

Discrimination Law Review for 2019

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First, probably the most important event for equality law is the retirement of the President of the Supreme Court, Lady Hale. She has shown a rare mastery of the subject, and one hopes that others in the Supreme Court and elsewhere can emulate the high standards and progressive ethos she has set.

We start with an *unfair dismissal* case with significance for discrimination. In *Royal Mail v Jhuti* [2019] UKSC 55 [62], the Supreme Court held, ‘if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the decision-maker adopts [in good faith], the reason for the dismissal is the hidden reason rather than the invented reason.’ This overrules long-standing Court of Appeal authority (*Orr v Milton Keynes* [2011] EWCA 62), but curiously, the Supreme Court did not mention the Court of Appeal’s similar take on the parallel issue for discrimination (*Reynolds v CLFIS* [2015] EWCA Civ 439), recognised in the United States as ‘Cat’s Paw’ theory (from an Aesop fable): *Shager v Upjohn* 913 F 2d 398 (7th Cir, 1990). This was a curious omission, and could mean another trip to the Supreme Court to settle the matter, presumably by incorporating the same principle for discrimination law.

The Court of Appeal entertained two large equal pay claims. First, it upheld the EAT’s decision in *McNeil v HM Revenue & Customs* [2018] ICR 1529, affirmed [2019] EWCA 1112, rejecting a ‘distribution analysis’ (where a length of service criterion was just one part of the overall pay), as a basis for an equal pay claim. (See (2019) 149 Emp. L.B 5-8.)

Meanwhile, in *Brierley v ASDA* [2019] EWCA 44, the claimants, predominantly female, worked for ASDA in its retail stores and were paid less than men in ASDA’s distribution depots, whom, they argued, were doing work of equal value. Thus, this was an equal value claim using comparators from different establishments run by the same employer. A major issue was whether those men were legitimate comparators. This turned on the meaning of EA 2010, s 79(4) (replacing EPA 1970, s 1(6)) and Lady Hale’s ‘North hypothetical’ (*North v Dumfries and Galloways* [2003] UKSC 45 [30]). The old section 1(6) permitted a comparison between workers at different establishments ‘at which common terms and conditions of employment are observed either generally or for employees of the relevant classes.’ Underhill LJ pointed out that the latter phrase meant that the comparators’ terms should be (roughly) the same if they were to work in the claimants’ establishment, and vice versa [73]. Its replacement, section 79(4), stated ‘common terms apply at the establishments (either generally or as between A and B)’. ASDA argued that this restricted the cross-establishment comparators to those

sharing the same terms as the claimants ('between A and B'). Underhill LJ rejected this. The new 'inept' version could not have been intended to narrow the law, and any court (including the ET in this case) applying the ASDA interpretation had 'fundamentally misconceived' the exercise required [79]/[89].

ASDA also argued that as the distribution workers would never be employed in the retail stores on their existing terms (and vice versa), the comparison failed for being hypothetical. This is trying to highlight that the retail and distribution establishments operated under separate respective regimes, albeit under the same employer. Underhill LJ rejected this, holding that the *North* hypothetical survived the new version. In other words, even if the terms at the depot could never be applied at the retail store, a tribunal was not prevented from assuming that they could. The policy basis of the *North* hypothetical is not a just matter of preventing woman and men being isolated into segregated occupations, but where this occurs, 'The fact that of necessity their work has to be carried on in different places is no barrier to equalising the terms on which it is done' ([2003] UKSC 45 [34]). In any case, ASDA was the 'single source' of the pay differential, and so EU law (C320/00 *Lawrence* [2003] ICR 1092) supported this interpretation [117-113]. It should be noted that this hypothetical is solely for the purpose of bringing in as comparators workers from other establishments (under the same or associated employer). It does not affect the rule (subject to a narrow exception under s 71), that for establishing like or equal work, the comparator must be an actual person. Leave to appeal to the Supreme Court was granted 31 July (UKSC 2019/0039). Given her retirement, ASDA will not have the task of persuading Lady Hale that her *North* hypothetical no longer applies. Even so, it is difficult to envisage a reversal of this decision.

Perceived disability discrimination. It can happen that an employer discriminates against a person because he (mis)perceives that the person has a particular protected characteristic. For instance, an employer may reject a turbaned Sikh man, wrongly thinking he was Muslim. A difficulty arises with the more complex definition of disability, requiring an impairment having a substantial long-term effect on the person's day-to-day activities (EA 2010, s 6). An impairment has a long-term effect if: (a) it has lasted at least 12 months, or (b) it is likely to last at least 12 months, or (c) it is likely to last for the rest of the life of the person affected (Sch.1, para.2(1)). Some fear that requiring an employer to have perceived the section 6 *legal* requirements would render claims of perceived disability discrimination virtually impossible (e.g. *J v DLA Piper* [2010] ICR 1052 (EAT) [62]). In *Chief Constable of Norfolk v Coffey* [2019] EWCA Civ 1061 [35], the Court of Appeal adopted the EAT's suggestion that the perception, 'will not depend on A's knowledge of disability law. It will depend on whether A perceived B to have an impairment with the features which are set out in the legislation' ([2018] ICR 812 [51]). In this case, a police officer was refused a transfer because of an incorrect perception that her hearing impairment, while not currently having a substantial adverse effect, might do so in the future. On these (perhaps fortuitous) facts, the Court of Appeal agreed this was direct discrimination. Much turned on the employer's admission that she feared future effects, thus meeting the requirement that she

