

Taking Discrimination Personally?

An Analysis of the Doctrine of Transferred Discrimination

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A. INTRODUCTION

The Court of Appeal's decision in *Redfearn v Serco Ltd*¹ raises difficult questions regarding the extent to which members of an organisation such as the British National Party ('BNP') should be able to rely on the protection of the Race Relations Act 1976, where they have been dismissed or subjected to other detriment as a result of their BNP membership. Such a dismissal or detriment could be said to be for a 'race-related' reason in a very broad sense, although there are powerful policy arguments as to why members of an organisation like the BNP ought not to benefit from the protection of the Race

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¹ [2006] EWCA Civ 659, [2006] ICR 1367.

Relations Act 1976 in that capacity. This article considers the development of the doctrine of ‘transferred discrimination’,² and seeks to understand how and why the doctrine has become so wide that the arguments made on Redfearn’s behalf in the *Serco* case could be contemplated at all. It is also intended to offer a view as to the proper parameters of the doctrine of ‘transferred discrimination’ as a matter of both English and European law ahead of the ECJ’s forthcoming judgment in *Coleman v Attridge Law*.³

B. THE DOCTRINE OF TRANSFERRED DISCRIMINATION IN ENGLISH LAW

1) The Genesis of Transferred Discrimination

The doctrine of transferred discrimination arose from a subtle difference in the language used in the definitions of ‘direct discrimination’ in the Sex Discrimination Act 1975 and the Race Relations Act 1976. The Sex Discrimination Act 1975 makes it plain that the less favourable treatment complained of must be on the grounds of the complainant’s sex, stating that ‘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’.⁴ The Race Relations Act 1976 uses different language, referring simply to ‘racial grounds’: ‘A person

² Sometimes known as ‘associative discrimination’, but see our categorisation of the authorities below.

³ Case C-303/06. The reference to the ECJ was made by an employment tribunal whose decision was upheld by the EAT: [2006] UKEAT 0417/06/2012, [2007] ICR 654.

⁴ Sex Discrimination Act 1975, ss 1(1) and (2) (as amended).

discriminates against another... [if] on racial grounds he treats that other less favourably than he treats or would treat other persons'.⁵

This difference in language⁶ created the possibility that a direct race discrimination claim could be pursued where a person alleged that he had been discriminated against on grounds of someone else's race. Indeed, this possibility was recognised even before the Race Relations Act 1976 was passed, based on the language in the earlier Race Relations Act 1968.⁷ In *Race Relations Board v Applin*⁸ the Race

⁵ Race Relations Act 1976, s 1(1) (as amended).

⁶ A review of Hansard reveals no evidence that the difference in language was ever considered by Parliament. Indeed the speech of the relevant minister on 4 March 1976 indicates that the use of the words 'racial grounds' was intended to cover the multitude of sins that might amount to race discrimination, including discrimination on grounds of colour, race, ethnic or national origin and nationality: see HC Deb col 1551-1552. It might be argued that Parliament had the benefit of the appellate courts' decision in *Applin* when enacting the Race Relations Act 1976 (see text to n 8). However this argument might be difficult to develop given the absence of reference to that decision in Hansard. We acknowledge the assistance of Alice Carse in respect of this review of Hansard.

⁷ For present purposes, there is no material difference between the definition of direct discrimination in the Race Relations Act 1968 and that in the Race Relations Act 1976. The 1968 Act did not, however, provide protection against less favourable treatment 'on racial grounds', but rather was limited to treatment 'on the ground of colour' – see section 1(1).

⁸ [1973] QB 815.

Relations Board sought an injunction against the defendants who were putting pressure on foster parents who lived in the defendants' neighbourhood not to accept foster children from different ethnic backgrounds. The Court of Appeal held that such conduct was unlawful on the basis that it amounted to incitement to discriminate against the children. However, Lord Denning MR was prepared to go further and to find, in the alternative, that such conduct not only amounted to incitement to discriminate against the children, but also against the local authorities who were seeking to place the children with foster parents. Testing the definition of direct discrimination in the 1968 Act against a hypothetical example of two white women refused entry into a public house because they were accompanied by black men, Lord Denning MR stated:⁹

That definition of discrimination is wide enough to cover the case of the two women. They are treated less favourably than other women on the ground of colour. Similarly in this case, [the foster parents] would discriminate against the local authorities on the ground of colour if they said: 'We will take white children only.'

Stephenson LJ agreed with Lord Denning MR and concluded that 'A can discriminate against B on the ground of C's colour, race or ethnic origin'.¹⁰ Moreover, when the case was appealed to the House of Lords, Lord Simon of Glaisdale, the only one of the Law Lords to deal with the point, concurred. He considered the argument that direct race

⁹ *Ibid*, 828.

¹⁰ *Ibid*, 831. Buckley LJ agreed with both judgments.

discrimination should be defined to mean less favourable treatment occasioned to the complainant personally, and he concluded that:¹¹

Not only would this involve reading into the subsection a word which is not there; it would also mean that some conduct which is plainly within the ‘mischief’ would escape – for example, discriminating against a white woman on the ground that she had married a coloured man.

Therefore, all of the judges who considered the point held that it could be unlawful discrimination to treat an individual less favourably on grounds of the race, ethnic origin, or nationality of another. The facts of *Applin*, and the examples given by the appellate courts, indicate clearly that the critical feature was the connection between the complainant and the individual or individuals whose race operated on the mind of the discriminator. Just as a white woman could be discriminated against as a result of her association through marriage with a man of a different race, so too could a local authority be discriminated against as a result of its association with a child from an ethnic minority while undertaking its duty to place that child with foster parents. This, then, is the genesis of transferred discrimination. The discrimination is transferred onto another by virtue of the association which a person has with that other.

¹¹ [1975] AC 259, 289.

2) The Development of Transferred Discrimination

The doctrine of transferred discrimination was developed and significantly widened in a small number of cases with very similar facts relating to the giving of discriminatory instructions. In *Zarczynska v Levy*¹² a white barmaid was instructed by her employer not to serve customers of certain racial origins. When she informed her employer that such an instruction was neither lawful nor reasonable, she was dismissed. She brought complaints of unfair dismissal and race discrimination before the employment tribunal. The complaint of unfair dismissal could not succeed because *Zarczynska* did not have qualifying service to bring that claim.¹³ However, the EAT held that the employment tribunal did have jurisdiction to hear the complaint of race discrimination, on the basis that the complaint was one of transferred discrimination. The EAT declared itself to be ‘unhappy’ with the ‘most unjust’ suggestion that *Zarczynska* should be deprived of an opportunity to obtain compensation for losing her job because she tried to uphold the law forbidding racial discrimination. The EAT acknowledged that it stretched the meaning of

¹² [1979] 1 WLR 125.

¹³ Had *Zarczynska*’s complaint arisen after 2 July 1999, then the Employment Rights Act 1996, s 103A would have provided her with an alternative remedy. That section declares a dismissal to be automatically unfair where the principal reason for the dismissal was that the employee made a protected disclosure. In the case it was found as a fact that *Zarczynska* had insisted to her employer that the instruction was not reasonable or lawful. There is no length of service requirement to pursue such an unfair dismissal claim – see the Employment Rights Act 1996, s 108(3)(ff).

the statutory language to hold that *Zarczyńska* had been dismissed on racial grounds, but considered that:¹⁴

If this is not done the strict interpretation of the relevant sections taken as a whole may well create an absurd or unjust situation which Parliament would not have intended if they had contemplated its possibility.

Kilner Brown J drew comfort from the dicta of Lord Denning MR and Stephenson LJ in *Applin*, which were strictly speaking *obiter*, but which were helpful nevertheless in searching for the intention of Parliament.

Similarly, in *Showboat Entertainment Centre Ltd v Owens*,¹⁵ Owens alleged that he had been dismissed by Showboat because he had refused to carry out a racially discriminatory instruction to exclude individuals from particular ethnic backgrounds from his employer's amusement centre. Owens brought a complaint of race discrimination since, like *Zarczyńska*, he did not have qualifying service to bring a complaint of unfair dismissal. The EAT held that the phrase 'racial grounds' was capable of both a narrow interpretation, whereby it only applied to the race of the individual subjected to less favourable treatment, or, alternatively, a wider interpretation, whereby it could refer to the race of someone other than the individual subjected to less favourable treatment. The EAT (presided over by Browne-Wilkinson J) held that the wider view was correct.¹⁶

¹⁴ *Zarczyńska* (n 12) 129.

