



DISCRIMINATION LAW ASSOCIATION

# Briefings

# Briefings 1113-1126

<b>1113</b>	<b>Protecting hard-won equality principles</b>	Geraldine Scullion	<b>3</b>
<b>1114</b>	<b>A cycle of inequality: minority ethnic renters' experience of discrimination</b>	Tilly Smith & Ben Twomey	<b>4</b>
<b>1115</b>	<b>Gender-based discrimination in the music industries</b>	Dr Diljeet Kaur Bhachu & John Shortell	<b>16</b>
<b>1116</b>	<b>Patterns in gender critical belief discrimination</b>	Peter Daly	<b>22</b>

<b>1117</b>	<b><i>Higgs v Farmor's School</i></b>		<b>25</b>
-------------	---------------------------------------	--	-----------

CA considers recent case law on free speech and objectionable manifestation of belief as a ground of dismissal separate from the fact of belief.

Robin Moira White

<b>1118</b>	<b><i>Karim v GMC</i></b>		<b>28</b>
-------------	---------------------------	--	-----------

CA remits ET's findings of direct race discrimination against a regulator on the basis that the tribunal erred in its approach to statistical evidence and failed to adequately consider whether there were material differences between the claimant's and comparator's circumstances.

Austin Clavane

<b>1119</b>	<b><i>E Carozzi v University of Hertfordshire &amp; Others</i></b>		<b>30</b>
-------------	--	--	-----------

EAT holds that the ET erred in law in its analysis of what the term 'related to' means in the s26 EA definition of harassment and in its analysis of a complaint of victimisation.

Sally Robertson

<b>1120</b>	<b><i>NSL Ltd v Zaluski</i></b>		<b>33</b>
-------------	---------------------------------	--	-----------

EAT overturns ET decision that an unauthorised absence policy indirectly discriminated against non-British nationals. ET wrongly focused on the impact on the individual instead of the group disadvantage when considering proportionality. The ET's finding that the manager's repeated threats of disciplinary action amounted to harassment related to race was upheld.

Angela Nguyen

<b>1121</b>	<b><i>Thomas v Surrey and Borders Partnership NHS Foundation Trust &amp; Others</i></b>		<b>35</b>
-------------	---	--	-----------

EAT upholds ET decision that a belief in English nationalism, which encompasses anti-Islamic views, does not qualify for protection under Article 10 ECHR.

Ahilya Gurung

<b>1122</b>	<b><i>Worchester Health and Care NHS Trust v Allen</i></b>		<b>37</b>
-------------	--	--	-----------

EAT holds that the ET erred in law by upholding a complaint of age-related harassment and finding that several complaints of discrimination amounted to a continuing act of discriminatory conduct.

Ioana Jelea

<b>1123</b>	<b><i>Rollett v British Airways &amp; Others</i></b>		<b>39</b>
-------------	--	--	-----------

The EAT concludes that a claimant can bring a claim under s19 EA for indirect discrimination where the claimant does not have a relevant protected characteristic but where a PCP puts him at the same disadvantage as the group with the protected characteristic.

Martina Murphy & Jessica Franklin

<b>1124</b>	<b><i>Sutcliffe v Secretary of State for Education</i></b>		<b>42</b>
-------------	--	--	-----------

HC upholds prohibition order on a teacher who had deliberately misgendered a trans pupil in class and on national TV against the decision of the school to respect the pupil's gender identity and in circumstances where the pupil would be outed. The teacher had also expressed personal views about homosexuality which failed to treat LGBTQ+ pupils with dignity and respect.

Robin Moira White

<b>1125</b>	<b><i>R (on the Application of AK) v Westminster Council</i></b>		<b>44</b>
-------------	--	--	-----------

High Court declares that the Council's housing allocation scheme was unlawful indirect discrimination insofar as it related to women escaping violence. The Council had failed to comply with its PSED or justify its policy.

Laura Redman

<b>1126</b>	<b><i>Steven Laidley v Metropolitan Housing Trust Limited</i></b>		<b>46</b>
-------------	---	--	-----------

HC clarifies that if an EA assessor provides evidence to the court, this is disclosable to the parties; if the assessor's report advises the court on how to weigh and evaluate the evidence, this is not disclosable. This practice does not breach the applicant's right to a fair trial.

Jonathan Boyle

Abbreviations can be found on page 15

## Protecting hard-won equality principles

The concept of the right to free speech is currently high on the international political agenda. This issue of *Briefings* reports on three court judgments which explore the relationship between this right under Article 10 of the European Convention on Human Rights (ECHR), the right to freedom of thought, conscience and religion under Article 9 ECHR and protection from discrimination under s10 of the Equality Act 2010.

The right to believe in a version of English nationalism which says that there is no place in British society for Muslims and they should be forcibly deported from the UK, or a belief that homosexuality is a sin against God, or that sex is immutable, are beliefs which are protected by law. The cases emphasise however that the right to manifest one's religion or beliefs under Article 9 or to exercise the right to freedom of speech under Article 10 is qualified by such limitations deemed necessary to, among others, protect the rights and freedoms of others. S10 EA protects against discrimination on the grounds of belief and the EHRC's employment code of practice uses the five *Grainger*<sup>1</sup> criteria to define how a particular belief will qualify for protection. Article 17 ECHR is also highly relevant in that it prohibits any act aimed at the destruction of any of the other ECHR rights and freedoms.

In *Surrey*, the EAT held that while the claimant was entitled to hold his beliefs, he was not entitled to claim discrimination in relation to them. His beliefs did not meet the *Grainger* criteria, namely, to be worthy of respect in a democratic society, not incompatible with human dignity and not conflict with the fundamental rights of others. In *Sutcliffe*, the court held that teachers' Article 9 and 10 rights were qualified, in this case, by their duty to '*at all times treat the children in their care with dignity and respect*' and their requirement to safeguard their wellbeing.

In *Higgs*, the CA analysed the manner in which the claimant teacher's beliefs were manifested; it repeated that the '*dismissal of an employee merely because they have expressed a religious or other protected belief to which the employer, or a third party with whom it wishes to protect its reputation, objects*' would constitute unlawful direct discrimination. If the teacher's dismissal was motivated by '*something objectionable in the way in which it was expressed, determined objectively, then ... the dismissal will be lawful if, but only if, the employer shows that it was a proportionate response to the objectionable feature – in short, that it was objectively justified*'. [para 175] The CA upheld the claimant's discrimination claim as it considered that the school's dismissal of her was not objectively justified bearing in mind the language she had used in her social media posts and the fact that she has not made any remarks of an objectionable kind at work or displayed any discriminatory attitudes in her treatment of pupils.

In a world which appears to be changing fast and moving to the right politically, arguments about the right to free speech or the relevance of equality, diversity and inclusion policies prevail. It is good to be armed with a clear understanding of the limits of the former and the benefits of the latter. As readers are aware, the removal of barriers to resources or opportunities which some groups in society face is not just legally and morally the right thing to do, it makes good 'business' sense. Evidence shows that a diverse workforce makes better decisions and produces stronger results, and inclusion boosts retention, innovation and productivity. The fight against the erosion and undermining of our hard-won equality principles, anti-discrimination law and policies will be a battle fought on many fronts in the coming years.

**Geraldine Scullion**  
Editor, *Briefings*

<sup>1</sup> *Grainger plc v Nicholson* [2010] ICR 360; [2009] Briefing 549

## A cycle of inequality: minority ethnic renters' experience of discrimination

Tilly Smith, Research and Engagement Manager, and Ben Twomey, Chief Executive of Generation Rent review the experience of minority ethnic people who rent properties in the private sector. They highlight the structural disadvantages many of them face which make it especially difficult for this group to access and keep safe and secure homes and avoid homelessness. They paint a picture of discrimination and bad treatment which minority ethnic renters disproportionately receive from landlords, and address the ineffectiveness of the Equality Act 2010 in providing protection from such discrimination. They argue that a fairer system is needed and recommend a number of actions which would protect the rights of minority ethnic private renters.

Three years of research by Generation Rent has uncovered a market which imposes barriers to minority ethnic peoples' acquisition of safe and secure homes at every stage of private renting – from looking for a new home, to living in a tenancy, facing eviction and navigating homelessness support.

A clear picture has emerged. At every step, minority ethnic people were being disproportionately subjected to structural discrimination and racism – trapping many into a vicious cycle, cut off from safe and secure homes, with depleting financial resilience and physical or mental wellbeing.

### The Equality Act 2010

Under the Equality Act 2010 (EA), a landlord or letting agent must not unlawfully discriminate against a person in the disposal or management of premises on the basis of their protected characteristics. The seven protected characteristics applicable to private renting are: disability, race, religion or belief, pregnancy or maternity, sex, gender reassignment and sexual orientation. Discrimination on the grounds of age, marriage and civil partnerships is excluded from protection when renting a home.

...minority ethnic people were being disproportionately subjected to structural discrimination and racism – trapping many into a vicious cycle...

Private renters have some protection from discrimination under the EA and there have been a number of successful cases brought against private landlords. One example was the 2020 case of *Ratcliffe v Patterson*; in this disability discrimination case, the tenant was awarded £2,200 after she successfully proved that the rent arrears, on which her eviction was based, resulted directly from her multiple health problems. However, successful cases against private landlords and letting agents are vanishingly rare, especially those concerning race discrimination.

One of the most important discrimination cases in recent years occurred in 2017 when the landlord Fergus Wilson, who owned hundreds of properties, sent his lettings agents a directive stating, '*no coloured people because of the smell of curry at the end of the tenancy*'. This behaviour was deemed unlawful direct discrimination by Maidstone County Court.

This case was brought by the Equality and Human Rights Commission under s24 and s24A of the 2006 Equality Act, as this Act provides for general discrimination without naming an individual complainant, whereas complaints under the EA are brought by the named person who has been affected. It is notable that in such an important case of minority ethnic discrimination, the EA was evidently not the most practical or useful legislation to use.

The legislative protection provided by the EA has been unable to completely stamp out discrimination for several reasons. Firstly, the requirements for proving discrimination

under the EA are very high. Secondly, people must bring their claim to the courts within six months of the treatment complained of and this is a very short amount of time to get a case together.

Moreover, discrimination is often subtle and covert. While a person may suspect that they are the victim of discrimination, it is sometimes difficult to be sure of this, especially without knowing the perpetrator's wider pattern of behaviour.

The EA provides protection against direct and indirect discrimination; it does not apply where landlords and letting agents make assessments based on income or circumstances (outside of the protected characteristics) which lead to them denying a let to a potential tenant. Choosing one higher-earning tenant over another is not necessarily unlawful discrimination. However, as minority ethnic people, on average, earn less (as explained below), income inequality means that they are more often discounted from tenancies without any justification. While there have been successful indirect discrimination complaints in the provision of housing on grounds of sex or disability, Generation Rent is unaware of any such cases based on structural inequalities experienced by ethnic minority renters.

Finally, a person bringing a complaint under the EA needs a significant amount of time, research and money which (especially considering the reduction in the availability of legal aid) many renters do not have.

All of this means that the EA is not proving effective enough in itself to bring discrimination of racialised and marginalised communities to an end.

### **Stage 1: Finding a new affordable home to rent**

Discrimination and structural obstacles to acquiring new tenancies make it especially difficult for minority ethnic renters to access safe and secure homes.

#### ***Difficulties affording the rent***

Private renting is the least affordable tenure. The 2022/23 English Housing survey (EHS 22/23) revealed that 29% of private renters found it difficult to pay the rent, compared to 27% of social tenants and 11% of homeowners having difficulty in paying their mortgage.

The average mortgage payment was £222<sup>1</sup> per week and social rents were £118, compared with £237 per week in private rents. When housing support and a partner's joint income were taken into account, mortgagors spent an average of 20% of their income on mortgage payments, whereas rent payments were 29% of income for social renters and 39% for private renters.

Minority ethnic people also disproportionately rent privately. In 2021/22, nearly a quarter<sup>2</sup> of private rented households (23%) had an ethnic minority household reference person, compared to 19% of social renters, and 8% of owner occupiers.

On average, minority ethnic people earn lower incomes and are disproportionately affected by wealth inequality and poverty. Between 2016 and 2019, for example, white British households received an average income of £518 per week; Black African, Black British, and Black Caribbean households had an average of £408; Bangladeshi households £365 and Pakistani households £334. According to the ONS, between 2016 and 2018, 55% of Bangladeshi, 47% of Pakistani, 40% of Black, 32% of Mixed and 28% of Asian households were living in poverty after housing costs were accounted for.

---

1 EHS 22/23, page 27

2 EHS 22/23, page 27

**...minority ethnic renters were especially struggling with an unaffordable rental market and increasing costs of living.**

Overall, minority ethnic renters struggle the most to pay the rent. Generation Rent polling (GR poll June 2024) conducted in June 2024 with 1,016 private renters found that minority ethnic private renters were especially likely to be struggling with expensive rents in their current home; over half (53%) reported this, compared to 44% of white respondents. This figure rose to 60% of Asian respondents.

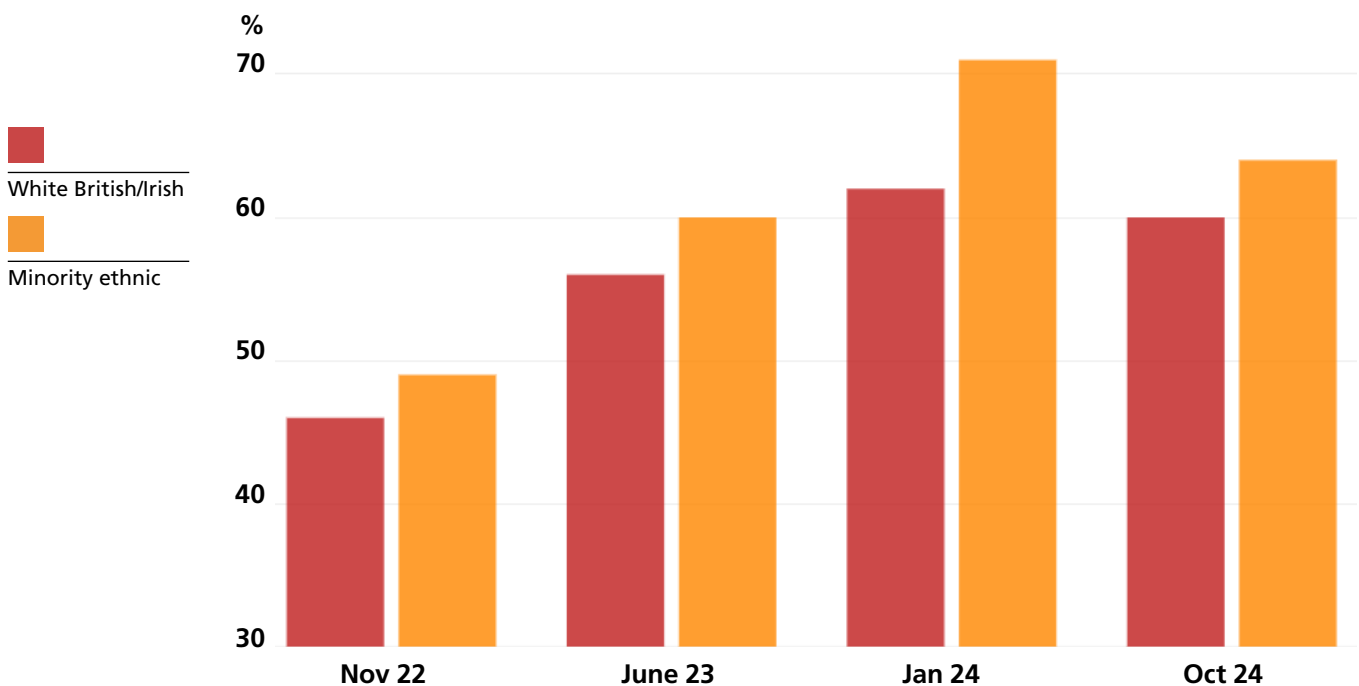
Generation Rent’s report End Renting Inequality 2023 (GR ERI 2023) found that minority ethnic renters were especially struggling with an unaffordable rental market and increasing costs of living. While minority ethnic and white British or Irish respondents were similarly likely to report an increased difficulty in paying the rent in the last six months, minority ethnic respondents were 54% more likely to report that it was ‘a lot’ more difficult than white British or Irish renters.

