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Legal Bulletin

The Commission for Equality and Human Rights – A DRC perspective

Contents

In October 2003, the Government announced its intention to establish a single equality and human rights body under the working title of the Commission for Equality and Human Rights (CEHR). The new body was to bring together the existing equality commissions (the Commission for Racial Equality (CRE), the Equal Opportunities Commission (EOC) and the Disability Rights Commission (DRC)), as well as to make provision for the three 'new' strands of age, sexual orientation and religion and belief. The body would also have a remit to promote and support human rights in Britain, providing for the first time institutional support for the Human Rights Act 1998.

To assist it in its task, the Government established a 'Task Force' of key stakeholders from the existing strands, new strands, academia and business. The long-awaited White Paper released in May 2004 called 'Fairness for All: A

New Commission for Equality and Human Rights' included some, but not all, of the recommendations made by the Task Force. Fairness for All sets out the Government's proposals for the new body including its vision, mission, function, powers and tools as well as plans for working with key stakeholders, promoting good relations and developing regional arrangements. It also describes the proposed transitional arrangements as well as plans for Scotland and Wales.

It is anticipated that the CEHR will be more than the 'sum of its parts' covering the full spectrum of equality and human rights issues. This is an ambitious and challenging remit for the new body involving balancing the need for strand-specific protection against the broader remit of education and promotion of equality and human rights across the board.

The DRC welcomes much in the White Paper and in particular its distinctive arrangements on disability. However, there are a number of key areas of concern. It will be crucial to address these specific concerns if the CEHR is to be an effective body both for disabled people and for the other strands.

Key proposals

The White Paper proposes seven core functions for the CEHR, as well as a duty to consult on its strategic plan. It also contains a commitment that powers currently available to the existing commissions will be retained and, where appropriate, modern and new powers will be given to the CEHR across all strands, to support the human rights function and to take account of developments in discrimination law. Although the human rights remit will be limited to 'promotion', the promotional remit is defined to include the conduct of 'general inquiries' and 'third party interventions' in litigation. There will, however, be no enforcement role for human rights and no power to support 'free-standing' human rights cases.

Strategic enforcement: tools

The new body will have the ability to undertake **general inquiries** including across the discrimination, equal opportunities, good relations and human rights remits. This will provide a broader base

than existing tools allow, enabling the Commission to examine issues affecting two or more protected groups. Furthermore, there will be the ability to develop new **Codes of Practice** across all the strands and to update existing Codes.

The body will have the ability to undertake **third party interventions** with a remit across both discrimination and human rights. It is intended that it take a 'strategic approach' to enforcement via a combination of **direct case support and litigation**. This will include the ability to undertake 'combined' cases (discrimination and human rights) and in such cases where the discrimination element 'falls away' it is proposed that the CEHR could continue to support the case through to completion.

In line with the DRC's current functions it is proposed that the new body provide **conciliation** services – provided by an independent arbiter – in the areas of goods, facilities, services, education and exercise of public functions. It is expected that ACAS will continue to provide services for cases within the jurisdiction of the employment tribunals. Once again, free standing HRA cases could not be supported by this means, but combined human rights/discrimination cases could be.

The CEHR's **investigation and enforcement powers** are to include the ability to undertake named party investigations; to issue non-discrimination notices; to seek injunctions in respect of persistent discrimination; and to enter into binding agreements in lieu of enforcement. The CEHR will not (as had been previously suggested) have the ability to act as an 'amicus curiae' (friend of the court), undertake representative actions or take hypothetical test cases.

Governance arrangements

The CEHR is to be an executive Non-Departmental Public Body (NDPB), with an obligation to lay an annual report before both Houses of Parliament. The board will consist of 10-15 commissioners and the CEO, and will guarantee places for a representative from Scotland and Wales respectively (in agreement with their respective devolved governments), as well as a disabled commissioner. Commissioners from the existing commissions will be appointed during the transition

period to ensure continuity. These 'transition' commissioners will be expected to serve out their terms.

The Board of the CEHR will be empowered to establish committees (both advisory and decision making). There is to be a committee each for Scotland and Wales, as well as one specific to disability, the latter being subject to an open review after five years. The committees of the devolved nations will be expected to report to their respective governments by way of an annual report and to formalise their working relations with relevant bodies in their areas. This includes the recommendation that a memorandum of understanding is drafted between the CEHR and the Scottish Human Rights Commission (SHRC). The body is to be funded through grant in aid via the sponsoring department, the identity of which has yet to be confirmed.

Arrangements for disability

As discussed previously, there will be specific arrangements within the Commission for the disability strand, including the establishment of an executive Disability Committee with decision-making authority in respect of areas specific to disability – including such matters as reasonable adjustments in relation to access to goods, facilities and services, the built environment, education and transport for disabled people. There will be a disabled commissioner represented at CEHR board level and a chair of the Disability Committee who is to be a person who has (or has had) a disability (they need not be the same person). In addition, in accordance with current DRC governance arrangements, at least 50 per cent of Disability Committee members must be disabled.

