



DISCRIMINATION LAW ASSOCIATION

Briefings



NOVEMBER 2025 | VOLUME 86 | 1140-1153

Briefings 1140-1153

1140	Editorial: 30th anniversary of the Discrimination Law Association	Lisa Crivello	3
1141	The long and winding road to equality	Paul Crofts and Sandhya Drew	5
1142	Protections against discrimination in Northern Ireland: developments after Brexit	Professor Colin Murray	11
1143	Thirty years on: disability discrimination law – is it fit for purpose?	Catherine Casserley	17
1144	<i>Leicester City Council v Parmar</i>		25
	CA confirms that evidential comparators were sufficiently similar to shift burden of proof in a race discrimination claim, and adverse inferences can be drawn from withholding relevant documents.		
	Jenny Chung		
1145	<i>Logo v Payone GMBH</i>		28
	EAT overturns ET's finding that an advertisement shared via WhatsApp was not 'related to' race. The ET incorrectly focused on the advertisement's intention and the sharer's motivation without considering the subjective element of 'effect'.		
	Laura Redman		
1146	<i>Wainwright v Cennox PLC</i>		31
	EAT confirms that discriminatory acts are usually capable of constituting a constructive discriminatory dismissal, even if they did not directly cause the resignation.		
	Eliaana Baretto and Lara Kennedy		
1147	<i>Aslam v London UK Transport Bus Ltd</i>		33
	Victimisation: EAT considers the difference between the 'does' and 'may do' limbs of s27(1) EqA. ET erred in treating a pleading point as conclusive when considering the scope of the claim.		
	Sally Robertson		
1148	<i>Stedman v Haven Leisure</i>		36
	EAT allows an appeal against an ET decision that a claimant with autism and ADHD was not disabled under s6 EA. It is sufficient for only one day-to-day activity to be substantially affected.		
	Daniel Holt		
1149	<i>Forrest v Amazon Web Services</i>		38
	EAT overturns ET decision to strike out a claim for failing to comply with a case management order, without first making an unless order. It is an error of law not to consider whether a fair trial remains possible		
	Daniel Holt		
1150	<i>Hindmarch v North East Ambulance NHS</i>		41
	EAT holds that the effectiveness of a reasonable adjustment is key to considering a breach of s20 EqA.		
	Catherine Casserley		
1151	<i>AB v Grafters Group Ltd</i>		44
	EAT examines the application of section 109 EA 2010 (whether something is done 'in the course of employment') with particular reference to events that occur outside the workplace.		
	Robin Moira White		
1152	<i>Haynes v Thomson & others</i>		46
	CC finds that a transgender woman who brought a claim of gender reassignment discrimination was not discriminated against after she was excluded from women's pool competitions.		
	Ioana Jelea		
1153	<i>Bailey v Linnaeus Veterinary Ltd</i>		48
	CC confirms that gender-critical beliefs are protected in relation to the provision of goods and services.		
	Wayne Henry		
News:	2025 European Network Against Racism's regional meeting in Dublin – review		51
	Francesca Almond		

30th anniversary of the Discrimination Law Association

In my first publication in the role of editor, I am very honoured to be involved in this 30th Anniversary edition of *Briefings*. I am also aware that I follow in the footsteps of a long line of highly esteemed editors, and am particularly grateful to Geraldine Scullion for showing me the ropes in July. I know I have much to live up to – and hope not to disappoint!

Since the launch of the DLA in 1995, we have witnessed a dramatic expansion of equality rights in the UK. The initial focus on race and sex in the 1970s has since extended to embrace a wider range of protected characteristics. These include disability in 1995, followed by age, religious belief, sexual orientation and gender reassignment in the years leading up to the enactment of the Equality Act 2010. Not to mention the inclusion of marital status and pregnancy/maternity, both of which have reinforced the protection of women's rights, arguably supplemented by regulations covering part-time and fixed-term employees.

The Employment Rights Act 1996 and the Human Rights Act 1998 have both added valuable contributions to the equality framework in law. So far, so good, but has the legislation achieved a nirvana of peace and harmony, or are we even further away than before?

Of course, nothing is ever black and white. The reality is more like a haze of greys with fuzzy edges, expanding and contracting with the tide of political climate.

This is the territory explored in our first article, 'The long and winding road to equality'. Written by two of DLA's founding members, Paul Crofts and Sandhya Drew, we are taken through some giant leaps in equality law, accompanied by a multitude of trips and slips. Advances include the unification of anti-discrimination legislation and the introduction of a general public sector equality duty, accompanied by a significant cultural change within our judicial system.

Yet while legal provision for our 'rights' may appear to have multiplied, the ability to enforce those rights has become increasingly difficult. Thirty years of funding cuts across all public services have not left

the judiciary unscathed. Far from it, if you want to enforce your employment rights in the tribunals, you are likely to be waiting up to a year just for a one-hour case management hearing. Complex discrimination cases, which require multi-day main hearings, often take up to three years to be listed.

Catherine Casserley investigates a similar theme through the lens of one specific area of law – disability rights. Her article charts the bumpy progress of legislation from the Disability Discrimination Act 1995 to the Equality Act 2010, and considers how far it may now be from being '*fit for purpose*'. She concludes that whilst the legislation may have led to a greater recognition of the barriers faced by disabled people, we are still some distance from implementing a '*social model of disability*' where accessibility is included at the design stage.

Finally, no discussion about the last 30 years would be complete without mentioning Brexit. In his article on the development of equality law in Northern Ireland, Colin Murray investigates difficulties created by the withdrawal negotiations. The Windsor Agreement enshrines a commitment for equality law to keep pace with developments in the EU, which inevitably gives rise to potential divergence and conflict with the rest of the UK. Professor Murray considers that an early example of such a paradox is presented by the Supreme Court decision in *For Women Scotland*.

The likely significance of that case should not be underestimated. It highlights the urgent need to resolve tensions between conflicting equality rights, already seen in the field of religious belief. The emotional and highly toxic culture war seen in arguments about trans rights is a dangerous step backwards and must be resolved. Perhaps one possibility might be to progress the long-awaited provision in the Equality Act addressing 'combined' discrimination? While that might risk making what is already a very complex area of legislation even more convoluted, we must surely campaign for the law to recognise the complexity of ways in which individuals suffer discrimination in today's world.

Lisa Crivello
Editor, *Briefings*

Anniversary event

The DLA is planning a special event in London on 28 November to celebrate the last 30 years of actively promoting equality law in the UK. The executive committee asked previous speakers at DLA events to reflect on changes affecting their subject areas over the years and consider the future. As a result, the November event will explore whether a 'hierarchy' of equality rights is emerging in our law, and if so, what is next for the human rights principles of tolerance and mutual respect?

Further details will be circulated by Chris Atkinson soon, but confirmed speakers include Catherine Casserley, Audrey Ludwig, Karon Monaghan, Gay Moon and Robin Allen. Such a venerated range of speakers is by no means unusual for the DLA, which, while being a relatively small organisation, punches well above its weight in the field of UK equality law.

Remembering Barbara Cohen

It seems appropriate at this point to pay tribute to Barbara Cohen, who has been sorely missed by our readers (and many more) since her death in June 2023. An Inspirational co-founder of DLA, and long-standing member of the executive committee, she worked tirelessly throughout her life as an equality activist, and her immeasurable contribution to this organisation cannot be overstated. Her pioneering work, especially in the field of race discrimination and immigration, has had a significant impact on the development of equality law and human rights across the UK, EU and beyond.

A frequent contributor to *Briefings*, Barbara wrote numerous articles and reported on many of the UK landmark discrimination law cases. It is not possible to do her justice in this short paragraph, but you can find a more comprehensive tribute by Gay Moon in *Briefings* [2023] 1049.

The long and winding road to equality

In this article, Sandhya Drew and Paul Crofts, two of the founder members of the Discrimination Law Association, look at current protections for equality, first in law and then in practice. They go on to consider how the situation for victims of discrimination has changed over the last 30 years and what prospects for the future may look like.

At the time the DLA was formed ... judicial attitudes were sceptical, appearing to view the prohibition on discrimination as a fetter on freedom... Judges now more readily see their role as protective, with a correspondingly broad reading of statute.

Introduction

At the time the Discrimination Law Association (DLA) was formed (with some honourable exceptions, such as Stephen Sedley), judicial attitudes were sceptical, appearing to view the prohibition on discrimination as a fetter on freedom. Consequently, the law was not read protectively, and existed only in pockets of legislated protection, namely the Equal Pay Act 1970 (EPA), the Sex Discrimination Act 1975 (SDA), the Race Relations Act 1976 (RRA) and the then-recent Disability Discrimination Act 1995 (DDA).

Individuals seeking redress for sexual identity discrimination had to squeeze themselves into sex discrimination law, sometimes with success,¹ sometimes not.² Similarly, discrimination on grounds of religion was sometimes covered,³ and sometimes not.⁴ Age was regarded as a legitimate cause for differential treatment, even if unjustified by reference to the context. As lawyers and equality campaigners, our call was for more comprehensive law, more protectively applied. This piecemeal approach to protection, we said, was not how people experienced their characteristics. In the words of Albie Sachs, *'the rights had to fit the people, not the people the rights'*.

A raft of legislation driven by the EU was to follow: the Employment Equality (Sexual Orientation) Regulations 2003, the Employment Equality (Religion or Belief) Regulations 2003, and the Employment Equality (Age) Regulations 2006. Finally, the 'last hurrah' of the outgoing Labour government was to enact the Equality Act 2010 (EqA). This was given Royal Assent just a month before the Labour government was swept from political power in the General Election of 6 May 2010.

PART 1 – THE LAW

The EqA came into force on 1 October 2010, almost exactly a decade after the Human Rights Act 1998. Together, these two statutes have set a legal architecture for equality law which can be said to have taken us some way along the road to equality. In addition, the EqA simplified the language of discrimination and harassment, making it more accessible to ordinary people.

Judicial attitudes

This legislation has been accompanied by a sea change in judicial attitudes when ruling on discrimination cases. Initially, most judges were suspicious and saw discrimination law as a fetter on freedom of contract. Judges now more readily see their role as protective, with a correspondingly broad reading of statute. They have equality training, and the first edition of the Judicial Studies Equal Treatment Bench Book was published in 2002,

¹ *P v S and Cornwall County Council* [1996] ECR I - 2143

² *Pearce v Mayfield School* [2003] ICR 937

³ *Seide v Gillette* [1980] IRLR 427 (against Jews in part); *Mandla v Dowell Lee* [1983] 2AC 548 HL (against Sikhs)

⁴ *Tariq v Young* [ET/24773/88] (as regards Muslims); *Dawkins v Dept of the Environment* [1993] IRLR 284 (as regards Rastafarians)

before even the EqA. Lady Hale, as the President of the Supreme Court from 2017 to 2020, did much to lead the change in judicial attitudes.

Advances

The EqA covers a broad range of areas of public life, and can truly be described as comprehensive. It covers equality in work, goods and services, and education, filling in many gaps in coverage. Its comprehensive approach to protection was followed throughout caselaw. For example, in *Chandhok v Tirkey* [2017] IRLR 195, a domestic worker succeeded in her argument that caste discrimination fell within the definition of 'ethnic origins' in the EqA. The judge held: '*I do not accept that the effect of section 9(5) of the Equality Act is to limit the scope to which the statutory definition of race extends... Such an interpretation is consistent with the UK's international obligations, including that derived from ICERD.*'⁵

The EqA introduced a range of proactive measures to identify and act on the gender pay gap... Yet, despite litigation, half a century after the first equal pay legislation came into force, the gender pay gap remains.

The EqA, through its section 149, extended a proactive duty by public authorities across *all* protected characteristics. A public sector equality duty already existed under the RRA, following the Stephen Lawrence Inquiry in 2001, and had been successfully used by Southall Black Sisters to challenge the withdrawal of their funding by Ealing Council.⁶ The new duty requires not only the elimination of discrimination but a positive obligation to level up equality of opportunity between those with a protected characteristic and those without. More specifically, it requires the recognition of disadvantages connected with a protected characteristic *and* the removal of them. The public sector equality duty (PSED) can be seen to have advanced equality through its good use in challenging a range of public decisions, including on housing, closure of a leisure centre, and many other decisions on planning and public spaces.

Brexit signalled the loss of the EU as a key driver in the development of equality law across many protected characteristics, and in particular, equality between men and women. Despite that, equal pay law has continued to march forward, most recently with supermarket cases such as *Asda Stores Ltd v Brierley and ors* [2021] UKSC 10, in which 35,000 equal value claims were brought by predominantly female shopworkers against predominantly male comparators in distribution depots. *K and ors v Tesco Stores Limited* C-624/19 marked a similar positive outcome. The EqA introduced a range of proactive measures to identify and act on the gender pay gap, as has the recent Employment Rights Bill. Yet, despite litigation, half a century after the first equal pay legislation came into force, the gender pay gap remains.

Finally, a word on protection from harassment, whether sexual or on grounds of a protective characteristic. The EqA contains a prohibition in section 26(3) which expands the definition of harassment to retaliation for rebuttal of advances. Seemingly something everyone would want to eliminate, yet the right has had a complicated development. It only entered anti-discrimination law after Michael Rubenstein had argued that sexual harassment was a form of discrimination. Case law gradually made it clear that allowing 'banter' based on protected characteristics would result in legal liability. That liability, however, was arguably limited to acts by fellow employees, leaving no remedy for those in service-based jobs who were being harassed by customers, passengers or other third parties. There followed a rollercoaster of cases and legislation. Before the EqA, it had been decided in *Burton and Rhule v De Vere Hotels* [1996] IRLR 596 that the law protected two black waitresses who had been subjected to abuse based on their

⁵ International Convention on the Elimination of All Forms of Racial Discrimination

⁶ *Queen (Kaur and Shah) v London Borough of Ealing* [2008] EWHC 2062(Admin)

The EqA says nothing about conflicts between rights or how these might be resolved. In this, it differs from human rights law, which allows limits on one right for the protection of the rights of others.

race and sex by the 'entertainer' Bernard Manning. The employer, De Vere Hotels, had done nothing. That EAT case was, however, overruled by the House of Lords in *Pearce v Mayfield School* [2003] ICR 937. The case concerned a lesbian teacher who had been abused on grounds of sexual orientation by students. Again, the employer had done nothing. The House of Lords held that failure to act had to be on the grounds of sex as opposed to sexual orientation, which was not illegal at that time. Instead they focused their time on considering whether the name 'Evelyn' was male or female.

