

Taking Service Providers to Court: People with Learning Disabilities and Part III of the Disability Discrimination Act 1995

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Accessible Summary

Many people with learning disabilities experience unfair treatment when they go to shops, banks or pubs.

Very few people take legal action or go to court about the unfair treatment they experience.

It can be difficult for a judge to decide if treatment is unfair if, for example, a sports centre gives free carer's tickets to some disabled people but not to others.

It is easier for a judge to decide treatment is unfair if a person with learning disabilities has been refused something. For example, if someone was refused a tattoo even though other customers were not refused.

Summary

Despite evidence of poor service provision for people with learning disabilities in the UK (e.g. DRC, 2006; Sloan, 2001), very little use has been made of Part III (Goods, Facilities and Services) of the Disability Discrimination Act 1995 by people with learning disabilities (personal communication, Disability Rights Commission Conciliation Management Unit). Difficulties faced by individuals who might consider pursuing a claim against a service provider are well-documented and include stress, time and financial constraints (Gooding, 2000). Once a complaint has been made or a claim lodged other legislative barriers can make it difficult to pursue a case (Davies, 2003). The aim of this article is to investigate the effectiveness of legislative use of Part III of the Disability Discrimination Act 1995 in promoting equality for people with learning disabilities. Effectiveness will be gauged through analysis of the legal process engaged in by two people with learning disabilities who made claims against service providers under Part III.

Key words

Part III (Goods, Facilities, Services); Disability Discrimination Act 1995; service providers; people with learning disabilities

Introduction

Until the Disability Discrimination Act (DDA) 1995 was introduced, legal action was little used *to enforce and promote the rights model of disability within society as a whole* (Vanhala, 2006, p564; Woodhams and Corby, 2003). The intention of the DDA 1995 is to promote equality for disabled people and Part III places a requirement on service providers to provide accessible services for disabled people. Service providers include public and commercial services such as shops, banks, libraries, GP surgeries and sports facilities which members of the public are entitled to access and use (Section 3, DDA 1995). Accessible services that people with learning disabilities may benefit from include longer appointments with GPs and accessible information, such as easy read leaflets, about services offered by banks or libraries.

Since the introduction of the DDA 1995, and with support from the Disability Rights Commission (DRC, now Equality and Human Rights Commission), the Act has been increasingly used by disabled people, with most cases relating to Part II (Employment) and Part III (Goods, Facilities and Services) of the Act though a substantial but smaller number are connected to Part IV (Education) (DRC, 2007). DRC (2007) records show that between April 2004 and June 2007, 25,117 cases were reported to the DRC under Part III (Goods, Facilities and Services) of the Act. Of these the DRC financially and legally supported 117 cases. Figures do not reveal how many of the 25,117 cases reported to the DRC were legitimate cases of discrimination and therefore it is not possible to establish the proportion of legitimate cases that were supported. Earlier figures suggest that few claims relating to goods, facilities and services are made by people with learning disabilities. Of 53 known Part III claims that were made across the UK between 1998 and 2001, 8 (6.6%) were made by people with learning disabilities (Leverton, 2002). This is a small figure compared to the numerous accounts of poor service regularly experienced by people with learning disabilities, for example, on-line (Sloan, 2001; Kolah, 2005), in banks (Livingstone, 2007) and pubs (DRC, 2001).

The figures above reveal that of the thousands of potential discrimination cases only a few are resolved through legal processes (though it is possible that some of the cases were pursued by legal teams outside the DRC). Factors such as stress and emotional upheaval (Leverton, 2002; Woodhams and Corby, 2003); having to prove oneself 'disabled' (Meager et al, 1999; Roulstone, 2003); cost (of time and finance) (Gooding, 2000; Leverton, 2002) and limited legal advice or advocacy support (Hurstfield et al, 2004; Roulstone, 2003) are prohibitive to individuals who may otherwise have pursued a claim against a service provider. Self-confidence and the

availability of advice and support have been shown to facilitate individuals' pursuit of legal action against a service provider (Hurstfield et al, 2004).

