Disability Rights Commission

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Legal Bulletin

The Disability Rights Commission ('the DRC') was created in April 2000 pursuant to section 1 of the Disability Rights Commission Act 1999 ('the 1999 Act'). Its aim is to create 'a society where all disabled people can participate fully as equal citizens'. Section 2(1) of the 1999 Act requires the DRC: (i) to work towards the elimination of discrimination against disabled persons (ii) to promote the equalisation of opportunities for disabled persons (iii) to take such steps as it considers appropriate with a view to encouraging good practice in the treatment of disabled persons and (iv) to keep under review the working of the Disability Discrimination Act 1995 and the 1999 Act.

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Editorial

Welcome to Issue 10 of the Disability Rights Commission's Legal Bulletin.

As this issue rolls off the press, the DRC is about to embark upon its final 12 months of existence. The Equality Act 2006 received Royal Assent on 16 February and the new Commission for Equality and Human Rights (CEHR) is scheduled to open its doors in October 2007.

Against this backdrop, the year ahead will present many challenges for the DRC, not least in its legal work. The advent of the CEHR has, for instance, invited new thinking about the relationship between human rights and equality and about the role of a statutory commission.

As the DRC prepares for the transition, we explore the relationship between human rights and disability, and explain how the DRC is already using human rights arguments to address issues of real importance to disabled people.

Also in this issue, we consider the implications of the recent Court of Appeal decision in the employment case of Taylor v OCS Group Ltd and complete our look at the forthcoming changes to Part 3 of the Disability Discrimination Act 1995 by examining the new duties for providers of premises and providers of transport services.

Meanwhile, the European Court of Justice (ECJ) has considered its first case on the disability aspect of the European Employment Framework Directive, and a UK tribunal has made a further reference to the ECJ, this time on the question of 'discrimination by association' with a disabled person. These developments, and wider issues about the definition of disability, are considered at page 25.

The News section includes updates on some important recent DRC-supported cases, and a brief summary of the final report which followed the DRC's formal investigation into health inequalities. Finally, on pages 53 and 54 we list, as usual, a selection of the DRC's current legal enforcement priority areas, which may provide a flavour of the challenges that lie ahead in the run up to October 2007 and beyond.

Regards
Martin Crick

Human rights and disability

Rebecca Howard, Head of Legal Services at the Disability Rights Commission, considers the role that human rights can play in addressing issues of importance to disabled people

The Disability Rights Commission has long recognised the close inter-relationship between fundamental human rights and the social model of disability, upon which the Commission's philosophical approach rests.

Central to both are the concepts of participation, autonomy, dignity and respect. Disabled people should not be prevented from fully participating in the economic and social life of the community by barriers placed in their way. Equally, disabled people's right to exercise autonomy over their life choices must be central to government policy in the fields of education, health and social care before we can be confident that disabled people will be afforded the same dignity and respect as non-disabled people.

These key concepts are reflected in the articles contained within the Human Rights Act 1998 (HRA). The HRA enshrined the rights set out in the European Convention on Human Rights (ECHR) and provided individuals with a directly enforceable set of rights in the UK courts for the first time. Articles of key (but not

exclusive) relevance to disabled people are:

- right to life (Article 2)
- prohibition of torture and inhuman or degrading treatment (Article 3)
- right to a fair trial (Article 6)
- respect for private and family life (Article 8)
- right to education (Protocol 1, Article 2)
- right not to be subjected to discrimination in the enjoyment of rights under the ECHR (Article 14).

This article will explain how the DRC, in a number of cases, has used human rights arguments to address issues which the Disability Discrimination Act 1995 (DDA), with its statutory limitations, cannot reach, but which nonetheless are matters of real importance to disabled people. It then considers the role of human rights in the forthcoming Commission for Equality and Human Rights (CEHR).

Conceptional similarities

Disability, in particular, lends itself to human rights arguments. The underpinning concepts of positive duties in human rights are similar to the proactive duty to make reasonable adjustments found in disability legislation. The parallels are reflected in cases such as **Botta v Italy (1998) EHLRL 486**, where the court acknowledged a positive duty on states to take appropriate measures to ensure that citizens are able to enjoy a normal social life, which would enable them to participate in the life of the community.

This can be contrasted with the more reactive requirements of direct/indirect discrimination which provide a baseline of equality of treatment. Unlike most aspects of other equalities legislation, the DDA is asymmetrical, conferring no rights upon non-disabled people. This limits the role of the comparative exercise – an exercise which is fundamental to other equalities legislation. Disability discrimination is more closely aligned with the HRA, which does not engage in an essentially comparative examination of rights.

The HRA has a broader remit than the equalities legislation and can be an effective way of getting to issues which the specific equality legislation

cannot reach – for example, around access to justice, the right to education and the right to life. The HRA is often at its most effective when used to enhance discrimination-based arguments.

Of course, the HRA is not a panacea for the achievement of rights for disabled people, not least because it only applies to public bodies or other bodies insofar as they are carrying out 'public functions'. Consequently, it is of limited use to the significant proportion of disabled people who are either employed by private employers or whose concerns relate to private sector service providers.

However, whilst the HRA cannot be directly enforced against the private sector, it still has an impact beyond the boundaries of the public sector. If the public sector is obliged to address human rights issues in their decision-making processes, it follows that this will have implications for the private sector organisations with which they interact, whether as regulators, funders, contractors or partners.

Human rights arguments through intervention

The DRC is able to intervene as an interested party in litigation using its general functions, which are defined in Section 2 of the Disability Rights Commission Act 1999 as 'including working towards the elimination of discrimination against disabled persons and promoting the equalisation of opportunities for disabled persons'.

The DRC uses the power to intervene sparingly. The Commission will only consider intervening if the case highlights an issue of real importance to disabled people and if the DRC can add a dimension to the issues in question which the parties themselves cannot bring. The DRC's legal strategy envisages intervention to be a means to:

- challenge administrative decisions having an adverse impact upon disabled people's rights
- avoid the establishment of unhelpful precedents without the courts first being made aware of the DRC's interpretation of relevant questions of law
- challenge the compatibility

of domestic legislation with the Human Rights Act or EU legislation

- gain publicity for, and recognition of, the rights of disabled people.

In the following cases, the DRC has intervened on human rights and DDA issues:

The Queen on the application of Johnson, Thomas and Manning v London Borough of Havering

High Court: Queen's Bench Division: Case No CO/08481/2005

This High Court case, which is the most recent case in which the DRC has used its powers to intervene, explored the meaning of 'public authority' under the Human Rights Act.

The Council which owns and controls the care homes in which Mrs Johnson and two other claimants reside, has taken a decision, in principle, to transfer residential care homes to a private sector provider.

The claimants brought proceedings for judicial review, on the ground that the closure and transfer of the homes would lead to residents being deprived of effective protection for their human rights, which the Council is obliged to guarantee. The issue is of particular importance to disabled people due to the large number of disabled people currently residing in residential care, the increasing trend of local authorities contracting out that responsibility and the considerable evidence of poor practice and abuse of disabled residents in residential care homes.

Both the DRC and the Department for Constitutional Affairs (DCA) intervened in support of the claimants' argument that the definition of 'public authority' under section 6 of the Human Rights Act should be construed more widely to include bodies such as private care homes. The DRC submitted that care homes in the private sector, which provide accommodation and care to residents in accordance with arrangements made with a local authority (pursuant to the authority's statutory powers and duties), are exercising 'public functions' within the meaning of section 6(3)(b) HRA 1998. If correct, this would mean that the residents of the homes would still be able to

enforce their human rights directly against the private sector provider, notwithstanding the closure and transfer of the Council's care homes.

The case challenged the much-criticised Court of Appeal authority in **R (on the application of Heather and others) v Leonard Cheshire Foundation**. The Judge, Mr Justice Forbes, however, concluded that he was bound by that case. It was held that a private care home providing accommodation to elderly residents, pursuant to arrangements made with a local authority, was not, itself, exercising functions of a public nature for the purposes of the Human Rights Act 1998. Consequently, the care home would not be bound to act compatibly with the European Convention on Human Rights.

This case is now on appeal to the Court of Appeal and the DRC and DCA are both continuing to intervene.

R v East Sussex County Council Ex parte A, B, X and Y

High Court CO/4843/01/17 December 2002 and 18 February 2003

The DRC intervened in this case to challenge the practice in a number of local authorities of applying blanket 'no lifting' policies that were highly prejudicial to disabled people.

