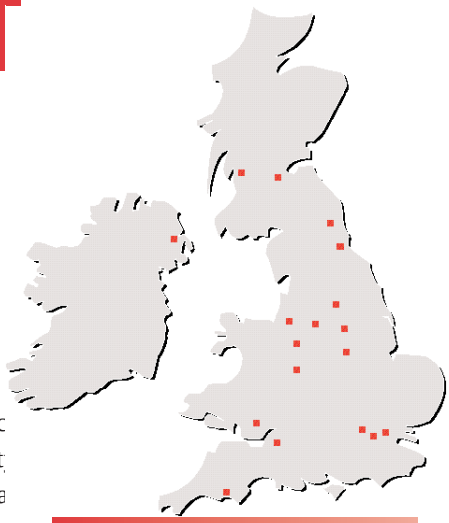
Sick pay ruling



London Clubs Management Ltd v Hood [2001] IRLR 719
Mills v London Borough of Hillingdon, 18 October 2001 EAT unreported

CAN AN employer's failure to pay sick pay amount to less favourable treatment or a failure to adjust under the Disability Discrimination Act 1995? We previously reported the successful Employment Tribunal decision of Hood v London Clubs Management Ltd (LELR 43, February 2000) which held that it could. The Employment Appeal Tribunal have now cast some doubt on that decision in a judgement which raises as many questions as it answers.

Mr Hood suffered from severe headaches and was disabled within the meaning of the Act. His employer operated a discretionary sick pay scheme. On his taking time off work due to his headaches, they decided that in the light of financial difficulties they would stop paying him sick pay. His Tribunal claim was presented as one of a failure to pay sick pay and a failure to adjust, a comparison being made with other people who were not disabled but whom were paid sick pay. The Tribunal upheld his claim, finding that following **Clark v Novacold** 1999 IRLR 318 the treatment he was complaining of was a failure to pay ordinary wages, so that the appropriate comparison was with people who continued to work and receive pay.

The EAT approached the matter differently, drawing a distinction between a failure to pay ordinary pay, and a failure to pay sick pay and said that the Tribunal had conflated the two. Mr Hood's case was a failure to pay sick pay. But this failure to pay sic pay was not related to Mr Hood's disabilit but rather to a policy of not paying sick pa resulting from financial difficulties. So the less favourable treatment claim failed. The second issue, a failure to adjust, has been referred back to the Tribunal.

The case illustrates the care with which the less favourable treatment has to be identified, and the need to tie the less favourable treatment to the disability. A claim for non-payment of sick pay may still amount to less favourable treatment under the Act, but it must be decided whether the case is one of a failure to pay ordinary wages due to absence, which is likely to be disability related, or a failure to pay sick pay, which may or may not be.

The EAT also confirm that sick pay arrangements do fall within the scope of "reasonable adjustments" under section 6. The employers had argued that the words of section 6(1) "any arrangements made by or on behalf of an employer" did not cover monetary benefits, and also was excluded by section 6(11) which excludes benefits under occupational pension schemes and other benefits payable under schemes. This argument was conclusively rejected by the EAT. Monetary benefits may be arrangements. Sick pay is paid by an employer to an employee, not under a scheme.

As it happens, a different division of the EAT has recently considered a similar point as to whether sick pay fell within the "arrangements" provisions of Section 6. In **Mills v London Borough of Hillingdon**, the EAT had to consider whether a failure to pay sick pay due to an administrative error amounted to an arrangement under section 6: they found that it did not. An error is not an arrangement, and the Applicant's claim failed.

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LELR AIMS TO GIVE NEWS AND VIEWS ON EMPLOYMENT LAW DEVELOPMENTS AS THEY AFFECT TRADE UNIONS AND THEIR MEMBERS. THIS PUBLICATION IS NOT INTENDED AS LEGAL ADVICE ON PARTICULAR CASES

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may be excluded; official lists of approved economic operators will be used to assess suitability of candidates; (iii) selection of candidates and award of contracts will be conditional on compliance with the legal provisions relating to employment protection and working conditions; (iv) there are to be review and enforcement procedures after award of the contract.

EUROPEAN COURT DECISIONS ON MANDATORY COLLECTIVE AGREEMENTS

Recent decisions of the European Court of Justice on 25 October 2001 highlight the possibility of using collective agreements as the basis for a labour code for public services, and their potential advantages.

