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Safeguarding our rights

Workplaces are increasingly using artificial intelligence to manage aspects of the employment relationship such as decisions on recruitment, line management, monitoring and training. And when AI is used to make or recommend decisions, there is potential for unlawful discrimination against individuals.

The accelerating development of AI and its widespread adoption by corporate bodies is the subject of Robin Allen KC and Dee Masters' article updating readers on use of AI in the workplace. The processing of data is under pinned by codes and computer programmes developed by human beings who can consciously, or unconsciously, introduce bias into the systems which results in discrimination against particular groups such as disabled people, ethnic minorities and women. In its 2020 report Technology Managing People, the Worker Experience, the TUC referred to '*two potential sources of a discriminatory outcome: the rules that are programmed by the software engineer; and the data that is used to "train" the algorithm*' highlighting that '*direct or indirect discrimination through the use of algorithms using workforce data is increasingly considered as one of the most pressing challenges of the use of new technologies'*. As the *Briefings* authors have pointed out, this report shows how '*AI technologies are increasingly being used in the employment sphere without the knowledge, understanding or participation of workers, employees, and trade unions*'.

They highlight that while existing labour law, equality, human rights and data protection laws can be used to regulate the collection of data and protect job applicants and employees, there is currently no UK legislation to manage or control the AI revolution. In contrast to steps being taken in the European Union to develop legislation and a framework convention by the Council of Europe, the current UK government favours a 'principles-based approach'. Although Home Secretary James Cleverly MP recently noted '*The era of deepfake and AI-generated content to mislead and disrupt is already in play*' and '*the landscape it is inserted into needs its rules, transparency and safeguards for its users*', the government's current approach is a 'light touch' one.

Challenging readers to engage with the AI revolution, the authors are working with the TUC and others to draft legislation and to ensure AI does not perpetuate bias and discrimination but instead that its potential is harnessed to benefit workers.

The protection of worker's rights was intended to be the subject of the Worker Protection (Amendment of Equality Act 2010) Bill which passed into law in October 2023. Initially framed around improving their protection from third party harassment, the government's amendments removed the bill's primary objective of reintroducing employer liability for such harassment. Olivia Fletcher and Alice Ramsay examine how the bill was 'heavily compromised' as it passed through parliament. They also explain how the EA has been amended by statutory instrument – the Equality Act 2010 (Amendment Regulations) 2023 – in order to retain equality law provisions which would have ceased following Brexit. These changes were introduced without consultation and without adequate debate or scrutiny. They express concerns that the lack of parliamentary scrutiny and the amendment of an act of parliament by statutory instrument could set a dangerous precedent. There continues to be a lack of clarity on how the amended provisions will work in practice and a concern that further changes might be made to the EA without parliamentary scrutiny.

The DLA will work with its members to closely monitor any such developments and to press for new legislation which regulates the use of AI and safeguards workers' rights.

Geraldine Scullion
Editor, *Briefings*

Unravelling recent legislative changes to the Equality Act 2010: implications for discrimination law

Olivia Fletcher, paralegal, and Alice Ramsay, senior associate solicitor, Leigh Day, analyse the recent legislative changes to the Equality Act 2010 (EA) and provide a brief overview of the differing amendment processes adopted. They consider the extent to which the changes are likely to have a significant impact on employment law. As well as questioning whether the relative lack of parliamentary scrutiny associated with amending an Act of Parliament by statutory instrument sets a dangerous precedent in the context of equality law, the authors also consider the level and effect of last-minute government amendments to the Worker Protection (Amendment of the Equality Act 2010) Act 2023 at the Bill stage. Outlining the speed with which changes to the EA have been ushered in by the new regulations, they note concerns about a lack of clarity on how the amended EA provisions will work in practice and conclude that the courts and tribunals should be closely monitored on such interpretation in the future.

The EA came into force more than 10 years ago. According to the Act's Explanatory Notes, it had two main purposes – to harmonise discrimination law and to strengthen the law to support progress on equality. Law is not static, however, and over the years there have been various calls to amend the EA. It has recently been amended through two separate legislative methods; firstly, by an Act of Parliament and, secondly, by statutory instrument. These created:

1. The Worker Protection (Amendment of the Equality Act 2010) Act 2023 (WPA) which introduced an additional duty on employers, under s40A EA, to take 'reasonable steps' to prevent sexual harassment of their employees in the course of their employment as well as a compensation uplift of up to 25% in cases where the ET finds a contravention of s40A(1). The WPA received Royal Assent on October 26, 2023, and will come into full effect in October 2024.
2. The Equality Act 2010 (Amendment) Regulations 2023 (EAR) were introduced by the government as secondary legislation to preserve various existing rights which would otherwise have fallen away following the coming into force of the Retained EU Law (Revocation and Reform) Act 2023 (REULA).

Overview of the legislative changes

The Worker Protection (Amendment of Equality Act 2010) Act 2023

Background

The question of employers' liability for third party sexual harassment has a controversial and complicated history within employment law. It is unsurprising, therefore, that the Bill parliament passed in October 2023 ended up as a heavily compromised piece of legislation. The Bill initially contained a provision under Clause 1 which would place a new responsibility on employers to take *'all reasonable steps'* to prevent harassment of employees, including from third parties such as clients or customers. Citing concerns over the potential 'chilling effect' that Clause 1 could have over free speech, government amendments removed the Bill's primary objective: to reintroduce employer liability for third party harassment.

Liability for third party harassment was originally introduced in 2008 by an amendment to the Sex Discrimination Act 1975, and later carried through into s40 EA. Currently, s40 EA prohibits employers from harassing their staff. When the EA was first passed,

s40 included two additional subsections (ss40(2)-(4)) containing provisions for employer liability in cases of sexual harassment by third parties. Under the '*three strikes rule*', employers would be vicariously liable for sexual harassment if they had knowledge of two separate incidents of harassment of that specific employee and failed to take reasonable steps to prevent a further incident from occurring.

Those provisions were repealed by the Enterprise and Regulatory Reform Act 2013 (ERRA) due to concerns by the then coalition government that they were potentially surplus and overly complex, effectively hindering the competitiveness of business growth.[1] Ministers reasoned at the time that there could be alternative legal routes for employees who experienced repeated sexual harassment by third parties, including breach of contract claims and claims under the Protection from Harassment Act 1997 (where the harassment was from a third party, such as a customer or a supplier), or both. The consultation document also queried whether the existing definition of sexual harassment in s26 EA could be interpreted to encompass third party harassment. Indeed, in the years between 2008 and 2013 when the third party harassment provisions were in force, there were only two instances of cases being brought on those grounds: *Blake v Pashun Care Homes Ltd* [2011] EqLR 1293, in the ET, and *Gloucestershire Primary Care Trust v Sesay* UKEAT/0004/13/MC in the EAT.[2]

[It was reported] to the EHRC that employers regarded sexual harassment and assault as just a 'normal' part of the job...

However, as case law surrounding employer liability has developed, it has become less clear whether employees are adequately protected from third party harassment. See, in particular, the CA's ruling in *Unite the Union v Nailard* [2018] EWCA Civ 1203; [2018] Briefings 823 & 878. Since that decision, an employee wishing to establish their employer's liability for third party harassment has to be able to persuade an ET that the protected characteristic was the 'ground of' the employer's failure to protect them from third party harassment, shifting focus away from the incident of third party harassment and towards the reason for the employer's action (or lack thereof). In practice, this means that after *Nailard*, and in the absence of ss40(2)-(4) EA, it is significantly harder to hold employers accountable for harassment by third parties.

The lack of protection against third party harassment was highlighted by the Equality and Human Rights Commission (EHRC) in a 2018 report on sexual harassment within the workplace. Almost a quarter of responses to the EHRC's study reporting harassment said that the perpetrators were third parties such as customers or clients.[3] Many submissions were from the hospitality industry. A common theme was a lack of support from management, with individual submissions reporting to the EHRC that employers regarded sexual harassment and assault as just a 'normal' part of the job, implying that harassment by third parties was just something managers expected employees to withstand.[4] In the same year, the House of Commons Women and Equalities Select Committee (WESC) highlighted a number of concerns with harassment protections in existing legislation.[5] In response, the government launched a consultation in 2019 into the issue of sexual harassment in the workplace. A major outcome of the consultation was that the government committed in 2021 to two legislative responses: introducing

1 Equality Act 2010 – employer liability for harassment of employees by third parties: A consultation, P.1. https://assets.publishing.service.gov.uk/media/5a7b535fe5274a34770eaef4/consultation-document.pdf

2 Government Equalities Office https://www.gov.uk/government/consultations/consultation-on-sexual-harassment-in-the-workplace/workplace-harassment-impact-assessment-final-stage-october-2021-part-2-of-2-evidence-base#fn:21 [Accessed on 13.02.24].

3 https://www.equalityhumanrights.com/sites/default/files/ending-sexual-harassment-at-work.pdf (Equality and Human Rights Commission, published March 2018), p.4.

4 Ibid, p.3-4.

5 https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/725.pdf (HC, Women and Equalities Committee, published July 2018).

workplace protections against harassment from third parties and creating an explicit duty on employers to take all reasonable steps to prevent sexual harassment at work.[6]

Procedure

The WPA was presented to the House of Commons by Wera Hobhouse MP as a Private Member's Bill (PMB) on June 15, 2022. The WPA aimed to amend the EA to increase employer liability for sexual harassment in the workplace and to introduce employer liability for the harassment of their employees by third parties, such as customers or clients. Wera Hobhouse, who presented a PMB to amend the Sexual Offences Act 2003 and legislate against the voyeuristic practice of upskirting in 2019, said that the WPA would '*help to create safer working environments that are fit for the 21st century*'.[7] Quoting evidence given by the Trade Union Congress (TUC), she noted that 43% of women have experienced at least three separate instances of sexual harassment at work.[8]

The WPA aimed... to increase employer liability for sexual harassment in the workplace and to introduce employer liability for the harassment of their employees by third parties

The Government Equalities Office's Explanatory Notes on the Worker Protection Bill provided a commentary on each of the six proposed clauses.[9] Clause 1 proposed treating an employer as harassing an employee in circumstances where an employee is harassed in the course of their employment by third parties over whom the employer does not have direct control, and it is shown that the employer failed to take all reasonable steps to prevent that harassment. Harassment was to be given the same definition as in s26 EA. Third parties were to be defined as a person other than the employer or a fellow employee. Clause 2 proposed a new duty on employers to take all reasonable steps to prevent sexual harassment of their employees.

In a significant move, the Bill did not replicate the 'three strikes' formulation which was originally enacted by ss40(2)-(4) EA. By contrast, liability could be triggered without any prior incidents of sexual harassment. In practice, this would have created parity between employer liability for harassment by a third party and harassment by a colleague. This aspect of the Bill was criticised during the Committee and report stages by MPs who argued that the 'three strikes' rule ensured that what was prohibited was *'a course of conduct that was harassing'*, despite inherent failures within the design of that provision.[10] While the removal of this rule was at the heart of the Bill's agenda to incite cultural change within the workplace, Conservative backbenchers argued that this would lead to a curtailment of free speech as employers would be expected to '*head off at the pass any possibility of harassment*'.[11]

Building on their commitment to '*strengthen and clarify the laws in relation to third party harassment*', the Worker Protection Bill received government backing.[12] The Bill also received broad cross-party support at its first and second reading in the House of

6 Government Equalities Office https://www.gov.uk/government/consultations/consultation-on-sexual-harassment-in-the-workplace/outcome/consultation-on-sexual-harassment-in-the-workplace-government-response (July 21, 2021).

7 Wera Hobhouse MP, 'Worker Protection (Amendment of Equality Act 2010) Bill - Consideration of Lords amendments' Parliamentary Debates (Hansard) Friday October 20, 2023 (Parliamentary Copyright House of Commons 2023), column 485.

8 'Written evidence from the Trade Union Congress (TUC) [EOV0029]' https://committees.parliament.uk/writtenevidence/125060/pdf/ September 2023, p.1. [Accessed on: February 13, 2024].

9 Worker Protection (Amendment of the Equality Act 2010) Bill - Explanatory Notes 220028en.pdf (parliament.uk) [Accessed on: February 13, 2024].

10 Hansard, Commons Chamber, Worker Protection (Amendment of Equality Act 2010) Bill, debated on Friday February 3, 2023, Column 589

11 Ibid.

12 HOC, Women and Equalities Committee, Sexual harassment in the workplace: Government Response to the Committee's Report https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1801/1801.pdf (5 December 2018), P.9.

Commons. On November 23, 2022 it was considered by a House of Commons public bill committee, which lead on to the report stage on February 3, 2023. At this stage, the government tabled four amendments with the express purpose of protecting free speech and expression through the insertion of four new subsections *'designed to set a ceiling on what can be considered "reasonable steps" for an employer to take'* to avoid liability.[13]

When moving the amendments, the government used the example of pubs *'seeking to prevent certain topics of discussion on their premises'* as an instance of *'unreasonable or drastic measures'* to avoid employer liability.[14] The amendments were designed to dissuade employers from suppressing free speech on their premises, but also hoped to retain the Bill's original intent to prevent targeted and grossly offensive remarks, and any form of sexual harassment. One MP objected to the provisions within the Bill on the basis that it would be plausible for pub owners to put up signs reading *'no banter allowed'*, as this could be seen as a 'reasonable step' to prevent harassment of their employees.[15]

The Worker Protection Bill decreased in strength as it passed through parliament. Most significant were the blows from Conservative backbenchers who tabled over 40 amendments ahead of the committee stage. The resulting negotiations between these backbenchers and the Bill's sponsor resulted in the removal of Clause 1 in its entirety and the word 'all' from Clause 2. The latter effectively makes it easier for employers to protect themselves from liability if they can show that they have taken 'reasonable steps', rather than *'all reasonable steps'*, to protect their employees from sexual harassment.

The Worker Protection Bill decreased in strength as it passed through parliament.

Additionally, s2 WPA, which deals with enforcement, means that ETs cannot consider standalone breaches of the employer duty in s40A. Only the EHRC can take enforcement action against standalone breaches of the duty if an employer fails to take reasonable steps to prevent third party sexual harassment of employees. ETs cannot consider individual claims for a breach of the s40A employer duty other than in cases where a claim of sexual harassment has been upheld.

How has the law changed?

While Wera Hobhouse expressed disappointment with the changes arising from the Bill's passage through parliament, along with those who had advocated for the Bill, including members of the Fawcett Society, she recognised the significance of the WPA in terms of creating a new 'preventative duty' for employers.[16]

The WPA provides employees with less comprehensive protection against harassment than had first been anticipated. Nonetheless, it does underline the need for employers to enforce clear policies, training, and proper, impartial investigations into reported harassment. While the Bill stated that employers should take *'all reasonable steps'*, well-understood in the context of the statutory defence in s109(4) EA, the WPA still requires employers to take 'reasonable steps', thereby requiring them to actively engage in a culture of anti-discrimination, subtly changing the working landscape by encouraging employers to be alive to potential risks of sexual harassment in the workplace.

This is further consolidated by s3 WPA (Clause 4 in the Bill), which introduced a new s124A EA to allow ETs to order a compensation uplift for breaches of the employer's

13 Explanatory Notes

14 Hansard, Commons Chamber, Worker Protection (Amendment of Equality Act 2010) Bill, debated on Friday February 3, 2023, Column 589.

15 Ibid.

16 https://www.fawcettsociety.org.uk/news/update-fawcett-response-to-progress-on-the-worker-protection-bill (11 July 2023) [Accessed on: 13.02.24].

duty to take reasonable steps to prevent sexual harassment of employees. ETs can decide whether to order an uplift and how much to award, subject to any award being no more than 25% of the compensation otherwise payable by the employer. Any uplift also has to reflect the extent to which, in the ET's opinion, the employer's duty was breached.

Employer liability for third party harassment remains unchanged following the enactment of the WPA. The Bill divided commentators and parliamentary members, some of whom thought that the Bill went 'too far' in its agenda, while for others, it served a disappointing blow to the protection of workers.[17] Paul Nowak, General Secretary of the TUC, described the amendments as 'disgraceful', arguing that the concessions were a betrayal to working women.[18]

Final thoughts

...it is clear that the concessions made to the Bill have challenged the extent of the government's commitment to preventing sexual harassment in the workplace.

