

15. DISABILITY AND DISCRIMINATION

15.1 Overview

According to the Disability Rights Commission, there are approximately 9.8 million disabled adults in Britain. Some estimates put the number of people covered by the Disability Discrimination Act 1995 at around 10 million, some 17.5% of the population.

This legislation affects courts and tribunals in two ways: first, they must comply with it, and second, the civil courts and certain tribunals are expected to try claims under the Act. Part III (in particular, ss.19–21) makes it unlawful to discriminate against disabled persons in the provision of goods, facilities and services, and provides civil remedies in the county courts for doing an act made unlawful. Separate provisions in the same part of the Act apply to those letting or managing premises, whilst provisions in another part of the Act (Part IV) apply to, amongst other aspects of education, that for post-16 year olds – these are all claims dealt with in the county court.

The Act is supplemented by Regulations and Codes of Practice which provide detailed information and must be taken into account when interpreting the statutory material (s.53). There has lately been a move from a *medical* model of disability, whereby inability to participate in society is seen as a direct result of a medical condition, to a *social* model under which society disables people who have impairments because the way it has been set up prevents them from taking part in everyday life. Thus the ‘solution’ offered by the medical model of disability is rehabilitation or repair whereas that offered by the social model is human/civil rights and the removal of barriers. This change of culture explains the philosophy behind the legislation: society needs to change the way in which it deals with disabled people.

15.1.1 Compliance by the courts

The Act places a duty on service providers to take reasonable steps to change any practice, policy or procedure which makes it impossible or unreasonably difficult for disabled persons to make use of a service which they provide to other members of the public; to provide auxiliary aids and services (such as information on tape or in Braille) and, from 1 October 2004, to remove physical barriers to service. The courts are not exempted from these provisions. They provide legal services and could find themselves in breach of this legislation if they do not take into account the needs of disabled people (indeed the Court Service has already found itself having to admit liability in a claim involving access to the courts for a hearing-impaired person). Guidance on this aspect of the legislation and in respect of the treatment of disabled people generally is to be found in the JSB’s *Equal Treatment Bench Book*.

15.1.2 Claims dealt with by the courts

Most civil claims are dealt with on the ‘small claims track’ in the county courts because of the level of damages. There are few at present because disabled people have been expected to bring their own claims but this is changing with the involvement of the Disability Rights Commission. Employment tribunals deal with many employment cases and appeals are

reaching the courts. Through these cases, judges are becoming aware of the realities of life for people with disabilities and the standards that are being set are open to critical comment in the public domain.

Guidance for judges who hear claims in the county court in relation to goods, facilities and services under Part III of the Disability Discrimination Act 1995 is to be found in the following paragraphs.

15.2 Meaning of 'disability'

15.2.1 Definition

Section 1(1) provides that a person is treated as having a 'disability' if he or she 'has a physical or mental impairment which has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities'.

Schedule 1, para. 4(1) states that: 'An impairment is to be taken to affect the ability of the person concerned to carry out normal day-to-day activities if it affects one of the following:

- a) mobility;
- b) manual dexterity;
- c) physical co-ordination;
- d) continence;
- e) ability to lift, carry or otherwise move everyday objects;
- f) speech, hearing or eyesight;
- g) memory or ability to concentrate, learn or understand; or
- h) perception of the risk of physical danger'.

The definition is amplified in the:

- Disability Discrimination (Meaning of Disability) Regulations 1996
- Disability Discrimination (Blind and Partially Sighted Persons) Regulations 2003
- Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability.

Physical impairment is not defined but includes sensory impairment. Mental impairment is defined as including both learning difficulties and an impairment resulting from or consisting of a mental illness, providing the illness is 'clinically well recognised' such as those classified by the WHO (World Health Organization). Schizophrenia and manic depression, psychosis are included but the definition of mental impairment in the Mental Health Act 1983 should not be an automatic passport to someone being defined as a disabled person for these purposes. During the passage of the Bill through Parliament the Minister stated that the term excludes 'moods or mild eccentricities'.

