

Legal

Bulletin

- 1 Editorial
- 2 The disability equality duty
- 8 New duties for private clubs and public authority functions
- 16 Protection for councillors
- 20 Fit to work? An investigation into discrimination in regulated occupations
- 22 News in brief
- 29 DRC support for legal cases – priority areas

Editorial

Welcome to Issue 9 of the Disability Rights Commission's Legal Bulletin

Since the last edition, the Employment Appeal Tribunal (EAT) has handed down an important judgment in the joined cases of **BUPA Care Homes (BNH) Ltd v Cann and Spillett v Tesco Stores Ltd**. The cases concerned the interaction of the time limits under the Disability Discrimination Act 1995 (DDA) and the requirements to comply with the statutory grievance procedures. The DRC is delighted that the EAT confirmed a tribunal's just and equitable discretion to extend time to hear a complaint of discrimination under the DDA still applies. The case is discussed in more detail in the News in brief section on pages 22 to 23.

In this issue, we examine a number of important developments brought about by the Disability Discrimination Act 2005. In particular, we focus on the new disability equality duty, which aims to ensure that public authorities build disability equality into everything they do. The 2005 Act also introduced a number of changes to Part 3 of the DDA, which previously covered access to goods, facilities, services and premises and has now been extended. In the first of two articles exploring these changes in depth, we consider their impact on public functions and private clubs.

We also look at the DRC's new formal investigation, the protection under the DDA for councillors, and, in the News in brief section, we look at some interesting recent employment cases involving direct discrimination.

Finally, you will notice that on pages 29 to 30 of this issue, we list a selection of the DRC's current legal enforcement priority areas. These are examples of the types of cases which might attract DRC support by way of funding for representation. If advisers, representatives or others become aware of complaints that fall within these priority areas, the DRC will be particularly interested to hear from you.

Regards
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The disability equality duty for the public sector and its legal context

Catherine Casserley, Senior Legislation Adviser at the DRC, explores the new public sector duty in the DDA

The Disability Discrimination Act 2005 amended the 1995 Disability Discrimination Act (the Act) to insert the disability equality duty – known as the general duty – into the Act. The duty is aimed at tackling systemic discrimination, and ensuring that public authorities build disability equality into everything that they do. This article examines the requirements of the duty and looks at how it might be used more generally in litigation carried out on behalf of disabled people.

What is the disability equality duty?

Section 49A of the Act says that public authorities must, when carrying out their functions, have due regard to the need to:

- promote equality of opportunity between disabled people and other people
- eliminate discrimination that is unlawful under the Act
- eliminate harassment of disabled people that is related to their disability
- promote positive attitudes towards disabled people
- encourage participation by disabled people in public life

- take steps to meet disabled people's needs, even if this requires more favourable treatment.

The Act also gives the Secretary of State, or in Scotland the Scottish Ministers, the power to introduce regulations setting out more specific duties which may assist public authorities in meeting their general duty. These duties, known as the specific duties, are set out, in relation to England and Wales, in the Disability Discrimination (Public Authorities)(Statutory Duty) Regulations 2005 (SI 2005 No. 2966) and, in relation to Scotland, in the Disability Discrimination (Public Authorities)(Statutory Duties)(Scotland) Regulations 2005 (SI 2005 No. 565). These duties apply only to the authorities which are listed in the regulations. The key aspect of the specific duties is the requirement to produce a Disability Equality Scheme.

Who is covered by the duties?

The general duty applies to all public authorities, including those private organisations which may carry out some public functions (but only in so far as those functions are

concerned). This would include, for example, a private security firm which runs a prison. There is no list of authorities which are subject to the general duty as there is in the Race Relations Act 1976 – rather, the definition of a public authority follows that contained in the Human Rights Act 1998.

Those bodies covered include government departments and executive agencies, ministers, local authorities, governing bodies of colleges and universities, governing bodies of schools, NHS trusts and boards, police and fire authorities, the Crown Prosecution Service and the Crown Office, inspection and audit bodies and certain publicly-funded museums.

The specific duties apply only to those authorities which are listed in the regulations.

The general and specific duties apply in England, Scotland and Wales. The specific duties in England and Wales are the same in all key respects as the duties which apply in Scotland, except that there are different arrangements in relation to education due to differences in legislation. The DRC has produced a Statutory Code of Practice for England and Wales and a separate one for Scotland.

Key dates

The general duty will come into force on 4 December 2006.

Those public authorities which are subject to the specific duties, apart from some exceptions set out below, must **publish** their Disability Equality Schemes by 4 December 2006. Primary schools in England must publish their Disability Equality Schemes by 3 December 2007 and all schools in Wales must publish their schemes no later than 1 April 2007.

What does the general duty mean?

The general duty requires public authorities to adopt a proactive approach, mainstreaming disability equality into all decisions and activities. This is framed as a requirement on authorities to give due regard to disability equality in its various dimensions set out above.

