Disability Rights Commission December 2001

Legal Bulletin

Securing legal rights in practice for disabled people

Contents

Central to the DRC's work is the task of securing legal rights for disabled people throughout England, Scotland and Wales, not merely as a theoretical possibility but as a practical reality.

Securing legal rights is not, however, synonymous with enforcing legal rights. The DRC is more than just an enforcement agency: its mission is to advise and to conciliate as well, and so secure legal rights by extra-legal means too.

Securing legal rights in practice means making the law work for disabled people, not engaging in legal activity for its own sake. Legal enforcement is a means, not an end; and it is just one of many means.

Individual cases attracting DRC legal representation

In its first 18 months the DRC has started work on making disability rights a practical reality. The DRC Helpline has provided advice to thousands of callers (over 64,000 in the

first year) and the casework team has offered more in-depth assistance, legal and otherwise, to roughly a further 2,500 individual disabled people.

In addition, the legal team has taken forward 78 cases on behalf of disabled individuals by providing or arranging legal representation in the civil courts and employment tribunals:

- Part II: 50 in total
- Part III: 28 cases in total
- in 26 cases the matter has either been resolved by a favourable judgement in the court or tribunal, or by the achievement of a satisfactory settlement
- in 11 cases, the claim has either been withdrawn by the applicant or defeated in the court or tribunal
- in the remaining 41 cases, the claim is still proceeding
- in Part II cases, the average award or settlement has been approximately £8,000 and in Part III cases £500
- in Part II cases, the most common impairments have been mobility impairments, visual impairments and mental impairment
- in Part III cases, the most common impairment has been mobility impairment
- other impairments have included diabetes, learning difficulties, manual dexterity, neurological conditions, epilepsy, hearing impairment, cancer and heart disease.

Details of all supported cases can be found on the DRC website at www.drc-gb.org

Conciliation under Part III DDA

In addition to providing or arranging legal representation, the DRC has since the outset been able to offer referrals to independent conciliation in cases relating to Part III goods, facilities and services disputes (to supplement the conciliation work done by ACAS in respect of employment disputes under Part II of the DDA).

The particular advantage of conciliation is that it enables the parties to achieve practical, often non-monetary, solutions to a dispute in a manner that addresses the underlying issues and so promotes lasting change. Such outcomes are to the advantage of all concerned, the disabled person, the service provider and future disabled users of the service.

- During the first year, 156 referrals to conciliation were made at no financial cost to either party.
- In as many as 60% of those cases, a settlement was achieved without recourse to the civil courts.

In March 2001 the DRC entered into contract with Mediation UK, a community-based conciliation network, to run the Disability Conciliation Service for the next three years.

Future Challenges

Despite the effective start that has been made on securing legal rights for individuals either by the provision of legal advice, assistance and representation or by the offer of free conciliation in respect of Part III cases, there is much that remains to be done to make the law work effectively for all disabled people. In particular, there remains the central task of translating the provisions of the DDA into widespread daily reality. Local successes in resolving disputes in individual cases or by winning a court case will not in themselves establish lasting and mutually beneficial change.

The central challenge therefore takes the form of transcending the individualism that underlies the legal process so that existing legal rights can be realised more widely. If the legal resources available to the DRC are to be used most effectively, their application must be strategic, informed by broader policy and communication initiatives, rather than merely reactive.

Partnership

The DRC recognises that it cannot secure legal rights for disabled people on its own. Already, it has sought to work in England, Wales and Scotland with disabled people, with public agencies, trade unions and with business to establish initiatives that will be of mutual benefit.

With further collaboration of this sort, the DRC will become the focal point for a miscellany of initiatives designed to make disability rights a reality: advice, conciliation and enforcement, each as a means of securing legal rights in practice and so a society in which all disabled people can participate fully as equal citizens.

Monitoring the DDA: is the law working?

