Disability Rights Commission

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Legal Bulletin

Disability rights, casework and alternative dispute resolution

Contents

The DRC is the newest of the domestic equality commissions. It is a feature of its modernity that its founding legislation makes express provision for alternative dispute resolution. In addition to giving the DRC the sort of enforcement and funding powers shared by the other long-established equality commissions, the DRC Act 1999 at s.10 permits the DRC to make arrangements for the provision of conciliation services in respect of potential and actual consumer disputes under Part III of the Disability Discrimination Act 1995 (DDA) (to supplement the conciliation work done by ACAS in respect of employment disputes under Part II). The Special Educational Needs and Disability Act 2001 has now extended that discretionary power to disputes about disability discrimination in education.

It is a further feature of the DRC's modern outlook that the Commission itself from the outset has embraced the opportunity that this innovative power creates: the DRC makes

no secret of its desire to seek change not just by advice and legal enforcement but by conciliation too.

In its first year, and whilst making use of a service inherited from the Disability Access Rights Advice Service (DARAS), the DRC referred 156 Part III cases to formal conciliation, with as many as 60% of those cases reaching settlement through telephone "shuttle" conciliation without recourse to the civil courts. In March 2001 the DRC entered into a three-year contract with Mediation UK, a community-based mediation network, to run a new Disability Conciliation Service from its offices in Bristol, drawing upon a specially recruited panel of 40 conciliators around England, Scotland and Wales. Since then nearly 100 further disputes have been referred to face-to-face conciliation.

The modern look of these conciliation arrangements reflects the contemporary interest, both domestic and international, in the use of alternatives to the courts as a means of resolving disputes. In England and Wales, the Woolf reforms, and the new Civil Procedure Rules which they generated, have translated that interest into practical necessity. The Court of Appeal itself has demonstrated in two recent decisions (*Dunnett v Railtrack PLC [2002] EWCA Civ. 302, and Frank Cowl & Others v Plymouth City Council [2001] EWCA Civ.1935*) that the courts will impose costs penalties on parties who reject a proposal to mediate.

Of course, alternative dispute resolution, especially in the context of discrimination, has not received universal support. Beneath the expressions of scepticism lies a legitimate fear that justice will be made subordinate to administrative efficiency, that the radical force of reforming legislation will be tamed by the subterranean resolution of disputes at the convenience of one party and at the expense of the other.

It was perhaps such concerns that prompted commentators on sex discrimination in the 1990s to temper their endorsement of alternative, or "appropriate", dispute resolution (ADR) with a call for any such conciliation to move further than the ACAS model towards a "rights-based" approach that would ensure that ADR would have as its primary objective the promotion and enforcement of the Sex Discrimination Act (see Rosemary Hunter and Alice Leonard, *Sex Discrimination and Alternative Dispute*

Resolution: British Proposals in the Light of International Experience, Public Law [1997] 298-314).

The proposed features of such a "rights-based" approach were that participation in ADR would be entirely voluntary, that settlements once achieved would be binding and a matter of public record, and that primary responsibility would rest on the mediators, who should have expertise in discrimination law and training on the handling of sex discrimination cases, to ensure that the parties are adequately informed about their rights.

In this way, ADR might become, as Paul Miller, Commissioner at the US Equal Employment Opportunities Commission puts it, a "just alternative" rather than "just an alternative" (see *Ohio State Law Journal 62[2001] 11-29]*). It is Miller's belief that justice has indeed been served by arrangements in the US that saw 7,544 discrimination cases (1,819 disability cases) referred to mediation in 1999 and a further 11,451 (2,646 disability cases) in 2000, at a settlement rate of 65%. In total, roughly 20% of all disability cases referred to the EEOC under the Americans with Disabilities Act find their way to mediation.

So what of the DRC's experience so far? As already indicated, the DRC has since April 2000 referred over 250 Part III DDA cases to conciliation. That figure is in itself significant, once it is recalled that the Government-sponsored research on the first three years of the DDA suggested that as few as 53 Part III cases had been commenced anywhere in the civil courts. In addition, settlement rates have been high, with 83% of cases referred to Mediation UK since March 2001 having led to a settlement.

Further encouragement is derived not just from the quantity of settlements but also from their quality. One potential attraction of ADR is its capacity to deliver outcomes that transcend the formal limitations of judicial remedy. ADR settlements can, in other words, achieve results that get to the heart of the matter in a way that compensation awards rarely achieve.