‘Substantial’ means more than minor or trivial and ‘long-term’ is defined as having lasted for at least 12 months, or where it can reasonably be expected to last for at least 12 months or for the rest of the person’s life. The areas in which ‘normal day-to-day activities’ are to be affected are set out in Schedule 1, para 4. When considering the effect of an impairment, any corrective measures (apart from spectacles or contact lenses), including medical treatment, are to be disregarded (Schedule 1, para. 6). In addition, there are particular provisions governing recurrent and progressive conditions.

15.2.2 Interpretation

This definition does not cover all types of disability (e.g. people with HIV and other progressive conditions who have not developed any symptoms) but it is not dependent upon being ‘registered disabled’ with the local authority or in receipt of disability benefits under the social security system. Although in the majority of cases it will be clear who falls within this definition, the Employment Appeal Tribunal has made the following important general observation:

‘... a relatively small proportion of the disabled community are what one might describe as visually disabled, that is people in wheelchairs or carrying white sticks or other aids. It is important, therefore, that when ... approaching the question as to whether someone suffers from a disability, [you] should not have in [your] minds a stereotypical image of a person in a wheelchair or moving around with considerable difficulty.’

The impairment must have an adverse effect on at least one normal day-to-day activity, the emphasis being on what the person cannot do, or can only do with difficulty rather than on what the person can do. The adverse effect may be direct, for example, where the impairment results in an inability to walk; or indirect, for example where walking is difficult because of fatigue or pain or where medical advice discourages walking.

A purposive approach has been suggested with a series of questions:

- Does the person have an impairment which is either mental or physical?
- Does that impairment affect the person’s ability to carry out normal day-to-day activities in one of the respects set out in Sch. 1 of the DDA, and does it have an adverse effect?
- Is the adverse effect substantial?
- Is the adverse condition long-term?

15.3 Disability discrimination claims in the civil courts

The county courts have sole jurisdiction to try claims under Pt. III (s.25(3)). Civil liability in relation to discrimination in the provision of services can arise under Pt. III in regard to either a refusal or failure to provide an equivalent service or any failure to make ‘reasonable adjustments’. This is supplemented by the:

- Disability Discrimination (Services and Premises) Regulations 1999
- Disability Discrimination (Providers of Services) (Adjustment of Premises) Regulations 2001
- Code of Practice: Rights of Access, Goods, Facilities, Services and Premises, 2002.

15.3.1 Services

'Services' includes 'goods or facilities' (but nothing consisting of the use of a means of transport) supplied in the UK to the public or a section of the public. It is irrelevant whether a service is provided on payment or without payment. The activities of a school may come within Pt. III if not directly related to education (*White v Clitheroe Royal Grammar School (No.1)* [2001], unreported, DJ Ashton).

Examples of services to which the prohibitions apply are:

- access to and use of any place which members of the public are permitted to enter (including shops, churches, courts, railway stations, public parks and so on)
- access to and use of means of communication
- access to and use of information services (including advice agencies)
- accommodation in an hotel, boarding house or other similar establishment
- facilities by way of banking or insurance or for grants, loans, credit or finance
- facilities for entertainment, recreation or refreshment (including pubs and theatres)
- the services of any profession (including doctors, lawyers, hairdressers) or trade or any local or other public authority, including public utilities and the emergency services.

15.3.2 Premises

In addition to the provisions that relate to 'services', discrimination in regard to the disposal and management of premises is covered by ss.22–24 of the Act.

15.3.3 Unlawful conduct – s.19(1)

It is unlawful for a provider of services to discriminate against a disabled person:

- in refusing to provide, or deliberately not providing, to the disabled person any service which he provides, or is prepared to provide, to members of the public
- in failing to comply with any duty imposed on him by s.21 (to make adjustments) in circumstances in which the effect of that failure is to make it impossible or unreasonably difficult for the disabled person to make use of any such service

- in the standard of service which he provides to the disabled person or the manner in which he provides it to him, or
- in the terms on which he provides a service to the disabled person.

