

David Bowden Law®
ideas are always in credit

**Court of Appeal
considers human rights
race discrimination claim
against the BSB**

*Miss Daphne Evadne Portia O'Connor v.
Bar Standards Board
A2/2015/0139*

Article by David Bowden

The Court of Appeal has heard submissions and reserved judgment in this appeal. Warby J dismissed an appeal against a decision of Deputy Master Eyre to strike out a claim against the Bar Standards Board ('the BSB'). Miss O'Connor had made 4 distinct claims against the BSB. These included serious allegations that the BSB had discriminated against her on the grounds of race, that the BSB had harassed her, and it had conducted misfeasance in public office. The judge below found there was only 1 human rights claim which was adequately pleaded but he ruled that this claim was made out of time. Miss O'Connor appealed this ruling.

Miss Daphne Evadne Portia O'Connor v. Bar Standards Board
A2/2015/0139 13 July 2016
Court of Appeal, Civil Division (*The Master of the Rolls, Lord Dyson, Elias & Sharp LJJ*)

What are the facts?

An agreed chronology was prepared for the hearing. On 30 September 2009 the BSB received a complaint from Mr Alexander Cunliffe who was then an in-house solicitor at Lloyds TSB. The complaint alleged that Miss O'Connor had signed statements of truth on court pleadings and that her firm (Pegasus Legal) was not authorised to do so under the Courts and Legal Services Act 1990 and the Bar Code of Conduct.

On 9 June 2010 disciplinary charges against Miss O'Connor were referred to a Disciplinary Tribunal and on 23 May 2011 5 charges were found proven. The tribunal chaired by Rosalind Wright QC decided to give Miss O'Connor some advice on her future conduct and made a modest costs order of £292 against her. On 17 August 2012 Miss O'Connor successfully appealed those disciplinary findings to the Visitors of the Inns of Court chaired by Sir Andrew Collins. The BSB received further complaints (from Mushtaq & Co and Cleggs respectively) about Miss O'Connor on 19 July 2011 and 25 November 2011 but these were later dismissed for lack of merit.

On 21 February 2013 Miss O'Connor brought this court claim against the BSB and served her particulars of claim in June 2013. The claim sought relief under 4 heads:

- Misfeasance in public office,
- Breach of the Human Rights Act 1998 ('HRA') by contravening articles 6 and 14 of the European Convention on Human Rights,
- Damages for harassment under the Protection from Harassment Act 1997, and
- Discrimination contrary to the Equality Act 2010.

What happened when the case came before Deputy Master Eyre?

In November 2013 the BSB applied to strike out parts of the claim and in January 2014 it applied to strike out the entire claim. At a hearing before Deputy Master Eyre on 28 March 2014 he granted the BSB's application in full. He accordingly struck out Miss O'Connor's statements of case, dismissed her claim and gave judgment for the BSB with costs. Miss O'Connor appealed this ruling.

What happened when the case came before Warby J?

In a written reserved judgment handed down on 9 December 2014, Warby J dismissed Miss O'Connor's appeal. His conclusions were:

- The Article 6 claim had no real prospect of success. It was 'fanciful to suggest that she did not have adequate time to prepare' her submissions for the Disciplinary Tribunal,
- The Article 14 claim as originally formulated did adequately state a case which is 'not fanciful',
- However there was no pleaded case that the BSB behaved in a discriminatory manner in respect of Miss O'Connor's appeal to the Disciplinary Tribunal and neither was it alleged that the BSB acted in a discriminatory manner in investigating the 2 further complaints it received,
- The BSB pleaded in its defence that Miss O'Connor's claim was time barred under the Limitation Act 1980 but no reply was served to that making any positive case as to why time should be extended, and
- The claims were therefore time barred.

What grounds did Miss O'Connor advance for appealing Warby J's ruling?

Miss O'Connor then sought permission for a 2nd appeal to the Court of Appeal on a number of different grounds. The main 3 were whether the judge below erred:

Miss Daphne Evadne Portia O'Connor v. Bar Standards Board - A2/2015/0139
Court of Appeal considers human rights and race discrimination claim against the BSB

- By failing to re-take the decision on limitation in circumstances in which part of the Deputy Master's reasoning on strike-out was undermined,
- By failing to take any account of the merits and importance of Miss O'Connor's claim, and
- In relation to the limitation point by failing to take adequate account of the fact that the proceedings that resulted in the claim were only concluded less than a year before the claim commenced.

However, Lord Justice Longmore on 3 June 2015 granted permission to appeal only in relation to the 3rd issue. Longmore LJ also directed that any renewed application for permission to appeal any other grounds on which he refused permission could only be made to the full court at the hearing of the actual appeal. Miss O'Connor duly sought this permission at the appeal hearing.