The same research found that minority ethnic respondents were also subjected to higher rent rises, increasing £131 per month on average compared to £87 for white British and Irish respondents, in the six months before taking the survey.

Generation Rent’s 2024 report on ending the mental health crisis in private housing (the GR 2024 mental health report) found that 60.1% of minority ethnic renters had at some point been subjected to an unfair rent increase, compared to 48.8% of white renters.

Generation Rent general survey data, taken between November 2022 and October 2024 (GR GS 22-24), reveals that minority ethnic renters are also more often asked by their landlords to pay a higher rent than their white counterparts, and that this is becoming increasingly common. In November 2022, 49% of minority ethnic renters were asked to pay a higher rent. In October 2024, this figure had risen to 64% (compared to white renters, at 46% and 60% respectively).

Graph 1: **Private renters who have been asked by their landlord or letting agent to pay a higher rent in the past 12 months, (GR GS 22-24)**



While only about half (52%) of private renters in England had any savings in 2023/24<sup>3</sup>, minority ethnic people have lower financial resilience on average. According to 2023 [research by the Money and Pensions Service](#), 26% of Asian people could not afford an unexpected bill of £300, meanwhile 32% of 'other' ethnicities, 37% of Black people and 41% of mixed-race communities could not afford this expense, compared to 25% of white people.

In 2020, The Runnymede Trust found that Indian households had 90–95p for every £1 of White British wealth, Pakistani households around 50p, Black Caribbean around 20p, and Black African and Bangladeshi approximately 10p.

### ***Additional barriers to acquiring privately rented homes***

A Generation Rent [mystery shopper exercise in 2023](#) demonstrated the racism which can cut off minority ethnic renters from safe and secure homes. It used AI-generated profile pictures of people seeking to view advertised rental homes; every element of the profiles was the same apart from the profile picture and name, with one showing a black woman called Zuri, and another showing a white woman called Lizzie. After analysing responses for over 200 properties, it found that white profiles were 17% more likely than black profiles to receive a response to a viewing request. White profiles were also 36% more likely to receive a positive response to a renting enquiry.

This set the scene for Generation Rent's 2024 general data survey of 1,058 private renters around the UK, which [revealed that](#) minority ethnic renters were significantly more likely to face obstacles in accessing new tenancies.

Minority ethnic respondents were almost twice as likely to have been refused a tenancy when they attempted to move home, with 12.5% reporting this experience compared to 6.3% of white British or Irish renters. Minority ethnic renters were also almost twice as likely to have failed a reference check, with 10.2% failing this compared to 5.6% of white British or Irish renters.

Minoritised renters in this group were 27.4% more likely than white British or Irish respondents to have been asked for multiple months of rent upfront to gain access to a new tenancy the last time they had attempted to move.

### ***Minority ethnic people priced out of their own communities***

Generation Rent's [Vanishing Communities 2025](#) (GR VC 2024/25) reported its research conducted in autumn 2024 with young private renters ages between 18 and 30. This found that minority ethnic renters were 18% more likely than white British and Irish respondents to have moved away from the area in which they grew up.

Of those who had moved out of their former home area, minority ethnic renters were over twice as likely to have moved because this area was too expensive.

As well as this, according to Generation Rent analysis of Census 2021, 27% of white households with non-dependent children, i.e. adults living with parents, are rented (either in private or social homes). However, this rises to 57% for Black households, 50% for mixed ethnicity households and 48% for 'other' ethnicity households. This means that not only are the children of renters especially likely to remain living with their parents into adulthood, but minority ethnic adult children are especially likely to do so, suggesting that they are struggling to meet the financial requirements to move away and permanently live independently.

**Minority ethnic respondents were almost twice as likely to have been refused a tenancy when they attempted to move home ...**

<sup>3</sup> EHS 22/23, page 27

... 25% of landlords were unwilling, on principle, to let to non-British passport holders, even though they would have the right to rent in the UK.

### **Right to rent checks**

The Immigration Act 2014 requires all landlords in England to check their tenant's immigration status to confirm that they have a right to rent.

Although landlords and agents must not make assumptions about who has the right to rent, government research found that 25% of landlords were unwilling, on principle, to let to non-British passport holders, even though they would have the right to rent in the UK.

There is overwhelming evidence that the right to rent practice negatively affects the lives and well-being of many people and families who were not intended to be impacted by this policy. Research conducted by the Tenancy Deposit Scheme Charitable Foundation in June 2024 found that around a quarter (24%) of landlords said they felt unable to rent to non-UK passport holders.

The Joint Council for the Welfare of Immigrants (JCWI) also found that it takes twice as long for minority ethnic groups and migrant people to find a home to rent compared to a white British person.

In 2019, High Court judge Mr Justice Spencer declared the right to rent policy unlawful, stating:

*The evidence, when taken together, strongly showed not only that landlords are discriminating against potential tenants on grounds of nationality and ethnicity but also that they are doing so because of the scheme. (JCWI v Secretary of State for the Home Department [2019] EWHC 452 (Admin), [2019] Briefing 921)*

In 2020, the government successfully appealed this decision and the practice continues, despite the High Court's damning indictment. (*JCWI v Secretary of State for the Home Department* [2020] EWCA 542; [2020] Briefing 944)

Having to prove their right to rent acts as a constant barrier for migrant groups and minority ethnic people, cutting them off from finding safe, good quality homes.

### **Stage 2: Asserting rights and landlords fulfilling responsibilities in active tenancies**

The issues minority ethnic private renters disproportionately face do not end once a new privately rented home is secured but persist across the tenancy.

#### **Lower rates of tenancy and safety documentation**

All landlords are legally required to give the following documents to their private tenants: A written tenancy agreement, a gas safety certificate (if there is a gas supply), an electrical safety certificate (if there is an electrical supply), proof of their deposit being protected in an accredited scheme, a government 'how to rent' guide, and an energy performance certificate.

There were significant disparities in minority ethnic renters being given these important tenancy and health and safety documents.<sup>4</sup> In the 2023 research, while every white British or Irish respondent reported that they had received a written tenancy agreement at the start of their tenancy, 94% of minority ethnic respondents reported the same. This figure dropped further to 86% amongst Black respondents.

The 'how to rent' guides were the least likely document for respondents to have received; 28% of minority ethnic respondents reported receiving the guide compared to 40% of white British or Irish respondents. Less than one in five (18%) Asian respondents said they had received a 'how to rent' guide.

<sup>4</sup> GR ERI 2023, page 21



Over three quarters (76%) of white British or Irish respondents received information on where their deposit was protected, compared to 61% of minority ethnic respondents.

### **Poorer homes and dangerous conditions**

Research indicates that minority ethnic communities are more likely to be living in more dangerous homes.

The 'End Renting Inequality' research found that minority ethnic tenants were more than twice as likely to have experienced dangerous disrepair issues and twice as likely to have had faulty electrics in their homes.<sup>5</sup> Minority ethnic respondents were also 50% more likely to report experiencing inadequate fire precautions, with nearly one in four (24%) of Black respondents experiencing this in their current tenancy.

The GR 2024 mental health report also found that 58.1% of minority ethnic renters reported that they had a landlord who refused to carry out repairs, 12% higher than white British or Irish tenants who reported this.<sup>6</sup> This suggests that marginalised groups are not only more likely to experience dangerous maintenance issues but will do so for longer periods of time, or even indefinitely.

### **Poor and illegal treatment**

Generation Rent has found that minority ethnic people are significantly more likely to be subjected to poor and unlawful treatment by landlords and letting agents with this group being 71% more likely than white British or Irish respondents to report being made to feel physically or psychologically unsafe by a landlord or letting agent.<sup>7</sup>

In addition, 58.8% of minority ethnic people had experienced rude behaviour from a landlord or letting agent, which was 18% higher than white British or Irish respondents. 42.6% reported that a landlord or letting agent had shown up at their home unannounced, 8% higher than white British or Irish tenants.

Finally, Generation Rent polling in 2024 found that one in eight Black and Asian renters had experienced racism or discrimination from a landlord or agent, with this rising to around one in six amongst Black people.<sup>8</sup>

## **Stage 3: Heightened risk of eviction and homelessness**

The ending of tenancies, especially against a renter's wishes, is another stage characterised by discrimination against minority ethnic people.

### **Utilisation of eviction threats to undermine tenant rights**

Generation Rent's 2022 research, published in the Voice's article, '*Are you sure you're British*', reported that minority ethnic renters were 36% more likely to have been threatened with an eviction than white British and Irish renters.

Alongside higher rates of threats of eviction, minority ethnic people were 38% more likely to have been threatened with an unaffordable rent increase, 18% more likely to have been threatened with an illegal refusal to do repairs and more than twice as likely to have been threatened with court action than white British or Irish respondents.

While some of these are legitimate legal actions or responses to tenants' actions, qualitative data from the research found that some landlords and letting agents use such threats to avoid or evade key responsibilities.

<sup>5</sup> GR ERI 2023, page 29

<sup>6</sup> GR 2024 mental health report, page 31

<sup>7</sup> GR 2024 mental health report, page 24

<sup>8</sup> GR poll June 2024, tab J Q7

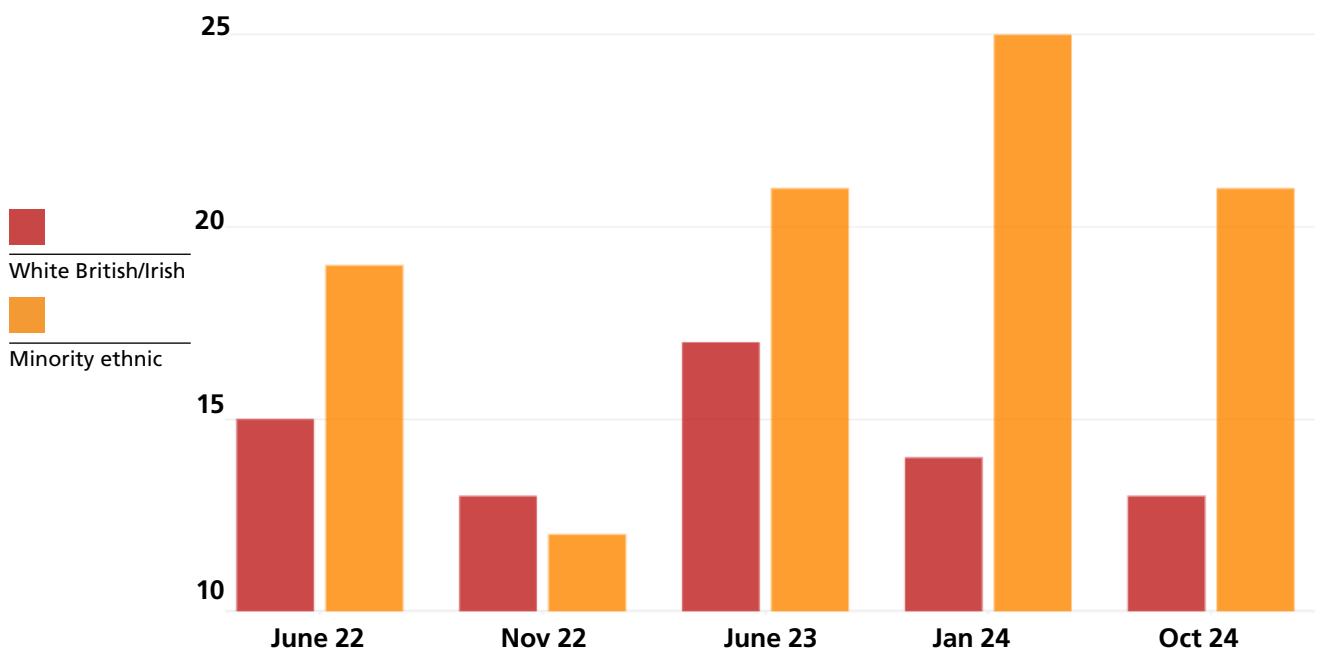
... minority ethnic tenants were more than twice as likely to have experienced dangerous disrepair issues and twice as likely to have had faulty electrics in their homes.

For example, Aaron, who identified as Black British, said: *‘Threats, unsociable behaviour, blame and money seem to be the business that landlords and letting agents are in and no one is making them have properties and rooms up to a standard of living and safety before someone rents.’*

Kane, who identified as Asian British, stated: *‘Landlord charged us rent below market value and used this as an excuse to not do any repairs on boiler. Threatened to increase rent.’*

Alice, who identified as any other dual heritage background, explained: *‘The landlord said that if I didn’t like something then I should leave. Also, after unsuccessfully trying to evict me the first time he said I could stay if I paid more rent to bring my room in line with the going rent for the area.’*

Graph 2: **Renters who were asked by their landlord to move in the last year** (GR GS 22-24)



**Actual evictions and repeated moves**

Generation Rent’s 2024 polling<sup>9</sup> found that minority ethnic renters were especially likely to have experienced repeated moves and shorter tenancies. 52% of ethnic minority renters had moved more than once in the last five years before completing the survey, compared to 32% of white renters. Only 17% of ethnic minority renters had not moved home in the last five years, compared to 39% of white renters.

The same polling also found that minority ethnic renters were more likely to have experienced an eviction in the previous two years. Almost one in 10 (9%) minority ethnic people had been evicted compared to 4% of their white counterparts.

Minority ethnic people are more likely to be evicted informally without due process. Generation Rent’s 2024 mental health report found that they were about twice as likely as white British or Irish respondents to have been served an informal notice (as opposed to a formal s21 or s8 notice under the 1988 Housing Act): 20.3% compared to 10.2%.<sup>10</sup>

<sup>9</sup> GR poll June 2024, tab A Q4

<sup>10</sup> GR 2024 mental health report, page 27

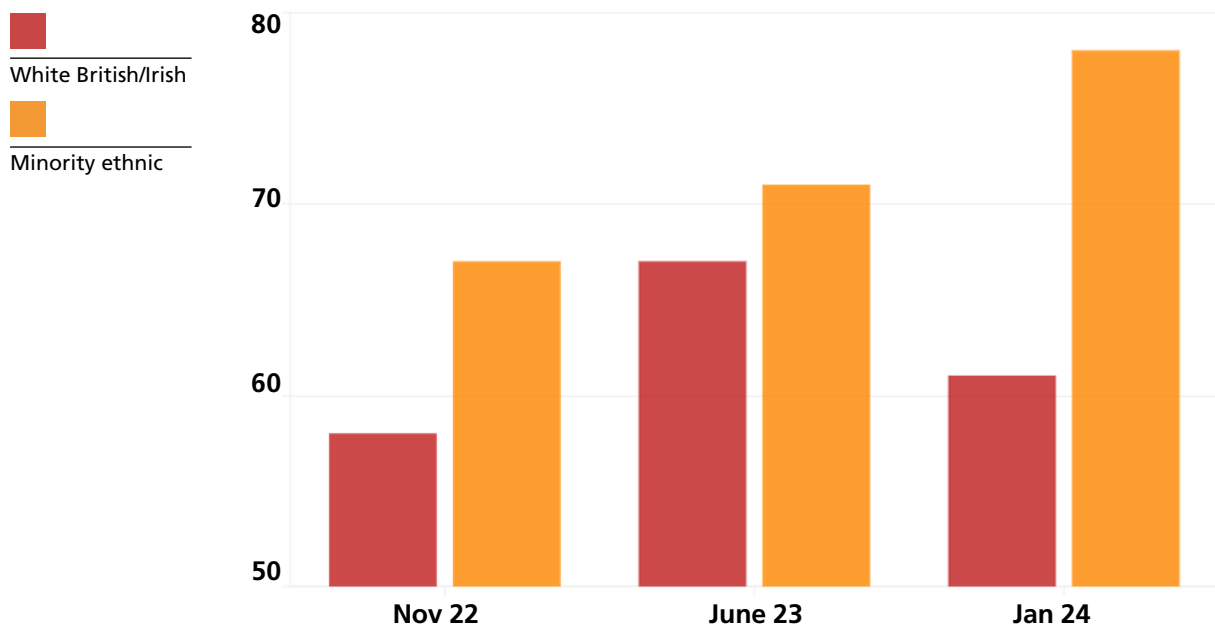
Generation Rent also found that ethnic minority communities are increasingly facing requests to move by their landlords.

