

Legal

Bulletin

- 1 Editorial
- 3 Adjustments to physical features of service providers' premises – legal and evidential issues
- 18 Voluntary binding agreements
- 27 Discriminatory advertisements
- 33 Sickness absence, sick pay and the Disability Discrimination Act
- 46 News in brief
- 61 DRC support for legal cases – priority areas

Editorial

There is little doubt that discrimination law is entering a momentous period in its evolution.

The Discrimination Law Review (DLR) team, which is considering the opportunities for creating single equality legislation, was due to issue a Green Paper with its proposals in March. At the time of writing, this is still awaited, but it is to be hoped that the review will address many of the concerns about equality legislation and its operation (for example, in relation to the effective enforcement of goods and services cases).

Linked to the DLR, the independent Equalities Review, which was investigating the underlying causes of inequality, published its final report on 28 February 2007. The report's recommendations set out 'ten steps to greater equality', each designed to contribute to 'a systematic overall framework for creating a more equal British Society'. Meanwhile, legislation dealing with discrimination on grounds of sexual orientation, religion or belief and age will continue to bed down and, of course, the Commission for Equality and Human Rights (CEHR) will open for business in October of this year.

The DRC, for its part, is aware of the unique challenges involved if it is to deliver on its current agenda, influence this evolutionary process and leave a powerful and lasting legacy. But these are the Commission's aims as we enter this potentially historic period.

In the context of its legal work, the DRC continues to achieve significant impact. This issue explores the Commission's use of voluntary binding agreements and examines the new formal investigation into fitness standards in professional occupations.

We also consider the vexed issues of sickness absence and sick pay in the light of recent important decisions and explore the duties on service providers to make adjustments to physical features of premises.

The News section includes updates on a number of important recent DRC-supported cases, including the first case to consider the qualifications bodies' provisions of the Disability Discrimination Act 1995. We also report on the EAT's decision to allow a reference on the

question of associative discrimination to proceed to the European Court of Justice. Without doubt, it has been a busy period for enforcement activity.

Now, as we enter the next phase of the evolution of discrimination law, the challenges of reforming the legislation and developing an effective legal enforcement strategy for a single commission must be tackled. But the vision of a society where every individual has the chance to achieve their potential, free from discrimination, is a powerful incentive to drive this work forward with passion.



Regards
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The Disability Rights Commission (DRC) was created in April 2000 pursuant to section 1 of the Disability Rights Commission Act 1999 ('the 1999 Act'). Its aim is to create 'a society where all disabled people can participate fully as equal citizens'. Section 2(1) of the 1999 Act requires the DRC: (i) to work towards the elimination of discrimination against disabled persons (ii) to promote the equalisation of opportunities for disabled persons (iii) to take such steps as it considers appropriate with a view to encouraging good practice in the treatment of disabled persons and (iv) to keep under review the working of the Disability Discrimination Act 1995 and the 1999 Act.

Adjustments to physical features of service providers' premises – legal and evidential issues

Sarfraz Khan, Senior Legal Officer at the DRC, explores the key legal and evidential issues that are likely to arise in claims relating to the 'physical features duties' on service providers

County courts in England and Wales and sheriff courts in Scotland have jurisdiction to determine claims of disability discrimination brought under Part 3 of the DDA in relation to access to goods, facilities, services, premises, private clubs and public authority functions. This article explores many of the issues that these courts will have to consider when determining claims brought under section 21(2) of the Disability Discrimination Act 1995 (DDA) – the so-called 'physical features duties' on service providers.

Legal framework

The DDA itself has been described by appeal courts as pioneering social legislation. In relation to access to services, the aim of this legislation is to ensure that disabled people have access to services to the same extent, so far as this is possible, as non-disabled people (see the Court of Appeal judgments in **Roads v Central Trains [2004] EWCA Civ 1541** and **Ross v Ryanair Ltd and Anor [2004] EWCA Civ 1751**, discussed in Legal Bulletin issue 7).

In terms of access to services, the DDA duties are designed to be anticipatory. This is based on the fact that section 21(2) of the Act specifically refers to "disabled

persons” rather than just the individual disabled customer. As a consequence, when forethought, combined with appropriate advance action, would have effectively prevented difficulties that a disabled customer experiences, a service provider is unable to rely on the fact that an adjustment cannot be made at the point in time when that disabled customer tries to access the service.

Since October 2004, providers of goods, facilities and services have been under a duty to make reasonable adjustments where a physical feature of premises that they occupy makes it impossible or unreasonably difficult for disabled people to make use of the service in question. This duty applies to premises from which goods, facilities and services are provided to the general public.

From December 2006, similar duties apply to physical features of premises occupied by private clubs and to those premises occupied by public authorities which carry out public functions.

(Note: unless otherwise apparent from its context, in this article, the term ‘service provider’ and related terms are used to include all providers that are now subject to the Part 3

physical features duties – that is, providers of goods, services and facilities, public authorities exercising functions and private clubs.)

The legal duty to adjust physical features of premises arises under section 21(2) of the DDA which provides:

“Where a physical feature (for example, one arising from the design or construction of a building or the approach or access to premises) makes it impossible or unreasonably difficult for disabled persons to make use of such a service, it is the duty of the provider of that service to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to:

- (a) remove the feature;
- (b) alter it so that it no longer has that effect;
- (c) provide a reasonable means of avoiding the feature; or
- (d) provide a reasonable alternative method of making the service in question available to disabled persons.”

This provision is supplemented by the following regulations:

- Disability Discrimination (Providers of Services)(Adjustment of Premises) Regulations 2001 (SI 2001/3253)
- Disability Discrimination (Service Providers and Public Authorities Carrying out Functions) Regulations 2005 (SI 2005/2901)
- Disability Discrimination (Private Clubs etc) Regulations 2005 (SI 2005/3258).

Section 19(1)(b) of the DDA states that it is unlawful for a service provider to fail to comply with the section 21 duty to make reasonable adjustments and section 20(2) states that an unjustifiable failure by a service provider to comply with the section 21 duty amounts to unlawful discrimination under the Act. The prescribed circumstances in which the justification defence can be used are set out in sections 20(3) and 20(4) of the Act.

It is worth noting that although the duties listed in section 21(2) (a) to (d) (above) are not, strictly speaking, set out in a hierarchy, in reality many Part 3 DDA claims will proceed on the basis that the physical feature in question should be removed or altered, failing which arguments

in relation to avoiding the feature or providing a reasonable alternative method of accessing the service should be considered.

Code of Practice

The DRC has written and produced a new Code of Practice on Part 3 of the DDA which came into force on 4 December 2006. **'DDA 1995 Code of Practice, Rights of Access: services to the public, public authority functions, private clubs and premises'** is a statutory Code, approved by Parliament and admissible as evidence in legal proceedings under the DDA. Courts must take into account any part of the Code that appears to them to be relevant to any question arising in those proceedings. The Code of Practice is available at: www.drc-gb.org

When does the duty to make reasonable adjustments to physical features of premises arise?

The duty to make reasonable adjustments to a physical feature of premises occupied by a service provider arises where that physical feature makes it impossible or unreasonably difficult for disabled persons to

make use of the service provided. A “physical feature of premises” is defined in broad terms – see paragraphs 7.43 to 7.46 of the Code of Practice referred to above.

It will often be clear as to whether a physical feature does make it impossible for disabled persons to make use of the service provider’s services. For example, if stairs leading into premises are the sole means of access available, this will often make it impossible for wheelchair users to make use of the service in question.

However, the DDA doesn’t define exactly what is meant by “unreasonably difficult” (in section 21(2)) where access is possible, albeit with difficulty. Paragraph 6.36 of the Code of Practice states that time, inconvenience, effort, discomfort, anxiety or loss of dignity are factors to be considered in this regard in any given case. The DRC believes that this question is largely one of fact based on the evidence presented – primarily by the claimant and, if necessary, by his/her medical advisers.

It is clear, though, that the phrase “impossible or unreasonably difficult” needs to be considered in two contexts.

Firstly, the section 21(2) duty on service providers is, as already mentioned, owed to “disabled persons”. Whilst no single feature of premises will obstruct access for all disabled persons, the phrase “disabled persons” in section 21(2) directs attention to features which make access impossible or unreasonably difficult for persons with one or more kinds of disability – for example, those with impaired vision or impaired mobility.

According to Lord Justice Sedley in **Roads**, “it is not necessary, in order to trigger the section 21(2) duty, for the feature in question to cause unreasonable difficulty for all or most disabled persons; any significant impact on, say, wheelchair users as a class will, in my judgment, suffice”. Sedley LJ also noted that “the practical way of applying section 21 in discrimination proceedings will usually be to focus the question and the answer on people with the same kind of disability as the claimant”; hence the anticipatory nature of the duty to make adjustments.

The second context in which the phrase “impossible or unreasonably difficult” needs to be considered focuses on section 19 of the DDA. This creates a personal right, by – in the words of Sedley LJ, again in

Roads – “fastening a cause of action onto the section 21 duty if the effect of a breach of the duty is to make it impossible or unreasonably difficult for the disabled person to make use of the service in question”.

The correct approach is therefore a two-stage test. Firstly, does the particular feature make access impossible or unreasonably difficult for disabled people with one or more kinds of disability; secondly, if it does, has it made access impossible or unreasonably difficult for the claimant?

Further, the fact that one disabled person can access the service does not mean that the same level of access is available for other disabled people. Assumptions that disabled people experience the same difficulties are often wrong; this is the case even when people share similar disabilities. Variations do occur in respect of the effects that similar conditions have upon different individuals. Courts should, therefore, carefully scrutinise the evidence in each case before reaching any conclusions in this regard.

Indeed, even if others with the same kind of disability as the claimant are able to make use of

an alternative means of accessing the service, that does not mean that it cannot be impossible or unreasonably difficult under section 21(2) for “disabled persons” to make use of the service.

In the **Roads** case, for example, the claimant, a wheelchair user, successfully argued that it was impossible or unreasonably difficult to access the eastbound platform at Thetford station, despite evidence that other wheelchair users had made use of an alternative means of access over a period of time. Access to the eastbound platform from the station forecourt was via a footbridge, which Mr Roads was unable to use. The alternative option entailed a half mile journey along a lane that passed under the track and which was negotiable only with excessive difficulty and risk in his wheelchair. The defendants submitted in evidence that certain other wheelchair users had used the alternative route along the lane as a means of access to the eastbound platform. The Court of Appeal was nevertheless satisfied that it was impossible or unreasonably difficult for disabled persons – in this case wheelchair users – to make use of the service. Sedley LJ

commented that “the relevance of the fact that some wheelchair users cope with the [alternative] route is logically spent with the finding that access is nevertheless unreasonably difficult for disabled people generally and for Mr Roads personally”.

Exemptions

Where the duty under section 21(2) arises, it may be necessary to explore whether Building Regulations have any relevance to the proper determination of a claim that a physical feature of premises should have been removed or altered.

In England and Wales, Part M of the Building Regulations could be particularly relevant – see particularly SI 2000/2531 and SI 2003/2692. In brief, Part M (which was extended in 1992 and 1999 and modified in 2004) says that a building must be reasonably accessible for all people, including disabled people. Although it does not apply to dwellings, Part M could apply where new buildings are being constructed, buildings are being extended or altered, or where buildings are subject to a material change of use.

Part M is accompanied by guidance in the form of

Approved Document M which outlines a number of objectives, design considerations and design solutions which suggest one way towards compliance, but not necessarily the only way. Under the DDA, if a physical feature of a building has been constructed or altered in accordance with the relevant objectives, design considerations and provisions in Approved Document M, a service provider will not have to make alterations or adjustments to that physical feature if 10 years or less have passed since construction or installation took place.

