Disability Rights Commission July 2002

Legal Bulletin

The DRC and The DDA: A Scottish Perspective

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Beyond national borders

When the Disability Rights Commission was established in April 2000, there was a clear recognition that an office in Scotland would be essential to carry the Commission's work through, north of the border. Since its official launch in December 2000, the Edinburgh office has functioned as an integral part of the DRC and has also brought a distinctive perspective to the work of the Commission across Britain.

The Disability Discrimination Act 1995 (DDA) is, of course, legislation covering Great Britain as a whole. As Lord Johnston pointed out in the DRC–supported case of *Executors of Gary Souter v James Murray & Co and The Scottish Provident Institution (EAT/592/01)* "…it must be noted that the border between England and Scotland is of no relevance to the jurisdiction of Employment Tribunals which is a national one". However, the Scottish courts and tribunals have added their own distinct flavour to case law in this area.

In addition to advice and information provided to disabled people by its two caseworkers in Edinburgh, the DRC has, through Lynn Welsh its Scottish solicitor, provided or arranged full legal representation in Part II and Part III cases. These account for more than 10% of the total number of cases funded by the DRC. Like the Equal Opportunities Commission (EOC) and Commission for Racial Equality (CRE), the Commission can provide legal representation only in those cases that meet the criteria set out in the relevant legislation. In essence, cases must have strategic significance. As knowledge of the DDA and the DRC grows, it is anticipated that the number of funded cases will significantly increase.

Part II DDA: employment

Of the Part II cases supported in Scotland, a significant number have been settled without the need for a substantive hearing. For example, cases involving a woman not offered employment because of aphasia, another where someone was chosen for redundancy because she worked part-time as a result of chronic fatigue syndrome, and another involving a man sacked because of diabetic episodes at work have all been settled successfully. By contrast, two DRC cases have also proceeded all the way to the Employment Appeal Tribunal (EAT) in Scotland. The first was the reported case of *Callaghan v Glasgow City Council (2001 IRLR 724)*, (see below). The second was *Executors of Gary Souter v James Murray & Co and The Scottish Provident Institution (EAT/592/01)* – see above. This case considered whether executors in Scotland could raise and pursue DDA actions in employment tribunals, in the same way as executors in England and Wales could. The answer was that they could.

The Scottish EAT

More generally, the Scottish EAT, under the Chairmanship of Lord Johnston, has been at the heart of interpretation of the DDA, making decisions with a GB-wide impact. In *Cosgrove v Caesar & Howie (2001 IRLR 653)* the EAT decided that an employer has a duty to consider whether reasonable adjustments could be made, even if there is no guarantee they would have worked.

In *Quinn v Schwarzkopf (2001 IRLR 67)* the EAT held that "an employer cannot justify disability discrimination where, in fact, it did not apply its mind during the currency of the employment to what should be done because it was ignorant of the disability". In other words, if an employer claims not to have known of the disability, the justification defence is not available.

However, in the DRC-funded case of *Callaghan v Glasgow City Council 2001 (IRLR 724)*, the EAT modified this decision, saying that "insofar as this tribunal may have suggested in *Quinn v Schwarzkopf* that justification can never occur if the employer was ignorant of the fact of disability at the relevant time, that goes too far…Obviously the fact that the employer did not know that a disability exists may affect the justification issue but does not preclude it".

The Court of Session decision in *Law Hospital NHS Trust v Rush (2001 IRLR 611)* has also contributed to the understanding of the day-to-day activities test. The ET had disregarded Ms Rush's activities in work when considering day-to-day activities and the EAT had upheld this. The Court of Session, however, held that as a matter of principle, evidence of the nature of an applicant's work duties and the way they are performed, especially where they include day-to-day activities, could be relevant to the question of whether someone is disabled within the meaning of the DDA.

Part III DDA

The sheriff court's dealing with Part III goods and services cases has been less generous to applicants. The case of *Rose v Bouchet (199 SLT)* set the scene when it was held that refusing to rent a flat to a visually impaired assistance dog user was justified by health and safety concerns.