In her closing statements to the Third Reading stage, Baroness Burt of Solihull, who sponsored the Worker Protection Bill in the House of Lords, said that the amended Bill presented a 'good start' towards effecting change in workplace culture.[19] Despite Baroness Burt's optimism surrounding the positive direction marked by the WPA, it is clear that the concessions made to the Bill have challenged the extent of the government's commitment to preventing sexual harassment in the workplace. The degree to which the Bill reneged on its original intentions – through changes ushered in by the government's last-minute amendments, which led to more brazen deletions at the House of Lords stage – means that the WPA, as enacted, contains no provisions to address the specific issue of sexual harassment by third parties. The law in relation to third party harassment remains as set by the CA in *Nailard* - employees must show that a protected characteristic was the reason for their employer's failure to protect them from third party sexual harassment.

The Equality Act 2010 (Amendment) Regulations 2023

Background

Following the UK's departure from the European Union in 2020, EU laws which had applied before that date were kept in place by the UK under the European Union (Notification of Withdrawal) Act 2017 '*to maintain legal continuity and certainty*'. On September 22, 2022 the government introduced a Bill in the House of Commons with the stated aim of providing a means to amend retained EU law and remove the special features that it had in the UK legal system. It proposed doing this by, among other means, repealing the principle of supremacy of EU law, facilitating domestic courts departing from retained case law, repealing directly effective EU law rights and obligations, and abolishing general principles of EU law in UK law by the end of 2023. Following amendments in parliament (which are outside the scope of this article), REULA received Royal Assent on June 29, 2023 and came into force on January 1, 2024.

Using the power in s12(8) REULA to reproduce the effects of retained EU law within UK domestic law, the government laid the EAR before parliament on November 7, 2023 to retain in UK law specific areas of equality law which would otherwise have been swept away at the end of 2023 by REULA. The EAR were made on December 19, 2023 and came into force on January 1,2024.

17 Hansard, Lords Chamber, Volume 831: debated on Friday July 14, 2023, Column 2034.

18 Adam McCulloch 'House of Lords waters down new sexual harassment laws' Personnel Today (July 14, 2023) [Accessed: 13.02.24].

19 Hansard, Lords Chamber, Volume 832: debated on Tuesday September 12, 2023, Column 789.

As explained in the EAR's Explanatory Memorandum, the EA consolidated and restated various enactments which implemented EU Directives in the field of equality law. Prior to REULA, the EA was interpreted in accordance with the interpretive effects of retained EU law. Given that REULA intended to remove those interpretive effects from the end of 2023, the government brought in the EAR to reproduce in domestic law the effects of various key decisions of the Court of Justice of the European Union (CJEU).

Procedure

By amending the EA via statutory instrument, the government introduced changes to the Act with a relative lack of parliamentary scrutiny or debate. The statutory instrument followed the affirmative procedure meaning that it would become law if actively approved by both Houses of Parliament. Parliament could decide not to approve the regulations, but it could not amend the proposed wording. This procedure seems to have been adopted due to the time limits imposed by REULA, which would reverse the interpretive effects of EU law after December 31, 2023, and because the changes to the EA aimed to maintain the status quo guaranteed by EU retained law in the areas specifically addressed in the Regulations.

By amending the EA via statutory instrument, the government introduced changes to the Act with a relative lack of parliamentary scrutiny or debate.

The government laid the EAR before parliament on November 7, 2023. In the EAR's Explanatory Memorandum, the government stated that consultation was not deemed necessary as the proposed amendments to the EA would reproduce the effects of retained EU law and did not amount to any policy change. A spokesperson for the EHRC welcomed the government's decision to enshrine the interpretative effects of EU law into primary legislation but also gestured towards the difficulty of these technical matters, commenting that it would be desirable for the government to provide '*sufficient opportunity to scrutinise*' the provisions.[20]

The EAR were debated by the House of Commons Delegated Legislation Committee on December 6, 2023. During that debate it was noted that the regulations were uncontroversial and aimed to preserve the status quo, although some concerns were raised, including in relation to the timing of the process for scrutinising which aspects of EU law should be specifically retained.[21] The EAR were then voted on and passed by the House of Commons on December 13, 2023 and by the House of Lords on December 19, 2023 (following a Grand Committee debate on December 13, 2023).

How has the law changed?

There are six regulations in total which, from January 1, 2024, reproduce the following eight principles to ensure that the rights and protections continue, notwithstanding the consequences of REULA:

1. Special treatment can be afforded to women in connection with pregnancy, childbirth or maternity (Regulation 2);
2. Less favourable treatment on grounds of breastfeeding constitutes direct discrimination on grounds of sex, and that this applies in the workplace as in other settings covered by the EA (Regulation 2);
3. Women are protected from unfavourable treatment after they return from maternity leave where that treatment is in connection with the pregnancy or a pregnancy-related illness occurring before their return (Regulation 2);

20 Equality and Human Rights Commission's Statement: https://www.equalityhumanrights.com/equality-act-2010-amendment-regulations-2023 (November 8, 2023) [Accessed on: February 13, 2024].

21 Hansard, Delegated Legislation Committee, https://hansard.parliament.uk/commons/2023-12-06/debates/1d6e0b95-4550-4973-b463-d8e43e928096/DraftEqualityAct2010(Amendment)Regulations2023 (Debated on December 3, 2023) [Accessed on: February 13, 2024].

4. Women are protected against pregnancy and maternity discrimination in the workplace where they have an entitlement to maternity leave which is equivalent to compulsory, ordinary or additional maternity leave under the Maternity and Parental Leave etc. Regulations 1999 (Regulation 2);
5. A claimant without a relevant protected characteristic, who suffers a disadvantage arising from a discriminatory provision, criterion or practice (PCP) together with persons with the protected characteristic may bring a claim of indirect discrimination, provided the disadvantage is substantively the same (Regulation 3);
6. Employers and equivalent for other work categories covered by Part 5 EA may be liable for conduct equivalent to direct discrimination if a discriminatory statement is made regarding recruitment, even when there is not an active recruitment process underway (Regulation 4);
7. An employee is able to draw a comparison for the purposes of equal pay claims with another employee where their terms are attributable to a single body responsible for setting or continuing the pay inequality and which can restore equal treatment, or where their terms are governed by the same collective agreement (Regulation 5); and
8. The definition of disability must be understood as specifically covering a person's ability to participate in working life on an equal basis with other workers (Regulation 6).

...it's not clear what process [the government] adopted to identify the precise areas of equality law to retain which would otherwise have been swept away by REULA.

When drafting the EAR, the government appears to have consulted specific CJEU decisions, although it's not clear what process they adopted to identify the precise areas of equality law to retain which would otherwise have been swept away by REULA.

The relevant cases mentioned in the Explanatory Memorandum are as follows:

- *Otero Ramos v Servicio Galego de Saude and another* Case C-531/15. The CJEU ruled in this case that employers must undertake an individual risk assessment for all breastfeeding mothers returning to work. The effect of the decision was to confirm that treating women less favourably at work because they are breastfeeding can amount to unlawful direct sex discrimination. Regulation 2(2)(b) omits s13(7) EA to make clear that the prohibition on less favourable treatment of a woman because she is breastfeeding does apply in a workplace context.
- *Brown v Rentokil* Case C-384/96; [1998] Briefing 107. In this case the CJEU held that pregnancy and maternity protection extends to unfavourable treatment which occurs after the end of the protected period, but which is because of the pregnancy or pregnancy-related illness during the protected period.
- *Commissioner of the City of London Police v Geldart* [2021] EWCA Civ 611; [2021] Briefing 979. In this case the CA held that a woman who did not have rights under the Employment Rights Act 1996, but who had an equivalent right to maternity leave under an occupational scheme, did not need a male comparator to bring a sex discrimination claim relating to maternity leave (applying the principle established by the CJEU in *Webb v EMO Air Cargo (UK) Ltd* Case C-32/93 that comparators are not necessary in sex discrimination claims relating to pregnancy or maternity).
- *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskiminatatsia* Case C-83/14; [2015] Briefing 762. The CJEU's decision in this case established that a person could bring a claim of indirect discrimination even if they did not have a relevant protected characteristic, provided they 'suffered together' alongside persons with the protected characteristic who were subjected to a particular disadvantage by a PCP.

- *NH Associazione Avvocatura per i diritti LGBT – Rete Lenford* Case C-507/18; [2020] Briefings 925 & 939]. The CJEU held in this case that employers may be liable for direct discrimination if a discriminatory statement is made about not wanting to recruit people who share a protected characteristic, even if there is no active recruitment process underway and no identifiable victim. Regulation 4 adds s60A to the EA, which includes clarification of the circumstances in which a statement will be discriminatory. It does not, however, create any individual cause of action and a breach of s60A (as with any breach of s60 in relation to pre-employment questions about a job applicant's health) is only enforceable by the ECHR.
- *Defrenne v Sabena (No.2)* [1976] ECR 455. The CJEU confirmed in this case that Article 157 of the Treaty on the Functioning of the European Union allows comparisons to be made between employees in the same establishment or service in the context of choosing an appropriate comparator in an equal pay claim. According to the EAR's Explanatory Memorandum, comparisons are not confined to employees working for the same employer or associated employers. The key question is whether the employees' terms are attributable to a single source, meaning whether there is a single body responsible for the alleged pay inequality and which can restore equal treatment. The 'single source' principle has been recognised in a number of domestic and European cases, including *Lawrence v Regent Office Care Ltd* [2003] ICR 1092.
- *HK Danmark acting on behalf of Ring v Dansk almennytiggt Boligselskab* C-355/11; [2013] Briefing 674. The CJEU held in this case that the concept of disability must include '*a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers*'. The Explanatory Note to the Regulations also mentions the importance of the CJEU's decision in *Sonia Chacón Navas v Eurest Colectividades SA* Case C-13/05; [2006] Briefing 423, in relation to the definition of disability for the purposes of the Framework Directive. New paragraph 5A of Schedule 1 EA provides that, in the context of employment and occupation, whether a person is covered by the protected characteristic of disability (s6 EA) should consider their ability to participate fully and effectively in working life on an equal basis with other workers. The Explanatory Memorandum to the EAR highlights the following EAT judgments which have considered the CJEU's definition of disability alongside the EA definition: *Paterson v Commissioner of Police of the Metropolis* [2007] 7 WLUK 660; [2008] Briefing 427; *Sobhi v Commissioner of Police of the Metropolis* UKEAT/0518/12/BA; *Igweike v TSB Bank Plc* [2019] 8 WLUK 313; *Aderemi v London and South Eastern Railway Ltd* [2012] 2012 WL 6774469; and *Banaszczyk v Booker Ltd* [2016] 2 WLUK 18.

As the EAR were passed under s12(8) REULA, there was no review clause included, nor was any full impact assessment completed.

Final thoughts

Commentary surrounding the introduction of EAR is limited due to the short time between when the regulations were introduced in parliament and when they were passed. Furthermore, the government provided very few, if any at all, details on the selection process adopted to choose which EU law-derived principles needed to be codified into the EA. As the EAR were passed under s12(8) REULA, there was no review clause included, nor was any full impact assessment completed.

Ostensibly, the EAR do not change domestic employment law as they intend to reproduce the interpretative effects of EU law which already applied in the UK prior to the end of 2023. However, questions have been raised over how the changes ushered in by the EAR will work in practice. In a recent article, David Mitchell of 39 Essex Chambers argues that there may be difficulty in anticipating how ETs and courts will interpret the

'*substantively the same disadvantage*' test in s19(A) EA and that judicial clarity is needed on its ambit and application.[22] Furthermore, there is a more fundamental objection to rewriting parts of primary legislation via statutory instrument, which was raised at Committee stage, and concerns about how widely these powers could be used going forward to alter UK anti-discrimination law without proper parliamentary scrutiny.

Conclusion

Two legislative changes have recently been introduced to maintain and strengthen anti-discrimination law in the UK. However, the process the government used to decide which parts of CJEU case law to incorporate into the EA remains opaque. On the other hand, the process by which changes were made to the Worker Protection Bill is clear. The WPA emerged as a heavily amended piece of legislation, reflecting significant last-minute changes introduced by the government. The parallel occurrence of two amendments to primary legislation, through distinct parliamentary methods, underscores a prevailing sense of uncertainty about the ramifications of REULA and how the EA might be amended further in the future. Could secondary legislation be used again or would an Act of Parliament be required?

Unpacking the complexity of the CJEU case law referenced in the EAR's Explanatory Note suggests a need to closely monitor how ETs and courts interpret the EA provisions introduced by the EAR

Most striking about the way that the EA has been amended by the EAR is the expediency with which the draft regulations were debated, reportedly within less than an hour by the Sixth Delegated Legislation Committee. This time appears disproportionate to the intricate nature, and level of technical detail, of retained EU law. Unpacking the complexity of the CJEU case law referenced in the EAR's Explanatory Note suggests a need to closely monitor how ETs and courts interpret the EA provisions introduced by the EAR going forward. It remains unclear how those provisions will be interpreted and, as some have suggested, whether they will contribute to further judicial uncertainty.

Considering that the aims of the EA include strengthening the law to support progress on equality, it seems unlikely that this government (or a future one) would try to use secondary legislation to amend the EA in any way which would take equality rights away from people with a particular protected characteristic.

Although passed as an Act of Parliament, close attention should still be given to how the changes to be ushered in by the WPA are implemented. The EHRC, which can take enforcement action against employers in breach of their s40A EA duty, has not yet updated its technical guidance on sexual harassment and harassment at work to assist employers with fulfilling that duty.[23] What clarity will any amended guidance give on what amounts to 'reasonable steps' for an employer to take to fulfil their new obligation? While the WPA as passed did not fully uphold the Bill's initial aim to impose stricter employer responsibilities to prevent workplace sexual harassment, especially with its omission of provisions addressing third party harassment, the introduction of a proactive duty for employers to protect their employees from sexual harassment is a positive step. In addition, although the original sponsors of the Worker Protection Bill haven't publicly signalled any intention to reintroduce similar legislation in the future, the issue of employee harassment by third parties is addressed in the Labour Party's Employment Rights Green Paper and it's possible that this issue could be revisited by a future government depending on the outcome of the upcoming general election.[24] How any future government might try to amend the EA, if at all, remains to be seen.

22 David Mitchell 'Section 19A Equality Act 2010: confusion codified' ELA Briefing January/February 2024, p.13.

23 https://www.equalityhumanrights.com/sites/default/files/2021/sexual-harassment-and-harassment-at-work.pdf

24 https://labour.org.uk/wp-content/uploads/2022/10/New-Deal-for-Working-People-Green-Paper.pdf

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Update on the use of artificial intelligence in the workplace

Robin Allen KC and Dee Masters of Cloisters and the AI Law Consultancy explore what the fast growing development of AI means for employment and discrimination lawyers and advisers. They describe developments in the use of AI and highlight the absence of legislation regulating its use in the workplace in the UK in contrast to emerging legislation, policy, and sources of guidance in the EU and the Council of Europe. They outline the EU's leading role in this field through its development of the Artificial Intelligence Act and technical standards. Referring to the UK's 'light touch' approach, they set out the role of UK regulators and conclude by referring to the TUC's call for new legislation to safeguard workers' rights and ensure AI benefits everyone.

The deployment of Artificial Intelligence (AI) in the UK's workplaces continues to grow and grow. AI systems are being rolled out by UK companies at a very fast pace. In January 2022, government research concluded that around one in six UK organisations, totalling 432,000 employees, had embraced at least one AI technology, and that 68% of large companies, 33% of medium-sized companies, and 15% of small companies had incorporated at least one AI technology.[1] In the same year the US International Trade Administration noted[2] that:

> *The UK's AI market is currently valued at over $21 billion, and it is estimated to grow significantly during the next few years and to add $1 trillion to the UK economy by 2035. UK artificial intelligence investment has reached record highs with UK AI scaleups raising almost double that of France, Germany, and the rest of Europe combined. The UK is the third largest AI market in the world after the United States and China.*

There is no reason to suppose that these developments will stop, both because the government continues to encourage investment in AI systems, and commercial competition between companies is driving such investment.

Significant developments in AI uses

Moreover, there has been a significant development in the kinds of work that AI systems are being developed to undertake. For instance, few will have missed the discussions about Chat Generative Pre-trained Transformer (ChatGPT), a large language model-based chatbot developed by OpenAI and launched on November 30, 2022. This is a natural language processing tool driven by General Purpose AI technology which purports to allow human-like conversations.