Examples of cases successfully resolved through independent conciliation include the following:

- a wheelchair-user booked a room in a hotel that was part of an international chain. He needed a bed for himself and

another bed for his personal assistant. All the accessible rooms had only double beds and so an extra charge was incurred to accommodate his personal assistant in a separate room. Following formal conciliation, the hotel chain undertook to change its policy throughout Europe and provide better training on disability for its staff. It also agreed to look at its other policies affecting disabled people (for example, its provision of shower facilities) and to pay compensation of £1,000.

- a woman with a speech impediment was refused service in a pub because the pub manager thought she was drunk. During the course of formal conciliation, the manager overcame his unfamiliarity with the way his customer spoke and realised he had been at fault, thereby achieving a degree of lasting insight that frequently proves elusive in the more combative environment of the court room. The manager apologised and agreed to disability training for himself and other staff.

It should also be remembered that the DRC's in-house casework service, although not engaged in formal conciliation, nevertheless has amongst its suite of problem-solving interventions the ability to engage in negotiations on behalf of disabled individuals in the hope of achieving productive outcomes without direct recourse to the courts and tribunals.

A DRC caseworker may resolve cases through a range of methods, including contacting the employer, business, school or college in question, and advising individuals on the law and legal procedures.

Between April and September 2002, the DRC casework team secured reasonable adjustments from businesses in 19 Part III cases without going to court, and in another 26 cases settlements were achieved as a direct or indirect consequence of caseworker interventions.

During the same period, in employment cases under Part II, DRC caseworkers achieved reasonable adjustments for clients from their employers in 17 cases, and 62 cases were settled.

Examples of cases successfully resolved by the DRC casework team include the following:

- the client, a deaf person, went shopping. When she realised she was late for college, she left the shop. As she was crossing the road, she was grabbed by the owner of the shop. The client was taken back to the shop and the owner went through her bag and belongings. The client explained to the owner that she was a deaf person, and asked him to write down what was happening. The owner refused to do this, and the client found the experience very distressing. Advice was given to the client about her options by the DRC casework staff. The client wanted the owner to understand his responsibilities under the DDA, and to apologise for his conduct. A full apology was received from the shop-owner and he in turn received full details of his obligations under the DDA, of which he was previously unaware.

- the client, a freelance businesswoman, has a visual impairment and requires printed information in 24-point type. She ordered a personal computer from a large mail order computer company, with the user manuals to be provided in large print. When the requested information was not supplied in the client's preferred format, she complained and was told that the company did not have to provide information in large print. The client then contacted the DRC. After a letter from a caseworker, which outlined the client's allegations and explained about the DDA, the company agreed to provide an apology, the requested documentation in large print, other documents in large print on request and an acceptance that they have a duty under the Disability Discrimination Act 1995.

In short, whilst the DRC entirely recognises the value of litigation and law enforcement in the achievement of justice for individuals and in the pursuit of broader social change, it is discovering in its own work that those objectives are in many instances served as well by alternatives to the legal process, whether formal conciliation or problem-solving casework. It is a function of the DRC's modern outlook that it will continue to encourage its existing ADR initiatives as an effective way of securing rights for disabled people and thereby promoting the spirit as well as the letter of the DDA.

Is the DDA failing people with mental impairments?

One of the most difficult aspects of the law on disability is the way the definition of disability operates in relation to someone with a mental impairment.

The starting point is to establish whether the impairment in question is properly classed as a mental impairment or, in fact, should be treated as a physical impairment. In many cases it will be self evident, but this is not true for all impairments. It is important to properly categorise an impairment as physical or mental because Schedule 1(1) of the DDA states "mental impairment" includes an impairment resulting from a mental illness only if the illness is clinically well-recognised. There is no such requirement for physical impairment.

The kind of cases that are likely to require careful consideration of categorisation are those in which a person experiences physical symptoms which have no underlying physical cause. In *Rugamer v Sony Music Entertainment UK Ltd and McNicol v Balfour Beatty Rail Maintenance Ltd* 2001 IRLR 644, the Employment Appeal Tribunal held that the condition known as functional or psychological overlay should

be treated as a mental impairment because "the dividing line between physical and mental impairment depends on whether the nature of the impairment itself is physical or mental, rather than on whether a physical or mental function or activity is affected".

This approach is contrary to the Guidance on matters to be taken into account in determining questions relating to the definition of disability (paragraph 11), which states that it is not necessary to consider how an impairment was caused.

