Disability Rights Commission

Monitoring the Disability Discrimination Act (DDA) 1995

Research

Phase 3

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Institute for Employment Studies

Change by
• advice • conciliation • legal enforcement

The Disability Rights Commission

The Disability Rights Commission (DRC) is an independent body, established by Act of Parliament to eliminate the discrimination faced by disabled people and promote equality of opportunity. When disabled people participate – as citizens, customers and employees – everyone benefits. So we have set ourselves the goal of "a society where all disabled people can participate fully as equal citizens."

We work with disabled people and their organisations, the business community, Government and public sector agencies to achieve practical solutions that are effective for employers, service providers and disabled people alike.

There are 8.6 million disabled people in Britain – one in five of the total population. This covers people with epilepsy, cancer, schizophrenia, Down's syndrome and many other types of impairment.

Under the Disability Discrimination Act 1995, many legal rights and obligations affecting disabled people's access to services and employment are already in force. Others become law in 2004.

Many people are still not aware that they have many new rights. And employers and service providers are often unsure how to implement "best practice" to make it easier for disabled people to use their services or gain employment.

The DRC has offices in England, Scotland and Wales. For further details of how we can help you, please contact our Helpline – contact details are featured on the back cover of this publication.

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1. Overview and Selected Key Findings

1.1 Scope of report

This report presents the findings of the research study undertaken by the Institute for Employment Studies (IES) on behalf of the Disability Rights Commission in partnership with the Department for Work and Pensions and the Equality Commission, Northern Ireland. The research conducted during the period October 2002 - May 2003 is the third phase of a series of studies monitoring the implementation of the DDA (see Section 2.1.2 on the findings of the first two phases)[1].

The aims and objectives of the current study are set out in detail in Section 2.1.1. In summary, they are:

- To examine how the Act is being implemented through the employment tribunal system (Part II) and the court system (Part III).
- To explore and analyse the views and experiences of participants in both actual and potential DDA cases through a series of in-depth case studies.
- To compare the findings from this study with the case study findings from the first phase of the monitoring study.

A number of key issues were identified for exploration in the current case studies. These issues are set out in detail in Section 2.1.1 and can be grouped under the following broad themes:

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1 Two reports on the monitoring studies have been published as *Monitoring the Disability Discrimination Act (DDA) 1995,* DfEE Research Report RR119, May 1999, London, Department for Education and Employment; and *Monitoring the Disability Discrimination Act 1995 (Phase 2),* DWP In-house report 91, London, Department for Work and Pensions, 2002.

- Access to justice, including actual and perceived barriers to taking cases, and the reasons for the under-representation of certain types of cases, such as recruitment cases.
- The effectiveness of the conciliation process, and the factors facilitating or impeding its effectiveness.
- The relationship between factors such as the characteristics of participants, and the availability and quality of representation on the one hand, and case outcomes on the other.
- The impacts on the parties involved in the process of taking a DDA case, including the immediate impacts and longer-term impacts.

This chapter provides an overview of the research findings on these key themes. The findings from the Part II and Part III case studies are discussed separately.

1.2 Findings from the Part II case studies

1.2.1 Access to justice

In the first monitoring study, a number of barriers affecting applicants' access to justice under Part II of the DDA were identified. These included lack of knowledge of the DDA, cost barriers in obtaining representation and in funding cases, and unwillingness to take a case because of a reluctance to be labelled 'disabled'.

In undertaking this research, it was anticipated that, in the period since the earlier study was conducted, some of these barriers would have eased and that the inequalities between the applicants and respondents in their access to justice would have been, at least partially, redressed. However, that is not borne out by the evidence from the current case studies, as discussed below.

The definition of disability under the DDA

The burden of proof on the applicant to establish that they are covered by the DDA's definition of a disabled person was found to be a major barrier for applicants. Fewer than half the applicants interviewed had considered themselves disabled prior to pursuing a case. Many applicants believed that the term 'disabled' only applied to people using wheelchairs, or those with severe learning disabilities. Applicants with conditions such as mental illness, diabetes and back problems often did not realise that the DDA might apply to them, until advised otherwise by a third party.

Those applicants whose disability was challenged by the respondent found the need to provide medical evidence of their condition costly, upsetting and stressful. Cases included in the case review confirm that the definition of disability, and the frequent need to obtain supporting medical evidence, continue to prove problematic for applicants.

This issue is of particular concern given evidence from the case studies that many respondents' legal representatives are now routinely challenging the applicant's status as disabled. This strategy appears to be more prevalent than it was at the time of the phase 1 case studies.

Access to legal representation

A major barrier for applicants continues to be the difficulty and cost of obtaining support, advice and representation. While respondents in our case studies generally were able to seek advice from in-house or external specialist lawyers, applicants were more likely to seek advice through sources of free support, such as the Citizens Advice Bureaux, or through their trade unions, legal aid, or insurance. They did not have the financial resources to choose who represented them, and some experienced so much difficulty obtaining

representation that they ended up representing themselves.

Access to written evidence

A lack of written evidence was mentioned more frequently as a barrier to pursuing a case in the current case studies than in the first phase case studies. Applicants did not usually have access to the same level of documentation as an employer. This was especially an issue in recruitment cases where it was difficult for job applicants to provide any hard evidence that they were the best candidates for a job. Some applicants cited the unavailability of written evidence as a key factor affecting their decision not to pursue a case. A few respondents who were unable to produce written records during the tribunal process did say that this went against them in defending a DDA case.

Barriers in the tribunal process

Lack of prior knowledge of the tribunal system affected many of the applicants. Applicants were more likely than respondents to say that they had not anticipated how formal and legalistic the tribunal process would be. Respondents were able to rely on their representatives to mediate the process and deal with the legal technicalities. In contrast, some of the applicants were represented by people with little legal expertise or experience of DDA cases.

The legality of the process particularly affected applicants who represented themselves and found they were facing a solicitor or barrister representing the respondents. There were many comments from applicants that legal aid should be widely available for DDA cases, and that it was not possible for an applicant to represent themselves effectively, given the complexities of the DDA law.

Legal issues

Lack of understanding of key legal issues was experienced as a barrier to fully participating in the tribunal process. As mentioned above, the DDA definition of a disabled person continues to confuse applicants. But many respondents also admitted that they were not clear how to apply the definition of a disabled person to individuals in their organisations. Both applicants and respondents singled out mental health conditions in particular, in the context of their confusion about the application of the DDA definition. Developing case law on mental impairment by reason of mental illness may add to confusion, rather than dispel it.

Another legal issue on which respondents appeared to be confused was that of the grounds on which they could justify less favourable treatment of a disabled person. Most of them relied on their legal representatives to make their case and were not at all confident of the circumstances under which less favourable treatment could be justified.

This lack of understanding about two major elements of the DDA was identified in the Monitoring Report (Phase 1). But it does not appear that the level of knowledge has substantially improved or that the body of case law has yet done much to reduce the confusion amongst potential applicants and respondents. The complexities of the law were frequently mentioned not just by the parties to a case but by the wider experts who were interviewed. In some of our case studies it appeared that, had the law been fully understood, the case might not have been pursued. Legal issues arising in decided cases are discussed in the case review.

1.2.2 The effectiveness of the conciliation process

As we examine in Section 4.1.1, three-quarters of DDA claims

are resolved without the need for a formal tribunal hearing. The research explored the factors affecting the decision to withdraw or settle a case.

The barriers identified in Section 1.2.1 to taking a DDA case, were also found to affect the outcome of the conciliation process and the likelihood of cases being settled or withdrawn. Concerns about the financial costs of a full tribunal hearing were mentioned not only by applicants, but also by some respondents, particularly employers in small organisations. Some employers were motivated to settle in order to avoid any adverse publicity for their business. For applicants, a key consideration was the potential stress of the tribunal process. Some applicants mentioned that the obligation to obtain medical evidence and prove their disability was too stressful and this was a reason for withdrawing or settling a claim.

In some cases, applicants who were initially committed to pursuing a claim, were later deterred by realising that they only had a limited chance of success, or that the benefits of winning the case might not outweigh the personal and financial costs.

These factors affected the conciliation process: cost, reputation, stress, and uncertainty about the outcome. These are all issues that were identified in the Phase 1 Monitoring Report case studies. During the current study, the case-study evidence indicates that their influence on the decision to settle has not diminished.

The role of third party involvement was also explored in the case studies. Interviewees' evaluation of the advice they received varied considerably. While some were happy with the advice, others felt that their adviser or representative was not sufficiently well-informed. There was some evidence that

potentially strong cases were steered into settlement or withdrawal on the basis of inadequate advice.

Similarly, mixed views were expressed about the role of ACAS. The process whereby ACAS conciliation officers deal with representatives where they exist, rather than with the applicants or respondents, appears to have had the unfortunate result that many applicants and respondents appeared unaware of whether or not ACAS had been involved in the process. Some interviewees who were aware of ACAS' role commented favourably on their involvement and commitment, while others felt that ACAS conciliators were overly influential in producing a pressure to settle.

As we discuss in Chapter 4, a withdrawal or settlement has potential advantages for the individual. But there are also disadvantages to settling. Not only are the parties involved denied their 'day in court', but also a claim that is settled does not contribute to the body of case law. Furthermore, if potentially strong claims which might help to clarify points of law, are settled for reasons to do with the cost of a case or the stress associated with the tribunal, rather than the merits of the claim, this pressure to settle will undermine the effective implementation of the legislation.

1.2.3 The factors affecting case outcomes

In Section 6.1, we show that the outcomes of the heard cases among our case studies replicated the pattern found in the monitoring studies (phase 1 and phase 2). For example, all five recruitment cases were unsuccessful, a pattern consistent with the low rate of success of recruitment cases found in the previous studies. However, the case studies are not statistically representative of all cases brought during this period and the focus of this qualitative research was on the *perceptions* of the parties of the factors affecting

the outcome.

The main factors identified by the case study participants as affecting the outcome of their case were:

- The availability and quality of written evidence
- The quality of medical evidence
- Witnesses
- The quality of representation
- The attitude of the tribunal members

The availability and quality of written evidence

Respondents were viewed by applicants as having greater access to, and control over, sources of written evidence such as personnel files and records of meetings (see Section 6.2.1). Some interviewees mentioned the particular problems for potential applicants in providing any written evidence of discrimination in recruitment cases.

The quality of medical evidence

The ability to provide specialised and expert medical opinion was regarded as crucial by both applicants and respondents (see Section 6.2.2). This view is supported by decided cases included in the case review.

Witnesses

The credibility of witnesses was mentioned by both applicants and respondents as influencing tribunal outcomes (see Section 6.2.3).

The quality of representation

The legal knowledge and expertise of the representatives was seen by interviewees as having a major impact on the

tribunal case outcome.The data analysis of cases in the phase 1 and phase 2 monitoring studies found that self-representation by applicants was associated with lower rates of success in terms of tribunal case outcomes, compared with the success rates of those who were represented (see Section 6.1.3). In the current case studies, only a small number of applicants represented themselves at tribunal. Of these, two-thirds were unsuccessful.

It is clear from the current case studies that some applicants represented themselves because they could not afford the cost of legal representation. There were examples of applicants who had initially sought legal representation but once they discovered the cost of a solicitor decided that they would have to represent themselves (see Section 5.7.3).

In such cases, where cost was clearly the issue and legal representation was available but not affordable, there was no evidence to suggest that any filtering process was occurring, whereby their cases were regarded as weak ones and failing to find representation.

But some applicants did find it more difficult than others to find legal representation for reasons that may have been related to the complexity of the case and a filtering process, as well as to the cost issue. An example from our case studies was an applicant with a mental health condition who tried hard and failed to find any solicitor prepared to take on her case on a ‘no win, no fee’ basis. She had to represent herself, with advice from the DRC, and won her case (see Section 3.3.4).

The small number of case studies in which applicants represented themselves makes it difficult to establish to what extent it was self-representation that determined the outcome, as compared with the strength of the claim itself. But generally, applicants who represented themselves, even

if they were successful at tribunal, said that they had underestimated the legality of the process and found it very hard to hold their ground against a solicitor or barrister. Some of them said they would not advise anyone to represent themselves because legal expertise was essential to pursuing a successful case.

The attitude of the tribunal members

Although the attitude and behaviour of tribunal members was widely seen as influencing the outcome, there was great variation in the assessment of the tribunal chair and members, by both applicants and respondents. It was evident from the experiences related by interviewees that there were differences between tribunal panels, for example in behaviour towards applicants with specific impairments and in the efforts made by tribunal members to accommodate disabled applicants. Applicants with depression and stress-related conditions often felt that the tribunal had not fully understood their disability and its impact, and that this had affected the outcome of the case.

Overall, there was a notable tendency for applicants to imply that the whole tribunal process was stacked against them, for reasons relating to the respondents' greater financial resources and access to legal representation. Applicants tended to perceive themselves as the weaker party compared with the respondents, and to believe that the tribunal system was biased against them.

1.2.4 The impact of taking a case

The evidence from the case studies on the impact of participation in a DDA case illustrates the variety of positive and negative, short and long-term effects of the process on individuals.

For a minority of applicants, there were some positive outcomes, such as winning an award or settlement, and developing greater confidence in themselves through pursuing the case. However, for the majority of applicants the longer-term impacts were perceived negatively. Many were left with large legal costs that they could not meet in the short-term, even if their case had been successful. Others had found the process so stressful that they said that they would not have taken the case if they had realised what was involved. There were also those who believed that the impact had affected not only their own physical and mental well being, but also that of their friends and family.

The process of taking a case had also had a negative impact on some applicants' ability to participate in the labour market. Tensions between the two parties to a case could make it difficult to return to the same job, or even find similar employment with another employer in the same sector.

The impact on respondents was also mixed. Some respondents said their organisations had learned from the experience and were taking steps to improve the employment of disabled people in their organisation. They mentioned that they planned to raise awareness within their organisation of the DDA and the need to follow best practice. A minority was more concerned about the negative impact on their business in terms of time and resources. This was especially the case for respondent interviewees in small businesses.

1.3 Findings from the Part III case studies

No evidence was found of a major growth in Part III claims since 2001 when the Monitoring Report (Phase 2) identified a total of 53 cases which had been lodged in the County Court

or the Sheriff's Court. The paucity of actual Part III cases, by comparison with Part II cases, resulted in difficulties tracking down and securing the participation of participants in Part III actual or potential cases. A wide range of information sources, organisations and contacts were used to identify participants (See Section 2.2.3).

A total of 18 people were interviewed about 12 cases. Almost all the cases involved private sector service providers, the majority in leisure and tourism services.

1.3.1 Origins of cases

The motivation for lodging or considering lodging a Part III case was, according to the claimants and potential claimants in the case studies, a desire to widen access for disabled people to a range of services. Claimants were particularly motivated to pursue a claim if they were refused a service that they had previously accessed from other providers, or if they believed they had been humiliated by the staff denying them the service.

1.3.2 Awareness of the DDA

General awareness of the DDA was high amongst claimants and potential claimants. But sometimes they did not have the detailed knowledge to frame the complaint in terms of the specific forms of discrimination covered by the Act. For example, in two case studies the complaint had originally been viewed as a consumer complaint, rather than disability discrimination.

The concept that less favourable treatment in the provision of goods and services had to be unjustifiable to constitute discrimination, in particular, was not always understood by the interviewees. Even advisers occasionally had difficulties framing the complaint in terms of the Act.

1.3.3 Barriers to taking cases

The research explored the barriers to taking cases. The cost involved in taking a case to the County Court, the low level of awards if the case was successful, the time and effort involved, and difficulty finding representation were all mentioned as barriers. Self-confidence and knowledge of the Act were the main factors that encouraged potential claimants to pursue a case.

1.3.4 The effectiveness of conciliation

The claimants in Part III cases involved in the conciliation process expressed confusion about the role of conciliators and the relationship between the conciliation service and caseworkers from the DRC or ECNI. They were all dissatisfied with the outcome of the process. They pointed out that the changes promised by the service provider during the conciliation process had failed to materialise.

1.3.5 Some differences between Part II and Part III cases

Definition of disability

The definition of disability emerged as a less significant issue in Part III cases than in Part II cases. In only one of the 12 actual and potential cases was the claimant's disability challenged by the service provider at the time of the incident. In fact, there was a perception by claimants and potential claimants, that some service providers were more likely to *overstate* the individual's disability and to then use this as a justification for not providing the service. These providers would argue that an individual's impairment was so severe that they could not cater for him or her.

A related difference between Part II and Part III cases was that,

because defendants tend not to dispute whether the claimant is covered by the DDA definition of disability, recourse to expensive medical evidence is rarely required.

Impact of taking a case

For claimants and defendants involved in the Part III cases, the personal impact appeared, at least at the initial stage, to be much less than for applicants and respondents involved in Part II cases. Where a claimant did refer to stressful consequences, this was focused on the actual incident of alleged discrimination, rather than the process of pursuing a claim. Whereas in an employment case, an applicant may have been involved in a long drawn-out process involving a difficult relationship with an employer or line manager before lodging a claim, Part III claimants were often not likely to be in ongoing contact with the provider who had refused the service.

However, it must be remembered that only a few of the Part III cases in our case studies had actually been lodged, and that the impact might increase for those whose case reached court.

1.3.6 Conclusion

Overall, this study has identified continuing barriers to the effective implementation of the DDA. Barriers such as cost and access to legal representation which disproportionately affect applicants or claimants, rather than respondents or defendants. An exception to this is the situation of small companies (with fewer than 50 employees) who lack the personnel functions found in large organisations, and who have greater difficulty in meeting the costs of defending claims.

Although the research study included interviews with a broad spread of applicants and claimants with different types of disabilities, there was a striking commonality in the barriers experienced by individuals with different impairments. The process appeared to cut across some of these differences between individuals, in its impact.

The case studies also highlighted legal issues that continue to confuse both parties in a case. The scope of the DDA definition of disability is still a highly problematic area in Part II cases, and amongst respondents the justification defence is rarely fully understood. These legal complexities mean that much of the pursuit of a case now depends, even more than it did in the phase 1 case studies, on access to expert advice and representation.

2. Introduction

2.1 Background and objectives of the study

This report contains the main findings of a research study, undertaken by the Institute for Employment Studies (IES) on behalf of the Disability Rights Commission (DRC) in partnership with the Department for Work and Pensions (DWP) and the Equality Commission, Northern Ireland (ECNI).

2.1.1 Aims and objectives of the research

The main aims of the study, building on the research specification issued by the DRC and IES' detailed research proposal, were:

- To examine how the Disability Discrimination Act 1995 (henceforth referred to as the DDA, or 'the Act') is being implemented through the employment tribunal system (Part II of the Act, relating to discrimination in employment) and the court system (Part III of the Act, relating to discrimination in the provision of goods, services and facilities).
- To explore and analyse the views and experiences of participants (of all types) in DDA cases and potential cases.
- To undertake in-depth case studies of:
  - Actual cases taken under Part II of the Act.
  - 'Potential cases' under Part II of the Act, with a particular emphasis on the barriers which may prevent cases being taken.
  - Actual cases taken under Part III of the Act.

‘Potential cases’ under Part III of the Act, again in order to explore the barriers and difficulties faced in taking such cases, and the reasons for the relatively small number of such cases taken to date.

At a more detailed level, the case studies aimed to explore the following key issues:

- The processes underlying observed relationships between factors such as the characteristics of participants, the availability and quality of representation and support on the one hand, and case outcomes on the other hand.
- Access to justice issues, focusing on the factors influencing the relative paucity of certain types of cases (*eg* recruitment cases in Part II, and Part III cases in general).
- The barriers that disabled people experience in accessing advice about the DDA, and within the adjudication/conciliation system itself.
- The effectiveness of the conciliation processes which are available to parties in DDA cases.
- The sources of information and advice which disabled people, employers and service providers are using, and their views and experiences of the quality and utility of those sources.
- The impacts of the DDA cases on the parties in the case, distinguishing where possible between:
    - Immediate impacts on the parties while the case is ongoing.
    - Longer-term impacts, following a case, *eg* on the behaviour and policies of employers/service-providers; on the motivation and well-being of disabled applicants/claimants in cases; and on the awareness

levels of all parties.

- The characteristics of the individuals participating in cases (which might include the nature of the impairment, as well as other characteristics such as age, gender, ethnic origin, educational level and previous labour market experience), and the role of those characteristics in influencing whether cases get taken and the outcome of those cases.
- The views and attitudes of parties about the case(s) they have experienced and about the legislation in general (including their motivation, their levels of satisfaction with case outcomes, and their views on the effectiveness of the legislation).

2.1.2 Building on previous research

The three phases of DDA monitoring studies

The present study is the third phase of a series of studies monitoring cases taken under the DDA. The findings of the first two phases of the monitoring studies have been published as Meager *et al.* 1999[1] and Leverton 2002[2], and Table 2.1 summarises the key elements of the three phases.

The first phase of the monitoring studies provided an overview of the experience of the first year and a half of the Act's operation, based on:

- The compilation of data on all cases brought under Parts II and III of the Act (from the inception of the Act in December 1996 to early July 1998) and statistical analysis of the patterns of cases taken;

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[1] Meager N, Doyle B, Evans C, Kersley B, Williams M, O'Regan S and Tackey N (1999), *Monitoring the Disability Discrimination Act (DDA) 1995*, DfEE Research Report RR119, May 1999, London, Department for Education and Employment.

[2] Leverton S (2002), *Monitoring the Disability Discrimination Act 1995 (Phase 2),* DWP In-house report 91, London, Department for Work and Pensions.

- legal analysis of the Act itself and some early case law;
- case studies involving in-depth interviews of parties involved in 92 cases and potential cases under the Act; and
- interviews with legal and other experts involved in the Act's implementation.

The second phase of the monitoring study updated only the first of these four elements (identifying all cases brought under the Act, and analysing trends and patterns in those cases up to Sept 2000 for Part II cases, and Feb 2001 for Part III cases).

The third and current phase of the monitoring study essentially updates the remaining three elements: it is based on in-depth case studies, supported by 'expert interviews' and a legal analysis of recent case law.

Table 2.1: Overview of DDA monitoring studies, phases 1 to 3

	In-depth case studies	Collection of data on all cases,and statistical analysis of patterns of cases	Expert-interviews	Legal analysis of cases
Phase 1 study (IES)	✓	✓ (all Part II cases, and all identifiable Part III cases issued up to 9 July 1998)	✓	✓
Phase 2 study (Incomes Data Services)		✓ (all Part II cases issued between 10 July 1998 and 1 Sept 2000; and all identifiable Part III cases issued between 10 July 1988 and 1 Feb 2001)		
Phase 3 study (IES)	✓		✓	✓

Key findings from the phase 1 and 2 monitoring studies

The two previous monitoring studies identified several patterns in Part II cases[1] which are consistent over time, and others which had changed between the two studies. In particular, both studies showed the following relatively stable patterns:

- Men are over-represented among applicants (compared with their representation among disabled people of working age, and disabled people in employment). It is unclear from the earlier work what factors underlie the gender patterns among Part II applicants.

