

Disability Discrimination Update and Caselaw

Local Government Staff
Commission

4 December 2007

1. Recent changes to the DDA

2. Case law relating to:

- ❖ Definition of disability
- ❖ Associative discrimination
- ❖ Reasonable adjustment

Disability Discrimination (NI) Order 2006 amendments to DDA

- ❖ increased coverage by widening the definition of disability
- ❖ imposed a new duty on public authorities to promote positive attitudes towards disabled people and encourage their participation in public life (January 2007 - 2nd Commencement Order)
- ❖ extra protection for disabled people in other areas such as private clubs and rental and disposal of premises
- ❖ Application of the prohibition on discrimination to *the functions* of public authorities
- ❖ Limit the existing transport exemption in the DDA

Disability Discrimination (2006 Order) (Commencement No.3) Order 2007 – 31st October 2007

- ❖ Change to definition (MS, HIV and cancer from the point of diagnosis)
- ❖ “Clinically well recognised illness” requirement has been removed

Guidance on Disability

- ❖ Amended Guidance will be introduced on matters to be taken into account in determining the question of disability
- ❖ Consulted upon last Spring

Commencement Order No.4 anticipated end December 2007 – should bring in Regs. Relating to:

- Premises
- Functions of Public Authorities
- Statutory Questions Procedure
- Extended coverage for private clubs
- Consultation by OFMDFM to lift exemption for buses, coaches, taxis, trains etc. will be commenced

Meaning of “disability” – sect 1 DDA

- i. Physical or mental **impairment**
- ii. **Adverse effect** on ability to carry out **normal day-to day activities**
- iii. **Substantial** adverse effect
- iv. **Long term** adverse effect

Paterson v Metropolitan Police Commissioner – normal day-to day activities (23 July 2007)

- ❖ Dyslexic chief inspector within definition when substantially disadvantaged in taking written promotion test
- ❖ EAT overruled ET that found taking promotion exams not “normal day-to-day” activity
- ❖ Should interpret 'normal day-to-day activities' widely - include activities relevant to participation in professional life, - not just mundane 'daily' tasks such as shopping, cooking etc

“Severe disfigurement”

- ❖ “Impairment consisting of severe disfigurement to be treated as having substantial adverse effect on the ability of to carry out normal day-to-day activities.”
(para.3 sch. 1 DDA)

Cosgrove v Northern Ireland Ambulance Service [2007] IRLR 397 - NICA

❖ Effects of Psoriasis - infection

Held:

❖ paragraph 3 related to the cosmetic aspect of the condition and nothing else and Mr. Cosgrove had not been discriminated against on that basis

Coleman v Attridge Law Case c-3/06 - associative discrimination (ECJ reference)

- ❖ Associative discrimination- is it included within the scope of the Directive?
- ❖ Has amended DDA properly implemented provisions of the Framework Directive?

Chacón Navas v Eurest Colectividades SA [2006] IRLR 662

- ❖ Restrictive approach to concept of disability
- ❖ DDA wider – sickness and disability not necessarily mutually exclusive

Reasonable Adjustment

DDA Section 6 (1) provides that employers have to make “reasonable adjustments” in certain circumstances if a disabled person is placed at a substantial disadvantage in comparison with a non disabled person.

Reasonable adjustments

- ❖ Distinguishes DDA from other discrimination statutes
- ❖ Creates a ***positive obligation*** on (prospective) employers and service providers
- ❖ Failure to comply with duty gives rise to discrimination claim

Reasonable adjustment

Archibald v Fife Council [2004] IRLR 651 (HL)

The duty to make a reasonable adjustment may require an employer to treat a disabled person more favourably than a non-disabled person, in order to remove the disadvantage caused by the disability. *This may include transferring an employee to a suitable vacant position*

O'Hanlon v HMRC [2006] IRLR 840 - CA

- ❖ Mrs O'H had been placed at a substantial disadvantage by the sick pay scheme. Payment of full pay during her absence was **not** a reasonable adjustment
- ❖ Mrs O'H had been subject to disability related discrimination, but that it was justified

Reasonable adjustment – assessment/consultation

❖ Tarbuck v Sainsbury Supermarkets Ltd [2006] IRLR 664

EAT held that employers do not have to consult with employees before making the adjustments.

❖ Mid-Staffordshire NHS Trust [2003] IRLR 566

Section 1(6) duty cannot be complied with unless employer makes a proper assessment of what needs to be done

Hay v Surrey County Council 2007 EWCA Civ. 93 – (Feb. 2007)

- ❖ No duty on employer to carry out a *formal risk assessment* as separate component of the reasonable adjustment duty
- ❖ Not clear whether failure to assess at all amounts to breach

Arthur v NIHE (NICA – June 2007)

EOR 169/27

“If the Code had been implemented Mr Arthur would have proceeded to the shortlist without sitting a test. If as the tribunal found Mr Arthur was no longer at a substantial disadvantage...the end had been reached.”