Some months after *Rugamer* and *McNicol,* in *College of Ripon & York St John v Hobbs* 2002 IRLR 185, the EAT took a different approach. In the judgment, Mr Justice Lindsay (then President of the EAT) stated "There is no statutory definition of "impairment" and nothing in the Act or Guidance which requires that the task of ascertaining whether there is a physical impairment involves any rigid distinctions between an ongoing fault, short-coming or defect of or in the body on the one hand, and evidence of the manifestation of the effects thereof on the other. The Act contemplates that an impairment can be something that results from an illness as opposed to itself being an illness. It can thus be cause or effect. In the present case, therefore, it was appropriate, and not simplistic, for the tribunal to ask itself whether there was evidence before it on which it could hold, directly or by inference, that there was something wrong with the applicant physically, something wrong with her body".

The *McNicol* case was appealed and the Commission intervened as an interested party, arguing that the correct approach to adopt in such cases was that taken in *Hobbs.* The Court of Appeal dismissed the appeal but approved the approach of Mr Justice Lindsay in *Hobbs* (see *McNicol v Balfour Beatty Rail Maintenance Ltd* 2002 IRLR 711). This is a helpful clarification and will be of assistance to both applicants and respondents in assessing whether a person has a disability as defined by the DDA – it is clearly more straightforward to assess the effects of an impairment rather than its cause. So far, so good.

In a case where the impairment is properly categorised as mental impairment, the next issue is whether it is "clinically well-recognised". The Guidance (paragraph 14)

states: "a clinically well-recognised illness is a mental illness which is recognised by a respected body of medical opinion. It is very likely that this would include those specifically mentioned in publications such as the World Health Organisation's International Classification of Diseases" (ICD-10). The EAT has since clarified that ICD-10 should be used rather than the more stringent criteria contained in the Diagnostic and Statistical Manual of Mental Disorders (known as DSM IV) – see *Goodwin v The Patent Office* 1999 IRLR 4 and *London General Transport Services Ltd v Blackledge* EAT 1073/00.

It should be noted that the Guidance does not require that an illness should be included in ICD-10 to be clinically well-recognised. However, tribunals and higher courts have been reluctant to conclude that a mental illness is clinically well-recognised unless there is expert evidence. For example, in the case of *Morgan v Staffordshire University* EAT 0322/00, it was held that medical notes containing comments such as "anxiety" and "ongoing recurring episodes of depression" and even "clinical depression" were insufficient to establish that the applicant had a clinically well-recognised illness. The EAT stated that it is for the applicant to identify how they will establish their illness is clinically well-recognised and to adduce the necessary evidence. The EAT did not think this would require a consultant psychiatrist's report in every case, but stated that "the existence or not of a mental impairment is very much a matter for qualified and informed medical opinion". In this context it is worth noting that all too often there are cases where medical experts take differing views as to whether an impairment is clinically well-recognised and/or is listed in ICD-10.

The EAT in *Morgan* also stated that "the tribunals are not inquisitorial bodies charged with a duty to see to the procurement of adequate medical evidence". This development is an unhelpful one, particularly for unrepresented parties, and is a departure from the line taken in *Goodwin v The Patent Office*, in which the EAT took the view that the tribunal's role is an inquisitorial one.

It also sits uneasily with the overriding objective of the employment tribunals as defined in Regulation 10 of the Employment Tribunals

(Constitution and Rules of Procedure) Regulations 2001 of ensuring that the parties are on an equal footing, saving expense, and dealing with the case expeditiously and fairly. It should also be noted that Rule 11(1) of Schedule 1 of those Regulations appears to contemplate that tribunals should adopt an active and interventionist role in hearings, avoiding formality and making such enquiries as are appropriate to clarify the issues and ensure the just handling of the proceedings.

The Commission takes the view that the role of the tribunal should be an interventionist one, particularly with regard to the question of whether the definition of disability is met.

If a disabled person can establish they have a mental impairment and that it results from a mental illness that is clinically well-recognised, they will also have to demonstrate that the impairment is a disability as defined in the DDA (ie one which has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities). This may be far from straightforward.

First, there can be difficulties in establishing that some forms of mental impairment have a substantial and long-term adverse effect, because the adverse effect may only be substantial for relatively short periods of time. This will not be a problem if the adverse effect is kept in abeyance by medication, and would otherwise be substantial. Where this is not the case, the only way the definition can be met is if it can be established that the effect is one which is recurrent. The Guidance states that a substantial effect will be treated as continuing if it is more likely than not that it will recur. It may be very difficult to obtain evidence on this point.