¹⁵ [1984] 1 WLR 384.

¹⁶ *Ibid*, 388.

Certainly the main thrust of the legislation is to give protection to those discriminated against on the grounds of their own racial characteristics. But the words ‘on racial grounds’ are perfectly capable in their ordinary sense of covering any reason for an action based on race, whether it be the race of the person affected by the action or of others.

Just as in *Zarczynska*, the EAT in *Showboat* relied heavily on the *Applin* decision, and also on policy reasons, to justify its decision to take the ‘wider’ view as to the meaning of the phrase ‘on racial grounds’:¹⁷

We find it impossible to believe that Parliament intended that a person dismissed for refusing to obey an unlawful discriminatory instruction should be without a remedy. It places an employee in an impossible position if he has to choose between being a party to an illegality and losing his job. It seems to us that Parliament must have intended such an employee to be protected so far as possible from the consequences of doing his lawful duty by refusing to obey an unlawful instruction.

The EAT concluded by setting out the relevant test for employment tribunals to apply. This test is, however, couched in extremely wide terms:¹⁸

¹⁷ *Ibid*, 389.

¹⁸ *Ibid*, 390.

The only question in each case is whether the unfavourable treatment afforded to the claimant was caused by racial considerations.

Finally, in *Weathersfield Ltd v Sargent*,¹⁹ Sargent was informed on commencing employment with Weathersfield that she was not to hire out vans to individuals who were from ethnic minorities and that she was to inform such people that there were no vans available. Sargent resigned and brought a claim for race discrimination. Just like *Zarczynska* and *Owens*, Sargent did not have qualifying service to bring a claim for unfair dismissal. In the course of argument, and for the first time in this line of cases, emphasis was placed on the contrasting language of the Sex Discrimination Act 1975 and the Race Relations Act 1976. Pill LJ rejected the suggestion that the wording in the 1976 Act should be given the same meaning as the corresponding section in the 1975 Act. Instead he accepted that the *dicta* in the *Showboat* case provided for an extremely wide interpretation of the statutory provisions, and he held that such an interpretation was ‘justified and appropriate’.²⁰

¹⁹ [1999] ICR 425. The case law in this area has also been considered by Silber J in *Carter v Ahsan* [2004] UKEAT/0907/03, although in *obiter dicta* his analysis was doubted by a majority of the CA when the case was appealed: [2005] EWCA Civ 990, [2005] ICR 1817.

²⁰ *Ibid*, 429. Swinton-Thomas and Beldam LJJ both agreed, although the former did not consider it helpful to try to ascertain the intention of the draftsman of the Act, or the intention of Parliament, because he thought it unlikely that the circumstances of the case

3) The *Serco* Case

In *Redfearn v Serco Ltd*,²¹ Redfearn was dismissed from his employment as a bus driver with Serco after he was elected as a councillor for the BNP. The Employment Tribunal found that the reason for Redfearn's dismissal consisted of a number of concerns. First, that his continued employment would present a risk to the health and safety of employees and passengers of Serco because it would render Serco's property open to attack, given the strength of public feeling against the BNP. Secondly, that Redfearn's public membership of the BNP would give cause for concern to the relatives of those entrusting vulnerable passengers to Serco. And finally, that Redfearn's continued employment might jeopardise Serco's reputation because clients might associate the company with the BNP's extreme policies. The Tribunal concluded that Redfearn was dismissed on health and safety grounds and not on racial grounds.

Redfearn appealed and the Employment Appeal Tribunal found in his favour,²² holding (among other things²³) that the Employment Tribunal had not properly dealt with the *Showboat* line of authorities in its reasoning. In argument, a hypothetical case was

would have been considered by Parliament. He found it more helpful to focus on the intention underlying the Act and the words used.

²¹ Leeds Employment Tribunal, 2 February 2005.

²² [2005] UKEAT 0153/05/2707, [2005] IRLR 744.

²³ Including the fact that the tribunal had failed to approach the question of race discrimination by reference to *Nagarajan v London Regional Transport* [2000] 1 AC 501.

considered in order to illustrate the undesirable effects of the wide *Showboat* dicta: suppose that a foreman treated black and white employees differently, and inappropriately and discriminatorily, and that he was disciplined by his employer for having done so; would this not amount to unfavourable treatment that was meted out ‘on racial grounds’ in the *Showboat* sense, even though the employer was acting with the best of motives and to further the intent of the race relations legislation?²⁴ The EAT accepted that it would not have been Parliament’s intention to permit such a claim, but took the view that Parliament (as opposed to the courts) should take any necessary steps to limit those who can take advantage of section 1(1)(a) of the 1976 Act. The EAT also declined to construe the sub-section in such a way that a claimant would be precluded from relying on it where ‘the treatment is because the claimant himself has acted, or is likely to act, in a way which treats others less favourably by reason of their race.’²⁵ In our view the EAT was right to reject this suggestion, as it would have entailed judicial legislation rather than construction.

The EAT remitted the case back to a differently constituted employment tribunal for decision in light of the *Showboat* line of authority. However, Serco then appealed from the EAT’s judgment, and the Court of Appeal found in its favour.²⁶ The court held that although ‘racial considerations were relevant to Serco’s decision to dismiss Mr

²⁴ *Serco* (EAT) (n 22) [32].

²⁵ *Ibid*, [34]-[42].

²⁶ [2006] EWCA Civ 659, [2006] ICR 1367.

Redfearn, ... that does not mean that it is right to characterise Serco's dismissal of Mr Redfearn as being on "racial grounds".²⁷ According to Mummery LJ:²⁸

Mr Redfearn was no more dismissed 'on racial grounds' than an employee who is dismissed for racially abusing his employer, a fellow employee or a valued customer. Any other result would be incompatible with the purpose of the 1976 Act to promote equal treatment of persons irrespective of race by making it unlawful to discriminate against a person on the grounds of race.

Unfortunately, the Court of Appeal failed to articulate why Redfearn's case did not fall within the *Showboat* dicta. Instead, the court simply stated that to allow his claim would be incompatible with the purpose of the Race Relations Act 1976, expressing confidence that it was 'not the kind of case for which the anti-discrimination legislation was designed'.²⁹ It is hard to avoid the conclusion that the court determined the outcome of the case on an instinctive reaction to the facts and then moulded the reasoning to obtain that very outcome. While the English courts have frequently construed statutes purposively,³⁰ the judgment of Mummery LJ does not seek to apply that canon of

²⁷ *Ibid*, [46].

²⁸ *Ibid*. [47].

²⁹ *Ibid*, [43].

³⁰ *River Wear Commissioners v Adamson* (1877) 2 App Cas 743 (HL) 763 (Lord Blackburn): 'from the imperfection of language, it is impossible to know what [Parliament's] intention is without inquiring further, and seeing what the circumstances

interpretation to the term ‘racial grounds’ as used in section 1 of the 1976 Act. In fact, the judgment can seemingly be applied no further than the facts of *Serco* itself. Mummery LJ simply asserts that Redfearn’s case does not fall within the scope of the doctrine of transferred discrimination, without explaining the whereabouts of the doctrine’s boundaries. We respectfully suggest that such an approach is not helpful: it does not explain to the parties why they have won or lost,³¹ and it fails to set down any principle of law which can sensibly be applied in subsequent cases.

4) Summary

The foregoing discussion reveals that there are three distinct types of case with which the doctrine of transferred discrimination is or might be concerned:

- The first type of case is that envisaged by *Applin* and occurs where an individual is discriminated against on racial grounds because of an association with another person of a particular race. This type of discrimination can be termed ‘discrimination by association’.

were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view.’ For further discussion see F Bennion, *Statutory Interpretation* 4th edn (2002) 809 ff.

³¹ Cf *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2003] IRLR 710: for judicial reasoning to be adequate both the common law and Article 6 of the European Convention on Human Rights require that the parties should be able to understand why they have won or lost a case.

- The second type of case occurs where an individual is subjected to a detriment or is dismissed as a result of a failure to follow a discriminatory instruction. *Showboat*, *Weathersfield*, and *Zarczynska* are all examples of this type of case. Cases of this kind will be referred to as ‘the discriminatory instructions cases’.
- The third type of case is that highlighted by the *Serco* decision and occurs when an individual is subjected to detriment or is dismissed because of the individual’s breach or perceived breach of an equal opportunities policy or for reasons relating to the individual’s views or perceived views about equal opportunities.