In Scotland, the current regulations contain similar provisions to those in England and Wales, but take into account the fact that, in Scotland, the requirements to provide access and facilities for anyone, including disabled people, are dispersed among the general Technical Standards. The Technical Standards stipulated requirements that must be met in order to comply with the Building Standards Regulations. In general, where a particular aspect of a physical feature accords with the applicable provision in the relevant Technical Standard or the functional standards and guidance in the Technical

Handbook in Scotland, no alteration will be required, so long as it continues to accord with the provision. (It should be noted that the Building (Scotland) Regulations 2004 will be amended by the Building (Scotland) Regulations 2006 on 1 May 2007. From this date, revised editions of the Technical Handbook will come into force.) As is the case in England and Wales, the exemption will last for 10 years from the date that the feature was constructed or installed.

In all cases, the exemption relates only to the particular aspect of the physical feature in question that accords with the provisions of the Approved Document M (in England and Wales) or with the relevant Technical Standard or functional standards and guidance in the Technical Handbook (in Scotland), rather than to the building as a whole.

Additionally, even where the duty to remove or alter a physical feature of premises does not arise as a result of this exemption, consideration should still be given as to whether the duty to avoid the physical feature and/or provide a reasonable alternative method of accessing the service has been discharged.

Statutory consents

Removing or altering a physical feature may, on occasions, require a service provider to obtain statutory consents – for example, planning permission, building regulations approval, listed building consent, scheduled monument consent or fire regulations approval. Whether statutory consent is required and, if so, whether such consent has been sought by the service provider could be important questions for a court to consider in the context of a section 21(2) DDA claim.

Under the terms of the DDA, such consent should be sought and interim reasonable adjustments may need to be made whilst consent is being obtained. Where such consent has initially been refused and it is possible to appeal, it may be reasonable for a service provider to pursue such an appeal.

Binding obligations and leases

Many service providers do not own the premises which they occupy but instead occupy the premises under terms contained in a leasehold agreement with a landlord (the 'lessor'). Leases

and other binding obligations often have terms affecting what alterations can be made in respect of such demised premises.

Where the terms of the lease prevent the service provider who occupies the premises from making an alteration to the premises, special provisions under the DDA will apply. Effectively, if the alteration is one which the service provider proposes to make in order to comply with a duty to make reasonable adjustments, the DDA overrides the terms of the lease so as to entitle the service provider to make the alteration, with the consent of the lessor.

In such a case, the service provider must first write to the lessor asking for consent to make the alteration. The request should include plans and specifications and make it clear that alterations are proposed to improve access to the premises for disabled people.

If the service provider fails to make a written application to the lessor for consent to the alteration, the service provider will not be able to rely upon the fact that the lease has a term preventing it from making alterations to the premises to defend its failure to make an alteration. In these

circumstances, anything in the lease which prevents that alteration being made must be ignored in deciding whether it was reasonable for the service provider to have made the alteration.

Generally, a lessor has 42 days from the date of receipt to respond in writing to the service provider's application for consent to the alteration. If the lessor fails to do so, he is taken to have withheld his consent. However, a lessor has 21 days from the date of receipt of the request to make a written request for any plans and specifications that are reasonably required and which were not included with the application. If he makes such a request, the 42-day period will begin with the day on which he receives the plans and specifications.

The lessor cannot unreasonably withhold consent but may attach reasonable conditions to the consent (for example, allowing inspection of works). A trivial or arbitrary reason for withholding consent would almost certainly be unreasonable.

Where a service provider has written to the lessor for consent to make an alteration

and the lessor has refused consent or has attached conditions to his consent, the service provider, or a disabled person who has an interest in the proposed alteration, may refer the matter to the county court or, in Scotland, the sheriff court. The court will decide if the refusal or any of the conditions are unreasonable. If it decides that they are, it may make an appropriate declaration or authorise the service provider to make the alteration under a court order (which may impose conditions on the service provider).

If a lessor requires another person's consent to the alteration (under a superior lease or because of a binding obligation), that other person's consent should be sought within 42 days, beginning with the day on which the lessor receives the service provider's request (or the plans and specifications if these arrive later). If he fails to seek the consent of the other person within this period, the lessor will be taken to have withheld his consent. If the lessor receives the consent of the other person but fails to communicate to the service provider within 14 days that consent has been received then, again, the lessor will be taken to have withheld consent.

In legal proceedings on a claim under Part 3 of the DDA (other than a case involving group insurance or employment services) involving a failure to make an alteration to premises, the disabled person concerned or the service provider may ask the court to direct that the lessor be made a party to the proceedings. The court will grant that request if it is made before the hearing of the claim begins (unless it appears to the court that a different lessor should be made a party to the proceedings).

Where the lessor has been made a party to the proceedings, the court may determine whether the lessor has unreasonably refused consent to the alteration or has consented subject to unreasonable conditions. In either case, the court can:

- make an appropriate declaration
- make an order authorising the service provider to make a specified alteration; or
- order the lessor to pay compensation to the disabled person.

Where the duty to alter or remove a physical feature of premises under section 21(2)

does not arise, the service provider may still be obliged to make adjustments by way of avoiding the feature or providing a reasonable alternative method of accessing the service.

Reasonableness

When the duty of a service provider to make adjustments to physical features of premises does arise and matters concerning exemptions, consent and leases have been settled to the extent that the section 21(2) duty remains live, the next question is: what reasonable adjustments should the service provider have made to discharge this duty?

Once again, the judgment of Sedley LJ in **Roads** explains the approach that should be taken to this question. Sedley LJ accepted that the policy of the DDA is “to provide access to a service as close as it is reasonably possible to get to the standard normally offered to the public at large”. Consequently, where there is a range of solutions, the fact that one of them – if it stood alone as the only practicable solution – would satisfy the duty, may not be enough to afford a defence. In effect, a ‘solution’ may be said not to be reasonable

precisely because a better solution – in terms of practicality or of the legislative policy – is available.

With this in mind, the DRC believes that the questions to ask, in turn, at this point are:

- a) whether removing the physical feature constitutes a reasonable adjustment
- b) whether altering the physical feature constitutes a reasonable adjustment
- c) whether providing a means to avoid the physical feature constitutes a reasonable adjustment; or
- d) whether providing a reasonable alternative method of accessing the service constitutes a reasonable adjustment.

This is because removing or altering physical feature barriers is an ‘inclusive’ approach to adjustments which makes the services available to disabled and non-disabled people in the same way.

In contrast, an alternative method of service offers disabled people a different form of service than is provided for non-disabled people.

Service providers must therefore balance the alternative options for overcoming a physical feature, with a view to approximating the access provided to disabled people to that enjoyed by the rest of the public.

When considering what is reasonable, a relevant factor which might be taken into account is whether taking any particular steps would be effective in overcoming the difficulty that disabled people face in accessing the services in question. In relation to this issue, the claimant may state what would or would not have been an effective adjustment to discharge the duty from his or her perspective.

However, on many occasions, this on its own will not be conclusive as to whether the adjustment is reasonable. Other relevant factors which might be taken into account when considering what is reasonable – as set out in paragraph 6.25 of the statutory Code of Practice – include, but are not limited to, the following:

- 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 any 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 or other assistance.

In reality, much of the information required to assess reasonableness will be within the service provider's possession or control (this applies equally to information concerning exemptions, statutory consents and leases, discussed above). The DRC believes that where the duty arises, cogent evidence is required from the service provider to demonstrate that an adjustment by way of altering or removing a physical feature would not be a reasonable adjustment – for example because it is impractical, or would cause disruption to the extent that it becomes an unreasonable step to make.

It may also be relevant to consider whether the service provider has a strategy or programme for carrying out

access improvements.

Furthermore, it is worth remembering that public authorities have additional duties under the Disability Equality Duty (section 49A of the Act) which may be relevant to their anti-discrimination obligations under the Act.

The DRC would suggest that, in order that these cases are managed in a way that satisfies the overriding objective of the court, it may be necessary that Directions are set that are designed to get the parties to address those factors that influence whether an adjustment is or is not reasonable in advance of the trial (and which ensure the parties prepare their evidence and trial or proof submissions accordingly).

Justification

Section 20(3) of the DDA states that a service provider can only justify failing to discharge the duty to make reasonable adjustments using one of the prescribed conditions of justification set out in section 20(4) of the DDA. Not only must the service provider have a belief that one or more of the conditions of justification applies in a given case (the 'subjective element'), it must

also be reasonable, in all the circumstances, for the service provider to hold that view (the 'objective element').

In a claim based on section 19(1)(b) – which states that it is unlawful for a service provider to fail to comply with the section 21 duty to make reasonable adjustments – the only conditions of justification applicable are “health or safety” and “the disabled person being incapable of entering into an enforceable agreement”. If there is, in fact, a genuine health or safety reason for failing to comply, it is very unlikely to be reasonable to make the adjustment in any event. In reality, therefore, this particular condition of justification is unlikely to arise unless coupled with a claim under section 19(1)(a), 19(1)(b) or 19(1)(d) – which make provision, respectively, for discrimination in deliberately not providing a service, in the standard or manner of service provided and in the terms on which a service is provided.

So, can a failure to make a proven reasonable adjustment be justified for substantially the same reasons that were rejected when the court considered reasonableness? This question has already been answered by

the Court of Appeal in the context of the employment provisions of the DDA in **Collins v Royal National Theatre Board Ltd [2004] EWCA Civ 144**. In that case, the Court of Appeal decided that the previously rejected reason considered in relation to reasonableness cannot be revived and used, once again, in respect of justification. The DRC believes that the Court of Appeal judgment in **Collins**, although arrived at in a Part 2 (employment) context, should apply equally to Part 3 of the DDA, notwithstanding that the basis for justification differs between these two parts of the Act.

Evidence gathering tools

Since December 2005, individuals who believe that they have claims under Part 3 of the DDA (including section 21(2) claims) have had the opportunity to seek answers and further information from the potential defendant using a statutory questionnaire procedure.

Such questionnaires must be served upon the defendant within 6 months of the date that the act(s) complained of took place; only the court can grant permission to serve a

questionnaire outside of this period.

Whilst the defendant is not obliged to respond to the questionnaire, failing to do so within 8 weeks of service of this document allows the court hearing the claim to exercise discretion to draw an adverse inference against the defendant. This can include an inference that the discrimination complained of has occurred. A similar inference can also be drawn from the defendant's evasive or equivocal responses to a questionnaire.

In addition, or as an alternative to a questionnaire, the court has powers to order disclosure and inspection of documents. This usually occurs during the course of proceedings but can also occur in more limited circumstances before proceedings have commenced.

The court may, for example, direct the defendant to provide disclosure to the claimant of:

- relevant leasehold agreement(s)
- relevant access audits that have been undertaken
- any relevant applications to a landlord for consent to remove or alter physical

features of demised premises

- documents concerning the date of construction of premises or the physical feature in question and information as to whether the premises or features are Part M or Technical Standard compliant
- building control approvals; or
- planning permission applications and appeals against adverse planning permission decisions.

If the questionnaire and court disclosure procedures still leave crucial questions unaddressed in relation to a section 21(2) DDA claim, opportunities exist, provided for by the Civil Procedure Rules in England and Wales, or the Sheriff Court Rules in Scotland, to obtain a court order requiring a party to provide further information to the other party (see CPR Part 18 and Ordinary Cause Rules Chapter 28). The usefulness of the 'interrogatories' procedure is particularly apparent where, following filing and service of pleadings, disclosure generates further legitimate questions that need to be answered in advance of the trial.

