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Gordon (Sam) Middlemiss
Subject Leader for the Law Department

This dissertation is submitted in partial completion of the requirements for the award by the University of a PhD by Public Output

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1. Aims of Reflective Review

What follows are the defined aims of the reflective review process involved in the PhD by public output as set out in the University's academic regulations.¹

- (a) The work submitted should demonstrate that the candidate has carried out a programme of study and research at least comparable with that required to prepare a PhD thesis in the field concerned
- (b) The candidate should demonstrate the evolution of substantive theoretical approaches, systematic study and research skills in the body of research that has been undertaken
- (c) The candidate should demonstrate originality by exercise of independent critical powers and have made a distinct contribution to knowledge.

It is my contention that all three aims of the PhD by public output have been fulfilled in the process of my research into harassment and discrimination and this will be illustrated in the following review of my public output in these areas.

¹ This is a summarised version of the aims outlined in Paragraph 20.12 also see section 16 of this application dealing with the Conclusions

2. Acknowledgements

I would like to thank my supervisors Professor Rebecca Wallace and Professor Dorothy Williams for their continuous encouragement, support and advice. I would also like to express my gratitude to Veronica Strachan for the efforts she has made on my behalf.

Thanks are due to all my current and ex colleagues and students that have contributed to my published research, most notably Nicole Busby, Richard Mays and Olga Hay.

The research support provided by Euan Roberts ² and Olga Hay ³ over a number of years has proved invaluable in sourcing the (often scarce) materials necessary to underpin my research.

There are undoubtedly authors that have influenced the direction of my research that deserve a mention. Michael Rubinstein was undoubtedly influential as the first expert on the law of harassment in the United Kingdom and David Pannick was an early source of inspiration as the first person in the United Kingdom to write a definitive text on discrimination law.

I would also like to thank Professor Vic Craig whose friendship and example motivated me to undertake research and Professor Richard

² Research Assistant

³ Research Support Worker

Mays who convinced me of my potential to write first class
published work.

3. Reflective Overview

In the course of my relatively short research career I have been extremely productive and published widely on employment law, especially in the area of discrimination law and the civil law of harassment. I have also researched and been published on aspects of the criminal law. In particular articles involving analysis of the criminal liability of perpetrators of harassment and stalking and the legal protection of their victims.

It is contended that the combination of the published output involved in these areas of research has produced a body of work which has led to this author being recognised as an authority in the field, been instrumental in ensuring these issues are placed at the forefront of legal debate and reform and led to legal rights being made available to victims of discrimination and harassment

Before considering these achievements in more detail it is necessary, in order to place my work in context, to provide a background to the research and a literature review of the published output of writers in these fields.

4. Background to Research and Literature Review

Background

I have worked in education for around twenty years although I only commenced academic research in 1986 with part-time study for my M. Phil. at the University of Edinburgh. The title of my thesis was 'An Inclusive Analysis of Sexual Harassment at Work'.

My research career in terms of published work began in 1993 however it only commenced fully in 1996. The reasons for my late start in publishing work are numerous however the most significant of these deserves mention.

The work involved in undertaking the M.Phil at the University of Edinburgh was considerable and took up all my spare time after undertaking a heavy teaching load (around twenty-one hours of teaching on nine separate courses at Napier) and fulfilling substantial administrative tasks (for a number of years at RGU I was course leader for the B A (Honours) Law and Management, timetabler, and unofficially head of the law section).

So the process of getting a significant amount of my work published started in 1996 and coincided with a gradual reduction in the administrative tasks I was required to do and an increased confidence in my own research abilities.

During the eight year period of my employment since 1996 at the Robert Gordon University I have achieved a considerable research output and with it recognition of my expertise in the areas of harassment and discrimination. Specifically I have written and published around 24 refereed articles, one book chapter and one book, 15 professional articles and presented 12 conference papers (the bulk of which are published).

I have organised and chaired three successful conferences and was instrumental in preparing a winning bid for funded research for the Scottish Executive. Although not all of these research outputs will be considered in this application fortunately the majority of them will as they fall within the broad themes of discrimination and harassment (see the bibliography of authors relevant publications)

Literature Review

The broad areas of sex and race discrimination have been widely covered in articles and books for some considerable time. Some of the most important will be mentioned below.

The earliest publications were in the United States where the law (particularly statute law) developed much earlier in these areas than in Europe.

The first definitive text on sex discrimination in the UK was published in 1985.⁴ It was written by a barrister specialising in employment law. As well as dealing with legal rules on sex discrimination it also touched on areas which were at an early stage of development at the time and would in the future feature in my research (sex orientation, sexual harassment, dress codes etc.).

It is interesting to note that after almost twenty years since publication of this book some of the areas of discrimination touched upon remain largely unprotected while others have only recently been covered by legislative rules. Camilla Palmer and Kate Poulton wrote a book with the title *Sex and Race Discrimination in Employment* shortly after Pannick's book.⁵ While this book lacked the depth of coverage of the earlier text it benefited from being concise and accessible.

Another influential book is *Discrimination Law: Concepts, Limitations and Justifications* edited by Janet Dine and Bob Watt.⁶ This is an edited collection of chapters contributed by various academics that deal in depth with specific aspects of discrimination law.

A text that has supported and underpinned my research and teaching by highlighting the leading articles, cases, statutory provisions etc. on sex and race discrimination is *Discrimination Law:*

⁴ Pannick, D *Sex Discrimination Law* (1985) Clarendon Press Oxford

⁵ (1987) Legal Action Group

⁶ (1996) Longman

Text Cases & Materials. The first edition was written by an academic Richard Townshend-Smith.⁷

Another important book that included detailed analysis of UK employment law derived from membership of the European Community (including equality law) is EC Employment Law by Catherine Barnard.⁸

Although my own contribution to texts on discrimination law is limited I have recently written a lengthy chapter for an edited collection on Discrimination Law contributed by academics and edited by a leading commentator on employment law Malcolm Sargeant.⁹ My contribution covered the law on sex and race discrimination and was a key chapter of the book. It is worthy of noting that I was the only contributor from Scotland.

It is my intention to write a book on discrimination law in the not too distant future when I find a suitable publisher.

The articles written by commentators on discrimination law generally are too numerous to mention although it seems appropriate to highlight some of the published articles that I have written on this topic.

The first of these was in 1997 when along with a colleague Richard Mays I wrote an article on the impact of a new definition of vicarious liability in discrimination cases that was introduced

⁷ (1998) Cavendish Publishing, 2nd edition published in 2003 and written by Michael Connolly

⁸ 2nd ed. (2000) Oxford University Press

through a landmark judgement.¹⁰ This was followed up in 1998 by a single authored case and commentary outlining how the legal judgement considered in the previous article had been applied in subsequent cases.¹¹

In 1999 I wrote a case note for a refereed journal which was a critical analysis of a judgement that decided that discrimination on the ground of sexual orientation was not included in discrimination law in the UK and in the European Community.¹²

In the same year I wrote an analysis of a case which highlighted the difficulties faced by persons pursuing a case under the Disability Discrimination Act 1995 finding suitable comparators.

The significance of this case was that the requirement to find comparators, utilised under the Act to underpin a discrimination claim, and had been largely dispensed with by the courts in favour of disabled employees.¹³

In the year 2000 I undertook analysis of a case which attempted to delineate the circumstances when an employee or a third party can

⁹ Discrimination Law (2004) Pearson Longman

¹⁰ The Common Law and Statutory Concepts of Vicarious Liability, The Parting of the Ways? Scots Law Times, March 28, pp 95-97

¹¹ Tower Boot Revisited: The Impact Continues, Scottish Law Gazette, December 1998, Vol. 66, No 4 p 180-181

¹² Smith v Gardner Merchant (1998) IRLR 510, Juridical Review, Vol. 17, March 1999 pp 134-137

¹³ Comparators in Disability Discrimination Cases, Scottish Law & Practice Quarterly, April 1999, Vol. 4, No 2, pp 151-153

be liable for discrimination along with an employer under the Sex Discrimination Act 1975 ¹⁴

In the same year I wrote a lengthy article for a refereed international journal arguing for changes in the law dealing with discrimination to ensure that applicants in discrimination cases can easily find comparators with whom they can compare their situation and thereby support their discrimination claim ¹⁵

In 2001 along with a colleague Nicole Busby I wrote a highly critical article on the failure of the legal systems in the UK and European Community to protect the employment rights of employees that are homosexuals or lesbians. This was published in a renowned refereed journal with an international readership. ¹⁶

This was followed up by a further case note in a refereed journal which offered a critical analysis of a case in which the judiciary confirmed that the Human Rights Act 1998 is incapable of extending rights under UK employment law to protect against discrimination in employment for homosexuals and lesbians ¹⁷ (see section 5(b) below)

¹⁴ Aiding a Discriminatory Act of the Employer, (AM v WC and SPF (1999) IRLR 410) Scots Law Times, Issue 1, 7 January 2000 pp 1- 4

¹⁵ "Shall I Compare Thee"? The Legal Dilemma, Choice of Comparators in Discrimination Cases, International Journal of Discrimination and Law, Vol. 4 September, 2000 pp 293-317

¹⁶ The Equality Deficit, Legal Protection for Homosexuals and Lesbians in Employment? Gender Work and Organisation, Vol. 8 No 4 October 2001 pp 387- 410

¹⁷ Back to Square One, The Secretary of State for Defence v McDonald (2001) IRLR 431 and the legal protection against discrimination in employment

More recently my articles on discrimination law have dealt with aspects of discrimination that remain unprotected after recent legislation was introduced to provide the right to claim unlawful discrimination and harassment on various grounds (including sexual orientation, religion and belief etc.). The legislation referred to implemented legislative measures emanating from the European Union on discrimination law.¹⁸

The areas unprotected after the legislative changes are discrimination on ground of physical appearance, discriminatory appearance codes, bullying and sexual favouritism.

I wrote an article along with a colleague Olga Hay, on the legal protection for employees against discriminatory dress or appearance codes utilised by employers. It was argued that where dress codes have a discriminatory effect they should represent the basis for a claim of sex, race or religious discrimination in the United Kingdom and the United States.

This article has been published in an international refereed journal¹⁹ and represents the first article to involve detailed comparative analysis of this area of law.

based on sexual orientation Scottish Law Practice Quarterly October 2001

¹⁸ Framework for Equal Treatment Directive 2000/78/EC, Council Directive on Equal treatment irrespective of racial or ethnic origin 2000/43 EC

¹⁹ Fashion Victims, Dress to Conform to the Norm, or Else? Comparative Analysis of Legal Protection against Employers Appearance Codes in the United Kingdom and the United States, International Journal of Discrimination and Law, 2003 Vol 6, pp 69-102

In the same vein I have written an article and conference paper on the legal aspects of discrimination on the ground of physical appearance. This article like the earlier one provides a comparative analysis of the legal status and impact of dress or appearance codes in the UK and the US but also includes a comparative analysis of legal treatment of discrimination based on physical looks (which includes weightism, heightism etc.) in these jurisdictions.²⁰

The evidence produced in this article shows that this is an important issue for staff of both sexes. This is the first article/conference paper to deal with both aspects of lookism and to attempt to provide a solution to this problem in the workplace.

I recently completed an article in which I critically examined the legal treatment of victims of sexual favouritism in the United Kingdom and compared how victims of this type of discrimination are dealt with under the United States legal system.

This article represents the first attempt by an academic in the UK to give this issue detailed consideration.²¹ Discrimination arises here through of a series of events whereby an employee has sexual

²⁰ Beauty's Only Skin Deep? Legal Liability of Employers for Discrimination on the Ground of Physical Appearance? A Comparative Analysis, sent to the International Journal of Discrimination and Law November 2004,

²¹ An article with the title Anglo-American Comparison of Legal Liability of Employers for Sexual Favouritism was sent for consideration to the Industrial Law Journal in September 2004. This is the top employment law journal in the UK published by the Oxford University Press and has an international reputation.

relations with her/his boss and as a consequence gets a tangible benefit (e.g. promotion) which is not available to other employees. This is because the employees (the victims) suffer a detriment because they are unable or unwilling to follow the same path.

Sexual and Racial Harassment

Areas of law that feature strongly in my research are sexual and racial harassment. When I started research on sexual harassment for my M.Phil in 1986 there were only a handful of published books or articles dealing with the legal aspects of this problem.

In the United States the definitive text was *Sexual Harassment of Working Women* by Catherine McKinnon.²² A further text that was published shortly after that was Lynn Farley's *Sexual Shakedown*²³

Although these books covered all aspects of the issue, including the sociological and psychological aspects of the behaviour they highlighted the case for reform of the law in the United States to protect victims. More importantly from a historical perspective they coined for the first time the term sexual harassment. Up until then the behaviour went largely unnoticed because there was no term to cover it.

Developments in the form of recognition of the problem and pressure for legal intervention in the United Kingdom were led by

²² (1979) Yale University Press

Michael Rubinstein. He was undoubtedly the only recognised expert in the field on the law on sexual and racial harassment in the nineteen eighties. ²⁴ Other writers that are worthy of a mention for dealing with sexual harassment were Camilla Palmer & Kate Poulton ²⁵ Christopher McCrudden ²⁶ and Alice Leonard. ²⁷ While all of these writers were in their own way influential in the development of the law their interest was short-lived. I would argue that my influence is greater because in my published work (as discussed below in Section 8) I have over a long period of time made a continuous study of the topic and attempted to identify all the possible legal remedies for victims of harassment throughout the UK (in England and Wales and in Scotland).

I recently wrote an Article which defined the law of harassment subsequent to significant changes in the law and also summarised the legal protection available for victims of bullying at work.

²³ (1980) Melbourne House

²⁴ Rubinstein M When the office romeo violates the law, Personnel Management, March 1979 pp 48-51
The Dignity of Women at Work - a report on the problem of sexual harassment in the workplace in member states of the European Communities by Michael Rubinstein (1989) was instrumental in inspiring European Community initiatives.

²⁵ Chapter 11, Harassment in Sex & Race Discrimination in Employment (1987) Legal Action Group

²⁶ Chapter 9 Conclusions and Issues for the Future
Ed. McCrudden Women Equality and European Community Law (1987) Eclipse Publications

²⁷ Remedies for Sexual Harassment New Law Journal Nov 8 1991 pp 1514 - 1516

This article has the title The Right to Dignity at Work? Protection from Harassment and Bullying under Employment Law in the United Kingdom and was sent to the Legal Studies Journal in October 2004

Stalking

The other area of law included in my application is the law of stalking. It is worth pointing out that while stalking is an important topic in its own right it is a form of behaviour that falls under the heading of harassment. Accordingly publications in this area contribute to my reputation as an advocate for victims of harassment and can be included in the application.

The difference between other areas of harassment such as sexual and racial harassment and stalking is that complaints about the former behaviour tend to be dealt with under the civil law whereas the seriousness of the nature and consequences of the latter behaviour means that complaints tend to be dealt with under the criminal law.

Where complaints are upheld they tend to be treated as a common law crime in Scotland or a statutory offence in England and Wales.

At the time of writing our first published article on stalking in 1997

²⁸ there were very few published works dealing with this topic from

²⁸ With Mays, R. Watson, J. Every Breath You Take, Every Move You Make... Scots Law, the Protection from Harassment Act 1997, the Problem of Stalking in Scotland, *Juridical Review*, Part 6, 1997 pp 331-354.

a legal perspective, particularly in Scotland. There were a number of articles dealing with legal protection against stalking in the United States where the law was more developed. In that jurisdiction Federal Law and in some instances State Law (e.g. California) would provide help to victims of stalking.²⁹

In Scotland in 1997 it was the legal establishment's opinion that the common law (particularly the crime of breach of the peace) was sufficiently flexible to protect victims of stalking and harassment.³⁰

At this time the Scottish Parliament were not convinced of this and considered that there was some merit in the argument for legislative intervention. Following the results of research commissioned by them³¹ and certain legislative changes in Scotland which impacted on victims of stalking they have reached a similar view. Protection in the form of statutory offences was introduced south of the border³² but not in Scotland and we argued in our article that this was a serious omission.³³

²⁹ Lingg, Stopping Stalkers: a Critical Examination of Anti-Stalking Statutes, St John's Law Review, (1993), 67 p 351

³⁰ Bonnington, A Stalking and the Scottish courts, New Law Journal, 27 September 1996 at p 1394

³¹ Morris S et al Research Finding RF 67, Scottish Executive available at www.scotland.gov.uk

³² Wells, C. Stalking: The Criminal Law's Response, 1997, Criminal Law Review 463

³³ Supra 28

This failure in the law became only too apparent in a case where a stalker that had been dealt with under the criminal law of Scotland went on to murder his victim.³⁴

There have been developments in the law dealing with stalking in both jurisdictions which have been well documented.³⁵ However no commentator has as yet provided detailed coverage of the legal rules dealing with stalking and harassment that apply in both jurisdictions. This is what I will have achieved when my book on stalking and harassment is finished.

While the book was initially written from a Scottish perspective I was unable to find a publisher in Scotland willing to publish it due to the restricted market for a book of this kind. I have decided I will re-write it from a United Kingdom perspective which will involve considerable re-working.

The expansion of, the subject-matter namely the Law of Stalking and Harassment (including the civil law) and widening of the jurisdiction covered (the United Kingdom) should ensure that the prospect of finding a suitable publisher is much improved.

³⁴ Protection against Harassment: The Harsh Reality in Scotland, Green's Criminal Law Bulletin, Vol. 36, December 1998 p 4-5. Reviewed in an article on the front page of the Scotsman Newspaper, 29th December 1998

³⁵ Finch, E Stalking the Perfect Stalking Law: An evaluation of the Efficacy of the Protection from Harassment Act 1997, The Criminal Law Review, September 2002 pp 703 – 718, Middlemiss, S Substantive Relief for Victims of Abuse? The Protection from Abuse (Scotland) Act 2001, Scots Law Times, 7.12.01, Issue 10, pp 324 – 327

5. Research Output on the Themes of Discrimination and Harassment

The theme that I have rigorously pursued and developed during my research career is expansion of legal protection for victims of harassment and discrimination. The terms harassment and discrimination are used here in their broadest sense and encompass various kinds of undesirable behaviour (usually on the part of an employer).

The victims of these types of behaviour have traditionally been disadvantaged because their legal rights have been disregarded and consequently they have been given little or no legal protection (e.g. victims of sexual harassment, bullying or stalking). They are often the weaker party in a relationship (employee, trainee) or someone who is not afforded due care or consideration by another party whose actions adversely affect them (e.g. liability of employers for work induced stress related illness of employees).

The victims of harassment or discrimination will often as a consequence of the behaviour suffer economic loss and/or physical or mental harm to their person. The legal process they must follow to secure redress is often weighted against them in respect of being beset with evidential difficulties (e.g. finding a comparator or proving an employer's vicarious liability in discrimination cases). Other obstacles to their legal redress are that the judicial procedure they must follow is inaccessible or there are inherent inequalities in

their treatment within the legal system as compared with other social groups (e.g. women, homosexuals and lesbians, victims of lookism)

The research is intended to highlight the difficulties faced by these disadvantaged groups and identify possible legal solutions.

This might involve recommendation of a course of action that can be pursued on their behalf by legal practitioners (e.g. applying existing laws that are untried in a particular legal context).

Alternatively the courts' handling of a case may be the subject of constructive criticism ³⁶ with a view to highlighting mistakes in a decision and recommending that it is reconsidered and overturned by a higher court or appeal tribunal.

In the context of an article dealing with analysis of legal protection for victims of discrimination and harassment this writer will often encourage the Government to introduce legislation, often for the first time, to provide protection for disadvantaged groups (e.g. protection against stalking, discrimination on the ground of physical appearance, legal rights for atypical workers, protection of the employment rights of homosexuals and lesbians). ³⁷ Alternatively it might be recommended that the Government change their social policy to take account of the legal rights of disadvantaged groups (e.g. atypical workers).

³⁶ Supra 17

³⁷ With Busby, N Supra 16

Parliament will also be encouraged to amend legislation where this is necessary to provide better protection to victims of harassment and discrimination. Also to ensure the compliance of UK legislation with European legal standards (law on sexual harassment, disability discrimination). The research has identified several areas for social change and it has undoubtedly influenced actual or proposed changes in the law.

The published research output has also facilitated improvements in the quality of the protection for legal claimants. This primarily occurs where legal practitioners in the field of harassment and discrimination as a consequence of reading my articles are persuaded to change their approach to an issue (e.g. by bringing an action under an area of law untried in that context).

Improvements in legal protection can also occur where academics and/or practitioners attend conferences or training sessions where I am presenting a paper and are convinced by my legal arguments to change their approach to the law.

The objective of the research will often be to advise legal representatives of the full scope of legal redress available to their clients.

Another feature of my research is consideration of the appropriateness of legal tests or principles to decide a particular issue (e.g. comparators in discrimination cases).³⁸ A substantial part

³⁸ Supra 15

of the research is concerned with discrimination and the need for equality of treatment within society. More specifically it is concerned with protecting individuals at work against behaviour which represents an affront to their person e.g. harassment, stalking or bullying.

The judiciary is sometimes respectfully requested to reconsider their approach to a legal issue to ensure such victims are given legal protection.³⁹

As can be seen the research often outlines the evidential difficulties facing victims of discrimination or harassment in obtaining legal protection or highlights gaps in their legal protection.

This application invites consideration of a collection of research outputs, which underpin the area of research highlighted namely legal protection for victims of harassment and discrimination (see Volume 2 for outputs included).

5.1 Sexual Harassment

I have over a number of years developed expertise in the United Kingdom and beyond in the legal aspects of sexual harassment. This process started when I undertook, by part-time study, an M.Phil degree by research at Edinburgh University (Graduated

³⁹ Supra 12 & 17

1993). At the time of writing the thesis there was little written on sexual harassment from a legal perspective and no broad scale research had been undertaken on this issue which complicated the process of offering a comprehensive analysis of the legal position. To achieve the depth of analysis required I was obliged to make reference to primary research and the legal treatment of this issue in other jurisdictions.

I have written various articles on sexual harassment which were derived directly from, or inspired by research undertaken on, the thesis. These were published in various refereed and professional journals ⁴⁰ some of which are cited below.

Although this type of discrimination was not included in any statute in the UK through statutory interpretation the judiciary provided a remedy for victims of this behaviour under the Sex Discrimination Act 1975.

As well as tracing and reporting on the development of this statutory tort through conference papers and articles and identifying obstacles to legal redress ⁴¹ I also undertook to explore the full range of remedies available for victims of this type of behaviour. Toward this end I considered the availability of other statutory remedies for sexual harassment e.g. Protection from Harassment

⁴⁰ Most notably in 1993 1997, 1998, 1999 and 2002

⁴¹ Gender Neutral Conduct is Sex Discrimination, Green's Employment Law Bulletin, December 1996.

Act 1997.⁴² I also analysed the appropriate common law remedies which could apply in Scotland under the law of delict⁴³ and contract⁴⁴.

As well as writing articles I have also presented various conference papers on this topic.⁴⁵

The most notable development to date was that as a consequence of my reputation in Scotland as an expert in the law of sexual harassment I was invited to present a paper on "Sexual Harassment Law since Porcelli" at a joint conference of the Industrial Law Group of the Law Society of Scotland and the Equal Opportunities Commission in 1997. This conference was held in Dundee and commemorated the 20th anniversary of the Equal Opportunities Commission in Scotland.

I continue to write books and articles on sexual and racial harassment in the United Kingdom⁴⁶ and in other jurisdictions, most notably the United States.⁴⁷

⁴² Statutory Control of Harassment, The Implications for Employment, Green's Employment Law Bulletin, Vol. 19, June 1997

⁴³ Civil Remedies for Victims of Sexual Harassment: Delictual Actions, Juridical Review, Part 4, July 1997 pp 241-249.

⁴⁴ The Legal Protection for Victims of Sexual Harassment: The Contractual Dimension, Scots Law Times, February 7, 1997, 37-40.

⁴⁵ In 1992 (Napier University) 1994 (The Robert Gordon University) 1996 (University of Central Lancashire) 1997 (Dundee).

⁴⁶ Ed. Sargeant M Discrimination Law (2004) Chapter 4, Sex and Race Discrimination (including sexual and racial harassment, Pearson Longman, pp 73-107

⁴⁷ Duffy, A, Middlemiss, S Comparative Analysis of Vicarious Liability of Employers in Harassment Cases in the United Kingdom and the United

The law in this area has dramatically changed over the period of my research and sexual and racial harassment will shortly be recognised for the first time in statutes as a specific stand - alone tort. This is gratifying because this is a legal outcome that I have advocated for in my writing since 1986 when I first undertook research in this area. Despite this development there will continue to be issues arising under the heading of sexual harassment that are worthy of consideration as a topic for research e.g. sexual favouritism, harassment based on physical looks.

5.2 Equality Law

Other areas of equality law where I have published work is disability discrimination,⁴⁸ racial harassment,⁴⁹ discrimination on the ground of sexual orientation (see section (a) below,⁵⁰ employers vicarious liability for employees discriminatory acts⁵¹ analysis of the use of comparators in discrimination cases.⁵² use of dress and grooming

States, Common Law World Review Vol. 31 Number 3 2002 pp 254 – 285

⁴⁸ Supra 13

⁴⁹ Supra 11

⁵⁰ Supra 16 With Busby, N & Supra 17

⁵¹ With Mays, R Supra 10

⁵² Supra 13 & 15

codes in employment, ⁵³ discrimination on the grounds of personal appearance (lookism) and sexual favouritism. ⁵⁴ A brief description of this research has already been provided under section 4 (background to research and literature review).

All of these articles involve an element of critical or constructive analysis of the current law in dealing with discrimination issues and recommendations for improving a particular aspect of discrimination law to enhance the legal protection for victims.

I have recently completed an article on the legal rights of atypical workers which considers the legal status and employment rights of various types of workers (e.g. part-timers, casual and temporary workers) and argues the law relating to them needs reformed. ⁵⁵

Hopefully it will be instructive to pick two of these areas as illustrations of my approach to research into equality law.

⁵³ Supra 19

⁵⁴ Articles on one of these topics is currently with Modern Law Review for consideration Supra 20 and the other Supra 21 is with the Industrial Law Journal

⁵⁵ This article was sent to the Journal of Obligations and Remedies for consideration a short time ago. On a similar theme see The Legal Liability of Employers for Trainees, Journal of Education and Law, Vol. 15, No 2/3 2003, pp 115-133

(a) Sexual Orientation Discrimination

My research in this area commenced in 1999 when I reviewed a case where the European Court of Justice decided that homosexual and lesbian employees were not entitled to protection against discrimination under the equality laws of the European Union because this behaviour was not covered by EU law.⁵⁶

The courts in the United Kingdom had already adopted a similar approach in respect of the Sex Discrimination Act 1975, arguing that sexual orientation was not sex for the purposes of determining the form of discrimination covered by the legislation. Around two years later I wrote a lengthy article along with a colleague which involved analysis of all the legal rights available (or more significantly) unavailable to these categories of employee.

It was argued that legislation should be introduced to address inadequacies in the law and protect their rights.⁵⁷

In the same year I reviewed a legal decision where the Scottish courts stated that on proper interpretation of domestic legislation interpreted in light of the Human Rights Act 1998 homosexuals and lesbians have the right to protection against discrimination under the Sex Discrimination Act 1975. Controversially this decision was overturned on appeal leaving employees in this position without any legal redress for discriminatory behaviour (such as dismissing

⁵⁶ Supra 12

⁵⁷ With Busby, N Supra 16

someone in the armed forces when it became known they were a homosexual).⁵⁸ This decision was critically reviewed in the article and the need for specific legislation to protect victims of sexual orientation discrimination was highlighted. Since then, largely as a result of EU intervention, legislation has been introduced to protect these categories of employee.⁵⁹ In a book chapter on sex and race discrimination law I recently contributed to an edited collection this area of law was given detailed consideration and the legislation recently introduced to protect these employees was reviewed.⁶⁰

It is gratifying that the action I have called for in these articles, namely the introduction of legislation to protect against discrimination on the ground of sexual orientation, has been taken. Given the volatile nature of this topic I am convinced that there will continue to be aspects of the law in this area that merit further research.

⁵⁸ Supra 17

⁵⁹ Employment Equality (Sexual Orientation) Regulations S1 2003/1661
⁶⁰ Ed. Sargeant M Discrimination Law (2004) Pearson Longman
Chapter 4, Sex and Race Discrimination, pp 73-107

(b) Legal Rights of Atypical Workers

This thread of my research involves four publications written over a number of years which contribute to an understanding of the current legal position of atypical workers and the impetus for reform of employment law to enhance their rights.

It can be argued that because of their particularly limited legal status they are discriminated against in the broadest sense by being denied the same rights as employees.

The first of these publications was an article published in 1998 which involved analysis of the legal liability of employers for non-employees (including self-employed contractors and visitors) under health and safety law (covering statute and common law). It was included in a refereed practitioners' journal published by the Institute of Occupational Safety and Health.⁶¹

This was followed up by a small article which considered whether mutuality of obligation and personal service were essential elements of a contract of employment and if so what impact this would have on the rights of atypical workers who are often involved in working arrangements with employers that don't have these essential characteristics.⁶²

⁶¹ Employer's Liability for Non-Employees Institute of Occupational Safety and Health Journal, June 1998 Vol. 2, Issue 1 pp 15-27.

⁶² Mutuality of Obligation, The Contractual Imperative in Employment Law? Scottish Law Gazette, June 2000, Vol. 68, No 3. pp 79-83

This article was also critical of the courts approach to determining the status of workers in this context.

The third article involved a detailed analysis of the legal status and rights of trainees in employment. In many instances trainees will carry out the same tasks as employees but are not granted the same contractual or statutory rights. They are deemed to work under a contract of training and are not eligible for the standard type of legal rights in employment. The position of relevant trainees (e.g. those working under a government sponsored scheme) has improved recently because they have been treated as workers under specific statutes and provided with rights arising under these statutes (restrictions on working time, entitlement to minimum working wage). Other trainees will not get these rights and will be denied any form of legal protection (except under health and safety legislation).

It is my argument that the distinction should be between those persons working on behalf of an employer under a training arrangement (including on-the-job training) and those only being provided with training. In the former case they should have the same rights as employees and in the latter case they should be extended the status of workers or the status quo should apply.⁶³

A topic which I recently taught on an undergraduate employment law module and thought was a suitable topic for an article is an

⁶³ Supra 55 The Legal Liability of Employers for Trainees

analysis of the legal rights of atypical workers. This combines together elements of the three articles mentioned above and includes new material (including in particular new legislation derived from EU law). It is argued that although certain types of atypical workers have had their employment rights extended as a result of EU law (part-time and fixed-term workers) and others will have additional rights shortly (agency workers) their position under the law is still uncertain. It is further argued that other forms of atypical workers (casual workers, trainees and temporary workers) are denied any substantial legal rights or protection.

While reviewing current developments in the law the article also makes recommendations for reforming the law to ensure that all these atypical workers are extended legal rights under statute and consequently lead to the extinction of a two-tier workforce.⁶⁴

It is interesting that the Government have recently considered broadening the concept of worker to cover almost all kinds of atypical workers for the purpose of ensuring their entitlement to statutory employment rights.⁶⁵

⁶⁴ Article on Legal Rights of Atypical Workers sent to Journal of Obligations and Remedies, August 2004

⁶⁵ Issued a consultation paper on this in 2002, Discussion Document on Employment Status in Relation to Statutory Employment Rights, DTI URN 02/1058

5.3 Law of Harassment

There are various aspects of my published research into the law of harassment which does not fall within the conventional areas of my research, namely sexual and racial harassment in employment law.

These are liability of employers for work induced stress related illness of employees, criminal aspects of stalking and harassment, harassment at work on grounds other than sex or race (sexual orientation see section 5.2 (a)) and bullying. Given that I have dedicated a considerable amount of attention to certain of these themes during my research career it is appropriate to explain how they have developed as research interests.

Since publication of my first article on stalking I have continued to write articles on this issue and I am in the process of writing a book on stalking and harassment. Unfortunately this book is unlikely to be published before submission of my application for a PhD.

I was instrumental in obtaining funding for the School of Public Administration and Law (£70,000 in total) from the Scottish Executive for research into stalking and harassment. My research on stalking including my progress on the book is given detailed consideration under section 4, above.

I have always had an interest in bullying particularly in the contexts of employment and education. I presented a paper at a conference in 1999 on the "Legal Aspects of Bullying in Education" which was

based on research undertaken by a Masters student ⁶⁶ into bullying in higher education. He was happy for me to use his findings in my paper but unfortunately had no desire to publish them in an article.

⁶⁷

Along with a colleague I have written a lengthy article with the title *Bullying in the Workplace, The Case for Legal Redress?* which was published in three parts by the Irish Law Times. ⁶⁸ This article set out to highlight the inadequacies in the legal protection for victims of bullying in the workplace, identify all the possible legal remedies available to them and emphasise the need for legal intervention in the form of statutory protection. I have recently written a further article dealing with bullying in the context of legal protection for dignity at work. ⁶⁹

Another area of law that falls under the heading of harassment is behaviour on the part of employers that causes stress in employees and lead to them suffering physical or mental illness. It may be harassment or bullying is the cause of stress or having to work to unrealistic deadlines or overlong hours. There are a number of

⁶⁶ LLM in Employment Law and Practice

⁶⁷ Association of Law Teacher's Conference , Oxford (1999)

⁶⁸ With Hay O Irish Law Times Issues October (Vol. 21 No 17), November (Vol. 21 No 18) and December (Vol. 21 No. 19) 2003

⁶⁹ This article has the title *The Right to Dignity at Work? Protection from Harassment and Bullying under Employment Law in the United Kingdom* and was sent to the Legal Studies Journal in October 2004

stressors that can apply here. The first research output on stress was a paper co-presented with a colleague on Stress and the Law.⁷⁰ This covered all aspects of the legal treatment of work-induced stress-related illness in the United Kingdom. It represented a critical analysis of the case law and provided a strong case for reform of the law.

A further paper covering a similar but somewhat narrower ground was presented at the Society of Legal Scholars Conference at De Montfort University, Leicester in 2002.⁷¹

This paper was published in the same year with the title Liability of Employers for Work-Induced Stress-Related Illness, The Judicial Dichotomy?⁷²

⁷⁰ Psychology and Law Conference, Trinity College, Dublin (1999)

⁷¹ Employer's Legal Liability for Employees' Stress Induced Illness Society of Legal Scholars Conference, De Montfort University, Leicester (2002)

⁷² Institute of Occupational Safety and Health Journal, Vol 6, Issue 1 June 2002 pp 57 – 71

6. Research Methodology

It is traditional in law research that books, articles and conference papers are produced after analysis of secondary sources such as relevant case law, articles, books, electronic sources and legislation. These research outputs will often include a summary of existing legal opinion in an area being researched and analysis of arguments for reform of the law or evaluation of the impact of legal changes in the pipeline (e.g. as a result of legal developments in Human Rights or EU law). Much of the information included in research outputs has been derived from visiting relevant free sites on the internet (www.dti.gov.uk, <http://www.echr.coe.int>), subscription services (e.g. Westlaw) and reviewing CD ROM materials held by the library. The novelty in the research is evident where the existing law is broadly reviewed to ensure that its widest coverage is considered to assist victims of harassment and discrimination. Alternatively the law could be analysed in the light of new developments (e.g. an important case or a new statute). Often ideas for articles will come from reading other articles or books, from research undertaken into new areas of teaching, ideas put forward by teaching colleagues or students or from discussions with colleagues from other institutions. Also attending sessions at which contemporaries give papers at conferences can be fruitful.

I obtain feedback about many of my ideas from delivering papers at conferences when contemporaries will ask questions and provide positive and negative reactions to the work.

7. Research Assistance

It is difficult to separate this section on research assistance from the one above on research methodology as the two are closely interrelated.

As referred to earlier I have been regarded as research active for a number of years now and part of the entitlement attached to this is research assistance. This was provided under the active researcher scheme in the former School of Public Administration and Law and is still provide under a current scheme in the department of law.

I have been provided with invaluable research support from various research workers over the last six years. Prior to this research for any articles I was writing was undertaken by myself.

This research consisted of reviewing articles in the library, reading relevant reference works and textbooks, reviewing cases, analysing statutes and to a lesser extent carrying out searches of databases on CD-Rom and the internet.

The precise form that the research support I have been given has taken is the dedicated services of a research worker for half a day or a full day in the week to assist me in my research.

The research worker will normally undertake an initial trawl of sources of research material to determine the information that is available on a given topic and to ensure the topic has not been the subject of writing (or more significantly substantial writing)

elsewhere. After considering the initial results of the search I will often instruct the research worker to continue but concentrate their research activities in a particular area. Once this process is complete I am then in a position to review the materials found, decide on a structure for the article, book or conference paper and then set about writing it. During the writing up stage I may call on the research worker to research minor points or I will do the work myself. On completion they may be asked to present the article in the format or house style required by a particular journal.

The assistance provided by research workers has allowed me the opportunity to develop areas of research that fall within the research theme of harassment and discrimination. I have also been able to write on topics that represent a departure from this theme (see section 8). It is likely that without this help my research output would have been considerably less, however because at certain times research support is not available I am still required to undertake research myself and accordingly utilise my research skills.

I have encouraged research workers to be fully involved in the research I am undertaking and this is evidenced by the fact that I have recently co-written four articles with my most recent research worker Olga Hay. She was an excellent researcher who assisted me for over a year but who has now unfortunately left the university.

The ex-Dean of Faculty and the two previous Heads of School have also provided their general support over the last few years in the form of a reduction of administrative responsibilities for three months, financial support for attendance at conferences over a number of years and a sabbatical (funded by RDI funding) consisting of one semester away from the university in the first semester of academic session 2003/2004.

The current Dean and Head of School ⁷³ continue to ensure that I have research assistance, funding to attend conferences, financial and administrative support for my PhD application and most importantly sufficient time away from my considerable teaching and administrative roles to undertake research.

8. Research Outputs Not Included

Although employment law is my primary teaching and research interest I have not restricted my research to this topic.

I will often undertake research in areas of law that are topical or of interest to myself at a particular juncture in my research career. Accordingly I have written and published articles on education law and the law dealing with medical and socio-legal issues ⁷⁴ that are not part of this submission.

Areas of employment law falling outside the research themes mentioned and accordingly not included in this application are worthy of a brief mention.

The earliest of these consisted of a short article that set out the legal position of employers and others called upon to give references to third parties. Through analysis of the relevant cases I highlighted the type of actions of a reference provider which could give rise to liability for them and/or their employer. It was stressed that their duty of care would extend to both the subject of the reference and the recipient.⁷⁵ This was followed up four years later by a commentary piece that updated the legal position of persons giving references including aspects such as liability for sex or race

⁷³ Assistant Head of School

⁷⁴ See note 81

⁷⁵ New Developments in Liability of Employers for Employee References, Green's Employment Law Bulletin, June 2000

discrimination and human rights. ⁷⁶ This was published in the top employment law journal in the United Kingdom which is also a journal of high international standing (see section 14).

In 1999, along with a colleague, I wrote an article critically examining the appropriateness of arbitration as an alternative method for adjudicating on unfair dismissal disputes.

This was prompted by the fact that up until 1998 Employment Tribunals had been the only forum for dealing with these cases. When new legislation was introduced which extended the jurisdiction of arbitrators appointed by ACAS to hear these claims it was important to consider the impact of this change. ⁷⁷

I had a vested interest in the subject-matter of this research as I was appointed as an Arbitrator a year after our article was published in a prestigious refereed law journal

I recently wrote an article on the Demise of the Common law in UK Employment Law? This is contentious because it argues that the common law, which has traditionally been the cornerstone of the employment contract and the employment relationship has declined in importance to such an extent that it is almost extinct. This article was published in two parts by the Irish Law Times. ⁷⁸

⁷⁶ The Truth and Nothing but the Truth? Legal Liability of Employers for Employee References Industrial Law Journal, Oxford University Press, March 2004 Vol. 33 pp 59 – 67

⁷⁷ With Busby, N Arbitration; A Suitable Mechanism for Unfair Dismissal Disputes? Civil Justice Quarterly, Vol. 18, April 1999 pp 149-161

⁷⁸ The Demise of the Common Law in UK Employment Law? Part 2 Irish Law Times Part 14 Vol 22 pp 214-219 The Demise of the

9. Research Collaboration

It will be apparent from the publications I have cited that I have written several joint articles with law graduates and other members of staff that involved pursuance of a common research interest with a view to publication. My earliest experience of co-writing an article with a colleague was in 1993 when we wrote an article on sexual harassment in education, which was a comparative analysis of the legal treatment of this behaviour in the UK and the U.S. and was published in a refereed journal.⁷⁹ Since then I have co-written various published works in refereed and professional journals with staff on aspects of the law dealing with discrimination and harassment.

Published work includes a critical analysis of law in Scotland dealing with stalking (1998) and comparison of the law of harassment in the UK and the US (2002). Since publication of the article on the former topic I have continued to undertake research on this issue in the form of three further articles and a book (this strand of my research is given detailed consideration under the section on harassment).

Common Law in UK Employment Law? Part 1 Irish Law Times Number (9) Volume 22 2004 pp 138-143

⁷⁹ With Stewart, R. 'Sexual Harassment in Education' Journal of Education and Law, Volume 5, No. 4, 1993 pp 187-197

The first article written with a student/graduate of the Law and Management degree involved a critical analysis of law in Scotland dealing with stalking.⁸⁰ The second article written with a graduate of the same degree (now a lecturer at RGU) involved an analysis of law as it relates to CJD in Scotland⁸¹ (not included).

The third article written with a graduate involved a comparative analysis of the law of harassment in the UK and US (see note 12).

The fourth and final article co-written with a graduate was a comparative analysis of legal protection against employers dress or appearance codes in the United Kingdom and the United States (see note 18). I am proud of the fact that along with a colleague or singularly I have taken an undergraduate dissertation and considerably re-written it to become of publishable standard.

All of these articles have been published in highly reputable refereed journals and two of them in journals of international standing.

I have written several articles with a previous colleague Nicole Busby two of which have been published (see note 12) and I also co-presented a conference paper with her.

⁸⁰ With Mays, R, Watson, J Every Breath You Take, Every Move You Make... Scots Law, the Protection from Harassment Act 1997, the Problem of Stalking in Scotland, *Juridical Review*, Part 6, 1997 pp 331-354

⁸¹ With Crichton, D Mays, R Liability for CJD Deaths, *Juridical Review*, Part 2, 1998 pp 89 - 103

I have also co-written several articles with a former colleague Richard Mays (formerly Depute Dean of the Aberdeen Business School) two of which are included in this submission (see notes 16 & 19).

10. Conference Papers

These research outputs are sometimes mentioned earlier in the context of research themes that I have pursued although I think it is useful to provide an overview of this aspect of my research.

I have included conference papers as part of the application because they are a measure of academic standing that will often lead to published outputs and will enhance the reputation of an academic within the legal community. Attendance at conferences also offers the opportunity for networking and knowledge update.

I can confirm that in the majority of cases I have obtained a published article from my conference papers.

I have organised three successful conferences during my time at the Robert Gordon University (1994, 2000, and 2002).

Areas of research covered in conference papers include comparative analysis of legal treatment of workplace pornography (1994) arbitration as a means of resolving sexual harassment complaints (1996), and a historical perspective of sexual harassment law (1997). I presented findings of a collaborative nature based on primary research undertaken with a graduate from the LLM in Employment Law and Practice course into bullying in education (1999).

Along with a colleague I co-presented a paper on stress and the law, primarily concerned with the employers' liability for stress-

related illness in employment, at the Psychology and Law conference in Dublin (1999).

A paper on a narrower aspect of employers liability for stress induced illness of employees at work was presented at the Society of Legal Scholars conference at De Montfort University Leicester in September (2002) and a paper on the legal aspects of dignity at work at the Institute for Employment Law conference in Aberdeen, September (2002).⁸²

All of these conference papers fall with the headings of harassment and/or discrimination and all have been subjected to an element of consideration by referees before acceptance. Because of the high standard of work involved the papers will often end up as published outputs.

⁸² This topic was covered in a training session for Sussex Police (see section 11)

11. Training/Consultancy

I have not included this in the main submission as I think it is a separate aspect of my research however it is an indicator of my academic standing and for this reason it deserves a mention. I will restrict my attention to recent examples of training or consultancy.

My first experience of training in Aberdeen was when I first arrived and was called upon to design and present in-house training programmes for managers of oil companies (Mobil, Chevron, and ELF) in the areas of employment law, trade union law and the health and safety law. This training was undertaken on behalf of the University but carried out at the client's workplace and outside my timetabled hours

I have developed and presented various training events including continuing professional development (CPD) courses for solicitors etc. (e.g. legal aspects of stress in the workplace, January 2000) and organised for various academics and practitioners to provide training for solicitors and human resource specialists over the years. I have designed and presented an employment law module over a period of twelve years on the post-graduate Diploma/LLM in Employment Law and Practice (over 13 weeks and now 6 weeks).

I have as a consequence, of teaching this module provided consultancy level employment law training to solicitors and human resource managers. I have also taught on various other modules on this programme including labour law and health and safety law.

The Legal Services Agency Ltd, a firm specialising in providing legal CPD updates, asked me to provide a half-day course for practitioners on the Protection from Abuse Act 2001 following an article I had written on this topic in the Scots Law Times.

I provided this training in Glasgow on the 10th of July 2002

At around the same time I was contacted by a consultant who asked me to provide a half day course on 'Dignity at work the legal aspects'⁸³ to his clients, who were trainers working for the Surrey Police.

I delivered the course at Police Headquarters, in Guilford, Surrey on the 8th of July 2002. It was made clear to me that I was chosen because of my recognised expertise in the area.

⁸³ Including racial and sexual harassment, bullying and other forms of harassment

12. Relevant external roles

While these roles are not strictly speaking part of my public outputs some of them have a bearing on my research experience and professional standing and deserve mention.

I have been a Member of the Research Committee of the Department of Law since September 2001. Its role is to engender a research culture, ensure sufficient research support is provided for colleagues, to monitor progress of colleagues towards research objectives and encourage junior colleagues to publish their ideas

I was a director of the Scottish universities law institute, which is the publisher of the most authoritative legal texts for law practitioners in Scotland from 1994 - 2000

As the university representative for the Society of Legal Scholars (SLS) I am the point of contact between the Society and other members of the Society at RGU and I am required to write regular updates on what the Department is doing for publication in their members update. I have been a representative and a Member of the Society from May 2001 to the present.

I have also been a Member of the Committee for Heads of University Law Schools (CHULS) since September 2001.

This consists of representatives from law schools throughout the UK who tend to meet at the SLS Conference each year and discuss issues of relevance to them (research, professional standards).

I was appointed as an Arbitrator by the Advisory, Conciliation and Arbitration Service (ACAS) in February 2000. My role is to arbitrate in unfair dismissal disputes at arbitration hearings held usually where the workplace is. In this capacity I have been extended the power to award the same legal remedies as Employment Tribunals. This is an open-ended appointment at the present time.

I was Head of the Institute for Employment Law (April 2000 – July 2003). Its aim was to encourage and facilitate research, consultancy etc. and create a focus for employment law. A two-day conference was held in Aberdeen in July 2000 with internationally renowned speakers in attendance.

A one day conference on the theme of recent changes in employment law was held at the University in September 2002

All of these roles have a bearing on my academic standing and sometimes feed into my research and teaching. It is for this reason that I have included them.

13. Quality of Research Outputs

The articles published in refereed and non-refereed journals and the conference papers selected for this application and cited all fall within the broad theme of the research submission.

The professional journal articles cited are mainly Scottish and accordingly more limited in their geographical coverage however the readership of these journals can be substantial, often consisting of all the legal practitioners in Scotland.

These publications in professional journals are important because they ensure I maintain a reputation for high quality writing at a national level. Writing for these journals also allows me the opportunity to analyse issues that have a particularly Scottish dimension.

The refereed journals included are published for a Scottish, UK or International readership.

The academic standing of the journals in which I have published has improved over time and while my early work tended to be published in professional journals, Scottish journals or journals with a specialised readership most of my recent publications have had at least a general UK wide readership. This is part of my strategy to increase the impact of my written work. I am pleased to say this has paid off and my most recent work has an international readership.

As a case in point I am extremely pleased that an article was accepted and published by the top employment journal in Europe, (the Industrial Law Journal) and it is anticipated that further articles will be submitted to and hopefully published by them.⁸⁴

This reflects a deliberate effort to have my work recognised as of international standing in the next RAE exercise in line with the research strategy of the Business School and the University.

14. Impact of Research

Before considering the broad impact of my research it is worth pointing out it has influenced specific aspects of my career such as providing the opportunity to carry out consultancy (see section 11) and my appointment to certain external roles (12).

The research has had a broad impact through identifying areas for change in statute law or common law rules. This has undoubtedly indirectly influenced actual or proposed changes in the law (e.g. E.U amendment to Equal Treatment Directive implementing law covering sexual harassment, protection for stalkers under the criminal law of Scotland (e.g. Protection from Abuse (Scotland) Act 2001) review of rules relating to compensation for psychiatric injury by the Scottish Law Commission. I have identified other examples

⁸⁴ They have been considering one of my articles for publication for several months now.

earlier where my research has proved influential on the judiciary and legislators.

It is difficult to quantify the direct impact that research has on individuals and society although it seems an unlikely coincidence that many of the objectives that I strived to fulfil through my research in the areas of harassment and discrimination have now been fulfilled through changes in the law.

15. Work In Progress

I am currently writing a book on the law of stalking and harassment, which can be firmly placed within the broad theme of harassment. The University allocated me a sabbatical during the first semester of 2002/2003 to allow me time to write the book. It is hoped that the final draft will be submitted for publication in June 2005 (subject to finding a suitable publisher) so the book should be completed (although it may not be published) during the period of application. As already stated the book is concerned with identifying the current protection to victims of stalking and harassment under the civil and criminal law in England and Wales and Scotland and considering where improvements might be made.

Other projects which I intend to undertake over the next few years are a book on Discrimination Law, an article on international employment law, an article dealing with a ten-year anniversary

review of the operation of the Disability Discrimination Act 1995, further articles on stress and vicarious liability and an article on the new age discrimination legislation.

16. Conclusion

The aims of the reflective review were set out at the outset and I have attempted to illustrate how my combined research outputs in the fields of discrimination and harassment law have fulfilled these aims. The study and research involved in producing these outputs does, in my opinion, compare favourably and probably exceeds the study and research necessary for a standard PhD. Although for reasons of brevity it has not been possible to provide a full account of the research process underpinning the work I hope I have illustrated in the brief outline provided the evolution of 'substantive theoretical approaches and systematic study'. This can be judged most effectively by looking at the research outputs themselves which can be found in Volume 2 of the thesis.

I have gone to considerable lengths in the written report to demonstrate that my work is original and that I have exercised critical powers. I would argue that all the outputs included contain an element of originality. Given that one of my personal aims in research is to highlight inequalities of treatment and inadequacies in the law I am often breaking new ground and offering original

explanations and solutions. Sometimes my work is unique because it is covering areas that not been written about by any academics or practitioners. This is particularly a characteristic of my recent work. Admittedly there are areas of law I have considered in my research where there is a proliferation of writers covering similar ground (e.g. employers liability for work-induced illness caused by stress) although even in these circumstances I strive to make the work original (e.g. by carrying out a comparative analysis).

The evidence of me exercising independent critical powers is evident in the choice of research topics, the research strategy adopted (section 5) and the methodology (section 6 & 7) that underpins the published output. There is undoubtedly a common theme which is to break down barriers to protecting victims of discrimination and harassment through legal argument. This inevitably involves (in the majority of cases) criticism of some aspect of the present legal system and constructive recommendations for improving it. It will also often involve comparison with legal systems in other countries (jurisdictions). The chosen comparator in my research tends to be the United States which up until recently had the most fully developed harassment and equality laws in the Western world.

The final aim is to demonstrate that I have made a distinct contribution to knowledge. I feel I have illustrated this through the foregoing consideration of my published work, my conference

papers, the consultancy activities I have carried out and the external roles I have undertaken. This is the aim that is most difficult to quantify but most important to establish. One way of ascertaining whether this aim has been fulfilled is to consider the state of knowledge without my contribution.

The legal protection that now exists against sexual and racial harassment and other forms of harassment might not exist in its present form. The law covering stalking and harassment in Scotland might not be as protective to victims of this behaviour as it is without the call made by myself and a few others to improve their position.

The areas highlighted in the application where I am most widely published and therefore have exerted most influence is the law on sex discrimination (Section 5.1), sexual orientation (Section 5(2) (a) and atypical workers (see section 5(2) (b) and the discussion below).

With respect to sex discrimination most of the criticisms of the legal process for obtaining redress have been resolved through decisions in legal cases and changes in statute law.

With respect to homosexual or lesbian employees their rights have recently improved dramatically as a result of the E U Framework Directive however the legislation introduced in the UK to implement the Directive appears to have taken account of criticisms raised by commentators which hopefully include my own.

I would like to believe that legislators and judges have altered their views and consequently changed their approach to the law as a result of critical views expressed in my published work.

There are some areas of the law where little has changed despite my efforts.

Workplace bullying is largely unprotected except where it can be established that it is based on a discriminatory ground or it represents a clear breach of duty by the employer under the law of delict in Scotland.⁸⁵

Where neither of these situations applies there is very little in the way of legal protection available for them. This could easily be remedied by statutory invention.

The position of women having to work alongside pornographic images in the workplace is still uncertain as the leading case states that the effect of this type of working environment is gender neutral (offending men and women equally).

While the legal position of relevant trainees has improved in relation to their entitlement to statutory rights since writing my article (see note 61) their entitlement to certain other statutory rights and their contractual status is still uncertain. Other types of trainee (e.g. students on placement) are still provided with very few rights of any kind.

⁸⁵ The three articles (note 63) an unpublished article (note 69) and the

While the article I have written on atypical workers highlights similar issues of lack of entitlement to employment rights and uncertain contractual status for other types of workers it is as yet unpublished. It is hope that the articles cited earlier on trainees and atypical workers will help convince the Government that inequalities in treatment for certain kind of workers should discontinue (see note 63) and a minimum standard of rights should apply to all workers.⁸⁶

Other areas where changes should be made to the law to protect employees against discriminatory dress or appearance codes, discrimination on the ground of physical appearance and sexual favouritism. While an article concerning discriminatory appearance and grooming code is already in the public domain articles on the other areas of discrimination are as yet unpublished. These are both contentious areas because they are difficult to define and more importantly it is uncertain, if legislation was in place to protect them how it would be framed and who if anyone would be willing to pursue their legal rights in these areas. In both instances it requires them to admit their unattractiveness (and make a claim on the basis of it) and establish that it has led to them suffering a disadvantage.

Such difficulties can be overcome and they should not mean that nothing is done to help employees in this position.

conference paper on bullying in the workplace is cited above.

As outlined in broad terms in section 15 my plans for future research are completion of any unfinished projects and primarily a continuance of my current research objective, which is hopefully apparent from my application, namely producing high quality published outputs in the areas of discrimination and harassment.

⁸⁶ Possibly only excepting the genuinely self-employed.

Public Output Included in the Application

Books

Ed. Sargeant, M Discrimination Law (2004) Chapter 4, Sex and Race Discrimination (including sexual and racial harassment, Pearson Longman, pp 73-107

The Law of Stalking and Harassment in the United Kingdom first draft written but requiring considerable re-writing before publication.

Refereed Articles

With Hay O Bullying in the Workplace: The Case for Legal Redress? Published in three volumes of the Irish Law Times Issues October (Vol. 21 No 17), November (Vol. 21 No 18) and December (Vol. 21 No. 19) 2003

Fashion Victims, Dress to Conform to the Norm, or Else? Comparative Analysis of Legal Protection against Employers Appearance Codes in the United Kingdom and the United States, International Journal of Discrimination and Law, 2003 Vol 6, pp 69-102

The Legal Liability of Employers for Trainees, Journal of Education and Law, Vol. 15, No 2/3 2003, pp 115-133

Duffy, A, Middlemiss, S Comparative Analysis of Vicarious Liability of Employers in Harassment Cases in the United Kingdom and the United States, Common Law World Review Vol. 31 Number 3 2002 pp 254 - 285

With Busby N The Equality Deficit, Legal Protection for Homosexuals and Lesbians in Employment? Gender Work and Organisation, Vol. 8 No 4 October 2001 pp 387- 410

Back to Square One, The Secretary of State for Defence v McDonald (2001) IRLR 431 and the legal protection against discrimination in employment based on sexual orientation Scottish Law Practice Quarterly October 2001

"Shall I Compare Thee"? The Legal Dilemma, Choice of Comparators in Discrimination Cases, International Journal of Discrimination and Law, Vol. 4 September, 2000 pp 293-317

Comparators in Disability Discrimination Cases, *Scottish Law & Practice Quarterly*, April 1999, Vol. 4, No 2, pp 151-153

Employer's Liability for Non-Employees, *Institute of Occupational Safety and Health Journal*, June 1998 Vol. 2, Issue 1 pp 15-27

Casenote: *Smith v Gardner Merchant* (1998) IRLR 510, *Juridical Review*, Vol. 17, March 1999 pp 134-137

With Mays, R. Watson, J. Every Breath You Take, Every Move You Make... Scots Law, the Protection from Harassment Act 1997, the Problem of Stalking in Scotland, *Juridical Review*, Part 6, 1997 pp 331-354

Civil Remedies for Victims of Sexual Harassment: Delictual Actions, *Juridical Review*, Part 4, July 1997 pp 241-249.

Professional Journal Articles

Substantive Relief for Victims of Abuse? The Protection from Abuse (Scotland) Act 2001, *Scots Law Times*, 7.12.01, Issue 10, pp 324 - 327

Mutuality of Obligation, The Contractual Imperative in Employment Law? *Scottish Law Gazette*, June 2000, Vol. 68, No 3. pp 79-83

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Sam Middlemiss, Application for PhD by Public Output

I write to confirm that the articles listed below were co-authored by Mr Middlemiss and myself with both of us contributing 50%:of the work undertaken.

Fashion Victims, Dress to Conform to the Norm, or Else? Comparative Analysis of Legal Protection against Employers Appearance Codes in the United Kingdom and the United States, International Journal of Discrimination and Law, 2003 Vol 6, pp 69-102

Bullying in the Workplace, the Case for Legal Redress? Irish Law Times Volume (16) October 2003 pp 250 - 255

Bullying in the Workplace, the Case for Legal Redress? Irish Law Times Volume (17) November 2003 pp 266 - 271

Bullying in the Workplace, the Case for Legal Redress? Irish Law Times Volume (18) December 2003 pp 287 - 292

I trust this information is sufficient for your purposes.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Olga Hay', with a stylized, cursive script.

Olga Hay

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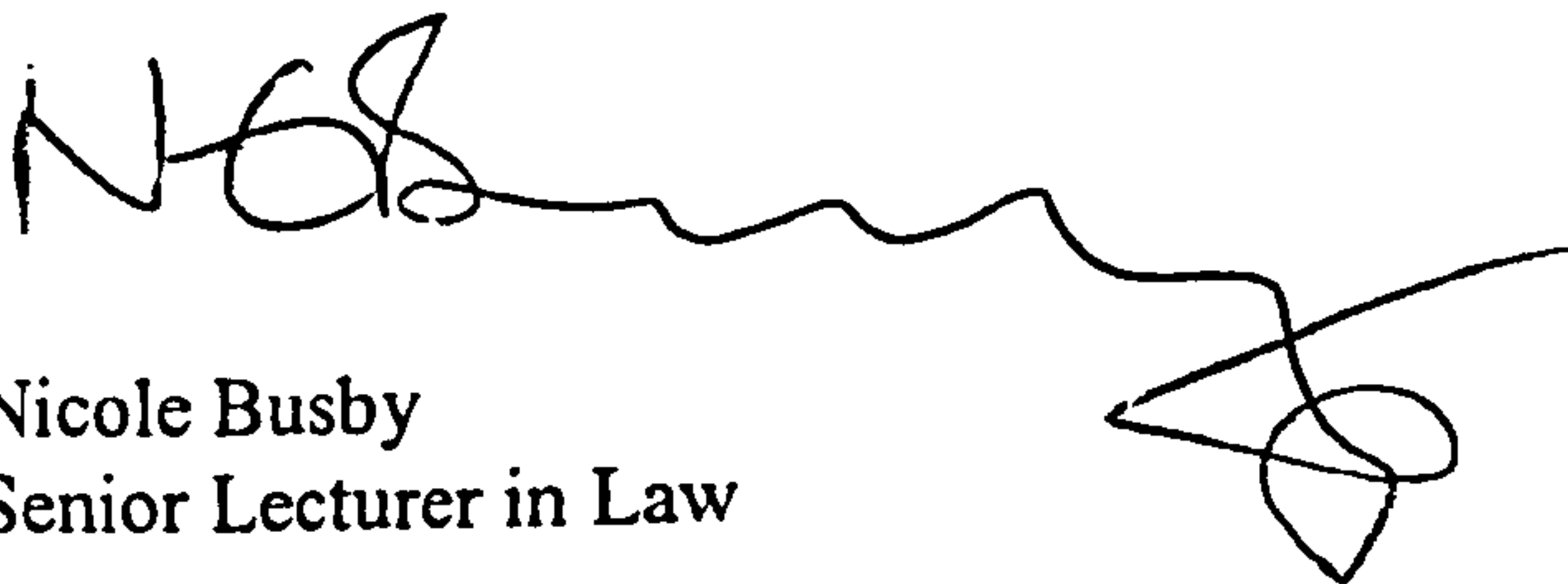
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The Equality Deficit: Protection against Discrimination on the Grounds of Sexual Orientation in Employment, Gender, Work and Organization, 8 (4) 387-410, 2001.

Arbitration: A Suitable Mechanism for Adjudication of Unfair Dismissal Claims? Civil Justice Quarterly, Vol 18 149-161, 1999.

Yours faithfully



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Liability for CJD, Juridical Review, Part 2, 1998, p 89 - 103

Every Breath You Take, Every Move You Make ..., Scots Law, The Protection from Harassment Act 1997, and the Problem of Stalking in Scotland, The Juridical Review, Part 6, 1997 pp 331-354.

I trust this information is sufficient for your purposes.

Yours sincerely

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INVESTOR IN PEOPLE

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**This dissertation is submitted in partial completion of
the requirements for the award by the University of a
PhD by Public Output**

Public Output Included in the Application

Books

Ed. Sargeant, M Discrimination Law (2004) Chapter 4, Sex and Race Discrimination (including sexual and racial harassment, Pearson Longman, pp 73-107

The Law of Stalking and Harassment in the United Kingdom first draft written but requiring considerable re-writing before publication.

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With Hay O Bullying in the Workplace: The Case for Legal Redress? Published in three volumes of the Irish Law Times Issues October (Vol. 21 No 17), November (Vol. 21 No 18) and December (Vol. 21 No. 19) 2003

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Published Outputs Included in the
Application

Discrimination Law

Edited by Malcolm Sargeant



Chapter 4

Sex and race discrimination

Sam Middlemiss

Introduction

This chapter will involve detailed consideration of the legal protection available to victims of sex and race discrimination. These are the areas of discrimination law that are by far the longest standing in the United Kingdom and a working knowledge of these areas is instrumental to an understanding of discrimination law.

What follows is a description of the current law in these areas, including the legal rules covering discrimination on grounds of sexual orientation, gender reassignment and racial and sexual harassment (aspects relating to the European Union are considered in Chapter 2).

Sex discrimination

Historical background

The sexual division of labour was predetermined by the division of labour that had existed in the family when the household was the unit of production. The epoch of modern industry far from challenging this division further demarcated it.¹

The starting point for sex discrimination within employment in the United Kingdom is commonly identified as the Industrial Revolution, when for the first time the home was separated from the place of

¹ S Alexander *Women's Work in 19th Century London. A Study of Years 1820–1850* (Journeyman Press, 1983), p 5.

work² and women were expected to stay at home and out of the workplace.³

The productive role which women had played as part of the economic unit of a family was largely forgotten in the economic and social changes brought about by the Industrial Revolution.⁴

When economic necessity forced women to enter employment they were faced with a wide variety of discriminatory behaviour.⁵

Gendered patterns of occupational segregation can be explained by the pervasive domestic or patriarchal ideology prescribing certain work roles as appropriate for women and others not: an ideology shared by employers, male workers and even many women themselves.⁶

The fact is that, where women were brave enough to enter employment in the face of a general opposition, they were regarded by paternalistic employers as second class workers. They were consequently restricted to low-paid and unskilled occupations,⁷ required to work for long hours in bad working conditions and often subjected to sexual harassment. Employers would be unlikely to promote women for a number of reasons. Women often worked part-time and promoted posts would often only be available to full-time workers. 'In general working-class women did not regard full-time work as something they would undertake for the whole of their adult lives, while married women continued to firmly believe that their primary commitment was to home and family.' Where promotion was available only to persons with a considerable length of service, women would find it difficult to qualify where they had taken breaks in employment to fulfil their parental role.⁸

The trade unions were the only force capable of gaining improvements in women's rights from employers but they were traditionally driven by male interests. They failed to encourage women to join the union and did not consider women's issues: this was because unions were restricted to craft or skilled workers for most of the nineteenth century, which excluded almost all female workers.⁹

² In the agrarian society prior to the Industrial Revolution men and women worked alongside each other on an equal basis and the place of work, the farm, was also the home. The process of alienation of work from home brought about by changing work patterns caused by the process of industrialisation has become known amongst sociologists as the 'social division of labour'.

³ E Durkheim *The Division of Labour in Society* (The Free Press, 1997).

⁴ S Boston *Women Workers and the Trade Unions* (Lawrence and Wishart, 1997), pp 13–14.

⁵ For the equivalent position in the United States, see J Matthaei *An Economic History of Women in America: Women's Work, the Sexual Division of Labour and the Development of Capitalism* (Schocken Books, 1988).

⁶ J Zeitlin 'The sexual division in the Chartist family' (1989) 54 *British Society of Social Labour History Journal* 6.

⁷ Sexual division of labour and job segregation.

⁸ I Pinchbeck *Women Workers and the Industrial Revolution* (Frank Cass & Co Ltd, 1969).

⁹ Note 4 above, pp 15–28.

Although in more recent times things have improved for women in terms of representation by trade unions,¹⁰ it is only relatively recently that mechanisms have been put in place to ensure that women receive equality of treatment with men in employment. The position of women began to change in the 1970s, with the passing of the Equal Pay Act 1970 (EPA 1970) and the Sex Discrimination Act 1975 (SDA 1975) (equal pay issues are dealt with in Chapter 5).

The main legislative provisions dealing with sex discrimination in the United Kingdom are as follows (see Chapter 2 for EU aspects):

- SDA 1975
- SDA 1986
- Sex Discrimination and Equal Pay (Remedies) Regulations (SI 1993/2798)
- Sex Discrimination (Gender Reassignment) Regulations 1999, SI 1999/1002
- Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001, SI 2001/2660
- Sex Discrimination Act 1975 (Amendment) Regulations 2003, SI 2003/1657.

Sex Discrimination Act 1975

Despite the fact that the United Kingdom had already joined the European Community (EC) when this legislation was introduced, little or no account was taken of the EC equality agenda at the time. 'It is doubtful too, whether the EEC Directive had much influence upon the structure of the U.K. Act.'¹¹ The Equal Treatment Directive 76/207 clearly came into being after the SDA 1975 was enacted, although details of its content were available to the legislators and they could easily have included its main provisions. The major influence on the legislation came from further afield than Europe: 'The main foreign influence on the UK Legislation was clearly from the United States.'¹² Concepts borrowed from the US legal system included the concept of indirect discrimination¹³ and the role of the Equal Opportunities Commission.¹⁴ Reference to American discrimination cases has been deemed relevant by courts in the United Kingdom and the European Court of Justice (ECJ).¹⁵

The threshold requirement in the SDA 1975 and the Race Relations Act 1976 (RRA 1976) is that an applicant in a case of sex or race

¹⁰ General and Municipal Workers Union, USDAW, NALGO, NUPE and the AUEW.

¹¹ C McCrudden (ed) *Women, Equality and European Equality Law* (Eclipse Publications, 1987), p 36.

¹² *Ibid* p 37.

¹³ As defined by the United States Supreme Court in *Griggs v Duke Power Company* 401 US 424 [1971].

¹⁴ Based on the role of the Employment Equal Opportunities Commission (EEOC) in the United States.

¹⁵ *Jenkins v Kingsgate* [1981] IRLR 228, ECJ.

discrimination must show that his or her employer is vicariously liable for the actings of the perpetrator of the discriminatory act.¹⁶ So, if, for example, a female employee is harassed in the workplace by a male colleague, is the employer then vicariously liable under the SDA 1975? On the basis of case law dealing with sexual harassment (considered below), it seems likely.

The employee could, in these circumstances, also sue the perpetrator of the discriminatory act or persons that assist him. Under s 42 of the SDA 1975 and s 33 of the RRA 1976, a person who knowingly aids another person to commit an act which is unlawful under the Act shall be treated as himself doing an unlawful act of the like description. In *Hallam v Avery and Lambert*,¹⁷ the Court of Appeal held that it is not enough that the person assisted with a complete act of discrimination. It must be established that the person knew that the perpetrator was treating or was about to treat someone less favourably on racial grounds and proceeded to provide them with aid.¹⁸ In *Anyanwu and another v South Bank Student Union and another*,¹⁹ the House of Lords held that a person aids another to do an unlawful act under the RRA 1976 if he or she helps or assists that other, whether or not that help is substantial and productive, provided it is not negligible.

One of the main aims of the SDA 1975 is to combat stereotypical assumptions about women and to make unlawful any behaviour by an employer that is based upon such assumptions. In *Skyrail Oceanic v Coleman*,²⁰ an assumption that a man was the 'breadwinner' in a marriage, resulting in the dismissal of a female employee, was held by the Court of Appeal to be discriminatory. In *Hurley v Mustoe*,²¹ the employer's general assumption that employees with young children are unreliable was held to be directly discriminatory against women and also indirectly discriminatory on the grounds of marital status.²²

Which types of workers are protected?

The SDA 1975 offers protection against discrimination to both men and women, although the legislators rightly anticipated that women would need more protection. The protection offered by the discrimination laws is not restricted to employees and applies to a much wider constituency. The SDA 1975 and the RRA 1976 offer protection to job applicants against

¹⁶ SDA 1975, s 41; RRA 1976, s 32.

¹⁷ [2001] ICR 408.

¹⁸ For some background to this provision, see S Middlemiss 'Aiding a Discriminatory Act of the Employer (*AM v WC and SPF* [1999] IRLR 410)' *Scots Law Times*, Issue 1, 7 January 2000, pp 1-4.

¹⁹ [2001] IRLR 305.

²⁰ [1981] ICR 864.

²¹ [1981] IRLR 208.

²² See also *Horseley v Dyfed County Council* [1982] IRLR 395.

discriminatory recruitment and selection practices (under section 6 and section 4 respectively).

Employment for the purposes of the SDA 1975 is defined widely by section 82(1) to include women working under a contract of service or of apprenticeship or a contract personally to execute any work or labour. This last category of person includes the self-employed, independent contractors, certain agency workers and trainees working under a training contract with the employer.²³

Direct discrimination

Direct discrimination is a relatively straightforward concept whereby an employer directly and usually blatantly discriminates against persons of one sex in terms of his process of recruitment and selection or in his employment policies. Section 1(1) states:

A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if –

- (a) on the grounds of her sex he treats her less favourably than he treats or would treat a man . . .

In respect of direct discrimination as defined above, the motive or intention of the discriminator is irrelevant, as determined by the House of Lords in *James v Eastleigh Borough Council*.²⁴ Mr and Mrs James, both aged 61, went for a swim in Eastleigh Borough Council's baths. Mrs James was allowed in free because she had reached the 'pensionable age' of 60, while Mr James had to pay 60p. Mr James, with the support of the Equal Opportunities Commission, brought a claim of direct sex discrimination as per s 1(1)(a) of the SDA 1975. Lord Bridge said 'pensionable age' is a convenient shorthand expression that refers to 60 for women and 65 for men. Thus, this was a case of direct discrimination – which is in breach of s 1(1)(a) of the SDA 1975 – and *but for* the fact that Mr James was a man he could swim free of charge in Eastleigh Borough Council's baths.

James v Eastleigh Borough Council establishes the '*but for*' test and also confirms that laudable motives are of no significance in determining if the employer is guilty of direct discrimination. In order to find direct discrimination under section 1(1)(a), the complainant must show that he has been treated less favourably by the discriminator than the discriminator treats or would treat other persons in the same circumstances. However, in certain cases the comparison need not be demonstrated by evidence as to how a comparator was or would be treated, because the very action complained of is in itself less favourable treatment on sexual or racial grounds.²⁵

²³ *Daley v Allied Suppliers Ltd* [1983] IRLR 14, EAT.

²⁴ [1990] IRLR 288, HL.

²⁵ *Sidhu v Aerospace Composite Technology Ltd* [2000] IRLR 602, CA.

Indirect discrimination

Indirect discrimination is defined in section 1(1):

A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if –

- (b) he applies to her a requirement or condition which he applies or would apply equally to a man but –
 - (i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and
 - (ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and
 - (iii) which is to her detriment because she cannot comply with it.

A different definition of indirect discrimination is provided by section 1(2), which applies to certain aspects of the SDA 1975, including those relating to employment.²⁶ Under section 1(2)(b) a person discriminates against a woman if he applies to her a provision, criterion or practice which he applies or would apply equally to a man but:

- (i) which is such that it would be to the detriment of a considerably larger proportion of women than of men, and
- (ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and
- (iii) which is to her detriment.

In *Price v Civil Service Commission*,²⁷ Mrs Price applied for a job as an executive officer in the Civil Service but she was told that she was too old at 32 as the age requirement for candidates was between 17 and 28. She claimed that this requirement represented indirect discrimination as less qualified women in the job market would be able to comply with it than men (as many women were absent from the sphere of work during this time, bringing up their families). It was held on appeal that it was a case of indirect discrimination that was not justifiable and the Civil Service were liable for damages. The Civil Service altered their age requirements for executive officer posts following this decision.

In *Home Office v Holmes*,²⁸ Mrs Holmes had worked full-time for the Civil Service but after maternity leave she found this difficult and asked her employer for part-time work. Her employer refused to employ her part-time on the basis that all their posts were full-time. She claimed indirect discrimination on the basis that it was more difficult for women to comply with the full-time requirement than men, given that women are more likely to have primary parental responsibility. It was held that in this case

²⁶ Any provision of Part 2, ss 35A and 35B, any provision of Part 3 so far as it relates to vocational training.

²⁷ [1978] ICR 27.

²⁸ [1984] IRLR 299, EAT.

there was indirect discrimination. The tribunal at the initial stage of the legal process summarised the position as follows: 'it is still a fact that the raising of children tends to place a greater burden on women than it does on men'. The Employment Appeal Tribunal (EAT), however, took the view that this ruling was not to be treated as a precedent that women are entitled to work part-time in all such circumstances. Whether or not a woman would be entitled to be offered part-time employment would depend on the circumstances in the case.

Issues in indirect discrimination cases

(1) The meaning of the terms 'requirement or condition' is clarified in *Falkirk Council v Whyte*,²⁹ where these terms were broadly interpreted by the EAT. In this case three women brought a claim of indirect discrimination when they were refused employment in a managerial post at Cortonvale Prison. The job specification stated that management training and supervisory experience were desirable qualities. It was clear that possession of these qualities was a decisive factor in being selected for the job. It was more difficult for women than men to comply with as all women were employed at basic grades.³⁰ It was held that a desirable quality could be a requirement or condition in this case.

A very different conclusion was reached in a race discrimination case, *Perera v Civil Service Commission (No 2)*,³¹ where it was stated that for a requirement or condition to be treated as discriminatory it must be an absolute bar to the employee gaining equal rights with their comparator. There have been recent changes to the definition of indirect discrimination under the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001, SI 2001/2660 (considered below). Under the Regulations, the terms 'requirement or condition' were replaced with the much broader terms of 'provision, criterion or practice' for certain important sections of the SDA 1975. This will make it easier for applicants and employees in indirect discrimination cases to establish they have been subject to inequality in their treatment by their employer.

(2) It is important that, in deciding the relevant 'pool' for comparison for the purposes of an application, one tries to second-guess the pool that the employment tribunal will choose. In *Jones v University of Manchester*,³² the applicant was excluded from employment as a careers adviser as the University (wanting someone close to the age of the students) had restricted eligibility for this post to graduates aged 27–35. She was 46 years of age and the basis of her claim was that the requirement was indirectly

²⁹ [1997] IRLR 560.

³⁰ See also *Meer v London Borough of Tower Hamlets* [1988] IRLR 399.

³¹ [1983] IRLR 166.

³² [1993] IRLR 218.

discriminatory as female mature students tended to be older than male mature students and, by definition, fewer women could comply with the age requirement than men. The Court of Appeal rejected this argument, claiming that the appropriate comparators were all persons meeting the relevant criteria: 'It is, in effect, the total number of all those persons, men and women, who answer the description contained in the advertisement, apart from the age requirement. Here, that means all graduates with the relevant experience.'³³ In the event that an applicant chooses a pool for comparison which is incorrect, he or she will lose the case.³⁴ The relevant pool is a matter of fact for the employment tribunal to determine³⁵ but, as illustrated in the *Jones* case, it does often prefer to choose a broad pool (e.g. all women in the United Kingdom eligible to apply for a job). The tribunal will expect statistical evidence to be produced and led to support assertions of indirect discrimination. One solution is to provide statistical evidence for a number of different pools and, instead of the employment tribunal turning down the case, if deemed appropriate, it can decide which statistical evidence is most apt and accept that as evidence of discrimination.

(3) It is a defence to a claim for indirect discrimination to show that the types of discriminatory activity were 'objectively justifiable' by an employer on a ground other than sex. The question is, can the provision, criterion or practice be shown to be justifiable?

In *Clarke v Eley (IMI) Kynoch Ltd*³⁶ it was not justifiable under a redundancy procedure to choose part-timers for dismissal before full-time staff. In *Ojutiku v MSC*³⁷ the Court of Appeal said that the standard for proving a justifiable reason other than sex should be 'what was acceptable to right thinking people as sound and tolerable reasons for adopting the practice in question'.³⁸ This was not a very helpful definition for employment tribunals and the ECJ in *Bilka-Kaufhaus*³⁹ provided clarification of the standard of proof required. The employer must demonstrate objectively justified factors which are unrelated to discrimination based on sex. The employer must show that there is a real business need for the discriminatory outcome and that the means chosen to achieve the outcome are suitable and necessary.⁴⁰

³³ Ibid, per Evans LJ at 228–291.

³⁴ *Pearce v City of Bradford Metropolitan Council* [1988] IRLR 378, EAT.

³⁵ *Kidd v DRG (UK) Ltd* [1985] IRLR 190, EAT.

³⁶ [1982] IRLR 482, EAT.

³⁷ [1982] IRLR 418, CA.

³⁸ Ibid at p 422. In *Rainey v Greater Glasgow Health Board* [1987] IRLR 26, the House of Lords held that the concepts of justification in indirect discrimination and equal pay cases should be interpreted in the same way.

³⁹ *Bilka-Kaufhaus GmbH v Weber Von Hartz* [1986] ECR 1607.

⁴⁰ S Anderman *Labour Law – Management Decisions and Workers' Rights* (Butterworths, 2000), ch 8. J Dine and B Watt (eds) *Discrimination Law. Concepts, Limitations and Justifications* (Longman, 1996), pp 103–109.

(4) The applicant must show that their inability to meet or comply with the provision, criterion or practice caused them to suffer a detriment. The degree of detriment needed to substantiate a discrimination claim for the purposes of this Act and other equality legislation was until recently unsettled.⁴¹ In *Ministry of Defence v Jeremiah*⁴² it was defined as merely 'putting under a disadvantage'. In other cases, however, something more had been looked for. In *Schmidt v Austicks Bookshops Ltd*⁴³ it was not sufficient detriment for a woman to be required to wear a dress under the company rules.⁴⁴

To establish a detriment it is not necessary to establish a breach of contract but it is necessary to show that the applicant had been disadvantaged in the circumstances in which he or she had to work.⁴⁵ In *In situ Cleaning Co Ltd v Heads*⁴⁶ a single sexist comment made to a female manager in a meeting was sufficient to constitute a detriment. In *Shamoon v Chief Constable of the Royal Ulster Constabulary*⁴⁷ the House of Lords heard an appeal from a decision of the Northern Ireland Court of Appeal that a female chief inspector whose power to undertake staff appraisals had been withdrawn by her employer had not suffered sufficient detriment for the purposes of the Sex Discrimination (Northern Ireland) Order 1976. The Court of Appeal's finding, that for a detriment to be established there must be some physical or economic consequence as a result of the discrimination, which is material and substantial, was overturned. The House of Lords emphasised that the word detriment should be given its broad ordinary meaning and there was no requirement to show that the employee suffered some economic or physical consequence.⁴⁸

Victimisation

Under s 4 of the SDA 1975 it is unlawful to discriminate against persons by way of victimisation when they try to assert a right under the SDA 1975 or take part in proceedings to assert such a right for someone else or themselves. To establish victimisation the applicant must show that the following three elements are present:

- (1) The victim must have brought an action for sex discrimination to an employment tribunal, given evidence in a sex discrimination case or alleged that sex discrimination has taken place.

⁴¹ *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285, HL.

⁴² [1979] IRLR 436, CA.

⁴³ [1977] IRLR 360, EAT.

⁴⁴ In *De Souza v Automobile Association* [1986] IRLR 103, CA, a racial insult made in a conversation overheard by a typist was insufficient detriment.

⁴⁵ Sexual harassment will represent a suitable detriment in most cases.

⁴⁶ [1995] IRLR 4, EAT.

⁴⁷ [2003] IRLR 285.

⁴⁸ *Chief Constable of West Yorkshire v Khan* [2001] IRLR 830.

- (2) It must be shown that the applicant experienced less favourable treatment compared to a person not involved in sex discrimination proceedings.⁴⁹
- (3) It must also be established that the less favourable treatment is a direct result of the involvement in sex discrimination proceedings.

In *Cooté v Granada Hospitality Ltd (No 2)*,⁵⁰ a woman who had left her employment claimed she had been subjected to victimisation by her employer because it refused to provide her with a reference. This matter was referred to the ECJ by the EAT to determine if she had a right of action under European Law. The ECJ ruled that Article 6 of the Equal Treatment Directive did provide a right to bring an action for discrimination after the contract had come to an end. The EAT decided it could give effect to the ECJ judgment without distorting the language of the SDA 1975 and it was possible to construe the Act in a way that is in conformity with the Directive.⁵¹

The application of the SDA 1975 to relationships which have come to an end is dealt with by reg 3 of the Sex Discrimination Act 1975 (Amendment) Regulations 2003, and similar provisions are made under the Employment Equality (Sexual Orientation) Regulations 2003 (reg 21)⁵² and the Race Relations Act 1976 (Amendment) Regulations 2003 (inserting s 27A into the RRA 1976, which includes only grounds of race, ethnic or national origin).⁵³ Where a 'relevant relationship' has come to an end it will be unlawful for the 'relevant party' to discriminate so as to subject another party to a detriment or to harass such a party 'where the discrimination or harassment arises out of and is closely connected to that relationship'.

Unlawful activities

The Act specifies what type of discriminatory activities should be treated as unlawful. These cover discriminatory practices in recruitment and selection, within employment and dismissal on the ground of sex. Under s 6 of the SDA 1975 it is unlawful for an employer to discriminate against a woman:

- *in the arrangements made for the purpose of determining who shall be offered employment (s 6(1)(a)).* In *Brennan v Dewhurst*⁵⁴ the EAT held that it

⁴⁹ Ibid.

⁵⁰ C-185/97; [1998] ECR I-5199, ECJ.

⁵¹ The legislation introduced to implement the Race Discrimination Directive and the Framework Directive makes it unlawful for an employer to discriminate against a former employee where the discrimination is closely connected to the employment relationship.

⁵² Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/1661.

⁵³ SI 2003/1626.

⁵⁴ [1983] IRLR 357, EAT.

was irrelevant that the employer did not intend to discriminate and clarified that 'in all stages in applying for and obtaining employment a woman should be on an equal footing with a man'.

- *or in the terms in which employment is offered* (s 6(1)(b)). Although inequality in pay and other terms and conditions between men and women in employment is covered by the EPA 1970, where the inequality applies to terms and conditions offered at the selection stage of employment the SDA 1975 will apply. It will also apply where there is no opportunity to bring a case under the EPA 1970 (e.g. where there is no suitable male comparator in the same employment). 'Under the EPA 1970 a female applicant must normally point to a male comparator with whom to compare her terms and conditions of employment, whereas in an equivalent claim under the RRA 1976 the applicant need only point to a hypothetical comparator of a different racial group.'⁵⁵ In *Macarthys Ltd v Smith*⁵⁶ it was decided by the ECJ that a woman was entitled to receive the same terms and conditions as her male predecessor under Article 119 (now Article 141).
- *by refusing or deliberately omitting to offer her employment* (s 6(1)(c)). This will be difficult to prove because the information needed to make a comparison is in the hands of the employer and the applicant needs to show that they are the best candidate and were refused employment on the basis of their sex.⁵⁷ The employer has a managerial prerogative to decide who is chosen for employment and, unless there is clear evidence of discrimination, the employment tribunal may be reluctant to intervene.
- *in the way in which she is afforded access to promotion, transfer or training or to any other benefits, facilities or services or by refusing or deliberately omitting to afford access to them* (s 6(2)(a)). This is a wide-ranging measure capable of covering most kinds of discrimination arising within the employment relationship.
- *by dismissing her or subjecting her to any other detriment* (s 6(2)). The term detriment has been interpreted by the courts as including sexual harassment (discussed below). Where a woman is dismissed on the ground of her sex then she may have a choice of bringing a claim under this part of the Act or for unfair dismissal.⁵⁸ The benefit for her pursuing the former option rather than the latter is that she will not need to establish that she has continuous service of one year with the employer and the damages that she can be awarded are unlimited. The term

⁵⁵ R Townshend-Smith *Discrimination Law: Text, Cases and Materials* (Cavendish, 1998), p 331.

⁵⁶ [1980] IRLR 210, ECJ.

⁵⁷ An order for the discovery of documents (see *Nasse v Science Research Council; Vyas v Leyland Cars* [1979] IRLR 465, HL) and a questionnaire procedure under s 74 of the SDA 1975 and s 65 of the RRA 1976 will assist the applicant in proving his or her case.

⁵⁸ Under s 95 of the Employment Rights Act 1996.

'dismissal' here and under s 4(2)(c) of the RRA 1976 has been extended to cover constructive dismissal.⁵⁹

Genuine occupational qualifications

There are certain situations prescribed by s 7 of the SDA 1975 where it is permissible to discriminate in terms of recruitment and selection and these are known as genuine occupational qualifications (GOQs). The onus is on the employer to show that this defence applies and he need only show that part of the job is covered by a GOQ.

Discrimination in recruitment and selection may be permissible where:

- it is for physiological reasons (other than physical strength or stamina). This would allow someone of a particular sex to be chosen for a job where the physical characteristics of a person of that sex are needed for reasons of authenticity (e.g. acting, modelling).⁶⁰
- the job needs to be held by a man or a woman to preserve decency or privacy as it is likely to involve physical contact with a man and it is reasonable for them to object. In *Wylie v Dee & Co (Menswear) Ltd*⁶¹ a woman applied for a job as a sales assistant in a men's tailors. She was refused employment on the basis that part of the job involved taking the inside leg measurements of male clients and they would object if a woman did this (GOQ). It was held that the refusal to employ her was sex discrimination and the GOQ did not apply because this was a small part of the job that could be undertaken by one of the six male assistants.
- men or women will be in a state of undress.⁶²
- there is single-sex accommodation – it is impractical for the job-holder to live anywhere other than in the employer's premises and the only such premises available are for one sex and these are not equipped with separate sleeping accommodation or sanitary facilities and it is not reasonable for an employer either to equip those premises with such accommodation and facilities or to provide other premises (e.g. manned lighthouses).
- the job is in a single-sex establishment which is a prison, hospital or other establishment for persons requiring special care, supervision and attention and it is reasonable having regard to the essential character of the establishment or that part of the job should be held by a person of a specified sex.

⁵⁹ SDA 1975 (as amended), s 82(1A) and *Derby Specialist Fabrication Ltd v Burton* [2001] IRLR 69, EAT.

⁶⁰ G Pitt 'Madam Butterfly and Miss Saigon: Reflection on Genuine Occupational Qualifications' in J Dine and B Watt (eds) *Discrimination Law. Concepts, Limitations and Justifications* (Longman, 1996), pp 198–206.

⁶¹ [1978] IRLR 103.

⁶² *Etam plc v Rowan* [1989] IRLR 150.

- the holder of the job provides individuals with personal services promoting their welfare or education or similar personal services and those services can most effectively be provided by a person of a specified sex.
- the job is one of two held by a married couple.
- the job involves working outside the United Kingdom in a country whose law and customs are such that the duties could not or could not effectively be carried out by a person of a specified sex.

Remedies

A complaint of sex discrimination must be brought to an employment tribunal within three months of the discriminatory act. Where a complaint is made out of time the tribunal can consider it when it is just and equitable to allow the case to proceed to a hearing.

Where a claim for sex discrimination is successfully brought against the employer there are three possible remedies that an employment tribunal can award to the applicant:

- (1) A declaratory order from the employment tribunal, setting out the rights and obligations of the parties in relation to the act to which the complaint relates (SDA 1975, s 65(1)(a)).⁶³
- (2) Recommendations can be made by a tribunal, recommending that an employer take action to remove the discriminatory effect of its behaviour on the complainant. This might consist of transferring a harasser away from his victim, introducing training for managers on equal opportunities policies and procedures, changing procedures for recruitment and selection to ensure equality of treatment, and providing a fair and accurate reference to someone that is dismissed because of his or her sex. When an employer fails to comply with the recommendation without reasonable justification, then the amount of compensation it has been required to pay to the complainant can be increased; or, where no provision for compensation has been made, an order for compensation can be issued against the employer.
- (3) Compensation is the most common remedy sought by and awarded to complainants. The compensation is unlimited as a consequence of the ruling of the ECJ in *Marshall v Southampton and South West Hampshire Health Authority (No 2)*⁶⁴ and the Sex Discrimination and Equal Pay (Remedies) Regulations 1993. In some instances, the amount of damages awarded have been considerable.⁶⁵ The headings of financial loss which the complainant can be compensated for

⁶³ For a critique of the remedies, see L Lustgarten 'Racial inequality and the limits of the law' (1986) 49 *Modern Law Review* 68.

⁶⁴ [1993] IRLR 445.

⁶⁵ M Nichols 'Analyst wins over £1m for sex discrimination' *The Scotsman*, Friday 31 January 2002, p 5.

by way of restitution include injury to feelings, loss of earnings (including future earnings), loss of pension rights, interest due on the award, and expenses associated with the legal claim.

Positive or affirmative action⁶⁶

The SDA 1975 and the RRA 1976 both make provision for positive action for sexual or racial groups who are under-represented in terms of employment, training or promotion. Most commentators agree that the provisions in both Acts are inadequate as a positive force for combating inequality.⁶⁷ The provisions in equality law encourage two types of positive discrimination: the first is to encourage more persons in a disadvantaged group to apply for jobs and to provide such groups with the opportunity to gain such skills and experience to allow them to compete for these jobs.⁶⁸

The second type, which is the right to positively discriminate in favour of one sex or a racial group, will not apply unless it can be shown that the group it is sought to discriminate in favour of is under-represented as per s 47(1) of the SDA 1975 – in other words, within that group, no one has been employed in that particular job during the last 12 months or the number of persons doing that work is comparatively small.⁶⁹ Under sex discrimination law, in determining whether the number of employees in a particular job is comparatively small, the comparator will be all women in a population. The issues related to this are highlighted in the following quote:

One of the difficulties with legal intervention, perhaps inevitably, is that there is no sliding scale of what is permissible . . . In policy terms, the greater the degree of under-representation, the greater and more varied the steps an employer should be encouraged and permitted to take.⁷⁰

In race discrimination cases the comparator in determining under-representation is much narrower, being the numbers employed by a particular employer, and this presents less difficulty for employers from an evidential point of view.⁷¹

Sex Discrimination Act 1975 (Amendment) Regulations 2003

This very short piece of legislation deals with two main issues, one of which has been dealt with elsewhere. Sections 1 and 2 clarify that a

⁶⁶ These terms can be used interchangeably.

⁶⁷ RJ Townshend-Smith *Discrimination Law: Text, Cases and Materials* (Cavendish, 1998), p 539. For the contrary view, see B Parekh 'A case for positive discrimination' in B Hepple and E Szyszczak (eds) *Discrimination: Limits of the Law* (Mansell, 1993), pp 261–280.

⁶⁸ V Sacks 'Tackling Discrimination Positively in Britain' in *ibid*, pp 357–383.

⁶⁹ RRA 1976, s 37(1).

⁷⁰ *Hughes v London Borough of Hackney*, below.

⁷¹ *Hughes v London Borough of Hackney* [1986] unreported, London Central Industrial Tribunal; see 7 *Equal Opportunities Review* 27.

police constable (despite being an office holder) should be treated as an employee for the purposes of the SDA 1975 and deemed to be working for the chief officer of police.⁷² Further, anything done by a person holding such an office shall be treated as done in the course of employment. Given that the police are increasingly respondents in discrimination cases, it is not surprising that the liability of both parties arising under the SDA 1975 should be clarified.

Under sections 3 and 4 the rules are set out dealing with discrimination after an employment relationship has come to an end (see the *Coote*⁷³ case). Where there is a relevant relationship and the discriminatory act that arises after the employment has ceased is closely connected with that relationship, then protection is provided (ss 20A and 35C are inserted into the SDA 1975).

Sexual harassment

Article 2(2) of the Equal Treatment Amendment Directive provides that harassment is unwanted conduct related to the sex of a person that occurs with the purpose or effect of violating the dignity of that person. Harassment is defined as occurring where, on grounds of sex, A engages in unwanted conduct which has the purpose or effect of (a) violating B's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B. The conduct is deemed to have the required effect if, having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect. Under the new legislative rules implementing the amendments, harassment will no longer be a type of discrimination but a distinct type of unlawful conduct.

Sexual harassment has been described as:

Conduct of a sexual nature, or other conduct based on sex affecting the dignity of women. It is unacceptable, if it is unwanted, unreasonable and offensive to the recipient and such conduct creates an intimidating, hostile or humiliating working environment for the recipient.⁷⁴

In *Porcelli v Strathclyde Regional Council*⁷⁵ Mrs Porcelli was subjected to a campaign of harassment by two male colleagues to get her to leave her job, including sexual comments and sexual innuendoes, threatening gestures, etc. She applied for and was given a transfer and claimed that the behaviour constituted sex discrimination under SDA 1975. It was held for the first time that sexual harassment was sex discrimination under

⁷² Similar measures were brought in for race discrimination cases under the Race Relations (Amendment) Act 2000.

⁷³ *Coote v Granada Hospitality Ltd (No 2)* [1998] ECR I-5199.

⁷⁴ Council of Ministers of EU, Code of Practice, definition of sexual harassment.

⁷⁵ [1986] IRLR 134, Ct Sess.

s 6(2)(b) of the Act and fell under the term 'any other detriment'. The behaviour was discriminatory as a man similarly placed who was equally disliked would not have suffered the same fate. Treatment is on grounds of the woman's sex as per s 1(1)(a). Sexual harassment by itself without any accompanying threat to terms and conditions of employment is sufficiently detrimental to be treated as sex discrimination (working environment).

While it was originally believed that harassment must involve a continuous mode of conduct, this was refuted by two cases: *Bracebridge Engineering Ltd v Darby*,⁷⁶ where a single incident of harassment was capable of constituting sufficient detriment (a serious assault by her supervisor and another); and *In situ Cleaning Co Ltd v Heads*,⁷⁷ where a single verbal comment of a sexist nature made by a fellow manager at a meeting was sufficient detriment.

In the following two cases sufficient detriment was not established. In *British Telecommunications v Williams*⁷⁸ an interview by a male manager of a female applicant for a job in a very confined space was not treated as sex discrimination; and in *Stewart v Cleveland Guest (Engineering) Ltd*⁷⁹ pornographic images displayed in the workplace were not deemed to be discriminatory against women as working in an environment tainted by pornography was gender neutral (a man would have been equally offended).

In *Waters v Commissioner for Police of the Metropolis*⁸⁰ a female police officer was sexually assaulted by a colleague outside working hours in her home. She reported the incident to her employer but after an enquiry no action was taken against the harasser. She then experienced victimisation by her employer and made a claim under s 4 of the SDA 1975. It was held that no legal action could be taken against the employer under the Act for the assault (not vicariously liable as per section 41 because the harasser was acting outside the scope of his employment); correspondingly, there was no right to bring a claim for victimisation, which is dependent on the action complained of following a complaint under s 41 of the SDA 1975. The case was eventually taken to the House of Lords and they upheld Ms Waters' claim that the employer's failure to offer her support and to prevent harassment and victimisation of her amounted to breach of its duty of care under the law of contract and tort.⁸¹

If an employer knows that acts being done by employees during their employment may cause physical or mental harm to a particular fellow employee and he does nothing to supervise or prevent such acts, where it is

⁷⁶ [1990] IRLR 3, EAT.

⁷⁷ [1995] IRLR 4, EAT.

⁷⁸ [1997] IRLR 668, EAT.

⁷⁹ [1994] IRLR 440, EAT.

⁸⁰ [1995] IRLR 531.

⁸¹ *Waters v Metropolitan Police Commissioner* [2000] IRLR 720.

in his power to do so, it is clearly arguable that he may be in breach of his duty to that employee. It seems to me that he may also be in breach of that duty if he can foresee such acts may happen, and if they do, that physical or mental harm may be caused.⁸²

The employer should have anticipated that Ms Waters' persistent complaint about the assault by a fellow officer would lead to retaliatory action.

I consider the person employed under an ordinary contract of employment can have a valid cause of action in negligence against her employer if the employer fails to protect her against victimisation and harassment which cause physical or mental injury. This duty arises both under the contract of employment and under the common law principles of negligence.⁸³

In the course of employment

Anything done by a person *in the course of their employment* shall be treated for the purposes of the SDA 1975 as having been done by the employer as well as him, whether or not it is done with the employer's knowledge or approval. The term 'in the course of their employment' must be given its everyday meaning.⁸⁴

It is a defence for an employer to show he has done all that was reasonably practicable to prevent an employee's discriminatory act. In *Chief Constable of the Lincolnshire Police v Stubbs*⁸⁵ the employer was held liable under s 41 of the SDA 1975, for a discriminatory act perpetrated outside the workplace. On two occasions outside work, a female police officer socialising with her colleagues was sexually harassed physically and verbally by a fellow officer. A question arose concerning the liability of the employer for these acts. It was held by the EAT that the employer was liable:

these incidents are connected to work and the workplace. They would not have happened but for the applicant's work. Work-related functions are an extension of employment and we can see no reason to restrict the course of employment to purely what goes on in the workplace.

The courts adopted a similar approach to determining whether the vicarious liability of an employer applied under the law of tort. In *Lister v Hesley Hall Ltd*⁸⁶ a warden at a school for children with emotional or behavioural difficulties was sexually abusing his charges. The House of Lords held that the employer was vicariously liable for the acts of its employee because the well-being of the children in its care was part of

⁸² Ibid, per Lord Slynn at 721.

⁸³ Ibid, per Lord Hutton at 724.

⁸⁴ See race discrimination cases redefining rules concerning vicarious liability, below.

⁸⁵ [1999] IRLR 81.

⁸⁶ [2001] IRLR 472.

the school's responsibility that it delegated to its employee. The torts were connected to the performance of the employee's duties under his contract.

Sexual orientation and gender reassignment

Until recently, victims of discrimination based on sexual orientation were denied any protection under discrimination law. There were no rights available to homosexual or lesbian employees facing discrimination under the equality laws of the United Kingdom or the European Union. They were denied protection because sexual orientation was not included within the ambit of section 1 of the SDA 1975, Article 141 of the EC Treaty or Article 5 of the Equal Treatment Directive 76/207 EEC. The position in the United Kingdom was summarised by the Court of Appeal in the case of *Smith v Gardner Merchant*⁸⁷ in the following way:

... discrimination on grounds of sexual orientation is not discrimination on the ground of sex within the meaning of the SDA 1975. A person's sexual orientation is not an aspect of his or her sex.

It was the view of the judiciary that homosexuality derived from someone's sexual proclivity rather than their gender and only gender-based discrimination was acceptable for comparison in sex discrimination cases.

A similar interpretation of Community law was provided by the ECJ in *Grant v South-West Trains*,⁸⁸ although they were apologetic for reaching such a conclusion: 'While the European Parliament... has indeed deplored all forms of discrimination based on a person's sexual orientation, it is nevertheless the case that the Community has not yet adopted rules providing for such equivalence.'⁸⁹

Even if homosexuals and lesbians could overcome this jurisdictional hurdle they would still be faced with the related problem of finding an appropriate comparator that meets the evidential requirement of the judiciary in these cases. The courts had ruled that the correct approach in determining if inequality of treatment applied was to compare a homosexual's treatment against a hypothetical comparator, namely a lesbian in the same situation. In the case of lesbians pursuing their rights, a homosexual would be the comparator. Only if they could satisfy the court that their gay comparator would be subjected to discrimination in the same circumstances would an action lie.⁹⁰ This intractable view of the judiciary on this issue has recently been given the added support of the Scottish Court of Session in the case of *Secretary of State for Defence v*

⁸⁷ [1998] IRLR 510.

⁸⁸ [1998] IRLR 206.

⁸⁹ *Ibid* at p 218; this reasoning was followed in *R v Secretary of State for Defence, ex parte Perkins (No 2)* [1998] IRLR 508.

⁹⁰ Referred to as the 'equality of misery' in sexual discrimination, this can now apply to gays: Employment Law News from Tolley, 23 October 2000, available on www.personneltoday.net/pt_legal/legal_features.

MacDonald.⁹¹ It removed any hope in the short term for lesbians and gay men obtaining equal rights with heterosexual employees under UK employment law.

They overturned an ambitious but ill-considered judgment of the EAT (discussed below) which resulted in short-lived protection being provided for employees suffering discrimination on the basis of their sexual orientation.⁹² It is important to remember that, despite this setback for these employees, legal developments in the law of the European Union in the form of a Directive providing protection against discrimination on the ground of sexual orientation, and consequent implementation in the United Kingdom through the Employment Equality (Sexual Orientation) Regulations 2003, will bring about a change in their legal position.⁹³

European Convention on Human Rights

The European Convention on Human Rights became part of the law of the United Kingdom with the passing of the Human Rights Act 1998 (HRA 1998).⁹⁴ The HRA 1998 came fully into force in most of the United Kingdom on 2 October 2000.⁹⁵ The precise impact of the legislation is still uncertain; however, it does offer the prospect of legal rights being provided for various categories of victims of discrimination not catered for by UK employment law (Article 8 – homosexuals and lesbians; Article 9 – covering religious discrimination; and Article 14 – a more general discrimination provision).

It was successfully argued before the Scottish EAT in *MacDonald v Ministry of Defence*⁹⁶ that, as the European Convention had directly impacted on interpretation of domestic legislation, domestic equality legislation (the SDA 1975) should therefore be deemed to include sexual orientation within the term 'sex' as the basis for a claim under the Act in view of relevant case law of the European Court of Human Rights (ECHR). The justification for this conclusion came from the decision of the ECHR in *Salguiero da Silva Mouta v Portugal*.⁹⁷ Article 14 was interpreted (the right not to be discriminated against) as extending a direct right of action for discrimination on the basis of sexual orientation. In light of this

⁹¹ [2001] IRLR 431.

⁹² The Court of Appeal's decision was recently upheld by the House of Lords.

⁹³ In the Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/1661 it is left suitably vague concerning the appropriate comparator in direct and indirect discrimination cases; and under reg 3 they are referred to as 'other persons', leaving the employment tribunal with a wide choice of comparator.

⁹⁴ K Ewing 'The Human Rights Act and Labour Law' (1998) 27(4) *Industrial Law Journal* 276.

⁹⁵ In s 57(2) of the Scotland Act 1998, the Scottish Parliament was called on to recognise the impact of the Convention and the Human Rights Act 1998 in fulfilling its legislative function.

⁹⁶ [2000] IRLR 749.

⁹⁷ Case 33290/96 [2001] Fam LR 2, ECHR.

judgment, the EAT interpreted UK domestic legislation as incorporating this right. The Court of Session, on appeal, regarded this reasoning as flawed and rejected this hypothesis in favour of the reasoning adopted in earlier cases such as *Smith and Grant*:

On the whole matter I am satisfied that this statute and in particular this provision is concerned with gender and not sexual orientation. Section 3(1) of the 1998 Act does not in my opinion enable or oblige us to adopt any other reading.⁹⁸

This judgment must be considered in the light of developments in the European Union: the Framework Directive 2000/78/EC has been implemented in the UK Employment Equality (Sexual Orientation) Regulations 2003 and this has had a direct impact on the rights of victims of sexual orientation discrimination. The Regulations will make it unlawful to discriminate on various grounds not directly covered by existing legislation, including sexual orientation.

HRA 1998 and Secretary of State for Defence v MacDonald

The case against the Ministry of Defence was as follows: Mr MacDonald was initially commissioned into the Territorial Army Intelligence Corps and then employed by the Royal Air Force. He applied for a transfer to the Scottish Air Traffic Control centre at Prestwick on compassionate grounds. Mr McDonald was subjected to a rigorous vetting procedure for the job, under which he was asked if he was a homosexual. After heavy questioning about his sexuality, he confirmed that he was a homosexual and notified his commanding officer of this fact. His declarations led to his compulsory resignation under Queen's Regulations 2905. He claimed that he was sexually harassed and unlawfully dismissed on the ground of his sex.

Although the legislative rules in the United Kingdom and the European Union offered him no chance of success, as his employer was the Ministry of Defence (a public body), he was entitled to seek appropriate protection under the HRA 1998. The argument that the effect of the HRA 1998 was expansion of the scope of existing domestic legislation to cover discrimination on these grounds was rejected by the Court of Appeal.

In *Smith and Grady v United Kingdom*⁹⁹ the ECHR was satisfied that the introduction and application of the Ministry of Defence's policy to discharge homosexuals from the services when their sexual orientation became known to them (e.g. following an investigation into the personal affairs of the accused) was contrary to Article 8 (right to respect for private life) and Article 13 (right to an effective remedy before a national

⁹⁸ *Secretary of State for Defence v MacDonald* [2001] IRLR 431, per Lord Prosser at p 436.

⁹⁹ [1999] IRLR 735.

authority). The issue of the applicability of Article 14 to discriminatory acts based on someone's sexual orientation was raised but was considered inadmissible.

The EAT in *MacDonald* considered the following question: who should be the appropriate comparator in these cases? It was decided that it should either be a heterosexual man where a lesbian is bringing a claim or a heterosexual woman where the applicant is a homosexual man.

If comparators are relevant, the issue is not as between male and female simpliciter but between a male or female homosexual and a male or female heterosexual in order to determine not whether one homosexual is being treated less favourably than another but whether homosexuals of either gender in this context are being treated less favourably than heterosexuals of the opposite gender which is the true comparator in the context of sexual orientation.¹⁰⁰

The use of inter-sex comparison as the basis of a discrimination claim is already undertaken in the enforcement of rights under the SDA 1975, whereby heterosexual comparisons are carried out between the sexes.

It is questionable whether an inter-sex or intra-sex comparator (e.g. comparing a lesbian with a heterosexual female) is likely to be the best option. In *P v S and Cornwall County Council*,¹⁰¹ however, the ECJ ruled that transsexuals should be compared with persons of the same sex not considering or undergoing gender reassignment. The EAT in the *MacDonald* case suggested that in serious cases of discrimination based on sexual orientation (such as those involving physical harassment or bullying) no comparator should be required: 'In circumstances where the behaviour complained of is both "blatantly unacceptable" and "sexually related" then there is no need for a comparator.' A similar approach was taken by the Court of Appeal in *Clark v Novacold Ltd*,¹⁰² where it was decided, in respect of disability discrimination, that the 'sick person' comparison was invalid and no comparator was required to establish discrimination against a disabled employee on the ground of his or her disability.¹⁰³ In the Court of Appeal, the majority reverted to the original basis for comparison in these cases – a homosexual man or lesbian. However, Lord Prosser (in his dissenting judgment) said that the appropriate comparator was a person of the opposite sex, regardless of any question of sexual orientation.

¹⁰⁰ M Rubenstein (2000) 29(11) *Industrial Relations Law Reports* 745.

¹⁰¹ [1996] IRLR 347.

¹⁰² [1999] IRLR 318, CA.

¹⁰³ For an interesting discussion on the appropriate comparators in gender reassignment cases, see R Wintemute 'Recognising new kinds of direct sex discrimination, transsexualism, sexual orientation and dress codes' (1997) 60 *Modern Law Review* 334 at pp 340–341. The intra-sex comparison is now part of the Sex Discrimination (Gender Reassignment) Regulations 1999, SI 1999/1002.

*Employment Equality (Sexual Orientation) Regulations 2003*¹⁰⁴

Sexual orientation is widely defined under regulation 2 to mean orientation towards persons of the same sex (homosexuals), persons of the opposite sex (heterosexuals), and persons of the same sex and the opposite sex (bisexuals). This means that homosexuals, heterosexuals and bisexuals are protected under the legislation.

They cover discrimination on grounds of perceived as well as actual sexual orientation (i.e. assuming – correctly or incorrectly – that someone is lesbian, gay, heterosexual or bisexual). The Regulations also cover association, i.e. being discriminated against on grounds of the sexual orientation of those with whom you associate (for example, friends and/or family).¹⁰⁵

The Regulations provide protection against direct and indirect discrimination and victimisation. Regulation 3 states:

- (1) For the purposes of these Regulations, a person ('A') discriminates against another person ('B') if –
 - (a) on grounds of sexual orientation, A treats B less favourably than he treats or would treat other persons; or
 - (b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same sexual orientation as B, but –
 - (i) which puts or would put persons of the same sexual orientation as B at a particular disadvantage when compared with other persons,
 - (ii) which puts B at that disadvantage, and
 - (iii) which A cannot show to be a proportionate means of achieving a legitimate aim.
- (2) A comparison of B's case with that of another person under paragraph (1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

The key provisions of this legislation are the same as or similar to existing equality legislation. Regulation 4 deals with victimisation and provides protection against such behaviour where it occurs for the reason that a person has brought an action against another or proceedings against, or given evidence or information in connection with proceedings against another, etc.

The definition of harassment in regulation 5 is similar to that found in other legislation, making it unlawful for A to engage in unwanted conduct on the ground of sexual orientation, which has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. Under regulation 6(3)

¹⁰⁴ SI 2003/1661.

¹⁰⁵ DTI website, www.dti.gov.uk/er/equality/eeregs_a.html.

'it is unlawful for an employer . . . to subject to harassment a person whom he employs or who has applied to him for employment.' Regulation 6 sets out the types of activities that will be treated as unlawful under the Regulations, which are largely identical to those under s 4 of the RRA 1976 and s 6 of the SDA 1975. Dismissal of a person includes expiry of a fixed-term contract or constructive dismissal.

Regulation 7(2) sets out a general occupational requirement in favour of employees of a particular sexual orientation that can exempt an otherwise discriminatory act, including unlawful dismissal of someone not of that sexual orientation. Under regulation 7(3), where employment is for the purpose of organised religion the employer can impose a requirement that it is difficult for a person (because of their sexual orientation) to meet and consequently can discriminate against them (including undertaking dismissal). This can apply where such a requirement is necessary to comply with the doctrine of a religion, or where, because of the nature of the employment (or the context in which it is carried out), the requirement is necessary to avoid conflicting with the strongly held convictions of a significant number of the religion's followers.

There has been little research into the extent of this type of discrimination within employment in the United Kingdom. However, where research has been undertaken the results show that discriminatory practices in employment against this type of employee are commonplace.¹⁰⁶

While at the present time it is impossible for victims of discrimination based on sexual orientation to bring a successful claim for discrimination, there may be other statutory claims (working time, wages, breach of contract, harassment) and common law actions (e.g. actions in tort) they could pursue.¹⁰⁷ Where they are dismissed because of their sexual orientation, this action could be deemed to be reasonable by an employment tribunal.¹⁰⁸ There is clearly a deficiency in equality legislation, which will hopefully be addressed by the Employment Equality (Sexual Orientation) Regulations 2003. It will be interesting to see how successfully the new regulations fulfil this role. Employees may be reluctant to pursue claims against their employers for fear of stigmatisation, victimisation (regulation 4) or harassment (regulation 5), despite legal protection being provided against these activities; and the issue of choosing the appropriate comparator may still cause problems for employment tribunals.

¹⁰⁶ Stonewall, a national lobbying organisation on behalf of lesbians, bisexuals and gay men, undertook a survey of 2,000 employees in 1993. They found that 16% of respondents had experienced discrimination, 48% had been harassed because of their sexual orientation and 68% felt the need to conceal their sexual orientation from co-workers. In an independent survey carried out by the Social and Community Planning Group in 1995, similar results were obtained.

¹⁰⁷ S Middlemiss and N Busby 'The equality deficit, legal protection for homosexuals and lesbians in employment?' (2001) 8(4) *Gender Work and Organisation* 387.

¹⁰⁸ *Saunders v Scottish National Camps Association Ltd* [1980] IRLR 14.

Transsexuals

Legal protection against discrimination has been provided for transsexuals at work. Transsexuals are persons convinced that their physical anatomy is different from their true gender.¹⁰⁹ They will often undertake operations to redress this perceived imbalance (by changing their sex) and will dress in the clothes of someone of the opposite sex and want to use facilities provided for the opposite sex. This will often cause practical problems for employers¹¹⁰ and possibly persons working alongside an employee who is a transsexual.¹¹¹ Transsexuals themselves may often experience various kinds of discrimination at work at the hands of their employer or co-workers, including harassment, social and professional isolation, dismissal and ostracism.

Judicial recognition of the right of transsexuals not to be discriminated against was first achieved in the ECJ's decision in *P v S and Cornwall County Council*.¹¹² When the applicant was initially employed as a general manager he was male but after about a year he announced that he was intending to undergo an operation for gender reassignment. He was dismissed. The tribunal felt that this case fell outside the scope of the SDA 1975 but referred the case to the ECJ to determine if the Equal Treatment Directive offered protection. The ECJ found that:

such discrimination is based, essentially, if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated less favourably by comparison with persons of the sex to which he or she was deemed to belong to before undergoing gender reassignment.¹¹³

The treatment of the employee in this case was deemed to be contrary to Article 5(1) of the Equal Treatment Directive.

Following this case, the EAT ruled in *Chessington World of Adventures v Reed*¹¹⁴ that the definition of sex discrimination in the SDA 1975 could be interpreted (in light of the judgment in *P v S*) as including gender reassignment. The response of the Government was to introduce legislation in the form of the Sex Discrimination (Gender Reassignment) Regulations 1999.¹¹⁵ These Regulations expressly prohibit discrimination on the grounds of gender reassignment in the fields of employment and vocational training. Where a person receives less favourable treatment than another person on the ground that the individual intends to undergo, is undergoing or has undergone gender reassignment, then a case will be

¹⁰⁹ Referred to as gender dysphoria or gender identity disorder.

¹¹⁰ *A v Chief Constable of the West Yorkshire Police* [2003] IRLR 32.

¹¹¹ In *Croft v Consignia plc* [2002] IRLR 851 a refusal to allow a pre-operative male to female transsexual to use a ladies' toilet was not contrary to the SDA 1975.

¹¹² [1996] IRLR 347.

¹¹³ *Ibid* at p 354.

¹¹⁴ [1997] IRLR 556.

¹¹⁵ SI 1999/1002.

established, unless a GOQ applies.¹¹⁶ As a result of the permanent GOQs, it will now be permissible to discriminate against an individual who intends to undergo, is undergoing or has undergone gender reassignment and the job involves the holder of the job being liable to be called upon to undertake physical searches¹¹⁷ or work or live in a private home and objection might reasonably be taken to allowing that person a degree of physical or social contact with a person living in the home (or knowledge of their intimate details).

The impact of these Regulations can be seen in *Goodwin v United Kingdom*,¹¹⁸ where the ECHR held that the United Kingdom was in breach of Article 8 of the Convention (dealing with the right to family life, etc.) because, as part of certain procedures set up to implement legal rules in the United Kingdom (e.g. dealing with national insurance, employment and social security), someone's sex was recorded as that of their birth, thereby discriminating against transsexuals.

In *A v Chief Constable of West Yorkshire Police*¹¹⁹ the complainant was a male to female transsexual who applied to become a police constable. She was refused employment on the basis that legislation affected the carrying out of searches by transsexuals and, accordingly, the complainant would not be able to carry out the full duties of a police constable. The Chief Constable argued that 'she was legally male and conformity of legal and apparent gender was a genuine occupational qualification within the meaning of section 7 of the Sex Discrimination Act 1975'. The employment tribunal found in favour of the complainant; however, the Employment Appeal Tribunal allowed the appeal. The case went on appeal to the Court of Appeal, where it was held that a post-operative male to female transsexual was to be regarded as female, except where there were significant factors of public interest to weigh against the interests of the individual applicant in obtaining legal recognition of her gender reassignment. This might include the situation where a transsexual wanted her transsexualism to remain undisclosed, although that was not the position in this case.

Race discrimination

Background to the legislation

The large-scale influx of racial and ethnic minorities into the United Kingdom in recent times started with recruitment of cheap migrant

¹¹⁶ For details of supplementary temporary and permanent GOQs in the legislation and relevant case law, see (2002) 104 *Equal Opportunities Review* 17.