Good relations and supporting key customers

Within the CEHR's remit there will be a duty to promote 'good relations' both between strands and between strands and the wider community. This will follow on from the existing work of the Race Equality Councils (RECs) but also includes provision for the CEHR to grant-fund local organisations and support innovative projects working on a cross-strand, cross-regional basis.

Supporting customers and key stakeholders is critical to the Government's proposals. This includes support via a range of services including information, advice, guidance, casework and in some cases litigation. In order to undertake this work the CEHR will have a website and helpline. In addition, it is intended that the CEHR act as a second-tier support service working in partnership with existing advice providers.

The CEHR will work with small, medium and large enterprises and their intermediaries to convey information and specialist expertise required by business. It will also provide business-specific guidance (this includes potential for a dedicated business 'channel' on the CEHR website, training materials and a case study database).

The White Paper proposes the introduction of a public sector duty on gender, complementing the existing race duty and forthcoming disability duty. It is further intended that the body works with inspectorates and standard-setting agencies to ensure implementation of duties and to monitor their impact on equality issues more generally.

Transition and regional arrangements

The CEHR will have a presence in Scotland, Wales and each of the nine English regions. The Government intends to pass a Bill through Parliament 'as soon as parliamentary time allows'. Following Royal Assent it is intended that the new body will exist in shadow form until its vestment date which will be 'not before the end of 2006'. It will be at this stage that the existing commissions will close and their property and assets transfer to the new body. To assist in the transition process a 'transition board' will be set up consisting of representatives of the existing strands, new strands and government. It will be the task of the transition board to oversee planning and key milestones towards launch.

DRC comment

The DRC is pleased that the White Paper includes a number of the DRC's original proposals. This indicates an understanding of the distinctiveness of disability rights and reflects the Government's recognition of the importance of the legislative agenda on disability. In addition,

the DRC welcomes the introduction of a public sector duty on gender and the Government's commitment to the principle of 'no regression' with regards to powers and functions of the existing commissions and the extension of some DRC powers across the strands. Nevertheless, a number of key concerns remain. These include:

- The need to move towards harmonised legislation. A common framework of rights covering all strands is essential if the new body is to overcome existing, damaging disparities between the strands.
- The role and remit of the designated disabled commissioner on the Board and of the Disability Committee require careful clarification.
- The need to go further towards creating meaningful human rights powers in a way that can usefully advance the rights of disabled people and the other strands. Furthermore there is a need to achieve an effective balance between promotion and enforcement – the White Paper's reference to a 'light touch' is in our view misplaced.
- Full and adequate resources are needed to meet the CEHR's ambitious remit overall as well as the essential need for an expert disability unit to support the Disability Committee.
- An urgent need for clarity on matters of most concern to staff of the existing commissions and the need to take account of the commitments of the existing commissions to deliver programmes of work in their areas.

More information on the CEHR

A provisional DRC position paper on the CEHR is available on the DRC website.

The White Paper itself is available on the Women and Equality Unit website: www.womenandequality.gov.uk as is further information and documents on the task force and response to the consultation exercise which closed on 6 August 2004.

As a result of the late release of the easy-read version of the White Paper by Government consultation responses by people with learning disabilities will be accepted after the closing date.

Disability discrimination – The key role of the duty to make reasonable adjustments

Regular readers of this Bulletin may recall that in an earlier article concerning justification, we suggested that the real problem with the decision in ***Jones v Post Office*** **[2001 IRLR 384]** was that the Court of Appeal had not had to consider the question of reasonable adjustments. Reasonable adjustments lie at the heart of the DDA. It is critical to understand the operation and purpose of the reasonable adjustments provisions in order to be able to give clear and accurate advice on the DDA.

The link between reasonable adjustments and the question of justification of less favourable treatment is clear on the face of the legislation itself. Section 5(5) (which becomes s3A(6) from October) provides that failures to make reasonable adjustments must be taken into account when considering whether any less favourable treatment that has taken place is capable of justification.

In two recent and ground-breaking cases, which were both supported by the DRC, the importance of reasonable adjustments has been established beyond doubt. Taken together these cases

provide an exceptionally clear picture of how the DDA operates and a clear path for tribunals to follow when considering a DDA claim.

Archibald v Fife Council UKHL

In this case, for the first time, the House of Lords considered in detail the operation of the provisions of the DDA.

The facts

Susan Archibald was a road sweeper working for Fife Council. After a routine surgical procedure she became unable to walk and was unable to do her job. She was placed on the Council's redeployment list. She needed to be redeployed to an office-based job because she was unable to perform manual work.

A difficulty arose because the Council's redeployment policy required that if a staff member was seeking redeployment to a higher grade they must undergo competitive interviews. Susan Archibald was on the lowest grade of the manual pay scale and this was a slightly lower rate of pay than the lowest grade of pay for an office-based job. Thus, when applying for office-based positions, Mrs Archibald was treated as applying for a promotion, and required to undergo competitive interviews. She was sent for a large number of interviews but was unsuccessful. She believed this was because of her manual work background, rather than her disability. It was her contention that, as a reasonable adjustment under the DDA, she should be transferred to an office-based post that she could do. There was no dispute that she had the requisite skills to carry out an office-based job.