It should be remembered that some of the difficult technical questions that arise in relation to

section 21(2) DDA claims may require expert evidence to aid proper determination. Although there is no nationally recognised accreditation for such experts at this moment in time, there is a list of recognised experts listed in the National Register of Access Consultants (see www.nrac.org.uk). Sometimes a service provider may have carried out an access audit through a suitable professional which will be of assistance to the parties and the court in determining the claim. However, where this is not the case, the parties and the court may need to address the question of who should bear the cost of such expert evidence.

Summary

Those providing advice to parties in relation to a Part 3 DDA physical features claim and those determining such matters may find it beneficial to consider the following questions:

- 1) Does the duty to make reasonable adjustments to physical features of premises arise as a result of that feature making it impossible or unreasonably difficult for disabled people to use the service?
- 2) Is the physical feature in question exempt from being removed or altered?

- 3) Is statutory consent required before removing or altering a physical feature of premises? Has this been obtained, if required?
- 4) Are the premises held under lease? If they are, has the landlord's consent to removing or altering the physical feature been sought under prescribed terms? If yes, has the landlord unreasonably refused to grant consent?
- 5) Where the duty does arise, has the service provider discharged the duty?
- 6) If the service provider has failed to make a reasonable adjustment, has that failure made it impossible or unreasonably difficult for the disabled person concerned to use the service?
- 7) Can the failure be justified?

Guide to claims under Part 3 of the DDA about physical barriers to access: now available

The DRC has recently made available a practical resource to assist disabled people and advisers to identify and progress claims against service providers relating to physical access under Part 3 of the DDA. As well as providing full details on the law, the guide has practical advice on negotiating with service providers for adjustments. It includes sample letters to send to service providers and sample questions to use on a Part 3 DL56 questionnaire. Copies of the guide are available from the DRC helpline (please quote publication code SP16). Contact details are provided on the back cover of this publication. Alternatively, the guide is available via the DRC website at: www.drc.org.uk/library

Voluntary binding agreements

Jonathan Timbers, Practice Projects Officer at the DRC, explores the DRC's power to enter into voluntary binding agreements

The DRC's legal powers under the Disability Rights Commission Act 1999 (DRCA) include a power to enter into agreements with organisations it believes have been discriminating against disabled people (section 5 DRCA). 'Voluntary binding agreements' – also known as 'section 5 agreements' – are intended to create a framework for these organisations to address discrimination in the provision of goods and services, education or employment.

The DRC has made increasing use of this power in the last two years and voluntary binding agreements now form an important part of the DRC's overall legal strategy.

How do voluntary binding agreements arise?

Section 5(1) of the DRCA states that:

"If the [Disability Rights] Commission has reason to believe that a person has committed or is committing an unlawful act, it may... enter into an agreement in writing under this section with that person on the assumption that that belief is well founded...".

In practice, a number of existing or proposed agreements have arisen out of litigation which has

been supported by the DRC under its powers – in section 7 of the DRCA – to provide assistance in relation to proceedings which an individual has brought or proposes to bring under the DDA. Generally, prior to granting such assistance under section 7, the merits of the case would have been assessed and relevant criteria for support satisfied. Accordingly, where a voluntary binding agreement is subsequently considered in relation to that litigation, the statutory criteria in section 5 are, almost invariably, bound to be satisfied too.

Barnsley Premier Leisure's experience of the process which led to a voluntary binding agreement is not untypical. In this case, as in others, the agreement arose from individual litigation.

Barnsley Premier Leisure (BPL), which operates a number of council leisure centres, found itself defending a claim of unlawful disability discrimination after it had refused to allow a child with Down's syndrome to participate in 'mainstream' swimming lessons. This was despite the fact that the child was already a competent swimmer. The case was

referred to the DRC which agreed to provide support to the claimant under the Commission's section 7 powers.

BPL believed that it could rely on health and safety reasons to provide a defence of justification, referring in particular to guidance from the Health and Safety Executive and the Amateur Swimming Association. As the case proceeded, BPL accepted that guidance was precisely that and the correct approach was to apply the guidance sensitively to each individual situation. Media coverage was also becoming a concern. After reviewing the case in full, BPL adopted a proactive stance and worked with the DRC to reach a negotiated settlement, the terms of which were approved by the court under the Civil Procedure Rules concerning children.

During subsequent discussions between the parties, BPL agreed to the DRC's proposal that the parties should enter into a voluntary binding agreement.

Voluntary binding agreements may also arise out of referrals from external legal sources

(although only the DRC can initiate the agreement) and other information gathering activities, such as 'mystery shopping' exercises.

Importantly, however, the DRC's power is only 'to enter into' an agreement – in other words, the agreement is voluntary.

Effect of a voluntary binding agreement

Even though there is no compulsion to enter into an agreement under section 5 of the DRCA, it should be noted that such an agreement is made 'in lieu of enforcement action' and is binding once entered into.

Section 5(2) of the DRCA provides as follows:

"An agreement under this section is one by which:

- (a) the Commission undertakes not to take any relevant enforcement action in relation to the unlawful act..."

Consequently, an organisation that does not enter into such an agreement could still be subject to 'relevant enforcement action' in relation to the unlawful act (if the statutory requirements for such enforcement action were also satisfied). 'Relevant enforcement action' in this

context is defined in section 5(4) of the DRCA as:

- "(a) beginning a formal investigation into the commission by the person concerned of the unlawful act in question;
- (b) if such an investigation has begun (whether or not the investigation is confined to that matter), taking any further steps in the investigation of that matter; and
- (c) taking any steps, or further steps, with a view to the issue of a non-discrimination notice based on the commission of the unlawful act in question."

Enforcement action which does not fall within this definition is not covered by the DRC's section 5(2) undertaking in respect of the voluntary binding agreement. Consequently, if other discrimination is brought to the DRC's attention, the DRC may consider taking other enforcement action, as appropriate.

The DRCA also provides at section 5(2) that an agreement under this section is one by which:

- "(b) the person concerned undertakes:

- (i) not to commit any further unlawful acts of the same kind (and, where appropriate, to cease committing the unlawful act in question); and
- (ii) to take such action (which may include ceasing an activity or taking continuing action over any period) as may be specified in the agreement.”

The undertakings given in section 5(2) are binding on both parties. In relation to the undertaking provided by the party which the DRC had reason to believe had committed an unlawful act, section 5(8) of the DRCA provides that if:

- the other party to an agreement has failed to comply with any undertaking under subsection (2)(b); or
- the DRC has reasonable cause to believe that he intends not to comply with any such undertaking,

then the DRC may apply to a county court (or by summary application to the sheriff) for an order requiring the other party to comply with the undertaking.

The legislation also provides that the parties may agree to bilaterally vary the voluntary

binding agreement (section 5(6)(b)).

Contents

The DRCA provides in section 5(5) that:

“The action specified in an undertaking under subsection (2)(b)(ii) [this is the undertaking by the other party to take such action as may be specified in the agreement] must be action intended to change anything in the practices, policies, procedures or other arrangements of the person concerned which:

- (a) caused or contributed to the commission of the unlawful act in question; or
- (b) is liable to cause or contribute to a failure to comply with his undertaking under subsection (2)(b)(i).” [This is the undertaking not to commit any further unlawful acts of the same kind and to cease committing the unlawful act in question.]

Section 6 of the DRCA continues:

“An agreement under this section:

- (a) may include terms providing for incidental or supplementary matters (including the termination of the agreement, or the right of either party to terminate it, in

certain circumstances);...”.

Having regard to this legislative framework, agreements invariably contain certain common features.

Firstly, in accordance with the requirements of section 5(2)(b)(i) of the DRCA, discussed above, the other party will undertake not to commit any further unlawful acts of the kind which the DRC had reason to believe were being committed and, if appropriate, to cease the unlawful act in question. These acts, which may be recited at the beginning of the agreement, are usually based on the originating case brought under the DDA, or the evidence otherwise gathered.

Secondly, in accordance with the requirements of section 5(2)(b)(ii) of the DRCA, also discussed above, the other party commits itself to undertake steps outlined in a schedule appended to the agreement.

It is important to note that, in signing an agreement, the other party does not have to admit that an unlawful act was committed.

In BPL’s case, the agreement required it to review its policies, practices and procedures and produce a

disability strategy ‘for ensuring, so far as is practicable and reasonable, compliance... with... Part 3 of the DDA’. BPL also agreed to report regularly to the DRC and to share best practice in the sport and leisure sector.

In order to meet the aims of the agreement, the other party is likely to be required to:

- identify key people who have the power within the institution to deliver the terms of the agreement
- identify resources, including finance and be prepared to buy in external expertise
- involve disabled people as service users/employees/learners/community members
- evaluate systems, policies, practices and procedures, including unwritten ones
- assess the physical environment in which they operate to ensure accessibility
- alter and improve systems, policies, practices, procedures and the physical environment
- make those changes permanent by setting up internal self-sustaining monitoring and evaluation systems.

For its part, the DRC may, for example:

- provide information about duties under disability law
- signpost to expert advice, consultancy, best practice and appropriate benchmarks
- assist with an action plan to achieve the aims of the voluntary binding agreement
- monitor progress in meeting the aims of the agreement.

Where appropriate, the DRC may assist in developing a sector-wide communication strategy to help the other party to publicise its achievements to others.

However, DRC involvement in overseeing the implementation of voluntary binding agreements would not extend into areas beyond the remit of the agreement.

For example, if the other party is a public authority, it remains the responsibility of that party to ensure it complies with all of its obligations under the Disability Equality Duty (DED). This is because even though both voluntary binding agreements and the DED are concerned with promoting disability equality, the DED is about ongoing plans to tackle institutional discrimination across the whole organisation,

whereas voluntary binding agreements arise out of specific issues and have specific, time-limited ends.

Benefits – for both parties

Strategic use by the DRC of its powers under section 5 of the DRCA can help to turn organisations which have or may have been discriminating against disabled people into exemplars of good practice. This contributes towards the DRC's vision of a society where all disabled people can participate fully as equal citizens.

Agreements can also bring benefits to the other party; these might include economic benefits, positive publicity, and improvements to the accessibility of their services.

The experience of Barnsley Premier Leisure, outlined above, led to a voluntary binding agreement being entered into with the DRC in 2005. James Starbuck, Chief Executive of BPL, said "in our case, the DRC were able to bring to our attention the fact that BPL had discriminated against a disabled child with Down's syndrome in the provision of swimming lessons. This enabled us to

review our provision and make sure the same activity was accessible to everyone. It turned a negative position into a very positive one and generated good publicity which attracted new customers and allowed us to become a centre of acknowledged excellence in the provision of services to disabled people.”

DRC's use of section 5 powers

At the time of writing, there are five voluntary binding agreements in place, one has been completed, and a further three are in development. Most of these have arisen from disputes under Part 3 of the DDA which deals with rights of access to goods and services etc. However, the DRC has, on occasions, also used its powers under section 5 to enter into agreements with providers of education when it has had reason to believe that unlawful acts have been committed under Part 4 of the DDA (which deals with discrimination in the education field).

To date, the DRC has not entered into a voluntary binding agreement which has arisen further to an unlawful act under

the employment provisions of Part 2 of the DDA, although such an agreement is clearly possible under the legislation.

However, even where an agreement arises from a possible unlawful act relating to, for example, rights of access to goods and services under Part 3 of the DDA, there may still be employment-related implications that flow from the agreement. For example, an agreement with a service provider may include terms relating to matters such as staff training.