In *EOC v Secretary of State* [2007] IRLR 327, the Equal Opportunities Commission succeeded in an argument that by failing to amend the SDA to include harassment by third parties, the Employment Equality (Sex Discrimination) Regulations 2005 had failed to implement EU Directive 2002/73. Section 40 SDA was then amended to cover cases where a third party harasses B in the course of B's employment, and A fails to take reasonably practicable steps. That provision was repealed in 2013 by the Conservative government, and an attempt to reinstate it in the 2023 Worker Protection Bill failed in the face of 'free speech'. The 'rollercoaster ride' will hopefully be halted by clause 20 of the Employment Rights Bill, which provides protection where an employer has failed to take 'all reasonable steps' to prevent a third party from harassing its employee. This will become s40(1)(A) of the EqA and is welcome.

Finally, it should not be forgotten that equality may also be indirectly advanced by other, non-equality laws. For example, the provisions in the Employment Rights Bill currently going through Parliament, for more flexible work and day-one rights not to be unfairly dismissed, should help women needing to balance work with childcare.

Flaws and gaps

Despite these advances, the EqA has fundamental flaws. Its concept of equality remains that of a series of individual protected characteristics. Whilst s14 prohibited discrimination on dual characteristics, this section was never brought into force. The EqA says nothing about conflicts between rights or how these might be resolved. In this, it differs from human rights law, which allows limits on one right for the protection of the rights of others. Unlike Article 17 of the European Convention on Human Rights (ECHR), the EqA contains no prohibition on the abuse of rights. This is not just an academic point. Perceived conflicts between the rights of protected groups predated the EqA: for example, between the rights of religious groups and gay and lesbian people (including those who were members of the groups). Another example is the trade union challenge to the law exempting religious organisations from sexual orientation regulations, in *R (Amicus MSF section) v Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin).

We have seen the issue of conflict more recently in the case of *For Women Scotland v The Scottish Ministers* [2025] UKSC 16, where the Supreme Court observed at its start:

On the one hand, women have historically suffered from discrimination in our society and since 1975 have been given statutory protection against discrimination on the ground of sex. On the other hand, the trans community is both historically and currently a vulnerable community which Parliament has more recently sought to protect by statutory provision.

The court went on to acknowledge that

...the purpose of addressing the particular needs, disadvantages or participation levels of women as a group with the protected characteristic of sex, is undermined if women as a group includes trans women with a GRC (in other words, biological men who are legally female). [para 241]

However, if the task for the courts is one of statutory interpretation, it will leave the resolution of conflicts to be worked out on a case-by-case basis, which is not ideal.

Another gap in protection is for the PSED to have regard to socio-economic inequalities. Despite being in pole position at s1 of the EqA, it has never been brought into force other than in Scotland.

Finally, attempts have been made to use the more general guarantee of equal enjoyment of convention rights under Article 14 of the Human Rights Act. These have had some success for victims of trafficking, but more widely, the exclusion of immigration status from equality law has denied protection to migrants (*Dhatt v MacDonalds* [1991] ICR 238).

PART 2 – THE PRACTICE

Over the past 25 years, the average length of time taken to progress tribunal cases to hearing has risen from around 27 weeks to 49 weeks in 2021 and is now probably over 12 months.

Employment tribunals – justice delayed is justice denied?

As Lord Reed observed in *R (UNISON) v Lord Chancellor* [2017] UKSC 51, the law is ultimately developed by people bringing claims. Justice must therefore be measured against how accessible it is and how much attitudes actually change. Over the past 25 years, the average length of time taken to progress tribunal cases to hearing has risen from around 27 weeks to 49 weeks in 2021⁷ and is now probably over 12 months. The exact data has not been available since the tribunal service introduced a new IT system four years ago, so it is unclear if this applies to a first preliminary hearing or the main substantive hearing. If it's the former, the wait time for a full merits hearing will be considerably longer.⁸

Such delays for victims of alleged injustices are unacceptable and have serious consequences for those claimants with poor mental health and/or limited finances. It is also likely to be a significant factor in people accepting settlements rather than pursuing an outcome in court, which they might have preferred.

Funding – virtually non-existent

In a 2013 article 'Rights without remedies', *Briefings* [2013] 683, the authors wrote: '*In the current world support for victims of discrimination is scant – limited in most cases to advice only.*' Little has changed since – in fact, it has certainly worsened. Many Regional Equality Councils and law centres have closed or lost substantial funding, which limits their capacity to support victims of discrimination. The EHRC has significantly less funding than it did when it was the Commission for Racial Equality (CRE), yet it now has to cover all protected characteristics and human rights. It has virtually ceased to offer support at all except in the most 'strategic' of cases (but how do such cases even get started?). The EHRC's financial (and other) criteria are so highly restrictive that they virtually rule out the chance of most claimants getting help. So, where is justice when access to it is denied?

Questionnaires and other pre-hearing processes

The abolition of the statutory questionnaire procedure for discrimination cases in 2014 has not been repealed. Instead, we are left with ACAS guidance only.

There is no longer any penalty for respondents who fail to supply information at an early stage of investigating a discrimination case. Given the evidence needed to prove a discrimination rests almost solely with the employer (eg, workforce statistics and information about comparators etc.), a worker's ability to pursue a discrimination case

⁷ Mike Freer MP, Parliamentary Under-Secretary of State in the Ministry of Justice, answered a written parliamentary question on 8 February 2023 on the average wait time in Employment Tribunals.

⁸ <http://gunnercooke.com/employment-tribunal-hearing-wait-times/>

...the formal and increasingly legalistic process of managing discrimination cases has now reached the point where it arguably obstructs the pursuit of justice and is a form of oppression in itself.

has been drastically curtailed. A failure to respond to a claimant's questions now carries almost no legal consequences.

Since the formation of the DLA in 1995, the formal and increasingly legalistic process of managing discrimination cases has now reached the point where it arguably obstructs the pursuit of justice and is a form of oppression in itself. Employment tribunals were initially intended to be a relatively informal judicial space where claimants could represent themselves or be assisted by non-lawyers. This is now virtually impossible, not only due to the factors outlined above, but because pre-hearing processes and the use of online systems are so complex that even professional advocates have difficulty. This can seriously disadvantage some claimants.

We conclude this section with a personal note from Paul.

When I first started to support victims of discrimination in the 1980s I was often aided by tribunals in how to present the applicant's case, helped with cross-examination and advice on the law. This way I could gain valuable experience, as could my colleagues at the Race Equality Council, who also undertook casework. In addition, I could call upon experienced advocates at the (then) CRE. This help is no longer available.

The procedures to lodge a complaint were simple and easy to follow. There was rarely a need for pre-hearings, and main hearings were held not far from where applicants lived. During this time, many cases were won, achieved significant local media coverage and had a significant impact on informing local communities of their legal rights. It meant local employers knew there was an agency around which would challenge them if they did not take equality and non-discrimination seriously.

In Jones v Tower Boot Co Ltd [1997] IRLR 168, CA, my colleague Jenny Sebastian won the tribunal hearing, but it was appealed by the employer (which was then owned by Dr Martens). It then went all the way to the CA, with assistance from the CRE, which made significant findings on the liability of employers for the actions of their employees. I understand this still stands as a landmark case in the area of harassment at work, but I am pretty certain that if a similar case arose today it would probably never reach an ET let alone the CA. Fortunately, Northamptonshire Race Equality Council still exists and employs a complainant aid officer – but this is very rare these days, if not unique.

EHRC – ineffectual and weak?

As stated above, the EHRC has effectively stopped giving support to victims of discrimination at work – but is it any better in other areas of discrimination? There is certainly much criticism of the EHRC for not using its law enforcement functions in other contexts, like challenging public authorities in their failures to carry out their statutory equality duties, or challenging the government in the way it treats asylum seekers and refugees. Indeed, there have been growing concerns about the EHRC's independence from government, both financially and in terms of its role in challenging discrimination and promoting equality. Whilst its 'A-status' as an accredited national human rights institution was reinstated in 2024, we doubt that such criticism will go away. DLA members may well have a view on this in the future.

Conclusion

We do believe that the UK has become a country less hostile to minorities (and the majority element of women) than it was in 1995, and that the law (as well as generational change) has played a part in this change in attitudes.

There are new 'out groups' being subject to serious harassment and discrimination, and new code words behind which racism is hiding.

However, the rise of Reform, with its divisive, hostile and inaccurate messages about migrants, builds on the exclusion of immigration from debates about race equality. We also see the rise in isolationist identity politics. There are new 'out groups' being subject to serious harassment and discrimination, and new code words behind which racism is hiding. Reform and the far right are deliberately stirring up racial hatred for political purposes (whilst denying they are racist), as they hide behind a cloak of concern about 'mass immigration', 'the boats', 'protecting (our) women and children' and a false 'patriotism'.

Unfortunately, these worrying developments have been aided by both the Labour government and the Conservatives, who are following Reform's agenda by proposing ever more restrictive immigration controls. The gratuitous flying of the Union flag, promoted by far-right/fascist groups, has also become a symbol of oppression and intimidation for all ethnic minorities in our local communities, with those flags adorning lamp posts in many towns and cities. These new developments need to be met with a broader and deeper vision of equality and diversity.

And what about the rise in socio-economic inequality, which sees an increasing gap between the very rich and the very poor? The EqA says nothing about this type of inequality. The funding and support for claimants available in 1995 have now fallen away, leaving the law on paper but not in practice.

Yet despite our pessimism of the intellect, we end on a note of optimism of the will. The road to equality is not an easy one, but our destination is clear. We have, of course, been here before in the sixties and seventies – but we got through it and advanced.

Protections against discrimination in Northern Ireland: developments after Brexit

Colin Murray, Professor of Law and Democracy at Newcastle University, discusses the divergence of equality law developments between Northern Ireland and the rest of the UK since Brexit.

Alike, but different

Viewed from elsewhere in the UK, equality law in Northern Ireland (NI) can seem like a strange combination of the unique and the familiar. Some elements look similar to the workings of the Equality Act 2010 (EqA), while others are profoundly alien, having been shaped by the history of ethno-nationalist discrimination and conflict within the community. The final result (especially in recent years) is characterised by its sheer messiness. In an era when the EqA has streamlined equality protections in Great Britain, the jumble of provisions operative under NI law is reminiscent of a bygone age. In the aftermath of Brexit, however, the provisions of the 'Withdrawal Agreement'¹ have added a new facet to the differences across the Irish Sea, with NI law continuing to be tied to EU law as it develops.

In the beginning

Northern Ireland has been the wellspring for anti-discrimination law in the UK. Whereas anti-discrimination provisions of almost any sort received little attention in Westminster until the 1960s, from the very foundation of NI, prohibitions on religious discrimination were imposed upon its devolved institutions under the Government of Ireland Act 1920.² Half a century later, as NI spiralled into conflict against a backdrop of persistent religious discrimination in contexts like employment, there was an attempt to reassert a commitment to non-discrimination in the Northern Ireland Constitution Act 1973 (which also protected political opinion).³ The inherent weakness of these measures, however, was the focus on direct discrimination for a single (and narrowly conceived) protected characteristic; they were simply not adequate to the task of preventing discrimination in a deeply divided society.

The next few decades saw intermittent efforts to deepen the protections of anti-discrimination law, usually in response to the UK's efforts to adapt to the requirements of what would later become EU law. The Belfast/Good Friday Agreement in 1998 (the 1998 Agreement) marked a culmination of these efforts. This contained a specific chapter on 'Rights, Safeguards and Equality of Opportunity', recognising that equality protections should have similar constitutional importance to other rights in Northern Ireland law.⁴ The UK government's commitments came to be reflected in the Northern Ireland Act 1998, s75 of which recognised a wide range of protected characteristics, including 'political opinion'. This moved the status of NI law away from simply providing protections against discrimination and towards the realm of

¹ [Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union.](#)

² Government of Ireland Act 1920, s5(1) and s8(6).

³ Northern Ireland Constitution Act 1973, s17 and s19.

⁴ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes) (1998) 2114 UNTS 473, Annex: Multi-Party Agreement.

The Belfast/Good Friday Agreement ... [recognised] that equality protections should have similar constitutional importance to other rights in Northern Ireland law.

actively promoting equality. A broad range of public bodies came under the s75 duty to embed equality considerations into the process of decision-making, a forerunner to the public sector equality duty in s149 of the EqA.

In 1998 (or indeed the decade after), there was no comparable general equality duty in the rest of the UK. NI's judges, however, struggled to adjudicate upon such an unfamiliar duty and ringfenced the ability to bring related cases to the Equality Commission for Northern Ireland (ECNI) in *re Neill*.⁵ Further, as equality law was a 'devolved' competence in Northern Ireland (unlike in Wales and Scotland), it saw limited development during the long periods in which the devolved institutions were inactive. Even when the Northern Ireland Assembly did function, equality issues were often too contentious for politicians to tackle under the power-sharing arrangements. And so, whereas the remainder of the UK saw equality provisions combined into a single statutory framework with the EqA (which included a public sector equality duty), the comparable law in NI did not keep pace, and it lost its role of 'pathfinder'.

And then Brexit happened.

Brexit and the 1998 Agreement

NI's awkward place within the efforts of successive UK governments to withdraw from the EU is well known. One of the most powerful criticisms levelled at Brexit was that leaving the EU would undermine the 1998 Agreement. This was not necessarily the case, but if the UK government was to stick by its commitment to protect the Agreement 'in full', then its terms did condition the withdrawal negotiations.⁶ The most contentious elements of those negotiations were over the terms of NI's special post-Brexit trade status, as many of the explicit equality commitments contained in the 1998 Agreement (especially in relation to employment and the provision of goods and services) were derived from EU law.⁷

The UK government therefore had to agree 'special' arrangements maintaining EU equality protections for NI, or risk exposing itself to accusations that it was in breach of the 1998 Agreement. Whilst the trading arrangements were worked and reworked on multiple occasions, the UK and the EU both agreed that EU law '*provided a supporting framework for the provisions on Rights, Safeguards and Equality of Opportunity of the 1998 Agreement*'.⁸ The terms of the special rights and equality arrangements were established in the first version of the Brexit deal under Theresa May, and have remained untouched during each reworking of the NI Protocol, including its rebranding as the Windsor Framework. Even when Boris Johnson's government threatened to renege on many of its commitments towards NI in the summer of 2021, it continued to insist that the guarantees around rights and equality were 'not controversial'.⁹ This apparent lack of controversy, however, left these commitments as some of the most misunderstood elements of the Withdrawal Agreement.

⁵ *In re Neill* [2006] NICA 5.

⁶ Theresa May, *Belfast Speech* (20 July 2018).