Legislation is no guarantor of social change; nor can the law operate in isolation from other social and economic forces. The causes of social change are complex, the reasons for legislative impotence various. To stand a chance of success, the law must be adequately framed, the courts and tribunals sympathetic to its generous interpretation. The alternative is erosion and obsolescence. So, what of the DDA to date?

Use of the DDA

The news on use is mixed. The available research (Monitoring the Disability Discrimination Act 1995: Report to the Department for Work and Pensions by Incomes Data Services Ltd, to be published shortly) shows that 8,908 cases have been commenced in England, Scotland and Wales under the employment provisions in Part II of the DDA, of which 1,757 have reached a hearing. By contrast, only 53 county court or sheriff court cases are known to have been commenced under the goods, facilities and services provisions in Part III, just 9 of which have proceeded to trial.

- Recourse to the DDA is concentrated in urban

areas, especially Greater London where 19.1% of all Part II claims have been registered.

- By contrast, in rural areas there have been few cases. For example, the South West of England accounts for just 6% of claims.
- The most common impairments are those connected with the back or neck (19.5%), mental health (18.2%) and the arms or hands (14.3%).
- The most common occupations are clerical and secretarial (15.9%), plant, vehicle and machine operatives (15.7%), and managers and administrators (13.6%).
- The most common sectors are public administration (20.9%), and manufacturing (18.8%).

A medical model of disability

When it comes to judicial interpretation, the balance between generosity and parsimony in the case law to date is delicate. Fears that the medical model underpinning the legislative definition of disability would prove a formidable obstacle have in part been realised.

- Of the 1,757 employment cases that have proceeded to trial, 35.5% have involved a preliminary hearing, in most cases to establish, with the help of medical reports, whether the individual applicant is disabled or not.
- The most common reason given by tribunals for rejecting a claim, in 26% of all unsuccessful cases, has been that the applicant is not disabled.

Typically, an applicant must argue simultaneously that the consequences of his or her condition for daily life are serious enough to count as a disability, yet not so serious as to justify dismissal, non-recruitment or other unfavourable treatment.

On the other hand, a case like *Kapadia v London Borough of Lambeth (2000 IRLR 699)* – supported by the DRC – demonstrates the willingness of even the highest courts to accommodate within the statutory definition 'hidden' disabilities, such as depression, epilepsy, and diabetes, and to reinforce the fact that any assessment must discount the beneficial effects of 'treatment', including psychotherapy, unless that treatment has

produced a permanent recovery (see *Abadeh v British Telecommunications plc 2001 IRLR 23).*

Help for applicants…

What counts as less favourable treatment has largely gone the way of applicants, at least since the Court of Appeal clarified the position in *Clark v Novacold Ltd (1998 IRLR 420)*: if an employee is dismissed for a disability-related absence, the correct comparator is a person to whom the reason does not apply, namely, a person who is able to attend work, rather than a non-disabled person who has also been absent.

Further help is offered to applicants by the case law on an employer's knowledge of a person's disability, notably *Heinz Co Ltd v Kenrick (2000 IRLR 144)*: an employee may be discriminated against on the basis of a reason deriving from how his or her disability manifests itself, even when the employer has no knowledge of the disability itself.

…and for respondents

Less helpful to applicants is the way in which the defence of justification has been made so readily available to employers.

- In 21.9% of all Part II cases commenced, an employer has sought to justify its unfavourable treatment of a disabled employee, most frequently on the grounds of health and safety considerations, or sickness absence.

The recent case of *Jones v Post Office (2001 IRLR 384)* has confirmed how little an employer must do to succeed with this defence. In effect, reasonable reliance on an independent risk assessment, whether thought by the tribunal to be right or not, will exonerate an employer from a finding of unjustified discrimination.

Legal representation

The interpretation of the law by the courts and tribunals is not the only factor relevant to the efficacy of the legislation. Individual claimants need access to justice. The very low take-up rate of Part III claims indicates obstacles to the civil legal process, although the number of claims is likely to increase once the physical adjustment requirements come into force in 2004.

- In Part II employment cases, disabled applicants

have been unrepresented in 21.4% of tribunal cases.