Reflecting on the incident which led to the county court claim against it, BPL recognised that the situation could have been avoided if front line staff had approached the issue with a different attitude and people on the 'operations' side of the business had felt that they had autonomy to make decisions about reasonable adjustments. As a result, BPL has developed a policy which encourages people to disclose impairments and enables staff to respond positively to requests for reasonable adjustments. To do this effectively, staff receive disability equality training at induction and are now aware

of the requirements of people with a range of impairments, including hidden impairments. In addition, BPL now has its own specialist tutor who trains swimming teachers to conduct inclusive swimming lessons.

Summary

Importantly, voluntary binding agreements move matters beyond the confines of litigation and towards a positive recognition by all parties of the need to tackle institutional discrimination. That positive recognition takes material form in a set of enforceable steps, detailed in the agreement and is demonstrated through the active participation of disabled people in influencing, monitoring and evaluating institutional change.

It is clear that voluntary binding agreements allow outcomes to be achieved which may extend beyond the constraints of a court or tribunal's more limited powers relating to remedy. This is a key reason why a voluntary binding agreement, used strategically, can be an effective tool in achieving wider change which can benefit disabled people generally.

In the case of Barnsley Premier Leisure, the voluntary binding agreement has been merely the first stage of a wider strategy intended to eliminate disability discrimination and move towards disability equality. Underlying this is recognition of the business case for disability equality and that the involvement of disabled people is essential if services are to continue to improve. BPL has, for example, worked with the local authority to create an Inclusive Activity Forum, whose membership consists of people with an interest in accessible sports activities, including disabled people and their organisations. BPL has also explored other, less formal means of encouraging feedback, including a discussion forum on its website.

In fact, there has been a quadrupling of business from disabled people at BPL – and not just for its sports facilities. For example, BPL has catering outlets too and groups of disabled people are choosing to meet there because of BPL's clear commitment to inclusion. As a result of its work, BPL was recently given an Inclusive Fitness Initiative award. Present at the award ceremony was DRC Commissioner Saghir

Alam, underlining the supportive role that the DRC has taken during the implementation of the voluntary binding agreement.

In September 2006, BPL hosted a workshop with the DRC at Leisure Industry Week. This was used to alert others in the sector to BPL's partnership with the DRC and to the improvements they had made. James Starbuck, the CEO of BPL, commented, "For us, that was very significant. The agreement has been very helpful in shaping a proactive approach to inclusivity. We're holding a beacon now and are willing to share this good practice with others in our industry."

The future

A similar power to enter into agreements has also been granted to the new Commission for Equality and Human Rights (CEHR) which comes into being in October this year.

Section 23(1) of the Equality Act 2006 provides that the CEHR may enter into an agreement with a person under which:

"(a) the person undertakes:

- (i) not to commit an unlawful act of a specified kind, and
- (ii) to take, or refrain from taking, other specified action (which may include the preparation of a plan for the purpose of avoiding an unlawful act), and

- (b) the Commission undertakes not to proceed against the person under section 20 or 21 [Investigations and Unlawful act notices] in respect of any unlawful act of the kind specified under paragraph (a)(i)."

Section 23(2) states that the Commission may enter into an agreement only if it thinks that the person has committed an unlawful act.

The CEHR power to enter into agreements will apply across the equality strands. In the meantime, the DRC's experience of using its section 5 powers has demonstrated the potential of 'agreements' to contribute to an effective legal strategy. It will be up to the new Commission to put this part of the DRC's legacy to best use.

Discriminatory advertisements

Keith Ashcroft, Legal Officer at the DRC, provides an overview of some of the recent changes to the employment provisions of the DDA and proceeds to explore, in particular, those provisions relating to discriminatory advertisements

It is now well over two years since significant changes were made to the employment provisions of the Disability Discrimination Act 1995 by virtue of the Disability Discrimination Act 1995 (Amendment) Regulations 2003 ('the Regulations'). These Regulations, which took effect on 1 October 2004, purported to implement the disability strand of the EC Equal Treatment Framework Directive 2000/78 which requires member states to introduce laws prohibiting discrimination on the grounds of religion or belief, sexual orientation, age and disability.

Most notably, the 2003 Regulations:

- introduced the concept of direct disability discrimination
- changed the scope of the duty to make reasonable adjustments to apply to "a provision, criterion or practice" rather than "arrangements"
- removed the justification defence in respect of a failure to make reasonable adjustments
- extended the scope of the employment provisions by removing the exemption for small employers and introducing provisions to cover new occupations such as barristers and advocates, partners in firms, office holders and police

- introduced express protection against disability-related harassment.

Inevitably, it has taken some time for these developments to bed down. However, as more cases exploring these amendments filter through the tribunal system, we are gaining a clearer picture of how some of these provisions will be applied.

The DRC, in fact, has been instrumental in exploring some of these new areas. For instance, the Commission supported the claimant in one of the first successful direct disability discrimination complaints to come before an employment tribunal – **Tudor v Spen Corner Veterinary Centre Ltd (ET Case no 2404211/05)**. This case, which was explored in Legal Bulletin issue 10, provided some useful guidance on the approach to direct discrimination claims, particularly in relation to the issue of the correct comparator. The DRC is also presently running a number of cases that relate to the newly-covered occupations.

More recently, the Disability Discrimination Act 2005 ('the 2005 Act') has made further changes to the employment provisions of the DDA 1995. Provisions introduced as a result of the 2005 Act have:

- extended the definition of disability to cover, effectively

from the point of diagnosis, people with HIV infection, cancer or multiple sclerosis (from 5 December 2005)

- ended the requirement that a mental illness must be "clinically well-recognised" before it can be regarded as an impairment under the DDA 1995 (also from 5 December 2005)
- placed a duty on public authorities to promote equality of opportunity for disabled people, including in their role as employers (from 4 December 2006)
- introduced protection against discrimination for Councillors.

Clearly, recent changes to the legislation have been significant. Many of the provisions listed above relate to matters of fundamental and general importance to the correct application of the DDA, including the definition of disability, the scope of the Act and the definition of discrimination. Consequently, these changes have received fairly widespread coverage in the legal and specialist press.

But not all aspects of the 2003 Regulations and the 2005 Act were introduced with equal fanfare. In particular, one issue which was addressed in both of these pieces of legislation – but

which may not have received the same exposure as the changes detailed above – was discriminatory advertisements. The new advertisements provisions should not be overlooked by those with an interest in Part 2 of the Act. They are explored in detail below.

Discriminatory advertisements

The 2003 Regulations inserted a new section 16B into the 1995 Act which made it unlawful for a person intending to confer a “relevant appointment or benefit” to publish a discriminatory advertisement or cause such an advertisement to be published. The advertisement is unlawful if it invites applications for such an appointment or benefit and might reasonably be understood to indicate an intention to determine the application to any extent by reference to:

- the applicant not having any disability or any particular disability, or
- any reluctance to comply with the duty to make reasonable adjustments.

A “relevant appointment or benefit” in this context has a wide scope. Section 16B(3) provides that the phrase includes not only any employment, promotion or transfer of

employment but also any partnership in a firm (within the meaning of section 6A), any tenancy or pupillage (within the meaning of section 7A or 7C), any membership of a trade organisation (within the meaning of section 13), any work placement (within the meaning of section 14C), any employment services (within the meaning of Part 3) and more.

Unlike the corresponding provisions in the Sex Discrimination Act 1975 and the Race Relations Act 1976, there is no definition of an ‘advertisement’ in the DDA. However, section 16B(4) of the DDA does provide that this term includes “every form of advertisement or notice, whether to the public or not”. The DRC believes that this term should be given a wide and purposive construction to include documents such as job descriptions and person specifications although, to date, tribunals have not been asked to consider the parameters of the term in the context of the DDA.

Justification

It should be noted that it is not unlawful to publish or to cause to be published an advertisement if it would not, in fact, be unlawful under the DDA for an application to be determined in the manner indicated in the advertisement

(section 16B(2)). Consequently, it is a defence for an employer to show that the determination of the application by reference to a person's present or past disability is justified. This will be the case where, for example, because of the nature of the job in question, the employer is entitled to take the effects of the disability into account when assessing the suitability of applicants.

The DRC's Code of Practice on Employment and Occupation gives the following example of this at paragraph 7.13:

"It would be lawful for a company specialising in a bicycle courier service to advertise for couriers who 'must be able to ride a bicycle'."

There is no justification defence available in respect of an advertisement which indicates a reluctance to comply with the duty to make reasonable adjustments.

Publishers

From 5 December 2005, the Disability Discrimination Act 2005 broadened the scope of the above provisions. Section 10 of the 2005 Act amended section 16B of the 1995 Act so that any

person that publishes or causes to be published a discriminatory advertisement may be liable under this section. Previously, the provisions had only applied to the person intending to make the appointment or confer the benefit (for example, the employer). The new provisions cover third party publishers (for example, newspapers) who publish discriminatory advertisements, even if they themselves are not intending to make the appointment or confer the benefit.

However, publishers (like employers) may also be able to establish a defence under section 16B(2) – described above. Effectively, it is not unlawful for a publisher to publish an advertisement if it would not, in fact, be unlawful under the DDA for an application to be determined in the manner indicated in the advertisement.

In addition, section 16B(2A) of the 1995 Act (inserted by the 2005 Act) prescribes that a person who publishes a discriminatory advertisement shall not be subject to liability under these provisions if he proves:

- that the advertisement was published in reliance on a statement made to him by the person who caused it to be published [for example, the employer] to the effect that publication would not be

unlawful [by reason of the operation of section 16B(2) described above]

- and that it was reasonable for him to rely on the statement.

However, if a person knowingly or recklessly makes such a statement which is false or misleading in a material respect, that person commits an offence and can be fined (section 16B(2B)).

Enforcement

The purpose of the discriminatory advertisements provisions is to help ensure that disabled people are not deterred from applying for a particular job. Consequently, it will not be necessary to show that specific duties arise in relation to individual applicants for a job; for example, an indication that there is some reluctance to comply, in general terms, with the duty to make reasonable adjustments will be enough to establish that a complaint is well-founded.

As a result, the 1995 Act does not permit an individual to take enforcement action in respect of an alleged contravention of the advertisements provisions. Instead, the DRC is given exclusive power to issue proceedings. The DRC may present a complaint to an employment tribunal within six months of the date of the act complained of. The tribunal's

power on a finding that a complaint is well-founded is limited to making a declaration to that effect. However, if a tribunal has made a finding that a person has acted unlawfully under these provisions and it appears to the DRC that the person is likely to act in this way again, the DRC may apply to a county court for an injunction, or (in Scotland) to a sheriff court for an interdict, restraining him or her from doing so.

To date, the DRC has not received significant numbers of complaints about discriminatory advertisements and has not yet found it necessary to take enforcement proceedings under these provisions. It has, however, engaged in correspondence and met with employers to address concerns over potentially discriminatory advertisements, job descriptions and person specifications.

In addition, although the individual job applicant has no right to take legal action, it should be noted that the content of an advertisement could be taken into account by an employment tribunal in determining a claim brought by a disabled person under the DDA.

The following example is based on an example given in the DRC Code of Practice on

Employment and Occupation at paragraphs 7.14 and 7.15:

An employer states in an advertisement for an office worker: "Sorry, but gaining access to our building can be difficult for some people." The DRC could take proceedings on the grounds that this constitutes a discriminatory advertisement. Additionally, if a disabled person who walks with the aid of crutches applies for this job and is turned down, he could ask the employment tribunal to take the content of the advertisement into account in determining whether he did not get the job for a disability-related reason.

