Neutral Citation Number: [2014] EWCA Civ 987

Case No: B2/2013/2886

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL LONDON COUNTY COURT
HER HONOUR JUDGE MAY QC
0CL00226

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 17th July 2014

Before :

LADY JUSTICE ARDEN
LORD JUSTICE CHRISTOPHER CLARKE
and
MR JUSTICE BARLING

- -

Between :

	David Cary	**Appellant**
	- and -	
	Commissioner Of Police For The Metropolis	**Respondent**
	Equality and Human Rights Commission	**Intervener**

- -

(Transcript of the Handed Down Judgment of
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James Laddie QC (instructed by **Deighton Pierce Glynn**) for the **Appellant**
George Thomas (instructed by **Weightmans LLP**) for the **Respondent**
Karon Monaghan QC (instructed by **Equality and Human Rights Commission**) for the **Intervener**

Hearing dates: 24th June 2014

- -

Judgment

LORD JUSTICE CHRISTOPHER CLARKE :

1. The appellant – Mr David Cary ("Mr Cary") – claims to have been discriminated

against by the Metropolitan Police on the grounds of his same sex sexual orientation. He brings a claim under the *Equality Act (Sexual Orientation) Regulations 2007* ("EASOR") against the Commissioner of Police for the Metropolis ("the Commissioner"). The issue in this appeal is whether the judge in the Central London County Court was right to overrule Mr Cary's objection to a particular individual acting as an assessor on the ground that, for this type of case, an assessor is required to have specific experience and expertise in relation to issues of discrimination on the grounds of same sex sexual orientation.

2. In addition to helpful submissions from Mr James Laddie QC for Mr Cary and Mr George Thomas for the Commissioner we have read and considered written submissions from Ms Karon Monaghan QC on behalf of the Equality and Human Rights Commission ("EHRC").

The history

3. Mr Cary claims that there was on 27 February 2007 an incident where he was subjected to homophobic abuse by his female neighbour which he reported to the Metropolitan Police Service ("MPS"). She also reported the incident to the MPS. There had been a history of disputes between the two individuals. She had been convicted of an assault on Mr Cary occasioning actual bodily harm – an incident when she broke Mr Cary's jaw – aggravated by homophobic abuse. Detective Sergeant Ali at Acton Police Station investigated the report and decided to take no further action.

4. On 11 December 2007 Mr Cary lodged a complaint about the way the MPS had treated his report and about the quality and outcome of their investigation into it. On 9 September 2008 Detective Sergeant Poynter of the MPS' Directorate of Professional Standards, who investigated his complaint, dismissed all aspects of it. Mr Cary then appealed to the Independent Police Complaints Commission ("IPCC") which ordered the MPS to conduct a reinvestigation. On 14 July 2009 Detective Sergeant Lucas, who conducted the fresh investigation, rejected all Mr Cary's complaints. Mr Cary appealed again to the IPCC which on 4 December 2009 rejected this second complaint to them.

5. Mr Cary then brought a claim of discrimination on the grounds of sexual orientation discrimination against the Commissioner and the IPCC. The claim against the IPCC has been compromised. His complaint against the MPS is that he was directly discriminated against by the two police sergeants investigating his complaint in respect of the handling of his original report, in that they treated him less favourably on the grounds of his sexual orientation than they would have treated a heterosexual person complaining of discrimination and/or a person complaining of a matter where homophobic abuse was not the key injury suffered, contrary to regulation 3 (1) of EASOR. Such a claim can only be heard in the county court. A claim was not brought in respect of D/S Ali's original investigation because that pre-dated the

coming into force of EASOR on 30 April 2007.

The course of proceedings in the county court

6. The claim was issued on 13 January 2010. On 3 August 2012 following oral submissions Her Honour Judge May QC gave case management directions which included an order that the trial should be heard by a circuit judge and an assessor, with a time estimate of 7 days.

7. On 5 December 2012 a telephone listing appointment took place. According to the note of Mr Cary's solicitors – Deighton Pierce Glynn ("DPG") – there was discussion of there being two assessors. The court officer said that they only had race and disability assessors and the DPG solicitor explained that the issues were in relation to homophobia. A 5 day trial in the week commencing 16 September 2013 was agreed. The court officer said that she would have to refer to HHJ Mitchell in relation to the solicitor's point about the type of assessors required. It is not clear whether that happened. If it did, no communication was received from the court as to the upshot of any such reference.