The problem is compounded by the fact that the more recent EAT decisions (such as *Latchman v Reed* 1303/00 and *Cruikshank v VAW Motorcast Ltd* 2002 IRLR 24) have held that the correct point of assessment is the time of the discriminatory act, so that evidence to the effect that an impairment has in fact recurred since that date should not be taken into account. This is a departure from the earlier authority *Greenwood v British Airways plc* 1999 IRLR 600 EAT.

A further difficulty relates to the list of "normal day to day activities" contained in paragraph 4 of Schedule 1 of the DDA. This does not

adequately encompass the range of effects that may accompany mental impairment.

The disabled person who manages to overcome all of the above difficulties and establish that they meet the DDA definition of disability, may well feel that the end of the road is in sight. However, as the requirement to meet the definition is merely a gateway provision, the reality is that they are at the start of it.

At the time that the DDA was being debated in Parliament the sponsoring Minister, William Hague (then Minister for Social Security and Disabled People) stated "our definition is the right one because employers and service providers will understand it, and it will therefore make the Act operable". It would be fair to say that the proliferation of case law on the question of definition illustrates that it has failed to live up to the intentions of the legislators. This is particularly true for mental impairment, where the process of establishing that the definition is met is excessively complex and too reliant upon medical technicalities. This is of no benefit to disabled people and nor does it benefit employers, service providers or educators. It does, however, generate substantial work for medical experts (and lawyers!) at considerable cost to all parties.

Reasonable adjustments for disabled people in employment tribunals and the civil courts

Introduction

Employment tribunal and court proceedings are daunting for all users but especially for disabled people. The DRC has been developing a range of strategies to address this by working with disabled people on their proceedings. People with a learning difficulty and people with a hearing impairment can find proceedings especially daunting because of their increased communication difficulties. With forward planning and the cooperation of the tribunal it is possible for them to have a fair hearing. Practical examples of DRC successes are a good way to illustrate this.

Mr Keane v United Lincolnshire Hospital Trust. Case No 2601176/2001

Mr Keane has a hearing impairment and was refused a job as a part-time evening medical records clerk because he could not take incoming telephone calls. He was marked down at interview to the point that he did not get the job for this reason alone. No consideration was given to making reasonable adjustments.

The case went to the employment tribunal, which found for Mr Keane. Compensation was agreed between the parties at a later date in the total sum of £7,436. This figure included 40 weeks loss of earnings, since it was accepted that it would be difficult for Mr Keane to find employment because of his impairment. The injury to feelings element was £4,500.

Mr Keane attended the directions hearing prior to DRC involvement but had arranged with the tribunal to use his regular lip speaker to communicate what was being said to him. The tribunal bore that cost. At the full hearing when the DRC was on the record as acting on behalf of Mr Keane, the same lip speaker was used. There was also an expert witness giving evidence on behalf of the applicant with regard to possible reasonable adjustments for deaf people. The expert witness Mr Langford also had a hearing impairment and used a palentypist (a stenographer who types on to a keyboard so that the enlarged type appears on a laptop screen which can be read by the deaf witness) so he could properly follow the proceedings. The applicant and the witness both had English as their first language, not British Sign Language, and gave their evidence in spoken English with the questions being put to them in English and lip spoken to Mr Keane with some signs. Mr Keane replied in English.

Mr Langford read the screen of the palentypist's laptop and answered the questions in spoken English.

Mr Keane had difficulty in answering some of the long and complicated questions which were put to him in cross-examination. The chairman suggested that the questions be shortened. This enabled Mr Keane to answer the questions.

If either of the hearing impaired witnesses had had BSL as a first language it would have been necessary to have two interpreters as the evidence of the witness would have had to have been translated into English for the tribunal to understand the evidence.

It was also arranged that there would be breaks every 45 minutes to an hour for the lip speaker and palentypist to have a 5 minute break. This assisted all parties not just the interpreters! Also the tribunal arranged that we would use the same tribunal room as for the "false start" hearing as it had an audio loop, which Mr Keane used with his hearing aid.

The tribunal staff were very helpful and arrangements were made with them in good time for the hearing. The palentypist was able to rearrange the desks slightly to allow for his laptop and keyboard to be positioned so that it could be plugged in and so that Mr Langford could view it comfortably.

Mary McKay v 1. Bryn Thomas & 2. Scottish & Newcastle Plc Case No IG100989

Ms McKay has learning difficulties, hearing and visual impairments. She visited the defendants' pub with a friend and within minutes was asked to leave and was told she would not be served any more drinks. The DRC became aware of another two individuals with learning difficulties who had also been asked to leave or refused entry to the same pub. All three gave evidence at the hearing.