In practice

One of the most common examples of content in an advertisement which may offend the discriminatory advertisements provisions, is a requirement that an applicant has the ability to drive or to travel independently. Such a requirement is bound to disadvantage certain disabled people and might reasonably be understood to indicate that the application will be determined by reference to the applicant not having a disability.

In considering the question of justification, the nature of the job and the low threshold set out in **Jones v Post Office EWCA [2001] IRLR 384** will be relevant.

However, if the advertisement makes no reference to a commitment or willingness to make reasonable adjustments, then a claim is likely to succeed on this basis in any event.

It is therefore incumbent on employers when advertising jobs that entail a degree of travelling to ensure that great care is taken over the wording of any advertisement. In particular, it should be made absolutely clear that reasonable adjustments will be made so that disabled people are not deterred from applying.

It is instructive and edifying to note that almost all the employers identified by the DRC as being in potential breach of these provisions have responded positively and undertaken to review and revise their recruitment and selection policies as a result.

Complaints about potentially discriminatory advertisements can be referred to the DRC Helpline. Contact details are on the back cover of this publication.

Sickness absence, sick pay and the Disability Discrimination Act

Catherine Casserley, Senior Legislation Adviser at the DRC, explores the requirements of the employment provisions of the DDA relating to sickness absence and sick pay

Since the case of **Nottinghamshire County Council v Meikle [2004] IRLR 703 (CA)**, there has been some confusion about the reach of Part 2 of the Disability Discrimination Act 1995 (DDA) in relation to sickness absence and sick pay.

The background

Part 2 of the DDA prohibits discrimination in employment, from recruitment through to dismissal and post-dismissal (section 4). Discrimination can take the form of direct or disability-related discrimination or a failure to make reasonable adjustments (section 3A) (victimisation, which is a form of discrimination, and harassment, are also covered but are not relevant here).

The duty to make adjustments is owed where a provision, criterion or practice applied by or on behalf of the employer, or any physical feature of premises occupied by the employer places a disabled person at a substantial disadvantage compared with people who are not disabled. The duty requires an employer to take such steps as it is reasonable for it to have to take in all the circumstances to prevent that disadvantage (section 4A(1)).

Employers will often have sickness absence management policies which, in practice, may put disabled employees at a substantial disadvantage or result in disability-related less favourable treatment. Such policies might include instigating disciplinary proceedings when a certain level of absence is reached, taking absence into account during a redundancy exercise or ultimately dismissing due to absence. Cases such as **Meikle and Archibald v Fife Council [2004] IRLR 651 (HL)** have emphasised not only the importance of the duty to make reasonable adjustments but also the relationship between the duty and disability-related discrimination. Such discrimination cannot be justified where a reasonable adjustment would have made a difference to the reason for the treatment (section 3A(6)).

Sickness absence

One of the earliest cases brought to tribunal under the DDA concerned sickness absence. In **Cox v Post Office, case No.1301162/97**, an employment tribunal held that it would be a reasonable adjustment for the employer to disregard, in its absence monitoring procedure, any

absence related to Mr Cox's asthma. They considered that it was feasible, given the resources of the organisation, for it to sustain what was a relatively low level of absence per year. A number of other tribunal cases followed suit, holding that disability-related absences should be disregarded as a reasonable adjustment (see, for example, **Kerrigan v Rover Group Ltd Case No. 14014006/97**, and **Hodgkins v Peugeot Citroen Automobiles Ltd ET/13000057/05**).

The more recent case of **Pousson v British Telecommunications plc [2005] 1 All ER (D) 34 (Aug) EAT**, concerned the application of the employer's poor performance attendance procedure (PPAP). The claimant (P) worked for British Telecom (BT) as a customer adviser in a call centre. He has diabetes, which rendered him more susceptible to infections than those without it. The occupational health department at BT had confirmed that his diabetes was a factor in viral infections and similar illnesses.

BT used a computer-based absence logging system, reports from which would lead to the PPAP being invoked. The procedure was invoked against P on at least four occasions over

a two-year period. The PPAP states, however, that it is not intended to cover situations where poor performance stems from absences connected to a disability. Despite this, P was placed on a performance improvement action plan. This put him under significant pressure to achieve tighter times on handling calls. P was reluctant to test his blood sugar levels and inject his insulin at his desk; when he did so, colleagues complained. However, he was discouraged from leaving his desk. In August 2001, he had a serious hypoglycaemic attack as a result of having not tested with sufficient frequency. This led to a head injury, following which he did not return to work at BT and his employment was terminated over two years later.

The tribunal found that there was a link between P's level of absence from work and his disability, that the PPAP had been applied to him on a number of occasions when it should not have been (because P was disabled) and that this amounted to less favourable treatment for a reason relating to his disability. They made a number of other findings on the issue of reasonable adjustments. BT appealed in relation to the finding that P had been treated

less favourably for a reason relating to his disability, although the appeal was based on P not having raised issues in his claim form. The appeal was dismissed.

The Dunsby case

More recently, however, the EAT has taken a very robust approach to disability-related absence in the case of **Royal Liverpool Children's NHS Trust v Dunsby [2006] IRLR 351**. Mrs Dunsby (D) was a staff nurse who had gynaecological problems, migraine and depression. She had a number of absences, as a result of which the trust instituted its four-stage sickness absence procedure. At the stage 4 hearing, prior to her dismissal, she claimed that some of her absences were due to migraines caused by her gynaecological problems and that these would not recur because her medication had changed. D was nevertheless dismissed on the basis of her absence. She complained to an employment tribunal, alleging disability-related less favourable treatment.

The tribunal proceeded on the assumption that she was covered by the definition of disability under the Act – itself a rather unusual step. It found that two of the related absences had

been recorded as headaches by her employer and that these were said to relate to migraines caused by drugs which D had been taking for her gynaecological problem. If these absences had been ignored as relating to a disability-related condition, there would not have been a stage 2 review in October 2003, the review in June 2004 would have been a stage 3 review and, therefore, she would not have been dismissed when she was in fact dismissed, in 2004.

The tribunal then found that the treatment was not justified 'because, but for the disability-related absences, the claimant would not have been at risk of dismissal in June 2004'. The tribunal also found that the dismissal was unfair, as it was not reasonable for the employers to treat disability-related absences as part of the 'totting up' review process.

The employer appealed, in particular, on the basis that justification was not properly considered by the tribunal. The EAT upheld the employer's appeal. It said that the provisions of the DDA do not impose an absolute obligation on an employer to refrain from dismissing an employee who is absent wholly, or partially, on

grounds of ill health due to disability. The law requires such a dismissal to be justified, so a tribunal does not answer the question whether a dismissal is justified merely by saying that it was, in part, because the employee was absent on grounds of disability – in this respect the tribunal erred in law. The EAT continued:

"...it is rare for a sickness absence procedure to require disability-related absences to be disregarded. An employer may take into account disability-related absences in operating a sickness absence procedure. Whether by doing so he treats the employee less favourably and acts unlawfully will generally depend on whether he is justified or not."

It is precisely the question of justification that the tribunal failed to consider in this case.

The EAT also upheld the appeal on the unfair dismissal point, holding that the tribunal had failed to make it clear why it was unreasonable to treat disability-related absences as part of the totting up review process. There is no absolute rule that an employer acts unreasonably in treating disability-related absences as part of a totting up review process or as part of a

reason for dismissal on grounds of repeated short-term absence.

Post-Dunsby

So where does that leave disability-related absences? Firstly, it must be noted that the **Dunsby** case did not address the duty to make reasonable adjustments at all. It is extremely rare for proceedings under the DDA not to include a claim for a breach of the duty to make reasonable adjustments – particularly in a case involving sickness absence. This is because a key example of an adjustment an employer may have to make is one of disregarding disability-related sickness absence when considering matters such as redundancy selection criteria or, indeed, dismissal.

The DRC's Employment Code of Practice (which must be taken into account where relevant) gives, at paragraph 5.20, examples of 'other steps' – which are not given as examples of reasonable steps in the Act – that it might be reasonable for an employer to have to take. It states that these other steps could include "adjusting redundancy selection criteria" and the following illustration is provided:

"A woman with an auto-immune disease has taken several short periods of absence during the year because of the condition. When her employer is taking absences into account as a criterion for selecting people for redundancy, he discounts these periods of disability-related absence."

Further, at paragraph 8.25, the Code states:

"When setting criteria for redundancy selection, employers should consider whether any proposed criterion would adversely impact upon a disabled employee. If so, it may be necessary for the employer to make reasonable adjustments. For example, it is likely to be a reasonable adjustment to discount disability-related sickness absence when assessing attendance as part of a redundancy selection scheme."

Additionally, the DRC provides the following advice to disabled people in its publication **Sick leave, sick pay and medical appointments:**

“Your employer’s records should record separately disability and non-disability-related absences, especially as it may be necessary to discount all or some disability-related absences for the following purposes: disciplinary procedures; performance appraisals, especially when linked to bonuses, ongoing professional development and pay rises; references; selection criteria for promotion; selection criteria for redundancy.”

Similar advice is given in the DRC web and CD resources aimed at employers. In response to the question: ‘How do we record sickness absence related to disability?’, the following answer is presented:

“It is important that all employee sickness absence records differentiate between disability and non-disability-related absences. Whilst the Act does not require any employer to retain a disabled person indefinitely if they are constantly absent, there will be occasions where it might be considered reasonable to discount absences related to the disability.

For example, a policy that states that employees will only receive a bonus if they are not absent for more than a set number of days is likely to be discriminatory against a disabled employee who needs regular but planned time off for treatment. By discounting the absences related to the disability, such discrimination could be avoided. This can only be done if accurate records are maintained.

In particular, it may be necessary to consider discounting all or some disability-related absences for the following:

- disciplinary procedures
- performance appraisals, especially when linked to bonuses, ongoing professional development and pay rises
- references – a high level of sickness absence in the past may not be any indicator of future attendance
- selection criteria for promotion
- selection criteria for redundancy.”

It is clear that, in many cases, employers do record disability-related sickness absence and non-disability-related absence separately. The issue to consider in any DDA case is what is it reasonable to do in respect of such absence? For example, in the recent case of **O'Hanlon [2006] v The Commissioners for HM Revenue and Customs [2006] IRLR 840 EAT** – which is dealt with below – the employer had a sickness pay policy which provided for additional paid sickness absence where employees had taken all of their paid sickness absence due to long-term illness or injury and other conditions were met. Clearly the employer was required to record such absences separately for these purposes.

The other reason which makes the **Dunsby** case unusual is that, as indicated above, disability-related less favourable treatment cannot be justified where a reasonable adjustment would have rendered the reason for the treatment no longer material and substantial. Thus, a tribunal would usually inevitably consider the duty to make adjustments before determining whether disability-related less favourable treatment was justified – something not done

in this case. The importance of the reasonable adjustment duty to the treatment of sickness absence is even more apparent when the nature of the duty – as emphasised in **O'Hanlon** – is considered:

“that question [of whether there has been a reasonable adjustment] has to be determined objectively... that is in striking contrast to the way in which the courts assess the question of justification with respect to disability-related discrimination.”

Taking all of this into account, it seems clear that the best advice to give to employers on this issue is to ensure that disability-related sickness absence is recorded separately and that policies are in place to address any reasonable adjustments which may be required in relation to sickness absence.

It is also worth noting that those employers who are public authorities are, since 4 December 2006, subject to the Disability Equality Duty – requiring them to actively promote equality of opportunity for disabled people. They will need to consider the impact that any sickness absence scheme has upon disabled people's ability to participate in the workforce and thus to achieve

equality of opportunity.

Sick pay

The issue often allied to sickness absence is that of payment for disabled people who are on sick leave.

