

What does *In the matter of Horan* tell us about judges and barristers?

Judges and barristers, and their organisations, could learn lessons about how to treat disabled people from the case of **John Horan**, who is suing the Bar Standards Board. In this article he gives a personal view, but it is the view of a disabled barrister – which, he points out, is still a rare beast.

First, there are two things that this article is not about. It is not about the Bar Standards Board (BSB) itself: I am suing the BSB for disability discrimination and have no comment to make now about its conduct throughout, for obvious reasons. It is also not about the legal ramifications of the case, although there remains an article to be written about the conduct of judges towards disabled advocates, the material provisions of the Equality Act 2010 relating to the BSB and disabled barristers and the standards of advocacy expected of a disabled advocate. This article looks at the implications of the decision of the BSB Review Panel in *In the matter of Horan* [2010] EqLR 473.

Personal history

On the day before the Millennium I had a stroke and it changed my life. I have fought for 11 years to build up again my practice at the Bar. I have made new friends, and old friends have turned into enemies due to my disability. This is known about me by a considerable proportion of the Bar, particularly those that specialise in employment work.

What is less well known is that in lieu of the imposition of conditions by the Medical Panel of the BSB, on the 8 May 2009 I gave an undertaking not to accept instructions involving advocacy in the High Court, the Court of Appeal, the Supreme Court or the Privy Council. Then, on 3 December 2009, the BSB ordered that I continue to turn down advocacy work before the “upper courts” and, in addition, required that I give notice in writing of my medical history before accepting instructions to appear as an advocate in the lower courts both to my client and to the relevant court or tribunal. This lasted until 11 October 2010 when it was successfully appealed to the Review Panel of the BSB. The complaint to the BSB that set this procedure in motion originated with a judge of the Court of Appeal who, with support of two other members of the Court, made a complaint about my advocacy in the case of *Bone v London Borough of Newham* [2008] IRLR 546, a case in which my client was successful.

I cannot describe how undermining and soul-destroying the original BSB decision was – having to write to my client and the judge or employment judge in every case that went to court or tribunal. I would not wish it on my colleagues at the Bar; fortunately, most able-bodied barristers will never have to experience it.

Prejudice against disabled people

In my pupillage I learnt to view disabled people with derision and laughter. I copied the attitude of some more senior barristers towards them. In particular, there were one or two who relied for their work upon personal injury claims brought by physically and mentally disabled people. Doubtless their standard of work, of itself, was very good – but the attitude towards disabled people was demeaning. The tone taken by them was, at the best, to laugh at them and, at the worst, to belittle their chances of having the court do anything about their lot. They were “other” – not “our kind” of people – expecting from their life something other than we, with our posh cars and natty clothes, expected.

It is hard to say these things. I certainly would not have admitted it at the time, even to myself – I was, after all, a barrister.

What has made the difference is the stroke and what happened to me professionally afterwards. I felt isolated and alone much of the time. I felt that my aspirations as a disabled barrister were different from my aspirations as an able-bodied barrister – they had vanished like a puff of smoke, and through no fault of my own. I now knew what it feels like to have able-bodied people assume that you are “not like them”.

Maybe I was unlucky and had a unique experience with the barristers that I learned from. But I doubt it. Does the Bar Council and most sets of Chambers provide the right environment to make it any different for disabled would-be barristers? Surely, the goal of a modern judiciary and a modern set of chambers is to leave it in no doubt, with a raft of objectively justifiable policies, training and monitoring, available for public scrutiny, that they are above reproach in their attitude towards disabled people.

The equality committee – a sort of triumph?

Mrs Justice Laura Cox is to be applauded for her strides in making the judiciary more open to training and to reflect society's concerns about equality, so that judges have it in mind as a central concept of what it is to act judicially.

However, in her article on p.24, she points out a concern about higher judges and the difficulties that she has had in making equality training mandatory. This is a concern which I share.

It is right that we have judges who are brilliant – this is one of the pleasures of working at the Bar of England and Wales. But does brilliance as a judge mean that, without training, they know the rights and wrongs of equality legislation and what makes an institution compliant? There were bright judges in England and Wales before the abolition of slavery. There were bright judges in South Africa who tried cases under the apartheid regime. There were bright judges that tried cases in England before there was anything unlawful about sex discrimination, let alone disability discrimination.