Of the Scottish DRC cases mentioned above, six involved Part III. Two recent cases have caused concern. The first involved a wheelchair user who was denied entry to an empty restaurant. The Defenders did not proceed with their defence, but an award of only £400 damages was made. In the second case, which went to a full proof, a café refused to allow entry to a guide dog. Discrimination was proved, but the damages award was only £350. These awards are low when compared to similar cases in England and Wales, where compensation of up to £1,000 has been awarded.

Reviewing devolved legislation

A unique area of work in Scotland is its interface with the Scottish Parliament.

Along with the EOC and CRE, the DRC works closely with the Scottish Executive to ensure equality issues are mainstreamed into all legislation, for example, the recent Housing Act and the forthcoming Best Value local authority legislation. The DRC has also had input where proposed legislation directly impacts upon disabled people's lives. In the Freedom of Information Bill the DRC drafted amendments to counter the impact of the charging provisions on a disabled person's rights to receive information in an accessible format. The forthcoming Mental Health Bill and the consultation on vulnerable adults will also attract substantial input.

Working in partnership

The DRC throughout Britain has close links with the EOC and CRE. In Scotland, that partnership has been taken further by the solicitors at the three Commissions combining to set up a panel of lawyers and a referral system. The panel consists of solicitors who meet minimum criteria, which allows the Commissions to fund discrimination cases that they might wish to bring. The additional referral panel consists of advisers who might not yet have the experience to meet the full panel criteria, but who are willing to work with the Commissions and to whom the Commissions will refer cases, which they cannot support in-house. The Commissions in Scotland are also working with the Bar to set up a similar panel of advocates and are keen to expand these lists as far as possible. If you would be interested in taking part, please contact Lynn Welsh on 0131 444 4321.

The DRC is also actively seeking strategic disability discrimination cases to support, whether by taking them in-house or by funding them. If you are involved in any Scottish cases that might be of interest, or if you simply wish to discuss any issues arising, please contact Lynn Welsh. In respect of cases in England and Wales please contact Pauline Hughes on 0161 261 1807.

Justification: an uphill struggle?

Cause for concern

It is perhaps unsurprising that, since the Court of Appeal decision in *Clark v Novacold (EWCA 1999 IRLR 318)*, the central legal issue in many claims brought under Part II of the DDA is the defence of justification. *Clark* made it clear that the test for "less favourable treatment" does not require a like for like comparison. Employers are now more likely to concede that a disabled person has been treated less favourably, but may nevertheless seek to justify this. Recent cases have, worryingly, suggested that justification may not be a particularly high hurdle for employers to surmount. This article explains why this may on occasion be so, but goes on to argue that the position may not be as simple as may first appear, and that in many cases employers may still have difficulty in establishing justification under section 5 of the DDA.

The meaning of "material" and "substantial"

Section 5(3) of the DDA provides that less favourable treatment of a disabled person (for a reason which relates to his or her disability) is justified if the reason for it is both material to the circumstances of the particular case and substantial. It is fair to say that the legal meaning of the terms "material" and "substantial" differs from the ordinary meaning of those words.

This was made clear in the case of *Heinz v Kenrick (EAT 2000 IRLR 144)* in which the EAT stated that the threshold for justification of disability discrimination under section 5(3) is very low. An employment tribunal is restricted to considering the question of whether the reason put forward by the employer is indeed material and substantial – a question of fact. There is no scope to ask whether, in all the circumstances, it could be said that the discriminatory act was objectively justified.

The Court of Appeal decision in *Jones v Post Office (EWCA 2001 IRLR 384)* bears this out. This made it clear that the tribunal may scrutinise the employer's claim of justification to the extent of considering whether there was evidence available to it on the basis of which a decision could properly be taken. But it may not decide whether the employer's assessment of risk was in fact correct.

The implications of Jones

All is not lost for disabled employees, however. For one thing, *Jones v Post Office* does not permit employers to impose a blanket ban on employees with a particular type of disability. In every case, the employer will be required to show that they have undertaken an individual risk assessment in order to justify less favourable treatment.

