EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2015/9 Caste discrimination may be unlawful, but not necessarily (UK)

<p>The employment tribunal decision in Tirkey v Chandhok (reported in EELC 2014/21) has been appealed to the Employment Appeal Tribunal (‘EAT’). The EAT rejected the appeal against the tribunal’s decision to allow the claim for caste discrimination to proceed, agreeing with the tribunal that the definition of ‘race’ in the Equality Act 2010, which includes ‘ethnic origin’, is wide enough to include caste</p>

Summary

The employment tribunal decision in *Tirkey v Chandhok* (reported in EELC 2014/21) has been appealed to the Employment Appeal Tribunal ('EAT'). The EAT rejected the appeal against the tribunal's decision to allow the claim for caste discrimination to proceed, agreeing with the tribunal that the definition of 'race' in the Equality Act 2010, which includes 'ethnic origin', is wide enough to include caste.

Background

The Equality Act 2010 prohibits discrimination on the grounds of a number of characteristics, 'race' being one of them. Caste is not currently one of the 'protected characteristics', and so caste discrimination is not expressly prohibited. However, Section 9(1) of the Equality Act 2010, which defines race as including 'ethnic or national origins', is non-exhaustive and includes 'colour; nationality; ethnic or national origins'.

Section 9(5) of the Equality Act 2010 (as added by the Enterprise and Regulatory Reform Act 2013 (ERRA)) allows the government to amend Section 9 'so as to provide for caste to be an aspect of race'; but this power has yet to be exercised. In July 2013, the Government Equalities Office announced that before exercising this power, there would be a full public consultation in order to make sure that the legislation is appropriate and fit for purpose. As it stands, no amendments have yet been made, and caste remains outside the statutory definition of race.

Previous case law suggests that ethnic origin should be interpreted widely. In *Mandla - v - Dowell Lee* [1983] 2 AC 548 the House of Lords (now the Supreme Court) considered that the term 'ethnic' is used in a sense that is wider than the strictly 'racial' or 'biological'. Holding that Sikhs were protected from discrimination, the House of Lords held that the term 'ethnic origin' includes religious and cultural factors. The case laid down guidelines for determining 'ethnic origin' and stated that the group in question 'must regard itself, and be regarded by others, as a distinct community' by possession of a long shared history and their own cultural traditions. Following the Supreme Court decision in *R(E) - v - Governing Body of JFS and Another [2010] 2 AC 728*, it is not necessary for each caste to establish that it constitutes its own ethnic group, and nor is it relevant that an alleged discriminator is of the same ethnic origin.

Facts

The Claimant, Ms Tirkey, worked for the Respondents, Mr and Mrs Chandhok, as a domestic worker. She claimed that they treated her poorly, in a demeaning and humiliating manner, and that this was in part because of her low status. Ms Tirkey argued (by amendment to her original claim) that she was subjected to such treatment because of the Respondents' caste considerations. Ms Tirkey is a member of the Adivasi caste which is known as 'servant caste'. This caste is recognised as being at the lowest point of socio-economic indicators, and individuals belonging to this caste are frequently equated with Dalits (once known as 'untouchables'). Ms Tirkey sought to amend her claim by adding the word 'ethnic' to national origin thereby asserting her ethnic origin as being a further or alternative ground for the disadvantageous treatment.

The Respondents applied to strike out this amendment on the ground that 'caste' did not fall within the definition of race in S.9 Equality Act 2010. The Respondent's grounds of appeal were as follows:

1. Caste was not a protected characteristic in Section 9(1):

The power in Section 9(5) for the government to include caste at some point demonstrates that there was a deliberate decision to omit it from the wording of the original legislation. The Respondents argued that it was not for an Employment Tribunal to anticipate future

legislation by holding that Ms Tirkey could bring a claim which included caste as the basis on which discrimination was being alleged.

2. Previous case law on the definition of ethnic origin is to be distinguished:

The cases of *JFS and Mandla v Dowell Lee* (above) which had found that Jews and Sikhs were capable of being protected due to their ethnic origin were distinguishable because those cases adopted a purposive interpretation of the meaning of 'ethnic origin' under the Race Relations Act 1976. On the present facts, caste had been singled out for specific statutory provision by Section 9(5), and was not yet covered by the Equality Act 2010.

3. The EC Race Directive was inapplicable:

The Respondents argued that this was inapplicable because a Directive could only have direct vertical effect and not horizontal effect. The present case was between individuals and not against an emanation of the state. Even if applicable, the Respondents argued that as the EC Race Directive is silent on caste, it was a deliberate exclusion, and the government had chosen to make an amendment to the Equality Act under the ERRA 2013. This was seen to be a deliberate exclusion as Article 2 of the directive refers only to 'racial or ethnic origin' whilst the International Convention on the Elimination of all Forms of Racial Discrimination ('ICERD') includes 'descent' as a separate entity to race, colour, national or ethnic origin. Caste discrimination fell within 'descent', meaning that neither descent nor caste as an aspect of descent could be combined with any of the other characteristics.

4. The Respondents also argued that the tribunal was incorrect to hold that caste could come within the scope of the protected characteristic of religion and belief.

Judgment

The EAT dismissed the appeal, and permitted the caste discrimination claim to proceed to a full hearing in the employment tribunal (which has yet to take place).