⁷ See Christopher McCrudden, 'Equality', in Colin Harvey (ed), *Human Rights, Equality and Democratic Renewal in Northern Ireland* (Hart, 2001) 75, 99.

⁸ Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union (30 January 2020), *Protocol on Ireland and Northern Ireland, Preamble*. See also EU Commission, '*Joint report from the negotiators of the European Union and the United Kingdom Government*' (2017) para 52.

⁹ Northern Ireland Secretary, *Northern Ireland Protocol: the way forward* (2021), CP 502, para 37.

...many of the explicit equality commitments contained in the 1998 Agreement ... were derived from EU law.

The Windsor Framework

Article 2 of the Windsor Framework makes the following commitments:

1. *The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.*
2. *The United Kingdom shall continue to facilitate the related work of the institutions and bodies set up pursuant to the 1998 Agreement, including the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland, in upholding human rights and equality standards.¹⁰*

Article 13(3) of the Windsor Framework provides that the UK is under an obligation to ensure that Northern Ireland law keeps pace with any developments in these EU laws.

Under the first paragraph, two commitments can be discerned. Firstly, NI would face no reduction in rights and equality protections derived from EU law, and secondly, a specific commitment to the six directives, listed in Annex 1, concerning key EU laws relevant to race, sex, sexual orientation and disability as protected characteristics.¹¹ Article 13(3) of the Windsor Framework provides that the UK is under an obligation to ensure that Northern Ireland law keeps pace with any developments in these EU laws. Under the withdrawal legislation,¹² rights and obligations subject to UK commitments are actionable in domestic law, functioning as if the UK remained an EU member state.¹³

Because NI's devolved institutions had collapsed under the strains of Brexit between 2022 and 2024, it is unsurprising that some of the most notable case law arising from Article 2 related to measures enacted by Westminster. In *re Dillon*,¹⁴ the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 was challenged on the basis that it diminished protections available to the victims of crime under the Victims Directive.¹⁵ In *re NIHRC and JR295*,¹⁶ the Illegal Migration Act 2023 was challenged as it could not be reconciled with EU protections for immigrants, including the Trafficking Directive, the Procedures Directive and the Qualification Directive.¹⁷ In these cases, the NI courts have agreed that Article 2 had direct effect¹⁸ and that any inconsistent provisions under Westminster statutes should be disapplied.¹⁹ The *re Dillon* decision is currently subject to an appeal before the UK Supreme Court (UKSC), with the UK government seeking to limit the scope of the non-diminution commitment. None of the cases

¹⁰ Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union (30 January 2020), Protocol on Ireland and Northern Ireland, Article 2.

¹¹ Race Equality Directive: Directive 2000/43/EC; Framework Directive (religion and belief; age; sexual orientation; and disability): Directive 2000/78/EC; Gender Goods and Services Directive: Directive 2004/113/EC; Equal Treatment Directive (Recast) (employment): Directive 2006/54/EC; Equal Treatment Directive (self-employment): Directive 2010/41/EU; Equal Treatment Directive (social security): Directive 79/7/EEC.

¹² Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union (30 January 2020), Article 4(1) and European Union (Withdrawal) Act 2018, s7A.

¹³ See *Re Allister's and Peoples' applications for judicial review* [2023] UKSC 5; [2023] 2 WLR 257, [74] (Lord Stephens).

¹⁴ *Re Dillon and others' applications for judicial review* [2024] NICA 59.

¹⁵ Directive 2011/36/EU, Articles 11 and 16.

¹⁶ *Re NIHRC and JR295's applications for judicial review* [2024] NIKB 35.

¹⁷ Qualification Directive: Directive 2004/83/EC; Procedures Directive: Directive 2005/85/EC; Trafficking Directive: Directive 2011/36/EU.

¹⁸ *Re Dillon and others' applications for judicial review* [2024] NICA 59, [85] (Keegan LCJ); *Re NIHRC and JR295's applications for judicial review* [2024] NIKB 35, [57] (Humphreys J).

¹⁹ *Re Dillon and others' applications for judicial review* [2024] NICA 59, [158] (Keegan LCJ); *Re NIHRC and JR295's applications for judicial review* [2024] NIKB 35, [57] (Humphreys J).

above, however, touch upon the specific UK commitments to EU law contained in the six Annex 1 directives.

The ongoing significance of CJEU decisions

Put simply, therefore, the Windsor Framework provides for no backtracking on existing EU equality protections during the Brexit implementation period, along with a specific commitment to future EU developments. In some cases, however, this might be too simplistic an understanding. As Article 13(2) of the Windsor Framework states, *‘the provisions of this Protocol referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union [CJEU].’* This is deliberately distinguished from provisions in the general withdrawal legislation about the application of CJEU case law in post-Brexit UK. The UKSC majority in *Lipton v BA Cityflyer Ltd* concluded that these provisions enabled the UK courts to depart from pre- and post-Brexit CJEU case law, recognising that *‘a fundamental object of Brexit was to remove the supremacy of the CJEU.’*²⁰

Yet Article 2 of the Windsor Framework means the NI courts (including the UKSC when it sits as the highest court of appeal within NI) are obliged to follow relevant CJEU case law, with no suggestion that this obligation is limited to pre-Brexit CJEU decisions.²¹

There are already multiple examples of post-Brexit CJEU case-law developments which are relevant to the application of equality law in NI. For example, the Disability Discrimination Act 1995 continues to provide the basis for the protected characteristic of disability. Under that legislation, the determination of unlawful discrimination requires the treatment of a person with a disability to be compared to that of a person with no disability. However, the CJEU has since concluded that the comparator can include a person with a ‘different’ type of disability.²² In certain cases, this would need at least a rather creative reinterpretation of the law in Northern Ireland.

A further example can be found in the Race Relations (NI) Order 1997, which implements the EU’s Race Equality Directive (covered by Annex 1 of the Windsor Framework). This Order makes race, ethnicity and nationality ‘protected characteristics’ in contexts like employment. In *Braathens*, the CJEU concluded that Article 7 of the Race Equality Directive (concerning the enforcement of non-discrimination) constitutes a ‘specific expression’ of Article 47 of the Charter of Fundamental Rights, which guarantees the right to an effective remedy for Charter violations.²³ Consequently, any remedy for unlawful racial discrimination must be effective, including by having a *‘genuinely dissuasive effect’* on the discriminatory conduct.²⁴ This requirement could influence the NI courts in their consideration of remedies in certain cases.

Unlike Great Britain, the NI courts are obliged to interpret their relevant equality laws in line with these developments. So, while it might look superficially similar, NI law is actually being pulled in a different direction as a result of the Withdrawal Agreement’s commitments. The UKSC’s decision in *For Women Scotland (FWS)* is a case in point, highlighting this new divide.²⁵

NI law is actually being pulled in a different direction as a result of the Withdrawal Agreement’s commitments. The UKSC’s decision in *For Women Scotland (FWS)* is a case in point...

²⁰ *Lipton v BA Cityflyer Ltd* [2024] UKSC 24, [115] (Lord Sales and Lady Rose).

²¹ See Eleni Frantziou and Sarah Craig, ‘Understanding the implications of article 2 of the Northern Ireland Protocol in the context of EU case law developments’ (2022) 73(S2) NILQ 65, 69.

²² Case C-16/19, *Szpital Kliniczny im. dra J. Babinskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, EU:C:2021:64, para 29.

²³ Case C-30/19 *Diskrimineringsombudsmannen v Braathens Regional Aviation AB*, EU:C:2021:269, para 30.

²⁴ Case C-30/19 *Diskrimineringsombudsmannen v Braathens Regional Aviation AB*, EU:C:2021:269, para 38.

²⁵ *For Women Scotland (FWS) Ltd v The Scottish Ministers* [2025] UKSC 16.

The *For Women Scotland* conundrum

In *FWS*, the UK Supreme Court held that for the purposes of the EqA, the term 'sex' refers to 'biological' sex. As a result, individuals holding a Gender Recognition Certificate (GRC) recognising their gender as female are not included within the definition of 'woman' under the EqA.²⁶ This case arose from issues raised by devolved legislation in Scotland. The substance of the ruling and the debate surrounding it have already been discussed in depth in *Briefings* [2025] 1127-1130, and this section is only intended to consider its implications for Northern Ireland.

The Equality Commission for Northern Ireland (ECNI) followed *FWS* with an effort to address the decision's implications for NI equality law. This began from the premise that such a judgment would normally be treated as '*highly persuasive in this jurisdiction in the interpretation of equivalent legislation that applies only in respect of Northern Ireland*'.²⁷ The ECNI came to this conclusion because legislation such as the Equal Pay Act 1970, the Sex Discrimination (Northern Ireland) Order 1976, and s75 of the Northern Ireland Act 1998, provides a legal framework for sex/gender that appears generally comparable to the EqA.

However, in this case, as the ECNI goes on to observe, there are significant difficulties in 'translating' that judgment into NI law²⁸ due to Article 2 of the Windsor Framework. As a result, the courts in NI cannot simply apply the UKSC's decision without careful consideration of its implications for EU derived law.

In *FWS*, the UKSC's ruling on the meaning of sex under the EqA is derived from its (selective) account of the development of this protected characteristic in anti-discrimination law. The court began from the historic proposition that 'sex' in the Sex Discrimination Act 1975 referred to biological sex, and that the Sex Discrimination (Gender Reassignment) Regulations 1999 did not alter that approach.²⁹ Consequently, the court held, neither did the EqA.³⁰ However, this account did not address the EU law context that informed these developments. The 1999 Regulations did not need to redefine 'sex', as EU law already required a trans-inclusive interpretation. The Regulations had been adopted in response to *P v S and Cornwall County Council*, in which the CJEU held that discrimination on the grounds of gender reassignment is, '*essentially if not exclusively*', a form of sex discrimination.³¹

This distinction is critical when evaluating *FWS*. Like the UKSC, the CJEU recognised that discrimination can occur when someone transitions to another gender. However, they then went further by acknowledging that transgender individuals may experience discrimination specifically related to their affirmed, post-transition gender. This broader understanding was later confirmed by the UK House of Lords.³² The EqA was enacted within an evolving legal environment, shaped by EU jurisprudence, which had already expanded the meaning of sex and gender beyond the definitions set out in 1975. For

...the CJEU recognised that discrimination can occur when someone transitions to another gender. However, they then went further by acknowledging that transgender individuals may experience discrimination specifically related to their affirmed, post-transition gender.

²⁶ *For Women Scotland (FWS) Ltd v The Scottish Ministers* [2025] UKSC 16, para 264.

²⁷ Equality Commission for Northern Ireland, '[Legal paper and information: The meanings of "sex", "men", "women" and "gender reassignment" in equality and allied legislation in Northern Ireland and interim information for employers, service providers and public authorities](#)' (June 2025) 5 (emphasis in original).

²⁸ Equality Commission for Northern Ireland, '[Legal paper and information: The meanings of "sex", "men", "women" and "gender reassignment" in equality and allied legislation in Northern Ireland and interim information for employers, service providers and public authorities](#)' (June 2025) 9 (emphasis in original).

²⁹ Sex Discrimination (Gender Reassignment) Regulations 1999 (SI 1999/1102). The Northern Ireland equivalent of this measure is the Sex Discrimination (Gender Reassignment) (Northern Ireland) Order 1999 (SR 1999/311).

³⁰ *For Women Scotland (FWS) Ltd v The Scottish Ministers* [2025] UKSC 16, para 265.

³¹ Case C-13/94 *P v S and Cornwall County Council*, EU:C:1996:170, para 21.

³² *Chief Constable of West Yorkshire v A (No 2)* [2004] UKHL 21, para 11 (Lord Bingham).

It seems that the law in Great Britain is moving in the opposite direction to the law in NI on high-profile equality issues like the treatment of trans people.

as long as protection for gender reassignment was aligned with the protection of sex within the UK's jurisdictions, the requirements of EU law were being fulfilled.

In asserting that these protections are entirely distinct, the *FWS* decision fails to account for the EU law's requirements for the alignment of sex and gender protections.³³ The UKSC might be able to adopt this approach in post-Brexit Great Britain, where it is no longer bound by the CJEU, but Article 2 of the Windsor Framework preserves the alignment of NI's equality laws with those of the EU, even after Brexit. Article 13(2) requires NI's courts, including the UKSC when acting in NI, to act 'in conformity' with relevant CJEU case law. It cannot therefore ignore that the provision of the Equal Treatment Directive (2000/78/EC) operates on the basis of a trans-inclusive meaning of 'sex'.

In the wake of *FWS*, the ECNI is asking the NI High Court for clarification on the protection of rights for trans people in NI. In preparing guidance, it is not, as the EHRC is in Great Britain, responding to the terms of that judgment in isolation, but must also act in line with the Windsor Framework's commitments. As a result, the High Court will likely be providing the first substantive judicial assessment of the specific equality commitments to the Annex 1 directives made under the Windsor Framework.

A place apart

The bonds which once connected the equality law in NI to that in Great Britain have come under increasing strain since Brexit, mostly due to the provisions of Article 2 of the Windsor Framework. It seems that the law in Great Britain is moving in the opposite direction to the law in NI on high-profile equality issues like the treatment of trans people. But this is not surprising given the nature of the Brexit deal. Unionists had hoped that over time, withdrawal from the EU would see NI law track developments in Westminster more closely, thereby complicating any move towards the reunification of Ireland. What happened, and indeed, what *had* to happen in light of the 1998 Agreement's commitments, was that NI left the EU on very different terms from the rest of the UK. The reality of that arrangement is only beginning to be felt in the realm of equality law.

³³ Case C-13/94 *P v S and Cornwall County Council*, EU:C:1996:170, para 21. See also Case C-423/04 *Richards v Secretary of State for Work and Pensions* EU:C:2006:256, para 24.

Thirty years on: disability discrimination law – is it fit for purpose?

Catherine Casserley is a barrister at Cloisters Chambers, specialising in discrimination, human rights and employment, with particular expertise in disability. She was employed as senior adviser at the Disability Rights Commission, where she advised on the formative cases on disability equality and has since appeared in many of them. In this article, Catherine considers the background to disability law in the UK, outlines some key milestones in its development, and evaluates the impact that legislation may have had.

Introduction

This year marks the thirtieth anniversary of the passing of the Disability Discrimination Act 1995 (DDA). While it was a landmark moment in the recognition of disabled people's rights, the journey since has been uneven. There have been notable legal victories, and the passage of the DDA has undoubtedly made a significant difference to both the legal landscape and the lives of disabled people. However, the legislation does not always deliver, and disabled people continue to face systemic discrimination.