It follows that it may be possible to establish that an employer has failed to justify less favourable treatment by challenging the risk assessment which has taken place. The challenge must be on the basis that the risk assessment was not properly conducted and therefore is essentially a procedural challenge rather than an opportunity to adduce medical evidence more favourable to the applicant.

In the DRC-funded case of *Marshall v Surrey Police (ET Case No. 2303885/2000)*, which was decided by an employment

tribunal shortly after the Court of Appeal's decision in Jones, it was held that the applicant had been less favourably treated for a reason relating to her disability and that this could not be justified. The tribunal held that the risk assessment had not been properly conducted, was not based on the properly formed opinion of suitably qualified doctors and so produced an answer which was not rational. This case is presently being appealed by the respondent and is due to be heard by the EAT in May.

It should also be borne in mind that in *Jones* the Court of Appeal was only considering justification of less favourable treatment, and not justification of a failure to make reasonable adjustments under section 6 of the DDA. Arguably, the scope of the Jones decision should be limited to such cases because, where justification of a failure to make reasonable adjustments is also an issue, the DDA requires it to be considered separately. This is so notwithstanding the fact that the two justification tests in Part II of the DDA (section 5(3) and 5(4)) are in very similar terms.

An analogy with unfair dismissal?

Perhaps the most controversial aspect of the *Jones* decision was the suggestion that the function of tribunals in relation to justification for the purposes of section 5(3) is not very different from the task in unfair dismissal cases – to apply the range of reasonable responses test. The DRC does not share this view. However, the proposition concerned does illustrate why *Jones* should not apply to the question of justification in reasonable adjustment cases. There is statutory provision in section 6 (4) DDA as to what a tribunal should take into account in determining whether it is reasonable for an employer to take a particular step. This determines what a "reasonable adjustment" might be. Once a tribunal has determined that a step is reasonable, it cannot be right for the question of reasonableness to be considered again at the justification stage.

Justification and failure to make reasonable adjustments

The applicability of *Jones* to cases involving both less favourable treatment and failure to make reasonable adjustments is also questionable. Although it would be tempting to assume that a legal precedent concerning the question of justification in relation to less favourable treatment will be good law in relation to justification of a failure to make reasonable adjustments, this does not necessarily follow in all cases. This is because of the qualification to the test for justification of less favourable treatment, which is imposed by section 5(5) of the Act.

The effect of section 5(5) is that, in a case involving both less favourable treatment and reasonable adjustments, the tribunal should not consider the question of justification of less favourable treatment until it has looked at the question of the failure to make reasonable adjustments and the justification thereof. If the tribunal has concluded that there was a failure without justification to make a reasonable adjustment, then a defence of justification for less favourable treatment cannot succeed unless the treatment concerned would have been justified, even if the adjustment had been made. Justification of failure to make a reasonable adjustment must therefore be determined separately from, and before, the question of justification of less favourable treatment.

This point was neatly illustrated by the case of *Baynton v Saurus (EAT 1999 IRLR 604)* in which the EAT outlined the statutory sequence for establishing justification under section 5(3) in a case where section 5(5) applies, and stated "it is necessary for the respondent to show that the reason for dismissal was material to the circumstances of the case and substantial and that he has not, without justification, failed to comply with any duty under section 6".

Beyond *Jones*

So what are the implications of this for cases relating to justification after *Jones v Post Office?* As explained above, an employer who has conducted a risk assessment, which concludes that the employee cannot carry out their existing task, may well be able to establish justification for the purposes of *Jones*. However, if

the employee alleges that adjustments could have been made to his or her post in order to enable them to continue in their job, an employer who has failed to do this may well be in considerable difficulty in relation to the question of justification of less favourable treatment. If a tribunal concluded that there was an unjustified failure to make reasonable adjustments, this would impact on the question of whether the risk assessment, which had been carried out, was a proper one. If that risk assessment had not considered what the position would have been if the adjustments had been made, it would have failed to take into account a relevant consideration and would be flawed. For these reasons the DRC considers that the issue of reasonable adjustments will be of great importance in cases where the less favourable treatment is justified on the same basis as *Jones*.

