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a word from the editor

Imagine yourself in an employment tribunal. At the outset, the judge asks you and your opponent to agree to the decision that s/he will make and not to appeal against it. You both ask what that decision will be and the reasons for it and s/he replies that it hasn't yet been decided, but nevertheless expects you to agree. Clearly, in those circumstances, neither party would agree to do so. Leaving aside the lack of transparency and inherent unfairness in such a process, no-one wants to sign up to something that they know neither the detail nor the substance of, not least because it may be adverse to their own interests or views in doing so.

Yet, as the Brexit train rumbles down the track to a destination yet to be determined, there is a whiff of unrealistic expectation in the air when it comes to workers' rights and protection.

On one side of the debate, there are two anti-EU schools of thought. There are those that consider the EU to be a capitalist club. Its members are multi-national corporations and the politicians who facilitate them. They move capital and labour around to maximise profit and, in doing so, actively or otherwise undermine the rights of the workers that they exploit. They play off different groups against each other, seeking to drive down costs and protection by offering to build their manufacturing plant in this country or the other, depending on where they can get the better deal. The EU, it is said, facilitates this by being a single market with free movement of capital and labour.

'there is a whiff of unrealistic expectation in the air when it comes to workers' rights and protection'

Then there are those that view the EU as being an interventionist and meddling organisation. Its members are unelected bureaucrats who have never worked in the so-called real world, all being career (and probably failed) politicians or civil servants. They justify their existence by coming up with rules and regulations that are designed to thwart the entrepreneurial ambitions of individuals and communities, and try to create some sort of homogenous mass.

Both these groups would be unwilling to sign up to future workers' protections, on the basis that one would not regard them as being that (not going far enough), while the other would believe things had already gone too far and would not be prepared to sign up for more.

On the other side of the debate, are those that are pro-EU. They believe that a single market, with freedom of movement, capital, goods and services can be liberating and facilitates not only economic growth and development, but also cultural and social growth and development.

They believe that common rules and standards provide greater protection for consumers, workers and the environment and that clubbing together gives the collective group greater strength and bargaining power when compared to other large nations in the world.

Even this group, however, would not think the EU was perfect in every respect and may have similar views to the other as to workers' protections, ie they have gone/not gone far enough.

It seems strange, therefore, to propose, as a compromise to our current stalemate, that a way through is to sign up to such future protections, without knowing what they are. Employment law is where politics meets economics meets social policy and it is dynamic and fast-changing. One only needs to look at the growth of the 'gig economy' to see the challenges. ELA's purpose is to promote the best practice of employment law. For that, you either need a seat at the table or your own table.

ALEX LOCK, DAC Beachcroft LLP

in brief

Mental ill health in the workforce

We've all been aware of the increase in claims following the abolition of employment tribunal fees, but the most recent data indicates that the increase is not the same across the board.

Claims increased by 4% last year, rising to 178,990. However, the number of disability discrimination claims rose by 37% to 6,550. This was a 99% increase from 2012-13, when there were 3,294 disability discrimination claims. Several HR organisations have suggested that the increased number of claims is a result of an increase in mental health problems in the workforce. It is unsurprising, therefore, that we are also seeing much greater discussion about mental health and wellbeing.

Working time

One aspect of wellbeing is working time. In *Federacion de Servicios de Comisiones Obreras v Deutsche Bank SAE* (C-55/18), the Confederación Sindical de Comisiones Obreras, a workers' union in Spain, brought a group action against Deutsche Bank, seeking a declaration that the bank was under an obligation to set up a system for recording the time worked each day by its members of staff so that compliance with the Working Time Directive could be verified. Questions were referred by the Spanish courts to the Court of Justice of the European Union, which emphasised the fundamental nature of the rights provided by the Directive. Although member states enjoy a discretion in relation to taking the 'measures necessary' to ensure implementation of the rights, the effectiveness of those rights must be guaranteed in full.

The court noted on several occasions that the worker is in the weaker position in the working relationship. In that light, in the absence of a system to record working hours, it noted that it is not possible to determine objectively and reliably either the number of hours worked by the worker and when that work was done, or the number of hours worked beyond normal working hours, as overtime. Therefore, the court held that it appeared 'to be excessively difficult, if not impossible in practice, for workers to ensure compliance with the rights conferred on them' by the Charter and the Directive 'with a view to actually benefiting from the limitation on weekly working time and minimum daily and weekly rest periods provided for by that directive'.

'we must not forget to look in our own backyard'

Bullying and sexual harassment

We must not forget to look in our own backyard: the International Bar Association (IBA) published a report on 14 May this year, '#Us too? Bullying and sexual harassment in the legal profession'. It is sobering reading. The IBA surveyed nearly 7,000 individuals from 135 countries across a spectrum of legal workplaces. Approximately one in two female respondents and one in three male respondents reported that they had been bullied in connection with their employment.

One in three female respondents and 1 in 14 male respondents reported that they had been sexually harassed in the workplace context. In the UK, 715 legal professionals were surveyed, predominantly from within law forms. Some 62% of female respondents and 41% of male respondents reported that they had been bullied in connection with their employment; 38% of female respondents and 6% of male respondents had been sexually harassed.

The report makes 10 recommendations: raise awareness of the issue; revise and implement policies and standards; introduce regular, customised training; increase dialogue and best practice sharing; take ownership; gather data and improve transparency; explore flexible reporting models; engage with younger members of the profession; appreciate the wider context; and maintain momentum.

There is much to be done. The Bar Council issued advice in February this year, signposting barristers to its equality and diversity helpline. The Law Society has provided a factsheet and suggests speaking with LawCare or the diversity and inclusion team at the Law Society.

Time limits for unfair dismissal claims

There has been a reminder of the strict approach to reasonable practicability in relation to the time limits for unfair dismissal claims. The EAT, in *Pora v Cape Industrial Services Ltd* [2019] UKEAT 0253/18, had considerable sympathy for the claimant who had attended a law centre for advice and support to present a claim to the employment tribunal for unfair dismissal and race discrimination. He followed up regularly and was assured that matters were in hand. However, the claim was not, in fact, lodged in time. The claimant had done everything he could to have his claim presented in time.

The EAT upheld the tribunal decision that his unfair dismissal claim was out of time and it had been reasonably practicable for him to lodge it in time. Slade J emphasised that the situation plainly fell within the scope of the Court of Appeal judgment in *Dedman*: 'Where a claimant knows that he has a claim and puts his case in the hands of specialist advisers and it is due to their fault that a claim is not presented in time, it was reasonably practicable for the claimant to present his claim in time' (at para 19).

Injury to feelings

Where a single act of discrimination is found by an employment tribunal, it is not wrong to award sums for injury to feelings in the middle or upper band of *Vento*. In *Base Childrenswear Ltd v Otshudi* UKEAT/0267/18, the claimant had complained of six acts of race harassment, all of which were out of time, save in respect of her dismissal. The tribunal found that the dismissal came out of the blue.

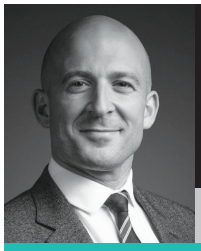
The claimant, at the time of the dismissal, was given a patently false reason – that she was being made redundant – the veracity of which she challenged at the time. The respondent's response at the time was to call her into the meeting to reinforce the decision. The claimant was aware that she was the victim of wrongdoing and that she was being put under pressure not to question it. She had to deal with the sudden loss of her job in a career that she had chosen and invested time and study in developing. She suffered a depressive episode after the dismissal. Thereafter, the tribunal noted that the claimant had promptly submitted a letter of grievance and appeal against her dismissal, to which the respondent failed to reply. The false statement of the reason for the claimant's dismissal had been maintained until shortly before the relisted full hearing.

The tribunal awarded her £16,000 for injury to feelings, £5,000 for aggravated damages and £3,000 for her personal injury, an overall award of £24,000.