Case C-493/99, **Commission v Germany**, concerned German legislation which prevented the hiring out of employees among construction undertakings, including those outside Germany, unless they were party to collective agreements for the industry. Such undertakings could be party to the collective agreements only if they had a subsidiary in Germany employing construction workers. The German government sought to justify the requirement as necessary in order better to monitor undertakings supplying labour from outside the EU: the objective was to protect workers from abuses which were notorious in the construction industry.

The European Court condemned the German legislation, but on grounds which do not undermine the role of collective agreements. The Court held that the requirement to have an establishment in Germany, which was a condition of affiliation to the collective agreement, violated the EC law on freedom to provide services. This went (point 22) "beyond what is necessary to attain the objective of providing social protection for workers in the building industry". However, if the German law had required affiliation to the collective agreement without the requirement of establishment, it would not have violated EC law on freedom to provide services. In sum, the case supports the proposition that legislation making mandatory affiliation by employers to a collective agreement, with the objective of protecting workers, is not an infringement of EC law.

On the same day, 25 October 2001, the Court decided joined **Cases C-49/98, C-50/98, C-52/98** and **C-68/98** to **C-71/98, Finalarte**. These concerned challenges under EC law to a German collective agreement by employers from other Member States who posted workers to Germany. The collective agreement required contributions to a paid leave fund for construction workers and provision of information for the calculation of these contributions. It allowed for payment of the holiday entitlement directly to the workers employed by firms established outside Germany.

The European Court refused to condemn the collective agreement. It was for national courts to decide on the balance between the economic burden on the employers and the social protection of workers. The agreement might well reflect (point 63) "objective differences between business established in the Federal Republic of Germany and those established in other Member States as regards the effective implementation of the obligation to give holiday pay".

In these cases, the European Court appears willing to support the role of collective agreements as establishing mandatory fair labour standards.

UK GOVERNMENT POLICY

In the Financial Times of 28 September 2001 under the heading "Ministers accept public services pay shield", it was reported that "Ministers have accepted, in principle, proposals from unions to protect all private sector staff working in public services from any deterioration in pay and benefits… Ministers confirmed yesterday that they were seeking a wages agreement. 'It is our hope that we can reintroduce the fair wages resolution in some form' said one".

Bringing the UK back into line with the policy of all other EU Member States on mandatory labour standards on public contracts is particularly important now as the EU is revising the public procurement directives. The European Parliament will finalise its position on the revised procurement directives in early 2002, and the Council of Ministers will decide at a meeting in March 2002. The UK government is an important player determining whether labour standards become mandatory on public contracts.

In the UK, the government needs to translate its commitment in principle to a new fair wages resolution into proposals for practical implementation of a policy guaranteeing fair labour standards in public services. The Fair Wages Resolution of 1946, ILO Convention No. 94 and the recent decisions of the European Court of Justice all point to collective agreements as the basis for mandatory fair labour standards for public services.

Our guest author is Brian Bercusson, professor of Law at King's College, London and Director of the European Law Unit at Thompsons Solicitors.

A Labour Code for Public Services?

A LABOUR CODE FOR public services is currently on the agenda in both the UK and the European Union. The Code would specify the terms and conditions under which staff are employed on public services provided under contracts with the private sector.

BACKGROUND: UK "FAIR WAGES POLICY"

Since 1891, the "Fair Wages Resolution" of the House of Commons, revised in 1909 and 1946, instructed government departments to require their contractors to comply with specified "fair" standards of wages and working conditions. However, the 1946 Resolution was revoked by the Conservative government elected in 1983. The Local Government Act 1988, section 17, outlawed the pursuit of such "non-commercial" considerations in public procurement by local authorities.

Under the new Labour government's Local Government Act 1999, the Local Government Best Value (Exclusion of Non-commercial Considerations) Order 2001 (applying only to England, effective March 2001) allowed for employment standards to be taken into account, but only if linked to Best Value or TUPE.