Under Part III of the Act individuals can claim either that they have been treated 'less favourably' than another person or they can claim that a service provider failed to make a 'reasonable adjustment'. Under the DDA 1995, lack of knowledge of an individual's impairment is not a justifiable reason for failing to provide accessible services (DRC, 2006).

When a disabled person claims that they have been treated less favourably than another person it must be for a reason which relates to the disabled person's impairment (s20.1a) and the treatment must not be shown by the service provider to be justified (s20.1b). Less favourable treatment of a disabled person can be considered justified if *'it is reasonable, in all circumstances of the case, for [a service provider] to hold that opinion'* (s20.3b) in accordance with one of the following grounds:

- health and safety (s20.4a);
- the disabled person not being able to enter into an enforceable agreement or give informed consent (s20.4b);
- if in providing the service the service provider would no longer be able to provide services to the disabled person and/or members of the public (s20.4c/d);
- there was greater cost to the service provider to provide services to disabled people (s20.4e).

The DRC investigated a number of cases involving less favourable treatment of people with learning disabilities. In one case the landlady of a pub refused to serve a drink to a customer with learning disabilities and asked the individual to leave the premises, stating that the customer was behaving inappropriately. A companion who was with the customer at the time of the incident provided evidence which refuted the landlady's claim of inappropriate behaviour on the part of the customer with learning disabilities. The claimant was awarded £3000 for injury to feelings (DRC, 2001).

Discrimination relating to a failure to make reasonable adjustments occurs if a service provider does not take steps to change *'practice, policy or procedure which makes it impossible or unreasonably difficult for disabled persons to make use of a service which [a service provider] provides, or is prepared to provide, to other members of the public'* (s21.1). Under Part III, service providers *'should anticipate the requirements of disabled people and the adjustments that may have to be made by them'* regardless of *'whether or not they already have disabled customers'* (DRC, 2006, p44). There are two exclusions to the requirement to make reasonable adjustments. Service providers are not required to make reasonable adjustments if it will alter the nature of the trade, profession or business (s21.6), or if it exceeds prescribed maximum costs (s21.7). An example of a failure to make a reasonable

adjustment for a person with learning disabilities would be a service provider's refusal to provide information in an accessible format, for example, refusing to produce accessible bus timetables.

Discriminatory treatment may at times be difficult to substantiate since bad treatment is not necessarily discriminatory (for example, if service is poor in general). To address this type of situation the DRC stated in *The Rights of Access Code of Practice* that 'where a service provider acts unfairly or inflexibly, a court may draw inferences that discrimination has occurred' (DRC, 2006, p32).

It has been shown that service providers are largely aware of, and have met, their responsibilities to provide physical access under Part III of the DDA 1995 (Stoneham, 2006). Service providers are less aware of how to meet their responsibilities to people with learning disabilities (DRC, 2004; [authors], 2008) and often may not be aware that the services they offer are not accessible to all disabled people (Stuart et al, 2002). Similarly, there is evidence of a lack of awareness among many people with learning disabilities about the full extent of their rights under Part III of the DDA 1995. Some individuals may not realise that they are entitled to make a claim and also may not be aware that the way they have been treated is unacceptable ([authors], 2008).

Given the limited information about claims made under Part III of the DDA 1995 by people with learning disabilities, the purpose of this paper is to compare in detail the characteristics of two claims made by people with learning disabilities under Part III of the Act. The analysis will consider the impact of key characteristics on decisions made throughout the claim process and on the final outcome of the claim. The first of the two claims was an incident which took place at a local council sporting venue which was eventually resolved through mediation. The second case involved an incident where a tattooist refused to tattoo a customer with learning disabilities. This case was pursued in court.

In Case Study 1 details have been changed to protect identities. In Case Study 2 names have been changed.

