

AHEAD NEWSLETTER

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LESBIANS SACKED FOR BEING LESBIAN

Welcome to the 5th edition of the **AHEAD** newsletter. This edition contains a selection of cases that have been heard under the heading of sexual orientation or religion or belief discrimination.

Faith & Homophobia Conference
Saturday 17th February 2007
Shoreditch, London
www.lgcm.org.uk
All welcome

Margaret Durman & Penny Smith vs. Barchester Healthcare Limited
1701873/2005 & 1700455/2006

Durman & Smith are women in a sexual relationship with each other. Simply put they were sacked for being lesbians.

Durman and Smith are both registered nurses. Durman was the home manager of Kernow House, which was part of Barchester Healthcare which employs about 18,000 people in 170 or so homes throughout the country. The company is a major commercial undertaking.

Durman worked for her employer for eight years. In 2001, she started running Kernow House in Cornwall. Despite her vast experience in several medical fields Kernow House was a challenge for her. "Kernow House was in difficulty in terms of profitability, reputation and staff morale. It had the highest usage of agency

nursing in the group. It is common ground that Ms Durman was responsible for a change in its fortunes, much for the better".

Penny Smith stated working for the employer in 2002. She managed a care unit that had changed from "an unimaginative caretaking role into a place where staff became enthused by the difference they were able to make to the quality of life of the residents. Ms Smith's energy, ideas and leadership revolutionised the unit so that it became the home of choice for the local authority and was given an award by the Alzheimer's Society".

In May or June 2004, the two women began having a relationship with each other. It was a private matter; it was not obvious to all staff. They informed senior management and any matters relating to

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Want more ?
AHEAD 5

Could have been a very long publication I have therefore put some

cases as "supplements"

RoB1 has 24 cases & costs £45.00

SO1 has 11 cases & costs £40.00 contact me for further details

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(Continued on page 2)

Smith were dealt with by another manager on the same level as Durman but at a different home.

In May or June 2004, the two women began having a relationship with each other. It was a private matter; it was not obvious to all staff. They informed senior management and any matters relating to Smith were dealt with by another manager on the same level as Durman but at a different home.

In April 2005, an email was sent anonymously to the Commission for Social Care Inspection (CSCI) – this is the government watchdog for nursing homes. The email was sent from an address specifically set up for the purpose. The email complains about Durman and Smith and other members of staff (not named) and complains about bullying, incompetence and abuse of patients.

The CSCI wrote to Barchester Healthcare saying they wanted the allegations investigated and to be informed of the outcome.

The complaint was taken seriously by senior managers and one of them, Pam Hardy met with Durman and Smith in separate meetings. Both women were suspended.

On seeing the email, both Durman and Smith suggested that the complaint had come from Mr Shepherd. They did this without having the chance to talk to each other about the situation, having come to this conclusion, because they both recognised certain spelling mistakes and several other grammatical idiosyncrasies.

Mr Shepherd was a nurse who was married to an ex-employee. He had previously sent abusive e-mails and threatening letters to the women, had been reported to the Police and had two harassment orders against him.

As Durman left that day, she handed the file on Mr Shepherd to Pam Hardy who said she would look into it. She never did.

Hardy suspended both Durman and Smith. The tribunal took the view that neither should have been suspended and could have easily been re-deployed in the Company elsewhere. Even though suspension is a neutral act the tribunal thought it was "unfair".

The tribunal also said "It is distinctly possible that the email is founded upon a homophobic view of their relationship". The problems with Mr

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Shepherd were documented as part of Smith's human resources file.

Hardy then put up a notice in the staff room. "Anyone with the slightest grievance or grudge was in effect encouraged to come forward and make a complaint."

"Pam Hardy then trawled through all the patient files and all the staff files seeking to find matters which could be turned into allegations to be investigated". She found 8 allegations. For each of these allegations, the tribunal decision gives the details and states "...we see nothing more than the considered exercise of management discretion on a proper basis. In each case there has been investigation, records have been kept, the circumstances considered ...with appropriate follow-up action taken."

Durman with the aid of the Royal College of Nursing took out a grievance against her managers but she was dismissed before the grievance was concluded.

The tribunal said of the dismissal that "none of us can recall a case where dismissals have been so patently unfair". They went on to say "It is hard to see how any dismissal conducted by an employer of such size, and with a dedicated human resources department could be so very bad unless sexual orientation discrimination was the root cause of it".

This case had a five day hearing. The bundle amounted to several hundreds of pages and both sides were represented by Counsel.

The decision contains no information about compensation.

