Disability Rights Commission

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# Legal Bulletin

## Disability Discrimination Bill: Important new rights for disabled people

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In December 2003 the Government took the welcome and long-awaited step of publishing a draft Disability Discrimination Bill for pre-legislative scrutiny. The DRC is delighted by this development, which will introduce important new rights for Britain's 8.6 million disabled people.

The draft Disability Discrimination Bill will amend the Disability Discrimination Act 1995 (DDA) in a number of very significant ways:

- The definition of disability will be extended to make it clear that it includes more people with HIV, cancer and multiple sclerosis from the point of diagnosis (at present coverage of these conditions is not guaranteed).
- The Bill provides for the extension of the DDA to cover discrimination in relation to the actual use of a means of transport (at present only the transport infrastructure is covered).

- A duty to promote disability equality will be placed on the public sector (this parallels the Race Relations Amendment Act). This is a substantial move forward for disability rights, which have so far been reliant for enforcement on individual disabled people taking cases.

- The DDA will cover most of the functions discharged by public authorities. There is presently a lack of clarity, for example, relating to critical issues for many disabled people such as access to pavements and highways.

- The duties imposed on landlords and managers of premises by the DDA will be extended to include a duty to make reasonable adjustments to policies, practices and procedures, and provide auxiliary aids and services, where reasonable, to enable a disabled person to rent a property and facilitate a disabled tenant's enjoyment of the premises.

- Any private club with 25 or more members will be covered by the Act. This provision is also likely to have an impact upon political parties.

- Clauses will also be brought forward to prohibit local authorities discriminating against disabled councillors.

## How will the Bill be scrutinised?

A Parliamentary Scrutiny Committee will consider the draft Bill. Pre-legislative scrutiny means that interested organisations and individuals have the opportunity to submit written evidence to the Committee, which will also hold oral evidence sessions in public. Further details about the scrutiny arrangements can be found on the DRC website.

## Background to the Bill

The DRC is especially pleased to note that the Bill implements many of the outstanding recommendations of the Disability Rights Taskforce. The Government charged the Disability Rights Taskforce with advising on how to provide comprehensive and enforceable civil rights. In 1999 the Taskforce's Report, "From Exclusion to Inclusion", provided the Government with a significant legislative reform agenda.

The Task Force was chaired by the then Minister for Disabled People, and brought together a wide range of stakeholders including not only a wide range of disability groups but also the Small Business Federation, Institute of Directors, CBI, TUC and representatives from the health and social services sectors. Its recommendations to the Government were unanimous. The Taskforce's Report therefore carries enormous authority, and one of the DRC's first decisions was to agree full support for all its recommendations.

In 2001, the Government published "Towards Inclusion", responding to the Task Force. It indicated an intention to legislate on most (but not all) of the legislative recommendations, and invited public comment. The DRC applauds the Government for implementing many of the Task Force recommendations. These have so far included the creation of the Disability Rights Commission itself, the passage of the Special Educational Needs and Disability Act, and the Disability Discrimination Act 1995 (Amendment) Regulations 2003, which made significant changes to the employment provisions of the Disability Discrimination Act. This new Bill will implement most, but not all, of the Government's outstanding commitments to legislative reform.

## DRC comment

Notwithstanding that the Government has now brought forward these long-awaited and hugely significant changes to the law, the DRC is disappointed that the Government has not introduced all the changes which it promised. The DRC will be pressing for their incorporation into the final Bill, including the following:

- Landlords should not be allowed to withhold consent unreasonably from a disabled person to make changes to the physical features of the premises, but should not have to meet the costs.
- Employment tribunals should be able to order re-instatement or re-engagement under the employment provisions of the DDA.
- A power should be taken in the DDA to bring volunteers into coverage through regulations.

In addition, since the Task Force Report is now 4 years old, experience suggests that there are further reforms which the Scrutiny Committee should consider including in the Bill. In May 2003, the DRC published its own set of proposals for legal reform ("Disability Equality: Making it Happen"). Two of these proposals are contained in the Bill (multiple sclerosis to be covered from point of diagnosis, and the introduction of questionnaires for Part 3 proceedings).

In particular, the DRC would like to see:

- The definition of disability improved in connection with people with mental health problems, who experience high levels of discrimination but have additional evidential difficulties to surmount in claiming protection under the DDA.
- All examining bodies and standard-setting agencies should be covered (the exact parameters of coverage are at present unclear).
- School governors should be covered.
- Disability-related enquiries before a job is offered should be permitted only in very limited circumstances.
- Part 3 of the DDA (relating to discrimination in service delivery) should be enforced through employment tribunals rather than through the civil courts.