Method

This study was part of a wider study, funded by the Baily Thomas Trust, [authors] which aimed to:

1. explore knowledge and awareness of the DDA 1995 among people with learning disabilities and service providers;
2. identify action taken by people with learning disabilities (with support) in relation to mediation and litigation under Part III of the Act;

3. identify barriers associated with the legislation or its implementation in relation to people with learning disabilities and the provision of goods, facilities and services, and how these might be overcome;
4. make policy and practice proposals for improving awareness and implementation of the Act.

To meet these aims a literature search, focus groups and interviews were carried out. Focus groups were arranged through disability organisations in Scotland and were carried out with adults with learning disabilities and parents of adults with complex needs. Key informant interviews were carried out with 14 service providers including some major UK service providers across leisure, retail and health sectors. Six key informant interviews were carried out with representatives from disability organisations.

In-depth interviews were used to gather information relating to the two discrimination claims that are the focus of this paper. Participants for this strand of the research were recruited through the DRC Conciliation and Mediation Unit and the Legal Team. For the first case study (relating to the sporting venue) an interview was carried out with the claimant's litigation friend. For the second case (the tattoo incident) a group interview and discussion took place with the claimant, her mother, two support workers and the claimant's advocate. Data was collected about: each incident and the circumstances of discrimination; the process and events leading up to the court hearing or mediation session; the circumstances and process of the court hearing or mediation session; and the outcomes of each case. From the time of the incident each case took approximately two years before it was heard at court or mediation.

The study was approved by the University of Strathclyde Ethics Committee.

Case Study 1. The Sports Venue

Anthony went to the local council's sports venue to buy two tickets for a forthcoming event which he and his wife wished to attend. He told the ticket salesperson that he would require a seating area suitable for his wife who used a wheelchair. Anthony was informed that there would only be a charge for one ticket since there was no charge for carers' tickets. Anthony then asked for two further tickets, under the same scheme, for his brother and his brother's carer. Anthony's brother, Samuel, had severe learning disabilities and did not use a wheelchair. Anthony was advised that Samuel was not entitled to a free carer's ticket since the free carers' ticket policy only applied to people who used wheelchairs. Anthony stated that Samuel always attended events with a carer and could not otherwise attend.

Anthony did not raise a complaint at this point but when he received a local council services evaluation survey later that week, Anthony wrote an account of the incident

at the sports venue. The incident was quickly brought to the attention of the local MP who wrote to Anthony stating that the issue would be addressed immediately. A senior local council official wrote to Anthony stating that *'the background to this [policy] was that the accompanying person could assist in evacuating the person [using a wheelchair] in case of a fire alarm or emergency'* and that the council would look into Anthony's request to extend the policy to people with learning disabilities. Three months later, after becoming frustrated by the lack of progress in the development of the sports venue's disabled access policy, Anthony carried out an internet search to find out what further action he could take. Anthony learned about the DRC's Casework service and a few weeks after contacting the service a caseworker was assigned to investigate the incident.

The DRC caseworker wrote to the manager of the sports venue outlining Anthony's concerns and included a request to resolve the situation through conciliation. Following a response from the sports venue manager the caseworker indicated to Anthony that it would not be possible to show that in offering wheelchair users a free carer concession, the sports venue was discriminating against Samuel. Anthony disagreed with this and convinced the caseworker to pursue the case. Anthony successfully applied to become Samuel's litigation friend, and on Samuel's behalf filed a court action against the council which was responsible for running the sports venue. Over a year later, during which time evidence and defences were prepared and preliminary meetings were attended, the DRC approached Anthony and Samuel to discuss the possibility of using mediation rather than a court hearing to resolve the dispute. Anthony was disappointed maintaining that the incident was a clear case of discrimination but the DRC indicated that if the council won this would send the wrong message to other similar venues.

The mediation session took place three months later. Anthony thought that the council seemed surprised and unaware of the earlier offer of conciliation made by the DRC which suggests that the sports venue manager had not discussed the case with senior council officials. Although Anthony intimated that the mediation session generally proceeded on terms and conditions set out by the council staff and their legal team, he felt the council was engaged with the process, listening to advice from the DRC and claimants. They were agreeable to changing the policy. Mediation concluded with an agreement that the council would develop a new disabled access policy which incorporated free carer tickets for people with learning disabilities. The draft policy would be made available for public consultation. In addition, free carer tickets were made available to Samuel with immediate effect.