Such policies are a major cause for concern as they affect the quality of life of large numbers of disabled people. A ban on lifting can result in loss of dignity and autonomy for the disabled person and can sometimes compel the disabled person to go into residential care.

The case concerned A and B, who were sisters with profound physical and learning disabilities. They had always lived in the family home, which had, to an extent, been specially adapted and equipped for them and where they were looked after on a full-time basis by their mother, X, and their stepfather, Y.

Both A and B had impaired mobility and in order to carry out many of their daily activities – including, for example, getting out of bed or into the bath – it was necessary for them to be moved and lifted by their carers. For health and safety reasons, the council sought to ensure that staff moved A and

B using lifting equipment rather than by 'manual handling'. Central to the case was the balance to be struck between the needs of the disabled sisters and the concerns of the council to ensure adequate protection for the health and safety of its staff.

The DRC deployed arguments under Article 2 (the right to life), Article 3 (the right not to be subjected to inhuman/degrading treatment) and Article 8 (the right to private and family life).

The Judge concluded that fair lifting and handling policies are fundamental to disabled people's independence, dignity and inclusion. A and B's rights to participate in the life of the community and to have access to an appropriate range of recreational and cultural activities are so important that a significant amount of manual handling may be required.

He held that lifting policies should ensure that a proper balance is struck between meeting the needs and rights of disabled people on the one hand, and ensuring a safe working environment for staff working with disabled people on the other. The judgment makes it clear that blanket policies do not allow such a balance to be struck and that the individual circumstances of each case need to be considered.

R (on the application of C) v Royal Devon and Exeter NHS Foundation Trust

In this case, the DRC agreed to apply to intervene in judicial review proceedings of the Trust's decision that C could no longer be guaranteed to be provided with appropriately trained female staff to perform intimate care tasks. The DRC argued that this decision breached the claimant's rights under Articles 3 and 8.

The case gave rise to issues of wider strategic significance concerning choice, independence, autonomy and dignity of disabled people in the provision of health care services, particularly intimate care services.

Judicial review proceedings were commenced and C obtained an interim injunction which required the NHS Trust to provide female nursing staff to perform C's intimate care tasks until final determination of this matter in the High Court.

Prior to hearing, the matter settled, with the Trust providing the guarantees relating to the provision of intimate care tasks that C had sought.

R (on the application of Burke) v General Medical Council [2005] EWCA Civ 1003

In this case, the DRC intervened to make submissions on the guidance issued to medical professionals regarding the withdrawal of artificial nutrition and hydration (ANH).

The DRC argued that the guidance placed too much power in the hands of the medical profession without taking sufficient account of the disabled person's wishes, and that, therefore, aspects of it were incompatible with Articles 2, 3, 6, 8 and 14 of the HRA. The DRC's overarching concern was that some decisions by medical professionals on whether disabled people should live or die are based on a backdrop of negative images and poorly informed assumptions.

The High Court found for the claimant, Mr Burke. The Court of Appeal, however, allowed GMC's appeal and did not consider the GMC's guidance unlawful. Significantly, it did recognise the important principles of patient autonomy and choice; that a competent person's wishes must be respected (apart from a right to demand a particular treatment) and that withdrawal of life-prolonging treatment contrary to a competent patient's expressed wishes could be murder.

The Court of Appeal further held that the GMC guidance should be understood and implemented at every level of the medical profession to ensure people are treated properly and not ignored or patronised because of their disability.

N v B

The DRC was granted permission to intervene in a judicial review of a hospital's decision not to provide a severely disabled 10-year-old girl with medical treatment. The hospital had decided not to provide ventilation, and had placed a 'Do Not Resuscitate' order on the girl's file against her mother's wishes.

The DRC felt that the case raised issues of importance to

disabled people generally; there was particular concern that decisions by health professionals relating to the care of disabled people may sometimes be influenced by their perceptions of the disabled person's quality of life.

The DRC submitted arguments under both the Disability Discrimination Act (section 19, the provision of a service) and the HRA (Articles 2, 3, 6 and 14, as well as Article 8 in relation to the mother's right to respect for private and family life).

The matter was resolved on confidential terms.

Human rights in the CEHR era

The Commission for Equality and Human Rights (CEHR), which comes into being on 1 October 2007, will be the first national, institutional support for the Human Rights Act since its incorporation in 2000. The CEHR vision rests on the 'three pillars' of equality, human rights, and social cohesion. Its human rights remit is broad with a range of duties and powers.

Its duties are to:

- promote understanding of the importance of human rights
- encourage good practice (as distinct from mere compliance and to include private as well as public sector)
- promote awareness, understanding and protection of human rights in all that the CEHR does
- encourage public authorities to comply with their duties under the HRA
- monitor effectiveness and progress on human rights delivery.

Its powers are to:

- conduct inquiries – general, rather than named party investigations – either on freestanding human rights issues or blended with equality issues (this includes the power to call for witnesses and papers)
- provide guidance and advice on human rights (but not casework or legal representation)
- intervene in human rights litigation and bring judicial review proceedings against public authorities

- undertake research and provide education and training
- award grants for human rights work.

This broad human rights remit has the potential to provide an effective framework of principles through which to balance rights arising under the equality 'strands' within the CEHR's remit: disability, race, gender, sexual orientation, religion and belief and age. The underpinning concepts of proportionality and positive obligations derived from human rights could be used to 'lever up' protection for vulnerable or disadvantaged groups in society, ensuring a joined-up approach to the CEHR's legal and enforcement strategy and preventing key issues affecting those groups from falling between the legislative cracks.

It is through recognition of this key role that human rights can play in ensuring rights for disabled people and in anticipation of the CEHR human rights remit, that the DRC has been proactive in integrating DDA and HRA arguments where the appropriate opportunities have arisen. So far, this approach has had a significant impact and the DRC hopes to build upon these successes over the coming year and beyond, into the CEHR era.

Further information on the cases cited above and transcripts of the judgments can be found on the law section of the DRC website at: **www.drc-gb.org**

Premises and transport – new duties under the DDA

In the second of two articles examining the changes to Part 3 of the DDA, Chris Benson, Senior Legal Officer at the DRC, explores how the changes affect providers of premises and transport services

The Disability Discrimination Act 2005 ('the 2005 Act') makes, amongst other things, various amendments to Part 3 of the Disability Discrimination Act 1995 ('the DDA') which covers access to goods, facilities, services and premises etc. In the previous issue of the Legal Bulletin, those changes relating to public authorities and private clubs were explored. Further changes to Part 3 of the 1995 Act specifically affect premises providers and providers of transport services; these changes are explored below.

A. Premises (sections 24A–24L)

The original Disability Discrimination Act 1995 made no provision for the making of reasonable adjustments in relation to premises.

The 2005 Act, however, introduces a reasonable adjustment duty with effect from December 2006, which aims to ensure that disabled people can rent and enjoy premises and facilities associated with them in a similar way as non-disabled people, by removing barriers to their occupation or enjoyment.

The reasonable adjustment duty will make it unlawful for 'controllers' of premises to discriminate against a disabled person who:

- is a tenant
- is otherwise lawfully occupying the premises, or who
- is considering taking a letting of the premises.

A 'controller' of premises is a person:

- by whom premises are let
- who has the premises to let, or
- who manages the premises.

The duty to make adjustments is only owed to a disabled person when certain conditions have been met; it is unlike the existing duty to make adjustments contained in the goods and services provisions of Part 3 of the DDA, which is anticipatory in nature. The duty in relation to premises only arises if the controller of premises is asked to make an adjustment by a person who is letting the premises or a person who wishes to take a letting of the premises (or by someone on their behalf).

The request may be in writing but does not have to be. It does not have to specifically ask for an auxiliary aid or a change to practices, policies, procedures or terms; it will amount to a request for the purposes of the Act if it is reasonable to assume from what is said or written that an adjustment has been requested.

The duty to make adjustments comprises a series of duties falling broadly into three areas:

- the provision of auxiliary aids and services
- changing practices, policies and procedures, and
- changing a term of the letting (this latter provision applies only to premises that are let).

There is no obligation on premises controllers to take any steps that would involve the removal or alteration of a physical feature.