## More information on the draft Bill

A full briefing on the draft Bill is available on the DRC website.

The draft Bill itself is available on the Parliament website: **www.parliament.uk**
Hard copies of the Bill (Command Paper 6058) and the accompanying Explanatory Notes and Draft Regulatory Impact Assessment are available for £15.50 from The Stationery Office.

# The Web: access and inclusion for disabled people

## A DRC formal investigation

On 28 March 2003, the DRC announced its first formal investigation and so heralded the use of those distinctive law enforcement and promotional powers that sit in the legislation alongside the production of codes of practice and assistance to individual litigants.[1] The purpose of the investigation was threefold: to conduct a systematic evaluation of the extent to which the current design of websites helps or hinders use by disabled people; to produce an analysis of the reasons for any recurrent barriers; and to recommend further work that will contribute to the enjoyment of full access for disabled people.

To achieve that purpose, the DRC invited City University to conduct the automated testing of 1,000 sites representative of 5 sectors: Government and official information; business; e-commerce; entertainment; and leisure and Web services, such as search engines, discussion boards, portals and internet service providers. In addition, City University selected 100 sites from the original 1,000 for more in-depth evaluation by disabled users and experts.

Although this general investigation did not seek to establish whether particular named organisations were in breach of the law, the context in which the investigation was conducted was that provided by Part 3 of the DDA, and in particular by the obligation upon service providers to facilitate access to those services for disabled people. Insofar as a website in itself constitutes a service, or is the primary medium for the delivery of a service, it will be covered by Part 3. At present, there is no reported case law on the application of these provisions to websites. However, the most recent statutory Code of Practice, published by the DRC and authorised by the then Secretary of State for Education and Employment, includes commentary and examples that create a very strong anticipation that any future case law will support this interpretation of the Act.[2]

## Low levels of industry compliance

The DRC has recently published its findings in a report entitled "The Web: Access and Inclusion for Disabled People". Its conclusions offer very little consolation to those with responsibility for the design and maintenance of websites in this country. The vast majority of websites (81%) fail to meet even the most basic industry standard on accessibility, the Web Content Accessibility Guidelines disseminated by the World Wide Web Consortium (W3C). In addition, the results of site evaluations undertaken by disabled people themselves (including people with visual impairments, dyslexia, physical impairments that affect access to the Web, and deafness) show that most sites make it very difficult, if not impossible, for people with certain impairments, especially those who are blind, to use the services provided. This results both from lack of interest and knowledge on the part of website developers, and from perceived cost implications.

## Guidelines necessary but not sufficient

It is clearly a cause for concern that the industry guidelines are commanding such a low level of compliance. This concern is accentuated by the finding that the industry guidelines are, in any event, only the first step on

the path towards accessibility; compliance is a necessary but not a sufficient condition for ensuring that websites are practically accessible to and usable by disabled people. Nearly half of the problems encountered by disabled people cannot be attributed to lack of compliance with the guidelines at all. For that reason, and since a number of the more critical guidelines can only be evaluated subjectively, it is essential that disabled users are more fully involved than at present in the process of design and testing. Such involvement makes good commercial sense in any event, since the sort of improvements suggested by disabled users will invariably enhance the usability of the site for non-disabled people too.

## Making the most of what is already there

The poor performance of the industry against the guidelines makes it all the more important that disabled people are well placed to make the most of the accessibility features that already exist on most personal computers. For example, most operating systems include devices for enlarging text and changing colour contrast, yet these features will lie dormant if disabled people do not know how to find them or how to change the settings.

Since blind and visually impaired people are most severely disadvantaged, full access to the Web depends critically upon effective use of the available assistive technology, such as screen-readers and magnifiers. Effective use in turn depends upon prior selection of the most suitable equipment and the ability to purchase updated models at affordable prices. The apparent cost of such technology, the relative shortage of suitable training in its use and of advice on selection, entail that many disabled people are not currently getting the most out of the assistive technology that is available.

## Putting things right

To put things right, the DRC has made a number of recommendations aimed especially at the industry, Government and disability organisations. To counter the relative lack of knowledge and expertise on the part of disabled people, the DRC has recommended that

government, disability organisations, training establishments and health, social and rehabilitation services improve the availability of appropriate information, education and training for disabled people in the use of the relevant technology. Designers and providers of assistive technology should enable and encourage users to keep their products up to date, whilst the designers of operating systems and browsers should ensure that their accessibility options are easier to use.