The DRC consults on Law Reform Proposals

The need for consultation

In May 2002 the DRC published a consultation on its first set of proposals for changes to the DDA and associated legislation.

The DRC was created to promote equality of opportunities for disabled people and work towards the elimination of disability discrimination. An important task, therefore, is to keep the DDA under review and make proposals to the Government for changes to this, and other relevant aspects of the law.

The DDA was ground-breaking legislation when it was passed in 1995. It has been significantly strengthened since then by the creation of the DRC and the extension of disability rights to education in the Special Educational Needs and Disability Act. However, much still needs to be done before it can be said to provide the quality of legal framework that disabled people need and society expects.

The law must be comprehensive, clear and effective. Wherever possible disability discrimination law should be congruent with the requirements of the law relating to other grounds of discrimination. Finally, and most importantly, the DRC

makes proposals which promote systemic change. The legislative framework needs to move from relying on individual enforcement towards a proactive approach to disability equality. All the evidence points to the impossibility of adequately tackling discrimination by relying solely on individuals.

The Disability Rights Taskforce

In 1997 the Government recognised the flawed nature of the DDA when they established the Disability Rights Taskforce and charged it with advising on the changes needed to provide comprehensive and enforceable civil rights. The Taskforce provided the Government with a significant legislative reform agenda, much of which remains to be implemented.

The DRC view is that implementing these outstanding reform proposals – such as extending full disability rights to all employees and in relation to housing, transport and public functions, and placing a positive duty on the public sector to promote equal opportunities for disabled people – must be a priority.

Time does not stand still. It is now more than two years since the Taskforce reported. For two years the DRC has provided advice and assistance to thousands of employers, service providers and employers. The DRC draws on this experience, as well as on case law and on research, such as "Monitoring the DDA", to put forward proposed law reforms for public consultation.

Justification for less favourable treatment by employer

The recent EU Equal Treatment Directive requires the UK to change the DDA's employment provision in a number of ways. In particular, it will require amendment to the grounds on which the DDA allows less favourable treatment for a reason related to a disability to be justified. The DDA currently requires an employer to show a material and substantial reason. However, the Directive only permits treating someone differently simply because they have a disability if there is a genuine and determining occupational requirement, and the objective is legitimate and the requirement proportionate. Equal treatment is not, however, required if a person is not competent, capable or available to perform the essential functions or undergo the

relevant training (taking into account any reasonable adjustments for disabled people).

The Government's recent consultation document, "Towards Equality and Diversity", states that it will change the DDA so that, "direct discrimination is excluded from the DDA's justification approach in the field of employment and training. Employers will still be able to justify not employing people who cannot do the job even with a reasonable adjustment". The DRC takes this to mean that less favourable treatment for a reason related to a disability should only be justifiable in law where an employer shows the disabled person is not competent, capable or available to perform essential functions, taking into account the employer's reasonable adjustment duty.

This strengthening of the DDA is very welcome, and the DRC proposes in addition that the law needs to make it clear that tribunals are able to substitute their own decisions for those of employers, where they believe that the employer's decision is tainted by prejudice or stereotypes. The test of justification needs therefore to be, in legal terms, an objective one. This is particularly important in the light of the recent Court of Appeal case, *Jones v Post Office*, which has made it easier for employers legally to justify less favourable treatment.

The anticipatory duty in relation to readjustments

The DRC proposes that the anticipatory approach to reasonable adjustments contained in Part III DDA in relation to service provision, and Part IV DDA in relation to education, should be extended to employment. This approach will help produce a common approach across the DDA encouraging organisations to review policies and practices in a way which prevents problems from arising.

Pensions

At present DDA regulations allow that, in certain circumstances, disabled people's access to certain occupational pension scheme benefits can be denied or restricted; disabled people can also be required to pay full contributions whether or not they have access to the full rate of benefits.