ILO STANDARDS

ILO Convention No. 94 of 1949 on Labour Clauses (Public Contracts), modelled on the 1946 Resolution, requires contracts to include clauses ensuring working conditions: (Article 2) "1. ...not less favourable than those established for work of the same character in the trade or industry concerned in the district where the work is carried on – (a) by collective agreement or other recognised machinery of negotiation between organisations of employers and workers...". The Convention was ratified by the UK in 1950, but the Thatcher government denounced it in 1982. Nonetheless, ILO Convention No. 94 has been ratified by eight EU Member States, and similar policies are in effect in six others. The UK remains the only EU Member State without a formal policy requiring fair labour standards in public procurement.

EUROPEAN LAW

EU law regulates the process of offering public contracts in four directives covering works, supplies, services and utilities, and EU public authorities may include labour standards as conditions in the public procurement process. In **Case C-225/98, Commission v France**, decided on 26 September 2000, the European Court of Justice declared that it was lawful for a public authority to make the award of a public contract to build a school conditional on observing conditions concerning employment.

Other EU legal provisions affect public contracts. The Acquired Rights Directive 1977 (the TUPE Regulations) protects the terms and conditions of workers transferred when public services are contracted out to the private sector. However, new employees hired by the contractor are not covered, creating a two-tier workforce. Even an extended TUPE would not abolish the two-tier system, but merely re-draw the boundaries: there would be other workers on contracts with suppliers of services who would still not be protected.

EC LEGISLATIVE PROPOSALS ON LABOUR STANDARDS AND PUBLIC PROCUREMENT

Proposals are being considered to require fair labour standards in public procurement in the EU. The supremacy of EC law means that such requirements would become mandatory in the UK.

Proposals from the European Parliament's Social Affairs Committee aim to ensure that "current legal provisions in the social and employment field are complied with by all the candidates, so as to prevent unfair competition… what matters is to create a level playing field for all candidates". The process has four steps: (i) potential tenderers must be given access to appropriate information about employment protection and working conditions, which must be defined; (ii) compliance with these standards must be checked by the contracting authority during the pre-selection, and candidates who have breached social legislation

did (or did not) consider an applicant to be a disabled person within the meaning of section 1 of the DDA because there was (or was not) a substantial adverse impact on such activities. In both **Vicary v British Telecommunications** [1999] IRLR 680 and again in **Abadeh v British Telecommunications** [2001] IRLR 23, the EAT has pointed out that there are limits to the matters upon which a medical adviser can give useful or relevant evidence. The EAT emphasised that it is for the Tribunal to decide whether impairments had a 'substantial' adverse impact on normal day to day activities within the meaning of the Act. It is not for expert witnesses to express opinions on these matters. Instead, said the EAT, their evidence should be directed to matters such as the prognosis, the effect of medication and, if appropriate, their own observations of the applicant carrying out any relevant tasks or functions and the ease or otherwise with which they were carried out. In addition to the matters referred to by the EAT, the approach referred to above about disadvantages and potential adjustments could also be used in producing evidence for use at any hearing.

As a result, it is important to ensure that the medical experts are asked to deal with the correct issues in their reports or letters to the court, especially if they are not going to be called to give oral evidence. Some matters require particular attention.

Firstly, the question of diagnosis should be addressed. This is essential in cases of mental ill health, where applicants need to prove that their conditions are 'clinically well recognised illness', Schedule 1 paragraph 1(1). This can usually be done by the treating doctor providing a diagnosis cross referred to one of the recognised systems which classify psychiatric disease, either ICD-10 or DSM-IV. In **Rugamer v Sony Music Entertainment UK Ltd and ors** [2001] IRLR 644 the EAT upheld two Tribunal decisions in which psychological overlay was held not to be a physical impairment for the purposes of the DDA. Furthermore, as there was no satisfactory evidence to show that the applicants had a diagnosed or diagnosable clinical condition of a recognised type, they had also failed to show that they had a clinically well recognised illness.

Although an expert may not be able to give direct evidence as to what impact a disability has upon an individual's normal day-to-day activities, s/he may be able to state that the fatigue or pain or loss of memory etc referred to by the applicant are typical of, and/or likely to be linked to, the physical or mental disability in question. This may be particularly useful where someone has been dismissed for poor performance or inappropriate behaviour if the respondent denies that this was related to the disability for the purposes of section 5(1) of the DDA. If evidence of such a link is produced, a tribunal can only decide that there was no such link if it has and explains its reasons for rejecting the expert evidence, see **Edwards v Mid Suffolk DC** [2001] IRLR 190.