Disability Discrimination Act 1995 (DDA)

The DDA was passed following a significant campaign by disabled people for their civil rights. It was rushed through by a government that feared the passage of a more generous private members' bill, but the legislation was limited. For example, it did not cover employers with less than 20 employees, nor did it apply to education, transport, or public authority functions. There was no duty to make adjustments in housing, and no public sector equality duty. But the DDA was the first time that disabled people could assert a right not to be subject to discrimination, and it included a positive obligation on duty-bearers to make reasonable adjustments (a novel and often misunderstood concept in UK legislation). The DDA's omissions were largely addressed by subsequent legislation implementing the recommendations of the Disability Rights Commission (DRC), in addition to changes required by the European Employment Framework Directive.

Early cases brought under the DDA – and supported mainly by the DRC – established the potential reach of the legislation. *Archibald v Fife* [2004] UKHL 32, makes clear the reach of the duty to make adjustments in employment, and the need to treat disabled people 'more favourably' to remove disadvantage (see Baroness Hale at para 47).

The 1995 Act, [DDA] however, does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment.

Clark v Novacold [1999] ICR 951 established that the breadth of provision for disability discrimination was broader than the traditional direct formulation, and comparators were not required to be in the 'same or not materially different' circumstances. In *Roads v Central Trains* [2004] EWCA Civ 1541, the Court of Appeal (CA) confirmed the anticipatory nature of the duty to make reasonable adjustments in the context of services (para 11) and the need for services to be as close as reasonably possible to get to the standard normally offered to the public at large (para 13) – something which, unfortunately, is still overlooked today.

RBS v Allen [2009] EWCA Civ 1213, saw the CA affirm the decision of a lower court that a bank had failed to make reasonable adjustments in not installing a platform lift. As

***Archibald v Fife* [2004] makes clear the reach of the duty to make adjustments in employment, and the need to treat disabled people 'more favourably' to remove disadvantage...**

The EqA not only brought together the anti-discrimination provisions across the full range of protected characteristics, but it also expanded those specific to disability.

a result, the bank was ordered to install such a lift at a cost of a quarter of a million pounds – a first for UK legislation.

However, *Lewisham v Malcolm* [2008] UKHL 43 was, unfortunately, a disaster for the operation of the broader direct discrimination provision established by *Novacold*. This was largely due to the housing provisions having been added to the DDA at the last minute, without the ramifications having been thought through. It was fortunately remedied by the introduction of s15 to the Equality Act 2010 (EqA) – though not without considerable lobbying on the part of the Disability Rights Commission (DRC), together with the disabled community and their lawyers.

The Equality Act 2010

The EqA not only brought together the anti-discrimination provisions across the full range of protected characteristics, but it also expanded those specific to disability. This included the introduction of s15 '*discrimination because of something arising in consequence of disability*', extending the application of indirect discrimination (s19) to the characteristic of disability, and prohibiting discriminatory job advertisements in employment. It also applied a consistent definition of 'reasonable adjustments' across the different areas of activity, although the application of the duty as set out in the Schedules to the EqA varies depending upon what area of activity it is being applied to (e.g. employment or goods and services).

Employment

The EqA provisions have addressed the need for businesses to respond appropriately to the barriers faced by disabled workers, as a matter of law. In particular, *City of York Council v Grosset* [2018] EWCA 1105 clarified that whether treatment is '*because of something arising in consequence of disability*' is a question of fact for the court. In addition, whilst emphasising accepting that no knowledge of the causal link is required, the judgment in *Grosset* illustrated the breadth of that link. The case involved a teacher who, under stress exacerbated by his disability, showed an 18-rated horror film to a class of younger teenagers and was then dismissed for gross misconduct. He successfully claimed discrimination under s15 EqA, arguing his conduct was caused by '*something arising in consequence of his disability*'. It then fell to the employer to justify it as being a '*proportionate means of achieving a legitimate aim*'. This approach to s15 has been followed in numerous cases since, see for example the helpful obiter comments on causal connection in *Connor v Chief Constable of South Yorkshire Police* [2024] EAT 175.

In *Griffiths v Secretary of State for Work and Pensions* [2015] EWCA Civ 1265, the CA considered the broad nature of the duty to make reasonable adjustments, and confirmed that it could extend to attendance management policies. For example, a policy that triggers disciplinary action after a fixed number of absences may adversely affect all, but the relevant question is whether it has a greater negative impact on disabled people. The case also confirmed the correct comparator for these purposes is not someone with the same level of absence, but for non-disability related absences, instead, it is a non-disabled employee subject to the same policy. This finally banished any remnants of the old DDA approach to comparators, and it also reaffirmed that the duty to make adjustments is objective – what an employer believes about reasonableness is irrelevant.

Knowledge of disability

There are still areas for disabled people in employment (or perhaps waiting to get employment) that the disability legislation has failed to tackle.

The burden of proving disability for the purposes of s6 EqA is placed upon the employee. Whilst the threshold is low, disabled people will often find that disability is disputed, and this may be used as a tactic to deter claims and/or to increase costs. Caselaw and the statutory guidance have been broadly helpful in this respect; however, when it comes to the requirement of 'knowledge', it is a different matter. If an employer can show that it does not know (or could not be reasonably expected to know) of a disability, there is no liability for s15 discrimination. If it can show *either* that it did not know of the disability *or* of the disadvantage likely to be caused (or could not reasonably be expected to know), there is no liability for breach of the duty to make reasonable adjustments (EqA Schedule 2). Knowledge, it has been held, is knowledge of an impairment with 'a substantial and long-term effect' – which can sometimes be a low threshold for an employer to meet (see, for example, *A Ltd v Z* UKEAT/0273/18/BA, para 23).

Reasonable adjustments under s20 EqA

The cost of making reasonable adjustments has not generally featured as a factor when determining claims, largely because where they do involve cost (and many adjustments do not) they can often be funded by the government's Access to Work scheme. This may no longer be the case, however, in light of potential changes indicated in the recent government consultation – *Pathways to Work: Reforming Benefits and Support to Get Britain Working Green Paper*.

However, Access to Work is not available to civil service employers, and in *Cordell v Foreign and Commonwealth Office* [2012] ICR 280, the EAT dealt explicitly with cost. Ms Cordell (C), who is Deaf, was employed as a diplomat in Warsaw, with full-time lip speaker support. She was offered a promotion as Deputy Head of Mission in Kazakhstan, but the cost of replicating her support in that country was estimated at £250,000 per year. The employer (FCO) withdrew the offer, citing the unreasonableness of the cost and practicability of the arrangements. C claimed direct discrimination (comparing herself to non-disabled employees who had their children's school fees paid) and failure to make reasonable adjustments. Both claims failed at ET. On appeal, whilst the EAT was sympathetic to C's situation, it was said by the court that: *'It is a great misfortune for her that her disability may limit her opportunities to use her evident abilities in full...But the law does not require it to compensate for that misfortune at whatever cost.'* This was a significant blow, not only for C, but potentially for all those who rely on their employers to provide costly reasonable adjustments.

In addition to the limitation on reasonable adjustments, the concept of 'indissociability' has not been extended to disability. This term refers to situations where the reason for discrimination is a 'proxy' for the protected characteristic, and features in race and sex discrimination claims. So, for example, in *Amnesty International v Ahmed* [2009] ICR 1450, the employer had refused to permit a Sudanese national to be allocated to a post in Sudan because it was concerned about her 'impartiality' in addition to her safety. The EAT upheld the tribunal's decision that this had been race discrimination as the concerns were actually a proxy for the claimant's race.

However, in *Owen v Amec Foster Wheeler Energy Ltd* [2019] EWCA Civ 822, the ET (and EAT) held that a refusal to allow a disabled claimant to work overseas due to 'risks' arising from his disability was *not* direct discrimination. On appeal, the CA said that *'... unlike racial or sex discrimination, the concept of disability is not simply a binary one. It is also not the case that a person's health is always entirely irrelevant to their ability to do a job. For those reasons, the concept of indissociability... cannot readily be translated to the context of disability discrimination.'*

'... unlike racial or sex discrimination, the concept of disability is not simply a binary one. It is also not the case that a person's health is always entirely irrelevant to their ability to do a job.'

The reach of the PSED, however, has been disappointing in other respects. There are many cases in which it has failed to deliver the results expected by those who had lobbied for its implementation...

There have been far fewer significant cases in the area of services and functions than in employment under the EqA. However, cases such as *Paulley v First Bus* [2017] UKSC 4 have established the continued importance of the anticipatory duty to make reasonable adjustments and the 'real prospect' test for their effectiveness. Meanwhile, *Finnigan v Northumbria Police* [2013] EWCA 1191, though not successful on its facts, emphasised the shifting of the burden of proof in the context of s20.

Public sector equality duty under s149 EqA

Though off to a comparatively slow start, the public function provisions and the public sector equality duty (PSED) now feature more significantly in challenges to public bodies by way of judicial review. There have been notable successes in relation to:

- decision to close the independent living fund: *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345
- decision to close a leisure centre: *R on the application of Williams v Caerphilly CBC* [2019] EWHC 1618
- decision to grant planning permission involving loss of a car park: *LDRA Ltd v Secretary of State for Communities and Local Government* [2016] EWHC 950
- immigration detention of those with mental health issues: *VC, R (On the Application Of) v The Secretary of State for the Home Department (Rev 1)* [2018] EWCA Civ 57
- imposition of a benefits cap: *R on the application of Hurley and Ors v Secretary of State for Work and Pensions* [2015] EWHC 3382.

The reach of the PSED, however, has been disappointing in other respects. There are many cases in which it has failed to deliver the results expected by those who had lobbied for its implementation, especially in relation to the duty under s149. This requires, having regard to various matters in the process by which an outcome is reached, but not requiring any particular outcome. (See *Hamnett v Essex County Council* [2014] 1 WLR 2562, per Singh J at para 76.)

Housing

Practitioners now routinely use the EqA in defending possession proceedings for disabled claimants. Not only in cases of delay/inability to pay rent, or 'anti-social behaviour', but also in public law challenges to allocation schemes – often successfully.

There are difficulties, however, when it comes to accessible housing, where the High Court has been clear that the duty to make reasonable adjustments does not apply to local authorities as landlords in relation to their premises. (See *(FG) v Royal Borough of Kensington and Chelsea* [2024] EWHC 780.)

Education

Again, few claims are brought in the area of education, and those that are will often be settled out of court. Cases relating to schools are limited in their scope as the duty to make adjustments does not extend to physical features of school buildings. As for enforcement, any discrimination claim involving disability in education must be brought in the first tier tribunal. This means that no compensation is available, and it is generally a 'no costs' regime. This is likely to limit take-up, particularly where a child has left school.

Post-16 claims are also rare, with a few exceptions – such as the tragic case of *University of Bristol v Abrahart* [2024] EWHC 299. This significant judgment about the reach of reasonable adjustments in universities was long overdue.

Whilst there is a good support network for disabled people who are bringing their own cases, those who are not legally qualified can fall foul of some of the more complex legal arguments...

Enforcement of non-employment cases

In my opinion, the most significant difficulty with the non-employment provisions lies in enforcement. While there is an anticipatory duty to make reasonable adjustments both in services and in further and higher education, it relies on individuals to bring claims against those in breach of their obligations. Civil litigation is costly, and legal aid is limited both in terms of provision and availability. The expertise required to run these cases is also limited, not least due to the lack of available funding. Whilst there is a good support network for disabled people who are bringing their own cases, those who are not legally qualified can fall foul of some of the more complex legal arguments in what is largely uncharted non-employment territory. The same issues arise in education (and to a lesser degree, housing), where it is the limitation of the provisions themselves that causes the difficulty.

Has disability legislation made a difference?

Employment: according to the Disability Unit's publication *Disabled people's employment in the UK: A thematic review of the literature* (July 2025):

- *Disabled people in the UK are currently more than twice as likely as non-disabled people to be unemployed (6.9% versus 3.6%).*
- *They are also three times as likely to be economically inactive (43.1% versus 15.4%).*
- *Disabled people face barriers in every aspect of employment, including*
 - *recruiting*
 - *applying*
 - *interviewing*
 - *hiring*
 - *training*
 - *career progression*
 - *retention*

Negative perceptions from employers about impairment heavily influence the organisation's:

- *hiring of disabled people*
- *willingness to provide reasonable adjustments*
- *views about the disabled person's expertise*
- *social inclusion of disabled people into their workplace*
- *treatment of disabled people by the employer and their colleagues*
- *other issues that can create barriers to a disabled person's employment*

Telling employers about their impairment or health condition has sometimes led to a negative experience for disabled people. This often stems from negative reactions and stigma from their manager and colleagues.

The research also found:

'Within our analysis, an emerging theme is discrimination. By far the most prominent type of discrimination is 'systemic discrimination'. This indicates that barriers to work arise more from barriers in society than from people and their impairments.

Some of these barriers relate to the views employers hold about disabled people. The research indicates that when some managers have negative attitudes, this can affect the quality of reasonable adjustments and therefore affect disabled people's employment.¹

Services: there have been repeated reports from disability organisations about the difficulties that disabled people face in accessing services.

A 2022 survey by RNIB found that 41% of blind and partially sighted people said they did not receive accessible information after requesting it from financial service providers, contrary to the provisions of the EqA.²

In 2024, research by the organisation Guide Dogs found that 88% of guide-dog owners had experienced an access refusal, and 72% of those said that it occurred in the past 12 months.³

The Women and Equality report of its inquiry into the national disability strategy⁴ considered the inaccessibility of many banking facilities to disabled people, and made the following statements:

We are also concerned that not all banks properly consider the needs of disabled people in the provision of ATMs. The Financial Conduct Authority should work with the retail banking sector and organisations such as the RNIB to ensure all banks embrace inclusive design from the outset when innovating or phasing out existing services. We recommend that all banks:

- *roll out flat bank cards that are accessible to disabled people, and continue to issue embossed cards to customers who request them;*
- *in addition to tactile indicators, ensure that all flat bank cards have a clear visual design, including colour, good contrast and large font size; and*
- *where ATMs are provided, ensure they have been user tested with disabled people, installed in locations accessible to all and are regularly checked to guarantee that accessible features are in working order.*

Not only has there been little improvement in some areas, but with increasing changes to services and digitalisation, things are actually getting worse in certain respects. For example, STAMMA found that of the approximately 42 million calls made by people who stammer, 65% were mishandled by being talked over, interrupted, trapped in voice recognition loops and hung up on.⁵

Education: the House of Lords Report *Challenges faced by People with Disabilities* published on 13 May 2024 stated that:

Data from the ONS's release 'Outcomes for disabled people in the UK: 2021' (the most recent edition available) shows that disabled people are less likely than non-disabled people to have degree-level qualifications and are more likely to have no qualifications at all.

