

## SUMMARY

# 2014/21 Caste Discrimination might amount to race discrimination (UK)

***&lt;p&gt;An Employment Tribunal has allowed a claim for caste discrimination to proceed on the basis that the definition of &lsquo;race&rsquo; in the Equality Act 2010 is broad enough to include discrimination on grounds of caste.&lt;/p&gt;***

### **Summary**

An Employment Tribunal has allowed a claim for caste discrimination to proceed on the basis that the definition of 'race' in the Equality Act 2010 is broad enough to include discrimination on grounds of caste.

### **Background**

The caste system is a system of social stratification, as the explanatory notes to section 9(5) of the Equality Act 2010 (EqA) explain:

“The term ‘caste’ denotes a hereditary, endogamous (marrying within the same group) community, associated with a traditional occupation and ranked accordingly on a perceived scale of ritual purity.”

Caste is considered immutable and hereditary, often linked to geographic origin and language. Caste status can determine occupation, education and marital opportunities.

Under the EqA there are a number of protected characteristics, including race and religion. Currently caste discrimination is not expressly prohibited. However, the definition of 'race' is broad and includes 'colour, nationality, ethnic or national origin'. It is therefore arguable that there is scope for caste to fall within the definition of race, particularly within the concept of

ethnic origin.

The EqA has recently been amended to give Parliament power to provide specifically that caste is an aspect of race (section 9(5) EqA). However, a draft Order is not expected until the summer of 2015.

The case of *Ms P Tirkey v Mr and Mrs Chandok ET3400174/2013* considered whether caste could fall within the definition of race under the law as it currently stands.

### **Facts**

Mr Chandok originates from Afghanistan and is a practicing Hindu. Mrs Chandok was born in New Delhi to an Afghan Hindu family and is a practicing Buddhist. Whilst living in India, Ms Tirkey began her employment with Mr and Mrs Chandok (the Respondents) in domestic service, looking after their children and carrying out a number of domestic chores.

Ms Tirkey is of the Adivasi people, who can either be Christian or Hindu; she is a Christian. Ms Tirkey asserted that the Adivasi people are regarded as a 'servant caste'. Ms Tirkey alleged that the Respondents would have known she was of a poorer caste because of her dialect, her dark skin and the clothes she was wearing.

When Ms Tirkey began her employment for the Respondents in India she was not invited into the Respondents' house. Ms Tirkey's case was that she lived in the Respondents' house as a servant but in separate living quarters and was not allowed to sit on the same furniture or use the same cutlery or plates as the Respondents. Traditionally, higher caste people would not touch crockery used by those of a lower caste.

When the Respondents relocated to the UK, Ms Tirkey moved with them. Ms Tirkey claimed that whilst working in the UK she was overworked and underpaid. Her complaints included that her movements were restricted, she was not allowed to speak to people outside of the family (other than to say hello and ask how they were) and she was not allowed to attend church (despite being a practising German Catholic).

Ms Tirkey brought claims of discrimination on grounds of race, based on her Indian nationality, ethnicity and national origin, and religion. At a case management discussion on 30 May 2013, Ms Tirkey was permitted to amend her claim to add a complaint of caste discrimination as part of her race discrimination claim. She alleged that "the reason she was recruited and treated in the manner alleged was that the Respondents concluded she was of a lower status". Ms Tirkey's case was that the features of race, religion and caste overlapped and are the reasons for the treatment she alleged.

The Respondents refuted any claims of caste discrimination (as well as the original allegations). At a preliminary hearing on 26 September 2013, the Respondents applied to strike out Ms Tirkey's claim of caste discrimination on the basis that it had no reasonable prospects of success.

## **Judgment**

The Employment Tribunal declined to strike out Ms Tirkey's case.

Employment Judge Sigsworth (the Judge) began his analysis by noting that there was no exhaustive definition of race in the EqA, but that it included ethnic origin. Similarly, he considered Article 14 of the European Convention on Human Rights (ECHR) which gives a right to enjoy convention rights free from discrimination on grounds of:

“sex, race, colour, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

The Claimant also relied on Article 9 (right to freedom of thought, conscience and religion) and Article 4 (nobody shall be held in slavery or servitude) of the ECHR. The Human Rights Act 1998 (HRA) incorporates certain articles of the ECHR. Pursuant to section 3(1) of the HRA, so far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with ECHR rights. However, it is not possible for an individual to make a claim in the UK courts for a breach of the ECHR nor could anyone bring a claim for a breach of the HRA against a private individual (but only against public bodies).