Belief or not

Nicholson vs. The Aspire Trust 2601009/04 is an interesting case because it deals with issues that arise when a non-Christian works for a Christian organisation. (although I'm not suggesting that all Christian organisations would treat their employees or service users like this).

Nicholson started working for the Trust in 2002. He was not a Christian although his wife was and he had no difficulty working within a Christian ethos. Nicholson is disabled and used a wheel-chair at the time of appointment. This was his first job for 10 years. He was an ex-drug user, had been homeless had managed to rehabilitate himself and then had a stroke. He proved to be highly effective in his dealings with the service users. His job was a learning skills adviser, a post funded by European Social Fund and administered by a local college.



Nicholson's case is that he was discriminated against as a non-Christian. In a seven day hearing, where both sides were represented by solicitors, he argued successfully that he had been constructively dismissed and discriminated against on the grounds of religion.

The Aspire Trust is a registered charity. They are ... "associated with the evangelic movement within the Christian Church". The practical focus of the Trust is to provide supported accommodation for single people over the age of 16.

The solicitor acting on behalf of the Trust tried to argue that the case was not covered by the Religious Regulations as much of the case focuses on the respondent's religious belief and these are not the concern of the Religious Regulations. The tribunal took the view that non-believers are equally protected by the Regulations as are people of faith.

The Trust took on duties similar to that of other supported housing organisations such as managing hostels. They worked with secular and statutory organisations and developed various policies including an equal opportunities policy. Their policy offered equal opportunity to men and women, irrespective of race, faith, gender, sexual orientation or previous personal history.

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If you know of someone who might want this n/l tell them to send me a blank email & their phone number

Belief or not CONTINUED

The Trust originally worked with a small team of volunteers and then in 2000, appointed their first employee.

The tribunal's decision describes in detail the religious beliefs of the Trust and of Nicholson. They rejected the suggestion that the Trust had tried to convert him. The Trust members would only seek to evangelise to someone where the person in question might be receptive.

The tribunal did however accept that there were ideological clashes between Nicholson and many of the other employees, most of whom were members of the same Church that the Aspire Trust was associated with.

For example, one of the other employees regarded equal opportunities as "left wing rubbish". Nicholson believed that providing condoms to residents was an important aspect of health and safety because of the risk presented to young women who, at one time, were seen climbing the fences in order to have intercourse with male residents in the hostel. This employee (in common with others at the Trust) did not regard providing condoms as being in any way part of the Trust's health and safety responsibilities; indeed he regarded it as contrary to Christian principles to take such steps.

Similarly, Nicholson had a difficult relationship with a woman employee who was disgusted at the detail in which Nicholson thought sexual advice should be provided. Moreover, Nicholson expressed disagreement with her taking to church a resident who had expressed an interest in attending, when she would not have taken a Muslim resident to a Mosque.

Nicholson also had other concerns about the professionalism of his co-workers and would complain about this in a way that other workers found difficult. He complained that the Christians would close ranks against him. In December 2002, the Trust, in recognition that the Religious Regulations would be lawful by December 2003 took the view that all management positions should be occupied by Christians (their type of Christian).

In March 2003, the manager of the project went off sick and Nicholson was asked to act-up. This caused tension between him and some of the other workers, in particular the one that had described equal opportunities as left-wing rubbish.

The manager taking sick leave at this time also had implications for future funding. It had been the manager's role to

oversee the "Supporting People" grant application; this funding initiative was to be the main source of funding for the project.

In May 2003 the manager resigned and the Trust agreed that Annette Richmond, an ordained minister should take over in the interim. Miss Richmond said that she was "troubled spiritually" by the Project. She said that she felt that there was a wrong spirit throughout the project which has affected the Christians working there. "The project has been birthed wrong, and there is a wrong spirit in place". She also felt the Trust was turning into a business when it should be a ministry and should not be answerable to anyone but God.



BELIEF OR NOT CONTINUED

Nicholson agreed to step down and had no ambitions towards becoming a manager at this particular workplace although he did want the Trust to send him on a management course.

It was the Trust's failure to send him on a management course that was an important element of his grievance.

By the summer of 2003 the Trust was dealing with a funding crisis and so they did not pay attention to the continued funding of Nicholson's post. In addition to this, a partnership organisation expressed concerns about the Trust's equal opportunities policies, especially in relation to how their residents were treated. This too had implications for the funding for Nicholson's post. The funds for his post needed to be sorted out before September 2003; they were not. By November it was recognised that Nicholson's position was "untenable" as the post could not be funded by the previous funders and alternative sources had not been identified.