The duty to provide auxiliary aids and services

Where certain conditions have been met, a controller has a duty to take reasonable steps

to provide an auxiliary aid or service. This might be, for example, the provision of information in accessible formats, such as large print or tape, or the provision of a sign language interpreter at a meeting. In addition, Regulation 5 of the Disability Discrimination (Premises) Regulations 2006 (SI 2006/887) provides that the following are to be treated as auxiliary aids or services:

- the removal or replacement of any furniture, furnishings, materials or equipment; or the provision of other chattels (so long as they would not be fixtures when installed)
- the replacement or provision of any signs or notices
- the replacement of any taps or door handles
- the replacement, provision or adaptation of any door bell or door entry system
- changes to the colour of any surface.

The duty to provide auxiliary aids and services is owed where a request has been made, as outlined above, and:

- in relation to let premises:
  - the auxiliary aid or service would enable or make it easier for a disabled person to enjoy the premises, or to make use of any benefit or facility, but would be of little or no practical use to him if he were neither the tenant nor occupying the premises; **and**
  - it would be impossible or unreasonably difficult for the disabled person to enjoy the premises or to make use of the benefit or facility if the auxiliary aid or service were not provided.
- in relation to premises which a disabled person wishes to rent:
  - the auxiliary aid or service would enable or make it easier for the disabled person to take a letting of the premises but would be of little or not practical use to him if he were not considering taking a letting of the premises; **and**
  - if the auxiliary aid or service were not provided, it would be impossible or unreasonably difficult for the disabled person to take a letting.

For example, a disabled child of a tenant has started using a wheelchair. She lives with her family in a rented ground-floor flat but is unable to leave the flat without being carried as she cannot get down the one step at the entrance to the block of flats. A portable ramp would allow her to get down the step in her wheelchair and enable her to enjoy the premises. The tenant discusses this with his landlord, who agrees to provide a portable ramp for the family to use. This is likely to be a reasonable step for the landlord to have to take.

The duty to change practices, policies and procedures

The duty to change practices, policies and procedures arises where:

a request has been made, as outlined above, and:

- in relation to let premises, a controller of premises has a practice, policy or procedure which makes it impossible or unreasonably difficult for a disabled person to enjoy the premises or to make use of any benefit or facility (such as communal gardens); **or**
- in relation to premises to let, a controller of premises has a practice, policy or procedure which makes it impossible or unreasonably difficult for the disabled person to take a letting of the premises; **and**

in relation to both let premises and premises to let, the practice, policy or procedure would not have that effect if the relevant disabled person did not have a disability.

For example, a tenant with a learning disability is accused of antisocial behaviour by a neighbour who reports that he is playing football against her house late into the evening and is rude to her. The housing association's policy is to send a letter to a tenant accused of antisocial behaviour warning them about the complaint and detailing the potential effect on the tenancy if the behaviour persists. The housing association is already aware of the tenant's inability to read letters and so it alters its policy by visiting the disabled tenant personally to explain the

complaint to him and talk to him about his behaviour. This is likely to be a reasonable step to take.

The duty to change terms

The duty to change terms arises where, in addition to a request having been made as outlined above, the following conditions are met:

- a term of the letting makes it impossible or unreasonably difficult for a disabled person to enjoy the premises or to make use of any benefit or facility which he is entitled to use; and
- the term would not have that effect if the disabled person did not have a disability.

For example, a disabled tenant cannot access the drying area in her block of flats because of her disability. The landlord agrees not to enforce the term of the tenancy which prohibits her from hanging out clothes on her balcony, so that she can use her balcony to dry clothes. This is likely to be a reasonable step for the landlord to have to take.

There are also provisions relating to commonhold premises, permission for disability-related alterations to premises and victimisation relating to the cost of making adjustments.

These provisions, and the various other amendments to Part 3 of the DDA 1995 affecting the housing sector (as well as the changes affecting public authorities and private clubs discussed in issue 9) are reflected in a revised Code of Practice on Rights of Access: services and premises (services to the public, public authority functions, private clubs and premises). Please refer to page 48 of this publication for more details about this Code of Practice.

B. Transport (sections 19(5) and 21ZA)

From December 2006, certain services in respect of transport vehicles will be covered by Part 3 of the DDA 1995.

Prior to these changes taking effect, any service so far as it consisted of the use of a means of transport was exempted (by the operation of section 19(5)(b)) from Part 3 of the DDA 1995.

However, not all services associated with transport fell within the exemption. Those associated with transport infrastructure, for example, were covered by Part 3 of the DDA and were subject to the same provisions as other services not associated with transport.

This means that, irrespective of the changes introduced by the DDA 2005 discussed below, most transport providers are already subject to Part 3 of the DDA 1995 in respect of certain services provided to the public. These include services at stations and airports, or information and timetabling services.

However, from 4 December 2006, following amendments made by the 2005 Act, and regulations made under that Act, the exemptions regarding the use of transport provided by means of certain vehicles will be lifted.

As a result, forms of public transport which will be covered by the 1995 Act will include:

- buses and coaches
- taxis and private hire vehicles
- trains
- trams and light railways
- rental cars
- breakdown recovery vehicles.

Essentially, providers of transport services in respect of the provision or use of a vehicle covered by the Disability Discrimination (Transport Vehicles) Regulations 2005 (SI 2005/3190) ('the 2005 Regulations'), are now providers of services to the public for the purposes of Part 3 of the DDA 1995. They must therefore comply with the relevant duties under that Act.

The Act empowers the Government to lift the transport exemption in respect of any form of transport service. This could include aircraft and shipping vessels, but these modes of transport are not specified in the 2005 Regulations. The Act, as applied by the 2005 Regulations, sets out the scope of the duties as follows:

- A transport provider must not discriminate against a disabled person:
  - when providing, or not providing, a disabled

person with a vehicle; or

- when providing, or not providing, a disabled person with services when he is travelling in a vehicle provided in the course of a transport service.

- A transport provider also has a duty to make certain kinds of reasonable adjustments for disabled people in respect of the provision or use of a vehicle.

'Provision of a vehicle' in the context of these duties means provision of the vehicle itself; it does not include any services ancillary to the vehicle (for example, arrangements for buying a ticket for travel or accessing the office of a vehicle rental operator).

Indeed, the 1995 Act has been amended by the 2005 Act to clarify that Part 3 already applies to the provision of transport infrastructure services. This reflects the position established in case law by the Court of Appeal in **Ross v Ryanair and Stansted Airport Ltd [2004] EWCA Civ 1751** and **Roads v Central Trains [2004] EWCA Civ 1541** – decisions which were analysed in Legal Bulletin issue 7.

What does the Act make unlawful?

As is the case with all other service providers under Part 3 of the 1995 Act, it is unlawful for a transport provider, in relation to the provision or use of a specified transport vehicle, to discriminate against a disabled person:

- by refusing to provide (or deliberately not providing) any service which it provides (or is prepared to provide) to members of the public; or
- in the standard of service which it provides to the disabled person or the manner in which it provides it; or
- in the terms on which it provides a service to the disabled person.

It is also unlawful for a transport provider to discriminate by:

- failing to comply with any duty to make reasonable adjustments, in circumstances in which the effect of that failure is to make it impossible or unreasonably difficult for the disabled person to make use of any transport service provided.

The duty to make adjustments in respect of the use of transport vehicles applies in a slightly different way to the reasonable adjustment duty in respect of other services. Unlike the duty that applies to other services, there is no duty to overcome physical features. However, there are two exceptions to this:

- in the case of rental vehicles, the full duty to overcome physical features applies; and
- in the case of breakdown recovery vehicles, the duty applies in part.

Full details of the duties are set out in chapter 5 of the Code of Practice: Provision and use of transport vehicles which is available on the DRC website at: **www.drc-gb.org**

Justification

The defence of 'justification' applies to those providing services in respect of transport vehicles in the same way as to other service providers covered by Part 3 of the 1995 Act. The justification must fall within one of the relevant categories set out in the 1995 Act, which are:

a. Health or safety

The Act does not require a transport provider to do anything which would endanger the health or safety of any person. A transport provider can justify less favourable treatment, or a failure to make an adjustment, if it is necessary in order to protect the health or safety of any person, including the disabled person.

b. Incapacity to contract

The Act does not require a transport provider 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 transport provider may refuse to enter into a contract.

c. Transport provider otherwise unable to provide the service to the public

A transport provider can justify refusing to provide (or deliberately not providing) a service in respect of provision and use of a transport vehicle to a disabled person if this is necessary because the transport provider would

otherwise be unable to provide the service to other members of the public.

d. To enable the transport provider to provide the service to the disabled person or other members of the public

A transport provider can justify providing service of a lower standard or in a worse manner or on worse terms (an inferior service) if this is necessary in order to be able to provide the service to the disabled person or other members of the public.

e. Greater cost of providing a tailor-made service

A transport provider can justify charging a disabled person more for some services than it charges other people. This is the case where the service is individually tailored to the requirements of the disabled customer or passenger. If a higher charge reflects the additional cost or expense of meeting the disabled person's specification, that would justify the higher charge.