The lower courts

Mrs Archibald lost her claim in the employment tribunal, because the tribunal held that transferring her to an office-based post without competitive interview would amount to more favourable treatment. They decided this was prevented by section 6(7) of the DDA. The tribunal also held that Mrs Archibald was not discriminated against by being dismissed because dismissal was justified.

The case was appealed to the Scottish Employment Appeal Tribunal, which held that Mrs

Archibald was not placed at a substantial disadvantage by the redeployment policy, because it applied to all staff.

In the Court of Session the argument changed slightly, and the question became whether the scope of the reasonable adjustments provisions extended to a situation where an employee could no longer carry out the essential functions of their role because of their disability. The Court of Session decided that the fact that someone becomes disabled is not "an arrangement made by or on behalf of an employer" for the purposes of the reasonable adjustments provisions in section 6 of the DDA.

The Court of Session also thought that the steps that an employer might have to take in order to comply with the reasonable adjustments duty would not extend to transferring someone to a completely different job, notwithstanding the fact that section 6(3) – which contains examples of steps an employer might have to take to comply with the duty – has "transferring [the disabled person] to fill an existing vacancy" as one such example. The Court of Session also suggested that the DDA Employment Code was not of assistance in determining how the law should be applied.

House of Lords

The House of Lords unanimously allowed Mrs Archibald's appeal. In giving the lead judgment Baroness Hale made it clear that the DDA is different from the Sex Discrimination Act 1975 and the Race Relations Act 1976:

"In the latter two, men and women or black and white, as the case may be, are opposite sides of the same coin. Each is to be treated in the same way. Treating men more favourably than women discriminates against women. Treating women more favourably than men discriminates against men. Pregnancy apart, the differences between the genders are generally regarded as irrelevant. The 1995 Act, however, does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more

favourable treatment. The question for us is when that obligation arises and how far it goes."

This passage is crucial to understanding the way that the DDA operates and the recognition by the House of Lords of the essential difference between the operation of the DDA and other anti-discrimination statutes is to be welcomed.

The scope of 'arrangements'

The House of Lords rejected the argument that being incapable of performing the essential functions of one's job is not an 'arrangement', and instead held that the scope of arrangements can be very broad. They concluded that the relevant 'arrangement' was the liability of anyone who becomes incapable of fulfilling their job description to be dismissed.

Comparators

The next question which fell to be considered was who the non-disabled comparators would be for the purposes of determining whether the arrangements placed Mrs Archibald at a substantial disadvantage. There was some difference in the views contained in the three principal judgments on this question. Two of the judgments said that the comparison which falls to be made in relation to the question of substantial disadvantage cannot simply relate to people doing the same job, otherwise it would not encompass someone in a unique role or someone seeking a promotion. Baroness Hale's judgment appears to suggest that the comparison is with non-disabled people generally, whereas the other judgments suggested a narrower focus.

However, in all three judgments it was held that a person such as Mrs Archibald, who was unable to carry out the essential functions of her job, was substantially disadvantaged compared to people who were not disabled. That conclusion follows logically, once the arrangement had been identified in the way described above.

Scope of the duty to make reasonable adjustments

The House of Lords also considered whether the duty to

make reasonable adjustments would encompass transfer to fill an existing vacancy that was at a slightly higher grade, without competitive interview. It did not consider that the example given in section 6(3)(c) of the DDA "transferring him to an existing vacancy", was limited to the same kind of work or to a job of the same grade. A transfer could be upwards as well as sideways or downwards. The judgments also make clear that transfer is merely an example of a step which it might be reasonable to take – the range of potential steps is therefore broader than the examples contained in s6(3).

The question therefore became whether it might have been reasonable, in all the circumstances, to transfer Mrs Archibald without competitive interview to a sedentary post that she was capable of carrying out.

The House of Lords accepted that the control mechanism for determining the scope of the duty is that the duty only extends to doing what is reasonable in the circumstances of the case. If the transfer involved transfer to a much higher grade it might well be unreasonable for this to take place. If there were no suitable vacancies a transfer could not take place.

Interpretation of section 6(7)

The House of Lords found that the tribunal's interpretation of section 6(7) was wrong and that the opening words "subject to the provisions of this section...." mean that, to the extent necessary in order to comply with the duty to make reasonable adjustments, the employer is not only permitted but obliged to treat a disabled person more favourably than others.

This is a very important finding and it is central to the way that the duty to make reasonable adjustments operates. The nature of the duty is such that it requires a difference in treatment between a disabled person and a person who is not disabled. This is required in the field of disability because equality of treatment may not lead to equality of outcome – hence the need for reasonable adjustments. A useful way to understand the reasonable adjustments duty is to view it as designed to achieve equality of outcome.