Public authorities are expected to have 'due regard' to the six parts of the general duty. In all their decisions and functions, authorities should give due weight to the need to promote disability equality in proportion to its relevance. 'Due regard' comprises two linked elements: proportionality and relevance.

This requires more than simply giving consideration to disability equality.

Proportionality requires greater consideration to be given to disability equality in relation to functions or policies that have the most effect on disabled people. Where changing a function or proposed policy would lead to significant benefits to disabled people, the need for such a change will carry added weight when balanced against other considerations.

Disability equality will be more relevant to some functions than others. Public authorities will need to take care when assessing relevance, as many areas of their functioning are likely to be of relevance to disabled people.

What do the specific duties say?

The specific duties require each of those public authorities which are listed to:

- publish a Disability Equality Scheme showing how it intends to fulfil its general duty and its specific duties
- involve disabled people in the development of its scheme

- review the scheme at least every three years.

The Disability Equality Scheme should include a statement of:

- how disabled people have been involved in developing the scheme
- the steps which the authority will take to fulfil its general duty (the action plan)
- arrangements for gathering information about performance of the public body on disability equality
- arrangements for assessing the impact of the activities of the body on disability equality and improving these when necessary (impact assessments)
- arrangements for making use of the information gathered in relation to reviewing the effectiveness of its action plan and preparing subsequent Disability Equality Schemes.

A public authority must also:

- take the steps set out in its action plan
- put into effect its arrangements for gathering and making use of information
- publish an annual report which includes a summary of

the steps it has taken to involve disabled people in the development of the scheme, the result of information gathering and the use it has made of such information.

There are also duties placed on certain Secretaries of State, Scottish Ministers and the Welsh Assembly to report on progress towards equality of opportunity within their sphere and to put forward proposals for better co-ordination of action to bring about further progress towards equality of opportunity.

Enforcement

The general duty has no specific enforcement method attached to it. A public authority may, however, be subject to a judicial review as it would for breach of any other statutory duty. A breach of the specific duties is actionable by the Disability Rights Commission, which can issue a compliance notice stating that the authority must meet its duties and must tell the DRC what it is doing to comply with its duties. The notice can also request information regarding the authority's performance. A compliance notice can be enforced in the county or sheriff court.

How can lawyers use the duty?

The aim of the disability equality duty is to mainstream disability into all aspects of a public authority's functions. Similarly, the duty itself can be mainstreamed into cases brought against public authorities on behalf of disabled people.

In the employment field, someone who is bringing a claim of discrimination against a public authority can, when completing a questionnaire, ask for a copy of the authority's Disability Equality Scheme, as there may be steps in the scheme which have not been taken which may be relevant. Information regarding evidence gathering, or monitoring of employees, and patterns of disadvantage amongst disabled employees or applicants, may also be relevant.

Similar requests can also be made in the post-16 education field (by means of disclosure, as there is no questionnaire procedure in relation to education) and in relation to public authority services, functions or housing (via the new Part 3 questionnaire procedure, which is discussed further in the News in brief

section on page 28 of this issue, or by means of the general rules of disclosure).

Perhaps the most significant impact which the duty may have in relation to legal cases is in the field of public law. Similar duties in relation to race have been in place since 2001, but there has been little consideration of the duties in the courts.

In the case of **Elias v Secretary of State [IRLR] 2005 788**, the court considered the race duty for the first time.

Mrs Elias was born in Hong Kong in 1924 and registered as a British subject. She and her family were interned by the Japanese until the liberation of Hong Kong in 1945. As a result, she suffered serious psychological effects.

However, she could not benefit from the UK government's non-statutory compensation scheme for those who were interned by the Japanese, because, so far as civilian internees were concerned, the scheme was restricted to 'British civilians'. For the civilian internee to qualify, they either had to have been born in the UK or

have a parent or grandparent born in the UK.

Mrs Elias brought proceedings for judicial review claiming that the criteria adopted operated as direct discrimination on grounds of national origins or, alternatively, that they were indirectly discriminatory and could not be justified.

As well as holding that the scheme was indirectly discriminatory, the Court held that the Secretary of State was in breach of his duties under section 71 of the Race Relations Act 1976, as amended, which requires specified persons, in carrying out their functions, to have due regard to the need to eliminate unlawful racial discrimination.

The court said that given the obvious discriminatory effect of the scheme, the Secretary of State could not possibly have properly considered the potentially discriminatory nature of the scheme and assumed that there was no issue which at least needed to be addressed.

Nor was it sufficient that there was careful

consideration of the policy during the course of the litigation. The purpose of section 71 is to ensure that the body subject to the duty pays due regard at the time the policy is being considered – that is, when the relevant function is being exercised – and not when it has become the subject of challenge.

In the disability field, the duty might be cited in a case challenging potentially discriminatory legislation. On a more local level, claims against a local authority for a breach of statutory duty in relation to assistance in the home for a disabled person may well involve an authority failing to promote disability equality – and thus amount to a breach of the disability equality duty as well as its duties under the NHS and Community Care Act 1990.