By January 2004 Nicholson submitted a grievance. The way the Trust dealt with the grievance was at the very centre of Nicholson's tribunal case. The Trustees met on 5th February 04 saying that was to discuss the procedure without discussing the substance of the grievance. Nicholson's case was that the Trustees were "clandestinely reaching conclusions adverse to

him". Nicholson was invited to discuss his grievance letter – this was dishonest and a sham because the Trustees had already decided to reject the substance of his grievance. *The tribunal were "unimpressed with the Trustees as witnesses, noting how often, when dealing with events of this particular evening, and their evidence in general they would claim a failure of recollection over matters which were far from ancient history".*

The tribunal decision to this case is over 43 pages long and on many of the points the tribunal members couldn't reach a unanimous conclusion.

Nicholson was awarded a total of £8,033.70 of which £5,000 was for injury to feelings.



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XY vs AB Bank

The first case to be heard under the jurisdiction of sexual orientation has been to the Employment Appeal Tribunal.

In essence, it is quite a simple case, a case of an out gay man who is accused of sexually harassing another man, found guilty and then dismissed for gross misconduct. In the Employment Appeal Tribunal the case is listed as Lewis vs. HSBC bank UKEAT/0364/06/RN & UKEAT/0412/06RN, in the employment tribunal as XY vs. AB Bank 3200440/2005). The reason that the claimant, the ex-employee, and the respondent, the ex-employer have been anonymised in the original tribunal hearing is related to mandatory tribunal procedure. Neither party requested privacy and the case has already had a lot of attention from the press. For ease, I'll call the gay man XY and the ex-employer the Bank.

**New
website**

XY VS AB BANK CONTINUED

XY is 45 and was a senior manager at the Bank. He was expected to manage a team of 300 global traders and a budget of several hundred million pounds. He arrived at the Bank with an excellent track record and was expected to earn 1.6 million in the course of 2 years.

The case against XY is that he sexually harassed another man, A, in the showers at the Bank's gym. XY is said to have stood in the next shower cubicle to A looked at him in an "inappropriate" way and masturbated leaving the cubicle without turning the water on to shower. It is also alleged that another man B saw XY in an "excited state", that is with a fully erect penis.

Mr A thought that XY was a "nonce" and that "he was the wrong guy to be doing this to". There is an exchange between the two men which results in XY giving A a false name. He later said he did this as A's attitude towards him was aggressive.

XY denied the accusations and said he was the "victim of a malicious accusation because he was gay". He describes the allegations as "nonsense".

Whether XY was masturbat-

ing in the shower and leering at A cannot be proved either way.

The Bank went into a detailed investigation which ended with A being believed and XY dismissed. Much of the tribunal report deals with the way the resulting procedures were conducted.



The original tribunal report lists 16 allegations of less favourable treatment in their decision. The tribunal found in favour of the XY in four of these allegations. Or to put this another way, XY's case that he had been discriminated against on the grounds of sexual orientation was partly won. In a nutshell, the tribunal says that the early handling of this incident shows that discrimination had occurred as some of the professionals knew XY was

gay and so assumed that he must have been guilty.

The four allegations that the employment tribunal found to be discriminatory were mainly related to the early handling of the incident by an HR manager of the Bank called Mrs Hattrell.

Hattrell was one of the first HR professionals to deal with the case. The tribunal said of her that there had been both "embellishment and exaggeration" and on significant points her "credibility was lacking".

The tribunal then went onto to say that despite the early part of the investigation being flawed, the internal appeal was dealt with appropriately and came to a non-discriminatory conclusion.

Both XY and the Bank were not satisfied with the tribunal's decision and both sides took this case to an Employment Appeal Tribunal. From XY's point of view, he argued that the early proceedings being tainted by discrimination on the grounds of sexual orientation must have influenced the later proceedings.

The Bank appealed the four points that it had "lost" in the tribunal. It successfully argued that the case against them had not been properly put to them and so therefore could not refute them. The employment tri-

XY VS AB BANK CONTINUED

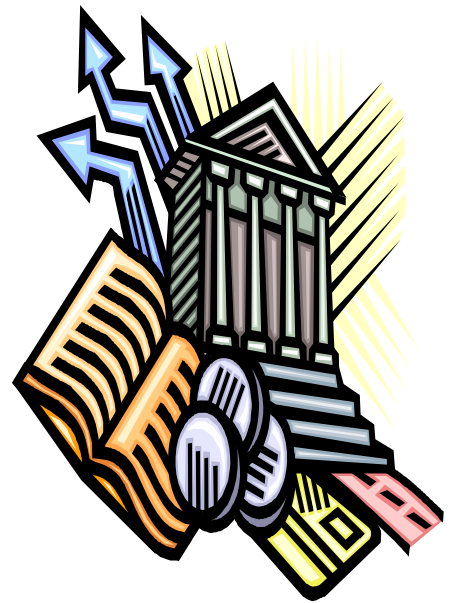
bunal had drawn adverse inferences but should have given the Bank an opportunity to answer the case against them.