C. PROBLEMS WITH THE CURRENT DOMESTIC LAW OF TRANSFERRED DISCRIMINATION

The authorities discussed above demonstrate that English law has extended the doctrine of transferred race discrimination, as encapsulated by the *Showboat* test, beyond cases of discrimination by association to take in the discriminatory instructions cases. However, as the *Serco* decision makes plain, the law is not prepared to entertain claims by individuals such as Redfern, who have been treated in a particular way because they have themselves breached equal opportunities policies or legislation, or it is perceived that they have breached or might breach equal opportunities policies or legislation.

A number of problems with the broad *Showboat* approach can be identified. First, the instinctive desire to provide a remedy in the discriminatory instructions cases has led to the EAT and Court of Appeal losing the proper focus on the relevant statutory wording and the alternative prescribed remedies available in those cases. Secondly, the case law which developed the doctrine has sidestepped the mandatory requirement of comparison which is so explicit in the legislation. Finally, as it presently stands, the doctrine permits undesirable results.

1) Specific Statutory Protection against Discriminatory Instructions

When the facts of the discriminatory instructions cases arose, there was already specific statutory prohibition against the making of racially discriminatory instructions. This was contained in the Race Relations Act 1976, s 30, which formerly read as follows:³²

30. Instructions to commit unlawful acts

It is unlawful for a person –

- (a) who has authority over another person; or
- (b) in accordance with whose wishes that other person is accustomed to act,

to instruct him to do any act which is unlawful by virtue of Part II or III or procure or attempt to procure the doing by him of any such act.

³² This version of the section pre-dates the amendments which were made following the enactment of the Equality Act 2006, as discussed immediately below.

Parliament thereby provided a remedy to deal with cases where discriminatory instructions were issued by, for example, an employer.³³ However, that remedy was not available at the suit of the individual concerned: action could only be taken by the Commission for Racial Equality. The Commission had two enforcement options: it could conduct a formal investigation and, at the conclusion of such an investigation, issue a non-discrimination notice;³⁴ alternatively, the Commission itself could bring proceedings in respect of a contravention of section 30 before an employment tribunal or court.³⁵ Section 30 has since been amended by the Equality Act 2006. The text reproduced above now forms section 30(1), and a new section 30(2) has been added. This additional subsection gives the new Commission for Equality and Human Rights the power that the old Commission had under section 63, to initiate proceedings in an employment tribunal or a county court where it considers that section 30(1) has been breached.³⁶ In such proceedings the Commission for Equality and Human Rights might seek a declaration

³³ Similar remedies are to be found in the Sex Discrimination Act 1975, s 39 and the Disability Discrimination Act 1995, s 16C. The issue is dealt with differently in the Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660), the Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661), and the Employment Equality (Age) Regulations 2006 (SI 2006/1031). See the deeming provision in reg 5 of the 2006 Regulations and the discussion of the 2003 Regulations at pp 000-000.

³⁴ Race Relations Act 1976, s 58.

³⁵ Race Relations Act 1976, s 63.

³⁶ Equality Act 2006, Part I, and more specifically, s 25.

from the employment tribunal or county court that a breach of section 30(1) has occurred³⁷ or alternatively, an injunction might be sought from the county court to restrain further breaches of section 30(1).³⁸

The very fact that Parliament chose³⁹ to state that only the Commission has the power to issue a non-discrimination notice or bring proceedings in respect of the discriminatory instructions cases indicates that Parliament did not believe these cases to fall naturally within the definition of direct discrimination. Had it done so, there would have been no need for a separate section dealing with discriminatory instructions. Further, Parliament has been particularly careful to confine action in respect of breaches of section 30 to the Commission, as opposed to affected individuals. Had it meant to empower individuals to pursue complaints, then it could simply have indicated in Part VIII of the Race Relations Act that complaints under section 30 could be pursued in the employment tribunals and county courts by individuals. It clearly chose not to do so. This reasoning continues to apply (arguably *a fortiori*) following the amendment of section 30. The new section 30(2), which mirrors the Equality Act 2006, s 25(2)(b), provides that ‘proceedings in contravention of subsection (1) may be brought *only* by the Commission and in accordance with section 25 of the Equality Act 2006’.⁴⁰ The

³⁷ Equality Act 2006, s 25(3)-(4).

³⁸ Equality Act 2006, s 25(5).

³⁹ And reiterated that choice in the new Race Relations Act 1976, s 30(2), and Equality Act 2006, s 25(2)(b).

⁴⁰ Emphasis added. Prior to the amendments to the Race Relations Act 1976 by the Equality Act 2006, this provision was found in the Race Relations Act 1976, s 63, which

presence of the word ‘only’ in the subsection renders it quite impossible to construe those words other than as explicitly precluding the pursuance of discriminatory instructions claims as claims of direct race discrimination.

However, as seen above, in *Zarczynska* and *Showboat* two differently constituted EATs chose not to construe the original section 30 in that manner. In *Zarczynska* the employment tribunal had found that it had no jurisdiction to hear the claim because the section plainly applied and that section could only be enforced by the Commission for Racial Equality. The EAT commented:⁴¹

The industrial tribunal did not like the situation in which they found themselves. We are equally unhappy and consider it most unjust that the complainant should be deprived of any opportunity to obtain compensation for losing her job because she tried to uphold the law which forbids discrimination on racial grounds. It is not easy for us to discover any error of law. But can nothing be done?

The EAT went on to suggest that something could be done, namely that discriminatory instructions cases could be brought within the doctrine of transferred discrimination which had been identified in *Applin*.

provided that: ‘Proceedings in respect of a contravention of section 29, 30 or 31 shall be brought only by the Commission in accordance with the following provisions of this section.’

⁴¹ *Zarczynska* (n 12) [8].

In *Showboat*, Browne-Wilkinson J dealt with the problem of section 30 in the following manner:⁴²

The fact that the giving of racist instructions is dealt with separately in section 30 in a part of the Act headed 'Other unlawful acts' is in our judgment explicable without requiring the words 'on racial grounds' to be given a narrow meaning. The mere giving of racist instructions is not, on any view, rendered unlawful by the earlier provisions of the Act. Parts II and III of the Act only render discrimination unlawful to the extent that such discrimination has been manifested in the various ways specifically mentioned in Parts II and III. Therefore, apart from section 30, the mere giving of the instruction unaccompanied by any action pursuant to such an instruction which falls within Parts II or III would not be rendered unlawful by Parts II or III of the Act. Therefore section 30 by making unlawful the giving of the instruction itself is creating another unlawful act, namely, the mere giving of the instruction. Moreover there is nothing manifestly absurd in giving the Commission for Racial Equality the right to take proceedings to stop the giving of such instructions (if necessary by means of an application for an injunction under section 63(4)) at the same time as giving a right of individual redress to someone who has actually suffered as a result of such instruction.

Browne-Wilkinson J therefore considered that the purpose of section 30 was to provide a remedy where, for example, an employer had simply issued a discriminatory instruction.

⁴² *Showboat* (n 15) [12].

He argued that there was nothing to prevent an individual bringing a complaint of race discrimination himself in respect of any act over and above the issuing of that instruction, for example, where the individual has been dismissed for a failure to carry out the instruction. He was of the view that the rule now contained in section 30(2),⁴³ that proceedings may only be brought by the relevant Commission, ought to be confined to cases where the only unlawful act is that a discriminatory instruction has been given.

Whilst this analysis is initially attractive, it breaks down on further examination. Browne-Wilkinson J had to accept that liability for issuing a racially discriminatory instruction *per se* was only justiciable at the suit of the Commission under section 30. Commission action was (and is) the only mechanism which Parliament provided for the examination of particular instructions in order to determine whether they are discriminatory and therefore in breach of section 30. However, Browne-Wilkinson J removed Owens' claim from the clutches of section 30 by drawing a distinction between the instruction and subsequent act of dismissal. This distinction is not, we suggest, sustainable. The only way Owens sought to introduce racial grounds into his treatment was by pointing to the instruction and asking the Tribunal to examine its contents. He thereby personally asked the Tribunal to undertake the very task reserved by Parliament for actions brought by the Commission. For Owens this stance was unavoidable because, of course, the only racial component of his complaint was the content of the instruction. In order to give Owens a remedy, Browne-Wilkinson J had to carry over the racial element of the complaint from the instruction to the dismissal in a way which ignores the requirements of the mandatory statutory comparison. This is more fully discussed below.