The Disability Rights Commission has already produced the two Codes of Practice referred to above and these are available from our website (www.drc-gb.org). The Commission will be producing further guidance on various aspects of the duty, as well as working with lawyers and others to ensure that it has maximum impact.

Public authority functions and private clubs – new duties under the DDA

In the first of two articles examining the changes to Part 3 of the DDA (which deals with access to goods, facilities, services and premises etc), Chris Benson, Senior Legal Officer at the DRC, explores how the changes affect two areas that were previously excluded from the DDA

In recent years, the Disability Discrimination Act 1995 (the Act) has undergone a number of significant changes. These include the implementation of the final stages of the original legislation requiring adjustments to physical barriers preventing access to goods and services, amendments to the employment provisions as a result of EU legislation and, most recently, various amendments introduced by the Disability Discrimination Act 2005.

In relation to Part 3, the 2005 Act:

- extends the scope of the 1995 Act to include
 - private clubs; and
 - the functions of public authorities
- creates new duties for
 - providers of premises; and
 - providers of transport services.

In addition, the 2005 Act introduces a questionnaire for use in Part 3 cases, which is similar to the questionnaire commonly in use in the employment tribunals for claims under Part 2 of the DDA (further information about the Part 3 questionnaire can be found in the News in brief section of this issue on page 28).

The majority of these provisions will be enforceable from December 2006, with the exception of the Part 3 questionnaire and the provisions concerning less favourable treatment in relation to private clubs, which were introduced in December 2005.

The DRC is currently re-writing the Part 3 Code of Practice to provide a fuller explanation of the changes to the DDA. The DRC has also produced a supplementary Code of Practice for the provision of transport services. The DRC's Codes of Practice in relation to Part 3 can be found on our website at: www.drc-gb.org

This article focuses on the new duties that apply to private clubs and to public authorities carrying out functions. In the next edition of the Legal Bulletin, the provisions relating to providers of transport services and premises will be explored.

Public authority functions (sections 21 F–J of the DDA 1995)

From December 2006, Part 3 of the 1995 Act will apply to the functions carried out by a

public authority. The original DDA did not apply to the exercise of certain functions by public authorities (such as arrests by the police) as these do not constitute the provision of a service to the public. The provisions relating to 'public authority functions' only apply where other parts of the 1995 Act do not already apply (section 21B (7)).

The 2005 Act also introduced provisions requiring public authorities to promote equality of opportunity for disabled people, to eliminate discrimination and harassment and to promote positive attitudes towards disabled people. These provisions – known as the disability equality duty – are explained in more detail by Catherine Casserley, the DRC's Senior Legislation Advisor, on pages 2 to 7 of this issue.

Private clubs (sections 21 B–E of the DDA 1995 and the Disability Discrimination (Private Clubs etc) Regulations 2005 (SI 2005/3258))

The original DDA did not apply to private clubs (as private clubs do not provide services to members of the public), but provisions introduced by the

Disability Discrimination Act 2005 changed this. The private clubs' provisions of the Disability Discrimination Act 1995, as amended, apply to any association of people, if:

- it has 25 or more members; and
- it has a constitution (which does not need to be in writing) about how people become members, and admissions are carried out in such a way that the members do not constitute a section of the public; and
- it is not a trade organisation (such as a trade union).

It does not matter whether the club's activities are carried out for profit, nor whether the club is corporate or unincorporated.

The duties imposed on private clubs are broadly similar to those that already existed in Part 3 of the DDA but which only applied to service providers.

What amounts to discrimination by public authorities and private clubs under the Act?

The Act says that it is unlawful for public authorities carrying out a function to discriminate against a disabled person in the way the function is provided (or not provided). It is also unlawful for private clubs to discriminate against a disabled person in the way access to the club and its benefits/facilities is provided (or not provided).

What amounts to discrimination is, in essence, the same for both areas of activity.

There are two main forms of discrimination applicable:

- unjustified less favourable treatment, for a reason relating to disability; and
- unjustified failure to make a reasonable adjustment in certain circumstances.

The law not only prevents **negative** treatment but, as is also the case in relation to service provision, requires public authorities carrying out functions and private clubs to take **positive** steps to ensure

that disabled people can access those functions or clubs (the duty to make reasonable adjustments).

This goes beyond simply avoiding treating disabled people less favourably for a disability-related reason. As with services, the duty to make adjustments is anticipatory.

Public authority functions

A public authority discriminates against a disabled person if, in the carrying out of a function:

- a disabled person is treated less favourably than someone else
- the treatment is for a reason relating to the person's disability, and
- the treatment is not justified in accordance with the Act.