21% of minority ethnic respondents had been asked to move on by their landlord in the last 12 months before completing the survey in October 2024, this compares to a low of 12% in November 2022.<sup>11</sup> It is important to note that a similar change did not occur with white British and Irish respondents – 13% reported being asked to move on by their landlord in both November 2022 and October 2024.

The November 2022 evictions may be lower across both groups because of a surge during the previous six months following the end of the Covid-19 related eviction ban, which meant a lot of people entering rather than leaving tenancies during those six months.

Generation Rent surveys also show that minority ethnic renters find it especially difficult to find a new home after they have been asked to move, something which has also been growing worse over time.

Graph 3: **Renters who were not able to find somewhere to move to after their landlord asked them to leave** (GR GS 22-24)



In January 2024, 78% of minority ethnic private renters who had been asked to move by their landlord stated that they had not been able to find somewhere within the notice period. 56% of minority ethnic renters reported the same in June 2022 so the issue has become worse over time. Meanwhile, 61% of white British or Irish respondents reported being unable to find somewhere to move to in January 2024, compared to 69% in June 2022.

### **Homelessness**

The risk of homelessness following eviction is particularly high for ethnic minority private renters given the higher number of evictions they experience and the increased difficulties they face in finding new homes.

The most recent government annual data on homelessness shows that, in the year ending March 2023, 298,430 households qualified for help from their local authority

<sup>11</sup> GR GS 22-24

for homelessness – up by 18,960 compared with the previous year. 67.2% of ‘lead applicants’ (people making homeless applications on behalf of households) were white. Meanwhile, 10.2% were Black, 6.4% were Asian, 3.2% were from a mixed ethnic background and 3.8% were from the other ethnic group – totalling 23.6% (this compares to 18% of the population of England and Wales being from a minority ethnic background overall).

In England, Black people are more than three times as likely as white people to experience homelessness while people of mixed race are almost twice as likely to be affected by homelessness. Bangladeshi, Black African, Black Other, and Pakistani groups are more than twice as likely as white British people to experience housing disadvantage.

#### **Stage 4: Poorer conditions and treatment in the homelessness system**

Experiencing the trauma of homelessness has dramatic and sometimes lifelong consequences for people’s physical and mental health and well-being. Minority ethnic communities experience the worst of the system dealing with homelessness.

##### ***Higher rates of temporary accommodation living***

On March 31, 2024, government figures showed that 117,450 households were in temporary accommodation, an increase of 12.3% from the same period last year.

44.3% of lead applicants in temporary accommodation were Black, Asian, mixed race or identified as a ‘other’ ethnicity, accounting for over 50,000 households. Minority ethnic people are significantly overrepresented in temporary accommodation – with these four ethnicity groups making up just 25% of England’s population overall.

This is especially the case for Black people, who despite making up only 4.2% of England’s population, account for 20.7% of temporary accommodation lead applicants.

Families and households living in temporary accommodation lack any security, with many being forced to move repeatedly at extremely short notice. They often lack basic washing or cooking facilities or any spaces to enjoy privacy or peace. Reliance on temporary accommodation to house England’s spiralling homelessness population is causing undue and disproportionate harm to minority ethnic people.

##### ***Hidden homelessness***

Hidden homelessness refers to a situation which is not visible either on the streets or in homelessness services or official homelessness statistics. This includes people living in unsuitable, inadequate or overcrowded conditions, or living in concealed or shared households. Minority ethnic communities are especially likely to be living in ‘hidden homelessness’, which by definition means that agencies are less able to offer or provide support.

Understanding Society data research in 2023 found that minoritised ethnic communities were almost five times more likely than white headed households to live in overcrowded accommodation. Pakistani and Bangladeshi-led households were the most likely to be living in what were considered ‘concealed’ households, followed closely by Indian and Black-led households.

##### ***Black rough sleepers disproportionately criminalised***

Because minority ethnic people are disproportionately over-represented as ‘hidden homeless’, they are disproportionately underrepresented amongst the rough sleeper population.

Only 5% of England’s rough sleeping population identified as Black in 2020, according

**In England, Black people are more than three times as likely as white people to experience homelessness while people of mixed race are almost twice as likely to be affected by homelessness.**

to government figures, despite this community being three times more likely to experience homelessness than those identifying as white.

However, research conducted by Generation Rent in 2023 found that Black people in England made up 8% of all arrests under the Vagrancy Act 1824 – a 19th century law which criminalises rough sleeping. They are disproportionately targeted by the police with 68% of Black people being more likely than white people to be arrested under the Act.

The Vagrancy Act makes it an offence to sleep rough or beg in England and Wales. Despite the law technically being 'repealed' in 2022, commencement rules mean that the Act, which the government have described as 'outdated', remains in force until replacement laws are put in place.

### Stage 5: The cycle repeats

Racism and discrimination create a vicious cycle which makes it harder for minority ethnic people to find safe homes.

For too many, it is a constant battle, and there is a danger that being forced into the homelessness system once can lead to remaining there indefinitely. If finding an affordable home to rent privately is difficult while still a sitting tenant, it is exponentially so when experiencing homelessness. In addition to the depletion of minority ethnic peoples' financial resilience described above, there is negative impact of private renting on their physical and mental health

### *Long-term impact on mental and physical health*

There is a strong link between mental and physical health and private renting with minority ethnic people experiencing the most detrimental elements of this link. Generation Rent found that nine in ten private tenants felt that renting had negatively affected their mental health, and four in ten their physical health.<sup>12</sup>

Its research found that people with minoritised ethnic backgrounds were 8% more likely than their white British and Irish counterparts to worry about being evicted and 18% more likely to worry 'a lot' when reporting repairs to their landlord or letting agent.

Stress, insecurity, poor conditions, evictions, moves, homelessness, all play a significant role in a person's mental and physical health. The impact this has on minority ethnic communities should not be understated. As a result, many are trapped into a system where their wellbeing is spiralling downwards, and their mental and psychological resilience is being chipped away.

### The Renters' Rights Bill

In September 2024, the government introduced the Renters' Rights Bill (the Bill); at the time of writing the Bill is progressing through the House of Lords.

The Bill aims to enhance renters' rights and protections and will include provisions to:

- End s21 'no fault' evictions
- Empower tenants to challenge rent increases which are above the 'market rent'
- Ban bidding wars and demands for multiple months of rent in advance of a tenancy
- Initiate a digital private rented sector database
- Introduce an Ombudsman for private renting
- Improve standards, including extending a Decent Homes Standard and 'Awaab's

**... nine in ten private tenants felt that renting had negatively affected their mental health, and four in ten their physical health.**

<sup>12</sup> GR 2024 mental health report, page 13

law<sup>13</sup> from the social sector to privately rented homes to address damp and mould issues, and

- Ban discrimination against benefit claimants and tenants with children.

The Bill should, in its current form, address a significant number of issues which minoritised and racialised communities experience disproportionately. Ending s21 evictions will improve security and reduce evictions. As a result, tenants will feel more confident about challenging rent rises and getting their landlord to carry out repairs. Given also that minority ethnic renters face the worst standards and treatment from landlords and letting agents, these groups should especially benefit from the reforms.

A new Ombudsman, the raising of the required standards of privately rented homes (through the Decent Homes Standard and Awaab's Law) and the banning of bidding wars and upfront rent requirements, if enforced effectively, will bring about improvements to all private renters' experiences and lives, and particularly benefit minority ethnic communities who experience the worst of these practices.

However, the Bill is not explicitly addressing the unchecked cost of renting. A vital omission is the lack of restrictions to rent rises, which are being set by the 'market', in other words speculative adverts with no underpinning beyond what landlords collectively choose to ask for. Limiting rent rises would be a powerful tool in addressing the soaring cost of rents. The Bill also does not currently introduce tenant relocation relief in 'landlord intention' evictions, such as when the landlord is selling the property or moving themselves or family members into it. It is unfair and extremely costly for private renters to foot the bill in expensive moves where the tenant is not at fault. Generation Rent has been calling for the landlord in these instances to be required to waive the final two months' rent to improve renters' ability to find a new home and avoid homelessness.

### Conclusion

The private renting system is uncompromising, inflexible and, often, unworkable. Those who struggle with or who are unable to meet the high requirements needed to access safe and secure homes, find themselves trapped in a vicious cycle which depletes their financial resilience, their physical wellbeing and their mental fortitude.

Minority ethnic people are especially likely to find renting unaffordable, live in unsuitable or dangerous conditions, face poor or unlawful treatment and be subjected to evictions. Homelessness weighs as a constant threat, and those forced to experience the homelessness system face unique barriers preventing them from escaping it.

Inequality is trapping people in the worst conditions of private renting, with minority ethnic renters experiencing the worst outcomes. This is a cycle which must end.

A fairer system which does not punish and victimise marginalised and racialised people but supports them into somewhere safe to call home is urgently needed.

### Recommendations

Generation Rent is campaigning to make sure that the Renters' Rights Bill is as strong as possible and comprehensively improves the lives and rights of all private renters and to make sure that it reaches marginalised and racialised communities. The Bill must include:

<sup>13</sup> 'Awaab's law' requires landlords to investigate and fix reported health hazards within specified timeframes under the Social Housing Regulation Act 2023. It is named after Awaab Ishak who died in December 2020, aged two, as a direct result of exposure to mould in the social home his family rented from Rochdale Boroughwide Housing.

Minority ethnic people are especially likely to find renting unaffordable, live in unsuitable or dangerous conditions, face poor or unlawful treatment and be subjected to evictions.

- 1 **Restrictions on unaffordable rent rises** – These would prevent landlords from evicting tenants through economic evictions, by raising the rent purposely beyond what the sitting tenant could afford. They would also prevent rents from rising unsustainably, stopping people from being priced out of their own communities.
- 2 **Tenant relocation relief in ‘landlord intention’ evictions** – It typically costs renters £2,216 upfront to move home. In evictions where the tenant is not at fault, the final two months’ rent should be waived by landlords so that renters are enabled to cover moving costs.
- 3 **An end to the right to rent policy** – This policy restricts the number of safe and secure homes available to migrant and ethnic minority peoples and forces many to choose between enduring poor quality and even dangerous living conditions, and homelessness.

In addition, the government must:

- 1 **Extend the time limit under the EA** – The six months’ time limit to bring a discrimination claim should be extended to two years.
- 2 **Increase local authorities’ budgets** – This would support regulatory and enforcement functions in local authorities to target criminal and predatory landlords and letting agents.
- 3 **Build affordable homes and more social homes** – These must be adapted to renters’ needs and built within communities and in places where renters want to live.

## ABBREVIATIONS

AC	Appeal Cases	KB	King’s Bench
All ER	All England law reports	LGBT+	Lesbian, gay, bisexual, transgender and others
BME	Black and minority ethnic	LJ	Lord Justice
CIISA	Creative Industries Independent Standards Authority	LLP	Legal liability partnership
Civ	Civil	NDA	Non-disclosure agreement
CPR	Civil Procedure Rules	NGO	Non-governmental organisation
CSIH	Court of Session Inner House	P	President of the Employment Appeal Tribunal
DBE	Dame Commander of the British Empire	PCP	Provision, criterion or practice
DJ	Deputy High Court Judge	PSED	Public sector equality duty
DLA	Discrimination Law Association	QB	Queen’s Bench
EA	Equality Act 2010	SC	Supreme Court
EAT	Employment Appeal Tribunal	UKEAT	United Kingdom Employment Appeal Tribunal
ECHR	European Convention on Human Rights 1950	UKSC	United Kingdom Supreme Court
EHRC	Equality and Human Rights Commission	WEC	Women and Equalities Committee
EHRR	European Human Rights Reports	WLUK	Westlaw United Kingdom
EJ	Employment Judge	WLR	Weekly Law Reports
ET	Employment Tribunal	WPA	Worker Protection (Amendment of Equality Act 2010) Act 2023
EWCA	England and Wales Court of Appeal		
EWHC	England and Wales High Court		
GMC	General Medical Council		
HC	High Court		
ICR	Industrial Case Reports		
IRLR	Industrial Relations Law Reports		

## Gender-based discrimination in the music industries

Dr Diljeet Kaur Bhachu (Equality, Diversity and Inclusion Officer) and John Shortell (Head of Equality, Diversity and Inclusion) from the Musicians' Union describe the extent of discrimination and harassment endured by women in the music industries. They echo the findings of the Women and Equalities Committee's inquiry into misogyny in music and call for greater legislative protection. They explain the gaps in legislative protection for freelancers under the Equality Act 2010 and outline some new developments and make recommendations to address these gaps. They describe a few typical scenarios to assist advisors when responding to complaints of discrimination and sexual harassment from women in the music industries.

### Introduction and background

As the UK's trade union for musicians, representing more than 35,000 musicians working in every corner of the music industries and the music education sector, the Musicians' Union has delivered key research projects which seek to map the experiences of women in music. These include 'For the Love of Music' (2020) and the 'Musicians' Census' (2023), in partnership with Help Musicians.

For the Love of Music gathered responses from all members of the Musicians' Union (MU); 48% of the 800 respondents reported that they had experienced sexual harassment, 58% had witnessed it, and 10% had witnessed it regularly; 47% reported they had experienced third party harassment. The vast majority (85%) did not report it; workplace culture and fear of losing work were cited as common barriers to reporting. Freelancers were identified as being more at risk due to lack of policies and procedures in their working situations and contracts.

The Musicians' Census 2023 presents one of the largest data sets on experience of working in the music industries with 5,687 respondents working across the industries, from performers and writers to teachers and studio engineers. A series of insights reports<sup>1</sup> has been published from the dataset, focusing on specific issues and communities of musicians, including a report on women musicians.

The Census shows that career barriers affect women disproportionately and these barriers intersect with parenting and caring roles, ethnicity, sexuality and disability. It found a significant pay gap between men and women, with only around 20% of those in top earning brackets being women. Women were more highly represented in lower income groups and their lower pay was connected to barriers to working in certain areas or working patterns which compounded experiences of direct and indirect discrimination.

The Census reported that 87% of women experienced or witnessed discrimination of some kind while working in music, compared to 65% of men; 20% of women reported discrimination as a career barrier; 51% of women had experienced gender discrimination; while only 11% of women who had experienced or witnessed gender discrimination reported it. Additionally, women said they experienced discrimination on the basis of other highly gendered experiences such as parenting and caring. Disabled women and women from the global majority reported higher rates of discrimination than their non-disabled and white counterparts. Almost a third of women responding to the Census questionnaire said they had been sexually harassed at work.

### Misogyny in music inquiry

The Women and Equalities Committee (WEC) opened an inquiry in 2022 into misogyny in music as part of its work to address violence against women and girls. The WEC

<sup>1</sup> [www.musicianscensus.co.uk](http://www.musicianscensus.co.uk)



published its report in January 2024 with a set of recommendations for the industry and government. These were rejected by the Conservative government in April 2024.

Following the election of the Labour government in 2024, the new WEC has revisited the inquiry, and it held a follow up evidence session in January 2025.

The WEC's misogyny in music report (the WEC report) details a number of areas where misogyny and sexism continues to be an issue:

- *In education:* gendered stereotypes and assumptions result in barriers and a lack of representation in some disciplines; double standards for women playing certain instruments which have been seen as masculine, and inappropriate behaviour by educators and other students towards female students and teachers. This influences the workforce and can mean that certain instrument groups are dominated by male players which has a negative impact on the talent pipeline of female musicians, their opportunities for work and career progression. This view is supported by research from the Arts Council England (Creating a More Inclusive Classical Music, 2021)<sup>2</sup> which found that *'for some instruments, or groups of instruments, there is a strong relationship with gender, which can be seen in the make up of young learners and likewise reflected in the workforce'*.
- *At work:* the industry remains a 'boys club'; women face sexist jokes, bullying, sexist assumptions by managers and employers in their abilities to do their jobs. Women expect to encounter misogyny as part of working in the music industry, pointing to a culture of normalisation.
- *In the live music sector:* disc jockeys face a lack of security and safety at work; musicians experience sexual harassment by their audiences, all of which is compounded by informality in working practices, the presence of alcohol and drugs, and elements of touring practices.