The 'merit' principle

In Archibald, because the employer was a local authority, the House of Lords gave consideration to the operation of section 7 of the Local Government and Housing Act 1989 which requires that all staff engaged by a local authority are to be appointed 'on merit'. The House of Lords decided the merit principle is subject to the duty to make reasonable adjustments. This is an important finding in relation to local authority employers.

It would be advisable for local authorities to review and, if necessary, amend their redeployment policies to take into account the effect of this judgment.

Justification of failure to make reasonable adjustments

The House of Lords briefly considered the question of justification. In the DRC funded case of ***Collins v Royal National Theatre Board Ltd*** **[2004 IRLR 395]** the Court of Appeal decided that the justification of a failure to make reasonable adjustments must relate to something other than circumstances that are taken into account for the purposes of deciding whether the adjustment is reasonable or not in the first place. This approach was endorsed by the House of Lords in ***Archibald.***

Readers should be aware that as from 1 October 2004 the DDA will be amended and will contain no provision for justification of a failure to make reasonable adjustments. But the upshot of the ***Collins*** case is that justification of failure to make reasonable adjustments is already a dead letter.

Justification of less favourable treatment

Another important aspect of the House of Lords judgment in ***Archibald*** concerned the interrelationship between the duty to make reasonable adjustments and justification of less favourable treatment. The judgments of Lord Hope and Lord Rodger dealt with this issue. Both concluded that the question of whether Mrs Archibald had been treated less favourably because she was dismissed for a reason related to her disability could not be determined until the reasonable adjustments question had been decided. This was because the Council would only be able to show

that their treatment of Mrs Archibald (the dismissal) was justified if, had they complied with the duty to make reasonable adjustments, they would still have been justified in dismissing her.

Again this is a very welcome aspect of the judgment. The operation of section 5(5) is often overlooked and yet is critical to every DDA case involving both failure to make reasonable adjustments and less favourable treatment.

Codes of Practice

The House of Lords made reference to an example from the DDA Employment Code as being helpful in clarifying how the reasonable adjustments provisions were intended to operate. This emphasises that it is important for courts and tribunals to take into account any provision of a statutory Code of Practice issued under the DDA which appears to be relevant to any question arising in a DDA case.

Meikle v Nottinghamshire County Council CA

This is the second important recent judgment on the question of reasonable adjustments.

The facts

Mrs Gaynor Meikle was a teacher and became partially-sighted in 1993. She requested that the school she worked for made reasonable adjustments (none of which were particularly costly or difficult), in order to enable her to carry out her job. There was a persistent failure to make these adjustments and, after working in inappropriate conditions for a long period of time, Mrs Meikle went off sick in June 1993 with stress and eye strain. During the period of time that she was off sick, her sick pay was reduced to half as a consequence of her employer's sick pay policy. She eventually resigned, having concluded that the remaining reasonable adjustments she had requested were not going to be made. She brought claims for disability discrimination and constructive dismissal in the employment tribunal.

The lower courts

Despite finding for Mrs Meikle in respect of numerous failures to make reasonable adjustments, and concluding that Mrs Meikle was correct to believe that the adjustments were not going to be made, the tribunal found that she had not been constructively dismissed. Mrs Meikle's claim that failing to pay her full pay during her sickness absence amounted to a failure to make a reasonable adjustment and less favourable treatment under the DDA did not succeed.

These points were appealed and the EAT found for Mrs Meikle in respect of all of her claims. The EAT held that the term 'dismissal' in the DDA included constructive dismissal. The EAT substituted a decision that she had been constructively unfairly dismissed and that, by reducing her pay when she was on long term sickness absence, her employers had treated her less favourably and had failed to make reasonable adjustments.

Court of Appeal

The Court of Appeal dismissed the appeal by the local authority on all grounds.

Constructive dismissal

In relation to the question of constructive dismissal, the Court of Appeal held that repudiatory conduct did not need to be the only reason for the employee's resignation. The Court of Appeal suggested that considering whether the conduct concerned was an 'effective cause' of the resignation was also an incorrect approach as it could lead to questions about the employee's motives. The Court of Appeal said that the proper approach, once repudiation of the contract had been established, was to ask whether the employee had accepted the repudiation by treating the contract of employment as at an end. The Court of Appeal also confirmed that the test for whether or not there has been a breach of the implied term of trust and confidence is objective, and not whether the employee has in fact lost trust in their employer – a principle established by the case of ***Malik and another v BCCI*** **[1997 IRLR 462].**

Constructive dismissal and the DDA

The Court of Appeal held that "dismissal" in section 4(2)(d) of the DDA would include a constructive dismissal and thus approved the EAT's decision in ***Catherall v Mitchelin Tyre*** **[2003 IRLR 61]** and found that the EAT decision in ***Commissioner of Police v Harley*** **[2001 IRLR 263]** was wrongly decided. The Court of Appeal also decided that where there is a discriminatory constructive dismissal claim, the time for lodging a complaint to the employment tribunal runs from the date the employment terminated rather than from the date(s) when the act(s) of discrimination took place. This should significantly impact on the way that tribunals approach the question of limitation in all discrimination cases.