Having recalled the principles that awards for non-pecuniary losses are compensatory not punitive, HH Judge Eady set out at para 36: 'Moving on to the [tribunal's] assessment of injury to feelings in this case, it is right to say that, in deciding whether the case should fall within the low or middle *Vento* bands, [a tribunal] might think it relevant to have regard to whether the discrimination in question formed part of a continuing course of conduct (perhaps a campaign of harassment over a long period) or whether it was only a one-off act. That said, each such assessment must be fact and case specific. It is, after all, not hard to think of cases involving one-off acts of discrimination that might well justify an award falling within the middle or higher *Vento* brackets, or other cases involving a continuing course of conduct that are properly to be assessed as falling within the lower band. Simply describing discrimination as an isolated or one-off act may not provide the complete picture and I do not read the Vento guidance as placing a straightjacket on the [tribunal] such that it must only assess such cases as falling within the lower band. The question for the [tribunal] must always be, what was the particular effect on this individual complainant?'

The appeal was dismissed, save in relation to a minor point of the Acas uplift. The award was not excessive in the circumstances.

SARAH FRASER BUTLIN, Cloisters



Gan Menachem: the liberal application of 'gay cake' in an Orthodox Jewish nursery

RAD KOHANZAD, 42 Bedford Row

The EAT in Gan Menachem, seeking to apply the Supreme Court's decision in Ashers Baking, confirms that when assessing whether an employee has been treated less favourably because of religion or belief, it is the religion or belief of the employee that is protected, rather than that of the decision-maker.

Background

Ms De Groen is a Jewish woman who worked in an ultra-Orthodox Jewish nursery as a teacher. She considers herself still to be a practicing Jew, but one who does not rigorously observe all of the practices that might be expected of an ultra-Orthodox Jew. The claimant was co-habiting with a man who was eventually to become her husband. While she understood that some ultra-Orthodox Jews would see co-habitation outside of marriage as being contrary to Jewish law, she did not herself believe this to be so.

The claimant attended a barbecue organised by a local synagogue with her boyfriend where trustees of the nursery and some parents were present. The claimant introduced her boyfriend to a trustee who, during discussions, mentioned that they lived together.

At some point during the following month, a few parents spoke to the nursery about the fact that the claimant and her boyfriend were living together, which had been revealed at the barbecue. One parent suggested that they might not allow their child to return to the nursery the following year if he or she were to be taught by the claimant. As a result, the claimant was asked to attend a meeting (the June meeting) with the managing director and manager of the nursery. They had intended it to be a friendly meeting to explore how the problem, as they saw it, might be resolved.

The conversation included the two female managers saying that living with a man to whom you were not married was wrong; that having children outside wedlock was wrong; that the claimant was already 23 and time was passing for her to have children; and that, if the claimant had a problem with the idea of marriage, she should seek counselling.

While the managers were sincere in what they said, which echoed their beliefs, they also appreciated that the claimant was upset by this conversation, as was one of them. The managers suggested, during the meeting, that one way out of the problem was for the claimant to tell them that she was not living with her boyfriend, knowing full well that she was. The purpose was so that they could tell parents or anyone concerned that this was what they were informed by the claimant. They made it clear that what she did in private was of no concern to the nursery.

After the June meeting ended, the claimant was in a very tearful and distressed state. She failed, however, to understand that the respondent wanted her to lie because lying is contrary to Orthodox Jewish beliefs (and her own) and she did not expect either of the managers to be asking her to lie. A few days later, when the claimant had an opportunity to speak to the two managers, she told them that she wanted a written apology and a promise that she would not be harassed in that way again. The nursery considered that they no longer saw an amicable solution as being possible. The two managers did not apologise and instead commenced disciplinary proceedings, at which point, the claimant was dismissed for some other substantial reason.

The claims

The claimant brought claims of direct discrimination claims against the respondent, on the grounds of her sex and religion or belief, as well as harassment and indirect discrimination claims on the ground of her sex.

The employment tribunal upheld the claimant's claims, which were the subject of an appeal to the EAT. The EAT

'the tribunal should have asked whether Ms De Groen was treated less favourably because of her beliefs, which it made no express finding on'

upheld the tribunal's finding of direct sex discrimination arising out of the June meeting, on the basis that the tribunal found that the two managers would not have behaved in the same way if the teacher had been male. That finding could in no way be said to be perverse given the discussions of possible marriage, pregnancy and childbearing.

The interesting part of the decision relates to the application of the recent Supreme Court decision of *Ashers Baking*. The EAT overturned the tribunal's finding of direct discrimination on the grounds of religion or belief, holding that it had wrongly concluded that Ms De Groen has been less favourably treated by reason of the nursery's religious belief – rather than her religious beliefs. The tribunal had expressly found that the 'protected characteristic relied on in this argument is the respondent's religious belief that co-habitation is wrong or impermissible'.

The tribunal should have asked whether Ms De Groen was treated less favourably because of her beliefs, which it made no express finding on. At para 24, Swift J encapsulates the point: 'The nursery acted because of its own beliefs, and Ms De Groen's non-compliance with those beliefs. A conclusion that the nursery acted because of Ms De Groen's belief (or rather, what she did not believe) is an entirely implausible conclusion. The motive of the discriminator is irrelevant. But on the facts of the present case, a conclusion that the nursery acted because of Ms De Groen's lack of belief presupposes that Mrs Toron's and Mrs Lieberman's [the two managers] concerns extended well beyond that which they saw as harm or the risk of harm to the nursery's reputation, and reached a free-standing concern that Ms De Groen's beliefs were not the same as their own. The tribunal made no express finding on this point."

Swift J expressly cited Baroness Hale's judgment in *Ashers Baking* in support of his conclusion. Readers will remember that, in that case, a bakery had refused to supply a cake iced with the message 'support gay marriage' because of its owners' objection on religious grounds to gay marriage. Baroness Hale concluded that the purpose of discrimination law was the protection of a person who had a protected characteristic from less favourable treatment because of that characteristic, not the protection of persons without that protected characteristic from less favourable treatment because of a protected characteristic of the discriminator. She said that if the law focused on the protected characteristic of the decision-maker, then any claim would be doomed to fail because the treatment of the comparator would always be the same because the decision-maker would always be acting on the grounds of his own political or religious belief, regardless of who was affected.

Discussion

The EAT's finding is problematic in a number of ways. First, there is something artificial about the logical process adopted by the EAT. It suggests that there is a real distinction between (i) dismissing an employee because they do not believe that co-habiting is living in sin – which would *prima facie* amount to discrimination; and (ii) dismissing an employee because of their belief that co-habiting is acceptable, which is inconsistent with the belief of the employer's ('the nursery acted because of its own beliefs and Ms De Groen's non-compliance with those beliefs') which would not.

The EAT held that there was no finding as to (i) and, furthermore, that it was 'an entirely implausible conclusion'. However, inherent in any finding that an employee's belief is inconsistent with their employer's must, as a matter of logic, involve at least an implicit finding as to the employee's belief.

Secondly, and a development of the first point, is that the circumstances in *Ashers Baking* were materially different to this case. In *Ashers Baking*, any customer wanting a cake saying 'supports gay marriage' would have been refused, regardless of their religion or belief because it was the message that the bakers objected to rather than sexual orientation or religion or belief of the customers. One could disentangle the beliefs of the bakers and customers because the customer's beliefs were irrelevant. Here, however, there was an interrelationship between the beliefs of the claimant and respondent. Ms De Groen's beliefs were not irrelevant – in the way that they were in *Ashers Baking*. In *Ashers Baking*, the bakers could say that they genuinely did not care for the beliefs of the customers. Here, the belief of the claimant was part and parcel of the reason for her dismissal because it was inconsistent with the two managers' beliefs.

