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LEGAL5
June 2003

Disability Rights Commission

Issue 4, June 2003

Legal Bulletin

A DRC formal investigation: Website accessibility

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Equality commissions and legal enforcement

It is tempting to suppose that an equality commission like the DRC, EOC or CRE will have as its primary enforcement function the support of litigation to remedy individual wrongs. Local redress for the violation of individual rights then becomes a major focus of activity, and an equality commission itself emerges as a curious amalgam of law centre and legal aid provider.

Such an account gains credence from the success of the existing commissions in discharging since the 1970s precisely these functions. Not of course at the expense of all other activity, such as promotional, strategic enforcement and policy work, but nevertheless as a central preoccupation. High profile cases attract media attention, clarify and, sometimes, change the law. They also secure rights and a sort of justice.

There is, however, another, more ambitious account that derives from a different perspective. On this alternative account (which, for example, underpins the White Papers that preceded the Sex Discrimination Act 1975 and the Race Relations Act 1976), it is precisely because of the limitations of individual litigation that equality commissions need other distinctive powers, not instead of, but as well as, law centre and legal aid functions. The purpose of an equality commission does not then lie primarily in the replication, albeit with a specialist twist, of activities undertaken by others but instead in the promotion of social change by different and idiosyncratic means.

Chief amongst those alternative means is the use of formal investigations, whether directed at individual persons, private or corporate, or at whole sectors. Unlike the reactive capacity to fund litigation, the ability to commence formal investigations lies at the core of a commission's own initiative. Whereas individual litigation is likely to be combative and particular, a formal investigation, at least in principle, can aspire to collaborative and systemic objectives – "in principle", because in practice the actual conduct of investigations by the existing commissions has frequently been adversarial and of local impact, complicated by the reservations expressed from time to time, and especially during the 1980s, by the higher courts about the very nature of these strategic powers – ("reminiscent of the days of the Inquisition", as Lord Denning put it or in the view of Lord Hailsham, of the Star Chamber).

Websites and disability rights

Like the other equality commissions, the DRC has the power to conduct formal investigations, supplemented in its case by an innovative ability to broker binding agreements in lieu of the exercise of that power, and constrained in its exercise by a tight 18-month time limit for completion of an investigation, whether general or "named-party".

On 28 March 2003 the DRC announced its first formal investigation into website accessibility. The purpose of the investigation is threefold: to conduct a systematic evaluation of the extent to

which the current design of websites helps or hinders use by disabled people; to produce an analysis of the reasons for any recurrent barriers; and to recommend further work that will contribute to the enjoyment of full access for disabled people.

This is not the first time website access has attracted attention. Internationally, in the case of *Maguire v The Sydney Organising Committee for the Olympic Games*, the Australian Human Rights and Equal Opportunities Commission concluded that the Committee had been in breach of the Australian Disability Discrimination Act 1992 due to its failure to provide Braille versions of information relating to ticketing arrangements, Braille copies of the souvenir programme and, more generally, a website to which Mr Maguire could have access.

In the USA, the debate about the "digital divide" inaugurated by President Clinton has been accompanied by litigation (not always successful) under the Americans with Disabilities Act 1990 (ADA). Most recently, in October 2002 the United States District Court for the Southern District of Florida found in the case of *Gumson v Southwest Airlines* that the ADA concept of "public accommodation" did not extend to the design of websites at all.

In the UK, the RNIB published in August 2000 a report on 17 websites in which it concluded that the performance of high street stores and banks was "extremely disappointing". A report in September 2002 from the University of Bath described the level of compliance by UK universities with website industry standards as "disappointing". In November 2002, a report into 20 key "flagship" government websites found that 75% were "in need of immediate attention in one area or another".

Website access is not, of course, the only area of service provision where the letter and spirit of the Disability Discrimination Act 1995 are not observed comprehensively. Unusually, however, the web is part of the social environment that is still relatively new. Whereas access to, for example, the built environment frequently entails tackling barriers unthinkingly created many years ago, in the case of the web its relative immaturity creates a unique opportunity to make an intervention in favour

of disability rights at a much earlier stage.

If disability discrimination is, as disability theorists have argued, a function of the relationship between physical or mental impairment and an unaccommodating environment, the web presents an environment that could, with relatively modest expense and forethought, be made more accommodating than at present. In the judgement of the DRC, these distinctive factors make website accessibility an attractive area for a general formal investigation, conducted in a collaborative and constructive spirit.

The DRC's approach: "accessibility for usability"

To assist in the achievement of the threefold purpose already identified, the DRC has arranged for authoritative research to be conducted by Professor Helen Petrie and her colleagues at the Centre for Human-Computer Interaction Design, City University London. This research will entail the testing of 1,000 websites by automated means and against recognised industry standards, as well as more in-depth testing of 100 websites by a specially convened panel of 50 disabled people with a variety of cognitive, sensory and mobility impairments. Critical to the effective conduct of this research will be the concept of "accessibility for usability", the notion that automated tests and objective industry standards are a means to the actual and effective use of the web by disabled people rather than an end in themselves.

In addition, the DRC will conduct a survey of the owners of 100 websites to establish their approach to disability issues and so obtain material for understanding the factors that have led to the current level of accessibility.

As already mentioned, the DRC is subject to an 18-month time limit in the conduct of formal investigations. In this instance, that limitation is welcome in imposing focus and direction. It is the DRC's intention to complete the requisite testing of sites by September, and to produce its investigation report in December 2003.