¹¹⁷ See *A v Chief Constable of West Yorkshire Police* [2003] IRLR 32, where this right was qualified.

¹¹⁸ [2002] IRLR 664.

¹¹⁹ [2003] ICR 161.

labour from the New Commonwealth territories such as the West Indies and India and other countries in Europe in the 1950s and 1960s. These immigrants were used to fill the labour shortages caused by post-war industrial expansion in the United Kingdom.

Following this period there was an economic recession which led to a substantial decrease in primary immigration, although the process of secondary immigration (whereby the families of existing migrants were allowed into the country to join their relatives) continued throughout the 1970s and 1980s. Substantial numbers of refugees from Eastern Europe and Africa sought asylum from the 1980s onwards and this phenomenon continues today.¹²⁰ Overall, the introduction of people with different backgrounds, cultures and physical characteristics often led to racism within British society and particularly in the workplace.¹²¹

In societies such as Britain racism is produced and reproduced through political discourse, the media, the educational system and other institutions. Within this wider social context racism becomes an integral element of diverse social issues such as law and order, crime, the inner cities and urban unrest.¹²²

The following quote summarised the traditional view of most employers in respect of employment of persons from racial minorities:

Despite the need for their labour, their presence aroused widespread hostility at all levels . . . Employers only reluctantly recruited immigrants where there were no white workers to fill the jobs . . . At this time the preference for white workers was seen as quite natural and legitimate – immigrants were seen as an inferior but necessary labour supply.¹²³

It was necessary to combat racism¹²⁴ through application of the law and the first attempt to do this in an employment context was the RRA 1968. There were inherent defects in this Act, however, which meant that it was ineffective in its attempt to combat racism within employment (e.g. there was no scope for direct complaint about employers by victims of discrimination and there was no facility to bring a case for indirect discrimination). These deficiencies became apparent and pressure was put on the government by various bodies to bring in new legislation in the form of the RRA 1976.

It is interesting to note that race discrimination in employment was not part of the agenda of the European Union until very recently. In the past, however, where changes in the legislation dealing with sex discrimination came about through EU legislation or case law, governments

¹²⁰ M MacEwen *Tackling racism in Europe: an examination of anti-discrimination law in practice* (Berg Publishing, 1995), pp 3–6, 155–159.

¹²¹ B Wiley *Employment Law in Context* (2nd edn, Prentice Hall, 2003), pp 194–199.

¹²² J Solomos *Race and Racism in Britain* (2nd edn, Macmillan, 1993), pp 183–185.

¹²³ J Solomos and L Back *Racism and Society* (Macmillan, 1996), pp 67–69.

¹²⁴ *Ibid*, pp 194–198 for useful definitions of race, ethnicity, colour and racism.

tended to introduce equivalent changes to legislation dealing with race discrimination shortly after (e.g. Race Relations (Remedies) Act 1994). The Amsterdam Treaty introduced the power to adopt a Directive to implement the principle of equal treatment on grounds of race or religion.¹²⁵ The power to adopt measures to deal with discrimination is now contained within Article 13 of the EC Treaty (see Chapter 2).¹²⁶

Race Relations Act 1976

There are strong similarities between the legislation dealing with race and sex discrimination in most areas. As a result, there is no need to give detailed consideration to sections of the RRA 1976 where this applies because reference can be made to the relevant provision in the SDA 1975.

The RRA takes its form from the SDA; the two are substantially equivalent, except that in one case discrimination on grounds of gender is being dealt with, whereas in the other it is discrimination on racial grounds which are proscribed.¹²⁷

The case law arising under sex discrimination law can not only alter interpretation of that law but also the equivalent legal rules dealing with race discrimination, and vice versa.

Under s 3(1) of the RRA 1976 racial grounds are defined as meaning 'colour, race, nationality or ethnic or national origins'.¹²⁸

There is no explicit protection against religious discrimination, although certain religions have protection under the Act (e.g. Sikhs and Jews) and all religions are covered by the Employment Equality (Religion or Belief) Regulations 2003¹²⁹ which came into effect in December 2003.

The term 'nationality' refers to race and citizenship. Thus it is unlawful to discriminate against nationals of countries in the European Union. It is now clear that the Scots and the English can be regarded as a separate national grouping for the purposes of the RRA 1976.

Direct discrimination and the RRA 1976

Section 1(1)(a) of the RRA 1976 provides: 'A person discriminates against another in any circumstances relevant for the purposes of any provision in this Act if . . . on racial grounds he treats that other less favourably

¹²⁵ Council Directive 2000/43/EC.

¹²⁶ E Guild 'The EC Directive on Race Discrimination: surprises, possibilities and limitations' (2000) 29 *Industrial Law Journal* 416.

¹²⁷ C Bourn and J Whitmore *Anti-Discrimination Law in Britain* (3rd edn, Sweet & Maxwell, 1996), p 11.

¹²⁸ The new regulations implementing the EU Race Discrimination Directive – the Race Relations Act 1976 (Amendment) Regulations 2003 – insert a new section 1A in the RRA 1976 that covers only discrimination based on race or ethnic or national origin, not on colour or nationality.

¹²⁹ SI 2003/1660.

than he treats or would treat other persons.’ As in sex discrimination cases, the motive of the employer is irrelevant. It is enough to show that the employee suffered less favourable treatment. The assumption is that the applicant will cite a comparator of a different racial group in a similar position to him or her who has been given (or would have been given) preferential treatment by the employer. In the event that a comparator in the workplace cannot be found, reference may be made to a hypothetical comparator.¹³⁰

The less favourable treatment may be on the ground of the race of a third party. In *Zarzynska v Levy*,¹³¹ a female barperson was dismissed when she refused to follow an order not to serve drinks to persons of a particular racial group. It was held that this represented direct discrimination as per s 1(1)(a) of the RRA 1976.¹³²

Indirect discrimination

Section 1(1)(b) of the RRA 1976 provides:

A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if . . . he applies a requirement or condition¹³³ which he applies or would apply equally to persons not of the same racial group as that other but –

- (i) which is such that the proportion of persons of a racial group that can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and
- (ii) which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and
- (iii) which is to the detriment of that other because he cannot comply with it.

Under section 1A¹³⁴ a person also discriminates against another if, in any circumstances relevant for the provision referred to in section 1B¹³⁵ (which includes discrimination in the employment field):

he applies to that other a provision, criterion or practice which he applies or would apply to persons not of the same race or ethnic or national origins as that other but –

- (a) which puts or would put persons of the same race or ethnic or national origins as that other at particular disadvantage when compared with other persons,

¹³⁰ *Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting* [2002] IRLR 288.

¹³¹ [1978] IRLR 7, EAT.

¹³² See also *Weathersfield v Sargent* [1998] IRLR 14, EAT.

¹³³ It used to be necessary to show that a discriminatory condition or requirement applied and this represented a high standard of proof for the applicant in these cases.

¹³⁴ Added by the Race Relations Act 1976 (Amendment) Regulations 2003; SI 2003/1626.

¹³⁵ Part II, ss 17–18D; s 19B so far as it relates to social security, health care, any form of social protection or social disadvantage which does not fall within s 20; ss 20–24, ss 26A and 26B; ss 76 and 76ZA; and Part IV in its application to the provisions referred to above.

- (b) which puts that other at that disadvantage, and
- (c) which he cannot show to be a proportionate means of achieving a legitimate aim.¹³⁶

There are therefore two different definitions of indirect discrimination which apply under the RRA 1976 (the second definition having narrower grounds but a less stringent evidential requirement) and determining which one of these definitions is appropriate is dependent on which section of the Act applies. The evidential aspect of these definitions is best illustrated by consideration of indirect discrimination cases.

In *Perera v Civil Service Commission (No 2)*¹³⁷ the complainant was a Sri Lankan by birth. He had a legal qualification and had practised at the bar in his own country, and for several years in the United Kingdom he had practised at the bar and obtained ICMA qualifications. Despite this, he had failed after numerous attempts to be transferred into the legal service or accountancy section, or to obtain a promotion in his post as executive officer. He brought a case against his employer, the Civil Service, alleging discrimination over the rejection of his application for the post of legal assistant. The selection board took into account four factors in determining suitability for selection: experience in the United Kingdom; command of English; whether the candidate had or had not applied for British nationality; and age. He claimed these requirements were indirectly discriminatory against people from his racial group. The Court of Appeal held: that the applicant had failed to establish that these were the requirements or conditions (must be *absolute* bar); and that the candidate's personal qualities were the significant factor in determining selection of staff:

The whole of the evidence indicates that a brilliant man whose personal qualities made him suitable as a legal assistant might well have been sent forward on a short list by the interview board in spite of being, perhaps, below standard on his knowledge of English and his ability to communicate in that language.¹³⁸

It is doubtful that the Court would reach the same conclusion now, given that the definition of indirect discrimination has been amended.¹³⁹

In *Hussein v Saints Complete House Furnishers*¹⁴⁰ an employer made it part of the specification for a job that applicants could not be residents in the city centre of Liverpool. Evidence was led which showed that 50% of the population of the city centre were black, whereas only 12% of the residents in the acceptable area were black. There was no justification for this

¹³⁶ RRA 1976, s IA.

¹³⁷ [1983] ICR 428, CA.

¹³⁸ *Ibid*, per Stephenson LJ at p 147.

¹³⁹ See *Raval v Department of Health and Social Security and Civil Service Commission* [1985] IRLR 370, where various questions were set for tribunals to help them analyse claims of indirect discrimination.

¹⁴⁰ [1979] IRLR 337.

discriminatory requirement. It was held that this was indirect discrimination as per s 1(1)(b) of the RRA 1976.

Victimisation

Under s 2 of the RRA 1976 anyone involved in enforcing the Act by bringing proceedings, making allegations or giving information is protected against victimisation by his employer or its employees.¹⁴¹ It is now possible, as a result of the *Cooté*¹⁴² decision, to claim victimisation where an employer takes retaliatory action against an ex-employee (e.g. refusing to give a reference) because he or she brought a claim against the employer under the RRA 1976. Section 27A of the Act is concerned with 'relationships that have come to an end'.¹⁴³ This section provides that an act of discrimination or harassment is unlawful even after the relationship has come to an end, provided that the discrimination or harassment arises out of, or is closely connected to, the relationship.

Genuine occupational qualifications

Under s 5 of the RRA 1976 it is permissible to discriminate in recruitment and selection where:

- the job involves participation in a dramatic performance or other entertainment in a capacity for which a person of that racial group is required for reasons of authenticity
- the job involves participation as an artist's or photographic model in the production of a work of art or visual image for which a person of that racial group is required for authenticity
- the job involves working in a place where food or drink is provided or served to and consumed by members of the public in a particular setting for which, in that job, a person of that particular racial group is required for reasons of authenticity (e.g. Chinese restaurant)
- the holder of the job provides persons of that racial group with personal services promoting their welfare and those services can be most effectively provided by persons of that racial group.

Enforcement of the Race Relations Act 1976

An employee or an employer or the tribunal itself can request a discovery of documents by an employment tribunal, whereby a party is ordered to produce documentation where such information is necessary for dealing with the complaint. In *West Midlands Passenger Transport Executive*

¹⁴¹ *Chief Constable of West Yorkshire v Khan* [2001] IRLR 830, HL.

¹⁴² C-185/97 *Cooté v Granada Hospitality Ltd (No 2)* [1998] ECR I-5199, ECJ.

¹⁴³ Inserted by the Race Relations Act 1976 (Amendment) Regulations 2003, SI 2003/1626.

*v Singh*¹⁴⁴ the applicant needed statistical data from his employer to substantiate his claim for indirect discrimination. The applicant was denied promotion as a senior inspector and claimed racial discrimination and asked for a discovery of documents of statistics relating to the ethnic origins, qualifications and experience of all applicants applying for senior inspector posts over a two-year period.

The suitability of candidates can rarely be measured objectively; often subjective judgements will be made. If there is evidence of a high percentage rate of failure to achieve promotion at particular levels by members of a particular racial group, this may indicate that the real reason for the refusal is a conscious or unconscious racial attitude which involves stereotyped assumptions about members of the group.

We are satisfied that the statistical material ordered is relevant to the issues in this case, in that (1) it may assist the applicant in establishing a positive case that the treatment of coloured employees was on racial grounds, which was an effective cause of their, and his, failure to obtain promotion; (2) it may assist the applicant to rebut the employer's contention that they operated in practice an equal opportunities policy which was applied in his case.¹⁴⁵

Under the Race Relations (Questions and Replies) Order 1977¹⁴⁶ the questions to put to an employer in the form of a questionnaire are set out.¹⁴⁷ A completed questionnaire can be used as evidence in the proceedings and where the employer fails to respond to the questionnaire or his answers reveal a discriminatory attitude on his part then the tribunal will draw appropriate inferences at the hearing of the case.

Remedies

The following remedies are available under the Race Relations Act 1976:

- (1) **Compensation:** the headings of compensation can include lost earnings, loss of future earnings, injury to feelings, loss of other employment rights (including pensions) and aggravated damages (in England and Wales).

The Race Relations (Remedies) Act 1994 came into force in July 1994 and repealed the upper limit for compensation (set out in s 56(2) of the RRA 1976). It also gave the Secretary of State the power to make regulations providing for interest to be included in any compensation award made under the RRA 1976.

- (2) **Recommendations** can be made whereby an employer will be given a specified time to take action to remove or lessen the harmful effect

¹⁴⁴ [1988] ICR 614, CA.

¹⁴⁵ *Ibid* at 620.

¹⁴⁶ SI 1977/842.

¹⁴⁷ Under RRA 1976, s 65 and SDA 1975, s 74 the Secretary of State is given the power to prescribe a questionnaire which an aggrieved party can send to an employer, seeking further information about the reasons for its decisions and actions.

of the discrimination on the complainant (RRA 1976, s 56(1)(c)). If an employer fails without reasonable justification to comply, then the employment tribunal (if it thinks it is just and equitable to do so) can award additional compensation.

- (3) A declaratory order states the rights of the parties in relation to the allegation of discrimination.
- (4) In the course of a formal investigation the Commission for Racial Equality can, where satisfied that an unlawful act or practice has taken place, issue a non-discrimination notice in respect of the person concerned.¹⁴⁸ The CRE also has the power to bring proceedings against an employer where the employer has issued instructions to or put pressure on an employee to discriminate. Under s 29(1) of the RRA 1976 it is unlawful to publish discriminatory adverts and the right to take action is placed in the hands of the CRE.

Burden of proof – vicarious liability

Under s 32 of the RRA 1976 and s 41 of the SDA 1975 (discussed above) an employer can be vicariously liable for the actions of an employee undertaking a discriminatory act. 'Anything done by a person in the course of his employment shall be treated . . . as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval.' In deciding if the employee was acting in the course of his employment for the purposes of the definition, the tribunals and courts referred to the interpretation of this phrase by the judiciary in tort cases under the common law.

In *Irving v Post Office*,¹⁴⁹ the Post Office was not liable for racially abusive words written on an envelope destined to be delivered by a postman, to his neighbour, since the postman was not acting in the course of employment. His employment provided the opportunity for his misconduct, but the misconduct formed no part of the performance of his duties, was in no way directed towards the performance of his duties and was not done for the benefit of his employer.

In *Tower Boot Co v Jones*¹⁵⁰ an employee was racially harassed at work, suffering severe physical and verbal abuse from his colleagues. The employer argued that the acts were not committed in the course of the harassers' employment and that there was therefore no liability. The EAT held:

The nub of the test of whether an act is done in the course of employment is whether the unauthorised wrongful act of the employee is so connected with that which he was employed to do as to be a mode of doing it.

¹⁴⁸ SDA 1975, s 67; RRA 1976, s 58.

¹⁴⁹ [1987] IRLR 289, CA.

¹⁵⁰ [1995] IRLR 529, EAT.

The racial harassment did not represent a mode of carrying out their employment. The case of *Lister v Hesley Hall Ltd*¹⁵¹ (discussed above) broadened considerably the scope for the employer to be vicariously liable under the common law for the actions of its employees.

The approach for determining the vicarious liability of an employer under both statutes was set out by the Court of Appeal in *Jones v Tower Boot Co Ltd*.¹⁵² The Court rejected the EAT's approach of resorting to common law rules and said that the words 'in the course of employment' as set out in s 41 of the SDA 1975 should be given a purposive construction and interpretation should be on the basis of everyday speech. The employer was held liable for the actions of its employees. Where attempting to avoid vicarious liability, an employer's primary defence in race and sex discrimination cases is provided under s 41(3) of the SDA 1975 and s 32(3) of the RRA 1976:

In proceedings brought under this Act against any person in respect of an act alleged to have been done by an employee of his it shall be a defence for that person to prove that he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description.

What shall be reasonably practical steps will depend on the circumstances. However, the following types of behaviour might in part or in full represent such steps: the employer undertaking training on equal opportunities for supervisory employees; having an equal opportunities policy (or more specific policies dealing with different kinds of discrimination, e.g. sexual harassment), the content of which is notified to all staff; providing adequate supervision to control discriminatory acts; and introducing disciplinary measures for dealing with perpetrators of sex or race discrimination under the employer's disciplinary procedure.

Race Relations (Amendment) Act 2000

This substitutes a new section 71 to the RRA 1976 and imposes a statutory duty on public authorities to have due regard, when performing their functions, to the need to eliminate unlawful racial discrimination and to promote equality of opportunity and good relations between persons of different racial groups. It therefore outlaws for the first time direct and indirect discrimination in the carrying out of public authority functions and places duties on public bodies to promote racial equality.¹⁵³ The CRE has new enforcement powers in the form of compliance notices, which

¹⁵¹ [2001] IRLR 472.

¹⁵² [1997] ICR 254, CA.

¹⁵³ The CRE has issued a code of practice for assisting public authorities in taking appropriate action to comply with the Act.

can be issued to public authorities failing to comply with any of their specific duties under the Act.¹⁵⁴

Justification defence

The employer has a defence that the discrimination is justifiable on grounds other than race, nationality, ethnic origins, etc. It must show that there is a real need which can be objectively justified for the practice, criterion or condition. In *Singh v Rowntree Macintosh Ltd*¹⁵⁵ a 'no beard' rule was found to represent indirect discrimination against Sikhs; however, it was justified on the ground of health and safety.¹⁵⁶

Race Relations Act 1976 (Amendment) Regulations 2003

The EU Race Discrimination Directive (2000/43/EC) is the first Directive to provide rights to employees in Member States. In the United Kingdom, this was transposed by the Race Relations Act 1976 (Amendment) Regulations 2003,¹⁵⁷ which include a statutory definition of racial harassment, introduce changes to the burden of proof and provide a new definition of indirect discrimination.

Definitions of direct and indirect discrimination were amended to comply more closely with the Burden of Proof Directive. With respect to indirect discrimination, the wording used in defining indirect discrimination as it applies to certain sections in the RRA 1976 changed to 'provision, criterion or practice' instead of 'requirement or condition' (discussed earlier). Also, for the first time racial harassment was defined under statute and treated as directly unlawful.

As in the case of sexual harassment, the legal protection against racial harassment has derived from creative interpretation of the RRA 1976 by the judiciary: it was decided that harassment was a detriment for the purposes of s 4(2)(c) of the Act.

In *De Souza v Automobile Association*¹⁵⁸ a black female employee overheard a racist comment about her in a conversation between two managers. This was not deemed to be sufficient detriment¹⁵⁹ by the Court of Appeal for the purposes of the RRA 1976. The Court of Appeal did take the opportunity to clarify that liability can arise in cases of sexual or racial harassment where the only detriment suffered by the employee is

¹⁵⁴ For detailed coverage of the Act's main provisions, see *Industrial Relations Law Bulletin* (March 2002) pp 2-8.

¹⁵⁵ [1979] IRLR 199, EAT.

¹⁵⁶ In *Panesar v Nestle Co* [1980] ICR 144, CA, a rule forbidding the wearing of beards in a chocolate factory, although discriminatory against Sikhs, was justifiable on hygiene grounds.

¹⁵⁷ SI 2003/1626.

¹⁵⁸ [1986] IRLR 103, CA; see also *Thomas and another v Robinson* [2003] IRLR 7.

¹⁵⁹ Defined as 'putting under a disadvantage' in *Ministry of Defence v Jeremiah* [1979] IRLR 436, CA.

having to work in a hostile or unwelcome working environment caused by the harassment.¹⁶⁰ The legal rules developed in sexual harassment cases such as *Strathclyde Regional Council v Porcelli*¹⁶¹ and *Insitu Cleaning Co Ltd v Heads*¹⁶² (covered earlier) also apply to racial harassment cases.

The leading case of *Jones v Tower Boot Co*¹⁶³ illustrates an extreme form of racial harassment involving physical assault and verbal abuse of a 16-year-old boy by a group of colleagues. The legal significance of this case was that employers could potentially be held vicariously liable for the actions of all their employees in cases of racial or sexual harassment or in other discrimination cases.

As a result of EU intervention, for the first time racial harassment is now defined and directly treated as unlawful under statute.¹⁶⁴ The Race Relations Act 1976 (Amendment) Regulations 2003 insert a new section 3A into the RRA 1976:

A person subjects another to harassment . . . where, on grounds of race or ethnic or national origins, he engages in unwanted conduct which has the purpose or effect of –

- (a) violating that other person's dignity; or
- (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

This effect is said to have occurred 'if and only if, having regard to all the circumstances, including in particular, the perception of that other, it should reasonably be considered as having that effect'.¹⁶⁵ This takes into consideration the impact of the behaviour on a particular victim, which caters for differences in the reaction of victims to racial harassment. There is no longer any requirement for a comparator in harassment cases.

Further reading

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¹⁶⁰ For a critique of this case, see RJ Townshend-Smith *Discrimination Law: Text, Cases and Materials* (Cavendish Publishing, 1998), pp 239–240.

¹⁶¹ [1986] IRLR 134, Ct Sess.

¹⁶² [1995] IRLR 4, EAT.

¹⁶³ [1997] IRLR 168, CA.

¹⁶⁴ For detailed coverage of the legal rules, see generally the *Equal Opportunities Review*.

¹⁶⁵ *Reed and Bull Information Systems Ltd v Stedman* [1999] IRLR 299 at 302.

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The Truth and Nothing but the Truth? The Legal Liability of Employers for Employee References

1. INTRODUCTION

... It is a reality of contemporary employment that the use of the reference in the workplace is so common that most employees take it for granted they will be granted one on request and even more significantly prospective employers expect that as a matter of course the employee would provide a reference or give his or her consent to one being obtained from the employer.¹

It is now widely recognised notwithstanding this 'contemporary reality', that where the employer giving the reference fails to provide a fair or accurate reference, through malice, negligence or carelessness, he may face a legal action. This article will deal with all the legal aspects of the provision or non-provision of references for employees or ex-employees by employers. This is an area of concern for both employers (sender and recipient) and employees. The employer giving the reference wants to know the scope of their liability (which can include the issue of disclosure of a reference to employees). The recipient employer needs to know if they have the right to recompense for economic loss arising from reliance on the reference. The subject of the reference needs to know their legal rights in respect of unjust or unfair references and accessing the content of written references. This is undoubtedly an important issue for all the parties that merits detailed consideration. The present note will outline the relevant principles of law in the context of recent case law on the subject.

Until judicial recognition in *Spring v Guardian Assurance plc and others*² of the appropriateness of pursuing a negligence action in these circumstances, the only option for an employee subject to a unjustly poor reference was to pursue an action in tort for defamation against their employer. This option was unpopular because of the evidential obstacles facing the plaintiff in the case.

The House of Lords in *Spring v Guardian Assurance plc and others*³ held that where an employer makes the decision to provide a current or former employee with a reference they are under a duty to that person to take reasonable care in compiling or giving the reference and in verifying the information on which it is based. They also held that where an employer provides a reference to a prospective or future employer he owes a duty of care to that employer in respect of the preparation of that reference. Where a breach of these duties occurs by reason of a negligently prepared reference the reference provider can be liable in damages to that employee or that prospective or future employer for any economic loss they suffer.

¹ N.L. Wallace-Bruce, 'Employers Beware! The Perils of Providing an Employment Reference', *Journal of Business Law* (September 1997) 456-64 at 462.

² [1994] IRLR 460, HL.

³ [1994] IRLR 460, H see Lord Woolf's judgment, pp 476-81.

2. REQUIREMENT TO PROVIDE A REFERENCE?

It is unclear whether in all instances there is a legal obligation to provide a reference. Although many employers provide a reference as a matter of course and may regard themselves as under a moral obligation to do so, it seems that some large employers do not normally provide references.⁴

Where the employer is under a specific legal duty or an implied duty (eg where it is customary practice within an industry or profession) to provide a reference they must do so or face an action brought by their employee for breach of contract. In *Spring* Lord Slynn and Lord Woolf were both of the opinion that it could be appropriate in some cases to imply a term into a contract of employment that the employer will provide the employee with a reference at the request of a prospective employer. This might arise where there is custom within the workplace that references are given and failure to provide one will jeopardise the employee's future employment.

In *Spring* there was a duty on the employer to provide a reference under the LAUTRO rules which governed employment practice within the life insurance industry. Under the scheme of self-regulation administered by LAUTRO⁵ which was highlighted in *Spring* and subsequent cases⁶ it is required that an employer covered by the LAUTRO rules must provide a written reference about employees to other employers covered by the scheme.⁷ Similarly under paragraphs 4 and 6 of the Financial Services Agency guidelines, former employers are required to give references about employees intending to perform a customer function for a new employer where both the former and new employer are FSA regulated. Under these rules while the former employer must respond to a new employer's request there is no obligation on that new employer to make such a request although it could be seen as part of his duty to exercise due diligence.

The right of refusal to provide a reference was qualified in the case of *Coote v Granada Hospitality*.⁸ Here an employer that refused to provide a reference to his employee was found to be acting unlawfully. This non-cooperation was deemed to be victimisation against the employee under section 4(1) of the SDA 1975 because she had during her employment pursued an action against her employer for sex discrimination. What was significant here was that other employees that had asked their employer for references were not treated the same. Despite the fact that discrimination rights were not available after the end of the employment relationship the European Court of Justice ruled that the Sex Discrimination Act 1975 could provide protective rights after employment had ceased in this type of case. The application of the SDA to relationships which have come to an end is clarified by regulation 3 of the Sex Discrimination Act 1975 (Amendment)

⁴ Consignia, one the UK's largest employers, does not give job references although it does provide a record of employment which confirms a person has worked for them for a certain period of time: see 'Jobs and Money', *Guardian* (11.5.02) 22.

⁵ Life Assurance and Unit Trust Regulatory Organisation; its functions are now performed by the Financial Services Authority.

⁶ *Singh v Royal Life Insurance Ltd*, Queen's Bench Division (6.11.00).

⁷ Now called the Personal Investment Authority (PIA) Rules.

⁸ [1999] IRLR 452.

Regulations 2003.⁹ Where a 'relevant relationship' has come to an end it will be unlawful for the 'relevant party' to discriminate so as to subject another party to a detriment or to harass such a party 'where the discrimination or harassment arises out of and is closely connected to that relationship.'

3. NEGLIGENCE ACTIONS

In these actions it is necessary for the claimant to establish a duty of care exists between the parties through proximity of relationship.

A. Duty of Care Owed to Subject

This will be easily satisfied in the case of an employee or ex-employee suing on the basis that the reference was negligently given by his employer under a contract of employment with the result that they suffered a loss arising out of their existing or former contractual tie. In *Kidd v Axa Equity and Law Life Assurance Society*¹⁰ the High Court attempted to summarise the legal rules that apply in this area:

The duty owed by the giver of a reference to the subject of that reference, whether arising in tort or from contract, is a duty to take reasonable care not to give misleading information about him, whether as a result of the unfairly selective provision of information, or by the inclusion of facts and opinions in such a manner as to give rise to a false or mistaken inference in the mind of the reasonable recipient. The giver of the reference owes no additional duty to the subject to take reasonable care to give a full and comprehensive reference, or to include in a reference all material facts.

B. Duty of Care Owed to Recipient Employer

The duty of care owed by the employer providing the reference to the employer relying on it and consequently employing the subject of the reference (recipient employer clearly does not arise under a contractual arrangement between the two employers). It will only be established where, it is foreseeable that the recipient of the reference would rely on the information supplied, their decision to employ someone is materially influenced by the content of the reference and as a result of employing them they suffer an economic loss.

Liability could arise where, in an effort to get rid of a troublesome employee, they provide a reference about him that is misleadingly favourable.¹¹ In *Spring*, Lord Goff of Chievely was doubtful whether an action would lie against the reference provider by the

⁹ Similar provisions are made under the Sexual Orientation Regulations (reg 29) and Race Regulations (inserting section 27A into the Race Relations Act 1976).

¹⁰ [2000] IRLR 301.

¹¹ *Supra* n 1 at 459–60; it is called an overblown reference see *Castledine v Rothwell Engineering Ltd* [1973] IRLR 99.

recipient unless causation could be shown between the provision of the reference and the decision to employ. It will be up to the reference provider to establish that factors other than the reference were relied upon in the recipient employer's decision to engage the services of the subject of the reference. He will find it difficult to maintain that the reference is unimportant where, as is often the case, completion of the selection process cannot be achieved until a satisfactory reference is received by the employer. Where it is an oral rather than a written reference that is given, the recipient employer will face evidential difficulties proving what was said to him about the employee and the recipient employer's success will depend on his ability to convince the court that untrue or misleading statements were made.

Where none of the exceptions identified above apply an employer may still feel morally obliged to provide a reference. Failing this he is in a position to refuse a reference, and may, in the light of recent judgements be inclined to do so.

4. RECENT DECISIONS

In *Legal Assurance Ltd v Kirk*¹² it was decided that if an employer makes an informal statement about an employee that is not relied on by a third party, no liability for negligent misstatement will arise. In this case the employee tried to argue that his employer was liable for negligent misstatement (for asserting that he was indebted to his former employer) even where no reference had been given. This claim was rightly rejected by the Court of Appeal as it was based on conjecture about what the employer might say when asked for a reference.

In *Bartholomew v London Borough of Hackney*¹³ an employer, in providing a reference for a former employee, had informed the Richmond-upon-Thames Social Services Department that at the time of leaving he 'was suspended from work due to a charge of gross misconduct and disciplinary action had commenced'.¹⁴ Mr Bartholomew brought a claim for breach of duty of care on the basis that although the reference was factually correct it was unfair. His appeal against this decision was unsuccessful; however, the Court of Appeal took the opportunity to clarify the law in this area. Essentially employers must not only take care in preparing any statements about their employee in the reference; they must also take care that the holistic impression of the employee from scrutiny of the reference is not unfair or misleading. Also it is acceptable in preparing a reference to err on the side of brevity:

An employer is under a duty of care to provide a reference which is in substance true, accurate and fair. The reference must not give an inaccurate or misleading impression overall, even if the discrete components are factually correct. However the duty of care . . . does not mean that a reference must in every case be full and comprehensive.¹⁵

¹² [2002] IRLR 124 CA.

¹³ [1999] IRLR 246.

¹⁴ At 246.

¹⁵ At 246.

In *Cox v Sun Alliance Life Ltd*¹⁶ Mr Cox was promoted by his employer to the position of manager of an office in Leeds which covered the whole of Yorkshire. Within six months of his appointment it became apparent that he had had a serious rift with his staff and he was suspended. After this it was reported to his employer by a tied agent that he had received improper payments. This allegation was not properly investigated or fully brought to the attention of Mr Cox. An audit investigation of his business dealings revealed no impropriety on his part. He agreed to resign subject to being given a reference mutually drafted in bland terms and which made no mention of the allegations against him. Mr Cox was then dismissed from two jobs he had obtained because his ex-employer had given each of his new employers a reference which stated that he had been suspended pending the outcome of investigations into allegations of dishonesty and that he would have been dismissed had he not chosen to resign. The Court of Appeal held that the employer was in breach of his duty of care and that this was an agreed settlement of termination rather than a dismissal by the employer:

Discharge of the duty to provide an accurate and fair reference will usually involve making reasonable inquiry into the factual basis of the statements in the reference . . . In order to take reasonable care to give a fair and accurate reference an employer should confine unfavourable statement about the employee to those matters into which they have made reasonable investigation and had reasonable grounds for believing to be true.

In *Chief Constable of West Yorkshire Police v Khan*¹⁷ a police officer who had taken a case against his employer for racial discrimination because he had been refused promotion was successful in a claim for victimisation where his employer refused to provide him with a reference. He had treated him less favourably than other employees who normally received a reference on request.¹⁸

In *TSB Bank plc v Harris*¹⁹ an employee, after discovering that the contents of a reference about him was misleading and unfair, claimed constructive dismissal on the basis of breach of the implied term of trust and confidence. The EAT found that the bank were in breach of the implied term because they failed to discuss the complaints included in the reference with Harris prior to their inclusion and they had presented a misleading picture of him which they should have anticipated would have a detrimental impact on his career prospects:

Using the implied term of trust and confidence the EAT approves in this case that employers should provide a fair and reasonable reference, a duty which goes beyond the obligation to take reasonable care to avoid inaccurate statements of fact.²⁰

While none of these decisions have had the impact of *Spring* on this area of law they collectively provide further refinement of the expectations of an employer in preparing

¹⁶ [2001] IRLR 448.

¹⁷ [2001] ICR 1065.

¹⁸ He was awarded £1,500 as compensation for injury to feelings see R. Clement, 'The Art of Comparison', *New Law Journal* (25.1.02).

¹⁹ [2000] IRLR 157. In this case the EAT held that an accurate and truthful reference may not be a reasonable and fair reference.

²⁰ H. Collins, K.D. Ewing and I. McColgan, *Labour Law Text and Materials* (Hart, 2001) 126.

a reference (to provide a reference which is in substance true, accurate and fair), the legal standards (reasonable investigation required before inclusion of facts) that an employee can expect to operate in his or her favour, and the remedies which will be available to them.

5. ACCESSING THE CONTENTS OF A REFERENCE

There are practical difficulties for employees and ex-employees in accessing the contents of a reference where the reference giver refuses to divulge this information. Where an employee is given a testimonial at the point of his leaving his job he will normally be privy to its contents. With regard to the content of references however, employers are under no obligation to provide the information to the subject of the reference. Under schedule 7 of the Data Protection Act 1998 it is stated that employees are not entitled to access any reference given in confidence by the data controller for the purposes of education, training and employment. The employee can ask the new employer to give him a copy of the reference provided to him although he can refuse in a case where showing the reference given by a third party (eg the former employer) would identify that third party. It can be disclosed to the employee, however if the former employer consents or if it is reasonable to disclose without consent.

6. CODE OF PRACTICE COVERING RECRUITMENT AND SELECTION

The Information Commissioner recently issued a code of practice which set out behaviour in respect of recruitment and selection (including giving references) which would be compliant with the Data Protection Act 1998. These recommended courses of action, which were largely drawn from relevant case law, are that employers should ensure that every reference is true, accurate and fair and not misleading. Moreover, they need not be comprehensive. It is also recommended that in order to limit their vicarious liability for managers giving personal references, employers should have clear policies on references, including specifying who is authorised to give references and who has access to them.²¹

7. HUMAN RIGHTS

The issue of human rights has been invoked in complaints involving employee references arguing a breach of convention rights, but so far without success. It seems that there is, firstly, little prospect of a successful challenge under the human rights legislation being brought by the subject of a reference against public authority employers that provide an unfair or inaccurate reference. In *Griffiths v Newport County Borough Council*²² the

²¹ www.dataprotection.gov.uk.

²² [2001] EWCA Civ 1860.

applicant argued that by being the subject of a negligently provided reference by his employer which was inaccurate, misleading and unfair, his security of work and prospects of employment had been removed and that there had therefore been a breach of Article 5 of the European Convention of Human Rights (ECHR). This lays out the right to liberty and security of the person. The Court of Appeal was unconvinced that the applicant's argument was a correct application of Article 5, and went on to state that a breach of the Article could only be established where negligence was proven on the part of employer. The applicant was unsuccessful because the negligence of his employer could not be established. This case therefore does not rule out the possibility that an action brought under Article 5 could be successful if the facts were different.

In *Legal and General Assurance Ltd v Kirk*²³ the appellant claimed unsuccessfully that Article 1 of the Protocol 1 to the ECHR (which entitles every person to the peaceful enjoyment of his possessions) had been breached by his employer. His argument was that his employer had through provision of a negligently prepared reference about him deprived him of a right to trade as a company or appointed representative.

There are three Articles of the Convention that are untested in this context but in the view of this writer clearly have a bearing on this area of law: Article 6, Article 8 and Article 10. It is questionable whether an employer breaches Article 6 by making unfounded or unsubstantiated accusations against an employee or referring to proceedings of an internal dispute procedures that are incomplete in a reference. The question of whether this article covers an internal disputes procedure arose in *Darnell v UK*²⁴ and the Court stated that it must involve a claim or dispute that is genuine, of a serious nature, and includes the determination of civil rights and obligations. The provision of a reference to another that treats an employee in a prejudicial manner is unlikely without more to be contrary to Article 6, unless it arises in the context of disciplinary proceedings, the outcome of which can affect the employee's right to continue in a profession, continued livelihood or ability to trade.²⁵

Under Article 8 every person has the right to the protection of their private and family life, home and correspondence.²⁶ This right might apply where the employer, in giving a reference, provides personal details of his employee (the subject) to a person who was not an agreed recipient. Although in most instances the employee will give his permission for the use of a reference, it is not inconceivable that a reference could be provided without it, in particular where the giving of a reference is an established custom or a part of a self regulatory code operating between employers. The issue of privacy arises here and the

²³ [2002] IRLR 124 CA.

²⁴ Application No 15058/89.

²⁵ *Tehrani v UK Council for Nursing Midwifery and Health Visiting* [2001] IRLR 208.

²⁶ Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings: furthermore, there is no reason of principle to justify excluding activities of a professional or business nature from the notion of 'private life' (see *Niemietz v Germany* judgment of 16 December 1992, Series A, 251-B, pp 33-4, §29, and the *Halford v United Kingdom* judgment of 25 June 1997, Reports 1997-III, pp 1015-16, §§42-6).

following passage summarises the impact of Article 8 on domestic measures in the United Kingdom providing privacy rights for employees (including the subject of a reference):

Article 8 may inform common law duties such as breach of confidence and the implied term of trust and confidence. In the context of unfair dismissal a tribunal should no doubt approach the test of reasonableness in section 98 of the ERA 1996 in the light of Article 8. Most important of all the wide scope of the Data Protection Act 1998 and in particular the requirement . . . that personal data must be processed fairly and lawfully provides a means by which domestic law can give effect to a right of privacy for workers.²⁷

The grounds on which interference with this right can be justified under Article 8(2) are unlikely to protect employers who issue unfair references.

Under Article 10 there is a right to freedom of expression which might appear to offer employers some protection. This freedom consists of a right to hold opinions and to receive and impart information and ideas. These rights are subject to qualification and certain of these qualifications apply to freedom of expression in connection with providing references. Article 10(2) states that:

the exercise of these freedoms . . . may be subject to formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . *for the protection of the reputation or rights of others, for preventing the disclosure of information disclosed in confidence . . .*²⁸

The following restriction on the freedom of expression could refer to the type of views often expressed by an employer about an employee in a written reference:

Where a person makes a factual assertion which is demonstrably false and damages someone it is reasonably easy to justify imposing a penalty or a duty to compensate the victim and refrain from repeating the falsehood, particularly if the speaker failed to take reasonable care to check his or her information.²⁹

8. USE OF EXCLUSION OR LIMITATION CLAUSES

Where an employer decides to give a reference, he/his may try to limit he/his liability by use of disclaimers or exclusion clauses in the contract of employment or in the reference itself.³⁰ These will only be upheld where they are deemed by the courts to comply with the standard of 'reasonableness' as defined in sections 1 and 2 of the Unfair Contract Terms Act 1977.³¹

Under section 1(1)(b) of the Act negligence is defined as breach of any common law duty to take reasonable care and exercise reasonable skill and under section 2(2) it states

²⁷ M. Ford, 'Two Conceptions of Worker Privacy', (2002) 31 ILJ 135-55.

²⁸ The domestic laws to protect privacy mentioned above under Article 8 would apply here.

²⁹ D. Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd edn (Oxford University Press, 2002) 757-8.

³⁰ Possible wording could be 'This reference is given in good faith but without any legal liability on the part of the company or the author of this reference. It is written and accepted on this basis'.

³¹ Sections 16, 21 and Schedule 2 in Scotland.

that in the case of loss or damage a person cannot exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness. Exclusion clauses included in the written document that incorporates the reference passing between the sender and the recipient employers would be covered by the Act. The subject of the reference, as well as being protected from attempts by his employer to unreasonably exclude liability under the law of tort, will also be protected from such action under the terms of the contract of employment.³²

Both the English and Scottish Law Commissions aim to replace two overlapping pieces of legislation, the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations SI 1999/2083, with a single Act written in a much more accessible way and potentially wider in its application. The Commissions aim for a Bill to be put before Parliament in 2004.

9. CONCLUSION

It is becoming increasingly difficult for employers to refuse to provide references to their former employees. It is important that the information provided is clearly given in confidence for reasons of privacy but also because it is a requirement in the Data Protection Act 1998 that before access to the reference for employees is restricted it must represent a communication between the employers given in confidence.

Employers may limit their liability through attaching qualifying statements to the description of their former employee's character and abilities and where these caveats are widely utilised within the reference it could lead to it becoming meaningless, since 'those giving such references can make it clear what are the parameters within which the reference is given, such as stating their limited acquaintance with the individual as to time or as to situation'.³³

Employment law is therefore increasingly encroaching on the format of the reference to ensure that it does not create a false or misleading impression. This does not mean that employers cannot provide unfavourable references where it is reasonable and justifiable to do so. On the other hand they must not provide references which are excessively favourable.

Employers are likely to continue to provide references as a consequence of moral pressures, practice and expectations within particular workplaces (eg financial services) or professions.³⁴ The law looks set to continue to extend the protection of the law to current or former employees. This could arise as a result of developments in the common law (particularly contract and tort) and through enforcement of human rights.

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³² In *Julian Bridgen v American Express Bank Ltd* (14.10.99 QBD) the question of whether an employee was covered by the Act was considered and decided in the affirmative.

³³ Lord Slynn of Hadley in *Spring*, see R.W. Painter and A. Holmes, *Cases and Materials on Employment Law*, 4th edn (Oxford University Press, 2002) 162.

³⁴ The Law Society of England leaves it up to its members to decide whether or not to provide references.

FASHION VICTIMS, DRESS TO CONFORM TO THE NORM, OR ELSE? COMPARATIVE ANALYSIS OF LEGAL PROTECTION AGAINST EMPLOYERS' APPEARANCE CODES IN THE UNITED KINGDOM AND THE UNITED STATES

OLGA HAY* AND SAM MIDDLEMISS**¹

ABSTRACT

An organisation will impose appearance codes on their employees that are designed to ensure that they conform to the prevailing organisational culture and present the correct image of the company to external agents. These codes can adversely affect members of a particular sex, sexual orientation or ethnic group, but often there is no legal remedy for them. This article will involve a critical analyse of the extent of the legal protection available for employees that are adversely affected by employers' appearance standards in the United Kingdom and the United States.

INTRODUCTION

'The semiotics of clothing are of course wide-ranging and go beyond performances of gender and sexuality to include negotiations of class, attitude and aspirations which are played out in the workplace.'² As this quote suggests the issue of controlling employees' standards of dress and grooming at work is a multi-faceted one including important considerations for the organisation and the individual employee.

Employees will often sublimate their normal mode of dress to comply with organisational norms or requirements. While this uneven arrangement will not have far-reaching consequences for most employees, some will find it compromises their sexual identity, religious beliefs or sexual orientation. A managerial prerogative that is generally accepted as being extended to employers under a contract of employment, is the right to lay down rules imposing appearance standards for their employees that control the way their employees are dressed (e.g. clothing) or groomed (hair, jewellery etc.) Whether or not such codes are capable of being included within a contract of employment is often a moot point because judges accept that a legal right exists for employers to introduce and enforce such codes irrespective of their contractual status.

Strictly speaking they are in most situations probably regarded

as the employer's unilateral company rules unless they have been mutually agreed with trade unions or employees prior to their introduction.

Normally unilateral rules of the employer are not contractual and therefore not binding on either party.³ However as the courts in the United Kingdom have generally accepted that employers have the right to enforce appearance standards it will be a brave employee that acts in contravention of them.

Where there is inequality of treatment under appearance codes between different classes of employee, then the dissatisfaction of the recipients of such discriminatory requirements will be substantial and may lead to them pursuing legal action.

'Such rules often impose different requirements on men and women, reflecting current perceptions of conventional appearance.'⁴ Overcoming traditional attitudes as to what is acceptable for each gender in terms of their appearance represents a hurdle that must be overcome before equality of treatment of the sexes will be achieved.

Reasons given by an employer for imposition of dress or grooming codes are that the application of such rules are necessary for operational reasons or they allow the employer to promote a distinct corporate image. Unfortunately their effect is often to impose substantially different burdens on men and woman thus representing a discriminatory requirement.

In this article we will undertake a critical analysis of the legal rules in the United Kingdom and the United States that control employers' imposing restrictive or discriminatory appearance standards on their employees. This will include consideration of the impact of the power relationship involved, the difficulties raised by the relevant case law and the defences available to employers in both jurisdictions e.g. business necessity.

Grooming codes tend to reinforce sexual stereotypes and they make it very difficult for employment decisions to be made without reference to the sex of a person. A stereotype is defined as a: 'widely held but fixed and oversimplified image or idea of a particular type of person or thing'⁵

An example of gender stereotyping would be where an employer does not allow men to wear jewellery because it does not present a masculine image to their customers. Stereotyping is inconsistent with the aim of the equality legislation in both jurisdictions. Some examples of the restrictions imposed on women by employers in furtherance of dress/grooming codes are given below

'Wear skirts of a certain length, or high heeled shoes, to conform to different weight criteria than men, or to wear make-up ... to have sexually alluring figures or to wear sexually provocative clothing, or they may be made to downplay their sexuality'⁶

The right of the employer to set policies concerning dress should not be uncritically accepted by courts and tribunals, since part of the role of the law is to protect the weaker party in an employment relationship where an abuse of power is likely. The reality is that the source of this power and its legal status has never been properly challenged in legal cases.

'There is no doubt that the power to control appearance is widely, though subtly, used in the workplace ... from refusing to employ people whose facial features depart very substantially from the accepted norm of good looks, through to the informal request to wear a shirt instead of a T-shirt'⁷

Strict adherence to standards of smart dress may also adversely impact on employees' productivity and job satisfaction.⁸

LEGAL ASPECTS OF APPEARANCE CODES IN THE UNITED KINGDOM

The leading case dealing with dress codes is *Schmidt v Austicks Bookshops Ltd.*⁹ where female employees who came into contact with the public were not allowed to wear trousers. Instead they were obliged to wear skirts and overalls. Schmidt was dismissed because she refused to wear a skirt. She claimed this represented direct discrimination on the ground of her sex but was unsuccessful.

The Employment Appeal Tribunal held that there was no inequality of treatment as required by s.1 (1)(a) of the Sex Discrimination Act 1975, because there was no comparable restriction that could be applied to men equivalent to a ban on wearing trousers. Moreover, men were not allowed to wear t-shirts and on the evidence it appeared that men would not have been allowed to wear any unconventional clothing. It was felt that there was insufficient evidence to show that choice of clothing at work was not restricted for both sexes. *Schmidt* appears to endorse a 'swings and roundabouts' approach¹⁰ to assessing whether appearance rules are acceptable, typified by the following quote.

'There were in force rules restricting wearing apparel and governing appearance which applied to men and also applied to women although obviously, women and men being different, the rules in the two cases are not the same'¹¹

It is argued in some quarters that where women are forbidden to wear trousers as in *Schmidt* they should have a valid discrimination claim because such a requirement means the treatment of women and men is unequal on two counts.¹² Firstly they are subjected to different requirements, which result in women suffering a detriment, and

secondly only women are denied the opportunity to wear something that is socially acceptable. If the dress code restricted men from wearing skirts, the effect would be far less burdensome because it is unlikely that many men would want to wear them. The restrictive interpretation of the equality aspect of dress codes in *Schmidt* has been followed by Employment Tribunals and Courts in the United Kingdom (cases considered below). However this narrow approach has not been confined to clothing requirements, but extended to cover hair length, jewellery, body piercing, facial hair etc.¹³

In *Schmidt* it is stated that: 'an employer is entitled to a large measure of discretion in controlling the image of his establishment, including the appearance of staff ...'¹⁴

Adherence to the idea of managerial prerogative in this respect was upheld in *Boychuk v H. J. Symons Holdings Ltd*¹⁵ where the Employment Appeal Tribunal agreed with the decision of the Employment Tribunal that it was not unfair to dismiss a worker who refused to remove a badge on her jacket stating 'lesbians ignite'.

In *Burrett v West Birmingham Health Authority*¹⁶ female nurses were required to wear a cap as part of their uniform but male nurses weren't. Ms Burrett claimed that this was a discriminatory requirement and brought a claim for sex discrimination. The Employment Appeal Tribunal followed the reasoning in *Schmidt* and decided that, as the requirement to wear a uniform applied to both male and female nurses, the fact that the uniforms differed and the applicant objected to one part of the uniform, did not amount to less favourable treatment under s.1 (1)(a) of the Sex Discrimination Act 1975.

The Court of Appeal in *Smith v Safeway plc*¹⁷ enthusiastically endorsed the *Schmidt* approach. In a case involving a grooming code. Smith, a male delicatessen assistant, was dismissed when his ponytail grew too long to be hidden under his hat. It contravened the rule for males in his position which specified 'tidy hair not below shirt collar length. No unconventional hairstyles or colouring.' Safeway required all food handlers to wear hats and both sexes were prohibited from having unconventional hairstyles or colour. However women were allowed to clip back shoulder-length hair. He brought a complaint of sex discrimination on the basis that a female employee would not have been dismissed for having long hair. The Court of Appeal held that Smith had not been discriminated against. Lord Justice Gibson stated that an employer would not be acting unlawfully by adopting a code that applies conventional standards to both sexes.¹⁸ Moreover, it was felt that it could not be accepted that changes in society rendered the above reasoning unsound in law.

The reasoning adopted by the Employment Appeal Tribunal at an earlier stage of the case was more sensible. They decided that the

imposition of two different conditions for hair-length for men and women was unnecessary.

'The need to present a conventional appearance at work is already met by the standards laid down as to hairstyle which, in the case of a pony-tail is specifically capable of being treated the same way for both men and women'¹⁹

The issue of hair length and an insistence that an employee cut his hair will not only impact on him at work but also in his private life. The Court of Appeal overturned the EAT decision in favour of the more conventional interpretation of *Schmidt*.²⁰ However, the *Smith* decision does not amount to a rule of law that restrictions on hair length for male employees are never discriminatory.²¹

The grooming policy affected Smith's life inside and outside of work and it seemed unlikely that in a legal regime governed by human rights that such a requirement would 'withstand scrutiny' as being necessary in a democratic society.²² However in a recent case with similar facts to Smith the issue of whether dress codes could represent a breach of human rights under the European Convention of Human Rights was considered and discounted. In *Fuller v Mascercare Service and Distribution EAT/0707/00*, the employer had different rules concerning hair length for men and women. Mr F grew his hair in contravention of a requirement for male employees that his hair should be 'cut conservatively'. He was eventually dismissed when he refused to have it cut. The Employment Tribunal held that neither the imposition of a dress code or his dismissal was discrimination on ground of his sex.²³ They were also of the opinion that even if the European Human Rights Convention had been incorporated into UK law at the time of the hearing there would not have been a breach by the employer of Article 8 of the Convention, *the right to respect for private and family life, the home and correspondence*, and the *right to freedom of expression* under Article 10.

The Employment Appeal Tribunal upheld the tribunal's decision, but chose not to address the human rights issue. We shall return to the Human Rights aspect and this case later in the article although it seems safe to conclude at this stage that it was wrongly decided.²⁴

The more recent case of *Cootes v John Lewis plc*²⁵ illustrates that the *Schmidt* approach is still being followed. The EAT upheld the Employment Tribunal's finding that it was not unlawful sex discrimination to require a female selling partner to wear a uniform. Ms Cootes was given notice that in accordance with dress regulations incorporated into her contract of employment she was obliged to wear the standard business dress for a female selling partner, which was a blue suit and a green blouse. She claimed that male selling partners were only required to wear a dark business suit, shirt and tie

which gave them a more senior appearance and that the uniform requirement placed on her amounted to sex discrimination. Her claim failed and the Employment Appeal Tribunal stated that 'different treatment is not necessarily less favourable treatment'.

The above are examples of cases where tribunals have decided that rules governing the appearance of employees are not discriminatory on grounds of sex, however in the interest of balance it is necessary to mention the few cases where actions for discrimination have been successful.

SUCCESSFUL SEX DISCRIMINATION/DRESS CODE CASES

In *McConomy v Croft Inns Ltd*²⁶ it was unlawful discrimination for a public house to refuse to serve a man wearing earrings, where there was no such objection to serving women wearing earrings. Although not an employment law case, it was accepted that there should be equality of treatment between men and women in respect of grooming codes in today's society.

'In today's conditions it is not possible to say that the circumstances are different as between men and women as regards the wearing of personal jewellery or other items of personal adornment'.²⁷

In *Hutcheson v Graham & Morton Ltd*²⁸ a senior female employee was required to wear a nylon overall whilst men wore lounge suits. She successfully argued that being forced to wear a uniform subjected her to a detriment under the Sex Discrimination Act 1975. The tribunal held that the detriment was that the uniform was uncomfortable and indicated a lower status than a male employee.²⁹

The approach in *Schmidt* was not followed in *Rewcastle v Safeway plc*.³⁰ where female employees were required to tie back shoulder-length hair whilst men were required to keep their hair short and well groomed. *Rewcastle* refused to cut his hair and was dismissed.

The tribunal acknowledged the right of employers to set standards of dress and appearance, however, they questioned whether a policy which mirrors conventional differences between the sexes could be in harmony with the underlying logic of the Sex Discrimination Act 1975.³¹

More recently, in *Owen v The Professional Golf Association*³² it was held that dress codes forbidding women to wear trousers to work was discriminatory. The tribunal distinguished this case from *Schmidt*, because the latter involved clear dress codes whereas *Owen* had resigned after being ordered home to change from a trouser suit into a skirt. The tribunal felt that if *Owen's* manager, Mr Paton, had taken the opportunity to consider *Owen's* trouser suit, he would have accepted that it complied with the PGA policy which said clothes

should be 'on the conservative side of conventional business dress'. The instruction of the supervisor telling her to go home became a special and arbitrary ruling which only restricted females. In the eyes of the Employment Tribunal it was impossible to say that Owen had not been disadvantaged by the lack of choice. The manager's instruction amounted to less favourable treatment on the ground of sex.

Unfortunately while these cases are interesting departures from the principles in *Schmidt* and *Smith*, they are not binding on tribunals and the EAT and while they illustrate a more enlightened approach to this issue they are unlikely to be followed in future cases.

SEXUALLY PROVOCATIVE CLOTHING

In the United States in *EEOC v Sage Realty Corp.*³³ the courts held that where an employer applies a sexually provocative dress requirement (e.g. it is made a condition of employment that a woman wears a revealing uniform or costume) that he knows, or reasonably expects, will lead to sexual harassment of those female employees then this amounts to sex discrimination. In this case a lobby attendant was required to wear a sexually provocative uniform and was consequently sexually harassed by customers of her employer. She brought a successful claim for sex discrimination.

There have been no comparable cases reported in the UK although this type of behaviour would undoubtedly be treated as a detriment to women and contrary to section 6(2)(c) of Sex Discrimination Act and fall within the definition of sexual harassment in the 'European Commission Recommendation No.92/131/EEC on the Protection of the Dignity of Women and Men at Work',³⁴ since this definition is broad enough to cover sexually provocative dress codes.

Although there does not appear to be a UK equivalent of *Sage Realty* where a dress code led to sexual harassment, it is worth mentioning the case of *Driskel v Peninsula Business Services Ltd & OR.*³⁵ Ms Driskel was told by her head of department that she better attend her promotion interview in a short skirt and see-through blouse, showing plenty of cleavage in order to persuade him to promote her. She was successful in her sex discrimination case against her employer on appeal. It was held that she had been unlawfully discriminated on grounds of her sex. The EAT decided it was irrelevant that his remark was 'flippant' and that he never expected her to do those things. What was relevant was that his remarks had undermined her.

It is likely that the UK courts would probably follow the approach of the EAT in *Driskel*, where a woman was subjected to

sexual harassment because she was required to wear sexually provocative clothing at work

TRANSSEXUALS AND TRANSVESTITES

Transsexualism is concerned with sexual identity. A transsexual is anatomically of one sex but believes they belong to the other sex³⁶ and thus tends to dress up as the opposite sex. This can generate a 'panicked defence' from management resulting in harsh decisions being made against the employee.³⁷ Transsexuals are now protected against the discriminatory acts of the employer by section 2A of the Sex Discrimination Act 1975.³⁸

A transvestite on the other hand is a person who obtains gratification from wearing the clothes of the opposite sex. Grooming codes are important here since a transvestite may wish to wear clothes to work that are deemed inappropriate by society. The Court of Appeal's decision in *Smith* was followed in *Kara v London Borough of Hackney*.³⁹ The EAT held that Kara, a male transvestite, was not discriminated against when his employers banned him from wearing women's clothes at work. It was concluded that the employers were lawful in requiring Kara to dress as a man whilst at work. The claim was dismissed on the grounds that the council reasonably and genuinely believed Kara's clothes were in breach of their clothing policy.

Kara went on to complain to the European Commission that his rights under Article 8(1) and 10(1) of the European Convention had been violated. The outcome of this appeal will be discussed in detail below.

RACIAL DISCRIMINATION AND DRESS CODES

Dress codes could run contrary to religious beliefs of various racial groups or cultural norms of ethnic groups. In *Mandla and Anor v Lee and Park Grove School*⁴⁰ the meaning of racial grounds (as defined by s.3 of the Race Relations Act 1976) was considered and it was held that Sikhs were a racial group by reference to their ethnic origins. In this case the applicant, a schoolboy, was compelled to wear a turban because of his religion, but he was denied this right by his school and the House of Lords ruled that forbidding the wearing of turbans could amount to indirect sex discrimination against Sikhs under s.1 (1)(b). They held that if 'can comply' is literally construed, then anybody could refrain from wearing a turban. However, in the context of s.1 (1)(b)(i) the phrase has a broader meaning and does not simply mean they can 'physically' comply but that they 'can consistently with the customs and cultural conditions of the racial group'

comply with a requirement or condition. Although *Mandla* is not an employment law case it does have some application to employment law. The House of Lords held that a rule forbidding the wearing of turbans could amount to indirect sex discrimination against Sikhs under s.1(1)(b) and this could extend to employers forbidding the wearing of turbans in the workplace. Most problems arise for applicants in race discrimination cases where the employer argues that the condition imposed was justifiable. In *Malik v British Home Stores*⁴¹ shop assistants were required to wear a uniform consisting of a skirt and overall. Malik, a Muslim woman, was turned down for a job because British Home Stores would not consent to her request to wear trousers and she successfully claimed indirect discrimination. The tribunal rejected the employer's claim that the requirement was justified on the grounds that sales staff must wear a neat and tidy uniform in order to present a good image to customers. It was felt that the detriment to Muslims far outweighed this commercial necessity.⁴²

Sikhs wearing turbans are excused from any legal requirement to wear safety helmets on a construction site under the Employment Act 1989.⁴³ As part of their religion Sikhs are often required to have a beard. In *Panesar v Nestle Co Ltd*⁴⁴ an orthodox Sikh applied for a job as a machine fitter. The employer had a long-standing rule that no beards were allowed in the chocolate-making section. Mr Panesar refused to shave and was subsequently refused a job interview. Having heard expert evidence on the possible health hazards of beards, it was held that the rule had only been introduced in the interests of hygiene.⁴⁵ Although indirectly discriminatory against Sikhs the requirement was justifiable on the grounds of hygiene and his appeal was unsuccessful.⁴⁶

In *Kingston and Richmond Health Authority v Kaur*⁴⁷ it was disputed whether a policy forbidding nurses to wear trousers as part of their uniform was justifiable. A Sikh woman was unable to comply with the policy and was refused a place on nurses' training course. It was held that although the Health Authority's requirement was reasonably necessary, they could easily have accommodated Ms Kaur's need to wear trousers and the policy could not be justified. The Area Health Authority successfully appealed. The EAT held that the refusal of the employer to allow Ms Kaur to wear trousers was justifiable because it complied with a prohibition by the General Nursing Council.⁴⁸

SUMMARY OF THE UK POSITION

Until recently employers have had nothing to fear from applying appearance standards to their employees even when the rules were

different for employees of each sex or impacted more seriously on one group of workers than another. The areas where some restriction is placed on employers is where codes interfere with religious beliefs or cultural norms, dress requirements that represent or are likely to lead to sexual harassment, or codes that restrict the rights of transsexuals. In these situations dress or grooming codes could be deemed contrary to the provisions in the Sex Discrimination Act 1975 or the Race Relations Act 1976.

There is a judicial view that the restrictive application of equality law to dress codes is wrong (best seen in some sex discrimination cases) and that in an era of full equality and human rights, differentiation between sexes, racial groups etc in this respect is inappropriate and unfair.

Although the impact of human rights legislation and European Community law in this area has been touched on it will be more fully considered below. Before this it is important to analyse the extent of legal protection for victims of dress/grooming codes in the United States.

A recent case involving a dress code that required men but not women to wear collar and tie is noteworthy. It is the first case in the United Kingdom, where an employment tribunal accepted that dress codes requiring different treatment in employment are discriminatory. Matthew Thompson, a clerical worker from Stockport won his sex discrimination case against a rule requiring him to wear a collar and tie.⁴⁹ He complained that the Jobcentre required men to dress formally even if they did not come into contact with the public, whereas this requirement did not apply to women, who were free to wear t-shirts. However, this decision has now gone on appeal to the Employment Appeal Tribunal and there is a possibility that it could be overturned.⁵⁰

LEGAL PROTECTION AGAINST EMPLOYER'S DRESS CODES IN THE UNITED STATES

While no explicit reference is made to workplace grooming policies in US equality laws, they are often deemed to be included in the terms and conditions of employment and thus can fall within the types of discrimination prohibited by Title VII 42 as amended by USCA Section 2000e-2(a).⁵¹ The only exception to the above would be where race, colour, religion, sex or national origin and associated appearance standards are a bona fide occupational qualification⁵² which is necessary for the operation of the employer's business.⁵³

The courts in the United States take a similar view to their UK

counterparts in that both treat dress or grooming codes as a managerial prerogative that they are reluctant to interfere with.

In *Fagan v National Cash Register Company*⁵⁴ it was noted by the Federal Court of Appeals that: 'Perhaps no facet of business life is more important than a company's place in the public estimation. That the image created by its employees dealing with the public when on company assignment affects its relations is so well known that we take judicial notice of an employer's proper desire to achieve favourable acceptance'

In *Fagan* the judges were categorical that the employer's public image was paramount and any measures taken to maintain that image such as dress codes would be justifiable.

SEX DISCRIMINATION

Ultimately workplace appearance standards will only amount to unlawful discrimination if one sex is less favourably treated than another because of their sex.

In the early 1970s the US District Courts were more supportive than they are today of male employees subjected to different hair length requirements from female employees.⁵⁵

In *Donoghue v Shoe Corporation of America Inc.*⁵⁶ a requirement that males have short hair was prima facie a violation of Section 703. Similarly in *Laffey v Northwest Airlines Inc.*⁵⁷ impositions of different grooming standards for women amounted to sex discrimination, since female cabin attendants (unlike male attendants) were not allowed to wear spectacles and were subjected to a maximum weight requirement.

In *Carroll v Talman Federal Savings and Loan Association of Chicago*⁵⁸ the Federal Court of Appeals held that Title VII had been breached: '... Disparate treatment is demeaning to women. While there is nothing offensive about uniforms per se, when some employees are uniformed and others not there is a natural tendency to assume that the uniformed women have a lesser professional status than their male colleagues attired in normal business clothes'⁵⁹ However, Judge Pell complained that the decision meant that: 'Big Brother or perhaps in this case, Big Sister has encroached ... farther than the Congress intended or authorised into the domain of private enterprises ... simply to respond to the emotional complaint of one disgruntled employee'.⁶⁰ In *Michigan Department of Civil Rights ex rel. Cornell v Edward A. Sparrow Hospital Association*⁶¹ it was held that an employer's dress code was based on sexual stereotyping and amounted to sex discrimination.

Despite the decisions outlined above, most challenges to groom-

ing policies have been unsuccessful. *Willingham v Macon Telegraph Publishing Company*⁶² appears to be the US equivalent of the *Schmidt* case. In this case Willingham filed a complaint asserting sex discrimination by Macon in its hiring policy. He was refused employment because they disliked the length of his hair.⁶³ Their grooming policy required all employees who were in contact with the public to be neatly dressed and groomed in accordance with community standards. Willingham claimed that if he were a female with identical hair length and similar qualifications he would have been hired. It was held that the employer's grooming policy constituted discrimination on grounds of grooming standards and not on the grounds of sex, which meant his claim was outwith the scope of the 1964 Act.⁶⁴ Moreover, if an employee objects to the grooming code they have the right to reject it by looking elsewhere for work or alternatively they could compromise their preference by accepting the code that comes with the job.⁶⁵ The court's decision in this case while in line with previous authority⁶⁶ was not without its critics.

The four dissenting judges in *Willingham*⁶⁷ disagreed with the majority decision of the Court of Appeals that the 1964 Act does not apply to grooming codes. They argued that anti-discrimination law: 'extends to all differences in the treatment of men and women resulting from sex stereotypes... (the law) does not permit one standard for men and another for women, where both are similarly situated'.⁶⁸

In *Dodge v Giant Food Inc.*⁶⁹ it was decided that hair policies: 'are classifications by sex... which do not represent any attempt by the employer to prevent the employment of a particular sex, and which do not pose distinct employment disadvantages for one sex.

Neither sex is elevated by these regulations to an appreciably higher occupational level than the other'⁷⁰ It cannot be denied that the number of men who have lost such claims in the United States is high. In *Page Airways of Albany, Inc. v New York State Division of Human Rights*⁷¹ it was held that hair regulations which required men to cut their hair, did not discriminate or classify within the meaning of Human Rights Law. In *Knott v Missouri Pacific Railroad Company*⁷² the Court of Appeal decided that a grooming policy requiring men to have short hair did not violate Title VII of the Civil Rights Act because it was never intended that this legislation would interfere with the 'promulgation' or 'enforcement' of personal appearance regulations by private employers.⁷³

The justifications put forward by the judiciary in these early cases for excluding grooming codes from coverage of the Civil Rights Act 1964 were interesting because of their diversity but otherwise fairly tenuous.

Aside from hair length, the biological differences inherent in

males and females can cause additional problems. Most cases show that courts in the United States believe that 'no-beard' policies do not amount to sex discrimination.⁷⁴ In *Rafford v Randle Eastern Ambulance Service*⁷⁵ the principal reason for termination of the plaintiff's employment was his beard and moustache and not the length of his hair. It was decided that this behaviour did not violate the 1964 Act.⁷⁶ They had not been discriminated against because of their sex but because only men could be discharged because of an unwanted beard.⁷⁷ There is more chance of a claim being successful where wearing a beard is required as part of the employee's religious beliefs (considered below). Federal Express have, following legal actions against them by certain of their Rastafarian and Muslim employees, agreed to amend their personal appearance policy to allow employees with sincerely held religious beliefs to wear a beard.

SEXUALLY PROVOCATIVE DRESS REQUIREMENT

Deakin & Morris⁷⁸ state that the reciprocal duty of co-operation means that an employer will violate Title VII by implementing a policy that clearly oppresses an individual's dignity.

In *Marentette v Michigan Host Inc.*⁷⁹ the court recognised that requiring an employee to wear sexually provocative clothing which leads to them experiencing sexual harassment could violate the spirit of Title VII. It is useful to remind oneself of what constitutes sexual harassment in the US:⁸⁰ *unwelcome sexual advances, requests for sexual favors other verbal/physical conduct of a sexual nature in three situations*⁸¹ The nature of the job in question will play a part in determining whether sexual harassment is unlawful.⁸²

Thus a topless dancer may be expected to tolerate more sexual advances and unwanted verbal comments from customers than a woman who is a receptionist, without considering herself discriminated against. Perhaps the most cited case in this area is *EEOC v Sage Realty Corporation*⁸³ where a female lobby attendant was sexually harassed as a result of customer reaction to her uniform. The US District Court found there had been sex discrimination because it was unreasonable for her to tolerate such treatment and the employer's knew the 'Bicentennial Uniform' would expose her to sexual harassment due to its revealing nature. Moreover, the employee raised two important issues. The first was that the uniform was entirely inappropriate and incompatible with the nature of her job. She was to be responsible for security, safety, maintenance and information functions of the office building. Secondly, she said the uniform misrepresented her duties by making her look like a sex object. *Sprogis v United Air Lines*⁸⁴ was referred to; where it was stated that many

years ago an employer could conduct himself in such a way that women were treated as sex objects, however, those days are long gone. In *Sage* it was decided that Title VII was: '*intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotyping*'.⁸⁵ Male employees would not have been required to wear such a uniform thus there was no question that Hassleman was only required to wear the uniform because of her sex. The uniform was made a term and condition of employment and by firing her for refusing to wear the outfit, her employers violated Section 703(a) of the 1964 Act⁸⁶.

TRANSSEXUALS AND TRANSVESTITES

The relevant caselaw indicates that transsexuals in the US, unlike their UK counterparts, have little protection from discrimination under Title VII and are likely to be unsuccessful in such claims. In *Grossman v Bernards Township Board of Education*⁸⁷ the US District Court categorically conformed this and stated it: 'has no desire, to engage in the resolution of a dispute as to the plaintiff's present sex. Rather we assume... the plaintiff is a member of the female gender... she was discharged by the defendant school board not because of her status as a female, but rather because of her change in sex'.⁸⁸

The employee had no claim under Title VII since the court felt that there was no evidence of any congressional intent to include transsexuals within the ambit of equality legislation.

Three US Court of Appeal decisions are often cited in this area and they follow the reasoning in *Grossman*.⁸⁹ In *Holloway v Arthur Anderson & Company*⁹⁰ there was no unlawful discrimination when an employee was dismissed for commencing sex-change treatment because Congress only had the 'traditional notions of sex' in mind when enacting Title VII. Despite their restrictive interpretation of Title VII in respect of transsexuals the US Court of Appeal in *Holloway* did concede the legislation could offer limited protection:

'consistent with the determination of this court, transsexuals claiming discrimination because of their sex, would clearly state a cause of action under Title VII'⁹¹

They accepted that transsexuals could have a valid claim of sex discrimination where they can prove they have been less favourably treated as a result of their sex and not their transsexualism. In such a case they will be afforded the same protection under equality law as any other person of the same sex that is a victim of discriminatory treatment (see *Enriquez* case below).

The position of persons who are dismissed for displaying characteristics that are associated with the opposite sex must now be assessed. A man could argue that if he belonged to the opposite sex he would not have been dismissed since it would have been socially acceptable to adopt the social role he is being penalised for adopting. It is unlikely that an employer would be able to establish that dressing like a woman or having feminine tendencies affect's a male employee's ability to perform his contractual duties.⁹² Despite this, in the case of *Smith v Liberty Mutual Assurance Company*⁹³ the Court of Appeals held that Title VII had not been violated when a homosexual employee was dismissed for being 'effeminate'. It was stated that the 1964 Act does not forbid discrimination based on sexual preference. Moreover, it was averred that Smith was not discriminated against because he was male but because his characteristics were associated with females. Thus owing to his display of 'sexual aberration' he was justly refused employment.⁹⁴

In *Gay Law Students Association v Pacific Telephone & Telephone Company*⁹⁵ it was held that a public utility's management could not automatically exclude homosexuals from consideration for employment, however, they were not denied the authority to exercise legitimate discretion in such decisions.

All of these early decisions were flawed in their reasoning. It could be convincingly argued that just because discrimination in dress or grooming codes is not mentioned in the legislation it does not mean that they should not be brought within its ambit.⁹⁶ The legislators would have specifically included this behaviour within the ambit of equality legislation had they thought of it and it should be interpreted as if they had included it. Legal protection against sexual harassment has been provided by the US courts on the same basis.

In *Price Waterhouse v Hopkins*⁹⁷ the plaintiff was denied appointment as a partner because her manner, speech, dress and physical appearance etc. were not feminine enough.

The Supreme Court ruled that Title VII protects employees against discrimination for failing to comply with gender role expectations. It could be argued that a reasonable extrapolation of this decision is that employers cannot discriminate against employees that maintain an outward appearance that is inconsistent with their anatomical sex. Unfortunately the courts have not chosen to utilise the decision in *Price Waterhouse* as the basis for affording protection to transsexuals.

State Governments are generally more generous in affording protection to employees than Federal Authorities. Some State laws extend similar protection against classic forms of discrimination to that provided by Federal Acts to employees while other statutes provide protection to groups not covered by the Federal Acts e.g. Cali-

fornian statute to prevent discrimination based on sexual orientation, *Californian labour code 1102.1*.

Many States now provide protection against discrimination because of an employee's sexual orientation (California, New Jersey, Connecticut, Hawaii, Massachusetts, Minnesota, Wisconsin, New York and the District of Columbia) and individual States provide protection against discrimination on the ground of being a transsexual or cross-dressing (Rhode Island, Connecticut, Minnesota and in California shortly) personal appearance (District of Columbia) and height and weight (Michigan).

In the case of *Enriquez v West Jersey Health Systems*⁹⁸ a doctor was dismissed when he underwent treatment for gender reassignment and his appearance gradually changed to that of a woman. When he refused a request by the West Jersey Health Systems to change his appearance back he was dismissed. A New Jersey Court accepted his argument that forcing men to act like men and women to act like women constituted gender discrimination. They also held that discrimination against transsexuals could constitute illegal disability discrimination under New Jersey law.⁹⁹

In the absence of Federal laws protecting against discrimination on grounds of sexual orientation and transsexual behaviour it will be left to the courts to broadly interpret relevant State legislation (where it exists) to ensure employment rights are available to those category of employees.

Obviously as long as dress or grooming codes are being upheld by the courts as non-discriminatory on the basis that they are gender neutral or required in the interests of business necessity, it will be difficult for transvestites and transsexuals to obtain any protection against discrimination because they tend to wear clothes etc. that present an outward appearance that is inconsistent with their anatomical sex and are contrary to organisational norms.

RACE, RELIGION AND GROOMING CODES

Grooming codes can have a discriminatory impact on individuals that have specific appearance requirements as a consequence of their race or religion. An employee suffering a detriment because they are obliged to flout their racial or religious rules could bring a case against their employer under Title VII and claim their rights have been breached under the Federal Constitution.¹⁰⁰

With respect to hair requirements in grooming codes these can have a discriminatory effect on the ground of race and be contrary to Title VII. In *EEOC Decisions No.71-1985* the EEOC found reasonable cause to believe that an employer's hair policy violated Title 42 U.S.C.A. Section 2000e-2(a), since it banned hair that was 'cut

bushy' and the court felt African-Americans were being measured against a grooming standard that assumed Caucasian hair characteristics. Furthermore, it was found that the employer was not applying his policy uniformly.

In *EEOC Decisions No.72-0979*¹⁰¹ the EEOC held that prohibiting bushy hair styles (Afros) discriminated against African-Americans of both sexes. The grooming policy also banned various moustaches, which were common amongst Black males and were thought to be an expression of their heritage and culture. However, in *Rogers v American Airlines, Inc.*¹⁰² a Black employee failed to prove that a 'corn-row' hairstyle was exclusive to black people.

In relation to facial hair, the majority of cases are decided in favour of the employers, especially if their business requires a high standard of hygiene and safety.

Policies prohibiting beards for safety reasons do not usually violate Title VII as long as they are not used as an excuse to reject Black applicants.¹⁰³ There are cases where Black employees have won their case, like in *Johnson v Memphis Police Department*¹⁰⁴ where a grooming policy requiring all officers to be clean-shaven violated Title VII because employers made no effort to accommodate a black officer who suffered from folliculitis which prevented him from shaving.¹⁰⁵

In *EEOC v Sambo's of Georgia, Inc.*¹⁰⁶ a grooming policy banned restaurant managers and personnel from having facial hair. Employers however, are not free from all liability when setting grooming policies. A Jewish employee won his case when it was held that the employer failed to show neutral or valid reasons (health or safety) for the 'no-beard' policy other than the excuse that it was 'tradition'.¹⁰⁷

The US District Court in Atlanta recently ruled that a no-beard rule for employees in contact with customers violated an employee's religious beliefs. Khaleed Abdul Azeez had asked for an exemption from the rule because of his Islamic beliefs. Federal Express Corp was found to have violated Title VII.¹⁰⁸ A rule set down by the military that originally required (and later strongly recommended) female personnel serving in Saudi Arabia when off duty to wear local dress in the form of a 'abaya' was prohibited by the US Legislature. This move followed a lawsuit by America's highest-ranking female pilot Colonel Martha McSally claiming the requirement violated her Christian sensitivities and her constitutional rights as a woman.¹⁰⁹

SUMMARY OF THE US POSITION

In the United States the courts have supported the legitimacy of employer's codes regulating the appearance of employees in all but

the most extreme cases. With respect to arguments of inequality on grounds of sex, race etc. it will only be treated as discrimination where the restrictions are unjustified and there are no similar restrictions on the chosen comparator. Where there are restrictions that apply to both sexes, races etc then no matter how different the dress codes are this will be treated as a gender neutral requirement and therefore not contrary to Title VII. The employer can often easily establish that the code is necessary to maintain the image of the business.

Areas where dress or grooming codes are treated as unlawful is where they lead to the employee being sexually harassed, under Federal law where they have an adverse impact on transsexual employees who are discriminated against because of their sex (and not because they are a transsexual) and where appropriate employees have a claim for discrimination on the basis of sexual orientation or being a transsexual under State law. Increasingly where a code interferes with employees' racial or religious beliefs the courts are willing to treat this as a breach of Title VII.

The case of *The People v Santorelli*¹¹⁰ which is not an employment law case, is noteworthy because the Court underlines the fact that traditional stereotypes work against the interests of equality law. The New York Court of Appeals were asked to apply a provision of the penal code that made it an offence for women to expose their nipples in public. The women were arrested for appearing topless in a public park and argued that the provision was contrary to the equality guarantee in the Constitution. Their argument was successful and on appeal it was held that:

'One of the most important purposes to be served by the Equal Protection Clause is to ensure that 'public sensibilities' grounded in prejudice and unexamined stereotypes do not become enshrined as part of the official policy of government. Thus where 'public sensibilities' constitute the justification for gender-based classification, the fundamental question is whether the particular 'sensitivity' to be protected is, in fact, a reflection of archaic prejudice or a manifestation of a legitimate Government objective'¹¹¹

Flynn comments that *Santorelli* makes more demands in support of equality than most employment law cases.¹¹² One would expect that because of today's diverse social conditions, any difference of treatment based on sex, sexual orientation, race or religion would not be tolerated. However, as can be seen there is a need for further reform either in the form of statutory intervention or judicial creativity before such an egregious environment can be created in the United States.

COMPARATIVE ASPECTS

In both jurisdictions there must be 'less favourable treatment', for discrimination to occur and this usually requires a comparison of like with like.¹¹³ In *R v Birmingham CC, ex p. EOC*¹¹⁴ it was stated that less favourable treatment includes denial of an option which is valued by the employee. Unfortunately because of the 'swings and roundabouts' or gender neutral arguments there is difficulty in showing that there is inequality of treatment.

The legal approach to this issue adopted by the Employment Appeal Tribunal in the first stage of appeal in the case of *Smith v Safeway Stores* was in our opinion an appropriate one.

Firstly it was asked whether Smith had been treated differently 'but for' his sex? He was because if he were a woman he could have tied his hair back. Secondly, it was asked whether this amounts to less favourable treatment for the purposes of the Act? It did amount to less favourable treatment in Smith because he was dismissed when he refused to cut his hair. Thirdly, it must be determined whether he was less favourably treated on the grounds of his sex? The majority of the EAT felt that he was because women could pin up their hair rather than have to cut it. It is submitted that this approach is an appropriate means of deciding on the unlawfulness of dress codes in discrimination cases. Unfortunately there is little scope for challenging managerial discretion to operate dress codes and female employees would have difficulty in convincing the judiciary of the unreasonableness of enforcing such a code because it is contrary to the spirit and the word of equality legislation.

The UK and US courts use a 'comparative model' when dealing with discrimination cases which on the face of it is fair and objective but in reality in some cases produces biased and unfair results from an employee's perspective.¹¹⁵ The comparative model centres on: 'less favourable treatment as opposed to purely unfavourable treatment'.¹¹⁶ The imposition of dress or grooming codes on employees is a good case in point.

It has become apparent that the main difference between the UK and US is the lengths the courts will go to test the validity of the business necessity defence. This defence is more developed in the US. Once discrimination has been established under Title VII it is open to the employer to establish the defence. The central difference between the two jurisdictions is that unlike the courts in the UK, the US courts investigate such claims of business necessity rather than simply accepting them.¹¹⁷ Accordingly, the US courts give the impression of being more open and unbiased because they accept

contrary evidence and give equal attention to the arguments of both employee and employer. In effect they treat the discriminatory effect as seriously as the business need for it.

In *Diaz v Pan American World Airways Inc.*¹¹⁸ it was held that the: 'primary function of an airline is to transport passengers safely from one point to another'¹¹⁹

Accordingly, this function did not require a pleasant environment, enhanced by the obvious cosmetic effect that female stewardesses provide. This was particularly significant because it helped reduce discriminatory dress policies for women in the airline industry. *Diaz* was applied in *Bradley v Pizzaco of Nebraska Inc. & Domino's Pizza Inc*¹²⁰ where a requirement to be clean-shaven led to PFB sufferers claiming race discrimination.¹²¹ The employer maintained that the better the employees looked, the better their sales would be. This view was based on a public opinion survey that showed that up to 20 percent of those surveyed would react negatively to bearded deliverymen. Despite the fact this argument was supported by the results of primary research, the business necessity defence failed.

In addition, in referring to *Diaz*, it was said that bearded employees have no effect on the company's ability to make or deliver pizzas.¹²² However, a limitation of this decision is that the EEOC in this case sought an exemption from the no-beard policy for African-Americans. Although the employer granted this it was not extended to cover other male employees.

The limitation of the application of the business necessity defence in *Diaz* to purposes that are related to the primary function of the organisation is a development that could usefully be emulated by Employment Tribunals and courts in the UK.

In relation to health and safety matters, both the US and UK will usually accept the business necessity defence in this context because for example to allow beards or loose hair is a safety hazard and will not be tolerated.¹²³ In *EEOC Decisions No.72-0701*¹²⁴ it was decided that there was no violation of Title VII when an employee who handled hot lead was discharged after refusing to correct the safety hazard his long hair represented. It is important to note that he was given the option by the employer of cutting his hair or wearing a hairnet.

In the case of *Grieg v Community Industry*¹²⁵ in the UK it was held by the EAT that employers could not justify their discriminatory behaviour on the basis that it was done in the interests of business or with a good motive.¹²⁶ Similar reasoning has been adopted in later cases¹²⁷ but this approach does not appear to have been utilised in dress code cases in the UK since employers have been successfully using such a defence.¹²⁸

THE EUROPEAN DIMENSION

The Human Rights Act 1998, hereafter referred to as HRA, came into effect in England and Wales in October 2000. It incorporates certain rights and liberties guaranteed by the European Convention on Human Rights, hereafter referred to as ECHR, into national law, thus enabling Convention rights to be relied upon in domestic courts and tribunals. Section 3(1) of the HRA states that all legislation must be interpreted and given effect 'so far as it is possible to do so' to bring it in line with the ECHR. However, a court may issue a declaration under Section 4 if the relevant statute is incompatible with Convention rights. Furthermore, the HRA only allows challenges to be made to the actions of public authorities. Section 6 states that a 'public authority' will include bodies undertaking functions of a public nature and in addition, privatised prisons or utilities which have 'mixed functions' are covered.

The European Court of Human Rights was established in 1958 and its role is to ensure that domestic courts uphold the ECHR. The significance of the European Court of Human Rights is undeniable and it has been ranked as one of the three premier courts of 'international adjudication'.¹²⁹ Moreover, domestic courts and tribunals must take account of 'relevant judgements, decisions, declarations and opinions made by the European Commission and Court of Human Rights and the Committee of Ministers of the Council of Europe' when interpreting and developing their common law.

It could be argued that the Convention rights impact on the legality of workplace appearance standards in that such standards may amount to an interference with an individual's right to a private life or freedom of expression.

Each qualified right under the Convention under Articles 8, 9, 10 and 11 all follow the same format and assert a right whilst detailing the circumstances when interference is justifiable. It is essential that a restriction complies with three conditions. It must be in accordance with national law; seek a legitimate aim as specified in the Article; and the interference must be 'necessary in a democratic society'. This third condition is important, since it allows employers to justify the application of dress codes. In *Deakin & Morris*¹³⁰ it is stated that the term 'necessary' requires the existence of a 'pressing social need', 'interference' must be 'proportionate to the legitimate aim pursued' and that reasons given as evidence by domestic authorities must be 'relevant and sufficient'. Thus an employer will find it difficult to establish a 'pressing social need' if the restriction is only based on their personal whim or where it is not uniformly applied across the organisation. That said, managers are usually allowed some discretion when determining whether the interference is 'necessary'.

The concept of freedom of expression and how people dress is linked to this third condition in that 'democracy should be sufficiently robust to be able to cope with a certain level of dissent and disagreement. Hence, if these rights are to be interfered with, that interference must be necessary in a democratically minded society, and not an authoritarian one. The onus is on society to tolerate the freedom in question unless it can be shown to lead to destructive consequences'.¹³¹

In addition, the notion of 'proportionality' means that restrictions should be kept to a bare minimum, thus it might be determined whether management's objective could have been achieved by some other means requiring less interference.

Ultimately the Court of Human Rights does not provide precise guidance on how the articles must be applied, however, it is responsible for ensuring that similar principles are used throughout all domestic justice systems.

It is unlikely that the hair-length policy in *Smith* would be allowed under the HRA because the employers would have to show evidence that the rule was 'necessary in a democratic society' and there is no obvious 'pressing social need' for men to have short hair. Moreover, when looking at proportionality, it could now be argued that Smith should have been entitled to tie his hair back since this option was open to female employees. Furthermore, this would have prevented any health and safety arguments from being raised.

Consequently, people should be able to do as they please provided no harm is done to others. It is unlikely that clothes or hairstyles will harm others. The only exception to this would be cases involving health and safety issues. Commentators have argued that an individual's freedom to choose how to present themselves to the world at large is an aspect of freedom of expression.¹³² Furthermore, in *Stevens v United Kingdom*¹³³ the European Commission for Human Rights said that the right to freedom of expression might include the right to express oneself through one's clothes.

However, it appears that the issue of freedom of expression has been widely ignored by UK courts or deemed to be inappropriate,¹³⁴ despite the fact that 'the choices of the shapes, colours and textures we put onto our body are intensely personal statements of who we are'¹³⁵ and sexuality, and clothing is the means by which we 'manage' our ambivalence'.¹³⁶

The views portrayed above suggest that it would be improper for employers to impose their own personal taste on employees when creating dress codes. One commentator maintains that freedom of expression benefits society, and that the meaning of dress is based on convention and thus stereotypes. Moreover clothes are 'symbolic' in that wearing a suit is not power, but it may symbolise power.¹³⁷

Furthermore, one may think of dress as an expression of participation in a culture and if one is allowed to wear their chosen clothes in public then their identity or lifestyle is being validated.¹³⁸ In turn this has a positive effect on society since it warrants greater acceptance and tolerance.

TRANSVESTITES AND THE ECHR

In *Kara v London Borough of Hackney* mentioned earlier it became clear that under UK law an employer would not be liable for sex discrimination if they dismissed a male employee for attending work dressed as a woman. The applicant appealed against this decision to the European Commission of Human Rights and complained he was prevented from expressing himself as he wished through his dress and that there had been a violation of Article 8 and Article 14 of the ECHR. However by a majority the Commission dismissed the complaint.

The Commission agreed that under Article 8(1) constraints imposed on a person's mode of dress amounted to an interference with their private life. Nevertheless, they felt that in the circumstances the restriction was 'in accordance with the law' since it was based on a lawful internal policy. The interference was held to pursue the legitimate aim of protecting the rights of others and thought to be 'necessary in a democratic society,' since employees who come into contact with the public may have to conform to reasonable dress codes. Such a requirement could be regarded as 'enhancing the employer's public image.'¹³⁹

Perhaps surprisingly the Commission takes a similar approach to that of courts in the UK and US and decides that the public image of the organisation is of greater importance than the individual's freedom of expression.

The Commission in *Kara* held that it had not been established that the applicant had been prevented by his employer from expressing a particular opinion or idea by means of his clothing. The employer was not acting in breach of Article 10(2) of the ECHR, despite the fact that the employee was a bisexual male transvestite and there was plenty of evidence to show that by wearing dresses he was indeed trying to express his own identity and opinions. In addition, the Commission acknowledged that although there might have been a wider range of dress available to females than to males, the complaint of discrimination under Article 14 was rejected since there was no evidence that the applicant was subjected to a different rule purely because he was male and not female.

Under Article 9(2) of the Convention an individual's right to the

freedom of religious belief may be restricted by a public health exception that it is 'necessary in a democratic society'. Thus a prohibition on beards while representing a violation of religious observance in certain religions will because of this exception not necessarily amount to a breach. There are various possibilities for legal actions being brought under the Human Rights Act although the case law to date does not suggest this is the most viable option. Article 8 and Article 10 are the most relevant to dress codes preserving as they do a right to a private life (dress codes could impact on this) and right to freedom of expression.

In order to comply with the HRA, a manager must determine whether their policy interferes with a qualified human right, if so, they must show reasonable justification for the interference. For example by arguing that the company dress code is the only option available, or is in the interests of public health and safety, or protects the rights and freedoms of others.

The HRA does offer employees some protection, however, dress codes tend to invoke the qualified rights which permit interference if necessary in a democratic society. The case law illustrates how qualifying circumstances have been construed by the courts and the most common justifications given are that policies are necessary to protect the rights and freedoms of others or are in the interest of public safety.

EUROPEAN COMMUNITY LAW AND DRESS CODES

It is not our intention to give detailed consideration to the impact of European Community Law on the legal treatment of dress codes under the UK law. The Code of Conduct on Sexual Harassment and its definition of sexual harassment has played an important role in expanding the scope of sexual harassment law in the UK to include any behaviour that adversely affects an employee's dignity at work. Whether this extends to dress or grooming codes remains to be tested but seems likely. In *P v S and Cornwall County Council*,¹⁴⁰ a transsexual was dismissed following minor surgical operations. There was uncertainty whether or not the employee was protected under the Equal Treatment Directive.¹⁴¹ As a result the case was referred to the ECJ and they emphasised that the principle of equality is central to Community law and that the right not to be discriminated against on grounds of sex is a fundamental human right and one that the Court has a duty to enforce. They decided that Article 5(1) prohibited the dismissal of transsexuals for a reason related to gender reassignment. Moreover, it was felt that discrimination against a person as a result of gender reassignment is fundamentally based on the sex of the

person and tolerating such behaviour would amount to a failure to respect their dignity and freedom. It seems likely that if transsexuals who live and dress as a member of the opposite sex were dismissed, then it would amount to unlawful discrimination under UK¹⁴² and Community law.

Legislation will be shortly forthcoming in the UK to implement the Council Framework Directive 2000/78/EC into UK law. The rules relating to discrimination on grounds of sexual orientation and religious belief must be implemented by December 2003 and on grounds of age and disability discrimination by December 2006.

There will be various additional grounds for a discrimination action in the UK that will potentially offer increased protection to persons suffering a detriment because of dress or grooming codes. Particularly in the areas of sexual orientation, religious belief and race.

If this behaviour could be challenged under the heading of harassment then the additional scope for legal action is considerable. If for example a homosexual man is subjected to verbal taunts by his colleagues because of the clothes he wears then an action for harassment based on sexual orientation could be taken against the employer. Alternatively the employer may harass an employee that refuses to comply with their dress or grooming code.

Under Article 2(3) express provision is made for treating as unlawful harassment on all the grounds specified in Article 1 (namely religion or belief, disability, age or sexual orientation). In what circumstances will harassment on these various grounds be treated as unlawful?

‘When unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.’

The Employment Directive offers new protection for employees who are unfairly treated as a result of their sexual orientation. It has been realised that sexual orientation rarely affects a worker’s suitability or capacity to perform their duties. Although ‘sexual orientation’ is not defined, one of the Government’s proposals is that the term should encompass heterosexual, homosexual and bisexual orientation.

The Employment Directive requires Member States to introduce legislation that prohibits direct and indirect discrimination based on ‘religion or belief’. The UK Government chose not to define ‘religion’ but clearly states that ‘belief’ only covers religious beliefs and profound philosophical convictions that deserve society’s respect. Specific practical concerns for employers when laying down rules on diet, dress and uniform and these will be covered by detailed guidance.

Another legislative development in the EU is the Race Discrimination Directive 2000/43/EU. For the first time in the UK racial harassment in employment is specifically treated as unlawful discrimination. It must be implemented in the UK by July 2003 and the victim will need to establish not only that the harassment affected his or her dignity at work and but also adversely affected his or her working environment.¹⁴³ This requirement to establish both types of detriment may not stand given that it imposes a higher evidential burden than the law does at the moment. Even if it does it may not prove an evidential obstacle to applicants claiming that appearance codes have interfered with their ability to dress in conformity with their racial or ethnic origins, interfering with their dignity at work and creating an unwelcome working environment. What may prove more difficult if the Government's proposals are implemented is convincing a tribunal that a reasonable person would have regarded the conduct as violating the dignity of the employee.

The European Union have adopted a Directive which makes considerable amendment of the Equal Treatment Directive and will introduce inter alia: new measures on sexual harassment, including for the first time a binding legal definition and a requirement for employers to take preventative measures to deal with sexual harassment. Although the new Directive is as yet not formally adopted it is likely to be in the near future and will be implemented in member states by 2005.

Although the UK Government is only at the consultation phase, the Directives are bound to have a future bearing on workplace dress codes, especially if they can be shown to be discriminatory or represent harassment on one of the various grounds.

SUMMARY OF THE EUROPEAN POSITION

By the end of this year employers in the United Kingdom will be subject to legislation that will treat them as acting unlawfully if they discriminate against their workers on the grounds of religion or belief, or sexual orientation. The Government has already issued proposed legislation and consultative draft regulations for amending the Race Relations Act and the Disability Discrimination Act in order to implement the new rights required by the EU Framework Employment Directive and the Race Discrimination Directive.

Amendments to the Race Relations Act will come into force in July 2003 and those relating to religion and sexual orientation will come into force in December 2003.¹⁴⁴ The Directives define harassment as occurring when unwanted conduct based on one of the

grounds of prohibited discrimination takes place 'with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment'. The wording of the definition requires the complainant to prove the harassment had the requisite purpose or effect and that it damaged the working environment.¹⁴⁵

The Race Relations Act 1976 (Amendment) Regulations which implements the EU Race Directive include a new definition of indirect discrimination, a freestanding definition of racial harassment and a change to the burden of proof. With regard to religion and belief, the structure of the draft Employment Equality (Religion or Belief) Regulations 2003 is similar to other equality legislation. Direct and indirect discrimination in employment on grounds of religion or belief, by way of harassment, is prohibited.¹⁴⁶ Moreover, the regulations will cover discrimination against contractors and discrimination by qualifications bodies. The Council of the European Union has revised and approved a final text of the Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

The Framework Employment Directive does not contain a definition of 'religion' or 'belief' and the UK Government has chosen not to provide a detailed definition or set an exhaustive list of acceptable religious groupings. The Draft Regulations simply say that the two terms mean 'any religion, religious belief, or similar philosophical belief'. The definition of direct discrimination is noteworthy because it would make it unlawful on grounds of religion or belief for A to treat B less favourably. Because of the way it is currently worded, this could be because of B's religion or because they do not follow A's religion.¹⁴⁷ Likewise the draft Employment Equality (Sexual Orientation) Regulations 2003 are also directly parallel to the SDA and RRA. Direct and indirect discrimination on the grounds of sexual orientation, by way of victimisation or by way of harassment, is prohibited.

It is unclear at the moment the exact role the Directives will play in relation to workplace dress codes once they are implemented. However, the Government consultation document contains their stated aim to: 'develop practical, workable and effective legislation which fully meets the standards required by the Directive and will have a real impact on removing unfair discrimination and improving people's lives – but without stifling business with unnecessary burdens'.¹⁴⁸ These measures will clearly have far-reaching consequences for discrimination law (including harassment) in the UK and all the other member states in the European Union, ensuring that all categories of victim of discrimination are provided with legal protection.

CONCLUSION

Ultimately, the US and UK treatment of complaints relating to dress/grooming codes are similar. This is probably as a result of the weight given to managerial prerogative in this respect by the courts and their acceptance of the employer's right to use these techniques to determine and maintain their corporate image. The unwillingness of the courts in both jurisdictions to challenge the legal basis for dress or grooming codes or favourably consider the human rights aspects is unfortunate for those persons whose behaviour is curtailed.

There are some differences in approach and lessons that can be learnt from considering the approach to these cases in the US highlighted above, for example, investigation of an employer's defence of business necessity, primary purpose approach in *Diaz*.

It is contended that the differences between the two systems will increase when the equality Directives are implemented into UK law, with the UK offering the prospect of much wider protection. Not only will the grounds for complaint increase but a more favourable definition of indirect discrimination will be introduced (making it easier to establish) and the concept of harassment will be given legislative force for the first time. There is also the possibility that the courts will recognise that the human rights of the employee in terms of freedom of expression and the right to family life should take precedence over the qualified defences in the Human Rights Act 1998.

In support of this view John Stuart Mill¹⁴⁹ claimed that individuals are the best guardians of themselves: 'The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant ... Over himself, over his mind and body, the individual is sovereign'.

NOTES.

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1 Robert Gordon University, Aberdeen.

2 P Skidmore, 'Dress to Impress: Employer Regulation of Gay and Lesbian Appearance' (1999) 8(4) *Social and Legal Studies* 509-512.

3 *Quinn v Calder Industrial Materials Ltd* [1996] IRLR 126.

4 I.T Smith, GH Thomas, *Smith & Wood's Industrial Law* 7th ed. (2000) (Butterworths) 258.

5 *The New Oxford Dictionary of English*, Oxford University Press, 1998.

6 KT Bartlett, 'Only Girls Wear Barrettes: Dress and Appearance Stand-

ards, Community Norms and Workplace Equality' 92 *Michigan Law Review* 2541.

- 7 G Clayton, G Pitt 'Dress Codes and Freedom and Expression' [1997] 1(54) *European Human Rights Law Review* 55.
- 8 Large companies found that when they introduced casual Friday's in the workplace productivity went up on those days. Research in the United States by the Society for Human Resource Management found the 49% of the employers surveyed allowed casual dress every day. See AHI'S Hot Topics in Employment Law, Casual Dress Code Red. See www.ahipubs.com/newsletter/121801.html
- 9 [1977] IRLR 360; [1978] ICR 85.
- 10 *IDS Handbook* (December 1998) p.234.
- 11 [1977] IRLR 360, 361.
- 12 D Pannick, *Sex Discrimination Law*, (1985) (Clarendon Press) 188.
- 13 In *Wilson v Royal Bank of Scotland Plc S/0590/89* the bank introduced a policy that men must wear suits instead of a uniform. Wilson refused to comply because his suit was not suitable for summer wear and he was unable to afford a new one. He claimed sex discrimination on the ground that women could wear anything as long as it was smart. Wilson's claim failed because the tribunal felt that he had not suffered a detriment and both sexes were subject to a requirement, in that they had to dress smartly.
- 14 [1977] ICR 85, 88.
- 15 [1977] IRLR 395.
- 16 [1994] IRLR 7.
- 17 [1996] IRLR 456.
- 18 [1996] IRLR 456, 459.
- 19 [1995] IRLR 132, 134.
- 20 *supra* 3 p.259.
- 21 *IDS Handbook* (December 1998) p.236.
- 22 S Deakin, G S Morris, *Labour Law*, 3rd ed. (2001) (Butterworths) 603.
- 23 In *Ross v Wm. Low & Co plc SC0IT 3177/83* a male employee did night work in a supermarket. Although he had no contact with the public, he was dismissed when he tinted and streaked his hair.
The Employment Tribunal held that there was no sex discrimination because if a female had done the same then she would have been treated in the same way as Ross. Interestingly, they stated that if Ross had had sufficient qualifying service he might have succeeded in a claim for unfair dismissal.
- 24 *supra* 6, in this article various justifications are put forward for the view that dress codes are contrary to the right of freedom of expression.
- 25 27 Feb 2001; EAT No. 1414/00.
- 26 [1992] IRLR 561 NIHC.
- 27 *Ibid.*, at p 563.
- 28 ET Case No.S/626/83.
- 29 In *Carpenter v Kennings Ltd* [1984] COIT 1571/78 a van driver was dismissed for refusing to remove an earring despite that fact that two fellow female drivers were allowed earrings. The Employment Tribunal held that there had been unlawful sex discrimination.

- 30 ET Case No.22482/89.
- 31 In *Stoke-on-Trent-Community Transport v Cresswell* EAT 359/93 the EAT upheld the tribunal's finding that a woman was directly discriminated against when she was dismissed for wearing trousers. In this particular case a dress code was imposed on one sex but no equivalent code was imposed on the other. This clearly amounted to less favourable treatment.
- 32 Case No.1303043/98.
- 33 [1981]507 F Supp.
- 34 'Sexual harassment means conduct of a sexual nature or other conduct based on sex affecting the dignity of women and men at work.'
- 35 [2000] IRLR 151.
- 36 *supra* 10 p.207.
- 37 L Flynn, 'Gender equality law and employer's dress codes' (1995) 24 *Industrial Law Journal* 272.
- 38 Inserted by the Sex Discrimination (Gender Reassignment) Regulations 1999 SI 1999/1102.
- 39 EAT 325/95.
- 40 [1983] IRLR 209.
- 41 ET Case No.29014/79.
- 42 If BHS had allowed her request then the 14% of their customers, who were Muslim, could have identified with the assistant, which would have been in the company's favour. In addition, modifying their uniform regulations to permit trousers beneath the overall would have been relatively simple.
- 43 sections 11 & 12 provide the exemption.
- 44 [1980] IRLR 6.
- 45 The applicant argued that the prohibition struck at his right to freedom of religion under Article 9 of European Convention of Human Rights.
- 46 Similar issues arose in a recent case where when a Mr Watson was turned down for a job in a Waitrose coffee shop because he had a beard. It was argued by him that the no-beard rule represented discrimination on grounds of sex because it was harder for a man to comply with than a woman. His claim was unsuccessful. See, D Pannick, 'Beards give employers a hairy legal problem' *The Times* (13.03.02).
- 47 [1981] ICR 631.
- 48 Although the applicant was given leave to appeal against the EAT's decision she did not proceed because her employer agreed to amend its regulations to allow her to wear a uniform consisting of trousers and a tunic.
- 49 *New Law Journal* (21 March, 2003) p.418.
- 50 *Department for Work & Pensions v M. Thompson* EAT No. 0254-03.
- 51 Civil Rights Act of 1964, as amended, makes it unlawful employment practice for an employer: '(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals race, colour, religion, sex or national origin; or (2) limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any

individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, colour, religion, sex or national origin'.

- 52 42 USCA Section 2000e-2(a)(1).
- 53 *Ibid.*, at 2(e) 1.
- 54 [1973] 481 F 2d 1115.
- 55 *Roberts v General Mills Inc.* [1971] 337 F Supp 1055 where there was a violation of s.703 as a result of a requirement that allowed females to wear hairnets, but required men to wear hats which meant they had to keep their hair short, see *Rafford v Randle Eastern Ambulance Service* [1972] 348 F Supp 316 and *Aros v McDonnell Douglas Corporation* [1972] 348 F Supp 661.
- 56 [1972] 337 F Supp 1357.
- 57 [1973] 366 F Supp 763, [1974] 374 F Supp 1382 (US District Court).
- 58 [1979] 604 F 2d 1028 (7th Cir).
- 59 *Ibid.*, at 1032-3.
- 60 *supra* 55. at 1033-4.
- 61 [1982] 326 N.W.2d 519 (Mich. App.).
- 62 [1975] 507 F 2d 1084, there was an 11-4 majority ruling.
- 63 In its defence the management at Macon argued that the business community on which it depended associated longhaired males with the 'counter-culture types' who gained extensive unfavourable national and local exposure during the 'International Pop Festival' in Georgia during 1970.
- 64 Section 703(a) as amended by Title 42 U.S.C.A s.2000e-2(a).
- 65 In addition it was stated that only immutable characteristics could frustrate employment opportunities. Immutable characteristics include, race, national origin and gender, thus hair length enjoys no constitutional protection since it is changeable.
- 66 In *Fagan v National Cash Register Co.* [1973] 157 US App. D.C. 15, 481 F 2d 1115, an employee was discharged and sued under s.703 (a). His suit was dismissed because hair length is not constitutionally protected and the grooming policy was designed to further the company's business interest and not for sex discrimination.
- 67 Wisdom, Tuttle, Goldberg and Godbold (all Circuit Judges).
- 68 In *Earwood v Continental South-eastern Lines Inc* [1976] 539 F 2f 1349, Circuit Judge Winter refused to follow the Court of Appeals' decision and dissented (p.1352) on the ground that the *Willingham* test: 'imports constitutional notions of immutability and fundamentally into the process of statutory interpretation'.
- 69 [1973] 488 F 2d 1333.
- 70 [1973] 488 F 2d 1333 at 1337.
- 71 (1975) 376 N.Y.S. 2d 32N.Y.A.D. 3 Dept.
- 72 [1975] 527 F 2d 1249.
- 73 *Ibid.*, at 1251-1252.
- 74 *Thomas v Firestone Tire & Rubber Company* [1975] 392 F Supp 373; *Bertulli v First National Stores Inc* [1979], 20 FEP Cases 1527.
- 75 [1972] 348 F Supp 316.

- 76 Civil Rights Act 1964 s.703(a)(1) as amended by Title 42 U.S.C.A. s.2000e-2(a)(1).
- 77 Likewise in *Indiana Civil Rights Commission v Sutherland Lumber* [1979] 394 NE 2d 949 Ind.App. 3 Dist. two male employees were discharged for failing to comply with the company's 'clean-shaven' rule. The policy did not amount to sex-based discrimination since it was enacted for business purposes. Moreover, the policy did not affect equal employment opportunities because it was uniformly enforced on all employees.
- 78 *supra* 21 at 601.
- 79 [1980] 506 F Supp 909 (US District Court).
- 80 United States Equal Opportunities Commission (Nov 1980) issued guidelines.
- 81 where submission/rejection of conduct is made a condition of employment; is used for employment decisions or where it has the effect of unreasonably interfering with an individual's work performance.
- 82 *supra* 6 at 182.
- 83 [1981]507 F Supp 599.
- 84 [1971] 444 F 2d 1194.
- 85 [1971] 444 F 2d 1194 at 1198.
- 86 as amended by Title 42 U.S.C.A. s.2000e-2(a) see also *Mathews v City of New York* [2000] 704 N.Y.S. 2d 49 N.Y.A.D. 1 Dept.
- 87 [1975] 11 FEP Cases 1196.
- 88 *Ibid.*, at 1198.
- 89 *Sommers v Budget Marketing Inc.* [1982] 667 F 2d 748; *Ulane v Eastern Airlines* 35 [1984] FEP Cases 1348.
- 90 [1977] 566 F 2d 659.
- 91 *Ibid.*, at 664.
- 92 *supra* 6 p.222.
- 93 [1978] 569 F 2d 325.
- 94 *Ibid.*, at 328.
- 95 [1979] 595 F 2d 592 (Cal.).
- 96 This was the successful argument put forward in the early sexual harassment cases. This behaviour is similarly left out of the detail of the Act.
- 97 [1989] 490 US 228, 109 S. Ct 1775, 104 L.Ed. 2d 268.
- 98 Decided July 3 2001, find at <http://lawlibrary.rutgers.edu/courts/appellate.html>
- 99 In *Nichols v Azteca Restaurant Enterprises* the Ninth Circuit Court of Appeals relied on the *Price Waterhouse* ruling in deciding that a heterosexual waiter who was subjected to homosexual taunts because of his effeminate manner was deemed to be the victim of sexual harassment Decision 16/7/01, <http://caselaw.jp.findlaw.com/data2/circs/9th/9935579p.pdf>
- 100 [1976] 27 ALR Fed 274 2000 Supplement, Part 2(b).
- 101 CCH EEOC Decisions 6241 [1971].
- 102 CCH EEOC Decisions 6343 [1972].
- 103 *Fitzpatrick v City of Atlanta* [1993] 2 F 3d 1112 The employer's

- defence was accepted on safety grounds since protective face masks would not fit unless employees were clean shaven.
- 104 [1989] 713 F Supp 244.
- 105 see also *Richardson v Quick Trip Corporation* [1984] 591 F Supp 115.
- 106 [1986] 530 F Supp.
- 107 *Carter v Bruce Oakley, Inc.* [1993] 349 F Supp 673, 64 Fair Empl. Prac. Cas. (BNA) 967.
- 108 June 20 2001, find at www.gospelcom.net/apologeticsindex/news1/an010621-12.html
- 109 House unanimously passes Saudi dress-code bill May 15 2002, <http://cnn.allpolitics.printthis.clickability.com>
- 110 [1992] 587 NYS 2d 601.
- 111 [1992] 587 NYS 2d 601 at 605.
- 112 L. Flynn, 'Gender Equality Laws and Employer Dress Codes' [1995] 24 *Industrial Law Journal* 255-272 at 270.
- 113 *Schmidt v Austick Bookshops Ltd* [1977] IRLR 360 EAT acknowledged that valid comparison between men and women are usually impossible, however, it was permitted in this particular case.
- 114 [1989] IRLR 173 (HL).
- 115 S. Middlemiss, 'Shall I Compare Thee'? The Legal Dilemma, Choice of Comparators in Discrimination Cases' (2000) 4/09 *International Journal of Discrimination and Law*, 293-317.
- 116 N Lacey, 'Legislation Against Sex Discrimination: Questions from a Feminist Perspective' (1987) 14 *Journal of Law & Society* 411.
- 117 *Smith v Safeway plc* [1996] IRLR 456; *Boychuk v HJ Symons Holdings Ltd* [1977] IRLR 395.
- 118 [1971] 442 F 2d 385 (5th Cir) cert. denied, 404 US 950.
- 119 [1971] 442 F 2d 385 at 388.
- 120 [1993] F 3d 795 (8th Cir).
- 121 pseudofolliculitis barbae, also known as 'razor bumps' most commonly suffered by African-American males.
- 122 [1993] F 3d 795 at 799.
- 123 *Dripps v United Parcel Service, Inc* [1974] 381 F Supp 421 (DC Pa) held that an employer's rule forbidding welders to have beards was a sound BFOQ based on reasonable safety concerns.
- 124 CCH EEOC Decisions 6318 [1971].
- 125 [1979] IRLR 159, (EAT).
- 126 *Ibid.*, at 159.
- 127 *James v Eastleigh Borough Council* [1990] IRLR 298 HL.
- 128 *Smith v Safeway plc*, *supra* 15.
- 129 MW Janis, R Kay, A Bradley, *European Human Rights: Text and Materials* 2nd ed. (2000) (Oxford University Press) 64.
- 130 *supra* 21 at 72.
- 131 P Villiers, *Human Rights: A Practical Guide for Managers* (2000) (Kogan Page) 50.
- 132 *supra* 6 54-70.
- 133 No.11674/85 [1986] D & R 245.
- 134 *Boychuk v Symons* [1977] IRLR 395 EAT 'What is necessary in a case of this kind... is the striking of a balance between the need of

the employer to control the business for which he is responsible, in the interests of the business itself and after all, it is upon its continued prosperity that everyone's interests depend – a balance between that need, on the one hand, and the reasonable freedom of the employee on the other', Philips J at p.396 para.7. See *Fuller v Mastercare Service and Distribution EAT/0707/00* where the Employment Tribunal ruled that dress codes were not contrary to the rights in Article 8 & 10.

135 *supra* 6 at 56.

136 *supra* 5 at 2546.

137 J Raz, 'Free Expression and Personal Identification' (1991) 11 *Oxford Journal of Legal Studies* 303.

138 *supra* 6 p.59.

139 [1999] 2 *European Human Rights Law Review* 232 at 233.

140 [1996] IRLR 347 ECJ.

141 EEC.76/207.

142 In *Chessington World of Adventures Ltd v Reed* [1998] ICR 97 it was held that in the circumstances the SDA was to be interpreted consistently with the ruling in *P v S and Cornwall County Council*. See section 2(a) of the Sex Discrimination Act 1975.

143 [2000] *Equal Opportunities Review*, September/October at 34.

144 see www.dti.gov.uk/er/equality

145 (January, 2003) 'Consultative draft discrimination Regulations: an EOR guide' EOR No.113 at 18.

146 (January, 2003) 'Consultative draft discrimination Regulations: an EOR guide' EOR No.113 at 20.

147 (January, 2003) 'Consultative draft discrimination Regulations: an EOR guide' EOR No.113 at 21.

148 [2002] 'Towards Equality & Diversity: implementing the Employment & Race Directives' EOR No.101 at 16.

149 English philosopher (1806–1873), wrote '*On Liberty*' (Lerner, 1961) in 1859.

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THOMSON



ROUND HALL

EMPLOYMENT

LEGAL REDRESS AGAINST EMPLOYERS FOR VICTIMS OF WORKPLACE BULLYING — PART II

SAM MIDDLEMISS* AND OLGA HAY**

Part I of this article was published in the last issue of the *Irish Law Times*. This second part deals with the key areas of UK law where victims of bullying are currently protected: under the law of the tort, under equality law and the law dealing with unfair dis-

missal. There are a number of problems with bringing a case against an employer under the law of tort, for breach of its duty care or on the basis of its vicarious liability and these are identified. There are also a few evidential difficulties associated with pursuing a case involving bullying un-

der equality law, e.g. the behaviour complained of must fall within a recognised ground of discrimination. The evidential difficulties are possibly less where the bullying leads to a dismissal or to an employee resigning and claiming constructive dismissal.

LIABILITY FOR MENTAL HARM CAUSED BY BULLYING UNDER THE LAW OF TORT

There is a causal link between bullying and stress and a connection between stress and mental illness that is generally accepted. Until recently, the courts were satisfied that employers were acting in breach of their duty of care when they were directly or indirectly responsible for bullying leading to their employee suffering mental harm.

In the Waters case mentioned earlier Lord Slynn summarised the position thus:

If an employer knows that acts being done by his employees during their employment may cause mental or physical harm to a particular fellow employee and he does nothing to supervise or prevent such acts, when it is in his power to do so, it is clearly arguable he may be in breach of his duty to that employee.

A case was taken against Strathclyde Regional Council in 1998 by a residential social worker Ms Ballantyne for breach of their delictual duty of care¹. She claimed that, along with other staff, she was deliberately threatened, ignored, humiliated and offended by her supervisor who kept her ignorant of information necessary for the perform-

ance of her jobs. He failed to consult her and subjected her to stress and confrontation. The consequences for Ms Ballantyne of working in such an unfriendly and stressful working environment, were a peptic ulcer, severe anxiety and depression. She claimed that her employer had failed in its duty to provide a safe system of work and safe and co-operative colleagues. This case was settled out of court and Ms Ballantyne was awarded £66,000.

In a more recent Scottish case², the difficulty in proving that a hostile working environment is responsible for psychological injury was illustrated. The pursuer, a welfare nurse, claimed that as a result of her line manager's behaviour, consisting of unjustified criticism, putting pressure on her time and misunderstanding her rôle, she suffered psychological damage in the form of severe anxiety and depression, panic attacks and loss of confidence and self-esteem. It was alleged she had suffered a nervous breakdown although no medical evidence was led to corroborate this. She was unsuccessful in her claim, primarily because she failed to, produce evidence of her medical condition or satisfy the court that the psychological harm she suffered was medically recognised under major diagnostic classification systems. The Court of Ses-

sion adopted a restrictive interpretation of foreseeability in this context, arguing that, generally, the employer as an "ordinary bystander" would not be in a position to foresee psychological harm being inflicted on its employees unless there was a "specific reason to foresee it in a particular case". The suggestion here is that the likely consequences for the victim of intolerable behaviour by an employer such as stress, anxiety, and depression would not be serious enough to establish a duty on the part of the employer to take care for the psychological well-being of its employees. Lord Reed stated that "[t]o suffer such emotions and others such as stress, anxiety, loss of confidence and low mood from time to time, not least because of problems at work, was a normal part of human experience."

Thus, there is no duty of care owed by an employer towards its employees in respect of psychological harm unless it is foreseeable by the employer that they will suffer harm. In these cases it will have to be shown that there is some special reason why the employer should have foreseen harm to its employee. Otherwise, it will be up to the psychiatric profession to judge these matters in the light of medical treatment of the victim. This lack of foreseeability will result in no duty of care being owed to the employee.

This means that most employees will be unable to substantiate a claim and this will be particularly true when the psychiatric illness only formally materialises after the employee leaves his or her job.