8. On 19 April 2013 DPG applied for the matter to be heard by a judge sitting with two assessors and submitted a draft consent order signed by them and the solicitors for the Commissioner. In the judgment appealed from the judge said that the court approved the consent order but that "*in the event, two assessors became one*". It does not, however, appear that the application for an order that there should be two assessors was ever dealt with and no order for two assessors appears ever to have been made.

9. From August 2013 DPG made inquiries of the Central London County Court about the assessors. On 8 August 2013 DPG telephoned the court and said that assessors were needed as the case was about sexual orientation discrimination. They were told that "*the standard assessors from the EAT will be booked*". I suspect that "*EAT*" is a misprint for "*ET*" i.e. the Employment Tribunal. On 6 September 2013 DPG telephoned the court again to say that the case needed two assessors and asked if the court could provide the expertise of the assessor. DPG was told that the official would have to take the matter back to the judge and look at the file because she believed that an assessor had been booked.

10. On 10 September 2013 DPG was told that the order sought on 19 April 2013 had not been approved yet. DPG was asked to send a copy of the correspondence and the court official would see whether she could get the judge's approval. DPG asked for and was given the name of the assessor but was told that the official could not provide details of her experience or a CV although she would check what she could do.

The trial

11. The trial began on Monday 16 September 2013, although Mr Cary was ill on that day. The assessor – Ms Angela Bennett – was present. She had no idea that there was going to be any objection to her sitting as an assessor. But objection there was. Mr Laddie pointed out that the Practice Direction to CPR Part 35 had not been complied with. That provides 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.*"

12. As is apparent from the above, the name of the assessor had only been given on 10 September 2013, six days before the trial. She was not stated to be a "proposed" assessor. When exactly any appointment took place and what form it took is unclear. No details were given to the parties before the trial of her qualifications. The problems that have arisen in this case stem largely from these failures to comply with the Practice Direction to whose existence and terms none of the parties appear to have directed attention before the trial.

13. So it was that on 16 September 2013 Mr Laddie pointed out to the court that details of Ms Bennett's qualifications had never been given. Overnight the office staff attempted to seek some guidance from their managers as to what information should be provided but were unable to get any assistance.

14. On Tuesday 17 September Ms Bennett provided a small clip of documents for the parties setting out her experience. Mr Laddie, whilst indicating that he intended no sort of disrespect for Ms Bennett, objected to her sitting as an assessor on the grounds that she lacked sufficient expertise in relation to same sex sexual orientation discrimination. Ms Bennett was thus in the invidious position of not having been informed until the day of the hearing that there was any issue about her qualification; and then having to go away and decide what useful information she could provide about herself.

15. In her judgment the judge also expressed concern at the absence of any guidance for the assistance of the assessors, the court office or the judge facing an objection from the parties as to what was meant by the use of the word "*qualification*" in para 10 (1) of the Practice Direction nor as to what information about such qualification was to be provided pursuant to it.

Ms Bennett's experience and qualifications

16. The information provided by Ms Bennett was as follows. Her professional career was as a manager for Royal Mail, where she ended up as an Appeals Manager. In that capacity she had had occasion to handle re-hearings of appeals against decisions of dismissal or a lesser penalty such as a final warning. She had dealt with grievance cases, being mainly complaints in relation to sexual and racial harassment or discrimination. She had on occasion been a witness for Royal Mail at employment tribunal hearings. Before taking up her post as Appeals Manager she had been elected to the National Executive Council for the Communications Managers Association ("CMA") for over eight years. She was involved in negotiating various policies including policies on sexual and racial harassment. She had published a paper in the CMA national magazine on Racism setting out the consequences of such behaviour in the work place from the recipient's position and that of the manager in charge should he or she choose to ignore it. She also published a similar article on sexual harassment and discrimination. She had been a lay member of the ET for some 12 years, had gained a position on the Race Panel for the ET, and had sat on a couple of sexual orientation cases. She had been appointed a race discrimination assessor in the County Court, pursuant to section 67 (4) of the *Race Relations Act 1976* to cover the South and South East of England; and had applied for a role as a discrimination assessor under the *Equality Act 2010*.

