solution to the particular problems that have arisen or are imminently likely to arise.* [para 109]

Comment

Ultimately, CA recognised that there is a fundamental unfairness in failing to provide Gypsies and Travellers with sites where they can pursue their traditional way of life whilst at the same time obtaining orders to criminalise the unauthorised encampments which inevitably result from the lack of such sites.

The CA did not go so far as to say that wide injunctions should never be granted. However, in light of the general guidance given, together with the recent decision in *Canada Goose UK Retail Ltd v Persons Unknown* [2020] EWCA Civ 303 confirming the limited circumstances in which final relief may be granted against persons unknown, it is difficult to imagine a case in which such relief would be appropriate. One thing in any event is clear: the *'feeding frenzy'* is over.

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Briefing 941

Court of Appeal upholds decision requiring trans man to register as his son's 'mother'

R (McConnell and YY) (Appellants) v Registrar General of England and Wales (Respondent) [2020] EWCA Civ 559; April 29, 2020

Facts

Alfred McConnell (AM) is a trans man who gave birth to his son YY in 2018 after obtaining a gender recognition certificate (GRC) in 2017. Upon attempting to register YY's birth, AM was told by the Registry Office that legally he would need to be registered as YY's 'mother' instead of 'father' or 'parent' because he had given birth to YY.

High Court

AM brought a claim for judicial review challenging the Registrar's decision, or alternatively seeking a declaration of incompatibility under s4 Human Rights Act 1998 (HRA) asserting that the domestic law concerned breached AM's and YY's Articles 8 and 14 European Convention on Human Rights (ECHR) rights.

The court considered the following questions:

1. Does the domestic law require AM to be registered as YY's mother?

S12 Gender Recognition Act 2004 (GRA) states that *'the fact that a person's gender has become the acquired gender under this Act does not affect the status of the person as the father or mother of a child'*. AM argued that s9(1) GRA, which confirms he should be treated as a man for all purposes after having obtained a GRC, means that s12 is only intended to be prospective in focus. The court held that s12 GRA was in fact both retrospective and prospective and therefore applied to AM's relationship with YY.

Regarding the legality of the decision to register

AM as 'mother', the court acknowledged that the circumstances of AM's role as a male birth parent are not expressly provided for in the legislation governing artificial insemination or that for gender recognition. The court identified the issue to be determined in the case as being a matter of public policy rather than law and stated that '*there would seem to be a pressing need for Government and Parliament to address square-on the question of the status of a trans-male who has become pregnant and given birth to a child*'. [para 125] The court satisfied itself that the term 'mother' is not necessarily a gender specific term but rather one that *'is a matter of the role taken in the biological process'* [para 139] of giving birth. The respondent's decision was therefore regarded as lawful.

2. Is this requirement incompatible with AM's and YY's rights under Articles 8 and 14 ECHR?

The court considered that the requirement to register AM as YY's 'mother' does infringe upon AM's and YY's Article 8 ECHR rights. It held, however, that this decision was made in accordance with the law (the GRA and the Births and Deaths Registration Act 1953 (BDRA)) and in pursuit of the legitimate aim of '*establishing a coherent registration system'*. [para 253]

When assessing proportionality, the court determined that the best interests of the child must be assessed in general terms. Despite YY's argument that it would be inconceivable that he would not know the circumstances of his birth and that registering AM as his father would reflect the reality of their family life, the court concluded that YY's right to know who gave birth to him was such that it would be to YY's detriment if AM were not registered as his mother.

Regarding Article 14 ECHR, the court held that there was no breach and that '*a registration scheme that requires each and every person who gives birth to be registered as the child's mother does not discriminate between or against any one group or another.*' [para 274]. No incompatibility was therefore found between the domestic law and AM's and YY's Convention rights.

Court of Appeal

On appeal, the CA considered two legal issues:

1. Was the High Court correct in applying the ordinary interpretation of s12 GRA to register AM as the mother of YY?

The CA upheld the HC's finding that s12 GRA was applicable both retrospectively and prospectively. Considering s9(2) GRA, which holds that having a GRC does not affect things done, or events occurring before the certificate is issued, and what the effect would be if s12 GRA only had retrospective effect, the CA held that the birth of a child is an event that is clearly capable of occurring before a certificate was issued and that s9(2) already caters for that situation [para 31]. The court also noted that s16 GRA, which concerns peerages and titles, was phrased very similarly to s12 and was intended to have both prospective and retrospective effect, and that s15 GRA, which concerns succession, only has retrospective effect and includes specific language explaining this.

2. Are s9 and s12 GRA, if correctly applied, incompatible with AM's and YY's Article 8 ECHR rights?

The CA confirmed that requiring AM to be registered as YY's mother did interfere with both appellants' Article 8 rights, even though the effect on their daily lives would be minimal (as the word 'mother' is contained only in the long form birth certificate, which is not required for most official purposes). It noted that the interference is not a trivial one and that the state's requirement for a trans person to declare their gender as that assigned at birth in an official document such as their child's birth certificate

> *… represents a significant interference with a person's sense of their own identity, which is an integral aspect of the right to respect for private life in Article 8. It is also an interference with the right to respect for family life of both Mr McConnell and his son because the state describes their relationship on the long form of YY's birth certificate as being that of mother and son; whereas, as a matter of social life, their relationship is that of father and son.* [para 55]

The CA then turned to whether this interference was justified, by using the objective test:

1. Was the interference in accordance with the law? Yes – the GRA and BDRA.
2. Was it done in pursuit of a legitimate aim? Yes – the '*maintenance of a clear and coherent scheme of registration of births*' and '*the protection of the rights of others, including any children born to a transgender person'*. [para 58]
3. Was the interference proportionate?
4. Could it have been done less intrusively?