This is only one of the new innovations and an alphabet soup of new terms. Practitioners are all going to have to learn what these terms refer to! So here are some broad definitions which have been developed by the Ada Lovelace Institute that will help readers begin to understand what this is all about.

1 See: https://www.gov.uk/government/publications/ai-activity-in-uk-businesses/ai-activity-in-uk-businesses-executive-summary These figures have certainly increased very considerably in the last 18 months.

2 See: US International Trade Administration: United Kingdom Artificial Intelligence, September 16, 2022, https://www.trade.gov/market-intelligence/united-kingdom-artificial-intelligence-market-0

General-purpose AI	General-purpose AI models are AI models which are capable of a wide range of possible tasks and applications. They have core capabilities, which become general through their ability to undertake a range of broad tasks. These include translating and summarising text; generating a report from a series of notes; drafting emails; responding to queries and questions; and creating new text, images, audio or visual content based on prompts.
Generative AI	Generative AI refers to AI systems which can augment or create new and original content like images, videos, text, and audio. Generative AI tools have been around for decades. Some more recent generative AI applications have been built on top of general purpose (or foundation) models, such as OpenAI's DALL-E or MidJourney, which use natural language text prompts to generate images.
Large language model	Language models are a type of AI system trained on massive amounts of text data which can generate natural language responses to a wide range of inputs. These systems are trained on text prediction tasks. This means that they predict the likelihood of a character, word or string, given either its preceding or surrounding context. For example, predicting the next word in a sentence given the previous paragraph of text. Large language models now generally refer to language models which have hundreds of millions (and at the cutting edge, hundreds of billions) of parameters, which are pretrained using a corpus of billions of words of text and use a specific kind of Transformer model architecture.
Foundation model	The term 'foundation model' was popularised in 2021 by researchers at the Stanford Institute for Human-Centered Artificial Intelligence. They define foundation models as '*models trained on broad data (generally using self-supervision at scale) that can be adapted to a wide range of downstream tasks*'. In this sense, foundation models can be seen as similar to '*general purpose AI models*', and the terms are often used interchangeably.
Artificial general intelligence	Artificial general intelligence (AGI) is a contested term without an agreed definition. Researchers from Microsoft have sought to define AGI as '*systems that demonstrate broad capabilities of intelligence, including reasoning, planning, and the ability to learn from experience, and with these capabilities at or above human-level*'. A stronger form of AGI has been conceptualised by some researchers as '*high-level machine intelligence*', or when '*unaided machines can accomplish every task better and more cheaply than human workers*'.
Frontier model	Frontier models are a category of AI models within the broader category of foundation models. There is no agreed definition of what makes a foundation model a 'frontier' model, but it is commonly thought of as the model which is the most effective at accomplishing specific distinct tasks, such as generating text or manipulating a robotic hand, often using cutting-edge or state-of-the-art techniques.

So, what does this mean for employment and discrimination lawyers and advisers?

The **first** answer is that it is now so easy to collect data about everything that happens in the workplace, and the use of AI systems to analyse that data and either make or recommend decisions is so prevalent, that they can no longer afford to be ignorant of these developments. This is the Fourth Industrial Revolution foreseen by Klaus Schwab, Chair of the World Economic Forum many years ago.[3]

The **second** is that they must understand that within the UK there is as yet no bespoke national legislated regulation of its use, so that they must think through how the existing regulatory framework concerning employment and data use engages with this new reality.

Of course, the collection of this data can be for good uses, such as avoiding accidents at work, or efficient work planning, but also there is no doubt that it can be dehumanising - reducing workers to mere units of production.

...within the UK there is as yet no bespoke national legislated regulation of its use...

However, it can also be unlawful because it is contrary to data protection laws (the UK GDPR, EU GDPR, Data Protection Act 2018), the Equality Act 2010 (EA), the Human Rights Act 1998, and sector specific regulatory laws.

One particular area of our concern has been the way in which AI, Machine Learning (ML) and Automated Decision Making (ADM) systems can discriminate. Together with a number of other commentators and academics[4], the authors have been pointing out for some time how AI and ML make predictions and decisions based on comparing a new data set with a previous one. The process of comparability and prediction is essentially concerned with making judgments based on complex analysis of previous data, and so cannot be any better than the previous data sets known to the system.

This is a process which is highly susceptible to discriminatory bias and therefore – depending on how it is used – very likely to rub up against provisions of the EA; it also concerns many contexts in which fairness and transparency are protected in employment law. These issues were discussed in the authors' research paper for the Trades Union Congress (TUC) *Technology Managing People – the legal implications*.[5]

Where to start?

We have previously written about the way in which existing UK legislation can intersect with AI systems (see [2021] Briefing 962[6] and [2018] Briefing 873[7]). This is also well explained in *Artificial intelligence and employment law* published in August 2023 by the House of Commons Library. [8]

In the UK, the government has taken non-legislative steps to try to frame a new kind of approach to such systems based on regulatory principles. In Europe, by contrast, there is now political agreement on the content of a new regulation known as the Artificial

3 See: e.g. *The Fourth Industrial Revolution: what it means, how to respond* (https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/) Schwab, K., 2017. The fourth industrial revolution.

4 Wachter, Sandra and Mittelstadt, Brent and Russell, Chris, Bias Preservation in Machine Learning: The Legality of Fairness Metrics Under EU Non-Discrimination Law (January 15, 2021). West Virginia Law Review, Vol. 123, No. 3, 2021, and Adams-Prassl, J., Binns, R. and Kelly-Lyth, A., 2022. Directly Discriminatory Algorithms. The Modern Law Review.

5 See: e.g. our paper for the TUC, Allen, R. and Masters, D., 2021. Technology Managing People – the legal implications. AI Law, 11. See also Allen, R. and Masters, D., 2020, March. Artificial Intelligence: the right to protection from discrimination caused by algorithms, machine learning and automated decision-making. In ERA Forum (Vol. 20, No. 4, pp. 585-598). Springer Berlin Heidelberg.

6 *Artificial intelligence and the risk of discrimination in the workplace* by Robin Allen KC and Dee Masters

7 *Algorithms, apps & artificial intelligence: the next frontier in discrimination law* by Robin Allen KC and Dee Masters

8 We made significant contributions to this report; See: https://researchbriefings.files.parliament.uk/documents/CBP-9817/CBP-9817.pdf

Intelligence Act (AIA), while the Council of Europe is feeling its way forward to a new Convention to address human rights issues arising from the deployment of these new technologies. The TUC is now taking active steps to frame a new regulatory approach based on legislation, rather than the principles-based approach favoured by the current government.

European Union leads the way

Political agreement on the terms of the AIA was reached just before Christmas 2023 but the last technical amendments to the drafting took place early this year and this was agreed by the relevant European Parliament committees on February 13, 2024.[9]

In summary, the AIA imposes limits on the use of general-purpose AI, limitations on biometric identification systems in law enforcement, bans on social scoring and the use of AI to manipulate or exploit user vulnerabilities. It will become fully applicable 24 months after adoption, with certain provisions taking effect sooner, such as bans on prohibited practices (six months), codes of practice (nine months), general-purpose AI rules and governance (12 months), and obligations for high-risk systems (36 months).

Outline of the Artificial Intelligence Act

The AIA aims to ensure that the AI systems and models marketed within the EU are used in an ethical, safe, and respectful manner, adhering to fundamental rights. Compliance is required by all providers, distributors or deployers of AI systems and models within the EU or marketed into it. The level of regulation varies based on risk levels, with four levels ranging from unacceptable to minimal risk, each with corresponding compliance requirements and deadlines ranging from six to 36 months. Special obligations apply to generative and general-purpose AI depending on whether the model is open source or not. The guidance offers three use cases to illustrate compliance considerations:

The AIA considers that employment, the management of workers and access to self-employment... are high-risk activities... subject to strict obligations...

1. spam filters as low-risk
2. artistic deep fakes as low-risk with disclosure requirements, and
3. credit scoring as high-risk requiring stringent compliance due to potential discrimination.[10]

The AIA considers that employment, the management of workers and access to self-employment (e.g. CV-sorting software for recruitment procedures) are high-risk activities. High-risk systems are subject to strict obligations before they can be put on the market:

- adequate risk assessment and mitigation systems;
- high quality of the datasets feeding the system to minimise risks and discriminatory outcomes;
- logging of activity to ensure traceability of results;
- detailed documentation providing all information necessary on the system and its purpose for authorities to assess its compliance;
- clear and adequate information to the user;
- appropriate human oversight measures to minimise risk;
- high level of robustness, security and accuracy.

9 https://data.consilium.europa.eu/doc/document/ST-5662-2024-INIT/en/pdf

10 See: further https://www.wavestone.com/en/insight/ai-act-keys-to-understanding-and-implementing-the-european-law-on-artificial-intelligence/

The European AI Office

There is also a European AI Office (based within the European Commission) which started work on February 21, 2024.[11] This will have an important function as the centre of AI expertise across the EU.

The office's tasks will include developing tools for assessing the capabilities of general-purpose AI models, monitoring the implementation of rules, identifying emerging risks, investigating potential infringements, and supporting the enforcement of regulations on prohibited AI practices and high-risk systems. It will collaborate with relevant bodies under sectoral legislation, facilitate information exchange between national authorities, and maintain databases of when general-purpose AI models are integrated into high-risk AI systems.

There will therefore be much [EU] guidance to look out for in the future and to consider how it might inform consideration of AI systems deployed in the UK.

There will therefore be much guidance to look out for in the future and to consider how it might inform consideration of AI systems deployed in the UK.

Work on technical standards

One particular aspect of this will be the push in the EU towards the use of systems which meet technical standards. Thus, the European Commission believes that the new European regulatory system will require a major new step in the certification of AI systems. In 2022, we spoke on different platforms of a conference held by the EU's certification body CEN - CENELEC (the body responsible for the 'CE' mark) to discuss how steps might be taken forward with certification.[12]

The CEN-CENELEC has set up Joint Technical Committee 21 'Artificial Intelligence' which is responsible for the development and adoption of standards for AI and related data, as well as the provision of guidance to other EU technical committees concerned with AI.[13]

There are various ISO standards which have been developed. One such is ISO/IEC 42001:2023 Information Technology — Artificial intelligence — Management system.[14] This standard aims to specify requirements and gives guidance on establishing, implementing, maintaining and continually improving an AI management system. The ISO claims it can help organisations develop or use AI systems responsibly in pursuit of their objectives while meeting regulatory requirements, as well as the obligations and expectations of interested parties. However, we are somewhat sceptical of its ability to detect and eliminate bias.

Closer to home, the British Standards Institution (BSI) is developing standards for the development and use of AI systems.[15] It seems certain that there will be an interchange of expertise between these standards bodies and that over time their standards will cohere, if for no other reason that there will be an increase in trade in AI systems between the UK and Europe.

Council of Europe's AI work

In parallel with the EU developments, the Council of Europe has also been developing standards for the proper use of AI systems. These standards are not merely ethical

11 See: https://digital-strategy.ec.europa.eu/en/policies/ai-office

12 See: the report of the workshops *Data quality requirements for inclusive, non-biased and trustworthy AI*.

13 See: https://www.cencenelec.eu/areas-of-work/cen-cenelec-topics/artificial-intelligence/

14 See: https://www.iso.org/standard/81230.html

15 See: *Artificial Intelligence - Shaping trust in AI for a sustainable world* https://www.bsigroup.com/en-GB/our-expertise/digital-trust/artificial-intelligence/

standards but will form the basis for any assessment in due course by the European Court of Human Rights when AI issues come before it. Although the work programme for the Committee on Artificial Intelligence (CAI) will take some time to be completed, it is important because of the breadth of its members and observers.[16]

These may be even more significant for the UK, since Brexit has had an impact on its continued membership of the Council of Europe. After a period of reflection by a working group which concluded at the end of 2021, the Council of Europe established the CAI which published a Draft Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law on December 18, 2023.[17] Chapter III of this draft set out *Principles related to activities within the lifecycle of artificial intelligence systems*.

...so far there has been no *legislative* steps in the UK which specifically address the use of AI in the workplace.

These include principles concerning human dignity and individual autonomy, transparency and oversight, accountability and responsibility, equality and non-discrimination, privacy and personal data protection, preservation of health and the environment, reliability and trust, and safe innovation.

It is currently expected that the Framework Convention will be adopted at the CAI's 10th plenary meeting on March 11–14, 2024.[18]

What's been happening in the United Kingdom?

There has been a huge amount of discussion about the need to create a new and appropriate regulatory regime for AI. However so far there has been no *legislative* steps in the UK which specifically address the use of AI in the workplace. That does not mean that nothing is happening. The government is trying to work out how it can both maintain the UK as an economy which welcomes new AI developments but at the same time control its unethical or unlawful use. So far, the UK government has adopted a 'light touch'.

Centre for Data Ethics and Innovation

Much of the most important work so far as DLA members are concerned has been done by the Centre for Data Ethics and Innovation (CDEI)[19] which has issued important advice and guidance. In 2020, the CDEI published its *Review into bias in algorithmic decision making*[20] providing recommendations for government, regulators and industry to tackle the risks of algorithmic bias. In 2021, it published the *Roadmap to an Effective AI Assurance Ecosystem,* [21] which set out how assurance techniques such as bias audits can help to measure, evaluate and communicate the fairness of AI systems. Most recently, it published a report *Enabling responsible access to demographic data to make AI systems fairer,*[22] which explored novel solutions to help organisations to access the data they need to assess their AI systems for bias.

16 These include representatives from the 46 member states, Canada, Holy See, Israel, Japan, Mexico, and the USA as well as representatives of other international and regional organisations working in the AI field such as the EU, the UN (in particular UNESCO), the Organisation for Economic Co-operation and Development, the Organization for Security and Co-operation in Europe, representatives of the private sector, including companies and associations with which the Council of Europe has concluded an exchange of letters under the partnership with digital businesses, and representatives of civil society, research and academic institutions which have been admitted as observers by the CAI.

17 See: https://rm.coe.int/cai-2023-28-draft-framework-convention/1680ade043

18 See: https://rm.coe.int/cai-bu-2024-01-meeting-report/1680ae57e6

19 Now part of the Department for Science, Innovation and Technology

20 See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/957259/Review_into_bias_in_algorithmic_decision-making.pdf

21 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1039146/The_roadmap_to_an_effective_AI_assurance_ecosystem.pdf

22 https://www.gov.uk/government/publications/enabling-responsible-access-to-demographic-data-to-make-ai-systems-fairer

Digital Regulators Co-operation Forum

To provide general help to business, four major regulators have come together in a Digital Regulators Co-operation Forum (the DRCF). These are –

- the Competition and Markets Authority
- the Information Commissioner's Office (ICO)
- the Office of Communications (Ofcom) and
- the Financial Conduct Authority (FCA).

Unfortunately, the DRCF does not include the Equality and Human Rights Commission or the CDEI, though it is known that it speaks to both.

[The EHRC guide] explains how the public sector equality duty should be applied in circumstances where AI and ML systems may be used.

The DRCF has launched a *New advisory service to help businesses launch AI and digital innovations*[23] with the aim of meeting the government's promise that businesses will be able to receive tailored advice on how to meet regulatory requirements for digital technology and AI.

Regulatory activity in the UK

The main regulators in the UK concerned with AI and ML and related activities are the Equality and Human Rights Commission (EHRC) and the ICO.[24]

Equality and Human Rights Commission

The EHRC has signalled it will take a greater look at the way in which AI systems can discriminate. It published a Guide on Artificial intelligence in public services,[25] which explains how the public sector equality duty (PSED) should be applied in circumstances where AI and ML systems may be used. While this guide will be particularly relevant when looking at cases under Part 3 of the EA, it should not be ignored altogether by employment lawyers since the PSED can be relevant to decisions about allocation of resources and the composition of work force teams as well as other employment functions.

The EHRC's current Strategic plan: 2022 to 2025[26] also states on p24 that it will provide:

> *… guidance on how the Equality Act applies to the use of new technologies in automated decision-making. Working with employers to make sure that using artificial intelligence in recruitment does not embed biased decision-making in practice.*

Information Commissioner's Office

The ICO together with the Alan Turing Institute has published an excellent guide Explaining decisions made with AI[27].