If an applicant was still receiving treatment (such as medication or counselling) at the material time, the expert should be asked to say what effect the condition would have had (i) if no treatment had been provided and; (ii) if the treatment had stopped at the material time. Unless the continuing treatment had produced a permanent improvement at the time of the discrimination, the tribunal will be required to disregard the beneficial effects of the treatment in deciding whether the applicant is a disabled person, see Schedule 1 paragraph 6 of the DDA. If it had produced a permanent (but incomplete) improvement, only the effects of the continuing treatment will be disregarded, see **Abadeh v British Telecommunications** above.

Expert evidence will often be useful and may even be essential. However, it will rarely be a complete substitute for direct evidence from the applicant about the impact which a condition has upon an applicant's day to day activities. This is particularly true in cases involving stress or depression, in which medical witnesses will not be able to give much direct evidence about the impact of the condition upon a particular applicant's normal day-to-day activities. Instead, they will often have to rely upon what they were told by the applicant during any examination. For this reason it will usually be best to ensure that the applicant gives detailed evidence of the effect of the condition upon his or her day to day life, to confirm and explain the account given in any medical report. A combination of detailed factual evidence from the applicant and focussed medical evidence which concentrates on the most relevant matters will allow the case to be put at its best.

Our guest author is Andrew Short, barrister at Coram Chambers, specialist in employment and discrimination law and co-authorr of Challenging Disability Discrimination at Work (IER 2000)

What's up Doc?

The role of medical evidence in disability discrimination cases

THE DISABILITY Discrimination Act 1995 has increased the access of many people to the labour market. Employment opportunities have certainly multiplied for one group: medical expert witnesses. Before the DDA came into force, medical experts rarely appeared before Employment Tribunals. Now, they have become a regular feature. This article will identify some ways in which representatives can increase the effectiveness of medical evidence.

It will often be of most use if the medical evidence is produced before the need for proceedings has arisen – for example during a sickness absence procedure, at an appeal or grievance hearing. Although a specialist medico-legal report is unlikely to be needed at this stage, a GP or treating consultant will often be willing and able to write a letter to an employer suggesting a possible date for a return to work and/or possible adjustments which could be made to enable a return. Alternatively, a letter could point out that a disabled person has difficulty with one aspect of work and suggest a way of removing or reducing the disadvantage so caused. In some cases, evidence of this nature will allow matters to be resolved satisfactorily at the outset.

Even if the evidence does not persuade the employer to act in the desired fashion, it may still serve a useful role in preparing the ground for proceedings under the DDA. The duty to make reasonable adjustments does not arise unless the employer knows or ought to know that a particular arrangement puts a disabled person at a substantial disadvantage (section 6(6) of the DDA). It is important that any difficulty is drawn to the employer's attention. Whilst a letter from a doctor is not the only way of doing so, it is a very effective way. Secondly, if an employer fails to take into account medical evidence provided by or on behalf of the employee, it is unlikely to show that any less favourable treatment is justified for the purposes of section 5. Even where the employer has already obtained its own unfavourable medical advice, it will be at risk if it fails to consider the contrary viewpoint of another clinician or even ask its own medical adviser to consider that alternative approach, see **Jones v Post Office** [2001] IRLR 384.

The fact that a particular adjustment is not suggested by an employee or the employee's doctor at the material time does not absolve an employer of responsibility for considering whether in fact any adjustments can be made, see **Cosgrove v Caesar & Howie** [2001] IRLR 653. Nonetheless, in practice it will often be easier for an employer to excuse a failure to make an adjustment in these circumstances. If the issue of adjustments is raised, representatives should consider whether all potential adjustments have been referred to in any medical evidence. If not, and if time allows, it will often be preferable for a particular adjustment to be raised with the GP or consultant to deal with it from the outset or in a follow up letter. If this is not practical, the possible adjustments could be raised by or on behalf of the employee in writing.