Thirdly, the findings suggest the reason the claimant was dismissed was because she was not prepared to hide her beliefs (that it was acceptable for religious Jews to cohabit) and its manifestation (her co-habiting). Had she been prepared to lie, she would not have been dismissed. When looked at like that, it appears absurd to suggest that she was not dismissed because of her religious beliefs or their manifestations. Cases such as *Buscarini* make clear that

'claimants should not generally seek to try and argue that one-off occurrences are PCPs'

obliging a person to manifest a belief that she does not hold is a limitation on her Article 9(1) rights to freedom of religion – a point expressly highlighted in *Ashers Baking*.

Finally, and this is not a criticism of the tribunal or EAT, it is possible that, had the claimant not been Jewish, the respondent would not have asked her to lie about co-habiting. It is arguable that it was the fact that she was an observant Jew who co-habited that was problematic because it undermined the belief that Orthodox Jews should not co-habit. This, unfortunately, does not appear to have been argued before the tribunal or EAT.

Indirect discrimination

The claimant also succeeded before the tribunal in claiming indirect discrimination. The provision, criterion or practice (PCP) was that employees had to be prepared to make a dishonest statement about their relationship and/or private life, in order to remain employed. The disadvantage suffered by the claimant was that because she was not prepared to lie she was dismissed. The tribunal found that the dismissal was not justified.

The EAT overturned this finding on the basis that the nursery's treatment of Ms De Groen was not the consequence of the application of any PCP, rather it was no more than a specific response by the managers to the circumstances as they saw them. This case is a reminder that claimants should not generally seek to try and argue that one-off occurrences are PCPs. In a useful summary, Swift J said: 'So, while it is possible for a provision, criterion or practice to emerge from evidence of what happened on a single occasion, there must be either direct evidence that what happened was indicative of a practice of more general application, or some evidence from which the existence of such a practice can be inferred. What is relied on must have what Langstaff P [in *Nottingham City Transport*] referred to as "something of the element of repetition about it"… In the present case, the tribunal did not address this point in terms.'

Swift J went on to remind us that claims will not necessarily be improved by the number of different ways they are pleaded, suggesting that trying to argue that the events of the June meeting gave rise to indirect discrimination 'was an exercise in over-analysis' – something many of us are guilty of.

KEY:

Gan Menachem	*Gan Menachem Hendon Ltd v De Groen* [2019] UKEAT 59/18
Ashers Baking	*Lee v Ashers Baking Co Ltd* [2018] 3 WLR 1294
Buscarini	*Buscarini v San Marino* (1999) 30 EHRR 208
Nottingham City Transport	*Nottingham City Transport Ltd v Harvey* UKEAT/0032/12]

Religious beliefs: a legal and moral minefield

TARIQ SADIQ, Parklane Plowden Chambers

Israel Folau's recent comments on Instagram that 'hell awaits … gay people' and Rugby Australia's decision to terminate his contract has reignited the debate about the rights of religious people to express their views on social media and in the workplace when this conflicts with the rights and freedoms of others.

At the heart of the issue is the need to balance two conflicting principles: the need, wherever possible, to respect religious beliefs and the right of same sex people to equal treatment, dignity and respect. Striking the right balance is complex and challenging for employers and represents a legal minefield.

Clashes and compromises

The conflict arises because of the strongly held belief of a number of the major religions that same sex relationships are wrong, and has arisen in a number of different contexts: the registrar of marriages who did not wish to perform civil partnerships (*Ladele*) and, in the non-employment context, the Christian bakery that refused to accept an order for a cake with the message 'Support Gay Marriage' on it (*Ashers Bakery*). (See Rad Kohanzad's article on page 4 of this issue of the *ELA Briefing*.)

To what extent should employers accommodate such religious views, especially when these beliefs conflict with the rights of others? This is an area that divides opinion and where emotions run deep. For example, see the intervention of Lord Carey, the former Archbishop of Canterbury, in *McFarlane* that the appellant could not receive a fair hearing before a Court of Appeal, which did not include a practicing Christian judge. Attempts by the courts to grapple with this conflict have so far been unimpressive, and frequently marked by superficial analysis and a dismissive approach to the assertion of religious rights.

Discrimination laws and Article 9

There are two sets of laws that seek to regulate and protect freedom of religion and belief. The Equality Act 2010 and Article 9 of the ECHR. Under the Equality Act 2010, religion is defined by s.10 as any religion, or lack of it; and belief as philosophical belief or religious belief.

The Act forbids both direct and indirect discrimination on these grounds; the important difference being that direct discrimination cannot be justified whereas indirect discrimination can. Article 9(1) confers an absolute right to freedom of thought, conscience and religion. Article 9(2) also provides a qualified right to manifest religion or belief and may be limited by a proportionate means in pursuit of the legitimate aims identified in Article 9(2), including the protection of the rights and freedoms of others.

Ladele and McFarlane

The first significant case to consider this clash of rights was *Ladele*. Ms Ladele, a registrar with Islington Council, refused to conduct gay civil partnerships because of her religious beliefs that marriage should only be between a man and a woman, and was dismissed. Her discrimination claims failed at the EAT and Court of Appeal.

As regards direct discrimination, any person who refused to perform civil partnerships would have been subject to disciplinary action. Regarding indirect discrimination, while the provision, criterion or practice (PCP) put Christians at a particular disadvantage compared to others, it was a proportionate means of achieving a legitimate aim to require her to provide services in a non-discriminatory way in line with its equality policies.

Similarly, in *McFarlane*, a counsellor who refused to offer psycho-sexual therapy to same-sex couples contrary to the

'most of the conflict cases turn on the issue of justification'

employer's non-discrimination policy was also dismissed. He too was unsuccessful in his indirect discrimination claim because it was proportionate for Relate to require non-discrimination in line with its ethos and code of ethics.

When these cases reached the ECtHR with *Eweida*, the court found, in both cases, that there had been a justified breach of their Article 9 rights, the most important factor being the employer's legitimate aim of adhering to its equal opportunities policies and providing services to all without discrimination, including same-sex couples.

The court did, however, clarify the law in a manner that has strengthened the rights of employees to manifest their religion in the workplace:

- the court emphasised that, in order to amount to manifestation of religious belief under Article 9, the act need only be intimately linked to the religious belief rather than a mandatory requirement of the religion; and
- the court departed from previous European jurisprudence that there was no interference with Article 9 because the employee was free to resign and seek another job. The proper approach, the court held, was to weigh up the possibility in the overall balance when considering whether or not the restriction was proportionate.

Direct or indirect discrimination?

Religious claimants invariably bring claims of both direct and indirect discrimination when their religious rights have been restricted. In direct discrimination, the issue is whether the less favourable treatment was because of the employee's religious belief. Employers can argue that there is no less favourable treatment because had a non-religious employee expressed the same views about homosexuality, they would also have been disciplined. Indirect discrimination claims are less straightforward since employees are seeking to be accommodated in their religious beliefs. Under both Article 9 and indirect discrimination, there is a proportionality test which involves balancing the rights of others, the employer's interests and so on.

Group disadvantage

The requirement to prove group disadvantage was initially interpreted restrictively in the religious context by the Court of Appeal in *Eweida (1)* and therefore Ms Eweida was unable to show group disadvantage because it was not a necessary requirement for Christians to wear a cross. This reasoning, however, was disapproved of in *Eweida (2)* by the ECtHR and later disavowed by the Court of Appeal in *Mba*.

Ms Mba didn't want to work on Sunday because of her Christian beliefs. The Court of Appeal held that it was not necessary that all Christians or even a majority refuse to work on a Sunday as it was clear that some Christians, including the claimant, refused to do so. Equally, that some Christians believe that same-sex relationships are wrong, is fairly well known. It is therefore legally possible for the group disadvantaged to be a small group and even a group of one. Moreover, it has always been possible to reply upon a hypothetical comparator.

Justification

Most of the conflict cases turn on the issue of justification. Whether there has been a proportionate restriction on religious expression is highly context specific, and includes the offensiveness of the speech and the context in which it was made; whether it takes place within work time; whether it is in the context of a conversation about religious matters; whether it is the result of unwanted proselytisation; and the employee's position is also important.