In another Scottish case, *Cross v Highlands and Islands Enterprise Board*,³ the judge was not convinced that an employer's failure to reduce undue levels of stress at work had materially contributed to an employee's suicide.

Given that both these decisions are made by judges of the Outer House of the Court of Session, they have questionable authority in the lower courts in Scotland and no authority over the courts in England and Wales.

These judgements were contrary to the decisions of the courts in a line of English cases starting with *Walker* and ending with an unreported case involving an action for breach of duty of care by a Mr Ingram against Hereford and Worcester County Council.⁴ Here, a council warden on a gypsy site was given an out of court settlement of £203,000 for stress-related illness caused by behaviour of the employer that was similar to that of the employer in the Rorrison case. The main difference was that in this case he experienced instances of physical assault by his client group.⁵

In a recent Court of Appeal decision, *Sutherland v Hatton*,⁶ the English courts adopted a similar approach to the judges in the Scottish cases of Rorrison and Cross. They stated that, for liability for stress related illness to be established, it is necessary to show that the employee informed the employer of the effect of stress on his health except where it would be reasonable in the particular case to assume that uncharacteristic absences from work were caused by undue stress. It was stated that: "by its very nature a psychiatric disorder would be more difficult to foresee than a physical injury", with an implication that an employer might presume that an employee can cope with the normal

pressures of the job unless the employee intimates otherwise.

The question is whether the courts would regard bullying as a normal pressure of the job? Where it is a mild form of bullying, then there is now limited scope for victims of bullying successfully pursuing an action against their employer on the basis of a breach of their duty of care (resulting from a failure to prevent bullying that caused stress-related illness). The presumption will be that they can cope with the stress caused by bullying and other causes of stress. Where the bullying is more severe, however, it would be treated as an abnormal pressure and employers would be liable.

In addition to owing a direct duty of care toward their employees, where another employee is a bully responsible for creating a stressful working environment, the employer may also be vicariously liable for the bully's actions.

VICARIOUS LIABILITY

Even where the employer is not acting in breach of his duty of care he may be vicariously liable to compensate the victim for bullying carried out by his employees. Where the bully is personally liable for the wrongful acts and they are carried out within the scope of his employment then liability could also extend to the employer:

Vicarious liability for the act of a servant will only attach to the master if the act of the servant is done within the scope of the employment. It is probably not possible, and is certainly inadvisable to endeavour to lay down an exhaustive definition of what falls within the scope of the employment. Each case must depend to a considerable extent on its particular facts.⁷

The crucial factor which will determine if an employer is vicariously liable for its employee's actions is whether the actions which amount to harassment or bullying were carried out in the course of the employment. It will certainly be liable where it authorises the wrongful act,⁸ al-

though, in the absence of written authority it may be difficult to prove that an employer instructed or authorised a supervisor to bully his or her victim. An employer might be liable, however where it permit a supervisor to use bullying to ensure subordinates are carrying out tasks in a correct or timely manner. Here the supervisor is doing something he or she is employed to do (ensuring staff carry out work) in a manner authorised by the employer. Where the victim suffers stress-related illness brought on by an oppressive working environment in this context, the employer will be liable. It is much less likely that the employer will be liable if the harasser or bully is a colleague of equal standing with the victim.⁹ It is difficult to identify the circumstances where employers will be liable for harm caused by bullying — even if they are unaware of the bullying they could still be liable because the supervisor is carrying out an authorised task in an unauthorised manner. Where the employer prohibits bullying, liability is much less likely although it could arise where it can be shown that, despite the fact the bully in acting contrary to instruction, he or she still acted in the interest of the employer.¹⁰

Otherwise vicarious liability is unlikely to be established, as the behaviour will be treated as occurring outside the contract of employment and as an independent act of the employee. In *Irving v The Post Office*¹¹ the employee was a postman working for the Post Office in a sorting office. While at work, he wrote racist comments before delivery on his neighbour's mail. The employer was held not to be vicariously liable for this act. It is not enough for the employer merely to put the employee in a position to cause the harm.¹² "It must be committed in the course of the business, so as to form part of it, and not merely be coincident in time with it."¹³

In *Waters v Commissioner of Police for the Metropolis*¹⁴ a female police officer, while off-duty,

was raped by a fellow officer. She claimed that she was subjected to victimisation contrary to the terms of s.4 of the Sex Discrimination Act 1975 when she brought a complaint about her attacker to the attention of her employer. She was unsuccessful in her victimisation claim because she could not establish that it occurred because she had brought an action for sex discrimination.¹⁵ She subsequently brought a claim for negligence against her employer and an action for breach of contract because of the bullying and harassment she had experienced. Lord Slynn, in the House of Lords summarised the case as:

one of negligence — the employer failed to exercise due care to look after his employee. Generically many of the acts alleged can be seen as a form of bullying — the employer or those to whom he delegated responsibility for running his organisation, should have taken steps to stop it, to protect the employee from it.

They decided that failure of an employer to take steps to prevent bullying or where it is aware of it happening or failing to bring about its cessation is a breach of its duty of care. It was decided that a claim for negligence against her employer could proceed to trial. This decision represents judicial recognition at the highest level that bullying is a ground for an action in tort and for breach of contract.

In the important case of *Lister and others v Hensley Hall*,¹⁶ the House of Lords was asked to consider whether an action in tort based on vicarious liability could be sustained against an employer of wardens in a children's home who sexually assaulted their charges. They decided that the appropriate test is not, are the acts carried out within the course of their employment, but are the wrongful acts of the employee so closely connected with his employment that it would be just to hold the employer liable? The less stringent requirement could result in employers being held vicariously liable in most cases of bullying result-

ing from the actions of a supervisor. Whether it would extend vicarious liability of the employer for wrongful acts (representing a breach of duty under tort) carried out by colleagues of the victim is uncertain. The employer is unlikely to be liable where the bully is a colleague of the victim because bullying will not be treated as part of the job, and more significantly the wrongful acts of the employee will not be so closely connected with his employment that it would be just to hold the employer liable.¹⁷

Statutory protection against bullying in the workplace.

Where the bullying leads to an employee being discriminated against, then he or she could bring an action under equality law. If he or she is dismissed or forced to resign, then he or she can claim unfair dismissal under s.95 of the Employment Rights Act 1996.

A claim can also be brought against the workplace bully for the statutory tort of harassment as defined by s.3 of the Protection from Harassment Act 1997.¹⁸ Finally, there may be some scope for pursuing an action against an employer (covered by the Human Rights Act 1998) for breach of the employee's human rights, e.g. under Art.3 (degrading treatment) & Art.4 (prohibition of forced labour) of the European Convention.¹⁹ Collectively these measures may appear to offer adequate protection to victims of workplace bullying; however, the reality is they only cover a narrow range of behaviour and with the exception of the equality laws are largely untested as a remedy for bullying.

RIGHTS UNDER EQUALITY LAW

Where bullying in the workplace is perpetrated because of the victim's sex, race or disability, it will be held to represent unlawful discrimination.²⁰ "Bullying can clearly constitute discrimination if it is directed particularly at women or ethnic mi-

nority workers."²¹ The most likely claim is for sexual or racial harassment or harassment on the ground of disability.²² The applicant will be successful if he or she can convince an Employment Tribunal that, as a consequence of bullying, a detriment was suffered.²³ Applicants bringing a case against their employer for sex or race discrimination would need to show that a comparator of a different sex or race would not, in similar circumstances, have suffered the same detriment.²⁴ Where the applicant is a disabled employee they need to establish that they were bullied and suffered a detriment because of their disability.²⁵

In discrimination cases where the bully is the supervisor of the victim, then the liability of the perpetrator and his or her employer can be easily established.²⁶ Even in circumstances where the bully is a colleague of the victim, the employer can be held vicariously liable for his or her actions.²⁷ This will arise where a complaint about the bullying behaviour was brought to the employer's attention by the victim and it failed to take action to deter or control it.²⁸ Where bullying in the workplace is not undertaken because of the victim's sex, race or disability, then there is no legal protection under equality law at the present time.²⁹

"While we have protection against sexual and racial harassment, there are many people who have no such protection because they fall into a gap in legislation to cover people who have complaints of this form of bullying."³⁰ The employer will only be liable for discrimination where it can be shown they are vicariously liable for the action of the bully.³¹

VICARIOUS LIABILITY UNDER STATUTE

In *Jones v Tower Boot Co. Ltd.*,³² a 16 year old, male employee was subjected to horrific acts of harassment and bullying by his colleagues, including being burnt by a hot screwdriver, whipped across the legs with

a piece of welt, and being subjected to verbal abuse because he was of mixed race. In a ground-breaking decision, the Court of Appeal departed from the restrictive effects of the common law rules on vicarious liability.³³ It was willing to ascribe vicarious responsibility to an employer for the vicious acts of its employees on the basis they were carried out "in the course of employment" (as defined in s.32 of the Race Relations Act 1976). In determining this issue the Court applied a common sense application to this phrase to allow acts of colleagues to fall within the coverage of the Act. This is now accepted as being the correct approach to this issue.³⁴

This means that victims of bullying or other types of discriminatory acts perpetrated against them by a colleague on grounds of race, sex or disability can successfully sue their employer under the more liberal interpretation of vicarious liability.

As a consequence of recent decisions on vicarious liability, where the harassment or bullying is perpetrated by colleagues on the victim outside the working hours or the workplace liability may arise.³⁵ Where third parties interact with employees at the workplace and bully them and their actions are under the control of the employer then the employer may be vicariously liable.³⁶ In *Chessington World of Adventures Ltd v Reed*,³⁷ the employer was held liable for failing to control harassment by his workforce against an employee that was undergoing gender reassignment.

The employer can avoid liability, however, when it can establish the defence that it has taken reasonably practical steps to prevent the act complained of or acts of that description.³⁸ This defence in equality legislation was defined in *Jones v Tower Boot Co Ltd* as follows:

The policy of the statutory provision on employer liability is to deter racial and sexual harassment in the workplace through a widening of the net of responsibility beyond the

guilty employees themselves, by making all employers additionally liable for such harassment, and then supplying them with the reasonable steps defence, which will exonerate the conscientious employer who has used his best endeavours to prevent such harassment

What type of practical steps taken by the employer would justify this defence? Although it is possible that having a policy on bullying (or dignity at work) and making it known to all employees would be sufficient,³⁹ it would be advisable for an employer to take additional steps. For example, ensuring adequate supervision is provided, disciplining known bullies and undertaking training for supervisors on bullying, policy and procedures etc.

UNFAIR DISMISSAL

Where a supervisory employee in the process of bullying his victim dismisses him or her, or the employer dismisses him or her as a direct response to a complaint of bullying, then this will be unfair dismissal under s.95(1) of the Employment Rights Act 1996. Where the employer fails to offer an employee an acceptable right of redress under internal procedures for grievances (or under a statutory grievance procedure)⁴⁰ or under procedures for equal opportunities or dignity at work he or she can resign and claim constructive dismissal. It is important, however, that employees follow these procedures before bringing a legal claim because they will be acting contrary to the terms of the Employment Act 2002 and risk a reduction in the compensation awarded by the Employment Tribunal. Employment Tribunals will expect employers to have a grievance procedure that complies with the statutory model in the Act but may, in addition, expect them to have procedures in place that are designed to deal with harassment and bullying complaints.

In any event in order to have a statutory or direct defence, and be able to demonstrate compliance with

the statutory codes, it is necessary for the employer to have a procedure for dealing with harassment which is known to all employees and through which complainants are able to have their complaints taken seriously and investigated swiftly and confidentially, whilst ensuring all are protected.⁴¹

Where the bully is dismissed because of his or her behaviour, then it is unlikely to be treated as unfair unless the employer fails to prove that individual is a bully or harasser or fails to follow the correct disciplinary procedure in dismissing them.⁴² In most cases of dismissal, the victim of bullying will have been forced to leave his or her job to escape the bullying behaviour. Such a person will then be in a position to claim constructive dismissal.

CONSTRUCTIVE DISMISSAL

Where victims of bullying are unable to continue in employment because bullying has created a hostile working environment they can resign and claim constructive dismissal.⁴³ This action is taken on the basis that the employer's behaviour is so unreasonable that they have breached the terms of the employee's contract of employment.⁴⁴ Where the basis of a claim for constructive dismissal is that a manager bullied his or her subordinates who were forced to resign because of it, then the employer will clearly be liable.⁴⁵ It is likely the behaviour will be treated as being carried out in furtherance of the employer's business interests and with its implied authority and consequently it will be held liable. In *Palmanor Limited v Cedron*,⁴⁶ an employee was wrongly accused by his superior of a wrongful act and in the process was subjected to a tirade of abuse. The Employment Appeal Tribunal held that this behaviour represented grounds for constructive dismissal. In *Hilton International Hotels (UK) Ltd v Protopapa*,⁴⁷ an employee resigned when she was severely reprimanded in front of other employees for failing to ask permission of the employer

to attend a dental appointment. She claimed that she had been constructively dismissed and the issue of whether the supervisory employee's actions in this context could lead to an employer's vicarious liability was considered.

In relation to repudiatory conduct, by what we call a supervisory employee of the employer, the general law of contract governs the question of whether the conduct binds the employer:

[i]f the supervisory employee is doing what he or she is employed to do and in the course of doing it he or she behaves in a way which if done by the employer would constitute a fundamental breach of the contract between the employer and the applicant, then, in our judgement, the employer is bound by the supervisory employee's misdeeds.⁴⁸

When managers use bullying tactics in fulfilment of their rôle, they are undermining the contractual duty of the employer to maintain the trust and confidence of the employee. Constructive dismissal can be established on the basis that bullying represents breach of the implied duty to maintain an employee's trust and confidence.

In (1) *Reed and (2) Bull Information Systems Ltd v Stedman*,⁴⁹ a secretary was bullied and subjected to sexual comments and innuendoes by her boss, the marketing manager. She brought a claim for sex discrimination arguing that the discriminatory behaviour led to her constructive dismissal by the employer:

The tribunal had not erred in finding that a course of unwanted and bullying behaviour by the applicant's manager, which amounted to sexual harassment was a breach of the duty of trust and confidence. When the employee was forced to leave her job as a result this amounted to constructive dismissal and accordingly was an act of discrimination within the meaning of s.6(2) of the Sex Discrimination Act.

This case was capable of being pursued under the Sex Discrimination

Act 1975 because of the sexual content of the manager's behaviour.

In the event that the bully is a colleague of the victim, the employer is unlikely to be liable for his or her behaviour in the context of constructive dismissal, unless the victim complained about the behaviour and the employer failed to take any action to bring about its cessation. They may have failed in their duty to provide and monitor a working environment, which is reasonably suitable to allow their employee to carry out his or her contractual duties.⁵⁰

Part III of this article will appear in the next issue of the *Irish Law Times*.

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1 Unreported, 1998.

2 *Rorrison v West Lothian College* (1999) Rep. L.R. 102 (OH).

3 *Rorrison v West Lothian College* (1999) Rep. L.R. 102 (OH).

4 (2001) I.R.L.R. 336.

5 *The Times*, January 11, 2000.

6 *Dodd, V. £203,000 award for stress at gypsy site*, *The Guardian*, November 11, 2000.

7 (2002) E.W.C.A. Civ. 76.

8 *Lord President Clyde, Kirby v National Coal Board* (1958) SC 514.

9 *Kooragang Investments Pty Ltd v Richardson & Wrench* (1982) A.C. 462.

10 *Irving and Irving v Post Office* (1987) I.R.L.R. 289, *Companies Act*.

11 *Rose v Plenty* (1976) 1 W.L.R. 141.

12 (1987) I.R.L.R. 289 *Companies Act*.

13 *Heasmans v Clarity Cleaning* (1987) ICR 479.

14 *Heuston R.F.V. Buckley R.A. Salmond & Heuston on the Law of Torts* 21st ed. Sweet & Maxwell, 1996, p 444.

15 (2000) I.R.L.R. 720 HL.

16 (1997) I.R.L.R. 589.

17 (2001) U.K.H.L. 22.

18 *Lester and others v Hesley Hall* (2001) UKHL 22.

19 S.8 of the Act in Scotland.

20 See schedule 1 of the Human Rights

Act 1998 which introduced the Convention into UK law.

21 *Strathclyde Regional Council v Porcelli* (1986) I.R.L.R. 134 CS, *Rarity v Jarvie Plant S/4788/91*, *Jones v Tower Boot Co Ltd* (1997) I.R.L.R. 168 CA, ss. 1 & 6 of the Sex Discrimination Act 1975 and ss.1 & 4 of the Race Relations Act 1976.

22 *Supra* 15 p 1701.

23 *Francis v Bentham & Co Ltd*, Case No 65996/94.

24 See s.6 of the Sex Discrimination Act 1975 4 (2)(c) of the Race Relations Act and s.4 of the Disability Discrimination Act 1995.

25 In *Porcelli v Strathclyde Regional Council* (1986) ICR 564, (Ct of Sess), Mrs Porcelli was subjected to a campaign of sexual harassment and bullying by two of her colleagues. This course of action was undertaken in an effort to get her to leave her job. Her claims for sex discrimination was successful partly because certain bullying acts perpetrated against her were of sexual nature and directed at her because she was a woman. If the acts of her harassers had been gender-neutral (simply bullying) she would probably have lost her case because a man similarly disliked by male colleagues would have been subjected to similar treatment.

26 S. 4 of the Disability Discrimination Act 1995.

27 S.41 of the Sex Discrimination Act 1975 and s.32 of the Race Relations Act 1976 prescribe when the employer will be vicariously liable for discriminatory acts of their employees

28 *Jones v Tower Boot Co Ltd* (1997) I.R.L.R. 168.

29 In *D Watt (Scotland) Ltd v Reid* September 25, 2001 EAT, a young male worker in a shellfish factory in Shetland was subject to bullying by the predominantly female workforce over a two month period. He was eventually forced to give up his job and successfully claimed sex discrimination.

30 There are various additional grounds for discrimination actions which will be provided by statute in the UK shortly, implementing various Directives of the EU, and these are considered below.

31 Lords, Hansard, 4 Dec 1996, Column 757, Baroness Gould of Potternewton.

32 Under s. 41 of the Sex Discrimination Act 1975 and s.32 of the Race Relations Act 1976.

33 (1997) I.R.L.R. 168.

34 Middlemiss, *S Tower Boot Revisited: The Impact Continues*, *Scottish Law Gazette*, December 1998, Vol. 66, No 4 pp 180-181.

35 Middlemiss, S. Mays, R. (1997), *The Common Law and Statutory Concept of Vicarious Liability, The Parting of the Way*, Scots Law Times, Issue 12 pp 95-97.

36 *Chief Constable of the Lincolnshire Police v Stubbs* (1999) I.R.L.R. 81.

37 *Jones v Tower Boot Co Ltd* (1997) I.R.L.R. 168, CA. *Burton v De Vere Hotels* (1996) I.R.L.R. 596, *Go Kidz Co Ltd v Bourdouane* EAT 1110/95.

38 (1997) I.R.L.R. 556 EAT.

39 S.41(3) of the S.D.A. 1975, s. 32(3) R.R.A. 1976, and s. 58(5) of the DDA 1995.

40 In a sexual harassment case, *Balgobin v London Borough of Tower Hamlets* (1987) I.R.L.R. 401 EAT, being an equal opportunities employer and having a policy to that

effect was sufficient.

41 See *Employment Act 2002* for statutory grievance procedure.

42 Desmond, H. Antill, D. *Employment Law*, Sweet & Maxwell, 1998, p 270.

43 *Polkey v Dayton (AE) Services* (1988) A.C. 344, *West Midlands Co-operative Society v Tipton* (1986) I.R.L.R. 112.

44 *Employment Rights Act 1996*, s.95(c) "The employee terminates the contract under which he is employed (with or without notice) in circumstances which he is entitled to terminate it without notice by reason of the employer's conduct".

45 Lord Denning in *Western Excavating v Sharp* (1978) I.R.L.R. 27 stated that "if the employer is guilty of conduct which is a sig-

nificant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance".

46 See *Isle of Wight Tourist Board v Coombes* (1976) I.R.L.R. 413, *Courtald Northern Textiles Ltd v Andrew* (1979) I.R.L.R. 84.

47 (1978) I.R.L.R. 303, EAT.

48 (1990) I.R.L.R. 316, EAT.

49 Knox, J. in the *Hilton International Hotels* case.

50 (1999) I.R.L.R. 299.

51 See *Waltons & Morse v Dorrington* (1997) I.R.L.R. 489, EAT.

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EMPLOYMENT LAW

Legal redress against employers for victims
of workplace bullying — Part III

THOMSON

ROUND HALL

Parts I and II of this article have appeared in the last two issues of the *Irish Law Times*. In this final part, there are a diverse range of issues considered in the context of bullying under UK law, including the impact of the Protection from

Harassment Act 1997, the extent of criminal liability of bullies under statute and the common law, the influence of the Human Rights legislation on this area of law and developments in the European Union that could lead to enhanced protection for

victims of bullying. The article finishes with some broad conclusions about the law in this area (including details of recent attempts to legislate and recommendations for changes in the law).

PROTECTION FROM HARASSMENT ACT 1997

The Protection from Harassment Act 1997 provides a civil remedy for victims of harassment (as defined in ss.1 & 3) against a harasser or bully. It is defined sufficiently broadly to include bullying behaviour. A person must not pursue “a course of conduct which amounts to harassment of another of which he knows or ought to know amounts to harassment of another.” The remedies for the civil action are set out in s.3 of the Act. The victim of bullying can bring a claim for damages against a bully to obtain compensation for harm they have suffered (e.g. for the anxiety caused by the harassment and any financial loss resulting from it).

Section 3 (2) places the award of such damages on a statutory footing. *Prima facie* the harasser is liable to compensate the victim for any financial loss resulting from the course of conduct that amounts to harassment. However the drafting of s.3 suggests that the test for determining financial loss is causation and damages are payable in respect of all financial loss resulting from the course of harassment.¹

Alternatively, an application can be made to a judge for an injunction to stop the bullying. In deciding whether to grant such an order, the primary consideration of the judiciary will be whether or not the legiti-

mate interests of the alleged victim are adversely affected sufficiently to justify curtailing or restraining the behaviour of the alleged harasser.²

A bully can also be prosecuted for the offence of criminal harassment (as defined in ss.1 & 2, see above) or the more serious offence of causing fear of violence (s.4). These offences will apply to the most serious forms of bullying involving violence or threats of violence. Under s.5 of the Act a restraining order can be granted by the court to restrain the unlawful behaviour of the bully, prior to a full hearing of the case and thereafter.³ The courts can also award an injunction but not where a restraining order is already in place. Where it is established that the harassment or bullying is ongoing within the workplace, the employee can apply to the court for an interlocutory injunction to restrain the harasser or bully. It is not necessary to establish intention on the part of the harasser or bully.⁴ It is sufficient that a reasonable person in possession of the same information would conclude that the course of conduct amounted to harassment of another.⁵

Part 1 of the Public Order Act 1986 (s.5) introduces a minor offence of causing harassment, alarm or distress.⁶ Also under s.4(a) of the Public Order Act 1986, which was introduced by the Criminal Justice and Public Order Act 1994, an of-

fence of intentional harassment has been provided where bullies intentionally “use towards another person threatening, abusive or insulting words with intent to cause that person to believe that unlawful violence will be used against him.” There is no requirement that the behaviour is directed at another person but it must be proved that the accused intended his or her conduct to be threatening, abusive or insulting or disorderly or was cognisant of the fact it might have this effect. It must also be shown that the unlawful conduct took place within the hearing or sight of a person that is likely to be caused harassment, alarm or distress.⁷

VIOLENCE IN THE WORKPLACE

This is an area of growing importance that is commonly associated with bullying and, therefore, warrants attention. The Home Office and Health & Safety Executive (HSE) published a joint report in October 1999. Violence at work is defined as, “all assaults or threats which occurred while the victim was working and were perpetrated by members of the public.”⁸ The report estimates that there were just over 1.2 million incidents of violence at work in England and Wales in 1997, which means 2.8% of working adults have been the victims of at least one violent incident.

Approximately half of assaults at

work and a third of threats happened after 6pm, thus the risk of violence increases with evening or night work.⁹ Moreover, one sixth of physical assaults at work involved young offenders under the age of sixteen, just under a half of assaults resulted in some sort of injury to the victim and it has been estimated that 3.3 million work hours were lost in 1997 due to such incidents.¹⁰ Patterns have emerged: for instance, occupational groupings strongly affect the risk of assault at work, with the high-risk groups being front-line jobs such as (in descending order) security and protective services; nurses; care workers; other education and welfare; catering, hotels and restaurants; and public transport.¹¹

Trends regarding the characteristics of offenders were also identified, with the majority of offenders being persons known to the victim, most commonly a customer.¹² The costs of violence at work can be broken into two areas.¹³ The first is the cost of absent workers to the employer and economy as a whole. The second is the cost of human suffering to the victim which often results in compensation.

It was concluded by the British Crime Survey that violence at work increased between 1991 and 1995, and that, despite a recent fall, it is still a significant problem facing employers.¹⁴ The report gives some helpful advice, saying that employers should follow the Management of Health and Safety Work Regulation (HSE, 1992), to identify the extent and nature of risk of violence and to take the necessary steps to minimise risks.¹⁵ The Health and Safety Commission and Health and Safety Executive have issued additional guidance to help employers manage and control violence at work.¹⁶

By failing to protect employees from violence, employers may be in breach of various obligations, including the duty to provide a safe place and system of work for all employees.¹⁷ There is also the question of determining what should be done

when the perpetrator of violence is another employee. It was argued in the June 2003 IDS Brief that the employer has greater liability for the actions of an employee, as opposed to those of a member of the public, because of the principle of vicarious liability for personal injury.¹⁸

CRIMINAL LIABILITY FOR WORKPLACE BULLIES

"The ancient right to chastise a servant, an apprentice or a wife no longer exists."¹⁹ There are limited instances where the bully will be prosecuted for a common law crime on the basis of their behaviour in the workplace. Where the action complained of consists of threats of physical force or actual force being used against an employee then the perpetrator could be prosecuted for assault or battery.²⁰

"The typical case of assault as distinct from a battery is that where the defendant, by some physical movement, causes the plaintiff to apprehend that he is about to be struck."²¹ There is some doubt whether a threatening statement could represent an assault, although modern authorities seem to support the view that it can.²² Bullying gestures, which could reasonably be interpreted as threatening that a violent act will follow, could fall within the *actus reus* of assault as could verbal threats conveying the same message.

In *R. v Ireland, R. v Burstow* (1997) 4 All ER 225, HL Lord Steyn in his judgement in the House of Lords made it clear that verbal statements threatening physical harm could represent an assault. "The proposition that a gesture may amount to assault, but that words can never suffice, is unrealistic and indefensible."

CRIMINAL LIABILITY UNDER HEALTH AND SAFETY STATUTES

What represents a less obvious and less settled basis for criminal prosecution

in this context are actions against an employer for breach of various provisions of health and safety legislation. Where bullying is perpetrated within the workplace or permitted to be carried out by the employer it could represent a breach of its duties (in respect of employees) under s.2(2) of the Health and Safety at Work Act 1974. Under s.2(2)(d) of the Act the employer must ensure (so far as is reasonably practicable) as regards any place of work under its control, the maintenance of it in a condition that is safe and without risks to health. Bullying carried out in the workplace could represent a serious threat to an employee's physical or mental well being. Where such behaviour is directly or indirectly attributable to the employer, it will be acting in breach of this section.²³ What is less certain is the means by which a serious breach of the Act will come to the attention of the agencies involved in criminal prosecution. A breach could be discovered and reported to the police by the Health and Safety Executive during an inspection of the premises, or where it is highlighted in a risk assessment of the workplace undertaken by the employer.²⁴ Employers must undertake a suitable and sufficient risk assessment in the workplace to assess the risks to the health and safety of their employees. This would extend to identifying the risk of stress-related illness caused by bullying behaviour identified as taking place in the workplace.²⁵

There is little doubt that attaching criminal liability and criminal penalties for persons perpetrating bullying activities in the workplace will act as a deterrent. There may be difficulties, however, in persuading the judiciary and the agencies involved in criminal prosecution of the appropriateness of criminal prosecution for the perpetrators of bullying and/or their employers.

There is a possibility that bullying will represent a breach of the Human Rights Act 1998 and this will now be considered.

HUMAN RIGHTS ACT 1998

The Parliament of the United Kingdom by passing the Human Rights Act 1998 incorporated the European Convention of Human Rights (ECHR) into its legal system. It mainly came into force on October 2, 2000 and has a far-reaching effect on the legislative and judicial process. Legislators must take account of the Convention in drafting primary and secondary legislation. Courts and tribunals also have to interpret domestic statutes and legal decisions in line with the convention and judge-made law of the European Court of Human Rights (ECtHR). The convention rights are enforceable against public bodies or private bodies fulfilling public functions. There have been no cases brought against employers under the ECHR or the Act for stress-related illness. Bullying has been considered in the context of human rights cases where homosexuals in the armed forces alleged bullying by their superiors was a breach of Art.8 (the right to respect for private and family law).²⁶ In *Prager Oberschlick v Austria*²⁷ a journalist alleged he was harassed and bullied by a judge but the courts were not satisfied that he had been bullied.

In *Halford v United Kingdom*,²⁸ the applicant claimed that the interception of her phone calls from her office and her home following settlement of a sex discrimination claim was a breach of Art.8.

The Government claimed that employers had the right to monitor phone calls made from their premises and on their equipment and that prior notification to the employee of this practice was not necessary. The ECHR disagreed, holding that Ms Halford should have a reasonable expectation of privacy especially as she had been given permission to use her phone for the purposes of the sex discrimination claim and that this could fall within the ambit of Art.8. Employers are given limited powers to intercept employee's communications under statute in the form of Regulation of Investi-

gatory Powers Act 2000 and the Telecommunications (Lawful Business Practice)(Interception of Communications) Regulations (SI 2000/2699).

Article 3 prohibits torture, inhuman or degrading treatment or punishment. Treatment is degrading if it arouses in the victim feelings of fear, anguish and inferiority capable of humiliating or debasing them and bullying could easily have these effects.²⁹ For punishment to be degrading and inhuman, the suffering and humiliation it invokes must go beyond that which a given form of legitimate treatment or punishment would incur. While intention to humiliate or debase may be important in determining if breach of Art.3 has occurred, absence of intention is not fatal to a claim. A public authority which had allowed bullying to continue or acted unlawfully through omission may be vicariously liable for the bully's actions and be subject to an injunction to restrain such behaviour. However the degree of humiliation suffered by the employee would need to be severe and public.³⁰

The other articles of the Convention which could have a bearing on bullying are Art.4 which prohibits forced labour, Art.10 which gives everyone the right to freedom of expression and Art.14 which prohibits discrimination on various grounds. It is not possible to fully consider the likely impact these rights will have on bullying actions although the impact is likely to be fairly limited and will apply only in the most extreme cases of bullying. Art.4 represents a prohibition of forced labour which means that it is carried out on an involuntary basis and the effect is on the victim is unjust and oppressive. With respect to Art.10, the most likely application will be in working environment cases where freedom of expression has been circumvented by bullying or harassment.

DEVELOPMENTS IN THE EUROPEAN UNION

As a consequence of EU interven-

tion (in terms of Directives expanding the grounds of actions for discrimination) employers in the UK will have extensive liability for harassment (that could include bullying). This has already led to changes in UK Law and other changes are set to happen in the not too distant future. Legislation has already been introduced to implement parts of the Council Framework Directive 2000/78/EC into UK law.³¹ Under Art.2(3) express provision is made for treating as unlawful harassment on all the grounds specified in Art.1 (namely religion or belief, disability, age or sexual orientation). In what circumstances will harassment on these various grounds be treated as unlawful?

"When unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment." This definition with its reference to dignity at work and intimidatory behaviour is clearly capable of encompassing most forms of bullying.

Under the Employment Equality (Sexual Equality) Regulations 2003 that will come into force in the UK in December 2003, direct and indirect discrimination and discrimination by way of victimisation and harassment against employees on the ground of sexual orientation is covered. With respect to comparators, it is enough to show that someone of a different sexual orientation would not have been harassed (or bullied).

Another legislative development is the Race Discrimination Directive (2000/43/EU). For the first time in the UK, racial harassment in employment is specifically treated as unlawful discrimination under statute. The Race Relations Act 1976 (Amendment) Regulations 2003 also change the burden of proof in discrimination cases and introduce a new definition of indirect discrimination. The victim of racial harassment (or bullying) in the UK will need

to establish under the new section 3A of the 76 Act, that on grounds of race or ethnic or national origins the bully engaged in unwanted conduct that violated his or her dignity or created an intimidating degrading, humiliating or offensive environment for him or her.

The institutions of the European Union have also adopted a Directive that has introduced considerable amendment to the Equal Treatment Directive 76/207 including *inter alia*: new measures on sexual harassment, introducing a legal definition under statute for the first time and a requirement for employers to take preventative measures to deal with sexual harassment.

These measures will clearly have far-reaching consequences for harassment law in the UK and all the other member states in the European Union. They will ensure that all categories of victims of harassment are provided will legal protection that exceeds the level of protection afforded to victims of harassment in countries outside the European Union, including the United States.

CONCLUSION

The limited evidence provided by primary research shows that workplace bullying represents a common workplace practice within the United Kingdom.³² "Too often today in the British workplace, stressed managers are applying negative pressure on workers. If that pressure takes the form of persistent intimidation, undervaluing or undermining of an individual or group of workers, that is bullying."³³ As discussed, there is uncertainty surrounding the nature of existing legal protection in this area. The civil law and, more specifically actions in tort, offer the best prospect of successfully pursuing an action against the perpetrator at the present time. However relying on the present system of legal protection for victims of bullying in the workplace (under civil and criminal law) requires them putting faith in a process that is uncertain and ill

equipped to meet their needs.

Where the bullying is discriminatory in nature then pursuing cases on the basis of discrimination under equality legislation offers a good prospect of success. Recent statutes have criminalised behaviour (such as harassment or disorderly conduct) that could encompass bullying and consequently the likelihood of a perpetrator being liable for criminal prosecution has increased.

Whether this behaviour will represent breach of the Human Rights Act 1998 is uncertain although the range of possible actions that can be pursued under the Human Rights legislation may persuade the Government of a need to legislate.

It is readily apparent that the legal framework to protect against workplace bullying is fraught with uncertainty. This unsatisfactory state of affairs could be remedied by the introduction of legal measures that are specifically designed to combat workplace bullying. The legislation could take the form of broad legal duties set out in the statute accompanied by guidance notes or a code of practice that details appropriate standards of behaviour for employers and employees. Where there is a failure to comply with these duties or maintain the standards, the employer should be required to provide civil remedies to the victim.³⁴

It is also important that future legislation should include the remedy of interim relief in civil and criminal cases.³⁵ This could take the form of an interlocutory injunction or a restraining order.³⁶ In 1997 and in 2001, the Dignity at Work Bill was an attempt to bring in legislation that would provide a civil remedy for bullying and would ensure everyone in employment was given the right to work free from bullying and intimidation. The Bill was introduced by the House of Lords in the latter part of 2001 and was set to tackle bullying in the workplace by providing employees with statutory protection.³⁷ It was read a second and third time in March and May 2002 respectively. The degree of scepticism

about the legislation invoked by the time of the second reading of the 2001 Bill was shown by the stance taken by the Government. It remained undecided about its utility; however, it reiterated Labours' commitment to tackle the problems of bullying and stated that it believed the root of the trouble lay in the culture of the workplace.³⁸ Thus, there was a general feeling that, although the current law was not perfect, it was doubted whether new legislation could stamp out all forms of workplace bullying. The Third reading (in the House of Commons) created further doubt when Lady Hermon (North Down) illustrated that measures already existed to protect victims of bullying in the form of the ECHR. The ECHR provides protection under Art.3, which requires the Governments of Member States to protect everyone, irrespective of their nationality against degrading treatment.³⁹ Surely bullying could fall under the term "degrading treatment".

Ultimately, the problems of bullying and violence at work have been gaining more importance following the debates that ensued at each reading of the 2001 Bill and as a result there has been heightened awareness throughout the public and Government Bodies of the need to tackle these issues more effectively. It cannot be said that the Bill came to nothing. Although it failed to become legislation and fell by the wayside, laws relating to bullying and violence in the workplace are likely to be forthcoming in the near future and will inevitably follow the structure set by the Dignity at Work Bill 2001. Under the Bill employees were entitled to work free from bullying or other degrading treatment.

Where employees were denied such a right, their employer would be in breach of a statutory tort. Clause 1(2) of the 2001 Bill defined the nature of the behaviour that would represent a breach of the Bill. "If that employee suffers . . . harassment or bullying or any act, omission or conduct which causes him

to be alarmed or distressed", then a breach occurs.⁴⁰ Clause 5(1) of the 2001 Bill provides the employer with a defence:

- (a) if the employer has a Dignity at Work Policy in force and complies with it in all respects;
- (b) the act/s complained of are repudiated by the competent person as soon as reasonably practicable; and
- (c) as soon as is reasonably practicable, the employer takes all steps as are reasonably necessary to remedy any loss, damage or other detriment suffered by the complainant.

While this is a commendable effort to introduce specific legal protection in this area, it is uncertain whether it would have been successful in resolving the problem. Reliance on a statutory tort, with remedies and concepts borrowed from equality legislation, could be insufficient to encourage employers to take proactive steps to prevent bullying. A combination of civil and criminal measures (as utilised in the Protection from Harassment Act 1997) may prove more effective in persuading them to combat this type of behaviour. Realistically, the type of civil model used in the Dignity at Work Bills will be adopted for any future legislation.

This article has tried to define the current parameters of legal protection available to victims of bullying. It has also identified where improvements can be made to provide specific legal rights to victims of bullying. It is argued that this development is necessary to make legal enforcement easier and extend protection to all employees forced to experience this type of destructive behaviour. It is a widely held view that the UK Government should introduce legislation soon to achieve those outcomes.⁴¹

"All professionals involved in the campaign to prevent bullying agree that if there is one thing their fight for legislation is achieving, it is that

it signals to employers that bullying must be stamped out."⁴²

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1. Lawson-Cruttenden, T Addison, N. *Protection from Harassment Act 1997*, Blackstone Press 1997, p.32.

2. In *Burris v Adjani* (1995) 4 All E.R. 802 Sir Thomas Bingham MR underlined the importance of using the legitimate interest test as the basis for deciding if injunctive relief will be granted or not.

3. In Scotland this is referred to as a non-harassment order.

4. The test for deciding this issue (a) is there an arguable cause of action (b) does it appear to the court "to be just and convenient" to grant an award (Supreme Court Act 1981 s.37(1). see *Burris v Azadani* (1995) 4 All E.R. 802.

5. The equivalent provision in Scotland is s.8(1)(b). The term course of conduct requires more than one instance of bullying, and conduct could include verbal harassment. Harassment as defined includes behaviour that will cause alarm or distress i.e. bullying.

6. Punishable by a fine not exceeding level 3 on the standard scale.

7. Punishable by six months imprisonment or a fine not exceeding level 5 on the standard scale.

8. Budd, T. Home Office, 'Violence at Work: Findings from the British Crime Survey' p.v.

9. *Ibid.* p.vi.

10. *Ibid.*

11. *Ibid.* p.24.

12. *Ibid.* p.31.

13. *Ibid.* p.35.

14. *Ibid.* p.41.

15. *Ibid.* p.42.

16. Recommended texts: "Violence at Work: a guide for employers", IND (G) 69 L (Rev.); *Violence & Aggression to Staff in health service: guidance on assessment & management*, ASBN 0 7176 1466 2; "Preventing violence to retail staff", HS(G) 133 ISBN 07176 0891 3; *Prevention of violence to staff in banks and building societies*,

HS(G) 100 ASBN 0 7176 0683; "Violence in the education sector", ISBN 0 7176 1293 7.

17. IDS Brief, N. 735, June 2003, p.13.

18. *Ibid.* p.17.

19. Smith J.C Smith & Hogan *Criminal Law*, 9th ed. Butterworths 1999, p.413.

20. In *Jones v Tower Boot Co Ltd* (1997) I.R.L.R. 168, CA, mentioned earlier Mr Jones' colleagues that were the perpetrators of the racial harassment against him would have been open to prosecution for assault and battery.

21. Smith, J.C. Smith and Hogan, (1999) *Criminal Law*, 9th ed. Butterworths, at p.402.

22. For both sides of the argument see *ibid.* pp 403-404.

23. Middlemiss, S, *Liability of Employers for work-induced, stress-related illness — the judicial dichotomy*, IOSH Journal, Volume 6, Issue 1, 2002, pp 57 – 71.

24. As required by Reg. 3 of the Management of Health and Safety at Work Regulations SI 1999 No 3242).

25. Under Reg.5 every employer must ensure they provide sufficient health surveillance as appropriate to the risks identified in the risk assessment.

26. In *Lustig-Prean and Beckett v United Kingdom* (2000) 29 E.H.R.R. 548 and in *Smith and Grady v United Kingdom* (2000) 29 E.H.R.R. 493 employees in the armed forces claimed bullying, dismissal etc on the ground that their homosexuality breached their right to a family life under Art.8.

27. (1996) 21 E.H.R.R. 1 95/11.

28. (1997) IRLR 471 ECHR.

29. see *Ireland v UK* (1979-80) 2 E.H.R.R. 25.

30. O'Dempsey et al, *Employment Law and the Human Rights Act 1998*, Jordans, 2001 p.86

31. The rules relating to discrimination on grounds of sexual orientation and religious belief must be implemented by December 2003 and on grounds of age and disability discrimination by December 2006.

32. A recent survey undertaken on behalf of Personnel Today showed that nine out of ten of the 331 respondents knew bullying was going on in the workplace, two out of three thought the problem had increased over the last two years, 82% said weakness in manage-

ment was the likely cause, 43% admitted they had no policy on bullying and 80% provided no training, see *Personnel Today*, August 5, 1999, pp 24-25.

33. Professor Cary Cooper as reported in Johnstone, A. *When the boss is a bully*, *The Herald*, November 5, 1999.

34. See Clause 6 of the *Dignity at Work Bill 2001 (HL)* for the details.

35. Under s.4A of the *Public Order Act 1986* and ss.1, 2 & 4 of the *Protection from Harassment Act 1997*.

36. See s.5 of the *Protection from Harassment Act 1997*.

37. S.1 confers the right to dignity at work on all employees and covers harassment and bullying which would

constitute a breach of that right; s.2 protects an employee if they bring proceedings under the Act; s.3 covers contract workers; s.4 provides rights for the employee to complain to an employment tribunal; s.5 covers the employer's defence against such claims.

38. Lord McIntosh's reply to the debate at the second reading of the Bill.

39. www.publications.parliament.uk — UK Parliament — House of Commons Debates for March 25, 2003 — Column 17 WH.

40. A non-exhaustive list of activities was provided to illustrate what would constitute unlawful behaviour: (a) behaviour on more than one occa-

sion which is offensive, abusive, malicious, insulting or intimidating. (b) unjustified criticism on more than one occasion (c) punishment imposed without reasonable justification, or (d) changes in the duties or responsibilities of employee to the employee's detriment without reasonable justification.

41. The Manufacturing, Science and Finance Union was recently pressing for a change in the law, arguing that, without statutory protection against bullying, employees would be too afraid to claim statutory rights such as parental leave.

42. Hilpern K. *Beware, Bullies in the office make life hell*. *The Independent on Sunday*, *Smart Moves* 9.1.2000, p.2.

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ROUND HALL

LEGAL REDRESS AGAINST EMPLOYERS FOR VICTIMS OF WORKPLACE BULLYING — PART I

SAM MIDDLEMISS* AND OLGA HAY**

INTRODUCTION

Bullying at work can seriously damage the lives of those employees unfortunate enough to be a victim of this behaviour. It can cause them to suffer economic and social loss and experience physical and/or mental harm. Despite this, the sad reality for many

victims of workplace bullying is that there is no appropriate procedure for combating this behaviour in the workplace and no specific legal remedy available to them.

This article, which is written in three parts, will involve analysis of the existing avenues of legal redress in the UK for victims of bullying,

including consideration of the impact of human rights legislation, identification of any obstacles involved in pursuing these legal rights and recommendations for legal rules that will offer victims of bullying in the workplace adequate and effective means of legal redress.

The lack of a suitable mechanism for protecting victims of workplace bullying is due in part to reluctance on the part of Parliament¹ employers and the judiciary to take this matter seriously.

This article will outline the severity of this problem and highlight the shortfall in legal protection available to victims of bullying.

THE NATURE OF BULLYING AT WORK

All employees will have been a victim of bullying at some point in their working life but not everyone will have been harmed by it. Bullying can take many forms including constantly criticising, belittling, degrading, shouting at, humiliating, overworking, denying job information, singling out for unfavourable treatment, threatening, ostracising, trivial fault-finding, applying unrealistic deadlines, assaulting and ridiculing. Where such bullying or intimidatory actions are perpetrated by supervisory employees against other employees in the workplace it is often symptomatic of an organisational culture, which perpetuates or condones the behaviour.

While interpersonal bullying may arise in the context of a supervisor/subordinate relationship or through personality clashes between col-

leagues the most harmful type of bullying is institutional and this is very difficult to tackle. In the case of interpersonal bullying the perpetrator usually acts from a position of insecurity or low confidence in his abilities. There will often be serious consequences for the victim including injury to confidence, forced departure from their job, relationship problems at work and at home and stress-related illness. The last of these consequences is probably the most harmful.

“There can be little dispute against ever growing research that stress has a significant negative impact on the well-being of both the individual and the organisation.”²

Victims will want the bullying to come to an end but will often be powerless to stop it. Grievance procedures, normally invoked to deal with internal complaints of employees, can be inappropriate for dealing with claims of bullying. This is particularly true where the first stage of complaint for the employee is to raise the matter with their line manager and it is his or her behaviour that is the subject of the complaint³. Inability to resolve the matter satisfactorily by internal means may lead employees to absent themselves from the workplace or to resign to

avoid the hostile working environment caused by bullying. The only option available to them in these circumstances is to pursue a legal action against the bully or his employer. Unfortunately the law in this area is uncertain and ill defined.

CURRENT LEGAL PROTECTION FOR VICTIMS OF BULLYING

Minor bullying incidents at work are unlikely to be treated as unlawful; however, bullying that causes material harm to the victim can represent a civil wrong (breach of contract, tort) and a serious incident of bullying may constitute a criminal offence.

Where the employer of the bully is a public authority then the victim may be able to pursue an action against his or her employer under the Human Rights Act 1998 if it can be established that the bullying represents a breach of one or more of the Human Rights enshrined in the European Convention, *e.g.* Art. 3 prohibits torture, inhuman or degrading treatment or punishment (see discussion below).

There are no specific legal rules under statute or the common law that provide a remedy for victims of bullying and protection against the actions of the bully. Some protec-

tion has been extended to victims of bullying, however, by the judiciary, through broad interpretation of existing laws to encompass workplace bullying. In the absence of any proposals for statutory intervention in the near future, this process of judicial creativity will no doubt continue.

Where a bullying incident is triggered by a racist or sexist motive, or involves racist or sexist behaviour, then the employer and the employee perpetrating the bullying will be treated as acting unlawfully under equality legislation⁴. Where bullying is an intentional or negligent act of the employer leading to harmful consequences for his victim he may be liable in tort for breach of his duty of care owed towards his employee. An employer can also be liable for the bullying activities of his employees where he is held vicariously liable for their actions that are directed at the victim.

Where a manager physically intimidates his workers or an employee assaults a colleague they could be guilty of a criminal offence under the common law, *e.g.* assault or trespass to the person or statute, *e.g.* putting in fear of violence under s. 4 of the Protection from Harassment Act 1997.

DEFINITION OF BULLYING

There is no legal definition of bullying but it has been defined as "persistent, offensive, abusive, intimidating, malicious or insulting behaviour, abuse of power or unfair penal sanctions which makes the recipient upset, threatened, humiliated or vulnerable, which undermines their self confidence and may cause them to suffer stress."⁵ While this definition is too imprecise to be used in a legal context, it does highlight the necessary elements of a legal definition. If the definition is to be capable of being utilised in a statute it should outline the nature of the behaviour, indicate the consequences for the victim, identify the disciplinary outcome for the bully and the necessary degree of intention of the perpetrator, if any, for causing harm.

On this last point it would probably be inappropriate to include in a definition reference to the motive or intention of the bully to harm his victim. This is because the motive of the bully is often largely irrelevant in a civil case. It is the effect the behaviour has on the victim that is important and not the reason underlying the bully's actions.⁶ Section 1 of the Protection from Harassment Act 1997 avoids any mention of the motive of the harasser by defining harassment broadly and introducing a reasonable man test to determine issues of intention and foreseeability. The test is, did the employer know (or would a reasonable employer have known) in all the circumstances that his behaviour amounted to harassment?

An employer can also be liable for the bullying activities of his employees where he is held vicariously liable for their actions that are directed at the victim.

CONSEQUENCES OF BULLYING

The effects of bullying on the victim are often underrated although they can be severe. Tania Clayton, a female fire fighter suffered severe depression when she was bullied and harassed by her male colleagues over a period of 15 months. The bullying and its effect on her led to the breakdown of her marriage. The bullying consisted of being: left to sit for an hour at the top of a turntable ladder 100 feet above the ground, being forced to serve tea to men in bed, experiencing physical and verbal abuse and being forced to carry out useless and dangerous drills. She received an out of court settlement of £200,000 from her employer following a claim for sex discrimination.⁷

Bullying in the workplace is now commonplace⁸ and there is considerable evidence that bullying is a major cause of stress-related illness. Professor Cary Cooper, a leading expert on occupational stress from the University of Manchester's Institute of Science and Technology

(UMIST), estimates that bullying is responsible for between a third and a half of all stress-related illness. It can cause symptoms of psychiatric injury similar to Post-Traumatic Stress Disorder (PTSD)⁹. Victims may be forced to leave their jobs rather than continue to face a hostile and unwelcome working environment caused by a bully.¹⁰

Employers may also suffer adverse consequences from their employees bullying other members of staff. These can include lower productivity in the organisation, lower morale amongst staff, higher labour turnover, more frequent absenteeism and sickness absence.¹¹ This article will concentrate on one-to-one bullying perpetrated against employees by their manager or colleague. There are instances where collective bullying by all or part of the workforce is perpetrated against an individual but this is rare and not worthy of detailed consideration here.¹²

SOCIOLOGICAL ASPECTS OF BULLYING

It is outside the scope of this article to undertake detailed analysis of the psychological or sociological reasons for bullying (including the psychological traits of bullies or their victims)¹³ or identify the factors leading to an increase in bullying in recent times¹⁴. It has been suggested that bullying is symptomatic of a tougher and more competitive management philosophy that has emerged in the last ten or twenty years. Employers often impose pressures on management to meet unrealistic performance standards, comply with tight deadlines or cope with fewer staff. The inevitable consequence is that these harassed managers bully their staff.¹⁵ Nigel de Gruchy, then General Secretary of the UK's National Association of Schoolmasters, commented on the escalating problem of bullying in the teaching profession as follows, "The problem is getting worse. We call it the cascade effect. If head teachers could lose their jobs because of pressures they are

under, they pass the stress on. It is caused by pressure now on schools."¹⁶

Bullying is normally attributable to men, who are often in a supervisory position and victims are normally female and subordinate to the bully in the workplace hierarchy.¹⁷ "Bullying is the use of a position or power to coerce others by fear, persecution or to oppress them by force or threat. The key to understanding bullying is power The position of power does not necessarily arise in the traditional workplace power hierarchy." In a rare case where the victim of bullying was a man, a Chinese worker, David Chan was bullied and humiliated by his two bosses. He was awarded £172,000 as compensation for race discrimination (including £25,000 for injury to feelings).¹⁸

The organisation or an individual manager may intentionally use bullying to get better results from the victim or force them to leave their job.¹⁹ It is important that such persons are provided with protection against these workplace tactics. Towards this end, it is important to analyse the extent of the legal protection available to victims of bullying and identify any obstacles to its utilisation.

The writers believe that the imprecision and uncertainty in the current system of legal protection and obstacles to accessing legal rights justify the need for a specific statutory remedy for victims of bullying.²⁰ However, there are no indications that legislation to combat bullying will be forthcoming and victims seeking protection from bullying are obliged to utilise legal remedies that are ill equipped to fulfil the rôle.²¹

LEGAL PROTECTION AGAINST BULLYING UNDER THE COMMON LAW

Protection under civil law for victims of bullying in the United Kingdom is mainly provided under common law rules.

Breach of contract

Employers are unlikely to offer protection against bullying to employees in the form of a written or oral express term in an employment contract. In the event that an employer introduces a policy for bullying or dignity at work and it is incorporated into employees' contracts of employment, then an express contractual right to be protected against bullying would be provided. An action for breach of a contract will otherwise only be available to a victim of workplace bullying where it represents a breach of an implied term of his contract. These terms are implied into employment contracts by the courts and normally place a duty on an employer to behave in a certain way towards their employee²² or vice versa.²³

Where an employer breaches its implied duty, this can represent repudiation by him of an employee's contract of employment and provide the basis for an action against him by the employee for breach of his contract. The most important of the implied terms is the mutual duty to maintain trust and confidence. This term and the term that places a duty on the employer to provide for the safety of his employees are the most relevant to bullying.

Duty of employer to maintain his employee's trust and confidence

Although this is a mutual obligation, the duty owed by the employer towards his employee is most relevant here. Where bullying is perpetrated by a supervisor or manager against a subordinate then it will represent a breach of an employer's duty to maintain his employees' trust and confidence:

"[t]here is implied into a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee."²⁴ Bullying in the workplace

is a pernicious form of behaviour that is capable of destroying the position of trust and confidence inherent in the working relationship.

In *Courtalds v Andrews*²⁵ a supervisor was told by his boss "you can't do the bloody job" and this was deemed to be a breach of this implied term. The employer must be seen to manage its business in an honest and upright manner. If the employer does not act appropriately and the employee suffers a loss, then the employer as a consequence of the *Malik* case (considered below) will be acting in breach of an implied term and the affected employee will be able to claim breach of contract and may be entitled to stigma damages.²⁶ In *Malik v BCCI SA*,²⁷ the House of Lords held that if the conduct complained of was operating a business in a "dishonest and corrupt manner" and was viewed as "calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee", then the employer would be liable.²⁸

Whether creating or condoning an organisational culture that permits perpetration of bullying in the workplace would be deemed by the courts to be operating the business in a dishonest and corrupt manner remains to be seen. What this decision suggests is that, if an employer by operation of his business seriously compromises an employee's future employment and, in the process, breaches the relationship of trust and confidence with him, then this will probably represent a breach of contract.

It is clear from the cases cited that there has been a significant expansion in the scope of the implied term of trust and confidence and employers will be acting in breach of this term where they are discourteous, intimidatory or insulting which are all aspects of bullying.

Employer's duty to take reasonable care for the safety of his employees

The employer is under a duty to take

reasonable care for the safety of all his employees. There is a similar duty owed by the employer to his employees under the law of tort.²⁹ The employee, therefore, has a choice of suing his employer for breach of this duty under contract or tort. The aspects of this duty that apply to bullying are the employer's duty to provide a safe working environment³⁰ and reasonably safe and competent fellow employees.

Where an employee suffers physical or mental harm because an employer fails to provide a safe working environment that is free from bullying, then the employer can be liable. Breach of this duty might arise where an employer fails to respond to a bullying complaint, insufficient supervision is provided or he allows bullying to become part of the organisational culture.³¹

With respect to the duty to provide safe and competent fellow employees, if the employer knowingly allows their supervisor to bully another employee under their control and they are harmed then this will be a breach.³²

OTHER IMPLIED CONTRACTUAL DUTIES

In the case of *Wigan Borough Council v Davies*,³³ a junior manager at an old folk's home failed to take the side of care assistants in a dispute with the warden. The care assistants harassed the junior manager and she requested the support of her employer. Despite its commitment to help her, it failed to give her any support.³⁴ The Employment Appeal Tribunal held that an employer is under an obligation to take reasonable steps to ensure their employees carry out their job free of harassment by fellow employees. Their failure in this respect was breach of their implied duty to provide employees with reasonable support.

In *Waltons & Morse v Dorrington*,³⁵ an employer that failed to operate a no-smoking policy was acting in breach of an implied duty (formulated by the Employment

Appeal Tribunal) to provide and maintain a working environment which is reasonably suitable for the performance by their employees of their contractual duties. The scope of this term was summarised in the following way:

"[t]he implied duty to provide a reasonably suitable working environment also can be regarded as encompassing a duty to protect the employee from violence or from harassment, whether sexual or racial, or in the form of general bullying."³⁶

Clearly, there is a range of implied terms which could apply to bullying and breach of any of these will entitle the victim to pursue an action in court against his or her employer for breach of contract or use the breach as the basis for resigning their job and claiming constructive dismissal. Where the breach arises or is outstanding at the termination of the employment contract, the victim of bullying can bring a case for breach of contract before an Employment Tribunal.³⁷ While breach of any implied term will provide the basis for an action for breach of contract, it is more likely to be utilised as the basis for an action in tort or a claim for individual statutory rights.³⁸

WRONGFUL DISMISSAL

If instances of bullying or complaints from the victim to the employer about the behaviour leads to the victim's dismissal, this may represent wrongful dismissal and that employee could bring an action for damages. This course of action will be highly relevant where an employee is dismissed summarily or without proper notice. However, the victim now has a choice of pursuing an action in court for wrongful dismissal or bringing a case before an employment tribunal for breach of contract.³⁹

In *Wilson v Racher*,⁴⁰ a head gardener was subjected to wrongful and aggressive accusations of dereliction of duty. An argument ensued and the employee swore at his

boss whose response was to summarily dismiss him. In an action for wrongful dismissal, LJ Davies (finding in the plaintiff's favour) summarised the position as follows:

here was a competent, diligent and efficient gardener who ... had done nothing which could be regarded as blameworthy by any reasonable employer. Here too was an employer who was resolved to get rid of him; an employer who would use every barrel in the gun that he could find ... and an employer who was provocative from the outset and dealt with the plaintiff in an unseemly manner.

While the employee's insolent behaviour represented a breach of his contract it was not capable of negating a claim for wrongful dismissal. The remedy for wrongful dismissal is unlimited compensation, although the award is normally concerned with compensating the plaintiff for inadequate notice and the amount of damages will often be limited to the wages due under the notice period. In a statutory claim for breach of contract the maximum compensation an Employment Tribunal can award is £25,000.

ACTIONS IN TORT

Physical or non-physical bullying⁴¹ that causes the victim to suffer harm can be the basis for an action in tort against the bully under the law of negligence. It must be shown that a duty of care exists between the bully and his victim that has been breached. The employer can be directly liable for negligence where they have knowingly or negligently allowed bullying to take place⁴² or they can be held liable for the actions of the bully on the basis of their vicarious liability.

LIABILITY FOR PHYSICAL HARM

A number of different actions in tort can be pursued against a bully (assault, trespass to the person). Where it is physical bullying, the victim can pursue an action in tort for assault

against his or her attacker. An action for assault can be brought with or without an accompanying action for battery. Assault has been defined as: "an act of the defendant, which causes to the plaintiff reasonable apprehension of the infliction of a battery on him by the defendant".⁴³ This is some gesture or physical act, which could reasonably be construed as leading to a physical attack or trespass to the person.

In *Stephen v Myers*,⁴⁴ the defendant threatened the plaintiff and moved towards him with a clenched fist. Although his progress and assault were halted by the intervention of a third party, it was still held to be an assault. A battery requires that "there must be a voluntary act by the defendant intended to bring about ... contact with the plaintiff."⁴⁵ The contact referred to does not need to be substantial (e.g. spitting at someone, kissing someone against their will, slapping, or pushing them). Although the physical act must be intentional, the force need not be applied in a hostile manner.

Where someone wilfully causes mental harm to another person it will be treated as a tort. In *Wilkinson v Downton*⁴⁶ the physical harm was psychiatric shock or injury caused by the defendant telling the plaintiff, as a practical joke that her husband had been in an accident causing injury to both his legs. Although liability arose from verbal statements causing nervous shock, cases brought on this ground are not restricted to such a "cause" or "effect" and could extend to cases of verbal or physical bullying causing mental harm.

Unfortunately, the plaintiff may often find that the perpetrator of the harmful act is not in a financial position to meet a claim for damages. Where it is viable, the victim of bullying can pursue an action in tort against his employer or against both his employer and the perpetrator. An employer is under a personal duty to take reasonable care for the safety of all its employees. Breach of this duty could arise where it has

encouraged or condoned the bullying or it is in a position to control the bully's actions and fails to do so.⁴⁷

DUTY OF CARE FOR SAFETY OF ALL EMPLOYEES

An employer is under a duty to provide all its employees on an individual basis with a safe system of work including a safe working environment, adequate safety instruction and supervision and safe and competent fellow employees. Where bullying occurs, it can lead to an oppressive working environment that has an adverse affect on the health of targeted employees.⁴⁸ There is a duty on the part of the employer to discipline staff that are a danger to the health and safety of its employees and this could extend to their dismissal.⁴⁹ In *Walker v Northumberland County Council*,⁵⁰ it was decided by the High Court that the employer's duty of care could be extended beyond protecting employees from physical harm to risks to their mental health caused by the working environment.

In an unreported case Ms Noonan a council worker brought an action against Liverpool City Council in 1999. She claimed that, as a result of being subjected to bullying, intimidation and harassment over several years her employer had breached his duty of care. This case was settled out of court, her employer paying £84,000 as recompense.⁵¹

There is now clear authority that an employer can be liable for the harm suffered by their employees as a result of bullying.⁵²

Part II of this article will appear in the next issue of the *Irish Law Times*.

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1 *The Dignity at Work Bill*, introduced in the House of Lords in 1997 and re-introduced in 2002 was designed to address bullying in the workplace but did not progress beyond the stage of a second reading in the Commons.

2 Ellis, A. *Workplace Bullying: A Project*, Ruskin College, Oxford p.6 — <http://www.stress.org.uk/bullying.htm>.

3 Under part 2 of schedule 2 of the *Employment Act 2002*, the employer must provide a statutory grievance procedure and if an employee fails to follow this procedure then they may be banned from taking the case to an Employment Tribunal or risk an adjustment of their award of compensation by a tribunal.

4 Under ss. 41 & 42 of the *Sex Discrimination Act 1975*.

5 As defined by the *Manufacturing, Science and Finance Union (MSF)*, which carried out a survey throughout the United Kingdom along with the University of Stafford in 1995, into bullying in the workplace, and found that out of a sample of 1,137 men and women, 78% had witnessed bullying and 51% had experienced it.

6 In pursuing this course of action bullies often act instinctively or recklessly, not considering what the impact might be.

7 "£200,000 for firewoman bullied by colleagues" *The Times*, Tuesday, March 18, 1997, Record £200,000 harassment settlement, *Equal Opportunities Review*, No 73, May/June 1997 p. 2.

8 *Supra* 4, the Institute of Personnel Development (IPD) commissioned a survey of over 1,000 employees. It was undertaken by the Harris Research Centre in September 1996. It found that one in every eight workers had been bullied, and 72% of workers said they had suffered from work-related stress in the past five years. *People Management*, December 5, 1996 Vol 2 Issue 24 p. 8.

9 In a survey carried out by UNISON in 1997, 36% of the respondents that were being bullied felt the best option was to leave their job. Simpson, C Unison calls for bullying inquiry, *The Herald*, December 15, 1998, pp 1-2.

10 Professor Cary Cooper estimates that of the £1.3 million employers lose every year through stress-related illness between a third and a half of this loss results from bullying. Cooper CL

Palmer, *S Conquer your Stress*, 2000, IPD Publications.

11 For a case example see *Wigan Borough Council v Davies* (1979) I.R.L.R. 127. Collective bullying has been referred to as mobbing, see Ramage, R. *Mobbing in the Workplace*, *New Law Journal*, October 25 and November 1, 1996.

12 *Supra* 2 pp 2-4.

13 In a recent survey by the *Andrea Adams Trust*, 93.1% of the respondents said that bullying went on in their company, 58.1% believed there is reluctance to report incidents and 80.7% of companies offer no training on dealing with or preventing bullying. Hilpern, K "Beware bullies in the workplace make life hell in the office", *The Independent on Sunday*, January 9, 2000, p. 2.

14 In *Walker v Northumberland County Council* (1995) I.R.L.R. 35 these elements in the workplace led to the employee suffering two nervous breakdowns.

15 Durisch, P. "Teachers win protection from staffroom bullies", *The Telegraph*, February 25, 1998.

16 McCabe, M, *The Legalities of Bullying*, *New Law Journal*, November 21 1997 p. 1700.

17 "Bullied worker pay-out" *The Daily Telegraph*, August 10, 1997.

18 Roger Ward chief executive of the Association of Colleges was accused by Members of Parliament of using bullying tactics to get staff to leave with a view to replacing them with agency workers, "AOC chief accused of bullying and intimidation", *Times Educational Supplement*, No 4248, November 28, 1998, p. 49.

19 The Dignity at Work Bill was a victim of legislative pruning prior to the general election in 1997 and represented a serious effort to provide legal remedies for victims of bullying.

20 The Dignity at Work Bill 2002 was a recent failed attempt to overcome this problem

21 Duty to maintain their trust and confidence (considered below).

22 Duty to co-operate with the em-

ployer or indemnify them against any loss arising out of their employment.

23 *J Browne-Wilkinson, Woods v W M Car Services (Peterborough) Limited* (1981) I.C.R. 666 EAT see Lord Denning's judgment in the Court of Appeal decision (1982) I.R.L.R. 413, CA.

24 (1979) I.R.L.R. 84, E.A.T.

25 This heading of damages does not apply in Scotland.

26 (1997) 3 All E.R. 1.

27 *Ibid.* Lord Slynn at p. 15.

28 In *Arbuthnott v Fagan and Feltrim Underwriting Agencies Limited* (1994) 3 All E.R. 506, the House of Lords confirmed that it is for the plaintiff to decide whether to sue in tort or contract.

29 In *Walker v Northumberland County Council* (1995) I.R.L.R. 35, the employer was in breach of their duty of care where it knowingly subjected an employee to intolerable levels of stress, caused by an excessive workload.

30 In *Johnstone v Bloomsbury Health Authority*, a hospital authority responsible for junior doctors suffering stress due to working excessive hours, was found to be in breach of an implied contractual duty to take care for the health and safety of their employees.

31 *Hudson v Ridge Manufacturing Co Ltd* 1957 2 Q.B. 348.

32 (1979) I.C.R. 411.

33 The Industrial Tribunal found that "the employers being aware of the disruption she faced from the care assistants to her work and the condition under which she is required to work, took no steps to render the support they had promised her."

34 (1997) I.R.L.R. 488.

35 Rubinstein, M. p. 485 (1997) I.R.L.R.

36 Industrial Tribunal Extension of Jurisdiction (England and Wales) Regulation 1994 SI No 1623, Industrial Tribunals Extension of Jurisdiction (Scotland) Regulations 1994 SI No 1624, The disadvantage of bringing a claim to a tribunal is that certain types of action are excluded (e.g. personal injuries claims are excluded by s.3 of the Industrial Tribunals Act 1996) and there is an upper limit for damages of

£25,000, and neither restriction would apply to a court action.

37 In a sexual harassment case, *Muehring v Emap & Ibett* (Unreported) July 29, 1988, COIT 10824/88, the applicant claimed constructive dismissal, breach of contract on the basis of breach of the implied duty to maintain trust and confidence and brought an action in tort for assault and battery.

38 *Supra* 33.

39 (1974) I.C.R. 428, CA.

40 Non-physical bullying may include verbal threats, emails, letters etc. For details of a survey on electronic bullying see Meikle, J "Email in the office fan flame of electronic rage", *The Guardian*, May 31, 1997.

41 *Waters v Commissioner of Police for the Metropolis* (2000) I.R.L.R. 720 HL.

42 *Rogers, W. v. H. Winfield and Jolowicz on Torts*, 15th ed. Sweet & Maxwell, 1998, p. 63.

43 (1830) 4 C & P 349.

44 *Supra* 36. p. 66.

45 (1897) 2 QB 57 for a review of the case see *Rogers, W. v. H. Winfield and Jolowicz on Torts*, 15th ed. Sweet & Maxwell, 1998 pp 85-88.

46 *Waters v Commissioner of Police for the Metropolis* (2000) I.R.L.R. 720 HL.

47 If inadequate supervision is provided this could lead to an employer's liability, as would a failure to alert staff to the activities of known bullies.

48 Where an employer allows a bully to undertake such activities with the consequence that his or her victim suffers mental or physical harm, it could be liable for failing to fulfil its duty of care (e.g. provide a safe system of work or safe fellow employees).

49 (1995) I.R.L.R. 36.

50 In another unreported case in 1999 Ms Lancaster, successfully sued Birmingham City Council for compensation in respect of her mental illness caused by overwork. The County Court recognised it had failed to provide a safe system of work and awarded £67,000 in damages to Ms Lancaster.

51 *Sutherland v Hatton* (2002) E.W.C.A. Civ 76 limited the application of this principle (see subsequent parts of this piece).

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The legal liability of employers for trainees

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Introduction

While the Labour Government seem committed to increasing legal protection for atypical workers such as trainees,¹ this category of worker is still denied certain fundamental legal rights, which are necessary to ensure their employment protection. This article attempts to define the scope of the liability of persons responsible for trainees² who are working for them for a fixed time period in furtherance of a work experience arrangement (e.g. a welfare-to-work scheme such as the New Deal).³ There is a general acceptance that the term employer can be used to describe anyone enlisting the assistance of another in a work context. 'Employer ... is often used as a neutral word applicable to all engagers of labour.'⁴ Where the training arrangement consists only of providing training or education to a trainee in return for a fee then the term training provider is more appropriate.

This article will not consider the legal position of apprenticeships or professional trainees such as lawyers, accountants and doctors because they tend to be treated as the same as or equivalent to employees and consequently their legal position is more settled.⁵

Most persons engaged under training contracts will receive on-the-job training from the employer and will work alongside employees undertaking the same work as them but trainees will not be afforded the same legal status and consequently not share the same terms and conditions of employment or access to individual statutory rights.

Employment rights available to trainees

It is necessary to undertake an analysis of the legal position of trainees to ascertain whether or not they are disadvantaged compared with other groups of workers. There are certain important rights that are only available to employees⁶ as defined by the Employment Rights Act 1996, e.g. redundancy rights (right to receive

redundancy compensation and the right to be notified and consulted about redundancy) and protection against unfair dismissal

Judicial reasoning is that trainees should not to be treated as employees but instead as working under a training contract and as such they are not eligible for most forms of statutory protection.⁷

Rights denied to trainees also include time off work for various duties, a minimum statutory period of notice of dismissal, right to receive written particulars of terms and conditions of employment, maternity rights including maternity pay, maternity leave and the right to return to work, and guaranteed payment for persons laid off work.

However, workers as defined in s 230(3) of the Employment Rights Act 1996 are entitled to protection against unlawful deductions from their wages (as set out in section 27 of the same Act) the entitlement to a minimum wage and rights under the Working Time Regulations

Trainees that carry out work for the employer which is 'effective and genuine' (as defined by the European Court of Justice (in various cases involving the freedom of movement of workers) would fall within the definition of a worker ('working under any other contract whereby the individual undertakes to work perform personally any work or services for another party').⁸ They would be entitled to the protection afforded to workers even though their remuneration takes the form of a training allowance rather than a wage.

Legal status of trainees

A trainee will often undertake the same role as employees and be subjected to the same or a more onerous degree of control by employers. They will invariably be worse off than employees in terms of entitlement to employment rights and health and safety protection. The training arrangement will normally be of a tripartite nature with the trainee being sponsored by a governmental agency or educational institution to undertake work for an employer.

While the legislation of the European Union has led to the creation of certain rights directly for trainees in respect of health and safety etc. (discussed below) its impact has been limited.

The legislative component of the European Community's vocational training policy were established gradually. This is unsurprising given ... the diversity of training systems of member states embedded as they are in state-specific systems of social relations, including industrial organisation and patterns of labour market participation.⁹

The treaty on European Union provided a new aspect to the Treaty of Rome in the shape of measures to encourage education vocational training and youth.¹⁰

Article 127 is most relevant here as it gives EU Institutions the option of enacting measures in order to introduce and implement a vocational training policy. Member states are also placed under a duty to cooperate in the exchange of information and experience. 'The role of the EU institutions is to support and

supplement national policies, and to promote cooperation, nothing more.¹¹ The EU is unlikely to have much impact on the Government's UK political agenda for vocational training except where they promote measures that are supported by financial incentives for implementation.

There is a need to demystify the nature of the legal rights extended to trainees, which this article attempts to do. However, as already intimated this process is hindered by confusion over different definitions being utilised in employment statutes to determine entitlement to specific legal rights. This can lead to marginal workers such as trainees being entitled to some employment rights but not to others. Problems also stem from the difficulty experienced by the courts in characterising the nature of an employee and a contract of employment and uncertainties arising from application of the tests devised by the courts to resolve this issue.

Distinguishing the contract of employment from other types of contract

Access to most rights is restricted to employees rather than workers. The tests applied by the tribunals to determine employee status do not always afford protection to those that are in need of it. Although some are clearly excluded, other groups of workers ... are left in a grey area with both themselves and the tribunals uncertain as to their employee status.¹²

In determining the type of contract applicable in a given situation the courts traditionally applied the control test. The question was who controls the work undertaken, the employer or the worker?¹³ If the former applied it was a contract of employment if the latter applied it was not. It became apparent that this was a crude and imprecise test that failed to recognise the high degree of autonomy exercised by various categories of employees. It was therefore replaced by the organisational test.

Here the courts considered the importance of the job carried out by the worker in relation to the organisation.¹⁴ The more importance attached to the task by the organisation the more likely it would be a contract of employment. The flaw in this test was that in practice organisations would often contract out various important tasks to independent contractors. It therefore did not conform to economic reality. It was replaced by the entrepreneurial test, which asked the question, is the person who is undertaking the work carrying it out on his own account? The courts would consider factors such as financial risk involved in the work, the method of paying for it and the ability of the worker to employ their own replacements when they are unavailable to carry out the work.¹⁵

The test that presently applies is the multiple test. This involves abandonment of a single factor test in favour of consideration of all the factors in the case before making a decision.¹⁶

Unfortunately in recent cases the judiciary have concentrated more on the existence or not of mutuality of obligation in the contract and/or an element of personal service than other factors. The consequence is that where there is a lack of mutual obligation between the parties or there is a substitution clause in the contract allowing for others to undertake the task then it may be treated as a contract for

services (contract with independent contractor) rather than a contract of employment.¹⁷ However, in *McFarlane v. Glasgow City Council* (2001) IRLR 7 the EAT attempted to limit the impact of the decision in *Tanton* by stating that the mere existence of a substitution clause in a contract did not mean it could not be treated as a contract of service.

Most training arrangements are founded on mutual obligation with the trainee providing their work in return for work experience and training. The employer will not normally allow the trainee to substitute someone else in his role. These tests will not present obstacles to trainees trying to establish that they should be treated as employees. Nevertheless the courts will still be reluctant to accept this argument.

Legal status of trainees and their eligibility for employment rights

Trainees are not normally attributed the status of working under a contract of employment¹⁸ and their lack of employment status will result in denial of the normal contractual rights associated with a contract of employment or apprenticeship and ineligibility to benefit from the individual statutory employment rights identified earlier and below.

Female trainees will be unable to claim maternity rights such as the right to maternity pay and maternity leave. Where trainees are dismissed for reason of redundancy there will be no requirement for the employer to provide them with consultation or notice of redundancy and no right for them to be compensated for the loss of their job.¹⁹ Trainees will be unable to sue the employer for unfair dismissal where their contract is unfairly or unreasonably terminated and they will not be able to sue for constructive dismissal. This is defined in section 95(1)(c) of the Employment Rights Act 1996) and provides the right to claim unfair dismissal where employees are forced to leave their jobs prematurely by resigning because of their employer's intolerable behaviour. The combined effect on trainees being deprived of these and other statutory rights will be the denial of job security.

The transient nature of most training agreements means that even where trainees were given employee status, their entitlement to job security rights would be limited because their continuity of employment would be insufficient to allow them to qualify for statutory protection (e.g. employment of less than one year with the same employer excludes the right to claim unfair dismissal).²⁰ They would be similarly placed to other marginal workers such as employees working on short fixed term or temporary contracts that have insufficient continuity of employment to qualify for employment protection.

It will be argued in some quarters that this is, as it should be because trainees are benefiting from employment training and the development of their skills arising from their placement.²¹ They should therefore be treated as working under a training contract rather than a contract of employment. However, it seems inappropriate that a training contract should be used to cover all training agreements. An exception should be made where the trainee is being utilised in the same capacity as an employee with training only being provided on-the-job. The nature of the arrange-

ment dictates that the relationship should be covered by a contract of employment, albeit one which is temporary and for a fixed-term

It could be argued that to date employers have been free-riders benefiting from the services of workers, free from the statutory obligations outlined and liability for breach of health and safety duties imposed by statute and the common law. The employer will also directly benefit from any Government subsidy attached to these schemes.

It will often not be necessary to offer trainees any financial consideration in terms of training unless it is a statutory requirement. The employer will benefit from the convenience of having in-house candidates for jobs that are readily available and suitable for future vacancies.

Nature and status of training arrangements

The welfare to work schemes adopted by successive Governments, as an aid to economic stabilisation has been the subject of some criticism. However there is no doubting the Government's commitment to the New Deal and other schemes as a way of reducing unemployment and creating a trained workforce. The Government devoted £5.2 billion to the New Deal over the first four years of the Parliament and a significant part of this (£1.4 billion) was directed at the young unemployed (18–24). The scheme although ultimately the brainchild of the Government and a central plank of its economic policy is administered on its behalf by the Employment Service.

The Employment Service works in partnership with Training and Enterprise Councils, training providers, employers, voluntary bodies and other local agencies. There is diversity in the nature of training schemes available with some being more akin to an employment relationship (e.g. subsidised employment under the New Deal) than others (e.g. National Traineeships). The crucial question is, does a contractual relationship exist between an employer and a trainee, and, if so, is it a contract of employment? It will clearly depend on the precise nature of the training arrangement.

There are four options under the New Deal for persons between the ages of 18 and 24 who have been claiming job-seekers allowance for six months. They can carry out work with a private sector employer, which includes training towards an accredited qualification (which is funded by the Government to the extent of £60 per week). Similarly they can be given a funded placement with the Government's Environmental Taskforce or work for an employer in the voluntary sector, which will also involve study towards an accredited qualification. Finally they can undertake a year's full-time training or education leading to a qualification. There are also New Deal arrangements for single parents and the disabled that are primarily focused on getting them back into employment. Where the arrangement primarily involves training or education provision then the relationship should be regulated by a training contract (e.g. University for Industry, see below, Full-time education and training under the New Deal). Where there is a combination of training and work experience the situation is less clear.

The National Traineeships scheme gives young people the opportunity to acquire the skills, knowledge and qualifications needed by employers and the University for Industry has a role to provide information about learning opportunities to employers and individuals and provide basic skills training. At the moment all these types of trainees are denied employment status and the legal nature of their relationship is ill -defined.

If training arrangements are ascribed the status of an employment contract through the introduction of new statutory rules or through judicial intervention it would bring a degree of clarity to what is essentially a legal minefield.²² At the moment judicial decisions and legislative measures in the UK are often at odds with legal measures or decisions emanating from the European Union. Confusion can result where different legal standards are applied. This is best illustrated by the introduction into domestic legislation of the concept of 'worker' as a consequence of implementation of the law of the European Union. The concept of 'worker' is broader than that of 'employee' which until recently was the main category of person entitled to employment protection under UK law. Increasingly the term worker will be used instead of the term employee. This is particularly noticeable in health and safety law, where under the auspices of Article 138 of the EC Treaty (formerly Article 118a), Directives have been issued to member states which have allocated certain employment rights to workers and led to a number of important changes in UK employment law (e.g. Working Time Regulations 1998). It was clearly on the agenda of the European Union to broaden the availability of rights in protective legal measures, e.g. Article 3 of the Framework Directive 89/391/EEC extends rights to workers and specifically to trainees. The same rights are not provided by UK legislation that implements the Directive because its coverage is restricted to employees.²³ This is despite the fact that Article 3 of the Directive was intended to obtain harmonisation amongst member states in respect of law and policy on health and safety.²⁴ 'Article 118a refers to workers generally and states the objective it pursues is to be achieved by the harmonisation of conditions in general existing in the area of health and safety of those workers.'²⁵

Contractual nature of training arrangements

In *Daley v. Allied Suppliers Ltd*²⁶ the Employment Appeal Tribunal were unwilling to accept that a trainee under the Youth Opportunities Scheme was an employee for the purposes of section 78 of the Race Relations Act 1976.

If a contract did exist between the applicant and respondent, it was a contract for the training of the applicant and not a contract of service or a contract to personally execute work or labour within the meaning of section 78.²⁷

The EAT decided there was a clear distinction to be drawn between a Youth Opportunities Scheme trainee working under a job creation scheme organised by the Manpower Services Commission and someone undertaking work for the employer under a normal contractual arrangement.

The primary object of the work experience scheme was to enable her to obtain some work experience and she was undertaking to work and comply with instructions as a trainee and not as an employee.

It was concluded that there was no contractual arrangement between the Manpower Services Commission (the agency organising the training arrangement) and Miss Daley. Were training schemes only to involve on-the-job or off-the-job training being provided (that was their primary purpose) then the reasoning adopted by the EAT would seem reasonable. However, welfare-to-work schemes and other training arrangements will seldom have as their primary purpose the training function and will often involve the trainee carrying out work on behalf of the employer. The real purpose of the schemes from the perspective of the Employment Service is to provide the employer with the services of a subsidised worker in return for providing them with relevant work skills.

All of the welfare-to-work schemes (except the University for Industry scheme that involves study for a specific qualification) have characteristics of a contract of employment. In practice, however, they tend to have mixed elements of employment and training contracts. This makes it difficult for the judiciary charged with determining this issue to decide on the primary purpose of the work arrangement.

A cynic might argue the real purpose of these schemes is to get the people concerned off the unemployment register²⁸ and an advertising slogan adopted for the New Deal by the Government supported this view 'as more sign up, fewer sign on'.

It is difficult to accept the argument in the Daley case that all training agreements, by definition, are not to be extended employee status. Under the Youth Training Scheme (the successor to the Youth Opportunities Scheme) it was deemed necessary specifically to exclude any contractual tie (unless the parties wanted it) by including the following phrase in the training agreements for the scheme: 'nothing in this agreement is intended to form the basis of any legal contract between you and anyone else.'

The legal nature of the Youth Training Scheme, a welfare to work scheme which was a forerunner to the New Deal and similar in many respects was summarised in *Daley v. Allied Suppliers*.²⁹

The Youth Training Scheme consisted, in legal terms, of the administrative framework for a series of interlocking contracts. The MSC offered to make contracts with managing agents who in turn could make contracts with employers or educational institutions for the provision of training. The young people who participated in the scheme entered into training arrangements with employers or other providers of training which could be but generally were not contracts of employment.³⁰

This description of the legal status of YTS trainees could equally be applied to New Deal trainees. The likelihood of these arrangements representing a contract of employment seems remote given this historical position. There are also strong policy reasons for the Government and the courts maintaining it, not least because employers may be unwilling to take on trainees where they are extended the same

rights as employees. These schemes will lead to enhancement of the Government's economic record through reduction in unemployment and in the long-term to an improvement in the skill profile of the workforce. There would be no advantage to them in providing trainees with the protection of employment rights although they have provided relevant trainees with some statutory rights since coming to power, e.g. working time. Where the status of the trainee is unmentioned it will be the responsibility of Employment Tribunals and the courts to decide what it is. As in *Wiltshire Police Authority v. Wynn*³¹ where the Court of Appeal used the 'primary purpose' test to determine the contractual purpose of the parties and thereby ascertained the nature of the contractual relationship. Put at its simplest where the primary purpose of the contract is to provide employment it would be a contract of employment and where it is to provide training it would be a training contract.

The distinction between the cases where teaching and learning are the primary purpose – and the cases where the work done is the primary purpose – is helpful in the present context.³²

What the primary purpose of the employer is in participating in these training arrangements will depend on their precise nature although it is unlikely their involvement will be for altruistic reasons. In the case of trainees working under Government schemes; employers benefit from financial incentives to encourage their utilisation of the services of trainees and to retain their involvement in the process.

They will also be in a position to closely observe the progress of the trainee over this period and decide whether they want to employ them.³³ It could be seen as an academic exercise to distinguish these types of contract, given that trainees accepted by the courts as working under a contract of employment may still be denied certain important statutory employment rights due to their lack of continuity of employment. However denial of an appropriate status will ensure trainees are treated as second-class workers and denied the most basic of employment rights.

Welfare-to-work programmes, tend to be restricted to people who have a prescribed period of unemployment³⁴ and only operate for a limited period of six months or a year.³⁵ There is a similar pattern in work experience placements, where the period in employment represents a small but significant part of their overall programme of study. The employment rights that are dependent on a lengthy period of service with the same employer will not be available to them. Rights that are not dependant on continuity of service are inter alia: cases of automatic unfair dismissal, an action for wrongful dismissal, breach of contract cases (before an Employment Tribunal)³⁶ where the breach has led to termination of the employment contract and actions under the equality statutes.³⁷

Liabilities for employers arising outside the contract

(a) Liability under health and safety legislation

Trainees and students on work placement are often the most vulnerable persons undertaking work in an organisation, as they tend to be young and inexperienced.³⁸

Even older trainees that are new to the workplace and through unemployment have been absent from employment for a considerable time are entitled to special consideration.³⁹

The Health and Safety (Training for Employment) Regulations SI 1990/1380 states that, 'for the purpose of the relevant statutory provisions (e.g. the Health and Safety at Work Act 1974) a person provided with *relevant training* shall be treated as being the employee of the person whose undertaking ... is for the time being the immediate provider to that person of the training.' While this does not extend application of protective health and safety legislation to all trainees it will include any working under a Government welfare-to-work scheme. Those not covered (by the employment provisions set out in section 2(2) of HASAWA 1974) may be given protection by Section 3(1) of the Health and Safety at Work Act 1974, which provides 'employers must conduct their undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in their employment who may be affected thereby are not exposed to risks to their health and safety.'

This extends a duty on an employer to care for the safety of persons not in their employment but working on their premises and trainees will often be classified as non-employees.

In *R v. Associated Octel*⁴⁰ the House of Lords had to decide whether a maintenance operation carried out by employees of an independent contractor on behalf of Octel could be regarded as part of the 'conduct of an employer's undertaking'. If it were then the main contractor Octel would be liable for breach of section 3(1) of the Health and Safety at Work Act 1974. The employer's argument was that for liability to exist the contractor must be in a position to control the actions of non-employees (as a constituent element of 'conducting their undertaking' as defined in section 3). This argument was rejected and Octel were criminally liable for breach of section 3 by failing to take care for the safety of non-employees. It was accepted that the degree of control or lack of it could be considered in the context of ascertaining whether or not the employer had done what is reasonably practicable in the circumstances to avoid harm to non-employees. In the case of trainees working under a Government training scheme or a student undertaking a work experience placement it is likely that their employer will be responsible for their health and safety.⁴¹ Employers may also be liable for the safety of non-employees in the workplace in their role as controller of premises. While trainees and other marginal workers may take comfort from knowing their employer is under a legal duty to care for their safety, in practical terms employers and controllers of premises are unlikely to give due consideration to their safety needs. Even though the employer's failure in this respect could lead to criminal prosecution under section 3 or 4 of the Act.

The Temporary Workers Directive (91/383/EEC) imposes a duty on Member States to provide the same health and safety protection to temporary workers that apply to full-time employees under other Directives, such as the Framework Directive (89/391/EEC). It seems likely that the Temporary Workers Directive which *inter alia*, sets out to extend the category of person covered by other Directives to include temporary workers, will extend rights to certain categories of trainees.

'The Directive applies to employment relationships of a fixed duration and workers employed by an agency who work for another undertaking. On its face the Directive appears to be restricted to employees ... But it is possible that the Directive has in mind categories of worker wider than those defined in UK as employees.'⁴² The practical effects are that employers would be obliged to include temporary workers in their risk assessment,⁴³ and any other specific duties provided by the Statute, including informing them of risks to their health (see regulation 10 of the Management of Health and Safety at Work Regulations 1999 SI No 3242) providing safety training and a safe working environment.⁴⁴

Other Directives that have Article 138 of the EC Treaty as their legal basis⁴⁵ are the Working Time Directive (93/104/EEC) and the Young Workers Directive (94/33/EEC)⁴⁶ and these also apply to temporary workers such as trainees.⁴⁷ These Directives are now part of UK law as a consequence of the Working Time Regulations 1998 (SI 1998/1833). Regulation 42 specifically states that relevant trainees will be treated as a worker for the purpose of the regulations. The criminal prosecution of the wrongdoer under the Health and Safety at Work Act 1974 or associated legislation might not provide much consolation to an employee that has suffered harm or loss because of a negligent employer. While the importance of criminal liability as an inducement to employers to take measures to avoid prosecution should not be underestimated the party suffering the harm will often want some financial compensation.

(b) Liability in tort for failing to protect the health and safety of trainees

Trainees suffering injury or harm as a consequence of the employer's failure to comply with health and safety standards will be obliged to sue them under the law of tort for negligence or for breach of a statutory duty (where this is permissible under the statute and appropriate) in order to obtain financial compensation.

This latter type of action is a difficult and uncertain prospect for trainees because of the standard of proof required and therefore will not be considered in the context of this article. The trainee can be awarded compensation as a result of successfully pursuing an action in tort for negligence against the employer.

The benefit for trainees of pursuing a tort action for negligence is their legal claim is not dependent on establishing a contractual connection (contract of service) between the employer and themselves. In *Lane v. Shire Roofing Co*⁴⁸ the Court of Appeal stated that it might be appropriate for the courts, in pursuance of the public interest in these types of cases, to assume that a normal employment relationship exists. However, it was also stated that where health and safety issues are involved establishing a contractual connection is less important than establishing the degree of control exercised by the employer over the actions of the worker. Under the law of negligence it is enough that the organisation owes a duty of care to the trainee to establish an enforceable legal duty.⁴⁹ Given that the duty extends towards anyone who it could reasonably be anticipated would be affected by their actions, persons working or undertaking training in the premises of the employer will clearly fall within the scope of their legal duty.

'The essential point ... is that all cases of negligence need the requisite level of proximity, i.e. a sufficient level of relationship. In cases of personal injury or damage to property this requirement will be satisfied by foreseeability.'⁵⁰ The standard of care must not fall below that of a reasonable person in the position of the defender.

In the case of an employer the standard of care is that which could be expected of a reasonably competent employer in all the circumstances. Reference can be made to standards of behaviour in an industry and good management practice to help determine the appropriate level of action but this evidence is not conclusive. The expected standard of care is higher where the trainee is inter alia, young, disabled or new to employment. Provided the employer's action or inaction is a foreseeable cause of the harm suffered and there is a clear link between the negligent act and the harm suffered then the employer will be liable.

(c) Vicarious liability for the unlawful acts of trainees

Where trainees are working on a temporary basis in the premises of the employer the employer may be legally responsible (vicariously liable) for harm caused to a third party by the trainee's negligence (including other workers).

'Vicarious liability is of importance to third parties injured as a result of the negligence of employees and to employees themselves whose employer has instituted and operates a safe system of work, but which, because of the negligence of another employee, is not followed.'⁵¹ Where the person committing the negligent act is deemed to be an employee then provided their wrongful act is undertaken within the scope of their employment then the employer will be liable. This may appear straightforward to determine however examination of the case law will illustrate the difficulty in defining when something is done within the context of employment or not.⁵² This difficulty is exacerbated in cases where the contract is ill defined which is the case in most training contracts.

Where the courts decide that a trainee is not an employee then the employer may still be vicariously liable in limited circumstances defined in the decision in *Marshall v. William Sharp & Sons*⁵³ in respect of independent contractors (who have a comparable status to trainees). Where employers exercise a high degree of control over the activities of contractors in the workplace they will be liable for the actions.

Employers will tend to closely monitor and regulate the activities of trainees or students and because of this could be liable for their unlawful acts as they would for unlawful actions of an independent contractor. They may also be liable where they instruct or authorise the trainee to undertake the act leading to an action in tort.

(d) Equality rights for trainees

The Employment Appeal Tribunal in *Daley v. Allied Suppliers Ltd*⁵⁴ decided that trainees on a Youth Opportunities Programme were not capable of falling within the definition of employment under section 78 of the Race Relations Act.⁵⁵ However, this is unlikely to lead to trainees being denied all forms of protection under the

equality laws. Trainees who are working under training arrangements which primarily involve employment would be entitled to a degree of protection under equality legislation because they are capable of falling within the definition of 'employment' in the Acts.⁵⁶

All trainees irrespective of their status will have a right not to be discriminated against in access to non-employment training. 'Hence the Acts can be said to entrench the right to equal treatment not simply at the level of the employing organisation but more generally at the level of the labour market as a whole, by seeking to protect individuals at the point of access to training and to the membership rights and qualifications which are a prerequisite of professional development.'⁵⁷ They would certainly be able to establish a case against the placement agency for discrimination where they are denied a training place or their rights to training are diminished or terminated on the basis of sex or race discrimination. With respect to training provisions in the Acts, Government training agencies are specifically covered.⁵⁸ Where trainees are deemed to be working under a training contract they may have a right of action against the training provider for discrimination in respect of training under section 14 of the Sex Discrimination Act 1975 (and 13 of the Race Relations Act 1976). Section 14 specifically identifies discrimination on the following grounds based on sex as unlawful activities; in the terms on which access to training is provided, by refusing or deliberately omitting to afford access to training, by terminating their training or subjecting them to any other detriment during training.⁵⁹ Interestingly no parallel provision can be found in the Disability Discrimination Act 1995. If the trainee is deemed to be an employee of the host employer, then discriminatory behaviour, such as denying employment opportunities, offering employment on less favourable terms than others, limiting or refusing access to promotion, training, transfer and other benefits or facilities and dismissing or subjecting to any other detriment, will be unlawful under the discrimination statutes.⁶⁰

All the provisions in the statutes relating to training should be read in conjunction with sections 47 and 48 of the Sex Discrimination Act 1975 and sections 37 and 38 of the Race Relations Act 1976, which provide for positive action in the provision of training places in areas of employment where women, men or ethnic minorities are poorly represented. 'There are two types of permissible positive action under the legislation, one designed to persuade more of the disadvantaged group to apply for the job in question, and the other to equip members of such groups with the skills to enable them to effectively compete for such jobs.'⁶¹ The reality is that most employers do not utilise the right to take positive action in terms of offering employment or providing training through fear of getting it wrong or an inability to understand the complex legal provisions. As it is a voluntary process which employers tend to shy away from it is unlikely that trainees would benefit from these provisions.⁶²

(e) Protection for trainees against dismissal

Where a trainee is treated as an employee they will be entitled to various statutory rights including the right not to be unfairly dismissed and redundancy rights.

However, if the trainee is deemed to be working under a training contract these rights will be extremely limited.⁶³ They will have no right to claim unfair or wrongful dismissal.⁶⁴

A recent change in the law will benefit trainees working under an employment contract for a fixed duration. Employers will no longer be able to include a clause in a fixed term contract requiring employees to waive their right to bring a claim for unfair dismissal.⁶⁵ A trainee that makes a protected disclosure about an employer and is dismissed because of it can bring an automatic unfair dismissal claim under the Public Interest Disclosure Act 1998 irrespective of their length of service because this right is not dependent on continuity of employment.⁶⁶

The unfortunate truth is that these contracts are normally for a fixed term and it is anticipated that they should cease at a given time, e.g. in the case of a Government scheme, when the period of training finishes and the financial support is at an end. Under the definition of dismissal in section 95(1)(b) of the Employment Rights Act 1996, an employee is dismissed 'where he is employed under a contract for a fixed term, and that term expires without being renewed under the same contract.'

Under the New Deal and similar Government schemes there is normally a fixed period of training, which is set well below the qualifying period of employment for unfair dismissal protection. In the case of students on a work placement, often their training will last for a maximum period of a year and thereafter it is anticipated they will return to their studies.

The tribunal may consider if it would have been reasonable for the training provider to extend the contractual arrangement by continuing with it or offering suitable alternative training or employment.⁶⁷ Their ability to continue to afford to train or employ someone in the absence of financial support would be a consideration. It is questionable whether the issue of redundancy would arise, unless the employee can prove their situation falls within the statutory definition of redundancy as per section 139 of the ERA 1996.⁶⁸ The financial compensation for redundancy for trainees with short periods of service would be so poor that there would be little point for them in bringing a claim. There may be the possibility of suing for a breach of contract under the Employment Tribunal's jurisdiction⁶⁹ or bringing a case for a unlawful deduction of wages under sections 13-14 of the Employment Rights Act 1996, where the employer fails to give adequate notice of dismissal. Pursuing these actions would not be dependent on establishing continuity of employment. Similarly he could sue for wrongful dismissal on the basis of an employer's breach of contract leading to wrongful termination of his contract.

The unfortunate conclusion is that the prospect for trainees securing employment protection through enforcement of statutory employment rights is extremely poor. While trainees could claim automatic unfair dismissal in limited circumstances (e.g. National Minimum Wage Act 1998, Public Interest Disclosure Act 1998) in other contexts their rights might be restricted because rights to claim automatic unfair dismissal are intended to apply only to employees. This applies where a dismissal is on grounds of pregnancy or childbirth as per section 99 of the Employment Rights Act 1996,⁷⁰ membership of a trade union or involvement in trade union

actives or non-membership or non-involvement as per section 152(1) of the Trade Union and Labour Relations (Consolidation) Act 1996 or dismissal for carrying out health and safety functions as defined by section 108 of the Employment Rights Act 1996. Because of the transient nature of their employment, trainees are unlikely to be involved in or be members of trade unions or have any responsibility for health and safety.

Conclusion

Increasingly the need to include trainees within the ambit of employment law is being recognised by Parliament prompted in part by the provision of rights for trainees in the legislation of the European Union. The Working Time Regulations SI 1998 No 1833⁷¹ in their definition of a worker include 'trainees that are engaged on work experience or training other than that on a course run by an educational institution or training establishment.' Anyone undertaking training under a Government sponsored training scheme will benefit from restricted working hours, rest breaks and annual leave under the Regulations, but other trainees will not. Although the Government is striving to ensure that any new employment laws provide trainees under welfare- to -work schemes (relevant trainees) with employment rights, they exclude other forms of trainee that need equal protection, and in the process create an underclass that experience the worst of all worlds.⁷²

It may be difficult to determine which category of trainee is to be treated as an employee although some guidance has been provided by the case law and the tests provided by the courts e.g. primary purpose test, multiple test. There is a pressing need for legislation to clarify the legal status of participants in training schemes and the scope of their legal rights.⁷³

Utilising the term 'worker' in legislation to define its coverage (in some UK and EU legislation) has resulted in trainees irrespective of their contractual status being provided with new employment rights⁷⁴ and this process looks set to continue.⁷⁵ It is questionable whether the process of European intervention in social legislation will have a far-reaching impact on the legal position of trainees.

With respect to the general issue of introducing measures to counteract unemployment, the European Union is determined to leave Member States to deal with this issue.

According to the EU, the ball really lies in the court of the Member States. The European Union confines itself to mapping out guidelines to be implemented at national level, giving itself the role of Eurowatcher.⁷⁶

A Council Decision (of 6.12.94, 94/819/EC) set out an action programme for the implementation of a European Community vocational training policy. While schemes such as New Deal will fall within the scope of activities recommended by the programme, it is clearly anticipated that the participants in such a scheme should be treated as employees rather than trainees although this is never directly stated.⁷⁷

Where the law of the European Union does impact directly on the rights of trainees is the requirement that availability of rights under social legislation should

extend to workers and specific rights extended to workers under the banner of health and safety.

However, it is ultimately the member states that will decide the nature of the arrangements for vocational training and the employment status of the trainees involved.

The ... capacity in which states are involved in vocational training is that of regulation of employer's training arrangements, that is the arrangements which employers make for providing or allowing for vocational training for employees, which they may do by way of apprenticeships or training contracts ... When operating in that capacity, states are faced with questions of what employment rights trainees should have against employers, and also with questions of what employment rights in respect of training employees should have against employers.⁷⁸

Although it might be argued that trainees are in no worse position than temporary employees or employees working under short fixed-term contracts, there may be a difference in the degree of exploitation this category of worker experiences. The following quote from a critical analysis of the Youth Training Scheme summarises the problem.

Flexible employment is a general term for several tendencies which respond in differing ways to cyclical economic influences and its precise meaning and extent are a matter of some dispute. Especially contentious is how far flexibility is associated with exploitative and uncongenial work situations.⁷⁹

Legislation to remove the uncertainty in this area of law could define the nature and scope of legal protection available to trainees in a similar way to the rights of part-time workers under the Employment Protection (Part-time Employees) Regulations S1 1995 No 31.

A simpler means of ensuring that trainees are provided with basic employment rights is to alter the status of trainees, where appropriate, to that of employees e.g. where the training arrangement involves a significant element of work for the employer.⁸⁰

Despite the commitment of the Government to the creation of a training culture and the encouragement of widespread training⁸¹ as part of their plans for economic prosperity it is not in their interests or that of employers or training providers to alter the status quo and legislative intervention in the short-term is unlikely.

The European Union is unlikely to pressurise the Government to change the law because their watching brief does not allow for direct intervention, although they can provide rights in their social legislation and in particular legislation to protect the health and safety of worker's. The European Court of Justice can also exert their influence through judicial interpretation of legal rules that impact on employment law. This can be seen in a case involving the freedom of movement of workers.

In *Lawrie-Blum v. Land Baden Württemberg*⁸² it was made clear that the term 'worker' (as developed by several judgements of the ECJ) for the purposes of determining free movement of workers under the Treaty (as per Articles 39–42) should be defined by the European Union and not Member States. In the opinion of the court the term worker is broader than an employee. It necessarily involves someone in an employment relationship undertaking an economic activity.

The essential feature of an employment relationship ... is that for a certain period of time a person performs work for and under the direction of another person in return for which he/she receives remuneration.

This definition of a worker would certainly cover trainees in training arrangements where they undertake a significant amount of work for the employer in return for payment.

Apart from trainees working under Government-sponsored training schemes there are other situations where training over a significant period of time is carried out by an employer such as where training is provided to prepare someone for employment, or where training is as an experiential element of an educational programme.

It is important that trainees in this position do not continue to be excluded from the current protection extended to workers (relevant trainees) and they are not alienated from any process of reform.

Despite the strength of the argument for reform, legal practitioners and the judiciary must be prepared to apply this complicated and uncertain law for the foreseeable future.

The flexibility and casualness of the current work arrangements and the financial incentives attached will continue to attract employers. They are unlikely to willingly accept any change in the status of trainees or the additional obligations which accompany such a change. Their response might be to refuse to offer traineeships or reduce the number they currently offer.

This article proceeds on the basis that legal acknowledgement that certain trainees should be deemed to work under a contract of service would be a welcome development. It is hoped it will also contribute to the legal and political debate and help achieve enhanced rights for trainees and a clarification of the law.

Notes

- [1] The National Minimum Wage Act 1998, The Public Interest Disclosure Act 1998 and the Working Time Regulations 1998 all extend rights to workers which is broad enough to include some trainees (see later discussion).
- [2] Who for the purposes of this article will be referred to as either employers or alternatively as training providers (where a straightforward training contract is involved).
- [3] Or an industrial placement for students under educational programmes offering an element of work experience, traditionally referred to as sandwich courses.
- [4] R. Rideout & J. Dyson, *Rideout's Principles of Labour Law*, 4th edn, Sweet & Maxwell, 1983, p. 2. See also I. P. Miller, *Industrial Law in Scotland*, W. Green, 1970, p. 5, who apply the term employer to someone who is engaging or wishes to engage labour to assist him in the efficient running of his business.

- [5] Employment Rights Act 1996 s230 (2), *Cassidy v. Ministry of Health* (1951) 2 KB, In *Oliver v. JP Malmick & Co* (1983) IRLR 456 the EAT held that articulated clerks had a training contract with an individual solicitor and a contract of employment with the firm.
- [6] An employee is an individual who has entered into or works under a contract of employment [s.230 (1)]. A worker is someone that works under a contract of employment or any other contract either express or implied (if express whether oral or in writing) whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not ... that of client or customer of any profession or business undertaking carried on by the individual [s.230 (3)].
- [7] *Daley v. Allied Suppliers Ltd* (1983) IRLR, *Hawley v. Fieldcastle & Co Ltd* (1982) IRLR 223.
- [8] *Bettray v. Staatssecretaris van Justitie* (1989) ECR 1621, *Mehmet Birden v. Stadgeneinde Bremen* (1998) ECR 1-7747.
- [9] Hervey, T., *European Social Law and Policy*, Longman, 1998, p. 116.
- [10] Including Articles 126 and 127.
- [11] *Supra* 9, p. 115.
- [12] L. Dickens, 'Deregulation and Employment Rights in Britain' in R. Rogowski & T. Wilthagen (eds), *Reflexive Labour Law*, Kluwer, 1994, Ch. 9, p. 229.
- [13] *Yewen v. Noakes* (1881) 6 QBD 530.
- [14] *Whittaker v. Minister of Pensions* (1967) 1 QB 166.
- [15] *Market Investigation Ltd v. Minister of Pensions* (1969) 2 QB 169.
- [16] *O'Kelly v. Trust House Forte plc* (1983) IRLR 369.
- [17] S. Middlemiss, 'Mutuality of Obligation, the Contractual Imperative in Employment Law' (2000) 68 *Scottish Law Gazette*, 79.
- [18] See *Wiltshire Police Authority v. Wynn* [1981] QB 649 and *Daley v. Allied Supplies Ltd* [1983] IRLR 14.
- [19] Sections 135-170 of the Employment Rights Act 1996.
- [20] The exceptions will be where dismissals are automatically unfair e.g. where dismissed because they proposed to become a trade union member (s.52(1)(a) ERA 1996), on grounds of pregnancy or childbirth (ss 99(1) & (3) ERA 1996), or dismissal for involvement in health and safety (s.100 ERA 1996). There is no requirement for a continuous period of employment here.
- [21] The Employment Appeal Tribunal followed this line in *Daley* in deciding the Race Relations Act 1976 did not apply to trainees working under the Youth Opportunities Scheme.
- [22] Section 171 of the Employment Rights Act 1996 and section 19 of the Employment Relations Act 1999 give powers to the Secretary of State to classify certain types of work arrangement as covered by a contract of employment including individual workers or extend part-time or full-time status to an existing arrangement.
- [23] The Management of Health and Safety Regulations S.I. 1999 No 3242 does extend the duty of the employer in certain cases to persons not in their employment but likely to be affected by the conduct of his undertaking, which could include trainees, e.g. Regulation 3.
- [24] Article 118a was introduced by the Single European Act 1986.
- [25] R. Blanpain, 'Employment and Labour Law: The European Union' in R. Blanpain & C. Engels (eds), *Comparative Labour Law and Industrial Relations in Industrialised Market Economies*, Kluwer, 1998, Ch.7, p. 133.
- [26] [1983] IRLR 14.
- [27] *Daley*, *supra* n.18 at p. 17.
- [28] A theme which been explored over a considerable number of years by the Labour Party in Opposition, in criticising the unemployment policy of the previous conservative Government.
- [29] [1980] I.C.R. 649.
- [30] *Ibid.* at p. 650.
- [31] [1980] ICR 649.
- [32] *Ibid* Ld. Denning M.R. at p. 656.
- [33] Details of a study undertaken by the National Institute for Economic and Social Research into the New Deal were disclosed at the annual conference of the Royal Economic Society at St Andrews

University on 14 July 2000. It was claimed that although 40,000 young people had been taken off the dole only 13,000 had obtained full-time employment.

- [34] Under the New Deal prospective trainees under 25 years of age need to have been unemployed for 6 months.
- [35] The gateway arrangement under the New Deal offers from 3 weeks to 4 months job preparation before the job begins. Most jobs are for 6 months and training or education for a maximum of one year.
- [36] Industrial Tribunal Extension of Jurisdiction (England and Wales) Order SI 1994/1623, Industrial Tribunals Extension of Jurisdiction (Scotland) Order (SI 1994 No 1624) gave the power to employment tribunals to hear breach of contract cases, with a £25,000 maximum for damages awarded.
- [37] These equality rights are widely available to workers and the self-employed.
- [38] This was recognised under the Youth Training Scheme where the Health and Safety (Youth Training Scheme) Regulations 1983 S.I. No. 1919 placed a specific duty on supervisors to take care for the safety of trainees. The Health and Safety (Young Persons) Regulations 1997 places a duty on employers to give special consideration to 16–18 year olds in their risk assessment. These regulations have now been replaced by the Management of Health and Safety at Work Regulations 1999 SI No 3242.
- [39] In respect of disabled employees, there is special standard of care required under the common law which could be extended to trainees (see *Paris v. Stepney Borough Council* [1951] AC 367, HL). Under the Disability Discrimination Act 1995 trainees could be extended rights in particular their right to be given serious consideration as a candidate for a job.
- [40] [1997] IRLR 122.
- [41] In *R v. Swan Hunter Shipbuilders and Telemeters Installations Ltd* [1981] IRLR 403 the main contractor was found to be in breach of section 2 & 3 of the Health and Safety at Work at Work Act, by failing to notify sub-contractor's employees of a known danger, which led to their own employees and the sub-contractors employees suffering harm.
- [42] J. Hendy & M. Ford, *Munkman on Employer's Liability*, 12th edn, Butterworths, 1995, p. 379.
- [43] See regulation 3 of the Management of Health and Safety at Work Regulations 1999 SI No 32421.
- [44] It is outwith the scope of this article to consider all the rules contained in the regulations implementing the Framework Directive, e.g. Management of Health and Safety at Work Regulations 1999, Provision and Use of Work Equipment Regulations S.I.1992 2932, Workplace Health, Safety and Welfare Regulations S.I.1992 No 3004, Personal Protective Equipment at Work Regulations S.I. 1992 No. 2966, Manual Handling Operations Regulations S.I. 1992 No 2793, and the Display Screen Equipment Regulations S.I.1992 No. 2792.
- [45] Inserted into the Treaty of Rome 1957 by the Single European Act 1986.
- [46] This is now incorporated into the Management of Health and Safety at Work Regulations S.I. 1999 No 3242.
- [47] The latter Directive only applies to trainees up to the age of 18.
- [48] [1995] IRLR 493.
- [49] The limits on the application of the duty of care are famously prescribed in *Donoghue v. Stevenson* 1932 S.C. (HL) 31.
- [50] Commenting on the effect of the House of Lord's decision in *Caparo v Dickman* [1990] 2 AC 605 HL, R. Kidner, *Casebook on Torts*, 5th edn, Blackstone Press, 1998, p. 58.
- [51] V. Craig & K. Miller, *Law of Health and Safety in Scotland*, 2nd edn, W. Green, 2000, p. 85.
- [52] *Kirby v. N.C.B.* 1958 S.C. 514, *Rose v. Plenty* [1976] IRLR 60 CA, *Century Insurance Co v. Northern Ireland RTB* [1942] AC 509.
- [53] (1991) S.L.T. 114.
- [54] [1983] IRLR 14.
- [55] 'Employment means employment under a contract of service, or of apprenticeship or a contract to personally execute any work or labour and related expressions shall be construed accordingly.'
- [56] SI 1983/1919, section 14 of the Sex Discrimination Act 1975, section 13 Race Relations Act 1976
- [57] S. Deakin & G.S. Morris, *Labour Law*, 3rd edn, Butterworths, 2001, p. 593.

- [58] Section 16 of the SDA 1975 & section 15 of the RRA 1976.
- [59] Section 13 of the RRA 1976 is almost identical.
- [60] These unlawful activities are specified in section 6 of the Sex Discrimination Act 1975, section 4 of the Race Relations Act 1976 and section 4 of the Disability Discrimination Act 1995.
- [61] R.J. Townshend-Smith, *Discrimination Law: Text, Cases and Materials*, Cavendish, 1998, p. 547.
- [62] In *Harrods Ltd v. Remick, Same v. Seeley and another, Elmi v. Harrods and another* [1996] I.C.R. 846 the EAT recognised that the purpose of s.7 of the Race Relations Act 1976 which defines the scope of coverage of legislation should be interpreted broadly to extend the protection of the Act.
- [63] Under section 43K of the Employment Rights Act as amended by the Public Interest Disclosure Act 1998 an extremely broad sector of the working population including trainees are given the right to be protected against unfair dismissal or some other detriment where their contract is terminated prematurely because they have disclosed information about specified types of wrongdoing internally to their employer (s.43 C, E of the ERA 1996) or to designated external bodies S43 F.
- [64] *Wiltshire Police Authority v. Wynn* [1981] QB 649.
- [65] Section 18 of the Employment Relations Act 1999, removes the provision in s.197 of the Employment Rights Act 1996 which allows waiver clauses to exclude unfair dismissal claims in contracts of employment although waivers for redundancy claims will still be legally binding as per section 197 of the Employment Rights Act 1996.
- [66] The only remedy for trainees is compensation, whereas employees are also entitled to re-employment orders and interim relief.
- [67] *Oakley v. Labour Party* [1988] IRLR 34, CA.
- [68] The employee is made redundant because the employer has ceased or intends to cease to carry on the business for the purposes they were employed by him or carry on business at the place where the employee was employed. Or the requirement of the business for employees to carry out work of a particular kind or work at a particular place has diminished.
- [69] Industrial Tribunals Extension of Jurisdiction (England and Wales) Order 1994, SI 1994/1623, Industrial Tribunal Extension of Jurisdiction (Scotland) Order (SI 1994 No 1624).
- [70] Even here the employer may be able to establish that the principal reason for dismissal was on grounds unconnected with pregnancy, such as the contract coming to an end or withdrawal of funding underpinning their employment.
- [71] Which implemented the EC Working Time Directive (No 93/104/EC).
- [72] Section 26 of the Employment Act 1988 gave the power to the Secretary of State to ascribe status to Youth Trainees for particular purposes, but this power has been rarely used, and never to ascribe them with contractual status.
- [73] The Employment Rights Act 1996 is a recent example of a statute which provided very little protection to atypical workers such as trainees.
- [74] Temporary Workers Directive 91/383/EEC, Directive on the Protection of Young People at Work 94/33/EEC.
- [75] Part-Time Workers Directive No 97/81/EEC as implemented by the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, Working Time Directive 93/204/EEC.
- [76] R. Blanpain, 'The Changing World of Work' in Blanpain and Engels, *supra* n.18, Ch. 2, p. 35.
- [77] According to the Decision, when outlining the social advantages of a Community Work scheme, they state that 'preventing exclusion and marginalisation: the individuals concerned would be integrated into, and remain integrated into the world of work.'
- [78] M. Freedland, 'Vocational Training in EC Law and Policy, Education, Employment or Welfare?' (1996) 25 *Industrial Law Journal* 110, p. 115.
- [79] D. Lee, 'The transformation of training and the transformation of work in Britain' in S. Wood (ed.), *The Transformation of Work*, Unwin Hyman, 1989, Ch. 8, at p. 163.
- [80] The Secretary of State has the power to make a Regulation to this effect under section 171 of the Employment Rights Act 1996.
- [81] There are provisions in the Teaching and Higher Education Act 1998 which allow young employees (16-18 year old) reasonable time off their work to undertake training where their formal education falls below accepted standards.
- [82] [1986] ECR 2121, ECJ.

Comparative Analysis of the Vicarious Liability of Employers in Harassment Cases in the United Kingdom and the United States

Angela Duffy and Sam Middlemiss*

Abstract Courts and tribunals in the United Kingdom and the United States are increasingly taxed with the problem of deciding if an employer should be vicariously liable under statute for the discriminatory acts of their employees or third parties. This issue is particularly relevant in harassment cases where sexual or racial harassment of employees can be perpetrated by anyone coming in contact with them inside and outside the workplace. Reference to and interpretation of relevant common law rules in both jurisdictions traditionally determined the question of whether or not an employer is vicariously liable under the statutory rules.

However, recently the judiciary in the UK has recognized that this approach was incorrect and inappropriate because of differences in the wording applicable to common law and statutory claims and the effect of the traditional approach in unreasonably restricting liability of an employer for a narrow range of employees and discriminatory behaviour. We believe they have arrived at a modern and correct solution, namely that the statutory wording of the definition of vicarious liability should be interpreted in a manner consistent with common and everyday usage. This has meant increased recognition of an employer's duty to prevent discrimination and vicarious liability for the discriminatory acts (including harassment) of co-workers and third parties. This change in the law combined with the increasing impact of the law of the European Community (on the vicarious liability of employers for harassment) has led to a more liberal approach to this issue being adopted in the United Kingdom than in the United States.

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I. Introduction

Under the equality laws of the United Kingdom employers can be vicariously liable for the discriminatory acts of supervisors, colleagues, and even third parties. They can also be vicariously liable for discriminatory acts of employees perpetrated against other employees inside and outside of the workplace. Dramatic changes in the judicial interpretation of equality rules in the United Kingdom by the judiciary have led to an expansion of the circumstances where employers can be held liable for their employees' acts and the acts of others, particularly where they involve sexual or racial harassment.¹ This has arisen because of a recent willingness on the part of the judiciary, in applying the statutory rules, to depart from reliance on common law rules. As a result they are free to ignore the restrictions inherent in the vicarious liability rules under the law of tort.

Although the original discrimination law in the UK² and decisions in early discrimination cases³ were inspired by employment law in the United States, its influence has gradually declined as tribunals and courts have become more familiar with legal principles underlying discrimination law and the influence of the law of the European Community has become more pervasive.⁴ As a result of this there are now important differences in the discrimination and harassment laws in the United States and the United Kingdom and it seems an appropriate juncture to carry out a comparative analysis of the current state of the law in the UK and the United States in these areas.

