

In total, the taskforce produced 53 recommendations. Although the success of the initiatives remain to be tested, and this is likely to be a focus on research in the coming years, by producing such recommendations, and showing a commitment toward implementation, at least shows the driving impetus behind the diversification agenda.

### Concluding thoughts . . . where the pathway ends

There are some positive trends that come out of the 2015 Judicial Diversity Statistics, although there are limitations, especially given that statistics in relation to leaving office as well as appointments (at least on the court side) are not available. The statistics that are available paint a positive picture at least in terms of upward trends in percentage participation by female and BME judges; however, much of this good work is done in the lower courts, with a barrier to progression to the higher courts seemingly existing.

There are a number of initiatives being introduced with a view toward further diversification of the judiciary, which will take time to see whether their aims come to fruition in terms of results.

In conclusion, there is potential for the judiciary to continue on this upward trend towards diversification, the concept of diversity used is somewhat limited; it is unclear why the idea of diversification is limited to gender and BMEs, which brings this paper full circle. Furthermore, there is a clear need for expansion of the data collected to identify other characteristics, including those with disabilities and sexual orientation. As this data may identify other barriers that the current data will never identify.

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- <sup>1</sup> For example, in the USA under the Obama administration it has been highlighted that seven states and 17 district courts now have their first female judges, it is the first time in history that the Supreme Court has had three women sitting, as well as further successes in the appointment of minorities, including African Americans and Hispanics.
- <sup>2</sup> Moran LJ, 'Judicial Diversity and the Challenge of Sexuality: Some Preliminary Findings' (2006) *Sydney Law Review* 565.
- <sup>3</sup> The taskforce comprised members of the Ministry of Justice, senior members of the judiciary, the Judicial Appointments Commission, the Bar Council, the Law Society and the Chartered Institute of Legal Executives.
- <sup>4</sup> Due to the length of this paper it was only possible to highlight a limited number of the recommendations; a full version of the report can be accessed [here](#).

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# Duty to make reasonable adjustments

PRINCIPLES IN PRACTICE By **David Bleiman** (left) and **Stephen Hardy**



Are tribunals under a duty to make reasonable adjustments to facilitate the effective participation of disabled persons in proceedings? How should this duty be carried out? What is the correct approach to deciding whether any act or omission by the tribunal amounts to an error of law? These were the key issues considered by the Employment Appeal Tribunal (EAT) in the recent case of *Rackham*.<sup>1</sup>



The EAT's findings and guidance, arising in the context of an Employment Tribunal (ET) which, in this case, was commended for its approach and the adjustments made, appear to be of wider significance. That is because the starting point of the judgment is that an ET, as an organ of the state, as a public body, has an undisputed duty to make reasonable adjustments to accommodate the disabilities of claimants. Plainly, as Langstaff J acutely put it:

'We do not think it could sensibly be disputed that a tribunal has a duty as an organ of the state, as a public body, to make reasonable adjustments . . . (para 32 of the judgment in *Rackham*).'

Albeit, as recently highlighted in the Upper Tribunal (in *L'Ol v SSWP* [2016] UKUT, paras 8–10) and recognised in *Rackham*, that judicial proceedings were arguably exempt from s29 of the Equality Act (cf. schedule 3). To that end, tribunals and courts alike ought to tread carefully and consider the nature of the specific circumstances of the case and the nature and procedural rules of the particular tribunal/court, as well as observe the duties embracing the overriding objective.

### Landmark case

Mr Rackham, who has Asperger's syndrome, brought a claim before an ET against NHS Professionals Ltd. There was considerable case management in relation to what adjustments it would be reasonable to make to enable his participation. At the second of three preliminary hearings, a judge thought that there should be an expert medical report, however the parties could, or would, not fund it. Accordingly, the judge thought it proportionate, as a first step, to obtain the claimant's medical records. They were provided. Subsequently, the parties then agreed between themselves what adjustments would be needed for the third preliminary hearing.

At that hearing, as an additional adjustment prompted by the Equal Treatment Bench Book,<sup>2</sup> counsel for the respondent offered a written list of the questions she intended to ask in cross-examination. The claimant then applied to answer the questions in writing, at home, and sought a postponement to obtain an expert report on appropriate adjustments. His application was refused.