However, justification on this ground cannot apply where the extra cost results from the provision of a reasonable adjustment.

Additional changes to Part 3 of the DDA 1995 – affecting private clubs and public authority functions – were explored in issue 9 of the Legal Bulletin, which is available from our website at: **www.drc-gb.org**

The definition of disability

Catherine Casserley, Senior Legislation Adviser at the DRC, considers proposals to change the definition of disability

The definition of disability contained in section 1 of the Disability Discrimination Act 1995 ('the DDA') – and supplemented by Schedule 1 to that Act, regulations and guidance – remains one of the most complex aspects of the DDA. In an employment context, it is also the subject of the majority of appeals to the Employment Appeal Tribunal.

The definition of disability has been the subject of much criticism by disabled people, representatives and others who find it complex and obstructive – and this remains the case despite changes to the definition made by the Disability Discrimination Act 2005 (which amended schedule 1 to the 1995 Act to provide that a person who has cancer, HIV infection or multiple sclerosis is deemed to have a disability and to remove the requirement that a mental illness must be 'clinically well-recognised').

Following a recent consultation on whether the DDA's definition of disability should be changed further (and if so, how), the DRC is making recommendations on this issue to Government. Before exploring these

recommendations, it is worthwhile considering some relevant developments in case law – specifically, the first case to be referred to the European Court of Justice (ECJ) on the issue of disability in the context of the European Employment Framework Directive, as well as a reference which has been made from a UK tribunal concerning 'discrimination by association' with a disabled person.

Sonia Chacon Navas v Eurest Colectividades SA, ECJ, C-13/05

This case is the first to be considered by the ECJ on the disability aspect of the European Employment Framework Directive.

It should be noted at the outset that the decision does not reflect the definition of disability contained in the legislation of countries which already have disability discrimination laws. As the directive contains a provision on non-regression, the decision will not affect the definition of disability in those countries, such as the UK, which have a broader definition than that implied by this decision.

Facts

Ms Navas was employed by Eurest, an undertaking specialising in catering. On 14 October 2003, she was certified as unfit to work on grounds of sickness and she was not in a position to return to work in the short term. On 28 May 2004, Eurest gave Ms Navas written notice of her dismissal, without stating any reasons, whilst acknowledging that the dismissal was unlawful and offering her compensation.

On 29 June 2004, Ms Navas brought an action against Eurest, maintaining that her dismissal was not valid as it was discriminatory – based on her leave of absence from her employment for eight months. She sought an order that Eurest reinstate her in her post.

Referral

In Spanish law, sickness is not expressly referred to as one of the grounds of prohibited discrimination. The Spanish court hearing the case referred the matter to the ECJ; it was the view of the Spanish court that there is a causal link between sickness and disability and that, given that sickness is often capable of causing an irreversible disability, workers

must be protected in a timely manner under the prohibition of discrimination on grounds of disability.

The referring court also suggested that, should it be concluded that disability and sickness are two separate concepts and that Community law does not apply directly to sickness, it should be held that, in accordance with Community law principles of non-discrimination, sickness should be added to the attributes in relation to which the directive prohibits discrimination.

Issues

The ECJ summarised the first question to be whether the general framework laid down by the directive for combating discrimination on grounds of disability confers protection on a person who has been dismissed by his employer solely on grounds of sickness.

On this issue, the ECJ held that 'disability,' in the context of the directive, must be understood as referring to a limitation which results, in particular, from a physical, mental or psychological impairment and which hinders the participation of the person concerned in professional life; by using the concept of 'disability' in the directive, the legislature deliberately chose a term which differs from 'sickness'. The two concepts cannot simply be treated as being the same.

The importance which the Community legislature attaches to measures for adapting the workplace to the disability demonstrates that it envisaged situations in which participation in professional life is hindered over a long period of time. For the limitation to fall within the concept of disability, it must therefore be probable that it will last for a long time. There is nothing in the directive to suggest that workers are protected by the prohibition on grounds of disability as soon as they develop any type of sickness. A person who has been dismissed on account of sickness does not fall within the scope of the directive.

The ECJ went on to clarify the relationship between the prohibition of discrimination and the reasonable adjustment provisions in Article 5 of the directive. It stated that, in respect of dismissal, the prohibition of discrimination on grounds of disability

contained in the directive precludes dismissal on grounds of disability which, in the light of the obligation to provide reasonable accommodation for people with disabilities, is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post.

On the second question – whether sickness can be regarded as a ground in relation to which the directive prohibits discrimination – the ECJ rejected the suggestions of the referring court. It held that the scope of the directive could not be extended beyond discrimination based on the grounds listed exhaustively in Article 1. Therefore, sickness could not be regarded as a ground in addition to those in relation to which the directive prohibits discrimination.

Comment

Whilst the ECJ's comments on the relationship between the anti-discrimination provisions of the directive and the reasonable accommodation provisions are particularly helpful (although of no impact in the UK, as this relationship is clear in the DDA), the conclusion on definition of disability is extremely disappointing.

It is important that, as the court pointed out, there is an autonomous and uniform interpretation of the term disability in this context. However, as is indicated above, the conclusion fails to reflect the definition of disability contained in the existing disability legislation in many of the member states. Given the non-regression principle contained in the directive, the judgment will not affect those definitions.

It is inevitable, however, that over time, the judgments of the court will develop and it is to be hoped that they will better reflect the social model of disability in future. The judgment fails, in particular, to take into account the stigma which may be faced by people with disabilities and particular chronic conditions, which may not fit within its concept of disability (ie the social model of disability).

Although it is true that disability and sickness are not the same, the judgment treats them as though they are mutually exclusive concepts –

which is not the case. There may be an overlap between sickness and disability – for example, multiple sclerosis may be considered to be an 'illness'.

It is arguable that the judgment may still leave room for certain 'sickness' to be covered – should it produce a 'limitation' – if it is probable that it will be 'long term'. Although no indication is given as to what period of time this would be, Ms Navas was off work for eight months, which was clearly insufficient in this case to amount to 'long term'.

The reference, however, contained very little factual information to put the issues into context – for example, there was no information about the nature of Ms Navas' illness, nor about its impact upon her life – and this may well have contributed to the approach taken by the ECJ.

The UK's definition of disability does attempt to address the issue of stigma and long-term conditions – with, for example, automatic coverage for people with severe disfigurements, HIV, cancer and multiple sclerosis. However, it fails to do this fully and is an extremely complicated means to achieving the end protection of the DDA. This was indicated in the recent consultation on the definition of disability, and is reflected in the DRC's proposals for change, discussed later on in this article.

Coleman v Attridge Law and Steve Law Case No 2303745/2005

The ECJ will be given a further opportunity to consider the disability aspects of the directive in the first reference from a UK court.

The case of Coleman v Attridge Law and Steve Law concerned a woman who claimed constructive unfair dismissal and disability discrimination. Her claim of disability discrimination was based not on her own disability, but on being the carer of a disabled person – her son. It is the DRC's view that discrimination by association is covered by the European Employment Directive's provisions prohibiting discrimination 'on grounds of' disability.

The tribunal ordered that the following questions be referred to the ECJ for a preliminary ruling:

(1) In the context of the prohibition of discrimination on grounds of disability, does the directive only protect from direct discrimination and harassment persons who are themselves disabled?

(2) If the answer to question (1) above is in the negative, does the directive protect employees who, though they are not themselves disabled, are treated less favourably or harassed on the ground of their association with a person who is disabled?

(3) Where an employer treats an employee less favourably than he treats or would treat other employees, and it is established that the ground for the treatment of the employee is that the employee has a disabled son for whom the employee cares, is that treatment direct discrimination in breach of the principle of equal treatment established by the directive?

(4) Where an employer harasses an employee and it is established that the ground for the treatment of the employee is that the employee has a disabled son for whom the employee cares, is that harassment a breach of the principle of equal treatment established by the directive?

The respondents have appealed against the decision of the tribunal.

