

## **Disability Discrimination and Further and Higher Education Peter Oldham**

### **WHAT IS DISABILITY DISCRIMINATION BY FE AND HE INSTITUTIONS?**

1. Disability discrimination against students and prospective students in further education (“FE”) and higher education (“HE”) is covered largely, but not solely, by Chapter 2 of Part IV of the Disability Discrimination Act 1995 (“DDA”). If the Equality Bill (see below) becomes law, these provisions will be replaced.

2. The DDA’s definition of disability and a disabled person for FE and HE purposes is that provided by ss 1-3 and Sched 1.

### **The areas of FE and HE activity subject to the DDA**

3. The areas of FE and HE activity caught by the DDA are (s 28R):-

(a) admissions;

(b) provision of student services (“services of any description provided wholly or mainly for students”);

(c) exclusions; and

(d) qualifications.

4. DDA duties are imposed on the responsible body (“RB”) i.e. the governing body of the institution, but by s 28U and Sched 4C, DDA duties are also imposed on local authorities in relation to FE and HE secured by them, and on schools in providing FE.

### **What amounts to disability discrimination?**

5. Disability Discrimination, for the purposes of the above areas of activity, is principally (ss 28S-28T, s 28UA s 55):-

(a) unjustified less favourable treatment (“LFT”) for a reason relating to disability;

(b) direct discrimination i.e. where the RB, on the ground of the disabled person’s disability, treats the disabled person less favourably than it treats or would treat a person not having

that particular disability whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person;

(c) failure to comply with the duty to make reasonable adjustments (“RA”) where a provision, criterion or practice, other than a competence standard, in relation to admissions or qualifications puts a disabled person at a substantial disadvantage in comparison with people who are not disabled;

(d) failure to comply with the duty to make RA where, in relation to admissions, student services and qualifications, a physical feature of premises occupied by the RB puts a disabled person at a substantial disadvantage in comparison with people who are not disabled;

(e) harassment i.e. violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment;

(f) victimisation i.e. treating someone less favourably by bringing proceedings, alleging discrimination or doing anything else by reference to the DDA.

#### Aiding, employers, principals

6. Aiding discriminatory acts is unlawful, and employers and principals will be liable for the acts of their employees/agents: ss 57-58. An act done in pursuance of statutory authority is not unlawful: s 59.

#### Other unlawful acts

7. Ss 28UA-UC deal with other unlawful acts i.e. discrimination when relationships have come to an end; pressure to discriminate; and discriminatory advertisements.

#### Failing to take steps and lack of knowledge

8. In relation to a failure to take a particular step, an RB does not discriminate against a person if it shows (s 28S(3)):-

(a) that, at the time in question, it did not know and could not reasonably have been expected to know, that he was disabled; and

(b) that its failure to take the step was attributable to that lack of knowledge.

Justification

9. Other than in respect of a competence standard, treatment is justified if the reason for it is both material to the circumstances of the particular case and substantial: s 28S(5).

Code of practice

10. By s 28T(2), there is a duty to have regard to a code of practice under section 14 of Equality Act 2006 in relation to RA.

11. The statutory code of practice ("CoP"), made by the DRC and in effect adopted by the CEHR, is entitled the "Code of Practice (revised) for providers of post-16 education and related services".

Caselaw

12. Caselaw across different parts of the DDA will almost certainly be applied uniformly where possible, and this means that much learning from the field of employment law will be imported into the field of education: McAuley Catholic HS v C [2004] ELR 89.

13. Note that the CoP was written well before the HL decision in Malcolm v Lewisham LBC [2008] 1 AC 1399, in which HL, overruling Clark v Novacold [1999] ICR 951, decided that the correct comparator in a LFT case (in the field of housing) was a person without the claimant's disability but with the same behaviour, as opposed to a person with neither the disability nor its attendant effects on behaviour and abilities.

14. Malcolm was applied to Chapter 1 of Part IV of the DDA (schools) in Rota N v IAP of Barking and Dagenham LBC [2009] ELR 268, so there is no doubt that it will be applied to Chapter 2 of Part IV.

"Competence standard"

15. "Competence standard" means an academic, medical or other standard applied by or on behalf of an RB for the purpose of determining whether or not a person has a particular level of competence or ability: s 28S(11).