If successful in achieving rapid and widespread change, this first formal investigation from the DRC will help establish a course for future enforcement

activity that sees the achievement of a new balance between interventions in individual cases and the use of the full range of the strategic enforcement powers available to it. In short, a significant step towards social justice, not just as the realisation of individual rights, but of increased and widespread participation for all disabled people in social, economic and political life.

Manual handling and disabled people: finding the right balance

Human rights and disability rights

The Disability Rights Commission (DRC) does not currently have standing to support causes of action founded principally upon the Human Rights Act 2000. Yet it is clear that in extreme situations the denial of rights to disabled people is as much a matter of human rights as of disability rights more narrowly conceived. Since the DRC, in keeping with the other equality commissions, has residual standing to intervene in judicial review proceedings, it is nevertheless likely that, from time to time, the weight of human rights legislation will come to bear upon issues with which the DRC is properly concerned.

The Divisional Court earlier this year delivered judgement in such a case, where the legal argument advanced by the parties and by the DRC in its intervening capacity encompassed principles derived from the European Convention on Human Rights, as well as domestic community care and public law legislation.

The case in question concerned two young women with profound physical and

learning impairments. The primary issue with which the DRC was concerned was the lawfulness of the responsible local authority's manual handling policy, which was interpreted by the local authority itself in such a way that it effectively prevented care staff from lifting the two young women manually and instead entailed the performance of lifts by mechanical hoist, against the wishes of the women and their parents.

"No risk" or "risk reduction"?

Regulation 4 of the Manual Handling Regulations 1992 applies to "hazardous" lifts; that is, those lifts that involve a risk of injury to the care worker. The regulations provide that as a general rule, such lifts should be avoided, so far as is reasonably practicable, but that where lifts cannot so be avoided, any risk of injury to those performing the lift should be reduced so far as is reasonably practicable. In other words, as the Divisional Court noted, the regulations prescribe a "risk reduction" regime, not a "no risk" regime. The ideal of absolute "safety" for care workers is simply not compatible in all circumstances with the proper discharge of basic obligations to those for whom care is being provided.

As the judge in the instant case put it, "There may be situations where some manual handling is an inherent feature in what the employee is employed to do…in the present case, in my judgement, some manual handling is on any view an inherent – and inescapable – feature of the very task for which those who care for A and B [the two young women] are employed."

Human rights and the needs of the disabled person

It is clear therefore that any risk assessment in such circumstances needs to take into account the needs of the disabled person and their human rights, their dignity and autonomy, as well as any reasonable concerns for the safety of the care worker. In order to give due recognition to the needs of the disabled person, it will be necessary to consider methods of avoiding or minimising the risk, the particular context (eg the frequency and duration of the manoeuvres required during a typical day) and the physical,

emotional, and social impact upon the particular disabled person.

In this particular case, the court concluded that it was not reasonably practicable for the local authority to avoid the need for their employees to undertake any manual handling of the two young women. The local authority's duty was therefore that of reducing the risk of injury as far as practicable. In this regard, the court considered that so far as the lifting of disabled people in their own homes is concerned, the Royal College of Nursing "Guide to the Moving and Handling of Patients" is less reliable than the Health and Safety Executive's "Handling Home Care" (HSG225).

Conclusions

The following general principles emerge from this important decision of the Divisional Court:

1. A lifting policy is most unlikely to be lawful either on its face or in its application when it:

- imposes a blanket ban of all manual lifting
- imposes a blanket ban of manual lifting save in circumstances where life is in issue
- imposes a blanket ban of manual lifting save where any other means are a physical impossibility.

2. In the case of hazardous lifts, manual lifting will probably be the exception but the fact that a hazardous lift **can** be performed by hoisting does not mean that it **must** be performed by hoisting. There may be circumstances where a disabled person's needs are such that it is not reasonably practicable for a hazardous lift to be carried out by hoisting, so that manual lifting is required.

3. Where the health and safety of the disabled person would otherwise be under threat, manual lifts, which may not otherwise be acceptable, may be required.

4. All lifts required for maintaining the client's dignity, comfort and quality of life must be performed somehow (by exceptional manual lifting if necessary, for example, where there is prolonged resistance or great and obvious distress).

5. There are certain circumstances where the carer would be obliged to lift a disabled person (manually). Such circumstances include obvious emergency situations.

6. In the case of merely routine lifts within the home, the balance will, in most instances, rest against manual handling and in favour of using hoists. However, the treatment of disabled people is likely to be unlawful where it entails:

- allowing them to remain sitting in the bath for any really appreciable time without lifting them out
- leaving them sitting on the toilet for a long time
- leaving them in a chair or elsewhere with the risk that bedsores will develop
- failing to pick them up if they have a fall and remain lying, particularly in a public place
- leaving them sitting in bodily waste for any appreciable time.

7. The rights of disabled people to participate in the life of the community, and to have access to an appropriate range of recreational and cultural activities, are so important that a significant amount of manual handling may be required. It is therefore likely to be unlawful for a carer:

- to fail to take a disabled person out of the house (for example, for a swim) merely because a power cut means that the hoist is not working
- to restrict the time available for access to such activities as shopping, swimming and horse-riding because manual lifting would otherwise be required
- to fail to take a disabled person swimming one or twice a week because the swimming baths do not have a hoist
- to fail to take a disabled person shopping because changing their incontinence pads requires manual lifting.

The Future

Following judgement in this case, the DRC wishes to ensure that lifting policies are developed and operated (by local authorities and others) which ensure a proper balance is struck between meeting the needs and rights of disabled people and ensuring a safe working environment for staff working with them.