A different approach needs to be taken in obtaining medical evidence for use at a hearing in the Tribunal. Doctors used to producing reports for personal injury claims may not appreciate what evidence will be useful in a DDA case. This explains why much of the medical evidence placed before tribunals deals with matters that are not in dispute or which are not questions of medical opinion and also fails to deal with the real issues in the case. On occasions, evidence from expert witnesses has contained as much legal advice as medical opinion. For example, experts have stated that a particular activity was not a normal day to day activity or that they

move and startle a fellow employee. That was held to be insufficiently connected with employment. It may be rationalised as a case where the offending employee did not have any particular duties towards the fellow employee whilst both were engaged in using the relevant washroom.

Similarly, an employee serving behind a bar threw a glass of beer over a customer. The pub owners were held not to be vicariously liable. The employee was not employed to maintain order so there was insufficient connection with the duties of employment. Strangely, one of the speeches commented that the position would have been different if the employee had been authorised to maintain order, eg the landlord, even if this particular act involved settling a private score.

In practice, though, it may be possible to argue that bar staff and similar employees such as counter staff etc will have some responsibility for ensuring the maintenance of order. Such staff may be expected to intervene or at least report a disturbance and usually would not be expected to turn a blind eye.

In cases of assault involving fellow employees, there were no helpful comments in the speeches provided. However, there must now be a very strong argument that where the assault is committed by a manager, vicarious liability will usually arise. The manager will have responsibility to issue and enforce instructions, ensure compliance with relevant requirements and procedures etc. Where an argument arises with an employee, even where the dispute is mainly personal, the assault may be seen as an unauthorised means of exerting authority, maintaining order, responding to the employee's challenges to authority etc.

The position is likely to be very different where it is simply a fight between two fellow employees.

The conduct of security staff was considered. An employee attempting to repossess the employer's property committed an assault. The employer was liable. The employee's job involved the need to resort to personal violence on occasion. Similar considerations may apply in cases involving assaults by night club bouncers.

Overall, this case is a considerable step forward. It is a complete review of the law of vicarious liability. There will be a considerable impact in many union personal injury cases involving misconduct and criminal conduct by fellow employees.

Busman's holiday

Bowden and ors v Tuffnells Parcels Express Ltd [2001] IRLR 838

THE SCOPE of the coverage of the Working Time Directive has long been problematic. The final draft of the Directive owed more to the political process in Europe than to logic. One of the exclusions under the Directive was the transport "sector". This was faithfully translated into the UK Working Time Regulations without amplification.

Does this mean that no-one working in the sector could benefit to minimum annual leave entitlements or only those doing the actual transporting? Mrs Bowden and her colleagues working in the clerical department of a road parcel delivery firm firm in Kent sought to establish their right to paid annual leave.

An Employment Tribunal held that they were employed in the road transport "sector of activity" and therefore had no rights under the Working Time Regulations 1998. The EAT referred the case to the European Court of Justice. The ECJ has now ruled that the Community legislature clearly indicated that it was taking account of those sectors of activity as a whole. It did not matter that the clerical and driving functions were completely separate at the company and that the van drivers were not allowed into the office where Mrs Bowden worked.

Thankfully the Working Time Directive has been amended to limit the exclusion to mobile workers only in the transport sector by 1 August 2003.

REFERENCES:
Labour and European Law Review
is archived at

Where the buck stops

Lister v Helsey Hall Ltd [2001] IRLR 472

THIS LANDMARK House of Lords ruling expands the scope of the vicarious liability of employers for the criminal or negligent acts of their employees. This particular case involved a boarding school for what were described as maladjusted and vulnerable boys aged between 12 and 15. For a three year period the warden of the school who was entrusted with their care systematically and seriously sexually abused them. He was ultimately convicted of these offences and the victims sought compensation. Clearly, a warden would be unable to meet any such claims, so the claims were directed against the school which was alleged to be vicariously liable for the misconduct of the warden as its employee.

Although this case involves sexual assault of children by a boarding school warden, the implications of this decision will be extensive and impact upon many person injury claims involving the misconduct or carelessness of fellow employees.

When the case was first heard the court was bound by the case of **Trotman v North Yorkshire CC** [1999] IRLR 98. In **Trotman** the deputy headteacher of a school sexually assaulted a pupil whilst on a school trip to Spain. The Court of Appeal rejected the case against the school on the basis that the acts of the deputy headteacher were so far removed from his duties, and amounted to an act of personal gratification, that he was not acting in the course of his employment. Accordingly, the school were not vicariously liable.