The Taskforce recommended that occupational pension

schemes should be required to offer equal access to scheme membership for disabled people when starting their employment. Restricted access to certain benefits should be permitted for disabled people choosing to join a scheme later in their employment or rejoining a scheme.

This proposal was made unanimously by a group with representation from both the small and large business sectors. The Taskforce determination of this issue was also helped by independent research indicating that additional costs were unlikely to be significant.

The DRC considers that occupational pensions are of fundamental importance to enable disabled people to make adequate provision for later life, particularly with the diminishing role of state provision. To deny disabled people equal access to occupational pensions, even if this could be justified in strict actuarial terms, is unfair, particularly in a situation where other risks (such as heavy drinking or smoking or unhealthy lifestyles) are pooled.

The DRC calls for the Government to implement this proposal rather than the more limited proposals contained in their consultation, "Towards Equality and Diversity" where it is conceded that occupational pension schemes should have to make reasonable adjustments to their documentation and information.

Questions at recruitment

The DRC is asking the Government to reverse its rejection of a key Taskforce recommendation. This proposal would mean that disability-related enquiries before a job is offered should be permitted only in very limited circumstances.

The Government's primary rationale for rejecting the Taskforce recommendation was that it did not accept that such change was necessary. On the contrary, the DRC considers there is a clear and pressing need. The DDA is proving inadequate in addressing recruitment problems. Many employers still ask medical questions about applicants' disabilities prior to job interview and selection. This enables employers who wish to discriminate simply to reject disabled applicants at an early stage. It is extremely difficult to prove such discrimination. In any event some disabled applicants are discouraged by such questions from even proceeding with

their application. The DRC believes that such questions prior to job selection should be prohibited.

The DRC agrees with the Taskforce that employers do have legitimate needs to ask some disability-related questions:

- when inviting someone for interview or to take a selection test, employers could ask if someone had a disability that may require reasonable adjustments to the selection process and when interviewing, employers would be allowed to ask job related questions, including if someone had a disability which might mean a reasonable adjustment would be required for monitoring purposes or in relation to a guaranteed interview scheme.

Enforcement of Part III DDA via Employment Tribunals

There is evidence that disabled people are being deterred from legally challenging acts of discrimination by service providers because of the cost and complexity of bringing claims in county courts (or sheriff courts in Scotland). The DRC is interested in views on the proposal that disability discrimination claims should be brought through the employment tribunal system, which is more accessible and more familiar with discrimination claims.

Strengthening and clarifying Part III

The DRC's work in revising the Code of Practice in relation to Part III of the DDA similarly highlighted a number of areas where the law could usefully be clarified, and where in our view it needs to be strengthened to promote best practice clearly. In particular, the DRC is consulting on the trigger for reasonable adjustments, the justifications for less favourable treatment and the "hierarchy approach" to adjustments to premises.

A new EU Directive on goods and services.

The European dimension of law making is increasingly important. The first EU Directive in relation to disability discrimination in employment was passed in 2000. This required all member states to prohibit discrimination against disabled people in relation to employment.

The DRC believes that a further Directive is required to combat discrimination on the grounds of disability in relation to a broad range of goods and services: such a Directive is the indispensable requirement for enabling disabled citizens of the European Union to achieve freedom of movement and equal participation.

Definition of disability

The DRC does not propose a fundamental alteration to the DDA's definition. However, the DRC is consulting on a range of proposals for clarifying the definition, and extending the DDA's protection. Probably the most significant change, and one on which the DRC is very interested in hearing views, is the way in which mental illness is covered. The DRC is proposing the extension of the range of day-to-day activities listed in the DDA, the removal of the requirement that a person's mental illness is clinically well recognised, and adjustment of the requirement that incidents of depression last 12 months or can be shown to be likely to recur.

This article has been able to highlight just some of the recommendations that the DRC has put forward for consultation. The DRC is genuinely interested in hearing views and open to different ideas, rejecting or refining our proposals, prior to putting them forward to Government. The Legislative Review is available from the DRC Helpline and website. Comments on the proposals are invited by the 16 August 2002.