Reasonable adjustments to sick pay

On the question of sick pay, the Court of Appeal first had to consider whether pay which is payable to an employee by their employer is an arrangement to which the reasonable adjustment provisions of the DDA apply, or whether it is exempt because of the provisions of section 6(11) of the DDA.

The Court of Appeal decided that s6(11) of the DDA was intended to exempt an employer from the duty to make reasonable adjustments in relation to benefits not administered by the employer, such as those payable under occupational pension schemes. Section 6(11) does not apply to sick pay paid by an employer. In deciding this, the Court of Appeal upheld the reasoning of the EAT in the case of ***London Clubs Management v Hood*** **[2001 IRLR 719]** as regards the scope of s6(11). The Court of Appeal concluded that there had been a failure to make a reasonable adjustment in respect of the sick pay policy.

Justification of less favourable treatment

Finally, and importantly, the Court of Appeal considered the effect of section 5(5) of the DDA. The appellant local authority argued for a narrow interpretation of s5(5). It was submitted that, when deciding whether cutting Mrs Meikle's pay while she was on long-term sick amounted to unjustifiable less favourable treatment, the only reasonable adjustment

which should be considered was whether an adjustment to the sick pay policy itself should have been made.

The Court of Appeal rejected this and held that, when considering justification of less favourable treatment, the tribunal must consider what the position would have been if all the reasonable adjustments had been made.

The Court of Appeal found that the evidence pointed towards Mrs Meikle's lengthy absence being the consequence of the prolonged failure by her employers to take appropriate steps to cope with her disability. This meant that if the tribunal had applied section 5(5) as it should have done, it could not have avoided making a finding of unlawful discrimination under section 5(1) in respect of the decision to reduce Mrs Meikle's pay to half pay.

Conclusions

Both cases show the importance of the reasonable adjustments provisions, and of section 5(5) which links these to the question of justification of less favourable treatment.

It is clear that the correct approach is to leave aside the question of justification of less favourable treatment until the question of reasonable adjustments has been considered. If this sequence is followed, it is likely that the much criticised formulation of justification of less favourable treatment expounded in ***Jones v Post Office*** will be of less significance in many DDA claims. This is because the low threshold set in ***Jones*** is moderated by the operation of section 5(5) in cases where there has been a failure to make reasonable adjustments.

It should also be noted that as from 1 October 2004, when the DDA is amended, less favourable treatment which amounts to direct discrimination cannot be justified at all.

Service Providers – The practical and legal aspects of meeting their duties under Part 3 of the DDA after 1 October 2004

Purpose and nature of the duties under Part 3 of the DDA

Anyone who is defined as a service provider for the purposes of Part 3 of the DDA, which includes any person who is "concerned with the provision, in the United Kingdom, of services to the public, or to a section of the public", has obligations under Part 3. Provision of services includes the provision of goods or facilities.

The underlying purpose of Part 3 is to promote inclusive service provision and to encourage systemic change in the provision of services. This can be seen from the nature of the duties. Thus it is unlawful to refuse to provide a service to a disabled person for a reason related to his disability, or to provide an inferior standard of service, or to provide the service on different terms. These provisions are intended to prevent disabled people from being excluded from services that the general public can access, or from being treated differently when they seek to access those services.

It is also unlawful to fail to comply with the duty to make reasonable adjustments. The reasonable adjustments

provisions are intended to promote systemic change in service provision. That is why the duty to make reasonable adjustments is an anticipatory duty.

Changes to the duties

From 1 October, there will be changes to the reasonable adjustment duties in respect of physical features. Where a physical feature makes it impossible or unreasonably difficult for a disabled person to access a service, the service provider may have to:

- remove the feature
- alter it
- provide a reasonable means of avoiding it, or
- provide a reasonable alternative method of making the service available.

Prior to October, service providers have only been legally obliged to take reasonable steps to make their services available by a reasonable alternative method. With the new expansion of the duties, it might be thought that there may be scope for argument that there should be a conceptual hierarchy – such that if it is reasonable to remove or alter a feature, the law should require this to happen, because it is more inclusive than merely providing a reasonable means of avoiding the feature or making the service available by an alternative method. However, the DDA does not deal with the concepts hierarchically – a service provider will discharge its duty provided it takes reasonable steps to prevent the physical feature making it impossible or unreasonably difficult for the disabled person to access its services. Nevertheless, it cannot be assumed that providing the service by a reasonable alternative method will continue to be an adequate solution once the law changes.

The Disability Rights Commission's statutory Code of Practice (Rights of Access: Goods, Facilities, Services and Premises) was published in 2002 and covers the legal position pre- and post-October 2004. The Code provides many examples of reasonable adjustments and will assist in understanding the duties under Part 3. The Code makes the point that the focus of the legislation is on providing access to services rather than buildings. What is important is that this aim is achieved, rather than how it is achieved.

Adopting an inclusive approach

The Code recommends that the best approach to meeting the duties under Part 3 of the DDA is to adopt an inclusive approach. This has the advantage of making the service available to everyone in the same way.