In its most recent Strategic Plan 2025 the ICO said, among other more general matters, that it would have a particular focus on employment:

23 See: https://www.gov.uk/government/news/new-advisory-service-to-help-businesses-launch-ai-and-digital-innovations#:~:text=A%20new%20pilot%20scheme%20set,innovative%20technologies%20such%20as%20AI%20

24 There are of course regulators concerned with specific areas of activity such as the FCA and OFCOM which it is reported have been looking at cloud computing.

25 See: https://www.equalityhumanrights.com/guidance/artificial-intelligence-meeting-public-sector-equality-duty-psed

26 See: https://www.equalityhumanrights.com/sites/default/files/about-us-strategic-plan-2022-2025.pdf

27 See: https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/artificial-intelligence/explaining-decisions-made-with-artificial-intelligence/

> *AI-driven discrimination has become an issue that can have damaging consequences for people's lives. For example, being rejected for a job or not getting the financial support they are entitled to, a risk particularly acute for vulnerable groups. We will be investigating concerns over the use of algorithms to sift recruitment applications, which could be negatively impacting employment opportunities of those from diverse backgrounds. We will also set out our expectations through refreshed guidance for AI developers on ensuring that algorithms treat people and their information fairly.*

It also added:

> *Biometric technologies, like gait analysis, facial recognition, iris scanning and fingerprint recognition, are becoming cheaper and more powerful. They are beginning to drive innovative new services across the finance, entertainment, health and education sectors. While these biometrics have immense promise, we also need to be alert to risks – especially around emotion recognition technologies which can discriminate against certain vulnerable groups. We will be working with industry to set out our expectations on how these technologies should be used and investigating how these technologies are being deployed for any adverse impacts on vulnerable groups.*

The government is aware that new regulatory principles are necessary to ensure that AI systems are properly and appropriately used.

New research commissioned by the ICO reveals that almost one in five (19%) people believe that they have been monitored by an employer.[28] If monitoring becomes excessive, it can easily intrude into people's private lives and undermine their privacy. Over two thirds (70%) of people the ICO surveyed said they would find monitoring in the workplace intrusive and fewer than one in five (19%) people would feel comfortable taking a new job if they knew that their employer would be monitoring them. In response to this on October 3, 2023 the ICO published an important guide on monitoring workers in ways that comply with data protection laws – see *Employment practices and data protection – Monitoring workers*.[29]

UK government's new regulatory principles

The government is aware that new regulatory principles are necessary to ensure that AI systems are properly and appropriately used. It published a White Paper entitled A pro-innovation approach to AI regulation in March 2023.[30] This outlined five principles to guide and inform the responsible development and use of AI in all sectors of the economy. These are:

- safety, security and robustness
- appropriate transparency and explainability
- fairness
- accountability and governance
- contestability and redress.

The White Paper discussed at some length what it meant by each of these concepts.[31] In respect of fairness it said:

> *AI systems should not undermine the legal rights of individuals or organisations, discriminate unfairly against individuals or create unfair market outcomes. Actors involved in all stages of the AI life cycle should consider definitions of fairness that are appropriate to a system's use, outcomes and the application of relevant law.*

28 See: https://ico.org.uk/about-the-ico/media-centre/news-and-blogs/2023/10/ico-publishes-guidance-to-ensure-lawful-monitoring-in-the-workplace

29 See: https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/employment/monitoring-workers/

30 See: https://www.gov.uk/government/publications/ai-regulation-a-pro-innovation-approach

31 We have not included the definitions and rationales for the other principles in this article but we strongly advise those concerned with these issues to check what is said in the White Paper as we can be sure that regulators will already be looking at the way these principles apply to their domain of regulation.

Fairness is a concept embedded across many areas of law and regulation, including equality and human rights, data protection, consumer and competition law, public and common law, and rules protecting vulnerable people.

Regulators may need to develop and publish descriptions and illustrations of fairness that apply to AI systems within their regulatory domain, and develop guidance that takes into account relevant law, regulation, technical standards, and assurance techniques.

Regulators will need to ensure that AI systems in their domain are designed, deployed and used considering such descriptions of fairness. Where concepts of fairness are relevant in a broad range of intersecting regulatory domains, we anticipate that developing joint guidance will be a priority for regulators.

...no regulator can apply these principles to its regulatory decisions if they are not within its statutory powers.

It also gave an explanation of the rationale for this principle:

In certain circumstances, AI can have a significant impact on people's lives, including insurance offers, credit scores, and recruitment outcomes. AI-enabled decisions with high impact outcomes should not be arbitrary and should be justifiable.

In order to ensure a proportionate and context-specific approach regulators should be able to describe and illustrate what fairness means within their sectors and domains and consult with other regulators where multiple remits are engaged by a specific use case. We expect that regulators' interpretations of fairness will include consideration of compliance with relevant law and regulation, including:

1) AI systems should not produce discriminatory outcomes, such as those which contravene the Equality Act 2010 or the Human Rights Act 1998. Use of AI by public authorities should comply with the additional duties placed on them by legislation (such as the Public Sector Equality Duty).

2) Processing of personal data involved in the design, training, and use of AI systems should be compliant with requirements under the UK General Data Protection Regulation (GDPR), the Data Protection Act 2018, particularly around fair processing and solely automated decision-making.

3) Consumer and competition law, including rules protecting vulnerable consumers and individuals.

4) Relevant sector-specific fairness requirements, such as the Financial Conduct Authority (FCA) Handbook.

It is clear from the White Paper that the government does not intend at present to put these principles on a statutory footing. Some of the regulators responding to the White Paper do not seem to be particularly concerned about this. However, no regulator can apply these principles to its regulatory decisions if they are not within its statutory powers. It seems likely that if these principles are really going to be used to underpin the modern UK regulation of AI, there will have to be amendments to the Legislative and Regulatory Reform Act 2006.[32]

AI Safety Summit and after…

On November 1 and 2, 2023 the government hosted the international AI Safety Summit 2023 at Bletchley Park, Milton Keynes. This summit is at last a recognition within government that AI raises really significant issues of safety and therefore of regulation.

One possibility floated for the Milton Keynes summit was a push for an international convention on the use of AI similar to that which was introduced for the very early days

32 See: https://www.legislation.gov.uk/ukpga/2006/51/contents

of aviation. Thus, the Warsaw Convention, and later the Montreal Convention which replaced it, allowed international air travel to develop rapidly by ensuring that there was a common international legal framework providing certainty for emerging and developing aviation business. So far there is not much progress on that front though the Organisation for Economic Co-operation and Development is taking an important lead in the international discussion.[33]

UK government's latest position

On February 6, 2024 the government published its response to the consultation to the 2023 White Paper - *A pro-innovation approach to AI regulation: government response*.[34] Significantly this said at paragraphs 24 – 26:

We want to harness the growth potential of AI but this must not be at the expense of employment rights and protections for workers.

> *24. AI is revolutionising the workplace. While the adoption of these technologies can bring new, higher quality jobs, it can also create and amplify a range of risks, such as workplace surveillance and discrimination in recruitment, that the government and regulators are already working to address. We want to harness the growth potential of AI but this must not be at the expense of employment rights and protections for workers. The UK's robust system of legislation and enforcement for employment protections, including specialist labour tribunals, sets a strong foundation for workers. To ensure the use of AI in HR and recruitment is safe, responsible, and fair, the Department for Science, Innovation and Technology (DSIT) will provide updated guidance in spring 2024.*
>
> *25. Since 2018 we have funded a £290 million package of AI skills and talent initiatives to make sure that AI education and awareness is accessible across the UK. This includes funding 24 AI Centres for Doctoral Training which will train over 1,500 PhD students. We are also working with Innovate UK and the Alan Turing Institute to develop guidance that sets out the core AI skills people need, from 'AI citizens' to 'AI professionals'. We published draft guidance for public comment in November 2023 and we intend to publish a final version and a full skills framework in spring 2024.*
>
> *26. It is hard to predict, at this stage, exactly how the labour market will change due to AI. Some sectors are concerned that AI will displace jobs through automation. The Department for Education (DfE) has published initial work on the impact of AI on UK jobs, sectors, qualifications, and training pathways. We can be confident that we will need new AI-related skills through national qualifications and training provision. The government has invested £3.8 billion in higher and further education in this parliament to make the skills system employer-led and responsive to future needs. Along with DfE's Apprenticeships [footnote 40] and Skills Bootcamps the new Lifelong Learning Entitlement reforms and Advanced British Standard will put academic and technical education in England on an equal footing and ensure our skills and education system is fit for the future. (Footnotes omitted)*

This response noted a significant amount of extra funding for UK regulators, though it also confirmed that it would not yet take legislative steps to regulate the use of AI, but this was not ruled out. The paper said:

33 See: for instance its work on the impact of AI in the workplace https://www.oecd.org/future-of-work/reports-and-data/impacts-of-artificial-intelligence-on-the-workplace.htm and also the OECD AI policy Observatory See: https://oecd.ai/en/

34 See: https://www.gov.uk/government/consultations/ai-regulation-a-pro-innovation-approach-policy-proposals/outcome/a-pro-innovation-approach-to-ai-regulation-government-response

> *… the challenges posed by AI technologies will ultimately require legislative action in every country once understanding of risk has matured. In this document, we build on our pro-innovation framework and pro-safety actions by setting out our early thinking and the questions that we will need to consider for the next stage of our regulatory approach.*

TUC's work on workplace regulation

In September 2023 the TUC launched an AI taskforce; jointly chaired by Assistant General Secretary Kate Bell and Professor Gina Neff,[35] it called for 'urgent' new legislation to safeguard workers' rights and ensure AI 'benefits all'.[36] We were commissioned by the TUC to draft an *AI and Employment Bill* with the support and input of a special advisory committee which had cross-party support and significant representation from Tech UK, the Chartered Institute of Personnel and Development, the University of Oxford, the British Computer Society, the Communication Workers Union, GMB, the Union of Shop, Distributive and Allied Workers, Community, Prospect and the Ada Lovelace Institute.

The work of the taskforce is now essentially completed and it is expected that the TUC's bill will be published in April 2024. It will hopefully crystallise thinking around what needs to be done to protect employees, workers and jobseekers while at the same time providing real opportunities for more innovation and further adoption of the benefits which AI can bring.

35 Executive Director of the Minderoo Centre for Technology and Democracy at the University of Cambridge.

36 See: https://www.tuc.org.uk/news/tuc-launches-ai-taskforce-it-calls-urgent-new-legislation-safeguard-workers-rights-and-ensure

A new type of injunction: orders against persons unknown

Wolverhampton City Council and others v London Gypsies and Travellers and others [2023] UKSC 47; November 29, 2023

Implications for practitioners

In this case, the Supreme Court clarified the law on the grant of injunctions against persons unknown. The SC held that injunctions against unidentified and unidentifiable persons could be granted but emphasised the exceptional nature of the remedy and the significant substantive and procedural safeguards which should be followed when such relief is sought. The case will be essential reading for practitioners representing Gypsies and Travellers, against whom many of the persons unknown injunctions granted over previous years have been targeted. However, it also has significant implications for those representing protestors and other groups in respect of which injunctive relief against persons unknown is sought.

Facts

Between 2015 and 2020, some 38 local authorities were granted injunctions restraining unauthorised encampments in their areas (Traveller injunctions). The orders were characterised by their geographical width – with many preventing encampments in most or all of an authority's area – and also by the fact that they were brought against unidentified and unknown defendants.

In *Bromley London Borough Council v Persons Unknown* [2020] EWCA Civ 12; [2020] Briefing 940, the CA dismissed an appeal brought by a local authority against a decision not to grant it a borough-wide injunction. In doing so, the CA described the flurry of applications by local authorities for Traveller injunctions, of which Bromley's was one, as *'something of a feeding frenzy'* [para 11] and it laid down strict guidance as to when local authorities could apply for Traveller injunctions.

Shortly thereafter, in *Canada Goose UK Retail Ltd v Persons Unknown* [2020] EWCA Civ 303, the CA held that a final injunction could not be made against persons unknown who were not parties to the case as at the date of the final order.

Following these two decisions, and in light of a number of applications made to extend or vary injunctions which were nearing their end, the High Court decided that there was a need for review of all existing Traveller injunctions. This led to the decision in *Barking and Dagenham London Borough Council and others v Persons Unknown* [2021] EWHC 1201 (QB), in which Nicklin J held that final injunctions could be granted only against parties who had been identified and had an opportunity to contest the claim.

A number of local authorities appealed that decision and it was reversed by the CA in *Barking and Dagenham London Borough Council and others v Persons Unknown* [2022] EWCA Civ 13.

Three charities representing Gypsies and Travellers (London Gypsies and Travellers; Friends, Families, and Travellers; and Derbyshire Gypsy Liaison Group) which had hitherto been acting as interveners in the proceedings, then applied for and were granted permission to appeal to the SC. The SC also made a protective costs order, stipulating that no costs should be awarded against or in favour of the appellants in any event.

The issue for the SC to determine was whether and in what circumstances a court could grant a final injunction which would bind 'newcomers', namely persons who were not parties to the claim when the final injunction was granted.

Supreme Court

The SC rejected the proposition that newcomer injunctions fell within any established category of injunction and noted that such injunctions have a number of distinguishing features, including that they were:

- made against people who were 'truly unknowable' as opposed to persons who were identifiable but could not be named;
- always made without notice as against newcomers;
- made in cases where the persons restrained were unlikely to have any right to do the prohibited act; and
- the injunction was not sought to hold the ring pending trial or to protect a related process of the court.

The absence of sufficient transit sites in an area (or information as to where such sites may be found) could in itself be a sufficient reason for refusing a newcomer injunction.

These distinguishing features left their Lordships *'in no doubt that the injunction against newcomers is a wholly new type of injunction with no very closely related ancestor from which it might be described as evolutionary offspring, although analogies can be drawn … with some established forms of order'* [para 144].

In light of this, the SC had to *'go back to first principles'* in order to decide whether such injunctions were permissible [para 145]. The court noted the flexibility of equity and that it looks to substance rather than form. It concluded that there was *'no immoveable obstacle'* to granting injunctions against newcomer Travellers [para 167]. However, such injunctions were only likely to be *'justified as a novel exercise of an equitable discretionary power'* [para 167] if:

1. there was a compelling need for the injunction;
2. there was procedural protection for the rights (including the Convention rights) of newcomers;
3. applicants complied with the most stringent disclosure duty when seeking such relief;
4. the injunctions were geographically, and time, limited; and
5. it was just and convenient on the particular facts for an injunction to be granted.

The SC went on to give detailed guidance as to the circumstances in which newcomer injunctions prohibiting unauthorised encampments may be appropriate [paras 187-234]. It held that a local authority which had not complied with its obligations to provide lawful stopping places for Gypsies and Travellers, exhausted all reasonable alternatives to an injunction (including by trying to find a way to accommodate a nomadic way of life), or taken appropriate steps to control unauthorised encampments using other measures, may find it difficult to satisfy a court that the relief sought was just and convenient. The absence of sufficient transit sites in an area (or information as to where such sites may be found) could in itself be a sufficient reason for refusing a newcomer injunction. Further, there was a need for *'strict temporal and territorial limits'* and the SC had *'considerable doubt as to whether it could ever be justifiable to grant a Gypsy or Traveller injunction which is directed to persons unknown, including newcomers, and extends over the whole of a borough or for significantly more than a year'* [para 225].

Comment

This is the latest case arising from the spate of Traveller injunctions granted between 2015 and 2020.

As the SC recognised, the injunctions which had been granted *'undoubtedly had a significant effect on the communities of Travellers and Gypsies to whom they were directed, for they had the effect of forcing many members of these communities out of the boroughs which had obtained and enforced them'*. The court noted that *'a nomadic lifestyle has for very many years been part of the tradition and culture of many Traveller and Gypsy Communities'* [para 74].

Although the SC has confirmed that newcomer injunctions are in principle permissible, it has emphasised the exceptional nature of such orders and the significant steps which applicants must go through before seeking this relief.

Marc Willers KC
Garden Court Chambers

Tessa Buchanan
Garden Court Chambers

Challenging the government's guidance on the use of tactile paving surfaces

Sarah Leadbetter v Secretary of State for Transport [2023] EWCA Civ 1496; December 20, 2023

Facts

In these proceedings, Sarah Leadbetter (SL), a visually impaired disability rights campaigner and guide-dog user, challenged the Secretary of State's guidance on the use of tactile paving which was published in January 2022 (the guidance). SL's judicial review challenge was supported by RNIB, Guide Dogs UK and the National Federation of the Blind of the UK (NFBUK).

