

Discrimination Law Association

DLA Email News No. 75

24th March 2007

Email News is an irregular, c. fortnightly/ monthly information & news service for DLA Members

DLA WELCOMES A NEW ADMINISTRATOR

The DLA has appointed a new administrator, Cassandra Balchin, and the DLA will therefore be moving on 26th March. Please note that the DLA office may not be contactable by email or phone for a few days as new telephone lines etc will need to be set up. New contact details will be circulated to members in due course but please continue using the current contact details for the time being.

It has been a pleasure working for the DLA and thank you to members for your support and continued interest in the DLA. I wish the organisation all the best. With very best wishes, Melanie.

DLA Events: Practitioners' Group Meeting

The next DLA PGM will be a joint event with TAEN and Justice and will take place on: **18th April 2007 starting at 5pm**. The topic is the **Age Regulations 'Strategic Cases' Strategy Exploratory Meeting** and the speakers are **Robin Allen QC and Declan O'Dempsey**.

Please see attached invite for further details.

The venue for this meeting will be the **Disability Rights Commission, 14 Gray's Inn Road, London, WC1R**.

Because there are a limited number of places, which we will allocate in order of application, if you would like to come please could you apply direct to TAEN at taen@helptheaged.org.uk.

This meeting has been accredited with 2 CPD hours.

The DLA is accredited as a training provider with both the Bar Council & the Law Society – details of how to claim CPD & NPP points, etc. are provided to those attending meetings. DLA Law society CPD reference - **AXL/DILA**

EGM and Open Meeting

The DLA would like to invite members to an open meeting in order to discuss the DLA response to the Discrimination Law Review. The open meeting will also be combined with the Extraordinary General Meeting to amend the DLA aims.

This meeting will be held on: **Tuesday 8th May 2007 starting at 6pm.**

The venue for this meeting will be the **Disability Rights Commission, 14 Gray's Inn Road, London, WC1R.**

Proposed Amendments to the DLA Memorandum of Association:

At the AGM in November, the DLA Executive Committee proposed amendments to the DLA Memorandum of Association and members had the opportunity at the AGM to discuss the proposed Special Resolution.

The open meeting on 8th May will therefore be combined with and Extraordinary General Meeting so that members will be able to formally vote on the proposed amendments. Please find the details of the Special Resolution attached to this email.

Reasons for amending the aims of the DLA were given at the AGM and are contained in the 2004/5 and 2005/6 Annual Reports which are available on the DLA website. To allow the DLA to continue to grow and to develop its work further, the organisation is in the process of seeking charitable status. This has meant that the committee has had to look again at our purposes and our aims, to make sure that they are charitable in law.

DLA Responses to Consultations

The DLA has been involved in a number of consultations. Anyone interested in receiving a copy of the 'completed' DLA responses please e-mail the DLA office. DLA members are encouraged to contribute to the 'ongoing' consultations; please forward any comment to the DLA office, if possible at least 10 days before the deadline (see below).

Completed Responses Since January 2005.

A full list of completed responses is available on the DLA website (www.discrimination-law.org.uk).

- Legal aid: A sustainable future – Carter proposals for reform of legal aid
- Submission to the Discrimination Law Review
- Disability Rights Commission Consultation on the Definition of Disability
- Advancing Equality for Men and Women: Government's Proposals for a Gender Duty

- Disability Discrimination Act Guidance Document: Guidance on matters to be taken into account in determining questions relating to the definition of disability
- Equality and Diversity – Coming of Age Employment Equality (Age) Regulations 2006
- DRC Questionnaire - Consultation on a New Code of Practice (The Duty to Promote Disability Equality)
- CRE Draft Code of Practice on Housing
- Equality And Diversity: Updating The Sex Discrimination Act 1975 – Draft Employment Equality (Sex Discrimination) Regulations 2005
- Equality Bill House of Lords 2nd Reading Briefing

Member Request

The CRE in conjunction with the Danish Institute of Human Rights (funded by the European Commission) is organising four roundtables on multiple discrimination in the UK. The Institute are conducting similar roundtables across a number of EU states, and the CRE regards this as a crucial piece of work that could not only inform positive proposals in the future from the European Commission, but hopefully also help push a seemingly reluctant DLR team to think a little more seriously about providing protection against multiple forms of discrimination and harassment in a future single equality act.

As part of this process the Institute would like to arrange one or two interviews with victims of multiple discrimination. Any qualitative information from these would, of course, be anonymised, and dealt with in an ethical manner. They anticipate that the interview session will last for between 60-90 minutes.

If any DLA members are able to help with this request or know of people who could, please contact Caroline Osander from the Danish Institute of Human Rights cos@humanrights.dk or Graham O'Neill at the CRE GONEILL@cre.gov.uk

Information:

Slavery and racism on the British stage

<http://www.irr.org.uk/2007/march/ha000025.html>

Launching her book 'Racism on the Victorian Stage' at the Institute of Race Relations, Race & Class co-editor and historian Hazel Waters talked about the destructive impact of slavery on White British culture.