DRC proposals on definition of disability

When the Joint Scrutiny Committee considered what was then the Disability Discrimination Bill in 2004, it recommended that the DRC, in line with its duty to keep the working of the DDA under review, should consider and consult on whether, and if so how, the law could be amended to provide:

a) protection against discrimination on the grounds of impairment, regardless of level or type of impairment, and

b) entitlements to the removal of disabling barriers.

The DRC consulted from December 2005 to March 2006 on whether the definition of disability should be changed.

104 responses were received, overwhelmingly in favour of a change from the present definition.

Following this, the DRC is recommending to the Government that disability discrimination law moves away from protecting a group of 'disabled' people and, instead, protects anyone who experiences discrimination on the grounds of an impairment. This recommendation is based on:

- experience through case law
- the observations of the Joint Scrutiny Committee on the Disability Discrimination Bill, and
- the results of the consultation.

An example of how the present definition causes considerable difficulties – and an inequitable result – is the case of **Gittins v Oxford Radcliffe NHS Trust EAT 193/99.**

Mrs Gittins was a nurse who was denied employment on the basis that she had bulimia nervosa. The hospital Trust concerned did not seek to justify their decision, but rather they successfully argued that since Mrs Gittins' impairment did not constitute a disability under the DDA, she was not legally entitled to challenge their decision.

The proposed change would have made it easy for Mrs Gittins to establish that she was entitled to protection against discrimination; the case would have focused instead on whether the Trust could have justified their refusal to employ her because of their perceptions of the risks associated with her impairment.

Specifically, it is proposed that the Disability Discrimination Act 1995's definition of disability should be changed to one which gives protection from discrimination to everyone who has (or has had or is perceived to have) an impairment. There would be no requirement, as at present, to show that the effects of an impairment are 'substantial' and 'long term'.

There would be strong benefits from such a change, such as:

- ensuring clear protection for all those who need it

- placing the focus on the fairness and reasonableness of employers/service providers, rather than on the medical condition of the individual
- producing a simpler, more certain approach for identifying who has protection
- providing better access to justice
- producing a more positive approach, encouraging a more systemic approach to change and bringing the law into line with best practice.

Of these, the chief impact would be to shift the focus of attention in disability discrimination disputes away from the individual's medical condition and on to the fairness of that person's treatment. More people would potentially be able to claim protection from disability discrimination.

The DRC does not underestimate the significance of this proposal. Indeed, the Commission has identified a number of potential areas of risk. It is recognised that further attention or action may be necessary, including:

- consideration of the exclusion of particular minor and transient conditions
- careful drafting of the law to retain the current approach to positive discrimination and reasonable adjustments
- wide public consultation
- regulatory impact assessment
- strong communications campaign.

The proposed change would only apply to discrimination law and would not affect state programmes or services such as the blue badge or entitlements to welfare benefits.

If the Government responds positively to this proposal, it is expected that it would conduct a further, more extensive public consultation on whether and how to make any changes to the definition of disability.

Any changes could be introduced by a Single Equality Act, which the government has said it will introduce in the next few years.

Taylor-made controversy

Martin Crick, Legal Officer at the DRC, considers the recent Court of Appeal judgment in Taylor v OCS Group

The Court of Appeal recently handed down a somewhat controversial judgment in the case of **Taylor v OCS Group Ltd [2006] EWCA Civ 702**. It is a decision that will not be welcomed by claimants and their representatives; potentially it makes discrimination more difficult to establish in some circumstances.

The controversy is focused on the Court's restrictive interpretation of 'disability-related discrimination' under the Disability Discrimination Act (DDA) 1995. The Court of Appeal decided that unless a disability-related reason for the less favourable treatment is present in and affected the mind of the alleged discriminator, there is no unlawful discrimination. Unless distinguished, this raises the hurdle for claimants by introducing a requirement to demonstrate that the discriminator had a certain state of mind. This is not good news for victims of discrimination.

The DRC is disappointed at this development and believes that the restrictive interpretation of 'disability-related discrimination' adopted by the Court of Appeal is open to challenge.

In the meantime, careful consideration of the Taylor judgment should help ensure that any adverse consequences are properly restricted.

Facts

Following an investigation into alleged misconduct, Mr Taylor, who is deaf, was invited to attend a disciplinary hearing. He was not provided with a British Sign Language (BSL) interpreter during the course of the hearing; as a result he could not participate effectively and struggled to understand what was happening. At the end of the hearing he was dismissed. An appeal hearing was held at which Mr Taylor was represented by his sister. An interpreter was provided but was unable to stay throughout and so Mr Taylor's sister took over as interpreter for the remainder of the appeal. The decision to dismiss Mr Taylor was affirmed.

Claims

As well as alleging that he had been unfairly dismissed, Mr Taylor brought claims under the DDA 1995 of unlawful disability-related discrimination and failure to make reasonable adjustments.

Reasonable adjustments
It was submitted that Mr Taylor had been at a substantial disadvantage in understanding the nature and purpose of communication during the disciplinary hearing and that there had been a failure to discharge the consequent duty to make a reasonable adjustment by providing a BSL interpreter.

Disability-related discrimination
It was submitted that the decision to dismiss Mr Taylor constituted disability-related discrimination as the decision resulted, in part, from Mr Taylor's communication difficulties and he may not have been dismissed had the adjustment – the provision of a BSL interpreter – been made.

Employment tribunal

The employment tribunal (ET) decided that Mr Taylor had been unfairly dismissed and that his employer had failed to make reasonable adjustments by omitting to provide a BSL interpreter at the disciplinary hearing.

Despite this, the tribunal concluded that the decision to dismiss Mr Taylor did not constitute disability-related discrimination. The tribunal was of the view that the reason for dismissal was conduct and this reason was not, therefore, disability-related.

Employment Appeal Tribunal

On appeal, the Employment Appeal Tribunal (EAT) reversed the ET conclusion on disability-related discrimination. The EAT held that the failure to make a reasonable adjustment had sufficient bearing on the decision to dismiss so as to constitute disability-related discrimination. This could not be justified due to the failure to make reasonable adjustments, as provided for in the DDA. Mr Taylor's disability had resulted in him failing to give a proper explanation for his actions and that had had a significant influence on the decision to dismiss him.

The EAT also upheld the ET decisions on the reasonable adjustments and unfair dismissal claims.

Court of Appeal

The employer was refused permission to appeal to the Court of Appeal in relation to the finding that it had failed to make reasonable adjustments.

In relation to the unfair dismissal claim, the employer's appeal was allowed and the case was remitted to a differently constituted employment tribunal. The Court held that, if a first disciplinary hearing is defective, the appeal hearing can cure the defect if that appeal is comprehensive.

Additionally, the employer's appeal in relation to the finding of disability-related discrimination was allowed and the order of the original employment tribunal – dismissing Mr Taylor's claim of disability-related discrimination – was restored.

It is this final aspect of the Court of Appeal judgment – dealing with disability-related discrimination – which has caused particular concern.

Comment

At the heart of the Court of Appeal's controversial

interpretation of 'disability-related discrimination' lies the assertion by Lady Justice Smith that 'discrimination requires that the employer should have a certain state of mind'.

Certainly, the incorporation of a subjective element – a requirement to prove that the discriminator had a certain state of mind – into what was previously thought to be an objective test is an unwelcome development. It is potentially an additional barrier to justice for victims of discrimination and an escape-route for those who discriminate.

In the present case, the Court of Appeal considered there was no evidence that this employer had a disability-related reason in his mind when he dismissed Mr Taylor. The reason for dismissal was conduct and the employer's mind was not affected, consciously or subconsciously, by a disability-related reason.

This was the case even though the Court of Appeal clearly recognised that there could be a causative link between Mr Taylor's disability and the decision to dismiss him (presumably on an objective assessment of the facts). Despite this, they decided that the subjective element of proving the employer had a disability-related reason in their mind at the time they decided to dismiss him could not be met in this case. It seems they accept that reasonable adjustments would have made a difference, but nevertheless, disability-related discrimination is said not to be made out in the absence of a disability-related reason affecting the employer's mind.

In a revealing passage set out in paragraph 73 of the Court of Appeal judgment, Smith LJ states:

> 'Here, the contributory reason relied on by Mr Taylor is not said to have affected the employer's mind. It is said that Mr Taylor's inability (on account of his deafness) to explain his conduct, contributed to his dismissal. So it may have done, as a matter of causation. It may be that, if Mr Taylor had not been deaf or had had an interpreter present at the first

disciplinary hearing, he might not have been dismissed. But that is not the issue under section 5(1). The issue is whether the employer had a disability-related reason in his mind when he dismissed the employee. There was no evidence that this employer had; indeed that was never suggested.'