In *Apelogun-Gabrriels*, an employee distributed a document that stated, 'Sexual activity between members of the same sex is universally condemned' and 'Male homosexuality is forbidden by law and punished by death.' Similarly, in *Haye (1)*, an employee sent a work email to the Lesbian and Gay Christian movement stating that being gay was a sin, and urged them 'to repent and turn from your simple ways before [it's] too late… hell is not a nice place.' In both cases, the employees were dismissed and their discrimination claims failed.

Sometimes, the manner in which the person manifests their religious belief is the problem. In *Trayhorn*, a prison gardener quoted passages from the Bible in a prison chapel in terms of damnation and homosexuality without putting the Biblical words into context. The EAT upheld the dismissal of his direct discrimination claim because he was disciplined, not because of the manifestation of his religious belief, but because the manner in which he had expressed it which was offensive and insensitive.

However, in other cases, it has been held that discriminatory religious expression is not a sufficient reason for disciplinary

'some complain about a hierarchy of rights in the Equality Act 2010 where religious rights are seen as less important than sexual orientation'

action. In *Smith*, the High Court held that a housing manager had been wrongfully dismissed when he was demoted with a 40% reduction in pay because of a news article he posted on Facebook entitled, 'Gay church marriages set to get the go-ahead' and commented 'an equality too far'. After a colleague asked, 'Does this mean you don't approve?' he said: 'No not really, I don't understand why people who have no faith and don't believe in Christ would want to get hitched in church. The Bible is quite specific that marriage is for men and women. If the state wants to offer civil marriage to same-sex then it's up to the state; [the] state shouldn't impose its [sic] rules on places of faith and conscience.'

Similarly, in *Mbuyi*, a nursing assistant said to a colleague, 'Oh my God, are you a lesbian?' and months later stated that homosexuality was a sin. The employment tribunal held that her dismissal amounted to direct and indirect discrimination because it relied on stereotypical assumptions about evangelical Christianity and because she was asked hostile questions about her beliefs, rather than her actions, which did not relate to the specific allegations at issue, at a disciplinary meeting.

In *Wasteney*, a senior employee was dismissed for trying to impose Christian religious views on a junior Muslim employee. Although the EAT held that the right to manifest religious belief could extend, in principle, to a right to attempt to convince others of the tenants of that religion, the employee had been justifiably disciplined because the employee's acts blurred professional boundaries and placed improper pressure on a junior employee.

The role of the employee was also important in *Haye (2)*, where a two-year prohibition order imposed on a teacher by the councils professional conduct committee was proportionate, when, in response to questions asked by his students, the teacher made comments about his Christian beliefs on homosexuality quoting from the Bible. The teacher was a role model for pupils from a diverse range of beliefs and backgrounds, and was expected to promote tolerance of the rights and freedoms of others.

Conclusion

Some complain about a hierarchy of rights in the Equality Act 2010 where religious rights are seen as less important than sexual orientation. However, there are numerous explanations for the decisions in the conflict cases that do not rest on the automatic trumping of one right above another.

Another argument is to introduce the concept of 'reasonable accommodation' in order to help resolve the conflict, which has been implemented by Canada and the US. Critics say that this means treating certain protected characteristics differently (which we arguably do already for disability) and that the indirect discrimination model, which balances the rights of religious employees with the rights of others, works well in practice. One thing is certain; this is a controversial and complex area of law which will continue to pose challenges for employers.

KEY:

Ladele	*Ladele v Islington LBC* [2010] 1 ICR 532 CA
Ashers Baking	*Lee v Ashers Baking Co Ltd* [2018] 3 WLR 1294
McFarlane	*McFarlane v Relate Avon Ltd [*2010] EWCA Civ 880 CA
ECHR	European Convention on Human Rights
Bull and Bull	*Bull and Bull v Hall and Preddy* [2013] 1 WLR 3741
ECtHR	European Court of Human Rights
Eweida (1)	*Eweida v British Airways* [2010] ICR 890 CA
Eweida (2)	*Eweida v UK* [2013] ECHR 37
Mba	*Mba v Merton LBC* [2013] EWCA Civ 1562 CA
Edwards	*Edwards v London Underground* [1998] EWCA Civ 877
Apelogun-Gabrriels	*Apelogun-Gabrriels v Lambeth* [2006] ET 2301976/05
Haye (1)	*Haye v Lewisham* [2010] ET 2301852/2009
Trayhorn	*Trayhorn v Secretary of State for Justice* UKEAT/0304/16
Smith	*Smith v Trafford Housing Trust* [2012] EWHC 3221 (Ch)
Mbuyi	*Mbuyi v Newport Childcare* [2015] ET 3300656/2014
Wasteney	*Wasteney v East London NHS Foundation Trust* UKEAT/0157/15
Haye (2)	*Haye v General Teaching Council for England* (2013) 157(16) SJLB 35

iForce: unfavourable treatment

KATE BENEFER and NIKITA SONECHA, Royds Withy King

Disciplining an employee for refusing to obey a lawful instruction – because of a mistaken belief it would impact on her disability – does not amount to unfavourable treatment due to something arising from a disability, according to a recent case in the EAT.

This important judgment of *iForce* is a valuable reminder that, despite there being a wide scope for finding the necessary causal link between a person's disability and the 'something' that resulted in unfavourable treatment, this scope is not absolute.

Background

Ms Wood, a warehouse operative, was deemed disabled under the Equality Act 2010, suffering with a degenerative condition, osteoarthritis. She believed that this was exacerbated by damp and cold conditions.

In 2016, her employer altered its working practices such that warehouse workers (including Ms Wood) were required to move between benches, rather than being at a fixed workstation. Ms Wood was unwilling to work at benches nearer the door, due to her mistaken belief that it would be colder and damper, and, as a result, adversely affect her osteoarthritis.

Her employer began extensive investigations into the matter to find out whether Ms Wood's belief was, in fact, correct. The investigations established that her belief was erroneous – temperature and humidity levels were not materially different throughout the warehouse and therefore the change in working practices would not exacerbate her condition. Nevertheless, Ms Wood continued to refuse to work at certain benches and so was subjected to disciplinary action as a result.

Ms Wood brought a s.15 claim of discrimination under the EA because of something arising from her disability.

At first instance, the employment tribunal found that Ms Wood's employer had issued her with a warning, because of her refusal to work at certain benches, which arose because she believed, albeit mistakenly, that it would adversely affect her condition.

The EAT's decision

The appeal was allowed. The EAT noted that for the purposes of s.15, although case law demonstrates that there need not be an immediate nexus between the unfavourable treatment and the 'something arising from one's disability', a connection between whatever led to the unfavourable treatment and the disability must nevertheless exist.

The EAT stated that the 'something' on this occasion arose from Ms Wood's mistaken belief that moving benches would irritate her condition. Her claim for discrimination arising from disability therefore failed.

Implications

There is a wide scope for finding the necessary causal link between a person's disability and the 'something' that resulted in unfavourable treatment. This loose connection is demonstrated in the cases of *City of Work Council* and *Risby*.

In *City of Work Council*, Mr Grosset had revealed the 18-rated film 'Halloween' to a small group of 15-16 year olds as the subject matter for a discussion about the construction of narrative. The employment tribunal here accepted that the stress he was under had resulted in an impaired mental state, which, in turn, led to his error of judgement in showing the film.

Similarly, in *Risby*, the EAT held that an employee's dismissal for misconduct could constitute discrimination arising from his disability in circumstances where he committed the misconduct after losing his temper at his employer's decision to move a course to a venue which was not accessible to wheelchair users.

The Employment Statutory Code of Practice also confirms that the 'consequence' of a disability is wide and includes anything that is 'the result, effect or outcome of a disabled person's disability' and sets out various examples of the same.

