Equality Act 2010 and the appointment of assessors

Law and guidance

The starting point in the County Court

County Courts Act 1984 Section 63(1) provides as follows:

> *"In any proceedings in the county court a judge of the court may, if he thinks fit, summon to his assistance, in such manner as may be prescribed, one or more persons of skill and experience in the matter to which the proceedings relate who may be willing to sit with in the county court a judge of the court and act as assessors."*

The Equality Act itself

Part 9 Equality Act 2010 deals with "enforcement "as it relates to equality issues.

Section 113(1) provides that, *"Proceedings relating to a contravention of this Act must be brought in accordance with this Part."*

Section 114, headed "Jurisdiction", provides relevantly as follows:

> *"(1) The county court or, …. has jurisdiction to determine a claim relating to— […]*
>
> *(a) a contravention of Part 3 (services and public functions);*
>
> *(b) a contravention of Part 4 (premises);*
>
> *(c) a contravention of Part 6 (education);*
>
> *(d) a contravention of Part 7 (associations);*
>
> *(7) In proceedings in England and Wales on a claim within subsection (1), the power under section 63(1) of the County Courts Act 1984 (appointment of assessors) must be*

exercised unless the judge is satisfied that there are good reasons for not doing so." [Same applies in Scotland]

(9) The remuneration of an assessor appointed by virtue of subsection (8 – Scotland) is to be at a rate determined by the Lord President of the Court of Session [Note; no equivalent in England and Wales]

Guidance

Under Section 15 Equality Act 2006, the court must take into account the statutory guidance, the closest to which is **The Services, Public Functions and Associations Statutory Code of Practice**, which states at **14.15**:

"It would not be a good reason that the court believes itself capable of hearing the issues in the case without an assessor or that having an assessor would lengthen proceedings."

Procedure

CPR r.35.15 provides as follows:

(1) This rule applies where the court appoints one or more persons under section 70 of the Senior Courts Act 1981 or section 63 of the County Courts Act 1984 as an assessor.

(2) An assessor will assist the court in dealing with a matter in which the assessor has skill and experience

(3) An assessor will take such part in the proceedings as the court may direct and in particular the court may direct an assessor to—

(a) prepare a report for the court on any matter at issue in the proceedings; and

(b) attend the whole or any part of the trial to advise the court on any such matter.

(4) If an assessor prepares a report for the court before the trial has begun—

(a) the court will send a copy to each of the parties; and

(b) the parties may use it at trial.

(5) The remuneration to be paid to an assessor is to be determined by the court and will form part of the costs of the proceedings.

(6) The court may order any party to deposit in the court office a specified sum in respect of an assessor's fees and, where it does so, the assessor will not be asked to act until the sum has been deposited.

(7) Paragraphs (5) and (6) do not apply where the remuneration of the assessor is to be paid out of money provided by Parliament

PD35 states further as follows:

"10.1 An assessor may be appointed to assist the court under rule 35.15. Not less than 21 days before making any such appointment, the court will notify each party in writing of the name of the proposed assessor, of the matter in respect of which the assistance of the assessor will be sought and of the qualifications of the assessor to give that assistance.

10.2. Where any person has been proposed for appointment as an assessor, any party may object to that person either personally or in respect of that person's qualification.

10.3. Any such objection must be made in writing and filed with the court within 7 days of receipt of the notification referred to in paragraph 10.1 and will be taken into account by the court in deciding whether or not to make the appointment.

10.4. *Copies of any report prepared by the assessor will be sent to each of the parties but the assessor will not give oral evidence or be open to cross-examination or questioning"*

The relevant case law

The leading case is *Cary v Commissioner of Police of the Metropolis (EHRC intervening)* [2014] EWCA Civ 987; [2015] ICR 71 [A copy is attached to this Presentation]

This was a claim for discrimination arising out of the way the Metropolitan Police had dealt with complaints by the claimant about a neighbour on the ground of same sex orientation.

It is significant for the purposes of this lecture that five months before the trial a Consent Order was made providing for two assessors to sit with the trial judge. However, just some six days before trial, the court released the name of one of the assessors to the parties without a CV. It failed to explain how the person concerned had been selected. A CV was, in fact, provided a few days later before the trial began.

At trial the judge overruled the claimant's objections that the assessor did not have specialist expertise. The Court of Appeal upheld that decision. The Court said that:

(i) There is no rule that assessors must have specific expertise in relation to the type of discrimination at issue. The test is whether the assessor is a person of skill and experience "in the matter to which the proceedings relate".

The judgment of Christopher Clarke LJ:

"…it is first, necessary to identify 'the matter' and then to decide whether the putative assessor has the necessary skill and experience in relation to it. In some cases it may well be necessary for any assessor to have a particular expertise. If the question is whether the necessary adjustments were or should have been made for a disabled person, an employment tribunal lay member whose special field of expertise was in respect of mental illness, may not be the right person, even though mental illness is a disability. Similarly a case of discrimination on the grounds of religious belief may require some knowledge or understanding of the particular belief in play.

But discrimination cases often raise less recondite issues. …"

(ii) The selection and appointment of an assessor requires a judicial decision. It requires a judge to consider the matter in respect of which the assistance of the assessor is sought, and to make a tentative decision as to suitability: paragraph 69.

