MOYHING (appellant) v. BARTS AND LONDON NHS TRUST (respondents)

600 *Sex discrimination*
611 *Direct discrimination*
613 *Discrimination against men*
653 *Discrimination by others than employers – vocational training bodies*
681.2 *Compensation – injury to feelings*

Sex Discrimination Act 1975 (as amended) sections: 1(1)(a), 5(3), 14

The facts:
Andrew Moyhing was a male student nurse, studying at City University. During a work placement at Barts Hospital, he proposed to the nurse in charge that he would carry out an electrocardiogram (ECG) on a female patient of Asian origin who had breathing difficulties. This would involve touching her breasts, and he was informed that he would need to be accompanied by a female chaperone during this procedure.

The chaperone arrangement was in accordance with a policy of the health trust adopted as a safeguard against the risk of assault upon a female patient and/or false accusations of assault against male nurses or male students when intimate procedures were being given to female patients. Female nurses or students treating a male did not require to be chaperoned as the risk involved was assessed as negligible by the hospital.

Mr Moyhing considered that he was either being regarded as untrustworthy and a potential abuser of women, or that the patient might make false accusations against him. Consequently, he declined to carry out the procedure. He brought a sex discrimination claim against two hospital trusts in which he had worked, including Barts and London, alleging that there was a culture which treated male nurses effectively as second-class citizens, and which assumed that female nurses were automatically suitable to provide intimate care to anyone, whereas the assumption was that it was inappropriate for male nurses to provide intimate care to female patients.

He identified five specific incidents where he said that as a male student he had been treated differently from the way in which a female student would have been treated. An employment tribunal found that no such differential treatment had been established in respect of four of the incidents.

As regards the ECG incident, the tribunal found that there had been a difference in treatment, but concluded that the claimant had not suffered a detriment as a result of being asked to have a chaperone present. The tribunal took the view that "declining to proceed under chaperone was not warranted by the fact that he felt that he or the patient was being categorised as liable to act wrongfully. It was not reasonable to interpret the respondents' general policy on chaperoning in this individual way." The tribunal acknowledged that "there can be no justification for less favourable treatment in a case of direct sex discrimination." It concluded, however, that "the claimant's unjustified objection to the respondents' policy undermines his claim to have been disadvantaged and thereby to have suffered a detriment from less favourable treatment on grounds of sex."

The Employment Appeal Tribunal (Mr Justice Elias – President, Sir Alistair Graham KBE, Mr D J Jenkins OBE) in a reserved judgment given on 9 June 2006 allowed the appeal, substituted a finding of unlawful sex discrimination and awarded compensation of £750.

The EAT held:

613, 653
The employment tribunal erred in holding that the claimant male student nurse had not been subjected to a detriment within the meaning of the Sex Discrimination Act when, in accordance with the respondents' policy, he was not permitted, without a chaperone, to carry out an ECG on a female patient in circumstances in which a female student nurse did not have to be chaperoned when carrying out such a procedure on a male patient. The tribunal erred in finding that the claimant's claim to have been disadvantaged was undermined by his unjustified objection to the respondents' policy of chaperoning where intimate treatment was being given by male staff to female patients, a policy that was a safeguard against a risk of assault upon a female patient and/or false accusations of assaults against male nurses or male students.

Direct discrimination cannot be justified. The fact that there may be good and sound reasons for distinguishing between men and women is no defence. The tribunal's approach of assuming that if the reason for a discriminatory policy is cogent and rational then it cannot be justified to object to it had the effect of reintroducing justification under the guise of detriment. There is no legal basis for treating male and female student nurses differently. In particular, it would be wrong and contrary to Parliament's intentions to restrict the concept of detriment so as to make good the limited scope of the present justification defence.

In the present case, however justified the policy, it could not be said to be unreasonable for a male nurse to feel that it was demeaning and irritating to have to be chaperoned. This disadvantage was more than just de minimis.