⁴³ Which was formally found in the Race Relations Act 1976, s 63.

Discriminatory instructions often result in resignations and claims of constructive dismissal. *Weathersfield* is a case in point. In contrast to *Owens*, Sargent resigned from her employment because she had been so upset by the racially discriminatory instruction. Her employer's only act was, therefore, to issue the instruction. Of course, if such an instruction amounted to a fundamental breach of contract which caused the employee's resignation, then the law would say that the employee had been constructively dismissed. In order to determine whether there is such a constructive dismissal, however, the Tribunal must consider the contents of the instruction and, in effect, answer the section 30 question. Further, if a constructive dismissal were established, and it was then sought to show that this amounted to a discriminatory dismissal, the Tribunal would need to consider the contents of the instruction for a second time in order to determine the 'reason why' question in any race discrimination case.

We therefore suggest that the treatment of section 30 in *Showboat* and *Zarczynska* was inadequate and that their Lordships also failed to analyse the point properly in *Weathersfield*. The strained separation between the instruction and subsequent events gives the impression that what really underlay the decision on each occasion was the need to fashion a remedy in order to compensate the unfortunate claimant and punish the discriminatory employer. In each case, the result defined the reasoning rather than the reasoning leading logically to the result, producing an extremely wide test for transferred discrimination. This is not a principled, or proper, approach for the courts to take to the construction of statutes.

It was a key feature of *Showboat*, *Zarczynska*, and *Weathersfield* that the facts all arose before protection was afforded to employees against being dismissed by reason of

having made protected disclosures.⁴⁴ Today, an employee in Owens' situation who explains to his employer that he will not follow an instruction because it is discriminatory, and who is dismissed for making such complaint, could claim unfair dismissal under the Employment Rights Act 1996, s 103A. To claim under this section, the employee must have made a disclosure of some sort about the instruction (as opposed to simply silently refusing to comply). A disclosure is widely defined as 'any disclosure of information' which tends to show that, for example, the employer 'has failed, is failing or is likely to comply with any legal obligation to which he is subject'.⁴⁵ There is no requirement that the employee must state that the employer's actions are illegal and, subject to certain provisions, the disclosure need not be made to the employer. Further, it makes no difference if the person receiving the information was already aware of what he has been told.⁴⁶ Provided that the disclosure or statement represents the claimant's reasonable belief⁴⁷ and is made in good faith,⁴⁸ he will qualify for protection irrespective of qualifying service.⁴⁹ Since in most cases, the employee is likely to cite why he does not wish to comply with the instruction (or at the very least, repeat the fact that the

⁴⁴ See footnote 13 above.

⁴⁵ Employment Rights Act 1996, s 43B(1).

⁴⁶ Employment Rights Act 1996, s 43L(3).

⁴⁷ *Babula v Waltham Forest College* [2007] EWCA Civ 174, [2007] ICR 1026.

⁴⁸ Within the meaning explained in *Street v Derbyshire Unemployed Workers' Centre* [2004] EWCA Civ 964, [2005] ICR 97.

⁴⁹ The Employment Rights Act 1996, s 108(3)(ff) removes the requirement for 1 year of continuous service for such unfair dismissal claims.

instruction has been made), the employee might well have a remedy outside the provisions of the Race Relations Act 1976.⁵⁰

2) The Statutory Comparison Exercise

It is now clear that in all cases of direct discrimination, with the exception of pregnancy-related discrimination,⁵¹ an employment tribunal must undertake the statutory comparison exercise. That follows from the House of Lords' decision in *Macdonald v Ministry of Defence*.⁵² Moreover, the very words of the Race Relations Act 1976, s 1(1)(a) require it.⁵³ It follows that in cases of transferred discrimination an employment tribunal is bound to identify the appropriate comparator or comparators and consider how he, she, or they would have been treated.

Judicial guidance on the comparisons that are required to determine direct discrimination cases has been given in sex discrimination cases, where, of course, the

⁵⁰ Such protection would not exist in absence of a complaint about a discriminatory instruction or in absence of a causal connection between the complaint and the subsequent dismissal.

⁵¹ On which see *Webb v EMO Air Cargo (UK) Limited (No 2)* [1995] 1 WLR 1454 (HL), and also the Sex Discrimination Act 1975, s 3A, as amended by the Employment Equality (Sex Discrimination) Regulations 2005. The comparison exercise in pregnancy cases is very different – it compares the treatment of the pregnant complainant with how she would have been treated had she not been pregnant.

⁵² [2003] UKHL 34, [2003] ICR 937, esp [29], [94], [153] and [194].

⁵³ As do the words of the Sex Discrimination Act 1975, s 5(3), considered in *Macdonald*.

issue of transferred discrimination has hitherto not arisen. In such cases, comparisons must conform with the Sex Discrimination Act 1975, s 5(3), which provides that:

A comparison of the cases of persons of different sex ... under section 1(1) ... must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

The Race Relations Act 1976, s 3(4) is in similar form. It provides that:

A comparison of the case of a person of a particular racial group with that of a person not of that group under section 1(1) or (1A) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

In *Shamoon v Chief Constable of the Royal Ulster Constabulary*⁵⁴ the House of Lords considered what amounted to ‘the relevant circumstances’ for the purposes of a comparison under the Sex Discrimination (Northern Ireland) Order 1976, article 11, which was in identical terms to the Sex Discrimination Act 1975, s 5(3). Lord Rodger’s answer was that the relevant circumstances were ‘those which the alleged discriminator takes into account when deciding to treat the woman as he does or when deciding to treat the man as he treats, or would treat him.’⁵⁵ This expression of ‘the relevant

⁵⁴ [2003] UKHL 11, [2003] ICR 337.

⁵⁵ *Ibid*, [134].

circumstances' was subsequently reiterated by the House of Lords in the *Macdonald* case.⁵⁶

Since the Race Relations Act 1976, s 3(4) involves the same type of comparison as the Sex Discrimination Act 1975, s 5(3),⁵⁷ the 1976 Act therefore envisages that the situation of one person of a particular racial group should be compared to the situation of another person who does not belong to that group. The key personal attribute that is 'switched' between the two persons is their racial group. The switching of no other personal attributes is envisaged, so that, for example, switching a person's qualifications, gender, or even attitude to race, is not an exercise that one would expect a tribunal to perform when undertaking a section 3(4) compatible comparison. Altering personal attributes other than race is highly likely to involve changing the 'relevant circumstances' and therefore offend against section 3(4).

The comparison requirement raises a problem in the discriminatory instructions cases since if those cases are to be analysed as cases of direct race discrimination, it follows that a comparison exercise must be undertaken. Taking the facts of the *Showboat* case by way of example, if Owens' race were switched but all other relevant circumstances were kept the same, including Owens' refusal to obey a discriminatory instruction, it would appear that Owens would have been treated in exactly the same manner by Showboat. Therefore, he would not have been subjected to any less

⁵⁶ *Macdonald* (n 52) [2003] IRLR 512, esp [64]-[65] and [155].

⁵⁷ *Rhys-Harper v Relaxion Group Plc* [2003] UKHL 33, [2003] ICR 484, [19], [74], [115], [134] and [208]. See too *Macdonald* (n 52) [80].

favourable treatment on racial grounds and so he would have been unable to pursue a claim for direct discrimination under the Race Relations Act 1976.

The EAT in *Showboat* considered this comparator point in response to a submission made by counsel for Showboat and dealt with it as follows:⁵⁸

Finally, we must deal with Mr Harvey's submission that, in deciding whether or not Showboat discriminated against Mr Owens, one has to compare how Showboat treated Mr Owens with the way in which Showboat would have treated another manager who also refused to carry out the unlawful racist instructions. Mr Harvey says that is to compare like with like. In our judgment, this submission is misconceived. Although one has to compare like with like, in judging whether there has been discrimination you have to compare the treatment actually meted out with the treatment which would have been afforded to a man having *all the same characteristics as the complainant except his race or his attitude to race*. Only by excluding matters of race can you discover whether the differential treatment was on racial grounds. Thus, the correct comparison in this case would be between Mr Owens and another manager who did not refuse to obey the unlawful racist instructions.

The EAT therefore considered that it was appropriate and instructive to compare how the complainant was treated with how another manager, real or hypothetical, would have

⁵⁸ *Showboat* (n 15) 391 (emphasis added).

been treated, attributing to that other manager all the same relevant characteristics except the complainant's attitude to race.