For website developers and owners, the chief lessons lie in the need to raise awareness of the issue of accessibility in the first place and involve disabled people in the design and testing process. In this way, they will stand a far better chance of achieving good practice in this area.

For W3C, there remains the disturbing conclusion that even compliance with the guidance will not guarantee accessibility, and for the developers of automated checking tools that many of the most important problems cannot currently be picked up by the available equipment. The DRC has suggested that the remedy lies in W3C seeking to expand the scope of the guidelines, especially insofar as they impinge upon site navigation, and in developers of automated tools creating more sophisticated products.

## The future

A formal investigation that does not 'name and shame' is necessarily quite broad in its range and ambition. It has been the purpose of this general investigation to inquire into the general state of play on website accessibility. The picture that emerges is not good: low levels of compliance with industry guidelines; low levels of awareness of disability and access issues among those in a position to make a difference; guidelines that are themselves imperfect and difficult to test with the equipment currently available; poor levels of technical knowledge and expertise among those disabled people who most need them; and lack of co-ordinated initiatives to tackle technical, funding and educational issues.

The DRC's investigation and report are a start. They are far from the final word. What is now needed is for those

in government, the voluntary sector and the industry to act upon the DRC's recommendations and to take the lead offered by the DRC in transforming the current state of provision. A general investigation is in practice as much a matter of promotion as of enforcement, a 'wake-up call' to the sector under scrutiny rather than the immediate imposition of penalty points. It remains to be seen in the months ahead whether the call has, in this instance, been heeded.

[1] For further information on the DRC's formal investigation powers and the background to, and scope of, this first use of those powers, see DRC Legal Bulletin, Issue 4, June 2003

[2] Code of Practice: Rights of Access to Goods, Facilities, Services and Premises (2002)

# Reasonable adjustments: an overview of the law

Sections 5(2) and 6 of the DDA concern the duty of an employer to take reasonable steps to make adjustments in relation to arrangements and physical features of premises to prevent a disabled employee or job applicant from experiencing disadvantage.

## Does knowledge matter?

Section 6(6) provides that the duty does not arise if an employer did not know, and could not reasonably be expected to know, of the disability in question. There have been a number of cases about imputed knowledge, such as *Ridout v T C Group* (1998 IRLR 628) in which it was held that the duty must be measured against actual or assumed knowledge of the prospective employer as to both the disability and its likelihood of causing substantial disadvantage.

In *Wright v Governors of Bilton School and Warwickshire County Council* (EAT/113/01 28 February 2002) the EAT clarified that in cases where the respondent cannot show that it did not know, and could not reasonably be expected to know, that the applicant was disabled, there is a section 6

duty to make reasonable adjustments. The issue of whether or not the respondent has done so is subject to an objective test regardless of its knowledge (actual or imputed) as to the extent and effects of that disability.

## What is the duty?

The duty is defined in section 6(1) as follows:

"6 (1) Where –

(a) any arrangements made by or on behalf of an employer, or

(b) any physical feature of premises occupied by the employer

– place the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the arrangements or feature having that effect".

The extent of the duty is wide-ranging, as can be seen from the non-exhaustive list of examples given in subsection (3) of section 6. Steps which an employer may have to take in relation to a disabled person in order to comply with the duty include: adjustments to premises; allocating some of the disabled person's duties to another person; transferring them to fill an existing vacancy; altering their working hours or assigning them to a different place of work. In some cases a combination of steps may be required.

Section 6(4) refers to those matters to be taken into account when determining 'whether it is reasonable for an employer to have to take a particular step in order to comply with subsection (1)'.

A failure to make a reasonable adjustment is not unlawful in itself because the statute provides that such failure may be justified (section 5(2)(b)). However, the circumstances in which it is possible to justify failure to carry out a reasonable adjustment are very limited indeed, for reasons explained below.

## What is the approach?

The question should be approached sequentially (see, for example *Morse v Wiltshire County Council* [1998] IRLR 352).

The first question is whether the provisions of sections 6(1) and (2) impose a duty on the employer in the circumstances of the particular case. If there is no such duty, that is the end of the matter.

If a duty is imposed, the next question is whether the employer has taken such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the arrangements or feature having the effect of placing the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled.