misperceived that the effects were *likely* to last at least 12 months. The United States' American with Disabilities Act 1990 provides that the perception need only be of the impairment (excluding those 'transitory and minor', to prevent cases such as colds and flu. See Rachel Crasnow (2016) 133 Emp. L.B 4-6). A further problem is the comparison. Section 13(3) requires that the comparator's abilities cannot change (to distinguish direct discrimination from 'Discrimination for something arising from disability': s 15). But this makes no account for *perceived* abilities, which if left unchanged would have scuppered this claim, as a comparator's future hearing loss would have been similarly misperceived. Accordingly, the EAT held that the hypothetical comparator would be a person *not* perceived to have the predicted deterioration of hearing [66]. While not quarrelling with this, the Court of Appeal preferred the ET's approach, based on the *Shamoon* obiter that where the reason for the treatment was established, there is no need for 'arid and confusing disputes about the identification of the appropriate comparator' ([2003] ICR 337 (HL) [11]). Underhill LJ said that this *Shamoon* dictum was 'very well established', and if the 'reason why' question is proven the answer to the 'less favourable' one 'will normally follow' [76]. Thus, where the reason for the treatment was the disability, rather than a person's abilities per se, either do not include the perceived abilities in the comparison, or, dispense with a comparison altogether.

As noted above, where the treatment *was* because of the person's abilities, a claimant may still complain under EA 2010, s 15: *unfavourable* treatment because of 'something arising' from disability. The employer's protection comes with an objective justification defence. In *Williams v Trustees of Swansea University Pension Scheme* [2018] UKSC 65 (decided 17 December 2018), the Supreme Court held that 'unfavourable' had a meaning independent of other terms in the Act, although the EHRC Employment Code of Practice provided 'helpful advice as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify' [27]. The Code suggests that 'unfavourable' means 'putting at a disadvantage' [5.7]. Nevertheless, the claimant's appeal was dismissed. His disability led to him reducing his hours to part-time, and later, early retirement. On the one hand, he had an enhanced pension because had he retired because of disability, so he was better off than an early-retiree without a disability. On the other, had he retired as a full-timer (say immediately upon his disability), his pension would have been even better, so he was worse off than a full-time disabled worker. It was held that he had not suffered a 'disadvantage' under section 15.

Can an employer be liable for discriminating because of its *own* religious beliefs? In *Gan Menachem Hendon v De Groen* [2019] ICR 1023, an ultra-orthodox Jewish nursery teacher was dismissed because she refused to lie about cohabiting with her boyfriend. The EAT held that this did not amount to direct religious discrimination because the treatment was based on the employer's *own* religion, and not that of the claimant (but upheld findings of sex harassment and discrimination.). Swift J relied on *Lee v Ashers* [2018] UKSC 49 [43], holding that a bakery could not be liable for direct

religious discrimination when relying on its religious-based belief to refuse to supply a pro-gay message (which did not amount to direct sexual orientation discrimination). In other words, a service provider cannot be liable for refusing a service *solely* because of its own religious belief. Policy dictates that, for instance, a newsagent refusing to sell pornography, or alcohol, should not be liable for religious discrimination. If the religious imperative is also discriminatory, the matter is different: for example, a ‘whites only’ requirement would amount to direct *racial* discrimination despite any religious imperative (see *JFS* [2009] UKSC 15 [150]). The comparison can test this. If the same employer would have treated a comparator without the protected characteristic in exactly the same way (as suggested in *Lee v Ashers*) then there is no direct discrimination. But the matter is not so clear-cut in De Groen’s case, and unlike *Lee v Ashers*, it fell within EU law (Framework Directive 2000/78). The judgment omitted the recent ECJ decision that there was direct religious discrimination where a (Roman Catholic) doctor at a hospital funded by the Roman Catholic Church was dismissed for (re)marrying without his first marriage being annulled (as RC doctrine dictated); the employer would not have dismissed a non-Catholic worker for this reason (Case C-68/17 *IR v JQ* [60]-[61]). De Groen was Jewish, but it was not clear whether the nursery employed non-Jews. It was found that the nursery ‘was more interested in appearance than actuality’ [55], suggesting that a comparator would be anyone cohabiting out of marriage, rather than a non-Jewish worker (not having the ‘marriage obligation’) doing so. Also, given the broad range of ‘cogent, serious, and cohesive’ beliefs likely to be recognised under the Equality Act 2010 (e.g. veganism, Socialism, free-market Capitalism, ‘catastrophic climate change’: *Grainger v Nicholson* [2010] IRLR 4 (EAT), [24]-[28]), it may be possible to recognise a ‘belief’ in commitment to cohabitation/against the institution of marriage, or a religious belief in not lying, for example. As such, a (comparator) colleague not holding such beliefs would not have been instructed to lie, or dismissed for denying the instruction, as the case may be. In *Showboat v Owens* [1984] ICR 65 (EAT) 73, a manager’s anti-racism stance was compared with someone with a different *attitude* to race. The point is that these cases can be very fact-sensitive, and it may be prudent for advisers to elicit from claimants any relevant yet-to-be formalised beliefs.

Finally, as reported in last year’s Review (149 Emp. L.B 5-8), some public sector pension reforms (for firefighters and judges) that ring-fenced older workers for protection, and thus disadvantaged younger ones, could not be justified in the EAT in a direct age discrimination case. The Court of Appeal agreed, holding that although the state employers enjoyed a margin of discretion in public policy aims, the aims, and the means to achieve them, remained subject to objective justification, which was not apparent here. (Joined appeals in *Lord Chancellor v McCloud* and *Secretary of State for the Home Department v Sargeant* [2019] ICR 1489.)