681.2
Given that the discrimination was not personally directed at the claimant, did not involve a personal slur on his reputation or character, and that he was only marginally inconvenienced by it, the award of compensation should be very much at the lower end of the scale. Harbouring a legitimate and principled sense of grievance is not to be confused with suffering an injury to feelings. £750 compensation was appropriate.

Cases referred to:
Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830 HL
Ilangaratne v British Medical Association [2003] All ER (D) 73 (Jul) EAT
Lord Chancellor v Coker [2001] IRLR 116 EAT; [2002] IRLR 80 CA
Ministry of Defence v Jeremiah [1979] IRLR 436 CA
Peake v Automotive Products Ltd [1977] IRLR 365 CA
R (on the application of European Roma Rights Centre) v Immigration Officer at Prague Airport [2005] IRLR 115 HL
Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL

Appearances:
For the Appellant:
NIGEL GIFFIN QC and NAOMI CUNNINGHAM, instructed by Palmer Wade on behalf of the Equal Opportunities Commission
For the Respondents:
ANDREW TABACHNIK, instructed by Capsticks

1 **MR JUSTICE ELIAS (PRESIDENT):** The appellant in this case is a male student nurse. He contended before the employment tribunal that he had been discriminated against by being subjected to various detriments during the course of his vocational training by the persons providing facilities for that training. He alleged that they had thereby acted contrary to s.14 of the Sex Discrimination Act 1975. More specifically, the allegations were made against the Barts and London NHS Trust, the respondent to this appeal, and also the Homerton University Hospital NHS Trust. The appellant had been undertaking certain clinical placements at those hospital Trusts during his BSc Degree in Nursing which he took at the City University. (Initially there were five

respondents, but after a somewhat chequered procedural history, which it is unnecessary to recount, only these two respondents remained when the case was advanced before the employment tribunal.)

2

Mr Moyhing's case before the employment tribunal was that at least in those two specific trusts in which he worked, there was a culture which treated male nurses effectively as second class citizens. More specifically, he contended that there was a widespread assumption that female nurses were automatically suitable to provide care, including intimate care, to anyone, whereas the assumption was that it was inappropriate for male nurses to provide intimate care to female patients.

3

The appellant identified five specific incidents where he said that as a male student he had been treated differently from the way in which a female student would have been treated. The tribunal made findings to the effect that as a matter of fact no such differential treatment had been established in relation to four of the incidents. In the fifth, it found that there had indeed been a difference in treatment but concluded that the appellant had not suffered a detriment. Accordingly, the tribunal unanimously dismissed all his complaints.

4

He now appeals against the tribunal's conclusions in respect of two incidents which we shall refer to as the electro-cardiogram (ECG) and catheter incidents respectively. Both these concern Barts and the London NHS Trust which is therefore now the only respondent to this appeal. The appellant contends that in relation to the ECG incident the tribunal erred in law in concluding that there had been no detriment suffered by the appellant. In relation to the catheter incident it is alleged that the tribunal failed to give proper reasons for its conclusion that the appellant had not been less favourably treated than his female comparator.

5

The legislation

This case concerns direct sex discrimination. The relevant provisions of the Sex Discrimination Act 1975 are as follows:

Section 1(1)(a)

'*Direct and indirect discrimination against women*

(1) In any circumstances relevant for the purposes of any provision of the Act, other than a provision for which subsection (2) applies, a person discriminates against a woman if –

(a) on the grounds of her sex he treats her less favourably than he would treat a man.'

Section 2(1)

'*Sex discrimination against men*

Section 1, and the provisions of Parts II and III relating to sex discrimination against women, are to be read as applying equally to the treatment of men, and for that purpose shall have effect with such modifications as are requisite.'

Section 5(3)

'*Interpretation*

A comparison of the cases of persons of different sex or marital status under [s.1(1) or (2)] or 3(1) [, or a comparison of the cases of persons required for the purposes of s.2A,] must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.'