The guidance was intended to be '*a guide to best practice by public or private bodies with a role in the provision, design and improvement of the public realm'* and covered a wide range of topics in relation to the use of different tactile paving surfaces. The guidance was intended to be an update to a similar document issued in 1998.

SL's concerns related to two particular passages in the guidance which referred to the minimum kerb height detectable by blind and visually impaired people. Kerbs are particularly important for guide dog and long cane users when navigating the public realm. Guide dogs are trained to stop at kerbs to prevent their user from stepping into the road. Similarly, a cane user will rely on kerbs of a sufficient height in order to differentiate between the footway and the road. This was an issue of significant importance for the organisations supporting SL's legal challenge.

The guidance stated that the minimum detectable kerb height for visually impaired people was 25mm. SL and those supporting her were concerned that this was much too low, placing visually impaired people at risk. The 25mm height was taken from the 1998 guidance, and it was unclear what evidence this figure was based upon.

A similar issue was considered by the courts in Northern Ireland in 2017 (*Re Toner* [2017] NIQB 49; [2017] Briefing 847). The High Court found that Lisburn City Council had breached s75 Northern Ireland Act 1998 when it developed a public realm scheme with kerbs below 60mm without having due regard to the impact on visually impaired people.

Since 1998 concerns had been growing in relation to the use by local authorities of 'shared space' designs in town centres which removed or lowered kerbs in order to create open pedestrianised spaces. In 2009, in response to these concerns, Guide Dogs UK commissioned a study in relation to the minimum detectable kerb heights for visually impaired people. The study was conducted by University College London (UCL) at the Pedestrian Accessibility Movement and Environment Laboratory. The study involved 36 visually impaired participants who were asked to walk forwards and stop when they detected a kerb. The study found that in order for kerbs to be detected reliably by visually impaired people, these needed to be 60mm or higher.

The guidance remains to date the only guide available to local authorities and others which specifies the minimum detectable kerb height for blind and visually impaired people.

In 2017 the Secretary of State instructed independent consultants - the Transport Research Laboratory (TRL) - to advise in relation to a proposed update to the 1998

guidance. In July 2019 TRL sent a survey about the proposed updated guidance to the NFBUK for circulation to their members. The survey was not sent in any braille or accessible formats and the response was required within 12 days. The Federation responded, requesting further time, but no extension was granted.

In April 2021 two remote workshops were held in order to discuss the draft guidance. Representatives from the three organisations supporting SL were present and all parties highlighted the need for a minimum kerb height of 60mm to be included in the guidance in accordance with the findings of the 2009 study. No feedback was provided to the charities following the workshops. In January 2022 the guidance was published with the 25mm minimum kerb height included. TRL advised the Secretary of State that further research on minimum detectable kerb heights was required.

The consultation process was unlawful

High Court

SL brought judicial review proceedings which challenged the guidance on three grounds:

1. The Secretary of State failed to obtain the necessary information (on minimum detectable kerb heights) in order to properly exercise his functions under the Equality Act 2010 or under common law;
2. The consultation process was unlawful;
3. The decision to include the 25mm minimum kerb height within the guidance was irrational, in the absence of any evidence that this kerb height is detectable, and in the face of the UCL study.

At first instance HHJ Jarman KC considered grounds 1 and 3 together and rejected SL's arguments on these points. He declined to interfere with the Secretary of State's decision to maintain the 25mm figure pending further research because the decision was made '*on the basis of political judgment*'. The judge noted that the guidance covered a wide range of topics and was in need of updating generally and it was not therefore irrational to issue this pending the outcome of the additional research.

In relation to the consultation process, HHJ Jarman did find in favour of SL. Any consultation must accord with the fairness requirements imposed by common law. The 2019 survey did amount to a consultation, and it was clear that insufficient time has been provided to respond (12 days). The charities involved also asked for more time to consider the draft guidance at the time of the April 2021 workshops, and this was also denied. The court noted that it was not possible to say what additional information may have come out of a further period of consultation. This could have resulted in a change in the kerb height figure, or a caveat within the new guidance.

SL accepted that the findings on the consultation point were not sufficient to quash the guidance. She was granted permission to appeal in relation to grounds 1 and 3, and the Secretary of State was denied permission to cross-appeal on ground 2.

Court of Appeal

The appeal was heard on November 23, 2023 before Lewison LJ, Singh LJ and Laing LJ. Dismissing the appeal, the court noted that the 25mm figure was included in two passages of the guidance which referred to specific road layouts, namely '*designated pedestrian crossing points*' and '*vehicle crossovers*'. The guidance was not intended to specify the minimum detectable kerb height for visually impaired people in all circumstances.

The court also found that Secretary of State was not obliged to accept the findings of the UCL study when his advisors (TRL) had advised him of the limitations of the study and the need for further research, which had indeed already been commissioned. The court also found that the Secretary of State had not breached his duties of inquiry; on the contrary he appreciated that further work was required in relation to the issue of kerb heights generally and was discharging those duties by commissioning the further research.

Conclusion

Although the court did not quash the guidance, SL and those supporting her are keen to ensure that those responsible for designing public realm schemes are aware of the need to treat the guidance on the use of tactile paving with caution, in light of the findings that the consultation exercise was unlawful. It is hoped that a full and fair consultation will be held following the conclusions of the further research, and that these will result in a prompt update to the guidance. The Secretary of State has assured stakeholders that he will not wait a further 20 years before the guidance is updated.

Elizabeth Cleaver
Barrister, Doughty Street Chambers

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Industrial Tribunal lacks power to appoint a litigation friend despite the incontestable benefit to a litigant lacking legal capacity

Patrick Galo v Bombardier Aerospace UK ◆ [2023] NICA 50; July 3, 2023

Judicial decision-making involving determining whether a party has capacity to litigate and, where necessary, appointing a litigation friend to act on their behalf is intrinsic to a litigant's constitutional right of access to a court and their right to a fair hearing. In this decision the Northern Ireland Court of Appeal has developed the law, and suggested necessary reforms, to try and ensure compliance with legal requirements.

Facts

The appellant, Patrick Galo (PG) was pursuing claims of unfair dismissal and discrimination on the grounds of disability, race and victimisation arising from alleged disparate treatment in the allocation of (amongst other things) shift patterns, overtime and training. PG is a citizen of the Czech republic. He has Asperger's Syndrome.

Industrial Tribunal

This was not the first time PG's claims had been struck out by the Industrial Tribunal (IT). An IT dismissed his claims in 2014 but that decision was overturned by the CA (see Galo Number 1, [2016] NICA 25; [2016] Briefings 804). Between 2017 and 2019 PG was represented by the Equality Commission for Northern Ireland (the Commission).

During that period efforts were made to address the issues arising from his disability which included:

a) appointment of a registered intermediary

b) holding ground rules hearings

c) obtaining psychiatric reports.

On the basis of the expert evidence, the Commission formed the view that PG lacked capacity to litigate and asked the IT to appoint a litigation friend for him, relying on the case of *Jhuti v Royal Mail* UKEAT 0061/17/RN wherein the EAT ruled that a tribunal could appoint a suitable and willing person in that capacity.

The IT adjourned the matter to enable a further report addressing the issue to be obtained, but PG did not consent to the provision of the report to the tribunal. Moreover PG would not cooperate in the appointment of a litigation friend which led to the Commission coming off record. The tribunal subsequently asked the Official Solicitor if it would act as litigation friend but was informed this was not possible.

There were further case management hearings where PG represented himself. The respondent applied for the claims to be struck out under Rule 32 of Schedule 1 of the Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020 (the 2020 Rules).

At a preliminary hearing in February 2022 the tribunal reached the following determinations:

◆ [2023] IRLR 1019

a) the Judge (the former President acting alone) had the power to determine whether PG had capacity to litigate;

b) the test to be applied was whether PG was capable of understanding, with the assistance of such proper explanation from legal advisers and other experts in other disciplines as the case may require, the issues upon which his consent or decision was likely to be necessary in the course of the proceedings; and

c) the test could not be applied because PG had failed to provide the tribunal with an extant psychiatric report addressing the issue and did not agree to the tribunal obtaining such a report.

PG was given time to consider his position and a further preliminary hearing was convened to consider whether his claim should be struck out. He was unrepresented at that hearing. The tribunal struck out PG's claims under Rule 32 by reason that it was no longer possible to have a fair hearing of his claims. PG lodged a notice of appeal with the CA.

The tribunal failed to consider whether to take steps to appoint or secure the appointment of a litigation friend. The CA held that the case of *Jhuti* should be followed in the Industrial and Fair Employment Tribunals.

Court of Appeal

McCloskey LJ gave the judgment of the CA. To assist the reader, the issues addressed are summarised under the following headings:

1. The test for capacity to litigate in Northern Ireland.

The CA accepted the test identified by the tribunal (and outlined above) based on English case law including *Masterman v Brutton* [2003] 1 WLR 1511; *Baker Tilly v Makar* [2013] EWHC 759 (QB); *Z v Kent County Council and others* [2018] EWFC B65; and, *Stott v Leadec Limited* [UK EAT/0263/19/LA].

2. How the tribunal erred in law

The CA identified a number of errors:

a) The IT failed to give due consideration to whether PG's capacity to litigate could be assessed notwithstanding the non-disclosure of the most recent psychiatric report, given the tribunal had other reports addressing the issues and first hand experience of PG. The tribunal should have tried to adjudicate on the issue before reaching the conclusion that a further expert psychiatric opinion was essential. The CA found PG lacked capacity to litigate.

b) The appointment of a litigation friend could have assisted in determining whether PG possessed litigation capacity. The tribunal failed to consider whether to take steps to appoint or secure the appointment of a litigation friend. The CA held that the case of *Jhuti* should be followed in the Industrial and Fair Employment Tribunals. *Jhuti* held that, under the English rules, employment judges are competent to appoint a litigation friend where a party to the proceedings lacks capacity to litigate. Notwithstanding, the CA found there was no procedural rule or mechanism governing the exercise of such a power and consequently a procedural lacuna existed preventing the tribunal making such appointments. This is discussed further below.

c) The IT had erred in its application of Rule 32(2) which states:

A claim or response may not be struck out unless the party in question has been given the opportunity to make representations, either in writing or, if requested by the party or ordered by the tribunal, at a hearing.

The tribunal had made a fundamental error by striking out the claims before according PG his Rule 32(2) right to make representations. The CA was critical of

the respondent's application because it was based on mere assertion and founded on no supporting evidence; the CA criticised the tribunal for failing to adequately interrogate the application stating:

> *… this court can identify no nexus between the appellant's possible lack of litigation capacity and the respondent's right to a fair hearing. The undetermined issue of the appellant's litigation capacity sounded exclusively on his right of access to a court and his right to a fair hearing. In addition, the tribunal nowhere acknowledged the draconian nature of the power being exercised or the constitutional right which it thereby defeated.'* [para 47]

The court emphasised that in any strike out application involving a party whose capacity to litigate is in doubt, the hurdle of establishing that the case should be struck out is obviously 'elevated' and '*the procedural requirements are exacting*' [paras 50 and 83 respectively].

d) Given the nature of the errors identified, unsurprisingly, the CA indicated the appeal could have succeeded on the basis of common law fair hearing principles and/or Article 6 of the European Convention on Human Rights (ECHR) referencing the case of *R (Kiarie and Byndloss v Secretary of State for the Home Department* [2017] UKSC 42 [para 53].

3. Further determinations reached by the CA

a) The CA endorsed the decision of the English CA in *AM* (*Afghanistan v Secretary of State for the Home Department and Lord Chancellor* [2017] EWCA Civ 113 which addressed incapacitated and vulnerable individuals' effective right of access to immigration tribunals, noting the framework of legal principle contained at paragraph 21 of the decision.

b) The CA accepted that the Official Solicitor had no power to act in these cases given the relevant legislation, namely the Rules of the Court of Judicature (NI) 1980 and directions made by the Office of the Chief Justice.

c) The CA emphasised there is no absolute right to an adjournment so long as a refusal does not interfere with a party's right to a fair hearing. This is particularly relevant where a party has been given a reasonable opportunity to provide evidence but has failed to provide adequate evidence.

The issue at the heart of this case was the identification of the correct process for adjudicating on capacity and appointing a litigation friend in respect of a litigant potentially lacking legal capacity who was uncooperative...

d) The CA also accepted that the 2020 Rules did not provide the power to require PG or any advisers to disclose the most recent consultant psychiatrist's report. McCloskey LJ stated:

> *This is unsurprising having regard to the combined considerations of litigation privilege, the essentially adversarial nature of tribunal proceedings, the confidentiality protections of the common law and the appellant's right to respect for private life guaranteed by article 8 ECHR via section 6 of the Human Rights Act.* [para 41]

4. Providing a solution to the problem raised

The issue at the heart of this case was the identification of the correct process for adjudicating on capacity and appointing a litigation friend in respect of a litigant potentially lacking legal capacity who was uncooperative, particularly given the Official Solicitor's role does not currently extend to IT cases. In the Office of Care and Protection when a court is considering a person's capacity to litigate, the Official Solicitor is often appointed to represent the interests of a patient. With the assistance of the Official Solicitor the court can decide whether the patient has litigation capacity and if they don't, can appoint the Official Solicitor to act in a next friend/guardian ad litem (i.e. litigation friend) capacity.

The case raised two important issues: (i) does the tribunal have the power to appoint a litigation friend; (ii) where there is no one suitable and willing to act, who can be appointed? The CA's decision provides more of a signpost to a solution than a solution.

… the affordability of justice, the availability of legal representation and the provision of support measures such as a litigation friend are... inextricably linked to every litigant's fundamental rights of access to a court and to a fair hearing.

Decision

1. The CA acknowledged the important role litigation friends play in ensuring a person receives a fair hearing, but introduces a caveat – the absence of procedural rule or framework in Northern Ireland to regulate the exercise of this power:

   … the affordability of justice, the availability of legal representation and the provision of support measures such as a litigation friend are closely related subjects, all of them inextricably linked to every litigant's fundamental rights of access to a court and to a fair hearing. An assessment in any given case that a litigant is entitled to the support of a litigation friend is a matter of enormous importance to the person concerned. Its value must not be underestimated. The need for a simple, accessible, expeditious and cheap framework to give effect to the assessment that any litigant should have the benefit of a litigation friend is incontestable. In the absence of this - coupled with the necessary related public funding - the pioneering decisions in [sic – 'Jhuti and'] AM (Afghanistan) will be set to nought and our legal system will find itself paying mere lip service to the hallowed common law right to a fair hearing. [para 59]

2. Whilst a tribunal is competent to appoint a litigation friend, the CA held that it cannot do so until there is either legislative reform or the issuance of a Practice Direction providing for a procedure to facilitate the hearing of such applications.

3. In *Jhuti* the EAT stated: *'while there is no express power provided by the 1996 Act or the 2013 Rules made under it, the appointment of a litigation friend is within the power to make a case management order in the 2013 Rules as a procedural matter in a case where otherwise a litigant who lacks capacity to conduct litigation would have no means of accessing justice or achieving a remedy for a legal wrong.'* [para 32] Rule 25 of the 2020 Rules is a comparable case management power to Rule 29 of the 2013 Rules as relevant in the *Jhuti* case.

4. It is puzzling why the CA did not adopt the same approach as the EAT in *Jhuti* in determining that the tribunals could exercise the power to appoint litigation friends under their rules. (See *Harvey on Industrial Relations and Employment Law* Division PI, para 869) And to date, no such amending legislation or Practice Direction has been introduced.

5. The court noted that the Chief Justice could use her powers under s75 of the Judicature (NI) Act 1978 to expand the remit of the Official Solicitor to enable that agency to act in IT cases. To date the Chief Justice has not done so.

6. The CA imaginatively suggested that the statutory powers of the Commission are sufficiently broad to permit it to perform the role of a litigation friend.

The CA reversed the tribunal's decision and remitted the matter to be heard by a differently constituted tribunal.

Comment

Patrick Galo has a significant disability which impacts on his capacity to litigate. The legal system in Northern Ireland has twice failed him by denying him a fair hearing and unlawfully striking out his claims. The 2016 CA decision was a landmark decision in the field. This further litigation highlighted a lacuna in the law in Northern Ireland and the

CA has gone some significant way toward providing a legal solution to the problems around the appointing of a litigation friend in IT cases in Northern Ireland.