Educating for Equality – Part IV of the Disability Discrimination Act 1995 as amended by the Special Educational Needs and Disability Act 2001

From September 2002, it will be unlawful for any school to discriminate against disabled pupils. The Act also extends to providers of post-16 education (including higher and further education institutions, youth and community services and adult education) and protects disabled students and adult learners from discrimination.

Codes of Practice relating to both schools and post-16 providers are due to be published by September 2002. In their draft form they can be found on the DRC website: www.drc-gb.org

The duties and responsibilities imposed by the new Part IV differ in some respects between schools and post-16 providers.

Schools

The new law is intended to complement the existing Special Educational Needs systems in both Scotland, England and Wales.

In Scotland, cases under Part IV will be raised in the sheriff court, while the SEN system will continue as at present. The Scottish Executive, however, has committed itself to the introduction of SEN Tribunals in Scotland. New planning duties for schools in Scotland are also contained in the

Education (Disability Strategies and Pupils' Educational Records – Scotland) Bill, which requires responsible bodies to prepare and implement accessibility strategies to improve, over time, access to education for pupils and prospective pupils with disabilities.

In England and Wales, Part IV provides parents with a means of redress via the new "Special Educational Needs and Disability Tribunals" (known as SENDIST) and via admissions and exclusions appeal panels. It introduces new planning duties which require Local Education Authorities to develop strategies and require schools to develop plans to improve accessibility for disabled pupils over time.

What does the new law cover?

S28A of the Act provides that it is unlawful for the body responsible for the school to discriminate against disabled pupils in respect of

- admissions
- education and associated services
- exclusions.

Admissions

Responsible bodies must not discriminate against a disabled person:

- in the way they decide who can get into the school. This includes any criteria applied when it is over-subscribed, and the way it operates those criteria
- in the terms for offering pupils a place at the school
- by refusing or deliberately not accepting an application from a disabled pupil for admission to the school.

Education and associated services

The Act covers all education and associated services for pupils and prospective pupils – in essence, all aspects of school life, including extra-curricular activities and school trips.

Exclusions

It is against the law to discriminate against a disabled pupil by excluding him or her from the school because of their disability. This applies to exclusions whether they are permanent or fixed-term.

How is discrimination defined under the new law?

A disabled pupil can be discriminated against in two ways:

- **Less favourable treatment (S28B)**

This is where the school treats a disabled pupil or prospective pupil less favourably than another pupil for a reason relating to his/her disability and does so without justification. Justification can only be established if the reason is "material and substantial" to the particular case. Less favourable treatment is also specifically justified if it is the result of a permitted form of selection as applied by maintained or selective schools with the aim of maintaining academic standards.

The draft Code for schools gives the following examples of less favourable treatment and justification:

1. A disabled boy is admitted to a secondary school. The school wants him to have all his lessons in a separate room in case other children are frightened by his muscle spasms and involuntary noises. This may be deemed less favourable treatment for a reason related to his disability and may be against the law.

2. A pupil with cerebral palsy who uses a wheelchair is on a trip with her school to an outdoor centre. The teachers arrange for the schoolchildren to go on a 12-mile hike over difficult terrain, but having carried out a risk assessment, they decide that the disabled pupil can't go on the hike for health and safety reasons. In this case, the school may be able to justify the less favourable treatment.

- **Failing to make a "reasonable adjustment" (S28C)**

Schools must also take reasonable steps to make sure that disabled pupils are not placed at a "substantial disadvantage" when compared to non-disabled pupils. Again, it is open to schools to justify their actions but their justification must be material and substantial.

The draft Code provides the following examples:

- a secondary school does not make special arrangements for disabled pupils who are taking public exams
- a deaf pupil who lip-reads is at a disadvantage because

teachers continue speaking while facing away from him to write on a whiteboard
- a pupil with severe dyslexia is told she cannot have her teacher's lesson notes, and that she should be taking notes during lessons "like everyone else".

What is "reasonable"?