Section 14

'*Persons concerned with provisions of vocational training*

(1) It is unlawful, in the case of a woman seeking or undergoing training which would fit her for any employment, for any person who provides, or makes arrangements for the provision of, facilities for such training to discriminate against her –

(a) in the terms on which that person affords her access to any training course or other facilities concerned with such training, or

(b) by refusing or deliberately omitting to afford her such access, or

(c) by terminating her training, or

(d) by subjecting her to any detriment in during the course of her training"

(2) Subsection (1) does not apply to –

(a) discrimination which is rendered unlawful by s.6(1) or (2) or s.22 or 23, or

(b) discrimination which would be rendered unlawful by any of those provisions but for the operation of any other provisions of the Act.'

6

The tribunal decision

The tribunal first identified the relevant principles of law, and there is no complaint about that. They then set out in some detail the material facts. The only parts of relevance are those dealing with the two incidents to which we have made reference. The principal incident relied upon by the appellant concerned the provision of an ECG upon female patients. The facts were summarised by the tribunal as follows:

'3.16 During a work placement in late May 2003 on the Cambridge Ward at the Royal London Hospital, the claimant was informed by a female nurse in charge that he would need to be accompanied by a female whilst he was performing an ECG upon an Asian female patient who had been having breathing difficulties. The patient was not asked to give her consent to the claimant acting without a chaperone. He felt that he was either regarded as being untrustworthy and a potential abuser of females, or alternatively, that the patient was likely to lie and make false accusations. He subsequently made a complaint about being required to have a chaperone, when he claimed that female nurses were not similarly required to be chaperoned whilst carrying out intimate procedures on males.'

7

The tribunal commented on this incident in its conclusions. It dealt with the contention that this was actionable discrimination in the following paragraphs of its decision:

'5.14 The final placement for the claimant was on the Cambridge Ward at Bart's Hospital in May 2003. The claimant proposed to the nurse in charge that he would carry out an ECG on a female patient of Asian ethnic origin who had breathing difficulties. This would inevitably involve touching the patient's chest area and he was advised that he should obtain a female chaperone who would be present during the procedure. Because of this instruction, although a care assistant was apparently available to chaperone, the claimant was annoyed by what he took to be an implication that he might abuse the patient or that she might falsely claim that he had. He consequently declined to carry out the procedure. It was established by the respondents that their policy was that a student nurse of either sex should be supervised by a qualified nurse when carrying out an ECG. In respect of an ECG procedure, a male nurse or student would have to touch a female patient's breasts, an intimate area. The same procedure would not be perceived in the case of a female nurse or student treating a male in the area of his chest as being an intimate procedure. This is therefore not an appropriate like for like set of circumstances from which to establish sex discrimination. However, on the basis that a requirement to be chaperoned is prima facie different and less favourable treatment than would be afforded to a female student carrying out an intimate procedure on a male patient and on the basis that from these facts we could draw an inference of sex discrimination, we must therefore look to the respondents for an explanation which is not based upon any sex discrimination for the differential treatment. The respondents' explanation was that, as a safeguard against the generalised risk of assault upon a female patient and/or false accusations of assault against male nurses or male students when intimate procedures are being given to female

patients, the chaperone arrangement was followed. This arrangement is consistent with guidelines given by the Royal College of Obstetricians and Gynaecologists (p.138). This explanation for the differential treatment of male and female nurses and students with regard to chaperoning was an aspect of risk management by the respondents to ensure the safety and welfare of their staff and patients where intimate treatment was being given by male staff to female patients. There was no corresponding perceived need for protection for patients and staff/or students in circumstances where male patients were undergoing intimate procedures from female carers. We accepted that the risk in such circumstances was assessed as negligible, so as to make chaperoning unnecessary in the respondents' judgment.