As will become apparent, there have also been important developments in the legal treatment of vicarious liability in discrimination cases in the United States but the law is less settled than in the UK, particularly as it relates to sexual harassment law.

Although these [legal decisions] have led to clarification of certain fundamental issues there are still uncertainties. The controversy concerning employer liability standards for sexual harassment continues to spawn academic debate.⁵

The differences in approach to this narrow but nonetheless important area of law will be the subject of this article.

1 See *Jones v Tower Boot Co* [1997] IRLR 168, CA and *Burton v De Vere Hotels* [1996] IRLR 156, EAT. For a discussion of the cases see S. Middlemiss and R. Mays, 'The Common Law and Statutory Concepts of Vicarious Liability: The Parting of the Ways' 1997 *SLT* 12, 95-7.

2 Indirect discrimination in the sex and race discrimination legislation was borrowed directly from the disparate impact theory as put forward by the US Supreme Court in the race discrimination case of *Griggs v Duke Power Co* 401 US 424 (1971).

3 For example *Hurley v Mustoe* [1981] ICR 490 and *Schmidt v Austicks Bookshops Ltd* [1978] ICR 85.

4 Article 137 of the Treaty of Rome 1957; Equal Treatment Directive 76/207 EEC; the European Commission's Recommendation and annexed code of practice protecting the dignity of women and men at work 92/131/EEC.

5 M. Vinciguerra, 'The Aftermath of *Meritor*: A Search for Standards in the Law of Sexual Harassment' (Notes) (1988-89) 98 *Yale Law Journal* 1717 at 1721.

Traditionally the judiciary in the United States has adopted a more enlightened approach to discrimination and harassment law than its counterparts in the UK,⁶ supported by more wide-ranging and liberal statutory rules.⁷ This has extended to the rules for determining the vicarious liability of employers for the discriminatory acts of their employees. Resolution of this issue hinges on whether or not the discriminatory act complained of was perpetrated within the scope or context of the harasser's employment. 'The issue of a servant's scope of employment is crucial in sexual harassment cases.'⁸

What follows is a comparison of the law of the United States with the law in the United Kingdom to determine the similarities and differences in the legal rules applicable to determining the vicarious liability of employers for harassment. Analysis will be undertaken of the process whereby the UK courts have departed from the prevailing ideology in the US and arrived at a fairer and more liberal application of the law in this area. It will involve detailed analysis of the legal rules in each jurisdiction.

II. Sexual Harassment Law in the United Kingdom

Before carrying out a detailed analysis of vicarious liability it is useful to outline the general law of sexual harassment in the United Kingdom. The legislation makes it unlawful for a person to discriminate against that employee by dismissing him, or subjecting him to any other detriment.⁹

The first case to provide protection for sexual harassment by a ruling that harassment was a detriment for the purposes of the Act was *Strathclyde Regional Council v Porcelli*.¹⁰ In this case Mrs P was subjected to a campaign of harassment and bullying by two male colleagues to get her to leave her job. As a consequence she was forced to apply for a transfer and she brought a claim against her employer for sex discrimination. The court decided that sexual harassment with or without any corresponding threat for non-compliance with sexual demands was unlawful under the Sex Discrimination Act 1975.

In the case of *De Souza v Automobile Association*¹¹ the Court of Appeal accepted that an employer could be liable for racial or sexual

6 The law on sexual harassment covers aspects of discrimination such as sexual favouritism not covered in the UK and has more developed rules on grooming codes etc.

7 In the United States there was protection against various forms of discrimination much earlier than in the UK, under Title VII of the Civil Rights Act 1964 which covered a broader range of discriminatory behaviour, e.g. religious discrimination.

8 K.S. Anderson, 'Employer Liability Under Title VII for Sexual Harassment After *Meritor Savings Bank v Vinson*' (1987) 87 *Columbia Law Review* 1258 at 1273.

9 Sex Discrimination Act 1975, s. 6(2) and Race Relations Act 1976, s. 4(2).

10 [1986] IRLR 134.

11 [1986] ICR 514.

harassment the effect of which was only to create a hostile or unwelcome working environment for the victim. In *Bracebridge Engineering Ltd v Darby*¹² a single act in the form of physical assault by a supervisor was treated as unlawful discrimination as was a single comment made to a female employee at a management meeting in *In situ Cleaning Co Ltd v Heads*.¹³ Many more significant harassment cases will be considered later in this article. However, it is important to emphasize the persuasive impact on tribunals and courts of the European Commission Code of Practice on Sexual Harassment. Although the Code is not legally binding in the UK, the harassment of an employee is contrary to its provisions.¹⁴ The Code sets out a definition of sexual harassment that has been adopted as the appropriate legal standard against which cases are judged in domestic tribunals and courts.

Sexual harassment means unwanted conduct of a sexual nature or other conduct based on sex affecting the dignity of men and women at work. This can include unwelcome physical, verbal or non-verbal conduct.

This definition highlights the importance of determining the impact of the behaviour on the individual victim and underlines the diverse nature of harassment at work.

The Code of Practice was issued under the auspices of a Commission Recommendation on the protection of women and men at work, with the purpose of giving practical guidance to employers . . . [This states] that sexual harassment may be unlawful as a breach of the Equal Treatment Directive . . .¹⁵

The EEC passed the Equal Treatment Directive (76/207) in 1976 and called on member nations to enact laws and regulations which guaranteed the equal treatment of women and men at work.¹⁶

The nature of sexual harassment was recently summarized by the Employment Appeal Tribunal (EAT) in the case of (1) *Reed* and (2) *Bull Information Services Ltd v Stedman*:¹⁷

The essential characteristics of sexual harassment is that it is words or conduct which are unwelcome to the recipient and it is for the recipient themselves to decide what is acceptable to them and what they regard as offensive. A characteristic of sexual harassment is that it undermines the victim's dignity at work. It creates an offensive or hostile environment for the victim and an arbitrary barrier to sexual equality in the workplace.

12 [1990] IRLR 3, EAT.

13 [1995] IRLR 4, EAT.

14 European Commission Recommendation and Code of Practice on the Protection of the Dignity of Women and Men at Work, 92/131/EEC, OJ 1992 L49/1.

15 L. Clarke, *Discrimination*, 1st edn (Institute of Personnel Management: London, 1994) at 31-2.

16 T.P. Lester, 'The EEC Code of Conduct on Sexual Harassment: Part 1' (1993) 143, No. 6621 *New Law Journal* 1473-4.

17 [1999] IRLR 299.

i. The Scope of the Vicarious Liability of Employers in the United Kingdom

Analysis of the rules relating to employers' vicarious liability in the UK for the discriminatory acts of employees and the defences available to employers will follow. The rules relating to vicarious liability can be found in section 41 of the Sex Discrimination Act (SDA) 1975 and section 32 of the Race Relations Act (RRA) 1976.¹⁸

Until recently it was necessary for the applicant in a sexual or racial harassment case trying to establish that an employer was vicariously liable under discrimination legislation to prove that the harasser was perpetrating his act while acting 'in the course of his or her employment', in line with judicial interpretation under the common law. Although equality statutes use different wording—'anything done by a person in the course of his employment shall be treated for the purposes of this act as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval'¹⁹—tribunals and courts chose to interpret the meaning of the statute by reference to the common law rules under the law of tort:

It has long been established law that an employer is vicariously liable for the wrongful or negligent acts of his employee committed within the general course of his employment.²⁰

ii. Liability of Employer through Application of Common Law Rules

Application of the common law rules in determining vicarious liability can be seen in the racial discrimination case of *Irving and Irving v The Post Office*.²¹ This case involved Mr Edwards, a postman who lived next door to the Irvings who were Jamaican. Edwards, while working in the sorting office, wrote on an envelope addressed to his neighbours, 'Go back to Jamaica Sambo' and added a smiling face. When it was discovered that Edwards was the culprit, the Irvings brought proceedings against the Post Office under section 32 of the RRA 1976.

The Court of Appeal decided that the Post Office was not liable for the postman's actions for the reasons given below:

It is clear that the master is responsible for acts actually authorised by him . . . but a master . . . is liable even for the acts which he has not authorised, provided they are so connected with acts which he has authorised that they might rightly be regarded as modes—although improper modes—of doing them. In other words a master is responsible

¹⁸ Also see the Disability Discrimination Act 1995, s. 58 which is identical.

¹⁹ Sex Discrimination Act 1975, s. 41, s. 32 RRA 1976.

²⁰ W.A. Wilson *et al.*, *Gloag and Henderson: The Law of Scotland*, 10th edn (W. Green/Sweet & Maxwell: Edinburgh, 1995) at 540, para. 33.6.

²¹ [1987] IRLR 289.

not merely for what he authorises his servant to do, but also for the way in which he does it . . .²²

To determine whether the Post Office was vicariously liable, the court had to decide whether the racist act of Edwards was a mode of doing his job that had been authorized by his employer. Edwards was authorized to write on letters for ensuring they were properly despatched but for no other reason.

The court decided that his act was 'not the performance of any duty for which he was employed. His employment provided the opportunity for his misconduct, but the misconduct formed no part of the performance of his duties . . .'²³ Edwards was not acting in the course of his employment and his employer was not vicariously liable for his actions. The court in applying common law principles did not consider that a different standard might be appropriate under the RRA 1976:

The Irving decision confirmed that the same test for vicarious liability applies in the context of the RRA and the SDA, as in the general area of tort law, and this decision has been accepted and applied ever since.²⁴

iii. New Approach to Vicarious Liability

Judicial interpretation of the words, in equality statutes, 'anything done in the course of his employment'²⁵ changed following the landmark decision of *Jones v Tower Boot Co Ltd.*²⁶ In the *Tower Boot* case a 16-year-old male employee of mixed ethnic parentage was physically and verbally abused and bullied by fellow employees because of his race. This consisted of burning his arms with a hot screwdriver, throwing metal bolts at his head, whipping his legs with a rubber welt and calling him racially insulting names. He brought a complaint of racial discrimination against his employer on the basis of vicarious liability for these actions under the RRA 1976.

The EAT at the first stage of appeal held that the employer was not vicariously liable.

The majority view was that the phrase 'in the course of employment' has (and had at the time the draughtsmen penned s. 32) a well-established meaning in law and they could see no reason not to adopt that meaning in the present context . . . since it had been adopted by other decisions of the tribunal and by the Court of Appeal in the *Irving* case . . .²⁷

The EAT was of the opinion that, 'by any stretch of the imagination . . . the acts complained of by Mr Jones . . . could not be described as an improper mode of performing authorised tasks'.²⁸

22 *Canadian Pacific Railway v Lockhart* [1942] AC 591 at 599.

23 [1987] IRLR 289.

24 L. Buckley, 'Vicarious Liability and Employment Discrimination' (1997) 26(2) *Industrial Law Journal* 158 at 159.

25 For example, RRA 1976, s. 32(1).

26 [1997] ICR 254.

27 [1995] IRLR 529 at 539.

28 *Ibid.* at 530.

The outcome of this decision was clearly unfair and unjust but in terms of application of the common law rules it was correctly decided. It seemed that the more outrageous and harmful the behaviour of the employee the less likely the employer would be liable even if it had harmed another of their employees. 'In conventional tort law, there is a sliding scale: the more serious the act of the employee, the less likely it will be attributable to the employer.'²⁹

The Court of Appeal went on to reverse the EAT's decision³⁰ and McCowan LJ concluded that, 'Irving does not decide that "in the course of his employment" in section 32(1) incorporates the common law concept of vicarious liability and we are not accordingly bound so to hold.'³¹

The Court of Appeal went on to consider the interpretation that should be given to the phrase 'in the course of employment' in discrimination cases and concluded that, 'tribunals are free and are indeed bound, to interpret the ordinarily, and readily understandable, words, "in the course of his employment" in the sense in which every layman would understand them'.³²

Waite LJ was of the opinion that, 'it would be particularly wrong to allow racial harassment on the scale that it was suffered . . . to slip through the net of employer responsibility by applying to it a common law principle . . . To do so would seriously undermine the statutory scheme of the discrimination Acts and flout the purposes which they were passed to achieve.'³³

Following *Tower Boot* the definition of an employer's responsibility under section 32(1) of the RRA 1976, section 41(1) of the SDA 1975 and section 58(1) of the DDA 1995 is now considerably wider than previously thought as the phrase 'in the course of employment' is to be broadly interpreted. The fact that the discriminatory acts took place in the workplace, were undertaken while both bully and victim were supposed to be working and under the direct supervision and control of the employer would all be relevant factors pointing to vicarious liability.

Although the *Tower Boot* ruling has increased the circumstances in which an employer will be vicariously liable for employees' discriminatory acts there are still problems associated with determining when an employee is acting in the course of his employment. Waite LJ in his conclusion in *Tower Boot* stated that, 'The application of the phrase will be a question of fact for each industrial tribunal to resolve,

29 Equal Opportunities Review, Law Reports, 'Employer not Liable for Racial Harassment' (1995) No. 64 (November/December, 1995) 37 at 39.

30 *Jones v Tower Boot Co Ltd* [1997] ICR 254.

31 *Ibid.* at 259.

32 *Ibid.* at 265.

33 *Jones v Tower Boot Co Ltd* [1997] ICR 254 at 265.

in the light of circumstances presented to it.³⁴ He usefully gave examples of the kinds of factors to be considered, such as whether or not the employee is within or outwith the workplace, in or out of uniform and in or out of rest-breaks when the incident occurred.³⁵

Problems associated with defining the scope of the term 'in the course of employment' since *Tower Boot* were highlighted in *ST v North Yorkshire County Council*.³⁶ The Court of Appeal held that an employer was not vicariously liable for the indecent assault of a pupil on a school trip by the deputy headmaster of a special school. His act 'could not be regarded as a mode, albeit an improper and unauthorised mode, of doing what the deputy headmaster was employed to do . . .'.³⁷

In *Waters v Commissioner of Police of the Metropolis*,³⁸ the Court of Appeal reached a similar conclusion. A policewoman complained that a fellow male officer had sexually assaulted her when both were off duty at the police section house where she stayed. The policewoman brought proceedings against the Commissioner of Police on the basis of *inter alia* vicarious liability for the assault under the SDA, section 41(1). The Court of Appeal held that the assault had not been committed by the officer in the course of his employment. Waite LJ stated that the circumstances of the assault 'placed him and her in no different position from that which would have applied if they had been social acquaintances only, with no working connection at all'.³⁹

The court discussed the decision in *Tower Boot*. However, Waite LJ decided it was inconceivable in the circumstances that any tribunal applying the reasoning used in *Tower Boot* could find that the alleged assault was committed in the course of the male officer's employment.⁴⁰

Because the act was held to be outwith the course of the officer's employment the policewoman was also unsuccessful in establishing a separate claim of discrimination by way of victimization pursuant to the SDA, section 4(1)(d). She had complained that due to her earlier allegation of assault she was removed from a list of specialist officers and subject to detriment in other ways that represented victimization. Her employer was not vicariously liable for the assault as he had not contravened the SDA and consequently the policewoman failed to establish that victimization (based on an action brought before a tribunal for sex discrimination) had taken place.

34 *Ibid.*

35 *Ibid.*

36 [1999] IRLR 98.

37 *Ibid* at 98.

38 [1997] ICR 1073.

39 *Ibid.* at 1095.

40 *Ibid.* at 1095-6.

It is vital that discrimination, including victimisation, should be defined in language sufficiently precise to enable people to know where they stand before the law.⁴¹

The law in this instance was given a strict interpretation that frustrated protection of the law being provided to a genuine victim of discrimination. If an applicant fails to establish the employer's vicarious liability under section 41, they will also be unsuccessful in a claim against the employer for victimization under section 4(1)(d) of the SDA.⁴²

In her appeal to the House of Lords⁴³ Ms Waters brought a claim for negligence against her employer and an action for breach of contract because of the bullying and harassment she had experienced following her complaint about a fellow officer.

Lord Slynn, in the House of Lords summarized the case as:

one of negligence—the employer failed to exercise due care to look after his employee. Generically many of the acts alleged can be seen as a form of bullying—the employer, or those to whom he delegated responsibility for running his organisation, should have taken steps to stop it, to protect the employee from it.

The House of Lords decided that failure of an employer to take steps to prevent bullying or harassment, or where they are aware of it happening and failed to bring about its cessation, is a breach of duty of care. It was decided that a claim for negligence against her employer could proceed to trial. This decision represents judicial recognition at the highest level that bullying or harassment is a ground for an action in tort and breach of contract.

In *Stubbs v Chief Constable Lincolnshire Police and others*,⁴⁴ a policewoman was sexually harassed on a number of occasions by a male officer in public houses after work. The employment tribunal held that the incidents were in the course of employment, and so the Chief Constable was vicariously liable. The tribunal took the view that:

the pub incidents were connected to the work and the workplace. They would not have happened but for the applicant's work. Work related social functions are an extension of employment and they could see no reason to restrict the course of employment to purely what goes on in the workplace.⁴⁵

41 *Ibid.* at 1097.

42 C. Bourn and J. Whitmore, *Anti-Discrimination Law in Britain*, 3rd edn (Sweet & Maxwell: London, 1996) 167.

43 *Waters v Commissioner of Police of the Metropolis* [2000] IRLR 720, HL.

44 9 September 1997, Case No. 38395/96 ((1998) *EOR Discrimination Case Law Digest*, at 11). See S. Middlemiss, 'Tower Boot Revisited: The Impact Continues' (1998) 66(4) *Scottish Law Gazette* 180–1. The EAT upheld the tribunal decision (reported in (1999) IRLR 81).

45 *EOR Discrimination Case Law Digest*, n. 44 above at 12.

This conclusion was affirmed by the EAT⁴⁶ which stated that the initial tribunal 'were in the best possible position to judge whether, despite the fact that the first incident occurred "in a pub" it was nonetheless to be regarded as part of the employment relationship'.⁴⁷ This decision clearly contradicts the view of Waite LJ in *Tower Boot* that an employer cannot be liable for behaviour perpetrated outwith the confines of the working relationship.

In *UP and GS v N and RJ*⁴⁸ a further issue was raised with regard to the phrase 'acting in the course of employment'. In this case, the tribunal upheld a submission that the EC Equal Treatment Directive and the subsequent European Commission Code of Practice on Sexual Harassment make no mention of an employer being able to avoid his obligation by claiming that in perpetrating the act his employee was not acting in the course of employment. The tribunal decided that section 41 of the SDA was incompatible with the Directive and so the defence was not open to the first respondents. Although the decision in this case did not establish a binding precedent because it only entailed the decision of an employment tribunal, it did raise an important issue that may be considered by courts in the future. Whether or not the wording of the SDA and the RRA in this respect are contrary to European Community law will ultimately be a matter for the European Court of Justice to determine. In the process it could consider whether courts need some yardstick to determine when the behaviour is employment related or not.

The interpretation of the term 'in the course of employment' has considerably changed since the introduction of the SDA and the RRA. The strict application of common law rules to determine liability following *Irving* meant that employers were avoiding liability in cases where the harasser was a supervisor (working environment cases) and in most cases of co-worker harassment. However, the *Tower Boot* decision means that an employer is no longer able to avoid liability merely because the conduct of the harasser does not directly relate to the duties under their contract.

The *Stubbs* decision has resulted in employers being potentially liable for the actions of employees outside the workplace. They may also be liable where third parties are the harasser and actually or potentially are under the control of the employer.⁴⁹ In a Canadian case *Janzen v Platy Enterprises Ltd*⁵⁰ it was decided that, '... "work-related" was defined broadly to include anyone whose opportunity to harass was directly related to his or her employment'.⁵¹

46 [1999] IRLR 81.

47 *Ibid.* at 85.

48 [1999] IRLR 81.

49 See *Burton and Rhule v De Vere Hotels Ltd* [1997] ICR 1.

50 [1989] 1 SCR 1252.

51 For an analysis of this case see S. Fredman, *Women and the Law* (Clarendon Press: Oxford, 1997) 326.

Where a serious assault is committed in the employment context (as in *Bracebridge Engineering Ltd v Darby*⁵² and the *Waters* case) the harasser could be prosecuted under the criminal law. 'Where an employee is the victim of physical manhandling by the harasser, this could constitute the basis of an action for assault. The development of sexual harassment as a wrong in itself, giving rise to civil, and where appropriate criminal liability, may serve to turn the spotlight on the perpetrators.'⁵³

Where the employer potentially has legal responsibility for the actions of a harasser, he may have the defence that he did all that was reasonably practical in the circumstances to prevent this occurring.

In proceedings brought under this Act against any person in respect of an act alleged to have been done by an employee of his it shall be a defence for that person to prove that he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description.⁵⁴

Once it has been shown that an employee has been the victim of harassment and that it was perpetrated by the harasser in the course of their employment, then it is up to the employer to show he has taken action to prevent the discriminatory behaviour.

iv. Employer's Defence that He Took Reasonably Practical Steps to Prevent the Discriminatory Acts

'The burden of proof is on the employer to show that he has taken such steps.'⁵⁵ Over the years since the enactment of the legislation tribunals have developed the standard of behaviour required for proof of the defence. Both the Equal Opportunities Commission (EOC) and Commission for Racial Equality (CRE) have recommended in codes of practice that employers adopt equal opportunities policies⁵⁶ and in early harassment cases tribunals were satisfied that the mere existence of a policy was sufficient to meet the requirements of section 41(3) of the SDA.

In *Balgobin and Francis v London Borough of Tower Hamlets*⁵⁷ two females were employed as cleaners in the canteen area in a hostel. Mr Clarke was appointed as a cook and he harassed both employees. In October 1985 they complained to management and Mr Clarke was

52 [1990] IRLR 3, EAT.

53 J. Dine and B. Watt, 'Sexual Harassment: Moving Away from Discrimination' (1995) 58(3) *Modern Law Review* 343-63 at 363.

54 SDA 1975, s. 41(3) and RRA 1976, s. 32(3).

55 J. Hemming, *Discrimination in the Workplace: A Practical Guide* (John Wiley & Sons: Chichester, 1997) 170.

56 Equal Opportunities Commission, *Code of Practice: Equal Opportunities Policies, Procedures and Practices in Employment* (HMSO: London, 1985) 6 and Commission for Racial Equality, *Code of Practice for the Elimination of Racial Discrimination and the Promotion of Equality of Opportunity in Employment* (HMSO: London, 1994) 6.

57 [1987] IRLR 401.

suspended; however, as the employees could not prove the harassment, Mr Clarke was allowed to continue to work in the canteen. The women complained to an industrial tribunal. However, the tribunal was:

. . . satisfied that no one in authority knew what was going on prior to 24 October 1985. Prior to that time, the respondents were running the hostel with proper and adequate supervision insofar as the staff was concerned. They had made known their policy of equal opportunities. We do not think that there were any other practicable steps which they could have taken to foresee or prevent the acts complained of.⁵⁸

The EAT upheld the tribunal's decision stating that it was ' . . . very difficult to see what steps in practical terms the employers could reasonably have taken to prevent that which occurred from occurring'.⁵⁹

The decision in *Balgobin* was controversial for a number of reasons. First, the employer's contention that no one knew what was happening before October is not a valid defence under equality legislation. The Acts provide that discrimination shall be treated as done by an employer, whether or not it was done with the employer's knowledge or approval.⁶⁰ Therefore, the opinion of the EAT 'seems to conflict with the express wording of s. 41(1) which says that "the employer's knowledge or approval" is irrelevant'.⁶¹ The employer's lack of knowledge of Mr Clarke's actions and the employees' distress was more likely due to improper and inadequate supervision.⁶² Secondly, the decision in *Balgobin* has been criticized because it 'would indicate that the requirements to establish a defence under s. 41(3) are not very rigorous'.⁶³ The minority view in *Balgobin* was that the employers had not provided a satisfactory defence under the 1975 Act.⁶⁴ Proof of the defence did 'not extend to requiring an explanation or guidance on the policy's application . . . or ensur[ing] supervision was in place to guarantee that the policy . . . was enforced'.⁶⁵

Because of criticism of this decision employment tribunals have adopted a more robust approach to the requirements for this defence, ' . . . Industrial tribunals have been rather more demanding . . . merely adopting an equal opportunities policy, and doing nothing more, is not enough . . .'.⁶⁶ 'It is more likely now with the added impact of the EC Code on the Protection of the Dignity of Women at Work, that

58 *Ibid.* at 402.

59 *Ibid.* at 403.

60 See SDA 1975, s. 41(1).

61 Income Data Services, 'Bullying and Harassment at Work' (1996) 76 *IDS Employment Law Supplement* (10 May) para. 76.3.4.

62 [1987] IRLR 401 at 402.

63 H. Houghton-James, *Sexual Harassment* (Cavendish Publishing Ltd: London, 1995) 140.

64 [1987] IRLR 401 at 403.

65 Houghton-James, above n. 63 at 139.

66 S. Cox, 'Employer Liability for Employees' Discriminatory Acts' (1990) 33 *Equal Opportunities Review* 19-24 at 23.

were the circumstances of this particular case to be repeated the minority view would prevail.⁶⁷

This EC Code recommends that for the defence, not only should there be a policy,⁶⁸ but it should be communicated effectively to all employees⁶⁹ and there should be provision for training of managers and supervisors.⁷⁰ These steps are also recommended in the EOC⁷¹ and CRE Codes of Practice.⁷² Counsel for the claimant in *Bal-gobin* had averred that, 'there was no evidence given at the tribunal that any of the employees were given any instruction or guidance as to the policy's operation'.⁷³ Employment tribunals dealing with sexual or racial harassment currently 'have a well-developed awareness that they must take into account the recommendations of the statutory Codes of Practice issued by the CRE and the EOC . . . whenever they consider them relevant to the issues before them . . . in addition [to] . . . a duty to take into account the content of the [EC Code]'.⁷⁴

Tribunals now accept that, 'an employer should either show that he has complied with the Code of Practice in adopting, implementing and monitoring an equal opportunities policy or that there is a good reason for not doing so'.⁷⁵

As detailed above, by following the recommendations in the EC Code, an employer must show that he has effectively communicated the policy to all employees. Where this duty is neglected, the employer may be held liable, as in the case of *Taylor v Adlam, Adlam and Hanley*.⁷⁶ Here a charge nurse of African origin complained of racist comments made to him by the director of nursing but no action was taken. The tribunal held that, 'although the employer had a "perfectly satisfactory equal opportunities policy" it was not enough . . . and that there was no evidence that this . . . policy was pointed out to the director on his appointment'.⁷⁷

In addition, the EC Code recommends that managers and supervisors and those playing an official role in any formal complaints procedure receive training for dealing with any problems. Training on the organization's harassment policy and procedures for dealing with harassment (where they exist) should also form part of appropriate

67 Bourn and Whitmore, above n. 42 at 168.

68 European Commission Recommendation and Code of Practice on the Protection of the Dignity of Women and Men at Work, 92/131/EEC, OJ 1992 L49/5, 5(A)(ii).

69 *Ibid.*

70 *Ibid.* at 5(A)(iv).

71 Equal Opportunities Commission, above n. 56 at 6 and 14.

72 Commission for Racial Equality, above n. 56 at 6, 11 and 12.

73 [1987] IRLR 401 at 402.

74 S. Cox, 'The Buck Stops Here: Employer Liability for Discrimination' (1998) 82 *Equal Opportunities Review* 18-24 at 21.

75 *Johnson v ABC Employment Agency and Whitworths Ltd*, 21 June 1990, Case Nos. 19643-4/89 (1991), *EOR Discrimination Case Law Digest* 9-10 at 10.

76 2 December 1996, Case No. 43213/96 (1997) 32 *EOR Discrimination Case Law Digest* 8.

77 *Ibid.*

induction and training programmes.⁷⁸ It is conceivable that proper compliance with the EC Code would involve the entire workforce receiving such training as part of their induction. In *A v B Ltd and others*⁷⁹ following a complaint of insulting language being used, the company put up a notice warning that sexual harassment was unacceptable. However, an employee, Ms A, was later assaulted and the tribunal held that the employer had not taken reasonably practicable steps to prevent the behaviour occurring. 'Nothing was done to educate or train the workforce . . . Putting a notice on a noticeboard is simply not enough.'⁸⁰

Any training given must be deemed to be adequate by a tribunal in order to constitute a defence. In *Williams v Bass Inns and Taverns*⁸¹ Greenhaigh, the acting manager of a public house, racially abused a contract doorman. Although the acting manager had received some equal opportunities training, in the tribunal's opinion, 'such training given by the employer was insufficient to show that adequate steps had been taken . . .'.⁸²

In *Martins v Marks & Spencer plc*,⁸³ a woman of Afro-Caribbean origin applied four times for a post as a trainee manager with the company but was rejected without an interview. She pursued a grievance for race discrimination; however, the claim was eventually settled on the basis that amongst other things she would be granted an interview. The interviewing panel was composed of a male of Afro-Caribbean origin and a Caucasian female and they graded her poorly for not communicating effectively. On bringing her case to a tribunal the communication argument was rejected by the tribunal which found that in relation to the decision to reject her 'nothing but bias' could explain it and drew the inference that this was due to racial discrimination. The company was held liable because in the opinion of the tribunal it had failed to take reasonable steps to inquire into the applicant's allegations. The EAT ruled that the tribunal's findings were perverse and held that, 'on the findings of fact about the arrangements for the interview, the employers' equal opportunities policy, their compliance with the CRE Code of Practice in relation to selection procedures, criteria and interviewing, and their selection of an interviewing panel to include a person with an interest in recruiting from ethnic minorities, there could be no doubt that the employers had made out the defence'.⁸⁴

78 European Commission Code, above n. 68 at 5(A)(iv).

79 19 September 1997, Case No. 2600329/97 (1998) 37 *EOR Discrimination Case Law Digest* 6.

80 *Ibid.*

81 16 October 1991, Case No. 8149/91 (1992) 11 *EOR Discrimination Case Law Digest* 6.

82 *Ibid.*

83 [1998] IRLR 326.

84 *Ibid.* at 327.

In addition to adopting, implementing and monitoring an anti-harassment policy, an employer must demonstrate that he has procedures in place for dealing with harassment once it has been reported. The EC Code recommends that, 'violations of the organisation's policy protecting the dignity of employees at work should be treated as a disciplinary offence'.⁸⁵ In addition it suggests that, 'even where a complaint is not upheld, for example because the evidence is regarded as inconclusive, consideration should be given to transferring or re-scheduling the work of one of the employees concerned rather than requiring them to continue to work together against the wishes of either party'.⁸⁶

In *Wagstaff v Elida Gibbs Ltd and Laverick*,⁸⁷ the employment tribunal recommended that the employer 'should transfer a proven harasser so that he does not come into contact with the complainant even though the case was heard prior to the introduction of the EC Code'.⁸⁸

v. Employer Liability for Harassment by a Third Party

An employer not only has a duty to protect an employee from fellow employees but following recent case law also has a duty to protect an employee from harassment by third parties. 'This duty clearly arises in the employment context whether the harasser be . . . a customer, a member of the public, or anyone else who comes into contact with the employee while she is at work'.⁸⁹ The Acts require the victim to show they suffered a detriment and this can be established by showing that the employer failed in his duty to regulate the behaviour of employees and others under his control. 'A person "subjects" another to a detriment if he causes or allows that thing to happen in circumstances which he could control whether it happens or not'.⁹⁰

The element of 'control' is, therefore, important in establishing that an employee has been subjected to a detriment for which the employer is liable. This was illustrated in *Go Kidz Go Ltd v Bourdouane*,⁹¹ in which Miss Bourdouane in the course of her employment was in charge of a children's party when one of the male parents made sexual remarks to her. She left the party and complained to a company director but he encouraged her to return. The parent then physically abused her and she brought a complaint of sex discrimination against her employer. The employment tribunal upheld her complaint and on appeal the EAT held that the employer could not be responsible for the initial verbal sexual harassment but was liable for the assault. 'He

85 European Commission Code, above n. 68 at 5(B)(v).

86 *Ibid.*

87 3 June 1991, Case No. 23259/90 (1991) 8 *EOR Discrimination Case Law Digest* 4.

88 *Ibid.*

89 R.J. Townshend-Smith, *Discrimination Law: Text, Cases and Materials* (Cavendish Publishing Ltd: London, 1998) 250.

90 [1997] ICR 1 at 10.

91 (1996) 70 *EOR* (Nov-Dec) at 49.

did not know and could not have foreseen that such treatment would be meted out to her . . . However, once the initial complaint had been made, the employer had actual knowledge of the sexual harassment and by allowing the employee to return . . . had subjected her to a detriment by permitting the sexual harassment to continue in circumstances where he could have controlled whether it happened or not.'

In *Burton and Rhule v De Vere Hotels Ltd*⁹² two waitresses of Afro-Caribbean origin were made the object of racially and sexually offensive remarks by the comedian Bernard Manning and consequently other guests at an after-dinner speech in the hotel in which they worked. The waitresses brought racial harassment complaints under section 4(2)(c) of the RRA. The EAT stated that the question for the tribunal was 'whether the event in question was something which was sufficiently under the control of the employer that he could, by the application of good employment practice have prevented the harassment or reduced the extent of it'.⁹³ As in the previous case the crucial factor for the EAT is to what extent the employer could have controlled the behaviour of the third party.

In *Thompson v Black Country Housing Association Ltd*,⁹⁴ the site foreman, who was not an employee of the company, sexually assaulted a female site sale negotiator. She resigned, complaining of unlawful discrimination. However, the tribunal held that, 'the respondent did not have a degree of control . . . because the applicant and other managers were not on site and there had been no complaint from the applicant about the site foreman . . .'.⁹⁵

Even where the employer has control over the situation, he has a defence where he can prove that he had applied good employment practice to prevent or reduce the possibility of harassment. It has been suggested that to demonstrate 'good employment practice' an employer 'should now put up notices in areas accessible to the public that racial or any other form of abuse or harassment will not be accepted whether from employees or customers. He should also take steps to deal with it if it does occur'.⁹⁶

vi. Summary of Position in the United Kingdom

Waite LJ in *Jones v Tower Boot Co Ltd* stated that the statutory defence for vicarious liability had 'a pro-active function, designed as much to eliminate the occasions for discrimination as to compensate its victims or punish its perpetrators'.⁹⁷ He also declared that the defence would 'exonerate the conscientious employer . . . and will

92 [1997] ICR 1.

93 *Ibid.* at 10.

94 16 November 1998, Case No. 1301643/98 (1999) 39 *EOR Discrimination Case Law Digest* 6.

95 *Ibid.* at 7.

96 K. Monaghan and M. Javaid, 'No Laughing Matter' (1997) 147 *New Law Journal* 350-2 at 352.

97 [1997] ICR 254 at 262.

encourage all employers who have not yet undertaken such endeavours to take the steps necessary to make the same defence available . . .'.⁹⁸

Employers are often in a financial position to meet the costs involved in preventing or combating sexual harassment in the workplace. ' . . . In the context of the workplace, employers are, in a broad range of circumstances, in a position to provide protection from such a detriment more cost-effectively than anyone else.'⁹⁹

Such protection could take the form of: introducing broad-ranging equality policies and procedures (which may include dignity at work policies) and taking proactive steps to communicate these to all employees and implement them fully; ensuring staff are trained to deal with this problem; providing adequate supervision to control harassment; and appointing an independent party to offer employees support and represent them where they bring an internal complaint of sexual harassment. These steps will ensure the employer has a defence to a claim that he is vicariously liable.

III. The Law Relating to Sexual and Racial Harassment in the United States

Cases of sexual harassment in the United States are divided into either *quid pro quo* harassment or harassment caused by the creation of a hostile work environment for the employee. The nature of these types of cases is summarized below.

The former requires sexual compliance in exchange for the retention of some current job opportunity or the possibility of some future opportunity. The latter involves a situation in which sexual conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.¹⁰⁰

It will become apparent that the type of harassment case involved will be a determinative factor for the court in deciding whether or not the harasser is deemed to be acting in the course of his employment.

i. Nature and Scope of Quid Pro Quo Harassment

The first appellate case to recognize that sexual harassment was unlawful sexual discrimination was *Barnes v Castle*.¹⁰¹ In this case, Barnes lost her job after refusing to go to bed with her supervisor. The case was 'authority for regarding sexual harassment as unlawful

⁹⁸ *Ibid.* at 263-4.

⁹⁹ R. Mullender, 'Racial Harassment, Sexual Harassment and the Expressive Function of Law' (1998) 61(2) *Modern Law Review* 236-44 at 236.

¹⁰⁰ R.L. Paetzold and A.M. O'Leary-Kelly, *Sexual Harassment in the Workplace: Perspectives, Frontiers and Response Strategies* (Sage Publications: California, USA, 1996) ch. 5 at 86.

¹⁰¹ 15 FEP Cases 345. (D.C. Cir 1977) FEPM 405: 6684, 421: 452.

where it could be established that an employee was threatened or suffered a tangible job detriment in retaliation for rejecting a sexual advance'.¹⁰² In *Barnes* the conduct amounted to a straightforward case of quid pro quo harassment. Quid pro quo harassment is unlawful under the US Civil Rights Act 1964¹⁰³ as it discriminates against an employee by threatening them with a deterioration in their terms and conditions of employment on sexual grounds. Section 2000e-2(a) of Title VII of the CRA 1964 states that, 'It shall be unlawful employment practice for an employer to . . . discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's race, colour, religion, sex or national origin.'¹⁰⁴

It is important to recognize that quid pro quo harassment can only be perpetrated by a supervisor (and not by a colleague) because only a supervisor has the power in the workplace to alter or threaten to diminish the terms and conditions of employment of the victim. The power to extort sexual favours by threatening someone's employment rights where they refuse to comply is extended to the employee by the employer directly, impliedly or ostensibly. Supervisors are deemed to have a delegated power that 'results in a tangible employment decision, hiring, firing, failing to promote, etc.'¹⁰⁵ The employer delegates this power and so the supervisor is relying 'upon actual or ostensible authority "to extort sexual consideration from an employee"'.¹⁰⁶

The US Equal Employment Opportunities Commission (EEOC) guidelines state that in 'applying general Title VII principles, an employer . . . is responsible for his acts and those of his agents and supervisory employees with respect to sexual harassment, regardless of whether the specific acts complained of were authorised or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence'.¹⁰⁷ The courts have applied the EEOC guidelines in reaching their decisions in quid pro quo harassment cases and have consequently held that employers are vicariously liable. This liability has been extended on the basis that in such cases the supervisor is acting on the authority of the employer and so his acts are held to be equivalent to those of the employer.

102 M. Rubinstein, 'Sexual Harassment Law in the United States' (1987) 12 *Equal Opportunities Review* 18 at 20.

103 From this point in the article onwards this will be abbreviated to CRA 1964.

104 US Code: Title 42, 'The Public Health and Welfare', ch. VI, Section 2000e-2(a), <http://www4.law.cornell.edu/uscode/42/2000e-2.text.html>

105 J. Chafetz, 'The High Court's Convoluted Sexual Harassment Jurisprudence' (1998) 19(4) *Yale Political Quarterly*, <http://www.yal.edu/yqm/articles/oct98/oct98a.html>, p. 1 of 5.

106 D. Pannick, *Sex Discrimination Law* (Clarendon Press: Oxford, 1985) 179.

107 US Government, Code of Federal Regulations, Chapter XIV—Equal Employment Opportunities Commission, Section 1604.11, Guidelines on Discrimination Because of Sex, <http://frwebgate.access.gpo>

ii. Hostile Working Environment Cases

In 1981 the judiciary in the United States in *Bundy v Jackson*¹⁰⁸ recognized the basis for pursuing a second type of sexual harassment case, where the harassment has no detrimental effect beyond the fact that it leads to the creation of a hostile work environment. Bundy received unwelcome sexual advances but retained her employment and was promoted and so did not suffer any tangible economic loss, but the court ruled that, '... sexual harassment, in and of itself, is a violation of the law and does not require further proof that the employee was penalised or lost tangible job benefits as a result. The [court] accepted the contention that "conditions of employment" include the psychological and emotional work environment.'¹⁰⁹

However, it was not until 'the landmark case of *Meritor Savings Bank FSB v Vinson* 477 US 57 (1986) that the Supreme Court held that sexual harassment creating a hostile work environment was prohibited employment discrimination under the CRA'.¹¹⁰

In *Meritor* a female employee named Vinson was allegedly subjected to public fondling and sexual demands by Taylor, her male supervisor. She submitted to these advances out of fear that she would otherwise lose her job. Despite this she managed to obtain promotion in the bank branch with Taylor as her supervisor although it was undisputed that her advancement was based on merit alone. Ms Vinson brought an action for sexual harassment against the bank after she was discharged for excessive use of sick leave.

The Supreme Court, in determining whether a hostile work environment was actionable under the CRA, held that, '... the language of Title VII is not limited to "economic" or "tangible" discrimination'.¹¹¹ In making its decision, the court considered the guidelines of the EEOC. They define sexual harassment as:

unwelcome sexual advances, requests for sexual favours, and other verbal or physical conduct of a sexual nature . . . when submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of an individual's employment . . . or when . . . such conduct has the . . . effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.¹¹²

The Supreme Court accepted that both the EEOC and the lower courts have recognized that a hostile work environment was a violation of Title VII and concurred with that opinion.¹¹³ However, the

108 24 FEP Cases 1155. (D.C. Cir. 1981) FEPM 405: 6700, 421: 454, 431: 8.

109 M. Rubinstein, 'The Law of Sexual Harassment at Work' (1983) 12 *Industrial Law Journal* 1 at 6.

110 S.T. Bradford, 'Relief for Hostile Work Environment Discrimination: Restoring Title VII's Remedial Powers' (1989-90) 99(2) *Yale Law Review* 1611.

111 477 US 57, 91 L Ed 2d 49 at 58.

112 US Government, Code of Federal Regulations, above n. 107.

113 Above n. 111 at 59.

Supreme Court declined to issue a definitive rule on employer liability in this respect, agreeing with the EEOC that Congress intended courts would look to agency principles for guidance in this area.¹¹⁴ The agency principles are part of the common law of tort and are contained in the Restatement of the Law.¹¹⁵ 'Under traditional principles of agency, employees act as their employer's agents when their actions fall within the scope of their employment.'¹¹⁶

The scope of their employment will be determined by reference to the task they were employed to undertake on behalf of the employer. 'The conduct of a servant is within the scope of employment if, but only if . . . it is of the kind he is employed to perform . . . [and] it is actuated, at least in part, by a purpose to serve the master.'¹¹⁷

The US courts held that in *quid pro quo* harassment cases, because the supervisor's retaliatory conduct (for example to dismiss or demote) is of the kind he is employed to perform and its purpose is to serve his employer, then the supervisor is acting in the course of his employment and so is acting as his employer's agent.

. . . In the wake of *Meritor* . . . if the plaintiff established a *quid pro quo* claim, the Courts of Appeal held, the employer was subject to vicarious liability.¹¹⁸

As is the case in the UK, an employer in the USA is likely to be vicariously liable where an employee is acting in the scope of his employment; however, in the UK the employer has a defence that he did all that was reasonably practicable to prevent the harassment. There are complications in working environment cases because the courts will be reluctant to accept that these are carried out within the context of the supervisor's job. 'The Supreme Court's refusal to delineate the scope of employer liability for sexual harassment in *Meritor* assures the perpetuation of confusion in the area of liability for a hostile work environment.'¹¹⁹ This confusion persists because in general the lower courts consider that a hostile work environment is not actuated for the purpose of the employee to serve his employer. They contend that an employee is '. . . acting out of gender-based animus or a desire to fulfil sexual urges . . . and often acts for personal motives, or motives unrelated and even in opposition to the employer's objectives'.¹²⁰ Therefore, the employee will not be deemed to be acting in the scope of his employment. The Restatement of Agency §228(2) declares that the 'conduct of a servant is not within the scope

114 *Ibid.* at 63.

115 American Law Institute, Restatement of the Law, Second Agency 2d, Vol. 1, 1958.

116 'Sexual Harassment Claims of Abusive Work Environment under Title VII' (1983-84) 97 *Harvard Law Review* 1449 at 1460.

117 Above n. 115 at §228(1)(a) and (c).

118 *Burlington Industries Inc v Ellerth* (97-569), <http://supct.law.cornell-edu/supct/html/97-569.ZO.html>, p. 4 of 10.

119 Vinciguerra, above n. 5 at 1730.

120 Above n. 118 at p. 6 of 10.

of employment if it is different in kind from that authorised . . . or too little actuated by a purpose to serve the master'.¹²¹

As a consequence of the Supreme Court declining to issue a definitive rule and simply referring courts to the agency principles, the lower courts 'have used various standards of employer liability based on several agency theories'.¹²²

The Restatement of Law §219 gives four situations in which an employer may be liable although the employee is not acting in the scope of his employment.¹²³ Subsection §219(2)(a) states that the employer will be directly liable if he intended the consequences. Under subsection (b) an employer is liable if he is negligent, for example he was aware of the conduct and failed to stop it.¹²⁴ Subsection (c) applies if the conduct violates a non-delegable duty of the employer, which is a duty that can be delegated. Liability follows if the person to whom it was delegated acts improperly.¹²⁵ The first part of subsection (d) relates to the 'apparent authority standard', for example where the agent purports to exercise a power which he does not have. The second part is called the 'aided in agency relation standard' and applies where the agency relationship aided the supervisor to accomplish the tort.¹²⁶

The confusion over whether or not a supervisor who creates a hostile environment for a subordinate employee can make an employer vicariously liable in sexual harassment cases was ended by two recent decisions in the US Supreme Court.¹²⁷ These cases were *Burlington Industries Inc v Ellerth*¹²⁸ and *Faragher v City of Boca Raton*.¹²⁹ In *Burlington*, Ellerth alleged that she was subjected to constant sexual harassment by her supervisor, Slowik, and that he threatened to deny her tangible job benefits. Although Ellerth did not suffer any tangible job loss and was, in fact, promoted, she resigned after being disciplined by another supervisor and then brought an action for Slowik's sexual harassment. The issue for the Supreme Court was 'whether an employer has vicarious liability when a supervisor creates a hostile work environment by making explicit threats to alter a subordinate's terms or conditions of employment, based on sex, but does not fulfil the threats'.¹³⁰

121 American Law Institute, above n. 115 at §228(2).

122 J.S. Weddle, 'Title VII Sexual Harassment: Recognising an Employer's Non-Delegable Duty to Prevent a Hostile Workplace' (1995) 95 *Columbia Law Review* 724 at 734.

123 American Law Institute, above n. 115 at §219(2)(a)-(d).

124 *Burlington Industries Inc v Ellerth*, above n. 118 at pp. 6-7 of 10.

125 Above n. 122 at 743.

126 *Burlington Industries Inc v Ellerth*, above n. 118 at p. 7 of 10.

127 Editorial, 'Tough Ruling on Harassment', *The Record*, <http://www.bergen.com/editorials/har19980629.htm>

128 Above n. 118.

129 (97-282), <http://supct.law.cornell-edu/supct/html/97-282.ZO.html>

130 *Burlington Industries Inc v Ellerth*, above n. 118 at p. 5 of 10.

The Supreme Court ruled in *Burlington* and the co-joined case of *Faragher* that, 'an employer is subject to vicarious liability to a victimised employee for an actionable hostile environment created by a supervisor with immediate or successively higher authority over the employee'.¹³¹ The court, in making its decision, followed the recommendation in *Meritor* to refer to agency principles. In particular, it considered the second part of §219(2)(d), the 'aided in agency relation' standard, and suggested that:

. . . a supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor is always aided by the agency relation . . . It is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates.¹³²

The Supreme Court recognized that in these cases even where an employee suffered no economic loss the employer is still vicariously liable.

The US courts have also applied both statutory and common law rules to determine issues related to employer's liability for harassment. This is because the CRA failed to set out standards of employer liability, for example vicarious liability, and so the Supreme Court in *Meritor* had to direct courts to look to the common law for assistance.

This has resulted in courts in the US applying a variety of standards and this lack of consistency only serves to make the system extremely confusing. In an article commenting on the case of *Jansen v Packaging Corporation of America*¹³³ it was suggested that, 'when resolving the confusion engendered by *Meritor*, the Supreme Court should discard the distinction between quid pro quo and supervisor hostile work environment sexual harassment and establish a single standard of employer liability for all claims of supervisor sexual harassment'.¹³⁴

This essentially is what has happened in the UK where there is no significant difference between cases involving sexual blackmail and working environment cases in terms of the liability of the employer, although in the former it is much easier to prove necessary harm or detriment than in the latter.

iii. Employer Liability for Harassment by Co-workers

In general an employer is not vicariously liable for co-workers who create a hostile work environment for victims of harassment. In these

131 *Ibid.* at 9.

132 *Ibid.* at 8-9.

133 123 F 3d 49 (7th Cir. 1997).

134 'Title VII—Sexual Harassment—Seventh Circuit Adopts Employer Liability Standards for Sexual Harassment by Supervisory Employees—*Jansen v Packaging Corporation of America*' (1998) 111(6) *Harvard Law Review* 1602 at 1605-6.

cases, the courts usually employ a 'knowledge standard' to assess employer liability.¹³⁵ This means that the employer will only be liable if he knew of the harassment and did nothing to prevent it. In adopting this standard, the courts have applied the Restatement of Law §219(2)(b) which provides that an employer is liable if he is negligent in his duty to protect his employee. '[The lower courts] by uniformly judging employer liability for co-worker harassment under a negligence standard . . . have . . . implicitly treated such harassment as outside the scope of employment.'¹³⁶

In the US, employer liability for the acts of co-workers is not the same as for the acts of supervisors. A co-worker is not capable of *quid pro quo* harassment; however, he can create a hostile environment because this type of harassment does not rely on proof of the victim suffering an economic loss. The Supreme Court held that employers could not be vicariously liable for co-worker harassment because 'the employer has a greater opportunity to guard against misconduct by supervisors than by common workers'.¹³⁷

As was the case for supervisors prior to *Burlington and Faragher*, a co-worker who creates a hostile environment is not acting in the scope of his employment. As stated earlier the lower courts have applied a variety of standards of direct liability based on the principles in §219 of the Restatement of the Law.¹³⁸ However, the dominant standard in the lower courts has been §219(2)(b)¹³⁹ where an employer is subject to liability for the torts of his employees acting outside the scope of their employment because he is negligent in his duty to the victim of the harassment. As stated earlier this is also called the 'knew-or-should-have-known-standard'.¹⁴⁰ This negligence standard is recommended in the guidelines on sexual harassment developed by the US EEOC. These guidelines state that, 'with respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or his agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action'.¹⁴¹ These guidelines, therefore, make 'an employer liable for the acts of . . . co-workers . . . if nothing was done after a complaint was brought to the employer's attention'.¹⁴²

135 Anderson, above n. 8 at 1262.

136 *Faragher v City of Boca Raton*, above n. 129 at p. 8 of 12.

137 *Ibid.* at p. 9 of 12.

138 American Law Institute, above n. 115.

139 Weddle, above n. 122 at 734.

140 *Ibid.* at 737.

141 US Government, Code of Federal Regulations, above n. 107, <http://frwebgate.access.gpo>, p. 1 of 7.

142 K. Segrave, *The Sexual Harassment of Women in the Workplace* (Farland & Co Inc: North Carolina, USA, 1994) 211.

The focus on action taken after an incident is reported is demonstrated in *Varner v National Super Markets Inc.*¹⁴³ In this case, following two incidents of sexual assault by a co-worker, the victim, Varner, informed her fiancé who was also an employee of the supermarket. On both occasions her fiancé contacted the store manager but was told that nothing could be done until Varner herself reported the incidents to him. Nevertheless, the court held that, 'the relevant question is whether National knew or should have known of the harassment and failed to implement prompt and appropriate corrective action . . . It concluded that Varner's reports of the incident sufficiently put National on notice of the incidents'.¹⁴⁴

In the UK an employer can be vicariously liable for harassment by co-workers. This has been illustrated in a number of cases, including *Jones v Tower Boot Co Ltd.*¹⁴⁵ Additionally, the emphasis in the UK is on showing that preventive action was taken prior to the harassment occurring. In comparison, an employer in the USA only needs to demonstrate that he took immediate action once an incident came to his attention.

The knew-or-should-have-known standard has been criticized because it could mean that, 'the employer is virtually able to ignore the possibility of workplace harassment until it is reported'.¹⁴⁶ For this reason it has been critically termed the 'see-no-evil' defence.¹⁴⁷ It has led to unsatisfactory decisions such as *Blankenship v Parke Care Centers Inc.*¹⁴⁸ where a 17-year-old woman claimed she had been sexually harassed by a fellow male colleague. Following her first complaint his work area was moved to minimize his interaction with her; however, none of the administrators confronted him in any way. He continued harassing Blankenship and then a second female complained that he had harassed her. The supervisory staff then met with him and issued a warning but Blankenship still needed to complain to her supervisor of his actions. She was told that it could not be guaranteed that she could continue to work without coming into contact with him and if she could not accept this she would have to resign. The court held that, 'the act of discrimination by the employer in such a case is not the harassment but rather the inappropriate response to the charges of harassment'.¹⁴⁹ Nevertheless, the court found that the employer's behaviour was appropriate.¹⁵⁰

143 94 F 3d 473, 480 (CA7 1996), <ftp://server.wulaw.wustl.edu/8th.cir/960909/953611.P8>

144 *Ibid.* at p. 7 of 10 (web address).

145 [1997] ICR 254.

146 Weddle, above n. 122 at 737.

147 National Organisation for Women (NOW), 'NOW Applauds Today's Supreme Court Rulings', NOW, 26 June 1998, <http://now.org/now/press/06-98/06-26a98.html>

148 123 F. 3d 868, 872-3 (6th Cir. 1997), <http://www.law.emory.edu/6circuit/aug97/97a0250p.06.html>

149 *Ibid.* p. 4 of 8.

150 *Ibid.* p. 5 of 8.

iv. Employer's Liability for Harassment by Third Parties

As is the case in the UK, in the United States employers can be liable for the harassment of employees by third parties. The EEOC guidelines recommend that in these cases the knew-or-should-have-known standard be applied. It also states that, 'in reviewing these cases the Commission will consider the extent of the employer's control . . .'.¹⁵¹ In *Lambertsen v Utah Department of Corrections*¹⁵² it was held that in 'determining whether a plaintiff has demonstrated an employee-employer relationship for purposes of federal anti-discrimination legislation, courts have generally applied either the economic realities test or the hybrid test . . . Under the hybrid test, the main focus of the court's enquiry is the employer's right to control the "means and manner" of the worker's performance.'¹⁵³ These statements demonstrate that in the US, as in the UK, where employers have knowledge of customer harassment and the means to prevent it, they may be held liable if they fail to take action to bring about its cessation.¹⁵⁴

The similarity of the law in the two jurisdictions is illustrated by the case of *Lockard v Pizza Hut Inc*,¹⁵⁵ where the circumstances of the case were very similar to those in *Burton and Rhule v De Vere Hotels Ltd*.¹⁵⁶ The plaintiff worked as a waitress in Pizza Hut where she was sexually harassed by two male customers. Lockard complained of their actions on a number of occasions but was instructed to continue serving them by her shift manager. In an action for sexual harassment against her employer the court held that, 'an employer who condones or tolerates the creation of such an environment should be held liable regardless of whether the environment was created by a co-employee or a non-employee, since the employer ultimately controls the conditions of the work environment'.¹⁵⁷

v. Defences and Employer Liability in the United States

As already discussed, employer's liability in the US will be dependent on the type of sexual harassment case, namely whether it is quid pro quo harassment or harassment creating a hostile work environment. The former 'involves a direct exchange; sexual compliance for an employment benefit, such as job retention, promotion, improved pay or conditions . . . [In the latter] no tangible employment benefits are lost, but the work atmosphere is "intimidating, hostile or threatening"

151 US Government, Code of Federal Regulations, above n. 107 at p. 1 of 7 (web address).

152 79 F 3d 1024 (10th Cir.) 1996, <http://law.emory.edu/10circuit/mar96/95-4072.wpd.html>

153 *Ibid.*

154 D. Hatch, and J.E. Hall, 'Employer Liable for Customer Harassment of Employee' (1999) *Workforce*, March, 108.

155 97-7027, 97-7078 (CA10 1998), <http://www.kscourts.org/ca10/cases/1998/12/97-7027.htm>

156 [1997] ICR 1.

157 Above n. 155 at p. 7 of 11.

because of constant touching, leering, personal comments, sexual abuse . . .'.¹⁵⁸

In *Meritor Savings Bank FSB v Vinson*¹⁵⁹ the Supreme Court recognized that both quid pro quo harassment and a claim of hostile environment sex discrimination were actionable under Title VII¹⁶⁰ of the Civil Rights Act (CRA) 1964. 'This decision was particularly important, as the remedies available under Title VII are such that they can only be provided by the employer.'¹⁶¹

However, this type of claim would only succeed where the supervisor is the harasser and the behaviour can be directly or indirectly linked with the performance of the supervisory role.

'Under current law, only supervisors are deemed capable of committing quid pro quo harassment. The rationale is that only supervisors have sufficient delegated power in the workplace to engage in the blackmail of quid pro quo harassment.'¹⁶² Where there has been quid pro quo harassment, 'employers have been held strictly liable for the conduct of supervisors because such persons rely upon their actual or ostensible authority'.¹⁶³ Therefore, 'courts hold employers "automatically liable" in quid pro quo cases because the supervisor's actions in conferring or withholding employment benefits, are deemed as a matter of law to be those of the employer'.¹⁶⁴

The imposition of strict liability by courts was confirmed by the Supreme Court in the cases of *Burlington Industries Inc v Ellerth*¹⁶⁵ and *Faragher v City of Boca Raton*.¹⁶⁶ The court held that 'no affirmative defence is available . . . when the supervisor's harassment culminates in a tangible economic employment action, such as discharge, demotion, or undesirable re-assignment'.¹⁶⁷

The Supreme Court in *Burlington* and *Faragher* clarified the extent of the liability of employers in sexual harassment lawsuits,¹⁶⁸ when it held that an employer was vicariously liable for a hostile environment created by a supervisor with authority over the employee.¹⁶⁹ However, the court also stated that:

when no tangible employment action is taken a defending employer may raise an affirmative defence to liability . . . [Which] comprises two elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behaviour, and (b) that the

158 L. Clarke, 'Sexual Harassment and the Sex Discrimination Act 1975' (1982) 132 *New Law Journal* 1116 at 1118.

159 Above n. 111.

160 *Ibid.*

161 Clarke, above n. 158 at 1118.

162 Anderson, above n. 8 at 1260.

163 Pannick, above n. 106 at 179.

164 *Faragher v City of Boca Raton*, above n. 129 at p. 5 of 12.

165 <http://supct.law.cornell.edu/supct/html/97-569.ZO.html>

166 Above n. 129.

167 Above n. 165 at p. 9 of 10.

168 Editorial, above n. 127 at 1.

169 Above n. 129 at p. 11 of 12.

plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.¹⁷⁰

The terminology adopted in the first part of the defence is reminiscent of the statutory defence provided under UK law allowing the employer to prove that he 'took such steps as were reasonably practicable' to prevent the discrimination.¹⁷¹ However, there is no equivalent to the second part. It has not been necessary in the UK to demonstrate that the claimant (plaintiff in the US) unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.¹⁷² Also in the US both defences are only available in cases where the strict liability of the employer does not apply; however, the defence in the UK is available in all cases.

In the US, the recommendations on what will constitute 'reasonable care' are very similar to the standards of behaviour required of employers in the UK. Namely that an employer should 'have specific sexual harassment policies, train supervisors and employees . . . and promptly investigate any allegation of sexual harassment by any employee'.¹⁷³

Following the rulings in *Burlington* and *Faragher*, the National Organisation for Women stated that, 'while the decisions are good signs for women, we are concerned with what will be held "reasonable" and "unreasonable" under the facts of future cases'.¹⁷⁴ Management attorneys have complained that, 'it will take the courts years to define ambiguous words like "reasonable care" . . .'.¹⁷⁵ The difficulty of deciding the correct interpretation of a statutory phrase has also been experienced in the UK. It was not until several years after the introduction of the discrimination legislation that tribunals and courts were in a position to determine what constituted the defence of taking 'such steps as were reasonably practicable'.

The action that an employer must take in the United States was discussed by the Supreme Court in the *Faragher* case where the petitioner was an ocean lifeguard who alleged that her immediate supervisors had created a sexually hostile environment and that this amounted to discrimination under the CRA 1964. Her employer, the City of Boca Raton, had adopted a sexual harassment policy but failed

170 *Ibid.*

171 Sex Discrimination Act 1975, s. 41(3) and RRA 1976, s. 32(3).

172 The Employment Bill before Parliament at the moment provides for a statutory grievance procedure whereby a standard grievance procedure will be implied into all contracts of employment and cover all equality disputes and where such claims are not undertaken or are incomplete internally it may prevent them from being presented to tribunals.

173 G. Flynn, 'Sexual Harassment Clarified?' (1998) *Workforce*, May, 105 at 108.

174 National Organisation for Women (NOW), above n. 147.

175 D. Bencivenga, 'Looking for Guidance: High Court Rulings Leave Key Terms Undefined' *New York Law Journal*, 2 July 1998, <http://www.ljx.com/practice/laboremployment/0702laguide.html>, p. 1 of 3.

to disseminate this to the employees in Faragher's section. The petitioner did not complain to higher management about the harassment because lifeguards had no significant contact with higher city officials; however, she did complain to another supervisor, a Mr Gordon. The Supreme Court held that:

the City had entirely failed to disseminate its policy against sexual harassment among the beach employees and that its officials made no attempt to keep track of the conduct of supervisors . . . [In addition] the City's policy did not include any assurance that the harassing supervisors could be bypassed in registering complaints . . . [and so] the City could not be found to have exercised reasonable care . . .¹⁷⁶

IV. Conclusion

There are many similarities in the discrimination law in the UK and the US which partly stem from the fact that originally UK legislation borrowed legal concepts from the US Civil Rights Act 1964 and case law. However, because the equality legislation in both countries failed to refer specifically to harassment both have encountered difficulties in adapting their legislation to acts of harassment. Due to this inadequacy, courts in the UK and US have found it necessary to refer to the common law of tort for assistance where disputes over an employer's vicarious liability in cases of harassment arise. Traditionally the judiciary in both countries put considerable emphasis on the common law tort principle of determining whether or not an employee, in committing the unlawful act, was acting in the course of his employment, as a threshold device to determine breach of a legal duty by employers. However, reliance on this principle was never intended to be applied in discrimination cases or for this purpose, especially in cases of discrimination involving serious consequences for the employee such as sexual or racial harassment cases. The judiciary encountered difficulties when they attempted to apply traditional legal principles to a modern phenomenon.

It is claimed in the US that strict liability is imposed on an employer to encourage him 'to act responsibly in delegating power to supervisors . . . because employers are in the best position to review and evaluate supervisors' conduct, they should expect to be held responsible for those to whom they grant authority'.¹⁷⁷ However, strict liability also means that, 'if the worker suffers a "tangible job action"—is demoted, sacked or otherwise penalised by the harasser—then the employer is liable even if he has in place a good anti-harassment policy and the victim failed to use it'.¹⁷⁸

In the US some employers' response to strict liability for sexual harassment may be considered excessive in that, 'many companies

¹⁷⁶ Above n. 129 at p. 11 of 12.

¹⁷⁷ *Harvard Law Review*, above n. 116 at 1462.

¹⁷⁸ 'Men, Women, Work and Law' *The Economist*, 4 July 1998, 49.

have written policies that forbid dating between persons with supervisory responsibility and employees who are subject to that supervision'.¹⁷⁹

In the US, where there is already an excessive amount of litigation,¹⁸⁰ it has been claimed that strict liability may eventually 'induce employers to take excessive precautions. The employer might not hire women, or might segregate them from men in the workplace, solely to avoid such liability.'¹⁸¹

In respect of harassment by co-workers, the knew-or-should-have-known standard may not encourage employers to have in place policies and procedures actively to prevent harassment because the standard means employers can avoid taking any action until an incident has occurred.

The reasoning of the US courts in applying this unsatisfactory standard is probably because they do not consider co-worker harassment as serious as harassment by supervisors. The Supreme Court in *Faragher* stated that where there is harassment by a co-worker, 'the victim can walk away or tell the offender where to go'.¹⁸² However, it has been demonstrated in many cases in the UK (for example *Jones v Tower Boot Co Ltd*¹⁸³) that such action is not always feasible. A person may fear the harasser because of his age, build or sex, as was illustrated in the *Blankenship* case in the US. Where an employer was to be held vicariously liable for co-worker harassment in the United States then he could avoid liability by establishing the defence that he had taken reasonable care to avoid liability. It is clearly a nonsense that the courts should deprive someone of protection against co-worker harassment on the flawed premise that everyone is equally placed physically and mentally to provide an assertive response to this type of behaviour.

With regard to an employer's direct liability to protect an employee from harassment by third parties, 'the question of whether or not employers were in a position to control a particular situation might well lead to as much legal argument as the question of whether or not acts of harassment were done "in the course of employment"'.¹⁸⁴ Is the employer in a position to control behaviour that takes place outside the workplace and working hours? The employer was deemed to be in such a position in the *Burton* and *Stubbs* cases in the UK. In addition,

179 S.D. Aaron and J. Thomas, 'Consensual Sexual Relationships Between Supervisors and Subordinates' *New York Law Journal*, 26 May 1998, <http://www.ljx.com/practice/laboremployment/0526supersex.html>, pp. 3-4 and 'Much Ado in the Office' *The Lawyer*, 3 October 1998, <http://www.the-lawyer.co.uk>

180 Bencivenga, above n. 175 at 2.

181 Anderson, above n. 8 at 1278.

182 Above n. 129 at p. 9 of 12.

183 [1997] ICR 254.

184 V. Edmunds, *Harassment at Work* (Jordan Publishing Ltd: Bristol, 1998) 118, para. 8.3.3.

problems may arise in respect of what will be considered to be good employment practice in the context of interaction with third parties. These issues are more difficult to resolve because the harasser is not an employee but a third party and an employer cannot discipline them or easily predict their actions.

In the UK, an employer can be vicariously liable for the acts of supervisors and co-workers (this has been demonstrated in a number of cases, including *Jones v Tower Boot Co Ltd*). An employer must prove that he has taken reasonable steps to prevent harassment by all employees, independent of their seniority. In the recent case of *AM v WC and SPV*¹⁸⁵ the EAT held that employee harassers could be sued personally under section 42 of the SDA for aiding and abetting a discriminatory act by their employer.¹⁸⁶

Section 42 makes the employee personally liable, as well as the employer and this also applies to race and disability discrimination. The result of this decision is to make clear that wherever the employer is presumptively liable for an act of discrimination the individual employee who committed the act of discrimination is also liable.¹⁸⁷

The significance of this decision is unclear. Employees perpetrating discriminatory acts may not always be in a position to pay compensation where they are held liable. However, the victim of harassment will no doubt obtain a degree of satisfaction from co-joining the harasser in a legal action for discrimination against their employer. Employment tribunals can use their power to make recommendations to instruct employers to discipline harassers and ensure their activities are curtailed.

In the US, the standard of employer liability applied by the court also reflects on the defence that should be demonstrated by an employer. In general, there are three standards of liability applied. For *quid pro quo* harassment, the courts adopt strict liability with no defence. Vicarious liability and the 'reasonable care' defence is applied to supervisors who create a hostile environment. With respect to the employer's defence that the victim failed to exhaust internal grievance mechanisms, this is unsuitable in many harassment cases. The sensitive and personal nature of the issues involved for employees in racial and sexual harassment cases will mean they are extremely reluctant to pursue an internal grievance against their harasser. They are also unlikely to want to bring an internal complaint to an employer that appears to tolerate or condone this type of behaviour. Under the Employment Bill at present before Parliament in the UK there is a

185 [1999] IRLR 411.

186 Section 42(1): a person who knowingly aids another person to do an act made unlawful by the SDA shall be treated for the purposes of the statute 'as himself doing an unlawful act of like description'. Section 42(2): for the purposes of s. 42(1) an employee . . . for whose act the employer is liable under s. 41 shall be deemed to aid the doing of the act by the employer.

187 M. Rubinstein [1999] IRLR 394.

statutory grievance procedure provided which will be a minimum requirement for all employers and be treated as an implied term in all employment contracts. There are three stages in the procedure: a statement of grievance, a meeting and an appeal. The employee bringing a discrimination claim must have complied with the first stage of the procedure (submitting a written grievance to their employer) otherwise they will not be able to pursue a claim before the tribunal. The only exception to this requirement is where the applicant is a victim of extreme bullying or threats of violence in the workplace. Finally, where co-workers create a hostile environment for an employee the vicarious liability of the employer is questionable. However, where it is established, there is a full defence for the employer that he took prompt action once he knew of the harassment.

These different standards of liability and the attached defences make the law in the US complex and confusing, whereas the law in the UK is commendable for its relative straightforwardness and reflects a growing recognition by the judiciary of the importance of eradicating harassment within all organizations. This is only likely to occur when the employer is potentially liable for all kinds of harassment.

This extensive liability for employers in the UK looks set to happen in the not too distant future as a consequence of EU intervention. Legislation will be forthcoming shortly to implement the Council Framework Directive 2000/78/EC into UK law.¹⁸⁸ Under Article 2(3) express provision is made for treating as unlawful harassment on all the grounds specified in Article 1 (namely religion or belief, disability, age or sexual orientation). In what circumstances will harassment on these various grounds be treated as unlawful?

When unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

Another legislative development in the EU that deserves mention is the Race Discrimination Directive 2000/43/EU. For the first time in the UK racial harassment in employment is specifically treated as unlawful discrimination. Once implemented in the UK¹⁸⁹ the victim will need to establish not only that the harassment affected his or her dignity at work but also adversely affected his or her working environment.¹⁹⁰ This requirement to establish both types of detriment will not prove an evidential obstacle to applicants in the more extreme cases of racial harassment or where it represents a continuous mode of behaviour.

¹⁸⁸ The rules relating to discrimination on grounds of sexual orientation and religious belief must be implemented by December 2003 and on grounds of age and disability discrimination by December 2006.

¹⁸⁹ By July 2003.

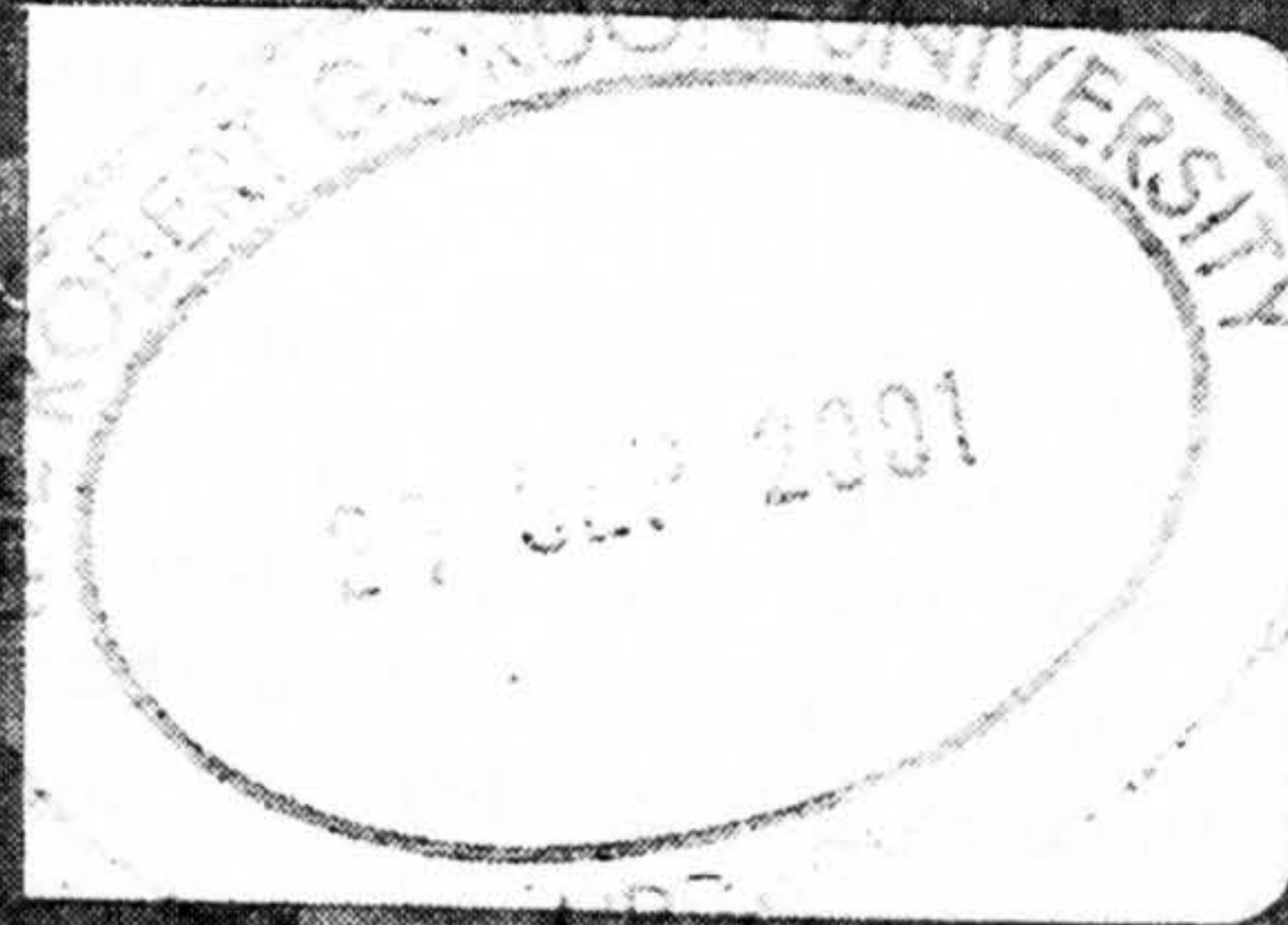
¹⁹⁰ 2000 *Equal Opportunities Review*, September/October at 34.

The Council and Parliament have recently agreed to considerable amendment of the Equal Treatment Directive in the form of a Directive which will introduce, *inter alia*, new measures on sexual harassment, including a legal definition for the first time and a requirement for employers to take preventive measures to deal with sexual harassment. Although the new Directive is as yet not formally adopted it is likely to be in the near future and will be implemented in Member States by 2005.

These measures will clearly have far-reaching consequences for harassment law in the UK and for all the other Member States in the European Community, ensuring that all categories of victims of harassment are provided with legal protection that exceeds the level of protection afforded to victims of harassment in countries outside the European Community, including the United States.

It is now the case that in this context the apprentice (the UK) has usurped the position of the master (the US) in terms of developing more liberal legal principles relating to harassment, although it could be argued that a new master has emerged (the EC).

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The Equality Deficit: Protection against Discrimination on the Grounds of Sexual Orientation in Employment

Nicole Busby* and Sam Middlemiss

The provisions of UK law offer no specific protection to gay men and lesbians suffering discrimination in the workplace on the grounds of sexual orientation. Such discrimination may take many forms and can result in 'fair' dismissal in certain circumstances. This article considers the degree of legal protection available under current provisions and investigates possible sources for the development of specific anti-discrimination legislation. It is concluded that, despite the application of certain aspects of employment law, the level of protection afforded to this group of workers amounts to an equality deficit in comparison to the legal redress available to those discriminated against on other grounds. Although the development of human rights legislation may have some application in this context, the combination of institutionalized discrimination and wider public policy concerns suggest that the introduction of specific legislation aimed at eliminating such discrimination in the United Kingdom is still some way off.

Keywords: equality, sex discrimination, sexual orientation, employment law

Introduction

The legal rules covering equality of opportunity in the workplace in the UK do not extend to protecting gay men and lesbians from discriminatory practices. The Equal Opportunities Commission has recently called for the introduction of new laws to protect such employees against discrimination (EOC 1998). Furthermore, the European Court of Justice (ECJ) has ruled that European Community law, in the form of Article 119

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(now Article 141) of the EC Treaty and the Equal Pay Directive (75/117/EC), does not extend rights to persons discriminated against on grounds of sexual orientation.

In *Grant v South West Trains Ltd* (1998) IRLR 206 (discussed later) the Court stated: 'While the European Parliament ... has indeed declared it deplores all forms of discrimination based on a person's sexual orientation, it is nevertheless the case that the Community has not as yet adopted rules providing for such equivalence' (at p. 218). Although protection may be available through pursuance of fundamental human rights under the European Convention of Human Rights which is now part of UK law following the introduction of the Human Rights Act 1998, the ECJ in *Grant* stated, 'homosexual relationships do not fall within the scope of the right to respect for family life under Article 8 of the Convention.' (at 33).¹

This appears to be an area of some uncertainty. In two recent cases before the European Court of Human Rights (ECHR),² the Court found that a Ministry of Defence policy which prohibited lesbians and gay men from serving in the armed forces did, in fact, constitute a violation of Article 8.³ The potential scope offered to those pursuing claims involving discrimination on the grounds of sexual orientation appears to have been significantly widened by this decision. This will be particularly relevant from 2 October 2000 when the Human Rights Act 1998 will require all 'public authorities' to act in a manner compatible with rights and obligations under the Convention. However, as discussed later, the Court's judgment may be far more restrictive in terms of impact than a preliminary assessment might suggest as it will be limited by the particular facts of the case under consideration. This is not to say that the route for legal reform offered by way of intervention arising from the human rights legislation should be underestimated, rather that acceptance of this particular route as a viable engine of change may take some time and will never be a truly effective substitute for specific legislation prohibiting discrimination on such grounds.

Attempts at introducing legislation in this area in the UK have been unsuccessful to date, although specific legislation at the European Community level is now possible. The Sexual Orientation Discrimination Bill, a Private Member's Bill which was dropped at the Commons stage in October 1998, was the third legislative proposal on this issue to be given parliamentary consideration in recent years. Progress at the European level, albeit slow, has been somewhat more promising to date. The European Parliament passed a Resolution on equal rights for gay men and lesbians in 1994⁴ and an amendment to the EC Treaty by way of the new Article 13⁵ confers new powers within the Community law-making process for the prohibition of discrimination on grounds of 'sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. The significance of this new Article is that it forms a suitable legal base for the introduction of specific legislation,

although the success of any such initiatives will depend on the attainment of unanimity at the Council of Ministers.

In this article the current shortcomings of the law in failing to adequately address workplace discrimination against lesbians and gay men will be outlined with a view to considering possible future developments. The main difficulty encountered during previous attempts at the introduction of legislation appears to have been in the potential scope of such provisions and it is worth considering these concerns in order to assess the form future legal intervention should take. General employment protection provisions may currently offer some limited protection against discrimination on the grounds of sexual orientation and merit scrutiny in the absence of specific measures. However, before considering the limited extent of current legal protection and the appropriate forms of potential legal remedies, it is necessary to analyse the nature and scope of discrimination against gay male and lesbian employees.

Background to sexual orientation discrimination

The independent advice agency, Lesbian and Gay Employment Rights (LAGER) has, for the past 15 years, provided advice, information and casework support to lesbians and gay men. The organization reports that, during this time, it has

found discrimination against lesbians and gay men in all areas of the job market, covering many different professions ... Few employers have a spotless record when it comes to equal treatment for lesbians and gay men. This is true for both the public and private sectors, from the smallest of employers to the very large. (LAGER 1998, p. 4)⁶

In the financial year 1997/8, LAGER received a total of 2098 calls requesting advice and information (an increase of 36% on the previous year) and took on 153 long-term cases — a number that could have been increased if additional resources had been available. The nature of the case work with which LAGER is involved is diverse, but includes incidences of workplace harassment of lesbians and gay men and the denial of promotion and career advancement and dismissal on the grounds of sexual orientation.⁷

Stonewall, 'a national lobbying organization working for legal equality and social justice for lesbians, bisexuals and gay men',⁸ undertook a survey of 2000 gay, lesbian and bisexual employees in 1993 (Palmer 1993). The results provided clear evidence of workplace discrimination: 16% of the respondents stated they had experienced discrimination at work; 48% had been harassed because of their sexual orientation and 68% felt the need to conceal their sexual orientation from some or all of their co-workers.

Similar results were obtained in the first independent survey of lesbian, bisexual and gay male employees, undertaken by the Social and Community

Planning Research Group in 1995 (Snape *et al.* 1995) in which it was found that 4% of respondents had been dismissed because of their sexuality; 8% had been refused promotion on such grounds and 21% had been the victims of harassment.

The forms of discriminatory acts which arise in this context are remarkably similar to those arising in race, sex or disability discrimination, where legal protection is available by virtue of specific legislation (for examples of successful claims in the context of racial and sexual harassment respectively see *Burton and Rhule v De Vere Hotels Ltd* (1996) IRLR 596 and *Strathclyde Regional Council v Porcelli* (1986) IRLR 134). As the analyses of relevant cases involving lesbian and gay male workers below illustrate, there is evidence of such discrimination in recruitment and selection, during the currency of the employment contract (such as denial of access to promotion or training or subjection to harassment) and in termination of employment on discriminatory grounds.⁹

The unequal treatment of gay men and lesbians

The ECJ has summed up the position of gay men and lesbians under European law in the following, clear terms, 'Community law as it stands at present does not cover discrimination based on sex orientation' (*Grant v South West Trains Ltd* (1998) at 47). This is also the position in the United Kingdom where the scope of the Sex Discrimination Act 1975 has been narrowly interpreted in terms of sex and does not extend to discrimination based on sexual orientation.¹⁰ Although this may seem somewhat out of step with the emergence in contemporary society of a more egalitarian stance, until specific legislative measures are forthcoming in either the European or domestic contexts there is little or, in some respects, no protection available against discrimination on the grounds of sexual orientation. The result of this is that such employees are in an inequitable position compared with other groups facing disadvantage in employment.

Wintemute (1995) has asserted that sexual orientation discrimination is, in itself, a form of sex discrimination and should, therefore, be actionable under the existing legislation. His argument is based on the premise that the imposition of legal restrictions on an individual's choices which are based on emotional-sexual conduct are wholly dependent on the sex/gender of the individual concerned. Thus, prevention of the use of legal redress as a means of remedying discrimination on the grounds of sexual orientation amounts to sex-based discrimination. This is a compelling argument, particularly when placed in the human rights context. As Wintemute asserts:

What advocates of sexual orientation discrimination must be persuaded to do is to *accept* and *respect* this extremely difficult and deeply personal

choice, whether or not they *understand* or *approve* of it. Most would be willing to do so in the case of persons who choose minority religious beliefs, and would not see the teaching of the existence of and respect for those beliefs as 'promoting' them.¹¹

The protection afforded by the provisions of human rights legislation will be considered later, but the line of reasoning adopted and subsequently developed by Wintemute (1997) also has application in the context of the current anti-discrimination provisions. The effective application of both the domestic and European Community provisions depends on successfully showing that the claimant has received less favourable treatment than a person of the opposite sex has or would have received in the same circumstances.¹² Discrimination on the grounds of sexual orientation is necessarily sex-based and could, therefore, simply be interpreted as direct sex discrimination which, in contrast to indirect sex discrimination,¹³ is not subject to potential justifications. The logic applied in reaching such a position is similar to that successfully advanced in order to extend the Equal Treatment Directive (76/207) to cases involving discrimination on the grounds of pregnancy (see *Dekker v Stichting*, Case C-177/88 (1990) ECR I-3941). This line of reasoning is based on the assertion that prohibition of workplace discrimination entitles the individual to be judged on merit rather than on the basis of gender stereotyping which, as the cases analysed below demonstrate, is generally the underlying reason for discrimination on the basis of sexual orientation.¹⁴

Furthermore, as the case law regarding discrimination on the grounds of pregnancy demonstrates,¹⁵ the nature of certain discriminatory acts may obviate the need for a comparator altogether, thus assisting greatly in the advancement of such claims. This occurs where the act in question constitutes the application of a sex-based criterion. In the case of pregnancy, the relevant criterion is easily identified as pregnancy is 'a condition which affects only women'.¹⁶ In cases involving discrimination on the grounds of homosexuality, the application of such reasoning is possible but necessitates acceptance of the notion that differential treatment on the grounds of sexuality also arises by application of a sex-based criterion — be it a gay man's sexual preference (see *Saunders v Scottish National Camps Association* (1981) IRLR 277 discussed below) or a lesbian's relationship with another woman (see *Grant v South West Trains Ltd* (1998) IRLR 206 discussed below). The root causes of such discrimination are clearly linked to the sex of the individual to whom the differential treatment is applied — in specific terms, because the gay man or lesbian engages in (or would engage in) a same-sex relationship.

The comparison between discrimination on the grounds of pregnancy and sexual orientation may appear, *prima facie*, to be spurious given that the former treatment arises due to biological difference and the latter, it could be

argued, due to a lifestyle choice. However, the application of anti-discrimination legislation to cases involving transsexualism has been successful on the same grounds and it is the development of the law in this context that, perhaps, offers a more suitable parallel for consideration of the possible extension of the current provisions to discrimination on the grounds of sexual orientation.

The transsexual case law

In *P v S and Cornwall County Council* (Case C-13/94 (1996) IRLR 347), a male employee who intended to undergo gender reassignment was dismissed. The Employment Tribunal referred the case to the European Court of Justice for consideration of whether the Equal Treatment Directive applied. In finding that discrimination on such grounds is contrary to European Community law, the Court held that 'the scope of the Directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex' (at p. 20). In applying the provisions of the Directive to cases of gender reassignment, the Court held that such discrimination 'is based, essentially if not exclusively, on the sex of the person concerned' (at p. 21).¹⁷ The appropriate comparison, as deemed by the Court, was between P's status as a non-transsexual male (as perceived by her employers prior to their knowledge of her decision to undergo gender reassignment) and her actual status as a male-to-female transsexual. This is a complex distinction under UK law as a transsexual, even after the successful completion of gender reassignment, retains the legal status of his/her sex at birth. Accordingly, the comparison applied is, *de facto*, an intra-sex comparison and is not dependent on biological difference.¹⁸

The UK courts were soon given the opportunity to apply the reasoning of the ECJ in *Chessington World of Adventures Ltd v Reed* (1997) IRLR 556. In this case, the EAT held that the Sex Discrimination Act 1975 could be extended to cover unfavourable treatment on the grounds of a statement of intention to undergo gender reassignment. The tribunal found that, in such cases: 'there is no requirement for a male/female comparison to be made' (at pp. 518-19). If this line of reasoning were to be extended to cases involving discrimination on the grounds of sexual orientation, the correct comparator in such cases would be a heterosexual person of the same sex as the complainant.¹⁹ The decision in *P v S* actually removed completely the need for any external comparator.

An attempt to apply the ratio in the transsexual cases to sexual orientation discrimination was made in the *Grant* case in which a lesbian employee was denied access to travel concessions in respect of her partner even though such concessions were granted to unmarried heterosexual couples.²⁰ In support of her claim, *Grant* argued that the appropriate

comparator should be a heterosexual woman whose male partner had been granted the travel concessions denied Grant's female partner. However, the ECJ chose to apply a narrow interpretation of its earlier decision in *P v S* by stating:

The Court [in *P v S*] considered that discrimination [in that case] was in fact based, essentially if not exclusively, on the sex of the person concerned. That reasoning ... is limited to the case of a worker's gender reassignment and does not therefore apply to differences of treatment based on a person's sexual orientation. (at p. 31)

The distinction made by the Court is questionable and will be considered later in the context of the corresponding policy implications arising from the possible extension of protection under existing legislation to cases involving sexual orientation discrimination. However, as the current judicial interpretation of the Sex Discrimination Act 1975 excludes protection on such grounds, it is pertinent to explore other legislative provisions in the domestic context under which claims of differential treatment may be advanced.

The limited protection presently afforded to such workers arises in the context of certain statutory rights in respect of which gay men and lesbians will be in the same legal position as other employees, for example, in relation to transfers of undertakings and redundancy. Furthermore, some types of discriminatory acts could substantiate the basis for other statutory claims (such as unfair dismissal) or directly or indirectly represent the basis for common law actions under contract or tort.

Protection against discriminatory acts

It seems likely that there is no existing remedy for gay men or lesbian employees discriminated against because of their sexual orientation in the context of the recruitment and selection process.²¹ Although the anti-discrimination provisions are intended to convey equality of opportunity, this right is specifically restricted to certain definitions contained within the legislation and, for this reason, the Sex Discrimination Act 1975 is unlikely to offer much protection. The Act is only applicable where the ground for discrimination is clearly related to sex but not sexual orientation.

Where discrimination takes place during the currency of contract, given that equality rights do not apply, the only likely remedy may be to bring a claim for breach of the contract. However, it is hard to envisage that such a claim could be based on breach of an express term in the contract as it is unlikely the employee would have express contractual rights to promotion, training or transfer, which could be enforced if denied them on discriminatory grounds. It is also difficult to determine how application of implied

terms in this context would provide much assistance without an element of creative application by the courts. An action for constructive dismissal on the basis of breach of an implied term may be justifiable, but a remedy against homosexual harassment is unlikely to be given. Both types of statutory claim and appropriate common law actions will be considered later.

Unfair dismissal

Where the gay man or lesbian is dismissed simply because of their sexual orientation, this may amount to a 'fair' dismissal in certain circumstances. Dismissal will often occur in circumstances where the employer becomes aware of their employee's sexual orientation during the currency of the contract and takes the view that continuation of employment has become untenable.

The employer's defence in such cases is often presented as being that the dismissal was necessary in order to protect other employees. This was illustrated by the Bell case (discussed below), in which a threat by policemen to boycott a canteen that employed a homosexual chef would probably have justified a dismissal if the correct procedure had been followed. An alternative line of defence is that it was deemed necessary to dismiss the employee in order to protect the client base of the company (as in Boychuck below). The scant case law on homosexual dismissal does not give ground for optimism that a case brought under the current provisions of the Employment Rights Act 1996 (ss. 94-98) would be successful.

In *Boychuck v Symons Holdings Ltd* (1977) IRLR 395 the dismissal of a lesbian for wearing a badge with the words 'lesbians ignite', was held to be fair on the basis that the badge was likely to cause offence to colleagues and customers of the firm. However, in the following year in *Bell v Devon and Cornwall Police Authority* (1978) IRLR 283 a tribunal found in favour of a cook employed in a police canteen who had been dismissed because he was a homosexual, although their ruling of unfair dismissal was strongly influenced by a failure on the part of the employer to follow a proper disciplinary procedure.

Any optimism concerning gay men and lesbians' prospects for success in unfair dismissal claims arising from the Bell case were short-lived, evidenced by the Employment Appeal Tribunal's (EAT) ruling in *Saunders v Scottish National Camps Association* (1981) IRLR 277. In this case, a gay man working as a handyman at a children's camp was dismissed because of his homosexuality. His job did not require him to come into contact with the children, and, in any event, a psychiatrist's report showed he was no danger to them, but his dismissal was held to be fair. The decision was justified on the spurious basis that there was a commonly-held perception that homosexuals are a danger to children and, therefore, a reasonable employer

would have dismissed him. Here, assumptions based on stereotyping (which have so effectively been outlawed in the context of sex discrimination in cases such as *Skyrail Oceanic Ltd v Coleman* (1981) ICR 864 and *Hurley v Mustoe* (1981) ICR 490) regarding the perceived behaviour of gay men were at the root of the EAT's decision.

It is hardly surprising that gay men and lesbians are disinclined to pursue unfair dismissal rights and have attempted instead to claim compensation for dismissal under equality legislation. However, as indicated earlier, this approach has also proved fruitless to date with both UK and European courts refusing to grant such a remedy.

Protection against harassment on grounds of sexual orientation

The surveys referred to earlier concerning the extent and nature of such discrimination have indicated a high incidence of workplace harassment of gay and lesbian employees. Workplace harassment can also adversely affect women (see *Strathclyde Regional Council v Porcelli* (1986) IRLR 134, Ct of Session), members of a racial grouping or ethnic minority (see *Jones v Tower Boot Co* (1997) IRLR 168, CA), a physically or mentally impaired employee or a transsexual (see *Chessington World of Adventures Ltd v Reed* (1997) IRLR 556, EAT). Unlike these other categories of employee, gay men and lesbians are denied any statutory protection against harassment as there is currently no legislation specifically prohibiting sexual orientation discrimination. The United Kingdom and European courts have been unable to extend protection against discrimination on such grounds under the existing provisions of domestic and European Community equality law and the reasoning applied in relevant case law can be illustrated by the case of *Smith v Gardner Merchant* (1998) IRLR 510.

Smith, a gay man, was employed as a barman. He was dismissed by his employer because he had been accused of treating a female colleague in a threatening and aggressive manner. He claimed she had sexually harassed him on the basis of his sexual orientation and that this represented discrimination under section 1(1)(a) of the Sex Discrimination Act 1975. The Court of Appeal recognized that if a gay man were subjected to less favourable treatment than a comparable lesbian, such treatment would constitute unlawful discrimination. However, as this argument was not advanced in the context of *Smith's* claim, the Court held that '[d]iscrimination on grounds of sexual orientation is not discrimination on ground of sex within the meaning of the Sex Discrimination Act 1975. A person's sexual orientation is not an aspect of his or her sex.'

In cases of this nature, the obstacle for the gay man or lesbian applicant often lies in the terminology adopted in the Sex Discrimination Act 1975

and the Equal Treatment Directive (76/207/EC). The requirement to produce evidence of inequality of treatment which underpins the application of the legislation involves comparison with another employee not of the same sex within the same employment who has received preferential treatment. Where the harassment is on the grounds of sexual orientation, the real comparator (i.e. a fellow male employee who is gay) will be deemed inappropriate under the legislation as both individuals are of the same sex. Furthermore, in using an inter-sex comparison, the man may be unable to claim unequal treatment because a lesbian is an appropriate comparator as deemed by the courts, is likely to suffer similar treatment.

As discussed earlier, transsexuals are protected from discrimination under European Community Law on the basis that discriminatory practices undertaken on the ground of gender reassignment are contrary to the Equal Treatment Directive. Following this interpretation of European Community law, most employment lawyers assumed that the Equal Treatment Directive would be interpreted as extending equality rights to gay men and lesbians. However, the decisions in the Grant and Smith cases (mentioned earlier) and *R v Secretary of State for Defence, ex parte Perkins (No 2)* (1998) 508 have dispelled such a view unequivocally. This is surprising given the fact that the EC Code of Practice on Sexual Harassment specifically identifies lesbian and gay employees as being particularly vulnerable to harassment and is intended to extend rights to such employees.²²

In *Johnson v Gateway Supermarkets Ltd* COIT 4079/90 a woman who was indecently touched by a female colleague was able to establish discrimination on the basis that a male colleague would not have been similarly treated. In *Gates v Security Express Guards* COIT 45152/90 an employee who was subjected to homosexual harassment by his superior was able to establish sex discrimination on the basis that the behaviour was contrary to the EC code of practice. It appears that where the harasser is a gay man or a lesbian, as in these cases, the victim may have a right of action under the Sex Discrimination Act 1975. In cases where the harasser is heterosexual and the victim is homosexual and the harassment is of a bullying nature, a strict application of the principles of equality will result in victims being denied any legal remedy under discrimination legislation as long as the heterosexual harasser can show that they are equally likely to harass gay men and lesbians on the grounds of their sexual orientation regardless of their gender.

One avenue of legal redress under statute for victims of homosexual harassment is through pursuance of a case under sections 1 and 2 of the Protection from Harassment Act 1997 in England and Wales (or section 8 in Scotland) of the Protection from Harassment Act 1997. This provides a tort of harassment which is breached where a person pursues a course of conduct which amounts to harassment of another and 'is intended to amount to harassment of that person

occurs in circumstances where it would appear to a reasonable person that it would 'amount to harassment of that person' (section 8(1) (a) and (b)).

In relying on these provisions as the basis for a claim, the concepts of equality of treatment and sexual orientation would not be central features which, given the shortcomings of the law which have been identified, would clearly be of benefit in this context. There is also a possibility of obtaining an injunction to stop the harassment which would clearly be in the interests of the victim. Under English law, the new criminal offence of intentional harassment under section 4A of the Public Order Act 1986 (inserted by The Criminal Justice and Public Order Act 1994) is 'wide enough to cover harassment on the grounds of sexual orientation' (IRLB 1996, p. 7).

As illustrated, it is possible in some limited respects for gay men and lesbians to claim protection against discrimination by the use of general provisions. The application of such provisions to cases involving sexual orientation often requires some creativity on the part of the judiciary which has not always been forthcoming. The obvious solution to such shortcomings would be to introduce specific legislation to protect gay men and lesbians against all forms of discrimination in employment, including harassment. This would obviate the need in the future for the introduction of complicated legal arguments designed to overcome the obstacles presented by the current equality laws. David Pannick writing on this matter thirteen years ago stated:

An anti-discrimination law prohibiting discrimination against persons on the ground of their sexual preferences in certain contexts and with defined exceptions, coupled with a repeal of the barriers to homosexual equality contained in existing legislation and common law, would be an important statement of the values of tolerance of a civilised society. (1985, p. 207)

The level of protection for gay men and lesbians against discrimination in employment has not improved in recent years and the prospect for victims of such harassment successfully pursuing a case under existing discrimination law is very poor. Cases brought under other provisions may offer some chance of success although such actions will undeniably be subject to uncertainty. The Sexual Orientation Discrimination Bill 1998 was a recent attempt to address some of these issues and, although the Bill was dropped, it is salient to analyse its provisions and the reasons for its failure in order to consider the form of future legislative measures.

Sexual Orientation Discrimination Bill 1998

The failure of the Sexual Orientation Discrimination Bill 1998 to make it through the Commons during the 1997/98 session was a case of third time

unlucky for Baroness Turner of Camden who has attempted to bring a Private Members Bill extending protection against discrimination on the grounds of sexual orientation on two previous occasions. On her first attempt in 1995, the Bill failed due to lack of time and, in 1996, the Bill was adopted by the House of Lords but failed to make progress in the Commons.

Baroness Turner has described her proposal as 'a simple Bill designed to protect vulnerable people'²³ and the length and drafting of the Bill certainly support this statement. However, during its second reading in the Lords, it emerged that the Government's position with respect to the Bill, as presented by Baroness Blackstone, Minister of State, DfEE, was far from simple. It is worth setting out the Government's objections to the Bill in order to consider the perceived complexities presented by such legislation, but first, the 'simplicity' of the proposals can be illustrated by a brief overview.

The aim of the Bill was to extend the provisions of the Sex Discrimination Act 1975 to prohibit discrimination on the grounds of sexual orientation using the definition contained in New Zealand's Human Rights Act which is 'a person's heterosexual, homosexual, lesbian or bisexual orientation'. Clause 5 proposed to extend the powers of the Equal Opportunities Commission to enable that organization to bring proceedings on the grounds of sexual orientation discrimination and Clause 7 sought to apply the provisions of the Equal Pay Act 1970 to gay men, lesbians and bisexuals.

In presenting the Government's response to the Bill, Baroness Blackstone quoted from the Labour Party's manifesto: 'The country's attitudes to race, sex and sexuality have changed fundamentally. The Labour Party's task is to combine change and social stability ... We will seek to end unjustifiable discrimination where it exists.' In defending the Government's stance on the furtherance of the legal rights of gay men and lesbians, various reforms were cited such as the insertion of a new Article 13 into the Amsterdam Treaty which was introduced during the UK's presidency of the European Union²⁴ and the Government's commitment to review the position of homosexuals in the Armed Forces. However, on turning to the Bill, Baroness Blackstone stressed the Government's commitment to 'the need to consider how all policies impact on the family'. The real difficulty faced by the Government in considering the wider implications of the Bill was represented as the treatment of 'same sex couples as the equivalent of a family unit' with the necessary policy approach being 'to tread a careful path between taking account of social reality and at the same time ensuring that we do not undermine the family'.

Areas of specific difficulty supporting this line of argument were presented as being the prohibition of indirect discrimination on the grounds of sexual orientation (which could have the effect of making any benefits derived through marriage unlawful); the possible impact on occupational pensions paying survivors' benefits; the impact on the armed forces' rules

which presently prohibit the accompaniment of unmarried partners on overseas tours; the blanket exclusion of non-married couples from adoption and succession rights in housing tenancies which currently exist for surviving heterosexual but, not homosexual, partners. In summing up, the Baroness stressed the Government's reservations were 'about scope and timing, not about the good intentions of the Bill'. It is difficult to accept this line of argument as the potential problem areas outlined by Baroness Blackstone arise largely out of fundamental policy concerns which will not be easily addressed by a slight shift of emphasis or a delay in the introduction of such legislation.

The UK policy dimension

The Government's primary concern appears to have been the extension of rights currently enjoyed exclusively by those residing within the traditional 'family unit' founded on marriage to unmarried, co-habiting couples, be they heterosexual, homosexual or bisexual. Emphasis was placed on the costs involved in extending such rights to this large group; the cost to the Civil Service of conferring survivors' pension benefits to unmarried couples would amount to approximately £20 million a year alone.

The stance adopted by the Government in this context, although not overtly anti-homosexual has an unfortunate effect in its juxtapositioning of the 'central value of the family and marriage' and 'other forms of partnership and other ways of bringing up children which are also valid'. In stating its primary concern as being to support and perpetuate the 'family unit' (but not a same sex couple, which the Bill 'invites us to treat as the equivalent of a family unit'), the Government's position is both prescriptive and moralistic although apparently justifiable on economic grounds.

An interesting contrast can be drawn between the failure of the Sexual Orientation Discrimination Bill and the recently-introduced government legislation aimed at prohibiting discrimination on the grounds of intending to undergo, undergoing or having undergone gender reassignment.²⁵ The legislation takes the form of an amendment to the Sex Discrimination Act 1975 by way of Regulations made under the European Communities Act. The need to legislate arose due to the UK's obligation to ensure that domestic law complied with the provisions of the Equal Treatment Directive following the ECJ's decision in the UK referral, *P v S and Cornwall County Council* (discussed earlier). In this and subsequent cases, the Court has drawn a distinction between discrimination on the grounds of sex or gender, for example on the grounds of transsexualism, which is contrary to the principle of equal treatment under Community law and discrimination on the grounds of sexual orientation, which is not. This is a crucial distinction which, if sustained, means that existing provisions regarding the prohibition

of discrimination in both the UK and European contexts can never be applied in order to extend the employment rights of gay men and lesbians. Given this position and the failure of legislative measures at the UK level, it would appear that new forms of legal intervention arising in the European context offer the only viable means by which such discrimination could be effectively outlawed.

European Community Law and sexual orientation

The existing provisions of European law which are relevant in this area can be divided into two categories: 'soft law' measures which are not legally binding but which operate as sources of guidance, such as the existing Code of Practice and Recommendation on the protection of the dignity of women and men at work (1991) and existing 'hard law' measures, such as the equality directives. In the introduction to the Code of Practice, the specific groups identified as being particularly vulnerable to sexual harassment in the workplace are identified and gay men and lesbians are expressly included in this categorization. The Code states, 'It is undeniable that harassment on grounds of sexual orientation undermines the dignity at work of those affected and it is impossible to regard such harassment as appropriate workplace behaviour.'

Although tribunals and courts have attached some weight to the provisions of the Code in deciding on issues of heterosexual harassment, in the context of harassment on the grounds of sexual orientation, the lack of any supporting 'hard law' provisions means that, in this respect, the Code is little more than a statement of good intent. As we have seen, existing 'hard law' measures such as the Equal Treatment and Equal Pay Directives do not have application in this area and, thus, cannot be said to provide a route for legal redress.

In October 1997 the Member States of the European Union agreed to the inclusion of a new Article 13 in the Treaty of Amsterdam which will bestow upon the Commission the power to take 'appropriate action' regarding discrimination on the grounds of sexual orientation. By virtue of this provision, the introduction of specific legal measures in this respect is at least possible. Assessment of whether such intervention at European level is likely requires further analysis of previous attempts at the application of existing provisions which, although unsuccessful to date, provides some insight into the wider jurisprudential issues involved.

In the transsexual case, *P v S and Cornwall County Council* (discussed earlier), the ECJ held that Articles 2(1) and 5(1) of the Equal Treatment Directive preclude dismissal on account of gender reassignment. Advocate-General Tesouro's opinion, which appears to have been followed by the Court, offers some interesting insights into the reasoning applied in this

case, particularly in the context of the extension of legal protection to individuals whose circumstances may not have been directly considered at the time that the legislation was drafted:

In society as it is today in which customs and morals are changing rapidly, citizens are guaranteed ever wider and deeper protection of their freedoms ... To my mind the law cannot cut itself off from society as it actually is and must not fail to adjust to it as quickly as possible. Otherwise it risks imposing outdated views and taking on a static role. (at p. 9)

The apparent 'widening' of the scope of the Equal Treatment Directive to enable discrimination on the grounds of gender reassignment to fall under its auspices, was justified by the Court in *P v S* on the grounds that tolerance of such discrimination 'would be tantamount ... to a failure to respect the dignity and freedom to which [the transsexual] is entitled, and which the Court has a duty to safeguard' (at p. 22). Subsequent attempts at proving a similar degree of protection against discrimination based on sexual orientation would appear to suggest that gay men and lesbians are not entitled to the same degree of 'respect and freedom' under European law. However, if closer attention is paid to the Court's consideration of the Grant case and subsequent developments a different picture emerges which is by no means as definitive as a scant consideration might suggest.

Grant's claim before the European Court was based on the denial of equal pay on the grounds of sexual orientation and, in order to consider this claim, the Court was asked to rule on the applicability of Article 141 and the Equal Pay Directive to such cases. This fact distinguishes the claim in *P v S* from that in Grant as the cases were concerned with different provisions of European Community law. It could be argued that the general concept of equality which is present in all Community instruments dealing with such issues confers a common goal and a common approach. However, the jurisprudential development of the concept of equality is subject to different standards depending on the context of the claim. Equal pay, having as it does a clear connection with economic factors, has traditionally been interpreted in a more conservative vein than the corresponding provision of equal treatment.

In Advocate-General Elmer's opinion in the Grant case, from which the Court on this occasion dissented, the issue of justification for discrimination on moral grounds is considered on the basis that the employer's attempted defence arises from the fact that 'cohabitation with a person of the same sex is not traditionally regarded as equivalent to a heterosexual relationship'. The Advocate-General rejected this assertion out of hand in finding that, in his opinion, 'such discrimination on the basis of gender cannot be justified by reference to the fact that the employer's intention is to confer benefits on heterosexual couples as opposed to homosexual couples'.

In general terms, this line of reasoning appears to be consistent with the Court's earlier ruling in *P v S* and the 'widening' of the scope of the principle of equality on the basis that it is social reality rather than subjective notions of morality which should be the guiding influences in this respect. In giving its decision in *Grant*, the Court expressly chose not to support this line of reasoning in finding that, 'an employer is not required by Community law to treat the situation of a person who has a stable relationship with a partner of the same sex as equivalent to that of a person who is married to or has a stable relationship outside marriage with a partner of the opposite sex.' Justification for this stance was presented as being based on 'the present state of the law within the Community' which, at present, does not provide specific protection against discrimination on the grounds of sexual orientation.

A later UK referral to the ECJ concerning the applicability of the Equal Treatment Directive was withdrawn following the Court's decision in *Grant* and this case is worthy of consideration at least in terms of the missed opportunity it represents. In *R v Secretary of State for Defence, ex parte Perkins* (1997) IRLR 297, the claimant was dismissed from his post as a medical assistant at a Royal Navy hospital in pursuance of the armed forces' policy of discharging any person of homosexual orientation. Mr Perkins sought judicial review contending that this policy was in contravention of Article 2(1) of the Equal Treatment Directive which provides that, 'the principle of equal treatment shall mean that there will be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status'. Accordingly, a reference to the European Court of Justice was made under Article 177 of the EC Treaty.

Following the European Court's ruling in the *Grant* case, the High Court took the decision to withdraw this reference on the grounds that the decision in *Grant* had established that Community law does not render discrimination based on sexual orientation unlawful. In giving his decision, Lightman, J. expressed his reluctance in withdrawing the case and recognized the possibility that the ECJ could depart from its previous decision in *Grant* if given the opportunity to consider the present case. However, he went on to state, 'to justify a reference the possibility that the ECJ will depart from its previous decision must be more than theoretical: it must be a realistic possibility... I can see no realistic prospect of any change of mind on the part of the ECJ' (*R v Secretary of State for Defence, ex parte Perkins* (No 2) (1998) IRLR 508 at 698).

That the European Court was not given the opportunity to consider Perkins' claim is unfortunate, not least due to the substantive differences that exist between the two cases, *Grant's* claim being based on the provisions of Article 141 and the Equal Pay Directive and Perkins' claim on the Equal Treatment Directive. The nature and corresponding implications of the claims are diverse: *Grant* was concerned with the provision of financial

benefits to homosexual partners thus rendering direct consideration of the nature of such relationships and the resultant policy implications, whereas the central issue in Perkins was the application of the fundamental principle of equal treatment to homosexuals in respect of their working conditions. With respect to the factual and legal bases of the original claims, Perkins appears to have had more in common with the successful transsexual case *P v S* (see earlier) than with the unsuccessful claim by Grant.

That the line of reasoning applied in order to confer the provisions of the Equal Treatment Directive to transsexuals could have been sustained with regard to gay men and lesbians by the Court's consideration of the Perkins case, is by no means certain. However, such consideration would have provided a valuable insight into the jurisprudential development of the principle of equal treatment as well as a test of the Court's commitment to adapt in line with social reality. The lasting impact of the Court's decision in the Grant case, as evidenced by the fate of Perkins' claim, is that application to the ECJ as a viable means of furthering the legal rights of gay men and lesbians facing discrimination in the workplace has been effectively 'blocked off' with regard to future claims regardless of the nature of such claims.

Given the perceived inability or reluctance of the judiciary in either the UK or European courts to effectively utilize existing legal provisions in order to assist in the furtherance of protection from discrimination on the grounds of sexual orientation, it is relevant to consider alternative means by which such discrimination may be effectively addressed. In the current absence of specific statutory provisions, the application of the European Convention on Human Rights and the recently introduced Human Rights Act 1998 will be considered.

The European Convention on Human Rights and the Human Rights Act 1998

The European Convention on Human Rights was ratified by the post-war Labour government in 1951 and came into force in 1953. Under the terms of the Convention, the High Contracting Parties undertake to secure everyone within their jurisdiction the rights and freedoms set out in the Convention. The procedure for enforcement of these rights was recently reformed²⁶ with the creation of a new Court with new powers.

The Human Rights Act 1998 was introduced in order to honour the Government's manifesto pledge to incorporate the European Convention on Human Rights into domestic law. Operation of the Act is by the imposition of a duty on domestic courts to interpret legislation in order to give effect to the rights contained in the Convention. The Act comes fully into force on 2 October 2000 when the rights created by the Convention will be directly enforceable against 'public authorities' through the domestic courts.

However, the European Court of Human Rights (ECHR) has directly held, in two recent cases brought by British subjects, that the armed forces' blanket ban on homosexuals contravenes the right to respect for private life under Article 8 of the Convention.

Respect for private life as a fundamental human right

The basis of the claims in *Smith and Grady v United Kingdom* and *Lustig-Prean and Another v United Kingdom*²⁷ was a Ministry of Defence policy which prohibits gay men and lesbians from serving in the UK armed forces on the basis of sexual orientation. The policy states, 'homosexuality is incompatible with service in the Armed Forces. Service personnel who are known to be homosexual or who engage in homosexual activity are administratively discharged from the Armed Forces.'

The four applicants, who were serving in the Royal Navy and the RAF, were subjected to an investigative procedure involving searches of their personal belongings and intimate questions about their sexual orientation and practices. The investigations continued after they had admitted they were gay. The four applicants were discharged from the Royal Navy and the RAF in 1994. Their application for judicial review was rejected by the High Court and the Court of Appeal upheld this decision.²⁸ The applicants then commenced proceedings in the ECHR arguing that the blanket ban and the treatment that they had received during the investigation amounted to, *inter alia*, a violation of their human rights under Article 8 of the Convention which provides a right to respect for private and family life.

The Court found the armed forces' ban on homosexuals to be in violation of Article 8 and that enquiries made into the applicants' sex lives after admission of sexual orientation also constituted violation of Article 8. The Ministry of Defence's attempted justifications (on bases of national security and prevention of disorder) were held to be for legitimate aims and in accordance with UK law generally. However, the Court expressed doubt about whether such severe treatment was 'necessary in a democratic society' and found no evidence to substantiate the claims that a change of policy would damage morale and fighting power. The UK's assertion that integration was impossible at this stage was rejected as most European countries allowed homosexuals to serve in the armed forces with no particular difficulties.

At first glance, the judgments of the Court appear to have far-reaching implications that have been lauded by some as 'extremely wide' (EOR 1999: 199). Whereas the significance of these historic decisions should not be underestimated, the present authors take a rather more sceptical view on the grounds that the particular facts of the cases and the provisions

the Convention themselves will place certain restrictions on their future application.

First, that the application of Article 8 to a policy which serves as an absolute bar has resulted in a finding of violation is hardly surprising. However, to assume that this will provide an effective remedy in a range of dismissal cases involving sexual orientation discrimination requires a huge leap. As the cases analysed earlier in this article illustrate, the current difficulties faced by gay men and lesbians in this respect do not generally arise out of the application of explicit policy, but rather due to more covert and intangible motives. Furthermore, the protection offered by Article 8 is potentially subject to justification on certain grounds and it was here that the Ministry of Defence policy fell down. In other words, justification on acceptable grounds would have deemed the policy legitimate and it is this potential defence which could be utilized by employers in the future in order to escape liability (for example, on the grounds of the protection of a client base as in the Boychuck case discussed earlier).

Second, the ECHR's judgments are further limited in terms of the other aspect of the particular claims before the Court, namely the nature and extent of the investigations carried out in those cases. Again it is hardly surprising that the Court found a violation of Article 8 in this respect. The means employed were extremely intrusive and heavy-handed, particularly as the investigation continued after the individuals concerned had admitted their homosexuality. The future application of these cases, which clearly represent a victory for gay men and lesbians facing exclusion from certain professions, is limited by the extreme and unusual facts of the claims. The potential scope offered by way of the implementation of the Convention's provisions into domestic law remains to be seen, but, given the conservative tradition of judicial interpretation in this respect to date, it seems prudent to proceed with caution rather than optimism.

Despite the widespread enthusiasm with which employment lawyers initially greeted the introduction of the Human Rights Act, it is uncertain whether the provisions will prove particularly useful in the furtherance of hitherto non-existent employment rights. The effectiveness of human rights legislation in this respect will not necessarily be hindered by the nature of the approach taken by such provisions, but rather by the scope of the Convention itself and corresponding domestic law. In other jurisdictions human rights legislation has been specifically targeted in order to extend rights to homosexual employees. New Zealand's Human Rights Act 1993 which was used as the template in definitional terms for the unsuccessful Sexual Orientation Discrimination Bill (discussed earlier), specifically prohibits discrimination on the ground of sexual orientation in the area of employment.

The effectiveness of the new UK legislation in this respect is, of course, purely speculative at this stage. However, as Ewing has noted, the

Convention applies to a such a narrow range of employment-related issues that 'it may provide a useful basis for filling in gaps, but it is no substitute for carefully tailored legislation dealing with such matters as sexual orientation discrimination' (Ewing 1998, p. 291).

Conclusion

Despite the lack of protection against discrimination in employment currently endured by gay men and lesbian employees under UK law which has been identified, there appears to be little cause for optimism with regard to future developments. The judiciary in both the UK and European contexts, although largely sympathetic to the absence of legal remedies in this respect, appear to be united in the belief that discrimination on such grounds is outwith the scope of existing anti-discrimination measures. The extension of the Equal Treatment Directive to discrimination on the grounds of transsexualism which has led to legislative initiatives in both the UK and European jurisdictions has been disallowed with respect to homosexuality, thereby removing the possibility of similar developments regardless of the nature of future claims.

The possibility of the introduction of specific legislation seems unlikely in the UK context due to the wider policy implications which would arise from the equal treatment of homosexual relationships with heterosexual relationships, particularly with regard to benefits currently enjoyed by married couples. Existing legislation which currently provides basic employment rights may be useful in some respects but is fairly limited in this context. Recent judgments of the European Court of Human Rights are encouraging and this certainly appears to be an area with scope for future development. The future use of human rights legislation, relatively new to the UK may also have some application, but it is possible that the judiciary in the UK will continue to apply conservative interpretations to potentially useful provisions.

The most likely source of future legislative intervention appears to be through European Community law, where the introduction of the new Article 13 at least places the prohibition of such discrimination on the policy agenda. However, the main hurdle to be overcome in this respect is the requirement of unanimity at the Council of Ministers. At a recent address to the European Parliamentary Intergroup of Gay and Lesbian Rights, Padra Flynn, Social Affairs Commissioner, made the following statement,

to be quite frank, it is much too early, at this juncture, to come to any firm conclusions about what should be done and what could be done in terms of specific anti-discrimination measures. We should also be conscious of the limitations of the new Treaty article. Action to combat discrimination can only be taken on foot of a unanimous Council decision (a

consultation with parliament). We all know how difficult it can be to get unanimity in what may be, let's face it, controversial areas. The provision falls far short of providing for the outlawing of discrimination with direct effect, which many had sought.²⁹

For the gay male or lesbian applicant facing discriminatory practices in relation to access to employment or during the currency of the contract in the UK, such slow progress will be of little comfort. The current state of UK law in this context is a sad reflection of workplace culture where it appears, in terms of a black letter application of the law at least, homophobic practices will continue to be tolerated for the foreseeable future.