- The most common impairments among applicants are: problems connected with the back or neck; depression, bad nerves or anxiety; and problems connected with the arms or hands.

- Fewer than one in ten cases are recruitment cases (dismissal cases being the most common). Recruitment cases are less likely than cases under other sub-jurisdictions to succeed at tribunal. The previous research tentatively suggested a number of possible reasons for this pattern, including:

  - the (actual or perceived) greater difficulty in meeting the burden of proof in recruitment cases, compared with those under other sub-jurisdictions;

  - the relative lack of availability of support and advice to potential applicants in recruitment cases (compared, for example, with those in dismissal or reasonable adjustment cases, for whom Trade Union or other support may be more easily accessed);

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1 The small number of Part III cases to date makes it difficult to talk of patterns or trends over time.

- a lower willingness of legal advisers and others to take recruitment cases, compared with cases under other sub-jurisdictions.

- The majority of cases are settled or withdrawn without a tribunal hearing. Although the earlier research suggests that factors of both types are relevant, it remains unclear exactly how much this pattern reflects effective conciliation or mediation (*eg* via ACAS), or whether it is mainly due to less 'positive' factors, *eg* pressure from employers, fear of the tribunal process, fear of subsequent impact on the applicants' labour market chances *etc.*

- The public sector is significantly over-represented among respondents (when compared with the proportion of disabled employees working in the public sector). Although the earlier research is not conclusive in this respect, it did suggest that the high incidence of public sector cases may not simply be a reflection of a disproportionately high incidence of discrimination in the public sector; rather it may (paradoxically) also reflect a greater prevalence of equal opportunity policies and rights awareness in the public sector (alongside, perhaps, more active employee representation through trade unions).

- The majority of Part II cases are also cases under one or more other employment law jurisdictions (particularly unfair dismissal), and the phase 1 monitoring study showed some evidence of DDA claims being added to unfair dismissal claims as an 'insurance policy', although it left open a number of questions. In particular: at what point, and why does a case 'become' a DDA case, rather than, say, a dismissal case, and what factors influence the decisions involved?

- Applicants are less likely than respondents to have legal representation, and the phase 1 monitoring study suggested that cost was a barrier to many applicants in securing representation.

In addition to these stable patterns, however, there were important differences between the findings of the previous two monitoring studies, indicating some evolution over time. In particular:

- In the first study, Part II applicants were concentrated at the lower end of the occupational scale, and people in managerial, professional and skilled manual jobs were under-represented. By the time of the second study, however, the occupational distribution of applicants was broadly similar to that of the distribution of disabled people in employment.
- Further, whereas in the first study, cases involving managers or administrators were among the least likely to be decided in favour of the applicant, by the second study this group were the most likely to succeed.
- The first study found that cases brought by men were significantly more likely to reach a hearing, while cases brought by women were more likely to be withdrawn or privately settled. By the time of the second study, however, these gender differences had equalised.
- The success rate of cases has increased over time. The first study found that 15.9 per cent of cases heard at tribunal were decided in the applicant's favour. In the second study, this had risen to 19.5 per cent. This important finding raises a number of questions. For example, how far does the rising success rate reflect improvements in the support available to applicants (*eg* because of the advent of the

DRC; because better information is available on individual rights under the DDA; or because advisers and representatives are now more experienced in taking/supporting cases)? Alternatively, how far does it reflect a growing tendency for 'weaker' cases not to be taken?

- While both studies showed that legally-represented applicants were most likely to succeed with their claims, the success rates of applicants represented by barristers, in particular, had declined somewhat between the two studies. There is, as yet, no explanation for this pattern, although several hypotheses suggest themselves: in particular, it is possible that as the DDA has become better-established and experience of taking DDA cases becomes more widespread within the legal profession, the more 'straightforward' cases are being taken predominantly by solicitors, leaving barristers to handle more complex cases, or cases which address previously untested areas of the law.

In addition to these patterns, revealed by the data analysis of case characteristics in the previous monitoring studies, the case studies in the phase 1 monitoring study raised several further issues about the operation and accessibility of Part II of the DDA, which are pursued further through the case studies in the present (phase 3) monitoring study. In particular, the earlier case studies showed:

- Low levels of initial awareness among applicants of the DDA and their rights under it; a lack of clarity regarding whether they were 'disabled' in the sense of the Act; and a common reluctance to be so labelled.

- A parallel lack of awareness among respondents and potential respondents of the Act's implications; its

definition of disability and the meaning of 'discrimination' as defined by the Act.

- Little experience of the working of the Act among advisers and legal representatives, sometimes leading to a reluctance to take cases, or a preference for relying on other jurisdictions.

- The (perceived or actual) cost of taking a case was a significant barrier for applicants, influencing the likelihood of cases being taken, and the likelihood of their obtaining legal representation.

- Concerns about the role of medical evidence in cases, with the cost (financial, and in terms of stress) of providing such evidence acting as a disincentive to take cases.

- Concerns (and misunderstandings) among respondents about the relationship between their obligations under the DDA and their obligations under other legislation (particularly health and safety legislation).

Turning to Part III cases, given the very small numbers of cases to date, there were few clear patterns in the previous research, but some early findings merited further investigation in the present study. In particular:

- It has been suggested in previous literature that the staged implementation of the Part III provisions may have reduced the number of cases taken. An interesting question, therefore, relates to the extent to which more recent cases reflect the provisions introduced in 1999, and the extent to which 'potential' cases reflect the provisions due to be introduced in 2004.

- The Phase 1 monitoring study showed a low awareness of

the Act among potential claimants (and defendants). It is of interest, therefore, in the present study, to understand whether and how levels of awareness have changed and the mechanisms by which potential parties become aware of the Act.

- The Phase 1 study suggested that the perceived cost and difficulty of taking a case played a role in inhibiting cases from being taken. The earlier research showed a low awareness of the procedures for taking cases, and of wider disability issues, among some advisers/ representatives, and indeed among the judiciary itself. The effect of the latter was reinforced by a perceived inaccessibility of the court system to disabled litigants. The present study provides an opportunity to examine whether and how provision and attitudes have changed in these respects.

2.2 Methodology

The research methodology consisted of seven distinct but overlapping stages:

1. Literature and case review
2. Expert/intermediary interviews
3. Identification of Part II and Part III cases
4. Identification of 'potential' Part II and Part III cases
5. Selection of cases for case studies
6. In-depth case studies of actual and potential cases
7. Case-study analysis
8. We discuss each of these stages briefly in turn below.

2.2.1 Literature and case review

This involved an examination of literature (in legal and

industrial relations journals and similar sources) on DDA case law to date, and the issues it raises, as well as consideration of Employment Appeals Tribunal (EAT) decisions and employment tribunal decisions in significant Part II and Part III cases. The emphasis of the review was on updating the legal analysis undertaken as part of the phase 1 monitoring study discussed above, and the focus of the literature and case review in the present study was on key cases decided during the period April 2001 to March 2003. This review helped to inform the selection of cases examined in the fieldwork, and the interpretation of the findings of the case studies. Key findings from the case review are summarised in Section 2.3 below, and fuller details of those findings are set out in Chapter 9.

2.2.2 Expert/intermediary interviews

The early stages of the study were informed by in-depth interviews with experts and representatives of organisations playing an intermediary or advisory role in the implementation of the Act, and who could provide a view on how the Act is being implemented and issues arising. These interviews supplemented the literature and case review in informing the selection of the case studies and the design of research instruments for the fieldwork. The breakdown of these interviews is shown in Table 2.2 below, and the topic lists used to guide the interviews are given at the Appendix.

Table 2.2: Expert/intermediary interviews undertaken

Category	**Total**
Legal practitioners/legal organisations	5
Advisory organisations/intermediaries	4
Disability organisations/charities	4
Academic experts	1
Trade Unions	1
Employer/business organisations	1
ACAS officials (NB this was a focus group of several ACAS officials)	6
Representatives of the judiciary	1
Total	23

2.2.3 Identification of Part II and Part III cases

Part II cases

The focus of the study was on Part II cases which had been brought and/or decided on or after 1 September 2000 (the cut off date for cases examined in the phase 2 monitoring study — Leverton 2002 *op. cit.*). In practice, however, the majority of cases were drawn from the recent past. Thus the sampling frame for cases was taken to be cases completed in the period April-October 2002 (for completed cases) or cases lodged in the same period (for ongoing cases).

As far as cases in England and Wales were concerned, completed cases were drawn from records of case decisions held by the DRC itself, and ongoing cases were drawn from records held at the Applications Register of the Tribunal Service in Bury St. Edmunds. Cases in Northern Ireland, and some Scottish cases, were identified separately through the tribunal services in those two countries.

Part III Cases

The Court Service holds no central record of Part III cases, and it was not possible to identify DDA cases in any straightforward fashion from data held at individual court level. It was necessary, therefore, to rely on a diversity of sources to track these down[1]. These included:

- Legal databases and information sources.
- Legal and industrial relations journals.
- Contacts with legal organisations, disability organisations,

[1] It had been hoped, at the outset of the study, that information collected by the researchers undertaking the phase 2 monitoring study would enable us to include the 44 Part III cases identified in that study in our sample for the present study. In practice, however, confidentiality restrictions meant that information from that study was not available in a readily usable form which would enable us to contact the parties in question.

lawyers' associations and societies (especially those active in the field of employment and discrimination law), as well as advice and representation organisations (Law Centres, Citizens Advice Bureaux, unemployed peoples' resource centres *etc.*), and the various voluntary and *'pro bono'* groups active in this field.

- Information provided by the DRC itself (through its Helpline and case workers), and in Northern Ireland by the ECNI.
- The placing of requests for information in several journals, magazines, newsletters, websites and discussion groups/forums.

2.2.4 Identification of potential Part II and Part III cases

The study also aimed to include a small number of 'potential' cases, *ie* situations which presented a *prima facie* breach of Part II or Part III of the Act, and which were similar in that respect to cases actually taken, but which had not (yet) themselves led to a case being lodged. This might be, for example, because the potential applicant/claimant had decided not to lodge a case under the Act, for whatever reason, or because the potential applicant/claimant was still considering the advantages and disadvantages to them of lodging a case.

Identifying such 'potential cases' posed some difficulties. By definition, there is no independent source of such cases. For both Part II and Part III, therefore, we used a variety of sources to identify such cases, including:

- Information from the expert/intermediary interviews (see Section 2.2.2).

- Advisers and representatives interviewed during case study interviews of actual DDA cases (these interviewees were asked to provide examples of similar situations which had not led to a case being lodged, and contact details, if appropriate).

- A range of disability organisations and advisory organisations involved with giving advice on disability, employment and consumer issues.

- Trade unions.

- Specialist law firms.

- DRC caseworkers.

2.2.5 Selection of cases for case studies

The original intention had been to conduct 65 case studies, with an average of two to three interviews per case. Where 360-degree case studies could not be obtained, due to the refusal of one or more parties to participate, the interviews of the non-participating parties were replaced with interviews with the corresponding parties in a case with similar characteristics. Thus, in practice, the interviews obtained were spread over a larger number of case studies than the 65 originally envisaged (overall, the research involved a total of 139 interviews and covered a total of 98 DDA cases, as detailed in Table 2.3 and Table 2.4 below).

Cases were chosen according to a number of criteria, the aim being to ensure coverage of a range of different types of case. Thus we selected cases according to the following factors:

- Whether the case was an actual case or a 'potential' case (see section 2.2.4 above for the definition of potential cases). In particular, in looking at Part III there was a particular emphasis on potential cases, due to the paucity

of actual cases to date.

- The region/country in which the case was registered. We aimed to ensure a minimum of around five cases in N. Ireland, ten cases in Wales, 15 cases in Scotland, and 35 cases in England.

- Nature of the discrimination. In Part II cases we aimed to ensure that there were at least eight to ten recruitment cases in the sample, and a reasonable spread of cases across the other sub-jurisdictions (dismissal, reasonable adjustment, other detriment *etc.*). In Part III cases we aimed similarly to ensure a reasonable balance between types of case (*eg* refusal of service, reasonable adjustment *etc.*).

- Whether the case was ongoing or completed at the time of the case study. It was clear from the research undertaken for the Phase 1 Monitoring Report (Meager *et al. op. cit*), that parties' perceptions of the legislation and its effectiveness could be heavily influenced by the outcome of their particular case. It was seen as essential, therefore, to ensure that the study included some cases which were ongoing, and for which the outcome was not yet known. We aimed to ensure that at least eight of the cases examined were ongoing.

- Case outcomes. We aimed for a balance of case outcomes in the sample, distinguishing between those which were withdrawn, settled or otherwise disposed of before a hearing, and those which went to a hearing. Similarly, among those which went to a hearing, we distinguished between those which were successful and those which were unsuccessful (from the point of view of the

applicant/claimant) at the tribunal/court hearing.

- Impairment type. We aimed for a broad spread of applicants/ claimants according to the type of impairment they had. In particular, we aimed to ensure that the sample included individuals with physical and mobility impairments, sensory impairments, mental health conditions, learning disabilities and progressive illnesses.

- Gender. We aimed for a reasonable balance between men and women among applicants/claimants (bearing in mind that the data analysis in the first two monitoring studies showed that men were significantly over-represented among litigants in DDA cases taken to date).

- Occupation of applicant/claimant. We aimed for a distribution of applicants/claimants from manual, non-manual and professional occupations.

- Sector of respondent/defendant. In Part II cases we aimed for a broad distribution of respondents from manufacturing and service sectors, and from the public and private sectors. In Part III cases we aimed for a spread of types of service providers.

- Representation/advice. The sample was chosen to include applicants/claimants and respondents/defendants who represented themselves in cases, and among those who had advice or representation we aimed to secure a spread of types of adviser/ representative.

Given the large number of relevant criteria, compared with the overall scale of the research, it was not possible fully to meet all of the above criteria. Table 2.3 to Table 2.9 below show

how the sample of interviews/case studies was distributed on some of these criteria, and it can be seen that in most cases the sample met, or came close to meeting, the desired selection criteria.

Table 2.3: Case studies, by number and type of interviews

	Part II		Part III		Total
	Actual cases	**Potential cases**	**Actual cases**	**Potential cases**	
Interviews with one or more parties from applicant's/ claimant's side only	50	5	4	7	66
Interviews with one or more parties from respondent's/ defendant's side only	20	-	-	-	20
Interviews with one or more parties from both sides	11	-	1	-	12
Total	81	5	5	7	98

Table 2.4: Interviews, by category of interviewee

Interview with...	**Part II**	**Part III**	**Total**
Applicant/claimant	59	11	70
Applicant's/claimant's adviser/representative	26	6	32
Respondent/defendant	31	1	32
Respondent's/defendant's adviser/representative	5	-	5
Total	121	18	139

Table 2.5: Case studies, by country

	Part II	Part III	Total
England	54	9	63
Wales	9	-	9
Scotland	20	1	21
Northern Ireland	3	2	5
Total	86	12	98

Table 2.6: Case studies, by gender of applicant/claimant

	Part II	Part III	Total
Male	48	10	58
Female	38	2	40
Total	86	12	98

Table 2.7: Case studies, by status of case at date of case study

	Part II	Part III
Potential cases *ie* case not (yet) lodged	5	7
Actual cases: completed		
Withdrawn	9	-
Settled	13	3
Struck out	1	-
Successful as ET	13	-
Unsuccessful at ET	21	-
Actual cases: ongoing	24	2
Total	86	12

Table 2.8: Part II case studies, by main DDA sub-jurisdiction

	Actual cases	Potential cases	Total
Recruitment	13	-	13
Dismissal	49	4	53
Detriment	10	-1	10
Failure to make reasonable adjustment	5	1	6
Not known	4	-	4
Total	81	5	86

Table 2.9: Case studies, by applicant's/claimant's impairment

Impairment/condition	Part II	Part III
Auditory impairment	3	-
Cerebral Palsy	1	1
Depression, bad nerves or anxiety	13	-
Diabetes	3	-
Disabilities connected with the arms or hands	9	1
Disabilities connected with the back or neck	14	1
Disabilities connected with the legs or feet	7	4
Epilepsy	3	-
Heart, blood pressure or circulatory problems	2	-
Mental illness, phobia, panic or other nervous disorders	9	-
Learning difficulties/disabilities	4	2
Stomach, liver, kidney or digestive problems	3	-
Visual impairment	4	3
Progressive illness not included elsewhere	6	-
Other	4	-
Not Known	1	-
Total	86	12

2.2.6 In-depth case studies of actual and potential cases

Having identified cases which might be used as case studies, parties in cases were initially sent a letter, explaining the research and its objectives and inviting their participation. Many parties responded directly to this letter, others were subsequently followed up by telephone. In cases where one party to a case agreed to participate, attempts were then made to secure the participation of one or more other parties in that case. Thus, for example, if an applicant in a Part II case agreed to participate, we would then approach the respondent to that case and, where appropriate, any advisers or representatives involved in the case. In all cases the participating party was informed of our approach to other parties in the case, and in cases where that party did not wish such approaches to take place, their wish was respected.

The case studies themselves were based on semi-structured in-depth interviews (the topic guides for the interviews can be found at the Appendix). The majority of the interviews were conducted face-to-face, although a small number (at the interviewees' request, or for logistical reasons) were undertaken over the telephone.

2.2.7 Case-study analysis

All the interviews were analysed under the headings in the topic guides and key items entered into a thematic database to facilitate the analysis of such a large number of interview scripts.

The themes incorporated into the thematic database, were also those used to structure the chapter headings of the present report, the object being to 'tell the story' of DDA cases, from the 'trigger point' at which the decision is taken to lodge a case under the act, through to the outcomes of the case and its impact on the parties involved.

2.3 Key findings from the case law review

To conclude this introductory chapter, and further set the scene for the case-study findings in the rest of the report, we briefly present some key findings from the case law review as they relate in particular to Parts I and II of the Act. Fuller details and more findings can be found in Chapter 9, as can some consideration of the very small body of case law evidence relating to Part III.

2.3.1 Part I DDA: Definition of disability

Several important recent developments in case law relate to the definition of disability under the Act. In particular:

- **Impairment:** Recent decisions on the meaning of impairment confirm that the burden on claimants to show mental impairment by reason of mental illness is heavy in comparison with that needed to show physical or other mental impairment.
- **Normal day-to-day activities:** There has been clarification of the relationship between work-related activity and normal day-to-day activities. Whereas work had previously been excluded when assessing ability to carry out day-to-day activities, the working environment may now provide the context within which performance of these should to be examined.
- **Deduced effects of treatment:** As with mental illness, detailed and persuasive medical evidence is required in cases in which an applicant alleges that an impairment would be substantial, but for the effects of medication or treatment.
- **Progressive conditions:** Diagnosis of a progressive condition is not sufficient to satisfy the definition of disability. Rather it must be shown that a condition's effect

on the applicant/claimant's ability to perform day-to-day activities will become substantial either by statistical evidence or by individual medical evidence. It has been established, however, that symptoms resulting from *treatment* for a progressive condition, rather than from the condition itself, suffice to meet the definition.

- **Medical evidence:** Cases on definition of disability continue to demonstrate the crucial role played by detailed medical evidence. It has been made clear, however, that it is not the duty of tribunals to obtain medical evidence or ensure that the parties obtain it.

2.3.2 Part II DDA: employment provisions

Several recent decisions clarify the **scope of the employment provisions.** In particular:

- **Post termination discrimination:** The employment provisions may apply to post-termination discrimination where, on the facts of the case, a continuing employment relationship can be shown to exist.
- **Statutory office holders** and applicants for statutory office: the provisions do not apply to these groups.
- **Constructive dismissal:** A recent ruling by the EAT that 'dismissal' in the Act includes constructive dismissals has thrown doubt upon an earlier decision and left the scope of the term uncertain.
- **Trade organisations and qualifying bodies:** It has been decided that bodies which grant professional qualifications are not bound by the Act as they are by sex and race discrimination legislation. Neither is the General Medical Council a professional organisation for the purposes of the Act. The Government has, however, since agreed that the Act should be amended to apply to qualifying bodies.

Other recent clarifications cover **less favourable treatment** and the **justification** of it:

- Inferences of less favourable treatment (and, in the absence of satisfactory explanation for it, of discrimination) may be drawn from the facts of a case by application of the principles developed for racial discrimination. It has also been made clear that disability does not have to be the principal reason for less favourable treatment. It has been confirmed that an employer's lack of awareness that an applicant's condition brings him/her within the DDA's definition of disability, is no bar to a finding that it had subjected him/her to less favourable treatment.
- Recent decisions have lowered the threshold of justification of less favourable treatment below that previously set. Considerable weight is now placed on 'proper' risk assessment or investigation and "properly formed opinions of suitably qualified doctors" in showing justification. It is now settled law that lack of awareness of disability does not prevent an employer from justifying less favourable treatment.

Recent clarifications relating to the **duty to make reasonable adjustments** include the following:

- The Act imposes a duty on employers to make reasonable adjustments where 'arrangements' place a disabled person at substantial disadvantage in comparison with someone who is not disabled. It has been established that 'arrangements' indicates some positive steps on the employer's part, so for example, the non-creation of a promised permanent post would not suffice.
- The duty falls on the employer, not the employee, and an employer cannot avoid the duty by arguing that neither an

employee nor his/her medical advisers were able to suggest any reasonable adjustments.

- In establishing a breach of the duty to make reasonable adjustment, an early case laid down a series of sequential steps to be followed by tribunals.The Court of Appeal has since held, that it is not necessarily an error of law for a tribunal to fail to follow these. Cases continue to confirm that the issue of whether an employer failed to take steps which it ought reasonably to have taken is to be decided by reference to an objective test of what it did or did not do.
- The Act provides that the duty does not arise if an employer does not (or could not reasonably be expected to) know, that a person has a disability. It has been decided that disclosure by a 'lay interested source' (*eg* a job applicant) is insufficient to establish actual knowledge of disability. This would require medical confirmation. Medical evidence may also be necessary to establish constructive knowledge. Under a related scenario, it has been held that this defence does not exempt the employer who claims to be unaware not of the fact of disability, but of its extent, although the state of knowledge of the extent of disability is relevant to justification.

Further significant findings from the case law review, relating to Part II of the Act include:

- The Government has signalled its intention to remove the **justification defence** for failures to make reasonable adjustments. In the interim, however, the case law review shows that there remains some confusion in existing decisions regarding the approach to adopt in such cases.
- A successful applicant has a **duty to mitigate losses** consequent upon discrimination. It has been established, however, that the onus rests upon the unsuccessful

employer to show that it was unreasonable of the successful applicant not to have taken mitigating steps that it proposed.