'this decision provides a welcome restriction for employers as to where the dividing line may fall in determining this causation'

One key example is where a woman suffering from cancer loses her temper at a work, albeit out of character, as a consequence of the severe pain caused by the cancer and is subjected to disciplinary action due to her conduct. The code confirms that subjecting the employee to disciplinary action would be unfavourable treatment because it is arises as a consequence of her disability. Her disability (the cancer) is not the immediate cause of the 'something', but the necessary causal connection exists given that the pain resulting from the cancer in turn leads to the loss of temper (para 5.9 EHRC Code).

Conclusion

iForce provides a welcome restriction for employers as to where the dividing line may fall in determining this causation. This is an objective test, where the employee must demonstrate that there is an actual causal link between the disability and the relevant 'something', unless the mistaken belief results in some way from a disability, to such an extent that it renders an employee incapable of accepting the reality of the situation. In such a case, a tribunal may well decide that the requisite link was established. Unfortunately for Ms Wood, her mistaken belief did not cross the threshold.

This case is also a useful reminder that employers should be pro-active in carrying out their own investigations to ascertain whether individuals are disabled, and if so, whether the disability would be impacted by the employers' requests. Employers should be careful not to accept assertions made by employees, as they may not always be correct.

KEY:

iForce	*iForce Ltd v Ms E Wood* UKEAT/0167/18/DA
EU	Equality Act 2010
City of Work Council	*City of Work Council v Grosset* [2018] EWCA Civ 1105
Risby	*Risby v Waltham Forest LBC* UKEAT/0318/15/DM

The proposed EU Directive on protection for whistleblowers

DAVID WOODWARD, Slater and Gordon and MUKHTIAR SINGH, Garden Court Chambers

It is apparent from Osipov that the piecemeal protection, particularly under Part V and Part X of ERA, throws up potentially inconsistent interpretations and needs reform. The proposed EU-wide Directive on Protection for Whistleblowers may provide the catalyst.

Background

Currently, whistleblowing protection in the UK is purely domestic legislation. The new EU-wide proposed Directive (the Directive), approved on 16 April 2019 by the European Parliament, was set to be approved by EU ministers in May and then must be enacted in all member states within two years.

Although in June 2018, the UK Government indicated that it would prefer the European Parliament to take a non-legislative approach towards the Directive, more recently the UK Government has committed not only to protect but also to enhance workers' rights after Brexit, and to give Parliament a say in whether the UK should align with future EU employment law. The Directive will therefore apply if the UK has not (yet) left the EU or if the UK decides to adopt it in any event.

Those disclosing information acquired in a work-related context, on illegal or harmful activities, will be better protected and many employers will face substantial duties and obligations to provide that protection. This article sets out the main provisions of the Directive.

Why was the Directive introduced?

Protection given to whistleblowers across the EU is currently fragmented and uneven. Laws are currently in the hands of individual member states and this has resulted in a range of vastly different approaches towards whistleblowers across Europe. In most EU countries, the protection granted is partial and only applies to specific sectors or categories of employees. Currently, only 10 member states, including the UK, have a 'comprehensive law' protecting whistleblowers.

In 2017, responding to the 2017 Special Eurobarometer on corruption, 81% of respondents said that they did not report corruption they had experienced or witnessed. The European Parliament, adopting the Directive with 591 votes in favour (and only 29 against), pointed to recent scandals such as the Luxembourg Leaks and the Panama Papers. The Directive says that whistleblowers are often 'discouraged from reporting their concerns or suspicions for fear of retaliation'. The Directive looks to change this and provides minimum standards across all member states. Member states can elect to enhance these minimum standards.

Who is protected? (Articles 1 to 6)

Article 2 limits protection to breaches of EU Law in specified areas such as public procurement, financial services, prevention of money laundering, transport safety, public health and protection of privacy.

Article 4 states that protection shall apply to whistleblowers working, having worked or have applied to work in the public or private sector who acquired information on breaches in a 'work-related context'. It protects a wide range of individuals including workers, self-employed individuals, shareholders, non-executive directors, volunteers, unpaid trainees, and any person working under the supervision and direction of contractors, sub-contractors and suppliers.

In addition, protection shall apply to individuals who assist whistleblowers in the reporting process (defined as facilitators); third parties connected with the individual such as colleagues and family members; and legal entities that the reporting person owns, works for or is connected with in a work-related context.

The Directive therefore significantly broadens whistleblowing protection to cover a much wider range of individuals and entities.

'the Directive significantly broadens whistleblowing protection to cover a much wider range of individuals and entities'

There will be an opportunity for the UK Government to extend protection in two ways:

- to cover wrongdoing beyond the specified breaches of EU Law (expanding Article 2 coverage); and/or
- to extend the range of who is protected (adopting Article 4).

Article 5 provides conditions for protection. The person reporting must have reasonable grounds to believe the information reporting was true at the time of reporting (even if they were anonymous at the time) and that the information fell within the scope of the Directive.

Internal reporting (Articles 7 to 9)

If the breach revealed can be effectively addressed within their organisation and where the whistleblower considers that there is no risk of detriment, whistleblowers should be encouraged to report internally first. They may also report directly to an external organisation that the member state is obliged to set up (see Article 11 below), in light of the circumstances of the case.

Under Article 8 of the Directive, organisations with more than 50 employees will have to introduce internal channels and procedures for individuals to report concerns and for the organisation to follow up on reports. Currently in the UK, there is no such obligation on organisations (other than regulated sectors including the NHS and financial services).

Article 9 sets out the procedure for reporting concerns and following-up. Provided the confidentiality of the whistleblower is maintained, it is up to each individual organisation to define its reporting channels, but the following must be included:

- channels for receiving reports that ensures the confidentiality of a whistleblower and any other third party mentioned in the report; and prevents access by non-authorised staff members. Channels must include oral or written reports, telephone lines, voice messaging and, if requested, a physical meeting within a reasonable time frame;
- an acknowledgement of receipt of the report to the whistleblower within seven days;
- a designated impartial person or department to follow up on the report;
- diligent follow-up to the report (for instance, referral to other channels, or launch of an internal investigation);
- a reasonable time frame to provide feedback to the whistleblower about the follow-up, not exceeding three months from the acknowledgment of receipt of it (or if no acknowledgement was sent, from the expiry of the seven-day period following the report). The whistleblower may be asked to provide further information and in all cases, the whistleblower should be informed of any investigation's progress and outcome; and
- clear and easily accessible information regarding the conditions and procedures for a whistleblower to report concerns.

External reporting and public disclosures (Articles 10 to 15)

Article 11 obliges member states to establish, and adequately resource, an external organisation to receive, give feedback or follow-up on the reports made to them directly or after a whistleblower has used an internal channel. The external organisation will need to deal with reports in a similar manner to organisations dealing with internal reports, although the timeframe to provide feedback to the whistleblower is, in some cases, extended to six months.

Article 12 sets out the criteria required in order to be considered an independent and autonomous external reporting channel, which include its systems, confidentiality, integrity and training.

In addition, Article 15 provides protection for a public disclosure if, having reported internally or externally in accordance with the Directive:

- no appropriate action is taken within the relevant timescales; or
- where the whistleblower has reasonable grounds to believe that the breach may constitute an imminent or manifest danger to the public interest; or
- where there is a risk of retaliation; or
- where there is a low prospect of the breach being effectively addressed, for example, because the authorities are in collusion with the perpetrator.

Rights and obligations

Article 16 provides that member states must ensure that the identity of the whistleblower must not be disclosed without explicit consent to anyone beyond the staff members who receive and follow-up on the reports. There is a narrow derogation in the context of national authorities conducting investigations or judicial proceedings.

Article 18 obliges member states to ensure that employers and external organisations keep records of every report received, while maintaining confidentiality in accordance with Article 16. Article 18 sets out a number of acceptable methods

'employers should start to consider how they would set up procedures for whistleblowers to report concerns'

of record keeping in light of the various forms in which a disclosure can be made under the Directive. If a transcript is made of a telephone call, the whistleblower should have the right to check, rectify and agree the transcript.