- Unrepresented applicants were successful in just 13.7% of such cases, as opposed to an overall success rate of 19.5% in all cases decided by a tribunal.

Remedies

- The average award for pecuniary loss under Part II is £9,841.
- The average award for injury to feelings under Part II is £3,565.

What cannot be so easily measured, crucially, is the extent to which employers and service providers alter their behaviour as a result of an award being made against them.

Rates of settlement

We do know, however, that DDA claims have settled much more readily in the first years since the legislation was introduced than was the case with either the Sex Discrimination Act 1975 (SDA) or the Race Relations Act 1976 (RRA).

- As many as 50.1% of DDA claims have settled in the first four years, 30.4% have been withdrawn and just 19.5% were disposed of at tribunal.
- The comparable figures for SDA claims were 15.8% settled, 34.4% withdrawn and 49.9% disposed of at tribunal.
- The comparable figures for RRA claims were 9.7 % settled, 37.8% withdrawn and 52.2% decided by tribunal.

It would be encouraging to believe that these figures indicate an increasingly enlightened approach on the part of employers, apparently willing to meet reasonable claims with reasonable proposals for settlement. The fear must be that at least some settlements have been bought at the expense of the disabled applicant.

DRC fast-track for legal support and Part III conciliation

Statutory remit

Section 7 of the Disability Rights Commission Act 1999 provides that the DRC may grant an application for assistance on any of the following grounds:

(a) the case raises a question of principle

(b) it is unreasonable to expect the Applicant to deal with the case unaided (because of its complexity, because of the Applicant's position in relation to another party, or for some other reason)

(c) there is some other special consideration which makes it appropriate for the DRC to provide assistance.

At present, assistance may only be provided in relation to proceedings under Parts II and III of the DDA, i.e. to employment cases or cases concerning the provision of goods, facilities or services.

The DRC's legal strategy identifies the kinds of case which should be given priority for enforcement action. These fall into two general categories: areas where the DDA is under-used, and areas where the law needs to be clarified.

Under-use

At present, the major area of under-use concerns claims under Part III of the DDA (claims against service providers). Few cases have been brought since the DDA came into force and there is real need for case law in this area.

Priority areas of under-use in relation to the Part II employment provisions are recruitment cases and claims for discrimination in relation to opportunities for promotion, transfer, training or other benefits.

Clarification

Areas of law which the DRC has prioritised as needing clarification in the employment context include the following:

- the defence of justification (particularly following the case of *Jones v The Post Office 2001 IRLR 384*)
- the extent of the duty to make reasonable adjustments
- the extent of protection afforded to contract workers
- and extent of the obligations of trade organisations.

In relation to goods and services cases, priority areas where the law requires clarification are the following:

- the extent to which the transport exemption applies
- the extent to which insurers can deny services to disabled people or offer services on substantially less favourable terms.

A good test case will meet the s.7 statutory criteria, fall within one or more priority areas of the Legal Strategy and be strong on merits.

The legal team has established a fast-track referral mechanism for external organisations which help disabled people to enforce their legal rights. The purpose of this is to enable appropriate test cases to be referred directly to the Legal Team for a decision on funding. The fast-track can be used by voluntary organisations, providers of community legal services, solicitors and others with expertise in the disability discrimination field.

In order to use the fast-track system, please telephone the DRC Legal Team. Initial contact should be with Pauline Hughes, Head of Legal Team on Tel: 0161 261 1807. In respect of Scottish cases of interest, please contact Lynn Welsh, Legal Officer (Scotland) on Tel: 0131 444 4321.

Part III Conciliation

The Disability Conciliation Service provides a free alternative to the court process in Part II cases. The service is available for disputes arising in England, Scotland or Wales. To make use of the service both parties must agree to conciliation. If they do, the DRC will make a referral to the conciliation service and the time limit for issuing proceedings under Part III of the DDA will be extended by two months (to 8 months).