A quarter (24.9%) of disabled people aged 21 to 64 years had a degree or equivalent as their highest qualification, compared with 42.7% of non-disabled people. In

¹ See report at <https://www.gov.uk/government/publications/disabled-peoples-employment-in-the-uk-a-thematic-review-of-the-literature/disabled-peoples-employment-in-the-uk-a-thematic-review-of-the-literature>

² <https://committees.parliament.uk/writtenevidence/130533/html/>

³ <https://www.guidedogs.org.uk/how-you-can-help/campaigning/manifesto/>

⁴ <https://publications.parliament.uk/pa/cm5804/cmselect/cmwomeq/34/report.html>

⁵ <https://stamma.org/2025-report-phone-accessibility>

It is obvious, but worth restating, that legislation alone cannot create equality or change attitudes.

addition, disabled people were almost three times as likely to have no qualifications (13.3%) than non-disabled people (4.6%). Disabled people were also more likely to have GCSE grades C and higher or equivalent as their highest form of qualification (23.3%), in comparison with non-disabled people (17.4%).

Housing: the organisation Disability Rights UK has described the housing sector as ‘a dangerous mess’ for disabled people. It has said that the private rented sector has problems with accessibility, issues with disrepair, dangerous homes and ‘poor behaviour from landlords’; the social housing sector also has unacceptable conditions and costs; only 23% of the new homes expected to be built by 2030 outside London are planned to be accessible; and that only 1% of homes outside London ‘are set to be suitable for wheelchair users despite 1.2 million wheelchair users.’⁶

Transport: in the summary of its report *Access denied: rights versus reality in disabled people’s access to transport*, the House of Commons Transport Committee stated:

Our predecessor Committee heard that accessibility failings in transport are systematically ingrained across modes, have got worse since the Covid-19 pandemic and have a significant negative impact on people’s lives. This is despite the adoption of clear policy aspirations to provide equal access to transport for disabled people, and a framework of equality legislation.

The evidence from disabled people shows that there is still a very substantial gap between the rights and obligations that exist in theory, and the daily experience of people who rely on pavements, buses, taxis, trains and planes to get to work, to access services or for leisure.

The view from parliament

There have been a number of parliamentary committees that have considered the working of the EqA in the context of disability. These include a House of Lords select committee, which found the EqA had not fully delivered for disabled people and, in particular, that enforcement mechanisms were weak and reasonable adjustments were inconsistently applied.⁷

The Women and Equality Committee also considered the enforcement of equality law⁸ and found, amongst other things, that it was overly reliant on individuals bringing claims, which put an unfair burden on disabled people. It further found that many products and services remained inaccessible, and disability issues are often overlooked in service design and delivery.⁹

Conclusion

Both the DDA and EqA have undoubtedly made some difference, not least in introducing rights where before there were none. But what of the future?

It is obvious, but worth restating, that legislation alone cannot create equality or change attitudes. However, as emphasised in what was the first review of disability legislation by the DRC¹⁰ it can set clear standards of acceptable behaviour and provide redress for

⁶ <https://www.disabilityrightsuk.org/housing>

⁷ *The Equality Act 2010, impact on disabled people:* <https://lordslibrary.parliament.uk/the-equality-act-2010-impact-on-disabled-people/>

⁸ *Enforcing the Equality Act: The Law and the Role of the EHRC*

⁹ *Accessibility of Products and Services to Disabled People*, March 2024

¹⁰ *Disability Equality, Making it Happen* (2003) <https://disability-studies.leeds.ac.uk/wp-content/uploads/sites/40/library/DRC-Learning-lessons-the-DRCs-legislative-review.pdf>

individuals who have suffered injustice at the hands of others. The DDA was the first formal acknowledgement in law of the existence of disability discrimination and the need for legal remedies to counter it. Whilst it marked a milestone in the achievement of disability rights, it was nevertheless limited in comparison with a full civil rights vision and flawed in some fundamental ways.

The EqA, whilst incorporating some significant improvements, has continued with those flaws. In particular, its ability to tackle systemic discrimination along with the prosecution of rights is severely limited by both its inadequate provision and the means of enforcement. A new approach is needed to ensure that rights are real and not illusory. Disability access – in its broadest sense – must be *built in*, rather than an afterthought.

Reverse burden of proof and treatment of comparators in discrimination claims

Leicester City Council v Parmar [2025] EWCA Civ 952; July 22, 2025; [2024] *Briefing* 1110

Implications for practitioners

The decision to instigate disciplinary procedures on an allegation of misconduct that is never particularised may amount to less favourable treatment when the use of non-identical comparators is relied on as supporting evidence. Adverse inferences can also be drawn from failures to disclose relevant documents when considering whether the burden of proof has shifted in a discrimination case.

Facts

Mrs B Parmar (BP) is a British national of Indian origin and was employed by Leicester City Council as a head of service. She reported to Ms R Lake (RL), the director of Adult Social Care and Safeguarding.

Between 2018 and 2020, there was an escalation of tension between the team managed by BP and another team. During this time, BP raised concerns with her director, RL, about possible race discrimination. No action was ever taken. In January 2021, there was an 'angry' exchange of emails that involved one of BP's staff and AE (a white British head of service) about a safeguarding case. BP had been copied in and referred the issue to a principal social worker for advice. AE then raised a complaint that BP had escalated the matters beyond reason. In response, RL started a disciplinary investigation against BP and decided to temporarily transfer her to another post.

From February 2021, RL had two disciplinary investigation meetings with BP, and a third was arranged. Two general failures were alleged against her, but they were vague, and no details were given about what provisions or standards she had breached. These allegations were eventually dropped after another director took over the investigation and found no case to answer.

Employment Tribunal

On 7 May 2021, BP brought a claim of direct race discrimination under s13 of the Equality Act 2010 (EqA). BP argued that the Council discriminated against her by starting a baseless disciplinary investigation and transferring her from her role. She referred to instances where complaints against white managers had been dealt with quite differently.

The ET was satisfied that BP had proven facts from which an inference of discrimination might be drawn, and the burden shifted to the Council to show there were non-discriminatory reasons for the treatment. The ET also drew adverse inferences from the Council's failure to disclose relevant evidence, and rejected the Council's non-discriminatory explanations for what happened.

The ET were satisfied that RL would not have initiated a disciplinary investigation or suspended a white employee in the same or similar circumstances, and upheld BP's direct race discrimination claim.

The ET was entitled to consider that the 'evidential' comparators assisted the process of drawing inferences, and to find there was more than a mere difference of treatment and status

Employment Appeal Tribunal

The Council appealed to the EAT on 11 grounds, including that the ET judgment did not itemise all similarities and differences between the comparators.

The EAT criticised the Council's pernicky approach and found that the primary reason for the ET shifting the burden of proof was that RL had not disciplined other white employees in similar circumstances to BP.

The court explained that when comparing treatment, there is no need to pick apart each small component to assess whether there is nothing more than a mere difference of status and treatment. The ET was entitled to consider that the 'evidential' comparators assisted the process of drawing inferences, and to find there was more than a mere difference of treatment and status.

The EAT also found that the ET had not automatically drawn an inference of discrimination from the failure to disclose documents, and therefore had not erred in law. The failure was a minor factor that was considered alongside everything else that resulted in the burden shifting.

Court of Appeal

The Council appealed to the CA on four grounds, all of which were dismissed. The Council argued that:

- the ET had treated the comparators as 'actual' comparators and did not pay sufficient attention to the difference in circumstances to BP. In response, the CA found that the ET made extensive findings of fact and was entitled to decide that the circumstances of the evidential comparators were sufficiently similar to support an inference of discrimination. BP had been treated more harshly than white employees whose conduct was similar to hers or more serious. RL had disciplined at least two Asian managers, but no white managers. The disciplinary investigation against BP was baseless as the charges were never particularised
- the ET erred in law by automatically treating a failure to disclose relevant documents as raising a presumption of discrimination. In response, the CA found that the ET did not do so. The ET was entitled to draw adverse inferences from the failure to disclose evidence which was clearly relevant and led to the conclusion that there was no substance in the allegations against BP
- the ET's approach to the Council's non-discriminatory explanation for its treatment of BP was wrong. In response, the CA found that it was clear the ET did not think the explanations were credible and could not displace an inference of discrimination
- the ET's approach to the Council's having invited BP to disciplinary meetings was wrong. In response, the CA found that it was clear the ET considered the decision to invite BP to the first two disciplinary investigation meetings was part of a baseless investigation, and amounted to less favourable treatment because of her race.

Comment

The case confirms that an ET does not have to itemise all the similarities and differences between evidential comparators and the claimant when drawing inferences of race discrimination. A decision to instigate disciplinary procedures can itself be found to be less favourable treatment if an employer cannot provide non-discriminatory reasons for not investigating other employees in similar or more serious circumstances.

Additionally, whilst it will be an error of law to automatically treat a failure to disclose relevant documents as raising a presumption of discrimination, an ET is still entitled to draw an adverse inference.

Jenny Chung

Senior paralegal, Leigh Day

More than a play on words: 'related to' and 'effect' in harassment claims

Logo v (1) Payone GMBH; (2) Mr S Schrader; (3) Mr A Boyens [2025] EAT 95; July 7, 2025

Implications for practitioners

This case confirms that conduct does not necessarily have to directly refer to a particular protected characteristic to be considered 'related to' such a characteristic.

Further, practitioners must look beyond the motivation and understanding of an alleged harasser and assess the 'effect' of the conduct under s26(1)(b) EqA, along with the wider context under s26(4). The subjective element in determining whether harassment has occurred must be considered, even where it may mean someone with innocent intent will be found to have carried out a harassing act. The view of the claimant and the context of the conduct is of vital consideration.

Facts

Mr Logo (JL), who is black, complained of three incidents of racial harassment. This briefing note focuses on one of those – an advertisement which Mr S Schrader (SS), who was German, circulated without comment to a small WhatsApp group including the claimant. The advertisement was for an Australian beer called 'Pure Blonde' and depicted a 'utopia' composed exclusively of white, toned, blonde people drinking the beer, who were then splashed with mud from another white but brown haired, overweight individual who was also drinking the beer.

JL's evidence was that the advertisement shared on the WhatsApp group was not funny. In his view, it appeared to promote an all-blonde Aryan 'utopia' associated with the ideology of the Nazis. SS's evidence was that he could not see how someone who was not white would be offended by the content; he saw no reference to Holocaust survivors or people of African origin and had interpreted the message of the advertisement differently. JL was cross-examined on whether his taking offence was influenced by SS being German. SS was cross-examined on whether he would have sent the advertisement to a Holocaust survivor.

Employment Tribunal

The non-legal members of the ET found the advertisement had no relation to race but was a play on words involving the name of the beer – 'Pure Blonde'. They also found it offensive that JL thought SS's conduct was deliberate and was influenced by SS being German. The judge found the play on words related to an aspect of race, as it carried an implication about the 'purity' of the beer and the white blonde people in the advertisement. However, she also found the connection to race was '*weak and tenuous*', and the full tribunal panel agreed it was not reasonable for JL to have felt there was any connection to the Nazi ideology of an Aryan race.

The full ET also found that it was not reasonable to take offence at the advertisement as it was not derogatory towards black people, and the presumption that the offence had been intended was based on the nationality of SS. Overall, the ET believed if SS had known the content might be offensive he would not have shared it.

Employment Appeal Tribunal

There were five grounds of appeal before the EAT:

- the ET erred in law in finding the third respondent did not contravene s.26 EqA
- the ET failed to properly apply the law regarding the meaning of 'related to'
- the ET failed to take into account the 'subjective elements' of its s26(1)(a) analysis
- the ET had considered the context of the advertisement itself rather than the context of its circulation by SS
- the ET finding that the conduct was not 'related to' race was perverse.

An individual's ignorance of how conduct, such as a video or advertisement, could impact and offend a person with a protected characteristic does not absolve them of liability.

The EAT found the ET made 'compounded' errors in its finding. First, it was not sufficiently careful in identifying the conduct in the first instance. This was the circulation of the advertisement, without any explanation, in a small WhatsApp group that included JL, who was black. The fact that the advertisement was meant to be humorous and SS had not intended to cause any offence, did not mean the conduct could not be related to race. The play on words aspect was clear to the EAT, who found that *'the circulation of a video that depicts a utopia of white, blond people who are "pure" is obviously related to race. It was perverse of the majority of the Employment Tribunal to find otherwise'*. The EAT went on to pose the point that *'If one asks the question what comes to mind if you think of a proposed utopia inhabited only by healthy toned white people who are "pure", an obvious answer is the offensive concept of racial purity advocated by eugenicists such as the Nazis'*. Even when finding it was obvious that the advertisement was not intended to support such ideology, the *'only rational decision'* for the ET was that the conduct was 'related to' race.

The EAT reaffirmed the law that in analysing the effect of the conduct, the ET must take *'account of the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have the effect of violating dignity.'* The ET had, instead, focused on SS's perception of the video. It ignored JL's evidence of how he felt, as a black person, having this content circulated to colleagues and himself without comment. The EAT also found *'no proper basis'* for the ET's assessment that it was offensive for JL to have found the conduct could have been deliberate. The ET had restricted its analysis to SS's evidence of intent or 'purpose' and failed to consider the wider context. The conduct did not need to be *'derogatory towards black people'* to have the requisite effect on JL. The advertiser's intention to 'debunk' the 'utopia' of the blonde people myth did not take away the potential for harassment.

The EAT remitted the matter to the same tribunal so it could be re-considered in light of their finding.

Comment

An individual's ignorance of how conduct, such as a video or advertisement, could impact and offend a person with a protected characteristic does not absolve them of liability. Section 26(1)(b) EqA has two alternatives divided by an 'or' – meaning an ET cannot just stop at evaluating the 'intention' of the alleged harasser. It must then turn to the context of the conduct together with the subjective view of the claimant when assessing the 'effect'.

Further, the conduct must be carefully defined. When a video is sent, that includes the context in which it was sent and not exclusively the underlying content. Nevertheless,

the content itself must also be analysed to understand how it could be interpreted in relation to the protected characteristic. Although an ET can draw a line where certain 'banter' is not considered harassment, it must also take into account the reasonable perception of a claimant within the context of a work setting.