A public authority also discriminates against a disabled person if, in the carrying out of a function, it fails to make reasonable adjustments, without justification, and the effect of that failure makes it:

- impossible or unreasonably difficult for the disabled person to receive any benefit that is, or may be, conferred

by the carrying out of a function by the authority; or

- unreasonably adverse for the disabled person to experience being subjected to any detriment to which a person is or may be subjected by the carrying out of a function by the authority.

The phrases 'impossible or unreasonably difficult' and 'unreasonably adverse to experience being subjected to any detriment' are intended to represent the same level of difficulty faced by disabled people who are having problems accessing the function in question because of a failure to make reasonable adjustments.

All of these provisions relating to the functions of public authorities will come into force on 4 December 2006.

Private clubs

The Act makes it unlawful for a private club to discriminate against a disabled person, who is a potential member of the club:

- in the terms of membership; or
- by refusing or deliberately

ignoring his or her application for membership.

The Act also makes it unlawful for a private club to discriminate against a disabled member or associate in access to, or refusal of, club benefits and services. Protection is also provided for disabled people who are guests or potential guests of a private club.

It is also unlawful if a private club fails to make reasonable adjustments, in circumstances in which it is impossible or unreasonably difficult for a disabled person who is a member, associate or guest to make use of the club or for a disabled prospective member to access membership.

The less favourable treatment provisions for private clubs came into force on 5 December 2005. The reasonable adjustment duties in relation to private clubs will come into force on 4 December 2006.

Justification

There are limited circumstances in which the Act permits less favourable treatment of a disabled person, or allows a failure to make a reasonable adjustment to be

justified. Justification cannot, however, be used as a reason for a general exclusion of disabled people.

It is important to note that before a public authority carrying out a function seeks to rely on a justification defence in relation to less favourable treatment (for example, a refusal of provision of the function to a disabled person), they should first have considered whether there are any reasonable adjustments that could be made so that there would no longer be any less favourable treatment to justify. The same requirement to firstly consider reasonable adjustments applies in relation to private clubs seeking to justify less favourable treatment of a disabled person.

In considering whether those carrying out a public function or those providing access to membership and/or the benefits or facilities of a private club are justified in treating a disabled person less favourably than others, or in failing to make a reasonable adjustment, the following test must be applied:

- those who provide the services must believe one or

more of the conditions in the Act have been met; and

- it must be reasonable in all the circumstances of the case for those who provide the services to hold that opinion.

The test for justification is therefore a **two-fold test**.

There is one exception to this two-fold test; this is where an act of a public authority is a proportionate means of achieving a legitimate aim. This justification, and others, are outlined below.

Justifications applicable to public authorities carrying out functions and to private clubs

Health or safety

The Act does not require a public authority or private club to do anything which would endanger the health or safety of any person, including the disabled person in question.

Incapacity to contract

The Act does not require a public authority or private club to contract with a disabled person who is incapable of entering into a legally enforceable agreement or of

giving an informed consent. If a disabled person is unable to understand a particular transaction, a public authority or private club may refuse to enter into a contract. There are special provisions where a disabled person has someone acting on their behalf (for example, under a Power of Attorney).

Specific justifications

Public authorities carrying out a function

In addition to the justifications set out above, there are additional justifications under the DDA which are specific only to public authorities carrying out functions.

Substantial extra costs

A public authority can justify treating a disabled person less favourably in the carrying out of a function if treating the disabled person equally would involve substantial extra costs and, having regard to its resources, the extra costs in that particular case would be too great.

This justification cannot be used in a case relating to the duty to make reasonable

adjustments. Nor is it intended to be used every time some extra cost is involved. The extra costs must be 'substantial', and this must be judged taking into account the resources of the public authority and the circumstances of the particular case.

Protecting the rights and freedoms of others

This condition is designed to protect public bodies from charges of disability discrimination where avoiding less favourable treatment of a disabled person, or making a reasonable adjustment, would have significant detrimental consequences for the rights and freedoms of others, and this effect would outweigh the effect of the less favourable treatment on the disabled person.

Proportionate means of achieving a legitimate aim

A public authority can justify treating a disabled person less favourably, or failing to make reasonable adjustments, if the act of the public authority which gives rise to the treatment or failure is a proportionate means of achieving a legitimate aim.

This final justification – 'proportionate means of achieving a legitimate aim' – unlike the other justifications applicable to public authorities, is **not** subject to the 'two-fold' test, but is a purely objective test.

Private clubs

In addition to the 'Health or Safety' and 'Incapacity to Contract' justifications detailed above, there are further specific justifications that apply to private clubs only, and these relate to club benefits and cost.

Benefit-related justifications

A private club can justify certain less favourable treatment of a disabled person if the treatment is necessary to be able to give members, associates or guests of the club or the disabled person access to a club benefit, facility or service.

The club may also be able to justify less favourable treatment if they would otherwise be unable to give members, associates or guests of the association access to a club benefit, facility or service.