In order to decide this, it is necessary to consider whether the employer could reasonably have taken any steps including any of the steps set out in paragraphs (a) to (l) of section 6(3). The list is not an exhaustive one. It is of assistance in pointing to possible steps an employer might take in order to comply with its duty. Section 6(4) lists factors to be taken into account when deciding whether taking a particular step is reasonable or not.

The case law makes it clear that in determining this question, a tribunal must make an objective enquiry (see *Morse and Collins v Royal National Theatre Board* EWCA 17 April 2004).

## What is the scope of the duty?

Where the duty arises it is a strict one (see for example, *Cosgrove v Caesar and Howie* 2001 IRLR 653, in which the EAT held that an employment tribunal had erred in regarding the employee's views and those of her doctor as decisive on the question of reasonable adjustments). The employer has the duty to consider whether reasonable adjustments could be made even though there was no guarantee they would have worked.

In *Fu v London Borough of Camden* (2001 IRLR EAT) it was held that consideration must be given to the extent to which all the adjustments requested by an employee might have alleviated his or her symptoms and assisted him or her to return to work.

As the case law has developed it is clear that the higher courts are interpreting the range of possible reasonable adjustments widely. This is consistent with the scope of

section 6(3). One example of this was (*London Clubs Management v Hood* 2001 IRLR 719 EAT), in which the EAT thought it was possible to argue that payment of sick pay constituted a reasonable adjustment. The question of whether the non-payment of sick pay to the disabled applicant had placed him at a substantial disadvantage was remitted to the original tribunal, which has since held that it did do so.

In *Royal College of Nursing v Ehdaie* (EAT/0789/00 29 July 2002) the EAT held that it may be a reasonable adjustment to consider allowing an employee to work from home on a temporary basis to maintain their skills, even if the job is not one which could be done from home permanently.

The respondent failed to consider the possibility of transferring the applicant to another office and, in absence of evidence from the respondent that there was no vacancy at that office, the EAT held that it was open to the tribunal to infer that an alternative position existed there and that there had been a failure to make a reasonable adjustment.

The EAT also held that it was not an error of law for the tribunal to find that the respondent's failure to put into effect its grievance/ harassment procedure was a failure to make a reasonable adjustment.

The Court of Appeal has recently considered the question of reasonable adjustments in the case of *Beart v H M Prison Service* (EWCA [2003] IRLR 238). The Court of Appeal upheld an employment tribunal's decision that there had been a failure to make a reasonable adjustment, by not offering the applicant a transfer to work at another prison, when the medical evidence was that she would not be able to return to work at HMP Swaleside, due to depression which had resulted from conflict with another member of staff. In the Court of Appeal judgment Lord Justice Peter Gibson said:

"The test of reasonableness under section 6 is directed to the steps to be taken to prevent the employment from having a detrimental effect on the disabled employee. The tribunal's conclusion that if the applicant had been relocated, there was a substantial possibility that she would still be in employment, was plainly

directed to the extent to which taking the step would prevent the effect in question, as part of the test of reasonableness.

The tribunal's conclusion that if she had been relocated there was a substantial possibility that she would still be in employment is plainly directed to the extent to which taking the step would prevent the effect in question.... as part of the test of reasonableness".

The Court of Appeal also rejected arguments that it was reasonable and/or justifiable not to make the adjustment because there were ongoing disciplinary proceedings involving the applicant.

When *Beart* was heard in the Employment Appeal Tribunal, the EAT, in upholding the decision of the employment tribunal, gave helpful guidance as follows:

'Section 6(4)(a) does not require of a particular step that it should prevent the effect in question but that the employer, in considering whether he was under a duty to take the step, is entitled to have regard to the extent to which the step would prevent the effect in question. There will be many steps of the kinds described in section 6(3) which, ahead of their being taken, could not be guaranteed to "work" in the sense of totally removing the disadvantage which the disabled person is encountering but that, of itself, is no reason to absolve the employer from the duty to take it or is such, without more, to deny the step the appellation "reasonable". The Tribunal's view that there was a substantial possibility that a relocation would have "worked" was, in effect, a finding that even if the Prison Service had considered the merits and demerits of a relocation (which seems not to have been proved), a case for not taking the step on the ground that it would or might not totally succeed had not been demonstrated and would not in any event have availed the Service. We see no perversity or other error of law in that.'