Blanket policies, it is clear, do not achieve such a balance. The particular circumstances of each case must be considered. In almost all cases it will be possible to identify approaches to handling that protect staff while simultaneously respecting the wishes and needs of disabled people.

In this particular case the DRC has worked with East Sussex County Council to ensure that its lifting and handling policies now conform to the new Health and Safety Executive guidance, "Handling Home Care". The DRC would anticipate that other local authorities, NHS trusts and care providers will wish to review their policies in the light of this decision. By way of assistance, the revised policy implemented by the local authority in this case and approved by the Divisional Court is available on the DRC website at **www.drc-gb.org**

Disability Equality: Making it happen

The Disability Rights Commission's (DRC's) first major review of the Disability Discrimination Act 1995 (DDA), contains a wide range of proposals to reform current legislation and to strengthen the civil rights of disabled people.

The DDA was a ground-breaking piece of legislation when it was passed in 1995. Nevertheless, much still needs to be done before it can provide the quality of legal protection that disabled people need.

It is clear from our experience in providing advice and assistance to disabled people, businesses and employers, from developing case-law and from research into the operation of the DDA, that more needs to be done to strengthen disabled people's rights. Our proposals seek to clarify and strengthen the rights in the DDA.

Employment

The Disability Discrimination Act 1995 (Amendment) Regulations 2003 currently before Parliament will extend and improve the employment rights in the DDA (see article on page 23). However, a number of significant problems remain with regards employment. The

DRC is very concerned that the DDA is proving inadequate in addressing the recruitment problems faced by disabled people. Many employers still ask medical questions about applicants' disabilities prior to job interview and selection. This enables employers who wish to discriminate to simply reject disabled applicants at an early stage. It is extremely difficult to prove such discrimination. Such questions discourage some disabled applicants from even proceeding with their application. We believe that questions prior to job selection should be prohibited except in very specific circumstances.

The DRC is also calling for Employment Tribunals to be given the power to order re-instatement in suitable disability discrimination cases (as they can already in relation to unfair dismissal). Finding employment as a disabled person is often an uphill struggle – as noted above – so it makes sense that they have the right to their job back if a tribunal has found their employer acted unlawfully.

The DRC believes that employers should be subject to a duty to anticipate the requirements of potential disabled employees and applicants and to take reasonable action to remove barriers in advance of individual complaint. Extending this approach to employment would encourage employers to think in advance about the ways in which their practices or premises might be made more accessible to disabled people.

Employers would not be expected to make expensive changes to their premises in case a disabled person applied for a job, but would be expected to consider access improvements when refurbishing.

Discrimination in relation to goods facilities and services

There is considerable 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 (The Price of Justice RNIB 2000.). We agree with the proposal of the Cambridge *UK Review of Anti-Discrimination Legislation* (2002) that disability discrimination claims should be brought through the employment tribunal system, which is more accessible and more familiar with discrimination claims.

The Report also makes a number of proposals for clarifying and strengthening the rights in Part III DDA.

The definition of disability

The most common reason for a disability discrimination case to fail in an employment tribunal is because an applicant did not meet the legal definition of disability. The DRC is recommending much greater clarity in defining disability – which is proving to be one of the most contentious and confusing aspects of the DDA.

Specifically, we propose:

- updating the statutory Guidance on the Definition of Disability
- strengthening the role of tribunals in the process of adjudicating in the definitions
- automatically accepting as disabled, people who receive particular benefits (such as Disability Living Allowance), so they do not have to prove their disability a second time.

The DRC is proposing these changes to ensure that groups who particularly experience stigma and discrimination have better protection under the DDA.

Probably the most significant area of change is to the way in which mental illness is covered. In particular, we recommend extending the range of day to day activities listed in the Act; removing the requirement that a person's mental illness is clinically well recognised, and changing the requirement that incidents of depression last 12 months or can be shown to be likely to recur.

The other main area of change is in relation to progressive conditions. The DDA already makes special provision for progressive conditions. However a particular problem has arisen in relation to multiple sclerosis, following an Employment Appeal Tribunal decision that an applicant with multiple sclerosis was not disabled because he had not shown that it was a progressive condition[1]. This case shows that it is often difficult to predict the course of multiple sclerosis, and perhaps 15 or 20% of people with this condition will never experience any substantial effects. It is, of course, understandable that doctors would not wish to pronounce a negative prognosis in situations like these.

Because of this the DRC proposes that all progressive conditions are deemed to be

covered from the point of diagnosis. We believe that Regulations could clarify in some instances – such as HIV, cancer or MS – whether or not a particular condition should be deemed to be progressive.

European Disability Directive

We propose that an EU Directive is passed with respect to discrimination on the grounds of disability in relation to a broad range of goods and services.

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 Disability Rights Commission 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. We believe that such a Directive is the indispensable requirement for enabling disabled citizens of the European Union to achieve freedom of movement and equal participation. The German Government has already endorsed the need for such a Directive. If the UK Government followed suit this would create a powerful impetus.

What do our Stakeholders think our proposals?

Each of our proposals was subject to thorough consultation. Over 400 organisations and individuals from all over Great Britain responded in depth, and overall gave strong support. An impressive range of disabled groups, business representatives (Federation of Small Business, the Institute of Directors and the CBI) and public sector organisations engaged in the consultation on our proposals. Some disability groups expressed concern that the proposals did not go far enough (particularly in respect to moving towards a definition of disability based on the social model). Conversely business representatives whilst supporting many proposals (particularly those involving improving the planning and tax systems) expressed some concerns about changes to the definition of disability to include more people with mental health problems and an anticipatory duty for employers. We believe these concerns can be allayed.