The EWC report notes the detrimental impact of misogyny on women musicians' ability to gain employment and progress in their careers. It also highlights the impact on women's mental health and wellbeing as well as the lack of clear reporting mechanisms, human resource structures, and visible support. MU members have made various reports of how these misogynist cultures impact on their ability to gain employment and on their career progression.

The use of non-disclosure agreements (NDAs) is still prevalent despite high profile campaigns to ban their misuse. The WEC recommended that the government urgently brings forward proposals to ban the use of NDAs and other forms of confidentiality agreements in cases involving sexual harassment and abuse, as well as bullying and discrimination, noting that they are often used to silence survivors of sexual harassment and abuse.

The WEC made many recommendations including in the following areas:

- *Education:* to develop and introduce strategies aimed at boys; address gendered areas of study and provide targeted funding and opportunities; improve safeguarding checks and visibility of policies and consequences.
- *Venues:* more training for security staff; better dressing room facilities; accountability through public funding and licensing processes.
- *Legislation:* reform of parental leave and improvements in flexible working arrangements and childcare; improved rights for freelance workers including extending the discrimination and harassment protections in the Equality Act 2010 (EA) to all freelancers; licensing of commercial recording studios; banning the misuse of NDAs.

---

2 [https://www.artscouncil.org.uk/sites/default/files/download-file/Executive\\_Summary.pdf](https://www.artscouncil.org.uk/sites/default/files/download-file/Executive_Summary.pdf)

### **Sexual harassment in the music industries**

Sexual harassment and abuse are significant issues in the music industries.

When dealing with complaints of sexual harassment or abuse by or towards musicians it is important to establish where existing legal frameworks set out a recommended process or outcome, and where the gaps are. The ways in which musicians work vary widely, and so individual circumstances may dictate who owes a duty of care of musicians, audiences, or other workers.

It is also important to consider the role of power dynamics, celebrity, and the close-knit nature of some music industry environments or communities. Large parts of the industry lack formal workplaces or employment structures, and this can play a significant role in the sense of safety experienced by survivors of harassment and abuse. Due to the lack of formal reporting structures, when incidents happen, particularly outside of traditional employment structures, industry bodies are limited in the actions they can take. As there is little police reporting and investigation, this can lead to increased risks of defamation when individuals or organisations seek to highlight the presence of a known perpetrator to organisations and programmers/bookers<sup>3</sup>.

### **Equality Act 2010**

The WEC was informed that over 80% of musicians are freelance and so they often lack protection from workplace discrimination or harassment under the EA. Protection from discrimination only applies to those who can demonstrate that they are under an employment contract or 'a *contract personally to do work*' and so many freelance musicians are outside those protections. The MU has lobbied on this issue for several years and has created a campaign 'Protect Freelancers Too' to raise awareness of the issue; it has called on the previous and current government to close the gaps in legislation by extending the EA protections relating to discrimination and harassment to all freelancers. This call was supported by the WEC which recognised that without this extension many musicians fall outside the scope of the EA's protections because of the flexible and informal ways by which work is offered and accepted. Musicians who accept work offered by another musician would find it difficult to prove a contract of employment between the musician who offered them the work and the actual supplier of that work.

### **Worker Protection (Amendment of Equality Act 2010) Act 2023**

The MU is fully supportive of the Worker Protection (Amendment of Equality Act 2010) Act 2023 (WPA) which introduces a new duty on employers to take reasonable steps to prevent sexual harassment of their workers. While appreciating that the legislation is still very new, the MU is concerned that the focus of the act on sexual harassment and discrimination may lead to the perception that it is less critical than other legislation which seeks to prevent workplace harm, such as the health and safety legislation.

The MU also has concerns that many of its freelance members may fall outside the scope of the WPA (which amends and therefore repeats the difficulties with the EA) because of their unique working arrangements. Extending EA protections to include all freelancers would solve this critical issue.

Compliance with the WPA requires additional resources, including time and financial investment. Small businesses and those operating in challenging economic environments, like most of the music industry, may struggle to allocate the necessary resources to implement preventative measures effectively.

---

<sup>3</sup> Bookers are people who undertake programming responsibilities and hire musicians for concerts and festivals.

The Equality and Human Rights Commission's (EHRC) advice on implementing the WPA could be improved by the addition of practical examples of how compliance operates within informal working environments with examples scaled down for small businesses to help them understand what is achievable for them.

Implemented in October 2024, the WPA may not have yet received the right level of attention and many employers, contractors and musicians might not fully understand their rights and responsibilities which could lead to breaches and a lack of reporting.

The effectiveness of the WPA depends on enforcement and accountability mechanisms. The MU would like to see an increased budget for the EHRC to enable it to undertake enforcement action and begin to investigate how industries, staffed largely by freelance workers, can comply with the act so it is truly preventative.

The MU also welcomes the strengthening of harassment protections which it hopes will be introduced by the Employment Rights Bill. Currently passing through the House of Commons, clause 18 intends to make employers liable if their employees are harassed by third parties in the course of employment.

Third-party harassment has been identified as a particular issue for MU members – 47% reported they had experienced third-party harassment (For the Love of Music, 2020). However, the Bill still lacks the necessary inclusion of freelancers which means many of our members will fall outside the scope of its protections.

### **The Creative Industries Independent Standards Authority (CIISA)**

A major development in tackling harassment and abuse in the music industries is the establishment of CIISA, a new body which has been set up to uphold and improve standards of behaviour across the creative industries. It states that its vision is to:

*... create consistently safe and inclusive workplaces for creative industry professionals through pro-active interventions and advice, providing a single place of accountability where behaviours of concern can be reported and investigated, and building capability to prevent and tackle bullying and harassment and bullying and harassment of a discriminatory nature.*

CIISA establishes a new and important mechanism to address harassment, filling the gap for freelancers and employers who do not currently have access or support to tackle issues. Whilst CIISA is still in development, once it is fully active it will offer mediation, early dispute resolution and support for individuals wishing to pursue police reports or go through the criminal justice system. CIISA's formation was backed by the WEC and it has recently provided evidence at the committee's January 2025 follow-up session at Westminster.

### **Responding to complaints**

Many of the issues facing women in music can be addressed through employment law and other legislation in the ways you would expect in an employed worker scenario. However, as much of the music industries workforce is freelance or self-employed there are a number of considerations which apply when navigating discrimination and sexual harassment claims.

When members do report discrimination and sexual harassment, both formally and informally, quite often they will experience victimisation in the form of being frozen out of the sector and not being booked for work. This is very difficult to evidence or tackle due to the informal employment practices which exist.

The extent to which MU members will have protection against discrimination depends largely on how they undertake work on a day-to-day basis. Some members may be

treated as self-employed for tax purposes but would legally be considered to be a 'worker' or 'employee' and therefore afforded protection against work-based discrimination. Where MU members have the ability to sub-contract work to other musicians (known as 'depping' in the music industry<sup>4</sup>), things may be more complicated. The MU would always investigate the true employment status of members when advising them on their rights. In addition, many members are gigging musicians working in grassroots music venues and operating across multiple workplaces in any given week, meaning that responsibility and who holds a duty of care is not fixed.

Many musicians work on their own and when issues occur, there may not be witnesses to observe or intervene to support or protect them. Informal working practices mean work arrangements may have been discussed verbally, or via messaging platforms; often there is no formal written contract.

Other issues the MU has encountered in responding to complaints have included incidents happening outside the UK's jurisdiction, historical complaints, counterclaims or complaints lacking evidence.

### ***Example 1: Venue owner***

A man who owns a music venue repeatedly sexually harasses female staff and female musicians. The man uses his position as someone who can engage musicians to stop people reporting and attempts to 'blacklist' anyone who does call him out or report his behaviour.

Factors to consider:

- The staff may be on zero hour or other casualised precarious contracts, but they could be protected under the Employment Rights Act 1996.
- The musicians in this scenario are fully self-employed or are engaged by another private business (e.g. an agency) and therefore don't have the same protections as the staff. However, there may be a responsibility on an agency.
- The new WPA may protect both the staff and musicians, by placing a greater preventative responsibility on the venue owner.
- Both the musicians and staff may be trade union members which could offer avenues for support and action.
- The venue owner has a private business, and there may be few accountability mechanisms to stop his behaviour. There are no requirements for him to continue to offer anyone work, if he chooses not to.

### ***Example 2: Record label***

Young female artist is signed to a label. The people in the label's team take control of her life and finances, won't allow her to go to the toilet alone, give her no money to live on, and move her into accommodation with them.

Factors to consider:

- While artists will usually sign a contract with a label, it is not an employment contract and the artist is not an employee.
- The contract does however legally bind them financially, and this can include not being able to claim any income until the 'loan' from the record company has been paid off. This can mean signed artists do not actually make any money for a period of years after signing their deal.
- The prospect of being offered a record deal carries weight, and so a new or young artist might be influenced by the power dynamics when negotiating its terms. This can result in artists signing exploitative contracts, such as holding rights to their creative material (as noted in cases with some high-profile musicians and bands).

---

<sup>4</sup> Depping describes the act of subcontracting work to other musicians, i.e. to deputise the role.

- Since the artist could be considered a contracted worker with self-employed status the WPA might apply, but it depends on the terms of the contract and how it defines the artist.

### **Example 3: Incidents on tour**

A musician in an orchestra is harassed by a colleague in the bar after a concert while on tour in another country. The orchestra management say the incident happened after the concert and is not their responsibility.

Factors to consider:

- Orchestras in the UK vary in their organisational structures. Some are made up of full-time, salaried musicians, with full management teams, buildings and human resources. Others may be made up entirely of freelance musicians, contracted gig to gig, or for a season of work, with no full-time personnel in place in terms of management.
- Whereas the musicians in Example 1 are considered self-employed, orchestral musicians may be 'workers' and have legal protection depending on the terms of their work for the orchestra and the nature of how they are engaged.
- Whilst the incident occurred outside of a rehearsal or concert, social aspects of orchestral working are embedded and the musicians in this case were travelling for work.
- The WPA preventative duty should mean that post-concert socialising and parameters around safety on tour are included in risk assessments, along with a clear reporting mechanism and process for the musician to report the incident.

### **Conclusion**

There are large gaps in the legislation to protect everyone who works in the music industries. This is largely due to musicians' freelance status and how this interacts with legislation and working practices, as well as a lack of human resource's support and reporting mechanisms within the sector. The examples above highlight some of the complex ways in which the music industries operate.

Whilst many of the issues MU members experience are not unique to the music industry, there are factors to consider which make discrimination and sexual harassment more likely and much harder to tackle such as late-night working, often in environments where drugs and alcohol are consumed, casual employment practices which rely on networks for employment, insecure work and short-term contracts.

Combined, these factors can support a culture of misogyny and unsafe workplaces which limit women's careers, their opportunities for progression, negatively impact their mental health and, in some cases, result in them leaving the industry altogether.

The MU is lobbying for the following legislative changes:

- An extension of the EA protections relating to discrimination and harassment, including third-party harassment, to all freelancers so that they are entitled to the same protections as individuals in the workplace.
- Implementation of s14 EA and a review of the limit of dual characteristics so that the law acknowledges that overlapping and interdependent systems of discrimination impact on people who experience sexual harassment.
- An extension of the limitation period for lodging discrimination and sexual harassment claims to at least six months.
- Legislation to make NDAs unenforceable for anything other than their original purpose i.e. the prevention of sharing confidential business information and trade secrets.

## Patterns in gender-critical belief discrimination

Peter Daly, partner at Clayton Doyle, and solicitor representing Dr Eleanor Frances in her discrimination complaint, reviews the pattern of recent litigation in gender-critical belief discrimination claims and gives his personal view on the reasons behind the trend towards settlement of these claims.

### Introduction

Claims of discrimination on the basis of gender-critical philosophical belief continue to attract coverage and controversy. It is now five years since the first employment tribunal judgment (*Forstater v CGD & Ors* ET 2200909/2019; December 18, 2019) and there have been a number of claims since then. These allow us to identify a series of patterns which have emerged, which distinguish litigation in this protected characteristic from others.

Settlement in the case of *Frances v Department of Culture, Media and Sport and the Department of Science, Innovation and Technology* (unreported; settled) attracted press coverage in January 2025. The case was brought by a civil servant alleging constructive dismissal on the basis of her gender-critical belief, and also on a separate philosophical belief in the integrity of the civil service. It settled relatively early – before disclosure – and was remarkable in the following respects: there was no confidentiality around the settlement, including its high value (the total of the schedule of loss, £116,000), and it resulted in public statements from two Whitehall permanent secretaries, committing their respective departments to significant redrawing of policies around sex and gender.

This followed settlement in the gender-critical case of *Esses v The Metanoia Institute and the UK Council of Psychotherapy* in 2024. In that settlement there was confidentiality over the financial award, but both respondents (who settled with the claimant at separate times) issued public statements acknowledging the claimant's belief. *Esses* had litigated for two years until that point, and was awaiting a listing for an EAT hearing on an interlocutory judgment. A similar settlement was also reached in 2024 in *Favaro v City, University of London*.

### The litigation approach

But prior to these 2024 settlements, the typical course of litigation had been an absence of settlement, and litigation to judgment and even to appeal. Some of these cases were very robustly litigated: *Bailey v Stonewall Equality Limited and Garden Court Chambers* ET 2202172/2020, July 25, 2022, was the subject of seven preliminary hearings, a 24-day full merits hearing and a two-day costs hearing, in which the claimant prevailed. *Forstater* had similarly significant hearing time. *Phoenix v Open University* ET 3322700/2021 & 3323841/2021, January 22, 2024, had a fourteen-day full merits hearing. *Adams v Edinburgh Rape Crisis Centre* ET/4102236/2023, May 14, 2024, was similarly lengthy. *Meade v Social Work England and Westminster City Council* ET/2200179/2022 and 2211483/2022, January 4, 2024, took ten days. Others, including *Fahmy v Arts Council England* ET/6000042/2022, June 21, 2023, were slightly shorter but still substantial.

All the claimants in these cases were successful.

### New pattern of settlements

During 2024 however, a pattern began to emerge of settlement and respondent concession. As set out above, there were a number of settlements. In *Pitt v Cambridgeshire Council* ET/3311160/2023, the respondent conceded at the beginning

of the full merits hearing. Similarly in *Bird v Liberal Democrat Party* (County Court) the defendant also conceded the claim.

What emerges then is a pattern of initially robustly-litigated claims becoming more likely to settle, and on terms which vindicate the claimant's decisions to litigate.

Another pattern which emerges is the identity of the respondents. All of the cases mentioned above were defended by public or third sector organisations – charities, universities, local authorities, think tanks and regulators. There have been almost no cases brought against strictly profit-making entities (with one exception – Garden Court Chambers in *Bailey*, returned to below).

My view is that non-profit driven entities have a greater sense of moral identity and purpose, resulting in them (a) taking greater exception to being accused of discrimination which is seen as an attack on their very identity, thus defending the claims more robustly than otherwise might be the case; and (b) identifying more strongly, on a moral and non-commercial level, with the trans community, whom they perceive to be discriminated against by the existence of gender-critical beliefs. This has led them to robustly defend claims, and to adopt confused interpretations of the law, where a more commercial approach might have led to a different assessment of the legal merits of their defence at an earlier stage and thus concession or settlement (or an avoidance of the acts relied on by the claimants in bringing their claims).