## Purposive construction

In a recent case the EAT has upheld a tribunal's decision that the duty to make reasonable adjustments encompasses assessment by the employer of what adjustments may be necessary. In *Mid Staffordshire General*

*Hospitals NHS Trust v Cambridge* [2003] IRLR 566 the EAT held that an employment tribunal did not err in finding that the employers had failed to comply with a duty of reasonable adjustment under section 6 of the DDA in that they did not carry out an assessment to enable them to decide what steps would be reasonable to prevent the applicant from being at a disadvantage. HHJ Keith stated:

"A proper assessment of what is required to eliminate a disabled person's disadvantage is a necessary part of the duty imposed by section 6(1), since that duty cannot be complied with unless the employer makes a proper assessment of what needs to be done. The submission that the tribunal had imposed on the employer an antecedent duty which was a gloss on section 6(1) could not be accepted. The making of that assessment cannot be separated from the duty imposed by section 6(1), because it is a necessary precondition to the fulfilment of that duty and therefore part of it. There must be many cases in which a disabled person has been placed at a substantial disadvantage in the workplace, but in which the employer does not know what it ought to do to ameliorate that disadvantage without making inquiries. To say that a failure to make those inquiries would not amount to a breach of the duty imposed on employers by section 6(1) would render section 6(1) practically unworkable in many cases. That could not have been Parliament's intention."

This is an important decision giving a purposive construction to the law.

**…and not so purposive construction**

On a less happy note, the Court of Session in Scotland has just handed down its judgment in the DRC-funded appeal case of *Archibald v Fife County Council* IRLR March 2004.

The brief facts were that the respondent local authority employed the appellant, Ms Archibald, as a road sweeper for almost four years. The appellant had a spinal anaesthetic for a minor surgical procedure, which resulted in a very rare complication of severe pain over her heels; as a result she was unable to walk. This meant that she could not continue to work as a road sweeper. She applied for over 100 alternative office-based positions with the respondent,

but had to undergo competitive interviews on each occasion as a consequence of the respondent's redeployment policy. She was unsuccessful in those applications and the respondent terminated her employment on the grounds that she was incapable of carrying out her role as a road sweeper.

The original employment tribunal decision was that the respondent had not failed to comply with a duty to make reasonable adjustments and that to waive the requirement for competitive interviews would amount to more favourable treatment of a disabled person.

In the Scottish EAT, the decision was upheld. The basis of this was that the term 'arrangement' in section 6 did not encompass 'the mere fact that a person in a certain job has become disabled'. The Scottish EAT also said that the redeployment policy did not place the applicant at substantial disadvantage 'because it applied to everyone'. The EAT also thought that to offer the applicant another job without competitive interview would amount to more favourable treatment contrary to section 6(7) of the DDA.

The Court of Session has refused the appeal. The opinions all stated that the term 'arrangements' did not cover the appellant's situation. This was explained in the opinion of Lord MacFadyen as being because "she was placed at substantial disadvantage in comparison with people who were not disabled, not by a term, condition or arrangements which the respondent had chosen to attach to the job of road sweeper, but by the fundamental nature of the job itself." As regards the question of more favourable treatment, the opinion of Lord MacFadyen was that section 6(7) does not stand in the way of it and that the original tribunal and Scottish EAT decisions were wrong on that point. The opinion of Lord Hamilton was more circumspect, and the question was not dealt with in the opinion of Lord McCluskey.

This is a most unfortunate decision and, if correct, undermines the purpose of the reasonable adjustments provisions of the DDA completely. The DRC is supporting this case on appeal to the House of Lords.

## Justification of failure to make reasonable adjustments

Regular readers of the bulletin will be aware that the DRC takes the view that the scope to justify a failure to make an adjustment which has already been determined to be reasonable, must be very limited. In this context the DRC has questioned whether the decision in *Jones v The Post Office* is relevant in reasonable adjustments cases (see, for example the article on justification in Issue 1).

This view has now been endorsed by the Court of Appeal in the case of *Collins v Royal National Theatre Board* EWCA. This case was funded by the DRC and conducted by DRC Panel solicitors, Thompsons. In a carefully reasoned judgment, Sedley LJ held that the possibility of justification of a failure to make reasonable adjustments is not ruled out, but is heavily restricted. He also raised some compelling questions about justification in less favourable treatment cases, which were beyond the scope of the appeal in *Collins,* but will hopefully be considered by the higher courts in the near future.