- A number of provisions of the Act have been challenged under the **Human Rights Act 1998**. These include: the small employer exemption in section 7(1); the justification defence; and time limits for lodging a complaint. To date, all challenges have been unsuccessful, although as previously noted, the government has stated an intention to amend some of these provisions.

2.4 Structure of the report

The report itself is structured as follows (note that Chapters 3 to 7 focus on Part II (employment) cases; because of the small number of Part III cases examined, only Chapter 8 focuses specifically on these case studies):

Chapter 1 provided an overview of the findings, highlighting the main conclusions from the research.

Chapter 3 looks at the origins of cases, and the factors leading to a case being taken or not, focusing on issues such as: the parties' awareness and understanding of the legislation; the factors acting as barriers or facilitators to cases being taken; and the various alternatives to legal action which may or may not have come into play prior to a case being taken.

Chapter 4 looks at those cases which were settled, withdrawn or conciliated prior to a hearing, focusing on: the factors influencing the settlement/withdrawal; the other parties involved in the settlement/withdrawal; the reasons for the case not proceeding; and parties' subsequent views on the decision to withdraw/settle.

In Chapter 5, we turn to the processes involved in a Part II

case, looking in particular at: tribunal hearings; the use of evidence; the attitudes and experience of tribunal chairs and panel members; the legal issues addressed during the tribunal process; and the barriers and obstacles encountered by parties during the tribunal process.

Chapter 6 looks at those cases which had been decided at a tribunal hearing, with a particular focus on the factors which were seen by the parties as having contributed to the (successful or unsuccessful) outcome). Where the case was 'successful' (*ie* decided in favour of the applicant) the chapter examines the various remedies which applied. Finally the chapter examines the views of the parties regarding case outcomes and remedies.

Chapter 7 examines the impact which participating in a DDA case (whether or not the case was concluded at the time of the case study) has had on the parties. The study looks both at contemporaneous impact in the sense of what effect it had on parties while the case was occurring, and also at any subsequent or longer-term impact. In the case of applicants, there was a particular focus on the financial, personal/social, health and labour market impacts of participating in a DDA case. In the case of respondents, as well as looking at the financial impacts of the case on the organisation and the impact on those directly involved in the case, there was also an interest in the wider impact on the organisation, both in terms of its policies, procedures and practices and in terms of the organisation's attitudes towards the employment of disabled people.

In Chapter 8 we turn to our case studies of Part III (goods and services) cases. As in our analysis of Part II cases, we look in turn at: the origins of cases; the processes involved in taking a case; the outcomes of cases and the factors influencing them;

and the impact of Part III cases on the parties involved.

Chapter 9 provides the full findings of the case law review (see Section 2.3 for a summary of key findings). The review covers recent developments in case law on Parts I and II of the Act, with a commentary on key cases decided by the Employment Appeal Tribunal and Court of Appeal. The chapter also examines the scope of Part III provisions of the Act and provides a commentary on the still relatively small number of reported cases.

3. Part II cases: Origins

This chapter is concerned with the origins of cases brought under Part II of the DDA, and the immediate events which acted as 'triggers' for a DDA case. Under Part II of the DDA, a case is commenced when an individual presents an 'originating application' to the appropriate office of employment tribunals. The standard form of application is known as an IT1. This chapter looks at the process up to the submission of an IT1, and covers:

- The events which led applicants to initiate DDA claims under the four sub-jurisdictions of Part II.
- Applicants' and respondents' prior awareness of the DDA.
- Whether applicants had previously considered themselves to be disabled.
- Why applicants decided to pursue a case under the DDA, and the barriers that they encountered.
- The extent of negotiation with employers, prior to applicants lodging a case and the role played by internal grievance procedures.
- The reasons why cases were lodged as stand-alone DDA cases, or registered as claims under other legislation such as unfair dismissal, or sex discrimination.

3.1 The 'trigger' event

This section examines the events which led applicants to take action using the DDA. It is grouped by the four sub-jurisdictions of Part II of the DDA: dismissal, other detriment, recruitment, and reasonable adjustment.

3.1.1 Dismissal cases

Amongst the case studies, dismissal was by far the most common sub-jurisdiction under which DDA cases were taken (Table 3.1).

Table 3.1: Part II case studies by DDA sub-jurisdiction

	Actual cases	Potential cases	Total
Recruitment	13	-	13
Dismissal	49	4	53
Detriment	10	-	10
Failure to make reasonable adjustment	5	1	6
Not known	4	-	4
Total	81	5	86

Source: IES case studies

In many of these, dismissal was the only DDA jurisdiction under which the case had been lodged, although the dismissal claim was sometimes accompanied by a secondary DDA jurisdiction, *ie* detriment or reasonable adjustment. In dismissal cases, applicants often brought their case under both the DDA and unfair dismissal employment legislation.

Many of the dismissal cases involved applicants who had been off sick from work for long periods prior to their dismissal as a result of a long-standing condition. Others had developed the condition more recently. There were also examples in which applicants reported that their disability

was as a direct result of an accident that had occurred when they were at work. Some were dismissed when off on long term sick leave; others were dismissed when they were back at work, but it was likely that further time off sick would be required in the future. There were several examples of applicants having been made redundant, but feeling that they had been unfairly selected for this, *ie* purely on the basis of their disability. Prior lengths of service among applicants in dismissal cases varied, from less than a year, to several years or more.

Occasionally, following a particular incident, applicants had simply walked out of their jobs and not returned, or they had resigned as a result of what they felt was ongoing pressure to do so. They later filed a claim as they had felt that the events leading up to the point where they left had been so unfair that they amounted to an unfair or constructive dismissal case.

An applicant had worked for his employer in the construction industry for many years. He went off sick for two months with depression, and during this time his employer contacted him to let him know that he had been made redundant. He went to see a psychiatrist who advised him that he could have a strong DDA case, and recommended that he seek legal advice. The lawyer he consulted also suggested that he had a DDA case.

In the 12 months following his return from a few months off sick from work, an applicant felt that he was being unfairly treated. He had more time off sick from work during this time, and increasingly felt that his employers wanted to be rid of him. They told him that his attendance levels and performance were not good enough, and he was disciplined on two occasions, which he felt was unfair. His health deteriorated badly during this time, and eventually he resigned. He did not consult any formal sources of advice but was encouraged to bring a DDA dismissal case as a result of talking to colleagues and family friends.

An applicant had worked for a retail employer for a year, had left and was then taken back on a probationary period a few months later. He had a physical impairment which affected his mobility. After performance quotas were introduced, based on moving cases to and from a warehouse, he was told on several occasions by his line manager that his performance was unsatisfactory. The applicant argued that his disability prevented him from reaching the quotas that had been set, and that they were not in his contract. Before the end of his probationary period, he was called to a meeting where he was told that as he was not reaching the quotas and no alternative post could be found for him, he was being dismissed.

3.1.2 Other detriment cases

Cases submitted under the other detriment jurisdiction were usually accompanied by a claim under one of the other DDA sub-jurisdictions, *eg* reasonable adjustment. There were also examples of detriment being used as a secondary DDA jurisdiction, rather than the primary one. The detriment part of claims encompassed situations where applicants felt that their employer had not dealt with their situation appropriately, and that they had suffered in some way as a result of this. Typical of claims of this type were those involving a loss of earnings, for example, due to redeployment to a different job in which they received lower wages.

An applicant had worked for an organisation for several years on shifts, although his condition had deteriorated during his time. His shiftwork pattern had been adjusted several years ago, from one involving both days and nights, to days only. Following a recent long period of illness, he was relocated to a different role which did not pay as much. The applicant lodged a claim that he was taken off shiftwork sooner than he believed was necessary as a result of his condition. He also claimed that he should still be receiving a higher rate of pay, aligned with that of the shift work, and that his permanent health insurance had been affected by this move. This case was brought under the jurisdictions of detriment and reasonable adjustment.

An applicant had developed a progressive illness while employed by a nursing home, and required time off work to go into hospital for an operation. She returned to work in a different role more suitable for her as a result of her condition, but it soon became clear that she would need further time off sick to recuperate. During this sick leave, her employer informed her that her new role had been given to someone else. She was told that she would be able to do her original job. However, she pointed out that due to her condition she was no longer able to perform the duties involved. As a result she was unable to return to work for her employer.

3.1.3 Recruitment cases

In the case studies, there were three main categories of recruitment cases:

- Applicants who believed that they should have been offered an interview for a job for which they had applied, but were not.
- Applicants who felt that they had not been given a fair chance at an interview because of their disability, or that reasonable adjustments had not been made to take their disability into account in the selection process.
- Applicants who had been offered a job which was later withdrawn when the employer realised the nature of their disability, usually following a medical examination.

Several cases involved applicants who already worked for the respondent organisation, and who had applied internally for an alternative post. There were examples where applicants felt that the post in question would have been more suitable for them as a direct result of their disability, and that it would have been an ideal way for the organisation to redeploy them. These applicants typically tended to feel that their employer was conspiring to get rid of them.

An applicant was not offered an interview, although she was sure that her application had demonstrated that she had suitable skills, experience and understanding of the role. She consulted her trade union, who pointed out that the organisation was a user of the 'two ticks' disability symbol, and was therefore committed to offer her an interview if she had met all of the necessary requirements for the job. It was at this point that she decided to submit an IT1, with the help of her union representative.

Prior to interview for a job in the health sector, an applicant with a specific learning difficulty had told the HR manager of her condition, and learned that the recruitment process would involve an interview and psychometric tests. She informed the HR manager of best practice guidelines for administering psychometric tests to people with her disability in advance of the interview, so that they would be able to act accordingly. However, she felt that when she took the tests and attended the interview, these procedures were not followed. She informed the organisation of this by letter and they conceded that some of the procedures had not been adhered to and that they would consider only her performance at interview in their decision. The applicant felt this to be unfair, and, on advice from the DRC, decided to lodge a case.

An applicant with diabetes was offered a job in the private sector which, following a medical examination, was withdrawn. The applicant contacted a support organisation for people with diabetes, which alerted him to the DDA. After consulting with some other sources of advice he decided to take the claim.

3.1.4 Reasonable adjustment cases

Very few of the case studies involved a claim under

reasonable adjustment as the main jurisdiction. It was more common for cases involving reasonable adjustments to be filed under another jurisdiction, with reasonable adjustment as a secondary factor. Those cases that did involve reasonable adjustments covered areas such as making adjustments to work arrangements and to the physical aspects of the workplace to accommodate a person's disability. Claims were, in some cases, made in response to an organisation's specific failure to respond to an applicant's single request. In other cases, they arose from a result of a series of events over time which became increasingly intolerable to the applicants.

An applicant claimed that he was disabled under the DDA and requested that his duties at a University be adjusted so that they were less physical, due to problems with his back. The respondent employer did not consider the applicant to be disabled and did not agree to making the full range of adjustments for him. The applicant lodged the DDA claim after this. The respondent noted that he had an extensive record of sickness absence, not as a result of the condition about which he was claiming disability.

An applicant with depression, lodged a reasonable adjustment case following bullying in the workplace which led to work-related stress. He felt that his employers had failed to take his condition into account when they tried to locate him in an office which he felt would exacerbate it. He had been aware of the DDA for some time but also involved his trade union representative in the situation prior to lodging the case.

3.2 Awareness of the DDA

This section turns to look at the extent to which applicants,

respondents, and their representatives were aware, prior to the case being taken, of the DDA and the associated procedures.

3.2.1 Applicants

DDA awareness

Around half of the applicants interviewed had been aware of the existence of the DDA prior to taking their case. Their awareness had come via a variety of different routes.

Some had become aware of the DDA in a general way through the media, perhaps after seeing a report on the television, or reading an article in a newspaper. However, they did not always realise at that time that the Act could apply to them, if they did not consider themselves to be disabled or did not know about the DDA definition of disability.

Others with progressive conditions had heard about the DDA through contacts as their condition worsened, and realised that the legislation might have become applicable to them.

A fair number of applicants had become aware of the DDA through their work, *eg* if their role had involved equal opportunities, or they had done work for their trade union. Other applicants had learned of the DDA, and that they could be covered under it, during a period of time off sick from work, *eg* they were informed by an occupational health doctor that they were protected under the terms of the DDA.

Some applicants first learned of the DDA when they sought advice about the way that their employer had treated them. This was sometimes found to be the case where applicants already classed themselves as disabled, but were simply not aware of the DDA. In other cases, applicants were vaguely

aware of the Act, but did not consider themselves to be disabled, hence they did not realise that it applied to them.

Whether applicants considered themselves to be disabled

Key to whether applicants were able to draw upon the provisions of the DDA for their cases was the extent to which they were aware that they themselves were covered by it. Less than half of those we interviewed had considered themselves to be disabled prior to the case (or potential case) in question (see previous paragraph for how these applicants came to take a case under the DDA). The definition of disability, defined in Section 1 DDA as a 'physical or mental impairment which has a substantial and long-term adverse effect on (the applicant's) ability to carry out normal day-to-day activities' was, for many applicants, a broader definition of disability than they had previously used. (See Section 9.2 for discussion of DDA definition of disability). As a result, even if applicants were aware of the DDA, they often did not realise that it might apply to them, until they were advised otherwise by a third party.

Applicants with less visible conditions *eg* depression, diabetes, and post traumatic stress disorder commonly fell into this category. Many applicants felt that disabilities had to be physical and obvious, involving for example, a lost limb or mobility problems, rather than a progressive condition, or mental illness. However, even applicants with physical disabilities such as back conditions or osteoporosis, which could severely affect mobility, did not always consider themselves to be disabled. The belief that disability applies only to people using wheelchairs, or those with severe learning difficulties may be deterring many of those whom the Act was designed to protect, from using it.

"I always felt the guy with one leg was disabled, you know, the wheelchair-user. That was my picture of disability."

"A disabled person to me is someone who can't walk, or can't do anything for himself."

One of the applicant representatives interviewed backed up this view, by suggesting that most people who are covered by the DDA do not know of the Act or that they should be protected by it. He felt that this was due partly to the persistence of stereotyped perceptions of disability:

"The vast majority of people still think of disabled people as the guy with the club foot or the girl in the wheelchair."

In contrast, applicants with what could be seen to be very obvious disabilities considered themselves to be disabled prior to the case. However, they were not always aware of the existence of the DDA, until a specific incident caused them to find this out. Others were very clear that they were disabled within the meaning of the DDA, and about their rights under the Act.

The extent to which applicants were able to draw upon the DDA was dependent upon both being aware of the Act and realising that they were disabled as defined by it. Only around one third of applicants interviewed said that they knew that they were covered by the DDA prior to the case.

For virtually all of the applicants, the case about which we interviewed them was their first DDA case.

An applicant who had taken on trade union duties while working for his public sector employer had been aware of

the DDA since it was established, and working with disabled employees had formed quite a large part of his union case work. He was also made aware of the Act through his wife who was also disabled and had had problems with her employer in the past. He had received bulletins from the DRC to keep up to date with the legislation. He was diagnosed with a progressive illness several years ago and knew he would be covered under the DDA if the employer failed to make reasonable adjustments as his condition progressed.

An applicant who had had his leg amputated above the knee many years ago had always worked despite his disability. Although he had considered himself to be disabled, he had not heard of the DDA until he was dismissed from his job, when he sought advice from a third party.

An applicant who was dismissed from her job in the social care sector after discovering she had cancer realised that she could make a claim under the DDA only when she sought legal advice from a local solicitor about bringing an unfair dismissal case. The applicant had not been working for her employer for long enough to bring a case of unfair dismissal against it but her solicitor suggested that she could have a case under the DDA. The applicant had not previously considered herself to be disabled.

An applicant with a disease of the circulatory system had considered herself to be disabled for some time, and had been registered as such in the past. However, she was not aware of the DDA, and found out that she could be covered under it only when she sought advice about taking a case of unfair dismissal.

An applicant with depression and anxiety had been aware of the DDA since he came across a book on it in his local library. This meant that he was aware of the Act at the time of the alleged discrimination, and was able to tell his employers in the financial service sector that he felt they were in breach of it. Prior to this he had considered himself to be 'ill' rather than 'disabled'. He said that he associated 'disability' with physical disability, such as using a wheelchair. As far as mental health was concerned, he felt disability might include someone with a more extreme mental illness, for example, someone who had no control over their actions.

3.2.2 Respondents (employers)

Interviews with respondents took place with individuals who had had significant involvement with the DDA case in question. They held a range of positions, depending on the size and nature of the organisation, and the procedures under which the DDA claim had been dealt with. Our interviewees included: heads of HR, finance and HR managers, managing directors, company secretaries, and line managers and office managers.

DDA awareness

Virtually all of the respondent interviewees said that they had been aware of the DDA before the case about which we interviewed them arose. This is in contrast to the findings of the previous Monitoring Report (Phase 1)[1] which found that around half of the respondents interviewed had some prior awareness of the DDA. This suggests that employer awareness of the DDA has increased over the last few years.

However, the exact nature of this awareness varied greatly, with some employers reporting that they were aware of the existence of the DDA, but only in a general way, and that only

1 Meager *et. al.* (1999) *op. cit.*

when they became involved in a case did they become more familiar with what the legislation meant for them.

Large employers, especially those in the public sector, tended to display a pro-active awareness of the DDA as it applied to their employees. It was usually part of the responsibility of the HR function within such employers to keep abreast of DDA legislation. In contrast, medium-sized and small organisations were more likely to be reactive to specific events which alerted them to the Act. The small minority of cases in which respondents had been made aware of the DDA only by the case in question were small employers who had less formal procedures and structures around which their organisation operated, *eg* a small family-run business. They tended to feel that the DDA was particularly cumbersome for them. A legal representative of such an organisation pointed out that awareness of the DDA had increased, but that the growth of knowledge was not evenly distributed:

"Case law has moved on some employers knowledge of disability. We're fortunate that the clients we deal with are usually clued up and sympathetic to the aims of the legislation. But not all employers are – they see it as more of a burden than a legitimate expectation." (a respondent's representative)

The nature of the organisation, *eg* size, and sector, together with the role of our interviewee within the organisation, seemed to have had considerable bearing on the extent of their awareness of the Act. Well over half of the respondents interviewed had dedicated HR functions, and interviewees who worked in HR positions in medium-sized and large organisations usually had a greater understanding of the DDA, than did the key person in small organisations where

the HR function was less clearly defined. As was noted in the Monitoring Report (Phase 1) the levels of awareness of the DDA in some organisations (most notably large organisations) varied. Key members of HR staff usually displayed good knowledge of the Act and DDA related issues, but there often appeared to be less awareness amongst some other staff, including line managers who had made the decisions which ultimately led to a DDA case being brought.

Although the applicants in the case studies typically believed that their employers were in general aware of the existence of the DDA, many said that their employer refused to accept that they were disabled. This raises questions about the extent to which employers understood the definition of disability as set out in the Act, but also highlights again that this part of the Act, and the way it works in practice, is a particularly difficult one for both applicants and respondents.

Routes to awareness for respondents

A fair proportion of the respondents had had some (often quite limited) experience of responding to a DDA case in the past. This experience was an important route by which these employers had been made aware of their obligations under the Act.

Other respondents had gained awareness 'on the job' through employing and working with disabled staff *eg* through making adjustments to accommodate a disabled employee. Large organisations usually had HR professionals for whom awareness and knowledge of the DDA was a key part of their role. Some organisations employed lawyers or deployed other individuals with legal expertise who could respond to situations involving the DDA. Some of the HR professionals interviewed were in possession of professional qualifications such as CIPD or other postgraduate

qualifications, which had included study of the DDA. Many said that they kept up to date with changes and developments in the DDA and other employment legislation through professional journals including *People Management*, *Personnel Today*, and *IDS Brief*. A small number of respondents mentioned the DRC website as a source of up-to-date information.

As in the previous first phase monitoring study, respondents were not always clear about how long they had known about the Act. It was common for those who had been working as HR professionals for some years to report that they had been aware of the DDA since its inception, as part of their professional role. Others seemed to have experienced a growing awareness over time, or had become aware more recently as a result of cases (or threats of cases) being brought against them.

Prior experience of the DDA and the tribunal system

Most of the responding organisations had had some experience of employment tribunals, although this was not always in the recent past, and some also had specific experience of a DDA case being brought against them. These were usually isolated cases, although very large organisations were likely to have had experience of more than one DDA case, partly as a result of the sheer numbers of people they employed or dealt with through their recruitment processes.

Definition of disability

Respondent interviewees who had been aware of the DDA for some years, and saw this as a key part of their job usually felt that they had a good understanding of the Act and their obligations as a result. But there were often discrepancies

between this and the extent to which they understood the way in which the definition of disability under the DDA might apply to their employees. For example, some employers knew that an employee had a longstanding condition but did not realise that this counted as a disability within the meaning of the Act. Some respondents highlighted the problem of not knowing that an employee was disabled if they had not been specifically told, and raised the question of how they could be expected to provide appropriate support and adjustments when they were not aware that an individual was disabled.

Policies and training

The vast majority of respondents had equal opportunities policies in place, but specific policies on disability were much rarer. However, many respondents said that their equal opportunities policy encompassed disability. A minority of respondents reported that they were disability symbol users.

Training specifically on the DDA had taken place in a limited number of organisations (a mixture of in-house and externally provided training was found). More commonly, respondents said that they had received, or provided to other staff, training on equal opportunities, diversity and disability more generally, and sometimes this touched on disability legislation. HR professionals had commonly received specific training on the DDA as part of their job. A small number of the individuals interviewed, usually those who had taken up posts fairly recently, said that although they had not had specific training on the DDA in their current post, they were well informed about the Act when they were recruited as a result of their previous employment or study. Some private sector service organisations mentioned in this context having received diversity/disability training relating

to customer service, rather than employment matters.

An Assistant Head of HR in a large public sector organisation had been in post for just over a year and was responsible for all areas of HR, excluding staff development. She had worked for the respondent organisation for just over a year, but had worked in HR since the early 1990s. She had been aware of the DDA since its inception; her knowledge stemmed from attending disability awareness courses and workshops on managing people with disabilities. She was very interested in looking at the DDA and seeing how it affects employers, and felt it is the duty of the employers to go beyond the DDA to ensure good practice. She had been involved with this case from the outset. The organisation was always aware that the applicant would be covered under the DDA, and felt it had offered the applicant various reasonable adjustments.

A small employer in the voluntary sector was aware of the DDA prior to the case in question, and also aware that the applicant was disabled in terms of the DDA. They were expecting the IT1 because the applicant had informally announced to her colleagues that she would take action if made redundant. The respondent was receiving personnel advice from the point of making the redundancy, and as soon as the IT1 was received, sought legal advice from solicitors. The employer had never been to an employment tribunal before, was not familiar with the system procedures and was anxious about the whole process.