Anthony considered the new disabled access policy, which was published approximately a year later, to be a thoroughly researched, comprehensive document. He felt it had taken on board many of the points raised at mediation, including collaborative development with nearby councils and widespread consultation.

Case Study 2. The Tattoo Incident

Sarah had planned to get a tattoo whilst she was on holiday. At a tattoo shop Sarah spent some time choosing a tattoo. Once she had made a decision, Sarah's father showed the tattooist the image she had selected. The tattooist responded *'We don't do people like that'*. It was explained to the tattooist that Sarah was over 18 and could legally have a tattoo, and indeed had one already, but the tattooist started to argue and shout. The tattooist phoned a second man to attend the scene, purportedly his father (though the family suspected he was the owner of the establishment), at which point Sarah and her family decided to leave the shop. The second man arrived and shouted after Sarah and her family as they walked away from the shop. The embarrassing and frightening nature of this incident, along with a threat by the second man to phone the police, prompted the family to phone Sarah's advocate.

Sarah's advocate advised the family to obtain details of the tattooist's name, and the name and address of the business. Sarah's father returned to the establishment to get these details though the tattooist refused to provide them. The advocate also suggested that the family write down everything they could remember about the incident.

When Sarah returned home from holiday her advocate suggested she write to the tattoo company. Sarah and her advocate wrote separately to the proprietor but after a few attempts when neither received a reply Sarah contacted the DRC. The DRC received no response to their requests for conciliation and a few months later a summons to court was sent to the tattooist. He responded, through a lawyer, that Sarah *'lacked the capacity to make a judgement'* and that *'he wouldn't be able to give [Sarah] a tattoo because of her condition'* (Sarah's Advocate).

During the court hearing which took place several months later, Sarah was asked to confirm that she was able to make her own decisions. This served two purposes, one, to ensure that Sarah did not need a litigation friend and, two, to refute the defendant's claim that Sarah lacked the capacity to make decisions. The judge spent time talking to Sarah, getting to know her and how the Talker she used to communicate worked. The second claim made by the defendant - that for health and safety reasons Sarah could not receive a tattoo - did not stand in court since Sarah had a tattoo at the time of the incident. According to the judge the defendant did not provide any suitable evidence in court and was considered to have created a smokescreen surrounding his defence. The judge believed that the defendant lied to cover up his lack of response to letters he had received from Sarah, her advocate and the DRC, creating a story about a car fire destroying letters. The defendant also suggested *'that [Sarah's] father was abusive and made communication impossible'* (Judgement) which the judge considered to be highly unlikely. In his Judgement the

judge stated ‘A declaration of discrimination is appropriate’. He also decreed that a copy of the Judgement should ‘be sent to the local newspapers in the hope that through publicity any remaining prejudice against disabled people may be outlawed’ (Judgement).

Case Study Analysis and Discussion

The key characteristics of each case, as outlined in Table 1, will form much of the focus of the analysis. Details from each case will be used to illustrate the influence of these characteristics during the legal process.

Table 1: Key characteristics of disability discrimination claims

	Sports venue case	Tattoo case
Case complexity	Complex	Simple
Claim	Less favourable treatment	Less favourable treatment
Focus of claim	Defendant's policy	Defendant's actions/attitude
Defence	Not failing to make a reasonable adjustment	Justification of less favourable treatment; Lack of capacity to enter into an enforceable agreement; Health and safety
Comparator	Claimant: Other groups of disabled people Defendant: Members of the public	Members of the public
Assessment	Health and safety assessment carried out	No assessment carried out
Outcome	Change in venue policy	Ruling that defendant's behaviour was discriminatory

Nature of the Claim

In the sports venue case the claimants maintained that Samuel had been treated *less favourably* than another group of disabled people, that is, those who used wheelchairs. Rather than justifying the claim that the policy was an example of less favourable treatment the council maintained, under Section 21.1 of the Act, that they had **not** failed to make a reasonable adjustment because the free carer ticket policy had not made it *impossible or unreasonably difficult* for Samuel to attend events.