However, this approach cannot be a proper application of the Race Relations Act 1976, s 3(4). The complainant's attitude to race is not a personal characteristic that section 3(4) allows an employment tribunal to alter for the purposes of a section 1(1)(a) comparison. In light of the subsequent decision in *Shamoon*, counsel's submission in *Showboat* was far from misconceived.

Whilst the above analysis could be criticised as being a rather formalistic approach to the question of direct discrimination, the decisions in *Shamoon* and *Macdonald* indicate that such an approach is correct. In any event, even adopting the rather less formalistic approach set out in Lord Nicholls' speech in *Shamoon*,⁵⁹ and focusing on the question of why the employee was treated as he was,⁶⁰ it may well be that

⁵⁹ Which is itself problematic on a practical level: see *Madarassy v Nomura International Plc* [2007] EWCA Civ 33, [2007] ICR 867.

⁶⁰ Lord Nicholls' approach (which, unlike Lord Rodger's approach in *Shamoon*, was not specifically endorsed in *Macdonald*) emphasised that whilst there were two issues within the statutory definition (viz less favourable treatment and the reason why the complainant was treated in the relevant way), a tribunal might 'avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was.' [11] There is, perhaps, little to separate this approach from that of Lord Rodger in which the tribunal looks at the 'reason why' question when deciding on the material circumstances for the purposes of the statutory comparison.

the ‘reason why’ Owens was dismissed in *Showboat* was his refusal to follow an instruction *per se* rather than his refusal to carry out an instruction that was racially discriminatory.

The question of the appropriate comparison to be made in transferred discrimination cases was touched on in certain of the speeches in *Macdonald*. The appellants suffered less favourable treatment because of their sexual orientation. The facts arose before Parliament had provided any protection against discrimination on grounds of sexual orientation and so the appellants had to seek a remedy under the Sex Discrimination Act 1975. They argued that their treatment was equally on grounds of their gender with the result that they were entitled to declarations of sex discrimination. One plank of their argument relied upon the academic writings of Robert Wintemute.⁶¹ This argument was based on the proposition that when performing a proper comparison under the Sex Discrimination Act 1975, one may only change the sex of the complaining individual and must hold all other circumstances constant. One of the circumstances which ought to be held constant is the sex of the complaining individual’s partner. One of the appellants, who was a woman with a female partner, therefore ought to have been compared with a man with a female partner. In support of that argument, the appellants in *Macdonald* sought to rely on an analogy with the position of a restaurateur who refused to serve mixed-race couples. They argued that this amounts to race discrimination notwithstanding the fact that the restaurateur would treat a black man

⁶¹ See e.g. R Wintemute ‘Recognising New Kinds of Direct Sex Discrimination’ (1997) 60 MLR 343.

accompanied by a white woman in the same way as a white man accompanied by a black woman.

The House of Lords rejected this contention, considering that the very argument itself breached the rule that a comparison must change only the sex of the relevant person because, by analysing the case in that way, it changed the sexual orientation of the complainant. In the light of this decision, it is difficult to see how the reasoning of the EAT in *Showboat* as to the appropriate comparator can stand. *Macdonald* requires that only the sex or race of the complainant can be changed when undertaking the statutory comparison, and yet *Showboat* requires the individual's attitude to race, rather than merely the individual's race, to be changed.

However, when considering the arguments in *Macdonald*, one of their Lordships considered the Race Relations Act 1976 and formally recognised the doctrine of transferred discrimination.⁶² Lord Hope also noted, with reference to the example put forward by the appellants, that 'in a racial discrimination case of the type mentioned it is the racial characteristic of the third party that is usually the decisive factor.'⁶³ He then went on to consider the extent to which the characteristics of the third party ought to be considered in a comparison.⁶⁴

The better answer, I think, is that there is no fixed rule that the characteristics of the third party must be taken into account or must be regarded as irrelevant. It is

⁶² *Macdonald* (n 52) [82] (Lord Hope).

⁶³ *Ibid*, [80].

⁶⁴ *Ibid*, [82].

necessary to form a judgment as to what is relevant in the light of the facts of each case, bearing in mind the wording of the relevant subsection which declares the kind of discrimination which is in issue to be unlawful.

Lord Hope's answer is expressed in somewhat opaque terms. Indeed, the danger with this guidance is that it provides very little direction at all: it leaves matters to the tribunal deciding each case and appears to abandon the rules which have been developed in *Shamoon* and *Macdonald* with regard to the construction of hypothetical comparators. Moreover, as with the reasoning in respect of the Race Relations Act 1976, s 30, this *dictum* appears to start with the premise that the discrimination referred to is unlawful and then considers how the requirement of comparison can be applied in a manner consistent with that premise.

3) The Potential for Undesirable Results

It has been seen above that in *Showboat*, Browne-Wilkinson J adumbrated an extremely wide test of what can amount to transferred discrimination because of the perceived need to include the discriminatory instructions cases. However, the breadth of that test permits undesirable results since it is insufficiently narrow to exclude cases like *Serco*.

That such a wide test might permit undesirable results was acknowledged by the Court of Appeal in *Wheeler v Leicester City Council*.⁶⁵ That case involved a claim for judicial review of the decision of a local authority to ban a sports club from using certain recreational facilities on the basis that members of the club had been selected to play

⁶⁵ [1985] AC 1054.

rugby in South Africa at a time when the policy of the local authority was to discourage sporting links with South Africa because of the apartheid policy. In that case, counsel for the club sought to argue that the council was discriminating against the club within the *Showboat dicta* since racial considerations were clearly involved in the decision of the council to ban the sports club from using the recreational facilities. Ackner LJ set out the relevant passage of the *Showboat* decision and then stated:⁶⁶

I cannot accept so wide a statement, which, as was apparent in the course of submissions, could produce consequences totally repugnant to the very purpose of the legislation.

Indeed, Browne-Wilkinson LJ, by then sitting in the Court of Appeal, also accepted that:⁶⁷

the words I used in the passage cited by Ackner LJ from *Showboat Entertainments Centre Ltd v Owens* were too wide. It was not in dispute in that case that the conduct complained of constituted discrimination on racial grounds; the only issue was whether such discrimination had been exercised against the applicant.

⁶⁶ *Ibid*, 1060.

⁶⁷ *Ibid*, 1061.

The potential for undesirable results is further demonstrated by the *Serco* case and the hypothetical examples referred to during argument. It is plain that Redfearn should not have succeeded in his complaint of race discrimination. Similarly, it is clear that an individual who is dismissed because he or she has racially abused a colleague ought not to be able to succeed in a complaint of race discrimination. The Race Relations Act 1976 was passed to prevent race discrimination, not to protect those who might advocate race discrimination. However, it is likely on a strict application of the *Showboat* test - where all that is required of an employment tribunal is to consider whether or not the individual's treatment was to any extent influenced by racial considerations⁶⁸ - that both Redfearn and an employee who is dismissed for racially abusing a colleague have been discriminated against on grounds of race: in both cases, racial considerations would have been at the forefront of the employers' minds when the decision to dismiss was taken.

Of course, Mummery LJ was right to suggest in *Serco* that it could not have been the intention of Parliament that either Redfearn or this hypothetical employee should benefit from the passing of the Race Relations Act 1976.⁶⁹ However, the Court of

⁶⁸ *Wong v Igen Ltd* [2005] EWCA Civ 142, [2005] ICR 931 [37] (Peter Gibson LJ), doubting whether dicta in *Nagarajan v London Regional Transport* [2000] 1 AC 501 were substantively different from the 'no discrimination whatsoever' formula.

⁶⁹ For analysis of the question whether Redfearn's case engaged Convention rights under Article 10, protecting the pursuit of activities of a political nature, see L Cariolou 'The Right Not to be Offended by Members of the British National Party: An Analysis of *Serco Ltd v Redfearn* in the Light of the European Convention of Human Rights' [2006]

Appeal in *Serco* failed to articulate adequately why Redfearn's case did not fall to be treated as a dismissal on "racial grounds" on an application of the *Showboat* test. Had the Court of Appeal addressed this point, it may well have concluded, as did the Court of Appeal in *Wheeler v Leicester City Council*, that the *Showboat* test was inappropriate to determine those cases for which a remedy ought to be provided.