The respondent was a large public sector organisation involved in a recruitment case. In previous posts the interviewee had had to deal with equality and diversity issues, and had trained others on the subject. She had attended employment tribunals before, although this organisation itself had only had been involved in one or two ET cases before this one, and none under the DDA. Prior to a recent centralisation, the organisation had a 'family feel', *eg* problems were usually dealt with internally, colleagues looked out for each other and the sense of community was good. However, the interviewee suggested that this approach to problems was not always adequate:

"In a sense it is quite naïve really, sort of thinking that everybody is the same, and that everybody who works here is nice and we don't do things like that, we don't have employment tribunals..."

A head of HR in a large public sector organisation had been aware of the DDA for several years before the case in question. The organisation also had a specialist DDA adviser whose role consisted exclusively of informing and supporting staff regarding DDA and disability issues. The organisation had never had a DDA case brought against it prior to this one. But now, whenever an employee has an illness–related problem, "*alarm bells start ringing*".

A small employer in the voluntary sector was not very well informed about the DDA prior to this case. The case has had an impact on raising awareness of the need to follow procedures, and the interviewee suggested that this had probably not been done well enough in the past. Now the respondent is keener on keeping proper records, and appraisals, and keeping people up to speed with requirements such as the DDA. However, providing training for staff on disability and equal opportunities is not an option at present due to the financial constraints of being a small company.

3.3 Barriers, motivators and facilitators to taking case

This section examines the motives that contributed to applicants' decision to bring a case; the potential barriers that some applicants faced; and some other factors that influenced their decision.

3.3.1 Motives for taking a case

A desire for justice

A desire for justice as a matter of principle was the most commonly reported reason for applicants deciding to take a case. Many of the applicants stressed that it was the way that they had been treated that had prompted them to bring a case, that they knew that they had been wronged by their employer and they wanted this to be acknowledged.

> **"I thought, how dare they do this to me. The bureaucracy was a joke, and my employers were stabbing me in the back. It was about morals and principles. It was never about the money until now, as I've lost everything, my career in this field is finished, my university degree is wasted."**
>
> **"It was the way they had treated me. Because I had a disability they told me they couldn't keep me on. I wanted justice, it wasn't fair."**
>
> **"I was not so bothered about getting a sum of money, it was more the principle. I just wanted (the employer) to admit they had discriminated against me."**

Some applicants also said that they wanted systems and procedures to improve so that others would not have to go through what they had experienced. Others wanted to raise awareness of the rights of disabled people more generally, to challenge discriminatory attitudes and behaviour and to push boundaries.

Occasionally, applicants initially lodged a case in the hope that it would enable the situation at their workplace to be resolved and enable them to return to work there, or improve

their working environment.

Financial reasons

Balanced against the cost of taking a case was the possibility of a financial award if the case was successful. Applicants usually offered this as a secondary motivation to take a case, with the principle of challenging wrongful treatment being their primary reason. Examples were found where applicants had had to take significant pay cuts, or who had experienced loss of pensions and benefits *etc.* in subsequent work they gained following the incident about which they lodged a case. They were often motivated to try to gain some financial recompense for this. Occasionally, applicants reported that they had become disabled as a result of their work, and if they then suffered a loss of earnings and/or an inability to work as result they tended to feel that a financial award was a key reason to lodge and pursue a case.

Career

Some of the applicants took cases as they felt that as a result of the (alleged) act, their career in a particular field had been damaged. Others felt that it would generally be difficult for them to get another job, partly because they were disabled. In addition to dismissals, we found cases where applicants felt that they had been forced into early retirement, when they still felt able to work given the appropriate adjustments. Other applicants took cases in the hope that they could get their previous job back or that their employer could be made to make the appropriate adjustments.

"I was just trying to get my work situation sorted out. It was like a nightmare because I didn't have the right equipment."

Career was most commonly found as a strong underlying motivation in cases relating to recruitment. Applicants in these cases, some of whom were already working for the responding organisations and had applied internally for posts, felt that they were not being given a fair chance with regard to their career. Some of the applicants in recruitment cases felt that they had frequently been on the receiving end of discrimination when applying for jobs, and the recruitment case was the culmination of a considerable period of having felt discriminated against.

3.3.2 Barriers to taking a case

Cost

Cost had been a concern for many of the applicants when considering taking a case, particularly with regard to the cost of securing legal representation. Some had been able to gain access to advice and representation through trade unions, legal aid, insurance, or through sources of free support such as the DRC, Citizens Advice Bureaux, community law centres and other services. However, financial constraints often meant that applicants had less choice over who represented them than did respondents. This may have resulted in some respondents being at an unfair advantage, as they were able to use experienced and specialist legal representation. This type of representation was far less common amongst the applicants.

Since a fair proportion of applicants had lost their jobs and were out of work, they were concerned with how they would manage from day-to-day without their wages, and so for these applicants the potential costs involved with taking a case had been a considerable barrier. Others said that their primary concern was to find more work to enable them to live and pay their mortgages *etc.* As a result, this took priority

over taking a case.

Evidence

The availability of evidence, or the lack of it, was one of the key factors in the decision as to whether it would be worth taking a case. Legal representatives often had to explain to applicants and potential applicants that they would need concrete evidence against the respondent in order for a case to be successful. Employers, particularly large employers, were usually adept at keeping careful records, and in the absence of alternative and suitable written evidence from the applicant, the employer would be well-placed if a case were taken against it. Applicants did not always have access to the same level of documentation as their employer, and this lack of hard evidence had, in some instances, proved to be a barrier to taking the case.

A lack of evidence was cited as being a particular barrier to taking recruitment cases. Applicants in the case studies who had decided to lodge claims of this type were generally adamant that they had been discriminated against. In addition, they often had more knowledge about the DDA than did applicants who lodged cases under other jurisdictions. However, several representatives pointed out that in recruitment cases it could be particularly difficult for applicants to provide evidence that proved they were the best candidate for the job, especially prior to lodging a claim, and before the questionnaire procedure[1] had been instituted. This point was also highlighted by the expert interviews carried out at the start of this study.

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[1] Under section 56 of the Act, the applicant may use the statutory questionnaire form to question the respondent on the respondent's reasons for doing any relevant act. The respondent's questionnaire is admissible evidence in any subsequent tribunal proceedings. If the respondent does not reply and does not have a reasonable excuse, the tribunal members may draw any inferences that it considers just and equitable to draw from this failure to respond.

A potential applicant sought advice from his trade union representative. He was told that, on paper, it appeared that the employer made all the necessary adjustments, even though the applicant said that it had not. The representative told him that it would be virtually impossible to prove at an employment tribunal that adjustments had not been made, and advised him not to take the case.

Medical evidence was raised as an issue by some of the applicants as being a barrier. It was seen as time-consuming and costly to obtain, especially in cases where the definition of disability was not clear cut. It was also felt to be one of the most upsetting and stressful aspects of taking a case (see Section 3.3.3). For discussion of the role played by medical evidence in decided cases, see the case review (Section 9.2.7).

3.3.3 Other factors affecting the decision to lodge a case

Confidence

Applicants in taken cases tended to be fairly confident at the outset that they had a case under the DDA. This may have been partly as a result of the outrage and upset that they had felt due to the events of alleged discrimination, which in turn led them to lodge a case. This initial confidence appears to be one of the key determinants of whether potential DDA cases are in fact lodged, with potential applicants who are less confident that they have a DDA case deciding not to fill out the IT1.

"I felt confident that I had a good case, otherwise I wouldn't have put myself through it"

Only a small number of interviews were undertaken with

potential applicants (*ie* people who believed they had experienced discrimination but had not taken a case). From these interviews, it appeared that those who were encouraged by an adviser or were confident themselves that they had a strong case were planning to submit an IT1. Those who were advised that their case would be difficult to prove, or that they had a weak case were, at the time of interview, considering not taking the process any further.

Some applicants had low self-confidence, and did not feel able to stand up for themselves in the aftermath of what they saw as a discriminatory incident. This was also sometimes related to their condition or disability. For example, applicants experiencing mental ill health, or those with learning difficulties often found it particularly hard to remain confident about themselves and their case, and were generally less equipped than some other applicants to take on the whole process of bringing a case. They tended to rely heavily on external sources of advice and support.

3.3.4 The role of advisers

The ways in which applicants accessed advice and representation were varied, as was the time at which they sought the advice. This advice had a significant effect on some applicants however, in motivating them to take the case, particularly those who had not previously been aware of the DDA.

Applicants who were members of trade unions usually contacted their union representatives as a first source of advice, soon after the incident had occurred, and prior to lodging the case. Applicants consulting other sources of advice usually, but not always, sought advice *before* lodging an IT1. Some applicants knew of specialist support organisations who they contacted for advice about their

rights in such situations. A small number of applicants had contacted the DRC helpline for advice and support. Given that less than half of the applicants had considered themselves to be disabled prior to taking their case, the small number contacting a specialist disability organisation is not surprising.

Some applicants had sought advice directly from a solicitor, as they were either willing to pay for this or were covered under an insurance scheme. Advice from legal specialists was sometimes sought after applicants had consulted other sources which had advised them to consult a solicitor or someone with legal expertise. Applicants usually knew that they could get advice and representation from a solicitor – if they were able and willing to pay for it. Other applicants went to advice centres or law centres in the hope of finding some cheaper relevant advice and support. Some applicants managed to find free sources of advice or knew people who could advise and help them.

Overall, the case studies suggested that respondents had the knowledge and resources to choose suitable representation, whereas applicants usually did not have this level of choice. In addition, many of the respondents, particularly large employers, had the structures, personnel, procedures, and contacts in place to respond to any claims made against them, and were experienced in doing so. For applicants with no experience of bringing a case to an employment tribunal (and this was virtually all of those we interviewed), the process was very much like feeling their way in the dark, and for some, their difficulty in finding a source of support for the claim constituted a significant barrier to taking or continuing with, a DDA case.

An applicant working for a local authority had originally enlisted the help of her union, but once her union had refused to support her claim, she was not able to get representation from any agencies she approached. She had found it impossible to get legal representation on a 'no win, no fee' basis, and was not entitled to legal aid. She represented herself, with advice from a DRC caseworker, and won her case, but the process caused her considerable trauma.

"I knew, I believed I hadn't done anything wrong, but the CAB, the Disability Law Service, all those places wrote me off. It was very distressing. I got ill and desperate. Once my union let me down, everyone else did. I tried everyone including training barristers, so the only options were to represent myself or give it up ... I wouldn't have known what I was doing without the DRC caseworker."

Some applicants felt that they needed better information from the medical profession, particularly regarding the definition of disability and how or whether it applied to them. Cases included in the case review confirm both the key role played by medical evidence, and the need for it to be focused clearly on the requirements of the definition (see Section 9.2.7).

Applicants often said that they would generally like more information about their rights, and about the process that they would have to go through if they took a DDA claim.

3.4 Whether other (non-legal) procedures pursued

Prior to submitting a DDA claim, some applicants had pursued a variety of non-legal procedures in an attempt to resolve the dispute. Applicants taking reasonable adjustment

and other detriment cases seemed particularly likely to have pursued internal procedures. This was often part of the negotiation process which, if it failed, eventually led to a case being lodged.

In cases involving dismissal, there were varied reactions from applicants: while some had been keen to appeal against their employer's decision, others were unwilling or felt unable to enter into negotiations of this nature. Some said that they were so angry about what had happened, or had felt that the incident was so distressing, that they did not want any more direct contact with their employer. Rather than attempting to pursue internal grievance procedures, they had decided to pursue the case through legal means straight away. Sometimes they made this clear to their employer at the time of their dismissal.

In recruitment cases, applicants were not in a position to use employing organisations' internal grievance procedures.

3.4.1 Internal procedures

Some of the applicants interviewed had gone through internal procedures, such as grievance procedures. Occasionally, applicants had already appealed against earlier incidents through internal procedures, a build-up of which had subsequently made them decide to lodge a case when a further incident occurred. It was fairly common for applicants to lodge a case if, during or after internal procedures, employers said that they did not recognise that the applicant had a disability.

In reasonable adjustment cases, it seemed to be fairly common to pursue internal procedures prior to taking a case. Applicants who were still working for their employers at the time of the case often said that they believed that an internal

appeal initially would do less to worsen their relationship with their employer than recourse to an employment tribunal. Conversely, there were examples of applicants who felt that relations had broken down to such an extent that they would not get a fair hearing via an internal route. For example, in some cases applicants did not pursue internal grievance procedures as they would have been dealt with by the person who they felt had discriminated against them.

An applicant who believed he had been bullied in the workplace and that his employer had failed to make appropriate reasonable adjustments, asked to have a personal interview with a key figure in the organisation, and also lodged a grievance with the support of his trade union representative.

An applicant sent a formal grievance letter informing the employer that they were in breach of the DDA. At the grievance meeting, the employer would not accept that the applicant was covered by the Act. Following this meeting the applicant submitted the IT1.

After a long period of what the applicant later claimed was repeated failure to make reasonable adjustments, an applicant was dismissed from a large employer. Following this, the applicant went through the employer's internal appeal system, being represented in this by a trade union. After this appeal was unsuccessful, the trade union representative submitted the IT1.

There were a couple of instances of recruitment cases where applicants were already employed by the responding organisation, but felt they had been unfairly treated with regard to applying for another post within that organisation. In such circumstances, trade union representatives could get involved and attempt to negotiate with the employer, prior to

the case being lodged.

There was a view amongst some representatives, particularly those from trade unions, that ideally, a large number of situations could be (and indeed were) resolved at the internal grievance stage through negotiation between the potential applicant and their employer. The point was made that, in many situations, simply mentioning the DDA as a possible course of action was enough to make employers comply with it. As a result, many potential applicants never had to resort to using the Act. This view was also expressed in the expert interviews.

3.4.2 Negotiations with line manager/HR

The case studies included examples of situations in which the applicant had attempted to negotiate with their line manager or HR department, usually at the time of dismissal. However, after this point, if further attempts were made to negotiate it was advisers/representatives, rather than applicants themselves, who would contact employers to see whether they would consider changing their minds and give the applicants their jobs back.

Prior to submitting an IT1, reasonable adjustment cases often involved ongoing negotiations with line managers, the HR department, occupational health departments, and doctors. Trade union representatives were sometimes involved during these processes.

> On hearing that she was being made redundant, an applicant asked her manager immediately whether her redundancy could be reconsidered. She also offered to work reduced hours instead of being let go. Her manager said that he would think about this over the next couple of days, but when she did not hear back from him she decided to seek legal means of proceeding.

An applicant had meetings with the HR department with regard to the employer making adjustments to his role, but when they said they did not believe this was reasonable the applicant submitted an IT1. Prior to receiving this, the employer was not aware that the applicant had planned to use the DDA against it.

Recruitment cases differed somewhat from those brought under the other jurisdictions, as applicants did not usually have recourse to internal procedures, or line manager negotiation. Nonetheless, many applicants in recruitment cases had contacted the respondent organisation, usually by letter, prior to lodging the case. They alerted the employer to the fact that they felt they had been unfairly treated. It was usually after the employer had responded to the effect that it defended its actions, and would not be reconsidering its decisions, that applicants submitted the IT1. Occasionally applicants submitted an IT1 when they failed to get a response from the employer.

3.5 Taking a case: choice of jurisdictions

Around half of the case studies had been lodged as a DDA claim alongside a claim under another non-DDA jurisdiction. However, this pattern varied according to the type of DDA case, with dismissal cases being most likely to have been lodged as multi-jurisdiction claims. Unfair dismissal was the most common of the other jurisdictions used; over half of the DDA dismissal cases had been registered in conjunction with this. There were also examples of DDA dismissal cases being lodged together with cases for Breach of Contract.

A number of applicants who had lodged a DDA dismissal claim had originally sought advice on taking an unfair dismissal case, but were advised that, since unfair dismissal

requires two years service with an employer, they were not eligible. It was at this point that the possibility of using the DDA was raised. A fair proportion of the 'double-barrelled' claims (*ie* those using DDA together with another jurisdiction) had come about as a result of applicants originally seeking advice about unfair dismissal, and then being advised that they could also be covered under the DDA.

Recruitment and reasonable adjustment cases were usually brought in isolation, although occasionally other non-DDA jurisdictions were included. A small number of DDA cases were taken in conjunction with the Sex Discrimination Act 1975, the Race Relations Act 1976, or the Wages Act 1986.

The first phase monitoring study found evidence to suggest a tendency to submit a DDA claim alongside a case involving wider employment law provisions *eg* unfair dismissal, in the hope of strengthening the case, rather than as a central part of it. In the current study participants with 'double-barrelled' claims were again asked which aspect they considered to be the most important part of the case. As in the Phase 1 Study, applicants themselves were often very clear that they considered the DDA element to be the main part of the case. However, this seemed often to be based on an emotional response (*ie* they felt that this should be so) rather than as a result of the legal strength of the DDA case compared to the other element(s). The fact that these applicants knew that they were being interviewed about the DDA may also have affected their responses.

Several representatives made the point that a DDA claim was often made alongside another claim as a 'bargaining tool'. The mention of the DDA was thought to be more threatening to employers than a straight unfair dismissal case, for example, due to a greater risk of adverse publicity. Amongst

the case studies there were indeed examples in which applicants' representatives said that the DDA element was added to strengthen the claim, and this was sometimes because they felt that the claim under the other jurisdiction was quite weak. There were a number of multiple jurisdiction cases taken in which the DDA element was ruled not applicable by a tribunal, due, for example, to the respondent employing less than 15 staff, or the applicant not coming within the DDA definition of a disabled person. Representatives admitted that they had known that the DDA claim would probably be contested, but felt that it was worth including nonetheless. Indeed, applicant representatives were generally keen to use all angles possible when fighting a case. As one representative said, "*it was worth a shot to use the DDA to support the other claim*".

It was also pointed out that there are problems predicting the outcome when using the DDA, as the legislation is relatively recent and case law is therefore fast moving. This suggests that it may be beneficial for applicants to bring claims which use the DDA alongside legislation which is more established. There were examples of cases in which applicant representatives felt that the balance between the DDA part of the claim and other jurisdictions was fairly even. Conversely there were a small number in which the DDA element was seen to be the major part of the case as it was primarily considered to be about discrimination.

3.6 Conclusion

This chapter has examined the process up to the submission of an IT1. The evidence from the case studies indicates that:

- The types of events that triggered applicants to take action under the DDA reflect the sub-jurisdictions of Part II of the

DDA. Being dismissed, being selected for redundancy, or being pressured into leave a job often triggered dismissal cases. Employers failing to deal with the situation triggered other detriment cases. Not being offered an interview, not being given a fair chance, and having job offers withdrawn triggered the majority of recruitment cases. Employers failing to respond to the applicant's requests triggered reasonable adjustment cases.

- Around half of applicants were aware of the existence of the DDA prior to taking their case, whilst almost all of the respondents were aware of the DDA before the case in question.
- Less than half of applicants interviewed had considered themselves to be disabled prior to the case, and the DDA definition of disability was a broader definition than many applicants had previously used.
- A desire for justice was the most commonly reported reason for applicants deciding to take a case. Financial reasons were often a secondary motivation, and the impact of the alleged act of discrimination on their career was also important to applicants, particularly to those taking recruitment cases. Cost was a major concern for many applicants when considering taking a case, and meant that applicants had less choice over who represented them than did respondents. A lack of evidence, and gaining medical evidence were also barriers to taking cases. (See case review at 9.2.7, on medical evidence in decided cases).
- The extent of negotiation with employers, prior to applicants lodging a case also varied with sub-jurisdiction of Part II of the DDA. Those taking reasonable adjustment and other detriment cases were more likely to have pursued internal procedures. Applicants in recruitment

cases were not in a position to use internal grievance procedures. In dismissal cases, whilst some appealed against their employer's decision, others felt unable to enter into negotiations of this nature.

- Dismissal cases were most likely to have been lodged as multi-jurisdiction claims, with unfair dismissal being the most common of the other jurisdictions used. Recruitment and reasonable adjustment cases were usually brought in isolation. Many of the as multi-jurisdiction claims had come about as a result of applicant originally seeking advice about unfair dismissal. In some cases the DDA element was added to strengthen the claim, and in some cases the DDA element was ruled not applicable by a tribunal.

4. Settled, Withdrawn and Conciliated Cases: Process and Outcome

4.1 Introduction

4.1.1 Background

Although not often regarded as a particularly high-profile element of legal action under the DDA, claims which are resolved without the need for a formal tribunal hearing constitute over three-quarters of applications received overall. As highlighted in Table 4.1, conciliation and withdrawal have a key role in the legal process, with the proportions of claims disposed of in this way remaining consistent with levels found during the phase 1 monitoring study.

Table 4.1: DDA claims disposed of by employment tribunals Service 2001/2

	All DDA cases		**Cases with DDA as main juristiction**	
	Numbers	**%**	**Numbers**	**%**
ACAS conciliated settlements	1,526	42	856	41
Withdrawn	1,307	36	767	37
Successful at tribunal	137	4	77	4
Dismissed at hearing	481	13	268	13
Other	176	5	96	5
Total	3,627	100	2,064	100

Source: ETS

Note: There are two important differences between the data referred to above and those referred to in Section 2.1.2 in respect of successful claims. Firstly, the database of cases used in phases 1 and 2 of the monitoring study details cumulative 'stock' data involving the total population of cases to date. The ETS data details only 'flow' data, that is those claims reaching a conclusion within a given period, in this case a year. Secondly, the monitoring study success rates are based on those cases about which a judgement has been made, whereas the ETS data involves all cases lodged and disposed of, including settlement and withdrawal outcomes. It is for these reasons that the proportions of successful claims does not appear to reflect the trends detailed in Chapter 2.

4.1.2 The process

Typically, an applicant who has decided to withdraw his/her claim must inform both the tribunal and the respondent organisation in writing at as early a stage as possible in the process.

A settlement may either be arranged privately between the parties involved in a claim, or be brokered by an independent conciliation body or other third party. In addition, either side may initiate the process: a respondent may enact proceedings by making a settlement offer, but equally, an applicant may prompt a conciliation by making it known that he/she would consider an offer were one made. Representatives play an important, often crucial, part in the process, mediating between the opposing sides, sometimes asserting a great deal of control over the negotiations themselves. Decisions to settle or withdraw amongst the majority of our case study claims were influenced by legal representatives, usually solicitors. Most of our settled case study claims were prompted by a settlement offer made by the respondent side.

4.1.3 Timing

Timing is an important factor in the settlement/withdrawal process. If a withdrawal, for example, is made unnecessarily late, the tribunal is entitled to order an applicant to pay costs to the respondent's side, towards their preparation for the hearing. The timing of settlements, too, can have a key impact on financial outcomes. Although there was a small number disposed of in advance of the hearing date, the majority of our settled case study claims reached a resolution immediately before the final hearing, whether on the day of the hearing or on the day before. A notable number were settled following a preliminary hearing at which disability status had been established.