In considering questions 3 and 4, the CA acknowledged that to allow a birth parent to be registered as something other than 'mother' would require significant changes to the legislation governing children and parental responsibility such as the Children Act 1989 and the Human Fertilisation and Embryology Act 2008. It was

noted that '*there are many, interlinked pieces of legislation which may be affected if the word 'mother' is no longer to be used to describe the person who gives birth to a child*' [para 63], and it was necessary for someone to have automatic parental responsibility for a new-born child, and that current legislation affords this responsibility to the mother.

It was further noted that there currently is no consensus in the European courts as to how to resolve this particular interference with Article 8 rights. Some states have changed their laws in ways which would favour the appellants, and some have not. [para 79] There is a case pending in the European Court of Human Rights following the German Federal High Court's decision in case XII ZB 660/14 (September 6, 2017) that a trans person's status as 'mother' or 'father' would not be altered by changing their legal gender. The CA held, however, that it could not pre-empt the Strasbourg Court's decision.

Comment

The CA concluded that the interference with the appellants' Article 8 rights was proportionate. While it acknowledged that further law reform may be necessary on this issue, the court drew attention to its narrow remit, which is limited to assessing if a lower court's decision is correct according to the current law, and concluded that only parliament has the resources to assess public opinion on such matters and to reform legislation if appropriate.

AM is seeking permission to appeal this case to the SC. In light of the current relationship between the SC and parliament, it will be interesting to see how the judiciary and the government interact around socially high-profile issues like this one, where steps necessary to protect the human rights of trans people may also have implications for a large body of legislation.

In considering the proportionality of the interference with AM's and YY's human rights, the SC may wish to consider if a less intrusive means of achieving the legitimate aim could have been employed, such as introducing a gender neutral term such as 'gestational parent' or 'birth parent', to be offered to registrants as an alternative option alongside the usual option of 'mother'. This would presumably require additional legislative measures to ensure that a person who has given birth to a child but who is not referred to as 'mother' on their birth certificate would automatically obtain parental responsibility.

It is possible that by the time the SC hears the appeal, if permission is granted, the Strasbourg Court will have given judgment in the German case mentioned above. Although there is no European consensus on this issue at present, as awareness of trans parenthood increases, courts may find that the balance is tipped toward viewing states' strict requirements to register a person as a child's 'mother' or 'father' according to their gender as assigned at birth are unjustified.

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Sex discrimination, enhanced maternity pay and shared parental leave

Chief Constable of Leicestershire v Hextall; Ali v Capita Customer Management Ltd [2019] EWCA Civ 900; May 24, 2019

Facts

These cases sought to establish the right of fathers to receive pay for parental leave at the same rate as mothers who often receive more generous remuneration under the guise of 'maternity' pay.

Mr Madasar Ali (MA) worked for Capita Customer Management Limited (Capita) and claimed indirect sex discrimination as he was not entitled to the equivalent of a higher maternity pay rate for 12 weeks after the first two weeks of pregnancy and instead was only entitled to be paid less under shared parental leave provisions.

Mr Hextall (H) worked for Leicestershire Police and claimed direct discrimination, indirect discrimination and a breach of equal pay regulations for the substantially same reasons as MA. Similarly, his employer only permitted him to claim for shared parental leave paid at the statutory rate while a mother was entitled to maternity leave at full pay for 18 weeks.

Employment Tribunal and Employment Appeal Tribunal

The claims were heard separately before the ET and the EAT; they were subsequently joined by the CA.

MA succeeded before the ET in his claims against Capita. In the judgment of the EAT (*Capita Customer Management Ltd v Ali* UKEAT/0161/17) Mrs Justice Slade held that the rationale behind the enhanced maternity pay regime was intended to give effect to European legislation (Council Directive 92/85/EEC of October 19, 1992) which has the purpose of safeguarding the health and wellbeing of women who have just given birth. She, therefore, overruled the decision of the ET.

H's claim before the ET failed. Slade J again heard this appeal (*Hextall v Chief Constable of Leicestershire Police* UKEAT/0139/17) but made no substantive decision on the particular issues, instead finding technical errors in the reasoning of the ET and remitting the case to be heard again while pointing to her own judgment in *Capita Customer Management Ltd v Ali* as potentially instructive.

Court of Appeal

The CA held that it was neither discriminatory nor a breach of the equal pay sex equality clause for employers not to pay male employees enhanced shared parental pay at the same level as any enhanced maternity pay offered by the employer to female members of staff.

Both the ET and EAT had erred in finding that the claims were not founded in equal pay terms. The CA read the claim as being related to a female comparator's more favourable terms of work, specifically her entitlement to take time off to care for her new baby which was also included in the father's terms of work by operation of the sex equality clause in s66 of the Equality Act 2010 (EA). Nevertheless, this claim also failed because the exclusion in paragraph 2 of schedule 7 to the EA prevents the reliance on the sex equality clause as the more favourable terms available to a female relate to special treatment in connection with pregnancy or childbirth.

The direct discrimination claim failed as it was held that statutory maternity leave related to matters exclusive to the birth mother resulting from pregnancy and childbirth. That purpose had not been altered by the introduction of shared parental leave. A woman on maternity leave could not, therefore, be the correct comparator as she had experienced childbirth and therefore was not in a similar enough position to the other parent.

As a result of the finding in the equal pay based claim, the indirect sex discrimination claim was bound to fail due to the effect of section 70(2)(a) EA, which provides that the inclusion of a less favourable term in an employee's terms of work could not be regarded as sex discrimination where it was included as a result of the sex equality clause found at s66 EA. Again, in a similar vein to its finding in relation to direct discrimination, the CA also set out that the correct pool for comparison ought only to be made up of employees on shared parental leave. Therefore, any disadvantage to a father is justified as being a proportionate means of achieving the legitimate aim of the special treatment of mothers who have borne a child.