The exception to the pattern of third- and public-sector defendants is Garden Court Chambers (motto: *do right fear no one*) in *Bailey*. While obviously a profit-making entity, Garden Court is a barristers' chambers with an established and well-earned reputation for pursuing cases which advance the human rights of, often, the most disadvantaged members of society. It therefore fits the pattern of an organisation with a strong moral identity, notwithstanding its profit-driven nature

### Factors at play

What has led to this pattern? In my view, it is the following.

The first factor is the unusually high success rates for claimants. Of around 20 gender-critical claims which have reached trial since 2019, all succeeded, with only three exceptions, two of which were litigants-in-person; (there was also a fourth case which failed on jurisdiction/employment status). Analysis undertaken by Professor Jo Phoenix (the claimant in *Phoenix* and a criminology and law academic) estimated that as at May 2024, the success rate including settlements was around 84%, contrasting with successful judgments in other Equality Act 2010 (EA) jurisdictions of 8-14% and only 3% in the religion or belief discrimination jurisdiction more broadly.<sup>1</sup> While (as Phoenix acknowledges in her paper) an exact statistical analysis of all cases is not possible because of the confidentiality of some settlements, there is plainly an anomalously high success rate for gender-critical claimants.

The second factor is the high profile of the cases. This is perhaps exemplified by the latest gender-critical case, *Peggie v Fife Health Board and Dr Elizabeth Upton* which is featuring heavily in the news cycle at the time of writing. Midway through the full merits hearing in February 2025, the ET had to cut the link to observers, such was the demand on the court's cloud video platform server (there was commentary that over 1,000 members of the public had logged on to watch the proceedings). This is a pattern which has extended for several years now, with hundreds of observers present on hearings, and extensive media commentary.

<sup>1</sup> *Don't Get Caught Out: A Summary of Gender Critical Belief Discrimination Employment Tribunal Judgments*. Phoenix, Jo & Birchall, Ruth. 2024: Reading University. <https://centaur.reading.ac.uk/118472/8/Don't%20Get%20Caught%20Out%20final%20%28002%29.pdf>

What emerges then is a pattern of initially robustly-litigated claims becoming more likely to settle, and on terms which vindicate the claimant's decisions to litigate.

Linking factors one and two is the use of crowdfunding: many of these cases have crowdfunded with great success (several raising six figure contributions towards legal fees). This has resulted in greater publicity and attention as the claimants have had to raise their profiles to raise funds; and it has confounded the typical pattern of tribunal litigation, where claimants can traditionally expect to be outspent by institutional or corporate opponents, and may therefore be forced into settlement. The availability of significant funding allows claimants to access more specialist legal advice, and to be able to engage in longer trials such as those set out above.

A further factor is, in my view, a growing realisation that the received understanding of the law in this area has been mistaken. The slogan ‘*trans women are women*’ is admirably clear and straightforward, but it does not form a complete basis for compliance with the EA – a trans woman without a gender recognition certificate is legally a male for the purposes of the EA (*For Women Scotland v Scottish Ministers No.2*), Second Division, Inner House, Court of Session, [2023] CSIH 37; [2024] Briefing 1081; November 1, 2023, at para 45 (*FWS*).<sup>2</sup> Nevertheless, ‘*trans women are women*’ was accepted as an accurate statement of the EA, and the basis for workplace policies and procedures for many years (and continues to be so, by some).

This is one example of mistaken understanding in this area, the full extent of which remains necessarily obscured. The pending Supreme Court judgment in *For Women Scotland v The Scottish Ministers (No. 2)* UKSC/2024/0042 may go some way to clear up the confusion. But there has been confusion around the meaning of ‘sex’ in the EA, and as a consequence confusion on the obligations on employers and service providers towards people with the protected characteristic of gender reassignment, single sex services, and the extent to which gender-critical beliefs are protected at law.

As each claimant in these claims has succeeded, there has been growing realisation among respondents in other cases that their litigation position was perhaps not as robust as they had originally thought, hence necessitating settlement or concession.

The final factor is that there has been a shift in public opinion. YouGov polling released in January 2025 shows that there has been a significant change of opinion among the public on questions relevant to sex and gender over recent years. For example, a majority of respondents now agree with the classically gender-critical proposition that transgender women should **not** be able to use women’s changing rooms, whereas a majority disagreed in 2022. Whether this is a direct consequence of the success of gender critical litigants is impossible to say; but public opinion reflects in how organisations run themselves as much as it reflects in polling. It seems logical that, as opinions shift in this area, so too does the appetite that employers may have for litigating against what is now a popularly held set of opinions.

### Next steps?

What comes next? The SC in *FWS* ought to clarify the law yet further. A resolution of the ‘gender wars’ may or may not be possible, but there is a clear recent pattern of respondents losing their appetite to litigate claims, and a long-term pattern of anomalous levels of success for gender-critical claimants who do litigate. If clarity in the law results in a reduction in the frequency of discriminatory conduct against those with gender-critical beliefs, then there will be a reduction in the frequency of resulting claims; and if there is not, it seems reasonable to assume that the recent pattern of significant and expensive settlements will continue.

<sup>2</sup> This point was not taken on appeal to the SC, so remains good law regardless of the outcome of the pending SC judgment.

**The pending SC judgment in *For Women Scotland v The Scottish Ministers (No. 2)* may go some way to clear up the confusion.**



## Manifestation of belief – use of social media

*Higgs v Farmor’s School* [2025] EWCA 109, February 12, 2025

### Implications for practitioners

Detrimental action because of a protected belief is likely to be unlawful but it is not unlawful discrimination to act in response to a justified objection to the manner of expression of a protected belief.

### Facts

Mrs Kirstie Higgs (KH) was a support worker at Farmor’s School (FS) (a secondary school). She made what the ET described as ‘*florid and provocative*’ posts on social media related to relationships education in primary schools and LGBT matters.

FS received a complaint about KH’s posts; following an investigation and a disciplinary hearing, she was summarily dismissed on the ground of gross misconduct. Her appeal against that decision was dismissed.

### Employment Tribunal

KH lodged complaints of direct discrimination because of her religion or belief and/or harassment relating to her religion or belief. Her protected beliefs were a lack of belief in:

- gender fluidity
- that someone could change their sex
- same-sex marriage.

And a belief in:

- marriage as a divine union between one man and one woman
- opposition to sex/relationship education for primary school children
- the literal truth of the Bible, and
- the obligation to speak out when unbiblical ideas are promoted.

The ET found her dismissal not discriminatory in respect of her beliefs because the school reasonably believed that her social media posts could be read as showing her to have homophobic and transphobic views (which KH denied holding).

### Employment Appeal Tribunal

KH appealed on a number of grounds.

The EAT President, Mrs Justice Eady DBE, remitted the case to the ET.<sup>1</sup>

She found that the ET had failed to engage with the question in *Eweida v United Kingdom* [2013] 57 EHRR 8; [2013] Briefing 663, and should have concluded that there was a close or direct nexus with KH’s beliefs and her posts on social media.

That being so, the question was whether FS’s actions were *because of* KH’s protected beliefs, or in fact due to a justified objection to the manner of expression or manifestation of those beliefs (see *Page v NHS Trust Development Authority* [2021] EWCA Civ 255). Answering that question required the ET to assess whether FS’s actions were prescribed by law and were necessary for the protection of the rights and freedoms others, recognising the essential nature of KH’s rights under the European Convention

<sup>1</sup> [2023] EAT 89, July 16, 2023; [2023] Briefing 1069

of Human Rights, particularly Articles 9 (belief) and 10 (manifestation of belief). This required a proportionality assessment *Bank Mellat v HM Treasury (No.2)* [2014] AC 700.

The President gave guidance for employers on the principles to be adopted in assessing such cases in future:

1. Free speech is a fundamental right in a democracy, even where that speech may not be popular or mainstream or may offend.
2. Manifestation of belief is protected except where the law permits limitation of expression to the extent necessary for the protection of the rights of others. Where that limitation of expression is objectively justified given the manner of manifestation, that limitation is not action taken because of the protected rights but because of the objectionable nature of the manifestation.
3. Whether a limitation is objectively justified will be context specific.
4. It will always be necessary to ask:
  - is the objective sufficiently important to justify the restriction
  - whether the restriction is rationally connected to the objective
  - could a less intrusive limitation achieve the objective, and
  - whether the importance of the objective out-balances the effect on the worker?
5. In the context of a working relationship the following factors are likely to be relevant to the balancing exercise to be carried out:
  - the manifestation
  - its tone
  - its extent
  - the likely audience
  - the intrusion on the rights of others and the employer's business
  - whether the manifestation is clearly personal or might be seen as representing the business, and
  - the potential power imbalance between the parties.

**Manifestation of belief is protected except where the law permits limitation of expression to the extent necessary for the protection of the rights of others.**

---

### **Court of Appeal**

KH appealed on the basis that the EAT was wrong to have remitted her claim; rather it should have found her claim to have succeeded and been remitted for remedy only.

Interventions were permitted by the Archbishops' Council of the Church of England, the Free Speech Union, the Association of Christian Teachers, Sex Matters, and the Equality and Human Rights Commission.

The CA extensively reviewed recent case law related to free speech, ECHR Articles 9 and 10, in particular *Page*.

It found that KH's dismissal for her manifestation of her belief was 'undoubtedly disproportionate', relying particularly on the following:

- the language used was not grossly offensive;
- the language was not primarily intended to incite hatred but was rather better characterized as derogatory sneers;
- the language, which was mostly quoted from other sources, was not the claimant's own and she made clear she disagreed with it;
- there was no evidence of reputational damage to the school, rather the concern was potential future damage;
- the school did not believe that KH's views would influence her work;

- the court did not find KH's apparent lack of insight into her actions particularly significant.

The CA held that the EAT was wrong to have remitted her dismissal claim; it held that her dismissal constituted unlawful belief discrimination.

However the CA maintained the remission of the discrimination claim founded on KH's complaint about having been subjected to a disciplinary process, stating that it had 'no doubt that the School was entitled to carry out an investigation of some kind'.

### Comment

Taken together with *Sutcliffe*, also reported in this edition (see Briefing 1124), these cases provide useful guidance on the distinction between private behaviour and behaviour an employer may legitimately seek to control or react to.

The final comment in the judgment, from Falk LJ in her short judgment concurring with the leading judgment of Underhill LJ, states:

*For example, something that might be unproblematic on a private Facebook page could justify different treatment if communicated in a work setting.*

**Robin Moira White**  
Old Square Chambers

## Discrimination Law Association's conference 2025

Booking is now open for the DLA's annual conference 2025 to be held online on Friday, March 7, 2025. Click [here](#) to book your place.

*In an ever-changing world, this year's DLA conference looks into the future of equality and asks: is the challenge of discrimination today increasingly more important than we've seen in the past?*

Attendees will:

- Explore the new changes to the employers' duty to protect staff from sexual harassment at work;
- Learn how the most vulnerable are being supported in our legal system during an access to justice crisis;
- Consider discrimination in welfare benefits and assess ways to prevent discrimination in housing and disability accessibility situations, without the need of legislation, and
- Be advised, and ask questions on, the latest developments on the increasing use of AI and its potential to discriminate.

You can find full details of the programme [here](#)

Book your place [here!](#)

## Statistical evidence and choice of comparator in direct discrimination cases

*Karim v The General Medical Council* ♦ [2024] EWCA Civ 770; July 9, 2024

### Implications for practitioners

This case serves as an important reminder that, in cases of direct discrimination, the claimant's case must not be materially different to the comparator's. Additionally, any statistical evidence relied on by the claimant to prove unconscious discrimination must clearly relate to the alleged discriminatory acts. It is also useful as a reminder that ETs do have jurisdiction to consider discrimination complaints against regulatory bodies such as the General Medical Council (GMC).

### Facts

Mr Omer Karim (OK) was a consultant urological surgeon who describes himself as mixed race, Black African/European. He and two colleagues (one of whom was white) were the subject of an investigation by the GMC. OK's white colleague, Mr Laniado (L), was exonerated by a Medical Practitioners' Tribunal in 2015. OK, however, was only exonerated in April 2018, after a delay of three and a half years.

As a regulator, the GMC is a 'qualifications body' for the purposes of the Equality Act 2010 (EA). OK brought a direct race discrimination claim against the GMC based on the length and conduct of his investigation compared to L's.

### Employment Tribunal

The ET upheld four of OK's twenty race discrimination complaints. Three were related to decisions made by the GMC during its investigation of OK's case compared to those made in its investigation of L's case. The fourth related to the prolonged delay in the GMC's investigation in relation to OK.

In its reasoning, the ET concluded that any differences between OK's and L's cases were not material, without explaining why.

In relation to the delay complaint, the ET noted statistics showing that Black and minority ethnic (BME) doctors were disproportionately likely to be complained about and to be given a sanction or warning. According to the ET, BME doctors were 29% of all UK doctors but featured in 42% of complaints. The ET also noted that UK graduate BME doctors were 50% more likely to get a sanction or warning than white doctors.

### Employment Appeal Tribunal

The GMC appealed arguing that the ET:

1. should not have treated L as an appropriate comparator after finding that there were material differences in L's and OK's cases;
2. erred in its approach to whether the GMC had shown facts sufficient to shift the burden of proof, or, if it had shifted, whether it had been discharged;
3. failed to give adequate reasons for some conclusions, including reaching some which were incomprehensible or contradictory; and
4. reached some conclusions which were perverse or erroneous because they were unsupported by evidence, contrary to the evidence or, on certain points, based on a misunderstanding or confusion about the evidence.

♦ [2024] IRLR 833

The EAT held that the ET:

1. made some conflicting and contradictory findings;
2. failed to explain why important aspects of the GMC's defence were unsuccessful; and
3. used too broad a brush when describing its conclusions on the question of which particular race discrimination complaints were upheld.

The EAT allowed the appeal, remitting the matter for consideration by a differently constituted ET. The EAT restricted the remittal to the four direct race discrimination complaints upheld by the ET.

### **Court of Appeal**

OK appealed against the EAT's decision on the grounds that the ET's judgment was clear, sufficiently explained and reasoned, consistent, and had engaged with the GMC's case.

The CA reiterated the standards laid down in the case law cited by Elias J in *Law Society v Bahl* [2003] IRLR 640 on the obligation of the ET to give clear reasons for its decisions.

The CA ultimately concluded that the ET's reasoning in upholding the delay complaint was not *Meek*-compliant (i.e. the parties should know why they have won or lost), and did not meet the *Bahl* standards. The court pointed to the misinterpretation or misuse of the statistical evidence which related to proportionate numbers of complaints and to outcomes and sanctions, not to delays. Therefore, the ET could not reasonably have inferred from the statistical evidence that unconscious race discrimination was a factor behind the significant delay in the GMC's investigation of OK's case compared to its investigation of L's case.

Furthermore, the CA held that the ET did not make a clear finding that the differences between OK's and L's cases were not material. Unless the cases of a claimant and any comparator are identical, an ET making a decision of this kind must set out such differences as there are and explain why they are not material.

### **Comment**

ETs must take great care when drawing inferences of unconscious discrimination from statistical evidence. Any statistical evidence relied on must relate to the alleged discriminatory acts. Where a respondent has put forward what it says was the non-discriminatory explanation for the conduct in question, an ET must engage with that case in relation to that particular conduct. Otherwise, a judgment will be deemed *Meek* non-compliant.

Furthermore, in direct discrimination cases, an ET must make a clear finding regarding whether any differences between the claimant's and comparator's cases are material or not. It is rare that a claimant's circumstances will be identical in all aspects to a comparator's. ETs should, therefore, take care to explain any differences and whether or not, in the tribunal's view, they are material.

**Austin Clavane**

Trainee solicitor, Leigh Day

[AClavane@leighday.co.uk](mailto:AClavane@leighday.co.uk)

## ‘Related to’ – a broad pragmatic concept

*Carozzi v University of Hertfordshire & another* ♦ [2024] EAT 169; October 9, 2024

### Facts

The claimant, Elaine Carozzi (EC), was employed by Hertfordshire University’s School of Creative Arts (the University) as a marketing, engagement and partnerships manager. She was still within a six-month probationary period which had been extended twice when she resigned claiming constructive dismissal, direct religious discrimination, direct race discrimination because of Brazilian nationality or Jewish ethnic origin, harassment and victimisation. There were many allegations, with 36 separate complaints of detrimental treatment.