4.1.4 Motivating factors

A number of factors may impact upon an individual's desire to settle or withdraw their claim. Our findings reveal that, for some, the stress of the process and the part they are obliged to play within it becomes too great, while others are unable to sustain the financial outlay required in bringing a claim, or are faced with procedural difficulties which force them to discontinue. Some develop a greater level of awareness with the progress of a claim and realise they have only a limited prospect of success, while for others the process is a balancing act in which costs are measured against the benefits of winning the case should it proceed to tribunal. The fear of negative publicity is also an important factor in decisions to settle or withdraw. Motivations to settle resemble those making for withdrawal, but include additional factors, since withdrawals are borne out of decisions made by applicants alone, while settlements involve the wishes of both parties. These kinds of factors are explored in more detail below in Section 6.3 in the context of case study examples.

4.1.5 Withdrawn and settled cases

- There were 22 claims altogether fitting this classification amongst the case studies – nine withdrawals and 13 settlements, with a greater proportion of straightforward withdrawals than in the phase 1 monitoring study.
- The views and experiences of 17 applicants, six respondents, five applicant representatives and one respondent representative, were drawn upon for this section.
- The majority of applicants were unaware of the DDA prior to making their claim.
- The majority of claims made were stand-alone DDA.
- ACAS appeared to be involved in only a minority of cases. It is possible, however, that conciliators were involved in a greater number of cases, but that represented applicants were unaware of this, since ACAS had no direct dealings with them and instead dealt with the case via their representative.

4.2 Third party involvement

4.2.1 Advisers/representatives

Many types of adviser were involved in the settled/withdrawn case study claims. These included solicitors (both independent and trade union-affiliated), barristers, trade union representatives, Disability Rights Commission (DRC) caseworkers, and Citizens Advice Bureaux (CABx) officers.

In general, representatives and advisers had a great deal of influence over the outcomes of settled/withdrawn cases. Some interviewees, particularly those whose prior awareness levels were low, expected a great deal from their advisers and relied heavily on any advice given. A few sought out alternative or additional sources of information,

sometimes using material from the Internet or from independent disability organisations. Perceptions of advisers and representatives were fairly mixed. Some felt thoroughly indebted to their advisers, whom they found to be hard-working and very supportive, whereas others described their advisers as remote, inefficient, inattentive or lacking adequate skills.

Difficulties

The levels of influence commanded by advisers and representatives sometimes became a problematic part of the withdrawal or settlement process. A number of interviewees felt they had no option but to follow the advice of their representatives, even where it went against their own instincts, and consequently reported feeling quite unhappy with the outcome. High levels of influence became problematic particularly where advice was felt to be biased or mistaken in some way. Some interviewees felt their representatives were giving misconceived advice based, for example, on a perception that tribunals tend to find in favour of a particular side. Others felt simply that their adviser was not well enough informed. Potentially strong cases were sometimes routed into settlement or withdrawal merely because of poor advice or inadequate representation.

In some cases, a change of adviser mid-claim presented problems. Contradictory advice was sometimes given in these instances causing a claim to lose its way. In other cases, an individual would build up a strong rapport with a first representative, only for the claim to be taken over by somebody less agreeable or committed.

One applicant involved in a less favourable treatment/dismissal claim was advised during her case by two different union representatives. She had built up a positive relationship with the first, whom she had met in person and who had provided a lot of support in the initial stages of making the claim. However, the second representative dealt with her only once on the telephone and she found him to be inattentive and lacking in commitment: *"he didn't listen to my story"*. At the preliminary hearing, he did not present her case confidently and she felt he gave way too readily to the Chairman's interruptions. Ultimately, she felt she had no option but to withdraw her claim.

Some advisers were felt by their clients to be remote and inaccessible, to be failing to provide adequate information about the progress of a claim. Without this information, those involved were 'left in the dark', ill-equipped to make decisions about the claim and more intensely reliant on their representatives as a consequence. Non-paying applicants were particularly vulnerable to these kinds of problems, as illustrated by the following case study.

An applicant bringing a recruitment claim under the Act was assigned a solicitor by an external agency. The agency indicated that it would not be directly involved in the claim, but would be paying the applicant's expenses. The applicant felt a distinct lack of control over this choice of solicitor and was not happy with her services. He found he constantly had to "*chase her up*" to establish what was happening with his case. She was half an hour late for their first meeting and seemed to lack commitment. On the day of the hearing she seemed intimidated by the respondent's team and was inadequately prepared. The case ended up being settled against the wishes of the applicant. The applicant felt it had been difficult for him, as a non-paying client, to make demands on his representative, and was conscious of a difficult power dynamic between them.

A number of representatives were interviewed as part of the case studies, and it is perhaps important to note here that their views did not always coincide with those of their clients' on the issue of advice. An applicant's satisfaction with his/her representative, for example, may be related to a number of other factors – whether their prior expectations were unrealistic, whether their prior awareness was low, whether the claim 'went their way', whether the representative told them what they wanted to hear, and so on. A course of action felt by a representative to be legally realistic, for example, can seem unfair to an applicant or respondent, who may be left with a different perception of the claim.

A number of interviewees had mixed feelings about the advice and representation they received, as shown in the following case study examples.

An unrepresented applicant bringing a dismissal claim under the Act had mixed feelings about the advice he had received during the process. He was not very impressed by ACAS describing their input as "*totally useless*". Their involvement in the conciliation process was minimal: "*they behaved as if they didn't want to know*". The applicant described his DRC caseworker, on the other hand, as "*spot-on*" and "*fantastic*". She always made herself available, making a point of responding to his queries on the same day. She was very supportive at every stage of the process, advising him on what to include in the IT1 and on how best to use the DL56 questionnaire procedure.

An applicant involved in a claim against a bus company had very mixed feelings about the advice she received during her claim. Initially she contacted her local CAB, but felt the way in which the officer there handled her case was "*disgusting*". She felt he was biased against taking claims to tribunal due to his own difficult past experiences in that area, and he seemed to lose interest in her claim when she refused to accept an initial settlement offer. He even suggested that her disability was inhibiting her capacity to understand the process. However, she contacted the DRC and was assigned a case worker without whom she would have felt "*cast adrift*". The case worker was extremely thorough and helpful, and the applicant described her as "*absolutely brilliant*".

Other interviewees prized the judgements of their representatives to the exclusion of all other input.

A respondent involved in a reasonable adjustment case deliberately opted not to use the services of a conciliation agency. He had been involved in a number of claims prior to the case in question and had built up a solid working relationship with a local legal practice. Since, in his view, negotiating a settlement via an outside conciliation agency tended to cut the barristers out of the loop, he preferred to bypass these kinds of services. (In fact, ACAS are obliged to deal with representatives where they exist, see Section 4.2.3) He knew that his local legal team liked to be autonomous in settlement decisions, and was reluctant to jeopardise their good working relationship.

4.2.2 ACAS/LRA

Independent conciliation organisations exist to provide third party support and assistance to parties involved in workplace disputes in order that claims might be resolved without the

need for a full hearing. The Advisory, Conciliation and Arbitration Service (ACAS) and the Labour Relations Agency (LRA), its partner in Northern Ireland, have a statutory duty to provide this kind of impartial input, to facilitate outcomes which minimise damage and expense.

Table 4.2: DDA cases received and dealt with by ACAS (with or without an IT1)

	2001/02	2000/01	1999/00
Cases received	5,057	4,422	3,583
Settled	1,957	1,647	1,410
Withdrawn	1,317	1,102	934
Heard at ET	791	679	572
Total cases completed	4,065	3,428	2,916

Source: ACAS

Of all DDA cases dealt with by ACAS in 2001/02, then, nearly half were successfully conciliated by ACAS and close to a third were withdrawn. Proportions of settled and withdrawn claims have remained stable since 1999. These figures reflect the picture outlined above in Table 4.1.

4.2.3 Views of ACAS conciliators

A group discussion was held with ACAS conciliators during the case study phase of the research and a number of interesting points were raised.

Approach

There appeared to be a number of variations in approach amongst the conciliators who took part in the group. Some sent a standard letter to those registering a claim under the Act, others followed up initial contact with explanatory

phonecalls and home visits. Some contacted the respondent side first and others the applicant side. One conciliator aimed to build up links with local employers to enhance credibility and establish trust. Another had formulated a document containing key information about the questionnaire procedure to send to parties embarking on the process. All mentioned the importance of "*getting in early*" before too much time and money had been invested in the process, and before emotional responses to the situation had become entrenched. Indeed, one conciliator emphasised the importance of pre-IT1 guidance in assisting individuals to think realistically about legal action under the DDA. Another arranged face-to-face meetings between the parties involved in a claim, noting that this approach often helped to break down barriers. In these many different ways, the conciliators taking part in the group expressed and demonstrated great commitment to the conciliation process.

Factors affecting the conciliation process

- ACAS are obliged to deal with representatives where they exist. Some of the group participants felt that representatives could constitute a barrier to conciliation particularly where they were uninformed or biased. Others felt that representatives injected an element of sense and objectivity into the process, and were happy to deal with them. Quality of representation in general was felt to be rather variable, with some representatives far more informed and highly-skilled than others. Representatives and advisers, the conciliators felt, were more likely than previously to be frank about the likely success of a claim due to the growing body of case law and a greater awareness about threats of costs.

The conciliators noted a general lack of knowledge about

disability issues and the DDA amongst parties involved in claims. Many, for example, are not adequately aware of the legalistic nature of the process, or have unrealistic expectations about compensation outcomes. Others are not sure of their obligations under the Act. Once individuals develop a greater awareness, their willingness to conciliate tends to increase, according to the conciliators.

- The conciliators referred to the problems associated with conciliating in multiple jurisdiction claims, for example, where a DDA claim is brought in conjunction with an unfair dismissal claim. Sometimes, they felt suspicious that those making claims under more than one jurisdiction were just "*trying their luck*", and that this could present barriers to conciliation.
- The difficulties associated with medical evidence and non-visible disabilities were raised during the discussion. It was noted, for example, that medical evidence could sometimes be conflicting, reducing a claim to the word of one independent 'expert' versus another. The conciliators acknowledged the difficulties of offering guidance on this issue.
- All referred to the complexities of the Act and the difficulties they experienced in explaining legal terms and processes to those with no prior experience.
- The group participants noted the differences between larger and smaller employers in respect of propensity to conciliate. Smaller organisations on tighter budgets are more inclined to pursue conciliation and settlement outcomes.

Interestingly, it seemed that barriers to bringing cases – fears of tribunal hearings, the unwillingness to 'prove' one's disability, difficulties in understanding the law, unrealistic

expectations, conflicting medical evidence – could act to facilitate the conciliation process. That is, those elements of the law or process which may be regarded as making it difficult to claim, can sometimes make settling easier.

Mixed views of ACAS amongst case study participants

Amongst the case study sample as a whole, it is notable that the vast majority of interviewees, including representatives, either were unaware of ACAS involvement in claims made, or considered the conciliation body to have had only a minor level of involvement. ACAS was felt to have had a key role in less than a tenth of our case study claims. Since ACAS conciliation officers are obliged to deal with representatives where they exist, it is possible that applicants and respondents were not generally aware of the extent to which ACAS was involved in claims made under the Act. However, it is important to note that, in our sample, those interviewees who considered ACAS to have had, at most, no more than minor involvement in the process, included all of the representative interviewees for whom awareness was not an issue. However, in some of the cases where only minor involvement by ACAS was reported, this seemed to be because at least one of the parties was unwilling to co-operate, despite an approach by ACAS.

Amongst those 22 case study claims which were settled or withdrawn, a similar picture emerges. Settlements were known to have been brokered by ACAS in only a tiny minority of cases. The majority of interviewees were applicants however, who may not have been fully aware as to the extent of ACAS involvement. Perhaps as a result of this, interviewees' views about ACAS have not emerged overall as a prominent feature of the case study interviews.

However, a number of negative perceptions of ACAS emerged during the study:

- Some interviewees complained about a lack of commitment on the part of ACAS. Of those who had had some level of contact, some recalled having barely heard from ACAS during the process, while others believed that ACAS' input was "*too little, too late*". Importantly, some interviewees suggested there was a lack of faith in ACAS and the conciliation process on the part of advisers, as illustrated by the following case study.

Having lodged a dismissal claim under the Act, a partially sighted applicant was told by his solicitor that ACAS had made contact. He was advised, however, not to return contact. She told him, "*you'll just end up with it going backwards and forwards and nothing will happen*".

- Some interviewees noted that ACAS appeared to function merely as a medium to formalise settlements or to 'rubber-stamp' outcomes brokered by others.
- Some felt that ACAS conciliators were overly influential and powerful, a dynamic which could too readily produce pressure to settle. This was felt to be particularly problematic in cases where the conciliator was perceived as biased or lacking in commitment.

In contrast, some interviewees reflected very positively on ACAS' involvement in their claim, as the following case studies show.

An applicant with depression brought a dismissal claim against his employer, a large private sector organisation. Although he ended up withdrawing his claim, he felt very positive about the role ACAS had had during the process. He described the conciliator involved as "*very committed*" and as "*bending over backwards*" to reach an alternative resolution.

A trade union representative involved on behalf of an applicant in a recruitment claim felt that ACAS had improved greatly in recent years. She described the organisation as "*quick off the mark*" and considered its emphasis to have brought a great deal of clarity to the process. She had great trust and confidence in the conciliation process.

4.3 Reasons for withdrawal/settlement

4.3.1 Awareness

Amongst those applicants involved in settled and withdrawn cases, the progression from relative ignorance to a greater and sometimes emotionally-charged awareness of the law was notable. Some applicants noted that, if they had known prior to lodging the claim what they knew by the time of our interview, they might well not have embarked on the process at all.

An applicant who had withdrawn a dismissal claim lodged under the Act, reflected that greater clarity of the issues at an earlier stage would have helped him realise his case was not strong enough to 'stand up in court'. He had become aware, only with the progress of the claim itself, how hard it would be to prove discrimination had occurred in this case. With more realistic information at an earlier point in the process, the applicant felt it was likely he would have withdrawn his claim sooner: "*I'm not enough of a fool to pursue a case with no hope*". In the event, two preliminary hearings had passed and a great deal of time and energy expended before he withdrew the claim.

Another applicant noted that if she had been more aware of what was involved in bringing a claim under the Act, particularly in respect of burden of proof issues, she would never have pursued the case in the first place.

4.3.2 Medical evidence

The obligations associated with acquiring medical evidence were also cited by some of the case study interviewees as a key impetus to settle or withdraw. Although the expense of obtaining a medical report from an independent health expert was not mentioned by those of our case study interviewees whose claims were settled or withdrawn, the indignities and difficulties of the process were flagged up, as is highlighted below.

An applicant whose disability stemmed from an injury at work complained that contradictory health assessments from medical specialists had obstructed the process of making reasonable adjustments in the workplace and ultimately had made it difficult for her to judge her chances of success in claiming under the DDA.

An applicant in a recruitment case felt such enormous indignation and stress at having to 'prove' her disability through acquiring medical evidence that she was prompted to withdraw her claim. She felt that providing evidence of disablement, to the point of being "*poked at and prodded*" by a doctor she didn't know, was more demeaning than the original act of discrimination.

"Anything you go for in this world if you're a disabled person, it's a fight – to get services, to get this, to get that, certainly to get employment. And I thought, why should I, as a disabled person, have to go through all this stress, just to get at the truth?"

The crucial role frequently played by medical evidence in decided cases is highlighted in the case review.

As in the phase 1 monitoring study, there seemed to exist a

number of problems for representatives in respect of advising on the issue of medical evidence. In spite of developments in case law and a growing body of legal precedents, the Act is still relatively new in the context of other discrimination legislation. Awareness and training continue to be an issue for many advisers and representatives grappling with the complexities of the Act, particularly in respect of certain kinds of impairment, as the following example shows.

> A solicitor advising an applicant in a multi-jurisdiction case recommended his client settle as he was unsure whether her mental health problems would be defined as a disability under the Act. In spite of being familiar with the Act and regulations made under it, he felt the burden of proof issue always presented challenges to those litigating under the DDA, particularly in respect of those with 'non-visible' disabilities.

One representative noted that it was common for respondents to settle after disability status has been confirmed at a preliminary hearing. Prior to this, they were likely to challenge disability as a matter of course.

4.3.3 Strength of case

A number of interviewees, felt by their representatives to have little prospect of success under the Act, were strongly encouraged to pursue a settlement or withdrawal outcome.

> A solicitor representing a public sector organisation in a recruitment case advised her client to settle. In this case, the responding organisation had made an unconditional job offer, but had then withdrawn this offer on receipt of less than satisfactory references. As far as the respondent was concerned, the issue was never one of disability; it was

simply felt that the applicant was unsuitable for the position. However, since the organisation's recruitment procedures had been shown to be inadequate, with an offer made and then withdrawn, the representative advised they pursue a settlement outcome.

4.3.4 Financial considerations

The financial side of involvement in a legal claim can be problematic in a number of ways both for those responding to claims and for those bringing them. A number of case study interviewees whose claims were settled or withdrawn became concerned during the process about mounting expenses.These included:

- Legal fees for those without financial assistance, that is those who were ineligible for legal aid or DRC assistance, who had no access to local law centres, and who had no legal cover as part of an insurance policy.
- The indirect expense of time spent on dealing with the claim, particularly a factor for respondents obliged to commit working hours to the process.
- The possibility of a costs ruling being made against a party for bringing a misconceived or mishandled claim.
- The burden of bringing a claim on a reduced income, particularly a problem for applicants involved in dismissal or recruitment claims who funded their claim on a pension, on a significantly reduced salary, or without a salary at all.

The following case study illustrates a typical scenario involving an applicant.

An applicant with depression bringing a dismissal claim under the DDA was ultimately unable to pursue the case due to a lack of funds. As the case progressed, he became increasingly anxious about the expense of bringing the claim, particularly since he was unemployed and living on a pension of £260 a month. The applicant's representative felt the respondent's team was capitalising on the applicant's anxieties about the expense of the process, in an attempt to make him so ill that he abandoned the claim. He was paying out several thousands of pounds in legal fees, with the first morning of the hearing alone costing him £3,000. The respondents told him that if they didn't win the case they would appeal and that this would be likely to take several months. The applicant was very distressed about his financial situation and in the end was forced to settle the claim:

"So after two and a half years fighting it, I'm no further forward, and I've had to throw in the towel because basically I can't afford it".

A number of our respondents, too, were cowed by the expense of the legal process as the following example shows.

A large educational establishment responding to a reasonable adjustment claim found the expense of the process prohibitive. Following a preliminary hearing, the respondent approached his barrister for advice on the likely duration of the claim. He was told it would take a number of days just for the applicant to prove his disability status. The legal fees, the respondent's own time, plus the cost of medical evidence made even the preliminary stage too expensive. With half an eye on the costs of a substantive hearing, and anxious about the possibility of paying out if the applicant were successful, the respondent decided it would be best to cut his losses and broach a settlement.

Many respondents were obliged to deal with cases pragmatically, to consider their financial outgoings first and foremost, rather than to pursue justice and 'the truth'. If it were more realistic in financial terms for a responding organisation to seek a settlement outcome, then, often it would be obliged to do so, even where a claim was felt to be weak; as a number of employers pointed out, a DDA case is expensive for a respondent, regardless of whether it is successful.

A medium-sized private sector organisation responding to a DDA dismissal claim initially offered £1,000 in settlement to the applicant, but this was turned down. Their second offer of £2,000 was also turned down. Finally they offered £3,000. The respondent was advised by a legal representative not to offer a settlement figure above this amount, since in that event it would be more cost-effective for the organisation to allow the claim to proceed to a full hearing. The representative considered the respondent to have a good chance of winning, and felt a settlement outcome would be preferable only if cost-effective.

Interestingly, one respondent who had attended a conciliation agency conference (LRA) had been urged not to settle for financial reasons if the case was felt to be unfounded. He felt this was easier said than done, since litigation, for parties responding to claims, is very expensive, even where those parties are successful.

Threats of costs were a major source of stress for some of the case study applicants, and a factor in many decisions to settle.

An applicant pursuing a recruitment claim under the Act felt obliged to settle due to a threat of costs. He had had epilepsy since birth, but had not had any seizures for three years, and had, in addition, stopped taking medication for the condition. His representatives felt that, as a result, he was unlikely to be defined as disabled under the Act, and were anxious to pursue a settlement outcome. They suggested to their client that if the case went to full hearing and was found to be misconceived, he might be charged with paying costs to the responding party. The applicant felt he had no option but to settle, but felt dissatisfied with this since he had brought the claim primarily out a desire for justice rather than for compensation of any kind.

The difficulty for respondents in gauging an appropriate settlement figure, which is explored in greater detail below in Section 4.4, was mirrored, for applicants, in the process of deciding whether or not to accept any offers made. Like respondents, applicants were often advised to approach the process pragmatically, to balance costs against the benefits of winning.

An applicant with a back injury sustained at work brought a dismissal claim under the Act. The respondent offered her £3,000 to settle the claim and her legal representative advised her to accept this offer. Since she had not sustained any broken bones in the incident, her representative judged the amount offered by the respondent to be on a par with any compensation award she might be made at tribunal level if her claim were successful. She accepted and was happy with the settlement figure.

4.3.5 Difficulty/stress of process

A large proportion of applicants interviewed found the process of making their claim a stressful one. Many felt

emotionally challenged, while others found the process had a detrimental effect on their disability. In some cases, this directly impacted upon decisions to withdraw or settle.

An applicant with RSI-related problems and Chronic Fatigue Syndrome was obliged to write out her medical history by hand and complete other forms at short notice as part of her claim. This exacerbated her disabilities and made her feel the Act and the litigation process had not been designed with disability in mind. This, along with others parts of the process, caused her to feel very stressed and angry. She had many sleepless nights and her symptoms were worsened by anxiety. She withdrew her claim prior to the first hearing.

Respondents, too, were often deeply affected by the stress of the process.

A respondent representative had to spend time counselling her client, who was left feeling raw and manipulated following a case brought by 'serial applicant'. The organisation in question had strong disability policies and was very supportive of its disabled staff, but had slipped up as a result of recruitment procedures which lacked rigour and appropriate formality. The representative noted that losing at an employment tribunal can be devastating for managers and wondered whether panels were fully aware of the impact their judgements can have on respondent organisations. In her experience, it tended, ironically, to be the better managers, those who spent time increasing awareness amongst the workforce, who ended up with claims brought against them. The respondent in this case became upset at the personal attacks made by the applicant on members of her team, and disconsolate and frustrated during the process wondering what more she could have done. Ultimately, the applicant initiated a settlement agreement on the day of the hearing which greatly surprised the respondent side. The respondent was relieved not to have had to endure a tribunal hearing.