The judge's findings

17. The judge overruled the objection to Ms Bennett. In paragraph 8 of her decision she said this:

> "*8. Assessors provide assistance to the court as they have particular life experience which can be brought to bear in receiving, understanding or evaluating evidence in relation to particular matters – in this case sexual orientation discrimination. Their function is much more limited than, for instance, a lay or wing member of the employment tribunal whose role encompasses that expertise plus a responsibility, with others, for making the final decision. I fully accept Mr. Laddie's submission that different forms of discrimination cannot all be lumped together and treated the same; that persons may be expert in identifying and challenging one manifestation of bias or stereotypical thinking in one area, but not necessarily in another. Nonetheless, if someone has been appointed – as Ms Bennett has for the past twelve years as a lay member in the employment tribunal hearing all forms of discrimination cases – then in my view that is sufficient qualification for the purpose of assisting as an assessor in a discrimination case. After all, candidates for appointment as lay members in the employment tribunal are*

> *fully assessed for all manner of skills and experience including, in particular, in the area of discrimination. Ms Bennett, as it happens, has sat in cases involving issues of sexual orientation discrimination in the employment tribunal.*"

18. The judge then asked herself how, if this was not sufficient qualification, a court could be expected to operate the Practice Direction given that the list of potential assessors provided to the court did not contain a potted biography for anyone on it. The court, she said, could not be expected to call up an assessor and interview them to assess whether they had the necessary qualification to sit on a particular case. She also queried whether, if she were to rule that Ms Bennett was unsuitable to sit that might be understood to be a determination that she was not, after all, sufficiently skilled and experienced to hear and determine cases of sexual orientation discrimination, as she had already done.

19. The judge held that, in the absence of any clearer guidance as to how the Practice Direction was to operate Ms Bennett was a suitable assessor "*by virtue of her appointment as a lay member of the ET*".

20. Before I come to the submissions it is convenient to set out the legislative provisions in respect of assessors in discrimination cases.

The Legislative background

21. There was a body of statutory provisions in force prior to the *Equality Act 2010*, (sometimes described as "legacy discrimination enactments"), which contained different provisions for the appointment of assessors in county court discrimination claims according to the type of discrimination in issue.

Race

22. The *Race Relations Act 1968* provided by section 19 (7) that a judge hearing a complaint of racial discrimination:

> "*shall be assisted by two assessors appointed from a list of persons prepared and maintained by the Lord Chancellor, being persons appearing to the Lord Chancellor to have special knowledge and experience of problems connected with race and community relations*"

Thus two assessors were mandatory and they had to have the special knowledge and experience referred to. I refer to this as "the special knowledge/experience condition".

23. The 1968 Act was repealed by the *Race Relations Act 1976*. Section 67 (4) provided:

> "*In any proceedings under this Act in a designated county court or a sheriff court the judge or sheriff shall, unless with the consent of the parties he sits*

> *without assessors, be assisted by two assessors appointed from a list of persons prepared and maintained by the Secretary of State, being persons appearing to the Secretary of State to have special knowledge and experience of problems connected with relations between person of different racial groups.*"

Accordingly the parties could agree that the court should sit without assessors and the special knowledge/experience condition was slightly amended. It is on this list that Ms Bennett's name must have appeared.

Sex

24. The *Sex Discrimination Act 1975*, s 66 (6) (a) provided that the *County Courts Act 1984*, s 63 (1) should apply to claims of sex discrimination brought in the county court save that the words "*on the application of any party*" should be omitted. If one makes that amendment the Act provided;

> "*In any proceedings the judge 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 the judge and act as assessors*"

Appointment of assessors was thus discretionary; they could be one or more than one; and they could be appointed whether or not any party applied for their appointment. There was no special knowledge/experience condition. The assessors were to be persons "*of skill and experience in the matter*" to which the proceedings related.

25. Other legislative provisions as to discrimination, including *EASOR*, the *Employment Equality (Religion or Belief) Regulations* and the *Disability Discrimination Act 1995* were silent as to the appointment of assessors.

The Equality Act 2010.

26. The *Equality Act 2010* is the current source of anti-discrimination legislation. Section 114 (7) provides that:

> "*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.*"

Accordingly (a) the appointment of an assessor or assessors is mandatory in all cases covered by the Act in the absence of good reasons not to do so; and (b) the persons who are to be appointed are those with "*skill and experience in the matter to which the proceedings relate*", that being the criterion under section 63 of the *County Courts Act 1984*. There is no special knowledge/experience condition, even for claims of racial discrimination.