In Defence of Multiculturalism

Briefing paper by Jenny Bourne at the Institute of Race Relations

<http://www.irr.org.uk/2007/february/ha000030.html>

Launch of pan-European campaign on hate crime

On 15 March 'Coalition Europe', a new consensus-based human rights network, launched a pan-European campaign against Hate Crimes, 'From Hate Crimes to Human Rights'. The launch was signalled by a press conference held in London, United Kingdom. Over the last few years Europe has seen a steady rise in the number of hate-motivated crimes against immigrants and refugees, Roma, religious minorities and other vulnerable members of European society. These violent acts range from desecrations to verbal threats, and in the most severe cases, physical assaults and murder. During the press conference speakers from across Europe addressed hate crimes situations in different countries and asked European governments to bury their inertia on this issue.

<http://www.coalitioneurope.org/english/index.php?link=Press>

Travellers go to court over eviction to make way for Olympic village

The first major contests of the 2012 Olympics are taking place not in one of the new stadiums but in the Royal Courts of Justice. Lawyers for two groups of Travellers are using human rights legislation to challenge plans to move them from their sites to make way for the Olympic Village. At the centre of the legal battle are two existing sites for Travellers in the east London boroughs of Newham and Hackney. The London Development Agency is seeking to move the Travellers to new sites so that construction work can begin.

<http://www.guardian.co.uk/olympics2012/story/0,,2031602,00.html>

TUC welcomes 'union can expel BNP member' judgement

The TUC has welcomed today's decision by the European Court of Human Rights that unions can expel members of the far-right BNP, and that this is not incompatible with the European Convention on Human Rights.

The case was brought by traindrivers' union ASLEF, after the UK courts found in favour of a BNP member expelled from the union because of the incompatibility of BNP views and those of the trade union movement.

TUC General Secretary Brendan Barber said, 'This is an important and welcome judgement. The European Court of Human Rights has made the common sense decision that the right to freedom of association does not force unions to accept into membership people opposed to the basic principles of trade unionism. Instead it says that the European Convention's provisions protect unions from excessive interference by government in deciding how they run their own affairs, including how they choose their members.'

'We will need to discuss further all the implications of this judgement, including what changes now need to be made to UK law, but every union will welcome this clear decision that they can now expel BNP members.'

www.tuc.org.uk

EOC NEWS is available from: EOC website at www.eoc.org.uk

CRE NEWS is available from: www.cre.gov.uk

DRC NEWS is available from: DRC Email News <http://www.drc-gb.org.uk/subscribe.asp> & DRC website <http://www.drc-gb.org>

THE EMPLOYMENT & SOCIAL AFFAIRS DG NEWS is available from: http://europa.eu.int/comm/employment_social/newsletters/1_03_en.html

EUROPEAN ROMA RIGHTS CENTRE NEWS is available from: <http://errc.org/>

THE EUROPEAN MONITORING CENTRE ON RACISM AND XENOPHOBIA (EUMC) website: <http://eumc.eu.int>

Events:

Equality and Diversity Lecture Series University of Northampton – Park Campus

Date/ Month/ Time	Lecturer	Subject of lecture	Venue
30/4/07 (1.00 – 3.00 pm - TBC)	Roger McKenzie (Midlands Regional Secretary, Trades Union Congress) Gloria Mills (National Equalities Officer/UNISON) UCU and ACAS speaker (to be confirmed)	Have we levelled the playing field? – E&D and the Workplace	Sunley MC Lecture Theatre
06/7/07 4.00- 7.00 (TBC) *** Please note prior booking will be required for this event	Camila Batmanghelidjh Trained as a psychotherapist. For more than twenty years has worked with exceptionally disturbed children and young people in two charities she has founded: The Place 2 Be and Kids Company . In 2005 She was named Social Entrepreneur of the Year.	Mothball therapy: Exploring the conceptual divide between mental health thinking and young people.	Holdenby LT1

All lectures are open to staff and students and visitors to the university. They are free and no prior booking is required *except* for the lecture on June 6th. For further information e-mail: equality@northampton.ac.uk

Cases

Hay v Surrey County Council: Court of Appeal 16.2.07

The Court of Appeal has, this morning, handed down judgment in *Hay v Surrey County Council*, which many hoped would resolve the conflict of EAT authorities on the issue of whether an assessment is a separate and distinct component of the duty to make reasonable adjustments under the DDA. However, despite the express invitation of the DRC, which represented Ms Hay, to review the decisions of the EAT in *Tarbuck v Sainsbury's Supermarkets [2006] IRLR 664* and *Mid Staffordshire NHS Trust v Cambridge [2003] IRLR 566*, the Court of Appeal declined to do so.

