

Briefings vol 63 - March 2018 - contents and editorial

| Vol | Subject | Author(s) | pg |
|------------|--|------------------------------|-----------|
| 848 | Moving beyond disbelief and complacency - a review of recent reports on racial inequality in Britain | Susan Belgrave | 3 |
| 849 | Practice and procedure update | Elaine Banton | 8 |
| 850 | <i>Carvalho Pinto De Sousa Morais v Portugal</i> ECtHR holds, without requiring a comparator, that it was a breach of Article 14, read with Article 8 ECHR, for a court to cut a woman's compensation for medical negligence on the stereotypical ground that sex was not as important for a 50-year old woman who had already had children as for someone younger. | Sally Robertson | 11 |
| 851 | <i>Otero Ramos v Servicio Galego de Saúde and another</i> CJEU holds failure to carry out appropriate risk assessment for a breastfeeding worker amounts to direct sex discrimination. | Jason Braier | 12 |
| 852 | <i>R (on the application of C) v Secretary of State for Work and Pensions</i> SC rules that the DWP's data procedures and policies which reveal a benefit claimant's gender history and, therefore, their transgender status, constitute a serious interference with their Article 8 ECHR rights and are prima facie indirectly discriminatory. However, they are justified as meeting a legitimate aim and are proportionate, and so do not violate Articles 8 or 14 ECHR nor s19 EA. | Claire McCann | 14 |
| 853 | <i>Benkharbouche v Secretary of State for Foreign & Commonwealth Affairs, and Secretary of State for Foreign & Commonwealth Affairs and Libya v Janah</i> SC clarifies that state immunity cannot always be invoked to deny embassy workers their employment rights within the UK, even if their contracts were negotiated at a time when they were living abroad. Additionally it confirmed the horizontal direct effect of Article 47 EU Charter. | Juliette Nash & Louise Price | 16 |
| 854 | <i>HM Chief Inspector of Education, Children's Services and Skills v The Interim Executive Board of Al-Hijrah School & Ors</i> CA overturns High Court decision and finds that a mixed sex school's practice of segregating pupils by sex was discriminatory. | Eirwen Pierrot | 18 |
| 855 | <i>In the matter of M (Children)</i> CA upholds the right of a transgender father to have direct contact with her children raised in a Jewish Orthodox community. | Rosalee Dorfman Mohajer | 20 |
| 856 | <i>Rochford v WNS Global Services (UK) Ltd & Ors</i> CA upholds ET's finding of in effect gross misconduct when employee refused to work even though the ET had found as discrimination a failure to allow him to resume his full role. An employee has no absolute right to refuse to work and there was nothing special about discrimination in this regard. | Catherine Casserley | 22 |
| 857 | <i>Baker v Abellio London Ltd</i> Are employers required to get documents proving workers' right to work? The EAT says no - the important fact is whether the individual has the right to work; not whether the worker has the documentation to prove their right to work. | Michael Newman | 24 |
| 858 | <i>CC of Norfolk v Coffey</i> EAT confirms ET decision that a claimant with a hearing loss impairment, but who is not disabled, was directly discriminated against on the grounds of a perceived disability. The ET found that the discriminator mistakenly believed the claimant to either have a disability or an impairment which would likely become a disability in the future. | Daniel Zona | 25 |
| | Notes, news and book review | | 27 |

Editorial: Time to act

2017 saw the publication of a number of key research papers and reports on the extent and impact of racial inequality in Britain. Discrimination law practitioners will not be surprised to find that widespread discrimination persists with little change in 2017. The data makes depressing reading. The reports, featured in this edition of *Briefings*, focus on different areas yet all highlight inequalities in education, criminal justice, health, employment, housing and economic status.

In her article *Moving beyond disbelief and complacency - a review of recent reports on racial inequality in Britain* Susan Belgrave outlines some appalling statistics. Black Caribbean pupils are falling behind at school; Irish Travellers have the lowest rate of educational attainment and are the most likely to leave school at 16 years than any other ethnic group. Members of Black and Mixed ethnic groups are arrested at much higher rates than compared to white groups; the odds of receiving a prison sentence for drug offences are around 240% higher for Black, Asian and Minority Ethnic offenders. Black, Minority Ethnic women as a group experience multiple disadvantages and have lower rates of employment, lower incomes and are more likely to be living in poor households. Over half of Bangladeshi and Pakistani children live in poverty.

This devastating impact on the potential and well-being of children and communities is avoidable. It is not only in the interests of individuals and the success of our communities, but also the economy, that action is taken to address the structural inequalities which create such an unequal society. Full representation of BME individuals across the labour market through improved participation and progression is estimated to be worth £24 billion a year.

The House of Common's Women and Equalities Committee is currently considering evidence as part of its inquiry into how the government should respond to the inequalities revealed in its race disparity audit. As Susan Belgrave argues, the implementation of ss1 and 14 EA could make a key difference to outcomes for individuals; as could better use of the public sector equality duties including in relation to procurement. These changes would have a real and immediate impact on legal enforcement and are changes and developments supported by DLA. She also argues for a strengthened EHRC to lead the work and hold government and employers to account for the implementation of their statutory equality duties - a critical issue which the DLA has long supported.

There are two progressive sex discrimination cases reported in *Briefings* which deal with 'separate but equal' treatment. In *Carvalho Pinto De Sousa Morais v Portugal* the ECtHR considered how a lower court's approach to compensation for medical negligence combined two factors, age and sex, and created a stereotypical assumption about older women which resulted in discrimination against the complainant. The judgment underscored a core equality law principle that individuals should be treated as individuals, not as members of a group, nor on the basis of stereotypical assumptions. In the *Al-Hijrah School* case, the SC also rejected an approach which compared the treatment of girl pupils with boy pupils when it considered the mixed-sex school's gender segregation policy. Holding that the policy was detrimental to both girls and boys, it pointed out that 13 EA defines direct discrimination by reference to a 'person' not a 'group'. '*Each girl pupil and each boy pupil is entitled to freedom from direct discrimination looking at the matter from her or his individual perspective*' the SC held.

These are important judgments which should assist complainants successfully argue that 'separate but equal' treatment is discriminatory.

But while case law develops and attitudes slowly change, there is huge work still to do. The EHRC's February 2018 survey of British employers finds that they are '*living in the dark ages*' and have worrying attitudes towards unlawful behaviour when it comes to recruiting women. Just under a third of senior decision-makers consider that women who become pregnant and new mothers in work are generally less interested in career progression than other employees in their companies; 59% of decision-makers believe that women should have to disclose during the recruitment process whether they are pregnant.

The Fawcett Society's January 2018 review of sex discrimination law '*Equality. It's about time.*' concludes that our legal system is failing women and needs fundamental reform. The report has revealed a 'deeply misogynistic culture where harassment and abuse are endemic and normalised coupled with a legal system that lets women down because in many cases it doesn't provide access to justice'.

These inequalities do not result from what some call 'pipeline issues', and the hope that time will resolve them is misplaced. Action is needed by government and policy makers now. As Susan Belgrave emphasises in her review of the racial inequality reports, we must implement lasting solutions if we are to start closing the ever-deepening gaps in society.

Geraldine Scullion
Editor