Implications for practitioners

Surprisingly, H's application for permission to appeal to the SC was refused. This leaves us with the CA judgment, namely that a failure to provide enhanced pay for shared parental leave in line with maternity pay is presently proportionate and justifiable.

It is of particular interest that the CA was prepared to read in a special treatment exemption in respect of indirect discrimination, basing this on a similar exemption being included in EU law and the previous UK legislation. Significantly any future challenge based in similar grounds would appear to be bound to fail until this particular issue is considered by the SC or a particularly independent minded judge at a more preliminary level.

Slade J's detailed commentary on the relevant legal provisions governing maternity, shared parental leave and pay contained in *Capita Customer Management Ltd v Ali* is a welcome opportunity to see the relevant elements of this complex set of statutes set out in a logical manner.

Comment

It is disappointing that, in refusing to grant permission to appeal, the SC has seemingly failed to recognise the public importance of these issues and the significant barriers now faced in couching them in terms of discrimination. The reliance on previous regulations to erect this barrier is of particular concern given the rapid (although not rapid enough) changes in societal attitudes to parenting and the government's own acknowledgment of this with its provision for shared parental leave.

Tempering one of the very few legal/workplace privileges that women enjoy may seem like a counterintuitive way to challenge patriarchy, but this could be one of the rare examples where it could well be the case.

The link between maternity pay and '*connection with pregnancy and child birth*' could, and arguably should, be limited to the amount of time it takes a woman to physically and mentally recover from giving birth, based on the usual prognosis. This would seem to give effect to the requirements of the EU regulations while also making it less likely that families see it as a financial incentive for women who have recently given birth to potentially stall their careers by taking an extended period of time off. In particular, the monetary incentive to do so irrespective of other circumstances fails to take into account the myriad other factors which govern who takes primary responsibility for childcare. This would also combat the apparent reticence of some employers to employ women of a child bearing age, reducing gender bias in recruitment practices as the likelihood of both men and women taking some form of parental leave becomes equalised.

As the route through the courts seems closed for the time being, we will have to look for political solutions to these complex issues. We may face a long wait.

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Briefing 943

Considering employers' one-off actions as PCPs

Ishola v Transport for London [2020] EWCA Civ 112; February 7, 2020

Implications for practitioners

This case concerned the framing of one-off acts or decisions by employers as a provision, criterion or practice (PCP) for the purpose of advancing claims of indirect discrimination or failure to make reasonable adjustments. In the CA judgment, Simler LJ provided some important guidance as to when singular decisions or actions by employers can be established as a PCP.

Facts

The claimant (CI) at all material times was a disabled person suffering from depression and migraines.

In April 2015 CI complained about the conduct of another employee of the respondent (TFL). After investigating the complaint, TFL found against CI. He was not satisfied with the outcome and went on sick leave in May 2015.

During CI's period of sickness absence he raised two further complaints about employees of TFL in April and May 2016. In June 2016, after failing to engage CI in sickness absence review meetings or occupational health appointments, TFL terminated his employment on the ground of medical incapacity.

CI brought various claims against TFL including disability and race discrimination, harassment, victimisation, unfair dismissal and unlawful deduction from wages.

Employment Tribunal and Employment Appeal Tribunal

The claims were mostly dismissed by the ET. The EAT held that the ET erred in one aspect of its judgment; this was not relevant to the PCP issue that came before the CA.

CI averred that the complaints he raised in April and May 2016 were not properly and fairly investigated prior to his dismissal, and that TFL operated a PCP of requiring CI to return to work without first concluding a proper and fair investigation into his grievances. The ET held that this was not a PCP as it was a *'one-off act in the course of dealings with one individual'*. The EAT upheld this reasoning, stating that *'the failure to resolve the April and May 2016 complaints before dismissal was not a PCP… It did not deal with any other individual apart from the claimant … although a one-off act can sometimes be a practice, it is not necessarily one.'*

Court of Appeal

CI appealed on the ground that an on-going requirement or expectation that a person should behave in a certain manner, in this case return to work with outstanding grievances, is a practice within the meaning of s20(3) Equality Act 2010 (EA).

CI asserted that the tribunals took too narrow and technical an approach in determining a PCP. He stated that this narrow approach was inconsistent with the appropriate liberal reading of the EA, and therefore the definition of PCPs, in light of the legislation's objective to protect employees from discrimination. CI made reference to paragraph 6.10 of the EA Statutory Code of Practice by the Equality and Human Rights Commission which states that the phrase PCP '*should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, or qualifications including one-off decisions and actions …'*

CI disagreed with the approach of the EAT in *Nottingham City Transport Ltd v Harvey* [2012] UKEAT/0032/12 to defining the term 'practice' in a PCP. In that case the EAT stated that practice *'has something of the element of repetition about it'*. It also held that if the practice relates to procedure, it needs to be applicable to other people not suffering the relevant disability, because disadvantage is determined by reference to a comparator and the comparator must be someone to whom, in reality or theory, the practice would also apply.

CI submitted that if an employer makes any decision or takes any action which has an effect capable of being remedied by a reasonable adjustment, it qualifies as a PCP. CI further submitted that an element of repetition is unnecessary, given that every action or decision taken by an employer can be assumed to be applied to a hypothetical comparator.

Lady Justice Simler disagreed with CI's submission that all one-off acts remediable by a reasonable adjustment qualify as a PCP. She held that the legislation specifically uses the terms *'provision, criterion and practice'* when defining failure to make reasonable adjustments and indirect discrimination, and does not use the terms 'act' or 'decision'. Further, the word 'practice' would not *'add to the words'* if all one-off decisions remediable by reasonable adjustments qualified as PCPs. Simler LJ held that all three words in PCP connote a *'state of affairs, indicating how similar cases are generally treated or how a similar case would be treated if it occurred again.'* In relation to practice, she stated that this implies the way in which things are generally done or will be done. Simler LJ stated that it is not necessary for a practice to already have been applied to another person, if there is an indication that it would be done again in future if a similar case were to arise.