In the case of **Nottinghamshire County Council v Meikle [2004] IRLR 703**, the Court of Appeal found that there was less favourable treatment when the applicant's pay was reduced while she was off sick, even though the reduction was in line with the employer's sick pay policy. Since this case, there has been some confusion as to when – or indeed whether – an employer will be obliged to keep a disabled person on full sick pay (or indeed full pay).

The O'Hanlon case

The EAT has addressed this issue in the case of **O'Hanlon v The Commissioners for HM Revenue and Customs [2006] IRLR 840**. Mrs O'Hanlon began work with HM Revenue and Customs in September 1985. She was diagnosed as having clinical depression in 1988 and began to have long periods of absence from work from 2001. In the four years to 15 October 2002, Mrs O'Hanlon had total sickness absence of 365 days. Of these, 320 days absence related to her disability and 45 days were

unrelated to her disability. From December 2002 until August 2003, she had only 3 days absence, none of which were related to her disability. There was a further period of absence from 4 September 2003.

Her employers recognised that she had difficulty with the commute to her office in Welwyn Garden City, so she was transferred to Hertford with effect from February 2004. In 2004, she had certain short absences unrelated to disability, but also a period of absence of between three and five days attributable to her disability.

The Revenue's sick pay rules, as summarised by the Tribunal, provide as follows:

"You may be allowed full pay for a maximum of six months in any 12 month period and half pay for a further maximum period of 6 months subject to an overriding maximum of 12 months of paid sick leave in any period of four years. After that, you may be paid your equivalent pension rate of pay [this is the amount of pension the employee would be entitled to if he or she had been retired on ill health grounds] or half pay, whichever is the less, unless you have less than two years pensionable service, in which case the absence will be unpaid."

Under this scheme, Mrs O'Hanlon has been on pension rate of sick pay for all absences after 13 October 2002. She raised a grievance in February 2005 through her trade union representative, contesting that the absences caused by her depression should not be included in the overall sickness absence record when calculating sick pay. Mrs O'Hanlon's grievance was not upheld on the basis that it was contrary to the sick pay policy and she brought a claim to the employment tribunal.

Employment Tribunal

Her claim was based on a failure to make reasonable adjustments and disability-related less favourable treatment; she claimed that she should receive full pay for all disability-related absences or alternatively that she should have received full pay for all non-disability-related absences. The employment tribunal considered four issues:

- Do the employer's sick pay rules, resulting in reduced rates of pay after 26 and 52 weeks respectively, constitute a provision, criterion or practice which places Mrs O'Hanlon at a substantial disadvantage in comparison with people who are not disabled?

- If so, has the Inland Revenue taken such steps as are reasonable in all the circumstances of the case to prevent the provision, criterion or practice having that effect?
- Do the reduced payments made to Mrs O'Hanlon when off sick constitute less favourable treatment for a reason related to a disability?
- If they do, is the treatment in question justified?

The tribunal found that Mrs O'Hanlon was placed at a substantial disadvantage by the Revenue's sick pay rules, but that the adjustment which was sought to address the disadvantage was not a reasonable one. In reaching this conclusion, it took into account, in particular, the evidence of the Revenue that the total cost of providing the same benefit to all disabled employees would be just under £6million a year. The tribunal also held that that there was no disability-related less favourable treatment and that even if there was, it was justified.

Employment Appeal Tribunal

Mrs O'Hanlon appealed to the Employment Appeal Tribunal (EAT) in relation to the three findings against her, whilst the

employer cross-appealed on the finding that the sick pay rules placed Mrs O'Hanlon at a substantial disadvantage.

The EAT allowed part of Mrs O'Hanlon's appeal in relation to disability-related discrimination but dismissed the remainder. The cross appeal was also dismissed. Following a thorough consideration of the relevant case law, the EAT came to the following conclusions:

- on the question of whether Mrs O'Hanlon was subjected to substantial disadvantage, the Revenue's cross appeal was dismissed. The tribunal had reached the correct conclusion on this matter. The EAT said that the only conceivable basis on which it could be said that the employment tribunal had erred in law is if it could be argued that the duty to pay money to someone absent sick from work falls outwith the scope of the section 4[A] duty (the duty to make adjustments). However, this was a matter considered and resolved in favour of the employee by the Court of Appeal in **Meikle**.
- The appeal against the finding of the tribunal that there had been no failure to make a reasonable adjustment was dismissed. In

particular, it was appropriate for the tribunal to consider the potential cost of such an adjustment if applied to all disabled people.

- The EAT went on to consider whether a claim for full sick pay would ever be considered a reasonable adjustment. The EAT stated that: "it will be a very rare case indeed where the adjustment said to be applicable here, that is merely giving higher sick pay than would be payable to a non-disabled person who in general does not suffer the same disability-related absences, would be considered necessary as a reasonable adjustment". The EAT did not believe that the legislation has perceived this as an appropriate adjustment, although it explicitly did not rule out the possibility that it could be in exceptional circumstances. This conclusion was reached for two reasons. Firstly, the implications of this argument are that tribunals would have to usurp the management function of the employer, deciding whether employers were financially able to meet the costs of modifying their policies by making these enhanced payments. Whilst they must do this to a certain extent in relation to all

reasonable adjustment claims, there is a very significant difference between doing that with regard to a single claim, turning on its own facts, where the cost is perforce relatively limited, and a claim which, if successful, will inevitably apply to many others and will have very significant financial as well as policy implications for the employer. The EAT asked: “on what basis can the tribunal decide whether the claims of the disabled to receive more generous sick pay should override other demands on the business which are difficult to compare and which perforce the Tribunal will know precious little about? The tribunals would be entering into a form of wage fixing for the disabled sick.” Secondly, the EAT held that “the purpose of this legislation is to assist the disabled to obtain employment and to integrate them into the workforce. All the examples given in section 18B [which lists examples of steps which a person may need to take to comply with the duty to make reasonable adjustments] are of this nature. True, they are stated to be examples of reasonable adjustments only and are not to be taken as exhaustive of what might be reasonable in

any particular case, but none of them suggests it will ever be necessary simply to put more money into the wage packet of the disabled. The Act is designed to recognise the dignity of the disabled and to require modifications which will enable them to play a full part in the world of work, important and laudable aims. It is not to treat them as objects of charity, which, as the Tribunal pointed out, may in fact sometimes and for some people tend to act as a positive disincentive to return to work.”

- The EAT allowed Mrs O’Hanlon’s appeal against the finding that there was no disability-related less favourable treatment. The EAT distinguished the case of **London Clubs Management v Hood [2001] IRLR 719** as that case turned on its own facts. “In **London Clubs**, it was held that if a claim is for sick pay, but no such pay is awarded to anyone, then the employee who is absent for a reason related to a disability is not at a financial disadvantage as a result of being sick at all.” The EAT had “no doubt that the analysis in **London Clubs** cannot run when the claim is for ordinary pay or indeed sick pay where full pay is given for a period of sickness. The decision of the Court of

Appeal in **Clark v TDG Ltd t/a Novacold Ltd [1999] ICR 951** then requires a comparison with someone who has not had the disability-related sickness absence. Such a person would not have suffered the loss of pay since he would not have been absent for over twenty-six weeks. It was the disability-related sickness absence which took the Appellant over the sick pay threshold.” The employment tribunal had wrongly compared Mrs O’Hanlon with a non-disabled person who was absent for the same length of time as her.

- The EAT upheld the tribunal’s finding on justification. “If the objective test for imposing a reasonable adjustment to the sick pay policy did not bite, then there was never any real possibility that the more subjective test of justification would not be satisfied. That is not inevitably so in all cases, but in our view [the view of the EAT] it is here where the same failure to make full pay lies directly behind both discrimination claims.” The EAT continued: “The tribunal found that there were powerful economic reasons for the rule adopted. It would cost a very significant sum to pay full pay to all disabled employees absent sick in

circumstances where their pay would otherwise be reduced. That must be a basis for a reasonable employer taking the view that, in line with the **Jones** case [**Jones v Post Office Ltd [2001] IRLR 384**], there was a material and substantial reason for the discrimination.”

Whilst it is debatable as to whether or not the payment of sick pay acts as a ‘positive disincentive’ to return to work, it is true that the focus of the DDA and, in particular, the duty to make reasonable adjustments, is on keeping disabled people in work. However, the EAT did acknowledge that it would be wrong to say that adjustments to a sick pay scheme may never be required. Further, **O’Hanlon** does not dictate that paid time off – such as for a period of rehabilitation – may never be required. Generally, though, providing that all reasonable adjustments have been made to enable a disabled employee to remain in the workplace and that time off for rehabilitation, if necessary, has been given, then an employer is likely to have fulfilled its obligations under the DDA.

It is notable that, in this particular case, the employer had made adjustments on three occasions to assist Mrs O’Hanlon in returning to work.

The Revenue had twice reduced her hours so as to enable her to return to work without facing the immediate strain of full-time employment and they changed her location so as to reduce the pressures from commuting. Further, it was not suggested in any way that Mrs O'Hanlon's absence could be attributed to any failure on the part of the employer to take steps to assist her in her return to work. By contrast, in the **Meikle** case, liability arose because of the failure to make reasonable adjustments to enable Mrs Meikle to return to work. This had the knock-on effect of rendering the failure to give her full pay unjustified.

In all cases, the duty on employers to make the necessary reasonable adjustments to retain disabled employees is still of vital importance.

Latest developments

Recently, the approach of the EAT in **O'Hanlon** has been followed in another EAT judgment – **Fowler v London Borough of Waltham Forest** **UKEAT/0116/06/DM**, handed down on 9 February 2007.

In **Fowler**, the claimant had been absent from work for 4 years for a disability-related reason and there was no likelihood that he

would return to work in the immediate future. The EAT upheld the decision of the employment tribunal that payment of wages and sick pay beyond that provided for in the respondent's sick pay policy did not constitute a reasonable adjustment within the meaning of (what was then) section 6 of the DDA.

As with **O'Hanlon**, the EAT held that, save in exceptional circumstances, payment of wages or sick pay to a disabled person absent from work could not constitute, on its own, a reasonable adjustment because it could not be said to facilitate a return to work. Further, in most cases it would be reasonable for an employer to decide that it was appropriate to pay those employees who attended work and not to pay those who did not. Any difference in treatment, therefore, between disabled employees and those who were not disabled would be justified.

So is the sick pay issue now settled? In fact, it seems we've not yet reached the final chapter – Mrs O'Hanlon has appealed to the Court of Appeal against the EAT's decision. The outcome of that appeal hearing is scheduled for March 2007.

News in brief

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Acknowledgments:
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Gap in premises provisions highlighted

A recent Court of Appeal decision has highlighted a gap in the premises provisions of the DDA and is likely to strengthen calls for the government to take action to prevent similar inequitable outcomes.

In *Richmond Court (Swansea) Ltd v Williams* [2006] EWCA Civ 1719, the Court of Appeal found that there was no discrimination where a landlord refused to allow a disabled tenant to install a stair-lift (at the tenant's expense) in common parts of a block of residential flats, as none of the reasons for the refusal related to the tenant's disability. Mrs Williams had claimed that her landlord's refusal of consent constituted discrimination within section 22(3) of the DDA 1995.

Lord Justice Scott Baker, who expressed 'some regret' at being driven to the conclusion that Mrs Williams' claim must fail, noted that the relevant sections of the DDA 1995 do not make express provision in respect of adjustments to common parts of a building (such as the entrance and stairs).

In fact, the provisions dealing with the duties on controllers of premises which are let (or to let) – which, incidentally, should not be confused with the provisions relating to buildings from which services are provided – have been extended since this case was heard. Yet the issue of adjustments to common parts is still not expressly addressed in the relevant provisions of the Act, as amended.