15.3.4 Discrimination – s.20(1),(2)

A provider discriminates against a disabled person:

- if for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply, and he cannot show that the treatment in question is justified, or
- if he fails to comply with the duty to make adjustments and he cannot show that his failure to comply with that duty is justified.

An employer of a provider is liable for the actions of an employee or agent, acting within the course of their duties, unless the employer took reasonable steps to prevent the discrimination.

The proper *comparator* in considering less favourable treatment is a person who is not disabled (or does not have the particular disability) and thus to whom the reason for a difference in treatment does not apply – *Clark v TDG Ltd (t/a Novacold)* [1999] 2 All ER 977. Following a number of key cases in the employment sphere, which have translated to the goods and services sphere, treatment will be discriminatory – subject to justification – where, but for the person's disability, it would not have happened. It is thus a fairly broad concept.

One example is if a blind person with a guide dog is turned away from a restaurant because they have a dog and the restaurant would have turned away anyone with a dog; this nevertheless amounts to a refusal of service and discrimination on the basis of less favourable treatment for a reason relating to disability. But for their visual impairment, the individual would not have had to have the dog and would thus not have been refused entry to the premises.

15.3.5 The duty to make adjustments

There is a duty to make adjustments which falls into three categories.

1. *Discriminatory policies – s.21*

'Where a provider of services has a practice, policy or procedure which makes it impossible or unreasonably difficult for disabled persons to make use of a service which he provides, or is prepared to provide, to other members of the public, it is his duty to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to change that practice, policy or procedure so that it no longer has that effect.'

Practical examples of situations where policies, procedures and practices arise include:

- dogs banned,
- only accepting a driving licence as a means of identification,

but there are many other policies that would amount to an obstacle for people with particular disabilities.

2. *Auxiliary aids or services*

Where an auxiliary aid or service (e.g. the provision of information on audio tape or of a sign language interpreter) would enable disabled persons to make use of a service which a provider of services provides, or is prepared to provide, to members of the public or facilitate the use of the 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 provide that auxiliary aid or service.

Examples include:

- information in Braille, on tape, in large print
- provision of assistance in a supermarket
- provision of a sign language interpreter.

3. *Physical features*

Where a physical feature (e.g. 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 for him to have to take in order to:

- remove the feature
- alter it so that it no longer has that effect
- provide a reasonable means of avoiding the feature
- provide a reasonable alternative method of making the service available to disabled persons.

The first three provisions came into effect from 1 October 2004. The fourth has been in force since October 1999.

Practical examples include:

- steps at the entrance to a shop
- heavy doors
- lack of colour contrast on steps.

15.3.6 General

This duty to make adjustments is in many ways the ‘cornerstone’ of the Act and is the key to disabled people being able to access goods and services in ways which many take for granted. There are three key aspects:

Anticipatory – the wording in s.21, regarding the duty, refers to ‘disabled persons’ and, as a result, the duty to make adjustments is not triggered by a disabled person approaching a service provider, but rather changes necessary so that disabled people can use a service should be anticipated.

Evolving – the duty is to do what is ‘reasonable’. What is not reasonable today, because of cost, technology etc., may be reasonable next week/month/year because of changes in circumstances, technological developments, etc. It is not enough for service providers to consider the duties as a ‘one off’ – they need to look at their duties on a regular basis

Enforceable – when it is ‘impossible or unreasonably difficult for a disabled person to use the service’. The Code of Practice suggests that you need to consider the time, inconvenience, effort, discomfort or loss of dignity experienced by the disabled person: would this be considered unreasonable by others if they had to endure similar difficulties?

What is reasonable?

This is an ‘objective test’ (*Morse v Wiltshire* [1998] IRLR 352). Factors to consider from the Code of Practice include:

- effectiveness of the step
- practicability
- financial and other costs of making the adjustment
- extent of any disruption caused
- extent of service provider’s financial and other resources (consider not just those in a specific budget, but consider the resources across the organisation)
- amount already spent on adjustments
- availability of financial or other assistance.

15.3.7 Unlawful contract terms

Any term in a contract for the provision of goods, facilities or services is void if it requires a person to do anything which would contravene the prohibition against discrimination, or it would exclude or limit the operation of the Act or prevent a person from bringing proceedings.