Simler LJ further held that where an employee is unfairly treated by an act or decision of an employer and neither direct discrimination nor disability-related discrimination is made out, it is *'artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP'*.

Comment

The analysis provided by Simler LJ in the CA judgment sets clear boundaries for the definition of PCP, a term not defined in the EA. Her guidance confirms that 'one-off' decisions or actions taken by an employer can only qualify as PCPs if there is indication that they would be applied in similar future hypothetical cases.

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CA upholds right to rent scheme

Secretary of State for the Home Department v The Queen on the application of the Joint Council for the Welfare of Immigrants and others [2020] EWCA Civ 542; April 24, 2020

Facts

This appeal concerned the lawfulness of the 'right to rent' scheme introduced under ss 20-37 of the Immigration Act 2014 (IA 2014). The Secretary of State for the Home Department (SSHD) appealed the High Court's decision that the scheme is incompatible with Article 14 read with Article 8 of the European Convention on Human Rights (ECHR).

At the time of the appeal, the policy only applied in England. The effect of the scheme is that it prohibits private rented sector (PRS) landlords from letting their property to people who are subject to immigration control and who would be classed as 'irregular immigrants'. Known as the 'right to rent', the scheme was part of the raft of measures entitled the 'hostile environment'.

Sanctions which can apply to a PRS landlord in breach of the legislation are up to five years imprisonment and a £3,000 fixed penalty notice per contravention; so if a landlord has five tenants without a 'right to rent', the financial penalty would be £15,000.

The legislation created a new mandatory ground for possession where the Home Office served notice on the landlord that one or more of the tenants did not have the 'right to rent'. The mandatory ground means that, if proven, the judge has to make a possession order, unless there is an Equality Act 2010 (EA) defence.

If the Home Office served notice that no-one in the household had the 'right to rent,' the landlord could get possession by serving a 28-day notice without needing a possession order, as the Protection from Eviction Act 1977 safeguards no longer applied and the tenant lost their security of tenure.

The policy became law in England in October 2016. There are many ways that a prospective landlord can ensure that the prospective tenant has the 'right to rent'. However, the easiest would be for the prospective tenant to produce a British passport.

The Joint Council for the Welfare of Immigrants (JCWI) published a research report in February 2017. The report contained a 'mystery shopper' exercise, where the 'mystery shoppers' all had the 'right to rent' and had similar characteristics save for race and nationality and whether they had a British passport. The exercise showed that prospective landlords tended to satisfy the 'right to rent' inquiry duty by relying on a prospective tenant producing a British passport. When faced with tenants without a British passport, landlords would prefer people with ethnically British names over non-ethnically British names, even though both had the same 'right to rent'.

JCWI's research supported the view that the scheme caused landlords to discriminate against people on the basis of their race and nationality. This finding was particularly relevant as it was intended to roll out the policy across the UK.

JCWI issued a judicial review challenge against SSHD arguing that the scheme was incompatible with Article 8 and Article 14 ECHR and the extension of the scheme throughout the UK would be irrational without further evaluation of its potential discriminatory effect and a breach of s149 EA. JCWI did not issue the challenge on behalf of the 'irregular immigrants,' but that the scheme had such a wide application that it was discriminating on race and nationality against people who did have the 'right to rent,' but didn't have a British passport or ethnically British name.

The EHRC, the Residential Landlord's Association and Liberty joined JCWI as interveners in the challenge.

High Court

In March 2019 Justice Martin Spencer held that Articles 8 and 14 ECHR were engaged. While Article 8 does not give a person a right to a home, he found that the way the scheme impaired an individual's rights to acquire settled accommodation placed the scheme within the scope of Article 8.

Spencer J held that the evidence showed that landlords were not only discriminating against prospective tenants on grounds of race and ethnicity but were doing so because of the scheme. [para 93]

Spencer J held that the SSHD had failed to justify the scheme. Even if the SSHD could have shown that the scheme was effective in controlling immigration, the discriminatory effect of the scheme would outweigh any policy benefit. In any event, the defendant couldn't

show that the scheme was effective in controlling immigration. [para 123]

Spencer J held that the scheme was incompatible with Article 14 ECHR read with Article 8 and that the intention of rolling out the scheme across the UK without further evaluation of its efficacy and discriminatory impact would be irrational and a breach of s149 EA. [See Briefing 921] The SSHD appealed.

Court of Appeal

Giving the leading judgement, Hickingbottom LJ accepted the scheme caused discrimination on the grounds of race or nationality against people who had the right to rent but who didn't have a British passport; but for the scheme, the discrimination would not have occurred. [para 66]

The majority of the judicial panel held that the right to seek a home fell within the scope/ambit of Article 8 and Article 14 would be potentially engaged. Davis LJ disagreed as he considered that Article 8 was not engaged at all. [para 111]

The SSHD argued that as the policy concerned matters which were of socio-economic importance and which were for parliament to decide, the proportionality of the policy could only be assessed by the courts if it was held to be manifestly without reasonable foundation.

The JCWI argued that the *'manifestly without reasonable foundation'* test was restricted to welfare benefits cases, as, so far, it had only been applied domestically in such cases.

Hickingbottom LJ opened the door to the possibility that the '*manifestly without reasonable foundation'* test could apply to non-welfare benefit cases, particularly as the first time the Strasbourg Court applied the test to a UK matter, it was a non-welfare benefits issue concerning property.