A core complaint, one of two substantive complaints considered on appeal, was that of harassment related to her *‘strong accent’*. The second was whether a refusal to provide notes of a relevant meeting was victimisation. Both grounds succeeded on appeal, being remitted to a fresh employment tribunal for re-hearing. Although a bias or procedural unfairness ground of appeal did not succeed, the EAT used the EJ’s demonstration of *‘such a firm initial view’* as a factor in remitting to a fresh tribunal [para 48].

Factual details are in the ET’s decision under case numbers 3313342/2019 and 3304194/2020. However, the EAT observed that the erroneous approach the ET took to harassment was *‘so significant that all of the decisions in respect of the complaint concerning [C’s] accent are unsafe and require redetermination’* [para 29]. Caution is required.

### Employment Tribunal

The ET in a 136-page decision dismissed all EC’s complaints.

On harassment, it quoted s26 Equality Act 2010 (EA) and went on to explain its understanding of what is meant by *‘related to’*. The ET found that s26 required a mental element as much as a direct discrimination claim requires. In doing so, the tribunal relied on passages from *Unite the Union v Nailard* [2018] EWCA Civ 1203, [2018] IRLR 730, which the EAT subsequently found to be a fundamental misunderstanding of the test and of *Nailard*.

The ET also noted *Sheffield City Council v Norouzi* [2011] IRLR 897, where the EAT had said: *‘To mock a racial characteristic seems to us plainly analogous with overtly racial abuse.’* However, it concluded that the University’s references to EC’s accent *‘had nothing whatsoever to do with [C’s] race in the sense that motivation ... for making them was in no way or to no extent [C’s] race. They were all to do with [C’s] intelligibility or comprehensibility when communicating orally.’* [para 21] (emphasis added by author).

In dismissing the victimisation claim about the failure to provide notes of a meeting, the ET concluded that the University would have done the same with any other employee who had indicated an intention to make a claim, such as constructive dismissal, which did not include a claim of a breach of the EA.

### Employment Appeal Tribunal

The EAT noted that s26 EA *‘focuses on the dignity of the individual and the right of a person not to have their dignity violated. It is a pragmatic provision that seeks to balance competing factors...’* [para 14]

♦ [2025] IRLR 179

Section 26 EA harassment:

1) A person (A) harasses another (B) if –

- a) A engages in unwanted conduct related to a relevant protected characteristic and
- b) the conduct has the purpose or effect of –
  - i) violating B's dignity, or
  - ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

...

4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

- a) the perception of B;
- b) the other circumstances of the case;
- c) whether it is reasonable for the conduct to have that effect.

The term 'related to' is designed to cover all forms of conduct which 'properly viewed, has a relationship to the protected characteristic'. [para 15] It is designed to have a relatively broad meaning. The balance between the competing interests is not achieved by applying a limited meaning to 'conduct related to a protected characteristic'. [para 17]

... the ET erred in law in its approach to the concept of treatment related to a protected characteristic. There is no requirement for a mental element equivalent to that in a claim of direct discrimination.

The limitations are that the conduct must be unwanted and have the purpose or effect of violating dignity. Where conduct has that effect (but not that purpose) the ET must go on to consider the other factors in s26 EA, i.e. the worker's perception, the other circumstances and whether it is reasonable for the conduct to have that effect. Noting that one can be expected to take greater care in how one speaks and behaves at work than one might in social life, and that it is in no-one's interest that colleagues walk on eggshells, the EAT observed that 'it is also important that proper protection is provided against violation of dignity at work'. [para 17]

Having reviewed the core authorities and the ET reasoning, the EAT held that the ET erred in law in its approach to the concept of treatment related to a protected characteristic. There is no requirement for a mental element equivalent to that in a claim of direct discrimination. Treatment 'because of' a protected characteristic may well relate to that characteristic but is not the only way in which conduct may be related to that characteristic [para 24].

The unknowing use of an offensive word does not prevent that word from being related to the protected characteristic. Depending on the factors in s26(4) EA, the use of that word would be harassment under s26 [para 25].

Noting that 'an accent may be an important part of a person's national or ethnic identity', comments about it could be related to the protected characteristic, and criticism could violate dignity. 'Obviously, that does not mean that any mention of a person's accent will amount to harassment' – all depends on how the s26(4) EA elements apply [para 26].

On victimisation, the ET, despite referring to *Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] IRLR 830, which identifies the correct comparator as a person who had requested a reference and not someone who had both requested a reference and had made a complaint which did not amount to a protected act, the ET wrongly used the latter comparator [paras 31, 32].

The EAT held that the correct question for the ET was whether the decision not to provide the notes was influenced to a material degree by the fact that a complaint of unlawful discrimination had been or might be made [para 36].

The EAT remitted the race harassment complaint related to EC's accent and one aspect of her complaint of victimisation to a differently constituted ET.

### **Comment**

The ET's approach here is of a type often described as 'salami slicing' or relying on a reason to explain the core reason for treatment (also known as 'motivation' in the wrong sense). As such, if dealing with a similar defence, it will be helpful to use both *Carozzi* and Underhill LJ's summary of his reasoning at paragraph 175 of the CA's recent decision in *Higgs v Farmor's School* [2025] EWCA Civ 109 (reported in this edition, see Briefing 1117).

### **Implications for practitioners**

- The concept of 'related to' is wide, so make no assumptions about what might or might not come within the scope of s26 EA.
- The reason for the treatment is core and is what counts. Here, the University in substance as part of its mistaken understanding of the 'related to' test, explained why that reason was not 'because of' a discrimination complaint. Intelligibility when communicating orally does not break the link between protected characteristic and the conduct. At issue will be whether the reason can break a link – for a discussion about that, see *Higgs*.
- *Khan* identifies the correct comparator – go to the simplest version. It is not a defence to say that a claimant would equally have been victimised if they had done some other act – see *Carozzi* [para 34].
- Always follow the structure of the questions posed by the relevant regulations. Had the ET followed the steps required by s26 EA, it would or should have seen that a mental element is required only where the purpose of the conduct is to achieve the prohibited effect.

**Sally Robertson**

**Cloisters**



# Unauthorised absence policy was not indirectly discriminatory

NSL Ltd v Mr P Zaluski [2024] EAT 86; June 5, 2024

## Implications for practitioners

This case is an important reminder that when considering the objective justification of a provision, criterion or practice (PCP), the focus must be on the impact the PCP has on the group and not the individual's circumstances.

## Facts

Mr P Zaluski (PZ) worked as a parking enforcement officer for NSL Ltd (NSL) on a contract with the London Borough of Wandsworth. PZ is of Polish nationality and origin. During the pandemic, NSL had an absence policy requiring staff to factor in any period of quarantine when requesting authorised leave, and stipulating that staff must return from their leave on the pre-authorised date. Unauthorised absence of over three days was liable to be classed as gross misconduct.

In January 2020, PZ took unauthorised leave when he travelled to Poland following the death of his mother-in-law. No action was taken on his return as he had a 'good excuse'.

In August 2020, PZ requested three-weeks' leave to go to Poland but only the first and third week were approved. As a result of sickness, PZ returned from his absence in November 2020. Mr M Shaw (MS) instigated disciplinary action as he suspected PZ had planned to take the refused leave anyway. On a review of the medical evidence, the disciplinary manager concluded the unauthorised absence was not a disciplinary issue.

Following his father's death in December 2020, PZ requested three weeks' leave to arrange and attend his funeral. MS granted leave from February 19 to March 15, 2021. While in Poland, PZ sought to extend his leave to account for mandatory quarantine in the country (which he did not anticipate undertaking) and the UK. MS refused his request and sent various emails to PZ threatening disciplinary action if he did not return on March 15, 2021. Despite this, PZ returned to work on April 6, 2021.

PZ was issued a final written warning under NSL's disciplinary procedure by Mr P Boxall who considered that PZ failed to keep MS sufficiently informed of his circumstances, and that PZ was going to do what he did irrespective of MS.

Two other colleagues from Goa also travelled to visit family at this time and received a final warning for their unauthorised absence caused by quarantine restrictions.

## Employment Tribunal

PZ issued claims against NSL for direct discrimination, indirect discrimination, and harassment related to race. He succeeded in his claims for indirect discrimination and harassment related to race.

### *Indirect race discrimination*

The ET accepted that the applicable PCP was the requirement for quarantine to be included in any authorised leave period and to return to work at the end of the authorised period, irrespective of unforeseen events arising from the pandemic.

Considering three non-UK nationals were also disadvantaged by the policy, the ET concluded the policy put non-UK nationals at a particular disadvantage. They would be more likely to travel overseas for family emergencies or to visit family compared to someone of UK origin.

Although the ET found NSL had the legitimate aim of ensuring its contract with Wandsworth was fulfilled, it did not consider the policy to be a proportionate means of achieving that aim and so was not objectively justified. The policy put PZ in an impracticable position where he could not achieve what he wanted to during his compassionate leave within the authorised leave period. The ET suggested more proportionate means included recruiting agency staff or managing the allocation of leave entitlement to avoid the build-up of absences at the end of the leave year.

The ET made an award for injury to feelings and aggravated damages on the basis that NSL refused to compensate PZ for taking unpaid leave to attend the tribunal hearing, whilst paying its line managers for their attendance.

#### ***Harassment relating to race***

The ET concluded that MS's four emails to PZ threatening disciplinary action amounted to unwanted conduct. As the conduct arose in the context of PZ being a foreign national travelling home and MS's holding a prejudicial view that he had a history of not returning on his authorised leave date, it held the harassment was related to race. Pressuring PZ to return to work before he could arrange and attend his father's funeral created a hostile and intimidating environment for PZ and was regarded as an inappropriate abuse of power.

#### ***Direct discrimination***

The claim for direct discrimination failed as ET could not conclude that a UK national in the same position travelling abroad for a family bereavement would have been treated differently to PZ.

#### **Employment Appeal Tribunal**

NSL appealed the findings that (a) the indirect discrimination was not justified and (b) the harassment related to race. It also appealed the award of aggravated damages.

The EAT upheld the appeal on indirect discrimination. When considering proportionality, it was an error to focus on PZ's particular circumstances rather than the impact of the PCP on the group. For example, the ET erred by factoring into its decision its view of whether the leave granted was sufficient for the claimant's purposes. The ET must also carry out a careful balancing exercise between the impact of the PCP on the group and NSL's business needs when considering more proportionate means.

The ET's finding of harassment relating to race was upheld by the EAT. The ET was entitled to conclude that PZ's Polish nationality contributed to MS's prejudicial view of him, which led to the threatening emails.

Finally, the appeal against the award of aggravated damages succeeded. The ET erred in treating MS's paid attendance at the hearing as being capable of triggering an award of aggravated damages. There was no finding of fact that his presence caused PZ any distress.

The matter was remitted to a different tribunal for reconsideration.

#### **Comment**

The EAT's decision reiterates the requirement to carry out a detailed balancing exercise when considering proportionality. There must be a careful assessment of the impact of any proposed alternative means of achieving the legitimate aims against the business's needs and the disadvantaged group, not the individual. Although the EAT notes there was no specific evidence put before the ET as to why alternative means would not be a reasonable or viable option, it would be prudent for a respondent to provide evidence when making such a case.

**Angela Nguyen**

**Associate Solicitor, Leigh Day**

**There must be a careful assessment of the impact of any proposed alternative means of achieving the legitimate aims against the business's needs and the disadvantaged group, not the individual.**

## Discrimination on the grounds of religion and belief

*Thomas v Surrey and Borders Partnership NHS Foundation Trust & Ors* ♦ [2024] EAT 141; September 5, 2024

### Implications for practitioners

This ruling reaffirms the position that for philosophical beliefs to be protected under s10 of the Equality Act 2010 (EA), all five criteria set out in *Grainger Plc v Nicholson*,<sup>1</sup> must be met.

Whilst employees are entitled to freedom of speech under Article 10 of the European Convention on Human Rights (ECHR), the fifth criterion in *Grainger* provides that a philosophical belief must be worthy of respect in a democratic society; it must not be incompatible with human dignity or conflict with the fundamental rights of others.

This case also demonstrates that Article 17 ECHR, which prohibits activities aimed at the destruction of Convention rights and freedoms, can be relied upon to prevent the misuse of Article 10 as a justification for discrimination.

### Facts

Mr S Thomas (ST) had been employed through an agency to deliver consultancy services to Surrey and Borders Partnership NHS Foundation Trust (the Trust) for three months.

Shortly before the contract ended, the agency informed ST that his assignment had been terminated due to his failure to declare an unspent criminal conviction for electoral fraud.

ST argued the real reason for his dismissal was due to his political affiliation with the English Democrats party and his belief in English nationalism, which included anti-Islamic views.

As a result, ST filed a claim alleging belief discrimination under s10 EA. He contended that his English nationalism beliefs should be protected, given his personal investment of money, time and image relating to this belief.

### Employment Tribunal

The ET held a preliminary hearing to determine if ST's beliefs were protected beliefs under the EA.

The tribunal applied the criteria established in *Grainger*, which states for a belief or religion to be protected under the EA:

1. the belief must be genuinely held;
2. it must be a belief and not an opinion or viewpoint based on the present state of information available;
3. it must be a belief as to a weighty and substantial aspect of human life and behaviour;
4. it must attain a certain level of cogency, seriousness, cohesion and importance;
5. it must be worthy of respect in a democratic society, not incompatible with human dignity and not conflict with the fundamental rights of others.

♦ [2024] IRLR 938

<sup>1</sup> [2010] 2 All ER 253; [2009] 11 WLUK 14; [2009] Briefing 549

While the ET did acknowledge that some political beliefs, including English nationalism, could be protected, it ruled that the extent of ST's beliefs exceeded the threshold for s10 EA protection.

Evidence at the cross examination showed that ST would make regular social media posts and statements which included that all Muslims should be forcibly removed from the UK, and used the hashtag '*RemoveAllMuslims*.'

As ST's belief in English nationalism encompassed extreme anti-Islamic sentiments, the ET found his beliefs incompatible with human dignity and in conflict with the fundamental rights of others, further failing to satisfy the fifth *Grainger* criterion.

### Employment Appeal Tribunal

ST appealed the decision, arguing that the threshold for the fifth criterion had been lowered in *Forstater v CGD Europe*.<sup>2</sup> He contended that *Forstater* established that only extreme beliefs which incite hatred, such as totalitarianism or Nazism, would fall outside the scope of protection and beliefs which are controversial or fall into lesser forms of hate speech would not be excluded.

ST further argued that the tribunal's approach did not give sufficient consideration to his freedom of speech.

However, the EAT dismissed ST's appeal and upheld the ET's decision, confirming that the *Forstater* ruling did not determine a '*lower threshold*' [para 91]. Instead, it clarified that the fifth *Grainger* criterion was designed to give effect to Article 17 ECHR [para 92].

The EAT found that ST's beliefs were not only controversial but were also specifically targeted toward an entire religious group which amounted to a '*disdainful and prejudiced focus on Islam*.' [para 108] As such, his views sought to undermine the rights of others, which was in direct conflict with the principles of equality which Article 17 upholds. Consequently, the EAT determined that ST could not rely on Article 10 ECHR to justify beliefs which promoted discrimination.

It was also argued that the judge's reasoning was inconsistent. The ET had found that ST's beliefs did not directly infringe the rights of Muslims, yet they were still deemed unworthy of being protected under s10 EA.

However, the EAT ruled that this inconsistency did not amount to an error of law. It clarified that ST was not prevented from holding these beliefs, but he could not claim discrimination in relation to those beliefs.

**Ahilya Gurung**

**Paralegal, Leigh Day**

[AGurung@leighday.co.uk](mailto:AGurung@leighday.co.uk)

... the *Forstater* ruling did not determine a '*lower threshold*'. Instead, it clarified that the fifth *Grainger* criterion was designed to give effect to Article 17 ECHR.