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Notes

1. See *R v Ministry of Defence ex parte Smith and Others* (1996) IRLR 100 where the Court of Appeal was of the same opinion.
2. *Lustig-Prean and Anor v United Kingdom; Smith and Anor v United Kingdom*, ECHR, 27.9.99, (31417/96, 32377/96, 33985/96, 33986/96).
3. The provisions of the Convention that have application here are Article 8 which provides the right to respect for private and family life and Article 14, which is not in itself a free standing right, but which guarantees access to the rights and freedoms contained in the Convention without 'discrimination on any ground' expressly in the contexts of sex, race, colour, religion, political or other opinion and national or social origin, but not specifically on the ground of sexual orientation. Although the Convention has been successfully invoked in previous cases dealing with homosexuality, most notably *Dudgeon v UK* (1982) 4 EHRR 149 and *Norris v Ireland* (1991) 13 EHRR 186, the scope of such judgments has tended to be outwith the specific field of employment, rather in respect of the right to a homosexual lifestyle.
4. Resolution of the European Parliament on equal rights for gay men and lesbians in the EC, OJ No C 61/41, 28.2.94.
5. Which replaced Article 6a when the Amsterdam Treaty came into force on 1 May 1999.
6. For empirical research relating to the experiences of lesbians and gay men employed in the public sector, see Humphrey (1999).
7. For examples of the range of cases handled by LAGER, see the case studies outlined in the LAGER Annual Report (1997/8, pp. 4-8).
8. See Stonewall Factsheet (1998) 'Stonewall: Working for Lesbian and Gay Equality'.
9. For specific examples of the nature and range of discriminatory acts in this context, see Lager Annual Report (1997/8, note 5) and for studies concerning the

- impact and underlying causes of such acts see Campaign for Homosexual Equality (1981); Greasley (1986); Taylor (1986).
10. As detailed later, it should be noted that the Grant case was concerned with a claim for equal pay under Article 119 (now 141) of the Treaty of Rome and the Equal Pay Directive (75/117), not the Equal Treatment Directive which is implemented in domestic law by the Sex Discrimination Act 1975. However, the cent point at this juncture is that the anti-discrimination provisions in both the EC and UK contexts have been effectively 'blocked off' from providing a possible means of legal remedy in cases concerned with sexual orientation discrimination.
 11. Wintemute (1995, p. 495).
 12. See the Sex Discrimination Act 1975, s.1(1)(a), the Equal Treatment Directive (76/207), Articles (2)1 and 5(1).
 13. Sex Discrimination Act 1975, s.1(1)(b).
 14. For an example of how the explicit stereotyping of gay men has been used as a basis for 'justified' discrimination, see *Saunders v Scottish National Car Assoc.* (1981) IRLR 277, discussed *infra*.
 15. See *Webb v EMO Air Cargo Case C-32/93* (1994) IRLR 482 in which the ECJ accepted that dismissal on the grounds of pregnancy constituted direct discrimination and was therefore prohibited under Articles 2(1) and 5(1) of the Equal Treatment Directive 76/207. The provisions of domestic law, namely ss.1(1)(a) and 5(3) of the Sex Discrimination Act 1975 were subsequently found to be in accordance with this ruling, albeit in fairly limited circumstances, by the House of Lords in *Webb v EMO Air Cargo (UK) Ltd (No 2)* (1995) IRLR 645.
 16. Opinion of Advocate-General in Case 32/93 *Webb v EMO Air Cargo Ltd*, *supra* at p. 491.
 17. See further discussion of this case at p. 23 *et seq.*
 18. For a clear exposition of this issue, see Flynn (1997).
 19. The decision in *P v S* actually removed completely the need for any external comparator at the European level allowing the individual him or herself to compare to the comparator on the basis that the characteristic in question had been removed. *Chessington World of Adventures* confirmed this at EAT level thus opening the way for discrimination related to any aspect of a person's 'sex' to form the basis of a potential claim.
 20. This line of argument was successfully advanced before the Human Rights Committee of the United Nations in *Toonen v Australia CCPR/C/50/D/4/1992*, No 488 1992 in which the Tribunal accepted that the word 'sex' could be applied to include orientation.
 21. This may be one area in which the European Court of Human Rights' judgments in the *Smith and Lustig-Prean* cases have a substantial impact (*supra* note 2), due to the Court's finding that an unjustified blanket ban on homosexuals which serves as an absolute bar to employment is in direct violation of Article 8 of the European Convention on Human Rights.
 22. European Commission Recommendation No 92/131/EEC on the protection of the dignity of women and men at work.
 23. The quotations reproduced in this section are taken from the debate at the second reading of the Bill, Lords, Hansard, 5 June 1998, Columns 640-657.
 24. Which gives new powers under European Community law to oppose discrimination on the grounds of sexual orientation.
 25. Regulation 2, The Sex Discrimination (Gender Reassignment) Regulations 1999 which came into force on May 1999 following the Government's decision on the interpretation of the SDA applied in the transsexual case law placed the legislation under excessive strain. For the background to the legislation, see

- Consultation Paper, 'Legislation regarding discrimination on grounds of transsexualism in employment', January 1998.
26. By Protocol 11 which came into force in November 1998.
 27. See note 2, *ibid*.
 28. *R v Ministry of Defence, ex parte Smith and Anor; R v Admiralty Board of the Defence Council, ex parte Lustig-Prean and Anor* 1996 (IRLR) 100.
 29. Meeting with EP Intergroup of Gay and Lesbian Rights, Strasbourg, Tuesday 13 January 1998, transcript available at <http://europa.eu.int/Dialogue>: Mar-Apr 1999

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SHALL I COMPARE THEE? THE LEGAL DILEMMA: THE CHOICE OF COMPARATORS IN DISCRIMINATION CASES

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ABSTRACT

There have been remarkable developments in some areas of discrimination law in the United Kingdom over recent years along with a notable lack of development in other areas with both relative success or failure (in terms of extending the protection of the law) often being determined by the appropriate comparator which can be used in presenting a claim for discrimination and/or the influence and constraints of rules set down in UK and European Community Legislation. It is contended that a lack of uniformity of approach to these issues both hinders and helps the equality cause. It hinders by presenting uncertainty about the appropriate comparator in these cases and helps where the law recognises uniformity of approach in determining comparators across differing kinds of equality cases is both ill-advised and inappropriate. It is contended in this article that reform of the areas of law where protection is weak or badly-structured is best served by borrowing from approaches in the better protected areas of UK discrimination law or from strategies utilised in other jurisdictions. In the interests of brevity and consistency of argument and analysis it has been necessary to refrain from considering this issue as it relates to equal pay.

INTRODUCTION

Inequality of treatment based on the notion that certain individuals or classes of people are more deserving of rights than others is endemic within society. Therefore attempts to address the issue of inequality through legal intervention are likely to be limited in their effectiveness or frustrated altogether. This will be especially true where the legal rules and institutions utilised for this purpose are operating on principles or rules, which have a discriminatory aspect:

'Social elites within Western society have conventionally displayed a very ambivalent attitude towards people who appear different from themselves, whether it is in terms of ablebodiedness, race, sexuality, or social ascriptions. Social elites are able to use their power to con-

struct normativity in their own image and to construct difference as otherness.' (Thornton 1997: 183)

This highlights the difficulty of developing legislative rules to achieve equality. The tendency has been for legislators to specify a normative comparator which will always represent the benchmark against which the aggrieved victim of discrimination will be compared, irrespective of the difficulties this may cause.

The definition of direct discrimination in section 1 (1) of the Sex Discrimination Act 1975 illustrates this where 'a person discriminates against a woman if ... on the ground of her sex he treats her less favourably than he treats or would treat a man.' This has become known by some employment lawyers as the assimilationist approach and is characteristic of anti-discrimination laws in the United Kingdom. 'An assimilationist argues that the purposes of anti-discrimination law includes a commitment to assimilating all the parties in a polity to a common outcome.' (Dine and Watt 1996: 9)

The preferable strategy is known as the pluralist approach. 'A pluralist recognises that there may be a number of different, but fundamentally equal outcomes or positions arising from the operation of anti-discrimination law.' (Dine and Watt 1996: 9) The emphasis should be on the outcome of the behaviour (analysing whether it is discriminatory) rather than analysing whether the behaviour falls within some formulaic pattern set down by statute.

The following quote outlines the difficulty for legislators and the judiciary in challenging discriminatory practices (presented here in the context of sex discrimination in employment) through application of the law:

'women are segregated by sex into lower paying occupations and workplaces, and are invariably found at lower levels than men in those occupations they share. Even within occupations, women earn less than men. This is particularly true of part-time workers, who tend to be most segregated in terms of sex and who are denied the wage rates and other benefits available to men and, to a less extent, to women who work full-time.' (McColgan 2000: 133)

This article will highlight the difficulties arising from the provisions in equality legislation that require applicants in discrimination cases to find a comparator (of a different category of person from themselves) within the same employment, who has been treated more favourably by their employer.¹ In direct discrimination cases a straight like-for like comparison of treatment by the employer is made between two category of employee. Indirect discrimination cases however are more complicated involving two main issues to be determined (which are often interlinked). Firstly is a requirement or condition imposed by an employer on all employees in practical

terms more difficult to comply with for one category of employee compared with another and secondly is the effect of this discriminatory and detrimental? In considering these issues the tribunal are required to compare two categories of employees (e.g. men and women, disabled and non-disabled) to determine whether there is sufficient disparate impact for one to justify a finding of discrimination and whether the inequality arising is sufficiently detrimental to the employees discriminated against to be treated as unlawful (see definitions of direct and indirect discrimination below).

DIFFICULTIES IN ENFORCING EQUALITY LEGISLATION

Problems with Legislative Rules

The notion of inequality applied in the statutes presents the applicant with the difficulty of proving that certain employees are better off than themselves because they are different, and favoured by the employer because of that difference.

'The outlawing of certain types of discrimination is justified on the basis of the simple premise that there are certain criteria for treating people differently which will never be regarded as morally relevant, or which are relevant in an admissible way only in a restricted range of situations which can be defined by law.' (Feldman 1993: 859)

The requirement for differential treatment to substantiate a discrimination claim necessarily involves some form of comparison of treatment between different categories of person. However, as will become apparent, this comparative requirement is not always necessary or desirable. Also legislators will often fail to define comparators in broad enough terms to encompass all type of relevant claims.²

Judicial Treatment of Equality Issues

In indirect discrimination cases, in determining issues of inequality the applicant will be expected to bring forward evidence that an employee or employees (of a different sex, race, married status, nationality etc.) within the same employment receive preferential treatment in comparison with them. 'A person discriminates against a woman in circumstances where he applies to her a requirement or condition which he applies or would equally apply to a man but which is such that the proportion of women that can comply with it is considerably smaller than the proportion of men that can comply

with it.' (e.g. as per s1(1)(b)(1) of the SDA 1975). Because the basis for comparison is a generic characteristic it inevitably leads to comparison between groups of employees that are of that generic type and those that are not within and/or outside employment. It will ultimately be up to the judiciary to decide if the collective comparators (known as the pool for comparison) put forward by the applicant are appropriate or not. Where the Employment Tribunal's choice of pool is different from that of the applicant it will serve to undermine their case, and will not always serve the interests of equality.³ The proposition that the judiciary have, at worst made this whole process unnecessarily elaborate and unworkable and, at best brought a high degree of uncertainty into the comparative aspects of discrimination cases, will be explored in this article through analysis of relevant statutory rules and legal decisions. Alternative approaches for determining whether someone has been subjected to unfavourable treatment will be considered based on analysis of approaches in other jurisdictions.

Employment tribunals and courts faced with the problem of deciding on appropriate comparators in differing contexts of discrimination, do not always make the logical and appropriate choice. They may be constrained by inflexible notions of equality which cannot accommodate inherent differences between the legally prescribed comparators. In indirect discrimination cases they may be inclined to opt in favour of a broad-based comparative sample, which is often too general to be of relevance to the discriminatory nature of the particular case. Another difficulty arises where the courts having made the comparison conclude that there is no inequality of treatment in a case. This can arise where an incomplete understanding of the perceptions of the comparators in the case can lead them to an unsatisfactory conclusion.⁴

'A law is . . . discriminatory if, although there is a relevant difference, it proceeds as though there is no such difference or, in other words, if it treats equally things that are unequal – unless perhaps, there is no practical basis for differentiation.'⁵

The problem of finding an appropriate comparator in discrimination cases has recently come to the fore in disability discrimination cases⁶ and sexual orientation cases⁷ and the issues raised by these important decisions will be considered later in the article. The uncertainties arising from judicial interpretation of equality statutes is not a recent phenomenon. As the following quote suggests, their approach of strict adherence to the requirement to establish inequality of treatment by comparison with someone that has very different characteristics or circumstances (an approach underlined by the ter-

minology in equality statutes), can serve to undermine the original purpose of the legislation. (Skidmore 1997)

The point has frequently been made that formal inequality is inappropriate because it focuses on difference rather than the disadvantaged position associated with differences, and thus fails to address many of the problems resulting from the difference. (Pitt 1996: 198)

The recent sexual harassment case *British Telecommunications plc v Williams* [1997] IRLR 669 illustrates the type of problem that can arise. A female employee claimed that, in an appraisal meeting with her supervisor, he became sexually aroused, arranged the paperwork so as to ensure close proximity between them, stared at her throughout the meeting and made the meeting last for an excessive amount of time. The ET were of the opinion that she had failed to prove that the accusations of sexual arousal and staring were true, and because of this, the claim failed. The EAT upheld this decision without considering the cumulative effect of the alleged behaviour, which would be to harass the woman by creating an oppressive working environment. It is unlikely a man in this particular case would have been treated in a similar manner, and if he were the consequences of the behaviour would be less oppressive.

'There was no willingness to analyse the overall atmosphere created by the manager's actions, which together might understandably have been regarded as creating an atmosphere intimidating to a reasonable woman. As it is the effect of the behaviour that is determinative, the fact that the manager might not have been aware of the reaction he was creating would not be relevant.' (Townshend-Smith 1998: 244)

The applicants in indirect discrimination cases and their representatives will face the often complex decision concerning the appropriate choice of comparator to underpin their case⁸ only to be informed at the hearing stage by employment tribunals that their choice was incorrect.⁹

The choice of an appropriate section of the population is in our judgement an issue of fact ... entrusted by Parliament to the good senses of tribunals.¹⁰

Even where a straightforward like-for-like comparison is made in direct discrimination cases based on sex it may turn out that the effect of the alleged discriminatory act is gender-neutral.¹¹ There could also be instances, particularly in sex discrimination cases where there is no comparator available.

It should be recognised that the stereotyping of women has far-reaching consequences, in that it can lead to job segregation, which in turn may prevent women obtaining equality in respect of their terms

and conditions of employment due to a lack of comparator. (Painter, Holmes and Migdal 1995: 209)

Given that equality legislation broadly covers both discrimination in recruitment and selection and discrimination within the employment relationship¹² it is relevant to examine the issue of comparators under each of these headings.¹³ In considering the law as it relates to comparators in discrimination cases (involving recruitment and selection) it is necessary to consider this under the separate headings of direct and indirect discrimination.

COMPARATORS IN RECRUITMENT AND SELECTION CASES

Direct Discrimination Cases

In direct discrimination cases, applicants pursuing claims concerning the process of recruitment and selection will not normally have great difficulty in proving inequality of treatment between themselves and a different category of employee. If a man is appointed to a position where a woman is better qualified or more experienced, then provided the evidence is available to substantiate this, it will amount to a prima facie case of discrimination.¹⁴ If the availability of employment is restricted by job specifications relating to nationality, residence or language skills which are unrelated to the requirements of the job, then a reasonable presumption of race discrimination can be established. Similarly where a disabled applicant is asked detailed questions about their disability at an interview which are unconnected with their ability to do the job, then it is likely to amount to discriminatory behaviour. In a sex or race discrimination case, it is incumbent on the applicant to introduce evidence that someone of a different sex or race has, or would have, been treated more favourably in the circumstances. In disability discrimination cases, as a result of the decision of *Clark v TDG Ltd (t/a Novacold)* [1999] IRLR 318 there is no need to find a like-for-like comparator to establish discrimination has taken place, although some form of comparison will be undertaken. In cases of direct discrimination the applicant must prove that they have been subjected to discriminatory behaviour and then the employer must then show that it is not the case.¹⁵

Indirect Discrimination Cases

The main difficulties arise in the context of proving indirect discrimination: namely unfair treatment in, the process of recruitment and

selection, terms and conditions of employment offered or refusal to employ (as per s1(1)(b) of the SDA 1975 and RRA 1976).

In *Price v Civil Service Commission (No 2)* [1978] IRLR 3 an age requirement of 17–28 for the post of executive officer was deemed discriminatory against women, because more women than men would be absent from the job market during these ages because of their responsibility for looking after children.

‘This case shows how easy it is to get dazzled by looking at the wrong statistics. If in this case the pool of actual applicants had been considered rather than the pool of potential (that is qualified) applicants, the decision would have been different.’ (Pitt 1998: 55)

Another difficulty is that in reaching their conclusions after comparing the treatment of two different category of prospective employee the courts may unwittingly import inherently discriminatory standards. In *Perera v Civil Service Commission (No 2)* [1983] ICR 428 CA the Court of Appeal dismissed a claim by a Sri Lankan of indirect race discrimination based on the assertion that selection criteria utilised by the Civil Service concerning nationality, experience in the UK and command of the English language were not a requirement or condition. The court decided that a requirement or condition had to be an ‘absolute bar’ and in this case the specified characteristics were merely preferred qualities which did not represent a bar to employment. They went on to say that in comparative terms a Sri Lankan (with poor language skills) would need to be much more talented and intelligent than a UK National before they would be selected for the job.

The whole of the evidence indicates that a brilliant man whose personal qualities made him suitable as a legal assistant might well have been sent forward on a short list by the interview board in spite of being, perhaps, below standard in his knowledge of English and his ability to communicate in that language.¹⁶

In *Kidd v DRG (UK) Ltd* [1985] IRLR 190 the EAT proceeded to decide the case on the basis of a false assumption, namely that there was no discernible difference between the number of men and women who stay at home or work part-time because of child-care responsibilities.

While the natural response for the applicant in choosing comparators is to localise the pools for comparison and confine the issue within the sphere of their own employment, the Employment Tribunal will tend to adopt a much broader pool for comparison. In *Jones v University of Manchester* [1993] IRLR 218 CA, a 46 year old woman unsuccessfully claimed she had been discriminated against when she applied for a job as a careers adviser, because there was

a stated preference for graduates between the ages of 27–35. Her claim that comparatively mature female students (entering higher education after 25) were disadvantaged compared with male mature students was rejected. The Court of Appeal held that it was not appropriate in comparing pools to introduce subdivisions of the sexes and that the appropriate comparators in this case were all suitably qualified men and women. Similarly in *Pearse v City of Bradford Metropolitan County Council* [1988] IRLR 379, EAT it was deemed inappropriate to consider a college-wide pool to determine if part-time female lecturers had been discriminated against by being denied the right to apply for a senior lecturer post. The preferred pool was suitably qualified people generally and as no evidence concerning this had been led the case failed. Where, through the comparative process, discrimination has been shown to have taken place in indirect discrimination cases the employer would be required to justify it on grounds other than sex or race (as per s1(b)(2) of the SDA 1975 and RRA 1976).¹⁷

The applicant in discrimination cases involving recruitment and selection may face a tough challenge in proving their entitlement to legal protection. There are certain occupations (modelling, acting, nursing etc.) which the equality statutes recognise as reserved for a particular sex or racial group and these are defined as genuine occupational qualifications. In direct race and sex discrimination cases, deciding on the appropriate comparator will not often be an issue, however proving that discrimination has taken place may be more problematic.¹⁸

Difficulties with the use of Comparators in Indirect Discrimination Cases

The essential nature of indirect discrimination cases is that a class of employees are disadvantaged in their treatment by their employer in relation to another collective group of employees. The challenge is to bring forward evidence (often of a statistical nature) which substantiates the claim. In indirect discrimination cases it is clearly advisable, in producing statistical evidence to underpin a claim, to pick the widest range of comparators available and resist the temptation to localise the sample to cover the situation they are familiar with. The problem is that local information will often be relevant where you are trying to establish historical discriminatory attitudes and behaviour on the part of the employer.¹⁹ As intimated earlier no matter how sensible and rational the applicant's choice of comparator may appear the tribunal or court will readily substitute their own pool and defeat

the claim, because it is pursued on the wrong premise (as per *Jones and Pearse*).

One commentator suggests that the best approach is to present a range of statistical data to the employment tribunal so that they can then choose the most appropriate. 'It may be necessary in some cases to have statistical information on various pools to hand and present this to the tribunal.' (Mackay, Simon 1998: 50). Unfortunately they may not all support the applicant's case and although this solution may be appropriate for applicants who are in a position to employ the services of a solicitor (who can help them find and present the statistical information), this may be an unrealistic option for unrepresented applicants.

There is clearly scope for employment tribunals to be more supportive in these cases. This could be achieved by adjourning the proceedings where the wrong pool has been chosen to allow the applicant time to collect the relevant data and present it to the tribunal. Where the matter goes on appeal to the EAT then they could refer it back to a differently constituted tribunal to re-hear the case on the correct grounds. Unfortunately both these options will tend to overload a tribunal system which is already struggling to cope with its workload. What may be a preferable solution is legislation being introduced which provides a mechanism for the issue of the appropriate pool for comparison to be sorted out prior to the tribunal hearing.

The discussion to date has been concerned with forms of discrimination where there is protection under employment law, however there are a number of areas of discrimination where no such protection is afforded. In cases of discrimination based on sexual orientation there will be no remedy²⁰ and in religious discrimination cases no remedy will apply unless the behaviour is found to be on grounds covered by the Race Relations Act 1976, such as ethnic origin.²¹ Similarly where the discrimination in the recruitment situation is on the ground of age, as is often the case, then unless the ageism has its roots in sex discrimination, as in *Price*, then there is no legal remedy.²² The next section will involve analysis of comparisons made in discrimination cases arising from acts perpetrated within employment or causing its termination. These will be considered under the broad headings of discriminatory behaviour (e.g. race, sex, disability).

COMPARATORS IN DISCRIMINATION CASES ARISING WITHIN EMPLOYMENT

For simplicity's sake this heading will be deemed to cover a wide range of discriminatory behaviour including discrimination, in access

COMPARATORS IN DISABILITY DISCRIMINATION CASES

In disability discrimination cases, the Disability Discrimination Act 1975 Act provides that 'an employer discriminates against a disabled person if—

(a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply' (s5(1)). In *Clark v Novacold* [1998] IRLR 420 the EAT in applying the relevant provisions of the Act, decided that disabled employees could only be compared with someone that is similarly disadvantaged but for a different reason, namely a non-disabled but sick person who has been absent from work for a long time. Mr Clark suffered a back injury at work and as a consequence was absent from his employment for a considerable period of time. He was dismissed by his employer and brought a case against him on the basis that he had been discriminated against contrary to section 5(1). The EAT accepted the employer's defence that a similar fate would have befallen someone who was off sick for a considerable period of time. In *British Sugar v Kirker* [1998] IRLR 624, a differently constituted EAT took the view in a similar case that the Disability Discrimination Act 1995 is materially different from the SDA 1975 and RRA 1976, in that the like-for-like comparison required in these Acts did not apply in discrimination cases.

'Put at its simplest, establishing a prima facie case of discrimination on the basis of disability (which does not apply to non-disabled job applicants or employees) will be sufficient to discharge any further evidential requirement on the part of the applicant and place the onus on the employer to show the discrimination is justifiable.' (Middlemiss 1999)

This reasoning was followed in the *Clark* appeal by the Court of Appeal²⁴ where it was stated that the essential issue for an employment tribunal will be to determine the underlying reason for less favourable treatment in the particular case and not concern itself with like-to-like comparison with other real or hypothetical employees. The Australian Disability Discrimination Act 1992 gets round this problem by spelling out the type of comparison which can be made. In section 5(1) direct discrimination applies where:

'a person discriminates against another person on the ground of disability of the aggrieved person if because of the aggrieved person's disability, the discriminator treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person without the disability.'

What this lacks in brevity and clarity it makes up for in sense, in that the obvious comparator here is someone who is simply not disadvantaged in the same way. In a Canadian case *Eldridge and Others v A-G of British Columbia and Another* [1997] 3 SCR 624, the following statement by La Forest J on behalf of the Supreme Court is instructive in identifying the particular nature of disability discrimination.

'Exclusion from the mainstream of society results from the construction of a society based solely on 'mainstream' attributes to which disabled persons will never be able to gain access... Rather, it is the failure to make reasonable accommodation, to fine tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them. The discrimination enquiry which uses the attribution of stereotypical characteristics reasoning as commonly understood is simply inappropriate here. It may be seen as a case of reverse stereotyping which, by not allowing for the condition of the disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment.'

The essential point here is that the standards and practices which are introduced by employers to counteract disability discrimination in employment must be much more proactive and far-reaching than those applied to deal with other forms of discrimination.

COMPARATORS IN SEX AND RACE DISCRIMINATION CASES CONCERNING DISCRIMINATION WITHIN EMPLOYMENT

The equality statutes (SDA 1975, RRA 1976, DDA 1995) outline the types of activities which will be treated as unlawful including discrimination in the way an employer provides access to training, transfer or promotion or any other benefit or facility, and dismissal or subjecting employees to any other detriment on discriminatory grounds.²⁵

'The vast majority of litigation under the Sex Discrimination Act 1975 and the Race Relations Act 1976 concerns discrimination in employment. This reflects the importance of employment in our society, in financial terms and in terms of self-esteem and psychological well being, especially where that employment relationship is ongoing and semi-permanent.' (Townshend-Smith 1998: 321)

In *Home Office v Holmes* [1984] ICR 678 EAT an indirect discrimination case was brought on the basis that requiring women to work full-time discriminated against them because their role of primary child-carer made it more difficult to work on a full-time basis.

The applicant was employed as an executive officer and she worked full-time, as did other employees at her grade. After the birth of her second child she asked to work part-time as she found it difficult to continue working on a full-time basis. Her employer refused and she claimed that by being denied this opportunity, she was the victim of indirect discrimination because women would find it more difficult to comply with the full-time requirement than men. The EAT found in her favour although it stressed that it did not intend to create the precedent that women working full-time can claim a right to work on a part-time basis. However, where the employer is a large, profitable organization it will be difficult for them to justify an inflexible full-time rule for employees.

In *Nicholas Smith v Safeway* [1996] IRLR 456 a male employee was disciplined and eventually dismissed because he insisted on wearing his hair in a ponytail. He argued that a woman would not have been dismissed in similar circumstances. The EAT accepted that he had not suffered less favourable treatment and that different treatment of men could be non-discriminatory. The reasoning was that any dress code which reinforces traditional gender stereotypes (complies with conventional expectations of appearance) cannot give rise to less favourable treatment.²⁶ The difficulty with dress codes is that they need to operate on a basis of social custom and stereotypical assumptions because there are no other parameters for determining the acceptability or otherwise of certain kinds of dress. 'An employer is entitled to a large measure of discretion in controlling the image of his establishment, including the appearance of staff, and especially so when, as a result of their duties, they come in contact with the public'²⁷ In indirect discrimination cases the employer will need to justify discrimination on grounds other than race or sex, and although the justification may appear on the face of it to be reasonable, it may in fact be rooted in discriminatory attitudes and practices.

The fact that there is an explanation for a practice which disadvantages one sex does not make the disadvantage disappear. If indirect discrimination is concerned with removing disadvantages the existence of a justification, even a genuine justification, should not per se be conclusive. In other words, justifiable discrimination does not cease to constitute discrimination. What the law should be concerned with is not merely discriminatory practices for which there is no alternative explanation but discriminatory practices generally. (Bernard 1996: 84)

In *Betts v Brintel Helicopters Ltd and KLM ERA Helicopters (UK) Ltd* [1996], the EAT upheld the decision of an industrial tribunal that Muslim Asian employees were found to be indirectly discriminated against on grounds of race by the their employer's insist-

ence that no holidays could be taken during the company's busiest period. Their request for a day off work to celebrate a religious holiday was turned down and they were disciplined when they took the time off. The difficulty for those employees of complying with the requirement was unique to them (working on an important religious holiday) and the employer intended to discriminate by denying them the time off. The employer's unwillingness to recognise an important cultural difference between one group of employees and another and make allowance for such a difference was clearly discriminatory here. However if the standard of behaviour adopted by management is based on the fact that employees are caucasian and U.K. nationals by birth, it will be difficult for them to accommodate the needs of employees falling outside that model and accept that a failure to do so may be discriminatory.

Comparators in Cases Involving Discriminatory Access to Promotion

The area of promotion within employment is one, which can be inherently discriminatory, often favouring those employees with long service and in full-time employment and thereby indirectly discriminating against female employees (particularly those working part-time or on fixed terms), disabled employees or those from ethnic minorities.

'It is clear that many women and black people are working in jobs from which there is no promotion pathways. An assumption that part-time employees are unsuitable for promotion may be unjustifiable indirect discrimination.'²⁸

In *Gerster v Freistaat Bayern* [1997] IRLR 699 ECJ the European Court ruled that legal measures which treat part-time employees less favourably than full-timers in respect of requiring them to accrue much longer continuity of employment than full-timers to be eligible for promotion will be contrary to the Equal Treatment Directive 76/207.²⁹

The case of *West Midlands Passenger Transport Executive v Singh* (1988) IRLR 186, CA illustrates the potential importance of obtaining evidence of the past practice of an employer (in respect of offering promotion) to substantiate claims of racial discrimination. Where there is a low incidence of members of ethnic minorities being promoted in the past it will create a presumption that there is discriminatory regime in place in that particular place of employment.

In respect of sex discrimination, organisational barriers which deny women the opportunity to progress to the highest levels in the

organisation are collectively known as the 'glass ceiling'. An explanation offered for this phenomenon is that

'...pressures on women to combine work and family life, which may force them to take career breaks or part-time employment ... may, in turn, jeopardise their chances of promotion or raise doubts about their commitment to the job.' (Morris, O'Donnell 1999: 204)

Thus employers will be reluctant to provide them with the same chances of progression which are available to men (e.g. in 1998, 75% of barristers in England and Wales were men and 93% of Queen's Council were men, and in 1997 women comprised 15% of all senior civil servants in Britain).

Comparators in Cases Involving Dismissal on the Ground of Sex and Race

The primary difference between discriminatory dismissal provisions under equality legislation and unfair dismissal provisions is that entitlement to the protection of the former statutes does not require any continuity of employment whereas the latter protection is restricted to those persons that have one year continuous employment with their employer.³⁰ An important development in race discrimination law has been to extend its coverage to persons who are not racially discriminated against personally but are instructed to discriminate against others on racial grounds.³¹ The issue of comparators does not arise here as the applicant is claiming redress for being forced to be discriminatory to others.

In *Weathersfield Ltd (t/a Van & Truck Rentals) v Sargent* [1998] IRLR 14 EAT a white woman employed by a car rental company was told in no uncertain terms not to hire vehicles to 'coloureds or Asians'. She left the company and claimed constructive dismissal on the basis that she could not continue working for a company that had a racist policy. The Court of Appeal upheld the tribunal's decision that she had been constructively dismissed on racial grounds and entitled to £5,000 as compensation.³² In *R v Secretary of State for Employment ex parte EOC* (1995) 1 AC 1 the weekly hours threshold for part-time employees which applied to restrict the availability of statutory employment rights including unfair dismissal was held to be indirectly discriminatory against women (given part-time workers are mainly women).

Comparators in Sexual Harassment Claims

As well as dismissal being a ground for an action as specified in section 6(2)(b) of the SDA 1975 this legal measure also applies to 'sub-

jecting to any other detriment' which has been defined by the judiciary as including sexual harassment. The difficulties for the victim associated with bringing harassment claims is convincing the employment tribunal that their treatment at the hands of the harasser is sufficiently detrimental to them to qualify for a legal remedy and that it involves an element of inequality, in that, the same treatment would not be meted out to a comparator of a different sex, race etc.³³ On the latter point, the leading case of *Porcelli v Strathclyde Regional Council* [1986] ICR 564 CS demonstrates a purposive approach to this issue. Mrs Porcelli was harassed as part of a campaign to try and get her to leave her job as laboratory technician. Two male colleagues made suggestive remarks and gestures to her and brushed against her in an aggressive manner.

The employer argued that a male colleague that was disliked would be subjected to the same treatment. The Court of Session was not convinced of this.

'It does not follow that because . . . the campaign as a whole had no sex-related motive or objective, the treatment . . . which was of the nature of sexual harassment is not to be treated as having been on the ground of her sex. . . . It was particular kind of weapon, based on the sex of the victim . . . which would not have been used against an equally disliked man.'³⁴

A similarly enlightened approach was adopted in *Insitu Cleaning Co v Heads* [1995] IRLR 4 EAT. Here an employer argued that a sexist comment about a female employee's physical attributes could be equated with a non-offensive remark directed to a male employee about their lack of hair or their facial growth, and therefore no inequality of treatment applied. The EAT found such an assertion to be absurd.

In *Stewart v Cleveland Guest (Engineering) Ltd* [1994] IRLR 440, EAT (Middlemiss 1996) a female employee complained that she was being discriminated against by being required to walk through the workplace with pornographic images of women on display. The EAT were of the opinion that as these images were not directed at Ms Stewart personally and men are as likely to be offended by such images as women, then the conduct was gender-neutral and there was no ground for complaint under the Act. This decision took no account of the images creating a work environment, which demeaned women and objectified them as sex objects rather than employees of equal status to men within employment.³⁵

In *British Telecommunications v Smith* [1997] IRLR 668, discussed earlier, Justice Morison (p 669) was of the opinion that 'because the conduct which constitutes sexual harassment is gender-specific there is no necessity to look for a male comparator.' Providing the

evidence showed that sexual harassment had taken place, this would be sufficient to substantiate a claim without the need for evidence being introduced showing someone of the opposite sex would not be similarly treated.

Comparators in Discrimination Cases based on Sexual Orientation

The most contentious area involving comparators and discrimination is in the area of sexual orientation. In *Smith v Gardner Merchant* [1998] IRLR 510 (Middlemiss 1999) a homosexual barman claimed he had been subjected to abusive harassment (in the form of offensive remarks and a punch directed to his back) by a female colleague who in turn had complained of Mr Smith's threatening and aggressive manner towards her. The counterclaim was upheld and Mr Smith was dismissed for gross misconduct. He brought a claim for unlawful dismissal on the ground of sex under the Sex Discrimination Act 1975. Both the tribunal and the EAT rejected his claim on the basis that they had no jurisdiction to hear the case because the discrimination was not related to his sex, but his sexual orientation. The Court of Appeal concurred with their judgement. They found that the appropriate comparator for the purposes of establishing discrimination was a female homosexual.

'If the applicant was subjected to sexual harassment, in the form of homophobic abuse, by his colleague it was for the tribunal to determine whether that treatment would have been meted out to a homosexual woman in a similar position to him. If the facts were to show she would have subjected a female homosexual to like treatment no discrimination under s1(1)(a) would have been established.'

In the unlikely event that an employee can introduce evidence to show that the harasser is only homophobic in relation to male homosexuals and not their female equivalent they may have some chance of establishing a case. In LJ Beldam's view sexual harassment based on someone's sexual orientation would not fall within the ambit of the Act.

I do not see how the sexual orientation of the victim is to be regarded as a relevant circumstance and, if it is not relevant to the case of the victim, it cannot be relevant in the case of the person of the opposite sex with whom comparison is made.' (p 521).

'It was decided in *R v Secretary of State for Defence ex parte Perkins* (No 2) [1998] 2 C.M.L.R. 1116 where a medical orderly was dismissed from the Royal Navy on grounds of sexual orientation, that European Community Law (in the form of the Equal Treatment

Directive) does not cover or render unlawful discrimination based on sexual orientation.³⁶

What is needed here is a different approach to this issue, namely to introduce legislation along the lines of the Sex Discrimination (Gender Reassignment) Regulations S1 1999 No 1102³⁷ or accept that sexual orientation is not so much a matter of choice as an instinctive and natural path which is largely determined by people's genetic make-up and life experiences. Once the judiciary accept this then they can interpret existing legislation as providing a remedy possibly using the more sensible intra-sex comparison with a heterosexual male.³⁸

Where an employee intends to or has undertaken an operation to reassign their gender it was decided by the European Court of Justice in *P v S and Cornwall County Council* [1996] IRLR 347 that they should have a remedy under European Community law (and subsequently under United Kingdom law).³⁹

'Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably in comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.'

CONCLUSION

The issue of identifying appropriate comparators in discrimination cases is fraught with difficulties, which stem from ill-defined statutory concepts and dependence on the views of the judiciary on how inequality should be defined and the legal rules applied. The inherent problems associated with this process are identified by one commentator thus:

'The objectification theory . . . views sex and race discrimination as social practices which treat people as unworthy of full consideration as human beings due to a characteristic which they are assumed to possess by virtue of their actual or perceived or actual membership of a group to which social sensitivity attaches . . . Human beings, under this theory, should always be worthy of consideration as subjects, and it is this which justifies the use of anti-discrimination law.' (Bamforth 1996: 60)

There is no standard comparator which can be referred to for different kinds of equality cases and it is inconceivable that there could be, given the diverse nature of the claims involved. However the judiciary's insistence on establishing inequality of treatment to underpin most claims and imposing their own pools of comparison in indirect discrimination claims mitigates against the protection of the

law being extended to minority groups who deserve it (either within society or within specific employment situations).

It is difficult for the judiciary to defy the accepted norm (as was done by the ECJ in following the Advocate-General's opinion in *P v S and Cornwall County Council*) without the reassurance of the existence of legislative rules, which are capable of being interpreted as supporting a departure from convention. There has been important positive developments such as the decline in importance of the hypothetical comparator (see *Webb*), the departure from the need for a like-for-like comparator in disability cases (see the *Clark* case)⁴⁰ and the legislative rule that employees undergoing gender reassignment should be compared with employees of the sex they are changing from. There have also been negative developments such as the requirement that homosexual men should be compared with lesbian employees that are real or hypothetical.⁴¹

The need to reform the law relating to equal opportunities is firmly on the agenda of the Equal Opportunities Commission with proposals being submitted for 'new sex equality laws being introduced which protects sex equality as a basic human right.'⁴²

There should be a clear agenda for a change in the law, which will ensure as many categories of employees as possible are protected against discrimination. 'For many workers and campaigners, the aim is to have sufficient freedom in law for all workers to have control over their gendered appearance and relationships, without this infringing the autonomy of others. Using sex discrimination law to the full is one way of attempting this.' (Skidmore 1997: 60). As suggested earlier allowing intra-sex comparisons in sexual orientation cases as has been done in gender reassignment cases would resolve the inequalities in the system, particularly where this change was enshrined in specific legislative rules. In the United States the Civil Rights Act 1964 covered grounds for discrimination in the areas of race, colour religion, sex or national origin. Subsequently legislation has been introduced to cover areas of discrimination not included in the original Act, e.g. Americans with Disabilities Act 1980. Canada has a single anti-discrimination Act called the Human Rights Act 1985 which prohibits multiple kinds of discrimination (including religion, age and sexual orientation) and in Ireland the Employment Equality Act 1996 bars discrimination on the same grounds. Some commentators have argued that we should move towards a similar model in the United Kingdom and at a stroke overcome most of the problems identified in this article (Wintermute 1997; Hepple, Ellis, Rose, Singh 1997). While the statute would include all forms of discrimination it would have different rules for determining whether discrimination applies including different approaches to comparators. Unfortunately the signs are that the present Government is unlikely

to pursue this option, choosing instead to avoid or delay resolution of the issue, as in the case of sexual orientation or religious discrimination⁴³ or resolve it by introducing codes of practice,⁴⁴ with little likelihood of success in changing discriminatory behaviour. In response to proposals for changes in the law submitted by the EOC and the Commission for Racial Equality,⁴⁵ the Government stated it has no plans to overhaul discrimination law in the immediate future and changes in the law will only come about where they are required under European Community Law.⁴⁶ This is a missed opportunity to formalise, but at the same time simplify the law as it relates to harassment and bullying, and introduce legal protection for employees who are denied it at present because of their age, religious beliefs and sexual orientation. In *Smith and Grady v United Kingdom* (Equal Opportunities Review, No 88, November/December 1999, pp 49–50) the European Court of Human Rights decided that investigations of allegations of homosexuality and discharge from the services on grounds of homosexuality, experienced by two female services personnel, were acts contrary to Article 8 of the Convention of Human Rights which covers the right to respect for their private and family life. Whether this decision is likely to be broadly interpreted by the judiciary and legislators to ensure homosexual men and lesbians are fully protected under employment law or given a narrow interpretation by domestic courts restricting its impact on the law relating to sexual orientation discrimination remains to be seen. However in the long term the European Convention of Human Rights (which will be integrated into UK law by the Human Rights Act 1998 by October 2000) could be instrumental in broadening the grounds for discriminatory action. The existing legislation needs to be changed to ensure the provisions have sufficient flexibility to permit relaxation of the need for comparison on the basis of equality and thereby dispense with the requirement for relevant comparators to be involved in cases where it is not appropriate. The judiciary has already gone down this road to some extent. I finish with a rather inscrutable quote from Justice Frankfurter in the case of *Dennis v United States* 339 US 162 at p 184. 'It is a wise man who said there is no greater inequality than the equal treatment of unequals.'

NOTES

- 1 Section 5(3) of the Sex Discrimination Act 1975, section 3(4) of the Race Relations Act 1976
- 2 The failure of equality legislation to directly include sexual or racial harassment has required creative interpretation by the judiciary of statutory rules to ensure these type of cases can be pursued under the stat-

utes. Certain other discriminatory grounds are not covered by statute e.g. religion, sexual orientation.

- 3 In *Pearse v City of Bradford Metropolitan Council* [1988] IRLR 379, EAT a part-time lecturer who was denied the opportunity to apply for a full-time promoted post because of her part-time status claimed indirect discrimination and used statistical evidence concerning staff in the college to support her claim. The EAT decided that the appropriate pool was men and women eligible to apply within society in general and therefore her case failed.
- 4 In *Stewart v Cleveland Guest (Engineering) Ltd* [1994] IRLR 3, EAT the tribunal failed to appreciate the effect of pornographic images in the workplace would have on women's feelings of self-worth, and the impression they would create could lead them to be objectified as sex objects rather than employees.
- 5 See judgement of Justices Gaudron and McHugh in *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at p 478.
- 6 *Clark v TDG Ltd (t/a Novacold)* [1999] IRLR 318
- 7 *Smith v Gardner Merchant* [1998] IRLR 510
- 8 Referred to as the 'pool for comparison'
- 9 In *Jones v University of Manchester* [1993] IRLR 218, CA it was the Court of Appeal that decided to 'move the goalposts' and instead of accepting the pool for comparison as mature graduates, chose all eligible graduates, which defeated a claim for indirect sex discrimination. *Pearse v City of Bradford Metropolitan Council* [1998] IRLR 379, EAT also illustrates the difficulty.
- 10 Waite J in *Kidd v DRG (UK) Ltd* [1985] IRLR 190 EAT
- 11 *Stewart v Cleveland Guest (Engineering) Ltd* [1996] IRLR 440, EAT, *Mascia v Dowell Schumberger Case No S/1560/89*
- 12 S6 of the Sex Discrimination Act 1975 and s4 of the Race Relations Act 1976 sets out the unlawful activities covered by the Act.
- 13 While comparators feature significantly in equal pay cases it is outside the scope of this article to analyse this aspect of discrimination law.
- 14 In *Miller v Strathclyde Regional Council* (Unreported) 1986, see Scotsman 6.3.86, an assistant head-teacher at a school was successful in showing that she was discriminated against, by not being interviewed for a head teacher job, despite being the best qualified and most experienced candidate.
- 15 In *James v Eastleigh Borough Council* [1990] IRLR 298, HL the House of Lords decided that a lack of motive or intent to discriminate on the part of the employer would be irrelevant in determining whether direct discrimination had taken place.
- 16 For a critique of this decision see Pitt 1998 (1) p 53
- 17 In *Bilka-Kaufhaus GmbH v Weber von Hartz* [1987] ICR 110 the ECJ applied a strict interpretation of justification to mean, that it corresponded with a real need of the organisation, and is appropriate to fulfil that need and necessary to achieve that end.
- 18 *Saunders v Richmond-upon-Thames Borough Council* [1977] IRLR 362 EAT, *Noble v David Gold & Son (Holdings) Ltd* [1980] IRLR 252 CA
- 19 In *West Midlands Passenger Transport Executive v Singh* [1988] ICR

- 614 CA a Sikh that was refused employment as an inspector asked for a discovery of documents concerning the ethnic origins, qualifications and experience of applicant for the equivalent post over a two year period. This was granted on the basis that this evidence would be highly relevant in determining the attitudes and behaviour of the employer.
- 20 This was confirmed in the case *Grant v South West Trains* [1988] IRLR 206.
 - 21 In *Seide v Gillette Industries* [1980] IRLR 427 discrimination against Jews held to amount to discrimination on grounds of ethnic origin.
 - 22 The Department for Education and Employment are in the process of issuing a code of practice on age discrimination which could underpin a claim at an employment tribunal where an employer acts contrary to its provisions. The Government will consider legislating in the event the code of practice is unsuccessful.
 - 23 In *Coleman v Skyrail Oceanic Ltd* [1981] IRLR 398 CA the employer dismissed women on the basis that they were unlikely to be the primary bread-winner as this role fell upon husbands.
 - 24 *Clark v TDG Ltd (t/a Novacold)* [1999] IRLR 318
 - 25 Section 4 (2) (b) & (c) RRA 1976, 6(2) (a) & (b) of the SDA 1975
 - 26 This case follows the line of reasoning adopted in *Schmidt v Austick Bookshop* [1977] IRLR 360 and is based on stereotypical assumptions about dress and appearance within the sexes. *c/f Rewcastle v Safeway* (1990) 2 AC 751 where an industrial tribunal took the view that such behaviour was discriminatory. (Skidmore 1997: 54–55)
 - 27 *ibid* Schmidt, J Phillips p 361
 - 28 *Clark v TDG Ltd (t/a Novacold)* [1999] IRLR 318 at p 333
 - 29 In the United Kingdom the Employment Protection (Part-Time Employees) Regulations SI 1995/31 extends many of the employment rights that full-time employees have under statute to part-time employees.
 - 30 There is no upper limit for compensation in discrimination dismissals however the upper limit for unfair dismissal cases currently stands at £50,000
 - 31 S(1) of the RRA 1976 'A person discriminates against another in any circumstances relevant for the purposes of the Act (a) on racial grounds he treats that person less favourably than he treats or would treat other persons.
 - 32 Similar issues arose in *Showboat Entertainment Centre Ltd v Owens* [1984] IRLR 7
 - 33 The term detriment is defined in the *Ministry of Defence v Jeremiah* (1980) QB 97 as 'putting at a disadvantage.'
 - 34 Lord President Emslie p 137
 - 35 See also *British Telecommunications plc v Williams* [1997] IRLR 669 commented on earlier when it was decided that the lack of proof of overt sexual overtures was sufficient to defeat a working environment sexual harassment case.
 - 36 This followed the decision of the ECJ in *Grant v South West Trains* [1998] IRLR 206 ECJ.

- 37 For a description of the regulations see Equal Opportunities Review, No 85, May/June 1999, pp 36–42
- 38 See *P v S and Cornwall County Council* (1997) 34 CML Rev 367 where an intra-sex comparison was made.
- 39 Sex Discrimination (Gender Reassignment) Regulations SI 1999 No 1102
- 40 In *Sidhu v Aerospace Composite Technology Ltd* 18.3.99, EAT 675/98 the EAT ruled that conduct which is race specific is less favourable treatment on grounds of race without the need for any comparison
- 41 Although such a comparison is unlikely to benefit an homosexual applicant against a background where discrimination on grounds of sexual orientation has been ruled as being outwith the scope of U.K. and European Community legislation see *Grant v South West Trains* mentioned earlier.
- 42 Making equality work: the challenge for Government, 1998, EOC Publications
- 43 The Religious Discrimination and Remedies Bill 1998 did not get the Government's support and was dropped from the legislative programme.
- 44 In the case of age discrimination the Department For Employment and Education issued a code of practice on it in 1998 which is recognised as not having the evidential weight of the ACAS Code of Practice on Discipline.
- 45 Reform of the Race Relations Act 1976: Proposals from the CRE, April 1998.
- 46 The Burden of Proof Directive (No 97/80) is requiring the Government to legislate in this area and they in turn have agreed to exceed the legislative requirement by extending its coverage to race discrimination cases. This only a commitment at this stage.

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Employment Law

Comparators in Discrimination Cases brought under the Disability Discrimination Act 1995

An enlightened Court of Appeal in *Clark v TDG Ltd (t/a Novacold)* [1999] IRLR 318 has resolved the thorny issue of who is an appropriate comparator in disability discrimination cases. The issue was first raised by the Employment Appeal Tribunal at an earlier stage (*Clark v Novacold* [1998] IRLR 420) where they held that the appropriate

comparator in a disability dismissal case should be a non-disabled employee who is absent from work for a long period.

'The proper comparator where a disabled person is dismissed for absence related to their disability is someone who is off work for the same amount of time, but for a reason other than disability. Such a comparator would possess all the characteristics of the applicant save for the fact of disability, and thus a comparison between them would prove whether the treatment was due to the applicant's disability.'

While this decision only applied directly to dismissal cases it did potentially undermine the disability rules generally by presenting the argument that a disabled person can only be compared with someone who is similarly disadvantaged but for a different reason. This decision was sensibly contradicted by a differently constituted Employment Appeal Tribunal in *British Sugar v Kirker* [1998] IRLR 624 where they differentiated cases arising under the DDA 1995 from cases brought under the other discrimination statutes. In this case, the applicant was chosen for redundancy because he was physically impaired, being partly-sighted, and the EAT considered evidence of discrimination during his employment to substantiate his claim under the DDA 1995. In dismissing the employer's contention that the case failed because no appropriate comparator had been nominated the EAT made it clear this was not a necessary requirement for such cases.

'In the present case there was no suggestion that other employees in the relevant redundancy selection pool suffered from a disability. That was not, therefore, a factor in their assessments but was, on the tribunal's findings, a detrimental factor in Mr Kirker's assessment. His complaint was he was undermarked by reason of his disability not that other employees in the redundancy selection pool had been overmarked.'

They were of the opinion that the DDA 1995 did not require a like-for-like comparison (which is a requirement under s 1(a) of the SDA 1975 and s 1(a) of the RRA 1976) but simply required the disabled person to show that he or she was less favourably treated than other employees where the reason for his or her treatment, being a reason related to his or her disability, does not apply to those other employees. Put at its simplest, establishing a prima facie case of discrimination on the basis of disability (which does not apply to non-disabled job applicants or employees) will be sufficient to discharge any further evidential requirement on the part of the applicant and place the onus on the employer to show that the discrimination is justifiable (as per s 5(1) of the Act). The Court of Appeal in *Clark* followed the EAT's ruling in the *Kirker* case, and distinguished disability cases from sex and race discrimination cases as outlined earlier. It is simply a case of identifying others to whom the reason for the treatment does not, or would not, apply. The essential issue for an employment tribunal will be to determine the underlying reason for less favourable treatment in the particular case and not to concern itself with like-for-like comparison with other hypothetical employees. The difficulties with using hypothetical employees in discrimination cases was overcome in the area of pregnancy discrimination in the case of *Webb v EMO Air Cargo (UK) Ltd* [1994] IRLR 482 where comparison between pregnant women and sick men was disallowed. It is still a problem for homosexual men whose hypothetical comparator in discrimination cases is a lesbian in the same employment (*Smith v Gardner Merchant* [1998] IRLR 510, *R v Secretary of State for Defence, ex parte Perkins (No 2)* [1998] IRLR 508).

The eminently sensible approach of departing from strict reliance on finding an equivalent comparator has rescued the disability provisions in the legislation from an unworkable and inequitable position and ensured that the spirit and purpose of the legislation can be upheld.

The Court of Appeal took the opportunity to clarify other issues which have arisen or potentially will arise from the operation of the provisions of the Act. A claim for dismissal based on disability discrimination must be pursued under s 5(1) of the Act, but where an employer refuses to make a reasonable adjustment to someone's job or the premises (contrary to s 6 of the Act) and subsequently dismisses them (eg on grounds of capability or redundancy as per s 98(2) of Employment Rights Act 1996), where a reasonable adjustment would obviate the need to dismiss, then a claim for discrimination based on a s 6 failure prior to the dismissal can be brought under s 5(2). In other words, two separate claims can be brought in a case such as *Clark v TDG Ltd (t/a Novacold)* [1999] IRLR 318 (Court of Appeal) where the employee was dismissed because his disability, an injured back, made it impossible to do his job, which was physically demanding, and led to him being absent from work for a considerable period. Instead of considering reasonable adjustments to the job or the workplace to accommodate Mr Clark and his physical impairment, the employer chose instead to dismiss him. Here, a claim could be brought in respect of the dismissal under s 5(1) and a separate claim for discrimination could be brought under s 5(2) for failing to make reasonable adjustments. The Court of Appeal pointed out that it was not necessary to pursue a s 5(1) claim before bringing a claim under s 5(2) as these were separate headings of claim, and while often there will be some overlap between them they were not interdependent.

The *Clark* decision, is clearly important for overruling a narrow application of the discrimination rules in disability cases, continuation of which would have undoubtedly presented a serious evidential obstacle to applicants which would have the effect of nullifying the application of the legislation in certain respects. What is potentially more important in the long term is the courts' willingness to depart from strict reliance on the need for a hypothetical comparator who in terms of their personal situation, closely resembles the applicant in discrimination cases. This could have an impact on other types of discrimination cases (such as those brought by homosexual men or lesbians) which at the moment are frustrated by this inappropriate approach.

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obligations. It is unlikely that the resignation of the Commission will be enough to ensure that the new Commission is entirely disassociated from the 'sins' of the old Commission since the report's criticisms relate in part to problems of resources and accountability which affect the Commission as a whole. In these circumstances, calls to reform the institutions will become harder to resist. The Commission has acknowledged the challenge it now faces. A Commission spokesman recently stated: 'There is a new ball game amongst institutions. We are fighting for competences with the Parliament and the Council of Ministers and if we do not get involved we will lose the battle for power.'⁹

The European Parliament has already demonstrated its determination to exploit the limits of the legal powers available under the EC treaty to achieve effective political goals. It is continuing to assert its right to superior powers. The debate surrounding the notion of censure has highlighted the need for greater accountability of the activities of individual Commissioners. The European Parliament wants to improve its ability to supervise the Commission by acquiring the power to dismiss individual Commissioners. It also seeks to strengthen its legislative powers. Support is already forthcoming from candidate-designate Romano Prodi who favours an increased use of the co-decision procedure which gives the European Parliament equal powers with the Council in the adoption of legislation.

It may well be the case that the next report from the Independent Committee of Experts, due in September, will uncover further evidence of mismanagement within the Commission. If so, the pressure for much needed institutional reform will become hard to resist and it is likely that the European Parliament will stand to gain from the next treaty review. The extent of the European Parliament's gains will depend in part upon its ability to exploit the current constitutional and legitimacy crisis within the Commission.

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⁹ *European Voice*, 4-10 March.

Employment Law

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chastisement of children is prohibited in the jurisdiction of some member States of the Council of Europe.) The crucial aspect of this case was the severity of the treatment/punishment administered to the child — the bruises and marks remained visible after several days and the paediatrician inferred that the blows with the garden cane had been administered with “considerable force” (judgment, para. 9). The United Kingdom breached its obligations under the Convention because this severity was found justifiable by the jury on grounds of reasonable chastisement.

The importance of this case lies in the advancement of the scope of application of the Convention. The onus on a State has been extended by this case. Rather than a State’s liability being restricted to the actions of its “servants” (soldiers, teachers, prison officers, police, etc.), the judgment of the Court in this case could be viewed as extending a State’s obligation to the providing of a legal mechanism for securing the rights and obligations articulated in the Convention to all its citizens, even in circumstances where the violation of the right is precipitated by the acts of a natural or legal person. “Beating a brat” is clearly a serious violation of the rights of the child. Accordingly, the State (usually under national law) should strive to protect the child from such physical abuse. Carefully chastising a child, however, assuming no excessive force is used, does not occasion a violation of the Convention.

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Smith v. Gardner Merchant (1998) I.R.L.R. 510

One of the possible consequences of being a homosexual within employment is that at some juncture within your working life, you will be subjected to harassment of a sexual or bullying nature by your superior or work colleagues. Stonewall, the organisation lobbying for equal rights for lesbians and gay men, in their survey in 1993 (with 1,873 respondents), found one in two homosexuals had been harassed at work. This fate could also face a woman (*Porcelli v. Strathclyde District Council* (1986) I.C.R. 564, Court of Session), a member of a racial or an ethnic minority (*Jones v. Tower Boot Co.* (1997) I.R.L.R. 168, C.A.), a physically or mentally challenged person or a transsexual (*P. v. S.* (1996) I.R.L.R. 347, E.C.J.). Unlike these categories of victim, who have a legally recognised protection against harassment (under statute, e.g. s. 4(2)(d) of the Disability Discrimination Act 1995 or judicially), homosexuals are denied the right of protection from such behaviour under United Kingdom equality law and European Community legislation, as is illustrated in the case of *Smith v. Gardner Merchant*, (1998) I.R.L.R. 510.

In this case Mr Smith was employed as a barman and was dismissed by his employer because he had been accused of treating a female colleague in a threatening and aggressive manner. He claimed he was sexually harassed by her, because of his sexual orientation, and this represented discrimination under section 1(1)(a) of the Sex Discrimination Act 1975 as she would not have sexually harassed a gay woman. The Court of Appeal rejected his claim on the basis that: "discrimination on grounds of sexual orientation is not discrimination on ground of sex within the meaning of the Sex Discrimination Act 1975. A person's sexual orientation is not an aspect of his or her sex".

The problem for the homosexual applicant partly lies in the terminology adopted in the Sex Discrimination Act 1975 and the Equal Treatment Directive (E.E.C. 76/207). While the legislation is intended to protect against discrimination on the grounds of someone's sex it cannot be interpreted as including within its remit discrimination on grounds of sexual orientation (see *Grant v. South West Trains Ltd* (1998) I.R.L.R. 206, E.C.J.). The question of equality (or inequality) of treatment applies here, in that the legislation (the Sex Discrimination Act 1975) requires comparison with someone else within employment not of the same sex, who has received preferential treatment. In a case of homosexual harassment, if a homosexual is harassed or bullied by his co-workers when they find out about his sexual orientation (as in *Smith*) he cannot claim unequal treatment because a lesbian is just as likely to face a similar fate. Any type of discrimination claim brought by a homosexual is likely to suffer defeat on the same grounds (see *Perkins* below or *Mascia v. Dowell Schlumberger*, S/1560/89). Such rigid adherence to the concept of equality of treatment has produced some intriguing, albeit unfair, results in other cases (see *Stewart v. Cleveland Guest (Engineering)* (1994) I.R.L.R. 440, E.A.T.).

In *P. v. S.* (1996) I.R.L.R. 347, E.C.J., where transsexuals were deemed to be protected from discrimination by European Community Law (on the basis that discriminatory acts undertaken on the ground of gender re-assignment were contrary to the Equal Treatment Directive), most commentators reasonably assumed a similar interpretation would be extended to homosexual discrimination. It has become apparent in cases such as *Grant* and *Smith* mentioned earlier, and in *R. v. Secretary of State for Defence, ex parte Perkins (No. 2)* (1998) IRLR 508 (where the Royal Navy dismissed the applicant from his post as medical assistant when they found out he was a homosexual), that the judiciary are unwilling or unable to broaden the interpretation of the underlying concepts in equality legislation to encompass homosexuals. This is despite the fact that the E.C. Code of Practice on Sexual Harassment specifically identifies lesbian and homosexual employees as particularly vulnerable to harassment and is intended to extend rights to this category of employee.

In *Johnson v. Gateway Supermarkets Ltd*, COIT 4079/90 a woman who was indecently touched by a female colleague was able to establish sex discrimination

on the basis that a male colleague would not have been similarly treated. Similarly in *Gates v. Security Express Guards*, COIT 45152/92 an employee who was subjected to homosexual harassment by his supervisor was able to establish sex discrimination on the basis that the behaviour was contrary to the European Commission's code of practice and recommendation on harassment at work. (European Commission Recommendation No. 92/131/EEC on the protection of the dignity of women and men at work.) Where the harasser is a homosexual or lesbian, as in these cases, the victim may have a right of action under the Sex Discrimination Act 1975. In cases where the harasser is heterosexual, and the homosexual harassment is of a bullying nature, strict application of principles of equality, may result in victims being denied any legal remedy under discrimination laws. They could argue here that they are just as likely to give a hard time to lesbian employees.

A possible avenue of legal redress under statute for victims of homosexual harassment, is pursuance of a case under section 8 of the Protection from Harassment Act 1997 in Scotland (or under ss. 1 and 3 in England). This provides a delict of harassment which is breached where a person pursues a course of conduct which amounts to harassment of another and "is intended to amount to harassment of that person", or "occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person" (s. 8(1)(a) and (b)).

While this case would need to be pursued in a court of law, the concepts of equality of treatment or sexual orientation would not be central features of the claim, which would clearly be of benefit in this context. Also there is a possibility of obtaining an interim interdict to stop the harassment, which is clearly in the interests of the victim. (Under English law "The new criminal offence of intentional harassment under s. 4(a) of the Public Order Act 1986 is wide enough to cover harassment on the grounds of sexual orientation", *Industrial Relations Law Bulletin*, Vol. 559, December 1996 at p. 7.)

The simple solution would be to introduce specific legislation to protect homosexuals and lesbians against all forms of discrimination in employment, including harassment, and this would obviate the need in the future for the refinement of complicated judicial arguments which can overcome the obstacles presented by ill-defined and overly prescriptive equality laws. David Pannick writing 13 years ago stated:

"An anti-discrimination law prohibiting discrimination against persons on the ground of their sexual preferences in certain contexts and with defined exceptions, coupled with a repeal of the barriers to homosexual equality contained in existing legislation and common law, would be an important statement of the values of tolerance of a civilised society." (D. Pannick, *Sex Discrimination Law* (1985) at p. 207.)

Nothing much has changed in the arena of protection against discrimination in employment against homosexuals and the prospect for homosexual victims

of harassment succeeding in a case under existing discrimination law is very poor. Although other legislation may offer some prospect of success, this course of action is full of uncertainty and common law actions are ill-suited to provide accessible and effective remedies.

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Limited Liability Partnerships — Draft Bill and Consultation Paper

Background

Seen largely as a response to calls for action from the accountancy profession for the introduction of some form of limitation of liability for partners in professional firms, the Department of Trade and Industry (DTI) issued a consultation paper in 1997 outlining proposals for a new form of business organisation to be known as a Limited Liability Partnership (LLP) (DTI, *Limited Liability Partnership – a new form of business association for professions* (Consultation Paper, URN 97/597, February 1997), (hereafter “1997 consultation paper”).) Following completion of the original consultation process the DTI has issued a further consultation document (DTI, *Limited Liability Partnerships* (Consultation Paper, URN 98/874, September 1998), hereafter “1998 consultation paper”) which outlines the responses to the 1997 consultation document, contains a draft Bill and associated draft regulations and calls for comments thereon no later than November 16, 1998.

Key Principles

The 1998 consultation document introduces the proposed LLP as combining features of the structure both of companies and of partnerships (1998 consultation paper, p. 7). What is intended is that the internal affairs and organisation of the LLP will retain the flexibility associated with a conventional partnership while its external affairs and duties will be defined and regulated by reference to those prevailing in respect of an existing registered company with limited liability. Based upon this general statement of intent the draft bill is stated to be based upon three general principles drawn from existing company and partnership law: limited liability; corporate personality; and partnership flexibility (1998 consultation paper, p. 7).

Limited Liability

Clause 1(3) of the draft bill provides no initial surprises for Scots lawyers by defining a limited liability partnership as: “a body corporate (having separate legal personality) with unlimited capacity”. The first radical departure from existing principles is also to be found in Clause 1(3) which stated that an LLP shall have: “such liability on the part of its members to contribute to its assets

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Employers' liability for the actions and safety of non-employees

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Abstract

In the past, the nature of the legal health and safety regime meant that employers needed to concern themselves only with taking reasonable care for the safety of their employees. Over recent years, the judiciary has interpreted statutes and applied common law rules to make employers liable for the actions of non-employees and responsible for protecting the health and safety of persons not employed by them, but working in premises they control or carrying out work on their behalf as independent contractors. This paper represents an analysis of legal developments in this area and a serious attempt to identify the nature and extent of an employer's liability for non-employees.

Key words

Controllers of premises, criminal and civil liability, extension of primary duty of care, liability for contractors, statutory duties, vicarious liability.

Introduction

One of the most interesting and problematic aspects of employment law concerns the liability of employers for the actions of their employees, agents and other parties outside the employment relationship. This area of law is mainly defined by the rules relating to vicarious liability derived from common law and statutes, although direct duties are also imposed on employers (eg in their role as a controller of premises under section 3 of the Health and Safety at Work etc Act 1974

(HSW Act) and in the duty set out in section 1(2) of the Occupiers' Liability Act 1957 (OLA57)).

"The result of vicarious liability is to make one person compensate another for the loss not due to his fault at all, although it may be due to the fault of his servant, agent or independent contractor" (Atiyah 1967). This paper concentrates on examining the rules governing the liability of employers for independent contractors and non-employees in the context of health and safety. It is not necessary here to consider in any depth the vicarious liability of an employer for the actions of an agent or employee. This area of law is given detailed consideration elsewhere (see Hendy & Ford 1995) but derives from application of the doctrine of *respondere superior*, which is summarised as: "The principal is held liable for the acts of his agent committed within the scope of his employment and in the course of business; the principal cannot escape liability even by proving that the tort was committed against his express command. It is liability frequently without fault and quite outside of the ordinary principles of causation" (Sayre 1930).

For the purpose of establishing the extent of the legal obligations of the parties involved, the courts will often be faced with the problem of distinguishing between a contract of service and a contract for services. While it might be interesting to consider the development of the legal tests which the courts have developed to determine this issue, it is outside the scope of this paper (see Brodie 1997). Nevertheless, with the development of rules which increase the legal responsibility of employers for the wrongful actions of independent contrac-

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tors and other non-employees that affect the health and safety of those persons in or around their premises, employers and their advisers need to be aware of the circumstances in which legal liability will arise.

The common law rules determining when an employer will be vicariously liable for the acts or omissions of independent contractors are relatively well defined (Atiyah 1967, Hendy & Ford 1995, Craig & Miller 1995). As a result of the judicial interpretation of statutes, employers now have a clear duty to consider the safety of non-employees, as illustrated in the case of *R -v- Swan Hunter Shipbuilders Ltd and Telemeter Installations Ltd* (1981), and control the actions of non-employees where they might pose a threat to the safety of their own employees or third parties present on their premises. In *R -v- Associated Octel Co. Ltd* (1997) it was decided an employer can be criminally liable (under section 3 of the HSW Act) for the action of independent contractors where these acts are carried out on the employer's premises and under his control. Similar reasoning was adopted by the judiciary in the case of *Burton -v- De Vere Hotels* (1996) where employers were held vicariously liable in a racial discrimination case for racial insults and jokes directed by a third party at their employees. Consequently, employers' liability for the wrongful acts of non-employees has increased, as has legal responsibility for the safety and wellbeing of non-employees.

In the light of recent developments in these areas, it seems an opportune time to evaluate the extent to which an employer can be held legally liable for the wrongful behaviour of non-employees in the context of health and safety, and, on the other side of the equation, liable for the protection of the health or welfare of non-employees working in or visiting his premises.

Vicarious liability for independent contractors: common law rules

"There is evidence to suggest that in certain spheres of industry ... employers are finding it convenient to 'sub-contract' work rather than do it by employing their own men [*sic*], simply because it enables them to get the advantages of employing labour without the corresponding obligations" (Atiyah 1967).

It is questionable whether this statement still holds true in respect of employers' obligations in health and safety law which arise from their dealings with independent contractors. The author will analyse various areas of law where employers' legal duties extend to non-employees.

Delegation of primary duty of care

Under the law of contract, liability often now remains with the employer where a primary duty is carried out on behalf of an employer by an independent contractor. In *Davie -v- New Merton Board Mills* (1959), the House of Lords held that an employer had discharged his duty of care towards his employee to provide safe plant and equipment by buying a chisel (negligently manufactured) from a reputable supplier, who in turn had bought it from a reputable manufacturer. The Employer's Liability (Defective Equipment) Act 1969 provided the opportunity for an injured employee in such circumstances to sue either his employer or the manufacturer of the defective equipment.

Where employers are under an obligation to fulfil a primary legal duty towards their employees (ie to take reasonable care for their safety) under the law of contract or tort, but in place of fulfilling it themselves they delegate this duty to another, then the employer will continue to be liable under the contract where the duty is breached by that other person. This was decided in respect of contractual duties in *Wilson and Clyde Coal Company*

Ltd -v- English (1938). In this case, mine-owners in Fife tried unsuccessfully to disclaim liability for the harm suffered by one of their employees as a consequence of failure to fulfil their contractual duty to provide a safe system of work, on the basis that this duty had been delegated to a colliery agent, appointment of whom was compulsory under the Coal Mines Act 1911. This is known as a non-delegable duty (McKendrick 1990). The doctrine first emerged in the case of *Pickard -v- Smith* (1861). Justice Williams differentiated between the situation where independent contractors are employed to do a specific task and are negligent in its performance, and that where they are employed to undertake a task in fulfilment of an employer's primary duty and do so negligently: "Unquestionably no-one can be made liable for an act or breach of duty unless it be traceable to himself or his servant in the course of their employment. This rule is, however, inapplicable to cases in which the contractor...is entrusted with the performance of a duty incumbent on his employer and neglects its fulfilment, whereby an injury is occasioned. ... The performance of this duty he omitted and the fact of his having entrusted it to a person who also neglected it, furnishes no excuse, either in good sense or law."

In the case of *McDermid -v- Nash Dredging and Reclamation Co. Ltd* (1987) a young boy was sent to work as a deckhand for the defendants and was injured as a result of the negligence of a ship's captain who was not employed by the defendants. They were still held liable on the basis that their duty towards their employee – to provide a safe system of work – was non-delegable (after *Wilson & Clyde Coal Company Ltd -v- English* (1938)).

In *Cook -v- Square D. Ltd* (1992) an employee was sent to Saudi Arabia to work in the premises of another employer where he suffered injury as a result of a hazard on the premises. The circumstances were similar to those in the McDermid case. However,

the court was prepared to depart from that decision in view of the extreme distance between the employee and his employer. "The Court of Appeal accepted that the duty owed by the UK employers could not be delegated but held that that duty, which was only to do what was reasonable in the circumstances, has not been breached merely by the presence of a hazard on a site abroad occupied by supposedly competent international contractors" (Buckley 1993). The decision in the Cook case was that the principle laid down in the McDermid case can be limited by the court's interpretation of what could be expected reasonably of an employer in a particular case. Further, there is some authority for the assertion that the duty of an employer to ensure that fellow workers are safe and competent extends to independent contractors. "The employer's general duty requires reasonable care to be taken to ensure that employees are not exposed to risks by the appointment of fellow employees and there would appear to be no reason in principle that this would not extend to the selection of others, for example independent contractors with whom an employee may be required to work" (Stair 1996).

Under the law of tort the primary duty of care owed to employees will be discharged only in the rare circumstances where it is treated as capable of being delegated to an independent contractor. Lord Tucker in *Davie -v- New Merton Board Mills* (1959) stated: "The employer may delegate the performance of his obligations in this sphere to someone who is more properly described as a contractor than a servant, but this does not affect the liability of the employer; he will be just as much liable for his negligence as for that of his servant."

Negligence

"The duties owed by an employer have traditionally not extended to independent contrac-

tors. ... But under the general law of negligence, duties, perhaps similar to those owed to employees, may be owed by an undertaking to persons not in its employment" (Hendy & Ford 1995). It is well established that in the event where the employer specifically instructs an independent contractor to undertake a tortious act, legal liability will remain with the employer in respect of any parties harmed by that act. The employer will also be liable where he has carelessly chosen to avail himself of the services of an incompetent independent contractor. This arose as an issue in *Salsbury -v- Woodland* (1969), but the Court of Appeal refused to accept that the defendant had enlisted the services of an incompetent contractor. It had been accepted in a much earlier case, *Pinn -v- Rew* (1916).

The employer may also be liable where he exercises control over the actions of the independent contractors (or sub-contractors). This will apply particularly where the employer and the contractors are working alongside each other on the same premises or on the same piece of land (as often happens in the construction industry and offshore working in the oil industry). In the case of *Marshall -v- William Sharp & Sons* (1991) the defendant hired the services of a worker at an hourly rate and had complete control over the actions of the worker. The worker was negligent in carrying out his duties and as a result injured an employee of the defendant. The employee sued the defendant arguing that he was vicariously liable for the actions of the independent contractor. While the judges in the Court of Session did not accept that the defendant had employed an incompetent contractor, they still found the defendant liable on the basis of the degree of control exercised over the contractor's actions. Thomson (1994) summarised the effect of this decision: "Unless the hirer has the full plethora of control over an independent contractor, he will not be vicariously

liable for the delicts of an independent contractor in carrying out a job."

In many instances the services of independent contractors or sub-contractors will be engaged because of their specialist skill and, more often than not where this is the case, the amount of control exercised over their activities by the employer will be minimal.

The 'control' test was the traditional test used by the courts to determine whether a contract with an employer was a contract of employment or a contract for services (*locatio operis*). It is still one of the factors to be considered in determining this issue. More significantly, it is also used to determine whether an employer is vicariously liable for the actions of an independent contractor and, where an employee is loaned or hired out to a second employer, it will be used to determine which of the employers is vicariously liable for the seconded employee's actions.

The rules for deciding which employer is vicariously liable for the wrongful actions of seconded employees will be considered later. In the meantime, it is important to consider the liability of employers for the actions of independent contractors carrying out extra-hazardous tasks on their behalf. The leading English case is *Honeywill and Stein Ltd -v- Larkin Brothers* (1933) where a cinema owner hired the plaintiffs to carry out acoustic work and they in turn engaged the services of the defendants, a firm of photographers, to take photographs of the cinema's interior. The photographic process at the time involved inherent dangers, in that magnesium powder was held in a metal tray above the lens of the camera and ignited when the photo was taken. This process was executed too close to the curtains which, as a result, caught fire, causing serious damage to the premises. The plaintiff paid damages to the owner of the cinema and claimed the full amount from the defendants.

The Court of Appeal decided in favour of the plaintiffs, on the basis that they were vicariously liable for the actions of the defendants as they undertook a task which was extra hazardous. They were therefore entitled to an indemnity for the money which had been paid out to recompense the cinema owner for the cost of repairing the damage to their premises resulting from the defendant's negligence. Lord Justice Slesser summarised: "Hence it may be said in one sense that such operations are not necessarily attended with risk. But the rule of liability for independent contractors attaches to those operations because they are inherently dangerous, and hence are done at the principal employer's peril." This decision has been the subject of some criticism (Hepple & Matthews 1980). There is something to be said for the view that this case was rightly decided for the wrong reasons, although it is perhaps unlikely that any court short of the House of Lords could undertake the drastic reinterpretation necessary to straighten out this branch of law (Atiyah 1967).

The employer will never be liable for casual or collateral negligence on the part of an independent contractor or the latter's employee. "Collateral negligence is negligent conduct incidental to, but not inherent in, the performance of the contractor's operation, disassociated from the normal risks of the operation, as distinct from negligence in that performance, or in the manner of the performance" (Walker 1981). It will often be difficult for the courts to determine whether a negligent act was within the nature of an independent contractor's work or a collateral matter falling outside the task he was employed to do (*Penny -v- Wimbledon UDC and Iles* (1899), *Padbury -v- Holliday and Greenwood Ltd* (1912)). There is some doubt whether this distinction should continue to be applied in these cases (Buckley 1993).

Vicarious liability for actions of seconded employees and others

Where the services of an employee are lent or hired out by his employer to a secondary employer, the issue of which of the employers will be vicariously liable for the employee's negligent acts may arise. "Where the servant is supplied to the temporary employer under some contractual arrangement – as is almost invariably the case – the question whether one is liable to the other for the tort of the servant should, it is submitted, be treated as depending on the express or implied terms of the contract and not according to the principles which determine which of them would be liable to a third party for the servant's torts" (Atiyah 1967).

One of the ways that the primary employer can try to ensure he does not lose out financially where he is held to be liable for the unlawful actions of a seconded employee is to place an indemnity clause in the contract between himself and the temporary employer, providing that he will be reimbursed by the other in the event he has to meet a claim for damages in this respect (*Arthur White -v- Tarmac Civil Engineering* (1967)). However, the courts will be reluctant to accept that liability has transferred from the main or primary employer, and contractual arrangements between employers which are designed to transfer liability may not bind them (*Smith -v- Blandforth Gee Cementation Co. Ltd* (1970)).

In the event that there is no formal agreement between the employers, the courts will determine this issue by reference to common law rules, particularly the 'control' test referred to earlier. The leading case is *Mersey Docks Harbour Board -v- Coggins and Griffith (Liverpool) Ltd* (1947) in which the House of Lords decided that there is a presumption against responsibility transferring away from the primary employer, which can only be rebutted by clear evidence that the sec-

ondary employer has a high degree of control over the seconded employee's work. Lord Uthwatt said: "The workman may remain the employee of his general employer, but, at the same time, the result of the arrangements may be that there is vested in the hirer a power of control over the workman's activities sufficient to attach to the hirer responsibility for the workman's acts and defaults and to exempt the general employer from that responsibility."

There are factors which may assist the courts in determining this issue (Hendy & Ford 1995), in particular the level of skill the employee has (highly skilled employees will be less likely to be subject to a secondary employer's control) and whether the employee is transferred with equipment. In the Mersey Docks case, for instance, a crane driver was transferred along with a crane (see also *Savory -v- Holland Hannen and Cubitts (Southern) Ltd* (1964)).

A similar approach is adopted in determining whether the employer can be held vicariously liable for the unlawful actions of persons present on his premises who are not employees of his or independent contractors (eg visitors, students or clients). The ultimate determinant of whether or not the employer is vicariously liable to compensate third parties (which might include his employees) who have been injured as a result of non-employees' actions is: 'was the employer in a position to control these actions?'. Interestingly, this was the test which was applied by the Court of Appeal in the racial harassment case *Burton -v- De Vere Hotels* (1996).

Employers may be obliged to take reasonable care for the safety of non-employees when they are in their premises or in the vicinity of their premises, provided such persons fall within the ambit of the employer's duty of care (under the 'neighbour principle', the parameters of which were set out

by Lord Atkin in *Donoghue -v- Stevenson* (1932)).

Occupiers of premises in Great Britain have a similar statutory duty under the OLA57 or the Occupiers' Liability (Scotland) Act 1960 to take care for the safety of persons who are invited by them to enter or use the premises.

Often an independent contractor (usually known as the main contractor) working on behalf of the employer will need to engage the services of a sub-contractor to assist him in fulfilling his task for the employer, normally by providing some sort of specialist service. The question which may arise is: 'can the employer ever be liable for the wrongful acts of the sub-contractors?'. Such a relationship exists in the Scottish case, *Junior Books -v- Vietchi* (1982), although the legal issue was whether an employer could sue a sub-contractor (not a party to a contractual relationship with him) under delict for pure economic loss. While the Scottish courts ruled in favour of the employer, upholding his claim, the English courts have been reluctant to follow this decision. In *D and F Estates -v- Church Commissioners for England* (1989), a claim for economic loss against main contractors and sub-contractors was unsuccessful as there was no contractual arrangement between them and the plaintiffs.

Where the employer knows that sub-contractors will be engaged by the main contractor, such knowledge may involve him in incurring liability for their unlawful acts, on the basis that he has been a willing participant in the delegation of the task to the sub-contractors. Employers will certainly be liable where they themselves nominate the engagement of sub-contractors. The lack of a contractual nexus between the employer and sub-contractor will not necessarily defeat claims for personal injury (*Donoghue -v- Stevenson* (1932)), but it will ensure that

an action cannot be brought against the employer for recovery of economic loss caused by a sub-contractor.

There are certain defences that can be established in order to escape or reduce the extent of an employer's liability under the law of tort, although they are of limited application. It could be shown that the harm suffered by the plaintiff was a consequence of his own actions which were the sole cause. It could also be established that the plaintiff voluntarily assumed the risk attached to the job he was doing, thereby raising the defence of *volenti non fit injuria*. This defence also applies to statutory claims and will be considered more fully in the context of the OL Acts in England and Scotland.

Finally, the partial defence of contributory negligence may apply, with the result that the award of damages may be reduced if it can be shown that the plaintiff contributed in some way to the eventual harm he suffered. Section 1(1) of the Law Reform (Contributory Negligence) Act 1945 states: "Where any person suffers damage as a result partly of his own fault and partly of the fault of any other person ... the damages recoverable in respect thereof shall be reduced to such an extent as the courts think just and equitable having regard to the claimant's share in the responsibility for the damage."

Statutory liability of the employer for actions of independent contractors

Liability arising for an employer under statute in respect of non-employees mainly derives from primary duties imposed on him by health and safety statutes (OLA57, Occupiers' Liability Act 1984 (OLA84) and HSW Act). Liability may also arise where an employer is under a strict or absolute duty to fulfil a legal obligation towards his employees or other parties. He cannot escape liability where he delegates

such a task to an independent contractor. A good example is the duty to safeguard machinery under regulation 11 of the Provision and Use of Equipment Regulations 1992. Under common law rules, strict liability is rare. The ruling in *Rylands -v- Fletcher* (1868) is a form of strict liability and imposes a duty on the owner or occupier of land in respect of his neighbours, not to allow harm to come to them through bringing something onto their land which subsequently escapes and causes harm. Justice Blackburn summarised the position thus: "We think that the true rule of law is that the person [owner or occupier], for his own purposes brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, he is *prima facie* answerable for all the damage which is the natural consequence of its escape."

Strict liability in the context of statute law mainly arises in the area of health and safety, such as section 22(1) of the Factories Act 1961 which imposes an absolute duty on an employer to ensure "every hoist or lift shall be of good mechanical construction, sound material and adequate strength, and be properly maintained" or in the context of the protection of the public health or environment (eg Nuclear Installations Act 1965, Merchant Shipping (Oil Pollution) Act 1971 and the Environmental Protection Act 1990).

Employer's duty to protect the health and safety of non-employees

An employer has a primary duty to conduct the undertaking in such a way that ensures, so far as is reasonably practicable, non-employees (including members of the public) are not exposed to risks to their health and safety under section 3 of the HSW Act. An expansive interpretation of this duty by

the judiciary has created one of the most dynamic and contentious areas of health and safety law (Barrett 1997, Blaikie 1997).

A duty is also imposed on self-employed persons under section 3(2) to conduct their undertaking in such a way as to take care for their own safety and the safety of persons likely to be affected by their actions.

The significance of section 3 first became apparent in the case of *R -v- Swan Hunter Shipbuilders Ltd and Telemeter Installations Ltd* (1981). Swan Hunter had informed its own employees of the proper and safe use of oxygen. However, it failed to give the same instruction to employees of sub-contractors working alongside Swan Hunter's employees repairing the ship, HMS Glasgow. As a consequence, a sub-contractor's employee failed to switch off the oxygen supply at the end of the working day which led to a build up of oxygen in the atmosphere. Some time later another employee ignited a welding torch and there was a serious explosion. The Court of Appeal found that Swan Hunter had breached section 2(1) of the Act (which requires an employer to take care for the safety of all his employees) and specific duties under section 2(2). The basis for this part of the ruling was that by failing to inform sub-contractors' employees of the risks involved in using oxygen, the company had put its own employees at risk. The employer's failure to inform non-employees about the risks of the operation they were involved in also constituted a breach of section 3. Hence it was found that: "The duty of an employer under section 3(1) to conduct his undertaking in such a way as to ensure that persons not in his employment who may be affected are not put at risk, includes the giving of information and instruction to employees of other employers."

Attempts by employers to evade liability under the HSW Act by putting the blame on senior management under the auspices of

section 36(1) (which provides that "where the commission by any person of an offence under any of the relevant statutory provisions is due to the act or default of some other person, that other person shall be guilty of the offence, and a person may be charged with and convicted of the offence by virtue of this subsection whether or not proceedings are taken against the first-named person") were emphatically rejected in the case of *R -v- British Steel plc* (1995). The legislation proposed on corporate manslaughter will ensure that corporations can be held responsible for breaches of criminal statutes and individual directors held liable for breaches of the legislation. At present, under section 37 of the HSW Act, a director or manager can be jointly liable with the employer for a breach of the Act. While it would represent a defence for an employer to show that he had done all that was reasonably practicable to avoid a breach of the Act, employers will tend to try to establish that the responsibility for non-employees is not theirs and therefore the duties under the Act do not apply. The case of *R -v- Associated Octel Co. Ltd* (1997) illustrates the difficulties with this approach. It was decided by the House of Lords that there is no need for the employer to be in a position to control the activities of the independent contractor for him to be liable for the consequences of the contractor's actions. In this case, an employee of an independent contractor involved in carrying out repair work to a chlorine tank at Associated Octel's chemical works was badly burned when a fire started in the tank followed by an explosion. It was argued on behalf of the main contractor that an element of control over independent contractors' actions was necessary before main contractors could be held responsible for a breach of section 3 in this context.

This line of reasoning had been given judicial approval in *RMC Roadstone Products Ltd*

-v- Jester (1994), where the Queen's Bench Division decided that for employers to be liable for a breach of section 3(1) in respect of the actions of sub-contractors, such action must fall within the employer's "conduct of his undertaking" and this will apply only where the employer exercises some degree of control over the activities of the sub-contractor. This argument was rejected in *R -v- Associated Octel Co. Ltd* (1997): "Section 3 is not concerned with vicarious liability. It imposes a duty upon the employer himself which is defined by reference to a certain kind of activity, namely the conduct by the employer of his undertaking."

The duty under this section is direct. The consequence of this is that where activities are carried out on behalf of an employer by an independent contractor which could be said to be assisting the employer in 'conducting his undertaking', the employer will be liable for the contractor's breach of statutory provisions arising from such an activity, unless he can show he has done all that is reasonably practicable to avoid such a breach. This will certainly extend to the provision of information on safety hazards to sub-contractors and their employees and could include the provision of instruction, training and supervision.

It is questionable whether the issue of reasonable practicability arises as a serious one in these cases, given that the central issue occupying the courts in most of the prosecutions is the liability or otherwise of the employer for the safety of non-employees (Barrett 1997). "Section 3(1) of the Act created a duty of strict liability and the words 'so far as is reasonable practicable' are simply referable to measures necessary to avert the risk" (*R -v- British Steel plc* (1995)).

Criminal liability of the employer as controller or occupier of premises

Under section 4 of the HSW Act, persons in

control of premises have a duty to care for the safety of persons not in their employment who are using the premises as a place of work. They must, so far as is reasonably practicable, ensure that access to and exit from the premises are safe and that plant and substances provided for non-employees' use are safe. There can be more than one controller of premises, and anyone exercising control, however slight, will owe a duty to non-employees under section 4(2) of the Act. In *Mailer -v- Austin Rover Group* (1989) (*Austin Rover Group Ltd -v- HM Inspector of Factories* (1990)), the car manufacturer was held liable for a breach of section 4(2) when the employee of a sub-contractor carrying out cleaning work on its premises was killed. Lord Jauncey summarised the position thus: "Subject to the limited qualification embodied in the phrase 'so far as is reasonably practicable' it seems to me that the duty imposed on the defendant to ensure that the relevant premises are safe and without risk to health for any use they are made available is *prima facie* absolute."

The sub-contractor was prosecuted and convicted for breach of duty to take care for the safety of his own employees (by failing to provide a safe system of work). However, Austin Rover was also held liable under section 4(2) as controller of the premises, even though the degree of control exercised over the activities of the sub-contractor's employees was minimal.

Civil liability of the employer as occupier or controller of premises

Under civil law, employers who are controllers or occupiers of premises have a duty under the law of tort in relation to non-employees (where they are their legal neighbours) to take care for their safety. The legal neighbour test was set out by Lord Atkin in *Donoghue -v- Stevenson* (1932): "You must

not injure your neighbour, and the lawyer's question 'who is my neighbour?' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is 'my neighbour'? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected." The plaintiff will have to establish that the employer owes him a duty of care. The fulfilment of this evidential requirement is more difficult where there is no legal connection between the employer and the person harmed, for example visitors to or members of the public on their premises.

Where a duty of care exists, the next question is: 'to what extent was the harm suffered by the person in attendance at or near the premises reasonably foreseeable to the employer?'. If the resultant harm could have been foreseen and the employer failed to take any steps to alleviate the risk of harm, then liability for breach of duty of care will be established.

A similar duty of care arises under OLA57 and OLA84. The Occupiers' Liability (Scotland) Act 1960 applies north of the border and imposes a duty on the occupier (employer) to take reasonable care for the safety of third parties on his premises (trespassers may be included in this category). An occupier can be liable for the unlawful actions of independent contractors perpetrated on his premises.

These Acts serve to clarify the issue of the legal responsibilities of occupiers of premises towards the safety and wellbeing of visitors to their premises and other parties coming within their duty of care.

The term 'premises' is widely defined to include not only land and buildings, but also fixed or moveable structures such as vehicles, aircraft, ships, ladders and scaffolding. The

question of who is an occupier is decided by resort to the common law 'control' test, to the extent that an occupier is any person who exercises active control over the premises. The case of *Wheat -v- E. Lacon & Co Ltd* (1966) clarified the meanings of section 1(2) of OLA57 and section 1(2)(a) of OLA84 which left this issue to be determined by resort to common law rules. Given that the control of premises can be shared, this means that there may be a number of occupiers for the purposes of the legislation. Each will have liability under the Acts, although the extent of their liability will be commensurate with the degree of control exercised over the premises. Lord Denning's judgment in the House of Lords appeal in the Wheat case offered a detailed rationale for this approach.

The types of visitor which OLA57 is designed to protect are lessees and those persons invited onto the premises by the occupier for whatever purpose. However, section 1 of OLA84 extended the liability of occupiers to trespassers. Liability for the safety of trespassers and others arises only where the occupier knows of a risk or has reasonable grounds to believe it exists, and the person concerned is already in the vicinity of the danger or may come within its vicinity. The occupier will only be liable where the perceived danger is such that he ought to have offered protection against it.

Occupiers will be liable for the faulty work of independent contractors only in limited circumstances, similar to those applying under common law in relation to the vicarious liability of employers for the actions of independent contractors. These are set out in section 2(4) of OLA57, which states that liability will apply only where employers fail to act reasonably in appointing an independent contractor, or fail to ensure that the contractor was competent or that the work was carried out safely. Where

they know that faulty work had been carried out by the contractor, the occupier is under a duty to have the defect remedied. "In practice the general approach adopted by the courts to cases involving personal injury is unlikely now to differ substantially whether the claim is made by a 'visitor' under OLA57, someone 'other than a visitor' under OLA84, or someone relying on general *Donoghue -v- Stevenson* negligence at common law (although where activities are carried out on the occupier's land which are unrelated to condition or safety of the land itself or any buildings upon it, then any negligence action must be pursued under the common law). This does not, of course, imply that the precautions which an occupier will need to take to avoid liability will now be the same regardless of the nature of the potential plaintiff" (Buckley 1993).

The occupier may attempt to avoid liability by the use of warnings and this may be successful in certain cases. Under section 2(4) of OLA57, warnings are recognised as being capable of 'absolving the occupier of liability', where following the warning would enable the visitor to be reasonably safe. They may also attempt to exclude liability for their negligence, through the use of exclusion clauses in a contract (where there is a contractual relationship between the occupier and the visitor) or by a notice. Section 2 of the Unfair Contracts Act 1977 (section 16 in Scotland) prohibits the use of exclusion clauses where businesses or public bodies attempt to use them to escape liability for death or injury caused by their negligence.

The defence of *volenti non fit injuria* may apply here (section 2(4) of OLA57) where it can be shown that the visitor was aware of a risk (possibly through seeing a warning or notice or being told of it by the occupier or others) and willingly accepted it as his own.

The remedy for the person harmed as a result of the occupier's negligence (which represents a breach of the Acts) will be damages, which will be calculated in the same way as under the law of tort. The defence of contributory negligence may also apply here, in line with the provisions of the Law Reform (Contributory Negligence) Act 1945 (mentioned earlier) resulting in damages awards being reduced in line with the contributory fault of the victim.

Direct liability of the employer for negligence of manufacturers

In the case of *Davie -v- New Merton Board Mills Ltd* (1959) an employer had acquired equipment from a reputable manufacturer which, at the time of purchase, appeared sound, but turned out to have a latent defect which caused injury to an employee of the defendant. The employee sued his employer but was unsuccessful on the basis that the employer had discharged his duty by taking reasonable care when acquiring the equipment. This decision was superseded by the Employer's Liability (Defective Equipment) Act 1969 which provides that where the defect in the equipment causes injury to the employee and the defect arises from the fault of the manufacturer (or his employer), the employee can recover damages directly from his employer.

Conclusions

The legal liabilities held by employers in respect of non-employees represent an area of law that is too vast to be covered in just one paper. Consideration in this paper is restricted to health and safety law and, even then, only to general areas. Industry-specific legislation, in particular, the Construction (Design and Management) Regulations 1994, introduces yet further complications. There are, however, certain inescapable

truths that employers must accept and respond to.

1. Employers cannot afford to ignore their responsibilities in respect of health and safety arising from their dealings with independent contractors, but they must also consider the safety and wellbeing of independent contractors' employees, visitors to their premises, persons working in premises under their control or which they occupy, and even trespassers.
2. Civil law, while still wrestling with concepts such as the 'control' test, has developed sufficiently to be clear about the nature and extent of the liability of employers for these categories of persons. "Under the general law of negligence duties perhaps similar to those owed to employees may be owed by an undertaking to persons not in its employment. The cases have often been viewed as exceptions. Yet they increasingly illustrate the readiness of the law to award damages where one person has assumed responsibility to another – whether through contract or through the factual nature of the relationship" (Hendy & Ford 1995).
3. The parameters of the coverage of criminal law (primarily in the guise of the HSW Act, although there are also the various regulations implementing European Union directives introduced under the auspices of the Act) are still being defined by the judiciary. It is clear that employers are not in a position to delegate responsibility for a task to another and then withdraw, secure in the knowledge that they have no further liability. Similarly, they cannot allow access to their premises for certain purposes while ignoring the safety and wellbeing of the individuals present there.
4. Regulation 3 of the Management of Health and Safety at Work Regulations 1992 requires that employers, in carrying out a risk assessment, should consider risks to the health and safety of persons who are not employees, but are involved directly or indirectly in the conduct of the undertaking. Where risks are identified, the employer is expected to take measures to avoid them. Under regulation 10(3), they are also required to provide self-employed workers or employees from an outside undertaking with instruction and appropriate information concerning risks to their health and safety if they are working in the undertaking. "Section 3 of the 1974 Act provides that the employer's duty is to conduct his undertaking in such a way that persons who are not employees are not exposed to risks to health and safety. This duty extends not only to other workers but to the general public" (Hendy & Ford 1995).
5. The liability of an employer who fails to comply with civil and criminal rules in this area is too great to be ignored. Undoubtedly the maxim 'do unto others as you would have done to yourself' takes on a new meaning in this context.

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CIVIL REMEDIES FOR VICTIMS OF SEXUAL HARASSMENT: DELICTUAL ACTIONS

SAM MIDDLEMISS

In this article, Sam Middlemiss analyses the civil remedies open to victims of sexual harassment. He concludes that, while a statutory remedy is available only against the employer, a remedy in delict is available against the employer and the harasser, a consideration which might be important to any victim.

There are very few cases where victims of sexual harassment have pursued a delictual claim against their harasser. Relatively recently however, the English courts recognised an extension of the employer's personal duty of care, to include a duty to refrain from causing an employee to suffer stress and anxiety brought on by overwork.¹ They also recognised the existence of a tort of harassment.² While neither of these developments impact directly on the legal rules relating to sexual harassment, they could prove to be instrumental in expanding the legal protection for victims of sexual harassment under the law of tort. These decisions will undoubtedly be persuasive to Scottish courts and tribunals, however there is no guarantee that the Scottish courts will apply the legal principles to sexual harassment cases or further expand their development in this direction.

It seems an appropriate juncture to analyse the importance of these decisions, and in the process identify the types of delictual action which could be pursued against a harasser or their employer, in the absence of a specific delictual remedy in Scotland. Before undertaking this analysis it is important to consider the potential advantages of a delictual claim and its underlying nature.

There may be difficulties in proving that the harasser has breached his or her delictual duty of care owed to the victim (not to cause them harm), or that the employer is in breach of their personal duty of care toward their employee or vicariously liable for the harasser's breach. On the positive side it is not necessary for the victim to base a delictual action on inequality of treatment on the basis of gender, as is required in statutory claims.³

There are also serious financial considerations in deciding between

¹ Senior Lecturer in Law, Robert Gordon University.

² *Walker v. Northumberland County Council* (1995) I.C.R. 702.

³ *Khorasandjan v. Bush* [1993] Q.B. 727; [1993] 3 W.L.R. 476; [1993] 3 All E.R. 669.

⁴ There have been cases where strict application of this principle has created difficulties for applicants in establishing their eligibility to bring a statutory claim. See *Webb v. EMO Air Cargo Ltd* [1992] 2 All E.R. 43 [1992] I.C.R. 445, C.A.; *Dixon v. Rees* [1993] I.R.L.R. 468; *MT & Stewart v. Cleveland Guest (Engineering) Ltd* [1994] I.R.L.R. 440, E.A.T.

pursuing a delictual (or contractual) claim before a court⁴ or bringing a statutory claim (e.g. sex discrimination, constructive dismissal) before a tribunal. "Although more time-consuming and potentially costly from the standpoint of the complainant an action in the ordinary courts has the advantage that, unlike industrial tribunal proceedings, legal aid may be available in appropriate circumstances."⁵ In fact legal aid is available to applicants in tribunal cases to cover the legal costs involved in providing advice and assistance in connection with the case, but not for the costs arising from representation at the tribunal.⁶

As suggested it is potentially more expensive to pursue a delictual action in the courts, than to bring a statutory claim to an industrial tribunal. Legal representation, with its attached cost, is more of a prerequisite in the former type of claim. Also the unsuccessful party may be ordered by the courts to pay the other party's costs, which according to Craig & Miller⁷ seldom happens in tribunal proceedings: "It is rare for expenses to be awarded to the successful party after an industrial tribunal hearing."

With this reservation in mind, it is important to analyse the nature of a delictual action and the types of delictual liability which may arise from sexual or racial harassment.

Nature of a Delictual Action

"The law of delict deals with the injuries, harm, losses and other damages which persons cause unwittingly or not to others living in the same organised society, on whose lives their conduct in some way impinges."⁸

The type of conduct which this definition covers is extremely wide and varied, and this area of law can be utilised to protect against new forms of delictual harm through judicial intervention. Lack of judicial precedent in a particular area is not necessarily a bar to an action. In respect of sexual harassment an action may be brought against a harasser for an intentional delict such as assault or where the harm caused is unintentional for a breach of duty under the law of negligence. An action may also lie against the harasser's employer for breach of their personal duty of care under the law of delict. Alternatively, where this does not apply, the employer may be vicariously liable for the harasser's actions. Intentional delicts and vicarious liability will be

⁴ For potential contractual actions see S. Middlemiss, "Remedies for Victims of Sexual Harassment: the Contractual Dimension," 1997 S.L.T. (News).

⁵ M. Rubinstein, *Preventing and Remedying Sexual Harassment at Work* (1989), at p. 18.

⁶ In August 1996 the Government confirmed their decision to refrain from extending legal aid assistance to tribunal cases, despite an earlier intention to consider this, set out in a green paper. See *Industrial Relations Law Bulletin*, No. 523, June 1995 at p. 16 for full details of the proposals.

⁷ V. Craig, K. Miller, *Employment Law in Scotland* (1991), at p. 227.

⁸ Walker, D. M., *Delict* (2nd ed., 1981), at pp. 4-5.

considered at a later stage: however it is important to consider whether a victim of sexual harassment is owed a duty of care by their harasser or their employer.

Breach of Duty of Care

In a delictual action the pursuer has to establish that they are owed a duty of care by the person causing them harm. Where there is a contractual relationship between the pursuer and the defender, this can be relatively easy to prove. It is well settled that the mere fact A and B are parties to a contract does not prevent A being liable in delict provided the criteria for delictual liability are established.⁹ Unfortunately the parties involved in incidents of sexual or racial harassment are often not directly linked by a contract (e.g. where they are colleagues or where a relationship between supervisor and subordinate is involved). The lack of a contractual nexus is not fatal however, because a duty of care under the law of delict can exist independent of a contract. In cases where the pursuer is claiming damages against their employer for pure economic loss (e.g. loss of promotion opportunities), the existence of a contractual relationship can act as a barrier to a delictual claim.¹⁰ "Where . . . the delictual claim is for pure economic loss . . . if the parties have direct privity of contract there appears to be no room for delictual liability as there is no obligation—apart from the contract itself—to prevent economic loss arising as a result of a failure to take reasonable care to perform a contract."¹¹ The existence of a contractual relationship will establish the necessary proximity for a duty of care owed by the employer where the claim is based on psychiatric damage.¹² In the case of *Donoghue v. Stevenson*,¹³ the "neighbour principle" (as defined by Lord Atkin), established that a duty of care will exist where the parties involved are legal neighbours. This is where person's acts or omissions have injured another, and such harm is reasonably foreseeable. The person harmed must be so closely and directly affected by the act or omission that the negligent party ought to have considered them.¹⁴ The pursuer must prove they have suffered some harm or loss as a consequence of the wrongful act, and a causal connection exists between the breach of delictual duty and the actual harm suffered.

A person will only be liable where it is reasonably foreseeable that harm will

⁹ J. Thomson, "Delictual Liability Between Parties to a Contract", 1994 S.L.T. (News)

¹⁰ The leading case on economic loss in Scotland is *Junior Books v. Vietchi*, 1982 S.C. (H.L.)

¹¹ Above, n. 9 at p. 34.

¹² In *Frost v. Chief Constable of South Yorkshire Police*, *The Times*, November 6, 1996, the Court of Appeal stated that employees who are acting in the course of their employment and suffer nervous shock or psychiatric injury as primary and not secondary victims of a trauma or accident and are therefore not required to bring themselves within the ambit of duty of care on the view that: "in the context of the master and servant relationship a duty of care existed solely by reason of that relationship."

¹³ 1932 S.C. (H.L.) 31; 1932 S.L.T. 317.

¹⁴ *Bourhill v. Young*, 1942 S.C. (H.L.) 78; 1943 S.L.T. 66 illustrates this point well.

result from their wrongful act, although it is not necessary that the precise nature of the harm is foreseen.¹⁵ In sexual harassment claims the causal connection between the harm suffered and the harasser's actions will be easily established. "It seems likely, . . . that when a victim is threatened with some penalty unless the harasser is permitted some physical contact, then an assault will have taken place."¹⁶ The penalty in this context will invariably have some economic aspect, such as loss of employment. It also seems reasonable to conclude that a foreseeable outcome of physical or verbal harassment is physical or mental injury to the victim. Whether or not the employer is in breach of their duty of care will depend on the context in which the harassment takes place. If the harassment can be shown to be as a consequence of a failure to provide a safe system of work (e.g. resulting in psychiatric injury) or safe and competent fellow employees, the employer will undoubtedly be liable.

On this latter point: "at common law, liability for intentional assault might arise, . . . where the employer has been negligent in recruiting or supervising the wrongdoer."¹⁷ Where an employer knows about the activities of a harasser he would be expected to take positive steps to remove them from the workplace. "It seems to me that if in fact a fellow workman . . . by his habitual conduct is likely to prove a source of danger to his fellow employees, a duty lies fairly and squarely on employers to remove that source of danger."¹⁸ The pursuer must prove that on the balance of probabilities the harasser or his employer breached their duty of care. "The onus of proof is on the pursuer initially in all cases of delict; it is for him to prove fault, and not for the defender to rebut it . . . there is a general presumption against wrong whether deliberate or negligent. The burden may however shift from time to time during a proof or trial."¹⁹

The initial evidential burden may serve to disincline employees from pursuing their actions through the courts, although where the harasser is the victim's superior, a breach of duty of care will be easily established.²⁰

What follows is an analysis of the specific types of delictual liability which could apply to cases of sexual or racial harassment.

Delictual Liability

In *Walker v. Northumberland County Council*,²¹ the High Court decided that the employer's duty of care could be extended to protecting their employees

¹⁵ See *Miller v. SSEB*, 1958 S.C. (H.L.) 20; 1958 S.L.T. 229; *Hughes v. Lord Advocate*, 1963 S.C. (H.L.) 31; 1963 S.L.T. 150.

¹⁶ J. Dine, B. Watt, "Sexual Harassment: Moving Away From Discrimination", M.L.R. Vol. 58, No. 3, at p. 362.

¹⁷ J. Ross, "Tower Boot Co. Ltd v. Jones", 1996 J.R. 284.

¹⁸ *Hudson v. Ridge Manufacturing Co. Ltd* [1957] 2 Q.B. 348; [1957] 2 W.L.R. 948; [1957] 2 All E.R. 229.

¹⁹ Above, n. 8 at pp. 379-380.

²⁰ See *Bracebridge Engineering v. Darby* [1990] IRLR 3, E.A.T. where common law rules were applied to a sexual harassment claim under the Sex Discrimination Act 1975, ensuring that the employer was liable for the harasser's lascivious act, because the perpetrator of the behaviour was the victim's supervisor.

²¹ [1995] I.R.L.R. 36.

from risks to their mental health caused by the working environment. Although the law on the extent of the duty of an employer to provide a safe system of work and to take reasonable steps to protect him from risks which are reasonably foreseeable had developed almost exclusively in cases involving physical injury to the employee, there is no logical reason why risk of injury to an employee's mental health should be excluded from the scope of the employer's duty.²² Where the employer is aware that a colleague or supervisor is sexually harassing one or more of their employees, and the recipient of this behaviour suffers mental harm as a consequence, then on the basis of the *Walker* decision, it seems reasonable to conclude that the employer will be liable for failing to provide a safe system of work. "In accordance with the individual focus of negligence, an employer will owe a higher standard of care to an employee, known or who should reasonably be known, to be susceptible to a stress-based illness."²³ If such a duty of care can be established, the need to establish the vicarious liability of the employer will be circumvented.

In *Khorasandjan v. Bush*,²⁴ the English courts recognised the existence of a tort of harassment. A woman was the recipient of indecent phone calls, made to her at her mother's house. She sought an interlocutory injunction to restrain the phone calls. The County Court granted an injunction to restrain the telephone calls and acts of violence or pestering of the plaintiff and forbade communication with her. The defendant appealed on the basis that the judge did not have jurisdiction to issue the injunction as the plaintiff's complaint did not relate to a specific tort and injunctions can only be granted to protect specific legal rights. The Court of Appeal decided to extend the tort of private nuisance (which had been developed to protect private property rights and the use and enjoyment of land) to include harassment directed toward a person at a place where they have no proprietary interest but do have a right of occupation.²⁵ It is difficult to predict the full effect this decision will have in England and Scotland. The court has decided that injunctions can be granted to restrain harassment which causes or is likely to cause physical or psychiatric illness. They have also recognised that the tort of harassment is a species of private nuisance, although it is difficult to envisage how this tort could be generally applied to harassment in the workplace, without further judicial creativity.²⁶

The *Walker* and *Khorasandjan* decisions, while not directly impacting on sexual harassment law, indicate a willingness on the part of the courts to

²² Above n. 21 at p. 36.

²³ J. Hendy, M. Ford, *Munkman on Employer's Liability* (12th ed., 1995), at p. 129.

²⁴ Above n. 2.

²⁵ In arriving at their decision they relied upon the reasoning adopted by the judiciary in an American case *Motherwell v. Motherwell* (1976) 73 D.L.R. (3rd) 62, where a wife living in (but having no proprietary interest in) the marital home, had sufficient right of occupation to found an action for private nuisance.

²⁶ Possibly by including within the ambit of the tort behaviour which represents an infringement of privacy, nervous shock or a threat to their physical or mental well-being.

extend the law of tort to provide further protection to recipients of behaviour which adversely affects their physical or mental well-being. Continued development of such protection will inevitably have a direct impact on victims of sexual harassment.²⁷ While it is uncertain whether these decisions will prove to be influential on courts north of the border, there are various well-established delictual actions in Scotland which will be applicable to sexual harassment.

Intentional Delicts

Delictual actions for assault may be most appropriate here, given that it will be relevant to pursue such an action where behaviour involves physical forms of sexual harassment. Assault has been defined as: "An overt physical act intended to insult, affront or harm another, done without lawful justification or excuse."²⁸

This definition refers to acts which have a physical element, although it is not necessary that the pursuer is struck or caused any physical harm, provided the consequence is an affront to the pursuer. Using abusive or threatening language or behaviour (*e.g.* shaking a fist) would be an assault, as would an immodest gesture which would affront a woman, such as attempted or actual fondling or handling of a woman, or kissing her against her will.

The defender can bring forward the defence that the pursuer consented to the assault, and if this is proven it will negate any claim. Most defences available under the law of delict would not apply to assault cases, however in circumstances where it can be shown that the assault was provoked by the pursuer's verbal statement or physical act, this may serve to reduce the amount of damages awarded (representing contributory negligence). In order to substantiate these defences of consent or provocation it is possible that evidence relating to the pursuer's sexual attitude or background will be introduced as evidence. Victims of harassment should be cognisant of this fact.

Where there is an aggravation of the assault (*e.g.* where the injury inflicted is serious or the insult or affront is enormous), then the amount of damages awarded will be increased to take account of this. The most extreme aggravation of assault is rape. "In the case of assault the essence of the delict is the invasion of a person's bodily integrity. ... rape is actionable as assault because sexual intercourse was obtained without the woman's consent."²⁹

As in the case of assault, a complete defence to an action for rape, is that the pursuer consented to the behaviour.

²⁷ The Protection from Harassment Bill creates a criminal offence of harassment and provides a civil remedy for breach of the statute, entitling the victim to an injunction and damages.

²⁸ G. J. Bell, *Principles of the Law of Scotland* (10th ed., 1899), at p. 2028.

²⁹ J. M. Thomson, *Delictual Liability* (1994), at p. 15.

Nervous Shock

Where someone unintentionally or negligently causes psychiatric harm to another without physically harming them this may represent the delict of nervous shock, or as it has become known in recent times—psychiatric injury.³⁰ Where the injury is inflicted directly the recipient of the behaviour is known as the primary victim. "The primary victim, is a person to whom a duty of care is due because the defender ought to have reasonably foreseen that his or her conduct would lead to the risk of personal injury, regardless of whether that illness is psychiatric or physical."³¹

In pursuing such a claim the victim would be obliged to substantiate the existence of a psychiatric illness by medical opinion. The expectation of the court is that such physical consequences would continue well after the incidence that provoked it has passed.

In the context of sexual harassment psychiatric injury may be caused by the mere act of harassment provided it is sufficiently traumatic for the victim. Proving that someone has experienced a severe shock may not be necessary in the light of recent authority, which suggests that liability can extend to persons who cause psychiatric damage over a period of time.³²

Vicarious Liability

While a delictual action can be pursued against the harasser, it can also be brought against the employer where it can be established that they are vicariously liable for the harasser's actions. The wrongful act must have been perpetrated within the course of the harasser's employment. Where the harasser is the victim's supervisor then the vicarious liability of the employer can be easily established.³³ "The tribunal correctly concluded that the acts perpetrated by the harassers were acts committed in the course of their employment since they were engaged in the course of exercising a disciplinary and supervisory function."³⁴ Where the harasser is a co-worker of the victim, then it may be difficult to prove that their actions should give rise to vicarious liability for the employer, the reason being that the delict must be a mode or method, albeit wrongful, of the kind of work the employee is engaged to do.³⁵

It is questionable whether sexual or racial harassment would qualify as part

³⁰ Although *Bourhill v. Young*, above, n. 14, is a case where the pursuer was unable to satisfy the court that they were entitled to recover damages for nervous shock, it is a good illustration of how the courts deal with these cases.

³¹ M. J. M. Bogie, "A Shocking Future?: Liability for Negligently Inflicted Psychiatric Injury in Scotland", 1997 J.R. 39 at p. 41.

³² *Moffat v. Secretary of State for Scotland*, 1995 S.L.T. 729; *Clark v. Scottish Power*, 1994 S.L.T. 924.

³³ A good example is the case of *Brucebridge Engineering v. Darby* [1990] IRLR 3, E.A.T., where a supervisor physically assaulted a subordinate and the employer was held liable.

³⁴ *ibid.* at p. 5, per Lord Justice Wood.

³⁵ For a full explanation of the law in this area see Salmond and Heuston, *The Law of Torts* (9th ed., 1992), at p. 457.

of an employee's duties.³⁶ The vicarious liability of the employer may be justified on the basis that the employer has failed to create a culture which is perceived by their employees that sexual or racial harassment is unacceptable (e.g. by failing to inform or train staff, or introduce a procedure dealing with complaints) or to provide adequate supervision to ensure that harassment does not take place. These issues will now be relevant to a tribunal in determining whether employers are vicariously liable under statute.³⁷ It will not however be of relevance to the courts in deliberating over this issue in a delictual action, where their sole concern will be the "course of employment" issue. In determining if the vicarious liability of the employer applies in delictual actions it is not enough to show that the employer put the employee in a position to cause the harm.³⁸

Conclusion

The scope for victims of sexual or racial harassment to pursue delictual actions against harassers or their employers is increasing with the advent of more enlightened judicial decisions and statutory developments which impinge on the common law rules. The advantages and disadvantages for the victim of harassment at work pursuing delictual claims (as opposed to statutory claims) have been highlighted in this article.

One aspect of this which has not been mentioned relates to the question of remedy. It is doubtful whether the remedies provided by statute are sufficient to satisfy the needs of the victim or, for that matter, the European Union. "The opinion is widely shared among lawyers that the remedies for unlawful discrimination in employment ... are inadequate and that, for example, in comparison with the remedies provided for in the equivalent legislation in the USA (Title VII of the Civil Rights Act 1964), they indicate a lack of real commitment on the part of the legislature to the eradication of employment discrimination."⁴⁰ While this view was expressed prior to the removal of the upper limit for compensation⁴¹ it is still valid today. "An appropriate remedy does not mean compensation, but a cessation of the harassment. Sexual harassment is usually not just a single incident but is likely to be a particular aspect of the working environment. It is changing this so that the working conditions improve which is what those harassed often wish for, rather than

³⁶ In *Tower Boot v. Jones* [1995] IRLR 529, E.A.T. (which is a race discrimination case where common law rules were relied upon to determine this issue, the E.A.T. had no difficulty in excluding vicarious liability. This decision was overturned by the Court of Appeal in *Jones v. Tower Boot Co. Ltd.* [1997] I.R.L.R. 168. The court declared that it was the wrong approach to resort to common law rules in determining if the employer is vicariously liable under statute.

³⁷ Race Relations Act 1976, s. 32; Sex Discrimination Act 1975, s. 41.

³⁸ See *Heasmans v. Clarity Cleaning Co. Ltd* [1987] I.C.R. 949; *Irving v. Post Office* [1998] I.R.L.R. 289.

³⁹ *Van Colson and Kamann v. Land Nordrhein-Westfalen* [1990] I.R.L.R. 481.

⁴⁰ P. R. Ghandi, P. G. Schofield, "Damages for Employment Discrimination", 1990 N.L.J. Vol. 140, at p. 57.

⁴¹ Sex Discrimination and Equal Pay (Remedies) Regulations 1993 (S.I. 1993 No. 2798).

etary compensation."⁴² With these reservations in mind it is important to consider what improved prospects in terms of remedy a delictual action offers. Where the harassment is ongoing there is clearly more scope for obtaining a decree to stop the behaviour in a delictual action.⁴³

While there is a resistance on the part of judiciary to issue interdicts in an employment context it would be difficult to find a more worthy cause for relaxation of this rule. "The question for critics would seem to be ... whether and how far it would be appropriate within our legal system to introduce judicially ordered affirmative action."⁴⁴

The statutory regime in equal opportunities, with its emphasis on controlling the discriminatory activities of employers, is ill-suited to providing remedies directly against an employee acting in a discriminatory manner.⁴⁵

The harasser will often escape any liability, which will undoubtedly leave the victim feeling aggrieved, in circumstances where the consequences of the harassment for them are serious (mental harm, loss of employment, etc.).

While the industrial tribunal system has the undoubted advantage of informality, cheapness and easy access to justice, it has drawbacks in that it punishes the employer for a sin of omission—failing to prevent an act of harassment. It exposes the employer to publicity and opprobrium rather than the harassers.⁴⁶ Where the victim pursues a delictual remedy they could have the choice of suing the harasser or the employer, or both. This clearly has its advantages.⁴⁷

⁴² H. Houghton-James, *Sexual Harassment* (1995), at p. 75.

⁴³ As was done in the *Khorasandjan* case, above, n. 2.

⁴⁴ Above, n. 40 at p. 58.

⁴⁵ See *Waters v. Commissioner of Police of the Metropolis* [1995] I.R.L.R. 531, where a male police constable who was harassed by a male colleague out of working hours was denied opportunity of redress against the employer or the harasser for sex discrimination or victimisation under the Sex Discrimination Act 1975.

⁴⁶ Above, n. 16 at p. 363.