However, he held that the *'manifestly without reasonable foundation'* test was not crucial in determining this case. [para 134]

There was some dispute between the parties about the efficacy of the policy in meeting its aim of deterring illegal immigration. Hickingbottom LJ was prepared to accept that the policy had some impact on achieving this aim. He commented that parliament was aware that the policy would have a discriminatory impact when it passed the legislation, which is why the discrimination Code of Practice was introduced to mitigate such risks. If the discrimination was greater than parliament had envisaged, then it would be a matter for parliament (or the SSHD) to address. [paras 146-147]

Hickingbottom LJ found that the policy did not intend, create or encourage the discrimination; it was coincidental. He then placed the agency and liability for any ensuing discrimination back on the individual landlords; he did not accept the submission that landlords acted out of economic rationality, in the sense that the sanctions were greater for letting property to a tenant without the 'right to rent' than the EA sanctions for not letting to prospective tenants on grounds of race or nationality, given that most tenants would not be able to enforce their rights. He held that tenants can enforce their rights in the County Court and the EHRC can step in, if the tenants are having difficulties in enforcement. [paragraph 148]

The scheme was held to be a proportionate means of achieving its legitimate objective and the appeal succeeded.

Comment

The case highlights the high level of deference that the courts will give to the policies of a democratically elected government in pursuing legitimate aims.

The JCWI is seeking permission to appeal the decision to the SC. Given the tension that the UK government policy is causing between the legitimate aims of the IA 2014 and the EA, it is likely that it will get permission to appeal. The CA is therefore unlikely to have had the final word on this issue.

Further, the CA judgment accepted that the right to seek a home fell within the scope of Article 8 ECHR and therefore Article 14 discrimination protection. This may have relevance to potential challenges to local authority housing allocation policies under Part 6 of the Housing Act 1996. Thus far, the CA has been reluctant to decide whether Article 14 read with Article 8 can be used to challenge the lawfulness of such allocation policies.

The decision dealt with the discriminatory policy on a governmental level. However, prospective tenants can potentially bring discrimination claims against prospective landlords under the EA. Further, the EA may afford actual tenants EA defences to possession claims made under the mandatory 'right to rent' ground.

It remains to be seen whether the scheme will be rolled out across the UK.

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The requirement for a capacity assessment re-visited

Royal Bank of Scotland PLC v AB; UKEAT/0266/18/DA, UKEAT/0187/18/DA; February 27, 2020

Facts

In 2008 the claimant, AB, suffered significant injuries when she was hit by a car on her way to start her first day of employment with the Royal Bank of Scotland (RBS). When AB was able to start work, she had a leg brace, a foot splint and was reliant on crutches. AB had to wear the splint throughout her employment with RBS and walked with a limp. Her injuries caused her continuous pain and affected her ability to work. AB also came to suffer from a mental health illness during the course of her employment, for which she had two significant periods of sick leave. AB resigned at the beginning of May 2014.

Employment Tribunal

AB brought claims against RBS for discrimination on the grounds of disability and unfair dismissal. The ET concluded in its liability judgment that AB had been constructively dismissed and that the dismissal was unfair. RBS had acted in breach of its obligation to maintain a relationship of trust and confidence with AB, and in breach of an implied obligation to provide a safe working environment. The ET held that RBS had discriminated against AB by failing to make reasonable adjustments to AB's workstation and requiring her to work on the till, making comments to or about AB on five occasions and failing to permit her to transfer to an alternative branch.

Remedies hearings

The first remedies hearing took place on various dates between July 24 and November 27, 2017. At that hearing, AB argued that in consequence of the discrimination which had occurred, she suffered severe depression requiring 24-hour care. AB relied upon expert evidence from Dr Ornstein who said that the discrimination AB suffered at work was the cause of her psychiatric condition. RBS relied on opposing evidence from Dr Stein, who disagreed as to the cause and extent of AB's psychiatric injury.

AB was supposed to give evidence on July 24, 2017, but did not do so as she was unable to give instructions. AB's appearance on July 25th was described as 'shocking'. The ET recorded in its first remedies judgment that AB's responses to questions were unintelligible and she did not appear to recognise her legal representatives. AB's legal representatives decided not to call AB to give evidence.

That afternoon, RBS made an application to adjourn the hearing pending a capacity assessment of AB. On July 26th, RBS's application was refused. The ET referred to s1(2) of the Mental Capacity Act 2005 (MCA) which states that a person is assumed to have capacity unless it is established that he lacks capacity. The ET's reasons for refusing the application included the fact that AB's legal team were satisfied they could obtain instructions from her and that neither of the experts informed the ET that AB lacked capacity to litigate, so the presumption of s1 MCA had not been displaced. The order was sent to the parties on July 27, 2017.

On July 27th RBS asked the ET to reconsider whether AB required a capacity assessment. RBS presented a note prepared by Dr Stein with her observations on AB's presentation on July 25th. Dr Stein stated that any formal assessment of capacity would need to be based on more than her observations that afternoon. The ET refused to reconsider its position, giving its reasons orally on July 28, 2017.

In its first remedies judgment, the ET made findings on causation and the amounts to be paid to AB in respect of pain, suffering and loss of amenity and future care. The ET asked the parties to try and reach settlement on the basis of its findings but listed a second hearing in case the parties could not agree.

The second remedies hearing took place in March 2018, following which the ET ordered RBS to pay AB £4,724,801.

Employment Appeal Tribunal

Both remedies judgments were appealed by RBS on multiple grounds, including that the:

1. ET erred by failing to adjourn the hearing for formal assessment of AB's capacity to conduct the litigation and give evidence (ground 1); and
2. ET had wrongly failed to reconsider its decision not to adjourn pending assessment of AB's capacity to litigate (ground 3).