27. The *Code of Practice on Services, Public Functions and Association* issued under the *Equality Act 2006*, section 14, which a court "*shall*" take into account where it appears relevant, provides that assessors will be persons "*of skill and experience in discrimination issues who help to evaluate the evidence*". The Code notes that it is mandatory for assessors to be appointed, absent "*good reason*" and that 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*".

The Rules

28. CPR 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 …*"

29. The relevant provisions of the Practice Direction are set out above.

Was Ms Bennett qualified to be an assessor in this case?

30. The only case in which this Court has dealt with the role of assessors in discrimination cases is *Ahmed v Governing Body of the University of Oxford and Another* [2003] 1 WLR 995, [2002] EWCA Civ 1907. The case dealt with the role of assessors under the *Race Relations Act 1968*, section 67 (4) and was principally concerned with the extent to which the judge must disclose to the parties advice from the assessors akin to expert evidence. Mr Laddie referred us to the following passage of the judgment of Waller LJ. Giving the judgment of the court, in relation to the attributes of assessors under that section:

> "*31 In our view section 67(4) assessors form a distinct category of their own; it was no accident that a section 67(4) assessor was not put under the CPR 35.15 umbrella by rule 17(3) quoted in paragraph 25 above. The terms of CPR 35.15 are not appropriate for the role of section 67(4) assessors.*
>
> *32. The background to Parliament passing section 67(4) and the language of section 67(4) demonstrate that the court was not intended to have a wide discretion as to whether to use the assistance of assessors. Furthermore, the persons to be appointed as assessors are not scientists or*

seamen with special expertise in the true sense of that term, but ordinary lay people who have a particular experience in life, an experience which, if it is to be of any real assistance to a judge, involves being able to assess the likelihood of whether some conduct or another is racially motivated. Their expertise (if that is what it should be called) embraces assessing the implications of factual situations, and assisting in reaching a conclusion as to whether racism has played a part. That in our view points to it being the intention of Parliament that in race relations cases judges were to be assisted by assessors in the broadest sense of helping them evaluate the evidence in the area of race relations. The fact that an assessor may be involved in the fact finding role, whether it be of primary fact or by way of drawing inferences from the primary facts, does not mean that the assessor is actually deciding the facts. The ultimate decision has to be for the judge, but section 67(4) requires the judge to use the assistance of assessors unless (as the section provides) the parties otherwise agree"

31. Now, however, there is no special position for assessors in relation to discrimination cases on the grounds of race.

The Appellant's submissions

32. Mr Laddie pointed out that discrimination remains an insidious feature of life in the UK where there are widespread entrenched and persistent forms of discrimination and inequality. This includes prejudice towards gays and lesbians much of which may be sub-conscious. This, he submits, is not that surprising given that the UK had no protection for such persons until 2003 and then only in the employment context. Only with EASOR in 2007 was the protection extended to goods and services. By comparison with other protected characteristics such as gender and race there is much less research on the prevalence of sexual orientation discrimination. As the Equality and Human Rights Commission ("EHRC") said in 2009 in a detailed report "*... new research shows that in 21st century Britain, despite legal advances, homophobia still has an unacceptable everyday impact on the lives of LGB people*". In those circumstances, so he submitted, the need for assessors is as vital now as it was in the mid-1970s.

33. Ms Bennett, he submitted, through no fault of her own, lacked the requisite qualifications for this case. Membership of an employment tribunal was insufficient to qualify a person to act as assessor in a county court same sex sexual orientation discrimination case. For such a task Ms Bennett had no relevant skill or expertise. Reliance on her qualification to sit as a lay member of an ET, including a mere couple of claims for sexual orientation discrimination, fails to identify what specific skill or experience she would bring as an ET lay member which was relevant to the matter to which these proceedings relate. Such a person is part of what is often called an industrial jury, whose members combine in the process of evaluation of the evidence and deliberation. They are not truly experts on any matter in the proceedings. The description of their qualifications and training is, according to published information, less than what the judge thought it to be. They are required to

have workplace experience (which is less likely to involve claims of discrimination on the grounds of age, religion, sexual orientation or marital status than on the grounds of race or sex). They undergo a verbal reasoning test and, after selection, an induction day, four observation days and a second training day. Thereafter they will attend two training events on an annual basis. They must attend a one day course before sitting on discrimination claims. They are expected to sit a minimum of 15 days a year.