Laura Redman

Barrister, Cloisters Chambers

LR@cloisters.com

Disability discrimination and constructive dismissal

Wainwright v Cennox Plc [2023] EAT 101; June 20, 2023

Facts

Ms Andrea Wainwright (AW) was a long-serving employee who TUPE transferred in 2018 from Acketts to Cennox Plc (Cennox) where her title changed from Customer Services Director to Head of Installations.

Following a cancer diagnosis in August 2018, AW was signed off sick. During her absence, Cennox decided AW's role was sufficiently large that it could be split across two employees, and offered her colleague one of the roles. AW was not consulted, only becoming aware of the appointment in November 2018 via LinkedIn. She promptly raised concerns to the HR Director, who, in an attempt to prevent any distress, inaccurately reassured AW that the colleague's appointment was temporary and her own position would not be affected.

In preparation for AW's return to work in July 2019, she was issued a new job description and organisational chart showing amended responsibilities in light of the job being split in half. AW perceived these changes as a demotion, a view disputed by Cennox. Following her manager's suggestion, AW raised a formal grievance, which attracted criticism from the UK Managing Director. Ultimately, the grievance failed, and AW appealed.

Events escalated in September 2019, when AW was signed off with stress. Her email access was suspended after the company learned she had been approached by one of its customers regarding a potential job opportunity. AW's grievance appeal meeting was also delayed, resulting in her resignation with immediate effect on 27 September 2019. The resignation letter cited exclusion from decision-making, misleading reassurances about the permanent appointment of her colleague, and referred to the unresolved grievance as the 'final straw'.

AW brought claims for direct disability discrimination, discrimination arising from disability, victimisation, wrongful dismissal, constructive unfair and discriminatory dismissal.

Employment Tribunal

The ET dismissed all AW's claims save for her discrimination arising from disability claim, which it upheld in two respects: firstly, in appointing the colleague to her position, which arose from AW's disability-related absence; and secondly, in misleading her about organisational changes in a misguided attempt to prevent upset during her cancer treatment.

In dismissing AW's claims of direct discrimination and victimisation, the ET found that the alleged detriments were not linked to her disability or any protected acts.

In dismissing her constructive unfair dismissal claim, and by implication her discriminatory dismissal claim, the ET held that AW's resignation was not caused by a fundamental breach of contract. Instead, it stemmed from dissatisfaction with her new job title and an incorrect perception that she had been demoted.

Employment Appeal Tribunal

AW successfully appealed the ET's dismissal of her claims for constructive and discriminatory dismissal.

...acts of discrimination will usually amount to a repudiatory breach of contract, even if the discriminatory act itself is not the last straw in causing an employee to resign.

The EAT held that the ET's reasoning for rejecting the claimant's evidence was inadequate. Although it accepted AW had suffered discrimination arising from disability contrary to s15 Equality Act (EqA), it failed to address whether those acts could also amount to repudiatory breaches of contract.

The ET had also failed to engage with key evidence. Both AW's resignation letter and witness statement explicitly linked her resignation to Cennox's misleading reassurances about her role and exclusion from decision-making. The ET's failure to address or explain its rejection of this evidence was a significant omission.

The EAT went on to criticise the ET's approach to causation, holding that it misapplied the law of constructive dismissal. It failed to carry out a structured analysis as per *Williams v Alderman Davies Church in Wales Primary School* [2020] IRLR 589, which asks whether the employer's breach 'materially influenced' the resignation, as opposed to being the 'effective cause'. Instead, in finding that an employee's resignation must be in response to a single breach, the ET had incorrectly applied the decision in *Nottinghamshire County Council v Meikle* [2004] IRLR 703.

The EAT reiterated that the 'last straw' need only add 'something' – it need not be discriminatory or unreasonable. The ET's misapplication of the law assumed that AW's dissatisfaction with her job title excluded all other reasons for her departure.

Finally, the EAT concluded that the ET failed to properly assess whether the employer's misleading conduct, described as '*clumsy and misguided*', could amount to a breach of the implied term of mutual trust and confidence. It referred to *Rawlinson v Brightside Group Ltd* [2018] IRLR 180, which confirmed the position that misleading an employee, even with good intentions, can still constitute a breach of contract.

AW's claims for constructive unfair dismissal and discriminatory dismissal were remitted to a differently constituted ET for reconsideration. The ET's decision to dismiss the other claims was preserved.

Outcome

On remittal, AW's claim for constructive discriminatory unfair dismissal was upheld. She was awarded £1.2 million in damages, mostly due to significant financial loss. The award included an injury to feelings award in the upper Vento band as the discrimination suffered amounted to moderate to severe psychiatric damage.

Comment

This case confirms that acts of discrimination will usually amount to a repudiatory breach of contract, even if the discriminatory act itself is not the last straw in causing an employee to resign. When setting out its judgment, an ET must ensure all evidence is addressed and make clear why certain evidence has been preferred.

Misleading an employee during illness or absence, even if well-intentioned, can constitute discrimination and a repudiatory breach of contract. During an employee's sickness absence, an employer should maintain transparent communication regarding any organisational changes and adhere to proper consultation and fair grievance procedures.

Eliana Barreto, Paralegal
Lara Kennedy, Partner
Leigh Day

Victimisation – ‘wafer-thin’ difference in s27(1) EqA between ‘does’ and ‘may do’ a protected act

Aslam v London UK Transport Bus Ltd [2025] EAT 113; August 6, 2025

Facts

Jamshid Aslam (JA) applied for a post as London Rail Replacement Controller with London UK Transport Bus Ltd (LTB). Responding to an ‘ice-breaker’ question at the interview, JA said he had been dismissed by Metroline on capability grounds and was pursuing a tribunal claim against them.

LTB made JA a conditional offer, and given his very long service with Metroline, they only sought one reference. Metroline did not respond, but LTB did not explore any other options.

While awaiting the non-forthcoming reference, JA undertook induction, being told this was required before he could be allocated shifts. On 11 June, he emailed LTB asking why the other two new recruits had been allocated shifts before induction, unlike him, and if this was because of the difference in race.

A team manager, on seeing this email, responded ‘*Is he real?*’ and ‘*he cannot work for us*’. Further discussions and emails between various managers resulted in the job offer being withdrawn. The ultimate decision-maker, who was not called to give evidence at the ET, emailed the HR manager, saying: ‘*We have found out today that this person is currently dealing with a Tribunal against Metroline, so we have decided to stop the process to make sure we do not get into future issues, but I would like to get your advice to make sure we use the appropriate wording to withdraw the offer.*’

Employment Tribunal

JA complained to the ET of victimisation and direct race discrimination. LTB’s core defence was that it withdrew the job offer because it was unable to obtain a reference.

In an oral decision, the ET dismissed the complaint of direct race discrimination but upheld the complaint that withdrawing the job offer was victimisation because LTB believed JA may do a protected act, contrary to s27(1)(b) EqA.

LTB’s counsel immediately asked the ET to reconsider, submitting that only s27(1)(a) was pleaded in the ET1, and it had therefore found in favour of JA on an issue that had not been pleaded. The ET allowed the application, accepting counsel was correct, and dismissed the victimisation claim.

Section 27(1) EqA puts victimisation in two ways:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act

The ET rejected the s27(1)(a) victimisation complaint, the only one it saw as being pleaded, finding those involved in the decision-making did not know the nature of the complaints in the Metroline ET1. Whilst they accepted that JA had mentioned his

claim related to disability in the interview, they found those involved in withdrawing the job offer were not aware of this and did not know JA had done a protected act.

In dismissing the claim for direct discrimination, the ET rejected LTB's case that the reason for withdrawal was the inability to get a reference. They found the reason was *'to avoid "future issues" which could include a complaint or claim of race discrimination'*.

On the shifts issue, the ET accepted LTB's evidence that the other two new recruits were able to work before induction as they had previously been engaged as agency workers.

JA appealed.

Employment Appeal Tribunal

As the ET's initial decision was to uphold the victimisation claim, the appeal was essentially about reconsideration. The EAT held that the ET had erred in holding a claim based on LTB's belief that JA *may* do a protected act was not within scope of the claim as pleaded in the ET1.

JA's grounds of complaint had been drafted by solicitors, and the judge accepted that it did not expressly allege that LTB's action in withdrawing its conditional job offer was because it believed JA *may* do a protected act. However, the distinction between the pleaded claim and the unpleaded one was 'wafer-thin'.

All of the relevant facts were included in the ET1. Both ways of putting the claim depended on the same two alleged protected acts (that JA had brought a claim against another bus company, Metroline, and his email of 11 June 2019). The only difference between the two ways of putting the victimisation claim was LTB's precise reason for its actions. That was a matter within LTB's own knowledge. No further findings were required.

The EAT held the ET decision was perverse given its findings of fact (which LTB did not challenge) in holding it was in the interests of justice to reconsider their initial decision and dismiss the claim. It treated the pleading point as conclusive and did not address the interests of justice. The ET should have considered whether the s27(1)(b) claim (*may* do a protected act), was so closely linked to the s27(1)(a) claim (*does* a protected act) that *'in the circumstances it was in the interests of justice for [the ET's] initial decision to stand, allowing an amendment if it felt necessary to do so.'*

In this case, arguments about lateness and whether JA should have applied to amend were of little weight, because the judge said *'the amendment ... was so small, and would have made no difference to the facts relied on or the scope of the evidence'*.

The EAT allowed the appeal, revoked the reconsideration decision, reinstated the ET's initial judgment, and remitted the claim to the same ET to decide on remedy.

Implications for practitioners

When drafting pleadings, think broadly – have you captured the essence of the case?

If doubtful about a protected act or knowledge about it, plead in the alternative a belief that the claimant *may* do a protected act

If a pleading point is raised against you, remember an amendment may be allowed at any time. In *Ahuja v Inghams (Accountants)* [2002] EWCA Civ 1292, [2002] ICR 1485, Mummery LJ pointed out that tribunals have a *'very wide and flexible jurisdiction to do justice in the case'*: there may be cases where amendment should be allowed to deal with matters given in evidence at the hearing. *'If there is no injustice .. in allowing such an amendment then it would be appropriate for the ET to allow it ...'* [para 42]

The EAT held that the ET had erred in holding a claim based on LTB's belief that JA *may* do a protected act was not within scope of the claim as pleaded in the ET1.

Comment

What else should counsel have properly done? In this case, the claimant represented himself, and the ET had not given him the opportunity to apply to amend. Should counsel have raised the point as part of their duty to assist the tribunal in furthering the overriding objective?

Sally Robertson

Barrister, Cloisters Chambers

sr@cloisters.com

Disability and neurodivergence: interpretation of s6 Equality Act clarified

Mr Harry Stedman v Haven Leisure Ltd [2025] EAT 82; June 16, 2025

Implications for practitioners

This case underscores the importance of ensuring that tribunals engage directly with the functional consequences of neurodivergence and avoid superficial reasoning based on apparent social competence or academic achievement.

The decision provides the following key guidance for dealing with claims by neurodivergent claimants:

- *a claimant needs only to show a substantial adverse effect on one day-to-day activity to meet the definition of disability under s6 of the Equality Act 2010*
- *tribunals must not weigh what a claimant can do against what they cannot do*
- *the correct comparison is between the claimant as they are and with how they would be without the impairment*
- *a clinical diagnosis is relevant to the question of 'substantial adverse effect', not merely to the existence of an impairment.*

Facts

Mr Harry Stedman (HS) had a diagnosis of Autism Spectrum Disorder (ASD) and Attention Deficit Hyperactivity Disorder (ADHD). He applied for the position of animation host with Haven Leisure Ltd (HL) but was unsuccessful. HS brought a claim of disability discrimination, arguing that HL's handling of his application amounted to unfavourable treatment.

At a preliminary hearing, the ET was asked to determine whether HS met the statutory definition of disability under s6 of the Equality Act (EqA). HS relied on his diagnosis together with an impact statement describing his difficulties with concentration, remembering things, forming friendships, using crowded public transport and taking part in social activities. He explained that he often had to 'mask' his difficulties in social settings.

Employment Tribunal

The ET accepted that HS had a mental impairment caused by his ASD and ADHD, but held that it did not have a substantial adverse effect on his ability to carry out normal day-to-day activities.

The judge focused on what HS was able to do: he had performed well academically, obtained a degree, performed in public, had some friends and was able to use public transport when not crowded. The ET concluded that any difficulties were no greater than those of a person without a disability and therefore 'not substantial'.

HS appealed to the EAT, arguing that the decision was perverse and legally flawed.

Employment Appeal Tribunal

The EAT allowed the appeal and remitted the case to a fresh tribunal. The judge identified several key errors of law:

- the ET compared HS's abilities with those of an average person rather than with what his own would be without his difficulties. The statutory comparison under s6 EqA is between the claimant as they are and as they would be without the impairment, not against a notional 'normal' person
- the ET wrongly weighed what HS *could* do (such as perform and form friendships) against what he *could not* do. The correct approach is to focus on any day-to-day activity which is adversely affected in a substantial way
- the ET wrongly relied on Appendix I, paragraph 8 of the EHRC Code of Practice by focusing on '*normal differences in ability*' without applying the statutory test of whether the effect is more than minor or trivial
- the ET made findings that HS had difficulty forming friendships and avoided crowded transport, but then dismissed these difficulties as insignificant without a reasoned explanation.

The EAT also made a general point that a diagnosis of ASD or ADHD is relevant not only to impairment itself but also to the assessment of its 'substantial' adverse effect.

It concluded that the ET's reasoning was 'totally flawed' and the issue should be reheard by a fresh tribunal.

Comment

This case will be of particular importance when dealing with disability discrimination claims involving neurodivergent conditions.

The decision emphasises that functioning well in some contexts does not negate a substantial adverse effect in others. An ET should not treat coping mechanisms, high achievement or social performance as evidence that the claimant is not substantially impaired.

By focusing on what the claimant could do with and without the impairment, rather than comparing his abilities against others, the EAT has reinforced an individualised, functional approach that is more consistent with the '*social model of disability*' embedded in the EqA.

This case provides practical support for claimants seeking recognition of neurodivergent disabilities, and a reminder to tribunals to apply the statutory test properly. Ultimately, the judgment reaffirms that where a condition such as autism or ADHD affects even just one area of daily living in a way that is more than minor or trivial, the protection of the EqA will apply.

Daniel Holt

Barrister, The Barrister Group

Chair of the Association of Disabled Lawyers

dh@danielholt.org

An ET should not treat coping mechanisms, high achievement or social performance as evidence that the claimant is not substantially impaired.