<sup>2</sup> [2022] ICR 1; [2021] 6 WLUK 10; [2021] Briefing 998

## EAT considers the criteria for proving continuing discriminatory conduct to ensure claims are pursued in time

*Worcester Health and Care NHS Trust v Allen* [2024] EAT 40; March 19, 2024

### Facts

Ms Angela Allen (AA) was employed by Worcestershire Health and Care NHS Trust (the Trust). During a restructuring process, the Trust informed AA that her role would cease to exist and offered her an alternative role at a lower pay grade, which she declined.

AA claimed that she had been discriminated against due to her age and disability. She raised a grievance about the restructuring exercise and an occupational health referral form which asked for the medical adviser's opinion on her '*retirement due to ill health*'.

AA went off sick, which she attributed in part to the restructure; she was dismissed by the Trust because of her sickness-related absences.

### Employment Tribunal

AA brought several successful complaints of age and disability discrimination against the Trust.

The ET concluded that AA's dismissal was an act of discrimination because of something arising in consequence of disability pursuant to s15 of the Equality Act 2010 (EA) as the dismissal was due to disability-related absence.

The ET determined that the action by AA's manager to tick a box on the occupational health referral form asking the medical adviser to comment on her '*retirement due to ill health*' was age-related harassment under s26 EA. Taking into account the restructuring process, AA's age and her long service, the tribunal found that it was reasonable for her to find her manager's action offensive and degrading.

The Trust argued that the action was unrelated to age. However, the ET rejected the argument, stating that both AA and the medical adviser perceived it as being related to age. The ET held that whilst this constituted age-related harassment, it did not also represent direct age discrimination under s112 EA.

AA also succeeded in her claim that the outcome of her grievance was predetermined and that this constituted an act of age-related harassment under s26 EA.

The only incident which fell within the three-month limitation period for bringing a claim under s123 EA was AA's dismissal. The ET determined that the other two incidents (the occupational health referral form and the predetermination of the grievance outcome) were part of '*conduct extending over a period*' along with the dismissal and therefore the limitation period ran from the date of the last incident in accordance with s123(3) EA.

The ET held that the three incidents all related to the restructuring process and proposed removal of AA's role and as such were inextricably linked with each other.

### Employment Appeal Tribunal

The Trust appealed the ET decision on two grounds and succeeded on both.

**To qualify as 'conduct extending over a period', the conduct must involve ongoing discriminatory conduct, rather than a series of separate or unconnected complaints.**

---

The first ground of appeal was that the outcome of the grievance was not predetermined, and did not constitute age-related harassment. The EAT held that the predetermination of the grievance was not discriminatory. It concluded that for conduct to be deemed harassment under s26 EA, the conduct in question must be related to a protected characteristic (age in AA's case). Although AA's grievance did contain an allegation of age discrimination, the EAT found no evidence which linked AA's age to the alleged predetermination. In order for the grievance to have been pre-determined on the basis of age, the predetermination had to constitute 'conduct' which had to be 'related to' age. The EAT found there was no evidence (such as ageist behaviour or language) which would support that.

The second ground of appeal was that AA's dismissal was not 'conduct extending over a period' connected to AA's age or disability discrimination complaints. The EAT stated that:

*... for there to be conduct extending over a period there must have been ongoing discriminatory conduct. It is not enough that incidents are linked, and later events would not have occurred but for the earlier events, there must be something in the conduct that involves continuing discrimination. [para 31]*

The EAT found that multiple individuals were involved in the alleged acts of age discrimination and in AA's dismissal. It determined that:

*Those who decided to dismiss the claimant had nothing to do with the decision to tick the ill health retirement box in the medical referral. There was a substantial gap between these two events, and they involved different types of prohibited conduct, two different protected characteristics and decisions by different people. While none of those factors precluded the possibility of there being conduct extending over a period, it would have been necessary for the Employment Tribunal to clearly identify what the continuing discriminatory conduct was. [para 32]*

As the ET did not clearly identify anything which could establish what the continuing discriminatory conduct was, the EAT overturned the ET's decision that the two earlier incidents formed part of 'conduct extending over a period'.

### **Implications for practitioners**

The EAT's decision highlights that multiple incidents over a period of time do not automatically constitute a continuing act of discrimination for the purposes of establishing whether a claim has been brought in time under s123(3) EA. To qualify as 'conduct extending over a period', the conduct must involve ongoing discriminatory conduct, rather than a series of separate or unconnected complaints.

When reviewing grievances containing allegations of discrimination, practitioners should carefully consider whether there is any evidence to support the allegations and whether there is a clear connection between the alleged acts of discrimination.

**Ioana Jelea**  
 Solicitor, Magrath Sheldrick  
[ioana.jelea@magrath.co.uk](mailto:ioana.jelea@magrath.co.uk)

## A new class of claimant in discrimination law

*British Airways Plc v Rollett & Others* ♦ [2024] EAT 131; August 15, 2024

### Implications for practitioners

It is no longer a requirement for a claimant bringing an indirect discrimination claim to have a relevant protected characteristic. All that is needed is a provision, criterion or practice (PCP) which puts a group with a relevant protected characteristic at a particular disadvantage, and for the claimant to be put at the same disadvantage as the group.

### Facts

The claimants, who numbered 49 at the time of the original preliminary hearing, were Heathrow-based cabin crew. Their claims arose out of restructuring and scheduling changes undertaken by BA in response to the Covid-19 pandemic.

The claimants alleged that the scheduling changes put those (predominantly non-British nationals) who lived abroad and commuted to Heathrow from abroad, at a particular disadvantage compared to those who commuted from within the UK. Likewise, the claimants alleged that the changes put those (predominantly women) with caring responsibilities at a particular disadvantage compared with those who did not have caring responsibilities.

The claims were pursued both by claimants who had the relevant protected characteristics (from the examples above: non-British nationals and women), and those who did not.

Those who had the relevant protected characteristics brought claims for what could be described as 'ordinary' indirect discrimination. Those without the relevant protected characteristics brought claims for what could be described 'same disadvantage' indirect discrimination.

### Employment Tribunal

EJ Anstis concluded that the tribunal had jurisdiction to consider indirect discrimination claims under s19 Equality Act 2010 (EA) where a PCP applied by an employer puts people with a particular protected characteristic at a disadvantage, and where the claimant suffers that disadvantage but does not have the same protected characteristic as the disadvantaged group. He came to this conclusion by relying on the decision of the Court of Justice of the European Union in *CHEZ Razpredelenie Bulgaria AD v Komisia za zashita ot diskriminatsia* Case C-83/14; [2015] IRLR 746; [2015] Briefing 762. (He rejected any other type of unlawful discrimination based on 'association').

### Employment Appeal Tribunal

BA appealed the ET's decision, contending that its interpretation went '*against the grain of the legislation*', and created '*an entirely new category*' of claimant. The appeal was heard by Mrs Justice Eady, then President of the EAT.

The EAT dismissed BA's appeal, holding that the ET made no error of law in concluding that it had jurisdiction to consider indirect discrimination claims under s19 EA.

♦ [2024] IRLR 891

In her judgment, Eady P first set out the history and context of domestic equality legislation and the associated EU directives, up to and including the introduction of

the EA. She cited the observation of Baroness Hale in *Essop & Others v Home Office (UK Border Agency) and Naeem v Secretary of State for Justice* [2017] UKSC 27; [2017] 1 WLR 1343; [2017] Briefing 830 that the ‘*whole trend of equality legislation since it began in the 1970s has been to reinforce the protection given to the principle of equal treatment.*’ [para 18]

Eady P then observed that there was ‘little dispute’ between the parties that the effect of *CHEZ* (a judgment concerning the interpretation of the Race Directive) was to extend indirect discrimination to those who did not share the same protected characteristic as the disadvantaged group [para 23].

Next, Eady P set out the well-known ‘Marleasing principle’: that member states are required to interpret national law ‘*as far as possible*’ in accordance with the wording and purpose of the relevant EU directives [para 24]. She outlined the limits on the interpretive obligation: namely, that the proposed interpretation should ‘*go with the grain of the legislation*’ and should be ‘*compatible with the underlying thrust of the legislation*’. It should not be ‘*inconsistent with a fundamental or cardinal feature of the legislation*’. [para 25]

... the effect of *CHEZ*  
... was to extend  
indirect discrimination  
to those who  
did not share the  
same protected  
characteristic as the  
disadvantaged group.

In drawing these threads together, Eady P noted that the ‘grain’ of the EA is clear: ‘*it seeks to harmonise discrimination law and to strengthen the law to support progress on equality*’. [para 53] While acknowledging that allowing a claimant without a relevant protected characteristic to bring a claim under s19 ‘*would undoubtedly amount to an extension of the protection*’, Eady P concluded:

*I am unable to see that the extension to that protection arising from the ET’s construction of section 19 can be said to go against the grain of the legislation; on the contrary, it seems to me to be entirely consistent with a statute that seeks to harmonise discrimination law and to strengthen the law to support progress on equality...* [para 61]

### Comment

Claimants can rely on *Rollett* to bring ‘same disadvantage’ claims for indirect discrimination where the cause of action arose before January 1, 2024. From that date onwards, the supremacy of EU law (and therefore claimants’ ability to rely on *CHEZ*) has been removed by the Retained EU Law (Revocation and Reform) Act 2023.

However, crucially, ‘same disadvantage’ indirect discrimination has been preserved in the new s19A EA, inserted by the Equality Act 2010 (Amendment) Regulations 2023 on January 1, 2024. S19A EA reproduces the effect of *CHEZ*, as applied in *Rollett*, to allow a claimant to bring a claim where a PCP puts them at ‘*substantively the same disadvantage*’ as persons who share the relevant protected characteristic (s19A(1)(e)).

The most obvious beneficiaries of *Rollett* and s19A EA are male carers who wish to bring ‘same disadvantage’ indirect sex discrimination claims (for example, where restrictions on flexible working put them at a particular disadvantage because of childcare responsibilities). But the protection is extended to age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, and sexual orientation too (see s19A(2) EA). There is scope for creative thinking.

Adapting some examples of ‘ordinary’ indirect discrimination from the Equality and Human Rights Commission’s employment code of practice, the following scenarios might give rise to ‘same disadvantage’ indirect discrimination claims:

- A hairdresser refuses to employ stylists who cover their hair, believing it is important for them to exhibit their haircuts. This is a PCP which puts or would put Muslim



women and Sikh men who cover their hair at a particular disadvantage. Could an applicant who is self-conscious about their alopecia and wants to wear a head covering bring a 'same disadvantage' religion claim?

- An employer invites its seasonal workers employed during the previous summer to claim a bonus within a 30-day time limit. The employer informs the workers by writing to them at their last known address. The PCP of writing to the workers puts or would put (predominantly non-British) migrant workers at a particular disadvantage, because these workers normally return to their home country during the winter months and are unlikely to receive the message in time. A British worker, who also lives abroad and who returned home for Christmas, misses the message too. Could the British worker bring a 'same disadvantage' race claim?

As lawyers become familiar with s19A EA, we are likely to see many more of these claims and creative ways of bringing them. It will be particularly interesting to see how courts and tribunals apply the notion of '*substantively the same disadvantage*' without any guidance – just yet – from higher courts.

**Martina Murphy & Jessica Franklin<sup>1</sup>**

**Barristers, Outer Temple Chambers**

[martina.Murphy@outertemple.com](mailto:martina.Murphy@outertemple.com)

[Jessica.Franklin@outertemple.com](mailto:Jessica.Franklin@outertemple.com)

---

<sup>1</sup> Martina Murphy and Jessica Franklin were instructed for the claimants by Tara Grossman of Kepler Wolf and Jacqueline McGuigan of TMP Solicitors. The claimants were supported by the Equality and Human Rights Commission (Clare Armstrong, Principal Solicitor).

## Protected beliefs and misgendering of schoolchildren

*Sutcliffe v Secretary of State for Education* ♦ [2024] EWHC 1878 (Admin), July 25, 2024

### Facts

Mr Joshua James Sutcliffe (JJS) was a mathematics teacher at two schools in Oxfordshire and London. He had deeply held Christian views which also included the protected beliefs that biological sex is immutable, homosexuality is a sin, marriage is a lifelong commitment between a man and a woman, the man is head of the household, and that Islam is evil and Mohammed is a false prophet.

The Oxfordshire school had accepted the male gender identity of 'pupil A' who had been born female but identified as male. Despite being informed of the school's decision, JJS chose to ignore this and referred to pupil A using female pronouns on multiple occasions in the classroom, in e-mail communications with the school and when interviewed on national TV (which would have 'outed' pupil A to persons who would not have known he was trans).

JJS expressed his views to pupils that he was against gay marriage and that homosexuality could be cured as it was 'wrong'. He showed pupils a video on his views about masculinity.

### Secretary of State's decision

A professional conduct panel of the Teaching Regulation Agency found that JJS was guilty of unacceptable professional conduct/conduct which might bring the teaching profession in dispute and recommended that an order under regulation 3 of the Teachers Disciplinary (England) Regulations 2012 be made prohibiting him from teaching, such order reviewable after a minimum of two years.

The bases for the recommendation were that JJS had:

- Not treated pupil A with dignity and respect and failed to safeguard him through the misgendering in class. The panel noted that he could have used no pronouns at all.
- Misgendered pupil A on national TV, and had failed to consider the ramifications for A or had regard for his well-being.
- By sharing his views on homosexuality and gay marriage had failed to consider the impact on children from the LGBT+ community.
- By showing the video about 'masculinity' had failed to take account of those pupils who might take a different view.

The panel found that JJS had been intolerant and had fallen significantly short of the professional standards expected of him. The panel found that a prohibition order was the proportionate response.

The Secretary of State for Education made the order.

### High Court

JJS challenged the order on multiple grounds but in particular on his rights under the European Convention on Human Rights, namely Articles 9 (thought, conscience and religion) and 10 (freedom of speech).

♦ [2024] IRLR 798

JJS's views amounted to protected beliefs under the Equality Act 2010 (EA), but his Articles 9 and 10 rights were qualified rights, and in this case, were qualified by the need to treat school pupils with dignity and respect and to safeguard their wellbeing.

The HC found no merit in JJS's grounds of appeal. The professional conduct panel had made expert findings after a proper assessment which should be respected. The 'expert' evidence which the panel had rejected from Dr Parsons (a theologian), Mr Matyjaszek (a retired headmaster of a faith school) and Ms Forstater (executive director of Sex Matters) was either not expert or not material to the case.

The panel had not required JJS to use pronouns which offended his views. He could have chosen to use none; rather he chose to attempt to impose his views.

JJS had *'failed to differentiate between teaching and preaching'* and the HC refused the appeal.

**This case provides a good illustration of how a person's Article 9 and Article 10 rights can be restricted when the balance requires the rights of others to take precedence.**

---

### Comment

In *Forstater v CGD Europe* [2022] ICR 1; [2022] Briefing 998, Choudhury P stated that finding gender-critical views amounted to a protected belief did **not** mean that:

- those with gender-critical beliefs can 'misgender' trans persons with impunity;
- that trans persons do not have the protections against discrimination and harassment conferred by the EA;
- that employers and service providers will not be able to provide a safe environment for trans persons. [para 118]

This case provides a good illustration of how a person's Article 9 and Article 10 rights can be restricted when the balance requires the rights of others to take precedence. The court concluded that JJS had failed to understand or *'accept that his right to manifest and express his religious convictions might have to be balanced against his professional duties to treat children with dignity and respect and to safeguard their wellbeing.'*

**Robin Moira White**

**Barrister, Old Square Chambers**

## Housing allocation policy was indirectly discriminatory

*The King (on the Application of AK) v Westminster City Council* [2024] EWHC 769 (Admin); April 5, 2024

### Implication for practitioners

The public sector equality duty (PSED) is not something to be taken lightly, nor can it be presumed that it had been considered by a local authority because of the passage of time. Following this judgment, when revising or reconsidering policies, even where very little will change, an authority should consider the PSED and document the process and results. Authority argues that a protected group cannot demonstrate indirect discrimination because the particular disadvantage also can affect people not of that protected group are not likely to get very far where it is clear a disproportionate number of people impacted are from that protected group. Finally, both the claim and the defence should always be supported with evidence and if there is none, consider that telling.