⁴⁷ While this article has concentrated on the delictual remedies available to victims of sexual and racial harassment, the same protection could be available to victims of bullying (see *Ballantyne v. Strathclyde Regional Council*, unreported, *Health and Safety Bulletin*, July 1996), and harassment on the ground of disability (the Disability Discrimination Act 1995 makes it unlawful to discriminate against disabled employees by harassment). It could be argued that in the case of disability there is a higher standard of care owed to the employee than in other cases—particularly where the disability involves mental impairment.

Juridical

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PART

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“EVERY BREATH YOU TAKE ... EVERY MOVE YOU MAKE”—SCOTS LAW, THE PROTECTION FROM HARASSMENT ACT 1997 AND THE PROBLEM OF STALKING

RICHARD MAYS, SAM MIDDLEMISS, JENNIFER WATSON*

In this article the authors discuss the belatedly recognised social phenomenon of stalking. They explain how the Scots common law crime of breach of the peace, which has developed for other socially and legally unacceptable conduct, has been employed to respond to this “new” threat. They posit that the recently enacted Protection from Harassment Act 1997, which criminalises harassment including stalking in England and Wales, but fails to do so in Scotland, represents a missed opportunity for Scots Law to enact a clearly defined offence to tackle a growing and increasingly alarming form of obsessive behaviour.

DONALDSON has acerbically commented that:

“Laws ... suffer from their incapacity to anticipate the novel or unusual circumstance. They tend to be written in response to events rather than anticipation of them. There is an inevitable time lag between the recognition of a problem and the law’s capacity to control it, so the law always runs after moral problems and, like a man chasing his coattails, can never quite catch them”¹

A reactionary and responsive should offer the law certain advantages. A period of reflection in respect of social problems should ensure laws are forged on the anvil of experience and resonant with widespread public opinion. Were it always so, one could sustain the law’s tardiness of response. In recent years there has been evidence to repudiate Donaldson’s thesis. In response to moral panic and genuine concern, there have been rapidly assimilated laws on such topics as dangerous dogs, joy-riding and gun control. The subject matter of this article can also be submitted to contest the thesis and more accurately, legislators’ inertia in responding to social

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¹ Donaldson, *Corporations and Morality* (1982) p. 165.

problems. However, it is trite to note that haste can result in bad law.² The contention in this article is that in the haste to respond to a burgeoning social problem, legislators, in promulgating the Protection from Harassment Act 1997, have not only failed to grasp an opportunity in Scotland to reconstruct a law specifically suited to the crime but, by continuing to rely on the ancient common law crime of breach of the peace, the wrong message is being conveyed to both victims and perpetrators of an identified and morally condemned course of conduct. Moreover, there must be concern that in practice the newly created delict of harassment and the attendant non-harassment order will not offer victims considerably more protection than existing civil law remedies already confer. This article considers the extent and nature of the problem of stalking, how Scots law currently addresses the problem, and finally, to offer a brief overview and assessment of the new legislative provisions (introduced in June 1997) as they pertain to Scotland.

Although clearly not entirely a modern phenomenon,³ it is only in recent years that stalking has achieved media notoriety.⁴ However, it is estimated, that for every case that attracts publicity,⁵ there are more than 100 that we hear nothing about.⁶ Many victims live in terror and are in constant fear of their stalker. They have limited means of protecting themselves. These victims have been frustrated by the perceived failure of the law to provide adequate legal protection against this unwanted and unsolicited attention.⁷ Many victims are so sceptical of current legal protection they question how far stalkers have to go before the law will intervene.⁸ It is they who have pressed for the changes now being introduced in both England and Wales and Scotland.

The Nature and Extent of the Problem

Stalking has been described by the Home Office in their Consultation Paper as, "a series of acts which are intended to, or in fact, cause harassment to

² Dyer, "How to stop stalkers", *The Guardian*, September 26, 1996; see the various contributions from M.P.s in the House of Commons Debate on the Bill, *Hansard H.C.* Vol. 287, cols. 795, 803 and 805.

³ *Davis v. Lane* 87 Eng. Rep 887 (Q.B. 1704), *R v. Dunn* 113 Eng. Rep. 939 (Q.B. 1840); National Victim Center, *Stalking Questions and Answers* (<http://www.nvc.org/ddir/info43.htm>).

⁴ Campbell, "New Law to give stalkers five years in Jail", *The Guardian*, October 19, 1996.

⁵ Stalking was originally seen to be the scourge of many Hollywood celebrities—John Lennon was stalked and killed by Mark Chapman, a devoted fan; John Hinckley shot Ronald Reagan in an attempt to impress actress Jodie Foster; Robert Hoskins hounded Madonna for five years and threatened to slit her throat if she did not marry him and Klaus Wagner had an ongoing obsession with the late Diana, Princess of Wales.

⁶ Alderson and Norton, "Inside the mind of the stalker", *The Times*, September 29, 1996.

⁷ Sohn, "Anti-stalking statutes: Do they actually protect victims?", 1994 30 *Criminal Law Review* 203 at p. 206.

⁸ See Guy, "The Nature and Constitutionality of Stalking Laws" 1993 46 *Vanderbilt Law Review* 991 at p. 996.

person".⁹ The essence of stalking has also been described as, "repeatedly harassing, threatening and/or intimidating a person by following them about, sending them letters or articles, telephoning them, waiting outside their place of abode and the like".¹⁰ Stalking involves a range of behaviour that is often continuous and increasingly severe. This may include repeatedly sending letters, making obscene phone calls, using threatening or abusive language and physical intimidation outside the victim's home or workplace.¹¹ Stalking often involves following, threatening, harassing or intimidating a victim.¹² The impact on victims ranges from inconvenience and annoyance, to alarm, distress and, in extreme cases, severe psychological and/or serious physical injury. The National Victim Center in America has said: "It suffices to say, virtually any unwanted conduct between a stalker and a victim which directly communicates a threat or places the victim in fear of harm, generally be referred to as stalking."¹³

A major problem surrounding the current debate is the distinct lack of reliable data concerning the frequency of incidents of stalking.¹⁴ It has been difficult to ascertain the magnitude of the problem while stalking itself was not recognised as a specific criminal offence under statute or common law. As a consequence, it does not appear in the criminal statistics¹⁵ which has perhaps contributed to the apparent failure of the police to respond appropriately and sympathetically to complaints in the past.¹⁶ Since the launch of their national campaign, NASH,¹⁷ has collected a wealth of information through its national telephone helpline. Between January 1994 and January 1996, a total of 8,097 victims of stalking contacted the crisis line for help, support, comfort and

⁹ Home Office and Lord Chancellor's Department Consultation Paper, *Stalking: the Solutions* (Home Office, 1996), <http://www.open.gov.uk/home-off/lh1426a.htm>, para 1.2.

¹⁰ As noted in Goode, "Stalking: Crime of the Nineties", (1995) 19 *Criminal Law Journal* 19. American literature perhaps provides the most comprehensive definition in that: "any person who willfully, maliciously, and repeatedly follows or harasses another person commits the offence of stalking ... or harasses another person and makes a credible threat with the intent to cause that person in reasonable fear of death or bodily injury, commits the offence of aggravated stalking" (Florida's anti-stalking law, Florida statute 784.048) as mentioned in the *Stalking and Harassment Overview* (Survivors of Stalking, <http://www.soshelp.org/Overview.htm>).

¹¹ Home Office (1996), *Stalking: the Solutions*, para 1.6.

¹² Guy, above n. 8 at p. 994.

¹³ See n. 3.

¹⁴ Lingg, "Stopping stalking: a critical examination of anti-stalking statutes" 1993 67 *Strathclyde Law Review* 347 at p. 349; Allen, *Look Who's Stalking: Seeking a Solution to the Problem of Stalking* (Web Journal of Legal Issues, 1996), <http://www.webjcli.ncl.ac.uk/issue4/allen4.html> p. 2.; Guy, above n. 8 at p. 945.

¹⁵ Allen, above n. 14 at p. 2.

¹⁶ 95 per cent of victims who had contacted NASH felt that the police did not take them seriously (Macleod, "Crime of the Nineties", *The Wire* (Strathclyde Police magazine), p. 22, 12 August 1996). Other victims criticised "the casual response of the police and the fact that they are sometimes powerless to intervene" (O'Kane, "The Hunted", *The Guardian*, April 1, 1996), as well as the temptation of forces to give complaints of this nature priority ("Stop the Stalker", *The Times*, March 5, 1996). 99 per cent of victims felt that police officers were "cynical, prejudgmental, insensitive and unknowledgeable about their role" (von Heussen, *Facts About Stalking* (NASH), p. 3). See also Perez, "When does harassment become a crime?" (1993) 20 *Amer. J. Crim. Law* 263.

¹⁷ National Anti-Stalking Harassment Support Association—a non profit making organisation founded in July 1993 by Evonne von Heussen.

advice.¹⁸ NASH also recorded that, over a two year period (1994-1995), 17 victims of stalking in the United Kingdom died as a consequence of attacks upon them. Families of victims have also been in touch for support.¹⁹ It is clear that the stalker's target is not the only one who suffers. The victim's partner or family may also be vulnerable if the stalker believes they are standing in the way of consummating his/her relationship with the victim. Although most stalkers live alone, where they have families, members of the family may also be affected by the stalker's actions.²⁰ Overall, there is evidence that the incidence of stalking behaviour is rising.²¹ The data collected by NASH provides an indication of the extent of the problem. However, the Association is keen to point out that the data does not present a complete picture of the problem as the work is still in progress. Despite this, it is the only source of data which the Home Office cited in its Consultation Paper.²² More recent research into the scale of the problem has been conducted by the Assistant Chief Constable of Hampshire. This research, conducted on behalf of the Association of Chief Police Officers (ACPO), found that, out of 44 forces asked about the types of behaviour that would constitute stalking, only four forces could not provide examples.²³

The problem is all the more prevalent in America where a survey estimated that there are as many as 200,000 stalkers.²⁴ A number of high profile celebrities have become victims.²⁵ The U.S. has responded rapidly to the problem with 48 out of the 52 states legislating against stalking.²⁶

A major priority is the need for information as to the psychological profile of the differing types of people who stalk.²⁷ Unless this data is established it is

¹⁸ von Heussen, *Facts About Stalking* (NASH), p. 2.

¹⁹ A recent example is the father of a victim who contacted NASH to inform them of the vicious murder of his daughter in 1995. Jessie Hurlstone was stalked for two years by a farm labourer who eventually battered her to death. Her killer was tried and convicted in November 1996.

²⁰ For example, Shameen Wagner (the wife of the late Princess Diana's stalker) says she has become another victim of her husband's obsession. Social workers have threatened to take her children into care if she remains with him; Alderson and Norton, "Inside the mind of the Stalker", *The Times*, September 29, 1996.

²¹ Guy above n. 8 at p. 995.

²² Home Office (1996), *Stalking: the Solutions*.

²³ Tendler, "Call for tighter law as victim tells of stalker's campaign", *The Times*, September 3, 1996.

²⁴ O'Kane, "Behind you", *The Guardian*, January 31, 1996. It is also estimated that 5 per cent of all American women are likely to become the target of a stalker during their lifetime (National Victim Center, *Stalking: Questions and Answers*, above n. 3); see also Walker, "Anti Stalking legislation: does it protect the victim without violating the rights of the accused? 1993 71 *Denver University Law Review* 273 at p. 275.

²⁵ Whittel, "Madonna hails court win for victims of stalkers", *The Times*, January 10, 1996. The Los Angeles Police Department estimate that of the 200 cases they handle each year, at least 30 per cent of calls are from celebrities seeking help and protection from obsessive fans; see also Attinello, "Anti-Stalking legislation: A comparison of traditional remedies available for victims of harassment versus California penal code 646-9", *Pacific Law Journal*, Vol. 24, pp. 1945-1980.

²⁶ Trevena, "Stalk talk", *The Guardian*, April 1, 1996.

²⁷ McAnaney, Curliss and Abeyta-Price, *From Imprudence to Crime: Anti-Stalking Laws* (1993), p. 819 state that those who stalk include "obsessed fans, divorced or separated spouses, ex-lovers, rejected suitors, neighbours, co-workers, classmates, gang members, former employees, disgruntled defendants, as well as complete strangers."

difficult to determine whether the new legislation will be effective. NASH has not conducted research into the psychology of stalkers, although it has investigated the relationship of stalkers to their chosen victims. Of the 8,097 victims who contacted their helpline, 85 per cent had experienced “post relationship stalking” (*i.e.* by ex-husbands or partners), and 10 per cent were known to the victim, but had never been romantically involved with them—“casual contact stalking”. This group may include neighbours, colleagues, doctors, teachers and postmen. Only around 5 per cent of the victims had been stalked by total strangers.²⁸

The investigation conducted by the ACPO involved the analysis of 151 incidents of stalking. Of these cases, 40 stalkers had casual relationships with their victims, 32 were unknown, 30 had some other form of relationship, 25 were “domestic” stalkers (ex-husbands or partners) and 24 knew their victim through work.²⁹

NASH have identified that stalking is not gender specific, though the most common situation is of men stalking women. Despite this, more women tend to stalk celebrities.³⁰ Those who stalk are from all walks of life, as are their victims. The stalkers and their victim are usually of different sexes.³¹ Stalkers have an average age of 35, most are unemployed and 60 per cent have received psychiatric treatment in the past. However, the vast majority are better educated than other mentally ill offenders, with at least average intelligence (25 per cent were above average).³²

While the victims may have a resilient character, it does not negate the fact that they suffer from the traumatic impact of stalking activity. The stress suffered by victims is such that 70 per cent have shown symptoms of post traumatic stress disorder and 25 per cent have contemplated suicide.³³

Though these facts from NASH and the ACPO are informative, there is clearly a need for further investigation into this area.³⁴ It has been suggested that a significant proportion of stalkers suffer from some form of mental illness.³⁵ The fact these people end up stalking perhaps reflects a lack of adequate treatment and of adequate care and support in the community. A number of stalkers have attempted to seek help, but have been turned away because their disorder and its treatment have only recently been recognised.

²⁸ von Heussen, *Facts About Stalking* (NASH), p. 3; Harrison, “Fear stalks provinces after rape of women ‘protected’ by Police”, *The Observer*, February 4, 1996.

²⁹ Tendler, “Call for tighter law as victim tells of stalker’s campaign”, *The Times*, September 3, 1996.

³⁰ Macleod, above n. 16.

³¹ Though a survey of 80 victims also noted that 13 women had been stalked by other women (Pool and Mihill, “Prison plan for stalkers challenged”, *The Guardian*, July 9, 1996).

³² Persuade, “In the shadow of the stalker”, *The Times*, February 2, 1996.

³³ Laurance, “Ban on stalking urged to help defend victims”, *The Times*, July 9, 1996.

³⁴ Suggested by Allen, above n. 14 at p. 2.

³⁵ It has been suggested that 60 per cent of stalkers have had previous psychiatric treatment (Persuade, above n. 32). A differing view suggests that whilst a small proportion are mentally ill (suffering from psychotic or paranoid illness which can be related to schizophrenia), most stalkers are not (Mullen and Pathe, “Stalking and the Pathologies of Love” (1994) 28 *Australian and New Zealand Journal of Psychiatry* 469).

Perhaps if they received the level of care and treatment they needed, they may not have ended up terrorising their unfortunate victims.³⁶

But what goes on in the mind of a stalker? Research has shown that the motives for stalking, real or imagined, are complex and vary dramatically from one case to another, making it difficult to arrive at a profile of stereotypical behaviour. Motivating factors may include: "intense infatuation or love fixation, jealousy, inability to accept a relationship ending, child custody dispute, revenge, racial/hate crime, disgruntled employee, or simply an extreme dislike of the victim."³⁷ One researcher has concluded that the motive is not always sexual.³⁸ McAnaney, Curliss and Abeyta-Price have identified four different categories of stalker:³⁹ erotomania;⁴⁰ borderline erotomania;⁴¹ former intimate stalker;⁴² sociopathic stalkers.⁴³

According to Lingg:

"Stalkers as a group, have been found to manifest a variety of psychological disorders including erotomania, schizophrenia and others. There is however no discernible pattern of stalking or of the stalking 'type'. Stalking also occurs in a wide variety of contexts, from situations in which the victim and stalker formerly had an intimate, personal relationship to cases in which the stalker was a complete stranger to the victim. The common thread is that the offenders, in most cases, use similar techniques to terrorise their prey. Consequently, stalking can be described as a type of anti-social behaviour, occurring in several

³⁶ Professor Paul Mullen (Professor of Forensic Psychiatry at Monash University, Melbourne, Australia), *I'm Your Number One Fan!* (Channel Four Documentary).

³⁷ Survivors of Stalking, *Stalking and Harassment Overview* (<http://www.soshelp.org/Overview.htm>).

³⁸ Pool and Mihill, above n. 31.

³⁹ McAnaney et al., "From Imprudence to Crime: Anti-Stalking Laws" (1993) 68 *Notre Dame Law Review* 819.

⁴⁰ The erotomaniac is generally delusional and believes that the object of his desire loves him even though the victim may not be aware of his existence. The most common victims here are celebrities. Male erotomaniacs are more likely to resort to violence when their feelings are not reciprocated. Erotomania has also been recognised in psychiatric literature as De Clerambault's syndrome has been classified as "delusions of passion" (Enoch and Trethowan, *Uncommon Psychiatric Syndromes* (2nd ed., 1991)).

⁴¹ Mullen and Pathe, above n. 36. This may be equated with "casual contact stalking" when an individual develops intense feelings for someone they know does not reciprocate his/her feelings. Stalking for these individuals is often a disordered solution to common personal problems such as loneliness or fear of intimacy. They are prone to narcissistic or abandonment rage when they are inevitably rejected. According to Allen (above n. 14 at p. 2), the LAPD estimate that 48 per cent of stalkers suffer from borderline erotomania.

⁴² The vast majority of these stalkers have previously been involved in abusive relationships. Between 1982 and 1987 in the U.K., 38 per cent-49 per cent of female murder victims, but only 5 per cent-7 per cent of male murder victims, were killed by their partner (Law Commission No. 207 (1992), *Family Law: Domestic Violence and Occupation of the Family Home*).

⁴³ These may include serial rapists or murderers. They do not stalk to initiate a relationship with a person, but as a means of selecting someone who fits their victim profile so they can initiate an attack. A slightly differing typology of stalkers has also been identified by Dr Richard Badcock who believes that stalkers fall into three main categories: "'erotomanics,' who suffer the persistent delusion that they are loved by their victim, 'love obsessional' who fantasise about relationships that do not exist, and 'simple obsession,' where after a relationship has finished the offender cannot take rejection" (The Suzy Lamplugh Trust, *The Stalking Obsession*).

contexts and perpetrated by individuals with a variety of behavioural types featuring some similarities, but not otherwise following a common pattern."⁴⁴

Attinello says:

Most stalkers are males, coming from all ethnicities and ages, and from a variety of social and family backgrounds. Many are intelligent with a history of inadequate heterosexual relationships. They are often motivated by fantasies of intimate relationships with their victims. However, for many stalkers, love means possession. Stalkers do not see the object of their obsession as a real person, but rather, see that person as a thing to be possessed."⁴⁵

Fahnestock meanwhile categorises three variants of stalking: celebrity stalking; work place stalking; and domestic stalking.⁴⁶ Whereas, The National Center offer a two category paradigm for stalking: the love obsession stalker and the simple obsession stalker.⁴⁷ The former represents roughly a third of all stalkers and are characterised by delusional belief. Invariably, they suffer from some form of mental abnormality. The latter predominant group include those who have had some former relationship, emotional or otherwise, with the victim.

Stalkers are often driven by obsession and a need to control their victims. An effective method of obtaining and maintaining control is for the stalker to cause pain or humiliation. Many stalkers thrive on knowing they can make a difference to their victim and witnessing the suffering of their victim provides the stalker with tangible evidence that their actions have had some effect.⁴⁸ In order to deprive the stalker of such a victory, and in the process disincline the stalker to persist with their behaviour, experts sometimes encourage victims to confront their stalker, although this has occasionally had an adverse effect.⁴⁹

Because of the social and psychological diversity of each individual stalker, it has been suggested that a range of solutions may be a more practical answer to the problem, rather than relying solely on the deterrent effect of legal rules. It is perhaps worthy of note that, though it would appear that the demeanour of many stalkers reflects or suggests some form of psychiatric disposition, a diagnostic labelling may be redundant in the majority of cases. The likelihood is that many stalkers may simply be deemed to have personality disorders of a general description which psychiatric authorities largely view to be unremitting.

⁴⁴ Lingg, above n. 14 at p. 351.

⁴⁵ Attinello, *op. cit.*, n. 25, at pp. 1950-1951.

⁴⁶ Fahnestock, "All Stalk and no Action: Pending Missouri Stalking Legislation" 1993 61 *4 C Law Review* 783 at pp. 784-786.

⁴⁷ See n. 3.

⁴⁸ Hanna, "Women at risk in Stalker's fantasy league", *The Guardian*, January 31, 1996.

⁴⁹ The Suzy Lamplugh Trust, *Psychology of stalking*.

and thus untreatable. However, the majority of experts are of the opinion that legislation should emphasise treatment rather than punishment.⁵⁰

Heightened public consciousness of stalking as a social and legal wrong is relatively recent.⁵¹ In the past, victims have been reluctant to inform the police. They frequently blame themselves for encouraging their stalker,⁵² thus allowing his behaviour to escalate until it reaches danger point before seeking help. The upsurge in interest and the growing number of civil and criminal cases before the courts suggest that victims now look to the legal system for protection and advice and that focus on treatment and non-legal prevention, important as it is, is being marginalised by public expectations, despite their reservations in the law and in particular the criminal law.

Scots Law's Response to Stalking

In Scotland there is no specific crime of "stalking" albeit that there are limited statutory provisions potentially applicable to certain features of stalking-related behaviour;⁵³ Scottish prosecutors generally rely upon the crime of breach of the peace. Many believe that utilisation of this ancient common law crime works well.⁵⁴ Any conduct or behaviour that "causes, or is likely to cause alarm to the public" may be prosecuted as a breach of the peace.⁵⁵ This is one of the most commonly prosecuted crimes and has been loosely defined to encompass a wide range of conduct that is perceived to be socially disruptive or offensive.⁵⁶ Historically, it was merely intended to define a class or category of offences. Hume contends that breach of the peace should be dealt with as a class of offences that tend or aim to disturb the public peace.⁵⁷ Within that class of offences he specifically mentions mobbing, challenging persons to a duel, the bearing of unlawful weapons, brawling, the sending of threatening letters, and the making of verbal threats.⁵⁸ The latter two of these offences are of particular relevance to the present discussion. Written threats were, in Hume's view, more serious.⁵⁹ Jones and

⁵⁰ Mullen and Pathe, above n. 36.

⁵¹ As one article identifies, "Three years ago, stalking was something we didn't talk about. It happened, but nobody told. The cuttings file yields just one mention of the subject during the whole of 1993. Now, it's a front-page subject." (Evans, "The woman who stalks the stalkers", *The Observer*, December 22, 1996).

⁵² The National Victim Center (*Safety Strategies for Stalking Victims*, <http://www.nvc.org/gdir/svsafety.htm>) say that victims must recognise that "victimisation is never their fault" and it is a "crime that can touch anyone, regardless of gender, race, sexual orientation, socio-economic status, geographical location".

⁵³ e.g. Telecommunications Act 1985; Malicious Communications Act 1988.

⁵⁴ See Dyer above n. 2; Bonnington, "Stalking and the Scottish courts", N.L.J., September 27, 1996 at p. 1394.

⁵⁵ Bonnington, *ibid.*

⁵⁶ McCall Smith and Sheldon, *Scots Criminal Law* (1992), p. 191.

⁵⁷ *Commentaries of the Law of Scotland Respecting Crimes* (1844) "Offences Against the Public Peace" Chap. XVI, XVII p. 416; see Christie, *Breach of the Peace* (1990) pp. 2-4, 9-10.

⁵⁸ Hume, i, 416.

⁵⁹ Hume, i, 135 and 442; see Christie, above n. 58 at p. 6.

Christie interpret Hume's reasoning as one of viewing verbal threats being usually as transient as hot-air".⁶⁰ Hume himself said that: "Even the verbal threatening of personal mischief if violent and pointed is a relevant ground of alarm to the individual and the public."⁶¹ However in the leading case of *James Miller*, Lord Justice Clerk Inglis saw no distinction between verbal and written threats.⁶² Jones and Christie endorse this view insisting that the crux of the matter is the impact on the victim.⁶³ However, Christie questions how written threats can tend or aim to disturb the public peace when the conduct appears to be levelled at the recipient of the letter and not to the general public.⁶⁴

If the threat, whether verbal or written, referred to some "personal mischief", then the likelihood would be that the accused would be cautioned to keep the peace. A threat of personal violence obviously creates an immediate potential for alarm—especially if stalking is involved where the possibility of violence is all the more real. Merely offensive words will not meet the requirement—the threat must be violent in nature.⁶⁵ However, Hume has remarked that offensive or slanderous expressions, if mixed with violent threats may suffice if "the words are uttered in his presence, and are attended with such circumstances of rage and disturbance, as justly to alarm with the fear of further mischief; so that it is not a cause of pure slander, but savours of violence, and has a tendency towards a real assault".⁶⁶

Although the courts have been reluctant to define common law offences precisely, attempts have been made to broadly define breach of the peace.⁶⁷ In *Wilson v. Brown*⁶⁸ it was said that: "It is well settled that a test which may be applied in charges of breach of the peace is whether the proved conduct may reasonably be expected to cause any person to be alarmed, upset or annoyed or to provoke a disturbance of the peace. Positive evidence of actual alarm, upset or annoyance or disturbance created by reprisal is not a prerequisite of conviction." Whereas in *Raffaelli v. Heatly*,⁶⁹ it was said that breach of the peace was a form of disorderly conduct and "where something is done in breach of public order or decorum which might reasonably be expected to lead to the lieges being alarmed or upset or tempted to make reprisals at their

⁶⁰ *Criminal Law* (1996) p. 235.

⁶¹ Hume, i, 442.

⁶² (1862) 4 Irv. 238.

⁶³ Jones and Christie, above no. 61 at p. 235; see also *H.M. Advocate v. Hayes*, 1973 S.L.T. 2 per Lord Cameron; *Edmiston* (1866) 5 Irv. 219; *Lord Advocate's Reference (No. 2 of 1992)*, 1993 J.C. 43.

⁶⁴ Christie, above n. 58 at p. 6.

⁶⁵ Nevertheless, Gordon, *The Criminal Law of Scotland* (2nd ed., 1978), Supplement (1992) p. 987 has said that any threat can be regarded as a breach of the peace if it places a person in a state of fear or alarm; *Galbraith v. Muirhead* (1856) 2 Irv. 520.

⁶⁶ *Hamilton, Lady St Foord v. Gordon* (1708, 1709) Hume, i, 343–344 where a charge was brought against Gordon for calling the complainer "a common whore, an adulterous bitch, and bearer of an illegitimate child," as well as threatening her with violence.

⁶⁷ The earliest attempt was in *Ferguson v. Carnochan* (1889) 26 S.L.R. 624.

⁶⁸ 1982 S.C.C.R. 49.

⁶⁹ 1949 J.C. 101.

own hand, the circumstances are such as to amount to breach of the peace". In *Montgomery v. MacLeod*,⁷⁰ it was said that there is: "no limit to the kind of conduct which may give rise to a charge of breach of the peace. All that is required is that there must be some conduct such as to excite the reasonable apprehension to which we have drawn attention [viz. that mischief may ensue], or such as to create disturbance and alarm to the lieges in fact."

Few cases involving breach of the peace have raised specifically the issue of *mens rea* as it can only generally be inferred from all the facts surrounding the case.⁷¹ Proof of the accused's motives or intentions may not be required. In *Butcher v. Jessop*,⁷² the court agreed with Gordon's⁷³ view of *mens rea* that it "is not necessary to show that the accused intended to provoke a disturbance, it is enough that his conduct was such that the court regarded it as objectively calculated to do so".⁷⁴ In *Ralston v. H. M. Advocate*,⁷⁵ the sheriff instructed the jury that they could convict even if they believed that the accused's explanation for his actions was innocent or blameless. The jury convicted and the decision was upheld on appeal. This may be relevant to stalking cases where the accused contends that his motives were purely innocent and of a non-criminal nature. A frequent feature of such cases is that the accused is suffering from some sort of delusion. This delusion is not just an opinion or judgment, but an absolute, incontrovertible, fixed knowledge that their victim is truly in love with him or her. Other motives, albeit delusional, might be that the stalker believes that he is married to the victim, that the victim is in need of his or her protection, or that it is actually the victim who is deluded.⁷⁶

Scottish courts rarely take motive into consideration except to the extent that it helps define intention.⁷⁷ One occasion that they did was in *Shannon v. Skeen*⁷⁸ where the accused (two private detectives) persisted in following a woman who was collecting cash from vending machines. The court said that there was no doubt they had caused her obvious distress and alarm (as she believed they were about to rob her), though the Scottish Court of Criminal Appeal quashed the conviction for breach of the peace on the basis that the detectives did not have the necessary *mens rea* to commit the crime.

Breach of the peace need not necessarily be committed in a public place.⁷⁹

⁷⁰ 1977 S.C.C.R. Supp. 164.

⁷¹ See Bonnington, above n. 55.

⁷² 1989 J.C. 55; 1989 S.L.T. 593; 1989 S.C.C.R. 119.

⁷³ Gordon, above n. 66 at p. 986.

⁷⁴ This view has been supported by a number of other decisions. For example, in *Palazzo v. Copeland*, 1988 J.C. 52 the court regarded it as truly significant that the conduct was likely to cause alarm to the public taking all the circumstances into account—that was all that was required for conviction.

⁷⁵ 1989 S.L.T. 474; 1988 S.C.C.R. 590.

⁷⁶ Mullen and Pathe, above n. 36.

⁷⁷ See Gordon, above n. 66 at p. 226.

⁷⁸ 1977 S.C.C.R. Supp. 180.

⁷⁹ See *Wightman v. Montgomery* (1758) Maclaurin 188; *Young v. Heatly*, 1959 J.C. 66; 1959 S.L.T. 250.

In Christie accepts the view that all that is required is evidence to show that there
of has been a disturbance of the immediate area.⁸⁰ Christie⁸¹ summarises by
t is saying:

ble "The general conclusion then is that the breach of the peace is not a
lay suitable appellation unless the accused's offence can be regarded as a
sue minor one. It is therefore, primarily an offence for the summary courts.
ng Great faith is, of course, reposed in Scottish prosecutors to exercise
ed fairly and properly the wide discretion that they have ... [r]esort to
at breach of the peace in [serious] cases illustrates the extraordinary
a flexibility of that crime, as also the lack of anything more suitable either
as at common law or under statute to deal with the realities of the
iff situation."

he Do the realities of the situation dictate "something more suitable" for
ry talking? Certainly, Scottish courts have encountered few problems in
to encompassing stalking behaviour within breach of the peace.⁸² As early as
ly 1961 in *Mackie v. Macleod*⁸³ the High Court upheld a conviction for breach of
at the peace where the accused became infatuated with a young woman,
ist habitually waited for her outside work and followed her about.

ge Naturally it goes without saying that, where the stalking graduates to other
at serious forms of conduct, other substantive criminal offences may come into
v. play. Crimes such as rape, attempted rape, indecent assault, aggravated assault
a and assault, along with other variants of inchoate crimes and criminal
at attempts, may all be pertinent. Treatment of these particular offences are
v. beyond the scope of this article.⁸⁴ They are nonetheless important. The
a question as to whether breach of the peace is the best way to tackle stalking
at behaviour is discussed more fully below.

e In Scotland, civil restraint of stalking-related behaviour has revolved
il around the common law interdicts against molestation, assault, invasion of
e privacy and, possibly defamation or trespass.⁸⁵ In addition to this, there are the
various matrimonial interdicts contained in the Matrimonial Homes (Family
Protection) (Scotland) Act 1981⁸⁶ applicable to married and cohabiting
couples. Common law interdicts *ad interim* are fairly readily obtained in the
Scottish courts. The balance of convenience test applied ensures this, as long
as writs are not too widely framed.⁸⁷ The efficacy of the common law interdict
as always been open to question. They do tend to restrain certain forms of

⁸⁰ Christie, above n. 58 at p. 35.

⁸¹ Christie, above n. 58 at p. 22.

⁸² Bonnington, above n. 55.

⁸³ March, 1961 High Court, unreported, Gordon, above n. 66 at p. 988.

⁸⁴ For a full discussion on these offences see Gordon, above n. 66; Ferguson, *Offences against the Person* (1990); Jones and Christie, above n. 61.

⁸⁵ See Scott Robinson, *The Law of Interdict* (2nd ed., 1994) at pp. 144-151.

⁸⁶ *ibid.*; Thomson, *Family Law in Scotland* (3rd ed., 1996) at pp. 92-96.

⁸⁷ *Murdoch v. Murdoch*, 1973 S.L.T. (Notes) 13.

obsessional behaviour and accordingly offer relief to many victims of obsessional behaviour. However, the determined stalker is not going to be deterred by a simple prohibitory court order. The absence of the ability to attach a power of arrest to common law interdicts is clearly a distinct disadvantage. Admittedly, extremely obsessive or psychologically-disturbed individuals would still not be restrained, but some individuals may be deterred by the immediate threat of arrest. The power of arrest is not to be underestimated in its psychological impact on some victims who will often feel more secure in the knowledge that the power does exist. One of the major flaws of the interdict system is that breach of interdict⁸⁸ often exacts a slow and cumbersome response, ill-suited to the needs of victims of obsessive threatening behaviour, where the need for a response might well be immediate.

The interdicts contained in the Matrimonial Homes (Family Protection) (Scotland) Act 1981 do have the added potency of the possibility of attachment of a power of arrest.⁸⁹ This may be attached if requested by the applicant spouse. The power of arrest is sometimes added where a breach of the original interdict *ad interim* has occurred. In practice, they are not difficult to obtain if the court is convinced that the defender's behaviour does pose a threat to the pursuer. The power of arrest entitles a constable without warrant to arrest a non-applicant spouse if he has reasonable cause to suspect that person of being in breach of the matrimonial interdict. Once arrested, the spouse may simply be released by the police if they are convinced he poses no further danger. Alternatively he may be detained and prosecuted for a substantive crime or, if the procurator fiscal decides not to prosecute, a quasi-criminal procedure⁹⁰ may be engaged under which a spouse may be detained pending breach of interdict proceedings.⁹¹

All civil remedies suffer from the fact that they must be sought by the individual victim. It may be a stressful and bewildering process. Added to their experiences which have culminated in the need for legal action, it may represent an imposing burden. In the absence of legal aid, it may not be financially viable. The simple fact remains that breach of the peace and the various civil remedies all existed prior to 1997. Despite this, there was still pressure for Parliament to act. The legislation for Scotland that did come forth was undoubtedly not as extensive as many had hoped for.

The Protection From Harassment Act 1997

Buoyed by growing public concern, the pressure group NASH had for some time campaigned for the introduction of a specific offence of stalking. It had

⁸⁸ See Scott Robinson, above n. 86 at p. 171.

⁸⁹ s. 15(1) of the 1981 Act; Scott Robinson, above n. 86 at p. 118-120.

⁹⁰ *Forbes v. Forbes*, 1993 S.C.L.R. 348; *Cordiner v. H.M. Advocate*, 1973 J.C. 16.

⁹¹ See Scott Robinson, above n. 86 at p. 120; Clive, *Husband and Wife* (3rd ed., 1992) pp. 313-314.

critical of existing legal remedies and the way these were applied and enforced.⁹² As a consequence of the growing concern and the promptings of NASH, a Private Members Bill was introduced by Janet Anderson, a Labour MP, in May 1996, though it failed to reach the stage of a second reading following a lack of government support.⁹³ Nonetheless, the Home Office offered further hope of legislation with the publication of their Consultation Paper.⁹⁴ Following the consultation exercise, the Government initially announced an intention to legislate,⁹⁵ but later announced that legislation would be left to a Private Members Bill. Then under pressure from the Opposition, in a quick *volte face*, reinstated the Bill.⁹⁶ The Act received the Royal Assent on March 21, 1997 in the last days of the Conservative Government.

The original Home Office proposals included the development of the existing criminal law with regard to harassment through the elimination of the difficulties which have led to its ineffectiveness in dealing with the “conduct of stalkers”.⁹⁷ The paper recommended a combination of civil and criminal remedies with the introduction of two new criminal offences for England and Wales—harassment and putting people in fear of violence.⁹⁸ In addition, the paper recommended a new statutory tort/delict of harassment, which would also extend to Scotland.⁹⁹

Sections 1–7 of the Act specifically relate to England and Wales, sections 8–11 only apply to Scotland. Section 1 of the 1997 Act prohibits a course of conduct by someone which either amounts to harassment of another or which the person knows or ought to know amounts to harassment of another. In determining the latter issue (*i.e.* should the stalker have known their behaviour was harassment), the courts should consider what a reasonable person in possession of the same information would have thought in the circumstances. This provision does not necessarily involve consideration of the intention behind the stalker’s actions.¹ The issue of intention has bedevilled attempts by the English criminal law to tackle stalking. Utilisation of the term “harassment” in the statute rather than stalking is designed to ensure that a broad range of activity is brought under the ambit of the legislation. The Act does not specify the nature of the unlawful behaviour. Given the complexity and

⁹² 95 per cent of victims who had contacted NASH claimed they had received inadequate protection from the police (von Heussen, *Facts About Stalking* (NASH), January 19, 1996, p. 1).

⁹³ See “Help for Stalking legislation refused”, *The Guardian*, May 7, 1996.

⁹⁴ Home Office (1996), *Stalking: the Solutions*.

⁹⁵ See “Stalking Curbs will Widen Net”, *The Guardian*, July 10, 1996.

⁹⁶ “Major buckles as Labour Calls bluff”, *The Guardian*, October 24, 1996.

⁹⁷ Home Office (1996), *Stalking: the Solutions*, para. 5.17.

⁹⁸ Home Office (1996), *Stalking: the Solutions*, paras. 5.17–5.18.

⁹⁹ 1997 Act, s. 8 applies here.

¹ Liberty (the National Council for Civil Liberties) in their Briefing Paper on the Protection from Harassment Bill No. B9/16, December 1996 criticised this provision on the basis that it was too vague and general and could infringe the rights of persons such as bailiffs and landlords, going about their lawful daily business.

breadth of staking behaviour, it is perhaps not surprising that the legislature declined to grasp the difficult "nettle" of seeking an appropriate definition. By utilising the generic term "harassment" they have been inclusionary rather than exclusionary and allowed the legislation to extend to other forms of harassment such as racial harassment or anti-social behaviour by neighbours.² Moreover, there is a distinct advantage in using the term "harassment" in that the courts are familiar with it, having interpreted it in the context of other statutes.³

There are limited defences to the prohibition of harassment, whereby it does not apply to:

- "a course of conduct if the person who pursued it shows—
- (a) that it was pursued for the purpose of preventing or detecting crime,
 - (b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
 - (c) that in the particular circumstances the pursuit of the course of conduct was reasonable."⁴

The insertion of the third defence proved contentious when the matter was debated in Parliament. It ensures that persons in pursuit of their legitimate occupations will not be charged with harassment.⁵ The courts will have discretion to determine whether a defence is sustained, and one imagines that there may be some difficult and contentious decisions ahead.⁶

A person who infringes the prohibition of harassment contained in section 1 will, according to section 2 of the Act, be guilty of an offence and liable on summary conviction to imprisonment for a period not exceeding six months or a fine not exceeding level 5 on the standard scale or both.

The provisions relating to the English civil tort and remedy for harassment are set out in section 3. Providing there is an actual or apprehended breach of section 1, this will entitle the victim to sue their harasser for damages or apply to the courts for an injunction to stop the unlawful behaviour.⁷ There is the capacity to attach a warrant to arrest in addition to any injunction where the plaintiff considers that the harasser has breached the injunction.⁸ A separate offence of putting people in fear of violence is set out in section 4, and is

² See speech by Lord Mackay of Clashfern, *Hansard*, H.L. January 24, 1997.

³ e.g. the Public Order Act 1986 as amended by the Criminal Justice and Public Order Act 1994.

⁴ Protection from Harassment Act 1997, s. 1(3).

⁵ e.g. investigative journalists, political canvassers.

⁶ Would for example a trade unionist stalking a worker intent on working during a strike be able to rely on the defence? Would a member of a religious sect attempting to recruit members of the public be acting reasonably?

⁷ s. 3 sets out in some detail the criminal consequences flowing from breach of the terms of an injunction.

⁸ 1997 Act. s. 3(3)(b).

ached where, as a result of the stalker's course of conduct (perpetrated on at least two occasions),⁹ the victim fears that violence will be used against her or him. The reasonable person test, set out in section 1, is replicated in this section and offers guidance on the accused's appreciation of his own conduct. The penalties for the section 4 offence are potentially more severe, with a maximum of five years imprisonment or a fine or both.¹⁰ If the case is prosecuted on indictment, similar penalties to those contained in section 2 apply to summary convictions for section 4 offences. Under section 5 the courts are empowered (additional to any other disposal of the case) to issue a restraining order, where an offence is committed under sections 2 or 4, to bring about cessation of the unlawful activity and thereby protect the victim from further harm. Failure to comply with the terms of such an order can result in up to five years imprisonment for offences tried on indictment.¹¹ Section 7 clarifies that reference to harassing someone includes alarming them or causing them distress. The term "conduct" includes speech, and most significantly the term "course of conduct" must involve conduct on at least two occasions.¹²

The specific provisions in the Act pertaining to Scotland show some congruence with those already outlined for England, with several key material differences. Significantly section 8, whilst asserting the individual's right to be free from harassment, only sets out the parameters for a civil remedy to be known as an "action of harassment". There is no analogous criminal offence provision. Section 8(1) states:

"Every individual has a right to be free from harassment and, accordingly, a person must not pursue a course of conduct which amounts to harassment of another and—
(a) is intended to amount to harassment of that person; or
(b) occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person."

Section 8 also identifies the appropriate remedies in a civil action, which are damages, interdict or interim interdict or a non-harassment order.¹³ Damages may be awarded in actions of harassment for anxiety caused in the harassment as well as any financial loss resulting from it.¹⁴

Section 9 of the statute provides that anyone in breach of a non-harassment order can be punished by way of a fine, or be imprisoned for up to five years

⁹ 1997 Act, s. 4(1).

¹⁰ 1997 Act, s. 4(4).

¹¹ 1997 Act, s. 5(6).

¹² The rule requiring two instances of harassment, is not a requirement under the common law of Scotland where a charge of breach of the peace can be brought against a stalker following a single incident. The Scottish Office, Information Directorate, "Stalkers Facing up to Five Years in Prison", Forsyth, No. 1727/96 (October 18, 1996).

¹³ For the application of the civil action in an employment context see S. Middlemiss, "Harassment: Implications of New Statutory Controls", 1997 Emp.L.B. 19-2.

¹⁴ 1997 Act, s. 8(6).

on indictment, or six months on summary complaint. The non-harassment order can also be granted as part of a sentence in a criminal case where the accused has been convicted of breach of the peace or any other offence that falls within the definition of harassment in the Act.¹⁵ Where the stalker or harasser breaches the terms of a non-harassment order imposed additional to conviction, he or she shall be guilty of an offence under section 11(4) of the Act and be liable to imprisonment for a maximum of five years or to a fine, or both on indictment or alternatively a maximum of six months imprisonment or a fine not exceeding the statutory minimum or both on summary conviction. The court has the power to vary or revoke a non-harassment order.¹⁶ An accused may appeal the imposition or variation of a non-harassment order additional to conviction,¹⁷ whilst the Crown may appeal variation or revocation.¹⁸

Assessing the New Provisions

The legislation has generally received a favourable response in England and Wales.¹⁹ In Scotland, the new law's reception has been more muted. On a positive note, the parameters of the behaviour which represents grounds for a civil action in Scotland have been set out in section 8(1) of the Act. More importantly in this context, the same parameters will be used to determine whether a non-harassment order should be granted as part of the sentence imposed on someone found guilty of breach of the peace or some other relevant criminal action. The potential efficacy of interdicts or non-harassment orders should not be ignored, given that they can be utilised to bring about cessation of behaviour, which is normally of a continuous nature. In respect of the new sentences for breach of a non-harassment order, the most obsessive stalker may be reluctant to continue in the face of a five year prison sentence. The experience in other countries with stalking laws, such as Australia and America, has shown that legal sanctions have gone a long way to help deter stalkers by expressing social disapproval of their behaviour.²⁰ There are, of course, limits on how much the law can hope to achieve. Attinello has pessimistically counselled that:

"It must be remembered that stalking is a crime based on obsessions. Because an obsession often transcends respect for the law, there is little that any law can do to adequately deter a person from stalking another

¹⁵ 1997 Act, 11 which inserts a new s. 234 into the Criminal Procedure (Scotland) Act 1995.

¹⁶ 1997 Act, 2. 11(6).

¹⁷ 1997 Act, s. 11(3).

¹⁸ 1997 Act, s. 11(5).

¹⁹ Evonne von Heussen, founder of NASH, has commented that: "the measures set out are comprehensive and impressive and will go along way to deter the stalking of innocent people and give the courts the power they need to punish those who bring such misery to their victims" (Ford, "Stalkers will risk five years in jail under new laws", *The Times*, July 10, 1996).

²⁰ Mullen & Pathe, above n. 36.

person. The threat of a civil tort action ... will no more deter a stalker than will waving an injunction in front of the stalker. Moreover, criminal remedies have proven to be similarly inadequate for deterring harassment."²¹

The scope of the delict is somewhat imprecise. Will its use be restricted to dealing with the excessive behaviour of stalkers and harassers? Or could it be utilised to curtail the activities of, *inter alia* nosy investigative reporters,repid fans of celebrities (intent only on meeting them or obtaining their photograph), religious activists or over-ardent suitors? While the defence that their behaviour was, in the particular circumstances, reasonable, can be employed,²² the courts will have to interpret and define "reasonableness".

A broader criticism of the Act is that, whilst it provides some degree of protection for the victims of stalking, and may act as a deterrent to stalkers, it fails to take account of the psychological aspects of stalking.²³ The stalker will often act from an obsessional or delusional perspective and will clearly be suffering from psychological problems. In these circumstances, the courts should be empowered to order that the stalker be remanded for psychiatric assessment and, where appropriate, make a restriction order. An attempt was made at the Committee stage of the Bill to introduce counselling for those who were the subject of non-harassment orders, but this was rejected.²⁴ Certainly the experience of America is that law is only part of the solution and that greater emphasis needs to be placed on the treatment of offenders.²⁵

There must also be a number of questions regarding the scheme as implemented in Scotland. One of the major concerns is that even if a non-harassment order is in place, the victim will have to face further fear of harm or harassment before the state will intervene to prosecute for breach of a non-harassment order.²⁶ The fact that the victim will be able to rely on the prosecuting authorities to thereafter pursue the offender and impose severe penalties whilst *prima facie* a distinct advantage may, in certain circumstances, be of little comfort. It will certainly be interesting to see how willing the authorities are to prosecute. Indeed, for some, reliance on state prosecution may be seen as a drawback as opposed to a positive benefit. Victims are often forgotten parties in the criminal justice equation.²⁷

The ability to seek a non-harassment order, whilst on the face of things a positive benefit, looks on further examination to offer little more protection than the existing interdict system. The provisions in section 9 are probably

²¹ Attinello, *op. cit.*, p. 334, n. 25, at p. 1980.

²² 1997 Act, s. 8(4)(c).

²³ See McAneney, *et al.*, above n. 27.

²⁴ *Hansard*, H.L. January 24, 1997.

²⁵ See Lingg, above n. 14 at pp. 356-360; Sohn, above n. 7 at p. 222; see also Goode, above n. 10 at p. 31.

²⁶ See Sohn above n. 14 at p. 208.

²⁷ See Moody and Mackay, "Victims and Scottish Criminal Justice", *Howard Journal of Criminal Justice*, 1996, 35, pp. 299-313.

more welcome than seeking contempt proceedings for breach of interdict. However, unlike the interdicts available by virtue of the Matrimonial Homes (Family Protection) (Scotland) Act 1981, there are no provisions for attachment of power of arrest. There remains an ongoing need for speedy police intervention to preclude serious violence being perpetrated against the victim at a time when a culmination in violence ought to be anticipated.²⁸ Much of the international literature notes that victims distrust police activity and attitudes²⁹ and it is to be hoped that, as well as reactive policing, there will continue to be preventive policing.³⁰ There is, however, evidence to suggest that policing in Scotland in this type of matter has dramatically improved in the past decade.

Damages for a victim of harassment represent a post hoc compensation and not an inherently deterrent remedy or a remedy of relief. This is not to understate that restitution can have deterrent effects.³¹ Damages were available previously in delictual actions in addition to common law interdicts and as such this "additional power" does not represent anything new. Matters will be easier for victims of harassment in that there will be a coherence and congruence between their action for a harassment order and a claim for damages.

The sentencing provisions set out in section 9 for breach of a non-harassment order also look appealing. Clearly the legislature hoped that the thought of five years in prison on indictment would represent a substantial deterrent to those engaged in stalking behaviour. When compared with breach of the peace, where there is a capacity to impose life imprisonment, it begins to look more restrictive. The fear is that five years will become the ceiling of punishment for all forms of harassment no matter how bad.

A further concern for victims is that the imposition of a non-harassment order following conviction may provoke retaliation.³² It is difficult to respond to such a criticism; there must be realistic assessment as to what the law can achieve. Certainly the fear of retaliation cannot be used in argument against not having such orders.

The creation of the new statutory delict of harassment, limited as it is, does offer some symbolism to victims and perpetrators. Utilisation of civil remedies is almost as controversial as deployment of the criminal law.³³ Lord Mackay offered support for civil remedies during the House of Lords Debate on the Protection from Harassment Bill. He said:

"Criminal proceedings cannot always protect a victim from anticipated

²⁸ See Sohn, above n. 14 at p. 206; Perez, above n. 16 at p. 265.

²⁹ See for example Sohn, above n. 14 at p. 209; Strikis, "Stopping Stalking" (1993) 18 *Georgetown Law Review* 2771 at pp. 2774-2775.

³⁰ See Goode, above n. 10 at p. 31.

³¹ See Zedner, "Reparation and Retribution: are they reconcilable" 1994 57 *M.L.R.* 228.

³² See Sohn, above n. 7 at p. 218.

³³ See Strikis, above n. 30 at pp. 2774-2775; Lingg, above n. 14 at pp. 360-361.

harm. The criminal law cannot provide protection for someone who might reasonably expect that they might be subject to harassment in the future. Nor does it provide protection where the case cannot be proved beyond reasonable doubt. In civil proceedings the court, if it is satisfied on the balance of probabilities that the defendant harassed the victims, should be able to order the defendant to compensate the victim for the distress and disturbance caused by the harassment. The civil court should also be able to grant an injunction preventing the carrying out of any specified activity which would amount to harassment. I believe it is an advantage of civil proceedings that the precise order can be tailored to the circumstances of the case.”³⁴

disadvantage of a civil remedy in this context is the expense for the pursuer in raising a civil action. In the absence of an effective civil legal aid system in Scotland, the pursuer will, in most cases, have to meet the costs themselves, which may deter some from pursuing civil remedies. Professor Gair argues that the Act does not add to existing remedies already available under Scots Law.³⁵ He further contends that the promise of change through the provisions of the Act will lull people into a false sense of security as its provisions would not be used by practitioners, who would continue to seek civil remedies.

The reforms introduced in this area in England should effectively deal with the problem and replace the somewhat piecemeal legislation and confusing decisions that currently exist in that jurisdiction. Legislative measures exist that allow prosecution to take account of the entire course of conduct and not just particular aspects of the problem. In Scotland it will soon be seen how this Act will be applied alongside existing common law remedies and other legislative measures.

Other methods of achieving a solution to the problem should not be overlooked. An increased role for social workers, probation officers and those in the mental health profession should be considered, as they are the professionals who can recognise and treat such problem behaviour. Moreover, the pervasive demeanour of some stalkers may mean that they are unwilling to change their behaviour regardless of the sentence imposed.

Utility of Existing of Criminal Measures

Lord Gair puts forward the view that, because breach of the peace is a common law offence, this has allowed Scottish criminal law to freely adapt to the changing modes of conduct demonstrated by today's criminals.³⁶ As such, it

³⁴ Lord Mackay of Clashfern's comments in the Lords, *Hansard*, January 24, 1997.
³⁵ Visiting professor at the University of Strathclyde and Chair of the Scottish Council for the Advancement of Learning.
³⁶ Bonnington, above n. 55.

ability to intervene early, ensuring that the "stature" of stalking is elevated in the criminal law hierarchy, that by defining the crime greater deterrence can be achieved, and confirming the victim's faith in the legal system to the point where more victims will come forward.⁴⁸ Arraigned against this are the arguments of sufficiency of current laws,⁴⁹ that by having specific laws, consciousness of stalking will not be raised⁵⁰ and finally that statutes on stalking will not deter.⁵¹

Undoubtedly, one of the major arguments in favour of specific statutory provisions is the one which posits that such laws will elevate the profile of the crime thus ensuring deterrence. Strikis argues: "by defining a type of unacceptable behaviour, anti-stalking statutes may discourage such behaviour through public scorn and condemnation."⁵² She goes on to say: "perception of the necessity for protecting stalking victims is increasing. Through the enactment of specific statutes, stalking conduct can be branded as unacceptable. The existence of statutes will deter some would be stalkers and will impede those persons for whom the threat of sanction will have no deterrent effect. Equally as important is the societal effect of the recognition of stalking as a crime. Victims will be empowered, and the entire legal system—from police to judiciary—will evolve a little farther in its understanding of the reality of crimes traditionally wrought against women."⁵³ Strikis also believes that the profile of the criminal conduct will also be important in how it is received by the judiciary and the profession.⁵⁴

Interestingly, whilst Scotland adheres to breach of the peace as the best way of tackling stalking "in the area of peace law, the historical movement in the Anglo-American tradition reflects a recognition that harm to an individual's mental and emotional health can be serious and deserves more protection from the state".⁵⁵ Part of the problem is the way in which breach of the peace is viewed. One commentator dismissively describes breach of the peace as a law "typically used to prosecute people who play music too loud".⁵⁶ Another has said that: "the common law with its emphasis on individual liberty and autonomy, provides no useful paradigm for deciding the contours of the crime [stalking]."⁵⁷

One potential benefit of the reliance on breach of the peace may be the ability to respond to solitary incidents of stalking conduct. In contrast, many of the stalking statutes, including the new provisions for England and Wales in the 1997 Act require a "course of conduct" or in any event repetition.

⁴⁸ Fahnestock, above n. 47 at pp. 790–791.

⁴⁹ Fahnestock, above n. 47 at pp. 798–799; Bonnington, above n. 55.

⁵⁰ Fahnestock, above n. 47 at pp. 799–800.

⁵¹ Fahnestock, above n. 47 at pp. 800–801.

⁵² Strikis, above n. 36 at pp. 2780–2781.

⁵³ Strikis, above n. 36 at p. 2812.

⁵⁴ Strikis, above n. 36 at p. 2778.

⁵⁵ McAnaney, Curliss and Abeyta-Price, above n. 27 at pp. 874–875.

⁵⁶ Fahnestock, above n. 47 at p. 787.

⁵⁷ Lingg, above n. 14 at p. 352.

never, a further question arises as to whether the Scottish lay and non-lay judiciary will be prepared to impose a non-harassment order on top of a statutory breach of the peace conviction which they may perceive as minor. They may see the one incident conduct as isolated and not tantamount to harassment, being devoid of any continuity and therefore not deserving of the imposition of a non-harassment order. One feature canvassed in Parliament which may help the judiciary in respect of repeat offenders is for breach of the peace convictions to be recorded with the word “harassment” in brackets after it, where the occasion so warrants.⁵⁸ How the judiciary, especially the lay judiciary, will view mental anguish will also be important. There is a fear that judges do not tend to see this sort of harm as particularly egregious and, indeed, there is a feeling that much obsessive behaviour is often viewed as innocuous. Will continuance of the practice to prosecute stalking as a breach of the peace not reinforce the view of the relative unimportance of the conduct? Guy has suggested that a “lack of understanding in the legal community about the nature of obsessive behaviour has contributed further to the inadequacy of the legal intervention. It is the judges who will have to identify ‘stalking’ and they are going to be confronted with several difficulties”.⁵⁹ It has already been noted that stalking often occurs following a relationship between the accused and the victim. There may well be a genuine fear that “where stalking occurs in a personal relationship there will be a tendency to downplay the situation especially because of the fear that the victim may in turn be victimising the accused”.⁶⁰

In assessing the case for legislation one must bear in mind that “the worth of legislation must be measured by the degree it improves on existing law. The second measure of value ... questions the practical benefits of statutes regardless of other remedies”.⁶¹ On balance, the writers, whilst recognising the strong case for retention of breach of the peace as the major criminal law weapon against stalkers, are of the view that an opportunity was not to adopt a specific crime of harassment in Scotland. The symbolism that such an approach would have presented, in our view, is a compelling enough one. In the process we do not denigrate Alastair Bonnington’s assertion that “in the case of stalking there may be reason to believe that the old ways are best”.⁶² It remains a valid viewpoint but not one we agree with.

The Protection from Harassment Act 1997 represents limited but worthwhile modifications to the law of Scotland. They will modestly improve the law to tackle the burgeoning problem of stalking (and harassment generally). Reliance continues to be placed on breach of the peace and the victim’s own efforts at civil restraint. The newly recognised delict of

Ms. Rosaeanna Cunningham, M.P. gained an assurance that this would be looked into by the Advocate.

Guy, above n. 8 at p. 999.

See Strikis, above n. 36 at p. 2806.

John, above n. 7 at p. 214.

Bonnington, above n. 55 at p. 1394.

harassment will assist in a limited way. With the exception of the non-harassment orders and the punishment for breach of these new orders, it very much looks like "old wine in a new bottle". Applying old solutions to new problem might in many circumstances be justifiable and prudent. Doubtless the flexibility of the crime of breach of the peace and the ingenuity of its broadening application is admirable to some. However, in the view of the writers, the modern phenomenon of stalking requires an attempt at a modern solution. There is evidence of growing concern coupled with a demand for explicit recognition of stalking as a crime in its own right. Deterrence is not confined to prosecution and sanction; it begins with delineation of prohibited conduct. The failure to enact a specific statutory offence, discernible and recognisable by the populace, ensures that an opportunity has been missed to send an unequivocal message to those who engage in such alarming and unwarranted conduct that it will not be tolerated in modern Scottish society. Encapsulation of limited provisions pertaining to Scotland in a statute which creates a statutory definition and prohibition for England and Wales, serves to highlight that the provisions of the Protection From Harassment Act 1997 as they pertain to Scotland, though welcome, do not go nearly far enough. The old ways as good as they are, can often be improved upon.

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SUBSTANTIAL RELIEF FOR VICTIMS OF ABUSE?

Poh Choo v Camden and Islington Area Health Authority [1979] 2 All ER 910: "Knowledge of the future being denied to mankind ... [t]here is really only one certainty: the future will prove the award to be either too high or too low". This remains as true as ever in the case of awards for loss of pension. When it is recognised that some "contingencies" are truly "imponderables" it must follow that they cannot submit to any precise quantification. Perhaps the whole head of claim should more honestly be thought of as "loss of pensionability".

[In his further article, to be published shortly, Mr Sellar considers the continuing need for actuarial evidence in relation to the various types of pension scheme.]



Substantial Relief for Victims of Abuse?

The Protection from Abuse (Scotland) Act 2001

Sam Middlemiss,
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Mr Middlemiss considers the impact of the Protection from Abuse (Scotland) Act 2001 and the extent to which it has overcome the deficiencies in existing legislation, providing more effective protection for victims of abuse.

The Protection from Abuse (Scotland) Act 2001 is the first committee Bill to be enacted by the Scottish Parliament, the committee responsible for the legislation being the Justice and Home Affairs Committee. More importantly it provides the police with the power of arrest where the subject of an interdict is likely to abuse his victim contrary to the terms of the order. The impact of this legislation could be far reaching, offering the prospect of arrest in a variety of situations for abusers, harassers or stalkers thereby bringing about cessation of their unlawful activities. Thus separated or divorced spouses, ex-partners living together or apart, homosexual and lesbian partners (particularly victims of harassment, intimidation or violence from current or ex-partners), and victims of stalking or of abusive neighbours may benefit from the legislation ("Victory for Abuse Campaigners", *The Scotsman*, Friday 5 October 2001, p 6).

Discussions at initial meetings of the Justice and Home Affairs Committee of the Scottish

Parliament prior to the introduction of the Protection from Abuse (Scotland) Bill centred on extending the power of arrest attached to matrimonial interdicts issued under the Matrimonial Homes (Family Protection) (Scotland) Act 1981. The limitations in the application of these provisions are detailed below.

Matrimonial Homes (Family Protection) (Scotland) Act 1981

The court had the power under ss 2, 3 and 14 of this Act to issue an exclusion order, interdict and power of arrest to prevent a spouse's occupancy in the marital home or perpetration of domestic violence against his marriage partner or child (*Millar v Millar*, 1991 SCLR 649).

Automatic application of these rules was restricted under s 14 (2) to spouses and children of the family, although cohabitants could benefit where their rights were declared to exist by the courts following an application by the cohabitee in line with the provisions in s 18.

More significantly, interim exclusion orders which were designed to get an unreasonable or violent spouse away from the marital home were not granted where spouses were living separately, although case law (most notably *Brown v Brown*, 1985 SLT 376) decided that intervention through an exclusion order may be warranted where a spouse wished to return to the marital home (Scott Robinson, *The Law of Interdict* (2nd ed), Butterworths, 1994, pp 114-116).

Matrimonial interdicts (including interim interdicts) as defined by s 14 (2) could be granted in circumstances where they were necessary to (a) restrain or prohibit any conduct of the spouse towards the other spouse or a child of the family, or (b) prohibit a spouse from entering or remaining in a matrimonial home or a specified area in the vicinity of the matrimonial home.

"By section 15 (1) the court is required to attach a power of arrest to any matrimonial interdict which is made ancillary to an exclusion order ... The courts also have discretion to attach a power of arrest where a matrimonial interdict is not ancillary to an exclusion order" (Edwards and Griffiths, *Family Law*, W Green, 1997, p 312). This power can also be attached to an interim exclusion order.

The most limiting aspect of the legislation was that the matrimonial interdict or exclusion order would cease to have effect on the termination of

SUBSTANTIAL RELIEF FOR VICTIMS OF ABUSE?

the marriage, which is often the point where protection is most needed.

The complexity of these rules, their limited application and the restricted constituency they covered led to calls for this aspect of the legislation to be improved. The Scottish Law Commission in their *Report on Family Law* (1992) recommended that the availability and scope of matrimonial interdicts should be clarified. The Scottish Office issued a consultation paper in 1999 with the title "Improving Scottish Family Law". A report was issued in November 2000 with the title "Proposal For a Protection From Abuse Bill" and in September 2000 the Scottish Executive issued a white paper. The Scottish Parliament charged the Justice and Home Affairs Committee with the task of reforming the matrimonial interdict legislation in Scotland. They ended up looking at ways to provide a right of arrest of the subject of an interdict where the power to do so is attached to interdicts, domestic violence is involved and a re-occurrence is likely.

The Justice and Home Affairs Committee

This committee through their discussions and hearing evidence from interested parties, discovered that the legislation was lacking in many respects. Not only does the protection stop on divorce (a time when an ousted spouse's resentment and violent feelings towards his partner might be strongest), but also cohabitants' rights are limited: for example, s 18 of the Matrimonial Homes Act gives cohabitants the right to an interdict for an initial six months with the right to apply for an extension after that, and a woman having a relationship with a violent man but not living with him would not be protected. Identification of these issues was derived from review of the minutes of the Justice and Home Affairs Committee meetings prior to introduction of the Protection of Abuse Bill (see Scottish Parliament web site at www.scottish.parliament.uk).

There is other legislation which could apply in these situations, such as the Protection from Harassment Act 1997; however its application to the criminal law of Scotland is extremely limited. The power granted to the courts to issue non-harassment orders under this Act (with a maximum of five years' imprisonment for non-compliance) has been underutilised by the Scottish judiciary. Their preference is to utilise orders they are familiar with, namely a common law interdict. There are also common law crimes which could apply to cases of domestic violence etc, such as breach of the peace and assault (*Kelly v Docherty*, 1991 SLT 419).

However prosecution in the past required a willingness on the part of the victim to bring charges against their abuser and the police to initiate a criminal investigation of domestic abuse (Mackay, "Domestic Violence — A Uniform Response?" (1987) 128 SCOLAG 76).

Consideration was given to widening the scope of interdict beyond the home to the place of work, social events, school etc. This would have impacted most on vengeful estranged partners, stalkers or harassers whose obsessive behaviour could affect all aspects of their victim's daily life.

The appropriateness of using an interdict, that is a civil order, albeit with the power of arrest attached, as opposed to a criminal measure, to deal with domestic violence was also considered. Practical difficulties with the enforcement of interdicts such as the requirement for corroboration of an alleged breach and tangible evidence of the alleged behaviour proved problematic for the police in enforcing the terms of the order, although corroboration is not considered necessary to establish the necessary reasonable cause in terms of s 15 (3) for suspecting a breach (Lord Advocate's "Guidelines to Chief Constables on the Matrimonial Homes (Family Protection) (Scotland) Act 1981", (1986) 122 SCOLAG 171).

It was thought that the protection from abuse aspect of the 1981 Act should be removed from what is essentially a conveyancing statute with protective measures attached and placed in an amended form in a stand alone Bill which could include protection for a variety of victims of violence and abuse. The emphasis in the legislation should be on protection of the vulnerable rather than protecting only those persons that are cohabitants or married.

These are just some of the issues discussed by the committee and their recommendations and conclusions. The Bill arose from a proposal in a report published on 23 November 2000 by the Justice and Home Affairs Committee. These proposals are also reflected in the content of the Protection from Abuse (Scotland) Act 2001.

The Protection from Abuse (Scotland) Act 2001

This is a short Act of eight sections and its stated purpose is "to enable a power of arrest to be attached to interdicts granted to protect individuals from abuse, to regulate the consequences of such attachment, and for connected purposes".

SUBSTANTIAL RELIEF FOR VICTIMS OF ABUSE?

To what extent does the Act overcome the deficiencies in existing legislation identified by the Scottish Parliament and provide effective protection for victims of abuse?

By s 1 (1) "A person applying for, or who has obtained, an interdict for the purpose of protection against abuse may apply to the court for the power of arrest to be attached to the interdict under this Act." Abuse is widely defined in s 7 as "violence, harassment, threatening conduct, and any other conduct giving rise, or likely to give rise, to physical or mental injury, fear, alarm or distress". So anyone that is a victim of abuse and entitled to an interdict under the civil or criminal law will be eligible to apply for a power of arrest to be attached. It is not necessary to show that the abuser is in some sort of relationship with the victim. However before granting an interdict the judiciary will certainly need to be convinced that there is a continuous mode of abusive behaviour which is likely to continue. Where the behaviour consists of harassment, domestic violence or stalking, this requirement will be easily met.

"The effect of attaching a power of arrest to an interdict would be that in the event of the interdicted person being suspected of breaching the interdict, a constable would be entitled to arrest the interdicted person, and take them away from the scene" (explanatory notes on the Protection from Abuse (Scotland) Bill, p 3).

The campaigners against physical and mental abuse will no doubt be pleased with the broad coverage of the Act in terms of the types of perpetrators of abuse and behaviour involved. However before this power of arrest can be attached to an interdict at the original application or to an existing interdict, the person seeking protection will have to convince a judge that it is needed to protect them from a risk of abuse. Under s 1 (2) the court must satisfy itself that the interdicted person has had a chance to be heard by or represented before the court and that they are not already subject to a matrimonial interdict under the Matrimonial Homes (Family Protection) (Scotland) Act 1981. They also need to be satisfied that the power of arrest without warrant is necessary for the applicant's protection.

These requirements may be difficult to establish to the judge's satisfaction when there are no witnesses to or corroboration of the applicant's claim of abuse. There must be a causal link between the interdict and risk of abuse. There are detailed rules in the statute regarding the duration (a maximum period of three years

after the power is attached is normal but this period can be extended or recalled), extension and recall of the power of arrest (s 2), rules regarding notification to the police (s 3), and the powers and duties of the police where a breach has occurred (s 4). While these rules will not be given detailed consideration here (see explanatory notes on the Protection from Abuse (Scotland) Bill), there is a need to mention s 4 (1), which sets out the grounds for an arrest by the police (reasonable cause for suspicion of breach and risk of abuse or further abuse). Reasonable cause will be established for the police, e.g. when the person is near or within the area prohibited by the interdict or acting in a way likely to cause damage to a person's property. Section 4 (3) sets out the rights of the detainee (right to be informed of his rights and the right to consult a solicitor). There are minor amendments to the Matrimonial Homes (Family Protection) (Scotland) Act 1981 brought in by s 6 to accommodate this additional route for victims of abuse to obtain interdicts with the power of arrest attached. Otherwise application of the measures covering matrimonial interdicts continues as before.

Conclusion

One commentator writing some time ago painted a rather bleak picture for victims of abuse relying on the assistance of the police for protection from their ordeal: "The police response to domestic violence is inadequate and ineffective; it puts women at risk, and condones a man's violence to his partner; with a few notable exceptions it is at best misguided and ineffectual, at worst illegal and lethal" (Mackay, "Domestic Violence — A Uniform Response?" (1987) 128 SCOLAG 76).

There are undoubtedly situations where this prognosis still holds true. In a number of high profile stalking cases victims who have contacted the police and utilised existing legal remedies such as interdicts have still been killed by their stalker.

Generally we now have a more enlightened and supportive police force and judiciary (Lord Advocate's "Guidelines to Chief Constables on the Matrimonial Homes (Family Protection) (Scotland) Act 1981" (1986) 122 SCOLAG 171), and now the legislative measures are in place to protect victims of domestic violence or abuse. They can bring about the cessation of the unlawful acts perpetrated against them through interim relief. They can achieve peace of mind from the knowledge that repetition can lead to the arrest of their spouse, cohabitee or partner. With regard to other types of abuse such as

stalking, attack by neighbours or harassment, victims may also be able to benefit from the protection of this Act, although ultimately the effectiveness of the legislation will depend on the judiciary's willingness to grant these measures. An evaluation of the use and effectiveness of the Protection from Harassment Act 1997 (Home Office Research study no 203) found that judges in England and Wales were only willing to grant restraining orders (non-harassment orders

in Scotland) under summary procedure. It will also depend on the ability of the police to enforce them. It is estimated that there will be between 2,000 and 5,000 new powers of arrest attached to abuse interdicts, and between 300 and 750 arrests per year for breach of these orders (explanatory notes on the Protection from Abuse (Scotland) Bill, pp 14-15).

NEWS

Appointments

New Court of Session judge

The Queen, on the recommendation of the First Minister, who considered the report of a selection board, has approved the appointment of Mrs Anne Mather Smith, QC as a Senator of the College of Justice, in succession to Lord Gill who has been elevated to the office of Lord Justice Clerk.

New Solicitor General

The Scottish Parliament, on the recommendation of the First Minister, has approved the appointment of Mrs Elish Angiolini to the post of Solicitor General for Scotland following the resignation of Mr Neil Davidson, QC. Mrs Angiolini, regional procurator fiscal in Grampian, Highlands and Islands since 27 July 2000, is the first woman to hold the post.

Chairman of Judicial Studies

The hon Lord Wheatley has been appointed Chairman of Judicial Studies in Scotland with effect from 1 January 2002, in succession to the rt hon Lord Ross, who is retiring at the end of the year.

Advocates depute

Edward G M Targowski, QC, Dorothy R Bain, advocate, and Geoffrey D Mitchell, advocate, have recently been appointed by the Lord Advocate as advocates depute.



General

Criminal proceedings and homicides statistics

Statistics issued by the Scottish Executive show a 7 per cent decrease in 2000 over 1999 in the

number of persons prosecuted in Scottish courts, to 137,000.

Eighty six per cent of persons proceeded against in court in 2000 were convicted. The number of custodial sentences imposed in 2000 was down 5 per cent from 1999 to 15,300 and 82 per cent of custodial sentences were for six months or less. The number of convictions resulting in a community sentence was down 1 per cent from 1999, at 12,400: in 7,400 of these a probation order was made, which was a slight increase from 1999, and 4,700 resulted in a community service order, a decrease of 4 per cent. Sixty six per cent of all convictions resulted in a fine or compensation order as the main penalty, compared with 78 per cent in 1990. The peak age of conviction in 2000 remained at 18.

For the first time statistics have been collected concerning drink or drug related homicides. Of the 88 people accused of homicide in 2000 where drink/drug status was known, 52 per cent were drunk, 13 per cent were on drugs and 9 per cent were both drunk and on drugs.

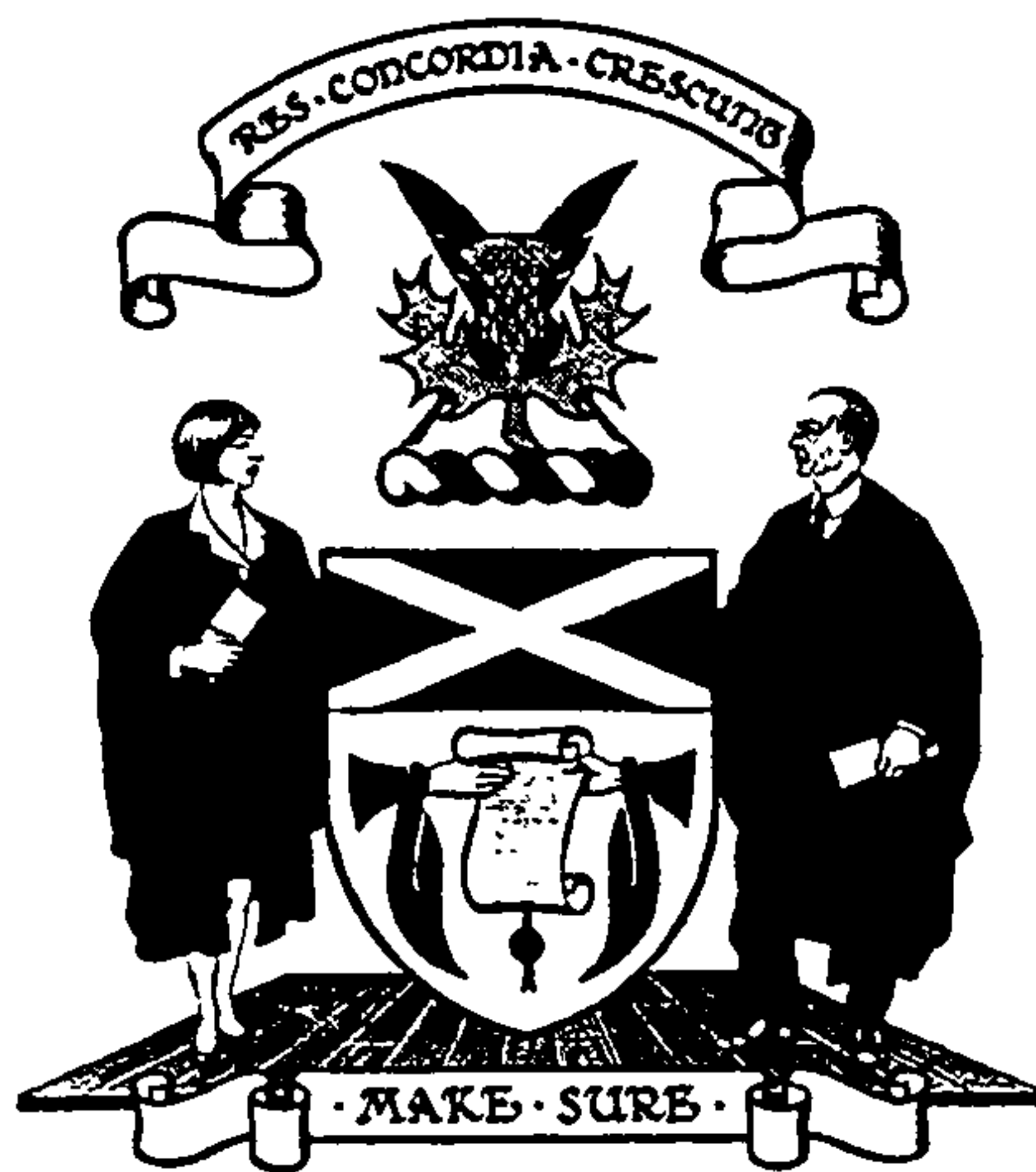
Recorded motor vehicle offences show an overall decrease of 2 per cent to 345,800. The findings are contained in three statistical bulletins available price £2 each from The Stationery Office bookshop.

Community legal service: working group report

A working group established by the Scottish Executive in October 2000 (2000 SLT (News) 286) to examine how a community legal service might be developed in Scotland has published a report containing initial findings and recommendations.

The project built on the research of Professors Glenn and Paterson which resulted in the recent

SCOTTISH
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*Mutuality of Obligation, the Contractual
Imperative in Employment Law?*

Culpable Homicide by Prizefighting

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The Practice of Law; Scottish Law Commission;

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A View to the Future – With a Touch of America

Human Rights Consultancy-llam-bie@btinternet.com; web-site: www.humanrightslawyers.com)

Internet Filing of Self-Assessment Tax Returns

Legislation in the 1999 Finance Act enabled Customs and Inland Revenue to develop new electronic services as an alternative to traditional paper-based communication.

The Commissioners of Inland Revenue laid before Parliament in April this year regulations – The Income Tax (Electronic Communications) Regulations 2000 (SI

2000 No 945) – to support the first Internet-based service provided by the Inland Revenue, for the filing of income tax self-assessment returns.

The Regulations are available on the Inland Revenue web-site: <http://www.inlandrevenue.gov.uk>

Simpler Reporting Arrangements Extended to More Estates

Following new regulations laid before the House of Commons in April this year, the simplified reporting rules now apply to qualifying smaller estates where

the gross value does not exceed £210,000 (previously £200,000). They apply to estates of persons dying on or after 6 April 2000.

The new regulations are:

The Inheritance Tax (Delivery of Accounts) Regulations 2000 (SI 2000 No 967);

The Inheritance Tax (Delivery of Accounts) (Scotland) Regulations 2000 (SI 2000 No 966); and

The Inheritance Tax (Delivery of Accounts) (Northern Ireland) Regulations (SI 2000 No 965).

Copies are on the Inland Revenue's home page www.inlandrevenue.gov.uk

Contributed Articles

MUTUALITY OF OBLIGATION, THE CONTRACTUAL IMPERATIVE IN EMPLOYMENT LAW?

by Sam Middlemiss, Senior Lecturer in Law at the Robert Gordon University

INTRODUCTION

This article involves an analysis of recent judicial decisions which are concerned with the process of identifying and attributing differing contractual status to work arrangements under employment law. The possible difficulties arising from these judgments is fully analysed, particularly the right of workers to be treated as having employee status being compromised.

The process utilised by the courts to determine the important issue of whether working arrangements can be classified as a contract of service (contract of employment) or as a contract for services (contract to engage services of an independent contractor) has always been problematic. This is due to a number of factors, not least, that certain working arrangements have aspects of both type of contract in their make-up. Problems also stem from the uncertainty and vagueness introduced into certain employment arrangements by the contracting parties themselves (particularly the employer).

The difficulty was characterised by leading commentators on

employment law as follows: 'it must be true, that each relationship has a number of characteristics the prominence of which is as variable as the working environment.'¹

Add to this the complexity that has been introduced by the judiciary into the process of determining which contract applies (in fulfilling their role as guardians of the integrity of employment contracts) and you have a recipe for confusion.

THE LEGAL TESTS FOR DETERMINING THE NATURE OF THE CONTRACT

The higher courts have devised for themselves (and by definition the lower courts and employment tribunals) complex legal questions to answer in the context of their deliberations. 'The courts and tribunals have been greatly taxed by the problem of devising criteria to distinguish a contract of employment from a contract for services.'²

The criteria that they have developed take the form of tests, which are applied, to the circumstances of the case to determine the type of contract underpinning

the relationship of the employer and the person carrying out work on their behalf.

The tests are used as a benchmark or legal standard' against which an employment tribunal or court can evaluate a particular claim and determine the contractual basis of the arrangement (control test, entrepreneurial test, organisational test).

This mechanism for resolving this legal dilemma has suffered from a lack of consistency in the decisions of the courts concerning the correct test to apply at a particular time.⁴ Traditionally the courts have used single factor tests such as the control test (considering which of the parties controls the way the work is done) and the organisational test (examining how integral the job is to the organisation)⁶ to determine the issue. The more control exercised by the employer over the manner of doing the job or the more important the task in relation to the activities of the organisation the more likely it will be a contract of service. In recent times the courts have opted for the multiple test, where no single factor is relied on but all the factors will

considered before a decision is reached.⁷

DEFINING BASIS FOR ENTITLEMENT TO EMPLOYMENT RIGHTS

Another difficulty for the courts in resolving this issue is that there are no universally accepted characteristics of an employee and generally statutes which have attempted to define the term fail to identify the essential nature of an employee or employment status.⁸ Statutes are increasingly adopting varied criteria for determining entitlement to different statutory rights.⁹ 'The economic man refuses to be placed in neat legal pigeon-holes.'¹⁰

This can lead to the anomaly that a worker may have the right to specific statutory protection (eg entitlement to the minimum wage) but fail to qualify for employment protection generally.¹¹ This inconsistency of treatment leads to confusion, the employer being left unsure of what rights different categories of workers are entitled to, and the employee in the dark about his contractual or statutory entitlement to legal protection.

While the parties may elect to choose a particular label to cover their relationship this will not be binding on the employment tribunals or the courts. They are the final arbiters of what label should be attached.¹² As this issue is a question of fact rather than law it is difficult for the Employment Appeal Tribunal or the courts to interfere with a tribunal's decision. They can only overturn the tribunal's decision where the employment tribunal has misapplied the law in reaching its decision.

Where the contractual nature of the arrangement is uncertain it will be the responsibility of the courts to determine the correct position. This will then allow them to ascertain the parties' rights and obligations under the common law and statute.

However recent judicial decisions may have resulted in employers being able to effectively limit the number of persons

working for them who will be afforded the status of employee which could result in temporary, casual and atypical workers in an organisation being denied such status (including workers carrying out integral tasks).

DEVELOPMENT OF THE MUTUALITY OF OBLIGATION TEST

Given that this article is largely concerned with the emerging prominence of the mutuality of obligation test in these types of cases it is important to trace the development of this legal standard through examining relevant cases.

In the case of *O'Kelly v Trust House Forte* [1984] QB 90, CA the Court of Appeal emphasised the inapplicability of a single factor test being used to determine this question and concluded that the multiple test was the appropriate test to be applied. This requires the employment tribunal to consider all the factors in the case before reaching a conclusion about the nature of the contractual relationship. However they also highlighted the importance of establishing the existence of mutuality of obligation between the parties. It was decided on the basis that there was no obligation to provide work or accept it where it was offered that a contract of employment did not exist. Lord Justice Dillon in *Nethermere (St Neots) Ltd v Taverna and Gardiner* [1984] IRLR 240, CA expressed a similar view to the Court of Appeal in the *Express* case *infra* in determining the contractual basis of homeworkers. 'For my part I would accept that an arrangement under which there was never any obligation on the outworkers to do work or on the company to provide work could not be a contract of service.'

In *McLeod v Hellyer Brothers Ltd, Wilson v Boston Deep Sea Fisheries* [1987] IRLR 232, five trawlermen working out of the port of Hull were treated as working under a contract for services owing to a lack of mutual obligations (which in this case arose from the fact that they could and did work for

other employers between sailings).

Recently the Court of Appeal in *Lane v Shire Roofing Co Ltd* [1995] IRLR 493, CA, affirmed the use of the multiple test as the correct mechanism for resolving these disputes. While the indications are that employment tribunals and the courts will continue to utilise the multiple test ostensibly, in practical terms it is more likely that a single factor test will dominate their proceedings, as illustrated by these cases. They will require evidence of personal service, namely the existence or non-existence of a mutuality of obligation, before attaching the label of contract of employment to the arrangement. Any doubts that this approach has become the definite one, were removed by the case of *Express and Echo Publications* [1999] IRLR 367.

MUTUALITY OF OBLIGATION, THE DEFINITIVE TEST?

In *Express and Echo Publications v Tanton* [1999] IRLR 367 the Court of Appeal arrived at the conclusion that the existence of an employment contract is dependent on an element of mutuality of obligation and personal service. In this case Mr Tanton along with his employer agreed he would be employed as a driver on a self-employed basis. The contract contained a clause, which allowed for another person to undertake the work on his behalf (and at his expense) where he was unable or unwilling to undertake the work personally. This is commonly known as a substitution clause.

He had relied on this clause from time to time and brought a replacement worker in to undertake his work. On the basis of these facts the courts were satisfied that Mr Tanton was working under a contract for services. They were unwilling to look further at the practicalities of the situation to determine if a mutuality of obligation did exist in the workplace.¹³ They summarised their position thus: 'where ... a person who works for another is

not required to perform his services personally, then as a matter of law the relationship between the worker and the person from whom he works is not that of employee and employer.¹⁴ The implication of this decision is that mutuality of obligation and personal service have become threshold devices to determine entitlement to employee status. Proving the applicability of this threshold standard in a particular case can be frustrated by the existence of an agreement between the employer and his worker that the relationship is covered by a contract for services and the introduction of a substitution clause into the contract (allowing for someone else to undertake the contractual task occasionally in the worker's place).

What follows is criticism of the use of these factors as barriers to employee status.

INEQUALITY IN THE CONTRACTUAL POSITION OF THE PARTIES

In reality it may not be difficult for an employer (with superior economic wealth and social status) to someone undertaking work for them to obtain their concurrence that they should be treated as working under a contract for services. The appeal court in the *Express* case seems to have neglected to consider this self-evident truth although they are certainly not alone. This lack of concern for equality in the contractual positions of the parties is widespread in legal circles and part of what one commentator describes as the market order in contract theory which is characterised in part in the following terms. 'The belief seems to be that, provided that a person has freely consented to the terms of the contract, then there could be no danger that the contract established unjustifiable positions of power.'¹⁵ It is, as if positions of unjustifiable powers over others simply cannot arise within the framework of freely chosen agreements. Part of the justification for this view is that the parties freely enter into a contract on mutually agreed terms

and the parties will both benefit from the transaction and the parties are therefore both equally placed.

In employment contracts the reality is different from this, an employer often being in a superior position to a prospective employee both economically and socially. As a result they can often dictate the terms and conditions of the employment contract or more importantly in this context the nature of the contract which applies to the transaction. The other element in a case, which can create a presumption of self-employment, is a substitution clause and what follows is a discussion of the legal principle of delegation and substitution in this context.

THE SUBSTITUTION CLAUSE AS A BARRIER TO EMPLOYEE STATUS

The High Court in *Ready Mixed Concrete (South East) Ltd v Macdonald and Evans* [1968] 2 QB 497 were willing to accept that contractual arrangements could allow for delegation of the contractual obligation to do work under its terms and still be treated as a contract of service.¹⁶ Mr Justice McKenna was of the opinion that some right to delegate arising under the contract was not inconsistent with employment.

The converse is also true, a contractual arrangement which does not provide the right to delegate work is not necessarily excluded from being treated as a contract for services. 'Common experience suggests that an absence of the right to delegate is not inconsistent with self-employment, but the contract will rarely make express provision as to delegation.'¹⁷

The judgment of the Court of Appeal in the *Express* case is at odds with the view reached by the court in *Ready Mixed Concrete* and could represent a retrograde step in the development of the law in this area. Unscrupulous employers may try to benefit from this legal ruling by utilising substitution clauses in their contracts along with other means to ensure

that their contractual relationships with workers is lacking any element of personal service and therefore is treated as a contract for services.

While it may be important for the employer to have the flexibility to substitute one employee for another in some situations, an express provision should be made for it in the contract. However, there may be other situations where substitution would not be appropriate or desirable, particularly where there is a strong element of *delectus personae* in the hiring decision.

When an employer enters into a contractual arrangement with a worker on the basis that he is self-employed they can introduce safeguards into the contract as to the performance of the service and the quality of the work undertaken. Such assurances will be difficult to obtain in the situation where a person is undertaking work on behalf of the contractor under a substitution clause. Their identity will often be unspecified and therefore unknown, there will be no contractual obligation between the worker and the employer and the nature of their abilities and the honesty and reliability will be unknown to the employer. Terms of health and safety to which the employer could be held vicariously liable to a third party (including their own employees) for a delictual wrong perpetrated by the substitute in the context of their work which causes third parties to suffer harm. Liability could also be extended on the basis that the employer is responsible for engaging the services of a competent contractor and failure to do so makes them legally responsible for the consequences of their actions.¹⁸ It is unlikely that such considerations will persuade employers that it is against their interests to employ their workers on a self-employed basis and many of these problems could be overcome by careful drafting of exclusion clauses in the contract for services.

ENTITLEMENT TO STATUTORY EMPLOYMENT RIGHTS FOR WORKERS

It is important to bear in mind that, in determining entitlement to some statutory rights, it is no longer necessary to establish that the person entitled to the right is working under a contract of service or its equivalent. A good case in point involved a sub post-mistress Ms Bain who ran a small sub post office in a village near Inverness.²⁰ She complained to an employment tribunal that her employer had failed to provide her with the minimum wage as provided for by the National Minimum Wage Act 1998²¹ and this claim was upheld.²² Despite the lowly status of this legal decision it serves as a useful illustration of the consequences of the judiciary adopting a broad interpretation of the definition of a worker to bring an individual or group of workers within the statutory context of an employment relationship for certain purposes.²³ This development may be heartening to atypical workers, affording them limited entitlement to specific statutory employment rights. This process of including the self-employed and other forms of atypical worker within the realms of statutory protection began with equality legislation and health and safety provisions. 'Self-employment is not altogether excluded from the scope of labour law and, moreover, ... statutory intervention can be used to overcome some of the limitations of the common law concept of the employee.'²⁴

CONCLUSION

Employers determined to place their workers on the footing of self-employed, will no doubt (following the decision in the *Express* case) make every effort to ensure the absence of any element of personal service in their contractual arrangements.

The Court of Appeal in *Carmichael v National Power plc* [1998] IRLR 301 were unwilling to accept an employer's assertion at face value that there was no mutuality of obligation and

decided that the correct response would be to analyse whether in practice work was offered by the employer, and if so, whether the offer was accepted by the employee. The workers in this case were employed on a 'casual and as required' basis which was interpreted as meaning that the employer would provide a reasonable share of the work as it became available and subject to the qualification of reasonableness, the applicants would accept the work. On applying this interpretation to the facts the casual workers were deemed to be employees.

On appeal the House of Lords were unwilling to uphold the eminently sensible decision of the Court of Appeal and ruled instead that a prima facie absence of mutuality of obligation in contractual arrangements would inevitably lead the courts to conclude that there was no contract of employment.²⁵ The Lord Chancellor summarised their position in the following manner: 'The parties incurred no obligation to provide or accept work but at best assumed moral obligations of loyalty in a context where both recognised that the best interests lay in being accommodating to each other.' He later stated 'flexibility suited both sides. The arrangement turned on mutual convenience and goodwill and worked well in practice over the years.'

The House of Lords decision in *Carmichael* supports the approach the Court of Appeal in the *Express* case by restricting the right of employment tribunals or courts to interfere with contractual arrangements between the parties where an agreement exists which is characterised by a lack of mutual obligation and evidence is led which shows the arrangement is of some benefit to both the parties.

The combined effect of these legal decisions is to place the emphasis firmly on employment tribunals to apply a single factor test in determining this issue and for the first time provide the employer with a clear indication

of what is needed to satisfy the requirements of this test.

There may be certain developments in this area which may counteract the negative impact of these legal decisions. There is a commitment on the part of the Government to give basic employment rights to everyone except the genuinely self-employed.²⁶ It is apparent that it is sometimes difficult to determine to define what type of worker falls within this heading although the case law may result in many more workers being classified as such. The European Union has expanded the category of person who is entitled to statutory employment rights (from employee to worker) in their legislative measures. This has resulted in United Kingdom legislation having to reflect this change and statutory employment rights applying to a much wider constituency whose entitlement is not dependent on employee status.²⁷ This trend looks set to continue.

Workers on the borderline between a contract of service and a contract for services such as employment trainees, agency workers, casual workers and people working under umbrella or global contracts are now much less likely to be extended employee status. Although the employment tribunals and courts will continue to deliberate over the contractual nature of these borderline occupations they may, as a result of the judicial developments discussed, have to contend with an increased number of claims where the employment status of applicants (and correspondingly their entitlement to fundamental employment rights) is uncertain.

Footnotes

- 1 Rideout, R W, Dyson, J *Rideout's Principles of Labour Law*, 4th ed Sweet & Maxwell, 1983, p 6.
- 2 Brodie, D *The Contract for Work*, *The Scottish Law and Practice Quarterly*, April 1997, Vol 2 No 2, pp 138-148 at p 139.
- 3 Lord Griffiths in *Lee v Chung* [1990] ICR 408 PC preferred the term *indicia*.
- 4 In *Lee v Chung* (above), the Privy Council adopted the entrepreneurial test set out by J Cooke in *Market Investigations v Minister of Social Security*

- [1969] 2 QB 173 instead of the multiple test which was generally recognised as the appropriate test to be applied.
- 5 *Gibb v United Steel Co Ltd* [1957] 1 WLR 668.
 - 6 *Stevenson, Jordan and Harrison Ltd v Macdonald and Evans* [1952] 1 TLR 101.
 - 7 *O'Kelly v Trust House Forte plc* [1983] IRLR 369 CA.
 - 8 See section 230 of the Employment Rights Act 1996 where an employee is unhelpfully characterised as someone who works under a contract of employment and a contract of employment means a contract of service or apprenticeship.
 - 9 The term worker in section 2 of the Working Time Regulations SI 1998/No.1833 is a much wider concept than employee. Also see the definition of worker under the National Minimum Wage Act 1998.
 - 10 Selwyn, N *Selwyn's Law of Employment*, 10th ed Butterworths, 1998, p 30.
 - 11 The Post-Mistress case (note 13) is a good example of this.
 - 12 *Ferguson v John Dawson and Partners* [1976] 1 WLR 1213, CA, *Massey v Crown Life Assurance* [1978] ICR 590 CA, *Ready Mixed Concrete (South East) Ltd v The Minister of Pensions* [1968] 2 QB 491.
 - 13 which was the approach taken by the Employment Tribunal at an earlier stage of this case and the Court of Appeal in the Carmichael case (see note 23).
 - 14 *Express and Echo Publications, LJ Gibson* p 370.
 - 15 Collins, H *The Law of Contract*, 2nd ed Butterworths, 1993, p 18.
 - 16 This was not the case here where the lorry drivers as part of the arrangement could substitute others where they were unable to drive the lorries because of illness and this was treated as a contract for services.
 - 17 *supra* 1 p 7.
 - 18 In teaching there is an expectation that where a teacher is off work owing to illness their colleagues will undertake their work. In *Sim v Rotherham Metropolitan Borough Council* (1987) Ch 216 teachers who were taking industrial action and refused to cover for colleagues who were sick were held to be acting in breach of their implied duty under the contract to co-operate with their employer.
 - 19 *Pinn v Rew* [1916] TLR 451.
 - 20 Bain brought a claim against the Post Office for the minimum wage, 'Sub-post-

- mistress wins landmark Ruling,' Scotland on Sunday*, 26 September 1999, p 4.
- 21 Although it was claimed by the Post Office that she was employed by them as an agent with no personal responsibility to be in attendance and only the need to ensure the service was covered, 'she was treated as someone 'who personally provided a service or work' as per the definition 'of worker in the Act.
 - 22 This ruling is not binding on other courts and tribunals and is likely to be the subject of an appeal given that it could affect 17,500 sub post-masters across the UK.
 - 23 Regulation 2(1) Working Time Regulations SI 1998/No 1833, National Minimum Wage Act 1998.
 - 24 Deakin, S, Morris, G S *Labour Law*, 2nd ed Butterworths, 1998, p 131.
 - 25 *Carmichael and another v National Power plc* (2000) IRLR 43.
 - 26 The best example currently is the National Minimum Wage Act 1998.
 - 27 See for example the definition of worker in Article 2(1) of the Young Workers Directive 94/33/EC which is also used to define the scope of the Working Time Regulations SI.

CULPABLE HOMICIDE BY PRIZEFIGHTING

by Robert S Shiels

The contemporary interest in sport and the law justifies a reconsideration of past events where sport had, for whatever reason, legal implications. Boxing has already been prohibited in some countries and it may yet be in the United Kingdom. A consideration of, for example, prizefighting which preceded boxing may provide some insight into the dynamics of one aspect of sport and the law.

The history of leisure may now properly be considered to be part of social history.¹ That in itself, however, does not negate the interest of others: prizefighting is of relevance to the history of criminal law and public order. The watershed in pugilism was 1867 when the rules of boxing were written by John Chalmers and given an aristocratic gloss by their association with Lord Queensberry. It was about this time that prizefighting began to decline and boxing started to develop.² One must be careful about identifying the time of change for it has been argued that: 'the general decline of prizefighting must not, in any case, be

exaggerated or ante-dated for it remained enormously popular with working men'.³ Contemporary prosecutions may reveal some of the reasons for the decline in the acceptability of prizefighting, as well as providing an insight to judicial views and prosecutorial discretion.

PRIZEFIGHTING

There seem to be two distinct aspects to prizefighting, although in discussion both are often run together: the mode of fighting is a separate matter from the context of the fight. Prizefighting had written rules from the 1740s and those allowed wrestling holds and falls, although these did not allow hitting a man who was down, or punching below the belt. The technique of prizefighting borrowed movement of the feet from swordfighting.

When giving ground became acceptable to spectators and contestants, a bloodier but slower variety of what is now boxing became recognisable. During a prize fight either or both contestants could be knocked unconscious more than once because

their attendants were allowed 30 or 40 seconds in which to bring them round.⁴ The bare-knuckled contests and the rather lax control of the prize fight probably enhanced the dangerous nature of the event and hence the excitement that drew the crowd. The extent of physical injury to participants in prize fights should not be underestimated.

As for the context, Professor George Trevelyn has referred to the 'more variegated social structures and rougher manners' that could be seen in the patronage of the ring in earlier times.⁵ He explained that 'when the date and place of a prize fight had been announced, hordes set out, driving, riding and walking to the spot from all parts of the island... In one aspect these vast outdoor assemblies were festivals of the common people. But the priests of the national cult were fashionable members of the aristocracy. ...' Moreover, 'without aristocratic patronage sporting events would have lost their zest and picturesqueness, and would very soon have degenerated into orgies of brutality and fraud.'

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EDITORIAL

May we begin the 2000 volume by wishing all our readers successful fulfilment of all the hopes and good intentions which must be especially prominent in this of all years.

This year is a highly significant one for the *Scots Law Times*, though it is more by accident than design that changes we have been planning for a few years now are finally coming to fruition as we reach the millennium.

Since its inception the *Scots Law Times* has relied, with a few exceptions, on practising counsel to prepare its law reports. At one time, indeed, a report would not have been accepted in court if prepared in any other way. This was regarded as a necessary authentication of the accuracy of the report as a record of the proceedings.

Times change. Judicial decisions are widely available to the profession and the public, particularly since the launch of the Scottish Courts web site. That does not take away the need for selected and properly summarised and edited law reports, but it does demonstrate that the authentication aspect of the report is now redundant, as it probably has been for some time.

It also has to be recognised that, while many able counsel have given generously of their time and ability over the years, it is not always easy to meet desired deadlines when professional duties take precedence. In addition the necessary in-house editorial checks for every report, and the time to proof and re-read prior to going to press, make it difficult to publish, using this system, with the speed required by today's profession.

The solution we have adopted is to bring the law reporting in house, to be undertaken by the same qualified team who are already preparing *Greens Weekly Digest* copy much more quickly than we could manage when it was done freelance. The same editorial control and scrutiny will operate, and counsel will continue to advise

on which cases should be reported; thus we hope to ensure the same quality that readers have come to expect. Indeed the appearance may have been noted of several reports towards the end of 1999 without the traditional counsel's initials at the end. These are the first fruits of the new system and are offered as evidence of our ability to deliver to these standards.

A number of reports initially prepared by counsel are still in hand for publication in 2000: these will be acknowledged by the use of counsel's initials as before. In addition, we hope shortly to introduce, as an appendix to the News section, a Case Comment section which will provide an opportunity for counsel (and other suitably qualified individuals) to offer a brief exposition of the more significant decisions and their implications. (The reason for adding it to the News section is so as not to delay publication of the reports. Other changes in prospect will, we hope, quite shortly make the News as well as the reports available in digital format.)

Technological change is set to play its part in speeding the production process, and in making the *Scots Law Times* available more quickly in electronic form. Greens have already publicised the fact that the reports on CD-rom will be updated monthly rather than annually, beginning in a few weeks' time. The functionality of the CD will not change meantime; but we shall be working this year to introduce a more sophisticated way of preparing the data which will at the same time permit us to move to a better search engine for the user.

"Exciting" is not an adjective traditionally associated with law publishing, but it is quite a good description of the feeling associated with being part of developments which we hope will bring benefits to *Scots Law Times* subscribers which could not have been imagined even a decade ago.

ARTICLES

Aiding the Discriminatory Act of the Employer

Case Note: *AM v WC* [1999] IRLR 410

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Mr Middlemiss considers the potential for increased

use of s 42 of the Sex Discrimination Act, allowing tribunal applicants to call individuals as respondents in addition to the employer in sex discrimination cases, in light of the recent EAT decision AM v WC [1999] IRLR 410. He believes this would be a welcome development, placing the spotlight on the individual perpetrators of discrimination.

Under s 42 of the Sex Discrimination Act 1975 ("SDA") an action can be pursued against an

AIDING THE DISCRIMINATORY ACT OF THE EMPLOYER

employee for behaviour that is deemed to aid an employer in the perpetration of a discriminatory act (as defined by s 6 of the SDA) and for which the employer is actually or potentially liable (under s 41 of the SDA). Sections 57, 4 and 58 of the Disability Discrimination Act 1995 ("DDA") and ss 33, 4 and 32 of the Race Relations Act 1976 ("RRA") are parallel provisions.

"Complaint may be made of discrimination by an employer as a company but it is important to note that such complaint can be made against any person. Any person who knowingly aids another person to do an unlawful act shall himself be treated as having done an unlawful act of like description and the act of an employee or agent for whose act an employer or principal is liable shall be deemed to aid the act of the employer or principal" (R W Rideout and J Dyson, *Rideout's Principles of Labour Law* (4th ed, 1983), p 343).

In practice it is through the discriminatory act of the employee that the employer is often liable in the first place, and having established that such action is capable of incurring vicarious liability for the employer, to succeed in an action under s 42 it will then be necessary to prove that the same employee assisted in the perpetration of the discriminatory act. If this legal process appears confusing it is largely the fault of convoluted legislative rules which apply in this area. This case note will represent a summary of the present law through a historical review of the law in this area and analysis of the current law (particularly the recent decision of the employment appeal tribunal in *AM v WC* [1999] IRLR 410).

Put at its simplest, an applicant bringing a discrimination case against their employer can co-join an employee or other party in the proceedings where that person has played a significant role in discriminating against the victim. This facility has not been widely utilised in the past because discrimination law is framed in such a way that primary liability for breach of its provisions lies with the employer. "Employers may be liable either personally or vicariously" (S Deakin and G S Morris, *Labour Law* (Butterworths, 1995), p 531).

Employer's primary liability

Legislators responsible for drafting the equality laws proceeded on the assumption that although it will invariably be the discriminatory acts of employees which lead to a discrimination action being brought before a tribunal, these acts in most cases will be undertaken on behalf of the employer (eg discrimination in recruitment, access to promotion, dismissal). Hence most

cases should be pursued on the basis that the employer is vicariously liable.

"By adopting an essentially tortious approach to non-discrimination, the court seems to base the legitimacy of discrimination law on the 'harm principle': an employer cannot discriminate because, in doing so he/she harms others" (N Bernard, "What are the purposes of EC Discrimination Law?", chap 7, p 87, in J Dine and B Watt (eds), *Discrimination Law: Concepts, Limitations and Justifications* (Addison, Welseley & Longman, 1996)).

It will ultimately be up to the applicant to prove that the employer is responsible for the harm suffered in line with the evidential requirement imposed by s 41 of the SDA (RRA, s 32; DDA, s 58), by proving that the behaviour was carried out within the scope of the discriminator's employment, and was "done by the employer as well as by him, whether or not it was done with the employer's knowledge or approval" (s 41 (1)). Section 41 (2) states: "Anything done by a person as agent for another person with the authority (whether express or implied and whether precedent or subsequent) of that other person shall be treated for the purposes of this Act as done by that other person as well as by him."

Since the decision of *Jones v Tower Boot Co* [1997] IRLR 168, CA, it is no longer difficult to prove that most discriminatory behaviour is related to the discriminator's employment (even where the behaviour is perpetrated by a colleague of the victim). In *Burton v De Vere Hotels* [1996] IRLR 596, EAT, it was held that an employer can be liable for discriminatory acts perpetrated against his employee by a third party where the employer is in a position to control such behaviour. Given that it is unnecessary to establish that the employer knew of the discriminatory act then liability under s 41 (1) of the SDA (and corresponding provisions in other Acts) is not usually difficult to prove.

The defence available to the employer under s 41 (3), is that "he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of their employment acts of that description". The employer in establishing this defence may introduce evidence that, inter alia, they introduced policies to outlaw discrimination in its various forms, provided equality training, informed employees fully of equality measures and had in place procedures to deal with internal complaints about discrimination. A combination of all these measures would probably be sufficient to satisfy the employment tribunal that the employer had taken reasonable steps to avoid

AIDING THE DISCRIMINATORY ACT OF THE EMPLOYER

discrimination taking place (Equal Opportunities Commission, Code of Practice, *Equal Opportunities Policies, Procedures and Practices in Employment* (HMSO, London, 1985), p 6 and Commission for Racial Equality, *Code of Practice for the Elimination of Racial Discrimination and the Promotion of Equality of Opportunity in Employment* (Commission for Racial Equality, London, 1994), p 6).

Analysis of an employer's liability in the context of discrimination cases is necessary to understand fully the circumstances in which a victim of discrimination would sue their employer and a fellow employee.

Joint discrimination actions

In *Read v Tiverton District Council* [1977] IRLR 203 a female council worker was refused promotion to the post of chief land charges clerk. Ms Read named Mr Bull, the solicitor to the council, as the respondent to her application and described him as her employer. Once it became clear he had been involved in refusing her promotion the tribunal decided it was appropriate to treat him as a separate but additional respondent to the council. This decision was arrived at through the application of a combination of ss 41 (1), 41 (2) and 42 (1). Both the council and Mr Bull were found liable for discrimination. In his obiter comments, the tribunal chairman was drawn into discussing the burden on the applicant in proving an agency relationship between an employee accused of discrimination and their employer (see s 42 (2)). This is unlikely to be an issue in most cases as proving the vicarious liability of the employer or the employee's involvement in aiding the employer does not require reference to agency principles. The chairman stated that "in any normal case we would expect an employer to be ready to accept responsibility for the acts of his employees. In these cases the addition of a second respondent would in practice, we think, prove largely nominal" (p 204).

In *Enterprise Glass Co Ltd v Glass* [1990] ICR 787 a harasser (and supervisor) was ordered to pay £750 to his victim of sexual harassment (his subordinate) and the employer was ordered to pay £1,000, to compensate her for their failure to take action in response to her complaint of sexual harassment.

In these cases the employment tribunals experienced little difficulty in accepting that both respondents, the discriminator and the employer, were liable through application of the legal principles in ss 41 and 42 of the Sex Discrimination Act 1975.

In *AM v WC* [1999] IRLR 410, a woman

police constable brought a sexual harassment case against her employer and the alleged harasser, her sergeant. An interesting twist was introduced into the proceedings when it was successfully argued before an employment tribunal that as the co-joined respondent was the perpetrator of the discriminatory act he could not aid and abet his own act as per s 42 (1) of the SDA and therefore could not be liable. On this reasoning liability could only arise against an individual under the Act where it was the employer himself that had committed the discriminatory act and the employee merely assisted them in the process. The EAT recognised that such an interpretation would severely limit the coverage of equality legislation and defeat the purpose of the legislation, and held that it was an incorrect application of the law.

The correct approach is to determine whether the employer is vicariously liable for the discriminatory act under s 41 (1) and, if he is, whether the defence under s 41 (3) applies and exonerates him. However even if the employer proves he has a defence, provided vicarious liability has been established the perpetrator of the discriminatory act may be liable under s 42 (1) on the basis that they assisted the employer in committing an unlawful act. "The result of this decision is to make clear that wherever the employer is presumptively liable for an act of discrimination, the individual employee who committed the act of discrimination is also liable. Individual liability is not entirely freestanding: the act of discrimination must be such as would render the employer liable (though it may be possible to establish this without bringing proceedings against the employer). Conversely, individual liability is not entirely contingent on an employer's liability, to the extent that it remains even where the employer has established a reasonably practical steps defence for itself" ([1999] IRLR, p 394).

It is clear that it is possible to pursue an action against an employee together with the employer under any of the Acts established to provide protection against discrimination. Continued success in pursuing actions against the perpetrators of discriminatory behaviour may have the long term effect of deterring prospective discriminators. "The wider the range of situations which are seen to be caught by the legislation, of the narrower the range of justifications in the linguistic sense, the more likely the law is to have a 'chilling' effect — to the extent that it is ever able to have such an effect — on sexually or racially discriminatory social conduct" (see Dine and Watt, *supra*, chap 5, N Bamforth, "Setting the

Limits of Anti-Discrimination Law: Some Legal and Social Concepts", p 56).

Conclusion

It is difficult to anticipate the type of discrimination case in which an employee will want to pursue a joint action, but it seems logical that it will happen in cases where the personal affront to the victim caused by the perpetrator's action is greatest, and these are cases involving harassment or bullying. This is borne out by the type of cases which have been pursued in the past. Given that vicarious liability of the employer in these areas has expanded dramatically to encompass acts by colleagues and third parties it is reasonable to assume that there are likely to be more of these cases being brought before employment tribunals. While this change will generally be of benefit to applicants in discrimination cases the employment tribunal will need to be on its guard that it is not used as a device by the applicant to settle personal grudges against other employees. Where individuals are directly involved (as co-respondents) in the proceedings they will be informed before the hearing of the precise nature and detail of the case against them, and they are entitled to be present during the full hearing and to hear the entirety of the evidence presented. They will be in a better position to prepare their evidence and themselves for the tribunal proceedings than if they were merely witnesses.

It is difficult to anticipate the reaction of employers to this development. While it may suit some employers to share the blame for the discrimination (with their employee or a third party) and the consequences of the tribunal ruling, others may be disadvantaged by the inclusion of one or more of their employees in the proceedings. The complications involved in defending such a case are likely to persuade the employer that legal assistance is necessary. On a practical level employers may feel inclined to pay

for the legal representation costs of the co-joined employee, and indemnify them for any compensation they are ordered to pay, where they are satisfied the employee was acting in the scope of their employment.

Where they are attempting to reach a settlement prior to an employment tribunal hearing informally, or through the auspices of ACAS conciliation or compromise agreements (see s 203 of the Employment Rights Act 1996 as amended by s 9 of the Employment Rights (Dispute Resolution) Act 1998), their efforts may be thwarted where a co-respondent feels unable to agree to settle because of feelings of personal resentment at the accusations levelled at them.

The possibility of additional financial costs involved for the employer and the uncertainties surrounding the testimony of the co-respondent (particularly in relation to the context of the discriminatory act) may combine to increase anxiety for them. As far as the co-respondent is concerned they will become more of a focus for the attention of the court which will increase the pressures involved in a tribunal hearing. Where they are not helped financially by the employer they will face the prospect of paying their own legal costs plus any damages awarded against them. The employer may also decide to institute disciplinary action against them in respect of their discriminatory behaviour.

As a result of the *AM v WC* case there is an increased likelihood that employees that are subjected to discriminatory behaviour by other employees will pursue an action against them, as well as their employer. To conclude, it is a welcome development (at least for the applicant in discrimination cases) which will ensure that the behaviour of the party responsible for discrimination will be placed in the spotlight in legal proceedings, and may in the long term have a deterrent effect on potential discriminators.

NEWS

Appointments

New sheriffs

On the recommendation of the First Minister the Queen has appointed the following all Scotland floating sheriffs: Craig Caldwell, advocate; Samuel Cathcart, advocate; Professor Douglas J Cusine, solicitor; Peter Gillam, solicitor; Isobel G McColl, advocate; Neil J Mackinnon, advocate; Derek C W Pyle, solicitor; Linda M Ruxton, procurator fiscal; Rajni

Swanney, solicitor; William J Totten, advocate; Alfred D Vannet, regional procurator fiscal; Thomas Welsh, QC.

Ministers have also approved the transfers of Sheriff Kenneth Ross, currently a floating sheriff based at Linlithgow, to a permanent post at Dumfries, and Sheriff James Friel, currently a floating sheriff, to a permanent post in Glasgow in succession to Sheriff Gerald Gordon, QC, who retired in November.

SCOTTISH
LAW
GAZETTE



The Reform of UK Competition Law
Determining Roof Obligations in the Tenement
Tower Boot Re-Visited: The Impact Continues
A Revolution in the Public Interest
Lawyers and Money Laundering
Cobblers' Bairns! Financial Services for Members
Craig and Bentley – What Would the Position
Have Been in Scotland?

Specialist Columns:

Committee News; Company Law; Criminal Law;
Family Law; International Criminal Law;
Parliament; The Practice of Law; Scottish Law
Commission; Selected Scottish Cases; Taxation;
A View to the Future – With a Touch of America

Scheme A to be applied (clause 4) unless provision was made (under clause 5) for use of Scheme B. Specifically the roof of the tenement would fall to be regulated as part of 'Scheme property' (rule 1.2(iv) of Scheme A and rule 16.1(iv) of Scheme B). Clause 12(1) of the Bill provides that: 'The owner of any part of a tenement building being a part which provides, or is intended to provide, support or shelter to any other part shall maintain the supporting or sheltering part so as to ensure that it provides support or shelter'. Only insofar as it was not reasonable to do so, having regard to all the circumstances (and including, in particular, the age of the tenement building, its condition and the likely cost of maintenance) would such obligations cease to be applicable

(clause 12(2)). Assuming the roof were owned in common such obligations would bind all the *pro indiviso* owners of the tenement. These duties would be enforceable by any owner of a part of the tenement who is or would be directly affected by any breach of those duties. But, presumably to reconcile this provision with those introducing the management schemes, it is provided (clause 14) that if work is carried out under section 12 the owner meeting the cost of that work shall be entitled to recover from any other owner the share of the cost to which he would have been liable under the management scheme involved. But (coming almost full circle!) rule 5 of Scheme A – dealing with apportionment of liability for arising costs – requires continuing refer-

ence to the titles involved; if they provide that the full amount of any costs is to be met by one or more of the owners of the tenement those provisions must govern (rule 5.2); if those title provisions do not entirely govern liability for the full costs they must be followed insofar as they apportion the costs (rule 5.3); and, otherwise, proportionate allocation is to be made (rules 5.5-5.8).

CONCLUSION

Agents will, therefore, have to continue to have proper regard to what the governing titles may provide; both upon enactment of such provisions and, more importantly for current purposes, in the meantime, proper examination of titles must remain part of the essential duties incumbent upon the prudent conveyancer.

TOWER BOOT RE-VISITED: THE IMPACT CONTINUES

by Sam Middlemiss, Senior Lecturer in Law, Robert Gordon University

In *Jones v Tower Boot Co. Ltd* (1997) IRLR 168 the Court of Appeal took the opportunity to re-interpret the meaning of the statutory definition of vicarious liability (set out in section 32 of the Race Relations Act 1976, section 41 of the Sex Discrimination Act 1975) ensuring that employers could be held accountable for the discriminatory acts of their employees, even where such acts are not carried out directly 'in the course of their employment'.

While this change applied to all types of sex or race discrimination cases, it has impacted most significantly on cases of harassment, where the harasser is a supervisor or co-worker of the victim.

The issue of what acts are, and are not, perpetrated within the course of someone's employment is not always clear, and will be dependent on a number of factors which will be considered by tribunals. Such factors are, the relationship between the two parties, the nature of the employment of the perpetrator, any relevant poli-

cies and instructions given to employees, the locality and time of the incident and the degree of control exercised by the employer over the party's actings. LJ Waite in *Jones* summarised the position thus:

'The application of the phrase will be a question of fact for each industrial tribunal to resolve, in the light of the circumstances presented to it, with a mind unclouded by any parallels sought to be drawn from the law of vicarious liability in tort.' Although he makes it clear that it should be interpreted in the sense of everyday speech, little guidance is given beyond this as to the parameters of employer's liability in this context.