Disability Bill

Other recommendations cover tax, planning, criminal law, genetics and human rights where we consider that these are needed to promote equality of opportunity for disabled people. The Government has already announced a draft Disability Bill to be published later this year. That Bill will cover housing, transport, larger private clubs, a positive public sector duty and public functions. We hope it may be possible to include some of our new proposals. Other proposals can be taken forward via a different route and over a slightly longer time-frame.

The DRC's report, "Disability Equality: Making it Happen", is available from the Disability Rights Commission's helpline on 08457 622 633 or from the DRC's website at **www.drc.org.uk**

[1] *Mowat-Brown v University of Surrey* (2002) IRLR 235

Compensation for disability discrimination

Introduction

This article will focus on compensation for disability discrimination claims (DDA claims) brought in the employment tribunals because the bulk of case law on compensation relates to such claims. Compensation for other types of DDA claim will be considered briefly at the end.

In DDA claims (as with sex and race discrimination) where a complainant is successful, the employment tribunal makes such order as it considers just and equitable, including compensation. There is no limit on the amount of the award. Damages are tortious and should compensate fully for the wrongful act.

In considering the appropriate level of compensation, awards made in relation to any form of discrimination will be relevant. Levels of personal injury damages will also be of relevance in some cases. As the Disability Discrimination Act 1995 (DDA) is a comparatively new piece of legislation, it is usually necessary to find precedent case law brought under the Sex Discrimination Act 1975 (SDA) or the Race Relations Act 1976 (RRA). However, this

process must be undertaken with some caution, because in the same way that the type, nature and extent of a disability are specific to an individual person, so too is the impact of discrimination.

The possible heads of claim for damages are as follows:

- loss of earnings and other employment related benefits to the date of hearing
- future loss of earnings and employment related benefits
- injury to feelings
- personal injury
- aggravated damages
- exemplary damages.

As with SDA and RRA claims, interest can be awarded.

Loss of earnings and other benefits

Loss of earnings and other benefits is usually awarded in two parts: losses to the date of the hearing and future loss.

Care must be taken in recruitment cases, because what is being assessed is the loss of a chance of employment. It is important to adduce evidence that the disabled person stood a good chance of being recruited but for the discriminatory act. It is necessary to compare the skills, knowledge, experience and qualifications of the disabled person with those of the successful applicant, in order to evaluate in percentage terms the loss of opportunity. This information should be obtained at a very early stage, for example by use of a questionnaire or by discovery, as it is crucial to informing any discussions about settlement.

The question of reasonable adjustments will often be relevant to the assessment of the loss which flows from a discriminatory act. The case of *Wight v East Riding of Yorkshire Council* EAT 18 April 2002 illustrates this point. The facts were that an employee developed irritable bowel syndrome as a consequence of being bullied at work. He complained to his employer about the bullying, and was then absent from work due to stress. He was dismissed for being off work. After intervention by his union he was reinstated and transferred to a workstation near to toilet facilities, but still in the proximity of the people who had bullied him. He became clinically depressed and a medical report stated he was unfit for work and unfit for

re-deployment. He was dismissed again on grounds of ill-health. The tribunal concluded that no loss of earnings flowed from the second dismissal.

The EAT allowed an appeal against this decision and held that the correct approach was to consider the chances, if the employer had complied with its reasonable adjustments duty, that the employee would have retained his employment. This meant considering the chances that, had the reasonable adjustment been made, the employee's health would have recovered so as to enable him to work for the employer in some other position. The EAT also held that a finding of fair dismissal did not negate any loss flowing from dismissal under the DDA.

Another issue to consider is mitigation of loss. It is not for the applicant to demonstrate that he or she has mitigated their loss, but rather, it is for the respondent to demonstrate on the balance of probabilities that there has been a failure to do so. However, as the recent Court of Appeal decision in *Wilding v British Telecommunications Plc* 2002 IRLR 524 demonstrates, a claimant must act reasonably.

In *Wilding* the Court of Appeal outlined the principles to apply when determining whether a refusal of an offer of re-employment would amount to a failure to mitigate loss.

When quantifying future losses, it is important to adduce evidence as to the relative disadvantage in the labour market of the disabled person. The general picture may be established using appropriate statistical evidence. However, it is also important to take into account the nature of the disability and the impact of it upon the individual in question. For example, it is likely to be more difficult for a person with a mental impairment to obtain employment than for someone with a physical impairment, subject to consideration of the severity of the impairment concerned. Expert evidence may be necessary in some cases. It will also be important to adduce evidence of previous employment history, of attempts made to seek work since the discriminatory act, and the outcome of these.

Injury to feelings

In *Vento v Chief Constable of West Yorkshire Police* the Court

of Appeal reviewed the approach to be taken to compensation for injury to feelings in discrimination cases. An award of £50,000 was considered to be excessive when taking into account the kind of damages awarded for non-pecuniary loss in personal injury claims. The court also considered the award to be out of step with authorities concerning injury to feelings, such as the Employment Appeal Tribunal (EAT) decisions in *Armitage, Marsden and HM Prison Service v Johnson* 1997 IRLR 162 and *ICTS V Tchoula* 2000 IRLR 643. The Court of Appeal identified three broad bands for injury to feelings, as distinct from compensation for psychiatric or similar personal injury, and stated as follows:

"i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race… Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.

ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.

iii) Awards of between £500 and £5,000 are appropriate in less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being so low as not to be a proper recognition of injury to feelings."

The Court of Appeal also stated that regard must be had to the sum total of awards of compensation made under the various headings of injury to feelings, psychiatric damages and aggravated damages, to avoid double recovery.