To ensure the witnesses and Ms McKay understood the purpose of the proceedings a local voluntary service for people with learning difficulties was contacted to provide extra support to the individuals involved. Contact was also made with the day centres and residential homes used by the individuals so that family friends and staff members involved in the three individuals' lives were familiar with the proceedings.

Correspondence was made accessible using a variety of methods. Each letter had a picture of the legal officer at the top so the individual knew whom it was from and that it related to the court proceedings. The letters were written using simple language and structured so they could be easily understood. Correspondence with two of the individuals was sent in half inch font and Ms McKay was also sent a copy spoken onto a tape. Copies of correspondence were also sent to the individuals providing support who could then discuss the letters with the three individuals and contact the Commission with any questions arising from them.

Information regarding Ms McKay's disability and its effect on her daily life had been provided to the defendants in order for them to be able to understand the reasons why requests for adjustments may be made.

The witness statements contained questions that had been asked to the witnesses to assist them in providing details of the incidents. All three

statements were produced in regular and large print and both formats were included in the trial bundle. One statement was also recorded on to tape for the witnesses' own use.

There is no provision in the Civil Procedure Rules for individuals with learning difficulties to sign a witness statement if they cannot read it themselves. A representative of the DRC read the statements to the witnesses and signed, and the witnesses confirmed they understood the content.

At the Case Management Conference the court was given information on Ms McKay's impairments and how they affected her. It was also requested that a court with an induction loop be used and a conference room be available so that the hearing could be adjourned for a short time, if necessary. This was to allow the proceedings to be explained or summarised to enable her to understand the case. A request was also made that the case be listed first so the witnesses with learning difficulties were not caused extra distress by having to wait long periods before giving evidence.

The court readily agreed to these suggestions and was happy to assist the witnesses if necessary. The issue of adjustments to enable Ms McKay to bring her claim was also raised with the defendants, who were happy to assist.

Prior to the hearing counsel met with the witnesses to gain an understanding of their needs and to explain the way the court worked and outline what would happen. Arrangements were made with the court clerk to enable the witnesses to enter the courtroom. They were given a chance to practise being on the witness stand, taking the oath, answering questions and had the role of the judge and barristers explained.

During cross-examination of the witnesses it was accepted that questions needed to be kept simple, to the point and only addressed one point at a time so the witnesses could understand what was being asked.

The claim was successful. Ms McKay was awarded £3,000 in compensation and the judge declared that the actions of the defendant amounted to unlawful discrimination.

Mr R Ellis v Ideal For All Limited. Case No 5204107/2001 & Mr A Brazil v Premier Cleaning Limited. Case No 2200272/2002

Both these case involved men with learning difficulties who had been dismissed from their jobs as cleaners, Mr Ellis in the Midlands and Mr Brazil in London.

In both cases the tribunal was informed as soon as possible of the applicant's impairments and that adjustments would be required. In the case of Mr Ellis these were outlined at the directions hearing and the Chair at that hearing who was then aware of the issues reserved the final hearing for himself. An arrangement was also made to enable Mr Ellis to view the room that would be used for the final hearing a week before the case was listed.

In both cases a letter was also sent to the tribunal addressing a number of points:

1. Formality of the hearing.
   Requests were made that the hearing was as informal as possible and that the witnesses had someone to support them while on the witness stand.

2. Questions to the applicants.
   The tribunal was made aware that the applicants were easily intimidated, could only understand simple questions and may need more time to respond or assistance from the person supporting them to understand the question.

3. Style of the hearing.
   A request was made that the hearing start promptly and that breaks be made if the applicants or their assistant requested it. It was also asked that patience be shown by all concerned and the hearing proceed at the applicants' pace.

In both cases the claims succeeded. Mr Ellis was awarded nearly £16,000 and Mr Brazil £17,000.

In all four cases mentioned above the court and tribunals showed a good understanding of the needs of disabled people and the adjustments needed to enable individuals to have full access to justice. It is hoped that more cases involving disabled people who require adjustments will be brought so that such adjustments are less unusual and more mainstream.

Making tribunals accessible to disabled people – new guidance on applying the DDA

The DRC has been working in partnership with the Council on Tribunals to produce new guidance which looks, for the first time, at the ways in which the DDA impacts upon the administration of tribunals systems. The guidance, which was published in November, considers the practicalities of making tribunals accessible to disabled tribunal users.

