DISCRIMINATION UPDATE PART 2:

TRICKY ISSUES UNDER THE EQUALITY ACT

Allan Roberts, Guildhall Chambers

Introduction

1. With the Equality Act 2010 approaching its second birthday, one would expect to look back and see a degree of teething problems and perhaps a few appellate authorities on the newer strands of discrimination. However, the area has proved fertile ground for appellate litigation. A talk on the Act could cover just about every aspect of its remit, with each section being a discrete talk in itself.

2. This seminar therefore focuses on three discrete areas:

   a) Post-Termination Victimisation;

   b) Dual Discrimination; and

   c) Age Discrimination.

Post-Termination Victimisation

Introduction

3. Following the introduction of the Equality Act 2010, victimisation has been re-classified from an act of discrimination to "*Other Prohibited Conduct*". Consistent with this re-classification, a comparator is no longer required. This is logical since the cause of action is not about less favourable treatment but rather consequent treatment. Whilst this may all sound uncontroversial it has led to a rather unfortunate and seemingly unintended side effect, namely the removal of the right to bring a claim for post-termination victimisation. A classic example is that of a negative and reactionary reference. The cause of action flows from the employer writing a reference *because* the former employer had done a protected act.

Pre-Equality Act 2010

4. Prior to the Equality Act the various discrimination statutes did not expressly permit claims where the act post-dated termination. Instead they related the action to the concepts of "employment" or "employed" and actions by the "employer" all of which necessitated an on-going relationship. The question of post-termination discrimination first arose before the EAT in *Nagarajan v Agnew [1995] ICR 520* and then the Court of Appeal in *Post Office v Adekeye [1997] ICR 110*, both deciding that post-termination discrimination was not actionable.

5. However, in *Coote v Granada Hospital Ltd (Case C-185/97) [1999] ICR 100, [1998] IRLR 656* the European Court of Justice applied the principles of EU law and determined otherwise. Ms Coote had brought a claim of sex discrimination, alleging her dismissal was because of her pregnancy. When the Hospital later failed to provide her with an employment reference she bought a further claim, alleging this was a reaction to her previous claim. The Employment Tribunal dismissed the case, finding the Sex Discrimination Act 1975 only protected against discrimination during the employment relationship. The ECJ determined the question by reference to the intended effect of Article 6 of the Equal Treatment Directive 76/207. This required Member States to provide a means for pursuing claims where equal treatment had not been afforded. The ECJ concluded this would be undermined if fear of reprisals - which had no legal redress - led to workers being deterred from taking action.[1] It accordingly rejected the argument that acts post-termination were outside the scope of the Directive. The matter returned to the EAT (*Coote v Granada Hospitality Ltd (No 2) [1999] ICR 942*) where it declined to follow *Adekeye*. It held that s.6(2) SDA was capable of being read as embracing a woman "*who has been employed by him*."

[1] Paragraph 24

6. This principle was extended further and approved by the House of Lords in *Rhys-Harper v Relaxion Group Plc [2001] IRLR 460*. During an internal appeal against a notice of dismissal, Ms Rhy-Harper made allegations of sexual harassment. The company rejected the allegations and upheld the dismissal. As part of her claim to the Tribunal, Ms Rhys-Harper alleged sex discrimination for failing to properly investigate her complaint. The Tribunal held the dismissal did not take effect until the appeal outcome was delivered and that it had jurisdiction to hear the claim. The EAT however, upheld an appeal, concluding the date of termination was the expiration of the notice of dismissal and that accordingly as any discrimination post-dated termination, the Tribunal lacked jurisdiction. The EAT and Court of Appeal were referred to *Coote* but concluded this applied only to claims of victimisation. The House of Lords disagreed. First, it concluded it was not possible for these purposes to differentiate between victimisation and other forms of discrimination.[2] Secondly, their Lordships concluded there was no material difference in the phrase "*employed by him*" or "*whom he employs*" as set out under the various different Acts. Finally, and most importantly, their Lordships identified that the employment relationship can and often does extend beyond the termination. It therefore went on to conclude that post-termination discrimination was actionable. In particular Lord Nicholls stated:

> *"To my mind the natural and proper interpretation of section 6(2) of the Sex Discrimination Act 1975 and the corresponding provisions in the other two Acts in this context is that once two persons enter into the relationship of employer and employee, the employee is intended to be protected against discrimination by the employer in respect of all the benefits arising from that relationship. The statutory provisions are concerned with the manner in which the employer conducts himself, vis-à-vis the employee, with regard to all the benefits arising from his employment, whether as a matter of strict legal entitlement or not. This being the purpose, it would make no sense to draw an arbitrary line at the precise moment when the contract of employment ends, protecting the employee against discrimination in respect of all benefits up to that point but in respect of none thereafter".*

Post-Equality Act

7. The law was therefore settled. However, the Equality Act 2010 established a different framework. First under section 39, the prohibited conduct is expressed as preventing "*An employer (A)"* from discriminating or victimising "*an employee of A's (B)"*. This seemingly returns to the original problem, but with added emphasis. The rationale of *Rhys-Harper* related to on-going employment relationships. That does not necessarily bear out from section 39.

8. This however, is now covered by section 108, which deals with "Relationships that have ended."

This states:

> *(1) A person (A) must not discriminate against another (B) if—*
> *(a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and*
> *(b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act.*
> *(2) A person (A) must not harass another (B) if—*
> *(a) the harassment arises out of and is closely connected to a relationship which used to exist between them, and*
> *(b) conduct of a description constituting the harassment would, if it occurred during the relationship, contravene this Act.*
> *…*
> *(4) A duty to make reasonable adjustments applies to A [if B is] placed at a substantial disadvantage as mentioned in section 20.*
> *…*
> *(7) But conduct is not a contravention of this section in so far as it also amounts to victimisation of B by A.*

[2] Lord Nicholls at Para 34

The Problem

9. As victimisation has been reclassified so as not to constitute discrimination, it cannot be pursued under s.108(1). There is however, an express provision including harassment, but not victimisation. Moreover, section 108(7) expressly excludes victimisation from this provision. This would make an argument about inadvertent drafting almost impossible. It is however, important to note the government did not appear to intend this outcome. To the contrary the explanatory notes to the Act appear to suggest post-termination victimisation is still actionable. Paragraph 353 states:

> *"A breach of this section [108] triggers the same enforcement procedures as if the treatment had occurred during the relationship. However, if the treatment which is challenged constitutes victimisation, it will be dealt with under the victimisations provisions and not under this section."*

10. As already observed, section 39 refers to employees and employers. It would therefore appear the government took the view this was already covered by earlier authorities. That being the case it is inexplicable why section 108 exists at all in light of *Rhys-Harper*.

Conclusion

11. So far no authority deals with this directly. In February 2012, an Employment Tribunal dealt with the point in *Jessemey v Rowstock Ltd 2700838/211*. The Tribunal concluded a reference supplied by the Respondent constituted victimisation but that this was not actionable as a consequence of s.108(7). The Tribunal do not however, appear to have been referred to the previous authorities or the explanatory note.

12. The government has been urged to consider an explicit amendment, but in the meantime there are powerful arguments to be advanced on both sides. For the employer, s.108(7) is unequivocal and post-termination, unlike in previous legislation is expressly catered for. For the employee, the rationale of *Coote* remains sound and parliament does not appear to have intended any reversal of the law or indeed rejection of EU principles. Rather, it appears to have considered this sufficiently covered by sections 27 and 39. Whilst *Rhys-Harper* is based upon enduring employment relationships, it found there to be no material difference in the phrase "*whom he employs*". Read plainly this identifies a present tense. Arguably this would apply to section 39 which prohibits victimisation of "*an employee of A's*", though the argument is less easily made. It will be advisable to address these arguments head on and with full reference to the above materials. Additionally, one may well consider a claim of unlawful detriment for making a protected disclosure under s.47B of the Employment Rights Act 1996, though this has its own difficulties when the disclosure is a personal grievance.

<u>Combined Discrimination – Failure to Implement</u>

Introduction

13. A widely welcomed provision of the Equality Act 2010 was "*combined discrimination*", namely discrimination as a result of "*dual characteristics*". However, this comes under s.14 which as yet has not been implemented. Moreover, the Government Equalities Office now lists combined discrimination as being a provision not to be taken forward. This follows George Osborne's Budget Statement in 2011, in which he discussed ways to make Britain "*the best place in Europe to start, finance and grow a business."* As part of that plan he proposed removing *"£350 million work of specific regulations …including the Equality Act's costly dual discrimination rules*". It would therefore appear s.14 has been kicked into the long grass.