The importance of procedural fairness before striking out

Mr Charlie Forrest v Amazon Web Services EMEA SARL UK Branch [2025] EAT 81;
June 10, 2025

Implications for practitioners

This case reinforces the value of seeking or resisting unless orders as a constructive step short of a strike out. It also confirms that tribunals should take explicit account of a party's disability and litigant-in-person status when assessing non-compliance.

The EAT's statement that the business of tribunals is '*deciding cases on their merits when a fair trial is possible*' will likely be cited in future appeals. The case also stands as a warning against overzealous procedural management.

For advisers, this case provides reassurance that claimants with neurodivergent conditions will not be penalised merely for struggling to navigate complex procedural requirements. Equally, respondents should note that applications to strike out will attract scrutiny where an unless order could have sufficed.

Facts

Mr Charlie Forrest (CF) was employed by Amazon Web Services (Amazon). He had severe Attention Deficit Hyperactivity Disorder (ADHD), a recognised disability.

While still employed, CF lodged a tribunal claim in November 2022 alleging:

- direct and indirect disability discrimination
- discrimination arising from disability
- failure to make reasonable adjustments
- harassment and victimisation under the Equality Act 2010 (EA)
- whistleblowing detriment under the Employment Rights Act 1996 (ERA).

The claim form and detailed particulars, filed on 17 November 2022, set out a chronological account of events which the ET itself described as '*cogent and well written*'. Acting in person, CF had limited assistance from a legally qualified relative.

Employment Tribunal

At a case management hearing on 4 April 2023, CF was ordered to complete a 'list of issues' using the respondent's framework. This was intended to clarify which pleaded facts supported each cause of action. Employment Judge Burns warned that if CF did not comply, his claim would likely be struck out at a further hearing, but she did not issue an unless order. The original deadline had to be extended to 16 June 2023 because the ET had failed to send out the order on time.

In July 2023, following CF's dismissal from Amazon and amid multiple pending applications (including for a stay, and specific disclosure), the respondent applied to strike out the entire claim for non-compliance.

The ET heard the matter on 14 July 2023 and struck out all the claims under rule 37 of the Employment Tribunals Rules of Procedure 2013.

... employers facing redundancy situations must carefully balance the duty to consider suitable alternative employment with the employee's expressed preferences and health considerations.

In written reasons sent on 20 July 2023, the judge identified the relevant default as CF's failure to provide the completed list of issues. He relied on *Blockbuster Entertainment Ltd v James* [2006] IRLR 630, and several other authorities cited in Amazon's submissions. The judge summarised the legal test as requiring either '*deliberate and persistent disregard of procedural steps*' or a situation where '*no fair trial was possible*'. He also referred to the Presidential Guidance (2018), noting that the power to strike out is '*draconian*' and '*not used lightly*'.

However, when considering whether to issue an unless order, the judge wrote that he had felt it inappropriate, as in the case management hearing CF had told EJ Burns he knew what to do. He had previously produced clear written pleadings and had not indicated he was struggling to understand the instructions. During the subsequent strike out hearing, CF had also twice declined invitations to work through the list with the judge, saying he could not 'reveal data'.

The ET therefore concluded that CF's non-compliance was '*a matter of principle*' rather than inability. Whilst Employment Judge Adkin accepted there were reasons for it, he felt CF's failure was due to a '*persistent and deliberate*' delay. He considered that an unless order would merely '*lead to further expense and delay*', contrary to the overriding objective, and therefore immediate strike-out was proportionate.

Employment Appeal Tribunal

There were three grounds of appeal:

(1) EJ Adkin had '*applied the wrong legal test to the question of strike out*'.

The EAT decided that EJ Adkin had applied the test from *Blockbuster Entertainment Ltd v James* [2006] IRLR 630 incorrectly, treating deliberate non-compliance and the possibility of a fair trial as 'alternative' rather than 'cumulative' conditions.

Further, the ET's own administrative failure to send out the original order in time undermined the finding of '*persistent and deliberate delay*'. Only four weeks separated the extended deadline and the strike-out decision, and Amazon's strike-out application had been lodged just one week before the hearing.

Following *Baber v Royal Bank of Scotland plc* UKEAT/0301/15, the tribunal was required to consider the following guidance:

- i. There must be a finding that the party is in default of some kind, falling within Rule 37(1).
- ii. If so, consideration must be given to whether a fair trial is still possible. In exceptional circumstances, if a fair trial remains possible, the case should be permitted to proceed.
- iii. Even if a fair trial is unachievable, consideration must be given to whether a strike-out is a proportionate sanction or whether a lesser sanction can be imposed.
- iv. If a strike-out is the only proportionate and fair course to take, reasons should be given why that is so.

(2) EJ Adkin had '*failed to ask himself the essential question of whether a fair trial was still possible, and it in fact was still possible*'.

The EAT criticised the decision to move directly from a single missed deadline to a full strike-out and said that:

It is hard to think of a case in which it would be right to go directly from non-compliance with a case management order to striking out for non-compliance, without first trying the effect of an unless order. [para 42]

The judge stressed that sanctions are designed to secure compliance and are 'not punitive'. The EAT held the ET's failure to ask whether a fair trial remained possible was an error of law. Had an unless order been made, CF might have complied, and the case could have proceeded to a fair hearing.

(3) EJ Adkin had '*failed to take sufficient account of CF's status as a litigant in person and as a disabled person with complex ADHD*'.

The EAT noted that CF was both unrepresented and disabled, requiring reasonable adjustments of 15-minute breaks every hour at the hearing. It held the tribunal should have shown greater patience and adjusted its approach accordingly. The judge found the ET's conduct '*would not have been appropriate even in the case of a represented person*' [para 39].

The EAT allowed the appeal and substituted its own decision; the only proper course would have been to make an unless order rather than strike out. As CF had since produced a complete draft list of issues, the claim was reinstated and proceeded to further case management.

Comment

This judgment underlines the limits of the ET's disciplinary powers. Even when faced with apparent obstinacy or repeated procedural default, tribunals must act within the framework of fairness, proportionality and the overriding objective.

The case serves as an essential reminder that striking out a claim for procedural failures remains a measure of last resort. Employment judges must always ask whether a fair trial remains possible and consider lesser sanctions as an alternative first. Furthermore, where the applicant is a litigant in person and/or disabled, tribunals must take particular care to ensure that the procedural process itself does not become an obstacle to justice. Case management orders are intended to secure compliance, not to punish default.

Daniel Holt

Barrister, The Barrister Group

Chair of the Association of Disabled Lawyers

dh@danielholt.org

Even when faced with apparent obstinacy or repeated procedural default, tribunals must act within the framework of fairness, proportionality and the overriding objective.

No duty to make 'ineffective' reasonable adjustment

Hindmarch v North East Ambulance NHS Foundation Trust [2025] EAT 87; June 16, 2025

Implications for practitioners

This case provides the first detailed consideration of the difference – or lack of – between the duty to take reasonable steps to avoid disadvantage created by a provision, criterion or practice (PCP) and that created by the failure to provide an auxiliary aid/service (s20(3) and (5) Equality Act respectively). It confirms that the duty does not arise where there is no real prospect that the proposed adjustment would remove the disadvantage, regardless of what section it is brought under.

Facts

Mr Hindmarch (KH) was employed as a non-emergency ambulance driver by the North East Ambulance NHS Foundation Trust (the Trust). He had depression and anxiety, which were exacerbated during the Covid-19 pandemic. Due to his asthma and family circumstances, he was clinically vulnerable and extremely anxious about contracting the coronavirus.

During the pandemic, national guidance provided that emergency ambulance staff should be issued with FFP3 masks due to their involvement in aerosol-generating procedures, while non-emergency staff were issued FFP2 masks. KH requested an FFP3 mask as a reasonable adjustment, stating he would not return to work without one. His claim to the employment tribunal centred on this decision.

The Trust declined the request, citing national guidance and the impracticality of using FFP3 masks for long shifts and driving. In addition, it took the view that the mask would not provide KH with complete protection from the risk of catching Covid and would not therefore satisfy his concerns in any event. Neither money nor availability was a feature in the decision to refuse his request. KH's position was that the provision of an FFP3 mask would manage his anxiety and so would improve his psychological well-being. It would help him to go back to work, whether or not it provided absolute protection from Covid. He did not, however, state unequivocally that he would definitely return to work if given such a mask.

KH submitted a grievance, which was not upheld. His mental health deteriorated to the extent that he was unable to work. He was offered non-patient-facing roles but said that he was too unwell to undertake them. At the final sickness review meeting, KH said that he could not give a date when he might be fit to return to work and that he was not prepared to do anything other than his substantive role. He was eventually dismissed on grounds of ill health. KH appealed, claiming that the dismissal was discriminatory and unfair. He said he would not have been in this position if reasonable adjustments had been made by the Trust when he first asked for them for an FFP3 mask to alleviate his anxiety.

Employment Tribunal

The ET found that KH was a disabled person under the Equality Act 2010 (EqA) and that his employer knew or ought to have known of his disability. However, it concluded that the Trust had not failed in its duty to make reasonable adjustments.

The duty to make reasonable adjustments does not extend to adjustments that have no chance of being effective.

The tribunal held that the duty to make reasonable adjustments under s20(3) and 20(5) EqA only arises where the adjustment would have a 'real prospect' of removing the disadvantage. The ET identified that disadvantage as KH's anxiety about catching Covid, and its impact on him and his family, such that he was unable to attend work. He was thus more likely to be subjected to the respondent's absence management policy and ultimately to be dismissed. However, in light of the evidence, the tribunal was not satisfied that if KH had been provided with the mask there was a realistic chance he would have returned to work to such an extent that he would not have been dismissed.

The ET also rejected the claim for unfair dismissal, finding that the dismissal process was fair and reasonable in the circumstances. It accepted that the Trust had properly balanced the impact of dismissal on KH against the operational needs of the service.

Employment Appeal Tribunal

KH appealed to the EAT, arguing that the ET had erred in its approach to reasonable adjustments and unfair dismissal.

The EAT, presided over by Mr Justice Cavanagh, dismissed the appeal.

In particular:

- (a) It rejected the claimant's argument that the identified disadvantage had '*jumped the gun*' in finding that the substantial disadvantage was not, as pleaded, KH's stress and anxiety when working without a mask, but the risk of absence management and dismissal. The EAT found that there was no real distinction in the disadvantages, and the ET had asked the right question (was it a reasonable auxiliary aid to provide?). The conclusion was that there was no real prospect of any outcome other than dismissal for long-term absence, even if KH had been provided with his preferred mask. The real problem for KH was the psychological effect of his fear of catching Covid, and there was no real chance of an FFP3 mask solving that problem.
- (b) It rejected the claimant's argument that the tribunal had wrongly analysed the s20(5) duty for auxiliary aids (which is triggered when an aid would avoid disadvantage), as if it were the s20(3) duty to avoid disadvantage created by PCPs. The ET had made it clear that it understood the two tests.
- (c) The EAT clarified that, as per *Paulley v FirstGroup plc* [2017] UKSC 4, in order for a claim for breach of reasonable adjustments to succeed, it must be shown that there would have been at least a 'real prospect' that the adjustment would have made a difference. The same test applies to both s20(5) and 20(3). The duty to make reasonable adjustments does not extend to adjustments that have no chance of being effective. There was nothing in the statutory code of practice to contradict the proposition that if there is no real prospect of the adjustment making a difference, it will not be a reasonable adjustment.
- (d) It also rejected the argument that the tribunal had not considered the unfair dismissal claim appropriately. In this particular claim, both claims stood or fell on the reasonableness of the Trust's refusal to provide the mask.

Comment

This case reinforces the principle that the duty to make reasonable adjustments is not absolute – but it does turn on its own facts. Nevertheless, whilst the effectiveness of a proposed adjustment is only one factor listed in the statutory code of practice,

it is likely to be central to any analysis of what is reasonable. As in this case, it may provide a complete defence to a claim. It will therefore be important for advisers to consider the likely effect of any adjustment claimed for the purposes of s20 EqA and, depending on the circumstances, consider whether expert evidence might assist in showing that it would make a real difference.

Catherine Casserley
Barrister, Cloisters Chambers
cc@cloisters.com

Meaning of ‘in the course of employment’ in s109 Equality Act 2010

AB v Grafters Group Ltd (t/a CSI Catering Services International) [2025] EAT 126;
August 28, 2025

Implications for practitioners

In order for an employer to be held liable for the discriminatory acts of their employee, those acts must be committed ‘*in the course of employment*’. This case serves as a reminder that the meaning of those words can be interpreted quite widely, especially in circumstances concerned with preparation for employment.

Facts

The respondent is a hospitality recruitment agency (the Agency). The claimant (AB) thought she was due to work at Hereford Racecourse on 1 November 2021, but didn’t realise her shift had been cancelled. AB attended the Agency’s pick-up point on the day, but arrived late after the transport had left. Her colleague (CD) offered her a lift to the racecourse, in accordance with a common practice of staff giving each other lifts.

AB and CD had been exchanging texts the previous evening, and he knew that she was expecting to be working the next morning. Some of the texts from CD had been sexually explicit. After AB accepted the lift from CD and was in the car, he told her she was not required to work after all. She then asked for a lift home, but instead, he drove her to another location and sexually assaulted her on the journey.

Employment Tribunal

The ET found that CD had sexually assaulted AB and that it had been an act of sexual discrimination. However, it found that the employer was not liable as CD’s actions had not been ‘*in the course of employment*’.

The ET noted that CD had not been due to work at Hereford that day, and the only reason AB got in his car was because she was late.

AB appealed to the EAT on three grounds:

- that the ET failed to consider that the incident occurred in circumstances that could be considered an ‘extension of employment’¹
- the ET erred in law by not taking into account the nature of CD’s communications with AB, which had been sent whilst he was on a shift with the Agency. There was a close connection with the reason he offered her a lift on that day
- the ET took into account irrelevant considerations such as the link between CD’s motive and his employment, and the Agency’s lack of knowledge about the lift.

Employment Appeal Tribunal

The EAT reviewed the authorities on ‘*in the course of employment*’ within s109 of the EqA 2010 and set out several key points arising from the wording of the statute and

¹ *Chief Constable of Lincolnshire Police v Stubbs and others* [1999] ICR 547

ETs should consider whether something done outside of work has a sufficient 'nexus or connection with work', such as to make it an extension of the workplace

those authorities, especially Jones², Waters³, Stubbs⁴, Sidhu⁵ and Forbes⁶:

- the phrase '*in the course of employment*' should be used in the sense in which every layman would understand, and must not be interpreted in accordance with the legal meaning in the law of negligence
- anti-discrimination legislation should be given a wide meaning
- the interpretation of the phrase will be a question of fact for each ET to resolve in light of all the circumstances. Therefore, different decisions can be made in circumstances which appear similar
- ETs should consider whether something done outside of work has a sufficient 'nexus or connection with work', such as to make it an extension of the workplace
- the employer's knowledge does not necessarily matter.