But in this case of **Lister**, the House of Lords has now overruled that decision. The key question is the extent to which the act of the employee is closely connected with his employment.

The emphasis is upon the duties of employment. In this case, the warden was entrusted with the care and supervision of the children. Sexually abusing them was a negation of that responsibility. Nevertheless, it was that responsibility which rendered the school vicariously liable.

However, it would not be enough if the employment simply gave the employee the opportunity to commit the wrongful act in question. For example, if a gardener or a porter had abused the children, the school would not be liable. Their specific tasks did not involve the care and supervision of children. But the position might be different if the children had been given gardening duties and entrusted to the care and supervision of the gardener when undertaking such duties.

Many instructive case examples were cited by the House of Lords. In reviewing these cases it was stressed that in establishing whether the misconduct is closely connected to the employment duties, those duties must be considered broadly and not broken down into individual component parts.

In one case a petrol tanker driver had caused an explosion by smoking a cigarette whilst engaged in transferring petrol from the tanker to a petrol station. Smoking itself was an unauthorised act but that was simply a component part of his conduct. Looking at his job more generally, a requirement was to safely transfer petrol such that this misconduct was in the course of his employment and the employers were variously liable.

A milkman was prohibited from employing children on his float but he disregarded that rule, engaged a child on an informal basis and then negligently injured that child. His employers were liable. Engaging the child was unauthorised but his job was to deliver milk and he had chosen to exercise that by employing a child to assist him.

Assault at work cases will be of particular relevance.

There have been difficult borderline cases. An employee using a hand basin at the end of a working day pushed the basin so as to cause it to

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CONTENTS

THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

ISSUE 65 December 2001

Chew on it

Chew v Chief Constable of Avon and Somerset Constabulary Employment Appeal Tribunal Decision 28 September 2001

MS CHEW was a single mother, with primary responsibility for the care of her young children. She was employed as a police officer for the Avon and Somerset Police Force. They operated a rotating shift pattern which she found did not fit with her available child care arrangements which could only cover a "standard" pattern of fixed and regular week day hours. Ms Chew applied to work part time, but her application was rejected because her proposals did not fit within the shift system.

Ms Chew's lodged a claim of indirect sex discrimination under the Sex Discrimination Act 1975, arguing that the requirement for shift work operated by the police force disadvantaged a greater proportion of women than men, could not be justified and was such that she could not comply with it. She produced statistics showing that, out of a work force of some 3,016 police officers, ten were unable to do shift work, all of them women. The Tribunal held that ten out of 3016 was statistically significant and therefore did set up an indirect discrimination claim, and the police force had not on the facts justified the policy.

The appeal before the Employment Appeal Tribunal raised a number of issues, but was primarily concerned with whether the ten women out of 3,016 was statistically significant enough for an indirect discrimination case to be made out. The EAT decided that it was. Relying primarily on the Court of Appeal in **London Underground v Edwards** (No 2)[1998] 364 IRLR, it held that it was not necessary to approach the issue of disproportion in the indirect discrimination provisions solely by reference to statistics. Statistics were only one way of proving disproportionate impact, but there were others. For example in **Edwards** the workforce was predominantly male and of the 2,000 men, all of them could comply with the shift patterns. Of the 21 women, only one, Ms Edwards, could not comply.

Nonetheless in **Edwards**, the Court of Appeal held that disparate impact was established despite the relative statistical insignificance of the figures. This was because the statistics did not present the full picture, and taking into account the predominantly male workforce it had to be taken on board that all of the men could comply. Likewise, although only one woman could not comply, the numbers of women in the workforce were very small (which was significant in itself) and anyway one woman represented five per cent of that female group.The EAT in **Chew** follow this "flexible" approach to uphold the Tribunal's findings on disparate impact, on the basis of statistics similar to those in **Edwards.**

Chew illustrates the use of the indirect discrimination provisions of the Sex Discrimination Act. It demonstrates the social consequences of shift working for parents, particularly rotating shifts. Shift working does not fit well with the generally rigid and inflexible hours operated by most nurseries and child minders. Shift working may work where a partner has a flexible job, but for single mothers in particular, it is simply unworkable.

Now with the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001 in force (see LELR September 2001) we can hope for more options for proving the disproportionate impact beyond the narrow world of statistics within workplaces.

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