Advisers to disabled people who wish to make use of the conciliation service can now make use of a fast-track referral mechanism. The adviser concerned should establish that both parties are agreeable to attempting to resolve their dispute through the conciliation service, before referring the case to the DRC legal team. The point of contact is Jackie Smith, Legal Team Secretary Tel: 0161 261 1775, fax 0161 261 1703, email Jackie.Smith@drc-gb.org If the case is not resolved by the conciliation service, it will be returned to the adviser who made the referral.

Tribunal reform: the implications for disabled people in England and Wales

The importance of tribunals

Tribunals constitute a substantial part of the justice system in England and Wales: more individuals bring a case before a tribunal than go to any other part of the justice system. There are about 70 tribunals systems in England and Wales. They deal with over a million cases a year, mainly appeals by individual citizens against administrative decisions by public authorities.

The collective impact of tribunals is immense, but the Leggatt Report, 'Tribunals for Users', has found that the quality of the component tribunals themselves ranges from excellent to inadequate: too often their methods are old-fashioned, they are under-resourced and inefficient, and they are daunting to users.

Disabled people may, of course, have dealings with any tribunal. However, claims under Part II of the DDA are heard by employment tribunals. More generally, the Appeals Service, the Mental Health Review Tribunals, the Pensions Appeal Tribunals, and the Special Educational Needs Tribunal obviously come into contact with many disabled people. Reform of the tribunals system may therefore have a significant impact upon disabled people, and this short article highlights the key recommendations of the Leggatt Report in this regard.

Public funding

Leggatt was discouraged to note the growing perception that tribunal users cannot represent themselves. A fundamental tenet of the Report is that tribunals should be participatory in nature: representation should be discouraged.

But although the Report discourages a general extension of publicly funded representation, it recognises that there will always be some people who are unable to participate effectively without representation, whether because of the complexity of the case, or because of a physical or mental impairment which makes it difficult for them to represent themselves adequately. Leggatt recommends that it should be possible for representation to be provided in such cases through the Community Legal Service.

This finding clearly has important implications for disabled users of the tribunals system. The Government has been reluctant to increase the availability of public funding

for tribunal proceedings generally and, if Leggatt had called for a wholesale increase in public funding, it is doubtful that the call would have been heeded. However, if it is accepted by the Government, this more limited proposal could allow many more disabled people to gain access to justice, including in areas which are beyond the remit of the DRC's powers to grant assistance to individuals.

Goods, facilities and services

It has long been suggested that employment tribunals should have jurisdiction to hear goods, facilities and services cases under the DDA. The Leggatt Report says that ETs and the EAT have demonstrably acquired the status and authority for them to be the forum for the resolution of all employment and discrimination disputes, and that there may be a good case for increasing their jurisdiction.

The arguments in favour of such a move are strong. Whilst experience shows that there is no shortage of disabled people who have been discriminated against in the provision of goods and services, relatively few cases under Part III of the DDA have been pursued through the courts. The cost and complexity of bringing proceedings in the county court acts as a disincentive. In addition, employment tribunals are much more experienced in dealing with claims of discrimination and would be a natural forum for hearing cases under Part III.

Strengthening rights for people with cancer

Future reform

The DRC has welcomed the Government's announcement that it will change the law to ensure that people with cancer count as disabled for the purposes of the DDA from the time at which the cancer is diagnosed as being a condition that is likely to require substantial treatment. Substantial treatment would be any treatment which is more than minor or trivial. This would include not just in-patient treatment but also out-patient treatment where the patient has to return because the original treatment has not proved successful or further treatment is required.

This development follows the final report of the Disability Rights Task Force (DRTF). Whilst acknowledging that full-scale changes to the statutory definition of disability may not be achieved in the short term, the DRTF thought that the current definition of disability has significant flaws, and proposed immediate reform in order to bring within the protection of the Act people with cancer (as well as those with HIV from the point of diagnosis).