However perfection is the enemy of progress. The CA only partially followed the *Jhuti* decision holding that whilst an IT is competent to appoint a litigation friend, the power cannot be exercised until legislative reform or a Practice Direction establishes a procedural mechanism to regulate the exercise of the power, thereby perpetuating the lacuna in the law. Consequently whilst the decision is in many ways a welcome and progressive decision (for example see the statement of principle at paragraph 82), the law in Northern Ireland remains in a state of uncertainty.

Michael Potter
Bar Library & Cloisters

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Meaning of 'sex' in the Equality Act 2010

For Women Scotland Limited v The Scottish Ministers ◆ [2023] CSIH 37; November 1, 2023

Facts

The Gender Representation on Public Boards (Scotland) Act 2018 passed by the Scottish Parliament introduced a policy objective that 50% of members of non-executive members of such boards should be women, which the Scottish government intended to include trans women. To achieve that, the 2018 Act included in its definition of women those with the protected characteristic of gender reassignment and who were living as women.

For Women Scotland (FWS), a pressure group, brought a successful action (FWS1)[1] which ruled the definition impinged on a matter reserved to the UK government under the Scottish devolution arrangements, and it was unlawful (the court 'reduced' it in Scottish legal parlance).

The Scottish government then issued guidance which stated that, for the purpose of the 2018 Scottish Act, 'woman' would have the meaning established under ss11 and 212 of the Equality Act 2010 (EA), including those who had been recognised as female under s9(1) of the Gender Recognition Act 2004 (GRA).

FWS brought a second action asking for the new guidance to be 'reduced' – ruled unlawful. That claim was heard at first instance by Lady Haldane in the Court of Session Outer House (FWS2)[2]. She ruled that the meaning of 'sex' in the EA was not limited to biological sex and included those recognised by a gender recognition certificate (GRC) as female under the GRA.

FWS appealed. In Scottish parlance this appeal is referred to as a 'reclaiming motion'.

Court of Session Inner House

The reclaiming motion was considered by the CSIH (the Scottish equivalent of the England and Wales Court of Appeal) before Lady Dorian (the Lord Justice Clerk) and Lords Malcolm and Pentland (FWS3)[3]

FWS argued that:

- FWS1 had been determinative of the question;
- The GRA, which focused on marriage and pensions, was now largely symbolic after same-sex marriage and pension equalisation;
- The integrity of the EA could only be preserved if 'sex' was taken to mean 'biological sex',
- Pregnancy and maternity provisions (among others) would become unworkable unless 'sex' meant biological sex, and
- The EA had impliedly repealed the GRA.

1 *For Women Scotland v Lord Advocate* [2022] CSIH 4, February 18, 2022

2 [2022] CSOH 90, December 13, 2022

3 [2023] CSIH 37, November 1, 2023

◆ [2024] IRLR 138

The CSIH noted that the whole subject of gender reassignment, gender identity and gender recognition was difficult and sensitive. It also noted that FWS had altered its position from FWS1 which had not challenged that a person with a 'female' GRC was a woman for the purpose of the EA.

Nor had the GRA impliedly been repealed by the EA as certain provisions had been moved from the GRA into the EA but s9 of the GRA remained untouched. The GRA had been prompted by the European case of *Goodwin*. In *Goodwin* the court had found breaches of articles 8 and 12 of the European Convention on Human Rights (ECHR) which had led the UK government to enact a mechanism to effect a change in a person's status in the eyes of the law and that was the GRA.

FWS's arguments would undermine the whole purpose and effect of the GRA. As Lady Hale had noted in *R(C) v Secretary of State for Work and Pensions*[4] the purpose was not to allow a person to live as a 'third sex' but fully as a man or woman. The GRA was not 'narrow' or 'symbolic' as FWS had suggested.

The 'marriage' cases of *Bellinger*[5] and *Corbett*[6] were now outdated.

The judgment makes plain that the legal sex status of a person with a GRC will be determined by the GRC.

In the EA the terms 'male, female, man or woman' were not limited to a biological definition. This is not required by ss212 or 11 which, the court said, were entirely capable of being read consistently with s9 of the GRA. The court noted that the terms 'sex' and 'gender' are often used interchangeably in the EA, for example in s7.

The CSIH found that the terms 'sex' and 'gender' should be given a contextual interpretation based on the circumstances in which the terms were used.

The court considered some of the examples put forward by FWS, namely the armed forces, single-sex spaces and services, sexual orientation, schools, communal accommodation, and pregnancy and maternity rights and found no difficulty with a contextual interpretation. Exemptions, where lawful and proportionate, could still be used to maintain single-sex spaces and services. Pregnancy was the basis for pregnancy and maternity rights, not sex. Examples where exemptions had not been provided did not lead to the interpretation that 'sex' meant biological sex.

A written intervention was allowed by the campaign group 'Sex Matters' which focused on ECHR rights. The court found this made no difference to its conclusions.

The CSIH concluded that a person with a GRC in their acquired gender should be recognised as such for EA purposes and so the Scottish government guidance was not unlawful.

Effect of the judgment

The judgment is binding on Scottish courts and tribunals and persuasive elsewhere in the UK. It would be a bold employment tribunal which would go against it.

However, on February 16, 2024 it was announced that FWS has been granted permission to appeal to the Supreme Court, so this will clearly a case to watch.

Comment

The judgment makes plain that the legal sex status of a person with a GRC will be determined by the GRC.

4 *R(C) v Secretary of State for Work and Pensions* [2017] I WLR 4127

5 *Bellinger v Bellinger* [2003] UK House of Lords 21, April 1, 2003

6 *Corbett v Corbett* [1970] 2 All England Law Reports 32

The conclusion of the judgment states that the legal status of a person without a GRC remains that of their natal sex. That is an obiter comment as the guidance does not deal with the status of such persons.

The CSIH stated that persons with a GRC have a prima facie right to access single-sex services consistent with their legal sex. It did not analyse the indirect discrimination arguments which can be raised to show a person without a GRC but with the protected characteristic of gender reassignment may prima facie be subject to unlawful discrimination if excluded from facilities which match their acquired gender unless a lawful exclusion is proportionately applied.

Practical discrimination situations will have further added layers of complexity because a trans man, for example, may be *perceived* as a man or a woman by a discriminator and discriminatory conduct may be founded on their perceived rather than actual sex.

Robin Moira White
Old Square Chambers

Settling unknown future claims under the Equality Act?

Charles Melvin Bathgate v Technip Singapore PTE Limited [2023] CSIH 48 XA18/23; December 29, 2023

The Inner House of the Court of Session in Scotland (CSIH) has handed down judgment in a case dealing with post-employment age discrimination and whether a settlement agreement can include complaints unknown to the parties which could arise in the future. The EAT decision was first reported in *Briefings*, [2023] Briefing 1043[1].

Facts

Mr C Bathgate (CB) was the chief officer of a vessel which operated mainly outside UK or EEA waters. He brought a complaint of post-termination age discrimination related to an additional pension payment. The primary question explored was whether an unknown future complaint under the Equality Act 2010 (EA) can be settled by way of a settlement agreement (the Agreement).

At the EAT it was found that at the time of entering the Agreement, CB did not, and could not, have known that the respondent would discriminate against him on the basis of his age. The words 'the particular complaint', under s147(3)(b) EA limited settlement to claims which were known to the parties at the time of entering the agreement. His right of action did not accrue until after he had left employment and, on this basis, the Agreement did not compromise his claim and he was free to pursue this.

This reversed the ET decision on this point, which found that common law principles provided that parties can settle claims of which they have, and can have, no knowledge at the time of settlement through language that is plain and unequivocal.

The EAT also made a finding the CB was a seafarer under s81 of the EA. Accordingly, the Equality Act 2010 (Work on Ships and Hovercraft) Regulations 2011 (the Regulations) applied which exclude certain persons, including seafarers, from the scope of the EA so as to give effect to the United Nations Conventions on the Laws of the Seas which prevents the UK from applying its laws to vessels flying another country's flag. In light of this finding, CB could not pursue his claims under the EA, by virtue of his status as a seafarer.

This reversed the ET decision that he was not a seafarer, finding that s81 EA had no application where employment has ceased, as in CB's case.

Finally, the EAT found s108 EA (relationships that have ended) would not apply to CB as he did not have the right to bring a claim of discrimination during employment due to his status as a seafarer, and as such his post-employment rights could be no greater than they had been during employment.

This again reversed the ET decision which had found that he was not a seafarer, and had the discriminatory act occurred during employment, it would have contravened the EA.

Court of Session Inner House

Both parties appealed the EAT decision. CB appealed the EAT decision that he had no right to bring a claim because he was a seafarer, and the respondent cross-appealed the decision that the Agreement could not be used to settle unknown future claims.

1 See [2023] Briefing 1043 for a full account of the background and the ET and EAT decisions.

The CSIH focused primarily on the issue of whether the Agreement satisfied section 147(3) EA in that it relates to *'the particular complaint'*.

On this point, the CSIH relied upon the legal principles set out in *Hilton UK Hotels Ltd v McNaughton* [2005] UKEAT. This established that if the wording in the agreement is plain and unequivocal, a future claim of which an employee can have no knowledge can be compromised. This is in contrast to a generic description or a rolled-up expression such as *'all-statutory rights'* such as was the case in *University of East London v Hinton* [2005] ICR 1260, where it was found there was no particularity in the waiver and as such it did not sufficient relate to the claim it sought to compromise. As such, the actual or potential claim must at least be identified by a generic description or reference to the section of the statute giving rise to the claim.

The CSIH found that the level of particularisation required was met in the current case, as the list of claims waived in the Agreement included those based on age discrimination under s120 EA (clause 6.1.1), even if they could not be known of at the time of the agreement (clause 6.2).

Finally, with reference to *McWilliams and Others v Glasgow City Council* 2011 UKEATS/0036/10/BI, it was confirmed that the provision is not temporal in nature and as such privately negotiated compromise agreements could settle future claims.

The CSIH therefore upheld this appeal on broadly the same reasons as the ET and confirmed that a settlement agreement can relate to an unknown future complaint if there is a sufficient description of the claims waived.

On the point of whether CB was a seafarer, the CSIH agreed with the EAT that CB was a seafarer and therefore beyond the protection of the EA.

On the point of s108, the CSIH again reached majority agreement with the EAT (Lord Malcolm dissenting). As CB was found to be a seafarer, and without protection of the EA, his post-employment rights could be no greater than they had been during employment.

The CSIH therefore upheld the cross appeal and found that the jurisdiction of the tribunal was excluded by the terms of the Agreement. The other points were academic.

Implications for practitioners

It is established in this judgment that claims under the EA, which do not exist, and which have not been contemplated at the time of entering into agreements, can be settled if they are sufficiently particularised in the agreement.

In light of this, parties should give considerable thought to circumstances where there is likely to be any type of future relationship, or the agreement relies on future performance. In these circumstances careful drafting will be required to take account of this and ensure potential future claims are not settled inadvertently.

However, it should be remembered that general waivers which are unparticularised remain unenforceable.

Whilst a Scottish judgment, this will be extremely persuasive in English and other UK courts. It is not known at the time of print whether this will be appealed further.

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State immunity and resisting the tribunal's jurisdiction over discrimination claims

The Royal Embassy of Saudi Arabia (Cultural Bureau) v Alhayali [2023] EAT 149; December 5, 2023

Implications for practitioners

In this case the EAT found that raising state immunity could avoid the jurisdiction of the employment tribunal in a discrimination complaint despite the respondent's former solicitors having confirmed acceptance, in writing, that the ET had jurisdiction over those claims derived from EU law and despite both parties taking procedural steps to prepare for trial.

Facts

Mrs Abir Alhayali (AA), a Syrian born British citizen, was employed in the academic and cultural affairs and ticketing departments of the Saudi Arabian Embassy (the Embassy) in London. She was dismissed and on January 30, 2018 brought various claims, including discrimination, against her employers under the Equality Act 2010. The Embassy in its grounds of resistance asserted state immunity under the State Immunity Act 1978 (SIA).

Employment Tribunal

Preliminary hearing

At a preliminary hearing in March 2019 the employment judge referred to the SC decision in *Benkharbouche v Embassy of Sudan* [2017] ICR 1327 (SC); [2018] Briefing 853. In *Benkharbouche* it was held that domestic law providing blanket immunity was disapplied (as it applied to claims deriving from EU law) except to the extent that the Embassy was entitled to immunity under customary international law. AA had brought various claims, notably her discrimination claims (on the grounds of religion and belief, disability, harassment related to sex and religion, and victimisation) which derived from EU law. The ET ordered the Embassy to clarify whether it conceded jurisdiction over those claims derived from EU law.

On April 9, 2019, the Embassy's then solicitors, wrote to the ET and conceded jurisdiction over claims derived from EU law (notably the discrimination claims). The SIA provides that sovereign states are immune from the jurisdiction of the courts of the UK save for limited exceptions as allowed for in the act. One such exception is s2 SIA where a state validly submits to jurisdiction. Following this, both parties continued with preparation for trial.

Open preliminary hearing

On August 4, 2021, the Embassy's new solicitors wrote to the ET seeking to reassert state immunity. At an open preliminary hearing held on November 30 and December 2, 2021 the Embassy submitted in evidence a stamped but unsigned document on Embassy headed paper which asserted that the ambassador (the head of mission) had not personally authorised submission to the jurisdiction. The ambassador did not attend the hearing nor did he give evidence.

The ET found that the Embassy had submitted to the ET's jurisdiction; the Embassy's employment of the claimant was not an exercise of sovereign authority (i.e. regardless

of whether the Embassy had submitted to the tribunal's jurisdiction, it did not have the benefit of state immunity); and, even if the Embassy had state immunity this would be disapplied by s5 SIA in relation to the claim that it had caused psychiatric injury to AA (a personal injury claim).

The Embassy was permitted to appeal to the EAT on the following 5 grounds:

1. that the ET had failed to attach due weight to the stamped document;
2. had erred in its application of the test as to whether the Embassy was entitled to immunity under customary international law (the test to be applied in the context of an employment dispute being set out in *Benkharbouche*);
3. had failed to properly consider the context in which the claimant carried out her functions when applying *Benkharbouche* (whether the work carried out by AA was 'sufficiently close' to the exercise of sovereign authority [para 92]);
4. that the personal injury exception does not apply to employment claims, and that
5. if it did, this exception did not apply in cases of psychiatric injury.

...state immunity does not apply to psychiatric injury arising from acts of discrimination.

Employment Appeal Tribunal

Following a hearing in October 2023 the EAT concluded that the Embassy had not conceded to the jurisdiction of the tribunal; it found that the work carried out by AA in the academic and cultural affairs department did amount to the exercise of sovereign authority (although AA was engaged in an ancillary role, some of the functions she undertook played a part in protecting the interests of the Saudi state and its nationals in the UK and promoting Saudi culture) and that state immunity applied. The EAT did however, confirm that state immunity does not apply to psychiatric injury arising from acts of discrimination.

Comment

Both AA and the Embassy have been granted leave to appeal to the CA. AA's grounds raise issues of practical importance about the resolution of issues of this kind, including the question of whether determining whether an Embassy has the benefit of sovereign authority is a question of fact or a question of law.

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How to determine time limits for reasonable adjustments

Fernandes v DWP ◆ [2023] EAT 114; September 14, 2023

Implications for practitioners

This case determines when the time limit for presenting a reasonable adjustments claim starts to run.

First the employment tribunal establishes when an employer would have made the adjustment. Then it is required to consider when an employee, based on the facts known to them, would conclude that the duty would not be complied with.

Facts

Ms M Fernandes (MF) had depression and anxiety as well as back pain. She worked as a Universal Credit Agent for the Department for Work and Pensions (DWP). After returning from maternity leave in November 2019, MF was not provided with a special chair for back pain as had previously been provided. The occupational health advised the DWP in January 2020 about arranging an ergonomic assessment.

During a Covid-19 lockdown MF had to take special leave to care for her medically vulnerable child. From July 22, 2020 she started working from home using a DWP laptop. She again requested an ergonomic assessment. From August 4, 2020 MF could access the internet and make and receive calls but there was a problem with the smart card needed to access the DWP's IT system. This problem limited the work she could do.