Disabled people are a significant group of consumers, and a service provider will benefit from being able to demonstrate that its services are accessible to disabled people. This is a key factor to take into account when weighing up whether to remove or alter a physical feature, thus making the service permanently accessible for future customers. By contrast, providing the service in an alternative way is a short-term solution which enables one disabled person to make use of the service, but in a way that differs from other customers, and is not inclusive.

A further consideration is that many service providers will, or may in the future, have staff who are disabled. A beneficial consequence of approaching the Part 3 DDA duties in an inclusive way is that a service provider will be better placed to be able to meet their obligations to employees under Part 2.

For these reasons, when deciding what adjustments to make, service providers should carefully consider the long-term benefits of removing or altering physical barriers.

A good approach is first to consider whether physical features which create a barrier for disabled people can be removed or altered. If that is not reasonable, consideration should be given to providing a reasonable means of avoiding the feature. If that is also not reasonable, the service provider should then consider providing a reasonable alternative method of making the service available to disabled people.

Physical features – to alter or not

Factors to take into account when advising clients about their obligations as service providers are:

- the need to review existing adjustments in the light of the new duties
- the anticipatory nature of those duties

- the desirability of factoring accessibility into forward planning
- cost-benefit analysis
- the crossover with Part 2 duties owed to disabled employees
- the need for an inclusive approach
- the possibility of making a combination of adjustments, and
- reasonableness.

Forward planning

It is advisable for service providers to consider accessibility when planning ahead. If, for example, it is planned to carry out work to renovate or improve their premises, the planned work could include adjustments to make the premises accessible. Planning ahead means that a service provider will have considered accessibility at the most appropriate time, and at their own convenience, rather than discovering there is a problem when a disabled customer turns up and is unable to gain access. The duty itself emphasises forward planning because it is anticipatory in nature, and is owed to disabled people in general.

Since 1985, building regulations have required reasonable provision to be made for disabled people to gain access to and to use new buildings (these also apply to some extensions). These requirements are contained in Part M of the Building Regulations and the Approved Documents to accompany Part M. An exemption provided by The Disability Discrimination (Providers of Services/ Adjustment of Premises) Regulations 2001 means that if a physical feature meets with the requirements of the Approved Documents, the service provider will not have to adjust that feature if ten years or less have passed since it was constructed.

What is reasonable?

The DDA does not provide any guidance on this question, which is in contrast to the reasonable adjustments provisions in Part 2.

The Code of Practice lists a non-exhaustive list of factors that could be taken into account when considering what is reasonable. These are:

- whether taking any particular step would be effective in

overcoming the difficulty that disabled people face in accessing the services in question
- the extent to which it is practicable for the service provider to take the steps
- the financial and other costs of making the adjustment
- the extent of the disruption which taking the steps would cause
- the extent of the service provider's financial and other resources
- the amount of any resources already spent on making adjustments, and
- the availability of financial and other assistance.

There are provisions in the DDA for the Government to make regulations about circumstances in which it is reasonable, or not reasonable, for a service provider to have to take steps prescribed by the Act, and regulations enabling the Government to prescribe maximum expenditure. The Government has not done so, and there is no indication that it intends to in the future.

Other adjustments and combinations of adjustments

In addition to the duty to make reasonable adjustments to physical features, service providers are also legally obliged to consider two other categories of adjustments. These are: to make changes to policies, practices or procedures that make it impossible, or unreasonably difficult, for disabled people to use the service; and to provide an auxiliary aid or service if this would enable, or make it easier for, disabled people to use the service. It is important to remember that accessibility is not just about physical access.

It is also important to remember that a combination of reasonable adjustments may be needed in order to comply with legal obligations.

Further information

The Disability Rights Commission's statutory Code of Practice (Rights of Access: Goods, Facilities, Services and Premises) considers the Part 3 duties pre- and post-October in detail. This can be viewed on the DRC's website (www.drc-gb.org).

Travel and disability – How far does the DDA go?

Most of us take holidays for granted but for a large number of disabled people, journeying of any kind is a frustrating experience. The impact of the DDA is patchy: it applies to many of the elements of travel but only partially to transport.

What services are engaged?

As explained elsewhere in this Bulletin, Part 3 of the DDA imposes duties on service providers – anyone "concerned with the provision, in the United Kingdom, of services to the public" (section 19(2)(b)). The range of services covered by Part 3 is extremely wide. The examples listed in section 19(3) include communication, information, accommodation, insurance, recreation and access to public places. The use of transport, however, is expressly excluded by section 19(5)(b).

Hotels and self-catering accommodation, tourist boards and visitor attractions, are all clearly service providers, and are therefore required not to treat disabled people less favourably for reasons related to their disability, and to make reasonable adjustments to make their services accessible.

Part 3 applies to insurers in a particular way. Under special rules which affect travel insurance, less favourable treatment of a disabled person (such as a higher premium or an exclusion) is only lawful if it is based on relevant and reliable data.