The EAT dismissed all grounds of appeal, save for the ET's failure to reconsider its decision not to adjourn for the assessment of AB's capacity to litigate.

Ground 1

Swift J noted that the hearing on July 25 and 26, 2017 took place prior to the judgment of *Jhuti v Royal Mail Group Ltd* [2018] ICR 1077 being handed down. In *Jhuti*, the EAT held that the ET has the power to appoint a litigation friend. Prior to *Jhuti*, assessments and any orders consequent to it had to be ordered by another court. On this basis, Swift J commented that at the time of the first remedies hearing, assessing AB's capacity would not have been 'entirely straightforward'.

Swift J held that the ET was wrong to conclude that a capacity assessment was unnecessary. The reasoning behind the ET's decision to initially reject RBS' application for a capacity assessment of AB was due to its misapplication of s1(2) MCA; it contended that no capacity assessment was needed because there was no evidence establishing that AB lacked capacity. Swift J stated that the ET's reliance on the absence of a report from Dr Ornstein or Dr Stein stating an opinion that AB lacked capacity was illogical. S1(2) MCA does not require a lack of capacity to be established before a court can require an assessment of capacity. The requirement of expert evidence to make such a decision creates a catch-22.

Swift J stated that the question was not whether AB had capacity to litigate, but whether there was a permissible basis for enquiries to be made as to whether she lacked that capacity. When there is good reason for a cause for concern and legitimate doubt as to capacity to litigate, the presumption cannot be used to avoid taking responsibility for assessing and determining capacity. AB's presentation at the ET on July 25, 2017 did provide reason to suspect that she did not have capacity to conduct the litigation, such that an assessment was required.

Despite Swift J's findings, this ground of appeal failed as it was commenced out of time. The 42-day time limit for appealing started running from the ET's July 27th order, rather than the first remedies judgment.

Ground 3

Swift J held that the ET's decision on July 28, 2017 was a reconsideration of a case management order under Rule 29. Under Rule 29, the ET may vary a case management order '*where it is in the interests of justice*'. Swift J held that the ET's decision on July 28th was '*outside the generous ambit of discretion properly to be afforded to it*'. The ET had failed to engage with Dr Stein's note, specifically her statement that further assessment was required for a professional opinion on AB's capacity. The ET's failure to revisit its decision on the basis that it did not already have conclusive evidence that AB lacked capacity was irrational.

Disposal

RBS submitted that the case should be remitted to the ET to determine whether, as at July 2017, AB had capacity to litigate. RBS submitted that (i) the lack of assessment invalidated the ET proceedings and (ii) it had been unfair not to assess AB's capacity because the assessment might have produced evidence in support of RBS' case that AB was exaggerating her symptoms.

Swift J held that there was no need for the matter to be remitted to the ET for further consideration and the remedies hearing's order would stand because (i) there was no conclusion that AB lacked capacity, only a determination that an assessment should have been undertaken; (ii) the ET's order followed a contested hearing and determined how much compensation should be awarded to AB; and (iii) AB (acting by a litigation friend) made clear that she did not wish to re-open the ET's decision on the grounds that she lacked capacity during the remedies hearing.

In respect of RBS' second submission, Swift J held that the lack of a capacity assessment did not amount to unfairness because there was only a 'mere possibility' that substantive evidence would come to light. The purpose of the assessment would be to decide on AB's capacity to litigate only and not to aid either party in any substantive case.

Conclusion

This case highlights whether it is necessary for an ET to assess an individual's capacity to litigate in a claim of psychiatric injury which was caused by the discriminatory act of the employer. It is a useful reminder that the question of capacity must be properly considered as a protective mechanism when there are concerns about an individual's ability to provide instructions or give evidence. ET's should be alive to capacity issues, take seriously any concerns about an individual's capacity to litigate and be willing to adjourn or stay proceedings in order for an assessment to be carried out.

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Discrimination arising in consequence of disability – capping a voluntary exit payment

Chief Constable of Gwent Police v Parsons & Roberts UKEAT/0143/18/DA; February 25, 2020

Facts

Mr Parsons (P) and Mr Roberts (R) were police officers, aged 48 and 44 respectively when they left Gwent Police (G) in 2017. They had joined in the 1990s. They were each disabled within the meaning of the Equality Act 2010 (EA) and under regulation H1 of the Police Pensions Regulations 1987. However, neither had been allowed to retire on 'ill-health' grounds as they were capable of performing 'back room' duties for G.

In 2016, G adopted a voluntary exit scheme (VES) which had been introduced in 2013 as an option for the police under Annex DA of the Police Regulations 2003. This enabled G to pay a compensation lump sum to officers who left the force voluntarily.

P and R applied. Under VES they were entitled to compensation payments based on 21 months' and 18 months' pay respectively. As they had H1 certificates, they were also entitled to receive a 'deferred pension' on leaving the police rather than having to wait until retirement.

G saw them as gaining financially by leaving through VES rather than on ill-health grounds and capped the compensation payments at six months' pay. P and R complained to the ET, arguing that capping the lump sums was discrimination arising in consequence of disability, contrary to s15 EA.

Employment Tribunal

The ET upheld the claims. It found that P and R were treated unfavourably because the VES payments had been capped. The reason was the existence of the H1 certificates. The H1 certificates were the '*something arising in consequence of disability*'.

G had put the 'legitimate aim' as the need to properly manage the police authority funds. That contention amounted to a need to avoid P and R receiving a windfall. On the evidence before it, the ET found that the treatment was not a proportionate means of achieving a legitimate aim.

Employment Appeal Tribunal

On appeal, the EAT upheld the ET's decisions.