16. The application of a competence standard to a disabled person is justified only if (s 28S(6)):-

(a) the standard is, or would be, applied equally to persons who do not have his particular disability, and

(b) its application is a proportionate means of achieving a legitimate aim.

17. An example of the operation of the competence standard given in the CoP is as follows:-

*“An education provider refuses to accept a disabled student onto a course in classical ballet because he fails to pass the audition for the course (for a reason related to his disability). This does not amount to direct discrimination because anyone, disabled or non-disabled, failing the audition would be treated in the same way. But it may be less favourable treatment for a reason related to the man’s disability. [Probably not, in the light of **Malcolm**, but the point is still relevant to reasonable adjustments.] The treatment could be justified if the criteria were applied equally to all applicants and the criteria were a proportionate way of showing that the person could fulfil the essential requirements of the course.”*

18. The CoP also says:-

*“6.30 If unlawful discrimination is to be avoided when the application of a competence standard results in less favourable treatment of a disabled person, the education provider concerned will have to show two things. First, it will have to show that the application of the standard does not amount to direct discrimination – if it does it is not a genuine competence standard. Second, it will be necessary to show that the standard can be objectively justified.*

*6.31 This is more likely to be possible where an education provider has considered the nature and effects of its competence standards in advance of an issue arising in practice. It would be advisable for education providers to review and evaluate competence standards. This process might involve:*

- identifying the specific purpose of each competence standard which is applied, and examining the manner in which the standard achieves that purpose*
- considering the impact which each competence standard may have on disabled people and, in the case of a standard which may have an adverse impact, asking whether the application of the standard is absolutely necessary*
- reviewing the purpose and effect of each competence standard in the light of changing circumstances – such as developments in technology*
- examining whether the purpose for which any competence standard is applied could be achieved in a way which does not have an adverse impact on disabled people; and*
- documenting the manner in which these issues have been addressed, the conclusions which have been arrived at, and the reasons for those conclusions.”*

## **Enforcement**

19. Claims of discrimination in breach of the FE and HE provisions:-

*“may be made the subject of civil proceedings in the same way as any other claim in tort or (in Scotland) in reparation for breach of statutory duty”: s 28V(1)*

20. Claims are to be brought in the county court only (s 28V(3)), and all remedies available in the High Court will be available in such a claim: s 28V(4). This will include damages, declarations and, where appropriate, injunctions. Damages may include compensation for injury to feelings: 28V(2). It is likely that quantum for injury to feelings will follow the guidelines in Vento v Chief Constable of West Yorkshire (No 2) [2003] ICR 318, updated for inflation by Da'Bell v NSPCC EAT 17<sup>th</sup> Nov 2009.

21. Where the claimant proves facts from which the court could conclude, in the absence of an adequate explanation, that the defendant has committed discriminated, the court will uphold the claim unless the defendant proves that it did not: s 28V(1A).

22. Discrimination is not otherwise actionable save by way of judicial review (Sched 3, para 12(2)) or as otherwise provided by statute.

23. The limitation period is six months beginning when the act complained of was done (i.e. go forward six months and take off a day) (Sched 3, para 13), save for:-

(a) an extension of three months in the case of reference for conciliation in pursuance of arrangements under s 27 of the Equality Act 2006 or reference to the Office of the Independent Adjudicator for Higher Education ("OIAHE"): Sched 4, para 13;

(b) acts extending over a period, which are to be treated as done at its end;

(c) acts "attributable to a term in a contract", where the act is to be treated as extending throughout the duration of the contract; and

(d) a general power to extend time where just and equitable,

### **The current Equality Bill**

24. On 9<sup>th</sup> February 2010, the Equality Bill completed the committee stage in the House of Lords. There will/may then be the report stage, third reading, consideration of amendments and royal assent.

25. Parliament's website says:-

*"The Bill will harmonise and in some cases extend existing discrimination law covering the "protected characteristics" of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. It also address the impact of recent case law which is generally seen as having weakened discrimination protection, and harmonise provisions defining indirect discrimination."*

26. The reference to caselaw weakening protection is to Malcolm.

27. As regards FE and HE, cls 90-94 of the Bill provide, in effect, that there is to be no discrimination in any aspect of a RB's dealings with a student. Cls 13-27 define discrimination. Cl 15 seeks to reverse the effect of Malcolm by outlawing unfavourable and unjustified treatment "because of something arising in consequence of B's disability".

