

In the recent case of **Oyarce v Cheshire County Council UKEAT/0557/06/DA (13 June 2007)** the EAT held that an employment tribunal erred in law in its deciding the issue of victimisation on the basis of the statutory reverse burden of proof rather than applying the common law approach, which is where there is *prima facie* discrimination that calls for an explanation from the alleged discriminator, in the absence of an explanation the employment tribunal is entitled, though not necessarily bound, to draw an adverse inference against that alleged discriminator. See article in Solicitors Journal dated 21 September 2007.

In **Paterson v The Commissioner of Police of the Metropolis UKEAT/0635/06/LA (before the EAT on 16 July 2007 and judgment handed on down 23 July 2007)** the EAT held that an employment tribunal that found although P suffered from dyslexia, it did not have a “substantial adverse effect on his ability to carry out normal day to day activities” and was not, therefore, disabled within the meaning of the Disability Discrimination Act 1995 (“DDA 1995”) erred in law.

In 2004 P, a police officer, discovered that he suffered from dyslexia. He alleged that as a consequence he was disabled, and complained that he had been discriminated against for a reason relating to his disability and that his employer failed to make reasonable adjustments, particularly in the processes for determining whether he might have been promoted to superintendent. Some adjustments had been made in his favour, which, in law, on the employment tribunal’s finding, it was not obliged to do, but P claimed they were insufficient.

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P had previously been promoted. In 2001, when he sought promotion, he was described as “an able communicator – this has resulted in the production of a number of complex and detailed reports which are successfully supported in both criminal and disciplinary proceedings...He has consistently produced work of high quality. This has been achieved despite the tight deadlines and the demanding environment present in his current role.”

The employment tribunal stated, amongst other things, “We find and direct ourselves that it is presumably open to a tribunal to reach a conclusion that a Claimant may be diagnosed to have a degree of dyslexia, but that that dyslexia does not as a matter of fact have more than a minor or trivial impact on his day to day activities. It is thus one of the conditions which we believe it is necessary for us in the Tribunal (the other obvious example being depressive illnesses) where it is necessary for us to carry out an assessment of issues of fact and degree. We find and direct ourselves that the correct “comparator” assessment is with the ordinary average norm of the population as a whole. We have, as we have already expressed, no doubt at all that the Claimant will continue to be at a definite disadvantage in the high pressure and we believe by no means day to day situation of a high pressure exam at a substantial disadvantage to his non dyslexic colleagues. That disadvantage we believe, however, is well capable of being compensated for within the Respondent’s own procedures and proper good industrial practice by a large employer.”

However, the EAT held, “...it is not to compare the performance of the employee with the average person in the population, which was the comparison the

[employment tribunal] seems to have made. Rather, it is the comparison between what the individual can do and would be able to do without the impairment.” In consequence, the EAT substituted a finding that P was a disabled person within the meaning of s1 of the DDA 1995.

Finally, on 14 September 2007 the Employment Equality (Sexual Orientation) (Religion or Belief) (Amendment) Regulations 2007 that amends the Employment Equality (Religion or Belief) Regulations 2003 (S.I. 2003/1660) and the Employment Equality (Sexual Orientation) Regulations 2003 (S.I. 2003/1661) (together “the 2003 Regulations”) comes into force. The amendments affect only the parts of the 2003 Regulations that deal with unlawful discrimination by qualifications bodies and providers of vocational training.

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