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The council claimed that they were not legally obliged to make a reasonable adjustment by offering free carer ticket concessions for Samuel.

This line of defence is weak for two reasons. One, it makes the assumption that because the claimant was able to move about freely he was able to attend sports events on his own. Two, using the defence of reasonable adjustment is inconsistent with the health and safety purpose of the policy. The policy was implemented to ensure that in the event of an emergency the carer would take responsibility for escorting the wheelchair user from the building. A more appropriate defence for the council would have been to indicate why people with learning disabilities did not require a free carer's ticket for health and safety reasons.

Although the claim of *less favourable treatment* was undisputed in the tattoo case the defendant attempted to defend his actions. The defendant claimed that Sarah was unable to enter into an enforceable agreement (s20.4a); and that for health and safety reasons he was unable to tattoo Sarah (s20.4b). The first claim is consistent with Hurstfield et al's (2004) finding that under Part III of the DDA defendants are likely to overstate the effects of impairment. The judge however spent time communicating with Sarah via her Talker and was satisfied that she was able to enter into an enforceable agreement. Sarah already had a tattoo so the latter defence did not stand in court.

Comparator

Inextricably linked to a claim is the comparator against whom the case is judged (Davies, 2003). In the sports event case claimants felt they had been discriminated against compared to other disabled people, specifically wheelchair users. The defendants however stated that the claimant had not been discriminated against compared to the general public. The initial reluctance of the DRC caseworker to pursue this case highlights the difficulty that can arise around selecting an appropriate comparator and the importance of the comparator to the nature of claim. If a judgement had been made that the appropriate comparator for the case was the general public who attended the venue (which would include other groups of disabled people) this would have reduced the likelihood of the case being won by the claimants. It seems likely that the caseworker felt there was a possibility that the council's line of reasoning may be accepted by a judge.

In the tattoo case the defendant did not dispute the claim of refusal to provide a service which was offered to other customers: therefore he implicitly agreed that the appropriate comparator was the general public who may use his service.

Assessment

It has been recommended by LJ Pill that 'proper' risk assessments, those which are thorough and take into consideration all available information, should be carried out when considering Part II (Employment) cases (Davies, 2003). Applying this reasoning to Part III of the DDA would necessitate the mediator or judge deciding whether the council (sports venue case) or tattooist had carried out a thorough assessment of their service provision.

It can be assumed that the council did carry out an assessment which led to them to introduce the free carers' tickets policy for wheelchair users. Information gathered from the local fire brigade and an organisation for people with learning disabilities by the claimant however indicated that the council could have conducted a more thorough assessment. The local fire brigade advised the claimants that people with severe learning disabilities should be accompanied by carers because they:

... would be unaware of the emergency procedures and therefore unable to follow the fire safety guidance provided by the staff. ... [and] there is the potential that this may compromise the safety of others. ... The potential problems would be alleviated if [venues] encouraged the policy that clients with severe learning disabilities were accompanied by a carer. (Fire Brigade)

It does not seem unreasonable that the council could have approached the fire brigade for advice, particularly since the venue is subject to annual fire safety checks by the fire brigade. It could be argued that the fire brigade also has a responsibility to raise awareness about the importance of carers' attendance for people with learning disabilities.

In response to the initial complaint raised by Anthony the council claimed to have contacted an organisation for people with learning disabilities for advice. Anthony contacted this organisation and they advised him that they recommended to service providers that people with learning disabilities should not pay for carers' tickets on the grounds that service providers did not ask individuals to pay for other reasonable adjustments such as ramps. Anthony reasoned that if the council had been aware of the information provided by the fire brigade and the organisation for people with learning disabilities then they would not have disputed his claim.