5.15 In light of the above explanation, we cannot find that the claimant suffered a detriment through being asked to have a chaperone present whilst carrying out an ECG upon a female patient. Declining to proceed under chaperone was not warranted by the fact that he felt that he or the patient was being categorised as liable to act wrongfully. It was not reasonable to interpret the respondents' general policy on chaperoning in this individual way. The claimant denied himself an opportunity of carrying out an EGG. He was not reasonable in declining the opportunity because of the requirement of a chaperone. As stated in paragraph 5.6 above, there can be no justification for less favourable treatment in a case of direct sex discrimination. However, the claimant's unjustified objection to the respondents' policy undermines his claim to have been disadvantaged and thereby to have suffered a detriment from less favourable treatment on grounds of sex.'

8 The second incident concerned the procedure of catheterisation. The appellant contended that when he was on the Currie Ward at the hospital in October 2002 he was told by a Miss Larce that he would be unable to participate in female catheterisation on the ward but that by contrast female students would be able to perform male catheterisations. Miss Larce disputed this. The tribunal found that she was unclear in her recollection but they accepted her account of what was said. She said that she had told the appellant that there was a large contingent from the Bengali community in the ward, that it would be necessary to have their consent for him to carry out any intimate procedures on those patients, and that it was unlikely that such consent would be forthcoming. The tribunal found as a fact that Miss Larce did not tell him that female students would be able to perform male catheterisations. They pointed out that that was not the policy since female students were not taught this procedure until they were at postgraduate level. They thought it unlikely that Miss Larce, who had 27 years' nursing experience, would have said something which was at odds with the clear policy. Accordingly, the tribunal concluded that the claimant had not established any less favourable treatment on the grounds of sex.

9

The grounds of appeal

The reasons ground

We shall deal first with the catheterisation issue. This was very much a subsidiary argument advanced by the appellant and can be shortly considered. Mr Giffin QC for the appellant submits that this finding of the tribunal was insufficiently reasoned. He does not seek to say that the finding was perverse; he accepts that there was a proper basis, as identified by the tribunal, for concluding that Miss Larce's account of the conversation was more likely to be correct than that of the appellant. He submits, and this is not disputed, that there was evidence that at an inquiry in November 2003 when this complaint was considered internally Miss Larce could not recall this conversation at all. He states that when cross-examined about this she could give no satisfactory explanation as to how she now remembered this conversation. Mr Giffin contends that in light of this the tribunal ought to have explained how it was that they could be satisfied that at this later stage, she could recall the conversation.

10 We note that the tribunal did not find that she could clearly recall the conversation; on the contrary, they found that her account was unclear, particularly as to the precise details. They preferred her account largely because they concluded that it would have been unlikely that Miss Larce would in the course of the conversation with the appellant have given him false information which was directly in conflict with the policy of the respondents.

11 In our view there is no possible criticism of the tribunal's conclusions on that matter. They were plainly not compelled to accept the appellant's account merely because Miss Larce had a less than complete recollection of it. They have given clear reasons as to why they find that it is more probable than not that his account was inaccurate. There was no error of law in this part of the decision.

12

The detriment ground

We therefore turn to the principal ground which concerns the ECG procedure. The issue is whether the tribunal was entitled to find that the requirement to work whilst chaperoned was not a detriment within the meaning of s.14(1)(d).

13 It is common ground that the tribunal was correct to find that a male student nurse who has to be chaperoned when carrying out an intimate procedure with a female patient is subject to less favourable treatment than a female student nurse who does not have to be chaperoned when carrying out such a procedure on a male patient. Similarly it is accepted that since the difference in treatment is directly related to sex – that is, it is direct rather than indirect sex discrimination – it cannot be justified. (There are certain forms of direct sex discrimination which can be justified, namely where there are genuine occupational qualifications within the meaning of s.7 of the Sex Discrimination Act, but none of those is applicable here.) The fact that there may be good and sound reasons for distinguishing between men and women is no defence. Even where stereotyping is based on cogent evidence that the disadvantaged group is more likely to act in a certain way than the advantaged group, that will not constitute a permissible basis for discrimination: see *R (European Roma Rights Centre) v Prague Immigration Officer* [2005] IRLR 115. That was a case of race discrimination; Roma applicants seeking entry into the United Kingdom were subject to much more intrusive questioning than non-Roma persons. The reason was that the statistics showed that they were far more likely to make asylum claims and thus more likely to put forward false claims to enter as visitors. But that did not make their treatment lawful. As Baroness Hale of Richmond observed (paragraph 90):