Present constraints

As the law stands, the mere fact of having cancer is not sufficient to render the individual disabled for the purposes of the DDA. (The position is otherwise in some overseas jurisdictions, where having any form of cancer would seem always to afford a person statutory rights in respect of discrimination.) The reason for this is that the DDA definition revolves around the existence of an impairment and the effects thereof upon the individual. Cancer itself is not an impairment, albeit that the disease is quite likely to cause an impairment.

Clearly, many cancer sufferers do, in fact, already fall within the statutory definition of 'disabled person': there will often be little room for argument that their cancer has resulted in an impairment which has a significant and long-term adverse effect on their ability to carry out normal day-to-day activities. This is particularly so in view of the fact that medical treatment which is being taken to treat the cancer must be disregarded in assessing whether the impairment has a substantial adverse effect, and that the likelihood of recurrence must also be taken into account. Moreover, a person who has a progressive condition is treated as having a disability if the condition has an effect on his or her ability to carry out normal day-to-day activities, and that effect is expected to become substantial. In *Cox v Bells Toyota* (1700896/98), for example, the applicant had cancer of the jaw. This caused his face to swell, impaired his speech and made it difficult for him to swallow. The tribunal did not think that this alone was enough to satisfy the statutory test. However, it found that the applicant had a disability because it recognised that his condition would be very much worse but for the courses of chemotherapy and radiotherapy he was undergoing. It also noted that the illness was likely to become more serious.

Nevertheless, there are also cases in which cancer sufferers have been unable to establish that they are disabled, most notably during periods when the cancer is in remission. Sometimes, following successful medical treatment, claimants who are no longer suffering substantial adverse effects from their illness have failed to show a likelihood of recurrence, although this is nearly always a concern for

cancer patients. In addition, the "deduced effect" principle is of limited value in these circumstances: it applies only in respect of treatment which is continuing at the relevant time. If treatment has ceased, the individual's condition must be assessed without discounting the previous medical treatment. In *Hay v Highdorn Co Ltd* (2201755/98) the applicant had returned to work part-time following successful treatment for breast cancer, but was subsequently dismissed for refusing to return to full-time working (which she would have found too tiring). She was unable to produce evidence that the cancer was likely to return or that it would recur if she stopped her medication. There was no evidence of an ongoing adverse effect at the time of her dismissal and so the tribunal found that she was not a disabled person at that time.

A person whose cancer is in remission may, of course, be able to bring an action under the DDA on the basis that he or she is a person who has had a disability. However, this will only be possible where the adverse effects of the cancer lasted for at least 12 months. Moreover, the employers' duty to make reasonable adjustments applies only in respect of employees who are disabled, not in respect of those who have had a disability in the past. Mrs Hay's employer, for example, was not obliged to make a reasonable adjustment to Mrs Hay's terms of employment by permitting her to continue working part time. The proposed change in the law, when eventually implemented, should go some way to enhance the rights of people like Mrs Hay.

News in brief

- The final phase of Part III of the DDA will come into force in October 2004, requiring service providers to make physical adjustments to their premises in certain circumstances. The revised statutory Code of Practice on Part III is scheduled for publication in February 2002.
- The DRC is currently consulting on two draft statutory Codes of Practice to accompany the Special Educational Needs and Disability Act when it comes into force in September 2002.
- The existing exemption from Part II DDA coverage for employers of 14 employees or less will be abolished in October 2004, in order to meet the Government's obligation to comply with the EC Directive under Article 13 of the Treaty of Amsterdam.
- At the invitation of Lord Newton, The Chairman of the Council on Tribunals, the DRC is working with the Council to produce new written guidance on access to justice for disabled people in all the Council's constituent tribunals. The new guidance will be published in Summer 2002.
- The DRC has responded to the Department of Trade and Industry consultation paper, 'Routes to Resolution: Improving Dispute Resolution in Britain' by pointing out that discrimination cases are relatively few and difficult, that compulsory use of internal dispute resolution procedures in such cases would be impracticable and that it would be a mistake to press ahead with tribunal reform in this area without due regard to the findings of the Leggatt Report. The DRC also opposed the introduction of charges in the employment tribunals and the wider use of costs orders.