The EAT rejected G's argument that capping the lump sum was not unfavourable treatment. G had relied on *Williams v Trustees of Swansea University Pension and Assurance Scheme* [2018] UKSC 65; Briefing 888, arguing the cases were indistinguishable. However, the 'relevant treatment' in each case was different. In *Williams* it was the award of a pension which would not have been awarded if he had not been disabled: that could not be seen as 'unfavourable treatment'. In contrast, in P and R's cases, the relevant treatment was capping their VES payments which otherwise would have been much larger.

The EAT described as 'misconceived' G's argument that in finding the treatment arose in consequence of disability, the ET had wrongly conflated the EA and H1 definitions of disability. The only issue, said the EAT, was whether, assessing the matter objectively, the H1 certificates arose in consequence of their statutory disabilities. An argument that only an H1 certificate entitled one to early receipt of a deferred pension was not relevant to that issue.

On appeal G argued that the ET was wrong in finding that the cases of *Loxley v BAE Land Systems Munitions and Ordinance Ltd* [2008] ICR 1348 and *Kraft Foods UK Ltd v Hastie* [2010] ICR 1355 were distinguishable, and that G had not demonstrated a 'windfall', or that applying a six months' cap was necessary to prevent any windfall. The EAT rejected this because of the limited financial material that G had put before the ET. There was no inevitability of receiving more from an uncapped redundancy payment than if P or R had worked until retirement. There was no analysis of, nor financial information about, how much P and R would have earned until retirement. Nor was there a financial comparison of leaving under the VES and leaving under the ill-health provisions. On this evidence, the ET was entitled to reject G's contention that he was justified in capping the VES payments.

Comment

This case turned on a combination of statutory interpretation and a failure to back up assertions with evidence.

The statutory provisions establishing the VES do not

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seem to have addressed the position of those with H1 certificates. Pension age was defined as the age at which the member was first entitled to receive an *ordinary* pension. For those approaching pension age, there was a tapering provision with a cap of six months' pay on reaching pension age. P and R however did not receive an *ordinary* pension: they were entitled to immediate payment of a *deferred* pension, something different. So neither had reached the 'pension age' as defined.

As ever, matters inevitably look simple with hindsight. Being convinced about how the law applied may have led to a minimalist approach to evidence.

Implications for practitioners

- Whatever case you're dealing with, try not to make assumptions.
- Review the list of issues – does it cover all that is needed?
- List each factual element you need to prove to win that part of the case – this may well require more detail than the agreed list of issues
- What evidence do you have which supports each part of your case?
- Is that really enough? If there are gaps, try and fill them.

Sally Robertson
Cloisters

947 Briefing 947

EAT provides guidance on circumstances in which permitting parties to make an audio recording of proceedings may constitute a reasonable adjustment

Heal v The Chancellor, Master and Scholars of the University of Oxford & Ors
UKEAT/0070/19/DA; July 16, 2019

Implications for practitioners

The EAT has provided a helpful framework for deciding whether to allow the audio recording of tribunal proceedings as a disability-related reasonable adjustment. The EAT stated that whilst each case will have to be determined on its own facts, permission to record proceedings is unlikely to be granted on a routine or regular basis. Given the factors which may be taken into account, there is a high threshold, in practice, for a party seeking to obtain an audio recording as a disability-related reasonable adjustment.

Facts

The appellant, Dr Heal (H), brought complaints of discrimination and victimisation against the University of Oxford. H suffered from medical conditions (including dyslexia and dyspraxia) which made it difficult for him to take a contemporaneous note of proceedings. H argued that the tribunal was required to make reasonable adjustments to allow him to participate fully in proceedings, including allowing him to make an audio recording of the proceedings.

H's ET1 form did not specify details of the conditions which gave rise to the need for adjustments. It just stated that he was disabled and requested permission to use a recording device in all hearings. The ET1 did not specify how the proposed adjustments, including audio recordings, would assist H.

Under s9 of the Contempt of Court Act 1981 (CCA 1981) making an audio recording of court proceedings without consent is a contempt of court. S19 CCA 1981 provides that a court for these purposes includes an ET.

Employment Tribunal

In August 2018, EJ Lewis directed that H should apply for permission to record proceedings at a case management preliminary hearing. H sought a reconsideration of this decision on the basis that the tribunal should consider the issue on the papers. In September 2018, EJ Gumbiti-Zimuto affirmed EJ Lewis' decision.

H appealed against the ET's decision. His main grounds were that the ET erred in:

1. Using the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (the ET Rules) to deal with the question of adjustments. Instead, the tribunal should have dealt with adjustments under the Equality Act 2010 and the Human Rights Act 1998.
2. Requiring H to make an application for reasonable adjustments at all.

3. Failing to determine the question of adjustments in advance of the hearing. In particular, the ET failed to take proper account of the fact that without an advance decision, H would be refused access to the tribunal building (or risk being in contempt of court) if carrying recording equipment.

Employment Appeal Tribunal

Choudhary J, President of the EAT, dismissed the appeal, rejecting all the grounds. In doing so he gave guidance on the factors to be considered when deciding whether to allow audio recording of proceedings as a disability-related reasonable adjustment.

Choudhary J held that there had been no error of law in the tribunal approaching the question of whether to allow the audio recording under its broad case management discretion under the ET Rules. He held that H did not have an automatic entitlement to a decision on the papers prior to any preliminary hearing. Under the ET Rules, the tribunal could either decide to deal with an application on the papers or it could decide to require a party to make an application at a hearing. This would depend on a consideration of all relevant circumstances including the amount of information provided and the views of the parties in the case.