34. It is the judge who is the legal expert in discrimination claims; the lay members will have employment experience and they deliberate in an employment context. That does not make them suitable assessors in a non-employment-related discrimination case, where their training will not be greater than that of the judge.

35. An assessor in a discrimination case has a more specialised role. He or she is intended to add something to the judge's own judicial expertise, which, in a case such as this an ET lay member does not. The sort of person who should be appointed as an assessor is someone with skill and experience in sexual orientation issues in the community, who could bring insight into a sexual orientation claim. That may be someone who is himself LGB or someone employed in the field of sexual orientation discrimination: such as the EHRC, Stonewall or an academic institution. Being a lay member of an ET is not enough.

36. Mr Laddie submitted that the judge appeared to be saying (a) that the mere fact of appointment as a lay member of the ET would qualify Ms Bennett regardless of how long she had been a member or what sort of cases she had sat on; and (b) that if picking someone from a list of lay members of an ET was not sufficient the county court would face unacceptable problems. However, the Practice Direction clearly called for a far more considered judgment as to suitability than mere membership of an ET. The judge was also in error in supposing that a decision that Ms Bennett was not an appropriate assessor in this case would imply anything as to her suitability in an employment case in the ET, where the circumstances (and her function) would be different.

37. Mr Laddie also drew our attention to researches that had been made after the hearing in the form of Freedom of Information Act and other requests as to how the County Court could or would have selected Ms Bennett and what lists were or were not available. The position is far from clear but appears to be as follows.

38. In October 2010 the Government Equality Office wrote to the President of Employment Tribunals for England & Wales, in relation to the *Equality Act 2010*, which came into force on 1 October 2010, welcoming his proposal to constitute a specialist panel for discrimination cases in employment tribunals covering the full range of protected characteristics in accordance with regulation 8 of the *Employment Tribunals (Constitution and Procedure) Regulations 2004* ("the 2004 Regulations").

The letter expressed the understanding that the county courts would be able to approach members of this panel with suitable qualifications and experience to appoint as lay assessors.

39. The papers before us include a list, compiled by the relevant Regional Employment judges covering the London Central, London East, London North West and London South regions which sets out a small number of names of individuals in respect of each of the four regions under the headings (i) Sex; (ii) Race; (iii) Religion; (iv) Disability and (v) Sexual Orientation. Ms Bennett's name is not on this list.

40. A letter of 10 June 2014 to DPG from the current President records that when that list was produced the system was that the County Court should approach those on the list directly to ascertain suitability and, if appropriate, to arrange subsequent booking. However, the list is no longer maintained as the process has changed. The current practice is that when an assessor is required the County Court contacts the relevant Regional Employment judges to discuss whether there is a suggested match between their needs and the non-legal members in that region. If there is a suggested match it is for the County Court judge to decide whether to appoint the member suggested. However none of the Regional Employment judges in the four regions to which I have referred had been approached in relation to discussion of suitable candidates to act as assessors for particular cases.

41. How exactly Ms Bennett came to be appointed is, thus, still something of a mystery. In a DPG attendance note of the telephone call of 10 September 2013 the court official stated that two tribunal judges (described in the note, somewhat confusingly, as "*Judges Tribunal Honour Hann, Honour Judge Deight*") had sent an email "*in relation to the assessors in relation to not having assessors for the trial*" [sic]. DPG asked whether the email could be sent to them: but it never was.

42. This state of affairs indicates, Mr Laddie submits, that the attempt to find someone appropriately qualified was at best unsatisfactory. Ms Bennett was not on the list which did specify those who were qualified in relation to sexual orientation, or indeed any other characteristic, and such evidence as there is appears to consist of two judges saying (if the note is accurate) that they did not have any names and four saying that they were never approached.

43. The fact that Ms Bennett is not on the ET list in our papers in any capacity is not surprising because she was based in the South and South East. Further it may be that the county court had a copy of the national list compiled under the *Race Relations Act 1976* in respect of county court assessors (as opposed to the list compiled under the 2004 Regulations) and obtained Ms Bennett's name from that.

The EHRC's submissions

44. The EHRC submits that Parliament intended that assessors should have special skills

and experience in relation to the particular protected characteristics in issue. That this is so appears from the fact that discrimination is defined, in part, very differently according to the protected characteristics in issue. Any other conclusion would fail to recognise that groups sharing particular protected characteristics often experience discrimination very differently from other protected groups. It would also fail to mitigate what might be a judge's lack of experience of a particular protected class and lack of knowledge of the ways in which discrimination might manifest itself in relation to that class. This would impair the confidence of the public in the system of adjudication of complaints of discrimination, and of the judge in the value of assessors.