Travel agents and tour operators are also service providers. Thus, tour operators should avoid statements in their brochures such as "We don't cater for disabled people" or "We're not specialists in holidays for the disabled". They should take reasonable steps to ensure that their booking services, whether by telephone or online, are easy to use and their websites are accessible. Information should be clear and easy to understand (transactions may be complicated) and available in alternative formats.

Does the DDA apply to overseas holidays?

The reference in section 19(2)(b) to "the provision, *in the United Kingdom*, of services to the public" suggests that the provision of overseas holidays is outside the scope of Part 3 since the services are enjoyed abroad. This would be consistent with the territorial extent of the DDA itself. However, the wording is not entirely clear and remains untested. (It is also not apparent how it would apply to a holiday provided partly in the UK and partly abroad, for instance a coach holiday from Edinburgh to the Dutch tulip fields.)

The brochure and booking services of a tour operator, however, are services within the Act even if the holidays are not. In providing advice, travel agents should also take reasonable steps to ensure that disabled customers have all the information they need to make an informed choice about the accessibility of the hotel, the local amenities and the transfer arrangements.

What about transport?

Part 3 of the DDA specifically excludes any service "so far as it consists of the use of any means of transport" (section 19(5)(b)). The exclusion relates to the actual vehicle. In-flight entertainment services and on-board catering services, for instance, are excluded.

Transport providers are not totally exempt from Part 3.

They must still avoid discriminating against disabled people and make reasonable adjustments for them in respect of matters such as timetables, ticketing arrangements, booking facilities, and public areas at airports, ferry terminals and stations.

The exemption gives rise to some bizarre distinctions. There is no logical reason why refusing to serve a disabled person in the cafe of a ferry terminus should be within Part 3, but the same conduct in the cafeteria on board the ferry should be excluded.

Cases on the transport exclusion

There have been two reported cases involving airlines. In ***Rimmer v British Airways PLC*** (2002 Great Grimsby County Court, Case No GG100921), where the airline refused to guarantee seats with extra legroom to a passenger with a mobility impairment, the court held that the policy for allocating seats on the plane clearly related to the use of the transport service and therefore fell within the transport exclusion.

In ***Ross v Ryanair Limited and Stansted Airport Limited*** (2004 Central London County Court, Claim No CL209468), where the airline charged Mr Ross for wheelchair assistance from check-in to the aircraft, the court held that providing access to an aeroplane did not fall within the exemption.

Ryanair was found to have discriminated against Mr Ross in providing service on less favourable terms and in failing to make reasonable adjustments – by not changing its policy, not providing an auxiliary aid (a wheelchair), and not offering a reasonable alternative method of making the airport facilities available (a wheelchair free of charge). The court awarded £1,336 compensation, including £1,000 injury to feelings. Ryanair are appealing to the Court of Appeal on the grounds that liability should have fallen on Stansted.

There has been no case law relating to ferries, but Brittany Ferries' assistance dog ban for foot passengers is an example of a discriminatory practice that is lawful, as the law currently stands.

A case that would have tested the boundaries of the exclusion

concerned the ticketing arrangements for the Highlands and Islands ferry services. A disabled passenger was effectively precluded from buying a ticket on board because she could not access the purser's office. In the event, the claim was settled when the ferry operator changed its ticketing practices, so the claim was not pursued.

Safety issues

Aviation regulations require emergency exit rows to be kept clear. Other safety considerations are for the airline to determine on each flight. There have been incidents of airlines refusing to fly disabled people on safety grounds (for example, in one case EasyJet ordered a group of deaf people off the plane and, in another, only agreed to take a group of students with a learning disability when passengers agreed to act as additional carers). Incidents of this kind fall squarely within the exemption.

The pilot's decision in such cases seems to be based on the belief that a deaf person or someone with a learning disability would be unable to follow the crew's instructions (if passengers are not self-reliant they are required to travel with a companion), but the position is surely not dissimilar to that of a Japanese passenger who does not speak English. Given that safety procedures are increasingly shown in pictorial form or video, it highlights the importance of disability awareness training.

Technical standards for public transport

Part 5 of the Act enables regulations to be made for new buses, coaches, taxis and trains (but not aircraft or ferries) so that they are accessible to disabled people, including wheelchair users. Paradoxically, the exclusion from Part 3 denies disabled people any rights in respect of such "accessible" transport. Further, no standards have been set for tourist and leisure coaches, although the hotels and attractions that the coach tours are visiting will themselves have to be accessible from 1 October. The Government is considering rectifying this omission.

Aviation and shipping

Aviation and shipping are subject to voluntary Codes of

Practice which reflect internationally agreed standards of good practice. The shipping guidance, published in 2000 by DPTAC, applies to everyone involved in the transport chain, from initial information to on-board accommodation. Similarly, the aviation code, introduced in 2003 by the Department of Transport, covers all aspects of air travel, from accessing information to arriving at final destination. It applies to travel agents, tour operators, airports and UK airlines. In respect of the first three, it reflects Part 3 requirements, but in relation to airlines it covers matters which presently fall within the exclusion, such as seat allocation and the provision of oxygen.