> 'It is worth remembering that good equal opportunities practice may not come naturally. Many will think it contrary to common sense to approach all applicants with an equally open mind, irrespective of the very good reasons there may be to suspect some of them more than others. But that is what is required by a law which tries to ensure that individuals are not disadvantaged by the general characteristics of the group to which they belong.'

14 The analysis of the similarly framed sex discrimination legislation must be the same.

15 The only issue therefore is whether the appellant suffered a detriment. There are two recent House of Lords authorities which cast some light upon the meaning of that concept. In Chief Constable of West *Yorkshire Police v Khan* [2001] UKHL 48; [2001] IRLR 830, a case of victimisation discrimination, Lord Hoffmann observed

(paragraph 53):

'Being subject to a detriment ... is an element in the statutory cause of action additional to being treated "less favourably" which forms part of the definition of discrimination. A person may be treated less favourably and yet suffer no detriment. But, bearing in mind that the employment tribunal has jurisdiction to award compensation for injured feelings, the courts have given the concept of the term "detriment" a wide meaning. In *Ministry of Defence v Jeremiah* [1979] IRLR 436, 31 Brightman LJ said that "a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment." Mr Khan plainly did take that view ... and I do not think that, in his state of knowledge at the time, he can be said to have been unreasonable.'

16 A similarly broad analysis was adopted in *Shamoon v Chief Constable of Royal Ulster Constabulary* [2003] UKHL 11; [2003] IRLR 285. The Northern Ireland Court of Appeal in that case had held, following a decision of the Employment Appeal Tribunal in *Lord Chancellor v Coker* [2001] IRLR 116 that in order for there to be a detriment there had to be some physical or economic consequence arising as a result of the discrimination which was material and substantial. The House of Lords rejected that approach. Lord Hope said this (paragraphs 34–35):

'The statutory cause of action which the applicant has invoked in this case is discrimination in the field of employment. So the first requirement, if the disadvantage is to qualify as a "detriment" within the meaning of Article 8(2)(b), is that it has arisen in that field. The various acts and omissions mentioned in Article 8(2)(a) are all of that character and so are the words "by dismissing her" in s.8(2)(b). The word "detriment" draws this limitation on its broad and ordinary meaning from its context and from the other words with which it is associated. Res noscitur a sociis. As May LJ put in *De Souza v Automobile Association* [1986] IRLR 103, 107, the court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.

But once this requirement is satisfied, the only other limitation that can be read into the word is that indicated by Lord Brightman. As he put it in *Ministry of Defence v Jeremiah* [1979] IRLR 436, 440, one must take all the circumstances into account. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment": *Barclays Bank plc v Kapur and others (No.2)* [1995] IRLR 87. But contrary to the view that was expressed in *Lord Chancellor v Coker and Osamor* [2001] IRLR 116 on which the Court of Appeal relied, it is not necessary to demonstrate some physical or economic consequence ...'

17 Lord Hutton (paragraph 91) and Lord Scott (paragraphs 103–105) both expressly approved this analysis. Lord Scott said that "if the victim's opinion that the treatment was to his or her detriment was a reasonable one to hold, that ought … to suffice."