Restricting the impact

The Taylor-test is certainly an unhelpful one. However, there are a number of factors which may assist claimants and their representatives to restrict any adverse consequences arising from this decision.

Intention
1. The Court of Appeal was careful to avoid suggesting that this subjective state of mind test imposes a need to prove that the employer had an **intention** to discriminate. The court drew a distinction between 'having in mind' and 'intention' and held that it is only necessary to show the former (paragraph 71).

Subconscious affect on employer
2. Further, the Court of Appeal conceded that it would be open to an employment tribunal to find that the employer's decision had been affected by the disability-related reason even though the employer had not **consciously** allowed that reason to affect his thinking. 'What is important is that the disability-related reason must affect the employer's mind, whether consciously or subconsciously.' (paragraph 72)

House of Lords on motive
3. Indeed, there is superior authority from the House of Lords on the question of motive in the context of discrimination claims. **Nagarajan v London Regional Transport, HL [2000] 1 A.C. 501** is authority for the proposition that direct discrimination (on the grounds of race) does not require a conscious motivation on behalf of the perpetrator. Prior to this, the House of Lords in **Reg v Birmingham City Council, ex parte Equal Opportunities Commission [1989] A.C. 1155** unanimously rejected a test importing a requirement of intention or motive in the context of section 1(1)(a) of the Sex Discrimination Act 1975. Lord Goff of Chieveley observed, at page 1194: 'The intention or motive of the defendant to

discriminate, though it may be relevant so far as remedies are concerned… is not a necessary condition of liability; it is perfectly possible to envisage cases where the defendant had no such motive, and yet did in fact discriminate on the ground of sex.' In **James v Eastleigh Borough Council [1990] 2 A.C. 751** – another House of Lords decision – the dictum in the Birmingham case was adopted and applied. Lord Ackner stated succinctly at page 770, that 'the council's motive for this discrimination is nothing to the point.'

More than one reason

4. It was also recognised by the Court of Appeal in Taylor that in some cases an employer might have more than one reason for dismissing an employee. For example, one reason for dismissal may be conduct, but the employer may also have in mind another reason which does relate to that employee's disability (for example, their sickness absence record). It was accepted that in such cases, if the disability-related reason had a significant influence on the employer's decision, that would be enough in order for the dismissal to be for a reason related to the employee's disability (paragraph 72).

Satisfying the test

5. The Court of Appeal considered the EAT decision in **HJ Heinz Co Ltd v Kenrick [2000] IRLR 144 EAT**. Although they felt this decision supported the employer's assertion that the disability-related reason must be present in the employer's mind, it may be of some assistance to claimants that the court went on to form the view that, in the Heinz case, the test would certainly have been satisfied. In that case, the employer dismissed the employee because he had been off work for so long and no date could be given for when he would be fit to return. At the time of the dismissal, a diagnosis had not been confirmed and the employer sought to defend the DDA claim on the basis that it did not know that the employee's condition was a disability under the Act. The EAT held that this did not matter. The employer knew about the condition and the absence it caused and that was the reason for the

dismissal. The dismissal was for a reason related to the disability. On these facts, the Court of Appeal felt that the employer did indeed have in mind a reason related to the employee's disability – namely his long-term absence.

Reasonable adjustments

6. Importantly, it is to be noted that the Court of Appeal judgment is of no significance in a claim that an employer failed to make reasonable adjustments. Indeed, the employer was refused permission to appeal on this point to the Court of Appeal after the EAT upheld the finding of the employment tribunal that the employer had failed to make the reasonable adjustment of providing a BSL interpreter at the disciplinary hearing.

The Court of Appeal's restrictive interpretation in practice

Notwithstanding that there are limits to its application, it is recognised that, where it cannot be distinguished, the Taylor test is an unhelpful development which imposes an additional burden onto the claimant.

Inevitably, questions will now arise about how the test will work in practice. For instance, it has been mentioned that the Court of Appeal was careful to stop short of requiring proof of intention to discriminate. Yet, to discriminate, it was held that the employer must have the disability-related reason in mind, and this reason must affect the employer's mind. 'Unless that reason has affected his mind, he cannot discriminate' (paragraph 72).

So, in practice, when does 'having one's mind affected (by a disability-related reason)' become 'motive' or 'intention' to discriminate? Unless the judiciary are able to establish this boundary with certainty, the Taylor-test becomes difficult, if not impossible, to apply.

More fundamentally, how relevant anyway is the question of what was in the employer's mind if it is accepted that the employer's actions had a discriminatory impact?

Certainly the judgment is difficult to reconcile with previous authority on disability-related discrimination, including the

leading case of **Clark v TDG Ltd t/a Novacold [1999] IRLR 318** where a wide construction of what was then section 5(1) of the DDA (now section 3A(1)) was preferred by the Court of Appeal.

Beyond Taylor

This controversial judgment has, for now at least, the potential to generate some confusion in respect of the correct test to apply to disability-related discrimination claims.

Despite those factors listed above which should properly restrict the adverse consequences of Taylor, this case, where it cannot be distinguished, may muddy what were previously clear waters.

Indeed, the potential implications of Taylor can be illustrated quite starkly by reading across the Court of Appeal's restrictive interpretation into other parts of the DDA, such as Part 3 – which covers rights of access to goods and services.

Consider, for example, the not uncommon scenario of a café refusing entry to a blind person because they are accompanied by an assistance dog. The refusal by the café would give rise to a claim of disability-related discrimination under section 20(1) in Part 3 of the DDA 1995. This provision mirrors the provision in Part 2 of the Act (section 3(A)(1), formerly section 5(1)) which protects employees from disability-related discrimination and which was explored by the Court of Appeal in Taylor.

The refusal of service by the café amounts to less favourable treatment of the blind person. The question which must then arise is whether this treatment is for a reason related to the person's disability? It has to be the case that it is, as the reason for the presence of the assistance dog is to give assistance to the visually-impaired person who wishes to access the service. As assistance dogs owners rely on their dogs to get around safely, refusing to allow an assistance dog on to the premises means refusing to provide a service to the owner for a reason relating to their disability.

If the Taylor test is introduced into the equation, however, the position is less clear. The café owner who defends such an action on the basis that the establishment operates a 'no dogs' policy, might now (post-Taylor) seek to argue that he did not have a disability-related reason in his mind at the time. Instead, it might be sufficient to demonstrate a health and safety reason for the policy.

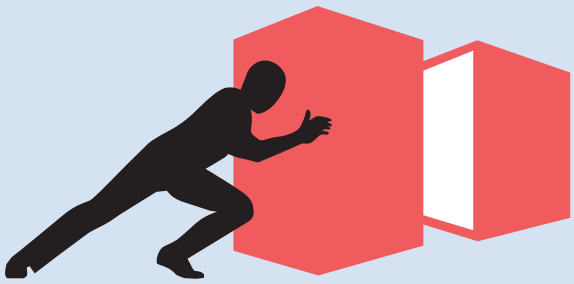
According to the Court of Appeal in Taylor, unless a reason which is related to the employee's disability is present in the alleged discriminator's mind and has affected his mind, there is no unlawful discrimination. So, if it is accepted that the café owner only had health and safety concerns in mind (and not a disability-related reason), the claim would appear to fail the Taylor test, regardless of the obvious discriminatory impact on the disabled person.

It is respectfully suggested that this cannot be right and this is not the correct test to apply in the context of any discrimination claim, whether relating to rights of access, education or employment.

With this in mind, it is anticipated that Taylor will not be the end of this particular debate.

The Disability Rights Commission, which recognises that these issues need further consideration, will consider supporting a suitable case that may enable these principles to be explored fully. In considering cases for possible support, it is recognised that an unsuccessful first instance claim under the provisions of Part 3 of the DDA (covering rights of access to goods and services) may invite an appeal on this important issue directly to the Court of Appeal. The DRC can be contacted using the details on the back cover of this publication.

News in brief



Equal Treatment: Closing the Gap

DRC's Formal Investigation into health inequalities

The DRC has recently published its final report following a comprehensive investigation into physical health inequalities experienced by people with mental health problems and/or learning disabilities.

Data

The investigation, which was featured in issue 7 of the Legal Bulletin, is unique internationally in bringing together three powerful sets of data to inform robust recommendations. That data consisted of:

1. **New research**. The most comprehensive study of primary care records and mental health issues in the world (8 million primary care records), coupled with Area Studies in four areas, extensive consultation with

service users and providers and evidence reviews. This enabled a detailed exploration of health inequalities, barriers to services and potential solutions to be undertaken.