On 1 October 2004 the DDA (Amendment) Regulations 2003 will come into force. Amongst other, far-reaching changes, the regulations amend the reasonable adjustments provisions, so that there will no longer be any provision for justification of a failure to make a reasonable adjustment. The DRC is in the process of producing a new Code of Practice on Employment and Occupation to accompany the changes to the employment provision of the DDA. This contains a chapter on reasonable adjustments. The draft Code can be viewed on the DRC's website **www.drc-gb.org**

# Educational discrimination: the early lessons

The period around the advent of the new provisions on education in Part 4 of the DDA was one of frenzied anticipation for disabled students, parents of disabled children and education and discrimination law practitioners. In the event, Sunday 1st September 2002 passed without incident, but the Monday morning saw the dawn of new legislation that would end the exclusion of disabled people from education. SENDIST prepared for the busiest day of the year for SEN appeals and a possible deluge of DDA claims.

Only one claim was lodged with SENDIST in September 2002, however. A second one arrived in October with a flurry of seven further claims by the end of the year. The first strikeout hearing was heard in January and the first substantive hearing in early March. By September 2003, 78 claims had been registered with SENDIST and 31 hearings had taken place. Fervent hopes about the usefulness of these early decisions were dampened by the realisation that, unlike Employment Tribunal decisions, those of SENDIST are not public documents and therefore not available to anyone other than

the parties. Decisions are not provided in an electronic format and, with no obvious means of circulation, it has been difficult to build a clear picture of how SENDIST has interpreted the new legislation in these early days.

Breath was then bated in anticipation of High Court decisions from appeals that would clarify the interpretation of the legislation. The DRC has supported three appeals to the High Court on behalf of parents, where it seemed clear that SENDIST had erred in its interpretation. However, on each occasion SENDIST have conceded and the cases have been remitted back to the Tribunal without the opportunity for further judicial clarification – a stark contrast to the position in relation to appeals against SEN decisions.

Finally, however, the wait was over and the first High Court appeal against a SENDIST DDA decision was heard and judgment delivered. *McAuley Catholic High School v CC, PC and SENDIST* was heard in December 2003. The case concerned a number of points:

- identifying the correct comparator in education discrimination claims
- the jurisdiction of the Tribunal to hear claims where a pupil has been excluded on a fixed-term basis and then asked not to return to the school
- whether the Tribunal was entitled to decide that a lack of pastoral care could constitute discrimination.

Unsurprisingly, the court concluded that the correct comparator in education discrimination claims under Part 4 of the Act is the same as it is for employment discrimination claims under Part 2. The court also clarified that, unless a pupil is permanently excluded under section 52 of the Education Act 2002, any claim about the exclusion should be made to SENDIST and not an independent appeal panel – even if, in effect, a permanent removal from school has occurred.

The issue of pastoral support was potentially an interesting one as it presented an opportunity to explore the vexed issue of what constitutes an auxiliary aid or service. The Tribunal had concluded that the school's failure to provide support during unstructured times was a failure to take

reasonable steps under section 28C(1)(b). It did not accept the school's argument that the lack of resources would be a substantial reason for the failure. It is not apparent that the school tried to argue that the support was in fact an auxiliary aid or service and therefore they did not have to provide it. However, the court's acceptance of the Tribunal's conclusion that providing additional pastoral support was not an issue of resourcing, but instead one of "planning and organisation" suggests that the organisation of such support is not caught by the auxiliary aids and services exemption.

Fears about the lack of remedies available to SENDIST have not yet been allayed or confirmed as many parents and their children have taken satisfaction in apologies and numerous schools have been ordered to undergo training and amend policies in the hope of preventing further discrimination. Some schools have been "named and shamed" by national press coverage of cases such as the boy with "the wrong trousers", the boy who was excluded from Christmas activities and his class photo, and the girl who was told she must eat a healthy fruit snack rather than the high carbohydrate snack she required to control her diabetes.

Things have been quieter in the Post 16 sector. Although it is impossible to know how many claims have been issued in the county court, a generous estimate would be less than 20 in the first year. No cases have reached trial or been reported. However, numerous settlements have been negotiated by DRC casework, other advisers/lawyers and through the Disability Conciliation Service, with students routinely receiving £500 – £1000, and in some cases considerably more. Agreements to review policies and to undertake staff training by institutions have also featured prominently in settlements.

The DRC supported one of the first Post 16 claims to be issued. It concerned reasonable adjustments in the form of appropriate education for a student with chronic post-traumatic stress disorder. The case was settled for over £13,000, which sets a good starting point for Post 16 damages, particularly as the relationship between the parties has been maintained and the claimant is able to continue his studies.