The error of law asserted by the claimant before the EAT was that the ET judge had failed to consider that the correct course at the hearing was that the tribunal, having earlier identified the need for an expert medical report, should adjourn and instruct an expert medical report on the way in which the duties arising under Article 13(1) of the United Nations Convention on the Rights of Persons with Disabilities<sup>3</sup> should be satisfied. In circumstances where the claimant, as here, could not afford it, the judge should request that HMCTS pay for the report out of public funds. If the claimant needed reasonable accommodation, what should it be? Without making such enquiry, the tribunal was unsighted and proceedings were conducted unfairly so far as the claimant was concerned.

*Courts and tribunals are exempt from the duty in s29 of the Equality Act 2010 not to discriminate, which is ordinarily imposed on those exercising a public function.*

### An undisputed duty?

Courts and tribunals are exempt from the duty in s29 of the Equality Act 2010 not to discriminate, which is ordinarily imposed on those exercising a public function. There can be no claim under the Equality Act against a tribunal for not having made a reasonable adjustment in order to accommodate a disability. However, a tribunal does have a duty to ensure the effective participation of disabled persons in its proceedings so that failure to do so may be an error of law – as was alleged in this case.

Both parties at the EAT accepted that there was a duty to make reasonable adjustments. The EAT summed up the position as follows:

[32] We do not think it could sensibly be disputed that a tribunal has a duty as an organ of the state, as a public body, to make reasonable adjustments to accommodate the disabilities of claimants. Miss Joffe accepts, and indeed submits, that the particular route by which the obligation rests upon the tribunal is unimportant, though it might be one of a number, because there can be no dispute there is such an obligation. It may be, as Mr Horan submits, through the operation of the United Nations Convention by the route he suggests. It may be by operation of the Equal Treatment Directive<sup>4</sup> or it may arise simply as an expression of common-law fairness.

[33] As to the purpose for which the adjustment is made, since it seems to us that what is reasonable has to be seen in context. The Convention, at Article 13(1) and (2) dealing with access to justice, provides:

- “1. States parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
2. In order to help to ensure effective access to justice for persons with disabilities, states parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.”

[34] That is the right secured for the purpose set out in Article 1:

“The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”

[35] It is well known that those who have disabilities may suffer from social, attitudinal or environmental difficulties. There may be barriers to their achieving the rights to which as human beings they ought to be entitled. We therefore take the purpose of making an adjustment as being to overcome such barriers so far as access to court is concerned, in particular to enable a party to give the full and proper account that they would wish to give to the tribunal, as best they can be helped to give it. We accept that practical guidance as to the way in which the court upon whom the duty to make adjustments for those purposes is placed should achieve this is given by the Equal Treatment Bench Book.’

*‘It is well known that those who have disabilities may suffer from social, attitudinal or environmental difficulties.’*

#### **When is a duty not a duty?**

So, having confirmed an undisputed duty to make reasonable adjustments, the question before the EAT was as to the adequacy of the steps the tribunal took either in making such adjustments or in considering whether to seek further information (the expert report) in respect of their making. The question was not whether the EAT would have taken the same steps as did the tribunal, but whether the ET judge had erred in law.

The EAT considered in some depth the alternative approaches as to the test to be applied by an appellate body. But in the end, their approach was a fairly simple one:

‘It seems to us we have to ask here whether there was any substantial unfairness to the claimant in the event. We have to consider the whole picture, and we have to consider fairness not in isolation, viewing his case alone, but as one in which there were two parties.’

Overall, the EAT emphasised the importance of giving people with disabilities proper respect for their autonomy as human beings:

‘In many cases, if not most, a person suffering from a disability will be the person best able to describe to a court or to others the effects of that disability on them and what might be done in a particular situation to alleviate it. This may not apply, of course, to those who are challenged in such a way that they may lack capacity or perhaps be very close to lacking it.’

In this case, the claimant appeared to have capacity and he having agreed to certain adjustments proposed by the respondent, the judge was entitled to regard his agreement as evidence that those adjustments were appropriate. The Equal Treatment Bench Book had indeed been taken into account. Whereas in many cases a tribunal may have to seek expert evidence, this was a case in which there was already a substantial amount of evidence including that

given by the agreement of the parties themselves and evidence that the claimant had, with similar adjustments, negotiated a hearing before the First-tier Tribunal.