The EAT stated that the following (non-exhaustive) factors may be taken into account where a party applies for proceedings to be recorded as a disability-related reasonable adjustment:

1. the extent of the party's inability and any medical or other evidence in support;
2. whether the disadvantage can be alleviated by other means, such as additional time or breaks;
3. the extent to which recording proceedings will alleviate the disadvantage in question;
4. the risk that the recording will be used for prohibited purposes, such as to publish recorded material, or extracts;
5. the view of the other parties involved, and, in particular, whether the knowledge that a recording is being made by one party would worry or distract witnesses;
6. whether there should be any specific directions or limitations as to the use to which any recorded material may be put;
7. the means of recording and whether this is likely to cause unreasonable disruption or delay to proceedings.

The EAT further stated that where such an adjustment is granted, parties should be reminded of the express prohibition under the CCA 1981 on publishing the recording or playing it in the hearing of the public.

The University submitted that providing both parties with an official transcript would be the appropriate adjustment in this case. It argued that the duty to make reasonable adjustments should '*very rarely, if ever,*' lead to the tribunal allowing a party to record proceedings. The University argued that doing so would lead to confusion and uncertainty including with respect to whether the recording or the EJ's notes were conclusive.

The EAT dealt with these concerns as follows:

1. The provision of an official transcript, possibly long after the hearing had concluded, would not alleviate H's difficulty in taking contemporaneous notes and therefore being unable to effectively respond to the evidence as it emerged.

2. The tribunal's notes of evidence would continue to be the conclusive record of the hearing whilst tribunal proceedings are not routinely recorded.

3. An authorised audio recording would not automatically take precedence over notes of proceedings. Whether it did so would be a matter for the tribunal to determine in light of all the circumstances.

Comment

It seems unlikely that the tribunal's decision would lead to the confusion envisaged by the University with respect to the status of the recording vis-a-vis the EJ's notes. The purpose of the recording and the way it would be used could be strictly limited by the tribunal from the outset.

In any event, the *Modernisation of Tribunals Innovation Plan for 2019/2020*, published on April 2, 2019 (but as yet unimplemented), included an intention to record all tribunal hearings. The objective of this was to facilitate open justice and to provide an independent record of proceedings separate from the EJ's notes. If this were to be fully implemented across all ETs it would address many of the concerns raised by the University about the status of an individual's recording vis-a-vis the EJ's notes. In the interim, if a litigant sought to rely on an audio recording to challenge the judge's notes, tribunals would be well placed to resolve any uncertainties through the kind of fact-specific determination which is routinely used to resolve other disputed issues.

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Windrush anniversary

June 22nd was the second anniversary of Windrush Day, marking 72 years since the docking of the HMT Empire Windrush and the symbolic start of migration from the Caribbean to the UK. Campaigners for the day wanted to mark the contribution and achievements of the Windrush generation in rebuilding Britain and some of its institutions, including the NHS.

However, unlike last year's light-hearted events, the day was marked by protest and anger at the way the Windrush generation and those affected by the scandal of 2018 continue to be treated.

This year's activities included numerous online events in which the Home Office was admonished for its failure to respond expeditiously to deliver justice to those affected by the scandal, including low levels of compensation with just £360,000 offered to 60 people between April 2019 and May 2020.

The Home Secretary has announced that she will be implementing the 30 recommendations in Wendy Williams' Windrush Lessons Learned Review published in March. The EHRC has launched an assessment under s31 of the Equality Act 2006 to examine whether, and how, the Home Office complied with its public sector equality duty in relation to understanding the impact of its policies on the Windrush generation.

Jacqueline McKenzie, partner, McKenzie Beute and Pope, will examine Williams' review recommendations and the government's response in the November edition of *Briefings*.

She said: *'The recent protests regarding societal inequalities and racism will no doubt focus the minds of public bodies and the government on how its legislation, policies and operational cultures affect the lives of Black, Asian and Minority ethnic people. With a plethora of reviews and reports in existence, what everyone wants to see now is action.'*

Abbreviations

AC	Appeal Cases
AG	Advocate General
All ER	All England Law Reports
AN	Anorexia nervosa
BAME	Black, Asian, minority ethnic
BDRA	Births and Deaths Registration Act 1953
BMA	British Medical Association
BSL	British Sign Language
CA	Court of Appeal
CA 2014	Care Act 2014
CCA	Contempt of Court Act 1981
CFS	Clinical frailty score
Ch.	Chancery Division
CJEU	Court of Justice of the European Union
DLA	Discrimination Law Association
EA	Equality Act 2010
EAT	Employment Appeal Tribunal
EC	European Council
ECHR	European Convention on Human Rights 1950
ECR	European Court Reports
ECtHR	European Court of Human Rights
EHRC	Equality and Human Rights Commission
EJ	Employment Judge
ET	Employment Tribunal
ET1	Employment Tribunal claim form
EWCA	England and Wales Court of Appeal
EWCOP	England and Wales Court of Protection
EWHC	England and Wales High Court
GMP	Guaranteed minimum pensions
GRA	Gender Recognition Certificate
GRC	Gender recognition certificate
HC	High Court
HHJ	His/her honour judge
HRA	Human Rights Act 1998
ICR	Industrial Case Reports
IA	Immigration Act 2014
IRLR	Industrial Relations Law Report
J/JSC	Judge/Justice of the Supreme Court
LGBTI	Lesbian, gay, bisexual, transgender, and intersex
LJ	Lady/Lord Justice
LLP	Legal liability partnership
MCA	Mental Capacity Act 2005
MHA	Mental Health Act 1983
NG	Naso-gastric
NHS	National Health Service
NICE	National Institute for Health and Care Excellence
P	President of the EAT
PCP	Provision, criterion or practice
PM	Prime Minister
PRS	Private rented sector
QBD	Queens Bench Division
QC	Queen's Counsel
SC	Supreme Court
UKEAT	United Kingdom Employment Appeal Tribunal
UKSC	United Kingdom Supreme Court
WLR	Weekly Law Reports
WLUK	Westlaw UK

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