In the racial harassment case, *Burton v De Vere Hotels* (1996) IRLR 596, the EAT had to determine whether an employer could be vicariously liable for the discriminatory acts perpetrated against his own employees by third parties, not in his employment. The crucial factor for the

EAT was the extent to which the employer could have controlled the behaviour of the third party. The rationale behind their decision of the EAT is convincingly presented in the judgment of Justice Smith, who argued that:

'The tribunal should ask themselves whether the event in question was something sufficiently under the control of the employer that he could, by the application of good employment practice, have prevented the harassment or reduced the extent of it. If such is their finding, then the employer has subjected the employee to the harassment.' Although the issue of control in *Burton* related to the actions of third parties, it is also relevant to consider whether an employer can be deemed to be in control of the actions of his own employees who are undertaking discriminatory acts against co-workers, and the extent to which this is relevant in these cases. Where the harassment is carried out within the workplace and during the normal working day,

the employer can readily be expected to be in control of the employee's actions, although the situation can be more difficult where the perpetrator is working outside the workplace. It might reasonably be assumed that discriminatory acts perpetrated outside working hours, cannot be attributable to an employer in this context. In *Waters v Metropolitan Police Commissioner* (1997) IRLR 589 a female police officer was raped by a colleague in off-duty hours at her place of residence. This act was clearly outwith the control of the employer and outside the scope of the perpetrator's employment. In other cases the issue may be less clear. In *Stubbs v Chief Constable Lincolnshire Police and others*, 9 September 1997 Case No. 38395/86, a chief constable was held liable for acts of sexual harassment by a male officer perpetrated against a female officer

in a public house. The employer was not in control of the person's actions (and under the common law this would be treated as an independent act of the employee); however the harassment was still held to be within the scope of the harasser's contract of employment, as the incident would not have happened, but for the applicant's work. In *Waters* the Court of Appeal took a contrary view: 'The man was a visitor to the appellant's room at a time and in circumstances which placed them in no different position from that which would have applied if they had been social acquaintances only.'

The tribunal in *Stubbs* was clearly influenced by events occurring previously to the pub incidents in question, although they were satisfied that the incidents 'were connected to the work and the workplace'. Although this

decision, emanates from an industrial tribunal and is therefore not binding on other tribunals, it can offer an insight into the direction of future decisions in this area. While the element of control has never been a decisive factor in these cases, it should be a consideration, to ensure that the reasonable bounds of employer accountability in this area are not exceeded. Even where the control element is not considered in determining whether a discriminatory act is carried out in the course of someone's employment, the degree of control exercised over the situation or the employer's inability to control the harasser's actions could be introduced by an employer as part of their defence under section 41(3), that they took such steps as were reasonably practicable to prevent the employee from doing the act.

A REVOLUTION IN THE PUBLIC INTEREST

(Contributed)

INTRODUCTION

Significant changes in neighbouring legal systems cannot in the modern era be ignored, particularly with comparable economic forces at work. The publication in June 1998 of the paper by the Lord Chancellor's department *The Rights of Audience and Rights to Conduct Litigation in England and Wales (The Way Ahead)* is important in several respects for Scots lawyers.

First, if legislation changes the rights of audience for lawyers in England and Wales then it is likely, in the context of a United Kingdom, that similar legislation would follow for Scotland. Secondly, and alternatively, if such changes for England and Wales are not implemented in Scotland, in the context of a United Kingdom, there would be major differences as between the respective jurisdictions.

THE PAPER

The Lord Chancellor, Lord

Irvine of Lairg QC, commented in a foreword to his departmental paper that the Government is committed to a modern, efficient and fair system of justice, which operates *in the public interest* (emphasis added). Having regard to other similar changes, the Government was not satisfied that the present state of affairs is in the public interest: 'We accept that entry to the legal profession needs to be controlled, in order to ensure the maintenance of high standards which protect the public. But the right to maintain properly high entry standards to a profession must not be misused to impose restrictive practices for the benefit of those already established in the profession.'

The Government believed that 'unnecessary and unjustified obstacles' prevented solicitors and employed barristers from obtaining and exercising rights of audience in the higher courts. The view of the Government was that 'all qualified barristers and quali-

fied solicitors should in principle have the right to appear in any court. It is proposed that all solicitors and all barristers should have full rights of audience before all courts which they will be able to exercise subject to meeting any additional training requirements imposed by their professional bodies.

The new rules put forward by the professional bodies will cover the additional training criteria, and rules of conduct will be subject to approval by the Lord Chancellor.

The legislation will also provide for designated judges who will be consulted on any change, but the veto (existing in the present but more limited legislation) is to be abolished. Further, the Advisory Committee on Legal Education and Conduct will also be abolished and replaced with a Legal Services Consultative Panel designed to give advice to the Lord Chancellor in response to requests.

EDITORIAL

As the year draws to a close it is time to reflect on some of the matters we have covered in the last twelve months: the cases completed and those which won't go away; the legislation passed and yet to take effect; and the wider developments in the field of Scottish criminal law and procedure.

1998 was a year redolent with major case law: it started with *Fox* (corroboration) and approached its end with *Salmon and Moore* (misuse of drugs). In the Spring there was *Campbell and Steele* (fresh evidence), a case which the Secretary of State has just refused to refer back to the appeal court. This is one which may well end up before the new Review Commission, the members of which have just been appointed and which starts its work in April next year.

Two major pieces of legislation have received the Royal Assent but have not yet been commenced: the *Human Rights Act 1998* and the *Scotland Act 1998*. The impact of the former on criminal practice is hard to overestimate; and while the Scottish Parliament will have legislative competence to deal with most matters of criminal law and procedure, its measures (and the acts of Scottish Ministers) must be in conformity with Convention rights even before the general commencement of the Human Rights Act.

What else faces the criminal lawyer? The way cases are prepared and presented may well change in 1999 when the new legal aid fee structure starts to bite. One can only hope this does not result in the lessening of standards of practice. With so much new over the horizon, there remains the need for highly professional legal services. It has to be doubted whether a strike of criminal legal aid lawyers will enhance the profession's reputation.

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PROTECTION FROM HARASSMENT

The Harsh Reality in Scotland

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Introduction

In England and Wales the police and the Crown Prosecution Service, in furtherance of their role of protecting the rights of victims of stalking and similar aberrant behaviour, were recently given extended powers which can be utilised against stalkers or harassers, either to punish them, or more importantly, force them to cease their criminal activities (ss. 1, 2, 4 and 5 of the Protection from Harassment Act 1997). The offences created were criminal harassment (s. 2, which is a summary offence) and putting people in fear of violence (s. 4, which is an indictable offence). In Scotland, these criminal offences were not introduced, on the basis that stalkers could already be prosecuted for common law crimes, such as breach of the peace, which would achieve the same purpose (for a contrary opinion to this see Mays, Middlemiss & Watson, "Every Breath You Take...Every Move You Make"—Scots Law, The Protection from Harassment Act 1997 and the Problem of Stalking", 1997 J.R., Pt 6, pp. 331-354). This article identifies the problems associated with enforcing criminal sanctions against stalkers in Scotland, through analysis of a recent case.

Criminal provisions in the Protection from Harassment Act 1997

What was provided under section 8 (5) of the 1997 Act was the right of the court in Scotland to grant a non-harassment order "requiring the defender to refrain from such conduct in relation to the pursuer as may be specified in the order for such period (which includes an indeterminate period) as may be so specified."

This will only be granted where someone has been found guilty of a criminal offence, involving a course of conduct which falls within the definition of harassment in section 8 of the 1997 Act (the definition will be given detailed consideration when civil remedies are examined later in the article). Under section 9, where someone breaches a non-harassment order they will be guilty of a criminal offence and liable to a maximum sentence of five years imprisonment and/or a fine. The courts thus have a legal device

at their disposal, which can be utilised to combat stalking and other associated behaviour, provided the authorities responsible for administering and enforcing the criminal law decide to prosecute the stalker for a common law crime. "Albeit that breach of the peace is a flexible enough crime to embrace the activities involved in stalking, nonetheless it is perceived as relating to less egregious conduct; it fails to convey the gravity of the nature and horror of much stalking activity. Prosecutable discretion and court sentencing flexibility may be viewed as a means of reflecting the variants of stalking behaviour, but such an approach offers imprecision and uncertainty" (Mays, Middlemiss and Watson, p. 350). The truth of this statement is clearly demonstrated in an unreported case of harassment to be found under the headline of "Case against harassment puts Scots law on trial", *The Scotsman*, November 14, 1998 at p. 5.

It is suggested that the particular sheriff court missed an ideal opportunity to demonstrate that the common law offence of breach of the peace could be utilised effectively by the courts to protect victims of stalking. The court should arguably have issued a non-harassment order against the convicted stalker, who (over a period of 21 months) made the life of his victim a misery. It was established that the accused followed and harassed his victim, entered her workplace and issued verbal threats (which was captured on video) and made threatening gestures toward her. The victim had been forced to leave two jobs because of the stalker's actions and suffered from clinical depression. The stalker had already been convicted on two separate occasions for harassing this victim. The sheriff merely re-imposed the bail conditions which had banned him from approaching his victim for six months, and his sentence was deferred for good behaviour for six months. In the newspaper article, David McKenna, deputy director of Victim Support Scotland, was quoted as saying: "This just doesn't go anywhere towards reassuring the public that the intimidation of vulnerable victims is taken seriously by the courts."

Civil remedies under the Protection from Harassment Act 1997

The Act provides for a civil delictual action for harassment, which is generally available to a victim of stalking. Not only can such a person be awarded damages, but he/she can also obtain an interdict or interim interdict against the tormentor to restrain him from stalking (s. 8).

The onus of proof in a civil case, is that, on the balance of probabilities the stalker pursued a course of conduct which amounted to harassment, in that it (a) was intended to amount to harassment; or (b) occurred in circumstances where it would appear

to a reasonable person that it would amount to harassment of her. The 'conduct' referred to in the 1997 Act can include speech, and causing the victim alarm and distress, although the term 'continuous conduct' requires stalking on two or more occasions. In England and Wales under section 3 of the 1997 Act it is possible to obtain a warrant for the arrest of the stalker when he does anything which is prohibited by an injunction, but there is no corresponding provision in the Scottish section of the Act, although breach of interdict is under Scots Law punishable by fine or imprisonment.

"Breach of interdict constitutes a challenge to the authority and supremacy of the court and is punishable by admonition, censure, fine or imprisonment." (Robinson, *The Law of Interdict*, Butterworths, (2nd ed., 1994) p. 168). While the civil remedy can to a limited extent recognise the degree of harm suffered by the victim and provide remedies to offset it, stalkers will be unlikely to be deterred from continuing to stalk their victims, or where they are restrained from doing so, switching their unwanted attentions to someone else.

Conclusion

The case referred to does not represent a binding legal authority, and it could be argued that it is not worthy of serious attention.

However it is indicative of an apparent unwillingness on the part of the judiciary and prosecuting authorities to treat this matter seriously. The introduction of statutory offences (the same or similar to those in England) would not only underline the importance of criminalising this form of behaviour to the enforcement authorities and the judiciary, but also send a message to stalkers that they will face serious criminal penalties when they are found guilty of acting outwith the confines of socially acceptable behaviour. There will always be stalkers who will be undeterred by such a threat, although the consolation for their victims would be that the law can provide them with genuine protection.

MISUSE OF DRUGS

Scope of Statutory Defences

The recent opinion of the Appeal Court in the two cases of *Salmon and Moore v. H.M. Advocate* (November 13, 1998, as yet unreported) should be essential reading for any practitioner dealing with a case brought under either section 4(3)(b) or section 5 of the Misuse of Drugs Act 1971, where it is sought to run a statutory defence under section 28. For the first time in Scotland, the court has

embarked on a detailed analysis of both these elements together: what does the Crown require to prove in such cases and how may the accused avoid conviction by invoking section 28(2) or (3)? Of these subsections of section 28, little has previously been heard of the former, but the court makes it clear that its scope differs from the latter.

The two appeals before the Court each concerned the adequacy of directions given by trial judges and provided an opportunity for revisiting this area of drugs law. But how each appeal was finally decided is of rather less interest for present purposes than the extensive exercise of statutory interpretation which was carried out, under reference to a number of examples of how in practice the various points might arise and how, in such eventualities, a trial judge or sheriff should direct the jury. On the questions of onus of proof, the court's view was extremely clear.

Taking section 5 first, whether it is a case of simple possession or possession with intent to supply, the Crown must prove knowledge and control of the substance, which is in fact a controlled drug. More particularly, in a "container" case, the Crown must prove not just knowledge and control of the container, but also: (a) knowledge that there was something in the container; and (b) that it was in fact a controlled drug. However, it is not necessary for the Crown to prove that the accused knew that the container contained drugs. If the accused claims that he thought the container over which he had control contained something not a "substance or product", but that he neither knew, suspected nor had reason to suspect that it was a controlled drug, then under section 28(2) he is entitled to be acquitted.

Where however, he accepts that he knew the container had in it a "substance or product" (for example, tablets of some sort), but that he neither believed, nor suspected, nor had reason to suspect that the "substance or product" was a controlled drug, then his acquittal will follow under section 28(3)(b)(i). Thus, the two statutory defences are designed to deal with different situations, something which had not previously been properly appreciated.

Turning to section 4(3)(b), again it is enough for the Crown to prove that the accused knew he was concerned in the supply of something and that it was in fact a controlled drug. But he can avail himself of the defence in section 28(2) if there is evidence that he did not know nor suspect nor have reason to suspect it *was* a controlled drug; and likewise of the defence under section 28(3)(b)(i) if he claims that he did not believe, nor suspect nor have reason to suspect that the "substance or product" in which he was concerned in the supply was a controlled drug under the 1971 Act.

EDITORIAL

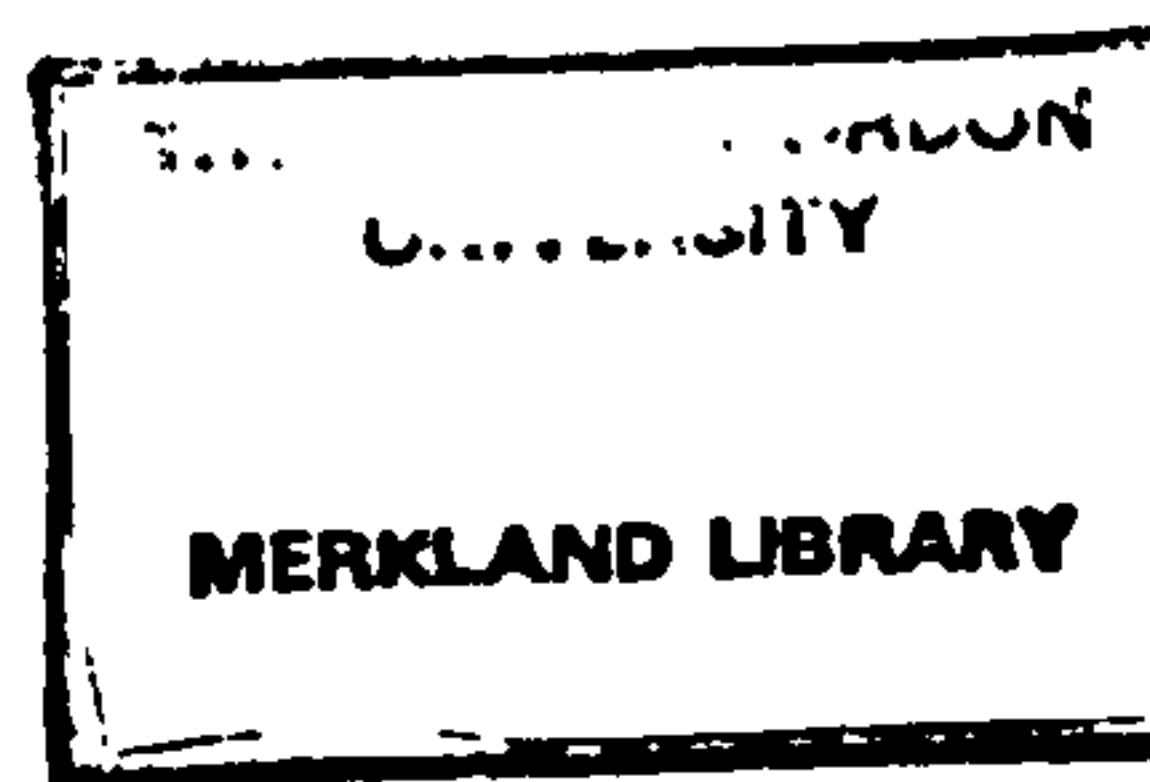
As a rule, employment lawyers and their clients are equally bewildered by the absence of legal aid in industrial tribunals.

Employment rights continue to increase in number and complexity, not least because of the arrival of a Labour government. Cameron Fyfe deals with this issue in a short article on p.6, stressing a point of which we are all too well aware – that financial constraints tend to dictate that many applicants are left unrepresented at tribunals. In the majority of cases the assistance of a legal representative will greatly enhance the parties' prospects of success.

It is a basic truth that tribunals operate in a procedurally flexible way. But the current policy of denying legal aid ignores the complexity of the substantive law in the field. We await the outcome of this test case with interest.

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NEW LEGISLATION

Harassment: Implications of New Statutory Controls

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The Protection from Harassment Act 1997 (c.40) received the Royal Assent on March 21, and certain provisions are due to come into force on June 16 by order (*c.f.* S.I. 1997 No. 1418, just published at the time of going to press). See also June issue of *Crim. L.B.* 27-2

The Act was primarily intended to deal with the problem of stalkers and similar obsessives by imposing criminal liability on them, and by providing civil remedies for their victims. It follows hard on the heels of section 4A of the Public Order Act 1986 (as inserted by s.154 of the Criminal Justice and Public Order Act 1994), which makes it a criminal offence in England and Wales to intentionally harass, alarm or distress someone, whether during the course of employment or elsewhere. Unlike the Public Order Act 1986, however, the Protection from Harassment Act 1997 does have application in Scotland (ss. 8-11).

From an employment law perspective, the Act provides civil remedies for victims of harassment of any kind (including sexual or racial harassment, bullying, or harassment on the grounds of disability), and it is these remedies (damages and interim interdict) which will make the new provisions attractive to victims of this type of behaviour.

Nature and scope of the civil offence

It is unlawful for a person to pursue a course of conduct which amounts to harassment of another and "is intended to amount to harassment of that person" (s. 8(1)(a)); or, "occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person" (s. 8(1)(b)).

Under the Act, the victim must prove that the harassment or bullying was intentional or, alternatively, that a reasonable person would view the behaviour as harassment. It cannot be clear what the "reasonable person" test entails in this context until the issue has been judicially considered.

Fortunately, there is no requirement to prove that the behaviour involves inequality of treatment on the basis of sex, race or disability (a fundamental issue in statutory discrimination claims; *c.f.* *Stewart v. Cleveland Guest (Engineering) Ltd* [1994] I.R.L.R. 440, EAT).

The phrase, "course of conduct" (s.8(3)), involves the requirement that the behaviour must take place on at least two occasions, thus clearly excluding cases like *Bracebridge Engineering v. Darby* [1990] I.R.L.R. 3, EAT, *In situ Cleaning Co. Ltd v. Heads* [1995] I.R.L.R. 4, EAT, and *De Souza v. Automobile Association* [1986] I.R.L.R. 103, CA, involving singular incidents of harassment.

The term "conduct" includes "speech" and by definition encompasses verbal harassment. The term "harassment" includes behaviour that "causes the person alarm or distress" (s. 8(3)).

Most forms of harassment or bullying which involve a continuous mode of behaviour will fall within the definitions of the Act (*Jones v. Tower Boot Co. Ltd* [1997] I.R.L.R. 168, (1997) 147 N.L.J. Rep. 60; *Dobbin v. Denholm Ship Management*, Case No. S/5309/1094).

The Civil action

It may not be difficult for a victim of harassment to establish a case against their harasser under the 1997 Act, unlike under the Sex Discrimination Act 1975 or the Race Relations Act 1976 according to which a case can be pursued only where it can first be established that the employer is vicariously liable for the employee-harasser's actions.

Defences

Although defences are available to the harasser under section 8, they apply in limited circumstances only. The best defence in most cases is likely to be that the course of conduct "was, in the particular circumstances, reasonable" (s.8(5)) - although this may be difficult to establish in cases of harassment in the course of employment.

Interim interdict

The advantage to a victim in pursuing this civil action, as opposed to any other civil actions available under statute or the common law, is that the 1997 Act specifically provides (s. 8) that the remedy of an interdict, or more importantly in this context, an interim interdict, may be granted.

The latter judicial decree can be utilised quickly and effectively to restrain the actions of the harasser and is generally unavailable as a remedy in other civil actions in this area: being provided by no other relevant statute (neither the Employment Rights Act 1996, Sex Discrimination Act 1975, Disability Discrimination Act 1995, nor Race Relations Act 1976), and tending to be unavailable in common law actions, particularly contractual claims, on the basis that the employment relationship is a personal relationship which cannot be enforced by a decree of the court, except where the breach of contract by either party has not affected the position of trust and confidence between them:

c.f. Irani v. Southampton and Southwest Hampshire Health Authority [1985] I.C.R. 590, [1985] I.R.L.R. 203, Ch.D.

Non-harassment orders

Where the harasser or bully is convicted of a criminal offence under the Act, the prosecutor may apply to the court for a non-harassment order. Where granted, it will have the effect of restraining the unlawful behaviour of the offender. It will be granted only where it is necessary to protect the victim from further harassment: see section 234A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 11 of the 1997 Act.

Wider Application?

While the Protection from Harassment Act 1997 is intended to protect individuals from the unwelcome attentions of stalkers or other persons infringing their right to privacy of person, it may have a wider application.

Where it is accepted that victims of harassment or bullying in the workplace are entitled to pursue the civil remedies provided by the legislation, they will have an effective means of directly pursuing a civil action against their harasser, and, for the first time, will be empowered to bring about the cessation of the behaviour (essentially what most victims want), where the courts are willing to grant an interim interdict to restrain the behaviour of the bully or harasser.

Victims of continuous harassment will no longer have to resign from their job to free themselves from oppressive behaviour – clearly a welcome development.

Dignity at Work Bill 1997

The Dignity at Work Bill, which aims specifically to render bullying at work unlawful, failed to be enacted prior to the dissolution of Parliament, but may now re-emerge (it has been passed by the Lords and had its first reading in the Commons on February 12).

UPDATE

G. Ian McPherson

Head of Legal Services, Strathclyde Police

Scottish Appeals to the House of Lords

Appeals to the House of Lords have been presented in —

(1) *City of Glasgow Council v. Zafar*, 1997 S.L.T. 281, and

(2) *West Dunbartonshire Council v. Wallace*, 1997 S.L.T. 315.

Notwithstanding the case citations in the *Scots Law Times*, regular readers of this column will recognise the appeals as those—

(1) against the Second Division's opinion of July 12, 1996 in *Zafar (sub nom, Strathclyde Regional Council v. Zafar)* in E.O.R., 31, and *sub nom Glasgow City Council v. Zafar* at [1997] I.R.L.R. 229; 1996 G.W.D. 30.- 1823; E.O.R. 72, March/April 1997 at 45-46; and IDS Brief 587, p.10 (April 1997)). And,

(2) against the Second Division's opinion of July 31, 1996 in *Wallace (sub nom Strathclyde Regional Council v. Wallace)*, [1996] I.R.L.R. 670 and 1996 G.W.D. 31- 1877).

Glasgow City Council v. Zafar

Interestingly, I.R.L.R. editor, Michael Rubenstein, commented in his April 1997 "highlights" at 1997 I.R.L.R. 198-199, in the following terms:

"It is understood the case is to go to the House of Lords. This is regrettable. The appellant appears singularly unmeritorious, having been found to have committed acts of sexual harassment 'of the most distasteful and unacceptable kind', and the legal arguments are far from compelling. Experience suggests that such circumstances heighten the risk that the appeal will produce general principles giving a restrictive interpretation to discrimination law".

Equal Pay cases against the former Strathclyde Regional Council

Fowler v. Strathclyde Regional Council

On January 13 and 14, the Glasgow Industrial Tribunal (Chairman: Mr A. McArthur) heard submissions from counsel for the respondent employers in *Fowler*, the equal value case (joint cases) in which depute principals of outdoor centres are seeking equal pay for work of equal value, citing assistant head teachers of residential schools as comparators.

After four days, the tribunal adjourned submissions (on both subss. 1(6) and 1(3) of the Equal Pay Act 1970) to April 17 and 18. Submissions concluded on April 18. The industrial tribunal's decision has yet to be promulgated, but will be reported in due course.

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Reid was not concerned with the procedure to be followed by the police, the writer cannot see that this is so. The decision in *Reid*, it is submitted, was that the police have nothing at all to do with any explanation given by the accused.

It is the writer's respectful suggestion that the reasoning in the *Reid* case is a better interpretation of the requirements of the statute than in *Docherty*. The crucial difference between the two decisions is that *Reid* recognises that the police cannot determine whether an explanation is satisfactory unless it is capable of "instant verification". Surely it does not matter what the police think of any explanation. The correct person to determine whether or not the explanation is satisfactory must be the magistrate or sheriff trying the case.

This does not mean, however, that the police are not entitled to take a practical approach to charges under s 58 (1), and are obliged to arrest every person they find with a screwdriver in their pocket. If a person is patently telling the truth, or there is verification of his explanation available, then no doubt the police would not charge him with any offence. But this is no different from any investigation into suspicious circumstances which the police may undertake — if someone is doing something which looks suspicious, but has a good explanation, then he will be allowed to go on his way. But, strictly speaking, it seems to the writer that in terms of the Act if the police find a known thief in possession of a housebreaking implement, they should be entitled to arrest and charge him without further ado. If he protests, they should then be able to utter the time honoured words: "Give your explanation to the judge."

One other interesting point arose in *Docherty*, and this was that it was argued by the accused that it was unfair for him to have been cautioned that he need not say anything before any explanation was asked of him. The court held that there was no unfairness as even if the caution put him off giving an explanation there and then, he could still give his explanation at the trial. This reasoning may not be seen as altogether convincing, but the court then went on to say that in some cases "the caution may be a necessary protection for the accused, because anything he might say could lead him into further difficulty". The question of whether a caution ought to be given was said therefore to be for the discretion of the police officer.

This to the writer's mind perhaps creates more problems than it solves. It gives police officers on the street a difficult decision to make as to

whether a caution is necessary, with only vague guidelines to help them, although it has to be said that this also applies in many other situations which the police have to deal with. Would it not be better, however, to take the view that in s 58 (1) cases no caution is necessary? Although this might be something of an exception to the general rules regarding cautions, there would be nothing wrong in having a special statutory procedure for a special statutory charge. This would give the police a fixed procedure to be followed, and would remove the scope for complicated arguments at any trial that a caution should have been given, which would revolve around the nebulous concept of fairness.

It must be unlikely that *Docherty* will be reconsidered. It would require a bench of seven judges to do so. The provisions relating to such charges seem to have become more obscure over the years. Perhaps the solution is to redraft the provisions of s 58 (1) so that the intention of Parliament is made somewhat clearer.

The Common Law and Statutory Concepts of Vicarious Liability

The Parting of the Ways

Sam Middlemiss and Richard Mays,
The Robert Gordon University,
Aberdeen.

Mr Middlemiss and Mr Mays analyse recent case law dealing with vicarious liability in discrimination cases and examine the legal and practical effects of the courts' dramatic change of direction in this area of employment law.

Currently the most dynamic area of discrimination law is undoubtedly the development of the courts' interpretation of the nature and scope of the statutory concept of vicarious liability. The decisions of the employment appeal tribunal in *Burton v De Vere Hotels* [1996] IRLR 596 and the English Court of Appeal in *Jones v Tower Boot Co Ltd*, *The Times*, 16 December 1996, have reversed the tide of judicial opinion that common law principles should be relied upon in determining issues of vicarious liability in discrimination cases. The effect of this approach had been severely to restrict the circumstances in which an employer could be held vicariously liable in discrimination cases.

COMMON LAW AND STATUTORY CONCEPTS OF VICARIOUS LIABILITY

Both cases have redefined the circumstances under which an employer will be held liable for their employee's discriminatory acts, by applying a commonsense approach to the meaning of s 32 (1) of the Race Relations Act 1976, which states that "anything done by a person in the course of his employment shall be treated for the purposes of the Act as done by the employer as well as by him, whether or not it was done with the employer's knowledge or approval". Section 41 (1) of the Sex Discrimination Act 1975 contains an analogous provision. Given that these statutory provisions undoubtedly emanate from the common law (delictual and tortious concepts of vicarious liability), it is hardly surprising that, to date, industrial tribunals and courts have tended to resort to common law cases to define their parameters. In particular the term "in the course of employment" has been interpreted strictly in line with the common law notion of "course of employment" (see, e.g. *Williams v Hemphill*, 1966 SC (HL) 31; 1966 SLT 259; for a definition see Salmond and Heuston on *Torts* (20th ed, 1992), at p 457).

The detrimental effect that such an interpretation has had on the legal rights of employees (particularly those harassed at work) is illustrated to full effect in the EAT decision in *Tower Boot Co Ltd v Jones* [1995] IRLR 529. Here, the EAT (following the earlier decision of *Irving v Post Office* [1987] IRLR 289) declined to accept that the employer was vicariously liable for a particularly vicious campaign of racial harassment, perpetrated against a 16 year old black employee by his co-workers (for a critique of the earlier decision see Jenifer Ross, "Case and Comment", 1996 JR 284). The facts were that the employee's arm was burned with a hot screwdriver, he had metal bolts thrown at him, and was subjected to racial insults. This behaviour was carried out over a five week period. The basis for the EAT's decision (overturning the industrial tribunal) was that the test of "course of employment" was whether the wrongful act was so connected with what the employee had to do as to be the mode of doing it. They viewed such incidents as being beyond the scope of the harassers' employment as they were incapable of being seen as an improper mode of performing authorised tasks (see *Contway v George Wimpey & Co* [1951] 2 KB 266; Munkman on *Employer's Liability* (1995), p 80).

In reversing the EAT decision, the Court of Appeal is clearly taking a more purposive approach to interpretation of the statutory provisions. The judgment of Waite LJ is especially enlightening, where he contends that "it would

be particularly wrong to allow racial harassment on the scale that was suffered by the complainant in this case at the hands of workmates — treatment that was wounding both emotionally and physically — to slip through the net of employer responsibility, by applying it to a common law principle evolved in another area of law to deal with vicarious responsibility for wrongdoing of a wholly different kind. To do so would seriously undermine the statutory scheme of the Discrimination Acts and flout the purposes which they were passed to achieve". He went on to say that tribunals should interpret "in the course of their employment" in a way that a layman would. They should act as an "industrial jury" and assess the situation on the basis of the facts, and apply their minds "unclouded by any parallels sought to be drawn from the law of vicarious liability in tort".

These judicial misgivings were represented in the obiter comments of the EAT in the earlier case of *Burton v De Vere Hotels* [1996] IRLR 596, where the tribunal contended that "it is undesirable that concepts of the law of negligence should be imported into the statutory torts of racial and sexual discrimination". (These comments appear to have influenced the decision of the Court of Appeal in *Jones v Tower Boot Co*.) The *Burton* case is also of major significance in that it further widens the scope of the vicarious liability of employers in discrimination cases.

The facts in the *Burton* case are relatively straightforward. The applicants were both black, and were employed as casual waitresses at an hotel owned by the respondents in Derby. One evening, at the hotel, the Round Table employed the services of Mr Bernard Manning as a speaker. In the course of his presentation he made sexist and racist jokes and used offensive racist terms, and on spotting the applicants clearing the tables made specific sexist and racist comments directed at them. Following the completion of Mr Manning's performance, customers, following his lead, made lewd and racist comments to both the applicants, and one customer attempted to manhandle Miss Burton. After complaints to the management by the women, apologies were offered; nevertheless the victims of the harassment decided to exercise their right to bring a case for race discrimination. Before the tribunal they argued that if the employer had vetted Mr Manning's material the incidents would not have occurred. The tribunal accepted that the applicants had suffered a detriment but did not accept that their employers were responsible for it, on the basis that the nature of the incident could not have been foreseen by management.

The EAT overturned the tribunal decision, contending that "an employer subjects an employee to the detriment of racial harassment if he causes or permits harassment serious enough to amount to a detriment to occur in circumstances in which he can control whether it happens or not". They further concluded that foresight of the events, or lack of it, is not determinative of whether the events were under the employer's control.

The practical effect of this decision is that employers can be held vicariously liable for the action of an individual who is not their servant or agent, where that individual harasses their employee, in circumstances where the employer is in a position to exercise control over these events. The implication is that employers may be vicariously liable for the unlawful behaviour of customers, clients or other persons visiting their premises, where it can be shown that they have sufficient control over the situation to prevent it happening or minimise the risk of it happening. The EAT took the view that "the question of whether an employer has subjected his employee to racial harassment, where a third party is primarily responsible for the harassment, should be decided by the tribunal in its capacity as an industrial jury. The tribunal should ask themselves whether the event in question was something which was sufficiently under the control of the employer that he could have prevented the harassment or reduced the extent of it".

The EAT were not inclined to accept the view

put forward by the respondents, that resort should be made to common law rules to determine whether vicarious liability applied. In fact, as intimated earlier, their opinion was that this practice, which had been followed in earlier cases (ie *Irving v The Post Office* and *Tower Boot Co Ltd v Jones* (EAT)) was unsound.

It is ironic that the offensive and racist comments of a well known personality should indirectly lead to the expansion of the concept of vicarious liability of employers to encompass the actions of third parties whose behaviour is subject to their control. Whilst *Burton v De Vere Hotels* may adversely affect the future employment of Mr Manning, of much greater significance (particularly in the light of the Court of Appeal's latest pronouncements in *Tower Boot*) is its impact on both parties to the employment relationship. The employer will have to ensure that their policies and procedures (which might include aspects such as equal opportunities training and ensuring adequate supervision of staff and third parties in the workplace) are sufficiently clear and comprehensive to satisfy a tribunal that they "represent such steps as were reasonably practicable to prevent the employee from doing that [discriminatory] act" (the defence set out in s 32 (3) of the Race Relations Act and s 41 (3) of the Sex Discrimination Act). Attention will undoubtedly re-focus on this defence, which will represent the last bastion of hope for an employer facing a discrimination claim based on vicarious liability.

NEWS

Appointments

New sheriff

The Queen, on the recommendation of the Secretary of State for Scotland, has appointed Mrs Pamela M M Bowman, solicitor, Forfar, to be a floating sheriff for all sheriffdoms, nominally based in the Sheriffdom of Tayside, Central and Fife at Perth. The appointment will be taken up on a date to be determined.



Scottish Law Commission

The Lord Advocate has appointed Patrick S Hodge, QC, as a part time member of the Scottish Law Commission for a period of three

years from 21 April 1997 in succession to Lord Nimmo Smith who recently demitted office on his elevation to the bench.



Queen's Counsel

The Queen, on the recommendation of the Secretary of State for Scotland, to whom the names were submitted by the Lord Justice General, has approved the rank and dignity of Queen's Counsel in Scotland being conferred on Thomas Welsh, advocate, Joseph Raymond Doherty, advocate, and James Robert Campbell, advocate.



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Remedies for Victims of Sexual Harassment: the Contractual Dimension

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Mr Middlemiss questions the utility of victims of sexual harassment at work pursuing statutory remedies in light of recent developments in case law, and suggests that actions based on breach of implied contractual terms may prove more beneficial in certain cases.

Where an employee is experiencing, or has experienced, sexual harassment they will normally pursue statutory remedies that compensate them for the harm they have suffered. The normal avenue of redress for victims of sexual harassment is to bring an action for sex discrimination under ss 1 and 6 of the Sex Discrimination Act 1975. This may appear to be an attractive option to a victim of sexual harassment and will certainly be the course of action recommended by most legal advisers.

The reality is that it is not necessarily the best option, given that in a significant number of cases the applicant will have to prove they have suffered a substantial detriment as a consequence of unequal treatment at the hands of the employer or the harasser (1975 Act, s 6 (2) (b): see *De Souza v Automobile Association* [1986] IRLR 103). Only where these evidential requirements are fulfilled will the tribunal afford a remedy which will normally be an award of compensation.

The applicant will normally try to establish the vicarious liability of the employer (as per s 41 of the Sex Discrimination Act 1975). This process has been made considerably easier as a result of the Court of Appeal's decision in *Jones v Tower Boot Co Ltd*, 11 December 1996, unreported. Where they are not vicariously liable it is questionable whether an action will lie against the harassers themselves (see *Waters v Commissioner of Police of the Metropolis* [1995] IRLR 531).

The recent removal of the upper limit of compensation that can be awarded under the Sex Discrimination Act by the Sex Discrimination and Equal Pay (Remedies) Regulations 1993 (SI 1993/2798) has meant there is scope for substantial compensation to be awarded in

favour of successful applicants, although despite a subsequent increase in the level of monetary awards, the majority of awards in sex and race discrimination cases are still below the previous limit of £11,000. (For detailed statistics concerning the level of recent awards see the *Equal Opportunities Review*, no 67, May/June 1996, pp 13-24.) Whether compensation, even of a substantial nature, represents sufficient consolation and redress for the emotional, physical and economic consequences suffered by victims, is uncertain.

There are difficulties for applicants in proving their case under the 1975 Act, which might not pertain to other types of civil action brought under the law of contract or delict. This has been recognised by other writers: "The authors contend that the discrimination foundation for such claims may not be the most appropriate base because sexual harassment, even of a severe nature, does not necessarily involve disparate treatment of the sexes. Rather it concerns inappropriate use of sexuality, regardless of the gender of the victim" (J Dine, B Watt, "Sexual Harassment: Moving Away From Discrimination" (1995) 58 MLR 343).

Bringing an action for breach of contract may prove a suitable alternative, given that a range of contractual actions may be viable, and there may be instances where although there are no grounds for bringing a delictual action, a contractual claim may lie. "Where . . . the delictual claim is for pure economic loss . . . if the parties have direct privity of contract there appears to be no room for delictual liability as there is no obligation — apart from the contract itself — to prevent economic loss arising as a result of a failure to take reasonable care to perform a contract" (J Thomson, "Delictual Liability Between Parties to a Contract", 1994 SLT (News) 29 at p 34). In the case of *Wright v Dunlop Rubber Co Ltd* (1972) 13 KIR 255 it was stated that although an employer had no duty under the law of tort to rescue an employee from a harmful situation caused by a third party, he did have a contractual duty of care which would extend to dangers caused by his own failure to act. Where a claim arises from personal injury resulting from a breach of an employer's duty of care, it will be advisable to pursue both a contractual and delictual action: "It is important always to consider whether there is potential delictual liability for personal injury . . . as there may be important practical advantages in being able to sue in delict in addition, or as an alternative, to an action for breach of contract" (Thomson, *ibid*).

Types of contractual claim

While normally an action against an employer under the law of contract must be raised in a court of law, where the breach of contract has arisen from, or is outstanding at, the termination of employment an action for breach of contract can be brought before an industrial tribunal (Industrial Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (SI 1994/1623) and Industrial Tribunals Extension of Jurisdiction (Scotland) Order 1994 (SI 1994/1624)). In such a case there is a maximum financial award of £25,000. The industrial tribunal is, in most cases, the preferable forum for resolving contractual disputes. It is less formal than a court (in terms of procedure and evidential requirements), it is cheaper for the applicant (particularly if they can represent themselves), and the process of adjudication of the case is quicker. Unfortunately the jurisdiction of industrial tribunals in breach of contract cases is much narrower than the jurisdiction of the courts.

Where someone has been subjected to sexual harassment in the context of their employment, it will be unlikely that they can base a claim on a breach of the express terms of an employment contract. This is because most contracts will not include rights and duties in respect of sexual harassment, unless specific policies and procedures for sexual harassment have been introduced and become incorporated into the contract. Despite the stated objective of most trade unions to combat sexual harassment in the workplace, the collective agreements drawn up between trade unions and employers will rarely contain references to sexual harassment. Even where sexual harassment is referred to, in most instances collective agreements will not form part of a contract of employment. The most likely basis for a contractual claim in this context is the implied duties placed on employers by the courts.

The effect of a breach of contract on statutory rights

Before considering the nature of contractual claims (underpinned by implied duties) which might apply to sexual harassment cases, it is important to recognise that a breach of contract can form the basis for an action for constructive dismissal. In the case of *Western Excavation v Sharp* [1978] QB 761, the Court of Appeal confirmed that the success of an action for constructive dismissal under what is now s 95 (1) (c) of the Employment Rights Act 1996, is dependent on the applicant establishing that the

employer's unreasonable behaviour represented a breach of contract, entitling them to resign their job. In illustrating the type of behaviour that would represent sufficient breach of contract to justify an employee's claim, Lawton LJ specifically identified "Persistent and unwanted amorous advances by an employer to a female member of his staff".

In *Bracebridge Engineering v Darby* [1990] IRLR 3, another case of constructive dismissal, it was held by the employment appeal tribunal that an employer's failure to investigate a complaint of sexual harassment breached the implied contractual obligation "not to undermine the confidence of the female staff".

Duty to maintain trust and confidence

It is certain that such behaviour represents a breach of the implied duty to maintain employees' trust and confidence. The following statement explains the nature of this implied term: "Destruction of trust and confidence is really no more than a technical sounding name for intolerable behaviour, the existence of which destroys the ability to work together" *Rideout's Principles of Labour Law* (4th ed, 1983), Sweet & Maxwell, at p 70).

In the case of *Muehring v Emap and Ibbett*, 29 July 1988, COIT, 10824/88, Ms Muehring was employed as an advertising director. She was forced to leave her job after six months as she was being sexually harassed. Ms Muehring claimed she had been constructively dismissed. She also brought a court action against her employer for breach of contract (on the basis of a breach of the implied duty to maintain trust and confidence), and in tort for assault and battery. Her employer eventually agreed to an out of court settlement of £25,000. There is no doubt that employers that perpetrate sexual harassment themselves or fail to respond to employees' complaints of sexual harassment will breach this implied duty. Where an employer maintains an organisational culture that condones sexual harassment, this may also represent a breach.

Duty to take reasonable care for the safety of employees

There is an implied duty that the employer will exercise a reasonable standard of care in providing for the safety of his employees: "The duty of care is generally thought of as lying within the law of tort, and so far as it concerns the employer's duty towards his employee, is always treated as such. There is no doubt, however, that a comparable almost identical contractual duty does exist" (*Rideout*, supra, at p 96).

REMEDIES FOR VICTIMS OF SEXUAL HARASSMENT

Employers must take reasonable care for the safety of their employees and in the process must provide and maintain a safe system of work, safe and competent fellow employees, and safe plant and machinery. The first two of these specific duties could apply to sexual harassment cases, where the consequence for the victim is their health being adversely affected.

(a) *Duty to provide a safe system of work.* In *Walker v Northumberland County Council* [1995] IRLR 35, it was judicially recognised that an employer's failure to provide an employee with a safe system of work by overworking him caused him psychiatric damage, and represented a breach of their duty to take reasonable care: "Although the law on the extent of the duty on an employer to provide an employee with a safe system of work and to take reasonable steps to protect him from risks which are reasonably foreseeable has developed almost exclusively in cases involving physical injury to the employee there is no logical reason why risk of injury to an employee's mental health should be excluded from the scope of the employer's duty."

Where sexual harassment creates an oppressive environment and causes the employee to suffer stress or other mental harm, the victim may have a right of action for breach of the duty to provide a safe system of work. The physical layout of the workplace may be a contributing factor to sexual harassment (e.g. secluded places, congested workspaces). Other relevant factors are insufficient supervision, unclear instructions and lack of adequate procedures. Where an employer receives a sexual harassment complaint and fails to take action, it could be argued he has failed to provide a safe system of work: "It may be the case that the employer has tried to prohibit bad working practices amongst his staff but has failed in his attempt to do so, and accordingly the continued use of bad practices may, depending on the circumstances, have developed into what is really a defective system of work, for which the employer will clearly be answerable" (I P Miller, *Industrial Law in Scotland* (1970), W Green, p 183).

All of these factors could be relevant in a contractual or delictual action for breach of duty. Where they are proven to be the substantial cause of the harassment or a material factor in the incident, the liability of the employer could be established.

(b) *Duty to provide safe and competent fellow employees.* An employer is placed under a duty to provide safe and competent fellow employees.

Employers, in the process of recruiting and selecting new staff, may experience difficulty in determining whether an employee's future behaviour will be safe and competent. However where a pattern of behaviour of an employee has developed which indicates they are unsafe or incompetent, there is an expectation of the courts that the employer will dismiss such a person from their employment or take other action to limit their effect on other employees. Where someone is known by the employer to be a perpetrator of sexual harassment and there is a causal connection between the behaviour and the victim experiencing health problems, the employer may breach the implied contractual duty (and a similar delictual obligation) to provide safe and competent fellow employees.

In the case of *Hudson v Ridge Manufacturing* [1957] 2 QB 348, an employer was held to be in breach of his duty for failing to have disciplined a known practical joker whose irresponsible antics led to a fellow employee being injured.

Duty to render employees reasonable support

There may be a separate implied duty for the employer to "provide the support necessary for an employee to do their job". In the case of *Wigan Borough Council v Davies* [1979] ICR 411, a junior manager at an old folk's home failed to take the side of care assistants in a dispute with the warden. In order to avoid the resulting personality conflicts between the manager and other staff the employers tried to arrange a transfer for the manager but were unsuccessful, and she agreed to continue working. She was subject to harassment by other members of staff who refused to co-operate with her. In the light of this and the failure of her employers to support her in her actions she resigned. It was held in an action of unfair dismissal that the employers had failed in their implied duty to render her reasonable support: "As the employers were in breach of contract by failing to attempt to correct a situation which was intolerable to the employee . . . there had been a fundamental breach of contract or a breach of the fundamental terms".

It seems reasonable to contend that the employer's implied duty to provide reasonable support to employees could be extended to cases of sexual harassment. Employers may breach this duty where they fail to take complaints of sexual harassment seriously or fail to take action to alleviate the suffering of a victim of harassment.

Conclusion

There is clearly scope for contractual claims to be

pursued against employers for sexual harassment. Victims of sexual harassment in employment and their representatives should reappraise the utility of pursuing statutory claims in the light of common law alternatives, such as contractual actions, where the issues are relatively clear (compared with those in a statutory claim, which are becoming increasingly complex and less user friendly) and the remedies are often as favourable. A contractual action should particularly be considered where it can be brought before an industrial tribunal, with consequent reduction in costs.

Aspects of Appeals from the Sheriff Court

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Mr Holligan surveys the authorities on rights of appeal from, and judicial review of, the sheriff, and suggests that there are a number of points that require clarification.

The purpose of this article is to examine the following two issues: (a) appeals from sheriffs in summary applications; and (b) judicial review of sheriffs' decisions.

Before doing so, it is worth looking briefly at the history of the appeal process in the sheriff court.

The procedure of appeals from one professional judge to another does seem anomalous. Its roots lie in the historical development of the sheriff court.

The Heritable Jurisdictions (Scotland) Act 1746 abolished the heritable nature of the office of sheriff. The office remained although no appointments appear to have been made. The office of sheriff depute was provided for, with the right to appoint substitutes for whom the depute was answerable. The sheriff depute was an advocate who did not sit within his jurisdiction throughout the year. It has been said (*Introduction to Scottish Legal History*, Stair Society, Vol 20, chap xxvi) that the practice developed for the sheriffs substitute to refer matters of difficulty to the sheriff depute. In the course of his note in *Archer's Trs v Alexander &*

Sons (1911) 27 Sh Ct Rep 11, Sheriff Ferguson stated that there always was an unlimited right to seek review of the sheriff substitute's decision, a right which was regularly employed. From 1839 onwards, the right of appeal from the sheriff substitute to the sheriff depute was gradually restricted, culminating in the present position set out in s 27 of the Sheriff Courts (Scotland) Act 1907 ("the 1907 Act").

The Court of Session Act 1868 abolished the process of advocacy as a method of review by the Court of Session and established the system of appeals which is now to be found in s 28 of the 1907 Act.

The process of appeal by way of summary application to the sheriff has a long history extending well before the 1907 Act. Throughout the 19th century more and more statutes gave rights of appeal to citizens dissatisfied with the actions of ever encroaching local and central government. The most obvious candidate to resolve matters was the local sheriff. As Sheriff Dove Wilson pointed out in 1883 (*Practice of the Sheriff Courts* (3rd ed), p 374), although appeals were permitted to the sheriff, no procedure was laid down as to the form they might take, or what the sheriff was supposed to do on hearing the appeal.

It is against that background that the 1907 Act was enacted. It was intended to provide a procedure to deal with summary applications, and also to establish the duty of the sheriff.

Summary applications

A summary application is defined in s 3 (p) as including a common law application (very rare) and all applications, by appeal or otherwise, brought by way of statute and to be disposed of in a summary manner, although the statute does not specify the form the appeal should take.

Section 50 of the 1907 Act provides that the sheriff shall appoint a hearing to dispose of the application and shall issue a judgment in writing.

Any uncertainty as to the form of the summary application (see, e.g. *National Bank v Williamson* (1886) 23 SLR 612) is now dispelled by the Summary Application Rules 1993 which provide that all such applications are to be initial writs in the form annexed to the rules. The rules provide that, unless there is an enactment to the contrary, there is a 21 day time limit for the commencement of proceedings (rule 6). Once the pleadings are under way, further procedure is a matter for the discretion of the sheriff (*O'Donnell v Wilson*, 1910 SC 799; 1910 2 SLT 3; *Park v Coltness Iron*

EDITORIAL

When the President of the Industrial Tribunals in Scotland addressed the Industrial Law Group conference last Christmas she was invited to ask Santa to grant her an employment law Christmas wish; she asked, not surprisingly, for "Some Certainty in an Uncertain World" but events since then have indicated that Mrs Littlejohn appears (and this is more surprising!) to have little influence with Santa or his helpers.

The end of the year is nigh and we still do not know who qualifies for the right to claim unfair dismissal. Readers will recollect that in *R v. Secretary of State for Employment, ex p. Seymour Smith and Perez* [1995] I.R.L.R. 464 the Court of Appeal decided that the two-year service qualification for the right to claim unfair dismissal was indirectly discriminatory (in breach of the Equal Treatment Directive) as at 1991 when the appellants were dismissed, since the proportion of women was considerably smaller than the proportion of men who qualified for the right in that year (90.5 women per 100 men).

This decision was appealed to the House of Lords and we could reasonably have been expected to have their Lordships' decision by now. However, illness appears to have slowed the progress of the case and the decision is still awaited. What we do have in the interim is a decision of the divisional court in *R v. Secretary of State for Trade and Industry, ex p. UNISON* [1996] I.R.L.R. 438, which also examined, among other things, the potentially disparate impact of the two-year qualification period. However, in this case the position was analysed as at Autumn 1994. The court noted that the gap between the proportion of female and male employees who could comply with the two-year service qualification was just over 4 per cent at that point. In considering whether this was a "considerable difference" the court indicated that on the evidence currently available it was inclined to the view that a 4 per cent disparity would fall within the *de minimis* exception.

(continued overleaf)

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scheduled dates. As a result, submissions from the respondents' counsel have been re-scheduled for January 13 and 14, 1997.

5) *E.I.S. v. Robert Gordon University*

The Inner House did not, in the event, hear a reclaiming motion on September 26, 1996 against Lord Milligan's interlocutor of May 29, 1996 (1996 G.W.D. 26-1511). The Lord Ordinary's opinion is now digested in *IDS Brief 573*, September 1996, at pp. 4 and 5, where it is incorrectly cited (in the English style) as *R v. The Robert Gordon University, ex parte the Educational Institute of Scotland!* I am obliged to Sandy Kemp (see article, below) for intimating to me that settlement terms were agreed and, as a result, the Lord Ordinary's interlocutor was recalled, and the petition for judicial review dismissed.

(6) *Blair v. Highland Council*

The Industrial Tribunal's written decision, with reasons, was promulgated on October 8, 1996. (Chairman: Mr George Livie — S/2020/95). Following a 24-day hearing over various dates between September 21, 1995 and June 24, 1996, the unanimous decision of the Tribunal was that Highland Council (statutory successors of Lochaber District Council) unfairly dismissed Mr Blair; that the respondents should re-engage him as a solicitor at a set salary; that the respondents should pay Mr Blair monetary compensation amounting to a fixed sum; that there should be restored to Mr Blair any rights and privileges, including seniority and pension rights which he would have benefited from had he not been dismissed; and the Council should re-engage him not later than November 11, 1996. In an 87-page written decision, which is mainly concerned with the question of the fairness of Mr Blair's dismissal, and the employers' failure to provide a proper and fair procedure, the Industrial Tribunal does, however, give consideration to an interesting issue as regards the remedy awarded. In addressing the question of remedy, the Tribunal's written reasons record (at page 85C/F) that:

"Had the applicant not been dismissed we are satisfied that he would have continued to discharge his duties until the date of reorganisation. Thereafter he would have enjoyed the benefit of the Detriment Regulations assuming that he was unsuccessful in securing an equivalent or higher position either with Highland Council or elsewhere."

"The Tribunal fully accepted Mr Williamson's submission in regard to the Transfer of Undertaking Regulations. The applicant was not an employee at the date of reorganisation and could not benefit from either the Regulations or

the Acquired [Rights] Directive. However, Highland Council as a consequence of the Local Government Scotland Act 1994, had taken over, albeit in a reorganised form, all of the administrative functions and employees of Lochaber District Council. Those employees whose jobs disappeared with reorganisation have either been matched to other employment or are in the process of being matched. None so far have been made redundant. Section 115(1) of the Employment Rights Act 1996 provides for re-engagement by a successor of the employer or by an associated employer. In the circumstances the Tribunal are of the opinion that a re-engagement order is competent. We do not think it could have been the intention of Parliament to deprive an employee of the right to a reinstatement or re-engagement order, if appropriate, in circumstances where the employee has been held to be unfairly dismissed at a date prior to implementation of the Local Government (Scotland) Act 1994."

It does not appear from the Tribunal's written decision, with reasons, that the Tribunal was referred to the provisions of section 181 of the Local Government etc. (Scotland) Act 1994. That is the statutory provision which made the consequential and supplementary provisions arising from local government reorganisation on April 1, 1996. In particular, section 181(4)(g) deals with any proceedings instituted by or against any local authority prior to April 1, 1996.

Gender-neutral Conduct can amount to Sexual Harassment

Richard Mays and Sam Middlemass
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The recent decision of an industrial tribunal sitting in Glasgow, *Dobbin v. Denholm Ship Management (UK) Ltd and McNiven* (I.T.S/5310/94), represents an interesting development in the evolution of sexual harassment law, expanding the scope of the behaviour which will be treated as unlawful sexual discrimination (*Strathclyde Regional Council v. Porcelli* [1986] I.R.L.R. 134 (C.S.); *Bracebridge Engineering Ltd v. Darby* [1990] I.R.L.R. 3; *Insitu Cleaning Co. Ltd v. Heads* [1995] I.R.L.R. 4, E.A.T.). It was decided that employers can be liable for failing to prevent sexual harassment of an employee by a colleague, even where the harassment is evidenced by gender-neutral conduct.

In *Dobbin* the applicant claimed that she had been subjected to sexual harassment on numerous

occasions by a male colleague who was previously her supervisor. Specifically, she first complained to employer (a merchant shipping company) of the supervisor's behaviour in 1992, alleging that he picked on her and purposely ignored her. The applicant said that the supervisor had acted towards other employees, both male and female, in the same way. The response of the company to this original complaint was that it was "trivial" and matters were dealt with by a meeting. The applicant subsequently moved sections within her workplace.

Despite this, complaints to management became more serious. The applicant claimed the male colleague had started to personalise the victimisation. When she went for a drink he made slurping noises, as she walked across the room he would stamp his feet in time, and when she ate he would say "munch, munch, munch". It was also alleged that he called her names such as "back-stabbing bitch" and called her "Mrs Blobby". The applicant made a written complaint to the manager stating that her health was being affected by the harassment. In response to this latest complaint the employer made the respondent employee aware of its "concern".

There was also evidence of a subsequent incident where the respondent employee had brushed against the applicant in a deliberate manner but that this was not sexually motivated. There emerged evidence of a succession of complaints from female employees of the respondent employee's past conduct. As a consequence, the company instructed an investigation through its solicitors. The company concluded that the respondent employee's conduct did not amount to sexual harassment as he had acted in a similar fashion to male colleagues. It also became clear that the respondent employee was suffering from a stress-related illness. Their response was to offer the male colleague counselling, although latterly he did receive a warning.

The applicant had in the interim contacted the Equal Opportunities Commission to seek support for her tribunal claim which she subsequently pursued. In finding for the applicant the tribunal said that the "repetition of trivial wrongs can become the essence of harassment with heavy cumulative consequences." The respondent employee's treatment of the applicant was "unwanted conduct which affected her dignity at work and so amounted to harassment" and that this conduct "was to her detriment and amounted to less favourable treatment" (see Sex Discrimination Act 1975 sections 1(1)(a), 6(2)(b); *Strathclyde Regional Council v. Porcelli* [1986] I.R.L.R. 134 (C.S.); *De Souza v. Automobile*

Association [1986] I.R.L.R. 103 (C.A.); *In situ Cleaning Co. Ltd v. Heads* [1995] I.R.L.R. 4, E.A.T. The tribunal went on to say that "while a sexual consideration may not have been the sole reason, the tribunal was satisfied that the sex or gender of [the applicant] was the important critical factor and was the activating, effective and operating cause, prevailing over mere dislike or [the respondent employee's] style of supervision."

This particular case expands the scope of the behaviour which will constitute unlawful sexual harassment. While it has previously been accepted that sexual harassment could represent discrimination based on gender, it had not hitherto been recognised that gender-neutral conduct could amount to sexual harassment (*Stewart v. Cleveland Guest (Engineering) Ltd* [1994] I.R.L.R. 440, E.A.T.). The tribunal were able to see similarities in this particular case with *Porcelli* (above), where some of the acts complained of were not primarily of a sexual nature.

In an earlier Scottish case, *Rarity v. Jarvie Plant Hire* (S/4788/91) a female employee was subjected to a tirade of verbal abuse by her supervisor. There was clearer evidence in this case of sex discrimination. A male employee guilty of the same misconduct as the applicant was not subjected to the same verbal harassment. There was also a "feminine connotation" in the language used.

In *Dobbin* almost all of the conduct of the respondent employee was considered not sexually motivated. Despite this, the tribunal had no difficulty in reaching the conclusion that the applicant had been subjected to materially different treatment from that which would have been inflicted on a male colleague. In failing to properly address the complaints from the applicant, the respondent employer, in the opinion of the tribunal: "had liability in more than just the formal sense". The company had no formal policy on sexual discrimination/harassment or equal opportunities. Indeed the company did not contest its vicarious liability for the sexual discrimination. Nor did the company seek to suggest that it had a defence because it had taken all reasonable preventative steps (see section 41(3) of the 1975 Act). The company had sexually discriminated against the applicant contrary to sections 1(1)(a) and 6(2)(b) by failing to take prompt and effective action to stop the applicant being harassed, despite her complaints of the respondent employee's conduct. In recognition of the failure of the company to protect the applicant the tribunal ordered the company to pay her £3000 compensation.

This decision represents an interesting departure from the recent trend in harassment cases (*Irving v. The Post Office* [1987] I.R.L.R. 289,

C.A.; *Tower Boot Ltd v. Jones* [1995] I.R.L.R. 529, E.A.T. — see also article by Vic Craig, above), whereby harassment perpetrated by a colleague against the victim is treated as behaviour outside the scope of their employment, and therefore incapable of attaching vicarious liability to the employer as per the statutory definition. It also sends a message to employers to not only take positive measures to outlaw sexual harassment from the workplace, but also to include in their coverage protection against intimidating or bullying behaviour.

Taxation of Payments on the Termination of Employment

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Payments on the termination of employment take a variety of guises: payments in lieu of notice; redundancy payments; lump sums in respect of death or disability, and golden handshakes are just some of the more common termination payments. It is critical from the point of view of both the employer and the employee to ascertain how such payments should be treated for the purposes of tax and national insurance contributions. The employer needs to be aware of when to deduct PAYE and national insurance contributions from the payments because failure to do so will render him liable in the first instance for these sums. From the employee's point of view, where he or she is in a position to negotiate over the amount of any payment, it is vital that he or she knows whether he will receive the sum net or gross before he can properly decide on the acceptability of any offer. The considerable degree of uncertainty in this area has been mitigated by the publication this year of a statement of practice (S.P. 3/96) and a summary of the Inland Revenue's view in the *Tax Bulletin* (August 1996, p. 325). This article briefly outlines the Inland Revenue's current practice in this area in relation to various different types of termination payments, focusing in particular on the recent Revenue statement on payments in lieu of notice.

There are four main provisions under which termination payments may fall to be taxed:

1. They may be taxed on general principles under section 19 of the Taxes Act 1988, which charges to tax "emoluments" from an office or employment, where "emoluments" include "all salaries, fees, wages, perquisites and profits whatsoever" (T.A. 1988, ss. 19 and 131(1)). If so

it is taxed in full;

2. If not caught under general principles, they may be taxed under section 148, which charges payments on termination of an employment to the extent they exceed £30,000, unless otherwise exempted from a section 148 charge by section 188. Section 188 exempts inter alia the following payments from a section 148 charge (the first £30,000 of a termination payment; payments on termination of employment as a result of death or disability; lump sums from tax approved pension arrangements; certain payments on termination of foreign service);

3. If it is a payment on retirement, other than a lump sum payment under Inland Revenue approved arrangements which are tax free, it will be taxed in full under section 596A;

4. The other possibility which remains to be considered is whether the payment is in return for entering into a restrictive covenant, in which case it will be taxable in full under section 313.

The main difficulty in practice has been in distinguishing between emoluments, and section 14 receipts.

Redundancy Payments

Statutory redundancy payments are exempt from tax under T.A. 1988, section 580(3). This treatment is extended to "genuine" non-statutory redundancy payments (*Mairs v. Haughy* [1994] 1 A.C. 303; [1993] 3 W.L.R. 393; [1993] 3 All E.R. 801 (H.L.)). A redundancy payment is genuine, broadly, if is paid to compensate or relieve an employee from the unfortunate consequences of being unemployed and is to be distinguished from payments on retirement, damages for unlawful termination and deferred payment of wages. The Inland Revenue will provide advance clearance for particular schemes if they are provided with the scheme details (S.P. 1/94).

Restrictive Covenants

These are taxed in full under T.A. 1988, section 313. The term 'restrictive covenant' is not used in the legislation, which refers to undertakings "the tenor or effect of which is to restrict him as to his conduct or activities". It became apparent that at least some tax offices were seeking to tax compromise agreements under section 313, but the position has been clarified by S.P. 3/96. This confirms that no tax charge will arise where the only "restriction" which the employee is suffering is an agreement not to claim further damages in respect of the dismissal, or where the agreement merely reaffirms undertakings

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CRIMINAL LIABILITY FOR SEXUAL HARASSMENT

by Sam Middlemiss, Senior Lecturer in Law, The Robert Gordon University

The perpetrators of sexual harassment rarely need to concern themselves with the prospect of facing criminal charges as a consequence of their behaviour, although serious forms of sexual harassment could represent a criminal offence in Scotland. In the light of recent developments in England and Wales, whereby certain forms of sexual harassment have become a criminal offence under the Criminal Justice and Public Order Act 1994, it seems an opportune time to review the existing forms of criminal liability which apply to perpetrators of sexual harassment at work and consider whether there is a need for legislative measures in Scotland which clarify the extent of their criminal liability and represent a suitable deterrent to prospective harassers.

Up until now victims of sexual harassment have primarily relied on statutory civil remedies (under the Sex Discrimination Act 1975) as redress for the harm suffered as a consequence of this behaviour, although realistically the only remedy available to them under statute is an award of compensation. There are other civil remedies which might be available under the law of contract, delict and other statutory provisions (eg claiming constructive dismissal under the unfair dismissal rules) although these are seldom pursued by victims of harassment and are also often restricted to offering financial recompense. Where the victim has suffered physical abuse, psychological harm and economic loss (possibly through having to give up his employment) it is questionable if the payment of compensation represents adequate redress, particularly where the perpetrator of the harassment goes unpunished and is free to continue his employment and his lascivious practices.

Victims of the more serious

forms of sexual harassment (ie involving physical assaults) have proved unwilling or reluctant to make a complaint which potentially results in criminal proceedings being undertaken against their harasser, even although this is clearly an option. The problem may be that, given this behaviour is carried out in an employment context, it may not be apparent that criminal remedies are appropriate. Even where they are cognisant of this fact it is likely they will be discouraged from making a complaint through fear of further harassment by their harasser or victimisation by their employer. The formality of court proceedings and the possibility of unwelcome publicity from press coverage of the trial may also act as a deterrent. At present in Scotland several common law crimes might be committed in the context of sexual harassment and these will be considered. As referred to earlier, under the Criminal Justice and Public Order Act 1994, certain forms of sexual harassment will be treated as a criminal offence in England and Wales. In the interest of providing an effective deterrent against this behaviour it may prove expedient for similar measures to be introduced north of the border.

Against this background it seems appropriate to consider the headings of criminal liability which might apply in cases of sexual harassment.

ASSAULT

Where an employee is the victim of physical manhandling by the harasser, this could constitute the basis of an action for assault. 'Any attack upon the person of another is an assault.'

This need not involve physical violence, but will usually involve some physical contact, although the contact may be of a trivial nature such as tapping on the shoulder or slapping on the back.

'Injury to the victim is unnecessary, it is an offence to kiss a girl without her consent. In practice prosecutions are not brought where the assault does not involve any significant violence or injury unless the circumstances are special'.²

It is unclear whether sexual harassment would represent special circumstances, although minor physical contact of a non-sexual nature (eg brushing against or leaning over someone) is unlikely to attract criminal liability.

Where the harassment involves interference with someone's person of a sexual manner (eg groping), then a prosecution for assault would be upheld. The penalty for assault is not fixed by law and ranges from a small fine to life imprisonment, depending on the gravity of the offence. 'The seriousness of the assault depends on its own general circumstances'.³

'There are certain circumstances which are regarded as specific *aggravations of assault*'. Where the court is satisfied that the behaviour represents an aggravated assault, the penalty attached will be more severe than for straightforward assault. The main area where aggravated assault may be proved in sexual harassment cases, is where it can be shown that the assault was committed with the intention of perpetrating a more serious crime. The crime in question might be *intent to ravish*, where it can be established that it was the harasser's intention to rape the victim but his action fell short of this (eg where someone is pinned against a wall or pushed across a desk with the purpose of carrying out sexual acts). Another form of aggravated assault which may apply is *indecent assault*, which is not a specific crime, but merely an assault accompanied by some degree of indecency.

'Where there has been actual

lewdness committed against the will of another party the lewd acts are specified in the charge and aggravate the assault'.⁵ Lewdness has been defined as: obscene, lustful, indecent, lascivious and obscene, and the term imports a lascivious intent.⁶ There are clearly instances where sexual harassment represents a criminal assault and in more extreme cases an aggravated assault.

There are evidential difficulties in proving that an assault (or other criminal act) has taken place in the workplace. Often the harassment is perpetrated behind closed doors or in circumstances where witnesses are not available to corroborate the evidence of the victim. There may however be physical evidence of an assault which could be brought forward.

In the event that evidence is unavailable, a conviction will be dependant on the victim's ability to convince the court of the veracity of the claims. The testimony will be severely tested under cross-examination by the accused's legal representative. The defence of *consent* may be lodged whereby the perpetrator of the harassment will attempt to convince the court that the victim was a willing recipient of the sexual advances and consented to them. If this is proved to the satisfaction of the court the accused will be discharged.⁷

RAPE

It is very unusual for sexual harassment to culminate in rape although where it does, and it can be proved, the perpetrator will face a severe penalty. The prosecution would need to satisfy the court that penetration of a female employee's sexual organ had taken place, and that such action was committed forcibly and against her will. The *mens rea* for rape has been defined as the criminal intent to force intercourse on a woman against her will.⁸

The prosecution would need to prove that the victim was subjected to violence, threats of violence, other types of threat or drugging, sufficient to overcome her will. In this context it is unclear whether a

threat to someone's promotion prospects or continued livelihood is sufficient.⁹ Resistance is not necessary although it is important that no degree of consent is present. The victim must be unwilling throughout the assault.

The penalties for rape can be severe and the High Court has a wide discretion as to the term of imprisonment which can be imposed (although guidance is provided for judges in Scotland). The maximum penalty for rape is life imprisonment.

INDECENT EXPOSURE

As the name suggests, *indecent exposure* is where one person exposes such bodily parts as are usually concealed to another.

'Where the exposure is made to a particular person or persons in such a way as to indicate an improper motive on the part of the accused, and is something from which the exposer derives gratification, something which for him is a sexual act, then it is a criminal act. . . . It is not clear whether exposure in a private place to a particular female is a crime where the female is above the age of puberty, even where the woman is not a consenting party, but it probably is, the crime consisting in an outrage to her sense of decency'.¹⁰

This definition of indecent exposure clearly envisages that where the exposure is perpetrated in the context of sexual harassment in the workplace it will be treated as a criminal act. In the unfair dismissal case, *Mellors v Courtaulds Northern Spinning Ltd*, COIT 904/82 1537/242, it was shown in evidence that the applicant had exposed his private parts to woman employees, and it was held by the tribunal that such action not only constituted sufficient reason for dismissal, but also represented a criminal act.

SHAMELESS INDECENCY

There seems to be a degree of uncertainty concerning the type of behaviour which would constitute the crime of shameless indecency, although one writer states that 'all shamelessly indecent con-

duct is criminal'.¹²

The High Court in the case of *McLauchlan v Boyd* 1934 JC 19 held that acts which could be categorised as sexual harassment did represent shameless indecency. The accused was a publican who behaved indecently towards people working in his bar, by carrying out acts of a homosexual nature (*ie* placing his hands on their private parts and their hands on his).

The case of *Watt v Annan* 1978 JC 84 extended the scope of the crime of shameless indecency to include an indecent display of pornographic material (in this case showing a pornographic film) in a *private place*, on the basis that such a display represented an affront to public morals and was likely to deprave and corrupt its viewers. Whether the criminal courts would accept that certain forms of sexual harassment would represent shameless indecency is uncertain given the ill-defined nature of this crime.

BREACH OF THE PEACE

It is perhaps surprising that a crime, often associated with noisy, drunken, disruptive or violent behaviour, will have application to sexual harassment at work. There are however two situations where it could apply. Firstly, with respect to threats: 'any threat may be prosecuted as a breach of the peace if it can be said to place the threatened person in a state of fear or alarm'.¹³

Where physical acts of a sexual nature are represented in the form of a threat to the victim this may easily place them in a position of fear or alarm concerning their physical well-being. The second situation is less straightforward because the crime of breach of the peace is one which is normally perpetrated in a public place and sexual harassment is normally carried out in a private workplace. If, however, the behaviour takes place in private, but has the effect of breaching the *public peace*, then it is actionable. In this connection *the public* need not be the public at large, but merely some other person. An actual breach is

unnecessary, as it need only be shown that the conduct is calculated to result in public disturbance.

In the case of *Young v Heatly* 1959 JC 66, a master in a technical school was charged on four counts of breach of the peace. All were committed on the same day, when he had indecent conversations with male pupils of the school, all aged around 16, in his study. In this case there was no evidence that anyone was annoyed or alarmed or that anyone other than the victims had knowledge of what occurred. Despite this fact the schoolmaster was convicted. There are clear parallels between this case and the typical case of sexual harassment where offensive or insulting sexual remarks are directed at the victim. In the case of *Sinclair v Annan*, 1980 SLT (Notes) 55 a charge of breach of the peace was upheld on the basis of remarks addressed to a woman and overheard by an 18-year-old girl which were deemed by the court to be embarrassing and particularly offensive to her.

CONCLUSIONS

Given the dearth of legal decisions in criminal law relating to sexual harassment cases it is difficult to predict the likely success of a common law criminal action at the present time, although developments highlighted in the foregoing discussion and scope for future expansion of criminal liability in these areas suggest an increasing likelihood that the courts will be willing to uphold such an action.

A victim who brings charges

against the harasser will not normally obtain any personal benefit from a criminal action, other than the satisfaction of knowing that the harasser has experienced some form of penalty for his illegal acts.

An indirect benefit of a successful prosecution, is that where the victim pursues a civil action against the harasser, the fact that guilt has been established in a criminal action will be persuasive in establishing civil liability under the law of delict. There is also the possibility that an action could be pursued against an employer on the basis of his vicarious liability for the delictual wrongs of the harasser.

As mentioned earlier, the Criminal Justice and Public Order Act 1994 makes it a criminal offence in England and Wales to intentionally cause harassment, alarm or distress to someone, and specifically identifies the type of behaviour which would represent a breach of the Act. This includes the use of threatening, abusive or insulting words or behaviour, disorderly behaviour, display of writing, sign or other visible representation which is threatening, abusive or insulting, and causing someone harassment, alarm or distress.¹³

It is perhaps a suitable juncture for a legislative measure to be introduced in Scotland which creates a specific statutory offence for sexual harassment, which provides similar protection to victims of sexual harassment and which more importantly represents a serious and effective deterrent to perpetrators of sexual harassment. In the absence of such a

measure, it will be necessary to resort to common law crimes which clearly has its disadvantages. While the following passage identifies the inappropriateness of common law rules being utilised to control verbal sexual harassment, there are similar difficulties in applying these rules to other forms of sexual harassment. 'Used with restraint there is place for the criminal law in combating verbal sexual harassment. Again, however, it must be questioned whether it is appropriate for the courts to distort the ambit of existing offences to achieve the end'.¹⁴

Footnotes

- 1 Gordon, G H, *Criminal Law*, W Green & Sons, 2nd ed, 1978, at p 759.
- 2 *Ibid* at p 759.
- 3 *Ibid* at p 816.
- 4 *Ibid* at p 816.
- 5 *Ibid* at p 823.
- 6 *Black's Law Dictionary: Definitions and terms and phrases of American and English jurisprudence ancient and modern*. Black H C, Nolan, J R, Connolly, M J (5th ed) St Paul, West, 1979 at p 817.
- 7 In indecent assault cases consent is defence provided there is no evil intention to injure on the part of the accused and there is no additional factor, (such as the victim's age causing a legal capacity to consent), independent of indecency, which invalidates consent a defence: *Smart v HM Advocate* 1975 30. In rape cases it is necessary to prove that the sexual intercourse which is subject of the charge took place with the victim's consent and by the means of overcoming her will.
- 8 *Meek v HM Advocate* 1982 SCCR, 613 Lord Justice-General Emslie at p 619.
- 9 Gane, C, *Sexual Offences*, Butterworths at p 29.
- 10 Gordon, G H, *op cit*, at p 904.
- 11 Macdonald, J H A, *A Practical Treatise on the Criminal Law of Scotland*, 1st edition (Edin 1867) p 229.
- 12 Gordon, G H, *op cit*, at p 987.
- 13 section 154.
- 14 Gane, C, *op cit*, at p 136.

THE ESTATE AGENT'S COMMISSION: WHEN IS AN INTRODUCTION NOT AN INTRODUCTION?

by Gordon Junor, Advocate

The author reviews the difficulties which may be experienced by estate agents in establishing entitlement to 'their' commission upon the introduction of prospective purchasers to

clients who are intending sellers of their property.

INTRODUCTION

From time to time estate agents

seeking payment of commission from their clients following the sale of the clients' property will almost inevitably, be faced with arguments from those clients that

Completed Outputs being Considered by
Publishers and Not Yet Published but
Included in the Application

Anglo-American Comparison of the Legal Liability of Employers for Sexual Favouritism

1. INTRODUCTION

This article will consider an aspect of employment law which has been given little attention by commentators on employment law but which the writer believes is an important issue for certain employees. The topic is sexual favouritism which has been defined as follows:

Sexual favouritism exists where a person who is in a position of authority rewards only those who respond to his/her sexual advances, whilst other deserving employees who do not submit themselves to any sexual advances are denied promotion, merit rating or salary increases.¹

This article is concerned with analysing the legal position of employees who refuse to enter into sexual relations with the person in authority, or are not given the option, and correspondingly are denied employment benefits, e.g. promotion, enhanced salary that are given to employees who have given into his sexual advances (his sexual paramours). Sexual favouritism is relevant to discrimination on the ground of sex, sexual harassment and can also impact on other areas of employment law.

¹ www.workinfo.com, sexual harassment policy from human resources policies and procedures manual Para 4.7, 12 March 2001

2. LEGAL POSITION OF PARTIES INVOLVED IN A SEXUAL RELATIONSHIP

It could be argued that given the power imbalance between a manager and the employees who report to him there could never be a fully consensual arrangement between them in terms of a sexual relationship. It is likely however that this is not unlawful behaviour on the part of the perpetrator unless it is contrary to a company policy and is deemed to form part of his contract. It could be established that it constitutes a breach of an implied contractual term such as the implied duty to maintain his employees' trust and confidence, particularly where the relationship goes wrong or the implied duty to provide a safe working environment ² although there is no precedent for this type of claim in the context of sexual favouritism.

In respect of the legal rights of the parties involved in the relationship it is not likely to be treated as sex discrimination because the employee involved in the relationship is not likely to suffer a detriment. ³

On the contrary they may receive tangible benefits from their involvement. It is not likely to be treated as sexual harassment because sexual harassment must involve unwanted conduct of a sexual nature and does not include behaviour that is welcome and mutual. It should be recognised however that it may be difficult for a victim to indicate to the perpetrator that the conduct is unwelcome because of the awkwardness of the situation, a fear of victimisation or because of power imbalances in the workplace. In the University of Ottawa's guidelines on romantic and sexual relationships the following abstract offers some food for thought.

² *Walton & Morse v Dorrington* (1997) IRLR 488

³ Section 1(2)(a) & 1(2)(b) of the Sex Discrimination Act 1975

The university recognises the potential for abuse in sexual relationships where an imbalance of power exists between the parties, such as in the relationship between faculty members and students or between supervisors and employees. Given the power imbalance in these relationships the students or employee's freedom of choice almost vanishes if sexual favours are intermingled with what would otherwise be legitimate demands on the part of professors or supervisors. As a result professors or supervisors would have great trouble in proving there was consent if they were accused of sexual harassment.⁴

At the end of day however it is a mutual relationship between two consenting adults of full legal capacity and unless doubt can be cast on this then employment tribunals and courts are unlikely to intervene.

3. LEGAL POSITION OF EMPLOYEES DISADVANTAGED BECAUSE OF SEXUAL FAVOURITISM

It is argued that employees who lose out in comparison with employees that enter into sexual relations with the boss and are consequently rewarded are victims of sexual favouritism.

Unlike the position in the United States there are no reported cases on sexual favouritism in the UK although it seems likely that if the matter did come before an employment tribunal they would follow the approach of the US courts which is discussed below.

The following extract from a policy on personal relationships covering staff at the University of Aberystwyth in Wales highlights a suitable approach for dealing with this issue.

⁴ www.ucttowa.ca

Where sexual/romantic relationships occur between members of staff each member of staff must ensure that they are not involved in any way in the assessment of that other (e.g. appointment promotion or discipline). This is primarily to protect impartiality but also to protect both members of staff from the possibility of accusations of favouritism or from the danger of the assessment being negative to emphasise the intention not to show favour.⁵

Enforcement of this type of policy will be difficult where the parties involved decide to keep their relationship secret, which will often be the case.

On a strict application of the Sex Discrimination Act 1975 women who are disadvantaged by this behaviour and suffer a detriment will not have a right of action. This is because where the person in authority is a heterosexual male then the comparator, his paramour, will be a female and it cannot be claimed that the victim and the comparator have been treated differently on the ground of sex.

What is the position of males who are disadvantaged because they cannot for the same reason obtain the employment benefits that a female paramour gets?

Where the person in authority is a heterosexual male he is only likely to have a relationship with a female employee and as males cannot have a relationship with him they are not eligible for the benefit arising from that kind of relationship. On the face of it this is direct discrimination against male employees on the basis that 'but for their sex' they would not have been disadvantaged. Of course the employer will argue in his defence that not all female employees benefit from his sexual attentions and accordingly as both men and women suffer the same fate it is a detriment that is gender neutral (the US courts position). It may be more practical for males affected by sexual favouritism to claim indirect discrimination on the ground of sex on the basis that considerably less men than women can have consensual sexual relations with

⁵ From the academic handbook at www.aber.ac.uk

their superior and qualify for the resultant employment benefits, and it is to their detriment.

What about these poor females who are similarly situated to the men? Even if males were able to claim sex discrimination, as discussed, their female counterparts cannot because there is no right to claim same sex discrimination in the UK.

A woman may now have the option of pursuing an action under the Employment Equality (Sexual Orientation) Regulations SI 2003/1661. The Regulations cover cases involving discrimination on the ground of sexual orientation directed at persons of the same sex and/or the opposite sex? "A sexual orientation towards persons of the same sex, persons of the opposite sex or persons of the same sex and the opposite sex." ⁶

It could be argued that a woman suffers a detriment because they are the same sex as the comparator and disadvantaged by not being eligible to receive the same employment benefits. Alternatively an action might lie where they can show that they are the same sex and similarly heterosexual to the recipient of the benefits and they are disadvantaged because they would have a right of action against the employer if they were a lesbian (because they could never be a paramour of the boss and rewarded because of it).

Of course any discussion along these lines is academic until this matter comes before an employment tribunal or court.

What about bringing an action for harassment under equality law? Under clause 12 of the Equality Bill ⁷ which is in the process of being passed to implement the Equal Treatment Amendment Directive 2002/73/EC a new statutory tort of harassment has been introduced and defined as follows:

⁶ Regulation 2

⁷ www.hmsso.gov.uk

It is unlawful ...for a person (P) to subject another person (B) to harassment for a reason related to one or more of the prohibited grounds. (2) P harasses B where he subjects him to unwanted conduct that has the purpose or effect of- (a) violating B's dignity or (b) creating an intimidating, hostile degrading or offensive environment for B. Under (4) ...regard is to be had to all the circumstances including in particular B's perception of the conduct in question.

Under this definition an applicant could show that their working environment including sexual favouritism impacted strongly on them by creating an intimidating hostile, degrading environment. There is also the possibility of bringing a harassment case under similarly constructed legislation that provides protection against harassment on the ground of race, disability, sexual orientation and religion or belief.

4. LEGAL TREATMENT OF SEXUAL FAVOURITISM IN THE UNITED STATES

Sexual harassment in the workplace raises sensitive and complex concerns. For courts these concerns are often competing. On the one hand we should not be in the business of throwing a wet blanket over activities that can lead to consensual amour. On the other hand a major purpose of Title VII is to immunize the workplace from sexual intimidation and repression.⁸

As pointed out earlier, sexual favouritism arises where a person in a position of authority enters into a consensual romantic relationship with one of his staff and as a consequence that member of staff obtains certain employment benefits that other members of staff do not receive. Those staff that are disadvantaged, whether a woman

⁸ *Hennessy v Penril Datacomm Networks Inc.* 69 F 3d 1344 (1995) p 1353

or a man, will not have any recourse to the law on the basis that this situation is gender-neutral, discriminating against both sexes equally.

In *DeCintio v Westchester County Medical Center*⁹ seven male respiratory therapists sued their employer maintaining that a woman was selected for a promotion because she was involved in a romantic relationship with the head of the department. The United States Court of Appeals stated there was no right of action under discrimination law because the men were in exactly the same position as other women who might have applied for advancement in rank. They were disfavoured not because of their sex but because of the decision-maker's preference for his paramour.

This flawed logic has been applied to various similar cases since¹⁰ and is supported by the EEOC. They have stated that "not all types of sexual favoritism violate Title VII...Title VII does not prohibit preferential treatment based upon consensual romantic relationships ... it does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their gender."¹¹

It could be argued that it is sex discrimination contrary to tile VII where a person in authority is a heterosexual male because he is only likely to have a relationship with a female employee and as males cannot have a relationship with him they cannot be eligible for the benefits arising from that kind of relationship. This approach appears to overcome the gender neutral obstacle to a successful claim of sexual favoritism on the ground of sex although claims based on the ground that this behaviour represents sex discrimination have to date been unsuccessful.¹² As is the case in the United

⁹ 807, F 2d 304 (2nd Cir. 1986)

¹⁰ In the judgement of *Womack v Runyon* 147 F. 3d 1298 the US Court of Appeals provide a useful summary of the law see *King v Palmer* 778 F 2d. 878 (D.C. Cir 1985)

¹¹ EEOC Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism EEOC Notice No 915-048 (January 12 1999)

¹² *Womack v Runyon* 147 F. 3d 1298, *Becerra v Dalton* 94 F. 3d 145 (4th Cir 1996)

Kingdom it could also be indirect discrimination which is classified as disparate impact discrimination.

This applies where a plaintiff challenges a neutral employment practice which has a discriminatory effect on a protected group.

Proof of disparate treatment requires a showing that the employer treated some people less favorably than others ...discriminatory motive or intent need not be shown under a disparate impact theory, which challenges facially neutral employment practices which have a discriminatory impact; under the latter theory, the plaintiff must actually prove the discriminatory impact at issue, rather than merely an inference of discriminatory impact.¹³

The plaintiff would have to produce statistical evidence that supports his assertion that the employer allows a practice to be followed whereby a heterosexual manager can enter into sexual relations with a female employee and reward them with employment benefits and this is an option that is not available to male employees and is to their detriment.¹⁴ This burden of proof may dissuade a prospective plaintiff and could account for the fact that, to date, no claims have been brought on this basis.

The employer has the defence, which is probably inapplicable here, that this discriminatory practice was applied as a business necessity.

What about female employees who are not involved in a romantic relationship with the boss and are therefore similarly situated to the men? They are also victims of discriminatory behaviour and may have a right of action under Title VII the Civil Rights Act 1964. This will apply where they can show that the behaviour represents same sex harassment creating a hostile working environment. Unfortunately this could fail because there is no inequality of treatment on the basis of gender.¹⁵

¹³ *Rose v Wells Fargo & Co.*, 902 F.2d 1417 C.A.9.Cal.,1990

¹⁴ Where the manager is bi-sexual this is not a valid option.

¹⁵ *Parqua v Metropolitan Life Ins. Co.* 101 F 3d 514 (7th Cir 1996)

In *Hentosh v Herman M Finch University of Health Sciences / The Chicago Medical School*¹⁶ the plaintiff brought an action for sexual harassment alleging that Dr Jacob during his tenure as chairman of the department engaged in a pattern and practice of sexual favoritism in the workplace. To this end he made unwelcome advances to four women in the department not including the plaintiff. The plaintiff also alleged he entered into a sexual relationship with a female assistant professor who received more favourable terms and conditions as a result of the relationship. She claimed that Dr Jacob's behaviour created a hostile work environment and that the university failed to take action to combat his conduct despite their knowledge of it. The District Court were of the opinion that the allegations did not rise to the level of an abusive, hostile working environment because Hentosh was not personally subjected to sexual harassment and she did not witness any of the alleged incidents of sexual harassment by Jacob. It was found that she only become aware of them after Dr Jacob has resigned as chairman.

In view of these facts they dismissed her action against the University. Although this ruling was made after the important and relevant decision of the Supreme Court in *Orcales v Sundowner Offshore Services*¹⁷ the court did not take account of it and if they had their decision might have been different.¹⁸ In *Orcales* the Supreme Court decided that same-sex harassment did constitute a violation of Title VII of the Civil Rights Act 1964 which prohibits discrimination in the workplace on the basis of race, color, religion, sex or national origin.

The court clarified that hostile work environment cases are not about the gender of the alleged harasser, but rather are about the behaviour – because of sex – that is so

¹⁶ 167 3 F.3d 1171 (3rd Cir 1999)

¹⁷ No 96-568

¹⁸ Although the plaintiff's arguments for a finding of unlawful discrimination in the Hentosh case were weak.

severe or pervasive that it would alter the conditions not only of the alleged victim's employment, but also a reasonable person's environment.¹⁹ Where does this leave women or men who are victims of sexual favouritism? In theory they have a right of action where they can show that the effect on them of the practice of sexual favouritism in the workplace is so severe or pervasive that it alters their conditions of employment.

5. CONCLUSION

The lack of relevant case law and statutory rules dealing with sexual favouritism in the United Kingdom makes it difficult to accurately define the legal position of victims of this behaviour.

Where a sexual relationship between a boss and an employee reporting him goes wrong and the employer uses his position to exact his revenge on the employee through victimisation of some kind, then an action would lie for sex discrimination and/or harassment and constructive dismissal based on a breach of the implied term of trust and confidence.

Despite this where the victim is indirectly disadvantaged by not being eligible for benefits given to a sexual paramour however, there is a distinct possibility none of these actions could be successfully pursued by them. In discrimination cases involving sexual favouritism, males are the most directly affected by the action, and they are less likely to bring an action for sex discrimination or harassment than

¹⁹ Supreme Court Rules that Same Sex Harassment Claims are actionable under Title VII
www.reedsmitler.com/library/publication

women.²⁰ Also, given that women can also be affected, it means the argument that the impact of the behaviour is gender neutral is regarded as applicable and this will serve to undermine the validity of a discrimination claim. It is accepted by the courts in both jurisdictions that this behaviour is morally wrong, however, it is not treated as unlawful and the judiciary seem content with this conclusion.

Whether other groups and individuals within society will be equally complacent remains to be seen. The General Secretariat of Organisation of American States in the United States²¹ includes sexual favouritism within their definition of sexual harassment which is:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when it interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive working environment. It is particularly serious when engaged in by an official who is in a position to influence career or employment conditions ...of the recipient of such behaviour.

As already pointed out some organisations have attempted to outlaw this type of behaviour in their policy documents.

Disappointingly the EEOC in the United States appear willing to accept the gender neutral argument put forward by the courts and endorse it in their own policy documents despite its inherent flaws.

It is difficult to know what impetus will be required for the courts in both jurisdictions to apply the current law in a more constructive manner to ensure that victims of the effects of sexual favouritism are provided with a legal remedy.

²⁰ In Leonard AM Judging Inequality, Cobden Press 1987, the findings of survey of applicants involved in sex discrimination and equal pay claims over a two year period showed that of the 234 claims in England and Wales 187 were brought by women and only 47 by men

²¹ Administrative Memorandum No 75 - Implementation of Part-Time Employment www.ilo.org

Additionally what strength of argument will be needed to convince the UK and US Governments that this is an outdated mode of behaviour that should properly be protected by statutory rules.

There may be strong policy reasons for the courts or the legislature refusing to intervene in this area although surely these are outweighed by the iniquity of an institutionalised reward system, eligibility for which is compliance with sexual demands.

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Beauty's Only Skin Deep? Legal Liability of Employers for Discrimination on the Ground of Physical Appearance? A Comparative Analysis

SAM MIDDLEMISS

ABSTRACT

This article analyses the nature and effect of discrimination against employees by employers on the ground of their physical appearance or lookism as it has become known. While the research into this phenomenon is limited it all points to the fact that the economic and social consequences for victims of lookism are significant.

A comparison of the legal protection for discrimination based on physical looks and employers' standards of appearance and grooming in the United Kingdom and the United States is undertaken. Proposals are made for reform of the legal system in the UK drawn in part from examples of relevant statutory rules and judicial decisions in both jurisdictions.

1. INTRODUCTION

“Why don't the champion of civil rights line up against lookism as they have against sexism and racism? The rhetoric of civil rights law denounces, in general and unqualified terms, discrimination based on stereotyping ... which is to say judging the worth of human beings on superficial characteristics like skin color. You can't judge a book by its cover, or so we say when we talk about race and gender. Does not the same principle make us say that beauty is only skin deep.”¹

Although this quote refers to the law in the United States the same challenge could be made to the champions of civil rights in the United Kingdom.

In the United Kingdom employees that are chosen for employment or other workplace benefits because of their physical qualities are known as aesthetic labour² and those

¹ Extract from Robert Post's, Brennan Centre Symposium Lecture 1998-99, Grey T C Cover Blindness, California Law Review, January 2000, Vol. 88 pp 65 – 73 at p 65

² This term has been used by the Industrial Society and researchers commissioned to analyse this

persons not chosen because they do not meet an employer's standard of looks or appearance are discriminated against.

Where an employee in the United States is subjected to discriminatory action because of their physical appearance, the term coined to cover this is lookism.³

This is a genuine area of discrimination within employment although as the opening quote suggests it is not generally recognised as such and as will become apparent there is often no legal remedy for a victim of this type of discrimination. This article will highlight the nature and extent of this problem, identify possible legal solutions, and undertake a comparison with the legal treatment of this issue in the United States. It will primary involve consideration of the current legal protection available to employees suffering discrimination because of their physical appearance in both jurisdictions (excluding for reasons of relevance and brevity, common law remedies) and analysis of the steps that employers, the Government and the legislature should take to eradicate this type of discrimination.

2. EVIDENCE OF DISCRIMINATION ON THE BASIS OF PHYSICAL APPEARANCE

In a recent study undertaken by a researcher at Guildhall University a sample of 11,000, thirty three year old employees were chosen and it was found unattractive men were paid 15% less than others and unattractive women 10% less.⁴

issue in the UK (see note 6 below)

³ The American Heritage Dictionary of the English Language Fourth Edition, 2000 Houghton Mifflin Coy. defines lookism as discrimination or prejudice against people based on their appearance

⁴ Overweight women received 5% less pay than average.

“We find that attractive people earn more than unattractive people; looks affect men as much as they do women; tall men, but not tall women, earn substantially more than their colleagues; those who are short earn less...”⁵

It is not just discrimination in terms of pay. It often extends to discrimination in recruitment and selection, availability of employment rights such as promotion and the basis for dismissal.

A recent report commissioned by the Industrial Society found that there is a danger of social exclusion because employers are increasingly choosing to employ people who ‘look and sound the part’. “Society is becoming more and more style-obsessed and this is reflected by a growing trend among UK companies to opt for staff who reflect the company image.”⁶

The following finding highlighted in this report provides an indication of the severity of the problem in certain professions.

“A survey of skills needs in hotels, restaurant, pubs and bars, indicated that 85% of employers ranked personal presentation and appearance in third place - above initiative, communication skills or even ability to follow instructions.”

There is undoubtedly a variation in the level of discrimination between occupations and this conclusion is affirmed by the findings of the Guildhall University study mentioned earlier.⁷

An employer’s requirements concerning physical appearance of his staff may be determined through fulfilment of the expectations of his clients and/or the general public. This could extend beyond his or her physical looks to what they wear.

⁵ Full details of this research appears in Harper, B. 'Beauty, Statute and the Labour Market: A British Cohort Study', Oxford Bulletin of Economics and Statistics, 62, December 2000, pp 773-802.

⁶ Chris Warhurst and Dennis Nickson of Strathclyde University compiled the report entitled Looking good, sounding right: style counselling in the new economy
http://www.hrmguide.co.uk/general/looking_good.htm

“Consumer preference is important here making the effects of appearance greater in jobs involving face to face contact or those that involve selling.”⁸

The evidence of discrimination on the basis of physical appearance in the United States is fairly limited although similar in nature. In a study undertaken by Dr Daniel Hamermesh, an economics professor at the University of Texas, and Jeff Biddle of Michigan State⁹ involving three surveys of more than 7,000 respondents it was found that over a lifetime good looking people in the United States earn about 12% more than less attractive people. According to the researchers the wage differentials are simply a result of employer bias and raw physical beauty bestows a major employment edge on both men and women. The interviewers rated the respondent’s attractiveness and they were categorised as strikingly beautiful or handsome, above average for age, average for age, below average for age and homely.

The research methodology utilised in these studies and underpinning these findings has not been subject to detailed scrutiny because at best the research to date illustrates that the behaviour has negative ramifications that the law should take account of. There is clearly a need for more widespread and rigorous research in terms of reliability and validity in both jurisdictions.

3. OVERVIEW OF LEGAL PROTECTION AGAINST DISCRIMINATION ON THE BASIS OF PHYSICAL APPEARANCE

What is perhaps surprising is that there is still little legal protection against discrimination based on physical appearance in the United Kingdom. There may be some protection against discriminatory dress or appearance codes under existing

⁷ The penalty for unattractive women in clerical/secretarial occupations is 15% less pay

equality law where it is reinforced by human rights legislation such as the right to privacy and family life (Article 8) and freedom of expression (Article 10) although application of these human rights to this type of case is, to date, untested. There is however little or no statutory protection against discrimination based on physical looks. although under paragraph 3(1) of Schedule 1 of the Disability Discrimination Act 1995 there is protection for persons suffering discrimination because of severe physical disfigurement¹⁰ The law dealing with discrimination on the ground of sexual orientation may have some application¹¹ as might the legislation to be introduced in the United Kingdom in October 2006 dealing with ageism.

In the United States the position is similar as there are no federal laws that directly treat lookism as discriminatory and few States have legislated against it. In the city of Santa Cruz however, they introduced an ordinance in 1992 that prohibited discrimination based on personal appearance and in San Francisco it is now unlawful to discriminate on the grounds of height or weight. In the District of Columbia under State law it is unlawful to discriminate on the ground of physical appearance and this measure is given detailed consideration below.

It is often left to the plaintiffs to prove that discrimination is due to factors covered by existing legislation but not readily apparent as such.¹²

There is some legal protection against dress or appearance codes¹³ in the United States and this aspect of discrimination law which is pertinent to discrimination against persons based on physical appearance will be considered later in this article.

⁸ Supra 2

⁹ Results published in the Austin Business Journal, July 2001

¹⁰ In *Gill and other v Tulip International (UK) Cooked Meats Division Ltd* EAT/114/00 this protection was narrowly defined.

¹¹ Equality of Opportunity (Sexual Orientation) Regulation 2003

¹² In a recent case McDonald's Restaurants were sued for breach of the American with Disabilities Act and the Connecticut Fair Employment Practices Act for refusing to employ someone because they were overweight reported by Catherine Valenti in item Appearance v Reality,

A. The nature of discrimination on the ground of physical appearance

“There is no doubt that the power to control appearance is widely, though subtly, used in the workplace...from refusing to employ people whose facial features depart very substantially from the accepted norm of good looks, through to the informal request to wear a shirt instead of a T-shirt”¹⁴

There are two aspects to this, cases that can be summarised as discrimination on the ground of physical looks (including weightism, heightism, discrimination because of physical disfigurement and ageism) and cases that include discrimination on grounds of physical appearance, excluding physical looks (discrimination through dress or grooming codes) and a term (borrowed from the United States which is increasingly being utilised in the UK) that covers the combined behaviour is lookism.¹⁵ It is difficult to distinguish between these types of discrimination as illustrated by the fact that restrictions imposed by employers on hair length or facial hair might reasonably be assumed to relate to discrimination of physical looks but is dealt with here under grooming codes. Nevertheless an attempt is made in this article to deal with these areas of discrimination separately in both the UK and the US.

Alleged Victims of Lookism Face Uphill Battle May 13 ABC News 2002

¹³ Hay, O., Middlemiss, S. Fashion Victims, Dress to Conform to the Norm, or Else? Comparative Analysis of Legal Protection against Employers Appearance Codes in the United Kingdom and the United States, *International Journal of Discrimination and Law*, 2003 Vol 6, pp 69-102

¹⁴ G Clayton, G Pitt ‘Dress Codes and Freedom and Expression’ [1997] 1(54) *European Human Rights Law Review* 55

¹⁵ As defined in note 1

B. Discrimination on the ground of physical looks

There is a well recognised failing in management decision-making in activities related to human resource management (e.g. recruitment and selection, performance appraisal) where managers allow themselves to be unduly affected by the halo or horns effect in assessing the qualities of a prospective or actual member of staff.

This is where one or more of the individual's characteristics closely mirror that of the organisation¹⁶ or more significantly the interests or lifestyle of the manager assessing the individual and a decision is unduly influenced by this factor (halo effect)

The less close the individual complies with the model requirements of the organisation or the manager then the less likely they will be appointed to a job or be successful in their career and one dissimilar factor could influence the decision (horns effect). These unduly favourable or harsh judgements of the individual being evaluated will often be triggered by their physical appearance.

The following quote outlines the pitfalls of such subjective judgements in employee appraisal

“In some cases appraisers may allow the rating they give to one characteristic to excessively influence their ratings on all subsequent factors. The appraiser who decides that the employee is good in one important aspect and gives him or her similarly high markings for all other aspects is demonstrating the ‘halo’ effect. Alternatively one serious fault can sometimes lead to an appraiser to reduce markings in other areas (the horns effect)”¹⁷

This problem can be resolved if the appraiser judges all employees on a single factor or trait before going on to the next factor. In this way it is possible to consider all

¹⁶ See note 2 Aesthetic labour

employees relative to a standard or to each other on each factor. In the results of the survey carried out by Guildhall University mentioned above one of its authors state that “ugly people are penalised far more than good-looking people are rewarded.” It is also recommended by the researchers that the Government should change the equality laws to ensure that discrimination on the ground of physical appearance is covered.¹⁸

In a book entitled *Appearance is Everything*,¹⁹ written by an individual who is currently seeking revision of the Civil Rights Act 1964 in the United States to include laws against appearance discrimination, much of the research findings in this area in the United States are included. The author concludes that unattractive people are amongst other things two to six times more likely to be laid off and are extremely likely to be passed over for promotion.

A new Directive is being proposed by the European Commission which if implemented will lead to a reduction in discrimination in interview processes. The proposer, Commissioner Olaf Porli, summarised the current position as follows: “Employers are struggling to recruit objectively, with white, middle-aged men still dominating the workplace. Race, gender, hair style, teeth and even facial tics continue to influence the process, making it discriminatory.”²⁰

¹⁷ ACAS Guidelines on Employee Appraisal - <http://www.acas.co.uk/publications/b07.html#top>

¹⁸ Supra 3

¹⁹ Jeffes, S M *Appearance is Everything* 1998, Sterling House

²⁰ Personnel Today April 1 2003, News p 3 www.personneltoday.com

4. LEGAL PROTECTION AGAINST DISCRIMINATION ON THE GROUND OF PHYSICAL APPEARANCE IN THE UNITED KINGDOM

There are a number of aspects of someone's physical looks that may lead to them being discriminated against or dismissed from their employment. They could amongst other things be overweight,²¹ unattractive, small, bald, have facial hair, piercings, tattoos or a severe disfigurement. Although as stated earlier there are no specific laws that protect against this type of behaviour it could form part of a legal action for discrimination or harassment under equality laws.

A. Action for Discrimination or Harassment under Equality Laws

If for example a woman sued her employer for sex discrimination where she was refused promotion and substantiated her claim by reference to sexist comments made about her physical appearance to her at the time by her manager she could be successful. The use of discrimination laws to deal with verbal comments about appearance is better illustrated in sexual harassment cases where such comments are by themselves²² or as part of a continuous mode of behaviour²³ deemed to be sexual harassment and unlawful under section 6 of the Sex Discrimination Act 1975.²⁴ This type of action for harassment based on verbal comments (or other harassing behaviour) could be taken under legislation dealing with race, sexual orientation, religion or belief or disability.

²¹ According to the Western Mail and Echo November 30, 2002, News p 7 "More than half the Welsh population is overweight or obese."

²² *In situ Cleaning Co. Ltd v Heads* (1995) IRLR 4

²³ *Porcelli v Strathclyde Regional Council* (1986) IRLR 134

²⁴ Equal Treatment Amendment Directive 2002/73/EC due for implementation in UK October 2005 will provide a separate ground and statutory definition of sexual harassment for the first time

Where discriminatory decisions are made by management on the basis of someone's physical appearance then this may or may not be unlawful. When they select someone for employment on the basis of their appearance, or ensure that the successful candidate for a promotion complies with appearance norms or expectations of the organisation then this should be treated as discriminatory but there is little evidence that it is.

Even if they can satisfy an employment tribunal of this, they have in addition to establish the decision is made on a discriminatory ground that is unlawful under equality law in the United Kingdom, namely sex, race, sexual orientation²⁵ religion or belief²⁶ or disability. This represents a high onus of proof which will dissuade most applicants from pursuing a case. They will find it easier where there is a pattern of discriminatory behaviour against unattractive men or women or against homosexuals (because of their style of dress) that can be referred to in the evidence.

In cases brought on the ground of sexual orientation the Regulations define the persons covered widely under Regulation 2 and sexual orientation means sexual orientation towards persons of the same sex, persons of the opposite sex or persons of the same sex and the opposite sex.²⁷ Protection is also extended against discriminatory behaviour because of assumptions (right or wrong) about their sexual orientation. "Perhaps more than any other form of discrimination sexual orientation discrimination and harassment is often based on stereotypical assumptions about a person's sexuality drawn from the way that a person is perceived as projecting

²⁵ Under the Employment Equality (Sexual Orientation) Regulations 2003/1661 that came into force in December 2003 direct and indirect discrimination and discrimination by way of victimisation and harassment against employees on the ground of sexual orientation is covered. With respect to comparators it is enough to show that someone of a different sexual orientation would not have been discriminated against

²⁶ The Employment Equality (Religion or Belief) Regulations 2003/1661 introduced equivalent measures (to the regulations dealing with sexual orientation) to deal with discrimination on these grounds

him/herself , whether through clothing, speech or other characteristics.”²⁸ It is not necessary for someone to reveal their sexual orientation to make a valid claim under the Regulations.

As intimated earlier the only exception to the relatively high burden of proof in discrimination cases is where the person has been discriminated against because of a severe disfigurement as defined by paragraph 3(1) of Schedule 1 of the Disability Discrimination Act 1995²⁹ and regulation 5 of the Disability Discrimination (Meaning of Disability) Regulations 1996/1455. The Regulations provide that disfigurement which consists of a tattoo that has not been removed is not to be treated as a severe disfigurement nor is piercing of the body for decorative purposes including anything attached through piercing.

In a guidance note that accompanies the legislation examples given of disfigurements are scars, birthmarks, postural deformation or diseases of the skin, however assessing its severity will mainly be a matter of the degree of the disfigurement and it may be necessary to take account of where on the body the disfigurement is.³⁰

Where an employee has a severe disfigurement they do not have the evidential burden normally faced by applicants in cases of disability discrimination of showing their situation complies with the definition of disability in section 1 of the Disability Discrimination Act 1995.³¹ They do not necessarily have to find a comparator³² and only have to show they have suffered a detriment because of their disability.³³

²⁷ Homosexuals, heterosexuals and bisexuals

²⁸ Oliver, H Sexual Orientation Discrimination: Perceptions, Definitions and Genuine Occupational Requirements, *Industrial Law Journal* Vol. 33 No. 1 2004, pp 1-21 at p 4

²⁹ An impairment which consists of a severe disfigurement is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities

³⁰ Paragraph A 17, Part 11, Guidance on Matters to be taken into account in determining questions relating to the meaning of disability, issued July 1996 under the DDA 1995

³¹ As amended by the Disability Discrimination Act 1995 (Amendment) Regulations 2003/1673

³² *Clark v Novacold Ltd* (1999) IRLR 318, CA and modified s 3A(5) of the DDA 1995 in force from October 2004

³³ This could take the form of direct discrimination by the employer or a failure on the part of the

There are obviously difficulties in proving that a management decision that is detrimental to the victim of discrimination is founded on an unfavourable opinion of their appearance.

If we continue with the example of derogatory verbal comments mentioned earlier it will be difficult to show these have been directed at an individual unless they have been overheard by another person in the workplace and that person is willing to substantiate the victim's claim before a hearing implementing the statutory dispute procedure and/or an employment tribunal. Where there are no witnesses it will be the applicant's word against his employer.

B. Action for Redundancy Rights or Unfair Dismissal

In extreme cases the person maybe selected for redundancy or for dismissal because of his or her physical appearance. It would be up to the person adversely affected by these decisions to show that unfavourable aspects of their physical appearance (because they are unattractive, disfigured or inappropriately dressed or groomed) is the reason or one of the main reasons for a detrimental decision. The difficulties in proving that the actions of the employer in unfairly or constructively dismissing an employee or making them redundant is based on their physical appearance is illustrated by a very old redundancy case *Vaux & Associated Brewers Ltd v Ward*.³⁴ In the absence of more recent relevant decision, this will serve to outline the inadequacies in the law. The applicant Ms Ward had worked as a barmaid for the same employers for eighteen years. The brewers decided to modernise the bar where she worked and converted part of it into a disco. In keeping with the bar's glamourised image they employed two barmaids to dress as bunny-girls. Ms Ward was fifty-seven years of age and did not fit into the new image of the bar and was dismissed. She claimed redundancy pay but

³⁴ employer to make reasonable adjustments (s 6)
(1969) 7 KIR 308, DC

it was held that she had not been made redundant because the need for the work she had done had not diminished. It was just that she was considered no longer suitable for the job. Although she is clearly the victim of ageism and *lookism* there was at the time, and still is now, no remedy for these types of discrimination. She was unable to claim unfair dismissal as no such remedy existed at the time.³⁵ It is not certain, in the absence of a suitable precedent, whether she would be successful with a claim for redundancy pay or unfair dismissal at the present time. In an unfair dismissal case an employer could argue that she was dismissed for a fair reason³⁶ of some other substantial reason. "Although an employer cannot claim that a reason for dismissal is substantial if it is a whimsical or capricious reason which no person of ordinary sense would entertain if he can show that he had a fair reason in his mind at the time when he decided on dismissal and that he genuinely believed it to be fair, this would bring the case within some other substantial reason."³⁷ In a case where dismissal is based on the unsuitableness of the appearance of the employee as in *Vaux* the fair reason could be that she was no longer suitable for her employment³⁸ or that she was dismissed as a result of a reorganisation of the business.³⁹

"Where there is a genuine reorganisation which has dislodged an employee who cannot be fitted into the reorganisation, it must be open to the employer to dismiss him and in such circumstances the dismissal will be for some other substantial reason."⁴⁰

³⁵ Introduced for the first time under the Industrial Relations Act 1971

³⁶ Section 98(1)(b) of the Employment Rights Act 1996,

³⁷ *Harper v National Coal Board* (1980) IRLR 260

³⁸ *Saunders v Scottish National Camps Association Ltd* (1980) IRLR 174, cited with approval by the EAT in the Harper case above.

³⁹ *Lesney Products v Nolan* (1977) IRLR 77

⁴⁰ *Robinson v British Island Airways* (1977) IRLR 477 EAT

Where an employer is pressurised by a third party such as his customers to dismiss a member of staff because he or she does not meet their standards of looks or dress then it may also be a fair dismissal.⁴¹

Provided the employer followed a proper procedure then it will probably be decided that he acted reasonably in dismissing her.⁴²

“Once it has been established that the reason for the dismissal was that it was impracticable for employment to continue and that this was a substantial reason for dismissal within the meaning of s 98(1)(b) it is extremely difficult to conclude that it was unreasonable in terms of s98(4) for the employer to dismiss on this account.”⁴³

A better option for an employee in this position is to show that they have been contractively dismissed. Thus they have been forced to leave their job because the employer’s behaviour is so intolerable that it represents repudiation by him of the contract and constitutes a fundamental breach of their contract.⁴⁴ Where it can be shown that the employer is subjecting an employee to unfavourable treatment because of their physical appearance then this may represent a breach of the implied term of trust and confidence and underpin a claim for constructive dismissal.

In the case of *Malik v BCCI*⁴⁵ defined the obligation on the employer in terms of maintaining trust and confidence as “...not without reasonable and proper cause to conduct oneself in a manner likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.”⁴⁶

In the absence of relevant case authority it is difficult to know what evidential difficulties may face someone in this position although it is likely that where it can be

⁴¹ *Scott Packaging and Warehousing Co Ltd v Paterson* (1978) IRLR 166, EAT

⁴² Section 98 (4) of the Employment Rights Act 1996

⁴³ *Kelman v GJ Oram* (1983) IRLR 432 EAT

⁴⁴ Section 95(1)(c) of the Employment Rights Act 1996

⁴⁵ (1997) IRLR 462, HL

⁴⁶ *Ibid* at p 471, para 70

established that a pattern of behaviour or a single detrimental act ⁴⁷is motivated by a dislike of someone's physical appearance, then this will be treated as a breach of this implied term and represent a suitable basis for a constructive dismissal claim.

In terms of cases such as *Vaux* the light at the end of the tunnel might be the legislation dealing with age discrimination that will be introduced in the UK in 2006 although for persons dismissed on the ground of physical appearance, without an element of age discrimination, there will be no salvation.

With respect to ageism this is clearly an aspect of discrimination based on physical looks because as illustrated in *Vaux* the mere fact that an employee is of advanced years, and looks it, may make them unsuitable from an employer's perspective for appointment to a job, training, promotion etc. Legislation on Age Discrimination in the UK will not be introduced until October 2006 to allow time for consultation and for employers to put in place suitable employment practices. It is uncertain what form the legislation will take although the Government has intimated that where possible they will introduce measures that are similar to other areas of equality law. It is important to note that this protection will not extend beyond the sphere of employment. Having said this, the Government may have to reconsider the use of minimum or maximum age limits in employment law as they may be subject to challenge under the legislation e.g. upper age limit of 65 for entitlement to the right to claim redundancy rights and unfair dismissal

⁴⁷ *Isle of Wight Tourist Board v Coombes* (1976) IRLR 413, EAT

5. FEDERAL AND STATE LAW IN THE UNITED STATES PROHIBITING DISCRIMINATION BASED ON PHYSICAL LOOKS

The legal rules dealing with this type of discrimination are unsatisfactory given that there are no federal laws directly protecting employees although certain employees (as illustrated below in the case of weightism and ageism) can gain protection under federal laws where they can bring their situation under definitions in the legislation (e.g. disability discrimination).

Where state law does deal with lookism it tends only to deal with one or two aspects of the problem. The exception to this is the District of Columbia which prohibits discrimination based on “personal appearance,” which refers to “bodily condition or characteristics.” The D. C. Human Rights Act of 1977, D.C. Code Ann. § 1-2501 (1981) states its intent and defines “personal appearance” as follows: “it is the intent of the Council of the District of Columbia, in enacting this act, to secure an end in the District of Columbia, to discrimination for any reason other than that of individual merit, including, but not limited to discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, matriculation, political affiliation, physical handicap, source of income, and place of residence or business. (§ 1-2501).”

Personal appearance is broadly defined as “the outward appearance of any person, irrespective of sex, with regard to bodily condition or characteristics, manner or style of dress, and manner or style of personal grooming, including, but not limited, to hair style and beards. “(§ 1-2502) This legislation covers both kinds of discrimination identified in this article although with respect to appearance or grooming codes it is

not clear whether the restrictions will be upheld by the courts or not although the reference to hair style and beards suggest they will be protected rights of employees.

A. Federal Law Dealing with Weightism

“Overweight people are at a high risk of discrimination due to disempowerment because of their weight or more specifically because of their weight combined with race, gender, and socioeconomic factors which operate synergistically to disadvantage them further.”⁴⁸

Under title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2) it declares that all Americans have a right to employment free from discrimination based on race, color, sex, religion, and national origin. While weightism is not included in the list of protected classifications, employers violate Title VII when they apply weight requirements in a discriminatory manner. Successful actions have been brought under Title VII by flight attendants for discriminatory application of weight requirements by airline companies.

Generally, the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.) protects the rights of persons with disabilities in programs, facilities, or employment that receive federal funds. The Americans with Disabilities Act (42 U.S.C. § 12101 et seq.) extends those protections to the private sector. In the employment area, both statutes prohibit discrimination against an otherwise qualified individual with a disability solely on the basis of their disability. The statutes define “persons with disabilities” as including

⁴⁸ Theran, Free to be Arbitrary and ...Capricious: Weight –Based Discrimination and the Logic of American Antidiscrimination Law, *Cornell Journal of Law and Public Policy*, Vol. 11 Fall 2001 pp 113-180 at pp 124-125

those who are regarded or perceived as having a disability which could include employees that are obese or that have a severe physical disfigurement.

In an important decision, obesity caused by metabolic dysfunction was found to be a disability under the Rehabilitation Act. In *Cook v Rhode Island*,⁴⁹ a “morbidly obese” plaintiff was denied reemployment at a state home for the retarded because the state claimed her obesity compromised her ability to evacuate patients in case of emergency. The state also claimed she was at a greater risk of developing ailments that would increase the likelihood of workers' compensation claims and absenteeism. The First Circuit Court of Appeals found that concern over absenteeism and increased costs is not a valid basis for denying employment. The court upheld a jury finding that the state denied Ms. Cook employment solely on the basis of her obesity, rather than on her ability to do the job, and it upheld a damages award of \$100,000.

B. State Law Dealing with Weightism

Through legislative enactments or court decisions, several states have moved to outlaw discrimination based on size or weight. Michigan appears to be the only state with a statute specifically including “weight” as a protected classification in the same way sex, religion, race, and national origin are protected. In the Elliott Larsen Civil Rights Act of 1976 , Mich. Comp. Laws Ann. § 37.2101 (West 1994) the law states that the opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age,

⁴⁹ 10 F.3d 17 (1st Cir. 1993)

sex, height, weight, or marital status as prohibited by this act, is recognized and declared to be a civil right.

In various cases state law has been widely interpreted to include discrimination on the ground of weight or obesity in the absence of specific protection under state legislation. In New York, in the case of *State Division of Human Rights v Xerox Corp.*⁵⁰ and in New Jersey, in the case of *Gimello v Agency Rent-a-Car Systems, Inc*⁵¹ the courts found that obesity falls within the definition of disability or handicap under the state human rights laws.

The state Supreme Court of California found that obesity could be the basis of a violation of the state's fair employment law where there is a physiological systemic basis for the condition.⁵²

Obesity may be regarded as a handicap under the state of Oregon's Fair Employment Practices Act, if the obesity substantially limits one or more of the person's major life activities, such as caring for oneself, working, walking, etc.⁵³ These classifications being much more general are very different from the closely defined day to day activities looked for under UK discrimination law to underpin an action.

C. Prohibition of age discrimination

Where discrimination on the ground of physical appearance is underpinned by ageism then there may be a right of action under federal law in the United States. The Age

⁵⁰ 480 N.E.2d 695 (NY 1985)

⁵¹ 594 A.2d 264 (N.J. Super. Ct. App. Div. 1991)

⁵² *Cassista v Community Foods, Inc.*, 856 P.2d 1143 (Cal. 1993)

⁵³ *Oregon Correctional Institution v Bureau of Labor and Industries*, 780 P.2d 743 (Or.App.1989).

Discrimination in Employment Act 1967 (ADEA), protects individuals who are 40 years of age or older;

It states that under SEC. 623 [Section 4] (a) It shall be unlawful for an employer- (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee,

because of such individual's age; or (3) to reduce the wage rate of any employee because of his age.