The EAT summarised its reasons for dismissing the appeal as follows:

[55] The conclusion that we have reached is that in this particular case, given that there was a considerable amount of evidence, given the central submission of Miss Joffe that the adjustment has to be one that is reasonable, given the balance that it was necessary to make between the parties to ensure fairness to both of them, and accepting that on the material before the tribunal at the time there were ample grounds for concluding that with the adjustments that were being made, and had been offered and accepted the claimant could have the reasonable access to justice and the reasonable opportunity to put his case as he would wish it to be put before the tribunal to which Article 6, the Convention, common-law fairness and the law entitled him. It is on that basis therefore that we do not consider that there has been an error of law in the approach of the judge below.

[56] We would observe in passing that the Employment Tribunal here is to be commended for its proactive approach at an early stage in seeking to know what reasonable adjustments it might make. This is not to say that being proactive immunises a tribunal from later criticisms might not be made of the adjustments eventually adopted, or to the effect that the procedure might not be improved, but it is to recognise that it is exactly the right place from which to start. It is not always easy for a tribunal; there are many different circumstances in which people with different disabilities come before tribunals on very different cases. It is difficult to generalise from one case to another. A considerable respect must be given to the decision of the judge below, who has seen the parties and who is best placed to judge the fairness of what happens provided in a case such as this that he then keeps the matter under review.'

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### **Guidance on fair hearings for all**

The EAT offered some guidance for tribunals in future cases. This was done with some caution, in particular because there is already very detailed guidance available in the Equal Treatment Bench Book.

First, every case is different and concerns an individual:

'A decision as to what it is reasonable to have to do which is then made by a tribunal must be tailored not to some general idea of what a person with that disability, or it may be disabilities generally, needs but what the individual before the tribunal requires.'

Second, as already noted as a significant factor in this case, the autonomy of the individual is emphasised:

'If a person entitled to make a decision affecting the conduct of their case makes that decision, it is not in general for any court to second guess their decision and to make it in a manner which patronises that person. As we have said earlier in this judgment, there may be exceptions to that, though they may be rare. Generally, we would wish to emphasise the very considerable importance of recognising that those who have disabilities are fully entitled to have their voice listened to, whatever it is they may be saying.'

Third, tribunals should consider holding ground rules hearings, which are described in the Equal Treatment Bench Book in relation to criminal cases:

'The suggestion in the tribunal context is that there might in an appropriate case be a preliminary consideration of the procedure that the tribunal should adopt in order best to establish the rights of the parties

before it. It may for instance consider the ground rules that it is appropriate to lay down for the hearing and the adjustments that it might be necessary to make. This may not be possible if the question of disability is seriously in dispute between the parties, but where it is not it is very often likely to be of advantage. It should not, however, be seen as a step that once taken is set in stone, since in the way of the world the condition or position of the parties may change, but . . . it provides something of a baseline from which other applications and decisions may be considered. We should add that although the tribunal in this case did not call what it did a preliminary ground rules hearing, it effectively held one.'

Finally, the EAT emphasised how, particularly in the best interests of those who suffer from disabilities, these steps should be taken quickly.

### Concluding thoughts

The EAT in *Rackham* gives a helpful reminder of the duty on all tribunals (and courts) to make reasonable adjustments to facilitate the effective participation of those with disabilities. It emphasises the importance of working out what adjustments are reasonable in relation to the particular circumstances, including listening to what the person with a disability actually has to say and taking into account the need for overall fairness to both parties. Clearly, this will be a highly fact-sensitive exercise in each case. As the EAT noted, the Equal Treatment Bench Book provides practical guidance and adopting such an approach lessens the opportunity to fall into error.

The EAT guidance as regards ground rules hearings is welcome and indeed potentially applicable across all courts and tribunals. However, it should not be taken as a strict requirement in all cases. It should be emphasised that this 'guidance' is carefully worded. *There might in an appropriate case* be a preliminary ground rules hearing. Notably, the tribunal in *Rackham* effectively held such a hearing – it did not matter that it did not call what it did a ground rules hearing.