D. DOES THE DOCTRINE OF TRANSFERRED DISCRIMINATION APPLY BEYOND THE RACE RELATIONS ACT 1976?

The above discussion has focused, principally, on the domestic development of transferred discrimination under the Race Relations Act 1976. It is necessary, however, to ask whether English law has been consistent in permitting the doctrine to exist across the various prohibited grounds of discrimination and whether the approach that has been taken complies with the European Directives which underpin the discrimination statutes.

1) The Position in Domestic Law

a) Direct discrimination

As seen above, the Race Relations Act 1976 permits cases of transferred discrimination to be brought as direct discrimination complaints, whereas the Sex Discrimination Act 1975 takes a strikingly different approach, and requires any less favourable treatment to be on grounds of the complainant's sex.

Industrial Law Journal 415. At the date of writing, Redfearn's appeal to the European Court of Human Rights is pending.

Regulation 3 of the Employment Equality (Sexual Orientation) Regulations 2003⁷⁰ states that ‘a person (“A”) discriminates against another person (“B”) if ... on grounds of sexual orientation’ A treats B less favourably than he treats or would treat other persons. The wording, similar to that used in the Race Relations Act 1976, s 1, would appear to permit cases of transferred discrimination to fall within its scope. Almost identical language can also be found in the Employment Equality (Religion or Belief) Regulations 2003.⁷¹ This choice of words was deliberate and intended to include transferred discrimination. The *Explanatory Notes* for the Regulations state that:⁷²

direct discrimination ... covers discrimination against a person by reason of the sexual orientation / religion or belief of someone with whom the person associates. For example, an employee may be treated less favourably because of the religion of his or her partner, or because his or her son is gay.

Further, it was the Government’s express view that the discriminatory instructions cases were also covered.⁷³

⁷⁰ SI 2003/1661. Hereafter ‘the Sexual Orientation Regulations’.

⁷¹ SI 2003/1660. Hereafter ‘the Religion or Belief Regulations’.

⁷² DTI, *Explanation of the Provisions of the Employment Equality (Sexual Orientation) Regulations 2003 and Employment Equality (Religion or Belief) Regulations 2003*, para 23. Available on-line at: <http://www.berr.gov.uk/files/file29350.pdf>.

⁷³ *Ibid*, para 27.

direct discrimination ... covers discrimination against a person by reason of a refusal to follow an instruction to discriminate against another person on grounds of sexual orientation / religion or belief.

For this reason, there is no equivalent of the Race Relations Act 1976, s 30 to be found in either set of 2003 Regulations.⁷⁴

The position under these Regulations can be contrasted with the position under the Disability Discrimination Act 1995, s 3A, which, at first sight, does not permit the operation of transferred discrimination at all, since discrimination must be on grounds of the disabled person's disability. Section 3A(1) provides that 'a person discriminates against a disabled person if ... for a reason relating to *the disabled person's disability*, he treats him less favourably than he treats or would treat others.'⁷⁵ Similarly, section 3A(5) provides that a person 'directly discriminates against a disabled person if, on the ground

⁷⁴ At the time the 2003 Regulations were passed, there was no equivalent enforcement body to the CRE tasked with supervising discrimination on grounds of religion and belief and sexual orientation. Since then, however, the Equality Act 2006 has created the Commission for Equality and Human Rights which has powers to supervise the enforcement of anti-discrimination law in respect of religion and belief and sexual orientation. However, although the Equality Act 2006, s 55(1) prohibits instructions to discriminate, and gives power to bring action for contravention of the provision only to the Commission, this only applies to unlawful instructions in relation to the provision of goods and services: see section 55(5).

⁷⁵ Emphasis added.

of *the disabled person's disability*, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability'.⁷⁶ Thus, as a matter of the domestic statute, it would appear that where an employee was dismissed because he had a disabled son, such an employee would not be able to pursue a claim under the Disability Discrimination Act 1995. Discriminatory instructions are dealt with in the same manner as under the Race Relations Act 1976 and the Sex Discrimination Act 1975, by virtue of the Disability Discrimination Act 1995, s 16C.

Finally, the Employment Equality (Age) Regulations 2006⁷⁷ do not appear to provide for direct transferred discrimination. Regulation 3(1) states that 'a person ("A") discriminates against another person ("B") if ... *on grounds of B's age*, A treats B less favourably than he treats or would treat other persons'. That said, unlike any of the other heads of discrimination, the Age Regulations do contain a specific deeming provision in Regulation 5 – where a person is less favourably treated because of failing to carry out a discriminatory instruction, that less favourable treatment is deemed to amount to discrimination.

Domestic law does not, therefore, take a consistent approach across the discrimination statutes and regulations to the question of transferred direct discrimination. It appears that there is no scope for such discrimination under the Sex Discrimination Act 1975, the Disability Discrimination Act 1995 and the Age Regulations but that a wide application of the doctrine is permitted under the Race Relations Act 1976 and the Sexual Orientation and the Religion and Belief Regulations.

⁷⁶ Emphasis added.

⁷⁷ SI 2006/1031. Hereafter 'the Age Regulations'.

b) Harassment

The provisions dealing with harassment in each of the above statutes and regulations prohibit conduct which has the purpose or effect of (a) violating the complainant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the complainant. There is an additional component of these definitions – such conduct must have been undertaken on particular grounds⁷⁸ (for example, under the Race Relations Act, section 3A, 'on grounds of race or ethnic or national origins').

In common with the definition of direct discrimination, the wording of the various statutes and regulations vary as to how those particular grounds are expressed. The Sexual Orientation Regulations⁷⁹, the Religion and Belief Regulations⁸⁰ and the Age Regulations⁸¹ mirror the wording of the Race Relations Act 1976 and appear to permit arguments of transferred discrimination to be deployed. In contrast, the wording of the Sex Discrimination Act 1975⁸² and the Disability Discrimination Act 1995⁸³ appear specifically to limit the grounds to the relevant characteristics of the complainant.

⁷⁸ As to this requirement, see generally *Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] EWHC 483 (Admin), [2007] ICR 1234, reviewing the Sex Discrimination Act 1975, s 4A.

⁷⁹ Regulation 5: 'where, on grounds of sexual orientation, A engages in ...'.

⁸⁰ Regulation 5: 'where, on grounds of religion or belief, A engages in ...'.

⁸¹ Regulation 6: 'where, on grounds of age, A engages in ...'.

⁸² Section 4A: 'if ... on the ground of her sex ...'.

⁸³ Section 3B: 'where, for a reason which relates to the disabled person's disability ...'.

The harassment provisions in the Sex Discrimination Act 1975 have recently been subject to judicial review and Burton J expressly recognised that his judgment would have implications for the equivalent provisions of the other discrimination statutes and regulations.⁸⁴ He held, among other things, that the words ‘on the ground of her sex’ contained in section 4A(1)(a) impermissibly engaged the issue of causation (as opposed to association found in the Directive) and, more importantly for present purposes, further limited the association to unwanted conduct by reason of, or on the ground of, the complainant’s own sex.⁸⁵ He ordered that the relevant section be recast by the Secretary of State to remove the causal requirement and to facilitate claims of transferred discrimination.

2) The European Directives

In contrast to the position on the face of the domestic statutes and regulations, the wording of the European Directives, is much more consistent. Amendments have been made to the Equal Treatment Directive⁸⁶ so that it now adopts exactly the same structure

⁸⁴ *Equal Opportunities Commission* (n 78) [7].

⁸⁵ *Ibid*, [29].

⁸⁶ Council Directive of 9th February 1976 (76/207/EEC) on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions. The amendments have been made by virtue of Directive of the European Parliament and of the Council of 23rd September, 2002 (2002/73/EC) amending Council Directive 76/207/EEC on the

as the Race Directive⁸⁷ and the Framework Directive.⁸⁸ The structure shared by the Directives is that direct discrimination is defined in Article 2(2)(a) as occurring when one person is treated less favourably than another is, has been or would be treated in a comparable situation on the grounds of sex / racial or ethnic origin / religion or belief / disability / age / sexual orientation.⁸⁹ Then, by Article 2(4) of each of the Directives, an instruction to discriminate is deemed to be discrimination for the purposes of the Directives.⁹⁰ Similarly, harassment is deemed to be discrimination when unwanted conduct 'related to any of the grounds' referred to above 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.⁹¹

implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions.

⁸⁷ Council Directive of 29th June 2000 (2000/43/EC) implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

⁸⁸ Council Directive of 27th November, 2000 (2000/78/EC) establishing a general framework for equal treatment in employment and occupation.