Background to the new guidance

Part 3 of the DDA has particular implications for the manner in which tribunals deliver their services. "Accessibility" is about much more than ramps and wheelchairs, and many tribunal systems face a sizeable task in making the necessary changes to comply with the DDA. The need for practical guidance is all the more relevant in the run-up to October 2004 when further provisions come into force under the DDA which will require physical adjustments to be made to premises in certain cases.

Barriers to access for tribunal users

Bringing and presenting a case before a tribunal is likely to be

a daunting prospect for most people. However, the practical and procedural requirements of the process are likely to present additional barriers for disabled people. Some users will face physical barriers to access. Others may be disadvantaged by the unavailability of information in accessible formats. Some people suffer acute pain if they are required to sit for long periods of time, or may need regular breaks in order to attend to dietary or medical needs. Users with mental health issues or learning difficulties may have difficulty in understanding the process or following the progress of their case, or may find the tribunal process particularly stressful.

The effect of the DDA

Many of the services which tribunals provide in the course of administering an application or appeal will fall within the ambit of the DDA. Services which are subject to the Act include the provision of advice and information about appeal rights, by telephone, over the counter and in writing; setting up a hearing at an appropriate venue; ensuring cases are heard by suitably qualified and trained tribunals; notifying the applicant or appellant of the tribunal's decision in good time; and advising on any further appeal rights from the decision of the tribunal.

Thus, for example, tribunals will need to consider whether sufficient steps have been taken to provide forms and literature in alternative formats and in Plain English; for suitably qualified sign language interpreters or lip speakers to be provided at hearings; and for hearing venues to be physically accessible to users with a range of impairments.

Nevertheless, the DDA does not apply to all the functions of a tribunal. The Act does not apply to the performance of a tribunal's judicial functions. If a tribunal discriminates against a disabled person when deciding a question which is before it, then there may be an appeal against that decision. However, the disabled person may not bring an action against the tribunal under the DDA.

The new guidance aims to flesh out the legal implications of the DDA for tribunals. However, it also attempts to set the law in context by giving practical examples of its application, and to explain how tribunals might seek to adopt a best practice approach to the provision of services to disabled people.

Adopting best practice

Given the importance of the role tribunals play in providing access to justice, it is axiomatic that tribunal systems should adopt best practice in all aspects of service provision, and particularly in the way in which they anticipate and respond to the needs of disabled people. There are some general steps which can be taken to facilitate the process. In particular:

- tribunals should ensure that their staff receive appropriate training in matters of disability awareness and disability etiquette, and that they are familiar with the types of adjustments which it might be reasonable to provide
- tribunals should also carry out regular accessibility audits; and
- it may often be appropriate for a tribunal to establish a user group comprising disabled people who come into contact with the tribunal to advise on the way in which the tribunal meets the diverse needs of disabled people and to recommend ways to make further improvements.

What does this mean in practice?

It is all very well to say that tribunals must ensure that their services are delivered in ways which overcome barriers to access, but what does this actually mean? The way in which individuals cope with disability can depend upon many factors, and there are few universal solutions to disability issues. However, while the nature and effect of barriers to access will depend upon individual circumstances, tribunals need to ensure as a minimum:

- the provision of good quality advice and information by staff who have been trained to recognise the needs of disabled people
- the availability of written information in accessible formats and in language which can easily be understood
- the availability of alternative means of communication with tribunal staff, such as minicom or textphone;
- sufficiently flexible hearing and administrative procedures which can be adapted to meet special needs
- accessible hearing venues (and proceedings) – for all

disabled people, and not only for those who use wheelchairs; and

- appropriate training for members of tribunals, not just in matters relating to the tribunal's jurisdiction, but also in chairing and inter-personal skills, particularly with the needs of disabled people in mind.

The full text of the guidance – *Making Tribunals Accessible to Disabled People: Guidance on Applying the Disability Discrimination Act* – can be downloaded from the Council on Tribunals' website at: www.council-on-tribunals.gov.uk. It is also available in hard copy from The Stationery Office.

DRC powers

Introduction

Although the DRC strives to resolve disputes about disabled people's rights without recourse to the courts, the Commission has considerable legal powers. It is not afraid to use those powers where the circumstances merit enforcement action.

The DRC's powers are wider than one might think. As is well known, the DRC has power to assist individuals to pursue claims under the DDA. However, the Commission has other powers too, some of which are expressly conferred by the DRCA, and some of which are implicit, given the Commission's status and functions. This article aims to give an overview of the DRC's powers, and to explain some of the factors determining when and how they are used.