Langstaff, P, sitting alone, held that although 'caste' as an autonomous concept does not currently fall within the definition of race in section 9(1) of the Equality Act 2010, there may be facts based on caste which are capable of falling within the scope of the race definition. 'Ethnic origins' in section 9(1)(c) has a *'wide and flexible ambit'*, including characteristics determined by descent. Key observations were also made about the circumstances in which it is appropriate to strike out claims based on discrimination.

Addressing the grounds of appeal

In relation to the first three grounds of appeal, the EAT held that Ms Tirkey could bring a claim for caste discrimination based on the wording of the Equality Act 2010 as currently drafted. Whilst caste is not mentioned explicitly in the definition of 'race' in section 9(1), on the facts, Ms Tirkey's caste was held to fall within the 'ethic origins' limb of the definition in section 9(1)(c).

The EAT held further that the fact the government had decided to legislate on this issue, but had not yet done so was not fatal to Ms Tirkey's case. The effect of Section 9(5) of the Equality Act 2010 does not limit the scope of the race definition. It gives power to clarify section 9(1) where issues may not be clear, and is not intended to restrict the application of the race definition. Furthermore, the decisions in the two leading cases of *JFS and Mandla – v - Dowell Lee* remain fully applicable, and give broad scope to the meaning of 'ethnic origins'. On the facts, the EAT held that where caste is linked to concepts of ethnicity, caste should be included within the meaning of 'ethnic origins', given the close links between descent and caste.

The EAT did not choose to comment directly on the fourth ground of appeal.

Other key observations made by the EAT

The claim must be fully set out in the claim form or response. The EAT observed that the Tribunal went 'well beyond the words of the originating application', since Ms Tirkey did not identify to which particular caste she belonged in her claim form. The tribunal Judge set this out as the Adivas people, and relied on material from Wikipedia and material put before the Tribunal by the parties as background information on the caste system. The EAT warned against this approach, emphasising that the case to which a Respondent is required to respond must be set out in the claim form and not in other documents. Such knowledge is vital for litigants to be able to tell if the claim is made in time, to keep costs proportionate and for both the litigant and the tribunal to allocate the correct time for the case.
The EAT observed that the general approach to striking out claims should be sparing and cautious. To strike out before the full facts have been established will be rare, especially so in discrimination claims. The challenging nature of strike-out applications is particularly apparent where there are language and cultural barriers. In Anyanwu - v - South Bank Student Union [2001] ICR 391, Lord Steyn commented that discrimination claims are fact sensitive and should only be struck out in the most obvious cases.

Commentary

The fact that the government is required to amend the Equality Act 2010 to provide expressly that caste is protected, but has not yet done so, did not prevent the claim proceeding on the

basis of the current law. Although there is an obligation on the government to amend section 9(1) (under Section 9(5) as amended by the ERRA), the government does not have any firm commitment to introduce changes to the law before the general election in May 2015.

Until the Equality Act 2010 is amended, this EAT decision is helpful in assessing whether caste can amount to an aspect of race. The Judgment provides useful guidance and resolves two conflicting first instance decisions; that of this case and *Naveed - v - Aslam and others ET/1603968/11*. In Naveed, an employment tribunal rejected a caste discrimination claim, partly because the government had not yet activated the power in section 9(5) of the Equality Act 2010 to legislate for caste to be an aspect of the race definition.

The EAT was careful to make clear that the Equality Act 2010 should not be read as automatically including caste as a protected characteristic. The claimant's caste in this case was a facet of her descent, which might not be so in every case. Commentary from the EELC German correspondent on our report of the original tribunal decision in EELC 2014/21 suggests that this is similar to the situation in Germany. This comment said that the German anti-discrimination law ('AGG') includes a prohibition against differentiating on the grounds of ethnic origin. Their definition of ethnic origin includes being of a certain people or belonging to a segment of the population that stems from a specific region, shares a specific history or culture and is bound by a common feeling. This means that Ms Tirkey might have been successful in her claim in Germany but other caste discrimination might not be covered.

How broad is the concept of ethnicity? The principles established in *Madla* have been used in subsequent cases to determine whether certain groups can claim to belong to an 'ethnic group'. The Court of Appeal in *Commission for Racial Equality - v - Dutton* [1989] IRLR 8 held that Romany Gypsies had a common ethnic origin whilst Irish and Scottish travellers were granted the same status in *O'Leary - v - Allied Domecq Inns Ltd* and *MacLennan - v - Gypsy Traveller Education and Information Project*.

The question of whether the English, Welsh and Scottish are separate ethnic groups has also been considered in case law with conflicting conclusions being reached. Although the case of *Gwynedd County Council - v - Jones* [1986] ICR 833 appeared to support the view that the Welsh and the English had differing ethnic origins, the decisions in the more recent cases of *Northern Joint Police Board - v - Power [1997] IRLR 610* and *BBC Scotland - v - Souster [2001] IRLR 150 I* (which related to whether the English and the Scottish could be considered as separate ethnic groups) disagree and mean we should approach this view with caution. However, Power and Souster both accepted that the English and Scottish had different 'national origins' and so could fall within this limb of the definition of 'race' and therefore bring claims of race discrimination.

Subject: Nationality discrimination

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