Article 19 prohibits any retaliation or threats of retaliation, whether direct or indirect, including a long non-exhaustive list of prohibited retaliation (what UK lawyers would interpret as detriment).

In accordance with Article 20, whistleblowers will have access to support measures that must include:

- access to comprehensive and independent information and advice, which must be easily accessible to the public and free of charge, on procedures and protection available to whistleblowers;
- access to legal aid in certain cases, primarily in criminal and cross-border civil proceedings; and
- the possibility of financial assistance and support, including psychological support.

Whistleblowers meeting the criteria of Article 5 will enjoy immunity from civil liability (Article 21). For instance, individuals' legal or contractual obligations, such as non-disclosure agreements, cannot be relied upon to prevent the reporting of concerns where there was reasonable grounds to believe that the disclosure was necessary for revealing the breach.

Whistleblowers shall not incur liability in relation to how they acquired or accessed the information, provided that no criminal offences were committed. This applies both in cases where whistleblowers reveal the contents of documents that they lawfully accessed, as well as in cases where they have made copies or removed them from the premises of the organisation. Immunity is provided where the acquisition of documents raises an issue of civil, administrative or employment-related liability, for example, where a whistleblower acquires information by accessing the emails of a co-worker as long as no criminal offence occurred, such as hacking or burglary.

Article 21.5 states that once the whistleblower establishes, prima facie, that they disclosed information on breaches (whether internally, externally or publicly) and suffered a detriment, 'it shall be presumed that the detriment was made in retaliation for the disclosure'. The burden of proof will then shift to the employer who must then demonstrate that the detriment was 'based on duly justified grounds'.

Article 23 obliges member states to ensure effective, proportionate and dissuasive penalties for people who hinder or attempt to hinder reporting; take retaliatory measures against whistleblowers; bring vexatious claims against whistleblowers; or breach the duty of confidentiality in Article 16. As a note of caution, in order to 'to preserve the credibility of the system', persons making a report of public disclosure which is knowingly false are also liable to penalties and civil claims.

Article 25 confirms that member states may enhance protection, but the Directive should, under no circumstances, bring about a reduction in the level of protection already provided to whistleblowers.

Comment

The EU has taken bold and ambitious measures to protect whistleblowing and thus, in theory, enhancing enforcement and application of its laws and policies in specific areas. The Directive provides substantial protection on whistleblowers and obligations on employers.

Perhaps the UK should consider not only implementing the Directive regardless of Brexit, but expanding its scope to breaches that currently fall within the definition of qualifying disclosures under s.43B ERA and providing that protection to a wider range of individuals and entities. It is apparent from *Osipov* that the piecemeal protection under Part V and Part X of ERA throws up potentially inconsistent interpretations and the Directive provides an opportunity to address much needed reform.

The Directive will, no doubt, be greeted positively by workers in the UK, as it broadens protection to a much wider range of whistleblowers, and provides them with clearer and safer channels to disclose breaches. The duty to follow up and investigate disclosures is welcome. Employers should start to consider how they would set up procedures for whistleblowers to report concerns while ensuring appropriate procedures are in place to ensure the concerns are investigated and dealt with.

KEY:

Osipov	*Timis v Osipov* [2018] EWCA Civ 2321; [2019] IRLR 52
ERA	Employment Rights Act 1996
Directive	Proposed EU Directive on Protection for Whistleblowers (COM(2018)0218)

Reform of IR35 in the private sector

CHRISTOPHER STONE, Devereux Chambers

Significant reforms to the IR35 legislation will be implemented in the private sector from 6 April 2020. Below, we provide guidance for employment lawyers on advising their clients.

These are interesting times for employment status. The courts and tribunals have considered the status of couriers, plumbers and National Gallery guides. The Government has published its response to the Taylor Review and we await its implementation. TV presenters have made headlines in their appeals against tax assessments applying IR35.

Three such decisions have been handed down by the FTT: IR35 was found to apply to the PSC of former BBC presenter Christa Ackroyd, but not to the PSCs of Lorraine Kelly or former BBC Scotland radio presenter Kaye Adams. Four more FTT decisions relating to TV and radio presenters are outstanding and the Upper Tribunal will hear the appeal of Christa Ackroyd Media Ltd (CAM) in May 2019. The volume of recent litigation indicates that the principles governing the application of IR35 are not settled.

In this context, the Government has announced that from 6 April 2020, it will extend to the private sector reforms of IR35 similar to those that have applied in the public sector since 2017. This is the most significant reform of contractor engagement since IR35 was first introduced in 1999. Its impact will potentially be felt in all sectors of the economy and employment practitioners should be aware of how the reforms may impact on their clients and what steps those clients can take now to prepare.

Current legislation

IR35 is the name commonly given to the legislation on the taxation of intermediaries, Chapter 8 of Part 2, ITEPA. Its purpose is to prevent the avoidance of income tax through the insertion of a PSC between an individual and a company that would otherwise have been her employer. Section 49 ITEPA requires a tribunal to construct a hypothetical direct contract between the individual and company, and asks whether that hypothetical contract would be one of employment or self-employment (their being no immediate status of 'worker'). If IR35 applies, the PSC has to operate PAYE on the monies received from the engagement. Similar legislation applies in respect of NICs and will generally produce the same answer.

Compliance with the current legislation is notoriously bad. The Government estimates that non-compliance will cost £1.3bn annually by 2023/24. Enforcement has been frustrated by the need for HMRC to open investigations and fight appeals in the FTT one PSC at a time, even if the terms on which two PSCs contract are essentially the same. Risk of enforcement action by HMRC currently sits with PSCs, with the end client avoiding any employment costs, but without taking on the compliance risk.

Public sector reform

It is for these reasons that IR35 in the public sector was reformed from 2017, with the effect of placing the onus of compliance on the client and any agency that it engages, rather than the PSC. Particular obligations are placed on the end client and on the company that pays the PSC, the 'fee-payer'.

In a simple, three-party contractual chain involving a client, PSC and individual, the client and fee-payer are one and the same. In a four-party chain, the client uses an agency to contract with the PSC, which then engages the individual. In that case, the agency is the fee-payer.

The client is obliged to carry out an assessment of the contractual chain and determine whether IR35 applies. If IR35 does apply, the fee-payer is obliged to operate PAYE and make NICs. The risk of non-compliance and enforcement by HMRC is thereby shifted from the PSC to the fee-payer. One investigation can therefore be opened by HMRC into the fee-payer in respect of payments to multiple PSCs.

'companies will be obliged to do something they have never previously had to do – consider whether IR35 applies to their engagements with personal service companies'

Private sector reform

Reform of IR35 in the private sector was announced in the 2017 Autumn Budget. In the 2018 Autumn Budget, it was announced that the reforms would be implemented from 6 April 2020 and would be based upon the public sector reforms. Draft legislation is yet to be published, but more detail of the Government's plans for implementation were set out in a consultation document published on 5 March 2019. The following are currently planned:

- the reforms will not apply to small businesses, defined in Companies Act 2006 s.382, as a company having two or more of (i) an annual turnover not more than £10.2m; (ii) a balance sheet total not more than £5.1m; or (iii) not more than 50 employees;
- the roles of client and fee payer will be the same as in the public sector; and
- the Government is considering: (i) how to ensure that the determination made by the client is communicated down the contractual chain; and (ii) how an individual can challenge a determination – to counter the perceived issue of clients adopting a blanket and/or risk-averse approach to determining whether IR35 applies.

Whether client or fee-payer, companies will be obliged to do something they have never previously had to do – consider whether IR35 applies to their engagements with PSCs.

Prepare for the reforms

For many companies, the first challenge will be to understand what PSCs they engage and on what terms. The process of auditing contractual arrangements is one that can and should start immediately, rather than awaiting draft legislation.