2. **Written and oral evidence** analysed by a high level Inquiry Panel, who generated recommendations designed to work practically in the newly-configured national health services.

3. **Existing evidence** collated through literature review.

Findings

The investigation found that people with mental health problems have higher rates of obesity, smoking, heart disease, hypertension, respiratory disease, diabetes, stroke and breast cancer than other citizens. People with learning disabilities experience higher rates of obesity and respiratory disease and high levels of unmet need.

One internationally new finding from the investigation is that people with schizophrenia are almost twice as likely to have bowel cancer as other citizens. People with mental health problems tend to get these conditions younger and die of them faster. They are more likely than others to develop coronary heart disease, diabetes, respiratory disease or have a stroke before the age of 55. Once they have these illnesses they are less likely to survive for five years.

Recommendations

The investigation report calls for a step change in the delivery of health services to people with learning disabilities and/or mental health problems. The Disability Equality Duty (DED), in force from December 2006, provides a legislative impetus for the public sector to improve outcomes for disabled people. The investigation recommendations identify practical ways for health organisations and policy makers to make this step change and will assist them to comply with the DED.

Further information

The Formal Investigation report, summary reports for target audiences, Welsh Executive Summary report, background evidence paper and supporting research reports are available at: **www.drc-gb.org/healthinvestigation**

DRC in partnership with Law Centres Federation and IPSEA

The DRC has entered into partnerships with the Law Centres Federation (LCF) and the Independent Panel for Special Education Advice (IPSEA) to help address access to justice issues and to increase awareness of rights under the Disability Discrimination Act 1995.

The partnerships form part of the DRC's capacity-building programme, which was highlighted in issue 8 of the Legal Bulletin.

The DRC has long recognised that if we are to reach those groups of disabled people who, perhaps because of a variety of factors including their social and financial circumstances, their race, gender or age, find it particularly difficult to obtain justice through the legal system, we can't simply wait for them to find us.

There remains a worryingly low level of awareness of basic rights under the DDA amongst all sections of the community and even more so amongst these groups. Even when disabled people are aware of the DDA, they are usually thinking of employment rights and not the rights to equal access to goods and services or to education that the DDA also provides.

The partnerships with LCF and IPSEA – both of whom have impressive track records in advice provision and representation – represent a major effort to tackle these problems.

LCF

The DRC has funded 15 posts in Law Centres for Disability Rights Workers, spread across England and Wales. The Disability Rights Workers are tasked with raising awareness of rights under the DDA in their local communities and client groups. They will also provide advice and representation on DDA matters, with a particular focus on the under-utilised Part 3 of the DDA, which deals with rights of access to goods and services. By using each local Law Centre's existing and developing networks and contacts, the DRC aims to take rights into the heart of local communities by raising awareness and offering advice and representation where it is most needed.

Scotland

In Scotland, the DRC has combined forces with the Legal

Services Agency to fund a Law Centre post providing a similar service. In conjunction with Citizens Advice Scotland, Capability Scotland, and UPDATE, the DRC is also employing a solicitor, funded by the Scottish Legal Aid Board, to work with advice agencies and solicitors to raise awareness of DDA rights and duties.

IPSEA

IPSEA is an independent advisory service for parents or carers of children on education matters arising in schools. It provides representation at Special Educational Needs and Disability Tribunals (which deal with challenges to educational provision and statements of special educational needs, disability discrimination and fixed-term exclusions) and at Independent Appeal Panels (which deal with permanent exclusions).

The DRC has funded four posts for advisers in IPSEA, covering the North West, North East, South West and South East of England.

The advisers have a dual remit:

- to raise awareness of education rights under Part 4 of the DDA, through existing networks such as local parent partnerships and by developing new links with representative groups; and
- to provide advice and representation within their region on disability discrimination matters in schools.

The partnership project, launched in January 2006, will continue throughout the remaining life of the DRC. Both LCF and IPSEA are already delivering great outcomes for disabled people and it is anticipated that, by the time that the existing Commissions merge into the CEHR in October 2007, the project will have produced such a proven track record of success that the CEHR will enthusiastically adopt it as a model of rights-based advice and representation provision to the most vulnerable groups in our society.

If you wish to refer a matter to IPSEA advisers or Disability Rights Workers, please contact the DRC Helpline – details are provided on the back cover of this issue. Alternatively contact details for the Disability Rights Workers can be found on the DRC website at: **www.drc-gb.org**

Disability Discrimination

Advising parents on making a claim

A free half-day seminar provided by the DRC/IPSEA Schools Project.

This seminar is designed for anyone who provides advice and support to parents/carers and who would like to develop their knowledge of disability discrimination rights and remedies in schools. The seminar will be facilitated by specialist advisers from the DRC/IPSEA Schools Project. The topics covered will include:

- Schools duties under the Disability Discrimination Act 1995
- Remedies available to parents
- How to make a Disability Discrimination claim to SENDIST and Independent Appeal Panels
- The overlap with the special educational needs framework

Disability Rights Commission

in Schools

This seminar will be held at the following venues:

Bristol	**16**	**November**	**2006**
Manchester	**30**	**November**	**2006**
Newcastle	**5**	**December**	**2006**
Birmingham	**11**	**December**	**2006**
London	**13**	**December**	**2006**
Cardiff	**14**	**December**	**2006**

For further details, including a booking form, please email **Steff Tharle** at steff.ipsea@intamail.com or write to her at

IPSEA
6 Carlow Mews
Woodbridge
Suffolk
IP12 IEA

with details of your organisation and number of delegates who would like attend. Details of courses in other regions are also available from Steff Tharle.

IPSEA
Independent Panel for Special Education Advice

Employer directly discriminated

The first direct disability discrimination case supported by the DRC to be considered by the employment tribunals concluded recently.

The claimant in **Tudor v Spen Corner Veterinary Centre Ltd and anor, Manchester Employment Tribunal (Case No 2404211/05),** won her claim of direct disability discrimination and also succeeded in claims of unfair dismissal, failure to make reasonable adjustments and disability-related discrimination. She was awarded £20,352.85.

Facts

Miss Tudor had been employed as a veterinary nursing assistant. In May 2005, she was admitted to hospital following a stroke and while in hospital was told that she had gone blind. It was unknown when or if her sight would return.

Miss Tudor's mother informed her daughter's employer that the claimant had lost sight in both eyes and provided the respondents with relevant medical certificates. After her employer received this information, Miss Tudor was dismissed.

Direct discrimination

Direct discrimination requires that the treatment is on the ground of the disabled person's disability, and is less favourable than the way in which an appropriate comparator is (or would be) treated.

Her treatment is to be compared with that of someone who does not have the same disability but whose relevant circumstances, including abilities, are the same as, or not materially different from, her own. Direct discrimination – unlike the more common claim of less favourable treatment for a disability-related reason – cannot be justified.

The judgment

It is to be welcomed that, in assessing the direct discrimination claim, the tribunal made reference to the Code of Practice on Employment and Occupation. The tribunal was satisfied that generalised and stereotypical assumptions were made about Miss Tudor, the duration of her disability and its effects. At the time of dismissal, her employer had no means of knowing whether Miss Tudor would make a recovery. Her employer did not hold a meeting, did not seek input from the employee and made no proper enquiries as to what reasonable adjustments might be made before taking the decision to dismiss.

It was accepted that an appropriate comparator could be an employee who has broken her leg, where this causes her to be unable to work and where it is unclear when she might be able to resume work again. The Tribunal stated: 'In respect of such an individual we do not consider that the respondents would have made stereotypical assumptions of their likelihood of recovery or their ability to do their job again. Further, the respondents would not have been so quick to rush to judgment without a proper consideration of all the relevant circumstances.'

Miss Tudor's award for loss of earnings was reduced to reflect a finding that there was only a 50 per cent chance of her remaining in employment even with reasonable adjustments in place.

The decision highlights the need for employers to give proper consideration to all relevant circumstances, including making enquiries as to what reasonable adjustments might be made.

Debenhams confirms commitment to making stores accessible for disabled people

Debenhams has signed a formal agreement with the Disability Rights Commission to improve access in its retail stores in England.

The legally binding agreement was made under the framework of section 5 of the Disability Rights Commission Act 1999 ('DRCA'). This provision allows the DRC to enter into an agreement in lieu of enforcement action where the Commission has reason to believe that a person has committed or is committing an unlawful act.