From July 22 to November 27, 2020 MF worked from home. In September MF was asked to attend the office to resolve the smart card issue. She was not able to as one of her children was hospitalised. From November 27, 2020 to January 1, 2021 MF went off sick due to severe anxiety and depression. Even during this time, she kept asking for an ergonomic assessment. DWP said this would be completed once she attended the office. She briefly returned to the office from January 1 to 12, 2021 but was off sick again after that.

MF lodged claims of indirect disability discrimination and a failure to make reasonable adjustments on April 14, 2021[1]; she alleged that the provision, criteria or practice (PCP) applied to her was the requirement to work from home without appropriate equipment.

At a preliminary ET hearing it was determined that these claims were presented outside the time limit and it was not just and equitable to extend time for their presentation.

Employment Tribunal

Determining the relevant PCP, Employment Judge Burgher (the EJ) concluded that the issue with the smart card to access the DWP's IT system from August 4, 2020 would have prevented MF's ability to work from home. The EJ stated:

> *…. I therefore consider that the last act for the time limit in relation to providing furniture and equipment for the claimant ended on 4 August 2020. The claimant therefore should have contacted ACAS by 3 November 2020.* [para 9]

The EJ went on to look at whether it was just and equitable to extend the time beyond November 3, considering a number of items in doing so [para 10]. The EJ did not extend the

◆ [2023] IRLR 967

1 ET judgment, Case Number 3201911/2021; Fernandes v DWP, March 17, 2022

time limit as it was for the ET to determine the date when the employer might reasonably be expected to make the necessary reasonable adjustments. This start date was determined by the EJ to be August 4; therefore, the three month time limit ended on November 3.

Employment Appeal Tribunal

According to the EAT:

> *The principles set out in the existing authorities amount to the following propositions:*
>
> *a. The duty to make an adjustment, under the statutory scheme, arises as soon as there is a substantial disadvantage to the disabled employee from a PCP (presuming the knowledge requirements are met) and failure to make the adjustment is a breach of the duty once it becomes reasonable for the employer to have to make the adjustment.*
>
> *b. Where the employer is under a duty to make an adjustment, however, limitations may not begin to run from the date of breach but at a later notional date. As is the case where the employer is under a duty to make an adjustment and omits to do so there will be a notional date where time begins to run whether the same omission continues or not.*
>
> *c. That notional date will accrue if the employer does an act inconsistent with complying with the duty.*
>
> *d. If the employer does not act inconsistently with the duty the notional date will accrue at a stage where it would be reasonable for the employee to conclude that the employer will not comply, based on the facts known to the employee.* [para 16]

If the employer does not act inconsistently with the duty the notional date will accrue at a stage where it would be reasonable for the employee to conclude that the employer will not comply, based on the facts known to the employee.

The EAT also enquired why, if the main issue was about providing the equipment, the EJ did not deal with the auxiliary aid requirement. This could have avoided the complications inherent in identifying a PCP. The EAT further emphasised that there are three requirements under s20 of the Equality Act 2010 (EA) which define the duty to make reasonable adjustments and complaints are not limited to cases where a PCP creates the disadvantage. Therefore, the parties should consider '*which of the requirements has created the duty to make adjustments as this may impact on whether it is reasonable for the employer to have to make a particular adjustment'*.

The EAT further stated that a judicial analysis may be required to identify the notional date, for example where there the employer has failed to act:

> *In the absence of a finding that the employer has made a specific decision not to alleviate a disadvantage there must be judicial analysis to identify the notional date.* [para 34]

The EAT concluded that the EJ had misdirected himself about the law when he indicated that it was the ET's function to determine when the DWP *'might reasonably have been expected to make the adjustments as the start for bringing the claim'*. He had failed to go on and consider whether MF, based on the facts known to her, would conclude that the duty would not be complied with.

The EAT also went on to consider whether the duty to make adjustments is extinguished by a decision that the claim is out of time. EAT stated that in these situations, the principle of res judicata will apply. It then posed the question, in '*what circumstances will a new cause of action arise*?'; it concluded that this will be '*an entirely factual consideration of the position before and after the change*'.

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1085

Causation and proportionality in claims of discrimination arising from disability

Topps Tiles Plc v Mr G Hardy [2023] EAT 56; April 13, 2023

Facts

Mr Gary Hardy (GH) was employed by Topps Tiles Plc (TT) as a store manager, having joined the company on June 5, 2002. GH had suffered with depression for over 20 years. GH alleged he made TT aware of his diagnosis of depression following a discussion with an area manager in 2016, though no support was offered at the time.

During a routine meeting on October 7, 2019 with GH's line manager, Tammie O'Lone (TO'L), GH broke down in tears and they discussed his poor mental state and history of depression. TO'L sent GH home after the meeting with some information about TT's counselling service. TO'L followed this up with an email two days later regarding the Employee Assistance Programme. She then spoke to GH at a managers' meeting a few days later to ask how he was. GH responded that he was fine and was hopeful that being back at work would make him feel better.

On November 14, 2019, a customer came into the store when GH was on duty and complained of a delay with his order. The customer's behaviour became increasingly aggressive and he used a lot of foul language. GH became angry at this and gestured to the customer to leave the store, resorting to swearing himself. GH gestured with his hand at one point while holding a cup of tea and as a result some of the tea splashed onto the counter with a small amount landing on the customer's face. GH was subsequently suspended and later dismissed.

Employment Tribunal

GH brought proceedings for discrimination arising from disability under s15 of the Equality Act 2010 (EA) and for unfair dismissal.

The ET found that GH was a disabled person within the meaning of the EA and that TT had the requisite knowledge of GH's depression at all material times. The ET found that GH's depression was a more than trivial contributing factor in his response to the customer and therefore a causative link was established connecting the disability to the conduct which in turn led to his dismissal. The ET concluded that GH was treated unfavourably because of something arising in consequence of his disability - *'namely his difficulties in managing his anger in response to a trigger such as an argument with a customer'*.

The ET found that TT gave no thought at all to the possibility of a sanction other than dismissal. Whilst the ET accepted the legitimacy of the aim to ensure a positive customer experience, it rejected the submission that it could not be achieved by any other means than GH's dismissal. The ET considered that had TT issued a warning with a referral to occupational health and support from management *'there was every reason to believe that this out of character handling of the incident would not have occurred'*.

GH was therefore successful at first instance in both his claims for discrimination arising from a disability and unfair dismissal.

In advance of the remedy hearing, the ET concluded that GH had not contributed to his own dismissal, such as to merit a reduction in compensation for unfair dismissal. The ET

did not agree that a reasonable employer would treat GH's handling of the incident as an act of gross misconduct in the overall circumstances.

Employment Appeal Tribunal

In relation to the s15 EA claim, TT appealed on the basis that the ET had failed to apply the correct approach in establishing causation. The EAT relied on that set out in *Pnaiser v NHS England* 2016 IRLR 170; [2016] Briefing 778, namely the ET should first determine whether GH was treated unfavourably and by whom, and then it should determine what caused that treatment, focusing on the reason in the mind of the alleged discriminator.

The EAT found that the ET had applied the correct test in relation to causation and that the 'something arising' from disability need not be the main or sole cause for the unfavourable treatment but must have at least a significant (or more than trivial) influence.

The EAT found that the ET had applied the correct test in relation to causation and that the 'something arising' from disability need not be the main or sole cause for the unfavourable treatment but must have at least a significant (or more than trivial) influence.

TT also appealed on the ground that the correct test in assessing proportionality had not been applied, as required under s15(1)(b) EA, namely whether the treatment is a proportionate means of achieving a legitimate aim. TT considered that the ET had relied on some factors which were speculation or conjecture, in particular the potential impact that a referral to occupational health would have had on GH's dismissal.

The EAT found that the ET was entitled to take into account factors such as his depression, that he was dismissed for gross misconduct, his length of service and also the fact that he was 60 and therefore would find it difficult to get a new job. The EAT also found that the ET, as an industrial jury, is well entitled to consider, without any speculation or conjecture, that there are reasonable alternative ways of achieving the legitimate aim set out.

TT's appeals on the grounds raised in relation to the s15 EA claim were rejected by the EAT.

However, for purposes of the unfair dismissal claim, the EAT allowed an appeal on the ground that the ET had not applied the correct test in accordance with s123(6) of the Employment Rights Act 1996 (ERA) when concluding that GH did not contribute to his dismissal.

S123(6) ERA provides:

> *Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.*

The EAT found that the ET had incorrectly focused on whether TT was justified in considering GH's behaviour as gross misconduct, rather than evaluating his actual behaviour and its impact on the dismissal. The matter was remitted back to the ET with any reduction in compensation to be dealt with as part of the remedy hearing.

Implications for practitioners

The EAT's consideration of *Pnaiser* highlights the test for discrimination arising from disability cases, that the 'something arising' just needs to have a more than trivial influence to establish causation.

This case is a reminder that reasonable adjustments need to be properly considered by employers in order to avoid incidents which lead to dismissal. Secondly, once the

incident occurs then it is important that a range of reasonable responses, other than dismissal, are considered.

In terms of contributory fault, this case highlights the important of considering the actual conduct of the individual and whether or not it contributed to the dismissal, as opposed to whether it was reasonable to treat the conduct as gross misconduct.

Sacha Sokhi
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ABBREVIATIONS

AC	Appeal Cases
ADM	Automated decision making
AGI	Artificial general intelligence
AI	Artificial intelligence
AIA	Artificial Intelligence Act
BSI	British Standards Institution
CA	Court of Appeal
CAI	Council of Europe Committee on Artificial Intelligence
CDEI	Centre for Data Ethics and Innovation
Civ	Civil
CJEU	Court of Justice of the European Union
CSIH	Court of Session Inner House
CSOH	Court of Session Outer House
CV	Curriculum Vitae
DLA	Discrimination Law Association
DRCF	Digital Regulators Co-operation Forum
DWP	Department for Work and Pensions
EA	Equality Act 2010
EAR	Equality Act 2010 (Amendment) Regulations 2023
EAT	Employment Appeal Tribunal
ECHR	European Convention on Human Rights 1950
ECR	European Court Reports
EEA	European Economic Area
EDI	Equality (equity), diversity and inclusion
EJ	Employment judge
EqLR	Equality Law Review
ERA	Employment Rights Act 1996
ERRA	Enterprise and Regulatory Reform Act 2013
ET	Employment Tribunal
EU	European Union
EWCA	England and Wales Court of Appeal
EWFC	England and Wales Family Court
EWHC	England and Wales High Court
FCA	Financial Conduct Authority
GDPR	General Data Protection Regulation
GP	General practitioner
GRA	Gender Recognition Act 2004
GRC	Gender recognition certificate
HHJ	His/her honour judge
HR	Human resources
ICO	Information Commissioner's Office
ICR	Industrial Case Reports
IRLR	Industrial Relations Law Reports
ISO	International Organization for Standardization
IT	Industrial Tribunal
LJ/LJJ	Lord/Lady Justice of Appeal (singular and plural)
LLP	Legal liability partnership
ML	Machine learning
NFBUK	National Federation of the Blind of the UK
NHS	National Health Service
NICA	Court of Appeal in Northern Ireland
NIQB	High Court of Justice in Northern Ireland Queen's Bench Division
Ofcom	Office of Communications
PCP	Provision, criterion or practice
PMB	Private Members Bill
PSED	Public sector equality duty
REULA	Retained EU Law (Revocation and Reform) Act 2023
SIA	State Immunity Act 1978
TRL	Transport Research Laboratory
TUC	Trades Union Congress
UCL	University College London
UKEAT	United Kingdom Employment Appeal Tribunal
UKSC	United Kingdom Supreme Court
WCS	Windrush Compensation Scheme
WLR	Weekly Law Reports
WLUK	Westlaw United Kingdom
WPA	Worker Protection (Amendment of the Equality Act 2010) Act 2023

Fair trial no longer possible due to failure to comply with an unless order

Dr S Bi v E-AC ◆ [2023] EAT 43; March 28, 2023

Facts

Dr S Bi (SB) had been placed, as an agency worker, to work as a teaching assistant at a school sponsored by the respondent E-ACT (R). SB's placement was terminated, and in November 2015, she brought various claims including for unfair dismissal, protected disclosure detriment and unlawful victimisation, relating to events which occurred at the school between September 14 and 23, 2015.

Employment Tribunal

SB succeeded in part in her claims at the liability stage, and directions were given for the trial of remedy. Notably, the parties were given permission to obtain a joint psychiatric report relating to psychiatric injury suffered by SB. At the time of the agreed expert's instruction in May 2018, SB objected to sending her full medical records to R, although she did send some GP records to the expert. The expert duly reported, although noted that psychiatric records had not been provided. R maintained that full disclosure of SB's medical records were required.

At a case management hearing in June 2018, SB agreed to provide her consent for the release of her medical records but in the months following, failed to do so.

In October 2018, R sought an unless order to require SB to provide consent for her medical records. SB, who was acting as a litigant-in-person, noted that R was seeking '*an unless order … to dismiss the remainder of my claims*' [para 9] and asserted that it would be disproportionate to deny her the right to bring a fundamental claim. Nevertheless, the unless order was granted.

SB failed to comply with the order and her claims were therefore dismissed. Within three hours of receipt of the notice of dismissal, SB contacted the ET to urge that her claim should not be dismissed, arguing that she had been working on her PhD thesis, had not been able to check her emails, and had thought the unless order applied only to the psychiatric claim. SB applied for the order to be set aside.

On November 5, 2019, EJ Perry, deciding on the papers, rejected the application, asserting that SB's '*failure to comply … was deliberate*' and SB's continued non-compliance was prejudicial to R [para 20]. He did not believe that SB would provide her consent, and it was therefore no longer possible to hold a fair trial. The ET also observed that SB's non-compliance had caused a second postponement of the remedy hearing, which was a waste of the tribunal's time, and delayed a claim which was already four years' old.

SB's subsequent application for reconsideration of the decision was refused.

Employment Appeal Tribunal

SB appealed the ET's November 5, 2019 decision, contending that a recent diagnosis of autism might go some way in explaining her failure to comply with the unless order. In May 2021, the EAT stayed the appeal to allow for the claim to be reconsidered (out of time) by the ET in light of SB's diagnosis.

◆ [2023] IRLR 498

In August 2021, EJ Perry considered the application on its merits despite noting

that it was not '*in the interests of justice to exercise any discretion to address the reconsideration application out of time*' [para 28]. The judge accepted that SB's autism diagnosis had had an impact on her non-compliance, but highlighted inconsistencies and omissions in SB's explanation which did not adequately justify it. He found that she had not indicated she intended to remedy the non-compliance and considered that the issues faced by SB were '*outweighed by the necessity of consent for a fair disposal of the claim*' [para 30] and the application for reconsideration was therefore dismissed.

SB appealed the ET's decision (and was thereafter represented), the hearing of which was combined with consideration of her appeal against the November 5 decision.

The EAT emphasised the importance of the overriding objective to deal with cases fairly and justly and that the ET should give regard to particular vulnerabilities which might otherwise impact on a party's ability to fully participate in tribunal proceedings: '*Such a vulnerability might arise from a disability that requires adjustments to be made to the procedures that would otherwise apply*' [para 36]. The EAT also highlighted the requirement for proportionality and careful consideration before imposing an unless order, due to its potentially draconian consequences.

The EAT emphasised the importance of the overriding objective to deal with cases fairly and justly and that the ET should give regard to particular vulnerabilities which might otherwise impact on a party's ability to fully participate in tribunal proceedings...

The EAT confirmed that:

> *The touchstone for granting relief from sanctions, so as to reinstate a claim that has been dismissed for breach of an unless order, is whether granting the relief sought would be 'in the interests of justice' (rule 38(2)) …* [para 47]

The EAT also stated that:

> *The exercise of case management discretion by the ET will only be susceptible to challenge where the ET applied the wrong principle, took into account irrelevant matters or failed to have regard to that which was relevant, or reached a conclusion that might properly be said to be perverse.* [para 51]

SB had argued that the ET had erred in not holding in-person hearings for its decisions of November 5, 2019 and August 18, 2021 which failed to consider her vulnerabilities and need for adjustments. Further, that its decisions were perverse, took into account irrelevant matters or took no account of relevant matters in that it *'had prayed in aid of its decisions the delays since the events giving rise to the claim'* (contending that such delays were not her fault). She also asserted that the ET had erred in its approach to proportionality, arguing that the more proportionate approach would have been to merely strike out her claim for psychiatric harm, and finally, that it had failed to consider the true extent to which SB's autism had rendered compliance difficult or impossible.