18 Mr Giffin submits that the tribunal erred in finding no detriment. The appellant claimed that he felt demeaned as a consequence of being stereotyped in the way he was. He felt upset, angry and demotivated. That evidence was not challenged. It may be that many others would have been indifferent to this treatment, or would have recognised the justification for the policy and accepted it as sensible. But that is not to the point. A reasonable male nurse or student nurse could properly consider that he was being disadvantaged by having to work under the eye of a chaperone in circumstances where a female trainee would not be subject to a like requirement. The tribunal should have considered the question of detriment by focusing on how the matter was perceived by the victim himself: see *Ilangaratne v British Medical Association* [2003] All ER (D) 73 (Jul) paragraph 26 per HHJ McMullen QC, giving the judgment of the EAT in that case. This it failed to do.

19 Mr Giffin contends that the tribunal has effectively reintroduced justification through the back door. Although it ostensibly recognised that there could be no defence of justification for direct discrimination, it concluded that the appellant's opposition to a justified policy, namely the need to treat males differently because of the greater risk they pose, was itself unjustified. If opposition to a justified policy of itself precludes a claimant from claiming a justified or legitimate sense of grievance, and thus demonstrating that he or she has suffered a detriment, then the concept of detriment is being used to establish a defence of justification in circumstances where Parliament has chosen not to make such a defence available.

20 Mr Giffin accepts that a de minimis difference in treatment cannot amount to a relevant detriment, as the Court of Appeal recognised in *Ministry of Defence v Jeremiah* [1979] IRLR 436, approving on this ground only the earlier decision of that Court in *Peake v Automotive Products Ltd* [1977] IRLR 365. But he says that the difference in treatment here could not conceivably be said to be de minimis, and in any event the tribunal did not seek to justify the decision on that ground. Whether the sense of grievance is justified is, he submits, a function of the impact on the victim of the treatment in question, not of the reasons for imposing that treatment. The question is whether the victim could reasonably take the view that he was being disadvantaged, not whether the perpetrator of the policy could take the view that it had a reasonable ground for its policy. Indeed, he went so far as to submit that the reason for the policy was irrelevant. He further contends that where deliberate and direct differential treatment on grounds of sex causes anger or distress, the only proper legal conclusion is that the victim has suffered a detriment.

21 Mr Tabachnik, counsel for the respondent, submits that the only question is whether the tribunal was entitled to conclude that the difference in treatment did not constitute a detriment. He says that the tribunal has not erred in the manner alleged. It did not simply conclude that an objection to a justified policy could not amount to a detriment because it was an unwarranted sense of grievance. Rather the tribunal considered the particular reasons why the policy had been adopted, and in the light of those objectives it held that the appellant was not justified in concluding that he was being identified as a potential sexual predator. The tribunal did not ignore how the appellant felt, but it concluded that his reaction to his treatment was excessive and unreasonable.

22 The respondent also submitted that there could in any event be no detriment here because it was common ground that the appellant, like any other student nurse, male or female, would have to be supervised when carrying out intimate procedures. Accordingly since the supervisor would effectively be the chaperone in any event, this rendered the requirement for a chaperone for a student nurse highly academic. (The same argument would not be available to meet a challenge by qualified male nurses, as Mr Tabachnik recognises.)

23 **Conclusions**

In our judgment the application of this policy did give rise to a detriment. We do not accept Mr Giffin's submission that the mere fact of deliberate stereotyping necessarily causes a detriment. If that were so then the concept of detriment would add nothing to that of less favourable treatment on grounds of sex. Moreover, the decision in Peake, where direct discrimination was found

to give rise to a detriment which was held to be de minimis, would be wrong. Nor do we accept Mr Giffin's submission that the reason for a policy is irrelevant. In our judgment it is part of the circumstances of the case. Here, for example, if the policy of requiring a chaperone had been solely because of fear of false claims of assault, the appellant would not have been able to claim that he felt that he was being treated as a sexual predator. Any grievance would have had to be on the grounds that women were being stereotyped in that it was assumed that they would make false claims when men did not. That would be a different case to this, but the treatment would be the same. It seems to us that the perception of a reasonable victim of the effect of particular treatment will often be related to the reason for that treatment.