15.4 Defences

15.4.1 Justification – s.20(3),(4)

Treatment which might otherwise have been discriminatory may only be justified if in the opinion of the service provider one or more of a number of conditions are satisfied and it is reasonable, in all the circumstances of the case, for him to hold that opinion (an objective/subjective test).

The specified conditions are:

- The treatment is necessary in order not to endanger the health and safety of any person.
- The treatment is necessary where the disabled person is incapable of entering into an enforceable agreement or of giving informed consent, and the treatment is reasonable in that case.
- Where service is refused, the treatment is necessary because the service provider would otherwise be unable to provide the service to the public.
- Where service is provided on different terms or in a different manner, the treatment is necessary because the service provider would otherwise be unable to provide the service to disabled person or others.
- Where service is provided on different terms, and these relate to cost, the difference in terms reflects the greater cost (effectively, a bespoke service).

Necessary

The treatment must be necessary for most of these conditions to be satisfied. This imposes quite a high threshold and in particular consideration of relevant evidence rather than a 'knee-jerk' reaction:

'...Consideration of the statutory criteria may also involve an assessment of the employer's decision to the extent of considering whether there was evidence on the basis of which a decision could properly be taken. Thus if no risk assessment was made or a decision was taken otherwise than on the basis of appropriate medical evidence, or was an irrational decision as being beyond the range of responses open to a reasonable decision-maker ... the employment tribunal could hold the reason insufficient and the treatment unjustified. ... The tribunal cannot, however ... conclude that the reason is not material or substantial because the suitably qualified and competently expressed medical opinion, on the basis of which the employer's decision was made, was thought by them to be inferior to a different medical opinion expressed to them.'

Jones v Post Office [2001] EWCA Civ 558, Pill LJ

This approach may be helpful but is arguably not applicable to goods and services because the specific justification concerned, that of material and substantial, is not the same as that relating

to goods and services. The goods and services justification is definitely objective/subjective, whereas the employment one is subjective – a different test.

Reasonably held opinion

Nevertheless, if the opinion was to be reasonably held any underlying assumptions would have to be checked and, in most instances, there should also have been some form of risk assessment. It is not sufficient for a service provider simply to leave these decisions to members of staff without providing any guidance.

‘This approach may have been justified by the needs of the school but does not amount to justification under the Disability Discrimination Act 1995 which requires a reasonably *held opinion that it was necessary in order not to endanger the health or safety* of the disabled person or others. Delegation to staff without setting the criteria for their decision-making and requiring them to act fairly cannot avoid liability under the Act.’

White v Clitheroe Royal Grammar School (No.2) [2002], unreported, DJ Ashton

Time for justification

The opinion must also have been reasonably held at the time of the discriminatory treatment and cannot be justified retrospectively:

‘I see no injustice in the requirement that the school had to justify its decision to exclude Tom from this trip at the time it was taken and on the basis of opinions that were reasonably held. ... it is not the decision itself that is being challenged; rather, it is the manner in which it was reached. All too often people with disabilities encounter pre-judgments based on misconceptions, and the 1995 Act seeks to prevent this type of discriminatory treatment. If a service provider was able to justify a decision retrospectively by introducing expert evidence not available or considered when the decision was reached, it would be almost impossible to tackle such injustice.’

White v Clitheroe Royal Grammar School (No.2) [2002], unreported, DJ Ashton

15.4.2 Limitation period

This is six months beginning when the act complained of was done, but this period may be extended if the court considers that it is just and equitable to do so – Sch. 3 Pt. II para. 6.

15.4.3 Claimant's conduct

The conduct of the disabled claimant may have an impact on the evaluation of the evidence. In extreme cases, it may be in issue and even the cause of the perceived discrimination:

‘I have come to the conclusion that, in the confrontation that did take place, the Claimant was so vociferous in asserting his position and Ms Klos so taken aback by what she was having to deal with that the Claimant failed to make his capabilities ... sufficiently clear to Ms Klos. Had he adopted a more reasoned approach ... there was no possible reason why he should be denied access to Screen I and, given the clear policy of the Defendant to encourage custom

(witnessed by the offer of the opportunity to see a film in one of the other screens) Ms Klos would have permitted access without hesitation.'