The EAT judge noted the tribunal had found that CD had sent sexually harassing texts in the hours preceding the incident, while working for the Agency. CD believed that AB was due to attend work on that day, and had offered her a lift in his car, as was a common work practice. The ET had failed to take these findings into account in considering whether there was sufficient nexus or connection to render it as '*an extension or work and the workplace*'.

The judge also considered the authorities on challenging findings of fact by the ET and what constituted '*Meek*' compliance.⁷

The appeal was allowed.

The ET had made clear findings of fact on the relevant matters, and the case was remitted to the same tribunal to reconsider the s109 finding, taking those matters properly into account.

Comment

The case contains a useful summary of the principles involved in applying s109 EqA. It provides a warning for employers as to the potential width of '*in the course of employment*' in respect of matters preparatory to work, such as travel to or from even intended work.

Robin Moira White
Barrister, Old Square Chambers

² *Jones v Tower Boot Co Ltd* [1997] ICR 254

³ *Waters v Commissioner of Police of the Metropolis* [1997] ICR 1073

⁴ *Chief Constable of Lincolnshire Police v Stubbs* [1999] ICR 547

⁵ *Sidhu v Aerospace Composite Technology Ltd* [2001] ICR 167

⁶ *Forbes v LHR Airport* [2019] ICR 1558

⁷ *Meek v City of Birmingham District Council* [1987] EWCA Civ 9, establishing the minimum information required in a Tribunal decision.

Exclusion from sports competition turned on biological sex, not gender reassignment

Haynes v Thomson and others [2025] EWCC 50; August 1, 2025

Facts

Ms Harriet Haynes (HH) is a trans woman and professional English eight-ball pool player.

In August 2023, the English Blackball Pool Federation (EBPF) amended its rules so that only individuals who were born biologically female would be allowed to play in women's teams and competitions. Prior to this, HH had played for the EBPF's Kent women's team. As a result of the change in the rules, she was no longer allowed to play for the women's team, despite having a Gender Recognition Certificate.

County Court

HH brought proceedings claiming that her exclusion was direct discrimination on the grounds of gender reassignment in breach of the Equality Act 2010 (EqA).

The claim was dismissed. The court held that, following the Supreme Court's decision in *For Women Scotland v Scottish Ministers (FWS)*¹, HH's exclusion from the women's team was a matter of sex discrimination, not gender reassignment discrimination. The claim failed at the first hurdle, as there was no gender reassignment discrimination. The EBPF rules did not prevent trans men, who were born biologically female, from playing in the women's team. It held that the exclusion was not because HH was transgender, but because she was born male. While this may have raised an issue of sex discrimination, that was not the claim that had been pleaded by HH.

The court also considered comparators. The reason for HH's exclusion was that she was born biologically male, not because she was transgender. The court held that the correct comparator was a person of the same sex as HH but without the protected characteristic of gender reassignment. That comparator, a biological man, would also not have been permitted to participate in the women's pool team and competitions. Accordingly, HH could not establish less favourable treatment.

The court emphasised that this interpretation did not render the protected characteristic of gender reassignment 'worthless'. Protection under this ground remains robust in other contexts, such as where an individual brings a claim for direct discrimination arising from dismissal or other less favourable treatment because of their gender reassignment.

The court also considered whether English eight-ball pool was a gender-affected activity. Comparing the relative strength and reach (among other physical differences) of the average man with those of the average woman, the court found that the average woman was at a physical disadvantage and concluded this sport was a gender-affected activity. The court held that there was no reasonable alternative to exclusion if fair competition was to be maintained. Even if this had been a case of gender reassignment discrimination, the exclusion of HH would have been justified under the gender-affected provisions of the EqA.

The court also considered comparators. The reason for HH's exclusion was that she was born biologically male, not because she was transgender.

¹ *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16; April 16, 2025

HH's claim failed because it was brought solely as a gender reassignment discrimination claim. The court recognised that sex discrimination could have been brought, but it had not been pleaded

The court also considered EBPF's defence that the exclusion of trans women from women's competitions was a proportionate means of achieving legitimate aims. The legitimate aims were ensuring fair competition and diversity through the inclusion of women. The court found that the fairness of competition was evidently a legitimate aim and the exclusion of trans women was a proportionate means of achieving it. Although encouraging greater female participation was also a legitimate aim, the court did not accept that the exclusion of trans women would be proportionate for that purpose alone.

Implications for practitioners

Although this is not an employment case, the court's decision shows the wider implications for how tribunals and courts could now interpret sex and gender reassignment provisions under the EqA. It is one of the first court rulings to engage with transgender issues since the decision in *FWS*. In that case, the Supreme Court confirmed that the definitions of 'sex', 'woman' and 'man' for the purposes of the EqA referred to biological sex. It was held that, accordingly, a transgender woman, who is a biological man, is not a woman for the purposes of the EqA, even if they hold a Gender Recognition Certificate.

The case underscores the importance of identifying and pleading all the possible relevant claims that may apply. HH's claim failed because it was brought solely as a gender reassignment discrimination claim. The court recognised that sex discrimination could have been brought, but it had not been pleaded. For practitioners, this highlights the importance of analysing the basis of the alleged discriminatory treatment carefully and ensuring that all possible legal claims are identified when advising clients.

The case also highlights that gender reassignment protections remain meaningful, particularly where the less favourable treatment is directly linked to an individual's transgender status, for example, dismissal, harassment or any other discriminatory treatment because of gender reassignment. Employers should therefore ensure that trans people in their workplace continue to be protected under the EqA and deal promptly with any discrimination or harassment issues under their usual policy.

Ioana Jelea

Solicitor, Magrath Sheldrick

ioana.jelea@magrath.co.uk

Belief beyond the workplace: gender-critical beliefs and the provision of goods and services

Bailey v Linnaeus Veterinary Ltd (County Court, Case No K03CL077); July 4, 2025

Introduction

Courts and tribunals issue judgments with reliable regularity, like the rising and setting of the sun. Some judgments only affect those directly involved in the litigation. Others are handed down with an impact that acts like a seismic shift, generating ripples long after the initial decision. One such judgment was the Employment Appeal Tribunal's decision in *Forstater*.¹ Over the past six years, since the Employment Tribunal's initial judgment in *Forstater*, the scope of protection under the Equality Act 2010 (EqA) for gender-critical beliefs has been tested in a number of discrimination cases, repeatedly prompting debate about the balance between one person's right to freedom of belief and the rights of another.

One recent example is *Bailey v Linnaeus Veterinary Ltd*. The judgment in this case is a landmark ruling. It is the first time that the county court has considered discrimination based on gender-critical beliefs in the provision of goods and services rather than in an employment context. While a number of employees have successfully argued that gender-critical beliefs constitute a protected philosophical belief under the EqA, Holmes J's decision in *Bailey* confirms that protection also applies to service users. The judgment, therefore, represents a significant development in discrimination law, with important implications for how service providers and their advisers should structure and apply their policies in relation to the provision of services.

Facts

The claimant, Allison Bailey (AB), is a barrister who holds the gender-critical belief that sex is biologically immutable. Her beliefs became well-known following her case against Garden Court Chambers and Stonewall in 2022. AB had been a client of the defendant, Linnaeus Veterinary Limited (trading as Palmerston Veterinary Group), for approximately 13 years. Citing that AB's behaviour towards their staff had been inappropriate, the defendant de-registered her from the practice. In her county court claim, AB argued that the termination was in fact because of her protected gender-critical beliefs, and that she had therefore been subjected to discrimination in the provision of services, contrary to the EqA. She claimed that an email dated 20 January 2023, referring to her as 'vile', was also a detriment.

County Court

The court found that AB's gender-critical beliefs were a material factor in the defendant's decision to cease providing her with services, amounting to direct discrimination under s13 EqA, and within the scope of s29, which governs the provision of goods and services.

Two ancillary issues arose:

1. Whether AB's beliefs were known to the decision-makers, and, if so, did that awareness influence their decision? The court accepted that relevant staff were aware of AB's gender-critical beliefs, and that the internal culture around trans rights made it more likely that AB's beliefs influenced the decision to de-register her.

¹ *Forstater v CGD Europe & Ors* [2022] ICR 1.

2. Whether the decision to de-register was justified as behaviour-based rather than belief-based. The defendant argued that the de-registration decision was taken under their zero-tolerance policy due to AB's rude and inappropriate behaviour with staff rather than her gender-critical beliefs. The court was not convinced. Holmes J found that there was evidence of inappropriate behaviour, but that none of it was violent, and there was no evidence of prior warnings being issued. The process taken by the practice was inconsistent with its zero-tolerance policy. The judge concluded that the defendant's decision was not based on a neutral application of the zero-tolerance policy but was based on AB's beliefs.

Holmes J did not, however, uphold AB's claim regarding the email of 20 January, finding that she had not established facts from which the court could conclude that the author had committed an unlawful act of discrimination in writing it.

Implications for practitioners

The judgment marks an affirmation of the scope of EqA protection in relation to gender-critical beliefs beyond the field of employment, establishing that such beliefs are also protected in the realm of goods and services. Arguably, service providers such as clinics, retailers, professional firms, and healthcare providers must now take care not to discriminate against clients or customers on the basis of their protected philosophical or religious beliefs – even controversial ones.

The court implicitly endorsed that gender-critical beliefs can constitute a protected belief under the criteria in *Grainger & Ors v Nicholson* [2010] IRLR 4. The case also serves as a useful reminder that once a prima facie case is established, the burden of proof shifts to the defendant to demonstrate their decision was not motivated by the claimant's protected characteristic, as per *Igen v Wong* [2005] EWCA Civ 142. The defendant's inability to demonstrate this in *Bailey*, combined with its inconsistent policy application in relation to AB's de-registration and use of selective evidence, proved fatal to their defence.

The judge also considered the defendant's internal culture, noting that staff activism and strong views in support of trans rights could suggest bias. It would follow that goods and services providers ought to evaluate their policies on client behaviour, including those on zero-tolerance, to ensure neutrality in wording, impact and procedural fairness. The selective application of such policies can be used as evidence of discriminatory motives.

Comment

Bailey represents an important doctrinal and practical development in discrimination law. It confirms that the scope of the protection for gender-critical beliefs, first recognised by the EAT in *Forstater*, extends to the provision of goods and services under s29 EqA.

While the reasoning in this judgment is consistent with existing decisions on the scope of protection for gender-critical beliefs, it also exposes fault lines in equality law around the balancing of rights and responsibilities. For instance, would the outcome of the case have been different if the inappropriate behaviour of a client had been the refusal to refer to trans staff members in line with their affirmed gender? In considering how to provide services in a way that is compatible with the requirements of the EqA, providers must endeavour to strike an appropriate balance between protected characteristics that may engage a conflict of rights and recognise that unpopular or controversial beliefs may attract legal protection just the same as those that are commonly perceived

In considering how to provide services in a way that is compatible with the requirements of the EqA, providers must endeavour to strike an appropriate balance between protected characteristics that may engage a conflict of rights

to be 'politically correct'. They will also need to assess what action is appropriate when it comes to the expression of protected beliefs, in a process similar to that which employers should be using when such issues arise in the employment context.

Finally, as a first-instance decision, the County Court's decision in *Bailey* is persuasive rather than binding, and dependent on its specific facts. Be that as it may, it signals a readiness to scrutinise how belief is treated in client and customer relationships. Whether future cases will reinforce or limit the scope of this protection remains to be seen, but *Bailey* undoubtedly marks a further step in embedding protection for gender-critical beliefs (and other beliefs that come within the *Grainger* criteria) within the full reach of the EqA.

Wayne Henry

Paralegal, Leigh Day

WHenry@leighday.co.uk

Review: 2025 European Network Against Racism's regional meeting in Dublin

This year's regional meeting held by the European Network Against Racism (ENAR) took place in Dublin. Set up in 1989, ENAR describes itself as a '*pan-European anti-racism network*' that combines advocacy for racial equality and facilitates cooperation among civil society anti-racism actors in Europe.

DLA is a member organisation of ENAR, forming part of what is known as 'regional group 1', which includes members of organisations from Ireland, France, the Netherlands, Belgium and the UK.

The regional groups meet annually to discuss key topics and issues on racial equality and anti-racism work. Attendees at these meetings are a mixture of activists and representatives of grassroots groups at the forefront of anti-racism and migrant solidarity work, along with (but to a lesser extent) legal professionals.

The focus of this year's regional meeting was on advocacy and developing an anti-racism advocacy toolkit. But before the meeting turned to these issues, ENAR colleagues gave an update to the group on the progress in EU Member States on the implementation of National Action Plans Against Racism (NAPARs). An EU initiative, NAPARs came about following the development of the EU Anti-Racism Action Plan back in 2020. The latter being the vehicle in which the European Commission signalled its intention to combat structural racism through a series of proposed measures, including the development of NAPARs.

Whilst NAPARs and the EU Anti-Racism Action Plan are not measures applicable to the UK, it was nevertheless interesting to hear about how civil society organisations (including ENAR) are pushing for greater implementation. However, it may come as no surprise to hear that implementation and

enforcement of NAPARs has been painfully slow in Member States.

One of the most engaging sessions of the two-day meeting was on developing an '*anti-racism advocacy toolkit*'. One of ENAR's facilitators kicked off the session with a more intellectual discussion around immigration laws in Europe/UK, and whether they are a colonial legacy and inherently racist; the consensus amongst the group was that such laws and policies are clearly discriminatory on grounds of race. The rest of the session explored ways that grassroots organisations could creatively and successfully challenge the far-right rhetoric that is becoming increasingly normalised and absorbed into mainstream discourse. Following this session, ENAR intends to build on feedback from its members to develop an anti-racist toolkit, which will be shared with DLA members when published.

The next meeting in 2026 is likely to take place in France, Belgium or the UK. Notification will be circulated to members by Chris Atkinson with an invitation to express an interest in attending as a DLA representative. **I would urge anyone interested in ENAR and anti-racist work more generally to put their name forward to represent DLA at these meetings.** I have found them very rewarding, and met some truly inspiring individuals working at the coalface of racial equality.

Given the current political climate, I came away from the last meeting remembering the words of Angela Davis:

'It is in collectivities that we find reservoirs of hope and optimism.'

Francesca Almond
Human rights lawyer