Cost-related justifications

A private club can justify charging a disabled person more than others where the club's facilities and services are tailor-made for the disabled person. These cost justifications, however, only apply to less favourable treatment and cannot be used where the greater cost arises from compliance with the duty to make reasonable adjustments.

A private club, therefore, can justify offering membership on different terms or allowing restricted access to benefits or services of the club by disabled members and guests, where the difference in treatment reflects the greater cost to the club of affording the disabled person access to a club benefit, facility or service.

Similarly, less favourable treatment by a private club in respect of the terms on which a disabled person is invited, or a member or associate is permitted to invite him or her, to be a guest of the club, can be justified where the limitation reflects the greater cost to the club of affording the disabled person access to a benefit, facility or service that the club may provide.

Further changes to Part 3 of the DDA 1995 will be explored in the next issue of the Legal Bulletin.

Protection for councillors against discrimination

Irene Henery, Legal Officer at the DRC, considers the relationships between locally-electable authorities and their members

Introduction

As highlighted on pages 2 to 7 of this issue, the new disability equality duty obliges public authorities to have due regard to the need to promote positive attitudes to disabled people and to encourage their participation in public life, including in roles such as councillors.

From 5 December 2005, to further ensure equal participation, disabled councillors are protected for the first time against less favourable treatment if it is in relation to their official duties, and for a reason related to their disability. The new legislation also gives protection against harassment. These provisions were introduced by section 1 of the Disability Discrimination Act 2005 which inserted section 15B to the Disability Discrimination Act 1995 (the Act).

From 4 December 2006, authorities will also have a new duty to make reasonable adjustments to any provision, practice or criterion or to any physical feature of the authorities' premises which places a disabled councillor at a substantial disadvantage. These reasonable adjustments

provisions are also contained in section 1 of the DDA 2005, which inserts a new section 15C into the DDA 1995.

The new legislation does not cover applying for election, further applications for internal or external appointments or internal party activities.

Who do the new 'councillor' provisions apply to?

Section 15A of the DDA 1995, as inserted by section 1 of the DDA 2005, provides that the following locally-electable authorities are covered by the new legislation:

- (a) the Greater London Authority
- (b) a county council (in England or Wales)
- (c) a county borough council (in Wales)
- (d) a district council (in England)
- (e) a London borough council
- (f) the Common Council of the City of London
- (g) the Council of the Isles of Scilly
- (h) a council constituted under section 2 of the Local Government etc (Scotland) Act 1994

- (i) a parish council (in England); and
- (j) a community council (in Wales or Scotland).

The legislation protects members of the authorities listed (referred to in this article, for convenience, as 'councillors') against discrimination and harassment.

A councillor is covered by the legislation if he or she satisfies the definition of disability used throughout the Act: namely if he or she has a physical or mental impairment which has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities.

What is less favourable treatment?

The new provisions are inserted into Part 2 of the DDA 1995, which also covers discrimination in the employment field. Less favourable treatment of councillors is therefore defined in the same terms as those which apply in the employment field after October 2004.

In essence, there are two types of less favourable treatment – direct discrimination and disability-related discrimination.

Less favourable treatment is direct discrimination if it is:

- on the grounds of disability, and
- less favourable treatment than that of a councillor who does not have that disability but whose relevant circumstances are not materially different.

Section 15B(5) clarifies that treatment of a councillor which amounts to direct discrimination falling within section 3A(5) of the DDA 1995, can never be justified.

For example, if an authority refuses to allow a councillor to go on a visit representing the authority on the grounds that she has epilepsy – the authority has assumed that there is a higher risk that she will be unwell on the trip compared to other councillors who do not have that condition – this will amount to direct discrimination which cannot be justified.

Less favourable treatment is disability-related discrimination under section 3A (1) of the Act if it is:

- for a reason related to disability, and
- is less favourable treatment than the way in which the authority treats (or would

treat) others to whom that reason does not (or would not) apply, and

- is not justified.

This type of less favourable treatment of a disabled councillor by an authority can be justified under section 3A(3) of the Act in circumstances where the reason for the treatment is both material to the circumstances of the case and substantial.

For example, if a councillor is told by the authority that she is no longer able to sit on the licensing committee as she has ‘missed too many meetings because of sickness’, this would be less favourable treatment for a disability-related reason if the absences were due to her disability – even if the authority was unaware of her disability. The disability-related reason is the councillor’s record or sickness absence, and the treatment would be unlawful unless it could be justified.

Direct discrimination occurs when the reason for the less favourable treatment in question is the disability, while disability-related discrimination occurs when the reason has a causal link to the disability but is not the disability itself.

What is harassment?

It is unlawful for an authority to subject a disabled councillor to harassment in connection with his or her carrying out of official business (section 15B(2) of the Act).

As with discrimination, harassment – defined in section 3B of the Act – is afforded the meaning that applies across Part 2 of the DDA. Harassment occurs where, for a reason which relates to a councillor's disability, another person engages in unwanted conduct which has the purpose or effect of violating the disabled councillor's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him or her.