In relation to the lower end of the spectrum of awards for injury to feelings, in *Doshoki v Draegar Ltd* 2002 IRLR 340 the EAT concluded that £750 would be very close to the bottom of the scale.

These general principles will apply to DDA cases.

Personal injury

Since the Court of Appeal decision in *Sheriff v Klyne Tugs* 1999 IRLR 481, it has been established that an employment tribunal has jurisdiction to award damages for personal injury, including both physical and psychiatric injury, caused by unlawful discrimination.

Although it is still early days, it seems likely that this development will be of particular significance in DDA claims, especially those where a discriminatory act exacerbates an existing disability, such as a mental impairment. Expert evidence will be of great importance in quantifying damages in such cases.

The starting point should be to refer to the Judicial Studies Board Guidelines for the Assessment of General Damages in Personal Injury Cases. In relation to the question of psychiatric damages, which are likely to be of most significance in DDA claims, the guidelines list factors to be taken into account when valuing a claim, which include:

- the injured person's ability to cope with life and work
- the effect on the injured person's relationships
- the extent to which treatment would be successful
- future vulnerability
- prognosis
- whether medical help has been sought.

On the question of double recovery, the case of *HM Prison Service v Salmon* 2001 IRLR 425 EAT is of assistance in that the EAT recognised that although, in principle, injury to feelings and psychiatric injury are distinct, in practice the two types of injury are not easy to separate. The EAT clarified that what is important is that the total award for personal injury and injury to feelings properly reflects the harm to the individual caused by the wrongful act of discrimination.

Aggravated damages

As with sex and race discrimination, compensation for aggravated damages can be awarded in DDA claims. Aggravated damages are additional compensation for injured feelings in cases where a respondent has behaved in a high-handed, malicious, insulting or oppressive manner in committing the

discriminatory act, or in subsequent proceedings. In the *Armitage* case (see above) the EAT held that £7,500 was not an excessive award for aggravated damages. In *Vento* (see above) the Court of Appeal considered £5,000 to be an appropriate sum.

In *(1) Zaiwalla & Co and (2) Hudson v Walia* EAT 24 July 2002, the EAT held that aggravated damages could be awarded by reference to conduct in the defence of proceedings. This is a significant development in relation to DDA cases. There are, for example, cases where respondents unreasonably refuse to concede that an applicant is disabled, and this may lead to an applicant undergoing unnecessary medical examination or unnecessary cross-examination. Such conduct may found a successful claim for aggravated damages.

Exemplary damages

These are punitive damages and may be awarded where the court considers that the compensatory award does not adequately provide a just outcome.

In the case of *Rookes v Barnard* 1964 AC 1129, the House of Lords held that exemplary damages could be awarded in three categories of case: where there has been oppressive, arbitrary or unconstitutional action by servants of the government; where the defendant's conduct has been calculated by him or her to make profit that may exceed the compensation payable to the plaintiff; or where there is statutory authority to do so.

The case of *Kuddus v Chief Constable of Leicester Constabulary* HL 7 June 2001 establishes that it may be possible to claim exemplary damages in discrimination cases falling within one of the categories specified in *Rookes v Barnard*. There is, as yet, no body of case law in respect of such damages for discrimination cases and it is unlikely that exemplary damages will be of significance in the majority of DDA claims.

Compensation in other types of DDA claim

Readers will be aware that claims can also be brought under Part 3 of the DDA in respect of discrimination in the

provision of goods, facilities and services. These claims are brought in the civil courts. The main head of compensation is usually injury to feelings and awards usually range from £1,000 upwards. In *Purves v Joydisk Ltd* Court of Session 25 February 2003, the DRC supported an appeal against an award of £350 for injury to feelings, made by a court in Scotland. The appeal was successful and the award was increased to £1000, and the Sheriff Principal commented: "the sum of £750 is the least that may nowadays be awarded for the slightest injury to feelings, deserving of damages, which is caused by discrimination on the ground of disability". This is a very helpful precedent and demonstrates that the approach to injury to feelings in Part 3 cases should be the same as for employment cases. The DRC's website gives details of awards and settlements made in Part 3 cases and practitioners may find it useful to refer to this when seeking to value a particular claim.

It is also possible for compensation to be awarded in respect of some types of claim brought under the education provisions of the DDA (Part 4). Compensation can only be claimed in cases brought in the civil courts which will almost always be claims relating to the provision of further and higher education. Claims relating to schools are normally brought in the new Special Educational Needs and Disability Tribunal (SENDIST) and compensation cannot be claimed. The education provisions of the DDA came into force in September 2002 and no awards of compensation have yet been made. It will be interesting to see how the approach taken by the civil courts to claims brought under Parts 3 and 4 of the DDA develops in the future.

Forthcoming changes to Part 2 of the DDA: An overview

Draft Regulations have now been published which will, once approved by Parliament, substantially amend the DDA as part of the Government's implementation of the EU Directive establishing a general framework for equal treatment in employment and occupation. The Disability Discrimination Act 1995 (Amendment) Regulations 2003 will come into force on 1 October 2004 – the same day as the provisions of Part 3 of the DDA which deal with physical adjustments to premises are to be brought in.

The changes relate principally to Part 2 of the DDA, although in respect of one particular issue (employment services) there will be changes to Part 3 of the Act as well.

It is well known that the directive necessitates the abolition of the small employers exemption in Part 2 of the DDA, and the extension of coverage to occupations such as the police, partnerships and barristers. The draft Regulations do indeed achieve these things, but they are more far-reaching than that. This article gives a brief overview of the main changes proposed to the present law, pending finalisation of the Regulations before the new law comes into force in October 2004.