What applications did the BSB make to the Court of Appeal?

The BSB put in a Respondent's Notice seeking to affirm the decision of Warby J below on other grounds. This was that Warby J was wrong to find that the BSB had **indirectly** discriminated against Miss O'Connor because the mere fact of statistical differences in treatment between 2 groups is not enough to establish on its own that the effect of a practice or measure was discriminatory.

The BSB applied to adduce further evidence. This evidence was a recent report the BSB had commissioned which contained regression analysis of complaints in relation to earlier years including those years when the 3 sets of complaints were received by it in relation to Miss O'Connor.

What reports had the BSB commissioned on this issue?

There were 3 reports or relevance that the BSB had commissioned in relation to equality and diversity in the barrister's profession. These are:

- 'Report on Diversity of Barristers subject to complaints 2013' www.barstandardsboard.org.uk/media/1451930/diversity_report_2012_report.pdf (published in February 2013),
- 'Diversity Review – The BSB's complaints system' prepared by Inclusive Employers www.barstandardsboard.org.uk/media/1538013/inclusive_employers_-_diversity_review_-_bsb_complaints_system.pdf (published 8 January 2014), and
- BSB data regression analysis report (published January 2016).

Miss O'Connor in the Court of Appeal also sought to rely on a research that Professor Gus John had published which she said was critical of some of the methodology used or conclusions reached by the BSB. Professor John had previously advised the Law Society and the SRA on their equality and diversity obligations. Professor John is an associate professor of education and honorary fellow at the University of London's Institute of Education. www.gusjohn.com

What does the BSB say?

It had prepared and served a skeleton argument. It was represented at the appeal hearing by the junior counsel, Miss Alison Padfield, who appeared below before Warby J. The BSB had put in a respondent's notice. The BSB submits that the judge below was correct to uphold the striking out of the claim by the Deputy Master. The BSB says that the Diversity Review report concludes that there is a high level of consistency in the way the BSB handles complaints and that the BSB's process is not of itself discriminatory. It denies indirect racial discrimination and says the later Strasbourg case of Orsus is more persuasive than DH.

The BSB says that the decision to refer a complaint for disciplinary action is a one-off act, not a continuing one and that the claims in this case are time barred as they were made more than 1 year after the BSB made that decision. It relies on *Ronex* as to why the Deputy Master was right to strike this case out on limitation grounds.

The BSB also sought to put in as evidence the January 2016 report. This had been more extensive root cause analysis carried out by the BSB and which seeks to strip out some false cognates in previous reports. In view of the interventions at the hearing and the rule in *Ladd v Marshall*, it seems unlikely that the Court of Appeal will admit this report which was not before the courts below and nor will it need to refer to it in reaching a decision.

What does Miss O'Connor say?

She says that the BSB is a public body and is subject to the Human Rights Act 1998. She alleges that there is systemic bias against barristers who are of black and minority ethnic ('BME') heritage. She submits that BME barristers are more likely to face disciplinary action by the BSB and that this amounts to indirect racial discrimination. She submits that the BSB has provided no justification for the disproportionate use of the complaints mechanism against BME barristers. She challenges the BSB's prosecution process. The indirect discrimination claim is made by reference to the Strasbourg case on Roma children in the Czech Republic ('DH').

Although there is a 1 year time limit for bringing human rights claims, she says that in setting in train a disciplinary process (which the BSB could bring to an end at any time by discontinuance) that this was a continuous act of discriminatory conduct by the BSB and therefore her claims were brought within the 1 year time limit. She submits that *Somerville* assists her in overcoming limitation.

Are there any prior authorities of any relevance?

These authorities are highly relevant:

Orsus v Croatia (2009) 49 EHRR 26, [2008] ELR 619

Where Croatian schoolchildren had been placed in Roma-only classes at primary school, there was no violation of the ECHR articles 2 or 14 because such segregation was based on an insufficient command of the Croatian language and not on racial or ethnic grounds. The children had not suffered a demonstrably poorer quality of education than that enjoyed by non-Roma children.

DH v Czech Republic (2008) 47 EHRR 3, [2008] ELR 17

Roma children complained that the state had indirectly discriminated against them in the enjoyment of their right to education. They had been placed in special schools intended for children with mental deficiencies who were unable to attend ordinary primary schools but their parents had either consented to or requested the placements. Where the head teachers of the special schools consented to the placements, written notice of the decision with a right to appeal was forwarded to the parents but none chose to appeal. Some parents later requested that the education authority revoke the special school placements. The children submitted that the interpretation of discrimination had been too restrictive and was incompatible with both the aim of article 14 of the ECHR and with prior Strasbourg case law. It was held that the application of Czech Republic domestic law had resulted in a disproportionate number of Roma children being erroneously placed in segregated special schools in violation of the ECHR article 14.