Bates v ABC Cinemas Limited (2001) DJ Dancey

15. 5 Procedural issues

15.5.1 Allocation and directions

Most claims are allocated to the small claims track, because it is the £5,000 damages limit that applies rather than the £1,000 figure for personal injury compensation and few individual claims exceed this limit.

There may be arguments for allocating to the fast track or multi-track – find out what both parties want and then apply CPR principles. There may be advantages in the informality and absence of costs vulnerability of the small claims track but significant test cases may proceed in the multi-track.

The procedural judge should plan ahead when giving directions, identifying the appropriate court and any need for disabled facilities and providing longer time estimates if needed.

15.5.2 Expert evidence

The court may be assisted by expert evidence on disability issues (e.g. an expert witness from the Guide Dogs for the Blind Association).

15.5.3 The hearing

Everyone is entitled to a fair hearing and there must be effective two-way communication with every party. Ensuring a level playing field may include:

- ensuring interpreters or facilitators
- allowing a McKenzie Friend or lay representative
- taking evidence in advance when a witness is infirm or disabled – CPR Pt. 34
- taking the trial to the disabled litigant if unable to attend at court – CPR r.2.7.

The *Equal Treatment Bench Book* deals with such matters in detail and has (almost) the status of law – see *R (application of King) v Isleworth Crown Court* [2001] All ER (D) 48 (Jan), Brooke LJ.

15.6 Remedies

In dealing with this tort, the court has all the remedies available to the High Court (s.25(5)) and damages may include compensation for injury to feelings (s.25(2)).

15.6.1 Damages

The starting point now appears to be £1,000 – 1,500 for injury to feelings, although other heads of damage may arise.

- Blind man turned out of a pub with his guide dog. No aggravating circumstances. Settled at court for £1,500 and a carefully worded apology.
Hitchen v Bass Taverns Limited and Banks [1999], unreported, DJ Ashton
- Blind man refused refreshments at a cafe with his guide dog. No aggravating circumstances. Judgment for £1,000.
Glover v Lawford t/a Hannah's Cafe [2003], unreported, DJ Wood
- Accompanied adult with learning disabilities turned out of a pub and very upset. Alleged to have caused a customer to spill drink (not proven). Any other customer would have been invited to offer to buy a replacement. Damages £3,000.
McKay v Thomas and Scottish & Newcastle [2002], unreported, Judge Collins

Trivial awards have been criticised.

- On appeal an award of £350 was increased to £1,000 and Sheriff Principal commented:
'... the sum of £750 is the least that may nowadays be awarded for the slightest injury to feelings, deserving of damages, which is caused by discrimination on the ground of disability.'
Purves v Joydisk Ltd [2003] Court of Session
- 'Awards of between £500 and £5,000 are appropriate in less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being so low as not to be a proper recognition of injury to feelings.'
Vento v Chief Constable of West Yorkshire Police – Court of Appeal

Aggravated damages are awarded where there has been high-handed, insulting or oppressive conduct in the discriminatory act or subsequent proceedings. *Exemplary* damages are punitive and awarded when the compensatory award is not enough (e.g. there has been profit from the discrimination). What about reduction for *contributory conduct*?

'The award of damages in these cases reflects injury to the feelings of the person who has been discriminated against and my starting point would be about £1,500. In this case I take into account a significant element of contributory fault ... Balancing these factors I think an award reduced to £1,000 for the initial discriminatory decision to exclude him from the holiday would be about right.