In the tattoo case the defendant's attitude towards and awareness of disabled people were particularly poor and are likely to have had a significant impact on his actions and behaviours towards Sarah and her family. As well as the aggressive manner that the tattooist adopted towards Sarah's family, he ignored Sarah and instead chose to speak to her father. He did not conduct an assessment of either of the areas that formed his defence, that is, Sarah's ability to decide whether she wanted a tattoo or the health and safety implications of giving a tattoo. It is likely that he was not aware that an assessment might have been appropriate.

Outcome

Research has shown that claimants are often dissatisfied with the outcomes of conciliation of cases under Part III of the DDA (Hurstfield et al 2004). In the sports venue case however, although the claimant was dissatisfied with several aspects of mediation, he was pleased that the council had changed their policy to include all disabled people which widened access to the venue for disabled people. Similarly, Hurstfield et al (2004) reported that while defendants were likely to comply with injury to feelings payments, claimants felt it was unlikely that the defendants' attitude would change. This same set of circumstances was apparent in the tattoo case. A ruling of discrimination was made against the defendant but the claimant felt it was unlikely that the defendant's attitude towards disabled people would change.

Conclusion and Recommendations

The different degrees of complexity of each case influenced the legal path pursued (though not the length of time for the case to be resolved). The current study follows patterns that have been identified by Hurstfield et al (2004): that is, the simple (tattoo) case was taken to court and the complex (sports venue) case was resolved through mediation. Roulstone (2003) has criticised the DRC for supporting (in court) only cases which are obvious infringements of the DDA 1995 stating that this may '*raise the threshold of harm*' for a case to be taken to court (p125). Opportunities to raise public awareness of some of the more complex discriminatory issues and set a legal precedent in a public, high profile setting are also lost. Some of the issues relating to more complex cases may be settled by paying close attention to the nature of the claim and the associated comparator and by taking note of the thoroughness of the service provider's assessment prior to implementing policy or providing or refusing services (Davies, 2003).

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It is clear however that some improvements to legal and support processes are required if discrimination cases involving people with learning disabilities are to be effectively resolved. Further action is also necessary to prevent discriminatory incidents occurring in the first place.

To improve the legal process and make it more accessible to people with learning disabilities it is suggested that:

- Part III legal cases should, like those brought forward under the Education and Employment provisions of the Act, go to tribunals rather than courts. This would be more accessible, in part, because tribunal staff receive training in equality issues and (unlike courts) can, for example, instruct service providers and their employees to undertake disability equality training.

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- Stronger enforcement and penalties are required to improve compliance with the law. For example, confidentiality clauses should not be allowed where cases are settled out of court. A number of large settlements in England have not been made public (personal communication, EHRC). Fear of adverse publicity is likely to improve compliance.

Service providers should be encouraged to comply with disability discrimination law. This may be achieved in the following ways:

- Disability discrimination law should provide examples of reasonable adjustments, such as producing accessible information, which service providers can make to improve access for people with learning disabilities.
- Service providers should take greater responsibility for ensuring they comply with their responsibilities under the disability discrimination acts. For example, by consulting documents such as *Valuing People Now* (HM Government, 2009).
- Umbrella agencies and large voluntary organisations should take a stronger lead in encouraging compliance. For example, Scope collaborated with architects' and surveyors' organisations to conduct audits of physical access, awarding a kite mark to agencies meeting required standards.
- Enforcement strategies are needed to ensure that service providers are meeting their responsibilities under Part III of the Act. This role should be undertaken by mainstream inspection agencies so that disability equality becomes embedded within organisational culture, like Health and Safety inspections.

Improved support for people with learning disabilities could take the form of:

- A Disabled People's Advocacy Service, contracted to the voluntary sector. Such an advocacy service would promote access to services generally and to legal services in particular, and must fully include those with learning disabilities.

Statutory and voluntary organisations working with people with learning disabilities and/or family carers should actively promote and educate people about the Act. This could be done by making written, audio and visual information available (such as that provided by EHRC or the useful Mencap (2004) leaflet) and organising workshops.

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