T015

Should there be mirrors in the Gents?

As the draftsman of the Sex Discrimination Act, I think it my duty to register a protest against the Court of Appeal decision in the 'early leaving' case as reported by you (6 July 1977). It offends both the letter and the spirit of the Act. It must throw the operation of the Act into disarray. The essential point is simple. In the interests of safety, women employees were permitted to leave the factory five minutes earlier than the men. As appears from the report of the proceedings before the Employment Appeal Tribunal *(Peake v Automotive Products Ltd* [1977] IRLR 105) the overwhelming majority of men objected. In a full year it meant they had to work the equivalent of two and a half days longer than the women for the same money. The EAT held that this 'early leaving' rule contravened the Act. In an impeccable judgment, exactly following the tenor of the Act, Mr Justice Phillips said that what is sauce for the goose is now sauce for the gander. Instinctive feelings based on the 'women and children first' philosophy 'are likely to be the product of ingrained social attitudes, assumed to be permanent but rendered obsolete by changing values and current legislation'. Upholding the claim of the male workers, the learned judge continued:

> 'Any other conclusion would involve giving the language of the Act a restricted construction out of deference to our preconceived ideas of what, had there been no Act, would be sensible in this field. But in the case of a reforming Act of this kind, deliberately introducing new ideas and policies, preconceived ideas of what is fit are at best an uncertain guide, and the only sure course is to follow the words of the Act in accordance with what appears to be its policy.'

Now Lord Denning and his colleagues have overturned all that. In the first case to reach the Court of Appeal under the Act, the Court reasserts the ingrained social attitudes. What is sauce for the goose is not necessarily sauce for the gander. If the *men* had been allowed to leave early (just as efficacious on grounds of safety) the women would have had an undoubted case. Yet the Court ignored the clear words of section 2, which says that provisions protecting women 'are to be read as applying equally to the treatment of men'. Lord Denning gratuitously threw in the statement that employers who provide mirrors in women's lavatories need not do so for men!

Mr Justice Phillips said that the view preferred by the Court of Appeal 'would certainly result in some cases in the Act not applying where it was obviously intended to'. I respectfully agree with him. If not reversed by the House of Lords this judgment will gravely impair the protection Parliament intended to give - both for men and for women. It will establish the dangerous principle that the Act does not necessarily mean what it says. I have worked hard for many years to secure clarity and certainty in legislation. The Court of Appeal do not say the Act is unclear, but elect to disregard its plain meaning. That has disturbing implications for Parliamentary democracy and the rule of law.[1]

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[1] *The Times,* 15 July 1977. See further Letter 20 below.