Is there still a cause of action?

14. It is first useful to understand the issue in context, by identifying the distinction between "Additive" and "Intersectional" multiple discrimination. These expressions were adopted by the Government Equalities Office in its discussion document: "**Equality Bill: Assessing the impact of a multiple discrimination provision**". The document defined the two as follows

15. Additive Discrimination:

> *"when a person is treated less favourably because of more than one protected characteristic and, although the two forms of discrimination happen at the same time, they are not related to each other. For example, a lesbian experiences both homophobia and sexist bullying from her employer during the same incident."*

16. Intersectional Discrimination:

> *"when the discrimination involves more than one protected characteristic and it is the unique combination of characteristics that results in discrimination, in such a way that they are completely inseparable. This often occurs as a result of stereotyped attitudes or prejudice relating to particular combinations of the protected characteristics."*

17. The document gives the following specific example:

> *"An older woman applies for a job as a driving instructor …[S]he is told it that she was not appointed …because it is not considered a suitable job for an <u>older woman</u>. The driving school advises her that they don't think she would have the strength and agility needed to grab the steering wheel or be able to brake quickly. She is told that she would have been appointed had she been an <u>older man</u> or a <u>younger woman</u>."*

18. The issue of additive discrimination has always been actionable providing one or both strands can be proved. The issue of intersectional discrimination however, gained greater prominence following the Court of Appeal decision in *Bahl v The Law Society and others [2004] IRLR 799*. Both the EAT and Court of Appeal overturned a decision of an Employment Tribunal that Dr Bahl had been subjected to both direct race and sex discrimination without analysing which of the two applied. Dr Bahl was a black Asian woman who had been the subject of allegations of bullying. Following an inquiry the Law Society censured and suspended Dr Bahl, consequent to which she resigned and claimed race and sex discrimination. Despite rejecting many of her complaints and finding Dr Bahl "*was not a witness of truth*" the Employment Tribunal upheld certain discrete claims, relating to comments of the Law Society President and Secretary General. The Tribunal concluded:

> *"We do not distinguish between the race or sex of the applicant in reaching this conclusion. Our reason for that is simple. The claim was advanced on the basis that Kamlesh Bahl was treated in the way she was because she is a black woman. Kamlesh Bahl was the first office holder that the Law Society had ever had who was not both white and male. There was no basis in the evidence for comparing her treatment with that of a white female, or a black male, office holder. We can only draw inferences. We do not know what was in the minds of Robert Sayer and Jane Betts at any particular point. It is sufficient for our purposes to find, where appropriate, that in each case they would not have treated a white person or a man less favourably. If we need to refine our approach for the purposes of dealing with remedy the parties may address this issue at that stage."*

19. Both the EAT and Court of Appeal upheld the appeal and in so doing criticised the adequacy of reasons and the lack of evidence supporting either race or sex discrimination. It is of note the earlier part of the Tribunal's reasons, point in the direction that discrimination was a product not of the Claimant being black or being a woman, but having the dual characteristics of a black woman. This would be intersectional discrimination. However, the latter part suggests they reached a conclusion of discrimination, but could not specifically identify which of the characteristics was behind the treatment.

20. The Court of Appeal rejected this reasoning. It identified the need to make comparisons and identify an appropriate comparator. Moreover, it went on to seemingly reject any suggestion of intersectional discrimination.

> *"What the ET has plainly omitted to do is to identify what evidence goes to support a finding of race discrimination and what evidence goes to support a finding of sex discrimination ...In our judgment, it was necessary for the ET to find the primary facts in relation to each type of discrimination against each alleged discriminator and then to explain why it was making the inference which it did in favour of Dr Bahl on whom lay the burden of proving her case. It failed to do so, and thereby, as the EAT correctly found, erred in law."*

21. It must be observed the ratio of *Bahl* does not expressly preclude intersectional discrimination. Section 14 however, was designed and intended to expressly permit such a cause of action. In light of *Bahl* and the government's decision not to implement s.14 it would appear such claims are not intended to be actionable. Were a Tribunal faced with a claim from the older woman in the example above, it would seemingly have to reject the claim, despite the apparent discrimination.