4.3.6 Procedural/technical factors

Where there was some doubt about a procedural or technical part of a claim, it was likely, on the basis of the case studies, that an applicant would be advised to settle or withdraw. These kinds of factors included:

- Cases which fell outside the scope of the legislation. Respondent organisations with fewer than 15 employees, for example, are not covered by the Act, and claims brought against such organisations will be judged invalid and thrown out[1].
- Cases where an 'out of time' ruling was likely to be made. Various time bars exist within the legislation for both applicants and respondents. An applicant, for example, must file his/her claim within three months of the act of discrimination, or face an 'out of time' ruling.

The cases detailed below illustrate these factors, and demonstrate the challenges faced in this area by some of our case study applicants.

> An applicant with depression was obliged to withdraw her dismissal claim as the size of the responding organisation brought it outside the scope of the DDA. The employer was found to have nine employees, and in spite of its being connected in partnership with a much larger organisation, the claim was invalidated. The applicant was very angry that organisations could be exempted from scrutiny merely on the basis of their size. She noted that awareness of employee rights at the organisation had been inadequate, particularly in respect of health and safety, and felt the ruling had denied her the chance of challenging shoddy practice.

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1 The Government has stated its intention to remove the small business exemption by October 2004 (see Section 'Small Employer Exemption' in Section 9.2.10).

An applicant with mobility problems bringing a dismissal claim against a voluntary sector organisation decided to withdraw his claim in view of the possibility that it might be judged 'out of time'. He had been made redundant and had contacted the DRC only two to three months after leaving the organisation. The claim proceeded to a directions hearing, after which the applicant was informed by a solicitor that the 'time bar rule' might be a problem in his case. He had not realised that delays in claiming under the DDA could be crucial, and following his redundancy, had spent much of his time finding a new job. In the event, he withdrew the claim at the advice of the solicitor.

The case review notes that both time limits and the small employer exemption have been unsuccessfully challenged under the Human Rights Act 1998, though the latter is due to be ended by October 2004.

Interviewees expressed a number of mixed feelings about 'out of time' rulings. One respondent involved in a reasonable adjustment claim, for example, felt that tribunals tended to 'bend over backwards' to give applicants the benefit of the doubt on this issue. In this case, the applicant had pleaded ignorance of the law. The panel members had accepted this, and, in turn, had overlooked this key part of the legislation. Applicants, and many representatives, however, tended to argue that time bar rulings fell more heavily against those bringing claims. Many suggested that time limitations faced by applicants were less fair, less realistic and less negotiable than those faced by respondents.

4.3.7 Risk of adverse publicity

The avoidance of bad publicity was widely considered amongst the case study interviewees to be a force making for settlement. This is a consideration particularly for

respondents, who commonly attach a 'confidentiality clause' to settlements in order to preserve a good reputation and minimise the risk of negative or uncomfortable publicity.

A respondent involved in a recruitment case was encouraged to settle by a legal representative who felt that a tribunal would be likely to come down more heavily upon them as a local authority which should be seen to be maintaining standards. The representative had been very impressed by the respondent's efforts to accommodate its disabled staff in general and was reluctant to allow the organisation's good name to be "*dragged through ET and smeared*".

Applicants, too, were concerned about these kinds of negative outcomes. One case study applicant withdrew her claim out of an unwillingness to 'advertise' the fact of her disability to future employers. Others negotiated settlements to include the provision of a good reference from their employer in order to avoid being labelled in the future as a whistle-blower or trouble-maker.

4.4 Terms of settlement

The settlement figures amongst the case studies (where known) ranged from £500 to £10,000. The average amount was £3,312.

Settlement agreements represented amongst our case studies included such terms as:

- A confidentiality clause
- A letter of apology to the applicant
- A commitment on the part of the responding organisation to review policies and procedures

- The possibility of a future reference for the applicant
- Re-employment of the applicant
- The offer of adjustments for the applicant
- An amount which did not implicate the respondent in an admission of liability.

The majority of settlements were arrived at either on the day of or on the day before the hearing and almost all were initiated by the respondent's side.

Frequently, settlement negotiations would rest on a process of bargaining and brinkmanship between the opposing sides, with each party delaying the outcome in order to achieve the best possible result for themselves.

A case brought by a dyslexic applicant was ultimately settled by the legal representatives of each side in the corridor of the tribunal building itself. Earlier in the process, the respondent organisation had offered the applicant what was felt to be "*a paltry amount*" and this offer was rejected. A week before the hearing, a more substantial amount was offered. The applicant's legal insurers advised the applicant to accept this offer, since it was felt to be optimal, and warned that if she did not, she would have to fund the claim herself from that point onwards. However, when the applicant accepted the offer, the organisation withdrew it, and it seemed to the applicant as though the respondent was playing a game and trying to wear her down. On the day of the hearing, the representatives had a consultation, and it became clear that the respondent's advocate was reluctant to represent the organisation at tribunal. Having discussed the matter, they explained to the tribunal that a settlement had been reached, and the case was closed.

The difficulty of deciding upon an appropriate settlement

figure was a problem particularly for responding organisations. In one case, a settlement offer made by a respondent was accepted on the day of the hearing. The respondent had received advice from two separate sources during the settlement negotiations, but had not been entirely satisfied with either. The fact that the applicant had so readily accepted the offer when it was made caused the respondent to suspect she had been misadvised into offering too much.

Another responding organisation dealing with a dismissal claim had difficulties arriving at an appropriate settlement figure. The employer in this case was fully prepared to offer £1,000-£2,000 to settle, and was rather embarrassed when he was advised by his solicitor to start the negotiations at £500. In the event, the applicant accepted this first offer, which left the respondent feeling that he had offered too much and that the claim was frivolous.

4.5 Applicants' views on decisions to settle/withdraw

It is perhaps unsurprising that many of those involved in bringing or responding to claims under the Act seemed to reflect most readily on the difficulties and stresses they endured during the litigation process, with almost all of those interviewed recalling mixed or negative experiences. The nature of legal action under the Act involving, as it does, conflict with former colleagues and friends, high levels of financial and emotional commitment, thorny legal terms and technicalities, and so on, means that those involved are unlikely to reflect on their experiences in an entirely positive way.

This general picture is reflected on a smaller scale amongst those of the case study claims which were settled or

withdrawn. Applicant interviewees, for example, were seldom unreservedly satisfied with the outcome of their claims, as the following case studies illustrate.

An applicant involved in a recruitment case was satisfied with the settlement outcome in terms of the amount she was offered, but felt unhappy at being "*gagged*" by the confidentiality clause which underpinned the agreement. One of her primary motivations for bringing the claim was to raise awareness and to publicise the cause for disabled people, and she felt very frustrated at having to remain silent about the claim she had brought.

In this case, an applicant who had originally been quite satisfied with her settlement, became, due to subsequent changes in her circumstances, less happy with the outcome. Since settling her claim, she discovered that a health condition brought on by the accident at work which prompted her initial claim was more complicated than first thought. Importantly, her disability was found to be degenerative and therefore likely to inhibit future employability. Due to inadequate health assessments and months of misdiagnosis at the time of the claim, she had been unable to take into account the full implications of her condition when arriving at a settlement figure. Now, she is angry, as it is too late to renegotiate.

An applicant who withdrew a dismissal claim against a local council felt very unhappy about the outcome. As far as he was concerned, he had been denied his 'day in court' and could only conclude that the DDA was weak and a 'soft touch' for employers.

An applicant involved in a settled dismissal claim against a large private sector employer had experienced problems, not in arriving at a satisfactory settlement figure, but in recovering the amount at the close of the case. Although the respondent had admitted liability and agreed on a settlement amount, the applicant was unable to get it to pay up. He had been forced to take further legal action against the organisation in order to get the settlement amount paid. At the time of the interview, the amount was still outstanding. The applicant was left feeling regretful that tribunals had no power to enforce their judgements.

In another case, however, where a recruitment claim was settled on the day of the hearing itself, the panel stayed the case for two weeks pending payment of the settlement amount. It appears that tribunals vary in the extent to which they draw on this power.

Other applicants felt dissatisfied with the settlement figure itself, and considered it did not adequately reflect the distress and inconvenience caused by the act of discrimination. Some applicants felt they had no option but to follow the advice of their representatives on the subject of settlement, even where this went against their own instincts. Many had felt obliged or even pushed into pursuing a settlement outcome and consequently tended to be less happy with the result. Since most applicants followed the advice of a representative when deciding whether or not to settle, this problem was fairly widespread.

Importantly, a number of applicants interviewed for this section said that, based on their experiences, they would be unlikely to pursue a DDA claim in the future.

4.6 Respondents' views on decisions to settle/withdraw

The number of case study respondents involved in withdrawn and settled cases was relatively small, and levels of satisfaction were mixed. Most had a fairly pragmatic view of the process and were relieved that a full tribunal hearing had been avoided, from a financial as well as from a personal perspective. In spite of this, some respondents still felt disgruntled about having to pay out a settlement figure at all. For others, the experience of pursuing the claim had caused them to reflect on their practices and how they could have done things differently if faced with the same situation. Here, the settlement had functioned as a wake-up call. The ways in which case study respondents were affected in the longer term by claims brought against them is discussed in greater detail in Chapter 7.

Just as was the case for the applicants, the respondent interviewees were rarely unreservedly happy with their settlement outcomes, a fact illustrated by the case below.

A public sector respondent involved in a DDA recruitment case felt mixed about the settlement outcome. The case involved a job applicant who was found to have been a 'difficult' employee in the past, and so was turned down for the position. Although the case had been very stressful, the responding HR manager felt satisfied that allowing the case to be brought and settled had averted greater expense and hassle in the long-term. However, as far as she was concerned, the issue was never one of disability, so she felt manipulated and upset at having to pay out money in settlement.

4.7 Conclusion

To summarise, then, a number of advantages exist to settling claims.

- The expense of involvement in a claim is significantly reduced both for applicants and for respondents.
- Adverse publicity may be averted by both parties.
- The stress of participating in a hearing is removed. This may be particularly important for those intimidated by or unused to the legalistic nature of the process.

In addition, great public expense is avoided since claims do not reach the tribunal stage, and the process is speeded up for those cases which remain.

In spite of this, a number of interviewees drew attention to the disadvantages of settling, namely that:

- The parties involved are denied their 'day in court', a part of the process particularly important, for example, to those applicants bringing claims in order to publicise a greater cause.
- If a claim is settled, it will not contribute to the body of case law, which is important for guidance and agenda-setting. It is especially unfortunate if a strong claim is settled simply because an applicant or his/her representative is anxious it will not be successful.

5. Ongoing Cases and Cases Decided at Tribunal: the Process

5.1 Introduction

This chapter is concerned with the experiences of applicants, respondents and their representatives following the decision to lodge an IT1. It covers the process from the stage of lodging the IT1 up to the tribunal hearing. It does not include cases that were withdrawn, settled or conciliated which were discussed in Chapter 4. The outcomes of the tribunal cases and the factors influencing the outcome are dealt with in Chapter 6.

A total of 59 cases come within the scope of this chapter. The breakdown of cases is shown in Table 5.1:

Table 5.1: Case studies by status of case

Status	No.
Successful at ET	13
Unsuccessful* at ET	22
Ongoing	24
Total	59

5.2 Initiating the tribunal process

Under Part II of the DDA, a case is commenced when an individual presents an 'originating application' to the appropriate office of employment tribunals. The standard

*The total for unsuccessful includes one case which was struck out.

form of application is known as an IT1. However, an applicant may also initiate tribunal proceedings in a letter to the employment tribunal, providing that the letter contains information about the personal details of the applicant, the party against whom the complaint is being made, the nature of the complaint and sufficient particulars. If the applicant has a representative acting for him or her, the originating application should identify the representative.

This application is then acknowledged using form IT5, registered and coded according to the DDA jurisdiction under which it falls. The case is assigned a case number. The respondent is sent a copy of this application, and a blank notice of appearance (form IT3). The respondent has 21 days to complete the IT3 (or an equivalent written response). The respondent should state whether or not he or she intends to resist the originating application, and, if so, what are the grounds of the resistance. A copy of this response is then sent to the applicant (or the applicant's representative).

The applicant may also make use of the statutory questionnaire procedure. Under section 56 of the Act, the applicant may use the statutory questionnaire form to question the respondent on the respondent's reasons for doing any relevant act. The respondent's questionnaire is admissible evidence in any subsequent tribunal proceedings. If the respondent does not reply and does not have a reasonable excuse, the tribunal members may draw any inferences that it considers just and equitable to draw from this failure to respond.

5.3 Respondent reactions to the IT1

Respondents in our case studies tended to react in one of two ways to receipt of an IT1: either with shock and surprise, or

they claimed to have seen it coming.

5.3.1 Respondents who had not anticipated an IT1

Several respondents said that they were taken by surprise when the IT1 arrived. They used expressions such as "*astounded*", "*gobsmacked*" and "*shocked*". This reaction was particularly apparent in cases where there has been a breakdown in any communication between the employer and employee. This tended to occur in cases where the employee had been dismissed following sickness absence or poor attendance.

A respondent in a retail outlet dismissed an employee with a poor attendance record. His dismissal followed an accident to the employee at work in which he injured his back and was on extended sick leave. But the respondent said that the grounds for dismissal were his poor performance and attendance during the year. The applicant lodged an IT1 referring to both unfair dismissal and disability discrimination. The respondent was taken by complete surprise as he had not considered the applicant to be disabled and the effects of the accident were not expected to persist. At the preliminary hearing, the applicant's claim to be disabled within the meaning of the DDA was dismissed but the decision is being appealed.

This example illustrates a common theme that respondents who claimed not to have considered that the employee was disabled were surprised to receive an IT1. In some, but not all cases, these were also respondents who had not been aware of the DDA and for whom this was the first case concerning alleged disability discrimination in their organisation.

5.3.2 Respondents who anticipated an IT1

A smaller proportion of respondents said that by the time the

IT1 arrived they were expecting it. This was usually because they had already been involved in an ongoing dispute or negotiations with the employee and usually because they were aware of the scope of the DDA. Therefore, although they disputed the claim of discrimination, they did not express surprise that the dispute was ending up in a tribunal.

5.3.3 Recourse to lawyers

Those who were anticipating that an IT1 might be lodged tended to have already sounded out solicitors or in-house lawyers. But for those for whom the IT1 came out of the blue, a common response was to immediately seek legal advice. The very fact of receiving an unanticipated legal document tended to highlight the respondent's sense that they could not deal with it by themselves and required legal advice.

5.4 Preliminary and directions hearings

Once the case has been lodged and a case number assigned, an interlocutory and pre-hearing stage can take place. As was noted in the Monitoring Report (Phase 1) the length and complexity of this stage depends upon the complexity of the case and the strategies used by both parties.

As part of this stage, a directions hearing may take place to, for example, identify the witnesses who must attend or the kinds of evidence which will be required.

The employment tribunal procedure also makes provision for a 'preliminary hearing' that can be initiated by either party, or by the tribunal itself. This hearing is held on issues of jurisdiction, for example, when the respondent challenges an applicant's disability status or when the time lapse since the occasion of discrimination is under dispute. The hearing provides the opportunity to examine the originating

application, the notice of appearance, and any additional written or oral representations. If the applicant loses at this stage, he or she cannot proceed to the full substantive hearing on that issue.

It was noted in the Monitoring Report (Phase 1), that there was a high degree of variation between tribunal chairs in their practice with respect to holding directions hearings or pre-hearing reviews and the purposes for which they were held.

In our case study interviews we found that, in many cases, preliminary hearings were being held to establish whether or not the applicant met the definition of a disabled person in the DDA.

5.5 Legal issues

Many of the respondents and applicants in the case studies indicated that they found the legal aspects of their cases difficult to comprehend. Two aspects on which many of them commented were the issue of the definition of disability in the DDA, and the issue of justification for less favourable treatment of a disabled person. These two issues are discussed below.

5.5.1 The definition of disability

The case study interviews highlight the importance of the definition of disability in a DDA case, a finding echoed by the case review. A large number of applicants said that their status as a disabled person was challenged by the respondent and that this challenge played a key part in the process of the case and sometimes its outcome. Examples of applicants withdrawing their case when they realised they would have to produce medical evidence of their disability are discussed in Section 4.3.

In this section we look at some examples of the types of disputes in heard cases over whether or not the applicant met the DDA definition of disability.

Tendency for respondent to challenge applicant's disability

There was some evidence from the case study interviews that a frequently adopted legal strategy by respondents' representatives was to challenge the definition of disability. Some of those consulted in the expert interviews argued that such a strategy was becoming more common as the Act became better established, and respondents learned that such a strategy could be effective.

One respondent admitted that the strategy had taken him by surprise. It was suggested to him by counsel that the organisation should challenge the applicant's disability. He disagreed with this because he felt that she was disabled, but on the solicitor's say so, the disability was disputed on the grounds that there was no clarity as to what the disability prevented the applicant from doing. At the initial hearing the applicant's claim to be disabled was upheld.

However, in some cases, the respondents said that they were challenging the applicant's disability because they had never been made aware of it.

In one organisation, the HR manager said that the applicant had made no mention of her disability and when the IT1 was lodged, they did not even know the nature of the disability being referred to. In his view, the case had nothing to do with disability and the issue had been included simply in order to bring the claim within the scope of the DDA. By contrast, the applicant in this case insisted that her line manager was aware of her impairment and that she had even mentioned the disability at her job interview. As there was no written evidence to back up her claim that the organisation was aware of her disability, it was a case of the applicant's word against the respondent. She represented herself and lost her case.

Some applicants mentioned the importance of written evidence other than medical evidence confirming the organisation's knowledge of the disability. In one case the respondent had disputed the applicant's disability and a preliminary hearing was held. The applicant was able to produce letters between himself and the respondent in which the disability was mentioned, and the hearing decided that that the applicant was disabled under the DDA.

In another case an applicant claimed that she had informed her line manager about her disability and its impact on her work. Her manager disputed her version, and without written evidence it was her word against his. She lost her case.

The findings are interesting in the light of decided case law, which holds that actual knowledge of disability is not a bar to liability for less favourable treatment.

Challenges to the person's status as disabled appeared to be particularly common in cases involving individuals with mental health difficulties, rather than visible physical impairments.

Definition of disability: role of medical and other written evidence

The importance of medical evidence in responding to a challenge to an applicant's status as disabled was highlighted by an applicant's representative.

> **"The definition of disability is a major stumbling block. In my experience, an employer's stock response to a DDA claim will be 'I don't believe this person is disabled within the meaning of the Act'. This presents a large barrier to an applicant, who must then go about proving his/her disability. It is very rare for an employer to accept that a person is disabled. In response, an applicant must find medical evidence, which is sometimes very costly – a good report from a specialist can cost several thousand pounds, which can be**

prohibitively expensive for many applicants. An applicant can ask their own GP to write a report for them, but although this is less expensive, frequently an employer will request evidence from an independent specialist. If the case goes as far as a tribunal, the panel will also often request an independent report."

Another applicant representative said that he felt that disputes over the definition of disability could force the issue down a medical route. Medical reports could be prohibitively expensive for applicants to acquire. He gave the example of a dyslexic person he was advising being quoted £1,800 for a report.

The cost of obtaining medical evidence to support their case is compounded for some applicants by confusion as to exactly what is required of them. In an ongoing case involving an applicant who had been diagnosed as depressed, the issue was far from clear.

He found it hard to obtain clear information as to whether he was covered. His own medical consultant was not aware of the DDA. "*How do you get to the point where you decide that you have got a case that is covered. How depressed do you have to be*?"

Another applicant in an ongoing case said that *"Mental illness is not that easy to define. Do you look at the problem when it is at its worst? There are also problems with the time frame imposed for the effects of an illness. What happens if you relapse?"*[1]

Self-definition as a disabled person by applicants

Applicants themselves frequently said that they had initially not realised they might be defined as a disabled person.

1 For recent cases on legal issues associated with recurrent illnesses, see the case review at Section 9.2.3. See also the case review more generally for the importance of medical evidence in decided cases.

Typical comments were:

"A disabled person to me is someone who can't walk, or can't do anything for himself."

"The vast majority of people still think of disabled people as the guy with the club foot or the girl in the wheelchair."

One applicant with an RSI condition said that she had not regarded herself as disabled until the DDA was mentioned by her employer. "*It's not like being in a wheelchair. I have a problem but I manage it*." When the respondent conceded at the tribunal that she was disabled, it was like a double-edged sword: good because it meant that she could continue with the case, but bad because it meant she heard herself labelled disabled again. To her it was like being told she was on the "*scrap heap*".

5.5.2 Justification defences

The case law review (Chapter 9) sets out the law with respect to the issue of justification. The two forms of discrimination under the DDA Part II (less favourable treatment, and failure to make reasonable adjustments) may be justified "where an employer shows that the reason for the otherwise discriminatory act is both material to the circumstances of the particular case and substantial" (Chapter 9). As the case law shows, the legal issues are complex, and it is perhaps not surprising that few respondents appeared to fully understand the justification issue. Most of them were relying on their lawyers to determine the legal basis of justification. Below are discussed some of the respondents' more 'common-sense' perceptions of how their actions were justified.

No knowledge of applicant's disability

Several respondents were under the impression that, whatever their treatment of the applicant, it could not amount to disability discrimination because they were not aware the applicant was disabled.

As the case law review points out, lack of knowledge of the applicant's disability, does not necessarily constitute a legal justification for subjecting the applicant to less favourable treatment. An employer may be acting in response to how the disability manifests itself, even where there is no awareness of the disability as such.

In our case studies, however, several respondents insisted that they had no knowledge that the person was disabled and therefore did not perceive the case as a disability case.

A large public sector organisation was involved in an ongoing case concerning a DDA dismissal claim. The applicant had multiple sclerosis. The respondent said that the applicant was not considered disabled before the DDA claim was made and there were no records relating to disability. "*I know the applicant would have been treated differently if he was disabled.*"

A respondent involved in an ongoing DDA dismissal case stated categorically that he had no idea that the applicant had a disability, and had never heard of the condition cited. As far as he was concerned the disability was triggered by a poor attendance record. He denied that discrimination had occurred: "*No, not at all, not with the knowledge that we had at the time, and the applicant did not go out of his way to tell us*". The applicant did have time off sick and hospital appointments, and the respondent's lawyer has suggested that he should have discussed the reasons for this absence with the applicant before dismissing him.

In the example below, a respondent challenged the applicant's disabled status. In case this challenge was not upheld, he also argued that his treatment of the applicant was justified on business grounds.

> In his IT3, the respondent wrote that his grounds of resistance to the case were that he did not admit that the applicant was disabled within the meaning of the Act, and also denied that there had been any discrimination against him on the grounds of disability. His final point was that even if the applicant was held to be disabled within the meaning of the Act, the respondent was justified in dismissing him given his attendance record and the needs of the respondent's business.

Justification of less favourable treatment

A large proportion of the case studies involved cases concerning dismissal or selection for redundancy.