(iii) The Court was critical of the last-minute nature of the arrangements which were made and gave further guidance on the process to be followed:

"62 In all discrimination cases under the Equality Act 2010 the court must appoint one or more assessors unless satisfied that there is good reason not to. To that end it is desirable that in discrimination cases the court should, at an early stage, address the questions (1) whether there is any reason not to have one or more assessors; (2) in respect of what matter(s) the assistance of the assessor(s) should be sought; (3) what sort of assessor(s) that should be; and (4) his or her identity(ies).

63 In their preparation for trial the parties should consider these questions and, if possible, reach agreement on all or some of them. In any event they should be in a position to make representations or suggestions to the court on each of these issues with appropriate reasoning related to the matters in issue in the particular case.

64 When the court is considering directions for trial, if not before, the parties should apprise the court of the need to address questions (1)—(4) above. To the extent that there is agreement on any or all of those questions the matter can be put before the court for its approval (which must not be treated as a foregone conclusion).

65 The most likely source of difficulty is as to who the assessor(s) should be, since the parties will often invite the court to nominate a proposed assessor(s). If the court does so it must nominate a proposed assessor,

66 It is in the selection of an appropriate assessor to propose and the notification of his or her qualifications that difficulty is likely to arise. In selecting an assessor the court is entitled to seek assistance from any source that it may think valuable, including the parties, the regional employment judges, the Equality and Human Rights Commission and others. I see no reason in principle why the county court should not in many cases follow the procedure, said to be current, of contacting the relevant regional employment judges to discuss a prospective appointment. The relevant employment judges are likely to be those for the regions in or relatively close to which the county court is located but there is no reason why inquiries cannot go further afield. For that purpose the regional employment judge is likely to be assisted by receiving a summary of the particular issues in the case and a description of the matter(s) in respect of which the assistance of an assessor is needed. That may sufficiently appear from the case summary provided at the first case management conference. In others something more specific may be called for. In many cases the 'matter' may be no more than assistance in understanding and evaluating evidence in relation to whether the discrimination complained of has taken place. In others something more specific may be required. In any event the proposed appointee will need to A provide a statement, whether in the form of a CV or otherwise, which show his or her qualifications to act as an assessor."

Principles to be drawn from the legislation, guidance and case law

Summary

1. The general rule is that a judge may "summon to his (or her) assistance" one or more assessors in any case.
2. In Equality Act cases, the power under the general rule must be exercised by the Judge in favour of an assessor unless there are good reasons not to.
3. The court must take into account guidance on the Act – please see The Services, Public Functions and Associations Statutory Code of Practice (above)
4. CPR 35.15 and PD35 set out the assessor's duties and procedure – NOTE it is for judge/court to determine including payment of fees and amount.
5. Following Carey, the test is "whether the person is a person of skill and experience" (whatever that means) in the matter to which the proceedings relate (whatever that means) rather than specific expertise in relation to the type of discrimination at issue (whatever that means).
6. The Court must first identify "the matter" and determine whether assessor has the necessary skill and expertise.
7. 6 is a judicial decision -not for the parties
8. What does "tentative decision as to suitability" actually mean?
9. Don't leave appointment or request for an assessor to the last minute despite onus on the judge/court – should be dealt with as early as possible – for example, at a directions hearing.

Practical Problems

There have been several examples of practical problems brought up by the current law and procedure in cases where the Equality Act is an issue.

There is:

(a) Confusion over the proper procedure to be adopted in appointing an assessor;
(b) The position is far from clear as to the exact circumstances in which a court must appoint an assessor;
(c) The position as to the remuneration of an assessor is far from clear;
(d) Does it or should it include Equality Act defences as they are not "claims"?
(e) RTJs not accepting requests for recommendations as to possible assessors made by the parties directly – as it is something that comes from the court.

In no particular order, I want to consider these points.

An example of these difficulties is a common order which could be made by the County Court as follows:

"… the court shall hear the case together with an assessor, in accordance with section 114 of the Equality Act 2010. The parties are either to agree an assessor or to provide the names and CVs of two proposed assessors to the court by xxxxxx. In the absence of agreement the court will select one of the proposed assessors."

The *Cary* guidance speaks of approaching the Regional Employment Tribunals to find an appropriate assessor. The interplay between the Court and Tribunal system (of which I have experience of both) could cause inevitable delay. This is something parties must be aware of out the outset – and perhaps underlines the need for early directions as to the appointment of assessors.

It must be accepted that a further difficulty often ensues with assessor's fees on two counts:

(a) That they can be quite challenging – and above any judicial fees guidance' (with the resultant difficulties in Legal Aid authorisation) and
(b) Delay caused by failure to quickly appoint a suitable assessor

This means that this falls back on the court – but, it could be argued, from the legislation, it is always the court's responsibility to ensure this is dealt with.

I can understand concern raised before me, sitting as a judge, that there remains a lack of clarity among parties, court staff, and the legal aid authorities on appointing assessors. There is a danger that there will be cases where an assessor should be appointed but is not.

There is very little guidance on this. I have attached a copy of an internal note that is the latest I can find on lay assessors produced by HMCTS. On fees, it appears to suggest that these should be paid for by the court akin to a fee- paid lay Tribunal member.

Remedies

1. Should an assessor be appointed and remunerated by the court who appoints them directly?
2. Should there be specific directions in case managing such cases - setting out an appropriate timetable and providing for proper qualified assessors in sufficient time for any trial?
3. Should assessor's fees be capped at judicial guideline rates (e.g. as a Tribunal member) – and then should they be met by the court?
4. Any other suggestions?

Steps being taken

1. Continual training with the Judicial College
2. Implementing standard directions and case managing Equality Act cases – HHJ Luba QC