### **Practicalities of litigation in this area**

#### Court's lack of familiarity with DDA

28. DDA claims in this field – indeed in any field other than employment law and to a lesser extent judicial review – are a rarity. You must assume that the court dealing with the claim will need a great deal of assistance in understanding the very elaborate statutory scheme, which is further underpinned by a great deal of caselaw, largely in the employment field.

#### Litigants

29. If you are acting for a RB, your opponent will often be unrepresented, or, if represented, have public funding.

#### Pleadings

30. An unrepresented claimant's particulars of claim will often be unclear. It will sometimes be possible to take pleading points in a way which would not be possible for an equivalent claim in an employment tribunal (e.g. identification of practice, policy or procedure, or of reasonable adjustments which it said should have been taken).

31. Consider applications to strike out, or at least to force the clarification of the case.

#### Role of the OIAHE

32. The provisions on extending time for claims demonstrate that (in the case of HE) Parliament considers reference of a dispute to the OIAHE as being preferable to litigation. It may be possible to have a claim stayed pending adjudication by the OIAHE. Indeed it is conceivable that bringing a DDA claim without referring the matter to the OIAHE is abusive.

#### Relationship with contract claims, judicial review and the doctrine in Clark v University of Lincolnshire and Humberside

33. Often claimants will assert that acts of discrimination, whether under the DDA or other discrimination legislation, are also breaches of the contract which subsists between them and the RB.

34. In Clark v University of Lincolnshire and Humberside [2000] 1 WLR 1988, CA held that a student's breach of contract claim against a university could be (though was not on the facts) an abuse of process, even if brought within the six year limitation period for contract claims, if in reality the claim should have been brought much sooner by way of judicial review i.e. to rectify and maintain the student/RB relationship, rather than complain about its breakdown many years hence.

35. In Moroney v Anglo-European College of Chiropractic [2009] ELR 111, this principle was applied by the High Court, on appeal from the county court, to strike out a claim.

#### Attacks on academic judgment

36. It has often been held that a claim which seeks to attack a decision based on academic judgment will not be justiciable. The DDA makes inroads into that principle, in that some such judgments may be flawed if they are taken subsequent to a failure to comply with e.g. the duty to make RA.

37. But the exception for the application of the competence standard provides some space in which academic judgment should be untrammelled by threats of litigation.

#### Evidence: disability

38. Often there will be no dispute that the claimant is disabled i.e. that the claimant has a condition which has a substantial and long term effect on his day-to-day life in one of the ways specified in Sched 1 to the DDA. Often it is futile for the RB to debate this question: the threshold for showing a disability is not particularly high.

39. But sometimes there will be issues as to whether a person has an impairment, and whether it has a substantial and long-term effect on his ability to carry out normal day-to-day activities. What the person can and cannot do is a question of fact. Whether it is caused by physical or mental impairment and whether the effect is long-term may occasionally be the subject of expert evidence. But, once causation is shown or admitted, whether the effect on normal day-to-day activities is substantial is an issue of fact.

40. Consequently medical experts should not be asked whether a person is "disabled" for the purposes of the DDA. That is a matter for the court.

Evidence: other expert matters

41. Consider whether expert evidence may be needed on what adjustments might generally be thought to be appropriate to mitigate against the effect of physical or mental disabilities. E.g. what sort of time extensions to essay deadlines might be suitable for a student with dyslexia of a certain severity? How much extra time in an exam might a person need if he or she is moderately depressed? How might a student with ME be assisted to undertake geography field work?

42. Occasionally there may be allegations that acts of discrimination under the DDA made the claimant develop a further illness, typically a psychological illness. Expert evidence may be needed on the issue of whether the claimant suffered such an illness, and if so whether it was caused by the alleged discriminatory acts.

Evidence: thinking about RA

43. Though it is not a pre-condition for an RB to defeat a claim to show that it considered e.g. what RA to make, or whether a provision, criterion or practice had a differential impact, it will make it considerably harder for it to do so if it cannot.

44. Any evidence showing such consideration will be useful.

**February 2010**