In the federal courts, some significant developments in equal opportunity law came about in 2000. One of the most important was *Reeves v Sanderson Plumbing Products*⁵⁴ in which the Supreme Court held that a jury may infer that an employer has violated the ADEA even if the plaintiff presents no direct evidence of age discrimination.

In the Reeves case, the employee gave the jury substantial evidence from which it could conclude that his employer's explanation for firing him was false. The Court held that this was enough for a finding of age discrimination.

Also, in *Kimel v Florida Board of Regents*⁵⁵ the Supreme Court held that state employees are not protected by the ADEA because states have not consented to being sued under this statute. Thus, only private employers may be sued for breach of the ADEA.

⁵⁴ (530 US 133 (2000))

⁵⁵ (520 US 62 (2000))

While there is limited protection under federal legislation for this type of discrimination in the US there are state laws which offer some protection against discrimination based on physical looks.

6. DISCRIMINATION UNDER DRESS CODES AND GROOMING POLICIES IN THE UNITED KINGDOM

An employer will often introduce codes or standards of appearance to apply in the workplace and as a consequence employees may have to sublimate or modify their normal mode of dress to comply with these organisational requirements. The impact of this on most employees is minimal although it can be important where appearance codes compromise an employee's sexual identity, religious belief or sexual orientation. The courts generally accept that employers have a managerial prerogative to specify and enforce rules that impose appearance standards on their employees that control the way their employees are dressed (e.g. clothing) or groomed (hair, body piercing, jewellery etc.)

These dress or appearance codes are not normally included within a contract of employment and are often the unilateral company rules of the employer.⁵⁶ Nevertheless judges tend to accept that employers have the right to introduce and enforce such codes irrespective of whether they have a contractual status or not.

⁵⁶ Unless, in the unlikely event, they have been arrived at through negotiation with trade unions or through agreement with individual employees prior to the contractual terms being settled.

A. Sex Discrimination

Inequality of treatment can arise where an appearance code imposes standards which impact differently on both sexes. The consequent dissatisfaction of employees affected by such discriminatory requirements could be substantial and lead to them pursuing a legal action against their employer. The chance of their success in an action under equality legislation has to date been limited.

The case that determined the judicial approach to discrimination cases brought because of inequality of treatment in dress codes is *Schmidt v Austicks Bookshops Ltd.*

⁵⁷ In this case female employees who came into contact with the public were not allowed to wear trousers and instead were required to wear skirts and overalls. The applicant Ms Schmidt was dismissed because she refused to wear a skirt. Her claim that this dress requirement represented direct discrimination on the ground of her sex was unsuccessful.

The Employment Appeal Tribunal took the view that there was no inequality of treatment as required by s.1 (1) (a) of the Sex Discrimination Act 1975, because there was no comparable restriction that could be applied to men equivalent to a ban on wearing trousers. The evidence showed that men were not allowed to wear t-shirts and it seemed likely that men would not have been allowed to wear any unconventional clothing. It was felt that there was insufficient evidence to show that choice of clothing at work was not restricted for both sexes. The EAT in *Schmidt* appear to approve of a 'swings and roundabouts' approach to assessing whether appearance rules are acceptable, typified by the following quote. "There were in force rules restricting wearing apparel and governing appearance which applied to men and also

⁵⁷ [1977] IRLR 360; [1978] ICR 85

applied to women although obviously, women and men being different, the rules in the two cases are not the same”⁵⁸

Where women are forbidden to wear trousers as in the *Schmidt* case there are two arguments put forward for women having a valid discrimination claim (because this requirement means the treatment of women and men is unequal).

Women are subjected to different requirements, which result in them suffering a detriment, and only women are denied the opportunity to wear something that is socially acceptable. If the dress code restricted men from wearing skirts, the effect would be far less burdensome because it is unlikely that many men would want to wear them. The restrictive interpretation of the equality aspect of dress codes in *Schmidt* has been followed by Employment Tribunals and Courts in the United Kingdom and has not been confined to clothing requirements, but extended to cover hair length, jewellery, body piercing and facial hair.⁵⁹

In the case of *Burrett v West Birmingham Health Authority*⁶⁰ a female nurse was required to wear a cap as part of her uniform but male nurses were not. The applicant claimed she had been subjected to a discriminatory requirement and brought a claim for sex discrimination. The Employment Appeal Tribunal followed *Schmidt* and held that, as the requirement to wear a uniform applied to both male and female nurses, the fact that the uniforms differed and the applicant objected to only one part of the uniform, this did not amount to less favourable treatment under s.1 (1)(a) of the Sex Discrimination Act 1975.

⁵⁸ [1977] IRLR 360, 361

⁵⁹ In India in a district in Madhya Pradesh state policemen are encouraged by the authorities to grow moustaches through payment of a bonus because they believe that persons with moustaches are more respected by the public

⁶⁰ Indian police given moustache pay BBC News 14.01.2004 <http://news.bbc.co.uk>
(1994) IRLR 7

The decision in *Schmidt* has also been upheld as correct by the Court of Appeal in *Smith v Safeway plc*.⁶¹

The applicant, Smith, was a male delicatessen assistant, who was dismissed when his ponytail grew too long to be hidden under his hat. It contravened the rule for males in his position which specified “tidy hair not below shirt collar length. No unconventional hairstyles or colouring.” Safeway required all their food handlers to wear hats and both sexes were prohibited from having unconventional hairstyles or colouring. However women were allowed to clip back shoulder-length hair. The basis for his complaint of sex discrimination was that a female employee would not have been dismissed for having long hair. The Court of Appeal held that Smith had not been discriminated against and Lord Justice Gibson stated that an employer would not be acting unlawfully by adopting a code that applies conventional standards to both sexes.⁶² Moreover, it was felt that it could not be accepted that changes in society rendered the above reasoning unsound in law.

In *Wilson v Royal Bank of Scotland plc*⁶³ the bank introduced a policy that men must wear suits instead of a uniform. Wilson refused to comply because his suit was not suitable for summer wear and he was unable to afford a new one. He claimed sex discrimination on the ground that women could wear anything as long as it was smart. Wilson’s claim failed because the tribunal felt that he had not suffered a detriment and both sexes were subject to a requirement, in that they had to dress smartly.

In the case of *Department of Work and Pensions v Matthew Thompson*⁶⁴ the applicant worked for Jobcentre Plus but his work did not bring him into contact with

⁶¹ (1996) IRLR 456

⁶² Ibid p 459

⁶³ S/0590/89

⁶⁴ EAT/0254/03/MAA

the public. He was required to wear a shirt and tie at work and he objected arguing that this was discriminatory against men. The dress code operated by his employer required all staff to dress in a "professional and business like way". Men were required to wear a collar and tie though in hot weather ties could be removed with the permission of management. Women were required "to dress appropriately and to a similar standard. Although the employer strictly upheld the dress code for men and gave a warning to the applicant when he refused to comply, the applicant produced photographic evidence that suggested it was not strictly upheld in the case of women. The Employment Tribunal upheld his claim and this led to around 6,950 similar cases being lodged with the employment tribunal. The decision of the Employment Tribunal was set aside on appeal by the EAT.

They found that the tribunal misdirected itself in law by amongst other things failing to establish that the facts in the case could be distinguished from the facts in the cases cited above. They decided it was for the employment tribunal to decide if requiring men to wear a collar and tie was necessary to achieve the level of smartness required of both sexes and this matter was referred to a differently constituted tribunal for a decision. Both parties were given leave to appeal.

A. Discrimination on grounds of sexual orientation, religious belief, race and disability

Legislation has been introduced to implement the Council Framework Directive 2000/78/EC into UK law. The rules relating to discrimination on grounds of sexual orientation ⁶⁵ and religious belief ⁶⁶ were implemented in December 2003 and

⁶⁵ Employment Equality (Sexual Orientation) Regulations SI 2003/1661

legislation on the grounds of disability discrimination by October 1, 2004. The legal rules dealing with age discrimination will be implemented by October 2006.

There is now as a result of the legislation dealing with sexual orientation and religious belief additional grounds for a discrimination action in the UK that will offer increased protection to persons suffering a detriment because of dress or grooming codes.

The Employment Equality (Sexual Orientation) Regulations offers new protection for employees who are unfairly treated as a result of their sexual orientation. It has been realised that sexual orientation rarely affects a worker's suitability or capacity to perform their duties. Although 'sexual orientation' is not defined, Regulation 2 provides protection against discrimination to heterosexual, homosexual and bisexual persons.

If the behaviour can be challenged under the heading of harassment set out in Regulation 5(1) & (2) below then the additional scope for legal action is considerable.

(1) ...“Where on grounds of sexual orientation A engages in unwanted conduct which has the purpose or effect of (a) violating B's dignity; or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment to B. (2) Conduct shall be regarded as having the effect specified in the paragraphs above only if having regard to all the circumstances including in particular the perception of B, it should reasonably be considered as having that effect.” If for example a homosexual man is subjected to verbal insults by his colleagues because of his clothing then an action for harassment based on sexual orientation could be taken against the employer. Alternatively the employer could be liable for harassing an employee who refuses to comply with the employer's dress or grooming code.

⁶⁶ Employment Equality (Religion or Belief) Regulations SI 20003/1660

The Employment Equality (Religion or Belief) Regulations prohibits direct and indirect discrimination based on 'religion or belief'. The UK Government chose not to define 'religion' but clearly states that 'belief' only covers religious beliefs and profound philosophical convictions that deserve society's respect. Where the behaviour consists of harassment because an employee on religious grounds wears religious dress or jewellery or alters their physical appearance then the employer will be liable under Regulation 5. There are specific practical concerns for employers laying down rules on dress and uniform in their appearance codes as they could be discriminatory directly or indirectly against persons religious or other beliefs which are protected by the Regulations.

Rights under Article 9(2) of the European Convention of Human Rights an individual's right to the freedom of religious belief may be restricted by a public health exception that it is "necessary in a democratic society". Thus a prohibition on beards while representing a violation of religious observance in certain religions will because of this exception not necessarily amount to a breach. There are various possibilities for legal actions being brought under the Human Rights Act although the case law to date does not suggest this is the most viable option. There are Genuine Occupational Requirements which apply under the Regulations dealing with sexual orientation and religion (provided by Regulation 7 of both) but these have no direct bearing on lookism or dress codes so they are not considered here. However it is important to point out that under Regulation 26 of the Employment Equality (Religion or Belief) Regulations, Sikhs can now wear turbans instead of safety helmets on construction sites in the UK.

The law dealing with racial discrimination in the UK has undergone considerable amendment as a result of changes brought in under the Framework Directive. There

amendments were introduced into UK law by the Race Relations Act 1976 (Amendment) Regulations SI 2003/1626 which includes a statutory definition of racial harassment, changes introduced to the burden of proof and a new definition of indirect discrimination. These Regulations could have a bearing on the protection of victims of discrimination based on physical appearance.

Definitions of direct and indirect discrimination have been altered to comply more closely with the Burden of Proof Directive 97/80 EC. With respect to indirect discrimination the wording used in defining indirect discrimination as it applies to certain sections in the Act has changed to provision, criterion or practice instead of a requirement or condition. It is likely that because most dress or grooming codes are expressed in clear and emphatic terms this change in the burden of proof will have little impact (the more stringent test being satisfied) but it will be a significant change where for example the code is informal or established through custom and practice.

Also for the first time racial harassment is defined under statute and treated as directly unlawful.

Racial or ethnic harassment is defined by Article 2(3) as unwanted conduct related to racial or ethnic origin ...with the purpose or effect of violating the dignity of a person or of creating an intimidating, hostile, degrading, humiliating or offensive environment” It is no longer necessary to prove that the treatment was less favourable than the treatment afforded to a comparator (real or hypothetical). This means that where restrictions are imposed that adversely impact upon the dress or appearance required of employees by their membership of racial groups they will have a right of action.

B. Transsexuals and Tranvestites

Discriminatory action against transsexuals and transvestites by an employer could fall under both kinds of discrimination, on the ground of their physical looks and on the ground of their appearance representing a breach of dress or grooming codes. Unfortunately it is difficult to see that the physical appearance of a transsexual or transvestite will meet the expectations of most employers, particularly where they employ aesthetic labour as part of their human resources policy.

Transsexualism is concerned with sexual identity and transsexuals are anatomically of one sex but believe they belong to the other sex. and accordingly they tend to dress up as the opposite sex. This often generates a "panicked defence" from management resulting in harsh decisions being made against the employee.⁶⁷ Transsexuals are now protected against the discriminatory acts of the employer by section 2A of the Sex Discrimination Act 1975.⁶⁸

A transvestite on the other hand is a person who obtains gratification from wearing the clothes of the opposite sex.

They are as a class unprotected by the law at present although they may be able to make a claim under the Employment Equality (Sexual Orientation) Regulations SI 2003/1661 where they can establish that the discrimination is based on their sexual orientation. Grooming codes are important here since a transvestite may wish to wear clothes to work that are deemed inappropriate by society or by an employer under his dress or grooming code. The Court of Appeal's decision in *Smith v Safeway plc* in respect of dress codes was followed in *Kara v London Borough of Hackney*.⁶⁹

⁶⁷ L Flynn, 'Gender equality law and employer's dress codes' (1995) 24 *Industrial Law Journal* 272 see *P v S and Cornwall CC* (1996) ECR I-2143 ECJ

⁶⁸ Inserted by the Sex Discrimination (Gender Reassignment) Regulations 1999 SI 1999/1102

⁶⁹ EAT 325/95

The EAT held that Kara, a male transvestite, was not discriminated against when his employers banned him from wearing women's clothes at work. It was concluded that the employers were lawful in requiring Kara to dress as a man whilst at work. The claim was dismissed on the grounds that the council reasonably and genuinely believed Kara's clothes were in breach of their clothing policy.

Kara went on to complain to the European Commission that his rights under Article 8(1) and 10(1) of the European Convention had been breached. In the earlier case it became clear that under UK law an employer would not be liable for sex discrimination if they dismissed a male employee for attending work dressed as a woman. The applicant brought an appeal against this decision to the European Commission of Human Rights complaining that he had been prevented from expressing himself through his dress and accordingly there had been a violation of Article 8 and Article 14 of the ECHR. The Commission however dismissed the complaint by a majority.⁷⁰ They agreed that under Article 8(1) constraints imposed on a person's mode of dress amounted to an interference with their private life. Nevertheless, they felt that in the circumstances the restriction was "in accordance with the law" since it was based on a lawful internal policy. The interference was held to pursue the legitimate aim of protecting the rights of others and thought to be "necessary in a democratic society," since employees who come into contact with the public may have to conform to reasonable dress codes. They also decided that such a requirement could be regarded as "enhancing the employer's public image."⁷¹ The Commission in *Kara* were not satisfied that the applicant had established that he had been prevented by his employer from expressing a particular opinion or idea by means of his clothing. The employer was not acting in breach of Article 10(2) of the ECHR,

⁷⁰ (1999) EHRLR 232

despite the fact that the employee was a bisexual male transvestite and there was plenty of evidence to show that by wearing dresses he was indeed trying to express his own identity and opinions.

Finally the Commission acknowledged that although there might have been a wider range of dress available to females than to males, a complaint of discrimination under Article 14 was rejected since there was no evidence that the applicant was subjected to a different rule purely because he was a male and not a female.

⁷¹ Ibid p 233

7. DISCRIMINATION UNDER APPEARANCE CODES AND GROOMING POLICIES IN THE UNITED STATES

While no explicit reference is made to workplace appearance or grooming policies in US equality laws, they are often treated by the judiciary as included in the terms and conditions of employment and therefore fall within the types of discrimination prohibited by Title VII 42 as amended by USCA Section 2000e-2(a).⁷² The only exception is where race, colour, religion, sex or national origin and associated appearance standards are a bona fide occupational qualification⁷³ which is necessary for the operation of the employer's business.⁷⁴

The courts in the United States adopt a similar approach to the courts in the UK, namely that introducing and applying dress or grooming codes is a managerial prerogative that they are reluctant to interfere with.

This approach is underlined in the case of *Fagan v National Cash Register Company*⁷⁵ where the Federal Court of Appeals states that: "perhaps no facet of business life is more important than a company's place in the public estimation. That the image created by its employees dealing with the public when on company assignment affects its relations is so well known that we take judicial notice of an employer's proper desire to achieve favourable acceptance."

⁷² Civil Rights Act of 1964, as amended, makes it unlawful employment practice for an employer: "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals race, colour, religion, sex or national origin; or (2) limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, colour, religion, sex or national origin"

⁷³ 42 USCA Section 2000e-2(a)(1)

⁷⁴ Ibid, at 2(e) 1

In this case the judges were categorical that maintenance of an employer's public image in a favourable light was paramount and measures introduced to protect that image, such as dress codes, would be justifiable.

A. Sex discrimination

As might be expected workplace appearance standards will only amount to unlawful discrimination if as a result of their application a person of one sex is treated less favourably than a person of the other sex.

In *Laffey v Northwest Airlines Inc.*⁷⁶ impositions of different grooming standards for women amounted to sex discrimination. Here female cabin attendants (unlike male attendants) could not wear spectacles and were subjected to a maximum weight requirement.

In the case *Carroll v Talman Federal Savings and Loan Association of Chicago*⁷⁷ the Federal Court of Appeals held that Title VII had been breached:

“...Disparate treatment is demeaning to women. While there is nothing offensive about uniforms per se, when some employees are uniformed and others are not there is a natural tendency to assume that the uniformed women have a lesser professional status than their male colleagues attired in normal business clothes”⁷⁸

⁷⁵ [1973] 481 F 2d 1115

⁷⁶ [1973] 366 F Supp 763, [1974] 374 F Supp 1382 (US District Court)

⁷⁷ [1979] 604 F 2d 1028 (7th Cir)

⁷⁸ Ibid, at 1032-3

In *Michigan Department of Civil Rights ex rel. Cornell v Edward A. Sparrow Hospital Association*⁷⁹ it was held that an employer's dress code was based on sexual stereotyping and amounted to sex discrimination. Despite these favourable decisions most challenges to grooming policies have been unsuccessful.

In *Willingham v Macon Telegraph Publishing Company*⁸⁰ which is probably the US equivalent of *Schmidt* Mr Willingham filed a complaint asserting sex discrimination by his employer Macon in its hiring policy. He was refused employment because they were unhappy with the length of his hair.⁸¹ Under their grooming policy all employees who were in contact with the public were required to be neatly dressed and groomed in accordance with community standards. Mr Willingham claimed that if he were a female with identical hair length and similar qualifications he would have been hired. The court held that his claim was outwith the scope of the 1964 Act.⁸² on the dubious ground that the employer's grooming policy constituted discrimination on grounds of grooming standards and not on the grounds of sex.

They decided that if an employee objects to the grooming code they have the right to reject it by looking elsewhere for work or alternatively they could compromise their preference by accepting the code that comes with the job.⁸³ While the court's decision was in line with previous authority⁸⁴ it was not without its critics.

⁷⁹ [1982] 326 N.W.2d 519 (Mich. App.)

⁸⁰ [1975] 507 F 2d 1084, there was an 11-4 majority ruling

⁸¹ In its defence the management at Macon argued that the business community on which it depended associated longhaired males with the "counter-culture types" who gained extensive unfavourable national and local exposure during the 'International Pop Festival' in Georgia during 1970.

⁸² Section 703(a) as amended by Title 42 U.S.C.A s.2000e-2(a)

⁸³ In addition it was stated that only immutable characteristics could frustrate employment opportunities. Immutable characteristics include, race, national origin and gender, thus hair length enjoys no constitutional protection since it is changeable.

⁸⁴ In *Fagan v National Cash Register Co.* [1973] 157 US App. D.C. 15, 481 F 2d 1115, an employee was discharged and sued under s.703 (a). His suit was dismissed because hair length is not constitutionally

The four dissenting judges in *Willingham*⁸⁵ argued that anti-discrimination law: "extends to all differences in the treatment of men and women resulting from sex stereotypes...(the law) does not permit one standard for men and another for women, where both are similarly situated"⁸⁶

In the case of *Dodge v Giant Food Inc.*⁸⁷ it was decided that hair policies: "are classifications by sex...which do not represent any attempt by the employer to prevent the employment of a particular sex, and which do not pose distinct employment disadvantages for one sex. Neither sex is elevated by these regulations to an appreciably higher occupational level than the other"⁸⁸

In *Page Airways of Albany, Inc. v New York State Division of Human Rights*⁸⁹ it was held that company regulations which required men to cut their hair, did not discriminate or classify within the meaning of Human Rights Law.⁹⁰

While the various justifications put forward by the judiciary in these early cases for excluding grooming codes from coverage of the Civil Rights Act 1964 were interesting in most cases the arguments they put forward were fairly unconvincing.

Most cases point to the fact that courts in the United States believe that 'no-beard' policies do not amount to sex discrimination.⁹¹ In the case of *Rafford v Randle Eastern*

protected and the grooming policy was designed to further the company's business interest and not for sex discrimination

⁸⁵ Wisdom, Tuttle, Goldberg and Godbold (all Circuit Judges)

⁸⁶ In *Earwood v Continental South-eastern Lines Inc* [1976] 539 F 2d 1349, Circuit Judge Winter refused to follow the Court of Appeals' decision and dissented (p.1352) on the ground that the *Willingham* test: "imports constitutional notions of immutability and fundamentally into the process of statutory interpretation"

⁸⁷ [1973] 488 F 2d 1333

⁸⁸ [1973] 488 F 2d 1333 at 1337

⁸⁹ (1975) 376 N.Y.S. 2d 32N.Y.A.D. 3 Dept

⁹⁰ In *Knott v Missouri Pacific Railroad Company* [1975] 527 F 2d 1249 the Court of Appeal decided that a grooming policy requiring men to have short hair did not violate Title VII of the Civil Rights Act because it was never intended that this legislation would interfere with the "promulgation" or "enforcement" of personal appearance regulations by private employers. at pp1251-1252

*Ambulance Service*⁹² the principal reason for termination of the plaintiff's employment was the fact he had a beard and moustache. It was decided that this behaviour did not violate the 1964 Act.⁹³ as they had not been discriminated against on the ground of their sex because only men could be discharged because of an unwanted beard.⁹⁴ There is more chance of success where a desire to wear a beard is part of the employee's religious beliefs (considered below). Federal Express have, following legal actions against them by certain of their Rastafarian and Muslim employees, agreed to amend their personal appearance policy to allow employees with sincerely held religious beliefs to wear a beard.

Employers in the United States may sometimes impose a sexually provocative dress requirement on their staff and this could in itself represent a discriminatory requirement and particularly where it leads to the person subject to this requirement being sexually harassed.

Deakin & Morris⁹⁵ state that the reciprocal duty of co-operation means that an employer will violate Title VII by implementing a policy that clearly oppresses an individual's dignity.

In the case of *Marentette v Michigan Host Inc.*⁹⁶ the court recognised that requiring an employee to wear sexually provocative clothing which leads to them experiencing sexual harassment could violate the spirit of Title VII.

⁹¹ *Thomas v Firestone Tire & Rubber Company* [1975] 392 F Supp 373; *Bertulli v First National Stores Inc* [1979], 20 FEP Cases 1527

⁹² [1972] 348 F Supp 316

⁹³ Civil Rights Act 1964 s.703(a)(1) as amended by Title 42 U.S.C.A. s.2000e-2(a)(1)

⁹⁴ Likewise in *Indiana Civil Rights Commission v Sutherland Lumber* [1979] 394 NE 2d 949 Ind.App. 3 Dist. two male employees were discharged for failing to comply with the company's 'clean-shaven' rule. The policy did not amount to sex-based discrimination since it was enacted for business purposes. Moreover, the policy did not affect equal employment opportunities because it was uniformly enforced on all employees.

The most cited case in this area is *EEOC v Sage Realty Corporation*⁹⁷ where a female lobby attendant was sexually harassed as a result of customers' reaction to her uniform. The US District Court found there had been sex discrimination because it was unreasonable for her to tolerate such treatment and the employer's knew that the revealing nature of her 'Bicentennial Uniform' would expose her to sexual harassment. The employee raised two important issues in support of her claim. Firstly that the uniform was entirely inappropriate and incompatible with the nature of her job because she was responsible for security, safety, maintenance and information functions in an office building. Secondly, the uniform misrepresented her duties by presenting her as a sex object. In *Sage* it was decided that Title VII was: "intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotyping".⁹⁸ Male employees would not have been required to wear such a uniform and correspondingly there was no question that the plaintiff was only required to wear the uniform because of her sex. The uniform was made a term and condition of employment and by firing her for refusing to wear it her employers violated Section 703(a) of the 1964 Act.⁹⁹

B. Sexual Orientation

Unlike the UK where sexual orientation is now a prohibited ground of discrimination under national law there is no federal law in the United States directly dealing with

⁹⁵ Deakin, S Morris G S Labour Law 3rd ed. (2001) Butterworths p 60

⁹⁶ [1980] 506 F Supp 909 (US District Court)

⁹⁷ [1981] 507 F Supp 599

⁹⁸ [1971] 444 F 2d 1194 at 1198

sexual orientation. A same-sex hostile environment sexual harassment claim under title VII could apply where a homosexual male or female employer discriminates against an employee of the same sex or allows such discrimination to take place against an employee by homosexual employees of the same sex. Sexual harassment by a supervisor of an employee of same sex could be actionable especially where this behaviour is taken because of the employee's physical appearance or because he breached an appearance code. Where male co-workers harass another male employee because they perceive him to be a homosexual (or female co-workers perceive a female employee to be a lesbian) it is not actionable because it is not harassment on the ground of sex. Unfortunately unfavourable comments or other harassment undertaken by colleagues against someone because of their sexual orientation will not be actionable. There are seven states where sexual orientation discrimination is prohibited in public employment ¹⁰⁰ and eleven states where it is prohibited in the public and private sector. ¹⁰¹ There are various cities and counties that prohibit discrimination on grounds of sexual orientation in the workplace. ¹⁰² The effect of all these legal measures combined is that only around 40% of the population have protection against discrimination. ¹⁰³ It is questionable whether this legislation will protect homosexuals and lesbians against the restrictive effects of appearance or grooming codes. Although the restrictions introduced by these codes may impact strongly on these groups they will find it difficult to show requirements that apply to all employees are discriminatory against them.

⁹⁹ as amended by Title 42 U.S.C.A. s.2000e-2(a) see also *Mathews v City of New York* [2000] 704 N.Y.S. 2d 49 N.Y.A.D. 1 Dept.

¹⁰⁰ Illinois, Iowa, Maryland, New Mexico, New York, Pennsylvania and Washington

¹⁰¹ California Connecticut, Hawaii, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, Vermont and Wisconsin

¹⁰² 124 in total

¹⁰³ Biedzynski et al Job Discrimination, American Jurisprudence Second Edition May 2003

C. Transsexuals and Transvestites

The relevant case law indicates that transsexuals in the US (unlike their UK equivalents) have little protection from discrimination under Title VII and are unlikely to be successful in any claim. In *Grossman v Bernards Township Board of Education*¹⁰⁴ the US District Court conformed this by stating it: “has no desire, to engage in the resolution of a dispute as to the plaintiff’s present sex. Rather we assume...the plaintiff is a member of the female gender...she was discharged by the defendant school board not because of her status as a female, but rather because of her change in sex”¹⁰⁵

The employee’s claim under Title VII failed because the court was of the opinion that there was no evidence of any congressional intent to include transsexuals within the ambit of equality legislation.

Three US Court of Appeal decisions are often cited in this area and they follow the reasoning adopted in *Grossman*.¹⁰⁶ In *Holloway v Arthur Anderson & Company*¹⁰⁷ there was no unlawful discrimination when an employee was dismissed for commencing sex-change treatment because Congress only had the ‘traditional notions of sex’ in mind when enacting Title VII. Despite this restrictive interpretation of Title VII in respect of transsexuals the US Court of Appeal in *Holloway* did concede the legislation could offer limited protection: where “consistent with the determination of this court, transsexuals

¹⁰⁴ [1975] 11 FEP Cases 1196

¹⁰⁵ Ibid, at 1198

¹⁰⁶ *Sommers v Budget Marketing Inc.* [1982] 667 F 2d 748 ; *Ulane v Eastern Airlines* 35 [1984] FEP Cases 1348

¹⁰⁷ [1977] 566 F 2d 659

claiming discrimination because of their sex, would clearly state a cause of action under Title VII”¹⁰⁸

On this reasoning transsexuals could have a valid claim of sex discrimination where they can prove they have been less favourably treated as a result of their sex and not their transsexualism. In such a case they will be afforded the same protection under equality law as any other person of the same sex that is a victim of discriminatory treatment (see Enriquez case below)

What is the position of persons who are dismissed for displaying characteristics that are associated with the opposite sex? In these circumstances a man could argue that if he belonged to the opposite sex he would not have been dismissed since it would have been socially acceptable to adopt the social role he is being penalised for adopting.

The employer in most cases would find it difficult to establish that dressing like a woman or having feminine tendencies affect's a male employee's ability to perform his contractual duties. Despite this, in the case of *Smith v Liberty Mutual Assurance Company*¹⁰⁹ the Court of Appeals in a rather draconian judgement held that Title VII had not been violated when a homosexual employee was dismissed for being 'effeminate'. It was stated that the 1964 Act does not forbid discrimination based on sexual preference. It was also contended that Smith was not discriminated against because he was male but because his characteristics were associated with females.

There were clearly flaws in the reasoning of the judges in these early decisions. It could be argued that just because discrimination in terms of dress or grooming codes is not mentioned in the legislation it should not mean that these cases cannot not be brought

¹⁰⁸ Ibid, at 664

¹⁰⁹ [1978] 569 F 2d 325

within its ambit.¹¹⁰ Furthermore the legislators, had they thought of it, would have included this behaviour within the ambit of equality legislation and therefore it should be interpreted as if they had included it.

In the case of *Price Waterhouse v Hopkins*¹¹¹ the plaintiff was denied appointment as a partner because her manner, speech, dress and physical appearance etc. were not feminine enough. The Supreme Court ruled that Title VII protects employees against discrimination for failing to comply with gender role expectations. It could be argued that a reasonable extrapolation of this decision is that employers cannot discriminate against employees that maintain an outward appearance that is inconsistent with their anatomical sex. Unfortunately the courts have not chosen to utilise the decision in *Price Waterhouse* as the basis for affording protection to transsexuals.

As can be seen in the case of the law dealing with discrimination on the ground of physical looks State Governments are generally more generous in affording protection to employees than Federal Authorities. Although some State laws extend similar protection to employees against classic forms of discrimination to that provided under the Federal Acts other statutes provide protection to groups not covered by the Federal Acts e.g. Californian statute to prevent discrimination based on sexual orientation, Californian labour code 1102.1. Many States now provide protection against discrimination because of an employee's sexual orientation (California, New Jersey, Connecticut, Hawaii, and Massachusetts. Minnesota, Wisconsin, New York and the District of Columbia) and

¹¹⁰ This was the successful argument put forward in the early sexual harassment cases. This behaviour is similarly

left out of the detail of the Act

¹¹¹ [1989] 490 US 228, 109 S. Ct 1775, 104 L.Ed. 2d 268

individual States provide protection against discrimination on the ground of being a transsexual or cross-dressing (Rhode Island, Connecticut, Minnesota and in California)

In California transsexuals and transvestites are now protected against sex and gender discrimination and harassment. The changes in State law to allow this was effective from January 1, 2004, and California's prohibitions against such discrimination and harassment will be expanded to cover not only an employee's actual gender, but also the employer's perception of an employee's gender identity, appearance, or behaviour, "whether or not that identity, appearance, or behaviour is different from that traditionally associated with the employee's sex at birth." This means that employers now cannot discriminate against a worker because he or she is a transsexual or a transvestite.

While this expansion of state law protection specifies that an employer may still "require an employee to adhere to reasonable workplace appearance, grooming, and dress standards," that employer must "allow an employee to appear or dress consistently with the employee's gender identity." Thus, while a company with office workers can specify that employees wear presentable office attire, that company is prohibited from barring a transsexual and cross-dresser from wearing the presentable attire of the gender with which that person identifies.

In the case of *Enriquez v West Jersey Health Systems*¹¹² a Doctor was dismissed when he underwent treatment for gender reassignment and his appearance gradually changed to that of a woman. When he refused a request by the West Jersey Health Systems to change his appearance back he was dismissed.

¹¹² Decided July 3 2001, find at <http://lawlibrary.rutgers.edu/courts/appellate.html>

A New Jersey Court accepted his argument that forcing men to act like men and women to act like women constituted gender discrimination. They also held that discrimination against transsexuals could constitute illegal disability discrimination under New Jersey law.¹¹³

In the absence of Federal laws protecting against discrimination on grounds of sexual orientation and transsexual behaviour it will be left to the courts to broadly interpret relevant State legislation (where it exists) to ensure employment rights are available to those category of employees. Obviously as long as dress or grooming codes are being upheld by the courts as non-discriminatory on the basis that they are gender neutral or required in the interests of business necessity, it will be difficult for transvestites and transsexuals to obtain any protection against discrimination because they tend to wear clothes etc. that present an outward appearance that is inconsistent with their anatomical sex and are contrary to organisational norms.¹¹⁴

D. Race, religion and grooming codes

Grooming codes can have a discriminatory impact on individuals that have specific appearance requirements as a consequence of their race or religion. An employee suffering a detriment because they are obliged to flout their racial or religious rules could bring a case against their employer under Title VII and claim their rights have been breached under the Federal Constitution.¹¹⁵

¹¹³ In *Nichols v Azteca Restaurant Enterprises* the Ninth Circuit Court of Appeals relied on the *Price Waterhouse* ruling in deciding that a heterosexual waiter that was subjected to homosexual taunts because of his effeminate manner was deemed to be the victim of sexual harassment Decision 16/7/01, <http://caselaw.jp.findlaw.com/data2/circs/9th/9935579p.pdf>

¹¹⁴ Changes in the California state law outlined above are a step in the right direction

¹¹⁵ [1976] 27 ALR Fed 274 2000 Supplement, Part 2(b)

With respect to hair requirements in grooming codes these can have a discriminatory effect on the ground of race and be contrary to Title VII. In EEOC Decisions No.71-1985 the EEOC found reasonable cause to believe that an employer's hair policy violated Title 42 U.S.C.A. Section 2000e-2(a), since it banned hair that was 'cut bushy' and the court felt African-Americans were being measured against a grooming standard that assumed Caucasian hair characteristics. Furthermore, it was found that the employer was not applying his policy uniformly.

In relation to facial hair, the majority of cases are decided in favour of the employers, especially if their business requires a high standard of hygiene and safety.

If policies are introduced that prohibit beards for safety reasons do not usually violate Title VII as long as they are not used as an excuse to reject black applicants.¹¹⁶

There are cases however, where Black employees have won their case, like in *Johnson v Memphis Police Department*¹¹⁷ where a grooming policy requiring all officers to be clean-shaven violated Title VII because employers made no effort to accommodate a black officer who suffered from folliculitis which prevented him from shaving.¹¹⁸

A Jewish employee won his case when it was held that the employer failed to show neutral or valid reasons (health or safety) for the 'no-beard' policy other than the excuse that it was 'tradition'.¹¹⁹

The US District Court in Atlanta ruled that a no-beard rule for employees in contact with customers violated an employee's religious beliefs. Khaleed Abdul Azeez had asked for an exemption from the rule because of his Islamic beliefs and Federal

¹¹⁶ *Fitzpatrick v City of Atlanta* [1993] 2 F 3d 1112 Employer's defence was accepted on safety grounds since protective face masks would not fit unless employees were clean shaven

¹¹⁷ [1989] 713 F Supp 244

¹¹⁸ see also *Richardson v Quick Trip Corporation* [1984] 591 F Supp 115

¹¹⁹ *Carter v Bruce Oakley, Inc.* [1993] 349 F Supp 673, 64 Fair Empl. Prac. Cas. (BNA) 967

Express Corp was found to have violated Title VII.¹²⁰ A rule set down by the military that originally required and later strongly recommended female personnel serving in Saudi Arabia when off duty to wear local dress in the form of an 'abaya' was prohibited by the US Legislature. This move followed a legal action by America's highest-ranking female pilot Colonel Martha McSally claiming the requirement violated her Christian sensitivities and her constitutional rights as a woman.¹²¹

In cases involving claims of religious discrimination under State law, the courts have dealt with various terms and conditions of employment giving rise to discrimination claims. For example, employers that have appearance codes governing the way their employees dress have been subject to the claim that the codes violate the requirements of an employee's religion, and the court concluded in *Phoebe v State Division of Human Rights*¹²² that enforcement of the code constituted illegal discrimination and in another case *Engstrom v Kinney System Inc.*¹²³ that it did not. Enforcement of an employer's grooming code was held in the case of *Eastern Greyhound Line Div. of Greyhound Lines Inc. v New York State Division of Human Rights*¹²⁴ not to constitute illegal discrimination.

In the United States the courts have supported the legitimacy of employer's appearance codes in all but the most extreme of cases. With respect to arguments of inequality on grounds of sex, race etc. it will only be treated as discrimination where the restrictions are unjustified and there are no similar restrictions on the relevant comparator. Where there are restrictions that apply to both the plaintiff and his

¹²⁰ June 20 2001, find at www.gospelcom.net/apologeticsindex/news1/an010621-12.html

¹²¹ House unanimously passes Saudi dress-code bill May 15 2002,
<http://cnn.allpolitics.printhis.clickability.com>

¹²² (1979) 418 N.Y.S. 2d 55

¹²³ (1997) 241 A.D. 2d 420

¹²⁴ (1970) 27 NY 2d 279

comparator in sex discrimination cases then no matter how different the dress codes this will be treated as a gender neutral requirement and therefore not contrary to Title VII. The employer can readily establish the necessity of the code to maintain the company's image.

The areas where dress or grooming codes are treated as unlawful under Federal law is where they lead to the employee being sexually harassed, where they have an adverse impact on transsexual employees who are discriminated against because of their sex (and not because they are a transsexual) and under State law where appropriate employees have a claim for discrimination on the basis of sexual orientation or being a transsexual. Increasingly where a code interferes with employees' racial or religious beliefs the courts are willing to treat this as a breach of Title VII.

It would be reasonable to expect that because of today's diverse social conditions, any difference of treatment based on sex, sexual orientation, race or religion would not be tolerated. As can be seen however, there is a need for further reform either through statutory intervention or as a result of judicial creativity before an environment of equality of treatment can be created in the United States.

8. COMPARATIVE ASPECTS OF THE LEGAL TREATMENT OF LOOKISM

With respect to discrimination on grounds of physical appearance the law in both jurisdictions is not dramatically different. There is no federal law in the US or Act of Parliament in the UK that directly provides protection against the various types of this behaviour.

Although there maybe limited scope for pursuing an action under legislation in the UK where it provides explicitly (severe disfigurement).or implicitly (harassment on the ground of sexual orientation) some degree of protection. The victims of this type of behaviour often face a difficult struggle in proving their case under statute. In a discrimination case they have to show that their physical appearance is the reason for the unfavourable decision and this represents a form of discrimination protected by the law. While in cases of discrimination on sexual orientation, religion and ageism (yet to be legislated on) the prospects are better than conventional areas of discrimination there is still evidential difficulties to face. With respect to other statutory rights such as unfair dismissal or protection against effects of redundancy the law is uncertain. How does someone prove that an employer's adverse view of their physical appearance lies behind unfavourable choices he makes in respect of them?

The law tends to be more protective in the United States ¹²⁵ because there are federal laws dealing with ageism and disability discrimination which have been applied successfully through favourable judicial interpretation to victims in these kinds of cases. Also legislators in certain States have provided specific protection against certain forms of discrimination (weightism) or a general protection against discrimination on ground of personal appearance.

What about the law dealing with discrimination under appearance or grooming codes? Unfortunately because of the "swings and roundabouts" approach and gender neutral arguments applied to this issue there is often difficulty in showing that there is inequality of treatment. In *Smith v Safeway Stores*, the Court of Appeal stated that where there is a package of restrictions that relate to standards of dress or grooming of

¹²⁵ With the exception of its treatment of transvestites and transsexuals.

all employees then it will not be discriminatory where one of these restrictions is different for both sexes. In *R v Birmingham CC, ex p. EOC*¹²⁶ it was stated that less favourable treatment can include denial of an option which is valued by the employee (e.g. dressing casually, having long hair, wearing jewellery)

The legal approach of the Employment Appeal Tribunal at an earlier stage of the *Smith* case was probably the correct one.

Firstly it was asked whether Smith had been treated differently “but for” his sex? He was because if he were a woman he would have been allowed to tie his hair back. Secondly, it was asked whether this amounts to less favourable treatment for the purposes of the Act? It did amount to less favourable treatment in Smith because he was dismissed when he refused to cut his hair. Thirdly, it must be determined whether he was less favourably treated on the grounds of his sex? The majority of the EAT felt that he was because women could pin up their hair rather than have it cut, which was the only option for men. It is submitted that this is the correct approach for deciding on the unlawfulness or legality of appearance or grooming codes in discrimination cases.

The UK and US courts use a “comparative model” when dealing with discrimination cases which on the face of it is fair and objective but in reality in some cases produces biased and unfair results from an employee's perspective.¹²⁷ The comparative model centres on: “less favourable treatment as opposed to purely unfavourable treatment”

¹²⁸ The imposition of dress or grooming codes or discrimination based on their physical appearance of employees are good examples of this.

¹²⁶ [1989] IRLR 173 (HL)

¹²⁷ S. Middlemiss, “Shall I Compare Thee”? The Legal Dilemma, Choice of Comparators in Discrimination Cases”(2000) 4/09 *International Journal of Discrimination and Law*, 293-317

¹²⁸ N. Lacey., “Legislation Against Sex Discrimination: Questions from a Feminist Perspective” (1987) 14 *Journal of Law & Society* 411

In respect of appearance or grooming codes the main difference between the UK and US is the lengths the courts will go to test the validity of the business necessity defence. This defence is more developed in the US because once discrimination has been established under Title VII it is open to the employer to establish the defence. Unlike the courts in the UK, the US courts investigate such claims of business necessity rather than simply accepting them.¹²⁹ Accordingly, the US courts give an impression of being more open and unbiased because they accept contrary evidence and give equal attention to the arguments of both employee and employer. In effect they treat the discriminatory effect as seriously as the business need for it.

In *Diaz v Pan American World Airways Inc.*¹³⁰ it was held that the: “primary function of an airline is to transport passengers safely from one point to another”¹³¹ and accordingly, this function did not require a pleasant environment, enhanced by the obvious cosmetic effect that female stewardesses provide. This was particularly significant because it helped reduce discriminatory dress policies for women in the airline industry. The limitation of the application of the business necessity defence in *Diaz* to purposes that are related to the primary function of the organisation is a development that could usefully be emulated in lookism cases by Employment Tribunals and courts in the UK. It seems unlikely but not impossible that the argument that aesthetic labour is needed to assist the primary function of an organisation would be accepted by the courts.

In relation to health and safety, the courts in US and the UK will normally accept the relevance of the business necessity defence in this context because for example to

¹²⁹ *Smith v Safeway plc* [1996] IRLR 456; *Boychuk v H.J Symons Holdings Ltd* [1977] IRLR 395

¹³⁰ [1971] 442 F 2d 385 (5th Cir) cert. denied, 404 US 950

¹³¹ [1971] 442 F 2d 385 at 388

allow beards or loose hair in certain workplaces is a safety hazard and should not be tolerated.¹³²

In a sex discrimination case in the UK *Grieg v Community Industry*¹³³ it was held by the EAT that employers could not justify their discriminatory behaviour on the basis that it was done in the interests of business or with a good motive.¹³⁴ Similar reasoning has been adopted in a later case *James v Eastleigh Borough Council* [1990] IRLR 298 HL.¹³⁵ In cases involving dress or grooming code in the UK employers have been successfully using this type of defence.¹³⁶

9. CONCLUSION

It is difficult to know what the solution is to this kind of workplace problem.

A culture of encouraging the employment and advancement of aesthetic labour and of using dress or grooming codes to create a company's image or maintain its reputation will tend to emanate from the senior management of an organisation.

Convincing them of the unacceptability of such practices may be difficult where their managerial prerogatives in these respects have to date largely gone unchallenged.

The impact of a favourable judicial decision in this area should not be underestimated as shown by the public response to the employment tribunal decision in the *Department of Work and Pensions v Matthew Thompson*. Here a male applicant won

¹³² *Dripps v United Parcel Service, Inc* [1974] 381 F Supp 421 (DC Pa) held that an employer's rule forbidding welders to have beards was a sound BFOQ based on reasonable safety concerns

¹³³ [1979] IRLR 159, (EAT)

¹³⁴ *Ibid*, at 159

¹³⁵ *James v Eastleigh Borough Council* [1990] IRLR 298 HL

¹³⁶ *Smith v Safeway plc*

his case of sex discrimination because he was required to wear a shirt and tie and this led to around 6,950 similar cases in the UK being lodged with employment tribunals. A warranted fear of the floodgates being opened may account for judicial reluctance to recognise and provide a remedy for the discriminatory effect of lookism in all its forms in both jurisdictions.

What is probably the only realistic solution is introduction of legislation specifically to deal with the problem.

Providing suitable and reasonable definitions and standards of behaviour in a statute dealing with discrimination based on physical looks and appearance or grooming codes is problematic but not an insurmountable problem.

Under Article 14 of the District of Columbia Code the following human rights are covered ¹³⁷ (a) "It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, disability, matriculation, or political affiliation of any individual."

They offer the following definition of personal appearance as a ground of discrimination under state law. "Personal appearance" means the outward appearance of any person, irrespective of sex, with regard to bodily condition or characteristics, manner or style of dress, and manner or style of personal grooming, including, but not limited to, hair style and beards. It shall not relate, however, to the requirement of cleanliness, uniforms, or prescribed standards, when uniformly applied for admittance to a public accommodation, or when uniformly applied to a class of employees for a reasonable business purpose; or when such bodily conditions or characteristics, style

¹³⁷ 2-1402.11. Prohibitions [Formerly § 1-2512].

or manner of dress or personal grooming presents a danger to the health, welfare or safety of any individual.¹³⁸ The aspects of personal appearance in the definition seem wide enough to cover the full spectrum of the behaviour although further definition would be useful in some cases.

As outlined above there are various situations where discrimination on the basis of personal appearance is allowable and requirements of cleanliness, uniform or prescribed conditions will not be unlawful. The most worrying is where such requirements are uniformly applied to a class of employees and are applied for a reasonable business purpose. It would be much better to apply the primary purpose test, set out in Diaz, to any argument about business necessity. The test should be is the requirement necessary for fulfilment of the primary purpose of the business?

Lessons can be learnt from the legal treatment of this issue in both jurisdictions however the inevitable conclusion is that neither system have got it right, in terms of dealing with this form of discrimination, and reforms need to be made. The following quote neatly summarises the issue “Thus all forms of anti-discrimination law straddle this barrier between unfettered managerial discretion and the protection of civil rights. The solution to the conflict between these two forms of discourse seems to be pragmatic adjustment of the scope of the protection and the extent of justification.”¹³⁹

¹³⁸ § 2-1401.02. Definitions

¹³⁹ Ed. Dine J Watt B Discrimination Law Concepts, Limitations and Justifications, Chapter 4, Bourn C Equal Treatment and Managerial Prerogatives, pp 37 – 48 p 48 (1996) Longman

Legal Rights of Atypical Workers

Introduction

This article will analyse the legal rights of atypical labour to determine what categories of workers are included in the generic term and how each of them compares with full-time workers in terms of their status and entitlement to contractual and statutory employment rights.

As the following quote illustrates the traditional contractual arrangement whereby work was undertaken on behalf of an employer involved a contract of service which was full-time and open-ended and persons working under this contract were entitled to economic rewards and some element of job security.

“The jobs were typically full-time of indefinite duration and were expected to last until retirement at which point most employees ...would benefit from the employer’s pension scheme.”ⁱ

There were of course exceptions to this model and persons not falling within its parameters were referred to as marginal workers. ⁱⁱ This term included, homeworkers, part-time workers, fixed-term workers and agency workers

Traditionally persons engaged on an atypical basis to carry out work on behalf of an employer were denied the same employment rights as persons working under a contract of service.

The Restructuring of the Individual Employment Relationship ⁱⁱⁱ

The nature of employment changed from the traditional model to one that reflected the flexible working methods introduced as part of the approach of employers to the market and enterprise economy encouraged by the Government during what has commonly been referred to as the "Thatcher years". It is not this writer's intention to outline the economic and social changes that led to the vast increase in atypical labour.^{iv} From the beginning of the nineteen eighties onwards employers were concerned with obtaining greater flexibility in the employment of labour and part of this process was to vary the arrangements under which work was undertaken. Although a core of persons would normally be employed under a full-time contract increasingly other workers were employed to undertake work of a peripheral nature. They would often be employed, on short-term or intermittent contracts, work outside the workplace usually in their own home, be allocated work through the services of an intermediary e.g. agency worker or undertake the work as an independent contractor.^v The workers would often have limited legal status and legal rights arising from their working relationship with the employer.^{vi} There has been an impetus for improving the legal rights of atypical workers in recent years primarily through the social policy of the European Union. The protection of atypical workers has been achieved through the introduction of measures specifically protecting certain groups e.g. Fixed-Term Work Directive.^{vii} Also through the introduction of the concept of worker in EU Legislation which has provided this category of person (see definition below) with specific legal protection. This E U legislation has been implemented into the law of the United Kingdom through domestic legislation e.g. National Minimum Wage Act 1998, Working Time Regulations.^{viii}

These developments are given general consideration below and are also discussed in the context of each separate classification of worker that is protected.

Classifications of Atypical Workers

It will be readily seen from the following breakdown of the number and types of atypical workers that although individually they are still a minority within employment they cumulatively represent a substantial part of the workforce in the United Kingdom.^{ix}

In the 1997/98 Labour Force Survey there were 1.7 million temporary workers (6.5% of all workers) * 868,000 fixed term workers (3.3% of all workers) 324,000 persons working in casual employment (1.2) 222,000 agency supplied temporary workers (0.9) 180,000 zero hours workers (0.7) 621,000 homeworkers (2.4) and 3.2. million self-employed (12.4).^{xi}

There are various classifications used to describe atypical workers although the following are the most common: casual workers, trainees, temporary workers, agency workers, fixed term and part-time workers.^{xii}

Each of these will be considered in terms of their current legal status and their legal rights although the difficulties in classifying these types of arrangement are identified in the following quote

“The complex form of modern industrial and commercial organisation enables people to work under a variety of legal arrangements which may be entirely satisfactory to all concerned, but which are difficult to rationalise into well-defined categories necessary for the purpose of legal analysis. “^{xiii}

Employees and Workers

Employees and contracts of employment are defined by the statutes which provide individual statutory rights.

The definition of employee as per section 230(1) of the Employment Rights Act 1996: is “an individual who has entered into or works under (or where the employment has ceased, worked under) a contract of employment.” (s230 (2)) and a contract of employment means “a contract of service or apprenticeship whether express or implied (and if express) whether oral or in writing.”

These definitions, however, are not helpful in identifying the essential characteristics of an employee.

A broader concept than the term, ‘employee’, is the term ‘worker’; that has been introduced as a consequence of legal developments in the European Union.

Accordingly the use of the term worker (and its introduction as a threshold requirement for employment rights) in UK employment law statutes has gained momentum.

A worker has been defined in the Employment Rights Act (1996) as “an individual who has entered into or works under a contract of employment s230(3)(a) or any other contract whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of that contract client or customer of any profession or business undertaking carried on by the individual
“(s230(3)(b))

Again, the definition is somewhat vague and incapable of identifying the full characteristics of a worker.

Despite this a possible means of increasing the number of persons covered by employment law is to use the broader definition of worker in preference to employee. This would cover individuals who do not have a contract of employment but who nevertheless contract to supply their services to the employer and to some degree are economically dependent on the employer's business.

The courts have developed tests which have been used to distinguish contracts of service from contract for services (between an employer and an independent contractor) but it is outwith the scope of this article to give this matter detailed consideration. Aspects of these tests however, will be considered below in the context of casual and temporary workers because they are the categories of atypical workers most likely to be treated as independent contractors.^{xiv}

Casual and Temporary Workers

Employment law does not recognise such categorisations as casual and temporary workers. The crucial issue is whether or not an individual is an employee or not.

Most statutory employment rights only extend to employees (e.g. unfair dismissal, redundancy) although some rights have been extended to workers and accordingly to casual and temporary workers e.g. rights under equality laws, the right to a national minimum wage, protection under health and safety legislation^{xv} and maximum working hours.^{xvi}

Casual Workers

In many instances casual workers have been deemed to be independent contractors because their arrangements with the employer tend to lack the mutuality of obligation necessary for a contract of service. ^{xvii} In such circumstances they may not be entitled to the rights extended to workers under recent legislation e.g. Working Time Regulations 1998.

The powers given to the Secretary of State under section 23 of the Employment Relations Act 1999 to extend coverage of employment rights beyond employees or workers is to date unused. ^{xviii}

The typical situation in casual employment is where there are breaks in employment where no work is undertaken and the requirement for work to be done is irregular or informal in its nature. Where individuals are employed on an ad-hoc basis, only where the need arises as the workers in the O'Kelly case ^{xix} or based on seasonal demands then they are referred to as zero-hours workers.

Whether casual workers will be treated as workers will be dependent on them providing services under a contract to another person and that other person not contracting in the capacity as a client or customer of a profession or business carried out by the individual in question.

Where there is substitution clause in the contract allowing the worker to provide a substitute to carry out the task then this will strongly suggest they are not a worker.

Where casual employment consists of bouts of broken employment, regularly undertaken over a considerable period of time then the person can be deemed to be an employee working under a global or umbrella contract. What is necessary here is that during the breaks in employment the employer is under an obligation to provide work

and the employee is obliged to undertake it. In the majority of cases it is deemed that global contracts do not apply to casual workers.^{xx} Even where the person undertaking the work can work for other employers during breaks in his employment does not point conclusively to it not being a contract of service.

In *McMeechan v Secretary of State for Employment*^{xxi} it was held that a contractual arrangement no matter for how long can be a contract of service for the duration of the work. Clearly this type of arrangement will involve breaks in the continuity of employment which will mean certain employment rights contingent on continuity of employment will be unavailable to the temporary worker (e.g. unfair dismissal protection).

Temporary Workers

The Labour Force Survey carried out in June –August 2000 found that around 7% of the workforce was employed under a temporary contract and these contracts are used widely in certain professions or industries e.g. nursing, teaching, fishing, hotels and catering. They are often used to meet fluctuations in workload arising from shortages due to a variety of causes e.g. seasonal demands. It is because of the irregular employment of many temporary workers that the arrangements they work under are regarded by the courts as lacking sufficient mutuality of obligation to be treated as a contract of service. A lack of mutuality of obligation was a key element in denying casual temporary workers employee status in the case of *O’Kelly v Trust House Forte plc*^{xxii} which dealt with zero hour workers. Home workers, agency workers, zero-hours contract workers and workers in a casualised trade or occupation have in the past been held not to be employees due to lack of mutuality of obligation

In *Clark v Oxfordshire Health Authority* ^{xxiii} a bank nurse had no fixed or regular contact hours and was only offered work when the need for temporary work arose. The relevant conditions of service stipulated they were not regular employees no right to guaranteed or continuous work (zero-hours worker). The Court of appeal found she was not working under contract of service because of lack of mutual obligation in periods when person not working for employer

“Even if an individual can show that he or she was employed as an employee for the purposes of a particular task or job, or for a particular period of time, they may be unable to show they have a global or umbrella contract which spans the gaps between periods of work.” ^{xxiv}

Agency Workers

There is little law that covers this category of worker and existing definitions should apply, however inappropriate. ^{xxv}

The proposal for an Agency Workers Directive, put forward by the European Parliament and the Council on working conditions for temporary workers ^{xxvi} may be of assistance in providing clear definitions and legal rules applying to this category of worker.

Until this comes to pass it is instructive to examine recent case law to try and determine agency workers current legal position.

In *McMeechan v Secretary of State for Employment* (considered above) ^{xxvii} a worker employed by an employer on a temporary basis through an agency claimed that he

was entitled to be treated as an employee for a particular transaction for which he was owed money.

The Court of Appeal needed to make a decision on the employment status of temporary or casual workers. It held that under the general rules of engagement temporary workers can have the stereotype of an employee for particular assignments, even if generally they do not have employee status

In *Motorola Ltd v Davidson* ^{xxviii} Mr Davidson was placed by an agency to repair mobile phones for Motorola and he worked for them for two years but then was suspended and had his contract terminated over a disciplinary issue. He claimed unfair dismissal citing Motorola as his employer. As there was a high degree of control exercised over Mr Davidson's work and he was subject to Motorola's disciplinary procedures the Employment Tribunal upheld his claim for unfair dismissal and the Employment Appeal Tribunal rejected Motorola's appeal. It would seem that this is a precedent for the fact that where an agency worker works exclusively for a client of an agency for a considerable amount of time (at least a year but probably longer) they become an employee of the client and are entitled to claim statutory employment rights from them.

The Court of Appeal in *Montgomery v Johnson Underwood Ltd* ^{xxix} made similar findings to the EAT in *Motorola*.

In *Dacas v Brook Street Bureau Ltd*. ^{xxx} Dacas was registered with Brook Street Bureau for six years and during that time worked for a single client. The contract stipulated that this was not to be treated as an employment relationship. The Employment Tribunal held he was not an employee of either employer but on appeal to the EAT they decided he was an employee of BSB. This decision was overturned

on appeal on the basis that there was no mutuality of obligation between the agency and the worker. ^{xxx1}

In *Franks v Reuters* CA (2003) IRLR 423 Mr Franks was supplied as a driver through an agency to Reuters for six years. Employment Tribunal held was not an employee of Reuters. The Court of Appeal decided he could be an employee of Reuters and remitted case back to the Employment Tribunal.

In this case the possibility of an implied contract of employment between Franks and Reuters was considered and documentation or lack of documentation in place as in this case was only one factor to be considered. The background circumstances to the relationship and how parties operate important and the period of service with the client was a relevant factor.

In most situations where there is an implied contract with client employer this is not necessarily not affected by anything stated to the contrary in the documentation governing the relationship. As a result of the decisions in *Motorola* and *Franks* the commercial advantage of using agency workers is now questionable, except for short-term hiring.

Dependent Self-Employed

Dependent self-employed or dependent entrepreneurs ^{xxxii} are terms which are increasingly used to describe self-employed contractors who as result of the economic realities of their situation are dependent on an employer for their livelihood. They could be freelance workers sole traders, home workers and casual workers of various kinds who will certainly be protected under health and safety legislation ^{xxxiii} and

could fall within the statutory definition of worker for the purposes of various pieces of legislation.^{xxxiv}

Fixed Term Workers

The Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations^{xxxv} were introduced to implement the Council Directive on Fixed Term Work 99/70/EC and ensure that the position of fixed term workers were not abused for example by the use of successive fixed-terms employment contracts.

These Regulations came into force in July 2002 although prior to this there was no statutory regulation of this type of contract. The Regulations apply to “an employee who is employed under a fixed-term contract.”^{xxxvi} What is fixed term contract? It is one that provides a specified term of employment and terminates automatically at the end of that term. There are limited remedies provided by the Regulations for unfair treatment in respect of contractual terms where the fixed term worker receives less favourable terms than a permanent employee’s terms of his or her contract.^{xxxvii}

Also under Regulation 3(1) it is unlawful to subject a fixed term employee to less favourable treatment than a permanent employee in respect of being subjected to any other detriment by any act or failure to act by his employer.

The right not to be treated less favourably than others is not absolute but employers must justify different treatment on objective grounds. Under Regulation 4(1) treatment may be justified “if the terms of a fixed term employee’s contract of employment, taken as a whole, are at least as favourable as the terms of the comparable permanent employee’s contract of employment.”

The DTI guide that accompanies the legislation ^{xxxviii} states that less favourable treatment is justified where it is necessary to achieve a legitimate objective and it is necessary to achieve that objective and it is an appropriate way to achieve it.

The relevant comparator must be employed by the same employer and engaged in same or broadly similar work at the same establishment.

Under s 95 (1) of the Employment Rights Act 1996 it states that an employee is dismissed if the fixed term expires without being renewed. The employee may be able to claim unfair dismissal where it is reasonable to continue the contract and the employer fails to do so. ^{xxxix}

An employee whose fixed term contract expires without being renewed can also claim redundancy rights provided they have sufficient continuous service. ^{xi} The right to include a redundancy waiver in a contract of employment has been abolished under the Regulations.^{xii} Redundancy may be a fair reason for dismissal however, and not renewing the contract at the end of the fixed term maybe a fair reason for dismissal under the heading of some other substantial reason.

It can still be fixed term even if a term of the contract allows the parties to terminate by giving notice before the term expires. ^{xiii} If the contract contains no right to prior termination where an employer terminates the contract summarily the employee has the right to claim damages for breach of contract.

It is automatically unfair dismissal if the principal reason for dismissal is one of those set out in Regulation 6(3). This provides wide ranging protection against victimisation and includes dismissal of fixed term employee because inter alia: he has, brought proceedings under the regulations, or requested a written statement of reasons or given evidence or information in connection with proceedings, refused or proposed to

refuse to forego a right under the regulations or has alleged that the employer has infringed the regulations.^{xliii}

Under Regulation 8 the use of successive fixed term contracts beyond four years is unlawful unless it can be objectively justified or a workplace or collective agreement has agreed otherwise. If a fixed term contract is renewed in breach of the limitation, the term of the contract limiting it to a fixed term will be invalid and the contract will be regarded as permanent.

There are clearly going to be difficulties in enforcing this legislation in particular the provisions calling for comparison with the position of a permanent worker. A suitable comparator may not be available within the same workforce and even if there is the employer can justify inequality of treatment on the basis that the package of rights available to both types of employee are equivalent or there is a genuine business need for the difference in treatment. On the other hand there are some positive measures that should ensure that fixed term employees benefit from equivalent terms and conditions to permanent employees e.g. automatic change in contract after four years, protection against victimisation for pursuing rights and abolition of redundancy waivers.

Part Time Workers or Employees

The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000^{xliv} introduced new rights for part-time workers.

The measures reinforce the Government's policy of putting in place decent minimum standards whilst promoting a flexible and competitive workforce and more significantly they implement the Part Time Work Directive^{xlv}

What is the likely impact of the new Regulations? Under a contract of employment part-time workers have pro rata contractual rights with full-time workers.

The Regulations are meant to ensure that Britain's part-timers are not treated less favourably than comparable full-timers in their terms and conditions, unless it is objectively justified.

This means part-timers are entitled to: the same hourly rate of pay, the same access to company pension schemes, the same entitlements to annual leave and maternity/parental leave on a pro rata basis, the same entitlement to contractual sick pay, no less favourable treatment in access to training and the same access to promotion and redundancy rights

From the 1st of October 2002, under the Part-Time Workers Regulations individual part-timers were allowed to compare themselves to a full-time colleague irrespective of whether either party's contract was permanent or fixed-term.

As the Part-Time Workers Regulations (unlike the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations) apply to both employees and non-employee workers, the possibilities of comparison under the Part-Time Regulations are available to both categories of individual.

Under Regulation 2(4) however, any claim by a part time worker that they are receiving less favourable treatment than a full-time worker, will need to be substantiated by reference to a full-time equivalent in terms of the type of contract, the type of work type of qualification, skills and experience, same place of employment and employer. It is important to note that of the six million part-timers in the United Kingdom only one million have a full time equivalent working under the same type of contract.^{xlvi}

The defences available to an employer are in certain respects similar to those that apply under the Fixed Term Work Directive (e.g. difference in treatment necessary to fulfil genuine business objective).

With respect to enforcement of the Regulations an employer or agent of the employer will be liable for anything done by an employee in the course of their employment.

There is a defence of having taken all reasonable steps to prevent the worker doing the act in the course of his employment

There is a right not to be dismissed or suffer a detriment as a result of exercising any rights under the legislation and a right to receive written reasons from the employer for less favourable treatment.

A tribunal can award damages, although not for injury to feelings and can make recommendations for action by the employer to correct the fault.

There are clearly deficiencies in these regulations which may be subject to legal challenge for non-compliance with EU standards (e.g. narrow basis for comparison) and they may fail to adequately protect this type of atypical worker as identifies by the following quote.

“The PtWRs 2000 do nothing to challenge the major part of the disadvantage associated with part-time work. They do not require that jobs are opened up to part-time working not even ...that women be entitled to return to their jobs after maternity leave. Further they do not appear to protect against a dismissal connected with a refusal to transfer between part-time and full-time work.”^{xlvii}

Homeworkers

Although homeworkers are not a particularly modern phenomena in the current situation where increased flexibility of working patterns suits both parties in the employment relationship people are choosing to work at home wholly or as part of their working week. It is estimated that homeworkers now account for around ten percent of the working population.^{xlviii} What is the legal status of these workers?

In *Nethermere (St Neots) Ltd v Gardiner*^{xlix} the applicant had worked for several years for the respondents although not every week. There were no fixed hours of work, payment was related to the individual amount of clothing they produced and the applicants were not obliged to accept any work offered. When they were dismissed they claimed unfair dismissal and the employment tribunal decided that despite the flexibility in the work arrangement they were employees for the purpose of entitlement to protection against unfair dismissal and this decision was upheld by the Court of Appeal.¹ Although this decision is not a precedent for the fact that homeworkers will be treated as employees and the matter will be determined in each individual case, there is likelihood that they will be regarded as employees or workers for the purpose of determining entitlement to statutory employment rights. Where however enforcement of these rights is dependent on inspection and enforcement of these rights in the workplace by regulatory bodies then there will be practical difficulties in them carrying out this role in the case of homeworkers.

Trainees

Persons working for an employer in the context of a trainee have traditionally been denied any employment rights as they have been deemed to be working under a training contract. This is fair enough when the arrangement consists of someone

obtaining training to do a particular job or obtain a particular qualification and there are no tangible benefits to the employer. ^{li} What is the current legal status of trainees? Increasingly trainees are expected to undertake work for the employer equivalent to that undertaken by his employees but are denied the same rate of remuneration, contractual status and employment rights. Where they are 'relevant trainees' in other words trainees working under a government sponsored or government supported training scheme e.g. New Deal, they will be treated as workers for the purposes of certain legislation e.g. minimum wage, working time regulations, equality legislation, although they will not be entitled to other employment rights. ^{lii}

Other types of trainee e.g. students on a course undertaking a work placement (sandwich course) are not covered by any legislation and have no employment rights as they will be deemed to be working under a contract of training. ^{liii} All trainees however, have some protection under health and safety legislation e.g. section 3 of HASAWA 1974.

There is a need for all trainees that undertake work on behalf of an employer to have their status enhanced to that of working under a contract of service or failing that to be treated as a worker. Otherwise they will continue to be regarded and treated as second class, cheap labour by employers. ^{liv}

Conclusions

The complexity of the situation created by the expansion of atypical work, and the introduction of new flexible forms of working relationship has meant that there are a variety of legal arrangements applying each with its own legal status and level of

statutory protection. It is hardly surprising that many of the people working under these arrangements are unclear about their employment rights.

“While some degree of uncertainty in the operation of the law in this area is probably inevitable a situation in which a substantial proportion of the workforce is unsure of its legal position would give rise to concern.”^{lv}

Employers may avoid their obligations by a number of means including exploiting their workers lack of awareness about their entitlement.

In terms of health and safety all classes of atypical workers have some statutory protection in the form of criminal duties placed on employers in respect of their safety and welfare under section 3 of the Health and Safety at Work Act 1974 and risk assessment requirements under the Management of the Health and Safety at Work Regulations 1999.^{lvi} There is now the possibility of a civil action against employers for breach of statutory duty where they fail to consider atypical workers in the health and safety arrangements implementing these Regulations.

Despite arguments about mutuality of obligation and dependency or otherwise of self-employed persons it is important to recognise the economic reality that agency workers and zero-hours workers rarely exercise their legal right to turn down work and increasingly genuinely self employed and freelance workers may also have to accept work due to economic dependence on a particular employer. “More generally evidence of the individual’s experience of non-standard work suggests that the legal division between employment and self-employment does not correspond to perceptions of a clear divide between these different forms of work.

In the context of non-standard work there is considerable ambiguity in the notions of control, autonomy and mutuality of obligation used as guidelines by the courts in assessment of employment status.”^{lvii}

There is undoubtedly a need for parity in the employment status, contractual rights and obligations and individual statutory rights extended to different types of atypical workers.

There is a need to modernise and simplify UK employment law and at the same time to extend employment rights to vulnerable unprotected groups, to prevent contracting out of employment rights (substitution clause) and tackle the problems created by the perception of a second class workforce

The reasons for this problem are neatly summarised in the following quote.

“...Employers may choose between different forms of contract for acquiring labour, if they are efficient substitutes, on the basis of which contractual arrangement avoids legal incidents of employment law. One of the least satisfactory aspects of many employment law systems is the way in which the allocation of the risk of economic insecurity on to the worker also tends to exclude the worker from protection of employment rights.”^{lviii}

Legal Rights of Atypical Workers

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- i Collins H Ewing KD McColgan A *Labour Law, Text and Materials* (2001) Hart Publishing p 47
 - ii For an account of their legal position Leighton P , Marginal Workers, Chapter 18 in Lewis R Ed. *Labour Law in Britain* (1986) Basil Blackwell
 - iii Terminology used by Davies P Freedland, M in *Labour Legislation and Public Policy* (1993) Clarendon Press, Oxford p 550
 - iv Supra 1, Chapter 1 provides source material on this topic
 - v For a useful discussion of the economic and political factors underpinning this change see Chapter 10, Restructuring the Labour Economy 1979-1990, Davies P Freedland, M *Labour Legislation and Public Policy* (1993) Clarendon Press, Oxford and discussion of the legal Factors see pp 550-552
 - vi Supra 2.
 - vii 99/70/EC
 - viii SI 1998/1833
 - ix Part time workers represent more than a quarter of all workers.
 - x This had increased to around 7% of the workforce in the *Labour Force Survey* June-August 2000
 - xi Those self-employed with employees represented 3.2% of the total workforce and those without employees 9.2% of the total workforce.
 - xii There were 2.2 million part-time employees in 1971 and over 7 million in 2001
 - xiii Selwyn, N *Selwyn's Law of Employment*, 12th ed. (2002) Butterworths p33
 - xiv O'Kelly v Trust House Forte plc (1983) IRLR 369 CA
 - xv Management of Health and Safety at Work Regulations 1999/3242
 - xvi For a full breakdown of rights applying to employees and workers see Part-time and atypical workers, IDS Employment Law Supplement 5 (Series 2) January 2001 Appendix pp 127-133
 - xvii Carmichael v National Power plc (2000) IRLR 43 HL is considered in the context of temporary workers
 - xviii See Discussion Document on Employment Status in Relation to Statutory Employment Rights July 2002 URN 02/1058 www.dti.gov.uk
 - xix Supra 14
 - xx Clark v Oxfordshire Health Authority 19998 IRLR 125
 - xxi (1997) ICR 549
 - xxii (1983) IRLR
 - xxiii (1998) IRLR 125
 - xxiv The Employment Status of Individuals in Non Standard Employment, Burchell, Deakin and Honey, March 1999 para 2.4 see www.dti.gov.uk
 - xxv Employment Agencies Act 1973 and the Conduct of Employment Agencies and Employment Businesses Regulations 1976
 - xxvi Official Journal C 203 E , 27/08/2002 P. 0001 - 0005
 - xxvii (1997) IRLR 353
 - xxviii (2001) IRLR 4
 - xxix (2001) IRLR 269
 - xxx (2003) IRLR 190
 - xxxi (2004) EWCA (Civ) 217, for a review of the Court of Appeal's decision see *Industrial Relations Law Bulletin*, Vol. 736, May 2004 pp 3-5
 - xxxii Supra 1 pp 169-178 in particular the legal aspects of franchising are considered.
 - xxxiii Sections 3 & 4 of the Health and Safety at Work Act 1974
 - xxxiv Section 82(1) of the Sex Discrimination Act 1975 extends rights to persons working und a "contract personally to execute any work or labour."
 - xxxv SI 2002/2034
 - xxxvi Reg 1(2)
 - xxxvii Reg 3 (1)
 - xxxviii Fixed term work: A guide to the Regulations (PL512)

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- xxxix Employees working under a contract for a specific task, purpose or event are given the same rights as workers on permanent contract and fixed term workers and termination of these contracts may entitle employees to a legal claim for unfair dismissal.
- xi Unless it is automatically unfair redundancy which is considered below.
- xli By repealing section 197(3) of the Employment Rights Act 1996.
- xlii Dixon v BBC (1979) ICR 281 CA
- xliii Automatically unfair to select an employee for redundancy on grounds specified under Regulation 6(3)
- xliv SI 2000/1551
- xlv 97/81/EC
- xlvi Under the Directive where no such comparator is available reference can be made to an applicable collective agreement or where no such agreement is available to decide the issue in accordance with national law, collective agreements or practice.
- xlvii Supra 1 p 425 on the last point it is argued that it is contrary to Article 5(2) of the Directive
- xlviii Supra 24
- xlix (1984) ICR 612 CA
- i In *McMeechan v Secretary of State for Employment* (1997) ICR 549 CA (considered above) the Court of Appeal adopted a similar approach.
- ii Under the New Deal and similar Government schemes the employer would be compensated financially under the scheme for taking on a trainee
- iii Maternity rights, protection against transfer of undertaking, unfair dismissal and redundancy
- liii Edmonds v Lawson QC (2000) IRLR 391 (CA)
- liv Middlemiss, S *The Legal Liability of Employers for Trainees*, *Journal of Education and Law*, Vol. 15, No 2/3 2003, pp 115-133
- lv Supra 24 para. 1.3
- lvi Regulation 3
- lvii Supra 24 p 88
- lviii Collins H *Employment Law* (2003) Oxford University Press p 40

The Right to Dignity at Work? Protection from Harassment and Bullying under Employment Law in the United Kingdom

Introduction

There is no legal definition of the term dignity at work although most parties involved in the employment relationship have some understanding of what it involves.

The terminology was originally derived from the European Union and in particular the European Commission Recommendation on the protection of the dignity of men and women at work.¹ This was supported by a Code of Practice on Sexual Harassment which defined sexual harassment as an affront to the dignity of men and women. “Sexual Harassment means unwanted conduct of a sexual nature or other conduct based on sex affecting the dignity of men and women at work. This can include unwelcome physical, verbal or non-verbal conduct.”

The term dignity at work is also utilised in the Race Directive² and the amendment to the Equal Treatment Directive³ both of which are considered below

Most of the behaviour of an employer that represents an affront to his employees’ dignity at work can be categorised under the terms harassment or bullying.⁴

The law in this area is complicated by the fact that in the case of harassment there has been a piecemeal development of statutory rules, now found in a variety of legal measures which collectively offer legal protection whereas in the case of bullying

¹ 91/131/EEC, OJ L49/1, 1991

² 2000/43/EC

³ 2002/73/EC Article 2 (2)

⁴ The only legislation dealing with bullying and harassment to make any headway in Parliament was the Dignity at Work Bill in 1997. Its progress stopped at the election and it was never re-introduced.

there is limited statutory protection and legal redress for victims of bullying is largely dependent on the application of a set of ill-defined and ill-suited common law rules.⁵

While the legal protection against both types of activity will be analysed in the context of this article the main focus will be on the former activity which has recently undergone considerable expansion as a result of legislative change.⁶

It is important to recognise that there is significant overlap in the types of legal action that can be utilised to protect against both types of behaviour⁷ particularly under the common law (actions for breach of contract, tort and criminal liability).

The law of harassment in employment law is now largely governed by statute and as this is the most likely avenue for legal redress by employees the article will restrict its attention to the statutory rules.

In the absence of specific statutory protection against bullying⁸ employees rely heavily on various common law actions to deal with this behaviour and these will be considered later in the article

The Law of Harassment

There are now various types of harassment that are specifically recognised and protected against by statute.⁹ The most established and well-defined legal rules dealing with harassment apply to sexual harassment and because of

⁵ Middlemiss, S Hay, O Bullying in the Workplace, the Case for Legal Redress? Parts 1, 2 & 3 Irish Law Times Volume 21 Number 18 December 2003 pp 287 – 292, Volume 21 Number 17 November 2003 pp 266 – 271, Volume 21 Number 16 October 2003 pp 250 - 255

⁶ E.g. Section 5 of the Employment Equality (Sexual Orientation) Regulations 2003 provides protection against harassment on the ground of someone's sexual orientation

⁷ Equality Laws and the Protection from Harassment Act 1997

⁸ Ibid. The legislation could provide some form of legal redress, depending on the nature of (e.g. continuous conduct) and basis for (e.g. sex, race) the bullying.

⁹ Race, Disability, Sexual Orientation, Religion or Belief

their importance and influence on other areas of harassment law it seems appropriate to consider these at the outset.

Sexual Harassment

The following quote summarises the nature of sexual harassment law in the United Kingdom which applied until very recently.¹⁰ “As neither sexual nor racial harassment is specifically mentioned in the anti-discrimination legislation, *the process by which it has been held to be unlawful and the boundaries of that unlawfulness are entirely judge made.*”¹¹

A good example of this was the landmark case of *Strathclyde Regional Council v Porcelli* (1986) ICR 134 CS where Mrs Porcelli was employed as one of three technicians in a school in Glasgow.

The other two technicians were male and they undertook a campaign of sexual harassment against her including physical touching, sexual innuendo and sexist comments all with a view to getting her to leave her job. In the face of such action she applied to her employer for a transfer which was granted.

She claimed that the sexual harassment she had experienced represented a form of sex discrimination under the Sex Discrimination Act 1975.

The Industrial Tribunal accepted the employer’s argument that there was no discrimination as the harassers would have bullied a man they disliked in a similar manner. This was overturned by the Court of Session who was satisfied that given the sexist nature of the action it would not have perpetrated against her but for her sex.

¹⁰ Amendments to the Equal Treatment Directive 76/207 including introduction for the first time of a statutory definition of sexual harassment will be introduced in the UK and apply from October 2005

¹¹ Townshend – Smith, R J *Discrimination Law: Text, Cases and Materials* (1998) Cavendish,

They held that the act of harassment itself without any accompanying threat to terms of employment could be discrimination under section 6(2) (b) of the Act, provided it represented a sufficient detriment.¹² Where the consequence of the harassment is sexual blackmail¹³ by the employer (give in to my sexual demands or else) then this would almost always represent sufficient detriment. Since Porcelli there have been numerous cases involving sexual harassment and often the issue is, are the consequences of the employer's behaviour sufficiently detrimental to the victim to represent a breach of the Act?

In *De Souza v Automobile Association*¹⁴ a racial harassment case, Mrs De Souza overheard a racist comment made about her in a conversation between two managers. It was held that this was not sufficiently detrimental to her to constitute an unlawful act. While this was undoubtedly an overtly restrictive interpretation of the term detriment used in the Acts,¹⁵ on the positive side, the Court of Appeal made it clear that even when the only consequence for the victim of the harassment is a hostile working environment this could represent a contravention of the Acts.

The difficulty in establishing sufficient detriment to represent a breach of the Act was illustrated in the case of *Stewart v Cleveland Guest (Engineering) Ltd*¹⁶ where a woman in the course of her employment had to walk through a working environment tainted by pornographic images. The impact of such a working environment was held to be gender-neutral as a man would be equally offended by such images.

The outcome of this case was clearly wrongly decided by the Employment Tribunal in this case. They failed to take account of the effect on the applicant of the

p 236

¹² These are referred to as working environment cases.

¹³ Quid pro quo cases

¹⁴ [1986] ICR 514 CA

¹⁵ Section 6 (2)(b)(c) of the SDA 1975 and Section 4(2)(c) of the RRA 1976

¹⁶ [1994] IRLR 440,EAT

objectification of women as sex objects in the workplace. The case does emphasise the need for applicants in sexual harassment cases to differentiate their treatment at the hands of the employer from that likely to be or actually, experienced by a man.

Similarly in the case of *British Telecommunications v Williams*¹⁷ the female applicant was unable to show that she had experienced sufficient detriment. The facts were that a performance review interview of a female employee undertaken by a male manager was carried out in a very confined space. She claimed she was forced into close physical proximity with the manager and this represented sexual harassment.

This was not treated as sex discrimination on the basis that there was no evidence that the manager was sexually aroused and that a male employee in the same situation would have been similarly discomforted.

While it was originally believed that harassment must involve a continuous mode of conduct this view was challenged in two cases. In *Bracebridge Engineering Ltd v Darby*¹⁸ a single incident of harassment was capable of constituting a sufficient detriment (a serious sexual assault by her supervisor and another). In the case of *Insitu Cleaning Co Ltd v Heads*¹⁹ a single verbal comment of a sexist nature made to a female manager by a male colleague at a management meeting was sufficient detriment.

The problem with bringing any kind of claim for harassment or bullying is that the consequences of the behaviour will often be dependant on the particular sensitivities of the victim and the Tribunal will need to be satisfied that sufficient harm has occurred to the particular applicant.²⁰ This subjective aspect of sexual harassment

¹⁷ [1997] IRLR 668 EAT

¹⁸ [1990] IRLR 3 EAT

¹⁹ [1995] IRLR 4 EAT

²⁰ All the new legislation dealing with harassment identifies that the sensitivities of the victim should be a key consideration in any claim

was identified by the Employment Appeal Tribunal in the case of *Reed and Bull v Stedman*²¹

“The essential characteristics of sexual harassment are that it is words or conduct which are unwelcome to the recipient and it is for the recipient themselves to decide what is acceptable to them and what they regard as offensive.”²²

In this case a secretary was bullied and subjected to sexual comments and innuendoes by her boss the marketing manager. She brought a claim for sex discrimination based on her constructive dismissal by her employer. “The tribunal had not erred in finding that a course of unwanted and bullying behaviour by the applicant's manager, which amounted to sexual harassment was a breach of the duty of trust and confidence. “

This amounted to constructive dismissal and accordingly was an act of discrimination within the meaning of s 6(2) of the Sex Discrimination Act.

“A characteristic of sexual harassment is that it undermines the victim's dignity at work. It creates an offensive or hostile environment for the victim and an arbitrary barrier to sexual equality in the workplace.”²³

In the case of *Waters v Commissioner for Police of the Metropolis*²⁴ a female police officer was sexually assaulted by a colleague outside working hours in her home.

She reported the incident to her employer but after an internal enquiry no action was taken against the harasser. Ms Waters then experienced victimisation by her employer and made a claim under Section 4 of the Sex Discrimination Act 1975.

It was held that as no legal action could be taken against the employer under the Act for the assault (not vicariously liable as per section 41 as the harasser was acting outside

²¹ [1999] IRLR 299

²² Ibid p 300

²³ Ibid p 300

²⁴ [1995] IRLR 531

the scope of their employment) and correspondingly there was no right to bring a claim for victimisation which was dependant on the action complained of following a complaint under Section 41 of the SDA 1975.

This case was eventually taken on appeal to the House of Lords and they upheld Ms Waters claim that the employer's failure to offer her support and to permit harassment and victimisation against her amounted to breach of their duty of care under the law of contract and tort.²⁵

"If an employer knows that acts being done by employees during their employment may cause physical or mental harm to a particular fellow employee and he does nothing to supervise or prevent such acts, where it is in his power to do so, it is clearly arguable that he may be in breach of his duty to that employee. It seems to me that he may also be in breach of that duty if he can foresee such acts may happen, and if they do, that physical or mental harm may be caused." ²⁶

The employer should have anticipated Ms Waters persistent complaint about the assault by a fellow officer would lead to retaliatory action.

"I consider the person employed under an ordinary contract of employment can have a valid cause of action in negligence against her employer if the employer fails to protect her against victimisation and harassment which cause physical or mental injury. This duty arises both under the contract of employment and under the common law principles of negligence."²⁷

This decision and the Reed case mentioned earlier will have more significance for victims of bullying rather than victims of harassment because the former are often

²⁵ Waters v Metropolitan Police Commissioner [2000] IRLR 720

²⁶ Lord Slynn

²⁷ Lord Hutton

dependent on common law remedies whereas the latter are now heavily protected by statute law.

Influence of the European Union on Sexual Harassment Law

There was, until recently, no legally binding measures emanating from the European Union dealing with sexual harassment or any other kind of workplace harassment. The European Commission Code of Practice on Sexual Harassment however was influential on courts and tribunals in the United Kingdom. The Code of Practice sets out a definition of sexual harassment which has been adopted by domestic tribunals and courts as the appropriate legal standard against which cases are judged.

“Sexual Harassment means unwanted conduct of a sexual nature or other conduct based on sex affecting the dignity of men and women at work. This can include unwelcome physical, verbal or non-verbal conduct.”

This definition highlights the importance of considering the impact of the behaviour on the individual victim and underlies the diverse nature of harassment at work.

An improved version of this definition has been provided by a recent Directive²⁸ which amended the Equal Treatment Directive 76/207/EC and is considered below.

There are plans in the United Kingdom to implement the terms of this Directive by October 2005 although the precise nature and content of the legislation is as yet unclear.

The Directive includes a clear definition of sexual harassment that is more comprehensive than definitions used in the other Directives providing protection against harassment.²⁹

²⁸ Equal Treatment Amendment Directive 2002/73/EC

²⁹ Race Directive 2000/43/EC, Equal Treatment at Work Directive 2000/78/EC

Harassment is defined as “where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

Sexual harassment is similarly defined as “Any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs with the purpose or effect of violating the dignity of a person in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.”

The definitions used in the Directive cover a wide range of harassing behaviour including sexual harassment, harassment based on sex but without any sexual element and intimidatory behaviour such as bullying and physical or verbal abuse.

The behaviour complained of does not need to be directed at a woman. It is enough that the harassment is linked to the fact she is a woman.

The Equal Treatment Amendment Directive ³⁰ also changes the definition of indirect discrimination and this development will be considered below.

Racial Harassment

The law dealing with racial harassment is virtually the same as the law dealing with sexual harassment except for the grounds of action. As any legal precedent relating to racial or sexual harassment applies to both areas it is unnecessary to run through the rules already mentioned. It will be useful however, to consider any relevant case law and statutes that apply to racial harassment.

The first case to recognise that racial harassment was a type of racial discrimination under the Race Relations Act 1976 was *De Souza v Automobile Association*. ³¹

³⁰ 2002/73/EC

It is useful to reiterate that Mrs De Souza was unsuccessful in her claim because the Court of Appeal, wrongly decided, in this writer's opinion, that the behaviour complained of was not sufficiently detrimental to her to constitute an unlawful act.³²

The Court of Appeal held that racial harassment was unlawful discrimination and that when the only consequence for the victim of the harassment is a hostile working environment this could represent a breach of the Act.

In what must be the most extreme case of racial harassment to be brought before an Employment Tribunal, *Jones v Tower Boot Co Ltd*, the complaint was considered by the Court of Appeal.³³ The case involved a sixteen-year-old male employee of mixed ethnic parentage who was physically and verbally abused and bullied by fellow employees because of his race. This consisted of burning his arms with a hot screwdriver, throwing metal bolts at his head, whipping his legs with a rubber welt and calling him racially insulting names.

He brought a complaint of racial discrimination against his employer on the basis of their vicarious liability for these actions under section 32 of the Race Relations Act 1976.

The Court of Appeal overturned the EAT decision, which relied heavily on the common law rules dealing with vicarious liability, and went on to consider the interpretation that should be given to the phrase 'in the course of employment' in discrimination cases. They concluded that, "tribunals are free and are indeed bound,

³¹ [1986] ICR 514 CA

³² Doubts were cast by the EAT on the appropriateness of the ruling of LJ May in *De Souza* to current racial harassment cases in the case of *Thomas and Comsoft Ltd. v Robinson* [2003] IRLR 7, EAT

³³ [1997] ICR 254

to interpret the ordinarily, and readily understandable, words, 'in the course of his employment' in the sense in which every layman would understand them." ³⁴

The Race Discrimination Directive ³⁵ has been implemented into UK law by the Race Relations Act 1976 (Amendment) Regulations SI 2003/1626

The Regulations insert after section 3 of the 1976 Act, Section 3 A, which for the first time sets out a statutory definition of racial harassment.

3A. - (1) A person subjects another to harassment in any circumstances relevant for the purposes of any provision referred to in section 1(1B) where, on grounds of race or ethnic or national origins, he engages in unwanted conduct which has the purpose or effect of - (a) violating that other person's dignity, or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

(2) Conduct shall be regarded as having the effect specified in paragraph (a) or (b) of subsection (1) only if, having regard to all the circumstances, including in particular the perception of that other person, it should reasonably be considered as having that effect.

The Regulations are drafted more narrowly than the Race Relations Act 1976 because of restricted grounds of action applying. They only apply to discrimination based on race or ethnic or national origins rather than the racial grounds which apply under the Act which include colour, race, nationality or ethnic or national origins. ³⁶

³⁴ Supra 29 p 265

³⁵ 2000/43/EU

³⁶ Section 3

These Regulations are significant because they closely define the nature of racial harassment although the definition used closely emulates the nature and scope of unlawful racial harassment that has been developed through judicial precedent.

One aspect of the Regulations that is different and worthy of a mention is that persons pursuing a harassment case under them, need not find a comparator in the workplace.

“Harassment, the third form of prohibited discrimination, does not require a comparator.”³⁷

Harassment on the Ground of Sexual Orientation

Until recently victims of harassment or any form of discrimination based on sexual orientation were denied any protection under discrimination law. Homosexual or lesbian employees facing harassment or discrimination within employment had no form of legal redress under the equality laws of the United Kingdom or the European Union.³⁸

The reason they were denied protection in the United Kingdom was summarised by the Court of Appeal in the case of *Smith v Gardner Merchant*³⁹ when they stated that “discrimination on grounds of sexual orientation is not discrimination on the ground of sex within the meaning of the Sex Discrimination Act 1975. A person's sexual orientation is not an aspect of his or her sex.”⁴⁰

A similar but rather more reluctant interpretation of Community Law was provided by

³⁷ Guild E The EC Directive on Race Discrimination: Surprises, Possibilities and Limitations, *Industrial Law Journal*, Vol. 29 No. 4 December 2000 pp 416-423 p 420

³⁸ Sexual orientation was not included within the ambit of Section 1 of the SDA 1975, Article 141 of the EC Treaty or Article 5 of the Equal Treatment Directive EEC 76/207

³⁹ [1998] IRLR 510

⁴⁰ It was the judiciary's view that homosexuality derived from someone's sexual proclivity rather than their gender and only gender-based discrimination was acceptable for comparison in sex discrimination cases.

the ECJ in *Grant v South West Trains*⁴¹

Despite the fact that the European Convention of Human Rights became part of United Kingdom law with the passing of the Human Rights Act 1998 (HRA)⁴² attempts to broaden the impact of domestic legislation through the application of human rights to provide protection to victims of discrimination or harassment on ground of sexual orientation have been largely unsuccessful.⁴³

In the case of *Pearce v Governing Body of Mayfield School*⁴⁴ the applicant was a lesbian teacher who regularly experienced homophobic verbal taunts by pupils at the school where she taught. When she complained she was provided with very little support by the school management and she was eventually obliged to take early retirement to escape the harassment. She brought a complaint of sex discrimination but the House of Lords dismissed her appeal. They compared the treatment that Ms Pearce received with that which would have been directed at a hypothetical homosexual male and decided they would have both suffered a similar fate. On this reasoning there was no inequality of treatment.

The need for the EU to legislate in this area was apparent and in December 1999 the European Commission introduced the European Employment Directive (Council Directive 2000/78/EC) which amongst other things proposed that discrimination on the ground of sexual orientation should be treated as unlawful. The United Kingdom Government have now introduced the Employment Equality (Sexual Orientation)

⁴¹ [1998] IRLR 206 at p218, this reasoning was followed in *R v Secretary of State for Defence ex parte Perkins (No2)* [1998] IRLR 508

⁴² Ewing, K The Human Rights Act and Labour Law, *Industrial Law Journal*, Vol. 27, No 4, December 1998 pp 276

⁴³ *Secretary of State for Defence v McDonald* [2001] IRLR 431

⁴⁴ [2003] UKHL 34

Regulations ⁴⁵ to fully implement the Directive into UK domestic law. This has had a direct impact on the rights of victims of sexual orientation discrimination. It makes it unlawful to discriminate by way of harassment or other discriminatory treatment on the ground of sexual orientation.

Sexual orientation is widely defined under Regulation 2 of the Regulations to mean orientation towards persons of the same sex (homosexuals) of the opposite sex (heterosexuals) and persons of the same sex and the opposite sex (bisexuals). This means that homosexuals, heterosexuals and bisexuals are protected under the legislation. ⁴⁶ The Regulations provide protection against direct and indirect discrimination and victimisation.

The definition of harassment in regulation 5 is similar to that found in other new legislation making it unlawful for A to engage in unwanted conduct on the ground of sexual orientation which has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

Under Section 6(3) "it unlawful for an employer ...to subject to harassment a person whom he employs or who has applied to him for employment. "

These regulations will provide much needed protection to employees in this position ⁴⁷ and the broad definition of harassment and category of comparator should ensure that it suitably comprehensive in its coverage. It will be interesting to see if these

⁴⁵ SI 2003/1661

⁴⁶ "They cover discrimination on grounds of perceived as well as actual sexual orientation (i.e. assuming - correctly or incorrectly - that someone is lesbian, gay, heterosexual or bisexual) The Regulations also cover association, i.e. being discriminated against on grounds of the sexual orientation of those with whom you associate (for example, friends and/or family). "

DTI Website

⁴⁷ Regulation 6 sets out the types of activities that will be treated as unlawful under the regulations which are largely identical those under section 4 of the RRA and section 6 of the SDA. Dismissal of a person includes expiry of a fixed term contract or constructive dismissal.

Regulations can overcome some of the practical obstacles faced by employees in this position (e.g. homosexual employees' reluctance to admit to their sexual orientation).

Harassment on the Ground of Disability

Where an employee suffered harassment because of their disability and it could be established it was to their detriment then this was contrary to section 4 (2) (d) of the Disability Discrimination Act 1995. The disabled employee would need to show that their disability fell within the meaning of the definition of disability in Section 1 of the Act.⁴⁸ As there is no opportunity to bring a claim for indirect discrimination under the Act the disabled employee being harassed would need to show that they were the victim of direct discrimination or that the employer had failed to make a reasonable adjustment, under section 6 of the Act, to allow them to carry out their job. The most obvious and effective adjustment would be to change the nature or place of the job to avoid the harassment or transfer or dismiss the harasser having followed the appropriate disciplinary procedure. The question is would the employer have treated someone else to whom the material reason (physical or mental impairment) does not apply in the same way. There are certain significant differences between this legislation and the other equality statutes.

⁴⁸ Further definition is provided in various guidance notes

This is not true of the law dealing with harassment on the ground of disability following the Disability Discrimination Act 1995 (Amendment) Regulations 2003/1673 which largely follows the model used in other legislation and states that:

(1) For the purposes of this Part, a person subjects a disabled person to harassment where, for a reason which relates to the disabled person's disability, he engages in unwanted conduct which has the purpose or effect of -

(a) violating the disabled person's dignity, or

(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

(2) Conduct shall be regarded as having the effect referred to in paragraph (a) or (b) of subsection (1) only if, having regard to all the circumstances, including in particular the perception of the disabled person, it should reasonably be considered as having that effect.

While the introduction of a specific statutory tort to deal with harassment should make it easier to establish a case the Regulations makes it clear that the reason for the harassment must relate to the person's disability otherwise it is not unlawful. If there a number of reasons for the harassment, with disability only being one of them, it might be difficult to show that there has been a breach.

Harassment on the Ground of Religion or Belief

There was very little protection available to victims of harassment or discrimination on the ground of religion or belief prior to Employment Equality Religion or Belief

Regulations 2003.⁴⁹ What protection there was arose under the Race Relations Act 1976 where certain categories of religious groups persuaded courts and tribunals to widely interpret the terminology used in the statute to cover their interests. In *Mandla v Lee*⁵⁰ the House of Lords defined in some detail what characteristics apply to an ethnic group (including a common language and religion) as defined in the RRA and decided that Sikhs fell within this term and were protected by the statute.⁵¹

There were various religious groups that weren't as fortunate such as Rastafarians, Muslims and Jehovah's Witnesses.

As a result of the recent legislation all religious groups are potentially covered as well as groups or individuals that hold a strong deeply held belief about something.

In common with other new pieces of equality legislation specific provision is made for a tort of harassment.

The definition of the terms religion or belief are set out in Regulation 2, the interpretation section, as follows:

2. - (1) In these Regulations, "religion or belief" means any religion, religious belief, or similar philosophical belief.

With respect to the tort of harassment this is defined in a similar way as in the other statutes.⁵²

⁴⁹ SI 2003/1660

⁵⁰ (1983) ICR 385

⁵¹ Gypsies were given similar protection in *CRE v Dutton* [1989] IRLR 8 and Jews in the case of *Seide v Gillete Industries Ltd.* [1980] IRLR 427

⁵² Regulation 5. - (1) For the purposes of these Regulations, a person ("A") subjects another person ("B") to harassment where, on grounds of religion or belief, A engages in unwanted conduct which has the purpose or effect of -

(a) violating B's dignity; or

(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) Conduct shall be regarded as having the effect specified in paragraph (1)(a) or (b) only if, having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect.

The most contentious aspect of the Regulations relates to genuine occupational requirements.

Under Regulation 7 the genuine occupational requirement is stated in broad terms and allows employers to refuse employment to those people that do not conform to their expectations regarding religion or belief. The categories of person that could be denied employment because of this requirement are homosexuals or lesbians. Their lifestyle and beliefs are likely to be regarded by some religious groups as the antithesis of their own religious ethos.

Regulation 7 (1) states that “in relation to discrimination falling within regulation 3 (discrimination on grounds of religion or belief) - (2) This paragraph applies where, having regard to the nature of the employment or the context in which it is carried out -

(a) being of a particular religion or belief is a genuine and determining occupational requirement;

(b) it is proportionate to apply that requirement in the particular case; and

(c) either –

(i) the person to whom that requirement is applied does not meet it, or

(ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it, and this paragraph applies whether or not the employer has an ethos based on religion or belief .⁵³

⁵³ (3) This paragraph applies where an employer has an ethos based on religion or belief and, having regard to that ethos and to the nature of the employment or the context in which it is carried out -

The onus is on the employer to show that the GOR applies and that it is proportionate because of the nature of a particular job.⁵⁴

Harassment on the Ground of Age

There is no legislation in place at the moment to deal with this type of harassment because the legislation implementing the Directive does not need to be in place until 2006. The indications are that it will follow the model used in other areas of discrimination law and harassment on this ground will be prohibited by statute. Unlike age legislation in the United States which only applies to workers over forty⁵⁵ these regulations will apply to workers of all ages.

Vicarious Liability

Under the equality laws of the United Kingdom employers can be vicariously liable for the discriminatory acts of supervisors, colleagues, and even third parties. Importantly, they can be vicariously liable for acts of harassment by employees perpetrated against other employees inside and outside of the workplace.⁵⁶

(a) being of a particular religion or belief is a genuine occupational requirement for the job;

(b) it is proportionate to apply that requirement in the particular case; and

(c) either -

(i) the person to whom that requirement is applied does not meet it, or

(ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it.

⁵⁴ A chaplain in a hospital or a prison could be an example.

⁵⁵ Age Discrimination in Employment Act 1967

⁵⁶ The rules relating to vicarious liability of employers can be found in s.41 of the Sex Discrimination Act 1975, s.32 of the Race Relations Act 1976, section 58 of the Disability

“anything done by a person in the course of his employment shall be treated for the purposes of this act as done by his employer as well as by him, whether or not it was done with the employer’s knowledge or approval.”

The judicial interpretation of the words in the equality statutes ‘anything done in the course of his employment’ (e.g. section 32 (1) of the RRA) changed following the landmark decision of Jones v Tower Boot Co Ltd ⁵⁷

The Court of Appeal concluded that the interpretation that should be given to the phrase ‘in the course of employment’ in discrimination cases should be decided by tribunals applying a commonsense and everyday meaning of the term.

“Tribunals are free and are indeed bound, to interpret the ordinarily, and readily understandable, words, ‘in the course of his employment’ in the sense in which every layman would understand them.” ⁵⁸

LJ Waite usefully gave examples of the kind of factors to be considered when deciding whether an employee was acting in the course of their employment.

Such as whether or not the employee is within or outside the workplace, in or out of uniform and in or out of rest-breaks when the incident occurred. ⁵⁹

In all of the relevant provisions of the equality legislation mentioned above ⁶⁰ a defence is provided for employers. “In proceedings brought under this Act against

Discrimination Act 1995, Regulation 22 of the Employment Equality (Religion or Belief) Regulations and Regulation 22 of the Employment Equality (Sexual Orientation) Regulations 2003.

⁵⁷ [1997] ICR 254

⁵⁸ Ibid p 265

⁵⁹ Ibid p 272

any person in respect of an act alleged to have been done by an employee of his it shall be a defence for that person to prove that he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description.”

In the case of harassment once it has been shown that an employee has been the victim of harassment and that it was perpetrated by the harasser in the course of their employment, then it is up to the employer to show they have taken steps to prevent the discriminatory behaviour.

“The burden of proof is on the employer to show that he has taken such steps.”⁶¹

The EC Code of Practice on Sexual Harassment recommended that for the defence to be established, not only should there be a policy, but it should be communicated effectively to all employees and there should be provision for training of managers and supervisors.⁶² These steps are also recommended by the Codes of Practice of the Equal Opportunities Commission and the Commission for Racial Equality. With respect to harassment employers will be expected to have taken positive steps to avoid the situation which could include having a harassment (or dignity at work) policy, informing and training employees, providing counselling for victims of harassment and disciplining the harassers.

⁶⁰ Supra 56

⁶¹ Hemming J, *Discrimination in the Workplace: A Practical Guide*, John Wiley & Sons, Chichester, 1997, p 170

⁶² European Commission, *Code of Practice on the Protection of the Dignity of Women and Men at Work (92/131/EEC)*, OJ (1992) L49/5, 5(A) (ii)

Vicarious Liability for Harassment Perpetrated Outside the Workplace

In the case of *Stubbs v The Chief Constable of Lincolnshire Police and others* a policewoman was sexually harassed on a number of occasions by a male officer in a public house after work. The Employment Tribunal held that the incidents were in the course of employment, and the Chief Constable was held vicariously liable

They took the view that; “the pub incidents were connected to the work and the workplace. They would not have happened but for the applicant’s work. Work related social functions are an extension of employment and they could see no reason to restrict the course of employment to purely what goes on in the workplace.”

This conclusion was affirmed by the Employment Appeal Tribunal who stated that the initial tribunal, “were in the best possible position to judge whether, despite the fact that the first incident occurred ‘in a pub’ it was nonetheless to be regarded as part of the employment relationship.”⁶³

Employer Liability for Harassment by a Third Party

An employer not only has a duty to protect an employee from the discriminatory acts of supervisors and fellow employees but also has a duty to protect an employee from harassment by third parties.

“This duty clearly arises in the employment context whether the harasser is... a customer, a member of the public, or anyone else who comes into contact with the employee while she is at work.”⁶⁴

⁶³ *Chief Constable of Lincolnshire Police v Stubbs* [1999] IRLR 81, EAT

⁶⁴ Townshend-Smith R J, *Discrimination Law: Text, Cases and Materials*, Cavendish Publishing Ltd, London, 1998, p 250

A good example is the case of *Burton and Rhule v De Vere Hotels Ltd*⁶⁵ where two waitresses of Afro-Caribbean origin were made the object of racially and sexually offensive remarks by the comedian, Mr Bernard Manning, and other guests at an after-dinner speech in the hotel in which they worked. The waitresses brought a complaint of racial harassment against her employer under s.4 (2) (c) of the Race Relations Act 1976.

The Burton case went on appeal to the Employment Appeal Tribunal who stated that the question for the tribunal was, “whether the event in question was something which was sufficiently under the control of the employer that he could, by the application of good employment practice, have prevented the harassment or reduced the extent of it.”

In *Go Kidz Go Ltd v Bourdouane*⁶⁶ an employer was held liable for the sexual harassment of a nursery teacher by the father of one of the children she was looking after.

The rules relating to vicarious liability will apply to all the types of discrimination or harassment claims mentioned above.

Legal Redress for Bullying

The second area of dignity at work I want to cover in this article is bullying.

While this a widespread activity with serious consequences for the victim including adversely affecting their dignity at work it has been given little attention under

⁶⁵ (1997) ICR 1

⁶⁶ See Equal Opportunities Review, Number 70 1996, p 49

employment law. The legal protection available to those unfortunate enough to experience bullying is limited in its coverage and ill-defined.⁶⁷

Recent research was undertaken by the journal Personnel Today⁶⁸ and the Andrea Adams Trust into the level of bullying amongst HR professionals and it was found that more than three quarters of the 1000 respondents had experienced bullying.

Bullying has been defined as “persistent, offensive, abusive, intimidating, malicious or insulting behaviour, abuse of power or unfair penal sanctions which makes the recipient upset, threatened, humiliated or vulnerable, which undermines their self-confidence and may cause them to suffer stress.”⁶⁹

Legal Redress for Bullying

Where an employer breaches an implied duty in the contract of employment of an employee such as the duty to maintain trust and confidence this can represent a repudiation of his contract of employment and give rise to an action for breach of contract. Under the law of tort, employees whose bullying behaviour leads to other employees experiencing physical or mental harm are likely to be held personally liable for a breach of their duty of care and employers that tolerate or condone acts of bullying could be vicariously liable for their actions.⁷⁰

Given that in the absence of any aspect of inequality these are the most likely heading off claim it is important to mention each of these remedies in turn.

⁶⁷ Supra 5

⁶⁸ Thomas, D HR the victim as bullying takes hold in UK business Personnel Today 28.09.04
www.personneltoday.com

⁶⁹ Taken from Guidelines on Bullying produced by the Manufacturing, Science and Finance Union (MSF)

⁷⁰ Waters v Commissioner of Police for the Metropolis (2000) IRLR 720 HL

Breach of Contract

Where bullying or harassment is perpetrated against an employee by his supervisor or manager then it is likely to represent a breach of the employer's duty to maintain their employee's trust and confidence "There is implied into a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee." ⁷¹

In *Courtalds v Andrews* ⁷² a supervisor was told by his boss 'you can't do the bloody job' and this was deemed to be a breach of the implied term of trust and confidence.

In *The Post Office v Roberts* ⁷³ it was held the Employment Appeal Tribunal that it is not necessary to show that the breach of this implied term involved deliberation, intent or bad faith.

The conduct of the parties has to be looked at as a whole and its cumulative impact assessed.

In *BG plc v O'Brien* ⁷⁴ it was decided that where an employer is behaving in an arbitrary, capricious or totally unreasonable manner to an employee in exercise of its contractual discretion this is a breach of their contract ⁷⁵

⁷¹ J Browne-Wilkinson in *Woods v W M Car Services (Peterborough) Limited* [1981] ICR 666 EAT

⁷² [1979] IRLR 84, EAT

⁷³ [1980] ICR 347 EAT

⁷⁴ [2001] IRLR 406

⁷⁵ See *Clark v BET* [1997] IRLR 348

What is significant for victims of bullying or harassment is that following the case of *Malik v BCCI*⁷⁶ it is not necessary for the behaviour complained of to be targeted at the victim and an employee need not know of the employer's trust destroying conduct while he is still employed. This could mean that not just victims but witnesses to bullying incidents can claim their contract has been breached and even where victims are not fully aware of the extent of bullying or harassment towards them during their employment they can still bring a claim if they become aware of it after they have left their employment.⁷⁷

The *Malik* case also extended the duty of trust and confidence to include a duty of cooperation taking the form of a positive obligation on the employer to take all steps which are necessary to achieve the purposes of the employment relationship.

In a case involving bullying and harassment *Reed and Bull information Systems Ltd v Stedman*⁷⁸ a secretary was bullied and subjected to sexual comments and innuendoes by her boss, the marketing manager. She brought a claim for sex discrimination arguing that the discriminatory behaviour led to her constructive dismissal by the employer. It was recognised that such behaviour represents a breach of the implied term of trust and confidence but the matter was dealt with under the Sex Discrimination Act 1975. "The tribunal had not erred in finding that a course of unwanted and bullying behaviour by the applicant's manager, which amounted to sexual harassment was a breach of the duty of trust and confidence. When the employee was forced to leave her job as a result this amounted to constructive dismissal and accordingly was an act of discrimination within the meaning of s 6(2) of the Sex Discrimination Act."

⁷⁶ [1997] IRLR HL 462

⁷⁷ Under equality law there is now a right to bring an action for discriminatory acts perpetrated after the contract of employment is finished.

⁷⁸ [1999] IRLR 299

In *Waltons & Morse v Dorrington*⁷⁹ it was decided that there is a duty to provide and maintain a working environment which is reasonably suitable for the performance by their employees of their contractual duties. The following quote summarises the impact this decision could have on this area of law. "The implied duty to provide a reasonably suitable working environment also can be regarded as encompassing a duty to protect the employee from violence or from harassment, whether sexual or racial, or in the form of general bullying."⁸⁰

While there is clearly scope for bringing a claim for breach of contract based on bullying behaviour or harassment representing a breach of an implied term⁸¹ the employee is more likely to bring an action under the law of tort

Tort Actions

A perpetrator of bullying and harassment may be personally liable for his actions to the victim for breach of their duty of care or in serious cases of physical bullying for the civil action for assault. It is more likely however, that the victim will sue his employer in tort on the basis of his breach of their duty of care or his vicarious liability.

Duty of care for the safety of all employees

An employer is under a duty to provide all his employees on an individual basis with a safe system of work including a safe working environment, adequate safety

⁷⁹ [1997] IRLR 488

⁸⁰ Rubinstein, M. p 485 [1997] IRLR.

⁸¹ As well as those mentioned there is a implied duty on the part of the employer to take care for the safety of his employees

instruction and supervision and safe and competent fellow employees. Where bullying occurs it can lead to an oppressive working environment that has an adverse affect on the health of targeted employees. If inadequate supervision is provided this could lead to an employer's liability, as would a failure to alert staff to the activities of known bullies.

There is a duty on the part of the employer to discipline staff that is a danger to the health and safety of his other employees and this could extend to their dismissal.

In *Walker v. Northumberland County Council* 82 it was decided by the High Court that the employer's duty of care could be extended beyond protecting employees from physical harm to risks to their mental health caused by the working environment.

In an unreported case *Ms Noonan* a council worker brought an action against Liverpool City Council in 1999 and claimed that as a result of being subjected to bullying, intimidation and harassment for several years her employer had breached their duty of care. This case was settled before the court hearing her employer paying an out of court settlement of £84,000. This and other cases against public authorities (usually unreported) concerning bullying and harassment established that a duty of care exists on the part of an employer to ensure that this behaviour is not perpetrated against his employees.

In *Waters v Commissioner of Police for the Metropolis* 83 *Ms Waters* brought a claim for negligence against her employer and an action for breach of contract because of the bullying and harassment she had experienced.

Lord Slynn, in the House of Lords summarised the case as "one of negligence - the employer failed to exercise due care to look after his employee. Generically many of the acts alleged can be seen as a form of bullying - the employer or those to whom he

⁸² [1995] IRLR 36

delegated responsibility for running his organisation, should have taken steps to stop it, to protect the employee from it.”

This decision represents judicial recognition at the highest level that bullying or harassment is a ground for an action in tort and for breach of contract.

Equality Claims

In the event that the bullying is of a racist or sexist nature or directed at someone because of their sexual orientation, religion or belief or disability then the employer and the employee responsible for the behaviour could be treated as acting unlawfully under the equality legislation.⁸⁴

Here, as bullying is likely to be regarded as a form of harassment for the purposes of the legislation the same evidential requirements as relates to harassment will apply. Namely the employee would need to show that the bullying behaviour would not have been directed at them, but for the particular ground. They would also have to show in cases dealing with harassment on the grounds of sex, religion or sexual orientation that another employee of a different category (e.g. male, Christian or heterosexual) would not be treated in the same way.

As an indicator of how these cases are dealt with under equality law the following examples are given from cases involving sex and race discrimination.

Bullying of a Sexist and Racist Nature

⁸³ [2000] IRLR 720 HL

⁸⁴ Reed and Bull information Systems Ltd v Stedman [1999] IRLR 299

In *D Watt (Scotland) Ltd v Reid*⁸⁵ a young male worker in a shellfish factory in Shetland was subject to bullying by the predominantly female workforce over a two month period. He was eventually forced to give up his job and successfully claimed sex discrimination.

Two cases were recently pursued against the Ford Motor Co. for racist bullying. In the first case, brought by an employee Sukhjit Parmar, he won his case for race discrimination and an undisclosed out-of-court settlement in November 2000.⁸⁶ In the second case an employee Shinder Nagra established that he had been subjected to racist bullying and abuse by colleagues over a six year period. His employer was accused of being institutionally racist and was held liable for race discrimination with an award of £149,000 being made against him.

In another case Tania Clayton, a female fire fighter, suffered severe depression when she was bullied and harassed by her male colleagues over a period of 15 months. She received an out of court settlement of £200,000 from her employer following a claim for sex discrimination.⁸⁷

Where there is no discriminatory element to bullying then the victim will have to resort to civil actions under the common law or a combination of actions under statute and the common law that are unintended to provide a remedy and because of that in many instances ineffective.

Other Forms of Legal Protection for Bullying and Harassment

⁸⁵ 25.9.01 EAT

⁸⁶ Rumoured to be in excess of £300,000

⁸⁷ McIlroy R Bullying at Work, SCOLAG pp 19-24

What follows is a brief outline of the alternatives to the forms of legal redress for victims of bullying and harassment outlined above.

Under the Protection from Harassment Act 1997 there is civil action for harassment. The term harassment is defined in section 1 and is broad enough to cover both types of behaviour. The significance of the Act is that it provides for an injunction to be granted for breach of the civil provisions which could be utilised by the victim to bring about cessation of the behaviour.⁸⁸

Other criminal and civil actions that could apply include an action for breach of contract on termination of employment under statute,⁸⁹ an action for unfair dismissal⁹⁰ or constructive dismissal⁹¹ and a criminal action for assault, threat or breach of the peace.

An action for could arise against public bodies for breach of the Human Rights Act 1998, particularly under Articles 4, 8 and 10 of the European Convention.

Bullying was considered in the context of human rights cases where a claim by homosexuals in the armed forces that bullying by their superiors was a breach of their human rights was upheld as a breach of Article 8 (the right to respect for a person's private and family life).⁹²

It is not appropriate to give these areas of legal protection detailed consideration here because they are dealt with elsewhere⁹³ and in the interests of brevity this article has

⁸⁸ There are two criminal offences provided under the Act, Harassment and Putting in Fear of Violence which could apply to serious acts of bullying and harassment.

⁸⁹ Employment Tribunals (Extension of Jurisdiction) Orders SI 1994/1623 (and SI 1994/1624 applying to Scotland)

⁹⁰ Chessington World of Adventures Ltd v Reed

⁹¹ Palmanor Limited v Cedron [1978] IRLR 303, EAT Hilton International Hotels (UK) Ltd v Protopapa [1990] IRLR 316, EAT

⁹² Lustig-Prean and Beckett v United Kingdom [2000] 29 EHRR 548, Smith and Grady v United Kingdom [2000] 29 EHRR 493

⁹³ Gillow E, Hopkins, M Williams A Harassment at Work 2nd ed. (2003) Jordan

restricted its attention to the most common avenues of redress for victims of harassment and bullying.

Conclusion

If it is accepted that the employees have a right to dignity at work that must be protected ⁹⁴ and that the behaviour on the part of the employer that is most likely to compromise this right is harassment or bullying, then it is of clear importance that legal mechanisms are in place to protect employees against this behaviour.

The question is, does the law as it stands offer sufficient protection? Given recent changes in employment law it probably does, although there are undoubtedly aspects of the legal rules that could still be improved.

Now, if harassment or bullying is based on one of the grounds in the equality legislation ⁹⁵ then the victims could have a basis for claiming legal redress.

They may in the process face certain evidential hurdles, including showing a causal link between the type of discrimination and the behaviour complained of and establishing that the effect of the behaviour on them is sufficiently detrimental to merit legal protection.

The fact that all the equality statutes now have broad and inclusive definitions of harassment including formal recognition of the need to consider the impact of the behaviour on the victim, can only make things easier for applicants in these cases.

The use of equality law in its present form is not without its critics.

“We must doubt the effectiveness of those elaborate laws against discrimination in employment. The legislation relies upon individual civil claims for compensation for

⁹⁴ In *Malik and Mahmud v BCCI SA* 1997 IRLR 462 HL it was held that the employee was entitled to be compensated by stigma damages for damage to his job prospects caused by his employer's fraudulent behaviour.

⁹⁵ Sex, Race, Disability, Sexual Orientation and Religion or Belief

losses caused by breach of an individual's rights as the principal enforcement mechanism, a strategy which... is generally weak." ⁹⁶

Despite these reservations there is, in this writer's view, in this context at least, some justification for arguing that instead of having a number of very similar definitions of harassment in a variety of statutes there would, in the interests of expediency and simplicity, be strong justification for having one statute covering all the existing areas of harassment. To get around some of the inadequacies identified in the present legal system the statute could also specifically include, protection from more general forms of harassment ⁹⁷ and bullying within its remit.

The obvious title for such a statute based on earlier discussion would be the Dignity at Work Act.

In the absence of such a move the legal protection for both types of victim (and in particular victims of bullying) will continue to be imprecise and in certain respects inaccessible.

⁹⁶ Collins, H Employment Law, (2003) Oxford University Press, p 73
⁹⁷ As utilised in the Protection from Harassment Act 1997