As Laura Cox points out, the attitude of the judiciary is changing for the better. But, is change happening quickly enough when members of the senior judiciary still insist that they should not be required to undergo equalities training? The three judges of the Court of Appeal in my case acted, I am sure, with the best of motives in reporting me to the BSB. But the fact that the BSB thought that they should have exercised “patience” with me and therefore, impliedly, that they did not, underlines the fact that many disabled people feel that they run a risk of not getting a fair hearing before judges in this country

Equal opportunities training is not about the detail of the law; it is about opening the recipient’s mind to “real people” – in all their glorious diversity – and the barriers they face because of inequality and different needs.

I know of no Employment Judge who would do anything other than utter an exasperated cry when he learnt that senior members of the management in a big firm did not have equal opportunities training. Why should judges be different?

Statutory codes of practice

There are statutory codes of practice on implementation of statutory equality duties which are binding on the courts as employer and as provider of public functions and goods and services. There is also a statutory duty to implement a disability equality plan. The codes, both under the old legislation and the new statutory codes of practice, describe what a good employer or public function provider or service provider should have in place to ensure equality of treatment and avoid discrimination claims. These contain a checklist of straightforward things that the management of the organisation should bring about, for example:

- establish a policy to ensure equality of access to and enjoyment of their services by potential service users or customers from all groups in society;
- communicate the policy to all staff, ensuring that they know that it is unlawful to discriminate when they are providing services;
- train all staff, including those not providing a direct service to the public, to understand the policy, the meaning of equality in this context and their legal obligations;
- monitor the implementation and effectiveness of the policy ...
- consult customers, staff and organisations representing groups who share protected characteristics about the quality and equality of their services and how they could be made more inclusive.” (See Code of Practice on Services, Public Functions and Associations, paragraph 3.41 to 3.42.)

These requirements have been in place in one form or another for 15 years. What steps have the courts or Bar Council taken to comply with these provisions? The judiciary and the Bar Council both have public duties as well as private duties towards disabled members of the public and towards disabled barristers. Sadly, there exists among the disabled community a perception that their concerns are belittled by the Bar and the judiciary. Surely the time has come for the Bar Council and the judiciary to take action on these things to ensure that they exercise good practice on anti-discrimination issues.

Judicial discretion

It matters not whether dealing with my disability in my case was an exercise of public functions under the Equalities Act 2010 or an exercise in the common law judicial discretion to apply the Judge’s Handbook – what matters is that disabled people have the right to have reasonable adjustments made to their advocacy dealt with in such a way as to be predictable, consistent and dealt with in good time. Although my case is the first case in 15 years where the judgment of a quasi-judicial board has been reported, it is likely that situations arise day-to-day in courts up and down the country where a disabled person – whether professional advocate, litigant in person, expert witness or witness – coming before the court has, for whatever reason, difficulty in making themselves plainly understood.

Way forward

What is needed is a system in place for dealing with the particular problems by way of one Order – either a change in the Civil Procedure Rules or a judicial pronouncement from the senior Judges – which affects the advocate rather than each individual case. The Order would need to be flexible so that in each particular case:

- the judges have knowledge of the fact that the individual was disabled and needed reasonable adjustments to be made;
- it would have a senior judge’s input as to what those reasonable adjustments should be; but
- judges would retain discretion over what reasonable adjustments should be made in the case, taking into account, for example, the disabled advocate’s rights and the rights of the other party.

Judicial discretion has, on many occasions, been exercised in favour of disabled people. However, the mere fact that an individual judge on a particular case should use his discretion wisely is not an answer to the systemic problem; what needs to happen is for the above system to become a feature of every case in which the disabled community has a part.

It is striking that, since its inception, the Civil Procedure Rules, the judicial guidance and the explanatory notes have never mentioned disabled people at all. Judicial guidance that implements the best practice set out in the codes of practice would go a long way to reassure disabled people that all judges involved in all cases are aware, and taking account, of the difficulties disabled people face in their day-to-day life. ■