The Act does not define "reasonable" – this depends on individual cases and will be a matter for the court, tribunal and/or appeal panels to decide. However schools can take account of the:

- need to maintain academic and other standards
- money available
- practicalities of making the particular adjustment
- health and safety of the disabled pupil and others
- the interests of other pupils.

What is a "substantial disadvantage"?

Again this is a matter for the court or tribunal to determine. However, the school needs to take account of a number of factors. These might include:

- the time and effort that the disabled child might need to expend
- the inconvenience, indignity or discomfort a disabled child might suffer
- the loss of opportunity or lack of progress that a disabled child may make compared to other non-disabled children.

Anticipatory duty

Schools have a duty to all disabled pupils and potential pupils, not just specific individuals. Schools should not wait until a disabled pupil has arrived before making adjustments, as they may find themselves already in breach of the law. They need to think ahead to what they might need to do, and should keep policies under review to ensure that they do not discriminate against disabled children.

Limitations on the scope of Part IV in respect of schools

Schools are not obliged to provide "auxiliary aids or services" under the DDA as service providers are required to do under Part III of the Act. This is because the Special Educational Needs (SEN) framework already deals with such issues and needs, at least in theory. Schools' duties under the DDA are designed to

sit alongside the SEN framework and are not an additional route of access to auxiliary aids and services.

Schools are not obliged to make reasonable adjustments to buildings and the physical environment. They do not have to remove or alter physical features. Instead, it is envisaged that physical alterations will be addressed by the longer-term planning duties for Local Authorities, LEAs and schools.

Accessibility strategies and plans (S28D)

Schools, Local Authorities and LEAs are obliged to provide accessibility plans and strategies, respectively, which outline how the following matters will be addressed by that particular school, Local Authority or LEA:

- improved access to the curriculum
- physical improvements to increase access to education and associated services
- improved information in a range of formats for disabled pupils.

However, there is no mechanism for enforcing these duties. In Scotland, all strategies must be sent to the Scottish Executive, who will monitor the strategies and consider complaints from organisations and individuals. In England and Wales, the strategies will be monitored by OFSTED as part of the inspection process.

Enforcement

In England and Wales

Parents can take a case to the SEN and Disability Tribunal within six months of the date of the act complained of, or appeal to the Admissions Appeal Panel or Exclusion Appeal Panel (time limits for which are set by the LEA). Both parents and schools can refer a complaint to the DRC's conciliation service, providing both parties consent.

In Scotland

Both parents and children can take a case to the sheriff court, again within six months of the date of the potentially discriminatory act. The DRC's conciliation service is also available.

It is worth noting that, unlike other DDA claims, compensation will not be available for a breach of the schools duties.

Post-16 Providers

These provisions, found at S28R to 28V, are similar to those relating to schools with some notable additions.

What does the new law cover?

It is unlawful for post-16 providers to discriminate:

- in admission and enrolments
- in the terms on which an admission and enrolment offer is made
- by refusing or deliberately omitting to accept an application for admission or enrolment
- in the provision of services provided wholly or mainly for students or those enrolled on courses – including courses of education, training, recreation, leisure and catering facilities or accommodation
- in permanent or temporary exclusions.

Less favourable treatment and reasonable steps

The provisions in respect of less favourable treatment, justification and failure to take reasonable steps, mirror those in respect of schools. From September 2002, post-16 providers will have to ensure that their policies, practices and procedures do not discriminate against disabled students and adult learners. Examples given by the Code are:

1. A wheelchair user is offered a place at a university on the condition that he finds his own living accommodation; no other students have this condition placed upon them.

2. A student, who is severely dyslexic, applies to take a course in journalism. However, because of her dyslexia, she does not have the literacy necessary to complete the course. Therefore the college rejects her application, using the justification of academic standards; although this is less favourable treatment for a reason that relates to the student's disability, the college is likely to be able to justify it, because accepting her would undermine the academic standards of the course. Therefore this treatment is likely to be lawful.

The duty to provide auxiliary aids and services

From September 2003, post-16 providers, unlike schools, will be required to provide "auxiliary aids and services". These may include the provision of information in alternative formats, such as sign language interpreters, Braille, audio and so on.