The EAT upheld the ET's decisions and the appeals were therefore dismissed.

In its decision, the EAT found that EJ Perry had been entitled to determine matters on the papers. In the absence of requests for in-person hearings from either party, the ET was not bound to make assumptions about SB's position, and SB had not *in fact* been prejudiced by the ET's decision to do so. Further, the EAT considered that the ET's observation of the delays caused by the non-compliance did not form a material part of its decision. Finally, the ET was entitled to find that R would be prejudiced if it was unable to explore each issue, requiring full disclosure of SB's medical records and positing that such records might be relevant not only to a claim for psychiatric injury, but to other losses, even if SB did not herself seek to rely on them.

Whilst the EAT also accepted that SB's disability had had an impact on her non-compliance with the unless order and noted the '*strong public interest'* [para 72] in

ensuring that those who have suffered victimisation are adequately compensated, it concluded that neither outweighed the detriment caused to R by the non-disclosure of medical records, which were required for the just determination of SB's claim.

Comment

This case acts as a stark reminder to practitioners of the severe consequences of unless orders. It demonstrates that the requirement for a fair trial is imperative, outweighing any issues faced by a claimant in complying with an order, in an otherwise meritorious claim. Even if a claimant has been successful in their claim(s) (and is therefore entitled to recover compensation), if a fair trial is no longer possible, then neither is the reinstatement of the claim.

In a broader sense, the case raises questions about the difficulties faced by litigants-in-person, particularly those with disabilities, which should not be underestimated.

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Express finding needed to establish that conduct is 'related to' a protected characteristic

Blanc de Provence Ltd v Miss Thu Lieu Ha ◆ [2023] EAT 160; December 21, 2023

Facts

Miss Thu Lieu Ha (TLH) worked as a tailor at the employer's Marylebone store. In 2020, disciplinary proceedings were brought against her after she posted an inappropriate message on an internal messaging system. She refused to attend her disciplinary meetings and took an abrupt tone in related correspondence. As a result, she was issued with a first written warning on March 20, 2020.

Around the same time, the employer was considering making redundancies due to the Covid-19 pandemic. On the same day that the written warning was issued, one of the company's directors and its head of operations visited the store to inform TLH that she was to be made redundant. This news was given to her in the locked basement of the store after her fellow female colleagues were told to leave the premises.

TLH brought various claims against the employer, including for harassment related to sex.

Employment Tribunal[1]

The sex related harassment claim succeeded. The ET found that the treatment TLH had received was inappropriate. She had been '… *knowingly deprived of her female companion and left as the only female in the store, contrary to her expressed wishes. The store having been locked from the inside so no-one else could enter, she was required to go down to the basement and submit to a one-sided process conducted by two managers standing over her. The conduct was the more unwanted because the Claimant was a woman, and the two managers were men*.'

The ET held that it was '… *not convinced that* [the head of operations] *would have felt at liberty to treat* [TLH] *in that way had she been a man*', noting that it was for **this** reason that the conduct was found to be related to sex.

The employer appealed on the following grounds, namely that the:

1. ET had erroneously concluded that the treatment was related to sex;
2. ET's decision had been procedurally unfair in that the head of operations was not asked by either the ET or TLH whether his actions were related in any way to sex; and
3. TLH had not advanced any sex-based connection to the incident in her witness statement or in the tribunal hearing.

Employment Appeal Tribunal

The EAT held that the ET erred in law in its approach to the claim of sex related harassment. Specifically, the EAT identified shortcomings in the ET's handling of the case, particularly the direct questioning of the two managers about the motivation for their conduct.

The EAT noted that it is clear that the harassment test (set out at s26 of the Equality Act 2010) is whether conduct is '*related to*' a protected characteristic. This is different

◆ [2024] IRLR 184

1 *Ms T Lieu Ha v Blanc de Provence Ltd*: 2204806/2020

to the test in direct discrimination claims, where the test is whether the less favourable treatment was *'because of'* the protected characteristic. Put simply, *'related to'* has a wider and more flexible meaning than *'because of'*.

Conduct may be found to be 'related to' sex where it was done 'because of' sex, but this is not a requirement. For example, if A subjects B to unwanted conduct with the effect of creating an intimidating environment for B in circumstances in which it is **established** that A would not have subjected a man to the same conduct, that will establish that the conduct was 'related to' sex (as was the finding of the ET in this case).

...the EAT noted that where there is an allegation of [sex-related harassment] it should generally be put *'fairly and squarely'* to the alleged perpetrator.

However, the EAT noted that where there is an allegation of this nature, it should generally be put *'fairly and squarely'* to the alleged perpetrator. Furthermore, even though the term 'related to' is wider than 'because of', there must still be a relationship between the unwanted conduct and the protected characteristic in question (in this case, sex). The EAT cited the case of *Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and another* [2020] IRLR 495 in which it was found that there must still '*… in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in questio*n'.

In the present case, the EAT noted that the ET had failed to question the managers directly about whether their conduct was influenced by TLH's sex, nor did TLH put this question to them. Whilst the ET had considered the question of whether the head of operations would have treated TLH differently had she been male, it was held that there were fundamental problems with the tribunal's reasoning in reaching its conclusion on this, the most pertinent being that if the ET was to reach its determination on that basis, it needed to make an **express** finding on that point.

Next steps

The EAT remitted the issue back to a freshly constituted ET for redetermination. It instructed the ET to consider additional facts to reassess whether the conduct was indeed related to sex to enable it to '*articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion*'.[2]

In considering whether remission should be to the same or a fresh ET, the EAT accepted the submissions made on behalf of the employer that the ET's questioning, including suggesting that where two men 'confront' a woman, it is 'common sense' that harassment is established, could lead the employer to fear that the view expressed was more than provisional.

Implication for practitioners

In the ever-evolving landscape of discrimination law, the case serves as a reminder to practitioners and the ET alike that there are certain obligations when scrutinising harassment claims including that clear and cogent reasoning is required, and it is crucial that witnesses are given the ability to fully respond to allegations against them.

Amy Hammond
Associate, Brahams Dutt Badrick French LLP

Transforming EDI Practices in UK Insurance

September 2023

New report calls for employers to change the narrative around equality (equity), diversity and inclusion

In September 2023 the University of Nottingham, in collaboration with Browne Jacobson LLP, conducted new research into equality (equity), diversity and inclusion (EDI) practices in the UK insurance industry.

EDI workplace practices aim to encourage diversity of talent, and inclusiveness and equity of treatment by employers, colleagues and peers. They are adopted as part of a strategic approach to establish a fairer, more inclusive culture providing opportunity to all, the purpose of which is to eliminate discrimination and prejudice based on an individual's protective characteristic or trait.

The study involved 125 participants sharing their experiences via an online survey or through an in-depth, one-to-one interview with a researcher.

The research report focused on key findings in the following seven areas:

- EDI programmes
- Flexible working
- Career progression
- Discriminatory language
- Alcohol
- Reporting
- Training.

Summary of findings

The report highlighted that:

- Participants negatively evaluated EDI initiatives as merely 'lip service' or 'tick box' exercises and that there was a strong resistance to flexible working from some organisations. However, for those who welcomed it there was also '*a risk that people working from home were potentially less "visible" and miss career progression opportunities, potentially compounding their disadvantage'.*
- 37% of participants '*experienced discrimination, prejudice and "microaggressions" based on race, gender stereotypes and child rearing'*.
- *'after reporting EDI issues, respondents reported a negative impact on career progression, including social exclusion'.*
- *'14% of participants felt that the outcome of them reporting an EDI issue had been satisfactory.*'

It stated that:

- '*The barrier to reporting EDI issues was the fear that complaints would not be taken seriously, either because of the high status of the perpetrator or a lack of confidence in the objectivity of HR*' and that participants '*recommended EDI training to educate people about acceptable language and behaviour in the workplace'*.

It also found that:

- 60% of participants advocated for unconscious bias training, 59% for EDI awareness and 57% for bystander training to challenge unacceptable behaviours, all of which they considered were needed to improve EDI in their organisation.

Recommendations

The report clearly spreads the message that '*EDI is not just about compliance with regulation needs to gain prominence*' and that '*Genuine diversity and inclusion increases economic productivity, staff well-being and reduces attrition.*' A point shared in research by McKinsey and Company (2020) *How diversity, equity, and inclusion matter* and in the Financial Conduct Authority's (FCA) report *Diversity, equity and inclusion*, in that:

> *Whilst improving the representation of women and people from minoritised backgrounds is crucial, this is just one part of the picture and needs to be accompanied by meaningful changes to embed inclusive workplace communication and practices.*

The recommendations aim to help organisations realise this transformation and lead the way in improving EDI in the insurance industry.

- Change the narrative around EDI. Whilst EDI data is important, it is not just about metrics in terms of the demographic make-up of firms. It is about having an inclusive culture, regardless of the company's size.
- Leaders must challenge negative attitudes towards part-time working and flexible working, maximise the benefit of times when the whole team is together in-person and consider how to ensure that people who routinely work from home do not miss the advantages of being visible in the workplace.
- Ensure that recruitment, promotions and career progression opportunities are fair and transparent. Critically review job adverts, role descriptions and promotions and rewards criteria. Are they equally applicable to people from all backgrounds and with different identity characteristics? Are people being given the opportunity to highlight the transferable skills they have gained in other sectors or other aspects of their lives? Perceptions of nepotism are damaging to morale and harmful to the principles of EDI. Equality of opportunity is key to attracting and retaining diverse talent.
- Re-evaluate team and client activities which centre around the consumption of alcohol, particularly to excess. Find ways to socialise and build client relationships which do not require excessive drinking.
- Develop and signpost robust and consistent approaches to dealing with complaints.
- Implement unconscious bias, awareness, and bystander training as part of the network of interventions required to improve EDI. Keep all training under review and adapt it according to feedback.

Conclusion

While the authors of this report claim that the research is the first of its kind in the insurance sector, its findings can be linked to any sector.

The FCA highlights that while gender and now ethnicity representations are starting to receive some attention, other characteristics such as disability '*lag further behind. As is the case in any industry, bringing about inclusive cultures is a long-term process which will not simply happen overnight*'.

The participants' responses make it clear that EDI in the workplace still has a long way to go to be fully recognised as a practice which promotes business growth and profitability.

A report based on UK workplaces which calls for a switch from mere data collecting and tick box exercises to a more '*long-lasting cultural change requiring more direct and sustained intervention*' is welcome.

The research echoes the McKinsey 2020 study which consistently found that '*the most diverse companies are now more likely than ever to outperform non-diverse companies on profitability*'.

Surely then, if the most corporate of companies can see this, there must be something to it?

Nicola Redhead
Chair of the Discrimination Law Association

The Windrush Compensation Scheme

A comparative analysis of the Windrush Compensation Scheme (WCS) by the Dickson Poon School of Law, King's College London has examined its structure and performance against three other contemporary compensation schemes relating to harm caused by the state. Set up in 2019 to provide compensation to the victims of the Windrush scandal for any losses suffered because of being denied the right to live in the UK, the WCS has been subject to extensive scrutiny and repeated calls for reform from JUSTICE[1], the Home Affairs Committee on the Windrush Compensation Scheme[2], Human Rights Watch[3], campaigners[4], and victims who '*have continued to express dismay and distress at the failure of the WCS Compensation Scheme to deliver justice*'[5]. See also [2018] Briefing 859 and [2021] Briefing 961 *A critique of the Windrush Lessons Learned Review published on 19 March 2020.*

1 JUSTICE, *Reforming the Windrush Compensation Scheme* (November 15, 2021)

2 Home Affairs Select Committee *The Windrush Compensation Scheme*, HC 204 (November 24, 2021), 3

3 Human Rights Watch, *UK: "Hostile" Compensation Scheme Fails 'Windrush' Victims* (April 17, 2023)

4 BBC News *Windrush scandal: Anger at Home Office over compensation progress* (BBC, March 31, 2022)

5 Testimony from WCS applicants, *Windrush Lessons Learned Review: progress update* (March 31, 2022), 32

Among its failings, the analysis highlights the WCS's:

- high refusal rate '*with only 22% (1,641) of those applying receiving compensation and 53% (3,986) of initial applications being refused*'
- potentially complex initial eligibility requirements
- elevated standard of proof
- inaccessible, complex and bureaucratic application process
- adversarial approach and a lack of independence in its decision-making
- absence of legal funding, among others.

There is no direct legal support for victims applying to the WCS. Such claims are not within the automatic scope of civil legal aid and to obtain public funding an exceptional case determination must be made.

The Legal Aid Agency has refused two requests for exceptional case funding made by Southwark Law Centre on behalf of two applicants seeking compensation pursuant to the WCS on the basis that '*WCS claims do not engage Article 6 ECHR and Article 1 of Protocol No 1, that Article 8 ECHR is not fully engaged and is not interfered with, and the applicants do not need legal advice to be involved in the relevant process*.' This decision is being challenged by the Southwark Law Centre and a full judicial review hearing was scheduled for late February 2024.

Fees to access tribunals

The Ministry of Justice is consulting on a proposal to re-introduce fees in the employment tribunal and the employment appeal tribunal systems. In 2017 the Supreme Court quashed a previous tribunal fees regime because it '*effectively prevents access to justice, and is therefore unlawful*', see [2017] Briefing 838.

Paul Nowak, TUC General Secretary, responded by accusing the government of wanting '*to make it even harder for working people to seek justice if they face discrimination, unfair dismissal or withheld wages*'.

The DLA has set up a working group to submit a response to the consultation. The working group would welcome information and opinions from members; please send these to info@discriminationlaw.org.uk. The deadline for submissions to the consultation is March 25, 2024.

EHRC serves unlawful acts notice on Pontins

The EHRC launched an investigation in May 2022 to examine whether Britannia Jinky Jersey Limited (trading as Pontins) committed unlawful acts of race discrimination against prospective guests it perceived or suspected were Gypsies or Travellers, or those 'associated' with Gypsies or Travellers, such as their friends or family.

The EHRC reported on February 15, 2024 that it had found Pontins responsible for direct discrimination based on:

- the identification of Irish Travellers
- the use of systems and databases to ban Irish Traveller guests and their associates, including those perceived to be Irish Travellers
- guest files,

and direct and indirect discrimination arising from the electoral roll term.

Pontins was found to have internally published and used an 'Undesirable Guests' list which contained 40 common Irish surnames to identify and refuse or terminate services to Irish Travellers or anyone perceived to an Irish Traveller and their friends and families.

The EHRC said:

> *Pontins considered people they thought may be part of the Irish Traveller community to be 'undesirable'. The term 'undesirable' was integrated into their data systems and included in their policies. Pontins refused or cancelled bookings from people they deemed 'undesirable'. In doing so, Pontins deliberately, openly and repeatedly broke the law.*

The EHRC has served an unlawful act notice under s21 of the Equality Act 2006 on Pontins which requires it to prepare an action plan to avoid repetition or continuation of the unlawful acts. The action plan will be based on the EHRC's recommendations.

The Commission had entered into a legally binding agreement with Pontins in 2021 to end the practices and prevent further discrimination. However, the EHRC terminated the agreement in 2022 and launched a formal investigation after Pontins failed to comply with the agreement's terms.

Pontins is required to produce the action plan by 5pm on Tuesday, April 9, 2024.

DLA practitioner group meeting programme

Forthcoming PGMs include the following:

Thursday, March 7, 2024

TIME: 6:00-7.30pm

SPEAKER: Imogen Brown of Cloisters and Clare Fowler of YESS (Your Employment Settlement Service)

TOPIC: Settlements in discrimination claims and in particular the implications of *Ajaz*

VENUE: Cloisters Chambers (entrance in Elm Court, Temple, London EC4Y 7AA)

Thursday, June 27, 2024

TIME: 6:00-7.30pm

SPEAKER: Paul Smith

TOPIC: Indirect disability discrimination

VENUE: Broadway House Chambers, 1 City Square, Leeds LS1 2ES

These events will be hybrid (in-person and online); you are encouraged to come along to the venue if at all possible. They are free for DLA members. If you are attending online, login details will be sent in due course. Register: here