24 **613, 653**
We do, however, accept Mr Giffin's submission that the tribunal appears to have approached the issue of detriment by assuming that if the reason for the discriminatory policy is cogent and rational then it cannot be justified to object to it. That approach does indeed have the effect of reintroducing justification under the guise of detriment. We are all of the view that however justified the policy, it cannot be said to be unreasonable for a male nurse to feel that it is demeaning and irritating to have to be chaperoned. Presumably also, chaperones are not always readily available, in which case it may mean that the male student nurse cannot carry out the procedure on that occasion at all. That would plainly be a detriment in the same way that in Shamoon it was considered a detriment for a female police officer not to be able to carry out appraisals which other officers of her rank could do. The detriment in this case is no doubt relatively minor, and as we make plain below, any compensation for injury to feelings should be very much at the lower end of the scale. We agree with the tribunal that to claim that the policy made him feel he was being treated as a potential sexual abuser displays an exaggerated and unduly sensitive reaction, but in our judgment this appellant has suffered a disadvantage which is more than just de minimis.

25 We do not accept Mr Tabachnik's argument that there can be no detriment suffered by a male student nurse because he has to be supervised in any event when carrying out an ECG, to ensure that the procedure is carried out safely. First, the policy appears to envisage that there would still need to be a female chaperone if the supervisor were male. Mr Tabachnik contended that the tribunal had made no specific finding to that effect, and suggested that the chaperone could be male, but the document setting out the relevant policy states that the chaperone should be female. Second and in any event, we think that there is a difference between being required to carry out procedures with a supervisor, common to male and female alike, and being obliged to have a chaperone, not required for females treating male patients, even if the same person will often fortuitously be able to play both roles.

26 Mr Tabachnik also averted to the implications of a finding against the respondent. He said that either the respondent would have to dispense with the need for chaperones, thereby increasing the attendant, even if small, risk to patients by assaults or to male nurses by false allegations; or else it would have to incur expense and time in securing chaperones when females carry out intimate procedures on male patients, even although the considered view of the trust is that there is simply no need for this. (It could give patients the option whether to have a chaperone in every case, but that would not always protect the trust itself from the risks it is trying to eliminate.) We have much sympathy for the dilemma in which this decision places the respondent and other hospital trusts who have adopted similar policies for good and objective reasons. Assuming that the risk of female assaults on male patients or false allegations by male patients really is virtually non existent (and Mr Giffin rightly pointed out that we heard no hard evidence about this), it seems a waste of potentially scarce resources in the health service to require a chaperone system to be extended to females (if that is the option chosen) merely to establish a formal equality. But that is the choice Parliament has made, and unless and until a specific legislative exception is made for this situation or the concept of justification is extended so that exceptionally it could apply to direct discrimination, we see no legal basis for treating male and female student nurses differently. In particular, we accept that it would be wrong and contrary to Parliament's intentions to restrict the concept of detriment so as to make good the limited scope of the present justification defence.

27 **681.2**
For these reasons, therefore, this appeal succeeds. In the normal way the matter would now be remitted to the tribunal to determine compensation but Mr Giffin points out that the only damages now sought are for injury to feelings, and he submits that it would be sensible for us to fix the compensation ourselves rather than to require the parties to incur the further costs of a remission to the tribunal. We agree, particularly having regard to the overriding objective which, amongst other matters, requires us to deal with the case proportionately and to save costs where that is compatible with justice. As we have said, we have no doubt that the compensation should be very much at the lower end of the scale, given in particular the fact that the discrimination was not personally directed at Mr Moyhing and did not, in our view, involve a personal slur on his reputation or character; and that he was only marginally inconvenienced by it. We understand why he would have wanted to bring this claim as a matter of principle, and he has succeeded. But harbouring a legitimate and principled sense of grievance is not to be confused with suffering an injury to feelings. We think that the appropriate figure is £750.

28 Accordingly, we substitute a finding of unlawful discrimination and award compensation of £750.