Physical adjustments to premises

From September 2005, post-16 providers will be obliged to make reasonable adjustments to remove barriers to physical access.

This will include installing ramps and ensuring doors are sufficiently wide to enable access.

Again the duty is anticipatory. Providers would be well advised to arrange for an access audit of all their premises and develop an access policy to ensure that access is improved at every opportunity – such as during major refurbishment, redecoration or general maintenance.

Enforcement

Proceedings can only be brought in the sheriff or county courts subject to a six month time limit. Unlike cases involving school pupils, the court is entitled to award compensation if appropriate.

News in brief

- In the DRC-funded Part III case of *White v Clitheroe Royal Grammar School* (unreported), District Judge Ashton, sitting at Preston County Court, found that a watersports trip to France during the school holidays arranged by the school was not classed as "education" for the purposes of the DDA and so was covered by the Act. However, a trip during term time to Germany for language instruction **was** education and so would not be covered by the DDA (until the implementation of SENDA in September 2002). The Judge commented that "education here means systematic instruction, not anything organised by the school which has some educational content". In addressing the merits of the claim that the school had discriminated against Tom White by excluding him from a sports trip to France following a diabetes-related hypoglycaemic attack during a previous school trip, the Judge found that the decision to exclude was "fatally flawed" in the manner in which it was taken. In particular, the school had not involved Tom in the process, the matters relating to his alleged past irresponsibility had not been put to him for explanation,

and the school had not made any serious attempt to conduct a risk assessment. The Judge awarded compensation of £3,000, including £2,000 aggravated damages to reflect the fact that the school had not taken an early opportunity to review its original decision

- In the DRC-funded case of *General Medical Council v Cox* (unreported), the EAT has found that the GMC is not a trade association for the purposes of the DDA. It is instead a qualifying body and so not covered by the Act. As a result, Ms Cox's substantive claim, that she had been discriminated against by the GMC when it refused to validate as a qualifying medical degree a course of studies at Oxford University adjusted to accommodate her mobility impairment, was unable to proceed.

- In the DRC-funded case of *Jones v 3M Healthcare Limited and Others*, leave has been granted for an appeal to the House of Lords on the issue of whether Part II DDA extends its coverage to acts committed by a former employer after termination of the contract of employment. This will be the first DDA case to proceed to the House of Lords.

- For the first time, the DRC is exercising its residual power to commence, or join in, judicial review proceedings where it has a legitimate interest to do so. In the case in question, the parents of two disabled women are challenging the blanket "no lifting' policy operated by a Local Authority social services department. As a result of the policy, the two women, who have previously been cared for at home, will have to be admitted to residential care so that the required lifting can be performed by hoists. The Divisional Court has imposed reporting restrictions that will protect the identity of the two disabled women.

News in brief

- Codes and consultations: the DRC has now published a revised Part III DDA Code in preparation for the additional duties to be introduced in 2004; the draft codes on education are available on the DRC website and are expected to be published over the summer before the introduction of SENDA. The DRC's consultation on its review of the DDA is being conducted between May and August, and the guidance for tribunals being prepared by the DRC and the Council on Tribunals will be published before the autumn.
- During its first two years, the DRC has offered telephone advice through its Helpline to approximately 200,000 callers, provided more in-depth casework in a further 4,000 cases, and arranged full legal representation in 105 cases. In addition, 223 Part III cases have been referred to independent conciliation at no cost to either party and at a settlement rate of over 60%.
- Of the 105 cases attracting legal representation from the DRC, 69 have been Part II DDA cases, and 36 Part III DDA. Of the Part II cases, 28 have been won or have settled for sums ranging between £120,000 and £500, at an average of £16,000. Of the Part III cases, 18 have won or been settled for sums ranging between £2,000 and £200, at an average of £470. The most common impairments in Part II cases have been mental health and mobility, and in Part III mobility and visual impairment. The most common sector in which Part II cases have arisen have been private business and local government, and in Part III sport and leisure services.

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

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