In the interviews respondents sought to justify dismissals on the grounds that the applicants were dismissed for reasons which they regarded as unrelated to the disability. Several of these cases involved applicants with a long history of sickness absence, or unreliable attendance, or lack of competence in the job. Many of the respondents argued that they had not treated the applicant less favourably on grounds of disability, because they would have treated any employee with a similar absence record in the same way. In this respect they failed to understand that they had particular duties to a disabled job applicant or employee, for example, to make reasonable adjustments where the working arrangements or physical features of the workplace created a substantial disadvantage for a disabled person in comparison with someone who is not disabled.

However, some respondents were aware that justification required them to show that they had complied with this duty to make reasonable adjustments for a disabled employee. They defended the case on the basis that they had thoroughly investigated all the options until there was no alternative but dismissal. This justification was put forward by several respondents who were aware of the applicant's disability and had made no attempt to dispute it. In defending their actions by showing that they had explored reasonable adjustments, they showed awareness that a disabled applicant may require different treatment on the grounds of their disability, rather than the same treatment as a non-disabled employee.

A respondent successfully defended a claim of less favourable treatment, failure to make reasonable adjustments and dismissal. When the applicant's condition deteriorated, the respondent had made a series of adjustments to accommodate the progressive illness. These included a work station assessment, a special chair, relocation to the ground floor, removal from driving duties, and a home risk assessment to enable the applicant to work from home. Eventually the occupational health department recommended ill-health retirement. The respondent admitted that it had treated the applicant less favourably in requiring ill-health retirement, but claimed that its actions were justified as they had made all the possible adjustments.

As this example shows, a key issue may be the extent to which further adjustments can be made. This may be partly determined by the essential requirements of the job as well as the capacity of the individual.

An applicant was working as a trainee doctor. He had mental health problems and a number of adjustments were made to accommodate his condition. But at a certain point, it appeared that he would not be able to fulfil his role. The respondent expressed concern that the applicant's absences could render the organisation liable to the risk of litigation. The respondent won the case.

In contrast, another respondent lost a case involving dismissal and less favourable treatment on the grounds that insufficient efforts had been made to accommodate the applicant's condition.

The applicant was absent for his employment in a finance organisation for some time with symptoms related to Crohn's disease. The medical reports from both the applicant's doctor and the company doctor gave no guarantee that the applicant would be able to return to work full-time. The respondent believed that that if an employee could not come into work for six months that put intolerable strains on the business and dismissal was justified. The tribunal ruled that the dismissal was not justified, as the respondent had not done enough to accommodate the applicant's disability, consult with the applicant or consider reasonable adjustments to the work environment.

5.5.3 Time limits

Under the DDA, applicants must lodge their claims within three months of the alleged act of discrimination. The Monitoring Report (Phase 1) identified this as a problem for some applicants. In particular, problems arose where applicants might have sought advice from a number of different sources before it was identified as being a DDA case. By that time three months could have expired. In one of our case studies this process occurred.

An applicant who was dismissed from his job, sought advice initially from an adviser at Jobcentre Plus who thought he might have a case for constructive dismissal. He then saw a second adviser who was a disability specialist and she suggested that he might have a DDA case. She did not mention any time limits but gave him the name of a lawyer at a law centre to contact. Unaware of any time pressure, the applicant went away for two weeks on a pre-booked holiday. When he returned he phoned the law centre and was told he was eleven days too late but he could lodge the claim in case it could be heard. Nearly a year later the case went to a preliminary hearing where it was ruled out-of-time. The tribunal did not accept the applicant's lack of knowledge about the time limit and said that he should have acted immediately he was given the advice from Jobcentre Plus. The applicant said that they appeared more interested in the fact that he had gone on a fortnight's holiday when he should have been reading the Jobcentre literature. The applicant was upset because he felt his character was being called into question.

The time limit can also be a problem for an applicant who is in the process of trying to resolve an issue through alternative processes without necessarily resorting to a tribunal.

An applicant was compulsorily retired on grounds of ill-health. She pursued her complaint initially through the internal grievance procedure. She consulted her union who advised her on the forms she had to complete. But due to the time limits for a DDA claim, she was obliged to lodge her IT1 at the same time, in case she had to pursue the case at a tribunal.

One applicant representative, a solicitor who has dealt with a few DDA tribunal cases, felt very strongly that the three-

month time limit was too short.

The solicitor took on a case from another firm of solicitors who had originally submitted the IT1 but had been negligent in their submission. The solicitor was therefore instructed late but decided to take the case on the basis that "*we would give it a go and try to appeal to the tribunal's better nature*". The employer had dismissed the applicant, who had depression and bulimia. The applicant had not initially been in a fit state to take the claim forward and time had elapsed because of this. The case was ruled out-of-time at the preliminary hearing. The representative believes that six months would be a fairer period of time, as most people do not know anything about the DDA, let along the time constraints.

The case review notes that a challenge to time limits under the Human Rights Act 1998 has been unsuccessful (Section 9.2.14).

5.6 Experience of the tribunal process

5.6.1 Tribunal Chair and members

The Monitoring Report (Phase 1) drew attention to the lack of any requirement for tribunal members to have expertise or training in disability issues or for any panel members to be disabled. One inevitable consequence of this is that the level of knowledge about disability issues will vary between tribunal members.

In the current case studies, this variation in knowledge and awareness was reflected in interviewees' comments about the tribunal process. Applicants and respondents and their respective representatives were asked for their views on the way the tribunal panel handled their case.

There is no clear pattern in the responses which diverged widely and opinions of participants in completed cases were inevitably affected by their knowledge of the outcome of the case.

5.6.2 Disability awareness of tribunal panel

Some participants commented positively on the knowledge and sensitivity of the chair and panel members. Others felt that they did not really understand the nature of certain impairments. Applicants whose impairment was some form of depression or mental illness and who lost their cases were particularly likely to comment that the tribunal members had not really understood the nature of their disability.

One applicant with a long-term depressive illness said that she felt that the tribunal had not understood the nature of her disability and the full enormity of its impact on her. She said that one of the older members of the tribunal sighed continually throughout the hearing and she had the impression he was "*bored to tears*".

In contrast some applicants felt that the tribunal members did understand the nature of their disability. One applicant whose impairment was mental illness represented herself at the tribunal:

> **"The Tribunal were so smart. They saw things that did not even get said in the tribunal; like the fact that I could not even look my line manager in the eye when I questioned her. They were very astute. They were very protective of me and if the barrister became aggressive they would step in. They made sure I had plenty of breaks."**

One applicant with a hand injury said that the tribunal

members were "*knowledgeable and sympathetic*". Another with cancer said that the tribunal members were very fair, and understood her circumstances and the nature of her disability.

An applicant's representative highlighted the crucial role of the chair. In her experience some tribunal chairs did not seem to ever find in favour of applicants, particularly when they were represented by a trade union. She contrasted this with a recent experience:

> **"The tribunal chair was wonderful. He had a really clear and concise way of setting out the law and running the case. It was superbly structured and he was professional and knowledgeable."**

Other interviewees were critical of the tribunal. One applicant representative, although not a lawyer himself, was convinced that the panel had misconstrued the DDA provisions:

> **"The panel elevated the notion of discrimination to something that had to be a conscious act. That means that if you inadvertently discriminate but your intentions are good you cannot be touched. They were mistaken in this interpretation of the law."**

Other respondents considered that the tribunal had been biased towards the applicant.

A respondent from a large finance organisation in a DDA case involving unfair dismissal, less favourable treatment and failure to make reasonable adjustments, said she was surprised by how pro-applicant the tribunal was. She believes that tribunals vary in how much they listen to the arguments put forward rather than instructing themselves. In this case she felt the solicitors might as well not have been there.The respondent lost the case.

The vagaries of the tribunal process were highlighted by a lawyer from a large employment law firm with experience of representing both applicants and representatives in DDA cases.

The representative noted that in one tribunal area a panel might tend to find in favour of the respondents, and another panel in favour of applicants. One tribunal might judge a case in a certain way, but another will judge the same case in a very different way. "*It's a lottery, definitely*."

5.6.3 Provision during the tribunal process for the disability

Some applicants mentioned that the extent of the panel members' knowledge of the nature of their disability was reflected in the extent to which they made any adjustments to the tribunal process to take account of the disability.

Here too, experiences diverged.

One applicant with chronic fatigue syndrome said that he found the full day's hearings very tiring and it was difficult to stay awake. This meant that he overslept on the second and third day and arrived late. No allowances were made for his disability, and he had the impression that the panel members thought he was only yawning for effect.

An applicant who is profoundly deaf and uses sign language said that the tribunal was very helpful. The tribunal chair let him and his interpreters sit where they could see each other and everyone else – that was very important. They would usually have to sit in a row, but they were allowed to sit in a triangle. One of the interpreters arrived early and met with the tribunal chair and explained what the applicant needed. The respondents attempted to provide a great deal of extra information in written form on the day of the tribunal, but this was disallowed by the Chair.

One respondent representative agreed that physical access to tribunal premises could frequently be a barrier for disabled people, as many of the buildings are not adequately equipped with lifts or ramps. Some of these premises are listed buildings so that it can be relatively difficult to make adjustments, but she considered it was important for everyone to have the right to be heard in the appropriate tribunal setting.

5.7 The importance of legal representation

Amongst the interviewees there was a variety of responses to the tribunal process itself, a mixture of both negative and positive experiences. But one widely shared view was that the process turned out to be more legalistic that they had expected, that legal representation was crucial, and that anyone who attempted to represent themselves was seriously disadvantaged.

5.7.1 Respondents' representatives

There was a marked difference between the respondents and the applicants interviewed in terms of their use of legal representation. The respondents were usually advised by an in-house lawyer or a specialist firm of employment lawyers, and represented at the tribunal by a solicitor or barrister.

All of the respondents' representatives interviewed for the case studies were legal professionals, and were usually based in specialist commercial or employment law practices. Without exception, they had been aware of the DDA since its introduction, or prior to it, and often had a strong interest in discrimination issues. They all had a detailed working knowledge of the DDA, and mentioned using a full range of guidance literature such as: the regulations made under the Act, statutory guidance on the meaning of disability, the

Employment Code of Practice, DRC literature, precedent cases, and Harvey's and Butterworths Legal Encyclopaedias. All of the respondent representatives interviewed had considerable track records of providing representation on DDA cases. Most specialised in representing respondents, although some had also represented applicants on DDA cases. In a few cases, they also had a history of working with the respondent organisation in question, on DDA and other employment law issues.

All had received training on the DDA, from sources including the Central Law Training Centre and Barristers' Chambers seminars when the Act had been introduced. Some had also received periodic training as the Act has become established. Several of the representatives had been involved in providing training on the DDA for others. This included training other legal professionals, and also providing awareness training on the DDA for employers.

5.7.2 Applicants' representatives

In contrast, as discussed in Section 3.3.4, some applicants were represented by solicitors or barristers, others were represented by trade union representatives, and several were represented by friends or family members, or represented themselves. Applicants were less likely than respondents to have access to representation by DDA specialists. Their choices were affected by factors such as cost, knowledge of where to seek advice, membership of a trade union, and the availability of disability organisations in their area.

Some applicants were represented by solicitors working in practices specialising in employment law, and who had particular DDA expertise. They were funded through legal expenses insurance, legal aid, and occasionally by applicants

themselves. Other representatives worked for legal firms that commonly represented applicants on behalf ofTrade Unions. In these cases, the representatives had been chosen for their expertise, and therefore had considerable knowledge and experience of the DDA.There were also examples in our case studies of applicants being represented by solicitors with a more limited experience of the DDA. This included a fairly newly qualified solicitor who had learned about the DDA while studying for a law degree at university, and a more established solicitor who had previously been involved in a couple of DDA cases but had not yet specialised in a particular area.

In other cases, applicants were represented by solicitors who worked in organisations or centres offering free or low cost advice to the public, either in specialist areas (for example, the Disability Law Service) or offering general legal assistance on a wide range of issues. In some instances, particularly within specialist services, individuals had been aware of, and had worked on, DDA cases for some years and hence were very familiar with it, but this was not always so. These case studies included examples of solicitors working in more generic centres not having engaged with the DDA prior to a case being brought to their attention, and who had a steep learning curve to enable them to provide adequate representation to the applicant.

Several of the trade union representatives interviewed had dealt with similar cases in the past, and had received training by the union on the DDA. They had a good knowledge of employment law, and we found instances where they themselves had provided training on a number of aspects of employment law including the DDA for other groups such as branch representatives and union caseworkers. These representatives had been involved in negotiating for

applicants who had taken DDA cases, and usually had prior experience of representing applicants at tribunals in cases involving the DDA.

Awareness of the DDA amongst advisers from the DRC was well established, with such individuals usually having had specific training on the DDA to enable them to advise actual and potential applicants, and in some cases to represent them. Citizens Advice Bureaux representatives' knowledge of the DDA varied depending on the background of the adviser involved. For example, one adviser was a trained solicitor but had only become aware of DDA while in the job, and had not been involved in a DDA case before. Another had previously worked with trade unions, and had a general knowledge of employment law including limited knowledge of the DDA.

We found occasional examples of people with no particular expertise becoming advisers and representatives, for example, a family friend of an applicant with no formal legal training but a personal interest in the DDA. For people without formal training, knowledge of the DDA had been gained from various websites providing information on the law, trade union websites and support association websites in addition to information from The Law Society, and employment tribunal decisions. Applicants who represented themselves at a tribunal often consulted these sources to familiarise themselves with the way the Act operated.

5.7.3 Self-representation

While only a small number of respondents did not have any external representation at a tribunal hearing, several of the applicants represented themselves, sometimes after failing to find someone to represent them. The issue of the cost of representation was raised by several applicants (see Section 3.3.2). Some were unable to secure free or low cost

representation, and were left with no option but to represent themselves.

The point was made several times by applicants and their representatives that there should be more legal aid available to enable applicants to pay for representation in DDA cases.

An applicant who had lodged a case under several DDA jurisdictions realised that she would need legal assistance with fighting the case. She was not able to get a solicitor on a 'no win no fee' basis as she was advised that her case would not be awarded enough, should it be successful. She paid a solicitor to prepare her case, but represented herself at the tribunal, She said she would have liked to have had representation but it was simply too expensive.

"It was £1,100 a day and who can afford that? I ended up representing myself."

Some applicants decided to represent themselves but underestimated the extent of legal expertise required.

An applicant initially consulted a solicitor who advised her that she had a DDA claim. But after initial expenses of £1,500 in obtaining the advice, the applicant decided to represent herself at the tribunal. She had some legal knowledge, had attended tribunal proceedings and thought she could cope with the process. However, she found herself up against the respondent's barrister and found it very difficult. There was too great a disparity between her and the barrister in terms of legal knowledge. She lost her case and now thinks that people should not be allowed to represent themselves. *"If I had known then what I know now, I would not have represented myself."*

Another applicant had a similar experience.

An applicant who is registered blind was compulsorily retired from his job as a catering manager on health and safety and ill-health grounds. He sought representation from a solicitor but at £150 per hour he could not afford to continue with legal representation beyond the preliminary hearings. His union said it could not help him as he already had legal support from a solicitor. He represented himself at the last two hearings but saw enormous disadvantages in doing so. *"When you get to the tribunal and there are professionals there, you do feel an amateur. They [the respondent] had an employment lawyer who could quote from the Act on their feet, and I couldn't have told you what they were saying."*

5.7.4 The stress of taking the case

Overall, the process that follows the lodging of an IT1 proved to be very stressful for some applicants. They had underestimated the time and effort involved in finding appropriate advice or representation and fulfilling obligations such as completing the necessary forms, attending appointments for medical examinations, or meeting advisers. In retrospect some said that they had not realised that a case could take such a long time, or that it would require providing such a level of detailed information.

An applicant in an unsuccessful recruitment case found the time taken for the case to come to a full hearing very frustrating. The preliminary hearing was cancelled the day before it was scheduled and the case took two years to be concluded. She lost her case and although she had the option to appeal, she had found the tribunal hearings *"very traumatic"* and wanted to 'shut the door' on the proceedings.

Some applicants mentioned fear of the unknown, sleepless

nights and worsening of symptoms. The impact on the individual is discussed in detail in Chapter 7. In some cases the stress proved too great to pursue the process and contributed to a decision to withdraw or settle the case. Examples of this are discussed in Section 4.3.

However, the experience of stress was not confined to applicants. Some respondents acknowledged that they had found the tribunal process very difficult. But the stress did not usually arise from the tribunal process which was mediated by the legal representative. It was usually related to concerns about costs. This was particularly the case for employers in small firms where the time spent on preparing the case and the potential cost to the business were a particular source of concern.

An employer in the retail sector succeeded at the preliminary hearing in challenging the applicant's claim to be disabled. He was very satisfied with his solicitor who represented him at the hearing. Subsequently, the applicant was granted a Judicial Review of the decision. The respondent was very anxious about the potential costs for the small business. He had been advised that if the case should proceed to a full hearing, the costs could be around £10,000-£20,000. This is now hanging over him, and affecting future business decisions.

5.8 Conclusion

Our case studies found that applicants were far less likely than respondents to have recourse to legal representation following the lodging of the IT1. Issues of cost were shown to force some applicants to represent themselves. Although some applicants who represented themselves were successful, others found the process very difficult and

believed that this contributed to the failure of their case as discussed in Section 6.2.4.

The difficulty of self-representation was accentuated for applicants by the complexity of the disability discrimination law, for example on the issue of the definition of who is disabled under the DDA. The tendency for respondents to challenge the case on the definition of disability was experienced as very stressful for the applicants, particularly in cases relating to mental illness. There was a lot of uncertainty about what type of evidence was required to prove their status, and some concerns that tribunal members were not sufficiently knowledgeable about their condition.

The legal issue on which some respondents appeared to be confused was that of the grounds on which they could justify less favourable treatment of a disabled person. The legal complexities of this issue, as discussed in the case law review section 'Meaning of discrimination: less favourable treatment' (in Chapter 9), strengthened the dependence of respondents on legal representatives to make their case.

One aspect of the tribunal process that emerged from our case studies was the enormous variation in interviewees' perceptions of the tribunal chair and panel's expertise, and of their approach and understanding of disability issues. Some praised the attitudes of the chair and panel and felt the proceedings were sensitively handled. Others were highly critical of the process. While for some this was their first experience of a DDA tribunal case and they had no previous experience to compare, it is notable that representatives with experience of several DDA tribunal cases highlighted the lack of consistency between tribunal panels.

6. Outcomes of Cases Decided at Tribunal

This chapter focuses on the outcome of Part II cases. It covers all the case studies that reached a tribunal hearing. The chapter examines the factors that the case study interviewees identified as affecting the case outcome. The recommendations and remedies suggested by the tribunal are also explored. The chapter includes discussion of

- Patterns of outcomes
  - outcomes by each DDA sub-jurisdiction
  - outcomes by disability/impairment
  - outcomes by representation
- Factors influencing case outcome
  - evidence
  - medical evidence
  - witnesses
  - quality of representation
  - attitude of the tribunal
- Remedies
  - compensation
  - reinstatement
  - other.

6.1 Outcomes of tribunal cases

Table 6.1 sets out the outcomes of tribunal cases in which our interviewees participated. Thirty-five case studies reached a

full tribunal hearing; thirteen cases were successful (in favour of the applicant) and twenty-two were not successful.

Table 6.1: Outcomes of cases decided at tribunal

	Cases completed
Successful at ET	13
Unsuccessful* at ET	22
Total	35

Source: IES Case study data

The outcomes of the case studies reflect a similar success rate to the case studies referred to in the phase 1 report. It found that of the 36 case studies that reached a hearing, 16 were successful and 20 were unsuccessful.

The first phase monitoring study also examined a database that contained a record of all Part II disability discrimination cases recorded since the legislation came into effect in December 1996 until July 1998. It found that 15.9 per cent of cases heard at tribunal were successful and 84.1 per cent were unsuccessful or dismissed. Analysis of the same updated database in phase 2 (all disability discrimination cases until September 2001) identified a similar pattern, but showed some increase in success rates, with 19.5 per cent of cases heard at tribunal successful and 80.5 per cent unsuccessful or dismissed. The numbers involved in the current case study data are too small to allow direct comparison with overall trends found in the database of the phase 1 and phase 2 studies, but the data do reflect a similar pattern of case outcomes.

6.1.1 Outcomes, by each DDA sub-jurisdiction

Table 6.2 examines the outcomes of cases under each of the

*The total for unsuccessful includes one case which was struck out.

DDA sub-jurisdictions.

Table 6.2: Outcomes, by DDA jurisdiction

DDA jurisdiction	Successful	Unsuccessful
Dismissal	11	14
Other detriment	2	2
Recruitment	-	5
Reasonable adjustments	-	-
Not known	-	1
Total	13	22

Source: IES Case study data

The case study data demonstrate that DDA claims are often coupled with dismissal claims. The case study data suggest that dismissal cases are equally likely to be successful (in favour of the applicant). Of 25 dismissal cases 11 were successful and 14 were not successful at tribunal.

Disability discrimination claims concerning the recruitment process had low rates of success, a pattern consistent across all phases of the research. All the recruitment cases in the current study were unsuccessful. A low rate of success amongst recruitment cases has been established by previous research. In phase 1, analysis of the database of recruitment cases identified only 10.4 per cent as successful. Similarly, phase 2 identified recruitment cases as the least likely to be successful (15.2 per cent).

6.1.2 Outcomes, by disability/impairment

Table 6.3 sets out the applicant's disability/impairment and the outcome of the case, in the current case studies.

Table 6.3: Outcomes, by applicant's disability/impairment of cases decided at tribunal

Disability/impairment/ condition	Successful	Unsuccessful
Auditory impairment	1	2
Depression, bad nerves or anxiety	2	4
Disabilities connected with the arms or hands	2	2
Disabilities connected with the back or neck	1	4
Disabilities connected with the legs or feet	1	1
Heart, blood pressure or circulatory problems	1	-
Mental illness, phobia, panic or other nervous disorders	1	2
Specific learning difficulties	1	1
Stomach, liver, kidney or digestive problems	-	2
Progressive illness not included elsewhere	3	1
Other	-	3
Total	13	22

Source: IES Case study data

The earlier (phase 1) monitoring study found that cases involving applicants with sensory impairments (30.0 per cent of cases were successful) and internal organ impairments (29.4 per cent of cases were successful) had the highest rate of success. Applicants with physical/ mobility impairments had the lowest success rate (10.1 per cent of cases were successful).

The phase 2 analysis of the database of all cases (using a more detailed classification of impairments) found that applicants with diabetes had the highest rate of success in employment tribunals (39.1 per cent), compared to applicants with other types of impairments. Cases involving depression, bad nerves or anxiety (18.0 per cent of cases were unsuccessful) and cases concerning disabilities connected with the arms or hands (16.4 per cent of cases were unsuccessful) had the lowest rate of success.