Strategic approach

The DRC's statutory functions (which are set out in section 2 of the DRCA) include working towards the elimination of discrimination against disabled people; promoting the equalisation of opportunities; and encouraging good practice in the treatment of disabled people. In support of the

Commission's overall objectives for performing these functions, the DRC has a legal strategy which governs the manner in which it uses its powers. This strategy includes objectives to support the enforcement of the DDA in individual cases; to improve access to justice for disabled people; and to challenge discrimination by carrying out formal investigations. It is against this background that the powers themselves should be considered.

Supporting cases under the DDA

As mentioned above, the DRC's most widely used power is to provide (or arrange) assistance to a person who has an actual or potential claim under the DDA. This is always a matter for the Commission's discretion, but the power may be used in circumstances where the case raises a question of principle, or where it is unreasonable to expect the disabled person to act unaided, or where there is some other special consideration which makes it appropriate for the DRC to provide or arrange assistance.

As it stands, this power (which is conferred by section 7 of the DRCA) is restricted to assistance with regard to particular types of proceedings brought under the DDA. Although the Secretary of State has the power to prescribe other descriptions of proceedings for the purposes of section 7, to date that power has not been exercised.

Judicial review

Although the DRC has no express power to bring judicial review proceedings in its own name, the nature of its general statutory functions under section 2 of the DRCA is sufficiently broad to enable it to bring such proceedings in an appropriate case. In this respect, it is in a similar position to the EOC and the CRE.

Judicial review proceedings involving the DRC need not be linked to an alleged breach of the DDA provided they are in pursuance of the Commission's statutory functions (its duties to work towards the elimination of discrimination against disabled people; to promote the equalisation of opportunities for such people; and so on).

This means that judicial review may be used by the Commission as a means to

highlight a disability rights issue which cannot be tackled using the DDA. In order to do so the Commission would need to be satisfied that the issue was of wider importance and merited the bringing of a test case. For example, the Commission is currently involved in judicial review proceedings which challenge the validity of a local authority's "no lifting" policy for staff caring for severely disabled people. The case does not involve a claim under the DDA, but it may still have significant implications for many disabled people.

Interventions

It also follows from the fact that the boundaries of the DRC's powers are supplied by the nature of its functions that the Commission has the power to intervene in litigation, provided that the purpose of any such intervention is connected with one or more of the Commission's general duties under section 2 of the DRCA.

An intervention may take the form of the DRC delivering written submissions on a relevant issue (either of its own motion or at the request of the court) – this is known as an "amicus" brief. Alternatively, the DRC may apply to be joined as a party to the litigation, as a third party intervener.

The Commission successfully utilised this power in the case of *McNicol v Balfour Beatty Rail Maintenance Ltd* 2001 IRLR 644. The DRC's purpose in intervening on that occasion was to persuade the Court of Appeal that the condition known as functional or psychological overlay should not be treated as a mental impairment (see *Is the DDA failing people with mental impairments?* on page 6 of this Bulletin). This was an important case because the practical consequence of an adverse interpretation of the law would have been that tribunals would have had to focus on technical medical evidence as to the cause of certain types of impairment, rather than considering the impact of the impairment on the person concerned.

Other legal activity

The DRC has various express powers of legal enforcement which are ancillary to its powers to conduct formal investigations; to enforce

compliance with non-discrimination notices; to secure and enforce action plans; to enforce agreements entered into under section 5 of the DRCA; and to apply for injunctions restraining persistent discrimination.

Purposes of legal action

It is self-evident that the DRC will wish to exercise its legal powers in order to enable individual disabled people who have been discriminated against to seek redress. It will usually do so by granting an application for assistance under section 7 of the DRCA in appropriate cases. However, there are other reasons why the Commission may wish to participate in legal proceedings, such as:

- to determine the precise application of a DDA provision
- to ensure that unhelpful precedents are not set without the court first being made aware of the DRC's preferred interpretation of relevant statutory provisions
- to challenge administrative decisions having an adverse impact upon disabled people's rights
- to challenge the compatibility of domestic legislation with the Human Rights Act or EC legislation
- to gain publicity for, and recognition of, the rights of disabled people
- to enforce compliance with the law by persistent discriminators.

The choice of power to be exercised in response to a given set of circumstances will depend primarily upon the underlying reason for the DRC's involvement, as outlined above. In cases of interest brought under the DDA, it will continue to be appropriate for DRC involvement to be channelled through the grant of section 7 assistance unless there are unusual circumstances. Such circumstances may arise where the DRC has not been approached for assistance, but nevertheless wishes to raise additional legal arguments – perhaps in respect of an issue which is not central to the actual case, or where the DRC has specialist knowledge or research which would not otherwise be available to the court.