22. Some assistance may however, be found in the well-publicised first instance decision in *Miriam O'Reilly v BBC 2200423/2010 (ET)*. The Claimant was a BBC presenter, well-known for a variety of programmes including Countryfile. Following successful ratings Countryfile was moved to a prime time slot as a result of which the Claimant was not "moved forward" with the role. Following discovery of other presenters not moving forward, the Claimant formed the view this was a result of older women being removed. The Claimant subsequently brought claims under the SDA and the Employment Equality (Age) Regulations 2006. Whilst considering the matter under the old legislation, particular reference was had to the then impending Equality Act 2010 and in particular the question of dual discrimination under s.14.[3] It was argued by the Respondent that in the absence of s.14 it must be assumed combined discrimination was not actionable. The Respondent also relied upon *Bahl*. The Tribunal rejected this argument, concluding the protected characteristic need not be the "*sole reason*" for discrimination. Indeed, this was made clear in *Nagarajan v London Regional Transport [2000] 1 AC 501; [1999] IRLR 572* in which it was held that the proscribed ground need only have been "*a significant influence on the outcome*".[4] This however, raises the problem of the appropriate comparator. It is of note this question was not specifically addressed even under the Equality Act 2010. The Tribunal however, reasoned the comparative exercise would work as follows:

> *"…a woman over 40 can compare her treatment to a man over 40; by which exercise the sex discrimination element of the treatment is established. Similarly, the woman over 40 can compare her treatment to another person under 40, thereby establishing the age discrimination element."*

23. It is however, clear from the first comparison that it succeeds only because it involves both gender and age. It is an intersectional comparison, which *prima facie* necessitates a conclusion of combined discrimination. This can be seen more readily in the context of another example of intersectional discrimination proposed in the government's discussion document:

> *"A bus driver does not allow a Muslim man onto her bus, claiming that he could be a "terrorist".*

24. A comparison with a Muslim female, would demonstrate that religion of itself was not the factor. A comparison of another male would demonstrate that gender was not the factor. The comparison can only be elucidated by reference to both characteristics. Indeed this was the explanation of the Government Equalities Office.

25. As *O'Reilly* is a claim of first instance, it is in any event not authoritative. Further support can however, be found in the EAT decision in *Ministry of Defence v Debique [2010] IRLR 471*. This

[3] See paragraph 238
[4] per Lord Nicholls, at p.576)

concerned a female officer from St Vincent & the Grenadines who was a single parent. The claim was one of indirect discrimination under the SDA and Race Relations Act 1976. The provision, criterion and practice ("PCP") relied upon was the requirement to be available for redeployment 24/7 and the restriction that members of her extended family were not permitted to stay wither her in the Service Families Accommodation. This was because she was a foreign national. The Claimant had made clear it was the combination of the PCPs that posed the problem, as the latter deprived her from having child care support from her sister. The claim was upheld by the Tribunal. The MOD appealed on a number of grounds, including the combination of the two PCPs. The EAT however, dismissed that appeal on the basis that a comparison necessitates a "like for like" namely where "*the relevant circumstances are the same or not materially different*."[5] It therefore concluded that when considering the 24/7 PCP the male comparator must also be a foreign national (and therefore subject to the relevant PCP). Applied to *O'Reilly* the Tribunal were right to conclude the first comparison of a male and woman must include the characteristic of age.

Conclusion

26. By this analysis, intersectional discrimination was actionable even under the old legislation and s.14 was unnecessary other than to clarify the position. It is suggested any claim reliant on a combination of characteristics needs to be carefully advanced. However, it would appear the approach to be adopted is to allow such claims. For Respondents arguing against intersectional discrimination, it will be necessary to rely heavily on the technical differences and the view and intention of parliament. However, it should be noted the latter argument is unlikely to assist. The inclusion of s.14 of itself may not evidence an intention to change the law, merely to make such a claim explicitly available. In any event, the government's intention not to implement s.14 is only an indication of the view of the executive. As an omission, it does not therefore provide the view of parliament.