⁸⁹ Hereafter referred to as 'the protected grounds'.

⁹⁰ See also Council Directive of 5th July, 2006 (2006/54/EC) on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) which consolidates the existing Directives dealing with equal treatment between men and women into one Directive.

⁹¹ Article 2(3).

a) Transferred discrimination as a matter of European law

The fact that the definition of direct discrimination in the Directives is materially identical to the definitions in the Race Relations Act 1976 raises the question of whether a concept of transferred discrimination exists as a matter of European law. We suggest that the arguments in favour of its existence, accepted by the Advocate General in *Coleman v Attridge Law*,⁹² are overwhelming. First, the words of Article 2(2)(a) are clearly wide enough to include such a concept as a matter of their textual construction. There are no words anywhere in the Directives limiting the reason for the less favourable treatment to prohibited characteristics of the particular complainant alone. On the contrary, Article 2(1) of the Equal Treatment Directive, for example, reiterates that ‘there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.’ Secondly, the recognition of such a concept in European law furthers the objectives of the Directives as recorded in their various recitals, perhaps most importantly, by furthering the basic principle of equal treatment on the various grounds.⁹³ Prohibiting less favourable treatment of an employee on grounds of the race of her partner is clearly mischief intended to be caught by the Directive. Therefore, a purposive interpretation of the wording equally supports the existence of the concept.

As a matter of history, the Race Directive was modelled upon the Race Relations Act 1976 and uses materially identical wording. The recognition of a domestic concept

⁹² The Advocate General’s Opinion in Case C-303/06 (31 January 2008). At the time of writing, the Court’s judgment is awaited.

⁹³ See the Advocate General’s philosophical approach to this issue at paras 7 to 14 of the Opinion.

of transferred discrimination is a powerful indicator of how this issue will be considered through the European prism. Further, as a matter of recent domestic authority, the parties in the *Equal Opportunities Commission* case⁹⁴ did not dispute, in the context of sexual harassment, that conduct related to sex in general (as opposed to conduct related to the complainant's sex) would suffice for a harassment complaint to be made out under European law. Accordingly the High Court ordered that the Sex Discrimination Act 1975 be recast to facilitate harassment claims of transferred discrimination being made. This is domestic authority recognising transferred discrimination as a component part of European law.

b) Implementation

If European law recognises a doctrine of transferred discrimination, an issue inevitably arises as to whether both the Equal Treatment Directive and the Framework Directive have been properly implemented by the UK Parliament. There are two key points. First, phrases such as 'on racial grounds' (which appear throughout the Directives) ought to be construed similarly across each of the prohibited grounds of discrimination. It follows that if European law recognises transferred discrimination for race discrimination, then by parity of language, it must also recognise the concept for sex, disability, and the other prohibited grounds. Member States should therefore implement the directives, including their concept of transferred discrimination, across the full spectrum of prohibited grounds. It has been seen above that English law does not do this. The Disability Discrimination Act 1995, for example, does not, on the face of it, outlaw transferred

⁹⁴ *Equal Opportunities Commission* (n 78) [29].

discrimination,⁹⁵ and so it may be argued that the statute fails properly to implement the Framework Directive. This very point is the subject of a decision pending before the European Court of Justice as a result of the London South Employment Tribunal making a direct reference to the ECJ in *Coleman v Attridge Law*.⁹⁶ In that case, Coleman alleged disability discrimination on grounds of her being the carer of her son who was disabled within the meaning of the Disability Discrimination Act 1995, s 1. The Employment Tribunal refused to accept that the Framework Directive did not include the concept of discrimination by association, and referred to the 2005 Annual Report of the EU Directorate-General for Employment, Social Affairs and Equal Opportunities, which states that the purpose of the Framework Directive is to:⁹⁷

protect everyone on EU territory against discrimination on the grounds of their race or ethnic origin, their original belief, their age, their sexual orientation or any disability they have This applies equally to anyone who is discriminated against because they associate with the person of a certain race, religion, sexual orientation etc.

⁹⁵ And see also the Age Regulations and the Sex Discrimination Act 1975.

⁹⁶ *Coleman* (n 3).

⁹⁷ European Commission Directorate-General for Employment, Social Affairs and Equal Opportunities, *Equality and Non-Discrimination: Annual Report 2005* 8. Online at: http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/annualrep05_en.pdf

The matter has been heard by the ECJ and the Opinion of Advocate General Poiares Maduro has been promulgated.⁹⁸ The Advocate General, reasoning from the purpose of Art 13 EC (under which the Directive was enacted) and by reference to philosophical concepts underpinning discrimination law, considered that the ECJ ought to recognise that the Directive protects people who, although not themselves disabled, suffer direct discrimination and/or harassment because they are associated with a disabled person. If the ECJ upholds this opinion, then the Disability Discrimination Act 1995 (and by extension the Age Regulations which are also designed to implement the Framework Directive) will have failed properly to implement European law.⁹⁹

The second way in which the Directives may not have been properly implemented concerns discriminatory instructions. It has been seen above that the Directive deems instructions to discriminate to constitute discrimination. The Age Regulations deal with this issue similarly in Regulation 5. However, whilst the Sex Discrimination Act 1975 and Disability Discrimination Act 1995 give the Commission the ability to take action against those issuing discriminatory instructions, it is to be doubted whether this can amount to the provision of an effective remedy for an individual complainant. Such a person is forced to resort to the unfair dismissal protection described earlier. Moreover, if, as is argued above, the ambit of the doctrine of transferred discrimination is not apt to include the discriminatory instructions cases, then all of the domestic statutes and

⁹⁸ The Advocate General's Opinion in Case C-303/06 (31 January 2008). At the time of writing, the Court's judgment is awaited.

⁹⁹ As the parties contended in *Equal Opportunities Commission* (n 78) [7].

regulations (except the Age Regulations) will have failed properly to implement Article 2(4).

c) Conclusion

It follows from the foregoing discussion that two further problems concerning the operation of transferred discrimination should be recognised: first, domestic law appears to take an arbitrary and inconsistent approach as to whether or not transferred discrimination is outlawed at all under the different provisions prohibiting discrimination; and secondly, several of the domestic provisions might well not implement the European Directives adequately. In our view, there is no sound reason for the scope of the doctrine of transferred discrimination to vary as between domestic and European law, both of which, after all, share common wording.

E. THE PROPER SCOPE OF THE DOCTRINE OF TRANSFERRED
DISCRIMINATION

In our discussion of the domestic authorities, we identified three classes of case. We consider that in principle the doctrine of transferred discrimination ought to include the association cases, but exclude the other remaining classes of case. The test which might be applied by employment tribunals and county courts in the association cases ought to be: was the complainant treated less favourably than an actual or hypothetical comparator on grounds of the protected characteristic of an individual with whom the complainant is

associating, has associated or intends to associate?¹⁰⁰ Confining the doctrine to the association cases would provide a principled structure and would be the best way to meet the problems we identified above, which stem from the wide ambit of the test set out in *Showboat*.¹⁰¹ Moreover, no undesirable consequences would flow from confining the

¹⁰⁰ The cases of prospective association require careful treatment. We consider that the only cases which would fall within this category are cases where the complainant intends to associate with an identifiable comparator. The *Showboat* line of cases does not fall within this test precisely because no comparator can be identified. In those cases there is a mere refusal to comply with an instruction not to associate with individuals of a particular race in circumstances where those individuals cannot be identified.

¹⁰¹ Some support is found for this type of test in the Advocate General's Opinion in *Coleman v Attridge Law* where he recommended (at para 25) that the Directive be held to protect those who suffer discrimination and/or harassment 'because they are associated with a disabled person' (see also para 22). Note, though that he uses somewhat wider language at para 23, where he states: 'It is not necessary for someone who is the object of discrimination to have been mistreated on account of "her disability". It is enough if she was mistreated on account of "disability". Thus, one can be a victim of unlawful discrimination on the ground of disability under the Directive without being disabled oneself; what is important is that that disability – in this case the disability of Ms Coleman's son – was used as a reason to treat her less well. The Directive does not come into play only when the claimant is disabled herself but every time there is an instance of less favourable treatment because of disability.' These comments must, however, be read in light of the fact that the Directive deems instructions to discriminate to be direct

doctrine in this way. The examples given in argument in *Serco* would simply not be caught by the test, and the difficulties in running the statutory comparison would also disappear. The difficulties experienced in the *Showboat* case stemmed from the fact that there was no readily apparent comparator. There was simply an instruction to the complainant and that instruction had a racial element to it. By contrast, in the example put forward in *Applin* of an innkeeper excluding a white woman because she is accompanied by a black man, there is a readily apparent comparator in the form of the accompanying (associated) person. The treatment of the white woman should be compared to the treatment of another white woman, the race of whose partner is switched. It is only in cases of association that the claimant is able to point to a person or persons whose race is said to be relevant to the way the claimant has been treated. A comparison complying with section 3(4) can then be undertaken by considering how that claimant would have been treated if the race of the person(s) pointed to is switched.