The most significant Post 16 case to date is probably *Ford-Shubrook v St Dominic's Sixth Form College* (another DRC-supported case). This case concerned a wheelchair user who was refused a place at his local sixth form college on health and safety grounds. The claimant proposed to access the classrooms on the first floor of the college by means of an innovative stairclimbing wheelchair. The college maintained that the claimant's presence at the college and in particular his use of a stairclimbing wheelchair would present a health and safety risk to the claimant and others. Despite the claimant and his parents approaching the college 18 months before he was due to start his sixth form studies, the matter was still not resolved as the end of the summer holidays approached. The claimant was in danger of missing a year of education and therefore an interim injunction was applied for and granted.

This was the first time that a mandatory interim injunction had been granted under the DDA. Following the injunction the college was required to allow the claimant to start at the college immediately. The decision confirmed that such a remedy is available from the County Court in DDA cases – a useful tool where defendants' deliberate delay is causing serious detriment to the claimant. The case was settled before trial and the claimant has continued studying at the college with great success.

So, despite the absence of a flood of claims there have been some useful early lessons, demonstrating the range and impact of real remedies available under this new legislation. The flip side to the lack of reported cases is the fact that many are being resolved without the need for litigation and examples of good practice are emerging in individual schools, colleges and universities. The move to educate the educators has definitely begun but there are still many lessons to learn.

# News in brief

## Disability rights in Europe: From theory to practice

A conference, sponsored by the UK Disability Rights Commission (DRC), took place at the University of Leeds on 25-26 September 2003. It was organised jointly by Caroline Gooding (DRC) and Anna Lawson (School of Law and Centre for Disability Studies, University of Leeds).

The event was designed to mark the European Year of Disabled People by focusing attention on legal strategies, both at the national and international level, to facilitate the full inclusion of disabled people into mainstream society. On the first day of the conference, anti-disability-discrimination law in Europe was explored – both within individual member states and at European Union level. The second day focused on human rights issues and on the development of effective enforcement mechanisms and approaches. Speakers came from a wide range of European countries and a variety of backgrounds. Academics included Theresia Degener from University of Applied Sciences, Bochum, Germany; Olivier De Schutter, University of Louvain, Belgium; Sandra

Fredman, University of Oxford, UK; Gerard Quinn, University of Gallway, Ireland; and Lisa Waddington, University of Maastricht, Netherlands. There were also activists and campaigners such as Richard Light from Disability Awareness in Action, Stefan Tromol from the European Disability Forum and Klaus Lachwitz from Inclusion International. Valuable contributions were also made by Richard Howitt (President of the European Parliament All-Party Disability Rights Group of MEPs), by Aart Hendriks (Equal Treatment Commissioner, Netherlands) and by others working to improve or enforce disability related legislation.

Bert Massie (Chairman of the DRC) gave an after dinner speech which stressed the importance of developing close links between academia and organisations such as the DRC that are working to improve the lives of disabled people. The conference provided an excellent opportunity for the forging of such links, together with those between people working in similar fields in other countries. Delegates, like speakers, came from a wide variety of backgrounds – including academics from various disciplines, practising lawyers, members of campaigning organisations, government workers (both at local and national levels), policy workers and many others. It attracted nearly 120 participants from 17 different countries. Hart Publishers will publish the papers in book form later this year.

## Commission for Equality and Human Rights (CEHR)

On 31 October 2003 the Government finally confirmed its intention to move towards the creation of a Commission on Equality and Human Rights (CEHR). The proposed Commission will cover the six strands of disability, gender, race, age, religion and sexual orientation, as well as promotion of human rights.

In responding to the announcement, the DRC welcomed the assurance from the Government that the CEHR would cater for the distinct needs of disabled people and that the programme of disability legislative reform would continue. Bert Massie, DRC Chairman remarked: "I welcome the announcement by the Government on the new equalities commission. It signals the first decisive step

towards the formation of a single body to tackle discrimination and disadvantage in Britain for all its citizens. The Government has taken on board many of the arguments that the DRC has made to ensure a distinctive presence for disability in the new commission and to guarantee that the specialisms and expertise developed over three years is maintained".

The Government has also created a taskforce to advise on the next steps toward the creation of the new Commission, including on a White Paper, which is likely to be published in the spring. The taskforce membership includes Nick O'Brien (DRC Director of Legal Services and Operations) and Andy Rickell (Chief Executive of the British Council of Organisations of Disabled People).