But the matter does not stop there. The discriminatory treatment was persisted in by the School despite the protests of the parents and others, including Tom's consultant paediatrician. The manner in which this was done singled Tom out as a person who was different and concentrated on the manner that he coped with his impairment with

consequences in regard to his self esteem and peer group respect. If, instead of adopting a defensive stance and relying on its immunity from the new legislation, the School had consulted Tom and his parents and reached a measured decision about the holiday, the initial discriminatory approach of the teacher involved would have been forgiven and forgotten and relationships would not have been soured. I could award further damages for this continuing discrimination, but instead choose to make an award of aggravated damages to send out the message that when discriminatory behaviour is alleged the perpetrator should look at the position from both points of view and adopt a conciliatory approach even if facing an element of provocation. It is for this reason that I permitted a late amendment of the claim to include aggravated damages and I award double the level of the basic award for this. In the alternative I would simply have awarded £3,000 for the overall discrimination.'

White v Clitheroe Royal Grammar School (No.2) [2002], unreported, DJ Ashton

15.6.2 Declaration

This is a stand-alone remedy which may be pursued in the absence of an admission even where damages are settled. This is important because the claimant usually wants recognition of discrimination more than money.

'I am satisfied that it is appropriate to exercise my discretion to grant a declaration. Discrimination against disabled people is prevalent, otherwise the Act would not have been passed. The purpose of the Act is not only to give individual claimants remedies, but also to eliminate discrimination ...

Discrimination occurs not only as the result of a conscious intention to discriminate – very often it is the result of the actions of well-motivated people, as it was in this case. In this connection it is important to recognise that on occasion good service providers who, like the defendant, have policies concerning discrimination and who take conscious steps to train their staff to avoid discrimination, may discriminate unlawfully. The purpose of the Act would not be served by refusing a declaration in circumstances such as this. That might be seen as sweeping discrimination under the carpet.'

Ginley v Virgin Cinemas Ltd [1999], unreported, DJ Madge

15.6.3 Injunctions

There may be an injunction to prevent any repetition of discriminatory conduct and this has been granted on an interim basis.

'On the basis of the evidence which I have read and the information presented, I take the view ... that the claimant does have a good prospect of success at trial. The grant of the mandatory injunction sought is in my judgment likely to involve the least risk of injustice. There will be no serious prejudice to the defendant, but there would be significant greater risk of prejudice to the claimant were the application now to be refused.'

Ford-Shubrook v Governing Body of St Dominic's Sixth Form College (2004), unreported, DJ McGrath

15.6.4 Publicity

One must handle these cases with care because publicity is being used as a tactic to stamp out discrimination and even cases heard in the small claims track may be widely reported as news items. The outcome of *Hitchen v Bass Taverns Ltd and Banks* was reported in *The Times* as a news item and has been much quoted by disability groups. There were six reporters in court for *White v Clitheroe Royal Grammar School (No.2)* and the case featured on television and in the newspapers.

15.7 Wider implications

15.7.1 Possession applications and the premises provisions

A lady with mental health problems was making life intolerable for her neighbours. The court on appeal declined to evict her because this would have amounted to discrimination on the ground of her disability: the threshold under the Act was higher than under the Housing Act and her bizarre behaviour was attributable to her mental illness.

North Devon Homes Ltd v Brazier [2003] EWHC 574 (QB).

This situation may be less likely to arise than was at first thought. In a later case relating to possession proceedings and their relationship to the DDA (*Romano and Samari v City Council of Manchester* [2004] EWCA (Cw) 834), the Court of Appeal held that the circumstances of the case met the justification for potentially discriminatory eviction contained in the DDA s.24.

15.7.2 Personal injury claims

The Act is sometimes relied upon by insurance defenders when dealing with claims for loss of earning capacity. The argument is that the claimant will not suffer a loss because the Act prevents discrimination on account of disability. Is this realistic?

15.8 The Disability Discrimination Act 2005

This further legislation, which comes into effect on 5 December 2006, should also be taken into account in the county court as it:

- clarifies and extends the definition of 'disability' by including anyone diagnosed with cancer, HIV or multiple sclerosis but not showing signs of their illness
- removes the requirement for people with mental illness to prove their condition is 'clinically well recognised'
- extends protection against discrimination to private clubs with 25 or more members
- imposes new requirements on landlords and managers of rented property
- broadens the definition of 'goods and services' to include the public sector
- ensures that access duties cover public transport
- introduces a 'disability equality duty' for public bodies (which include schools and statutory services).