Changes to the 1995 Act, introduced by the DDA 2005, mean that, with effect from December 2006, controllers of premises which are let (or to let) have a duty to ensure that disabled people can rent and enjoy premises and facilities associated with them in a similar way to non-disabled people, by making certain reasonable adjustments to remove barriers to their occupation or enjoyment. However, in England and Wales at least, there remains a need for further legislative provision dealing specifically with adjustments to common parts of buildings to improve access for a disabled tenant or occupier.

The report of the Review Group on Common Parts to the Minister for Disabled People

and the Minister for Housing and Planning, dated 23 December 2005, included a recommendation that “the government should develop (and consult on) legislation for England and Wales which would ensure that when requested by a lessee to make a disability-related adjustment to the common parts of let residential premises, the landlord would be under a duty to make the adjustment where that is reasonable.” It was noted that, because of the different legal system in Scotland, the Scottish Executive would need to consider whether and how to apply the concepts of the report’s recommendations to the position in Scotland with a view to ensuring broad equivalence across Great Britain.

Qualifications body fails to make the grade for visually impaired student

An employment tribunal has considered for the first time those provisions of the Disability Discrimination Act 1995 which relate to qualifications bodies. A qualifications body is an authority or body which can confer, renew or extend a professional or trade qualification.

Ms Latif, who is blind, wished to further her career and her professional expertise by studying for the Project Management Professional qualification. She claimed that the Project Management Institute (PMI), which confers this qualification, discriminated against her by failing to make reasonable adjustments to their examination arrangements.

Although PMI had provided Ms Latif with a reader and allowed her double time to complete the exam, they had failed to properly assess her individual circumstances and lacked any flexibility in their approach to reasonable adjustments. In fact, Ms Latif had made known that her preferred and accustomed manner of working was by using software which converts text to audio speech. In its written reasons, the tribunal referred to authorities in which "it is implicit that all cases are fact-specific and that a Qualifications Body should consider, as part of a proper assessment, the circumstances of the individual disabled person, rather than treating him or her as part of a more general class (eg 'The Blind')".

Ms Latif, who was supported by the DRC, was awarded £3,000 for injury to feelings. An appeal has been lodged by PMI which is expected to be heard in April 2007. The employment tribunal judgment is available on the DRC website at: www.drc-gb.org

Update: DRC's formal investigation into fitness standards in nursing, teaching and social work

The DRC is now more than half way through its general formal investigation looking at fitness standards within professional occupations.

The investigation was launched last year because of concerns that the statutory frameworks governing professions such as teaching, nursing and social work have the potential to discriminate against disabled people. The possibility of poor practice – by colleges, employers or regulatory bodies – in judging people's fitness to practice within these professions was also a concern. The DRC's investigation, which lasts until the summer of 2007, incorporates a number of separate projects looking at the regulations themselves and the way they are put into practice by employers, regulators and higher education institutions.

The first stage of the investigation was a review of

legislation, regulations and statutory guidance covering professional occupations such as teaching, nursing and social work across Great Britain. This was the first time that these provisions have been systematically reviewed to assess their compatibility with the DDA and their effect on disabled people and people with long-term health conditions wanting to study or work within these professions.

The review looked at the interaction between the DDA and the legislation, regulations and guidance covering these professions and explored relevant cases. It found that a very significant amount of primary and secondary legislation and guidance was likely to impact on disabled people at various career stages, such as during education, registration or employment. Within this legislation and guidance, very few references to the DDA were found except within the regulatory framework for the teaching profession. In relation to social work, there was no mention of the DDA at all in the legislation, regulations or statutory guidance which was reviewed. Additionally, it was found that the legislation and regulations setting up the regulatory Councils (such as the

General Social Care Council) do not explicitly impose a duty on these Councils to have regard to their obligations towards disabled people.

Fitness standards

Across teaching, nursing and social work (and in the additional health professions covered by this review) there are numerous requirements relating to fitness or health which have a statutory basis. For all the health professions across England, Scotland and Wales, 'fitness' is a requirement of registration; this is also a requirement for social work registration. For teaching, while there are no fitness standards at the point of registration, there is statutory guidance relating to the health of teachers and student teachers in England and Wales. The teaching profession in Scotland is the only profession reviewed where there are no statutory fitness standards.

An issue of particular concern to the DRC is that the concept of 'fitness' is described and defined in many different ways throughout the legislation, regulations and guidance examined. For example, in nursing, the term used is 'good health and good character', whereas in social work there is a

requirement to be 'physically and mentally fit'. Dentists, meanwhile, must be 'in good health, mentally and physically', according to statute.

Some of the regulations and other documents examined demonstrate that it is possible to frame fitness standards in such a way that they relate more closely to specific tasks, rather than to categories of jobs or to access to a profession in general. It is also possible to formulate such standards in a way that has regard to organisations' duties under the DDA and, in particular, to the requirement to make reasonable adjustments. However, even this more DDA-aware approach to fitness standards can still be problematic for people with certain impairments (such as mental health conditions) where stereotypical assumptions are often made about the person's fitness to carry out any role within a profession, even with adjustments. Cases where such discriminatory assumptions were made were identified through the case review.

Analysis of the way that the DDA operates in relation to competence standards

suggests that the more general the fitness standard, the more likely it is to give rise to direct discrimination or disability-related discrimination and the less likely it is to be a legitimate standard. Closer consideration could be given to whether health-related criteria are necessary, whether they can ever be non-discriminatory and whether standards should instead relate to the ability of individuals to carry out tasks competently and safely. The inquiry panel phase of the formal investigation has been exploring this issue.

Academic standards

As well as fitness standards, the review also identified some academic standards that may adversely impact on disabled people – particularly standards relating to spoken and written English. Once again, there are differences in the way that this requirement is specified within legislation or guidance. The wording used in some documents is more likely to amount to, or give rise to, disability discrimination (particularly disability-related discrimination). For example, the Nursing and Midwifery Council refers to language testing to cover listening, reading, writing and speaking.

In social work, there are requirements to ‘communicate clearly, accurately and precisely (both orally and in writing)’, and to use ‘verbal and non-verbal cues’. Whilst requirements for specific standards of English language or communication skills may be legitimate competence standards, the wording of these standards may unnecessarily exclude certain groups of disabled people.

Disclosure of health conditions and impairments

The review also showed that the requirement for disclosure of any relevant health condition or impairment to higher education institutions, regulatory bodies or employers often has a statutory basis. However, some of the legal cases examined showed that this requirement is problematic for several reasons. For example, some people may not regard themselves as disabled at all, while others may not share the institution’s view of what a ‘relevant’ condition, impairment or disability is. There are also likely to be disabled people within these professions who decide not to disclose information about their health conditions or impairments for fear of the possible consequences.

The Disability Equality Duty (DED)

Through this review, the DRC also looked at how the Disability Equality Duty ('DED') impacts on higher education institutions, public sector employers and bodies responsible for regulating teachers, nurses and social workers. The DED, examined in detail in issue 9 of Legal Bulletin, is aimed at tackling systemic discrimination and ensuring that public authorities build disability equality into everything they do. The duty has the potential to be a catalyst for changes that will enhance the opportunities for disabled people to enter into the professions under review. Higher education institutions, qualifications bodies and public sector employers will be subject to the general duty and the majority of these will also be subject to the specific duties.

Disability Equality Schemes, produced under the DED, must contain measures for assessing the impact of practices and policies upon disability equality. Impact assessment is also key to the general duty. Requirements and conditions established by government departments, education providers, qualifications bodies and public sector employers should be reviewed to ensure that they not

only meet the requirements of the anti-discrimination provisions of the DDA, but also that they promote participation in these professions by disabled people. Where any adverse impact on groups of disabled people is identified – for example, adverse impacts of fitness standards or disclosure policies – consideration should be given to how these effects can be ameliorated.

Other strands of the investigation

Research projects looking at how these regulations are implemented and the impacts they have on disabled people are now being completed. An inquiry panel, chaired by barrister Karon Monaghan, has been taking evidence from a range of organisations including trade unions, disability organisations and regulatory bodies. The evidence will be published by the DRC in September 2007.

Further information about the fitness standards formal investigation is available from the DRC website at: www.drc-gb.org/fitness

Associative discrimination – ECJ to rule

The EAT has dismissed an appeal against a decision by an employment tribunal Chairman to refer questions directly to the European Court of Justice (ECJ) for a preliminary ruling on whether associative disability discrimination is covered by the Equal Treatment Framework Directive 2000/78/EC. The case of **Attridge Law and S Law v Coleman [2007] IRLR 88** could, ultimately, have significant implications for the rights of carers and others who are 'associated' with disabled people. There are currently 6 million people providing unpaid care in Britain – most of them women.

Miss Coleman, who is not disabled, complains that she has been subjected to disability discrimination on the grounds of being the carer of a disabled person, namely her son (who, it is accepted, is disabled within the definition set out in the DDA 1995). It was argued on behalf of Miss Coleman that discrimination by association with a disabled person is covered by the Equal Treatment Framework Directive, which prohibits discrimination "on the grounds of" disability. It was also submitted that the DDA, as amended by Regulations (SI 2003/1673) which were brought in to ensure that the DDA fully

implemented the disability strand of the Directive, must also be construed in this way.

At a pre-hearing review, the Chairman ordered that the question of whether discrimination by way of association with a disabled person (or "associative discrimination") is prohibited by the Equal Treatment Framework Directive should be referred to the ECJ for a preliminary ruling. The employer appealed against that reference order, arguing that the wording of the relevant provisions of the DDA makes it clear that the Act is designed to protect those who are disabled from discrimination and that it is not possible to construe the DDA in such a way as to include protection from associative discrimination, whatever the true interpretation of the Directive.

The EAT, however, agreed with the tribunal Chairman that the DDA is capable – without distorting the words of the statute – of interpretation in a way which is consistent with an interpretation of the Directive which includes associative discrimination and which is consistent with the domestic courts' responsibility to arrive at a construction which ensures that the Directive is fully effective (as Parliament presumably intended when

passing the amending Regulations). The EAT held that the tribunal Chairman had been entitled to conclude that, in order to determine the preliminary issue of whether the claimant could bring a claim of associative discrimination under the DDA, it was first necessary to obtain the ECJ's opinion as to the proper interpretation of the Directive, before deciding whether the DDA should be construed in this way. The EAT also made the important point that reference is necessary not solely where, whichever way the point is decided, it is conclusive of the case, but also where it is required to do justice.

Should the ECJ rule that the Directive does not prohibit associative disability discrimination then Miss Coleman's claim will be struck out. The Directive is not directly enforceable between the parties and it is common ground that the DDA 1995 does not, on its face, prohibit associative discrimination. However, if (a) the Directive prohibits associative discrimination and (b) the DDA can be read consistently with such a construction of the Directive, then the claimant establishes a valid cause of action. The precise questions referred were detailed in issue 10 of Legal Bulletin and can also be accessed via the DRC website at: www.drc.org.uk

Although the EAT's decision means that the reference to the ECJ should now proceed, it is likely to be some months before this matter concludes. In the interim, if an individual believes they have been discriminated against in employment (or a related area) because of their association with a disabled person – even though they themselves are not disabled – they should follow the statutory dispute resolution procedures where they apply and/or submit a claim under the provisions of Part 2 of the DDA in the employment tribunal within the relevant prescribed time limitation period. They should then ask the tribunal to stay the case, pending the outcome of the reference to the ECJ in the case of **Coleman v Attridge Law and another**.