If the conduct was intended to have either of these effects, then it amounts to harassment irrespective of its actual effect on the disabled councillor. In the absence of such intention, however, the conduct will only amount to harassment if it could reasonably be considered as having one of these effects.

For example, if a councillor circulates by email a joke about people with mental health problems which another

councillor, who has depression, receives and finds offensive, this is likely to amount to harassment.

When does an authority have to make a reasonable adjustment?

From 4 December 2006, authorities will have a duty to make reasonable adjustments for disabled councillors where a provision, criterion or practice applied by or for the council or any physical feature of the authority's premises places a disabled councillor at a substantial disadvantage compared with other councillors who are not disabled. This duty, provided for in section 15C of the Act, as amended, applies in connection with the carrying out of official business and will be inserted by section 1 of the DDA 2005.

It is hoped that these developments will assist the drive towards fuller participation for disabled people in public life. To further assist, the Disability Rights Commission will be providing specific guidance on the new duties relating to councillors outlined above.

Fit to work? The DRC investigates discrimination in regulated occupations

Monica Kreel, Investigations Officer at the DRC, outlines a new formal investigation

The Disability Rights Commission is launching a new general formal investigation looking at the barriers disabled people face in trying to pursue careers in teaching, nursing and social work.

It is apparent that people with impairments or long-term health conditions are sometimes seen as not fit to work in these occupations – perhaps because they are seen as a risk to the public, or because these jobs are seen as too demanding for disabled people to cope with.

The DRC has decided to focus on 'fitness' issues because of evidence of potentially discriminatory legislation, policy and practice within professional occupations. Nurses, for example, are required under regulation to be of 'good health and good character'. Looking through case files it is evident that there are still the familiar fears about people with mental health problems working with children, or people with HIV or epilepsy training as nurses, for example.

Discrimination can also occur at entry to training or during the registration process. The DRC has recently been made aware of a case of a social worker with a mental health condition who had been working for 30 years

but whose fitness to practise was questioned when he was required to register under current regulations.

Not surprisingly, research evidence also indicates that disabled people within professions are often reluctant to disclose essential information about their impairments because of fears that this will lead to discrimination. As a consequence, it is then difficult for that disabled person to ask for reasonable adjustments from their college, employer or qualifications body.

However, the picture is not all bleak. The relevant qualifications bodies and professional organisations are eager to comply with their duties under the DDA (including the DDA 2005) and are keen to work with the DRC on this investigation. Through this investigation, the DRC hopes to find ways of balancing the need for adequate protection for the public with the rights of disabled people – something that organisations within the relevant sectors are keen to achieve.

Next steps

This formal investigation will start off with a legal review to give an overview of the existing regulatory frameworks covering

professional occupations. The DRC will also be collecting evidence from legal advisers and examining legal cases to see how existing legislation is being interpreted on the ground. For example, is occupational health advice being used too readily to deny disabled people employment? Is pre-employment screening leading to direct discrimination?

There will also be a number of research projects. The investigation will look at occupational health policies and practice within teaching, nursing and social work and will undertake research into the issue of 'disclosure'. The DRC will also be calling on disabled professionals to share their experiences of the barriers they have faced – as well as their success stories.

The DRC is working collaboratively with organisations in teaching, nursing, social work and the occupational health sector on this investigation and will also be contacting legal advisers for their views.

Contact us

If you would be interested in submitting evidence or advising the DRC on this investigation please contact:
investigations@drc-gb.org

News in brief

Time limits in discrimination claims in employment

The Employment Appeal Tribunal (EAT) has handed down an important judgment dealing with time limits for discrimination claims in employment in the joined cases of **BUPA Care Homes (BNH) Ltd v Cann and Spillett v Tesco Stores Ltd (UKEAT/0475/05) and UKEAT/0554/05**.

The key issue related to the interaction of the requirements to comply with the statutory grievance procedures, and the pre-existing limitation provisions to be found in other legislation – in this case, the Disability Discrimination Act 1995, as amended.

The Employment Act 2002 introduced a mandatory grievance procedure with effect from 1 October 2004. The new regime requires an employee who wishes to present a claim to a tribunal

to firstly set out in writing the grievance upon which the claim is based, and to send a copy of this to the employer. Section 32(4) of the Employment Act 2002 prevents a complaint being considered where the employee complied with this requirement (known as Step 1 of the statutory grievance procedure) more than a month after the end of the 'original time limit' for making the complaint.

Under Schedule 3, Paragraph 3 to the DDA, the primary time limit for presenting a disability discrimination claim is 3 months, subject to extension where the tribunal considers it is just and equitable in all the circumstances.

In an important judgment, HHJ Peter Clark held that there is no absolute bar to a tribunal considering a discrimination complaint where a grievance was submitted more than four months (three months plus one month) after the act of discrimination complained of. The tribunal is still

entitled to exercise its general discretion to consider a discrimination complaint outside of this time where it is just and equitable to do so.