Once they know what arrangements they currently have in place, companies will need to consider how to respond to the reforms. This may involve changing contractual terms to bring all PSCs onto standardised terms to make administration easier. Some companies will wish to avoid the requirement to operate PAYE by inserting an agency into their contracting chains (although this will not absolve them of the need to carry out a determination of whether IR35 applies).

Inevitably, there will be a desire among contractors who have been enjoying the tax benefits of being paid through a PSC to continue in the same way. Advisers will need to be prepared to explain that, in some circumstances, this will simply not be possible and that a lack of HMRC investigation in the past is no indication that IR35 did not apply.

If the client is going to maintain that IR35 does not apply, now is the time to start gathering evidence that favourable contractual terms do reflect the reality of the arrangements (such as examples of actual substitution or of the individual acting without any supervision).

Guidance from the FTT

Although not binding on HMRC or other FTTs, recent FTT decisions highlight some of the issues that are currently proving contentious in the application of IR35 and which practitioners should be aware of when advising their client.

Creating the hypothetical contract

A distinct feature of the IR35 legislation is that the tribunal does not determine employment status based on the actual contract, but a hypothetical contract. The actual contractual terms under which the services were provided are the starting point for the hypothetical contract, but there is scope for a tribunal finding that the hypothetical contract would have fewer or further terms.

One area of contention is how far and in what circumstances it is open to a party to argue that the terms of the actual agreement reached between the client and PSC should be re-written when constructing the hypothetical direct contract. In *Atholl House*, the FTT described this as being 'at the heart of the appeal'. The FTT relied on *Autoclenz* to find that written terms of the contract between the BBC and PSC would not have been part of the hypothetical contract.

Mutuality of obligation

In determining whether the hypothetical contract is an employment contract, the FTT will typically start with the familiar tests from *Ready Mixed Concrete*: mutuality of obligation; a sufficient degree of control; and other terms not inconsistent with a contract of employment.

As to mutuality, it is not necessary for there to be an 'overarching' or 'umbrella' contract. The obligation to operate PAYE can operate on an engagement-by-engagement basis. In theory, it is possible for someone to be an employee for a day. However, a lack of obligation to offer or accept work outside of a particular engagement may still be a relevant factor in determining whether the engagement was an employment. How important it is as a factor remains contentious.

'tribunals are guided by the Court of Appeal in Lorimer to stand back and see what picture emerges'

Control

The issue to be determined by the Upper Tribunal in the appeal by *CAM* is whether the FTT erred in its approach to control. The FTT found that the BBC had the contractual right of control over editorial output; a similar conclusion was reached by the FTT in *Atholl House*. CAM will argue that control by the BBC for the purposes of complying with its obligations to the industry regulator, Ofcom, is not relevant to determining employment status because the BBC has similar control for this reason over all content producers, whether employees and non-employees. If accepted, this argument has potential application to any regulated industry, such as financial services or healthcare.

Holiday and sick pay

Decisions of the FTT have been inconsistent on the relevance in an IR35 context of the absence from the actual contract of rights to holiday and sick pay etc. Such rights are not typically found in an agreement between a client and PSC because it is an agreement between two companies rather than a worker or employee contract; one would not expect to find such rights in such a contract. For this reason, the FTT in *CAM* disregarded the absence of such rights as being of no consequence. Conversely, in *Albatel* and *Atholl House*, the FTTs found this to be a relevant factor, the latter expressly disagreeing with *CAM* on this point.

Overall conclusion

Having considered all relevant factors, tribunals are guided by the Court of Appeal in *Lorimer* to stand back and see what picture emerges. With lots of IR35 appeals at FTT level and a lack of recent appellate authorities on IR35, it makes the task of an adviser being asked about prospects of success at first instance difficult. This can be seen by comparing the outcomes in *CAM* and *Atholl House*: the terms of the hypothetical contracts with the BBC were similar, yet FTTs came to the opposite conclusion about whether those contracts would be for employment or self-employment.

Conclusion

Any private sector client that currently contracts to obtain the service of individuals through PSCs is going to be affected by the reforms and needs to be taking steps prior to April 2020 to ensure that it is ready for the changes. Practitioners advising in this area will need to ensure that they stay on top of the developing case law showing how IR35 is applied in practice.

For those wanting further guidance in this area, there will be a break-out session on the IR35 reforms at ELA's annual conference.

KEY:

FTT	First-tier Tribunal (Tax Chamber)
PSC	Personal service company
ITEPA 2003	Income Tax (Earnings and Pensions) Act 2003
CAM	*Christa Ackroyd Media Ltd v HMRC* [2018] UKFTT 69 (TC)
Atholl House	*Atholl House Productions Ltd v HMRC* [2019] UKFTT 0242 (TC)
Autoclenz	*Autoclenz v Belcher* [2011] ICR 1157
Ready Mixed Concrete	*Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497
Albatel	*Albatel Ltd v HMRC* [2019] UKFTT 195 (TC)
Lorimer	*Hall v Lorimer* [1994] 1 WLR 209

Ensuring GDPR compliance in litigation

LISA RIX, GQ | Littler

Having just celebrated the anniversary of GDPR, now seems a good opportunity to reflect on the impact that it has had on litigation. Below, we explore the typical stages of the litigation process and consider what lawyers need to think about in respect of data protection obligations.

GDPR efforts should envisage potential litigation

When advising clients on their GDPR compliance, we should always aim to prepare clients – from a GDPR perspective – for any future litigation.

First, we should advise clients to set their retention periods to allow time to fight cases and defend claims. As most claims have a six-year limitation period, a seven-year retention period will usually be appropriate (allowing for the limitation period plus a 'buffer' year for the client to be made aware of any such claim). However, some potential claims may require clients to set a longer period; for example, where claims may arise in relation to a deed (where 13 years would be more appropriate).

Secondly, although strictly clients need not provide references to personal data being disclosed as part of legal proceedings in their privacy notices (due to an exemption in para 5(3), Part 1, Sch.2 DPA 2018), it is probably still good practice for clients to set out in their privacy notices broad references to:

- lawyers and e-discovery platforms being potential recipients of the personal data;
- the purpose of bringing, defending and carrying out litigation being a purpose for processing;
- the legal bases for processing in relation to litigation; and
- applicable retention periods, considering the possible limitation periods above.

Client obligations when collating relevant documents

Purely by clients collating the relevant information to bring or defend a claim, they will already be processing the personal data of their employees and other data subjects contained in those documents (client data). Clients will comfortably have a legal basis to rely on to process client data for the purpose of litigation, most likely being for its 'legitimate interests' under Article 6(1)(f) GDPR (its legitimate interest being the bringing and defending of legal claims) and Article 9(2)(f) GDPR (for any special categories of personal data).

Additionally, when clients send relevant documents to their lawyers, they should try to minimise the client data they share where practical and the transfer of data should be handled securely (in accordance with Article 5(1)(c) and Article 5(1)(f) GDPR, respectively).

Client instructs lawyers to assist with the litigation

When a client instructs lawyers on a piece of litigation, the client will be the controller of the client data. However, when they pass that data to their lawyers, the lawyers will usually receive and process the client data as a controller (or joint controller).

This is because lawyers have their own obligations towards client data, separate to the obligations that the client owes towards the data subjects themselves: lawyers have professional responsibilities which determine how they must use the client data (such as record-keeping requirements and the confidentiality of our communications) and they exercise a degree of autonomy in respect of the client data (for example, in determining what information to request from clients, what to process in order to provide legal advice and what needs to be shared as a result of disclosure).

That means that lawyers are subject to the usual controller obligations under GDPR when handling client data during litigation. However, helpfully, lawyers are exempt from two of the main controller obligations; we do not need to give a privacy notice to the data subjects of clients nor provide access to the personal data of those data subjects (para 19, Part 4, Sch.2 DPA 2018).