Discussion

45. The critical question is whether, in a same sex sexual orientation case, an assessor must be someone with specific experience and expertise in relation to same sex sexual orientation discrimination as opposed to any other form of discrimination. A similar question necessarily arises in relation to other forms of discrimination – e.g. race, sex, religious belief, gender reassignment and disability. Further, in some cases discrimination on account of more than one protected characteristic may be in issue.

46. In my judgment it would be wrong to lay down any rule that assessors must have specific expertise in relation to the type of discrimination at issue without which they are necessarily unqualified to act. The test now applicable in relation to all types of discrimination is that the assessor should be a person of skill and experience "*in the matter to which the proceedings relate*". Parliament deliberately chose that criterion in relation to all forms of discrimination (the preamble to the Act recited that one of its purposes is to "*harmonise equality law*") and did not include the special knowledge/experience condition previously applicable in race cases even in relation to those.

47. Mr Laddie submitted that, despite that, the function of an assessor as described by the court in para 32 of *Ahmed* must be the same under the *Equality Act 2010*. Thus assessors need the "*particular experience in life*" and "*expertise … [in] assessing the implications of factual situations in order to assist in reaching a conclusion as to whether [homophobia] has played a part*" which *Ahmed* called for. That means someone with specific sexual orientation discrimination expertise.

48. I disagree. The observations in *Ahmed* were made in the specific context of a decision that the broad terms of CPR 35.14 were not appropriate for the role of section 67 (4) assessors, whose selection was governed by a more restricted criterion.

49. In determining whether a person has skill and experience in the matter 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 ET 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.

50. But discrimination cases often raise less recondite issues. In the present case it will be necessary for the judge to decide, first, whether the way in which the officer acted was different from the way in which she would have acted if the complaint was made by a heterosexual person claiming to have been discriminated against or if the underlying incident had not been one of homophobic abuse. The answer to that hypothetical question may be difficult to reach and will depend, in part, on what the judge makes of the explanation given by the officer as to why she acted in the way that she did. But since the hypothesis assumes a set of circumstances in which homophobia plays no part the value of specific experience in same sex orientation discrimination is limited.

51. It is true, of course, that those who in fact discriminate on any grounds (e.g. sex, race, religion, disability, same sex orientation) often say that they would have acted in exactly the same way if the protected characteristic had been absent. An ability to discern whether people are deceiving the court or, sometimes as likely, themselves, when they say that they would have behaved no differently if there was no question of sex, race etc. playing any part, is thus an advantage in an assessor, as is experience of the sort of masks, pretences and protests that those who discriminate often put forward and of the way in which unconscious bias or stereotyping can operate. This is a skill in evaluation and analysis which can be honed by the experience of dealing with complaints of discrimination in, for instance, the workplace, and/or listening to and adjudicating upon tribunal cases in which discrimination is alleged and disputed. It is a skill which, generally speaking, does not appear to me to need to be divided into rigid categories so that only those with specific expertise and experience in same sex orientation cases can apply it in that field. It may be that such a person would be particularly well suited to be an assessor but that is not to say that only such a person would be.

52. If the first question is answered in Mr Cary's favour by a finding that, if the complaint was of a different form of discrimination or if the underlying incident was not one of homophobic abuse, he would have been treated differently, he is probably more than half way there. It would be necessary to determine what was the reason why Mr Cary's complaint was treated differently. But, on that hypothesis, the scope for non-discriminatory reasons would appear restricted. Mr Laddie submitted that this was usually the most difficult part of the case for applicants. I have some doubt as to whether that is so in this case, but, even if it is, the skill and expertise in discerning a dissembler of the true reason is not, as it would seem to me, necessarily quite different according to what characteristic is in play.

53. In my judgment it was open to the judge on the material that (in the end) was before her to come to the conclusion that Ms Bennett was an appropriate assessor.

54. If the judge meant to say that lay membership of an ET of itself and without more necessarily meant that the candidate was a suitable appointee, she would have been in error. On that footing a lay member who had scarcely sat, and never in a discrimination case, would qualify.

