

Public Law Update: Failing Prisoners with Learning Disabilities

Adam Straw and Sara Lomri write on disability discrimination and offending behaviour work in prisons

Providing offending behaviour work to prisoners seems to be in everyone's interests: the public, as it assists in rehabilitation and the reduction of crime; and the prisoner, as it greatly increases the speed with which he or she can demonstrate risk has reduced to a level consistent with release. Yet the case of *R (Gill) v. Secretary of State for Justice* [2010] EWHC 364 (Admin) drew attention to a deficit in the system, that those with learning disabilities were not being provided with an equal or adequate level of offending behaviour work.

This was a claim for judicial review by Dennis Gill, who is a life sentenced prisoner with a learning disability. He had served well over twice his four-year tariff, but by reason of his learning disability had not been permitted to undertake any offending behaviour programmes. The Judge accepted that Mr Gill had been, "let down by the system in that the treatment he required has not been forthcoming due to his learning difficulties ... and he has languished in prison".

DDA Claim

Mr Gill was successful in his principal claim, which was that the Secretary of State had unlawfully breached the statutory duty imposed on him by s.21D(2) of the Disability Discrimination Act 1995 (DDA), to make reasonable adjustments to enable Mr Gill to undertake some form of offending behaviour work. The six-step approach set out in *Lunt* [2009] EWHC 235; [2010] RTR 5, para.53, was applied. Cranston J noted that each step must be approached against the backdrop of the broad and beneficial interpretation of the legislation which is demanded by *Gichura* [2008] EWCA Crim 697; [2008] ICR 1287.

Application of the "Lunt" Test:

Steps 1 and 2 involve considering whether the defendant had a practice, policy or procedure (practice) which made it impossible or unreasonably difficult for disabled persons to receive any benefit that is, or may be, conferred by the public authority. It should be noted that the question is not about the claimant specifically, but is whether the practice would have any significant impact on a class of disabled persons, such as wheelchair users: *Roads v.*

Central Trains Ltd [2004] EWCA Civ 1541, para.26.

The Judge decided that steps 1 and 2 were satisfied, because the Secretary of State has a practice which make it impossible or unreasonably difficult for Mr Gill to undertake offending behaviour programmes provided to other prisoners. The defendant's "suitability for accredited programmes" document contains an explicit statement that IQ in the region of 80 or below may prevent meaningful engagement with the material in a programme. It was quite clear that Mr Gill had been prevented from undertaking the courses by reason of his learning disability. The Judge appeared to accept that PSO 4700 4.13.2 expresses the standard normally offered to other prisoners: short tariff lifers should be given access to sufficient offending behaviour coursework to give them every opportunity to demonstrate their safety for release at tariff expiry, and that short tariff lifers must be prioritized for offending behaviour programmes.

Steps 3 and 4: It follows that the Secretary of State came under a duty to take such steps as were reasonable in all the circumstances of the case to change the practice so that it no longer made it impossible or unreasonably difficult for prisoners with a learning disability similar to Mr Gill's, to access offending behaviour work that other prisoners could access. The Judge found that the defendant failed to do so, in that:

A deficit appeared to exist in the provision for people with needs such as Mr Gill.

There were no additional resources or services available at Long Lartin to assist those like Mr Gill to undertake existing offending behaviour programmes.

Long Lartin does not have the ability to facilitate one to one offending behaviour programmes and there are no adapted one to one behaviour programmes available nationally.

The defendant had not consulted the numerous specialist organizations listed in PSO 2855 and the HMP Long Lartin's "Disabled Prisoner Policy".

Long Lartin delayed seeking advice from the central Offending Behaviour Programmes Unit in London.

The defendant failed to consider what steps could be taken. He had not explored adequately making adjustments to existing behaviour programmes so Mr

Gill could benefit.

The defendant had not considered providing a suitably qualified person to assist and support Mr Gill so that he could take part in offending behaviour programmes, such as a scribe.

The defendant had not considered transferring Mr Gill to another prison establishment that might be better able to meet his needs.

It could not be said that the Secretary of State had provided Mr Gill with access to a service as close as it is reasonably possible to get to the standard normally offered to other prisoners, which is the purpose of the section: *Lunt* at paras.58-59.

This failure made it impossible for Mr Gill to access offending behaviour work, satisfying step 5. As to step 6, the discrimination was not justified under s.21D(4-5), DDA, for example by the cost of making the adjustments, because the cost was only limited to Mr Gill's case.

The Judge did not make any findings on the ancillary claims that there was direct discrimination, and a breach of the general duty under s.49A, DDA.

Public Law Claim

Mr Gill was also successful in the second part of his claim, which was that the defendant breached his public law duties. Primarily because offending behaviour work was part of Mr Gill's sentence plan, the Secretary of State was under a duty to comply with a number of his policies, in particular: PSO 4700, which provides that an essential element for short tariff lifers

is that they "complete any assessment required"; PSO 2855, which provides that where attendance at particular courses is necessary for the successful completion of a prisoner's sentence, reasonable adjustments must be made to allow prisoners with disabilities to participate; and PSI 31/2008, under which prisoners with disabilities must be able to follow their sentence plans and satisfy the conditions for parole. None of these policy requirements were fulfilled through enabling Mr Gill to access offending behaviour work in some form. The Secretary of State had not put forward good and clear reasons for such breaches, and in consequence acted unlawfully.

Points to Note

This case demonstrates that a claim under the DDA 1995 can be made by way of judicial review in the same way as in the county court, providing that at least one ground for claim is a public law point.

Unlawful discrimination is defined slightly differently in respect of a provider of services (ss.19-21, DDA) as compared to a public authority (ss.21B-21E, DDA). Cranston J observed that the provision of offending behaviour work seems to be a purely governmental function, and so comes within the public authority provisions. However, he did not decide the point because he found there was no difference between the services and public authority provisions that was significant to the outcome of this case.

About the authors

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Letter to the Editor

LW-Head1

Dear Sir,

In his editorial headed "Faith in Democracy" on May 8, the Consultant Editor slightly misquotes what Laws LJ said in *McFarlane v. Relate Avon Ltd* [2010] EWCA Civ B1 at paras.23, 24, which was in part:

"... the conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith, however long its tradition, however rich its culture, is deeply unprincipled... The precepts of any one religion – any belief system – cannot, by force of their religious origins, sound any louder in the general law [of England] than the precepts of any other."

Although the Consultant Editor did not say so, Laws LJ was inaccurate here because he overlooked the effect of the establishment of the Church of England, which still carries the full force of law. This effect was spelt out in the oath taken by the present Queen at her coronation. She promised to do everything indicated in the following questions put to her by the Archbishop:

"Will you to the utmost of your power maintain in the United Kingdom the Protestant Reformed Religion established by law? Will you maintain and preserve inviolably the settlement of the Church of England, and the doctrine, worship, discipline, and government thereof, as by law established in England? And will you preserve unto the Bishops and Clergy of England, and to the Churches there committed to their charge, all such rights and privileges, as by law do or shall appertain to them or any of them?"

The Consultant Editor said that there has not been a theocracy in the modern western world. This overlooks a number of countries, including Ireland. The first Duke of Wellington, born and initially reared in Ireland, said: "The Roman Catholic clergy, nobility, lawyers, and gentlemen having property, form a sort of theocracy in Ireland, which in all essential points governs the populace." Only very recently has that ceased to be true.

Yours faithfully
Francis Bennion
Via e-mail