'the key issue GDPR poses during disclosure is its potential conflict with the parties' duty of disclosure'

Engage e-discovery providers to help with disclosure

If lawyers use an e-discovery provider to assist with the disclosure process, the provider will process the client data as a processor on behalf of the lawyers, ie the controller. This means that in any contract with the e-discovery provider, lawyers must include the clauses required by Article 28 GDPR that are designed to ensure that their processing meets all the GDPR requirements.

If the e-discovery platform is based on an overseas server or has an overseas data centre, lawyers will also have to consider cross-border transfer implications. At present, the most likely practical solution for sending data outside of the EEA to a country without an adequacy decision is to include controller-to-processor model clauses in the contract with the e-discovery provider, pending issuance of further guidance on other possible safeguards from the ICO.

Lawyers must also ensure that client data is transferred and handled in a secure environment (in accordance with Article 5(1)(f) GDPR), either on their own systems or on e-discovery platforms.

Review documents for disclosure

The key issue GDPR poses during disclosure is its potential conflict with the parties' duty of disclosure.

Disclosure in tribunals, and standard disclosure in civil courts, requires the parties to disclose: (i) the documents on which they rely; and (ii) the documents that adversely affect their own case or another party's case or support their own case or another party's case (Part 31 Civil Procedure Rules). However, in practice, parties take a relatively wide approach as to what might be relevant when disclosing documents, and so many of these documents might be outside the scope of the requirements or might include peripheral client data. Although we can try to redact personal data that we think falls outside of the disclosure regime, this is difficult and costly and can ultimately lead to challenges by the other side.

There is, therefore, a risk of parties and their lawyers disclosing client data in breach of their obligations under GDPR to only process personal data lawfully and to minimise processing to what is necessary.

When at court or tribunal

HMCTS has recently confirmed (in a joint notice endorsed by the Bar Council and the Law Society) that bundles and all other documents brought to court by legal advisers remain their responsibility as a controller. Therefore, legal representatives must remove these immediately following the end of the court hearing. HMCTS and its staff will not do this for them and HMCTS may consider it necessary to report that a data breach has occurred if bundles containing special category data are left in the court building.

However, bundles filed at court are the responsibility of the court – legal representatives are not required to remove these (as lawyers are not processors of the court).

Conclusion

Given that large amounts of personal data are handled so regularly throughout litigation, it is important for us as lawyers, and for our clients, not to forget about GDPR in all the excitement and stress of a claim. GDPR may not have hugely changed the way litigation is conducted overall, but there are certainly some areas that need to be considered more carefully than under the old law.

KEY:

GDPR	General Data Protection Legislation (Regulation (EU) 2016/679)
DPA 2018	Data Protection Act 2018
HMCTS	HM Courts and Tribunals Service

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PHOTO: all submitted articles should be accompanied by a high-resolution portrait 'headshot' photograph of the author(s) in jpeg or tiff format (a minimum of 5cms at a quality of 300dpi).

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WORD COUNT: for all articles must be either 500-550, 1,100-1,200 or 1,800-1,900 words (reflecting the page length).

TITLES: should be no more than 50 characters, followed by the author's name and firm/chambers. The topic should be clear from the title.

KEY: at the end of the article, list the short form and full name (with un-italicised case reference) of all cases and legislation, in the order in which they appear in the article. Where possible, provide a hyperlink in the key to any case report cited (for the digital edition).

INTRODUCTION: begin with a 'standfirst' paragraph of 30-40 words, which should introduce the subject covered in the article.

EXTRACTS: suggest a phrase or short sentence for each page, to be extracted as quotes.

SUB-HEADINGS: only use initial capitals for the first word.

BULLETED LISTS: use bulleted lists rather than numbered or lettered paragraphs. Short lists should be introduced with a colon, begin with a lower case letter (unless, for example, there is a name) and have no punctuation at the end. Longer bulleted paragraphs should be punctuated at the end with semi-colons and with a full stop on the final bullet.

ABBREVIATIONS:

- use symbols (%, US$,€); do not use ampersand unless it is part of a name
- use numerals for all numbers except one to nine and million/billion
- do not use stops for abbreviations such as etc, ie, eg
- use acronyms where they exist, but with initial capital only: Acas, Ofcom, Nato, Defra
- use standard abbreviations for organisations and the like (CBI, ECJ, EAT, MoJ, BIS, ELA)
- if no standard abbreviation exists, first use its full name, then a short form
- only define short forms (in brackets without quote marks) if not doing so would be confusing
- refer to all legislation and cases (italicised) using an abbreviated form taken from the key
- sections of legislation should appear as follows: s.94 ERA (ERA s.94 at the start of a sentence), ss.94-95 ERA

CAPITALS: use initial capitals for languages, personal titles, names of places, institutions (such as the current Government) and publications, statutory provisions (other than section and paragraph), months and public holidays. Use lower case for job titles (such as director, editor) and legal descriptors such as claimant, defendant, judge, counsel, court, tribunal, etc.

DATES: display in the following format: 24 July 2012.

ITALICS: italicise case names and names of publications.

QUOTES: use single quote marks where quoting from judgments or legislation (except for quotes within quotes). Do not italicise. Include paragraph and page references in brackets after the quote mark (para 12, p.12).

diary

BOOKINGS Email: ela@elaweb.org.uk Tel/Fax: 01895 256972 Online: www.elaweb.org.uk

Event	Cost (excl. VAT)	CPD hours	Level	Date	Location
ELA annual conference and dinner 2019	£325 + VAT	5	general	25 June	London
Governance and ethical issues for employment lawyers	£150 + VAT	3	introductory	3 July	London
Settlement agreements	£150 + VAT	3	introductory	30 Oct	London
Introduction to employment law	Non-residential: £450 + VAT; residential, £600 + VAT	12.75	introductory	7/8 Nov	Birmingham

Lunchtime training	Speaker	Date	Location
Preparation for and procedure at preliminary and substantive hearings: a practical guide	Stephen Wyeth, 3PB	10 June	Cardiff
Religion and belief in the workplace	Tariq Sadiq, Parklane Plowden Chambers	24 June	Leeds
Current state of associative and perceived discrimination	Kate Annand, Doughty Street Chambers	19 Sept	Manchester

Evening training	Speaker	Date	Location
Asia: trends and developments in China, Hong Kong, Japan and Singapore	Johnny Choi, Helen Colquhoun, Lawrence Carter and Katherine Chew, DLA Piper	5 June	London
Understanding the National Minimum Wage	Former Employment Judge Helen Milgate	5 June	Birmingham
Understanding the National Minimum Wage	Former Employment Judge Helen Milgate	12 June	Hull
Religion and belief in the workplace	Tariq Sadiq, Parklane Plowden Chambers	24 June	Newcastle
Post-termination restrictions: update on case law developments and trends	Adam Solomon QC, Littleton Chambers	1 July	London
Commercial agents	Alfred Weiss, Exchange Chambers	3 July	Sheffield
Whistleblowing: a round-up of recent developments	Gareth Brahams, BDBF and Bruce Carr QC, Devereux Chambers	3 July	Bristol
Current state of associative and perceived discrimination	Kate Annand, Doughty Street Chambers	12 Sept	Birmingham
Current state of associative and perceived discrimination	Kate Annand, Doughty Street Chambers	18 Sept	Liverpool
Hiring and firing senior executives	Catherine Wilson, Keebles	2 Oct	Sheffield
Hidden disabilities	Kate Annand, Doughty Street Chambers	10 Oct	Southampton (4.30pm start)
Hiring and firing senior executives	Former Employment Judge Helen Milgate	17 Oct	Leeds

Details	Timings (unless otherwise stated)	CPD hours	Cost (excl. VAT)
All lunch training	Session time: 12.30-2.00pm	1.5	£40
All evening training	London, 6.30-8.15 pm; elsewhere, 6-8 pm	1.5	£40