Confining the doctrine of transferred discrimination to the association cases should be undertaken by Parliament, rather than the courts, for a number of reasons. First, there is EAT and Court of Appeal authority¹⁰² holding that the doctrine goes beyond discrimination by association in the context of the Race Relations Act 1976. This

discrimination and thus there is no need for any concept of transferred discrimination to cover that situation.

¹⁰² *Weathersfield* (n 19).

could only be overturned by the House of Lords.¹⁰³ Moreover, even if an appropriate case were found, and the House of Lords was prepared to restrict the operation of the doctrine of transferred discrimination to discrimination by association, that would still leave the Sex Discrimination Act 1975, Disability Discrimination Act 1995 and the Age Regulations, all of which appear to preclude direct discrimination by association. The courts might be prepared to construe the relevant sections purposively in accordance with European law.¹⁰⁴ However we believe that it would still be more desirable for the statutory wording to be amended.

Even this proposed legislative solution is not without difficulties. First, there is an understandable desire on the part of the courts and tribunals, seen in the domestic case law, to provide complainants with a remedy in the discriminatory instructions cases. Second, a prohibition on discrimination on grounds of the sex of an associated person might well amount to a prohibition on sexual orientation discrimination which would sit uncomfortably with the decision of the House of Lords in *Macdonald* and the decision of the ECJ in *Grant v South West Trains Ltd*.¹⁰⁵

¹⁰³ None of the exceptions to the rules of precedent set out in *Young v Bristol Aeroplane Co Ltd* [1946] AC 163 would apply to enable the Court of Appeal to depart from its own decision.

¹⁰⁴ Assuming that the ECJ follows the Advocate General in *Coleman v Attridge Law*.

¹⁰⁵ [1998] ECR I-621. In *Grant* the ECJ held that the protection in the EC Equal Pay Directive 75/117 did not include protection against discrimination on grounds of sexual orientation.

So far as the first of these problems is concerned, it should be noted that the courts are not alone in wishing to provide protection in the discriminatory instruction cases: the Directives render such conduct unlawful.¹⁰⁶ The neat solution, therefore, would be to deem such conduct to constitute direct discrimination as a matter of English law. Such a deeming provision would avoid the comparator problems discussed above and yet still provide a remedy to those subjected to this unlawful conduct. The Age Regulations adopt precisely this solution.

The Directives do not prescribe any particular remedy in respect of the discriminatory instructions cases. That is a matter for Member States to decide when implementing the Directives. In English law, it has been seen that provisions such as the Race Relations Act 1976, s 30,¹⁰⁷ which perform a similar deeming function, place responsibility for enforcement in the sole hands of the relevant Commission. Arguably there is a strong case for granting a remedy to the complainant, by affording the complainant the right to pursue a claim before the employment tribunal or county court. However, that is not how Parliament has chosen to approach the issue in the context of race, sex and disability discrimination.

If our proposal to restrict the doctrine of transferred discrimination to discrimination by association were implemented, then we consider that all of the domestic statutory provisions should be modified so as to set out, explicitly, how

¹⁰⁶ Article 2(4) of the Equal Treatment, Race and Framework Directives.

¹⁰⁷ See similar provisions in section 39 of the Sex Discrimination Act 1975 as amended by the Equality Act 2006 and section 16C of the Disability Discrimination Act 1995 as amended.

complaints in respect of the discriminatory instructions cases can be pursued before the employment tribunals and the county courts. Given the current structure of the domestic discrimination legislation, this could be done by means of a simple amendment to the existing provisions dealing with discriminatory instructions in the Race Relations Act 1976, Sex Discrimination 1975, and Disability Discrimination Act 1995. That amendment could permit complainants to pursue such claims as direct discrimination by including such conduct in the definition of direct discrimination. Similarly, in the case of the Sexual Orientation, and Religion or Belief Regulations, a simple deeming section could be inserted into the existing definitions of direct discrimination, in much the same way as Article 2(4) of the Framework Directive and Regulation 5 of the Age Regulations deal with the point. Alternatively, since the Government has committed itself to a review of the whole of discrimination law and the enactment of a ‘Single Equality Act’ to consolidate existing discrimination legislation, the Government could consider the application of the doctrine of transferred discrimination across all of the domestic discrimination legislation in order to construct an altogether more coherent framework.

In the context of such a review, the Government would have to grapple with the problem of whether or not discrimination by association on grounds of sex is sexual orientation discrimination. In the vast majority of cases, after the passage of the Sexual Orientation Regulations and the Equality Act 2006 – which have outlawed discrimination on grounds of sexual orientation in the employment context and in the context of the provision of goods and services – it matters little whether complaints are pursued under the sex discrimination legislation or the sexual orientation legislation. However, the distinction remains important on a conceptual level and in some cases the distinction

could still be important for practical purposes. For example, there is arguably a much wider genuine occupational requirement defence found in Regulation 7 of the Sexual Orientation Regulations than is found in the Sex Discrimination Act 1975, s 7. We do not propose to consider whether sexual orientation discrimination is a form of sex discrimination in this article, the arguments in relation to this point having been well rehearsed elsewhere.¹⁰⁸ However, we note the severe and convincing academic criticism which has been levelled at the decisions of the House of Lords in *Macdonald* and the ECJ in *Grant*.¹⁰⁹ We also note that *Grant* did not consider discrimination by association at all, and that to the extent that it was considered in *Macdonald*, the court's comments were limited to the observation that the Sex Discrimination Act 1975 did not permit transferred discrimination,¹¹⁰ a remark that was made without considering the wording of the Equal Treatment Directive and the implications of the wording of the Directive for the 1975 Act in the light of the *Marleasing* interpretative obligation.¹¹¹

¹⁰⁸ R Wintemute 'Recognising New Kinds of Direct Sex Discrimination' (1997) 60 MLR 343; M Connolly 'Discrimination on Grounds of Sexual Orientation Outside the Workplace – Is It Actionable?' [2005] 2 Web JCLI; R Wintemute 'Sex Discrimination in *MacDonald* and *Pearce*: Why the Law Lords Chose the Wrong Comparators' (2003) 14 KCLJ 267.

¹⁰⁹ C Stychin *Governing Sexuality: The Changing Politics of Citizenship and Law* (2003) chap 4; Wintemute (2003) (n 109).

¹¹⁰ *Macdonald* (n 52) [82].

¹¹¹ *Marleasing SA v La Comercial Internacional de Alimentacion SA* (C106/89) [1990] ECR I-4135.

F. CONCLUSION

The doctrine of transferred discrimination has been developed by contrasting the wording in the Sex Discrimination Act 1975 and the Race Relations Act 1976. However, the doctrine which was originally fashioned to provide a remedy in cases where an individual is discriminated against because of an association with someone else with a protected characteristic has become widened by a series of cases concerning individuals who have been dismissed or subjected to detriment by the issuing of a discriminatory instruction by an employer. We consider this development to be unfortunate. The cases pay little regard to the statutory wording of the Race Relations Act 1976 and open the door to an extremely wide doctrine of transferred discrimination which was far from the intention of Parliament when enacting the discrimination legislation. However, we recognise that it is necessary to protect individuals who have been given discriminatory instructions by an employer. Hence while we argue that the doctrine of transferred discrimination should be restricted to cases of association, we also contend that a deeming provision should be inserted into the legislation so that the giving of a discriminatory instruction and any treatment afforded as a result of the failure of an individual to comply with a discriminatory instruction is deemed to be direct discrimination. We hope that this would take place in the context of a review of discrimination law as a whole in order to ensure both that a consistent position is taken as to transferred discrimination across the spectrum of the domestic discrimination provisions and that the domestic provisions properly implement the relevant articles of the European Directives.