*. . . consideration may be given to ensuring that alternative mechanisms are in place to consult with the parties, in advance of a hearing, as to what reasonable adjustments should be made.*

Tribunals differ in the nature of cases and the time available to deal with case management issues prior to the substantive hearing. Where a disability is indicated on a tribunal pro forma, the administration may have acted on this information in advance. ETs are familiar with the facility to hold preliminary hearings in which, as in *Rackham*, there is scope to explore what reasonable adjustments a participant requests and what is fair and reasonable to provide. Such a practice is not common across all tribunals and jurisdictions. Though the administrative process which surrounds each tribunal might have identified and already explored the need for reasonable adjustments in advance of the hearing. Nevertheless, consideration may be given to ensuring that alternative mechanisms are in place to consult with the parties, in advance of a hearing, as to what reasonable adjustments should be made. Where, for whatever reason, that has not occurred or been effective, it may be necessary to consider adjourning to ensure as well as to enable a fair hearing.

In conclusion, the most helpful aspect of the EAT's decision in *Rackham* is the simple focus on fairness. There will be no error of law if the adjustments made, and/or the consideration of what adjustments to make, do not result in *any substantial unfairness*. Above all, it is especially heartening to see guidance laid down in a case where the tribunal has been found to have made no error of law and has been commended for its approach.<sup>5</sup>

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<sup>1</sup> *Rackham v NHS Professionals Ltd* [2015] UKEAT 0110\_15\_1612.

<sup>2</sup> Equal Treatment Bench Book (2013).

<sup>3</sup> United Nations Convention on the Rights of Persons with Disabilities (2006).

<sup>4</sup> EU Equal Treatment Directive (2006/54).

<sup>5</sup> For discussion of a case in which an ET judge failed to exercise properly her case management powers to adjourn when a claimant, known to be disabled, showed signs of disquiet and said that he was having a psychotic episode, see 'When some help is needed in the kitchen', Mary Stacey, *Tribunals*, Winter 2014. The case concerned is *U v Butler and Wilson Ltd* [2014] UKEAT/0354/13, 2.09.2014.

### e-Diversity Suite

The Judicial College has been working on the production of a suite of e-learning materials, to be called the e-Diversity Suite. The suite will provide opportunities for all judicial office-holders to improve their understanding of a range of diversity issues and communicate with a broad range of individuals appearing before them.

Module 1, 'Understanding Individuals who are Deaf, Deafened or Hard of Hearing', is now available. Further modules will be added to the suite in due course.

To access this first module in the e-Diversity Suite on the LMS, please see [here](#).

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# Insights into help available to judges

JUDICIAL PRESS OFFICE By **Michael Duncan**



You only have to open a newspaper to see that the work of judges in courts and tribunals is of immense interest to the press and the public. Just recently, the press has featured stories about judges ruling on a secret trial, a woman who has won an employment tribunal case against coffee chain Starbucks, an immigration tribunal judgment involving the daughter of Abu Hamza, a story about the country's youngest crown court judge as well as a story about the first transgender High Court Master.

This is just a snapshot of the main stories and does not include the dozens, perhaps hundreds, of decisions that are reported every week in local and specialist media.

With the level of interest in judges and their decisions where do the media go to find out information? And equally important, where do judges go when faced with press interest in a case they are dealing with or even in them personally? The answer to both questions is the Judicial Press Office. We are part of the Judicial Office based at the Royal Courts of Justice. The Judicial Office reports to the Lord Chief Justice and Senior President of Tribunals and our purpose is to provide support to all levels of the judiciary.

The Press Office is a small team of three press officers and our primary role is to respond to press queries about judges and the judiciary in general. Our function is also to proactively promote and explain the work of judges to the press, but a significant part of our job is giving advice to judges on dealing with the media.

### What does this mean in practice?

One of our priorities is to ensure that the press accurately report any court decision. This means that when a judgment is given we send a copy of the judgment to the press as soon as we can. In the case of High Court judgments where we know there is significant press interest, we often get judgments sent to us straight after they are handed down which we then publish on our website and e-mail to our lists of reporters. We also publish a link to it on Twitter so that our 30,000-plus followers can see the judgment, often at the same time as the news is breaking on television or radio. Twitter is an important channel for us as many of our followers are lawyers, legal commentators, journalists and other opinion formers.