Definition of discrimination

Once the Regulations come into force there will be a common definition of discrimination which will apply across the whole of Part 2 of the DDA. At the moment there are separate definitions in sections 5 (in relation to employers) and 14 (in relation to trade organisations). Under the new regime, Part 2 will apply to a much wider range of persons – hence the need for a generic definition of discrimination.

The new definition of discrimination (in section 3A of the Act) closely resembles the existing definition in most respects. However, there are modifications which are intended to meet the Directive's prohibition of both direct and indirect discrimination. It will no longer be possible to justify less favourable treatment which amounts to direct discrimination on the grounds of disability. In order to achieve this, the DDA adopts a definition of direct discrimination which closely mirrors that found in section 1 of the Sex Discrimination Act.

There is to be no new definition of indirect discrimination however. The Government has taken the view that the existing duty to make reasonable adjustments (slightly modified) is sufficient to comply with the directive in this regard. However, it will no longer be possible in any circumstances to justify a failure to comply with a duty to make reasonable adjustments. There is one exception to this approach to countering indirect discrimination. It relates to discrimination by qualifications bodies and is explained in that context later in this article.

Harassment

The DDA does not expressly refer to disability-related harassment at the moment (although the reference to "any other detriment" in section 4(2)(d) is apt to cover such conduct). However, the regulations insert a new section 3B into the Act defining "harassment" separately from discrimination, and prohibiting harassment in relation to each category of person subject to a prohibition on discrimination.

Harassment will occur for these purposes if there is either a violation of a disabled person's dignity, or if the person doing the harassing creates an intimidating, hostile, degrading, humiliating or offensive environment for that person.

Relationships which have come to an end

The regulations will plug a hole in the DDA by inserting a new provision outlawing discrimination (including harassment) after the employment or other relationship in question has come to an end. Post-termination discrimination will be prohibited if it arises out of and is closely connected with the relevant relationship.

Extending the scope of Part 2

It has already been noted that the regulations will extend the coverage of Part 2 to certain occupations which are not currently within the scope of the DDA. This is because the directive applies to all employment, self-employment or occupation and, thus, extends to some people who are not generally regarded as employees. There are a few categories which are particularly noteworthy:

Office-holders: The DDA's coverage of office-holders (such as some company directors, judges, chairmen or members of NDPBs, and ministers of religion) is presently quite limited.

However, the Regulations will extend the DDA's coverage to include all office-holders who are remunerated and who perform their functions under the direction of another person. The existing provisions on government appointments will be broadened to cover the whole life of the appointment, rather than just the appointment process. This will bring the DDA into line with the Race Relations Act on this issue.

Practical work experience: New provisions are to be inserted into the DDA to implement the directive's requirement that discrimination in vocational training "including practical work experience" should be prohibited. The provisions apply to a person providing, to a person whom he does not employ, practical work experience undertaken for a limited period for the purpose of a person's vocational training. The balance of the directive's requirements in relation to vocational training (other than those dealt with by the new Part 3 provisions on employment services) will be the subject of separate regulations which will need to be made before December 2006.

Qualifications bodies: New provisions are to be introduced

prohibiting discrimination by qualifications bodies (although such bodies do not include bodies responsible for schools or further and higher education institutions). These provisions, which are modelled on those in the Sex Discrimination Act concerning qualifying bodies, deal with discrimination in relation to the conferring of professional or trade qualifications.

There is a departure from the general approach to indirect discrimination in relation to the application of a competence standard by a qualifications body. There is no duty to make reasonable adjustments in the way such a standard is applied to a disabled person, but a test of objective justification is applied (instead of the usual test of "material and substantial"). Less favourable treatment in the application of a competence standard will thus be justified only if the standard is, or would be, applied equally to people who do not have the particular disability in question, and if its application is a proportionate means of achieving a legitimate aim.

A "competence standard" is an academic, medical or other standard applied for the purpose of determining whether or not a person has a particular level of competence or ability.

Enforcement

Enforcement of rights in respect of discrimination in any of the circumstances contemplated by Part 2 of the DDA is by way of a claim to an employment tribunal. The regulations will alter the rules about the burden of proof in Part 2 claims. A person who brings a claim for unlawful discrimination under Part 2 must show that discrimination has occurred. He must prove this on the balance of probabilities in order to succeed with a claim in an employment tribunal. However, if it is apparent from the facts of the case that there has been discriminatory conduct, the on us will shift to the employer to provide an adequate explanation for what has taken place. If the employer cannot provide such an explanation, the tribunal will uphold the claim.

The regulations will also impose new obligations which may only be enforced by the DRC. For example, the present rebuttable presumption of discrimination in cases where there has been a discriminatory advertisement is replaced by a

provision which makes the publication of such advertisements unlawful in itself. However, an alleged breach will be actionable by the DRC and not by individual disabled people. Similarly, there is to be a new prohibition on instructions and pressure to discriminate on the grounds of disability, and this too is enforceable by the DRC alone.

Employment services and Part 3 of the DDA

The regulations will also insert new provision in Part 3 of the DDA to deal with the provision of employment services. As the directive applies to employment and occupation, services concerning vocational guidance, vocational training and services to assist people to obtain or retain employment, or self-employment, are within its scope.

The regulations will modify the application of the provisions of Part 3 in respect of such services, in order to make them comply with the directive's requirements. In order to do so, the regulations prohibit harassment in connection with such services and modify the threshold for triggering the duty to make reasonable adjustments. The scope of the duty is extended, and the defence of justification is removed. Treatment amounting to direct discrimination will not be capable of being justified either.