Although this perpetuates the uncertainty as to whether the carrying out of an assessment is a necessary part of the duty to make reasonable adjustments, the practical effect for employers is, in reality, minimal. Whether *Tarbuck* or *Mid Staffordshire* is ultimately preferred, it is clear that any employer who fails to carry out a proper assessment (which should include consultation with the employee) is, at the very least, placing himself seriously at risk of not taking appropriate steps because of his own ignorance.

The EAT authorities:

Mid Staffordshire NHS Trust v Cambridge [2003] EAT

A proper assessment of what is required to eliminate the disabled person's disadvantage is a necessary part of the duty to make reasonable adjustments since the duty cannot be complied with unless the employer makes a proper assessment of what needs to be done. The making of that assessment cannot be separated from the duty to make adjustments imposed by the DDA; it is a necessary pre-condition to the fulfilment of that duty and therefore a part of it.

Tarbuck v Sainsbury's Supermarkets [2006] EAT

There can be no doubt that any employer would be wise to consult with a disabled employee in order to be better informed of all the factors which may be relevant to a determination of what adjustment should reasonably be made in the circumstances. If an employer fails to do that, then he is placing himself seriously at risk of not taking appropriate steps because of his own ignorance and will potentially jeopardise his legal position. However, a failure to consult about reasonable adjustments is not in itself a breach of the duty to make reasonable adjustments. There is no distinct duty of this kind.

Why did the Court of Appeal not give clarification?

The Court of Appeal held that this appeal was not the appropriate vehicle for undertaking a review of the EAT decisions as both parties broadly agreed that *Tarbuck* correctly stated the law, notwithstanding the DRC's concerns that certain aspects of the guidance in *Tarbuck* would benefit from clarification.

Giving the lead judgment in *Hay*, Buxton LJ commented that, "if the court were to respond properly, it would have to hear adversary argument [as to whether the judgment of the EAT in *Tarbuck* correctly stated the law], something not likely to be forthcoming when both parties are in agreement."

In any event, in these circumstances, any observations would have been obiter and carried no certainty of resolving the concerns that exist.

The outcome in Hay

The employment tribunal found that Ms Hay's disability could have been accommodated by adjustments to her job that it had identified. The EAT overturned this decision. The Court of Appeal, confining its judgment to the facts of this particular case for reasons identified above, held that the ET had ignored the full effect of the medical advice which, in its view, showed that adjustments to Ms Hay's job would have been futile. Her appeal was dismissed.

Position after *Hay v Surrey County Council [2007] (CA)*

It remains unclear whether a failure to assess is itself a breach of the duty to make reasonable adjustments. However, it does appear that there is drift towards *Tarbuck*; in *London Borough of Barnet v Ferguson UKEAT/0220/06/DA*, for example, the EAT confirmed that "we would...respectfully follow the judgment...in *Tarbuck* if it were necessary for us to do so". In many cases, the issue will not be of great significance in practical terms as a claim that an employer failed to assess would almost inevitably be accompanied by a claim that the employer failed to make one or more other specific adjustments. Whilst it is possible in such cases that an employer achieves entirely fortuitous and unconsidered compliance (without assessment), it is also very unlikely. For now, therefore, these key points should continue to shape best advice:

- In the absence of a proper assessment, which should include consultation, it will almost always be impossible for an employer to know what adjustments might be reasonable, possible or effective, and this is bound to put an employer at serious risk of failure to comply with the duty;
- There will be times when the nature of the impairment itself will give rise to a requirement to consult which is a part of the duty itself – for example, where the employee has communication difficulties.
- The DRC's Code of Practice, which must be taken into account where relevant, places importance on consultation and states that steps which it might be reasonable for employers to have to take could include conducting a proper assessment of what reasonable adjustments may be required.

Summary:

Uncertainty remains over whether the duty to make reasonable adjustments includes, in law, an "antecedent" duty on the employer to take steps to establish what reasonable adjustments can be made. But in practical terms, the message for employers is clear: consult with the disabled person and assess what adjustments may be required.

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Publications

Data Collection and EU Equality Law

<http://www.migpolgroup.com/documents/3645.html>

Religion and Belief Discrimination in Employment - the EU law

<http://www.migpolgroup.com/documents/3647.html>

Re-Imagining Equality: A Vision for the Future

Copies of the DLA 6th National Conference papers are now available for **£10.00 (incl P +P)**. Please email the DLA office if you would like to purchase copies. Electronic copies are also available.

Challenging Racism Using the Human Rights Act: published by Lawrence & Wishart in association with the DLA, ILPA, CRE & 1990 Trust. This book is a practical guide to using the Human Rights Act to challenge incidences of racism. *DLA members can order the book for the **price** of £10.99 from the DLA office.*

DLA Briefings Back Copies: Missing volumes of Briefings? Want an additional set for your organisation? - Buy the **full set** of the prestigious DLA Briefings Journal, **Volumes 14 to 30 for only £45 (incl p+p)!** *Members can order the set by contacting the DLA office.*

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