The conclusion to this case is that the Bank won its appeal points and so the case will be sent back to another tribunal to hear these four points again. XY's cross appeal is dismissed as it relied upon the original tribunal's decision being upheld.

This case will be sent to a fresh employment tribunal

for a rehearing of four of the points dealing with the early part of the investigation.

The only comment that I can make is that from my days at Lesbian and Gay Employment Rights the caseworkers used to regularly deal with cases of this type where a malicious allegation of sexual mis-conduct was thrown at a gay man who found it impossible to disprove the allegations.



Who am I?

Anne Hayfield is an independent trainer and consultant who has over twenty years experience in the equality & diversity arena. Here are some examples of her work:

She has worked with senior managers on the development of equality and diversity strategies at, for example, **Coopers and Lybrand** and **BT**. Work of this type places emphasis on the development of necessary leadership skills that are needed to communicate these sensitive issues to staff. Her down to earth approach is useful in encouraging front-line staff to adopt better working practices. This is illustrated by her courses for caretakers at **Industrial Dwellings Society** and care assistants at **Greenwich Healthcare Trust**. She has devised hundreds of courses, workshops and seminars working with a mixture of **Labour**, **Liberal** and **Conservative** councillors at **Cleveland County Council** and Police Officers at the **Ministry of Defence Police Force**. Anne has also acted as mentor to one of the equalities officer at the **British Broadcasting Corporation**. Anne's work at **Lesbian and Gay Employment Rights** includes pioneering training for trade unionists in this issue.

She has been involved with three training packs on the Sexual Orientation Regulations. The first of these, "Work Out" is based on Lesbian and Gay Employment Rights casework experience. It can be purchased from Anne. "Making Equality Simple" was co-authored with Mohammed Aziz and published by the National Council for Voluntary Organisations. This can be downloaded from the NCVO website www.ncvo-vol.org.uk Anne advised BDP media on their "Sexual Orientation" training pack produced in collaboration with Stonewall. This pack can be purchased via the website www.skillboosters.com.

Gay man fights back but loses case

In *Boyd vs. Little Haven Hotel* 2502182/06, the claimant was employed as a kitchen porter at the Little Haven Hotel from September 2005 until December 2005. He was subjected to a number of comments such as "you prefer it when men bend over for you" and you should "dress as a waitress". Both of these comments were said in front of other people who later when asked denied that they had happened.

Boyd made a complaint to a chef who was his immediate superior. The chef did not realise this complaint amounted to harassment or bullying on the grounds of sexual orientation and so the chef didn't pass on the complaint to his superiors.

The next incident of harassment is far more serious. The incident concerns another employee, Frankie, who made explicit movements simulating the act of oral sex with a man. This is directed to Boyd, with another employee, Ryan, as a conspirator. **The incident ends with Boyd hitting Frankie in the face**, a struggle results with Ryan entering the fray to break the fight up. The whole episode is captured on CCTV. A more senior member of staff was told that Boyd had hit Frankie in the face. Boyd was "certainly excitable" and was told to go home. He then irritated his bosses by

not leaving the premises when asked. His managers threatened to call the Police. Eventually Boyd left and was formally suspended some time after this incident. His employers then dismissed him a few days later.

This case was heard at a three day hearing at Newcastle Upon Tyne. The tribunal were able to view this tape although there is no sound track.

From Boyd's point of view, he has been subjected to harassment and then sacked and so his claim is of harassment, direct discrimination and victimisation.



From the employer's point of view, they sacked Boyd because he punched another employee.

The tribunal believed that the claimant was subjected to harassment by Frankie and Ryan on the grounds of his sexual orientation. They also believed that the employer was "plainly telling the truth they had spo-

ken to everyone they could think of and none of them had (or perhaps were prepared to admit they had) seen or heard the claimant, who was a popular employee with his colleagues, being harassed on grounds of sexual orientation"...." The one thing they had on CCTV was a deliberate punch thrown by the claimant."

Boyd's case was not well founded and was dismissed.

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