UK legislative proposals

Some of the anomalies under the present law will be addressed in the new Disability Bill which will provide for the extension of the Part 3 duties (other than the physical adjustments duties) to cover discrimination in relation to the provision or use of a vehicle. It will apply to public transport, including tourist coaches, but not – for the time being – aircraft or ferries. They will continue to be subject to the voluntary codes, but the Government is committed to applying Part 3 to both sectors if the codes are shown to be ineffective. The lifting of the exemption will cover, for example, the sale of tickets on board a coach or the dining car facilities on board a train. Physical adjustments will continue to be dealt with under Part 5.

EU proposals

The European Commission is proposing to outlaw discrimination against disabled people in air travel. This is likely to include a right for disabled people not to be refused booking or boarding, unless for justified safety or security reasons. The Commission also appears to favour making airports responsible for the provision of assistance, with the costs levied on the airlines in proportion to the total number of passengers flown.

Conclusion

There is little consistency in the way that the DDA presently applies to the travel sector, and the transport exclusion carves

out a swathe of discriminatory practices. The Disability Bill will remove some of the anomalies but until aviation and shipping are brought within the fold, disabled travellers will not be fully protected.

News in brief

Changes to Part 2 of the DDA

In addition to the commencement of the new duties in Part 3 of the DDA explained earlier in this Bulletin, 1 October sees significant changes to Part 2 come into force. These changes were described in issue 4 of the Legal Bulletin. The exemption for small employers is abolished, and occupations such as the police, partnerships and barristers are brought within the scope of Part 2 for the first time.

There are significant changes to the definition of discrimination in Part 2, including the introduction of the concept of direct discrimination and the abolition of justification in relation to failure to make reasonable adjustments. There is also an express prohibition of harassment of disabled people, and new powers for the DRC to take legal action in respect of discriminatory advertisements.

New Codes of Practice

The DRC has published new statutory Codes of Practice giving guidance on the new-look Part 2. There are two new

Codes, one dealing with Employment and Occupation, and one dealing with the application of Part 2 to Trade Organisations and Qualifications Bodies. The new Codes can be downloaded from the DRC website, and are available in hard copy from The Stationery Office.

Burke v GMC

The DRC intervened as an interested third party in the recently reported case of *Burke v GMC*. The case raised a number of important issues about the giving and withholding of life-saving treatments. The judge welcomed the DRC's involvement and expressly adopted DRC positions. Essentially, the case has established four things:

(1) The right of the competent patient to be able unequivocally to require continuation of artificial nutrition and hydration (ANH) either at the time or through a statement made while competent taking effect even whey they are no longer competent.
(2) That if quality of life was to be a factor in deciding when to cease ANH for an incompetent patient who had expressed no prior view, that quality was to be assessed from the point of view of the patient/disabled person.
(3) Quality of life, as assessed that way, was only to be treated as justifying cessation/withholding of ANH if the patient would consider their life to be 'intolerable' if continued.
(4) In the event of a dispute between any of the medics and/or relatives/carers/etc as to whether ANH should be ceased/withheld, the case should be referred to court.

DRC working in partnership

The DRC's Partnership Team continue to focus on working and developing links with advice and information services, including Law Centres. Kirklees are currently recruiting for their new Law Centre, with a view to commencing services in October 2004. Part of the development of that service will be support on DDA cases. Leeds Law Centre also visited the DRC recently to discuss joint work.

Over the past 12 months, a number of external advice services have indicated that a

Quality Mark on disability advice and information service provision would be useful in developing their services. Work has commenced with the Legal Services Commission on this issue.

Accessibility of tribunals

In recognition of the responsibilities of tribunals under the DDA as service providers, the Council on Tribunals has conducted a survey of a wide selection of tribunals in order to evaluate and report on their readiness to comply with the extended duties under Part 3. The survey asked about the physical accessibility of hearing centres, the provision of information in accessible formats, scope for reasonable adjustments to administrative procedures, and the training of tribunal members and staff. The Council has published a summary of responses from tribunal services in its 2003-04 Annual Report.

Training on changes to the DDA from October 2004 and new Codes of Practice

1 day seminar by members of the DRC's legal team

Dates:

London: 4 November and 24 November 10 a.m. – 4 p.m.
DRC London Office, 3rd Floor, Fox Court, 14 Grays Inn Road, London, WC1X 8HN
Manchester: 28 October and 30 November 10 a.m. – 4 p.m.
DRC Manchester Office, 2nd Floor, Arndale House, The Arndale Centre, Manchester, M4 3AQ

Topics to be covered:

- Significant changes to Part 2
- New DRC Code of Practice on Employment and Occupation
- Recommended approach for determining disability discrimination post-October
- Update on key case law
- Other changes to the DDA and future developments

The course is designed for practitioners with a good working knowledge of employment law and discrimination law, and is **FREE**. Places are limited.
To reserve a place please email **jackie.smith@drc-gb.org** specifying your preferred location and date.

Please give your contact details, any special dietary requirements, and details of any adjustments we need to make to enable you to participate fully in the training. We will be in touch as soon as possible to confirm whether you have a place.