The agreement follows legal action brought against Debenhams by Mr Greg Jackson, a 43-year-old wheelchair user, in July 2005.

Mr Jackson had been unable to access part of the menswear section in Debenhams, Derby. The part he found inaccessible was situated at mezzanine level and could only be accessed by two routes, both of which required customers to climb four steps.

Since 1 October 2004, service providers have had a duty to make reasonable adjustments in relation to physical features which make it impossible or unreasonably difficult for disabled people to make use of services. Where this duty applies, the service provider must take reasonable steps to remove the feature, alter it so that it no longer has that effect, provide a reasonable means of avoiding it, or provide a reasonable alternative method of making the service available to disabled people.

It was submitted that the options of providing the service by alternative means (such as internet shopping or the provision of staff assistance to bring goods down to the customer from the mezzanine floor) were unacceptable. These would constitute the provision of a lower standard of service as disabled customers would be prevented from being able to browse goods personally and at leisure, without pressure or embarrassment.

The 'section 5 agreement' commits Debenhams to have in place suitable means for disabled customers to access

previously inaccessible mezzanine floor areas in 16 of its stores, within six months from the date of the agreement. Debenhams will deliver a written report to the DRC on the measures it has implemented.

Under the terms of the agreement, the County Court claim brought by Mr Jackson was withdrawn. The improvements which Debenhams committed to included the installation and maintenance of an accessible platform lift to the mezzanine floor area in their Derby store – the area which Mr Jackson had previously been unable to access.

The agreement underlines the extent of the responsibilities for large retailers regarding what is reasonable under the requirements of the DDA.

It also highlights the value of a 'section 5 agreement' in achieving wider change through outcomes which can benefit disabled people generally. Had the matter been successful following a trial, the question of remedy for Mr Jackson would have been determined within the constraints of the Court's more limited powers in this regard.

Revised Code of Practice under Part 3 of the DDA: Rights of Access: services and premises (services to the public, public authority functions, private clubs and premises)

The revised Code of Practice on Rights of Access under Part 3 of the DDA was laid before Parliament on 8 June 2006 for a period of 40 days. It is being issued under section 53A(4) of the DDA and will come into force on a day to be appointed by the Secretary of State, which is planned to be 4 December 2006. It will reflect the changes to Part 3 of the DDA which are being introduced in December 2006 (including new duties for landlords, private clubs and public authorities). The revised Code is available on the DRC website at: **www.drc-gb.org**

Human rights summit:
Bringing human rights down to earth

The Disability Rights Commission convened a human rights summit on 11 July 2006 to address the current challenges to building a human rights culture in Britain.

The summit, which was chaired by DRC Chairman Bert Massie and Cherie Booth QC, brought together a wide-range of stakeholders including representatives from inspection bodies, the voluntary and advice sector, and all the equality strands, as well as educationalists, lawyers, and individuals who have used the Human Rights Act to enforce their rights. Under consideration was the question of how human rights can be better understood and supported in Britain as the foundation of a fair society.

Joint statement from DRC human rights summit

At the close of the summit, attendees agreed the following joint statement:

'We all came together because we are passionate about defending and promoting human rights and the values of fairness, respect, equality and dignity. These are the values at the heart of the Human Rights Act.

We agreed the following actions and recommendations:

We call on all political parties to:

- strongly reaffirm the value and importance of human rights and the Human Rights Act and champion them consistently.

We call on the Government to:

- ensure all public servants are provided with appropriate support and training in human rights values and principles
- support and resource voluntary and community organisations to use human rights in their work

- work with us to deliver greater opportunities for people of all ages and backgrounds to find out about their human rights, and be empowered to use them to get a fair deal
- ensure that everyone can access quality legal advice, advocacy and representation wherever they live, including by supporting and resourcing the advice sector, voluntary groups and Law Centres.

We call on the future Commission for Equality and Human Rights to:

- put human rights at the heart of its mission
- use its powers to spread awareness and understanding of human rights and to enhance the dignity of all.

For our part, we will redouble efforts to:

- defend human rights principles and values, resisting attempts to scrap or water down the Human Rights Act, even where it may be unpopular to do so,
- challenge misinformation in the media about the Human Rights Act
- ensure public services build human rights into their decision-making and delivery.'

Organisations and individuals who endorsed this statement include:

- Age Concern
- British Institute of Human Rights
- Ulele Burnham, Chair of the Discrimination Law Association
- Frances Butler, Human Rights Consultant
- Children's Rights Alliance for England
- Disability Rights Commission
- Sandhya Drew, Barrister at Tooks Chambers
- Equal Opportunities Commission
- Equalities National Council for BME disabled people
- Help the Aged
- Justice
- Dr Francesca Klug, Professorial Research Fellow, Centre for the Study of Human Rights, London School of Economics
- Liberty.

The British Institute of HUMAN RIGHTS

Available now – 'Your Human Rights' guides

The British Institute of Human Rights (BIHR) has recently launched 'Your Human Rights' – a series of four non-technical guides focusing on the practical relevance of human rights in the UK.

The guides are written directly for disabled people, people living with mental health problems, older people and refugees and asylum seekers who are in situations where they may need information on their human rights. They will also be useful for people working with these groups, or people who would like to know more about the impact of human rights on these groups.

The DRC is pleased to have provided assistance in the preparation of the BIHR's guide for disabled people.

The guides are now available from the BIHR website at www.bihr.org.

BIHR is keen to make sure that the guides reach the people that they are written for. Please contact BIHR on 020 7848 1818 or admin@bihr.org if:

- you belong to an organisation that may be able to help distribute or publicise the guides
- you would like to order printed copies of the guides; or
- you would like the guides in other formats.

The British Institute of Human Rights is an independent Charity which raises awareness and understanding about the importance of human rights. It works for some of the most disadvantaged and vulnerable communities in the UK, seeking to ensure that the principles of equality, dignity and respect are incorporated into practice and policy at all levels of public service.

New Education Regulations and Code of Practice

The Disability Discrimination Act 1995 (Amendment) (Further and Higher Education) Regulations 2006 (SI 2006/1721) ('the Regulations') were laid before Parliament on 10 July 2006 to come into force on 1 September 2006. The Regulations – outlined in issue 9 of the Legal Bulletin – aim to implement the anti-discrimination requirements of the European Framework Directive (EU Council Directive 2000/78/EC of 27 November 2000) in respect of vocational education and training.

The new duties apply to most further and higher education institutions. The DRC has prepared a revised Code of Practice on Part 4 of the DDA for post-16 education which provides guidance on the interpretation of the new duties.

Production of the revised Code was contingent on the publication of the Regulations by the Department for Education and Skills (DfES). The Regulations were published later than expected, in July 2006. Since then the DRC has liaised closely with DfES, for the most part successfully, to ensure a common interpretation of the new duties.

The revised Code requires ministerial and parliamentary approval before it has statutory force (which in effect would require courts to consider the Code where relevant). Given the delay in finalising the Regulations, the revised Code did not have statutory force at the date the Regulations came into effect (1 September 2006). It is anticipated that obtaining the necessary approvals in this regard is likely to take until December 2006. It is very unlikely that any cases concerning the new duties will be heard by the courts before this date.

In the meantime, the revised Code is available to view as non-statutory guidance from the DRC website: **www.drc-gb.org**. Printed copies and various formats will be published when the revised Code has statutory force.

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 refer to 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'
- cases involving adults with learning difficulties and other impairments which make access to justice difficult
- cases that involve human rights issues.

Part 2 – Employment

- recruitment cases involving obtaining employment at a level commensurate with ability
- cases involving the opportunity to progress within a given career
- cases that challenge cautious occupational health assessments concerning risk, and highlight the need to avoid making stereotypical or generalised assumptions
- cases involving the opportunity to enter a profession and/or pursue a chosen career path
- cases concerning employment in the health and social care sector.

Part 3 – Access to Goods, Facilities and Services etc

- cases that will test the provisions introduced by the DDA 2005 relating to:
  - less favourable treatment by private clubs, or
  - (from December 2006) public authority functions, premises, services in respect of transport vehicles or the reasonable adjustments duty that applies to private clubs

Part 4 – Education

- cases (including cases heard by SENDIST/SENTW) that will clarify the application of the new provisions on education contained in Part 4 of the DDA
- cases that will show differences in the application of the law in pre- and post-16 education.

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**

LEGAL16

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