55. I do not, however take the judge to be saying that. She was considering the ET experience of a particular person. She referred to assessors providing assistance to the court on account of "*their particular life experience which can be brought to bear in receiving, understanding or evaluating evidence*". Ms Bennett had such experience in her role as an appeal manager in dealing with disciplinary appeals and grievances including, in particular, sexual and race discrimination and harassment, and in 12 years of experience as a member of the ET hearing all forms of discrimination cases. Ms Bennett confirmed on 17 September 2013 in a manuscript note that as of 2011 she had only been invited to sit on discrimination cases (unless an unfair dismissal case was likely to last more than 3 days), including two cases involving same sex orientation.

56. Ms Bennett was not, in my view, disqualified from acting as an assessor. Nor does it seem to me evident that the judge would have been markedly more assisted in deciding whether there had in reality been discrimination by choosing an assessor from the cohort suggested by Mr Laddie. Mr Laddie said that he wished to cross examine the officer involved on her practical experience of sexual orientation issues; that an assessor could help on particular nuances or aspects of the evidence in this field; and that what was needed was someone well versed in the language and behaviour of those who say that they are not homophobic but are in some respects influenced by such considerations and someone who had been forced to confront discrimination which others might not recognize. The absence of such a person would risk reducing public confidence in the result.

57. However, I had some difficulty in discerning what particular contribution a representative of Stonewall or an academic would bring to the discernment of whether or not there was, in this case, real discrimination against Mr Cary, which Ms Bennett would not bring. Nor is there any good ground why the public should lack confidence in a conclusion, in whichever direction, reached by a judge sitting with Ms Bennett as an assessor.

58. Mr Laddie also submitted that, in the light of the training which judges now have in discrimination and the limited training that new lay ET members have, there was insufficient added value to be derived from Ms Bennett's appointment. I disagree. County Court judges do indeed have training in relation to some discrimination issues in relation to their judicial functions. But the number of discrimination cases

actually determined in the County Court is not high. Under the 2010 Act all county courts now have jurisdiction. There are hundreds of county court judges and many of them may have very limited or nil exposure to such cases. The assistance of someone who deals with discrimination issues on a regular basis and has had experience of them at work or in the tribunal or both is potentially very valuable.

59. I would, therefore, dismiss the appeal.

60. Had I reached a different conclusion it would not have cast doubt on Ms Bennett's suitability to act in discrimination cases in the ET – it would mean only that I would have accepted that a more specialised qualification was required for the instant case.

The Future

61. The procedural history of this case shows that matters went badly awry. It is important that it should not happen again.

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 (a) whether there is any reason not to have one or more assessors; (b) in respect of what matter(s) the assistance of the assessor(s) should be sought; (c) what sort of assessor (s) that should be; and (d) 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 (a) – (d) 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, having satisfied itself as to the appropriateness and availability of the person in question, and notify the parties and provide details of the proposed assessor's qualifications, which are most likely to be in the form of a CV. The rules require this to be done 21 days before any appointment; but the process should not be left to take place in, say, the 2 months before the trial, since if the objection is upheld it will be necessary to select another assessor (s) and give a new notification.

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 EHRC 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 CMC. 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 provide a statement, whether in the form of a CV or otherwise, which shows his or her qualifications to act as an assessor.

67. What I have said is not intended to be prescriptive. Selection of an assessor requires a case by case analysis of the matters in issue, what assistance is needed to address them and who should provide it. It is not necessary that any assessor should be a lay member of an ET and both the parties and the court are at liberty to consider other sources of expertise. It may be that the list previously kept under the *Race Relations Act 1976* Act is a potential source of personnel although that must be getting out of date. It is also to be borne in mind that an assessor is to take such part in the proceedings as the court may direct which may include preparing a report on any matter at issue.

68. It seems to me desirable that the parties should be told how the proposed assessor came to be put forward, even if that is only by recording to whom a request for a suitable person was made and with what response.

69. As I have said, it is not clear to what extent there was judicial input in the appointment of Ms Bennett and there was no notification of her proposed appointment. Notification of a proposed appointment may be a formal or administrative act within CPR 2.5 (1) which can be carried out by court staff. But the appointment of an assessor is not and requires a judicial decision. The same appears to me to be the case with the selection of a proposed assessor since it involves a process of decision as to the matter in respect of which the assistance of the assessor will be sought and a tentative decision as to suitability. In my judgment this is something that is required to be done by the judge.

Mr Justice Barling

70. I agree

Lady Justice Arden

71. I agree