Further regulations dealing with pensions

The pensions regime under the existing DDA is inconsistent with the directive in a number of respects – for example, it permits direct discrimination to be justified in some circumstances, and does not impose a duty to make reasonable adjustments. Although the Government did consult on draft regulations about pensions, the relevant provisions were omitted from the final Regulations as a change in approach is being considered. A further round of consultation, followed by further regulations, is therefore expected.

Revised Codes of Practice

The DRC is in the process of drafting new Codes of Practice giving guidance on the operation of Part 2, and taking full account of the new Regulations. These will replace the two existing Codes of Practice which deal with Part 2, and we are expecting to consult on our proposals in this regard later in the year.

Does my client have capacity to instruct me to bring and conduct legal proceedings?

Introduction

For legal advisers, particularly those helping disabled people enforce their rights under the Disability Discrimination Act 1995 (DDA), it is essential to be fully aware of the legal definition of incapacity and of what this entails.

This note provides a summary of the approach the courts adopt when considering the issue of incapacity. It also distinguishes the position in England and Wales from that in Scotland.

Legal presumption of capacity

The law, on both sides of the border, accepts that people have varying degrees of ability. Lack of knowledge or ability in a particular field should not prevent a person from dealing with their personal affairs as they see fit. Hence, the general legal presumption is that anyone has competence personally to bring and conduct legal proceedings. Courts will be reluctant to interfere with an individual's civil rights in this regard. It is for those who challenge this presumption to prove on the balance of probabilities that an actual or potential litigant does

not have capacity to bring or conduct legal proceedings.

What does incapacity mean?

In England and Wales, for the purposes of civil legal proceedings (but not of employment tribunal proceedings) incapacity is defined as the inability of a person, by reason of mental impairment, to manage and administer their own property and affairs. (See section 94(2) of the Mental Health Act 1983).

Incapacity, as defined in law, could arise as a result of the age of the client or the severity of a client's disability. The capacity issue has particular relevance to cases brought under Part III (goods, facilities, and services and premises) and Part IV (education – schools and post-16) of the DDA.

It should be noted that the phrase "affairs" does not cover physical care or treatment, but will cover business, legal and other similar transactions.

In Scotland there is no all-encompassing definition. Incapacity for adults is defined in the Adults with Incapacity (Scotland) Act 2000 section 1(6) as: "incapable of

- acting
- making decisions
- communicating decisions
- understanding decisions
- retaining the memory of decisions … by reason of mental disorder or of inability to communicate because of physical disability" (although it should be noted that a person does not fall within this definition if their inability to communicate can be improved by aid or assistance).

The position of children in Scotland is covered by the Age of Legal Capacity (Scotland) Act 1991. In essence, a child who has general understanding of what it means to instruct a solicitor in connection with any civil matter has legal capacity and a child of 12 or more is presumed to have that understanding.

The general legal test to determine incapacity

It should not be assumed that someone's inability to deal with legal advisers and the legal process without assistance from others means they lack capacity. Capacity personally to bring and

conduct legal proceedings can exist even when the client requires explanation and assistance from relatives, friends or advocates.

Furthermore, as a result of obligations under Part III of the DDA, legal service providers should of course always consider making reasonable adjustments to policies, practices or procedures, which result in a disabled client finding it impossible or unreasonably difficult to make use of the services they provide to the general public.

In England and Wales, the recent Court of Appeal judgement in the case of *Martin Masterman-Lister -v- (1) Brutton & Co; and (2) Jewell & Home Counties Dairies* (2002 EMCA Civ 1889) reiterates, for the sake of clarity, the factors the lower courts (and, by implication, legal advisers) should consider in determining the issue of incapacity.

The questions the Court of Appeal thought particularly relevant when determining capacity are listed below. While the law in Scotland is quite different, it would also be useful for Scottish practitioners to consider these general issues.

- Can the person recognise the problem they encounter?
- Can the person explain with sufficient clarity the problem to those from whom they seek appropriate advice?
- Can the person understand and evaluate the advice received from an appropriate source?
- Can the person understand the effects of choosing one course of action over another and give effect to their chosen course through instruction?

These general questions have, of course, to be answered according to the particular circumstances of each case. The context of each case and the degree of capacity required in each instance will vary. It is even possible that the same client will have capacity in respect of one set of legal proceedings, but not in respect of another since the demands litigation places upon any individual will differ from case to case. Accordingly, the standard of capacity required in law could shift according to the situation encountered in any given case.

How do I apply the test for determining incapacity in practice?

Judging the capacity of clients can pose very difficult questions for legal advisers and often requires a delicate balancing exercise between the needs and rights of clients, and the professional obligations of advisers.

Whilst recognising that in some cases it will be difficult, if not impossible, to communicate directly with a client, best practice requires some form of one to one contact between an advisor and the client, to the extent this will enable the adviser, at the very least, to make an informed preliminary judgement on the client's capacity and determine what can be done by way of reasonable adjustments.

If there are legitimate concerns that a client does not have legal capacity to deal with the case, advice may have to be sought from a psychologist or psychiatrist. The court may also require the personal evidence of the legal adviser or of family and friends.

It should not of course be assumed that the question of capacity arises simply because the client requires assistance from friends or family in order to make decisions in respect of the particular case in question. Whilst emphasis has properly been placed upon the importance, as a general rule, of direct communication with clients, advisers also need to consider making reasonable adjustments to the way they communicate with a client (in the form, for example, of Easy Read documents or a simpler method of explaining technical matters) to enable clients to make informed choices. Sometimes a third party will have to be involved, but not to the effective exclusion of the person on whose behalf the case is being pursued.