Age Discrimination

Introduction

27. The area of age discrimination has received two profound Judgments of the Supreme Court heard together and by the same bench in *Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15, [2012] ICR 704, [2012] IRLR 601* and *Seldon v Clarkson Wright and Jakes [2012] UKSC 16, [2012] ICR 716, [2012] IRLR 590*. Both of these are worthy of careful consideration.

Homer

28. This was a claim of indirect discrimination brought by a police officer who was subsequently employed as a legal advisor within the police authority. After his appointment a law degree was introduced as an essential element for admission to the highest pay grade. Mr Homer applied for that grade but was refused. The Claimant pursued a claim under the Age Regulations on the basis that as he was 61 he could not obtain a law degree prior to reaching the departments normal retirement age. He argued therefore that he was at a particular disadvantage compared with younger employees. The Tribunal upheld the claim. In the EAT *[2009] ICR 223*, Elias J (P) famously remarked:

> *"the financial disadvantage—if it can properly be so described—resulting from the operation of this criterion is the inevitable consequence of age; it is not a consequence of age discrimination"*

29. The Court of Appeal similarly concluded that what put Mr Homer at a particular disadvantage was his impending retirement, not his age or discrimination. Before the Supreme Court the police authority argued that accordingly the comparator should be someone who was due to leave for a reason unconnected with age. This was rejected by Lady Hale who stated:

> *"This argument involves taking the particular disadvantage which is suffered by a particular age group for a reason which is related to their age and equating it with a similar*

[5] See paragraph 165

disadvantage which is suffered by others but for a completely different reason unrelated to their age. If it were translated into other contexts it would have alarming consequences for the law of discrimination generally."

30. In rejecting this approach Lady Hale highlighted the legislative purpose is to level the playing field where there is a "*comparative disadvantage*". Further, she concluded that put simply people of a certain age group did not have time to acquire a law degree due to retirement. The case was therefore remitted to the Tribunal to consider the issue of justification.

31. The essence of *Homer* is that one must not be too technical or apply over-complicated analysis in the formulation of comparisons when dealing with age. Where age is the essential characteristic causing the disadvantage as compared with people of another age group, it seems that will suffice to establish indirect discrimination.

Seldon

32. This was the second case before their Lordships which has been heralded as permitting compulsory retirement. Whilst essentially accurate, the analysis is less clear cut. This case concerned a partner in a solicitors firm who was required to retire at 65. Mr Seldon brought a claim of direct age discrimination under the Age Regulations. The Respondent accepted the requirement amounted to direct discrimination but argued justification. It is of note the Lady Hale commenced her Judgment by confirming the same principles apply to the Equality Act 2010, where justification is permitted under section 13(2).

33. The central thrust of the appeal is that justification in respect of direct discrimination and indirect discrimination are different. In particular, justification for direct discrimination is narrow and must be the broad social and economic policy objectives of the state and not the individual business needs. It was argued this was implicit from the particular provision of justification under Article 6 of the Equal Treatment Directive 2000/78. Lady Hale concluded that the United Kingdom had chosen to give employers and partnerships flexibility to choose which objectives to pursue but only provided:

    "(i) these objectives can count as legitimate objectives of a public interest nature within the meaning of the Directive and
    (ii) are consistent with the social policy aims of the same and
    (iii) the means used are proportionate, that is both appropriate to the aim and (reasonably) necessary to achieve it."

34. Lady Hale went on to highlight the categories usually fitting within this test, namely, "*inter-generational fairness*" (e.g. access to employment for young employees and enabling older people to remain employed) and "*dignity*" (e.g. avoiding the need for dismissal on the grounds of capability). The Supreme Court then went on to consider if there was a legitimate objective whether it had to be justified in the particular case. It accepted the EAT's analysis that adopting general rules was an important element in the justification exercise. Lady Hale held that where it was justified to have a general rule, the existence of the rule will usually justify the individual results.[6] It did not however, rule out "*extremely rare*" cases where this would not be so.

35. The Tribunal and EAT having concluded the Respondent had three aims, the third having failed on appeal to the EAT, the Supreme Court remitted the matter for consideration of whether the first two were sufficient on their own.

Allan Roberts
Guildhall Chambers
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[6] See Paragraph 64