### Facts

While living in social housing in a London Borough which borders Westminster City Council (the Council), a woman's (AK) child was sexually abused by her neighbour. As a result, the child and mother experienced trauma and serious mental ill-health. AK sought to get away from the abuser, but her landlord was unable to find other housing. The child was eventually sent abroad for their own safety and well-being, separated from their mother.

The Council's housing allocation scheme policy had two sections to address requests related to pressing housing needs. S5.1 allowed for 'management transfers' of existing Council tenants where there were reasons such as threatened or actual violence. These individuals could be re-housed in a matter of weeks.

Individuals who were not current residents of the Council, were viewed under s5.3 which allowed individuals from other boroughs in a 'crisis' to be housed on a reciprocal discretionary basis, although this would mean waiting to be rehoused for around ten years. This 'reciprocal transfer' would mean the Council would provide housing for AK and child, and a Westminster resident (or someone on the Westminster social housing list) could take their place in the other borough.

There exists much guidance on how people who are fleeing domestic violence are to be considered in housing allocation, including in reciprocal arrangements. Fundamentally, local authorities must set up policies and structures which consider as a priority people fleeing or experiencing violence.

In June 2023, AK applied for a 'reciprocal transfer' with the Council, as she had close familial connections in the area. The Council refused this request stating that due to high demand from priority groups, agreeing to such a transfer would mean housing AK 'over 10 years out of turn'. The Council considered this decision was in line with its policy. No further information was provided.

AK brought judicial review proceedings alleging that the policy:

1. indirectly discriminated against women under s19 Equality Act 2010 (EA);
2. breached the PSED under s149 EA, and
3. violated Article 14 of the European Convention on Human Rights (ECHR).

She also argued that the Council had breached its duty under the Children Act 2004.

## High Court

The first important information to note is that the Council provided no evidence in support of its defence.

Deputy High Court Judge Tinkler (DJ) first addressed the PSED and reviewed the current housing allocation scheme policy and its previous iterations which were nearly identical. The Council admitted there were very recent occasions where it considered the policy but it could find no evidence that it had considered the PSED on any of those occasions. The Council accepted that the policy had basically been unchanged since the 1990s. Tinkler DJ stated that the PSED involves a 'duty of inquiry' which should be able to be demonstrated through some documentary evidence. As none could be provided, The judge found that the Council had not complied with the PSED.

Turning to indirect discrimination, with either sections 5.1 or 5.3 as the provision, criterion or practice, Tinkler DJ found that the two different policy provisions treat people from within and outside the Council differently and being a tenant within the Council is significantly more advantageous. He found this to be as a matter of the policy and as a matter of fact – finding the Council did not provide any evidence it used its discretion to determine otherwise. In essence the difference in treatment created a residency requirement to receive priority housing in the Council.

The people affected by this different (and lesser) treatment are people fleeing violence. It was generally agreed and supported by statistical evidence that it is more likely to be women who need to move because of violence.

This was also demonstrated in the reality of the people seeking reciprocal transfers to other boroughs to escape violence. Tinkler DJ then found the policy '*effectively excludes people who are not from the borough from a housing transfer [and] is therefore indirectly discriminatory*'. He said fundamentally, just because some people fleeing violence would be men does not mean the provision was not indirectly discriminatory to women generally.

In terms of justification, Tinkler DJ stated under the basic provision of the PSED it was for the Council to prove that its actions were justified, and it had not provided any evidence. The Council attempted to say in its submissions that even without documentary evidence, if it had considered the PSED, it would not have made any difference; the judge disagreed. Based on the above, he did not address the ECHR claim. He also found that the Council's individual decision was in breach of s11 of the Children Act 2004.

With regard to relief, Tinkler DJ made a declaration that the policy was unlawful as it related to women escaping violence, but he stopped short of quashing the policy. He stated there were routes for the Council to make the policy lawful without wholesale replacement, such as guidance on how to use its discretion. The judge did not set a time frame on the Council, but did order that the Council consider AK's application as if she was applying under the borough resident provision, and would do so within 28 days of the judgment.

## Comment

This case demonstrates that where the requirements of the PSED are not followed, this can demonstrate that the authority cannot justify its actions under s19 EA. It remains to be seen how the Council will make the policy lawful, but the lesson here is that it must certainly make an effort to do so.

**Laura Redman**  
Barrister, Cloisters Chambers

... just because some people fleeing violence would be men does not mean the provision was not indirectly discriminatory to women generally.

---

## Disclosure of an EA assessor's evidence

*Stephen Laidley, by his litigation friend, the Official Solicitor v Metropolitan Housing Trust Ltd* [2024] EWHC 2611 (Chancery Division); July 16, 2024

### Implications for practitioners

This case has clarified the status of an Equality Act 2010 (EA) assessor's evidence. If the assessor provides evidence to the court, this is disclosable to the parties; however, if the purpose of the assessor's report is to advise the court how to weigh and evaluate the evidence, this is not disclosable. This is different from the practice in shipping disputes where a nautical assessor's report is always disclosable.

The High Court held that the practice of not disclosing advice provided by an EA assessor did not breach the disabled person's right to a fair trial pursuant to Article 6 of the European Convention on Human Rights (ECHR).

### Facts

Since 2009, Mr Laidley (SL) has been an assured tenant of the Metropolitan Housing Trust (the Trust). SL's neighbour had complained about noise coming from his flat since 2018 and, in March 2020, the Trust instituted possession proceedings on the discretionary anti-social behaviour grounds set out in grounds 12 and 14 to schedule 2 of the Housing Act 1988.

Ground 12 states: *'Any obligation of the tenancy (other than one related to the payment of rent) has been broken or not performed.'*

Ground 14 states *'The tenant or a person residing in or visiting the dwelling-house – (a) has been guilty of conduct causing or likely to cause a nuisance or annoyance to a person residing, visiting or otherwise engaging in a lawful activity in the locality.'*

A discretionary anti-social behaviour ground of possession, as opposed to the mandatory anti-social behaviour ground of possession, means that the judge has the discretion not to grant a possession order even if the ground is proven. The judge also has the discretion to suspend the enforcement of the possession order on terms that it won't be enforced as long as the tenant keeps to the terms; in anti-social behaviour cases the terms are usually good behaviour and engaging with relevant support, or, as would have been relevant in this case, that enforcement is suspended until an event has happened such as the tenant being provided with suitable alternative accommodation.

Expert evidence found that SL did not have the capacity to participate in litigation because of a delusional disorder from which he had suffered since 2012. After receipt of a psychiatrist's report, the Trust did not contest that SL was a disabled person pursuant to s6 EA; the medical report concluded that his disability was a partial reason for his behaviour. It is unclear whether the medical report also adjudged SL's mental capacity to hold a tenancy (if SL didn't have the mental capacity to hold a tenancy, he could not be a tenant or apply for social housing; see *R v Oldham BC ex parte Garlick* and *R v LB Tower Hamlets ex parte Ferdous Begum* [1993] AC 509 and *WB v W District Council* [2018] EWCA Civ 928).

While capacity is issue specific, if SL lacks capacity to conduct litigation it is hard to see how he has the mental capacity to keep to the terms of his tenancy. When someone lacks capacity to hold a tenancy or likewise apply for accommodation pursuant to

the Housing Act 1996, it is one of the rare occasions where accommodation must be provided by the relevant local authority's adult social services department through the Care Act 2014 or potentially through the aftercare provisions of the Mental Health Act 1983.

SL's delusional disorder meant he did not think that there was anything wrong with him and thus didn't engage with the support which the Trust had sought for him prior to instituting possession proceedings. With the assistance of the Official Solicitor, SL defended the possession claim on the basis that the claim was discrimination arising from disability and the discrimination could not be justified; he also argued that the Trust did not have due regard to the s149 EA public sector equality duty (PSED) in instituting or continuing with possession proceedings. In January 2023 an EA assessor, Ms Jill Tombs, was appointed by the court. Neither party disputed Ms Tombs' qualifications or her suitability as an EA assessor.

### **Willesden County Court**

On the first day of the trial, SL's counsel made an application that the court would define the role of the assessor and for the assessor's advice to be given in open court. On the second day of trial, the Trust applied for an adjournment to give London Borough of Brent time to try to provide SL with more appropriate supported accommodation. SL resisted the application for the adjournment but this was refused and the adjournment was granted.

The short judgment for the assessor application noted that the precedent on which SL's counsel relied to support the view that assessors' advice should be disclosed, was based on the role of nautical assessors in shipping disputes, which the judge considered not to be analogous to the role of an EA assessor.

When the matter resumed in December 2023, the judge directed that the role of the assessor was to assess whether the Trust's conduct was a proportionate pursuit of a legitimate aim, and not whether SL was a disabled person or whether s15 EA was engaged as these questions had already been conceded by the Trust [para 11].

The court held that the discretionary grounds of possession were made out and SL had caused substantial nuisance and annoyance to his neighbours. The judge held that SL's behaviour was because of his disability and as his disability meant there was no prospect of him engaging in support, it was reasonable for the court to order possession. The judge found that the Trust had due regard to the PSED through its three equality impact assessments which struck a balance between SL's needs as a disabled person and the difficulties his behaviour caused his neighbours.

The legitimate aim advanced by the Trust was to protect the other residents from nuisance and to use its housing stock sensibly. Possession was held to be proportionate, as SL was not engaging in any support for his condition and the Trust had no supported housing stock. SL had not been provided with any accommodation support from Brent via the Care Act 2014 and the judge was persuaded by the Trust that the only way that SL would get support from Brent was if the court forced Brent's hand by making an outright possession order. However, enforcement of the possession order was stayed while the appeal was determined.

### **High Court**

The case was heard by Mrs Justice Bacon; there were two grounds of appeal:

1. the judge was wrong to refuse to disclose the assessor's evidence to the court, and
2. the judge had sought the assessor's advice on proportionality and legitimate aim,

which were issues not within her competence, and did not rely upon her advice in relation to the issues of whether SL was disabled or whether the Trust had breached its public sector equality duty.

The thrust of the first ground of appeal was the English common law principle of natural justice that a party has a right at trial to know the case against them and the evidence on which it is based. Also, under Article 6(1) ECHR, Strasbourg jurisprudence held in *Krcmár v The Czech Republic* (2001) 31 EHRR 41, that a fair hearing requires the parties to have knowledge and the ability to pass comment on all evidence which influences the judge's decision at trial.

SL drew upon the *Manzillo II* principle in *Owners of Bow Spring v Owners of the Manzanillo II* (Practice Note) [2004] EWCA Civ 1007, where Clarke LJ held that the evidence of nautical assessors should be before the court to enable the parties to submit to the court as to whether to adopt the assessor's evidence, but that the assessor would not be cross-examined.

Civil Procedure Rule (CPR) 35.15.4 provides for the disclosure of and use at trial of an assessor's initial report and CPR 35 Practice Direction 7.4 allows for the parties to have access to any subsequent assessor's report but the assessor is not to be cross-examined. SL argued that the same principle should be adopted for EA assessors and the right to a fair trial necessitates disclosure of any advice or evidence provided to the court by the assessor. This submission appeared to have expanded on *Krcmár*, as that case concerned the ability to pass comment on evidence, not advice.

The Trust disagreed with SL's submissions and pointed to the legacy EA case of *Ahmed v University of Oxford* [2002] EWCA Civ 1907 where the court rejected the submission that the advice of a Race Relations Act 1976 (RRA) assessor should be disclosed to the parties. In this case, the court held that RRA assessors were appointed by a distinct statutory regime and CPR 35.15 didn't apply; the role of the assessors was to assist the judge in evaluating the evidence and the principle of disclosure of the advice to the parties didn't apply.

Bacon J distinguished *Manzillo II* with *Ahmed*, stating that a nautical assessor was appointed specifically as an expert and their reports were expert evidence and disclosable, while the role of an assessor in *Ahmed* was to advise and assist the judge on the evidence and therefore the report was not disclosable to the parties [para 42]. Bacon J held that there was no inconsistency between the *Ahmed* position and Article 6(1) ECHR as '*the assessor in such a case is not either providing evidence or filing submissions in a trial*'. [para 44]. She stated:

*... [the assessor's] role was to assist the judge in the evaluation and assessment of the evidence in order to determine whether the Trust's claim was a proportionate pursuit of a legitimate aim. That is a paradigm example of a case where no general obligation of disclosure arises.* [para 45]

SL made the salient point that because the report was not disclosed to the parties, it is impossible for SL to determine whether the assessor's contribution strayed into the sphere of the evidential rather than remaining advisory. However, he didn't point to anything from the instant judgment to suggest that Ms Tombs ever provided evidence to the judge. Bacon J rejected this submission:

*Speculation that the assessor might, contrary to what is recorded in the judgment, have provided evidence which was not referred to by the judge but which influenced the judge's conclusions, cannot form a basis for a requirement for the assessor's advice to be disclosed to the parties. Indeed, if it were otherwise, it would be*

**... [the assessor's] role was to assist the judge in the evaluation and assessment of the evidence in order to determine whether the Trust's claim was a proportionate pursuit of a legitimate aim. That is a paradigm example of a case where no general obligation of disclosure arises.**



*impossible for an assessor ever to provide advice to a judge that was not disclosed to the parties.* [para 48]

The first ground of appeal was dismissed. Bacon J also dismissed the second ground. On the first strand of the latter she held that the assessor's role of assisting the judge to weigh and evaluate the evidence before the court on the questions of proportionality and the legitimate aims of the Trust were within Ms Tombs' realm of experience as a longstanding employment tribunal wing-member and human resources director.

Regarding the second strand, Bacon J held that the trial judge had found that the Trust had engaged with the PSED on each of its three equality impact assessments and surmised that, as the judge had said that the assessor provided advice on the proportionality of the Trust's actions, it was likely that Ms Tombs also provided advice on the PSED but if she didn't, it was within the judge's wide ambit of discretion regarding the use of an EA assessor not to seek Ms Tombs assistance on the PSED [para 55].

### Comment

SL has obtained permission to appeal 'on the papers' and the appeal hearing is provisionally listed for April 2025. We await the CA's judicial guidance on this issue which, although of importance to practitioners, is of less practical importance to SL as it is unlikely that he has the mental capacity to be a tenant.

At present it would seem that the difference between disclosure being allowed when the assessor is providing expert evidence and not allowed when they are advising the court doesn't sit well with the right to a fair trial, simply because SL will be in the dark as to what information the assessor has put before the judge; in an issue as vitally important as whether a disabled person can keep their home there may be a doubt as to whether all of the report was advisory or some of it was evidential. It is unclear as to why the EA assessor's advice couldn't be disclosed to the parties as a general rule.

Within the case itself, one can't help but observe that SL probably should have appealed the instant judgment on the basis that the trial judge didn't exercise discretion to suspend enforcement of the possession order until SL had been provided with suitable alternative accommodation by Brent Adult Social Services. With the judgment, as it was with the hope that an outright possession order would force Brent to whirr into action, there was a very real danger that SL would '*fall through the cracks*' and end up 'street homeless'. As the Trust has the outright possession order and has no need to ensure SL has appropriate alternative accommodation, and as his legal team will only be there when there is litigation, if SL fails to engage with Brent because of his delusional disorder, Brent may close the referral through non-engagement. This danger still applies if SL's appeal fails.

One could also observe that the respective legal teams should perhaps step outside the adversarial litigation sphere for a moment and cooperate with each other to draft a well-crafted judicial review pre-action protocol letter to London Borough of Brent to ensure that Brent provides SL with appropriate accommodation through the Care Act 2014 in the future because of his unlikely mental capacity to be a tenant.

**Jonathan Boyle**

**Solicitor-Advocate (Civil)**

**Southern Housing Group**

[jonathan.boyle@southernhousing.org.uk](mailto:jonathan.boyle@southernhousing.org.uk)

...the difference between disclosure being allowed when the assessor is providing expert evidence and not allowed when they are advising the court doesn't sit well with the right to a fair trial...