The EAT held that the 'original time limit' in section 32(4) Employment Act 2002 is the period within which a complaint under the DDA may be considered by the employment tribunal, **including** any exercise of its 'just and equitable' discretion under Schedule 3, Paragraph 3(2) to the DDA.

Effectively, the tribunal's just and equitable discretion to extend time in the DDA (which follows the same formula as that in the Sex Discrimination Act 1975 and Race Relations Act 1976) still applies. Section 32(4) Employment Act 2002 is **not** tantamount to an implied repeal of this discretion.

The appellant Mrs Spillett and the respondent Mrs Cann were both represented by the Disability Rights Commission.

Consultation on a revised Code of Practice on Part 4 DDA – post-16 education

The post-16 provisions of Part 4 of the Disability Discrimination Act 1995 have been amended by the Disability Discrimination Act 1995 (Amendment) (Further and Higher Education) Regulations 2006 which implement the European Employment Framework Directive (2000/78/EC) in respect of vocational training in the further and higher education sector.

The draft Code of Practice revises the existing Code to reflect these changes which will come into effect in September 2006. The main changes are:

- new direct discrimination duty
- removal of justification for failure to make reasonable adjustments
- new harassment duty
- reversal of burden of proof
- new duty prohibiting discriminatory advertisements
- new duty prohibiting instructions or pressure to discriminate
- new specific duties that apply

after the relationship between the student and education provider has ended

- new specific provisions in relation to qualifications
- introduction of competence standards.

These changes will affect:

- higher education institutions
- further education institutions
- local education authorities securing higher and further education, including adult and community education and, in Scotland, education authorities securing further education
- other specific institutions listed in regulations.

The consultation period closes on **22 May 2006**. A copy of the draft Code of Practice and the consultation documents can be obtained from: **www.drc-gb.org**

Copies in accessible formats are available from the DRC Helpline; contact details are provided on the back cover of this publication.

Direct discrimination developments

Further to the changes to the employment provisions under Part 2 of the DDA in October 2004, cases concerning direct discrimination are now finding their way through the legal system.

An employer's treatment of a disabled person amounts to direct discrimination – which cannot be justified – if it is:

- on the grounds of his or her disability, and
- is less favourable treatment than that of a person not having that particular disability but whose relevant circumstances are not materially different.

Recent cases which have involved these direct discrimination provisions include:

Morrison v Emma's Country Cakes

Mrs Morrison, who was represented by the DRC, claimed that she was dismissed from her job as a bakery assistant for having diabetes, and that this amounted to direct

discrimination under section 3A(5) of the DDA.

Shortly after her employment had commenced, Mrs Morrison was asked by a manager if she had diabetes. She confirmed that she did, and that her condition was controlled by insulin injections. Later that day, she was informed by her employer that they felt her medical condition made it too dangerous to allow her to continue to work on the premises, and she was dismissed.

The employer admitted discrimination and Mrs Morrison accepted an offer of settlement.

Backland v HM Revenue and Customs (case 2100860-05 Liverpool Employment Tribunal)

Mr Backland, who has arthritis and gout, claimed that he had been discriminated against by his employer, when, as a result of taking sick leave, he was put on 'inefficiency procedures'.

Mr Backland was employed as a Revenue Assistant. The length of a period of absence from work triggered a referral to the employer's occupational health

advisors. The report confirmed that the absence was in respect of an underlying medical condition which could flare up again and give rise to further absence.

He was advised that an informal Managing Attendance and Performance period would be set during which his attendance would be monitored and an improvement sought. However, in other cases, the employer had discounted sickness absences related to an employee's disability.

Mr Backland claimed that by putting him on inefficiency procedures, his employer had treated him less favourably and that the treatment amounted to direct discrimination.

The tribunal concluded that a reasonable adjustment should have been made with the employer considering discounting sickness absence relating to the recurring illness, as Mr Backland argued had happened in other cases.

The treatment amounted to direct discrimination, which cannot be justified.

Guidance on Definition

Revised guidance on matters to be taken into account in determining questions relating to the definition of disability has recently come into force.

The revised guidance was laid before Parliament on 7 February 2006 and issued by the Secretary of State for Work and Pensions on 29 March 2006. It came into force on 1 May 2006.

The revised guidance, which is issued under section 3 of the Disability Discrimination Act 1995, applies to England, Wales and Scotland.

The previous guidance, which was issued in 1996, was revoked on 1 May 2006. However that guidance (and not the revised guidance) will continue to apply in relation to any claim, whenever made or dealt with, arising out of an act of discrimination occurring before 1 May 2006.

Both guidance documents referred to are available on the DRC website at:
www.drc-gb.org

Equal access to justice for vulnerable witnesses

The Crown Prosecution Service (CPS) is working to improve equality of access to justice for vulnerable witnesses in England and Wales by promoting two initiatives, namely 'witness profiling' (details of which appeared in the DRC's Legal Bulletin Issue 8) and 'intermediaries'. Legislative provision for the latter initiative is afforded by the Youth Justice and Criminal Evidence Act 1999 (YJCEA).