DRC briefing on "Equality and Diversity: The Way Ahead"

The Government has published significant proposals for extending disability rights for consultation by 24 January. They will come into force on 1 October 2004.

Background

In November 2000 the Council of Europe passed a Directive requiring all EU member states to introduce legislation prohibiting discrimination in employment on the basis of disability, age, religion and sexual orientation (race and gender discrimination is already prohibited by the EU).

It has always been open to the Government to go beyond the minimum requirements of implementing the Directive. To do this and to meet its manifesto commitments to implementing in full the recommendations of the Disability Rights Task Force, which go beyond employment and indeed further than the Directive on employment, would require primary legislation.

The Government has decided instead to issue draft regulations for consultation. The Consultation Document, "Equality and Diversity: The Way Ahead", outlines plans to change the DDA (as well as amending the Race Relations Act and Sex Discrimination Act

and introducing new laws in relation to sexual orientation, religion and age). At the same time a draft of the regulations, which would implement these changes, has been published.

How to get copies of the documents

Both documents are available from the Department of Trade and Industry website: www.dti.gov.uk/er/equality

"Equality and Diversity: The Way Ahead" (reference 02/1164) can be ordered from 0870 1502 500; in Braille (reference 02/1220) from 0870 1502 500; on audio tape (summary reference 02/CAS5) from 0870 1502 500; on disc from 0800 028 8078 and in large print from 0800 028 8078.

The regulations and explanatory notes can be ordered from 0870 1502 500 (reference 02/1369).

The DRC's views

The extension of disability rights to all employees (except those in the armed services) and to employment related organisations, such as bodies issuing qualifications, is very welcome.

The DRC is however very disappointed that the basic right to equal treatment remains inadequately protected. It will continue to be too easy for employers legally to "justify" less favourable treatment on the basis of disability. In the absence of either a concept of indirect discrimination or an anticipatory duty to make adjustments the law remains inadequate to address institutional discrimination.

The DRC also believes that while the Directive requires discrimination on the basis of perceived disability or discrimination because of association with a disabled person, this is not addressed by the current proposals.

The DRC is concerned that these proposals fall short of the unanimous recommendations of the Disability Rights Taskforce, a group containing representatives from the Institute of Directors, Confederation of British Industry and Federation of Small Businesses, as well as a broad range of disability groups. For example, the proposals fail to permit re-instatement following a discriminatory dismissal, or to provide strong pension rights.

A fuller briefing is available on the DRC Website.

If you respond to the consultation, the DRC would be interested in seeing your comments and would be grateful if you could send an electronic version to pauline.hughes@drc-gb.org

News in brief

- The DRC is embarking on a thorough revision of the statutory code of practice on the elimination of disability discrimination in the field of employment. This will take account of anticipated changes in the law arising from implementation of the EC Directive under Article 13 of the Treaty of Amsterdam. The code of practice on the duties of trade organisations is also being revised. The DRC welcomes the views of practitioners and advisers on the strengths and weaknesses of the existing codes in these areas. Please send any written comments to: Pauline Hughes, Head of Legal Services Team. email: pauline.hughes@drc-gb.org

- The joint DRC and Council on Tribunals guidance on making tribunals accessible to disabled people was published on 20 November 2002. The guidance is available from The Stationery Office and can be downloaded at: www.council-on-tribunals.gov.uk

- The DRC-funded case of *Jones v 3M Healthcare Limited and Others* is to be heard in the House of Lords on 2-3 December 2002. The court will consider the issue

of whether coverage under Part II of the DDA extends to acts committed by a former employer after termination of the contract of employment.

- The DRC received over 300 responses to its draft legislative review during consultation in May-August 2002. The final version will be published during December 2002.

- The respondent has now discontinued an appeal to the Court of Appeal against the EAT decision in the case of *Cruikshank v VAW Motorcast Ltd* 2002 IRLR 24. The DRC funded Mr Cruikshank in his defence of the appeal. The case has settled for £8,500.

- In the DRC-funded case of *Franklin v E Coomes Holdings Ltd,* a case involving failure to make reasonable adjustments resulting in termination of employment, Plumstead Community Law Centre secured a settlement of £100,000 for Mr Franklin.

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.

If you require this publication in an alternative format and/or language please contact the Helpline to discuss your needs. It is also available on the DRC website: **www.drc-gb.org**

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