How do I manage a case brought by an adult client who lacks capacity?

In England and Wales, unless a third party has been appointed to conduct legal proceedings on behalf of another under Part VII of the Mental Health Act 1983, the Civil Procedure Rules 1998 and Rules of the Supreme Court 1980 require that, for the purposes of proceedings within the jurisdiction of the county court or High Court, a person deemed to lack capacity (and

therefore defined as a "patient") must act, when commencing proceedings and during the conduct of such proceedings, through a litigation friend.

A certificate of suitability of litigation friend needs to be completed with supporting medical and other relevant documentation demonstrating that the claimant satisfies the definition of a patient. A preliminary hearing may be required to determine the capacity issue and the suitability of a nominated litigation friend.

Suitable litigation friends would include the following:

- A person appointed under a validly donated Enduring Power of Attorney (EPA) whilst the donor retains capacity, which has subsequently been registered with the Public Guardianship Office after the Court of Protection has heard evidence regarding the donor's alleged incapacity and has expressed satisfaction that this exists.

- Persons appointed on behalf of others who, by reason of mental impairment, lack capacity lawfully to donate an EPA, therefore entailing the appointment of a receiver by the Court of Protection to act on their behalf in the management of their personal affairs.

- In the last resort, the Official Solicitor.

Any terms of settlement agreed on behalf of a "patient" will require court approval.

In Scotland, the Adults with Incapacity (Scotland) Act 2000 requires that, in cases involving adults who lack capacity, an Intervention Order or Guardianship Order must be sought from the Sheriff Court. Any such order should limit intervention as far as possible and must:

- benefit the adult
- take account of the adult's wishes, if these can be ascertained
- take account of the views of relevant others, so far as it is reasonable and practical to do so
- restrict the adult's freedom as little as possible while still achieving the desired benefit
- encourage the adult to use existing skills or develop new skills.

What about children?

In Scotland, the relevant legislation is the Age of Legal Capacity (Scotland) Act 1991, which states that a child who has general understanding of what it means to instruct a solicitor in connection with any civil matter has legal capacity to take legal proceedings, and a child of 12 or over is presumed to have that understanding. This means that in any case involving a child of 12 or over, the child, and not the parent, is the client, although the parent may, of course, provide instructions with the child's consent. It is therefore incumbent for advisers to deal directly with the child, whether in pursuing court proceedings or engaging in negotiations, albeit with the support of their parent, if so instructed by the child. Only exceptionally will a child's impairment mean that the presumption of legal capacity should not apply at the age of 12.

By contrast, in England and Wales, The Civil Procedure Rules 1998 and Rules of The Supreme Court 1980 prescribe that anybody under the age of 18 is deemed to be a child for the purposes of civil proceedings in the county court or High Court. A child (whether claimant or defendant) must therefore act through a litigation friend (preferably a parent or guardian), and the court must approve by way of formal order the settlement of claims involving children, even if legal proceedings have not been commenced.

News in brief

- The DRC has submitted a formal response to Government on its plans for the creation of a Single Equality Body (SEB). The DRC considers that it will be crucial for any SEB to retain expertise in the form of experience and knowledge of particular types of discrimination. The DRC is therefore proposing a radical blueprint for a federal model: an overarching Commission responsible for the core support departments and those areas where common work across the strands will be effective, and within the Commission separate units representing those of the six equality strands that would prefer such an approach. The DRC considers that disabled people should run the disability unit and that it should have executive powers and functions specifically related to the needs of disabled people, as well as its own budget. For further details of the DRC's position, please see the DRC website.
- The DRC will be undertaking a formal consultation exercise in July on its draft Codes of Practice on Employment and on Trade Organisations and

Qualification Bodies. These new Codes will seek to take account of the changes to the relevant law required by the EC Article 13 Employment Directive.

- In its first three years, the DRC has provided helpline assistance to nearly 250,000 people and casework support to over 5,500. Just over 50% of the cases attracting casework support have been Part II employment cases. In addition, since March 2001, the DRC has referred 219 Part III goods, facilities and services cases to its independent conciliation service run by Mediation UK, with a settlement rate of 80%. The DRC has also provided or arranged legal representation in 163 cases, 15 of which have been on behalf of people from ethnic minority backgrounds, and 103 of which have related to employment. Of the funded cases concluded in the financial year 2002-03, 27 were settled by negotiation, 9 succeeded at court or tribunal, and 2 were lost at court or tribunal. The average sum recovered in funded cases under Part II was £17,844 (with a range of £2,500 to £100,000) and under Part III was £1,615 (with a range of £750 to £5,000). The total expenditure incurred during the year by way of legal fees and other expenses was £281,309.
- DRC holds European Disability Law Conference: University of Leeds on 25-26 September 2003 Disability Rights Commission in partnership with Department of Law and the Centre for Disability Studies at the Leeds University will hold a conference to celebrate European Year of Disabled People. The conference will examine the range of legal strategies which have been adopted internationally to counter discrimination.

  This conference aims to bring together scholars, policy-makers, lawyers and others to share insights and develop a greater understanding of the issues involved. Confirmed speakers include Luke Clements, Theresia Degener, Sandra Fredman, Caroline Gooding, Art Hendriks, Richard Howard, Nick O'Brien, David Rubbain, Gerard Quinn, Lisa Waddington and Richard Whittle. Full information available at: www.disability-europe.info/lawconference