Intermediaries

Intermediaries help vulnerable witnesses gain equal access to justice. Section 29 of the YJCEA allows witnesses to be questioned and to give evidence through an intermediary.

An intermediary is someone who is approved by the court to provide a service which enables the witness and court to communicate. This service can apply to questions asked by the court, the defence and the prosecution, as well as to the answers given by the

witness in reply. The intermediary is allowed to explain questions and answers, if that is necessary, to enable the witness and the court to communicate. An intermediary can assist the witness at each stage of the criminal justice process.

Intermediaries come from a range of backgrounds including social work, speech and language therapy and psychology. They will normally be a specialist, by training or possibly through a unique knowledge of the witness.

The intermediary initiative is currently available in six pathfinder areas: Merseyside, West Midlands, Thames Valley, South Wales, Norfolk and Devon and Cornwall. The initiative will be evaluated during 2006 and identified good practice will be incorporated into a roll-out across England and Wales.

Vulnerable witnesses

Section 16 of the YJCEA provides that 'vulnerable

witnesses' include a child under 17 years old; or someone who has a mental or physical impairment that is likely to diminish the quality of their evidence in terms of completeness, coherence and accuracy.

Further information

For more details about the intermediary initiative, please contact CPS Policy Directorate at:
HQPolicy@cps.gsi.gov.uk

You ask the questions...

Disabled people and their advisers and representatives can now use a legal questionnaire to challenge discriminatory service providers.

A new Part 3 questionnaire for complaints about discrimination in services, premises and transport provision came into force on 5 December 2005.

The questionnaire can be used to ask direct and probing questions about a service provider's actions and to get evidence to back a legal claim. If a service provider doesn't reply, the county court (sheriff court in Scotland) has power to draw whatever conclusion it feels appropriate, which could include deciding that the service provider has discriminated.

The questions procedure may also have a part to play in encouraging successful dispute resolution without the need for litigation. Receiving the questionnaire document might itself lead some service providers to give fuller consideration to suitable means to resolve disputes without the need for court action.

To order copies of the Part 3 questionnaire please contact the DRC Helpline (contact details are on the back cover of this publication) and quote order no: SP15.

DRC support for legal cases – priority areas

The DRC has power to consider applications for assistance in respect of legal proceedings brought or proposed by an individual under the DDA.

To make best use of its limited legal resources, the DRC has established categories of cases which should be regarded as priority areas for support. In general terms, priority areas reflect cases which are likely to promote the rights of disabled people generally, by clarifying a point of legal principle or highlighting areas where the DDA has changed or been underused.

A selection of the types of cases which might currently attract DRC support by way of representation – over and above applications deriving from exceptional individual need – is included below. The list is not exhaustive, nor are cases that fall within these priority areas guaranteed support.

However, the DRC encourages advisers and representatives to contact our Helpline, referring to this section of the Legal Bulletin, if they are aware of complaints that fall within these priority areas.

Please see back cover for contact details.

General

- Cases that will test the amendments to the definition of disability introduced by the DDA 2005, namely those involving people with cancer, HIV infection or multiple sclerosis (particularly where cancer is in remission or where

disability is contested after diagnosis of a progressive condition), or people with a mental illness which is not 'clinically well-recognised'.

Part 2 – Employment

- Cases involving 'blanket bans' to test the direct discrimination provisions.

- Cases that will clarify how broad the concept of **direct discrimination** is; how wide 'on the ground of the disabled person's disability' is; and that illustrate the overlap with less favourable treatment that is potentially justifiable.
- Cases that explore whether (1) discrimination against associated persons or (2) perceived or imputed disability are covered as a consequence of the EC Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

Part 3 – Access to Goods, Facilities and Services etc

- Cases that explore the hierarchy of the provisions in section 21(2)

of the DDA, relating to the service provider's duty to remove or alter physical features which make it impossible or unreasonably difficult for disabled persons to make use of a service.

- Cases that involve less favourable treatment by a private club to test the provisions introduced by the DDA 2005 in December 2005.

Part 4 – Education

- Cases that explore the extent of the duty to take reasonable steps to avoid substantial disadvantage.
- Cases that explore duties of further and higher education providers in respect of adjustments to physical features.

The DRC's current legal strategy explains further the DRC's legal enforcement functions, and how it deploys its statutory powers to maximum effect. The strategy includes a more comprehensive list of current priority areas for support and is available on our website at: www.drc-gb.org

You can contact the DRC Helpline by voice, text, fax, post or email via the website. You can speak to an operator at any time between 08:00 and 20:00, Monday to Friday.

If you require this publication in an alternative format and/or language please contact the Helpline to discuss your needs. All publications are available to download from the DRC website: www.drc-gb.org

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