A v Essex County Council [2011] AC 280

Lord Kerr: The judge had been right not to extend the time for bringing the claim. Few cases under s.7(5) of the HRA 1998 lent themselves to the application of a burden of proof, and an open-ended application of the factors on either side of the argument was preferred. The judge's analysis had been sound, particularly his finding that it was highly unlikely that any significant sum would have been awarded had the action been brought within time and been successful.

Lord Clarke: The case should not go to trial merely because it was said to be a test case.

Lady Hale: The judge had erred in refusing to extend time. The delay in bringing the claim had not been long and had not prejudiced the local authority. Although expedition was important in public law claims, it was less so in a claim in vindication of human rights (or for damages) which were retrospective remedies.

Somerville v Scottish Ministers [2007] 1 WLR 2734

The court considered whether a claim for damages based on a breach of a Convention right by a member of the Scottish Executive was subject to the time bar in HRA 1998 section 7(5) and whether, when a continuing breach of Convention rights over a period of time was alleged, time began to run from the first date on which the breach occurred. The majority held that the ministers had exercised their statutory functions in a way that was incompatible with any of his Convention rights could raise proceedings under the HRA or the Scotland Act 1998. As s.100 of the Scotland Act did not mention the HRA s.7(5) HRA time bar, that limitation did not apply. Parliament had very deliberately chosen not to impose the same time limit on proceedings by reference to the Scotland Act as on proceedings under the HRA. The issue of when time began to run for the purposes of s.7(5) HRA had been rendered academic by the conclusion on the Scotland Act.

Ronex Properties v John Laing Construction [1983] QB 398

A defence under the Limitation Acts was a bar to the remedy not the claim, and one which had to be specifically pleaded. Where limitation would provide a complete answer a defendant might apply to strike out the proceedings as being frivolous or vexatious.

What interventions did the judges make? What points seem to be troubling them?

At the beginning of the hearing Elias LJ interjected to say that he found it difficult to see how this was a case of indirect discrimination at all. Mr Southey QC submitted that the BSB could have discontinued the disciplinary process at any time and because it did not, that amounted to a continuing act of discrimination but Elias LJ retorted that on this analysis that potential claims would 'never stop'. Elias also noted that the both the Disciplinary Tribunal and the Visitors were bodies entirely independent of and separate to the BSB.

At the end of the hearing, Elias LJ made a prescient observation that the 'O'Connor' surname of itself gave no indication that Miss O'Connor was BME. He asked the BSB's counsel how the BSB would know whether Miss O'Connor was black or not. In response Miss Padfield said that the BSB did hold data on the ethnic origins of barristers but that this data was not available within the BSB to those staff who make decisions as to whether to refer complaints for disciplinary action.

Lord Dyson pressed Miss Padfield as to whether the BSB wished to pray in aid this point about internal data access within the BSB. Rather surprisingly, the BSB's counsel said this point had not formed part of its case. Lord Dyson then pressed again stressing the importance of what Elias LJ had elicited that those staff within the BSB who made the decision to refer complaints for disciplinary action would not know the ethnic origins of Miss O'Connor. It seems that the BSB's counsel looked a gift horse in the mouth and said that there was no evidence on this before the court below.

Lady Justice Sharp intervened to draw out what Warby J below had said when he referred to 'aspects' of the claim being brought within the 1 year time limit, she wanted to know what these aspects were. She interjected later to say there were a series of discrete acts.

When will a written judgement appear?

At the end of the hearing Lord Dyson MR said that whilst he hoped to deliver a judgement in this case before the end of term, he could not guarantee it. As he is retiring as Master of the Rolls (but will remain sitting as an additional judge in the Supreme Court), it may be that judgment is not handed down until October 2016.

Is there anything else that follows from Lord Dyson's intervention about the way the BSB handles data?

The 7th Data Protection principle in the Data Protection Act 1998 requires that there be '*appropriate technical and organisational measures*' to protect the security of data. As the BSB holds sensitive personal data on ethnic origin and disability (as well as data on age, sex, caring obligations, whether a barrister was educated privately or at a state school and whether a barrister was the first in her/his family to go to university), it would be **required** to build a system that such data could only be accessed and processed by those with a need to know. There is also ISO 27001 which deals with international standards for information security management systems.

If the BSB's technical measures mean such data is not or is never accessible to those making enforcement or prosecution decisions then that must be a complete answer to any race discrimination claim.

13th July 2016