The Judge considered that Article 14 was wide enough to include caste discrimination and therefore concluded that the EqA should be construed in such a way as to include caste as part of the protected characteristic of race.

The Judge also considered domestic UK case law, which provides authority for the proposition that discrimination by descent is direct race discrimination. In particular the Judge considered the House of Lords decision in *Mandla v Dowell Lee* [1983] 2AC 548 (Mandla) which held that Sikhs were a racial group based on their 'ethnic origins'. In *Mandla*, it was determined that Sikhs had a historically determined social identity, in both their own eyes and those outside the group. The essential conditions were a long shared history and a cultural tradition of their own. Other relevant characteristics included a common geographical origin or descent from a number of common ancestors.

In addition, the Judge referred to the Supreme Court's decision in *R(E) v Governing Body of JFS and another* [2010] 2AC 728 (JFS) which both reaffirmed and extended the decision in *Mandla*.

JFS concerned a masorti Jew (M) who was refused entry to the Jewish Free School on the basis that his mother was not orthodox Jewish, whether by matrilineal descent or by conversion, at the time of M's birth. The Supreme Court held that applying a test of matrilineal descent amounted to direct discrimination on grounds of race. A test of a religion that focuses on descent is a test of ethnic origin.

The Judge noted that the Race Directive (Council Directive 2000/43/EC of 29 June 2000) and the International Convention for the Elimination of all forms of Racial Discrimination 1965 (to which the UK is a signatory) also prohibited discrimination on grounds of descent.

In light of the reasons set out above, the Judge concluded that he accepted Ms Tirkey's case that she was of a lower caste by birth, and therefore descent. As such, the Judge allowed Ms Tirkey's claim for caste discrimination to proceed to a merits hearing.

### **Commentary**

As previously mentioned, the UK Government has decided to legislate to provide specifically that caste is an aspect of the protected characteristic of race. The Judge determined that this was not relevant to whether or not Ms Tirkey could bring a claim based on the law as it currently stands.

A draft Order is not anticipated until the summer of 2015 and, in the interim, this case will be useful for any claimants who believe they have been discriminated against on grounds of caste. However, it should be borne in mind that this is only a first instance decision and not binding on other courts and, also, that there has been a conflicting first instance decision. In *Naveed v Aslam and others ET/1603968/11* a tribunal rejected a caste discrimination claim on the basis that the government had not yet made an Order to extend the EqA to provide for caste as an aspect of race.

The issue will be resolved when the anticipated changes to the EqA come into force, until then the position still seems somewhat unclear. We may see an appeal by the Respondents in this matter or there may be more first instance decisions which shed further light on whether caste discrimination is prohibited under the current law. If further courts agree with the decision in *Tirkey*, it is also questionable whether an amendment to the EqA is necessary.

### **Comments from other jurisdictions:**

*Austria (Martin Risak)*: The Austrian Act on Equal Treatment (Gleichbehandlungsgesetz) also does not mention caste as a distinct forbidden ground of discrimination but – of course as it transposes the Race Directive 2000/43/EC – it includes a prohibition against discriminating

on the basis of “ethnic origin”. Unlike the Directive it does not explicitly mention ‘race’. As appears from the parliamentary deliberations, the reason is that the legislator did not want to even hint that it might accept any notion of race. However, racist discrimination is considered a form of discrimination on ethnic grounds and therefore forbidden in any event. In line with the mainstream of the Austrian literature that interprets ‘ethnic origin’ rather extensively, I would expect the Austrian courts to consider discrimination based on caste to be covered by this.

*Germany (Paul Schreiner)*: The German anti-discrimination law (AGG) includes a prohibition against differentiating on the grounds of ethnic origin. The definition of ethnic origin includes 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. The plaintiff was apparently a member of the Adivasi people. Being the member of a certain people also qualifies as having a certain ethnic origin. Therefore, under German law, the case at hand would probably have qualified as a different treatment on the basis of different ethnic origin without any justification, and therefore discriminatory.

However, not every case of caste discrimination in Germany would necessarily be seen as discrimination on grounds of ethnic origin. In the case at hand, the plaintiff’s caste simply coincided with a certain ethnic origin and only this factor made a claim for discrimination possible. Had the plaintiff belonged to a different caste there may not have been prohibited discrimination for the lack of a prohibited criterion, because a different treatment on the basis of a certain caste is not prohibited by the German AGG. To my knowledge there has never been an attempt to integrate a separate prohibition of caste discrimination into German law.

*Subject: Discrimination*

*Parties: Ms P Tirkey - v - Mr & Mrs Chandok*

*Court: Huntingdon Employment Tribunal*

*Date: 24 January 2014*

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