The taskforce papers and notes of previous meetings can be found on the Women and Equality Unit website at the Department and Trade and Industry at **www.womenandequalityunit.gov.uk/equality/project/task_force.htm**

## Part 3 training courses for panel members in Manchester and London

In October 2003 Chris Benson and Louise Curtis, Legal Officers at the DRC, ran the first in house training events in Manchester and London exclusively for DRC Litigation Panel members. Jill Brown, a barrister of Outer Temple Chambers, jointly presented the day.

The sessions concentrated on Part 3 of the DDA, which covers goods facilities and services and has resulted in just 80 cases so far, in contrast with the several thousand cases brought under Part 2 on employment. The course aimed to fill the gap created by this relative under-use and to build the capacity of panel members to advise and act in such cases. The content included case studies drawn from DRC experience, aspects of disability awareness and equality, and a showing of the DRC/RNID video "Talk".

Each event attracted a mixture of practising barristers, law centre workers and solicitors in private practice, most of whom had experience of Part 2 of the DDA but not Part 3. A number of participants commented on the value afforded by the

opportunity to meet DRC lawyers and discuss matters of common interest.

### Colin Revell v General Council of the Bar – Legal Services Ombudsman case ref: 27185, September 2003

The Legal Services Ombudsman has recently upheld a complaint against the Bar Council by Mr Colin Revell, a disabled man with Autistic Spectrum Disorders (Asbergers Syndrome) and Specific Learning Disabilities.

Mr Revell claimed the Bar Council had failed to make its complaints procedure accessible to him by requiring him to complete an application form and refusing to let him give details over the telephone to one of their staff, who could then complete the form. He requested this adjustment to the usual procedure because of his disability.

The Ombudsman concluded that the Bar Council's decision not to adjust their procedure to allow a telephone complaint was not reasonable, and ordered the Bar Council to reconsider its decision and to pay compensation of £200 to Mr Revell.

This case illustrates that in appropriate cases involving Part 3 of the DDA, a complaint to the relevant Ombudsman may be a useful way to avoid civil proceedings, which can be costly and protracted.

### Robert Ross v (1) Ryanair and (2) BAA

Mr Ross, a disabled passenger, has recently been successful in his claim that Ryanair discriminated against him by charging him £18 per time for the cost of wheelchair assistance from the point of check-in to the aircraft when he flew with them from Stansted Airport.

Ryanair's defence to this claim was, in part, that the owners of the airport (BAA) were responsible, and, as a consequence, BAA was joined as a party. Another argument used by Ryanair (which was, unsurprisingly rejected) was that the wheelchair assistance itself amounted to use of a means of transport, and therefore fell within the transport exemption contained in the DDA.

The case was heard at Central London County Court by Judge Crawford Lindsay QC. He decided that Ryanair had discriminated against Mr Ross and ordered them to pay compensation of £1,300, of which £1,000 was for injury to feelings.

The DRC legal team has details of approximately 40 other potential claimants against Ryanair, and may fund a group litigation order in the future. In the meantime, Ryanair have been granted leave to appeal to the Court of Appeal.

### Essa v Laing Ltd, Court of Appeal

The DRC joined with the CRE and EOC in intervening successfully in this case before the Court of Appeal, which upheld the EAT decision that an applicant who has been the victim of unlawful discrimination is entitled to compensation where a direct causal link can be established between the act of discrimination and the loss incurred. It was not necessary, the Court of Appeal found, for the applicant to meet the "reasonably foreseeable harm" test which applies in negligence claims. The judgement is likely to be especially significant in claims where the applicant is alleging psychiatric damage.

### Archibald v Fife Council, Court of Session (see article above)

The Inner House of the Court of Session has found that where an employee becomes disabled during the course of employment there is no right under the DDA to redeployment by way of reasonable adjustment since in such circumstances it is not the "arrangements" within the meaning of the DDA that have put the employee at a disadvantage but the fact of becoming disabled. The DRC funded the applicant in the EAT and Court of Session, and will be supporting her also in the House of Lords.

### Collins v The National Theatre, Court of Appeal (see article above)

The Court of Appeal has overturned an EAT decision that even where an employer is found not to have satisfied the reasonable adjustment test, it will not have acted unlawfully if it can satisfy the low threshold for justification

prescribed by *Jones v The Post Office*. In giving the leading judgement, Lord Justice Sedley remarked that the justification afforded by s. 5 (4) DDA is "not ruled out but is, on a proper reading of the DDA, heavily restricted". From 1 October 2004 it will in fact be ruled out when the possibility of justifying the failure to make reasonable adjustments will be removed by regulation.

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

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