Meanwhile – as reported in issue 10 of the Legal Bulletin – the DRC has submitted to government proposals on a new definition of disability. The proposed definition would cover discrimination on the basis of a person's association with a disabled person.

Miss Coleman is jointly supported by the Disability Rights Commission and Bates, Wells and Braithwaite Solicitors.

House of Lords expected to consider meaning of ‘public authority’

In issue 10 of Legal Bulletin, we considered the High Court’s decision in the important case of **Johnson and others v London Borough of Havering**, which explored the meaning of ‘public authority’ in the Human Rights Act 1998 (HRA). We reported that the High Court held that a private care home providing accommodation to elderly residents pursuant to arrangements made with a local authority was not, itself, exercising functions of a public nature for the purposes of the HRA. Consequently, the care home would not be bound to act compatibly with the European Convention on Human Rights. Johnson appealed to the Court of Appeal and the case was joined with another (YL) which was thought to raise the same point. Judgment in these two appeals was handed down on 30 January 2007 (see **Johnson and others v London Borough of Havering [2007] EWCA Civ 26**).

The Court of Appeal dismissed the appeals and held that it was bound by a previous Court of Appeal decision in the case of **R (on the application of Heather and others) v Leonard Cheshire Foundation [2002] 2 All ER 936**.

In that case, the court rejected the argument that the provision of accommodation by a charity in accordance with arrangements made with a local authority was a public function.

However, Buxton LJ noted at paragraph 84 of the judgment in **Johnson and YL** that: “The issue in YL is of public importance, at present determined by authority in this court that might benefit from reconsideration.” It is expected that “the issue” referred to by Buxton LJ in this paragraph – whether the private care home is a public authority under section 6(3)(b) HRA – will now proceed to be considered by the House of Lords. The Court noted that this issue remains live in **Johnson** too.

Indeed, Buxton LJ, took the unusual step of indicating the answer he would have given on the public authority issue had the court not been bound by authority. In relation to the question of whether, in performing a particular function, a so-called ‘hybrid’ body falls under the Convention for all purposes and at all times, he would “draw back from giving a negative answer that will be binding in all the circumstances”. Instead, the question to be asked in any given

case should be “whether it is necessary for the protection of the claimant’s Convention rights that the body concerned should be held to be a public authority against which those rights can be directly asserted”.

“The answer to that question”, Buxton LJ added, “will vary according to the article of the Convention that it is sought to assert.” In the event, these considerations were not open to this Court of Appeal – which was constrained by **Leonard Cheshire** – but the views might be taken into account in any future investigation of the issue.

The DRC, which made written submissions to the Court of Appeal, supported the position that **Leonard Cheshire** was wrongly decided. Those in care homes are often amongst the most vulnerable in society who have a particularly acute need for the protections of the HRA.

Importantly, however, the judgment is concerned solely with the scope of the term ‘public authority’ in the context of the HRA. It does not address the scope of public authorities which are subject to the duties under the DDA 1995 as amended by the DDA 2005.

Scottish court hears schools case

Parent A v East Ayrshire Council [Kilmarnock Sheriff Court, 21 September 2006]

is the first case brought under Part 4 Chapter 1 of the DDA (which deals with schools) to be decided in Scotland.

The case concerned a child with Asperger’s Syndrome who was excluded from his primary school following a violent incident during a lunchtime game of football. Whilst the court agreed that there had been a prima facie case of disability discrimination, it decided that the school was justified in excluding the child.

The court had to consider the effect of a policy which, on the face of it, required an exclusion from school to result from any incidents of violence against staff. The court decided that, notwithstanding this policy, the reasons for the exclusion were both material and substantial.

In addition, the availability of remedies in the sheriff court was considered. In particular, it had been argued that the remedy of reduction was not available in a sheriff court action. Reduction, which would allow the court to overturn an exclusion decision, is a remedy which is normally only available in the Court of Session. However, having considered the equivalent provisions in England and Wales, the Sheriff decided that the intention of Parliament was that reduction would be available in Scottish disability discrimination cases in the sheriff court.

DRC Helpline recommended for prestigious accreditation

Following an audit by the British Standards Institution in February 2007, the DRC Helpline is to be recommended to the Customer Contact Association (CCA) Standards Council for the award of CCA Global Standard. The Standards Council is expected to rubber-stamp the successful outcome of the audit at its next meeting.

The CCA Global Standard is a highly prestigious charter mark for public-facing operations. Other organisations who have secured accreditation include British Telecom, British Gas, Lloyds TSB, BBC Information Services and the Department for Work and Pensions.

The Global Standard consists of the following six sections, against which the DRC Helpline was assessed:

- customer focus
- performance and operational effectiveness
- recruitment, selection and retention strategies
- learning and development
- legislation, regulation and policies
- governance framework and strategic alliance.

This development reflects the high standards that the Helpline has reached and continues to maintain across all areas. It is indicative of the exemplar nature of the services provided by the DRC which will provide a valuable legacy for the CEHR.



Consultation on a Revised Code of Practice on Trade Organisations and Qualifications Bodies to incorporate provisions on General Qualifications Bodies

From 1 September 2007, new provisions prohibiting disability discrimination by general qualifications bodies are due to come into force. These provisions are contained in section 15 of the Disability Discrimination Act 2005, which inserted a new Chapter 2A (sections 31AA to 31AF) into Part 4 of the Disability Discrimination Act 1995.

The new duties for general qualifications bodies will be similar to those already in place for bodies conferring professional and trade qualifications. Under the new duties, four forms of discrimination will be made unlawful for those conferring relevant general qualifications: direct discrimination, failure to make reasonable adjustments, unjustifiable disability-related discrimination and victimisation. In addition, disability-related harassment will also be made unlawful.

The existing **Code of Practice: Trade Organisations and Qualifications Bodies** has been amended to explain how the new legislation will operate in practice. Consultation on the draft revised Code closed on 14 February 2007. A final draft will be prepared for Ministerial approval and the revised Code will be published later in 2007.

In addition, Regulations concerning what a relevant general qualification is, what physical features of premises occupied by general qualifications bodies are, and what enforcement provisions there will be for these new duties have been produced by the Department for Education and Skills (DfES). Further information on these regulations is available on the DfES website at: www.dfes.gov.uk

Disability Conciliation Service

As a result of the unfortunate demise of Mediation UK, the previous incumbents of the Disability Conciliation Service contract, the DRC recently undertook a re-tendering exercise in order to appoint a new contractor to deliver the Disability Conciliation Service (DCS) for the remainder of the life of the DRC. This will maintain the independence of the service.

In the interim, it was business-as-usual and a full service was maintained to all pre-existing DRC and DCS clients. The DRC retrieved all cases that remained at the DCS and continued to progress all of these – along with the residual cases in the DRC domain – by agreeing contingency arrangements to work directly with conciliators. During this period, the established success rate of the service was maintained, with nearly 80 per cent of cases reaching full and final settlement.

Subsequently, following a highly competitive re-tendering exercise, the DRC announced that the new contract had been awarded to Mediation Works. The contract commenced on 2 January 2007 and the DRC looks forward to forging a strong relationship with Mediation Works in the coming months. The aim is to develop an exemplar conciliation service and a lasting legacy for the Commission for Equality and Human Rights.

Reasonable adjustments in employment

The Court of Appeal has handed down another judgment dealing with the duty on employers to make reasonable adjustments under the Disability Discrimination Act 1995. The duty arises where a provision, criterion or practice applied by an employer, or a physical feature of the employer's premises, places the disabled person at a substantial disadvantage.

In **Hay v Surrey County Council [2007] EWCA Civ 93**, the DRC, which represented Ms Hay, invited the Court of Appeal to review the conflicting decisions of the EAT in **Tarback v Sainsbury's Supermarkets [2006] IRLR 664** and **Mid-Staffordshire NHS Trust v Cambridge [2003] IRLR 566** and to provide guidance on the issue of whether an assessment is a separate and distinct component of the duty to make

reasonable adjustments under the DDA. The Court of Appeal declined this invitation and, as a consequence, some uncertainty remains over whether the reasonable adjustments duty includes, in law, an 'antecedent' duty on the employer to take steps to establish what reasonable adjustments can be made.

However, in practical terms, any ongoing uncertainty should have minimal effect for employers and their advisers. Almost inevitably, a claim that an employer failed to assess would be accompanied by a claim that the employer failed to make one or more other specific adjustments. Whilst it is possible in such cases that an employer achieves entirely fortuitous and unconsidered compliance (without assessment), it is also very unlikely.

For now, therefore, these key points should continue to shape best advice:

- in the absence of a proper assessment, which should include consultation, it will almost always be impossible for an employer to know what adjustments

might be reasonable, possible or effective, and this is bound to put an employer at serious risk of failure to comply with the duty

- there will be times when the nature of the impairment itself will give rise to a requirement to consult which is a part of the duty itself – for example, where the employee has communication difficulties
- the DRC's Code of Practice, which must be taken into account where relevant, places importance on consultation and states that steps which it might be reasonable for employers to have to take could include conducting a proper assessment of what reasonable adjustments may be required.

So, while uncertainty may remain over whether, in law, a failure to assess is itself a breach of the duty to make reasonable adjustments, in practical terms, the message for employers is clear: consult with the disabled person and assess what adjustments may be required.

DRC support for legal cases – priority areas

The DRC has power to consider applications for assistance in respect of legal proceedings brought or proposed by an individual under the DDA.

To make best use of its limited legal resources, the DRC has established categories of cases which should be regarded as priority areas for support. In general terms, priority areas reflect cases which are likely to promote the rights of disabled people generally, by clarifying a point of legal principle or highlighting areas where the DDA has changed or been under-used.

A selection of the types of cases which might currently attract DRC support by way of representation – over and above applications deriving from exceptional individual need – is included below. The list is not exhaustive, nor are cases that fall within these priority areas guaranteed support.

However, the DRC encourages advisers and representatives to contact our Helpline, referring to this section of the Legal Bulletin, if they are aware of complaints that fall within these priority areas. Please refer to back cover for contact details.

General

- Cases that will test the amendments to the definition of disability introduced by the DDA 2005, namely those involving people with cancer, HIV infection or multiple sclerosis (particularly where cancer is in remission or where disability is contested after diagnosis of a progressive condition), or people with a mental illness which is not 'clinically well-recognised'.
- Cases involving adults with learning difficulties and other impairments which make access to justice difficult.
- Cases that involve human rights issues.

Part 2 – Employment

- Recruitment cases involving obtaining employment at a level commensurate with ability.
- Cases involving the opportunity to progress within a given career.
- Cases that challenge cautious occupational health assessments concerning risk, and highlight the need to avoid making stereotypical or generalised assumptions.
- Cases involving the opportunity to enter a profession and/or pursue a chosen career path.
- Cases concerning employment in the health and social care sector.

Part 3 – Access to goods, facilities and services etc

- Cases that will test the provisions introduced

by the DDA 2005 relating to:

- less favourable treatment by private clubs, or
- (from December 2006) public authority functions, premises, services in respect of transport vehicles or the reasonable adjustments duty that applies to private clubs.

Part 4 – Education

- Cases (including cases heard by SENDIST/SENTW) that will clarify the application of the new provisions on education contained in Part 4 of the DDA.
- Cases that will show differences in the application of the law in pre- and post-16 education.

The DRC's current legal strategy explains further the DRC's legal enforcement functions, and how it deploys its statutory powers to maximum effect. The strategy includes a more comprehensive list of current priority areas for support and is available on our website at: www.drc-gb.org

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

If you require this publication in an alternative format and/or language please contact the Helpline to discuss your needs. All publications are available to download from the DRC website: www.drc-gb.org

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