6.1.3 Outcomes, by representation

Case outcomes by the type of representation are examined for applicant and respondent. Table 6.4 shows the breakdown of successful cases by the category of applicant representation.

Table 6.4: Applicant's representation, by case outcome

Representation	Successful	Unsuccessful
In person	2	4
Solicitor	7	7
Barrister	1	4
Trade Union	1	3
CAB/advice organisation	-	1
Friend relative	1	1
Consultant	-	1
Law Centre	1	-
Disability organisation	-	1
Total	13	22

Source: IES Case study data

In our case studies, four out of six applicants representing themselves were unsuccessful. This finding is consistent with the analysis of the database in phase 1 and 2, which found that applicants representing themselves experienced lower rates of success (in phase 1, 12.0 per cent and phase 2, 13.7 per cent). In the case studies equal numbers of applicants represented by a solicitor were successful and unsuccessful. Interestingly only one of the five cases represented by a barrister was successful. This is in contrast to the pattern of successful cases for respondents in which eight of the 11 cases (see Table 6.5) in which they were represented by a barrister had a successful outcome. Furthermore phase 2 analysis of the database found that applicants represented by a barrister were most likely to be successful (28.9 per cent of cases had a successful outcome). While it is important not to make too much of patterns observed in small numbers of cases, it is possible that those applicants that sought representation from a barrister had a different type of case. For example, the case could be more legally complex.

Table 6.5 shows the respondent's type of representation by case outcomes, and it is clear despite small numbers, that those with legal representation have a higher success rate than those without. This is not surprising, and is consistent with the database analyses from the phase 1 and 2 studies.

Table 6.5: Respondent's representation, by case outcome

Representation	Unsuccessful	Successful
Solicitor	3	12
Barrister	3	8
Employer's association	-	1
No external representation	3	1
Not known	4	1
Total	13	23

Source: IES Case study data

A striking difference between the applicant and respondent representation is that respondents are more likely to seek advice and representation from a legally trained source. The case study data demonstrate that, of the 35 cases, 26 of the respondents were represented by a solicitor or barrister compared with 19 applicants. The tendency for respondents to seek trained legal advice could be linked to the resources available to them; this is further discussed in Section 6.2.4 and has already been discussed in Sections 3.3.4 and 5.7.

6.2 Factors influencing case outcomes

A range of factors was identified by case study interviewees as important in influencing the outcome of the case. These have been categorised into the following broad themes:

- evidence
- medical evidence
- witnesses
- representation
- attitude of tribunal.

6.2.1 Evidence

The quality of documentary and written evidence was frequently cited as an important factor in successful cases. It was seen as vital that the applicant produces evidence to support their disability discrimination complaint. Respondents often had formal procedures to ensure events are documented. For example, personnel files or meeting minutes were frequently used as evidence. An applicant who was unsuccessful in a recruitment case highlighted the difficulties in providing evidence to prove that an act of discrimination has occurred. He commented:

"At the end of the day I knew discrimination had occurred, I just couldn't prove it."

A respondent who successfully defended a claim of disability discrimination in the recruitment process believed that the evidence they submitted was the most important influence on the case outcome. The respondent was able to submit evidence to show that it had taken deliberate and persistent steps to try and adapt the job to accommodate the applicant's disability. The evidence emphasised that the respondent had exhibited the desire to do the right thing. Within the evidence there were further details to illustrate that the respondent had checked their actions and sought advice from relevant disability organisations.

The presentation, order and quality of the evidence presented were cited in many cases as influencing factors. One applicant who was unsuccessful believed that the order of evidence regarding the act of discrimination influenced the outcome of the case. The applicant first gave her evidence followed by the respondent. This allowed the respondent to come back at the applicant's side regarding the questions they had asked, the applicant felt this provided the respondent with an unfair advantage.

The quality of the written evidence was also seen as important.

A respondent was unsuccessful in defending a claim of unfair dismissal and less favourable treatment. The respondent felt embarrassed to present its personnel files to the tribunal since they consisted of scribbled notes on scraps of paper. Instead the respondent presented the information as a typed list of events that had occurred. The tribunal noted that the list was not fully comprehensive and concluded that it had been compiled after the event. The respondent believed that the way in which the evidence was presented had led the tribunal to believe the respondent was telling "*a pack of lies*".

6.2.2. Medical evidence

The quality and type of medical evidence presented were also cited as an important factor affects the outcome of cases. The role of medical evidence is also important in establishing whether an applicant's disability falls within the realm of the DDA (see the case law review in Chapter 9). With regard to case outcomes, medical evidence was often used to demonstrate that the respondent had failed to carry out the necessary reasonable adjustments. The following case studies illustrate this point.

A successful applicant believed that the evidence provided by her psychotherapist was key to the successful outcome of the case. The applicant's representative supported this view and emphasised the psychotherapist's role in demonstrating that the advice the respondents had initially been given had not been followed. This enabled the tribunal to address the negative consequences of the respondent ignoring the psychotherapist recommendations.

A successful applicant believed that medical evidence had had a significant impact upon the case outcome. The psychiatric report that the respondent commissioned at the onset of the applicant's condition confirmed the applicant's disability and highlighted the necessary adjustments required to accommodate. When the report was shown to the tribunal it demonstrated that the respondent had failed to carry out the reasonable adjustments. The notes accompanying the report also showed that the respondent had asked the psychiatrist to change details of the report to support the respondent's stance.

Specialist medical reports often constitute a substantial volume of evidence provided at a tribunal, both for applicants and respondents. The cost of obtaining specialist consultant

medical reports can become a barrier for applicants, whereas respondents often have a larger pool of resources available to them. The cost of obtaining medical reports is also discussed as a potential barrier to taking a case to tribunal (see Section 3.3.2. The costs involved in taking a case to tribunal, including medical reports, can influence an applicant's decision to settle (see Section 4.3). This finding is upheld by the case review. See, for example, *Morgan v Staffordshire University*; *Fraser v Scottish Ambulance Service*.

Evidence from some cases showed that specialist medical reports are not always necessary and do not always address the right issues relevant to the DDA case.

An applicant submitted a claim under the recruitment sub-jurisdiction of the DDA. The applicant's case was not successful but she won the point concerning her condition meeting the DDA definition of disability. The applicant provided evidence of her medical condition in the form of a GP's report and an NHS consultation with a psychotherapist. The respondent used a Harley Street specialist who expressed scepticism about the applicant's condition. The report from the Harley Street specialist did not relate to the instructions given and the applicant's evidence held more credibility. When interviewed for the case study, the respondent said that challenging whether the applicant was disabled "*did not go down well*" with the tribunal. This is particularly so as the tribunal noted that the medical evidence provided by the respondent demonstrated that the Harley Street consultant had failed to carry out the correct tests to prove that the applicant did not meet the definition.

In cases where the tribunal requires the applicant to provide evidence to demonstrate that their condition is covered by

the DDA definition, a GP or specialist consultant's report is often used as standard practice. The respondent can also request that the applicant has a consultation with an independent consultant or doctor and both forms of medical evidence are submitted to the tribunal. An issue regarding which source of medical evidence the tribunal believes to be the most accurate was highlighted in the following case study interview.

An unsuccessful applicant provided a report from her GP explaining the nature of her disability. This was not accepted as sufficient evidence by the tribunal. Instead the tribunal asked the respondent's doctor to submit medical evidence on behalf of the applicant. The applicant felt that this medical evidence did not accurately diagnose the disability or its associated effect.

6.2.3 Witnesses

The quality and credibility of witnesses called were repeatedly cited by both applicants and respondents in our case studies as influencing the outcome in successful cases. The issue of witnesses' credibility with the tribunal is highlighted in the following case study.

A successful applicant cited her witnesses as having influenced the case outcome. Two witnesses were able to testify that they had witnessed episodes of bullying by management. The applicant's representative (who was also interviewed in the case study) added that both witnesses were ex-colleagues of the applicant and had left the respondent firm on good terms. This gave further credibility to the applicant's witnesses' testimony. The applicant's representative noted that the respondent called six witnesses in total, which the representative argued, was too many to maintain consistency.

A lack of supporting witnesses was often believed to have a negative impact on the outcome of a case. A successful respondent noted that the applicant provided only one witness, who was an ex-employee of the respondent's company. The respondent had called upon four witnesses, including an operations manager and the applicant's manager; all witnesses had contact with the applicant before the point of dismissal.

The choice of witnesses and their responses to questioning can be crucial to the outcome of the case. A representative for an applicant whose claim was not successful commented that, as a witness, the applicant was surly, unco-operative and showed irritation towards counsel. The respondent's witness, in contrast, came across as more credible.

An applicant successfully brought a case against a local authority employer for unfair dismissal and failure to make reasonable adjustments. The applicant believed that the personnel manager, called as witness for the respondent, had greatly influenced the case outcome. He came across poorly in the hearing and when asked about offering the applicant another position he replied that the respondent "*does not create vacancies for medical redeployment*". When asked if the respondent could have offered the applicant something else in another area of the local authority, he admitted that the respondent had not thought it through properly despite the policies they have in place.

6.2.4 Quality of representation

This section focuses on how interviewees viewed their representation and whether it was felt to influence the outcome of their case. As discussed in the phase 1 monitoring report, if an applicant was successful they tended to express positive views about their representative.

Correspondingly if an applicant was not successful criticism often fell upon their representative. This section covers:

- Positive and negative views about representation
- Last minute changes in representation
- Self-representation
- Perceived power differences between applicants and respondents.

Positive and Negative views of representation

An example of an applicant's positive view regarding their representation is illustrated in the case study below. Parties' views of their representatives have also been discussed in Section 5.7.

> A trade union representative represented the successful applicant in a DDA claim involving less favourable treatment. The applicant believed that the high quality of the representation was important in influencing the successful outcome. The applicant reported that her representative was very "*astute*" and "*did not bamboozle people when cross-examining*". Her representative presented the evidence very clearly "*in layman's terms so everyone could understand*". The applicant believed that the tribunal appreciated her representative's 'down to earth' approach in contrast to the respondent's representative who was using complicated questioning techniques.

Some unsuccessful applicants represented by their trade unions, Citizens Advice Bureaux, third parties or friends/relatives believed that their representative's lack of legal knowledge or expertise had an impact on the outcome of the case. For example, an unsuccessful applicant represented by a trade union representative believed that a

solicitor would have been better, as solicitors are more legally minded and tend to have a greater experience of the legislation. Similarly, another unsuccessful applicant represented by a third party felt that the chair and the respondent's representative were prejudiced against the applicant representative because he was not a lawyer.

An applicant's representative who worked in a law centre but was not legally trained commented that it could be difficult to understand all the legal terms in the DDA, especially the category of reasonable adjustments. The following two case studies demonstrate the perceived complexity of the legislation among parties to cases and problems arising from different interpretations of the legislation.

A respondent who successfully defended a claim argued that the applicant's representation had influenced the case outcome.
"The CAB were a little misguided in this case ... they had totally taken the applicant's version of events ... they completely led her (the applicant) up the garden path."
The applicant's representative noted, when interviewed for the case studies, that she did not feel she had the technical knowledge to argue the case. Similarly, the applicant believed that the case would have gone better had her representative been more experienced.

The applicant's representative had submitted a claim for unfair dismissal and disability discrimination. The respondent noted that she was surprised that a claim was being made under the DDA, as disability had never been found to be an issue with the applicant. At the pre-determination hearing, the DDA element was dismissed. The respondent described the DDA claim as a 'complete farce' as there was no medical evidence to prove that the applicant was disabled in terms of the Act. The applicant's representative was fined for conducting the case in an unreasonable manner and making up claims that were spurious, time wasting and ill-informed.

Last minute changes in representation

In several cases parties had experienced a change in representation at last minute. This was usually caused by the representative's previous case over-running. In these instances applicants and respondents believed that a lack of familiarity with the finer details of the case could have a negative impact on case outcomes. Thus, for example, one applicant had dealt with the same representative for a year leading up to the tribunal and knew the details of the case inside out. On the day of the hearing the applicant had one hour to discuss the case with the new representative.

An unsuccessful applicant bringing a case on the grounds of unfair dismissal and less favourable treatment was represented by a barrister. On the day of hearing the barrister was unable to attend, as his previous case had over run and he sent a junior barrister who was still in training. The applicant felt that the junior barrister was not experienced enough to represent the case and that his questioning during the cross-examination was "*diabolical*".

Self-representation

The data collected from the case studies confirm the pattern identified in Section 6.1.3. Self-represented cases are often associated with low chances of success.

Some applicants represented themselves at a preliminary hearing but sought legal representation subsequently. An applicant who represented himself initially felt that self-representation would be very difficult, particularly because of all the legal jargon used. Similarly, another applicant who represented herself at the preliminary hearing and sought legal representation thereafter said that she had not had enough information and knowledge of the DDA to represent

herself at the full hearing.

One applicant commented that the tribunal has been "*hi-jacked by the legal profession*".

"I was representing myself, but I was up against a trained barrister. This could be seen as a terrible disadvantage. Because of this, the system is outside the scope of the common man for whom it was originally intended. It's a sham. When you get to the appeal level, apparently it's just a barrister against a barrister – it's just a theatre."

An applicant who represented herself felt that people should not be allowed to represent themselves as there is too much disparity between individuals and barristers.

An applicant who successfully represented herself found the process very traumatic. The applicant had to cross-examine and challenge her former employers who had caused much stress, and she was up against a member of counsel.

"With representation the whole thing would have been less stressful, easier, less sleep deprivation, less anxiety and less fear of the unknown".

Perceived power differences between applicant and respondents

During the case study interviews with applicants and their representatives, a perceived power difference between themselves, the respondent and their representatives emerged. Repeatedly applicants implied that they were the weaker party from the outset. Respondents often have a

larger pool of financial resources available to them. Thus it is possible to instruct counsel to deal with the case, or use a team of 'in house' lawyers. Applicants, on the other hand, usually have restricted resources and their choice of representation will often depend upon the amount it will cost them. This situation creates feelings of injustice and a bias in favour of the respondent before the case has reached tribunal.

An applicant was forced to represent herself, because having sought advice from a solicitor initially (and paying £1,500) she realised she could not afford to pay any more for legal representation. Despite the applicant's own background as a qualified solicitor she felt she was taking on the 'big boys', and the respondent was represented by counsel. The case was unsuccessful and the award of costs was in excess of £10,000. The costs were subsequently referred to county court.

An applicant's claim was thrown out due to the size of the respondent's organisation. The applicant, however, had not felt confident about her chances of winning, because she knew that she was up against 'the establishment'. She knew early on that the respondent would send a "*flash lawyer*". If her case were successful it would set the precedent with regard to bullying within the organisation so she believed they would be getting out the "*big guns*".

6.2.5 Attitude of tribunal chair/members

This section examines the views expressed by parties to cases regarding the attitude and behaviour of tribunal chair and the panel. The views form a similar pattern to the views concerning the quality of representation at tribunal (see Section 6.2.4). Those applicants or respondents who had a successful case outcome gave more positive feedback about

the way the tribunal handed and decided their case than did those with negative case outcomes

Positive comments taken from the case study data include reference to the chair explaining terms and procedures that the applicant did not understand. An applicant, with circulatory problems, felt that having a doctor, as a lay member of the panel was influential in the successful outcome of the case. The applicant suggested that the doctor's presence might have caused the panel to have a better understanding the nature of her impairment.

A respondent who successfully defended a claim noted that the tribunal panel made allowances for the applicant's poor English when cross-examining. In this case, there were plenty of short adjournments and the tribunal was to the point and fair in their decision.

The case studies and interviewee's comments included examples where both applicants and respondents were satisfied with the way a tribunal decided and explained a case decision. It is of interest to note that the two case studies below concern applicants who represented themselves and found the tribunal to be very understanding. This contrasts with some views expressed regarding the problems associated with self-representation (see Section 6.2.4).

An applicant who successfully represented herself felt that the tribunal panel was very fair, understood her circumstances and the nature of her disability.

"They were really fair, they were smashing. They realised I wasn't represented and so they talked me through it at ease. They wouldn't have let me win if I hadn't had a good case, but they were very fair. They understood I wasn't playing on the fact that I had cancer. They said that they thought my employer could have been more compassionate."

An applicant who successfully represented herself felt the panel understood and was sympathetic to her situation. They intervened when the respondents questioned the applicant in harsh manner.

"The Tribunal were so smart; they saw things that didn't get said in the Tribunal, like that I couldn't even look my line manager in the eye when I questioned her. They were very astute. They were protective of me; if the barrister got aggressive they'd step in. They made sure I had plenty of breaks. I felt they were more lenient with me as I didn't have legal experience."

A solicitor representing an applicant said that the tribunal panel was very perceptive and it was apparent that they had an "*absolutely great knowledge of cases*" and were "*really up-to-date*". In general this representative found the panel to be very sympathetic to the applicant and aware of disability issues.

A trade union representative who successfully brought a case against a respondent felt that the tribunal panel was key in influencing the outcome of the case.

"The Chair was wonderful, I'd never seen a Chair like this before. He had a really clear and concise way of setting out the law and running the case. It was superbly structured, which has not been my experience, it was so refreshing. He was professional and knowledgeable, without being pompous."

By no means all case study interviewees reported so positively on the attitudes and approach of the chair and tribunal panel. However a representative expressed a strong view, on a general level, concerning the impact that a tribunal chair can have upon the case outcome. The representative felt

the chair makes a real difference, and referred to experiences in the past when the tribunal chair appeared to have held very strong views and, she believed, the impact of such strong views could lead to an unfair hearing.

There was a level of concern expressed by a number of different parties involved in cases regarding the tribunal's ability to make a fair and unbiased decision. It is fair to note that all parties expressing these concerns were unsuccessful at the tribunal. For example, a representative from a disability organisation advised an applicant who was unsuccessful in bringing recruitment cases against the respondent. The representative felt that the tribunal had a reputation for being biased towards respondents and reported he was astounded at the perceived bias that underpinned the panel's decision in this case.

A respondent that was successful in defending a claim, felt that the outcomes depended too much on the particular tribunal panel.

"There are contradictory judgements coming out, and that's what I find confusing. In a way, it can be a bit like a lottery depending which panel you get."

A tribunal found that the respondent was acting in breach of the DDA and instructed the respondent to pay compensation to the applicant in excess of £60,000. The respondent has attended a number of tribunal hearings and was surprised by how apparently pro-applicant they were in this case. The respondent felt that a tribunal's decision is often a question of interpretation. The tribunal does not have much guidance, and there is apparent variation in how much the tribunal instruct themselves, rather than how much they listen to the arguments put forward. In this case the respondent argued that the tribunal clearly instructed themselves.

Akin to views expressed by some applicants' representatives, applicants who had not been successful at tribunal, at times attributed this to the tribunal panel and their attitudes. Some applicants found the tribunal set-up inaccessible and one applicant equated the atmosphere to "*an old boys club*". Another applicant commented on the tribunal panel as

> *"Out of touch with reality ... not normal people"*

One applicant felt that the members of the tribunal panel were against him and his representative from the outset. The applicant's representative had previously encountered a panel member and told the applicant that the tribunal member had acted in a similar manner in a previous case. The applicant felt the tribunal had a *"closed shop feel, everyone knew everyone else*".

As noted in Section 6.1.2 a large proportion of tribunal cases involving applicants with depression and stress-related illnesses are not successful at tribunal. In the case studies it was apparent that such applicants often felt that the tribunal had not fully understood their disability or its effects. The two case studies below depict these feelings.

An applicant with a stress-related illness felt that the tribunal did not understand the extent or effects of his illness. The applicant would have liked there to have been an expert witness not associated with either herself or the respondent, as she argued that the panel would not be expected to understand every illness or disability.

An applicant with an anxiety disorder and depression described the panel as forming an intense hatred against her. The applicant felt that the tribunal did not recognise the full enormity of the effects of her condition. She believed

that depression was not taken seriously by the panel and notes its effects can be both devastating and time consuming. The conduct of a member of the panel distressed the applicant. This particular member sighed continually throughout the hearing and the applicant had the impression that he was bored to tears.

6.2 Remedies

If a tribunal finds the complaint of disability discrimination to be valid 'it shall take such of the following steps as it considers just and equitable' (phase 1 report Section 8.2). The tribunal can make a declaration of rights of the applicant and the respondent in matters that relate to the complaint. The tribunal may order the respondent to pay compensation to the applicant. There is no upper limit for the maximum amount of compensation that can be awarded in Part II cases. The phase 1 report (Section 6.12) provides further details on the basis of and how the award amount is calculated.

A recent survey of employment tribunal awards in 2001 (*Equal Opportunities Review* No 108 August 2002) found that the average award in disability discrimination cases had risen dramatically by 85 per cent from £13,046 in 2000 to £24,202 in 2001. The median award amount was £7,218 in 2001 (a 39 per cent increase from 2000). The highest tribunal award from any employment tribunal in 2001 was a disability discrimination case, the applicant was awarded £278,801 as a result of employers failing to make reasonable adjustments (*Newsome v The Council of the City of Sunderland* case no 6403592/99 Newcastle ET). This award was 46 per cent higher than the highest sex discrimination award and 342 per cent higher than the highest race discrimination reward. Despite award amounts increasing, there was only a small increase (14 per cent) in the number of cases winning awards from the

previous year, with an increase from 49 cases in 2000 to 56 cases in 2001.

6.3.1 Compensation

The amount of compensation awarded varies dramatically between cases and is dependent upon what basis the tribunal orders an award. In the current case studies, of the thirteen cases which had a successful outcome, in ten cases compensation was awarded to the applicant. The sum awarded varied between £1,700 and £65,000. The median award amount was £10,361 and the mean award amount was £17,281. It should be noted that information regarding award amounts was not obtained from all relevant case studies because applicants did not always wish to disclose their compensation amounts.

A tribunal can award compensation for a number of different reasons, including loss of earnings (past and future), injury/damage to feelings, pension or sickness pay owed. In one case study the tribunal panel had ordered the respondent to pay compensation as it had refused to admit the applicant was disabled. Injury to feelings and loss of future earnings were the categories generating the two largest amounts of compensation awards.

Applicants were generally satisfied with the award amounts, but some emphasised that, although they received compensation, the case "*was not about the money*". It was clear, however, that the amount awarded to an applicant did not always cover their costs. One applicant remarked that although she was awarded more than £1,500 in compensation, she was still £200 worse off having taken the claim as her legal fees were in excess of £1,700.

An applicant received an award in excess of £9,000. The applicant did not feel that this amount awarded in compensation made up for the distress she had encountered as a result of the discrimination. She noted that the amount would not help her return to employment and a substantial amount would be spent on fees for her representation. The applicant was not satisfied with the outcome. She wanted an apology from the respondent that she has never received. The applicant did not feel that the respondent would take notice and change their policies as a result of the case outcome. (It should be noted that a Tribunal has no authority to require a respondent to apologise to an applicant.)

A respondent who was ordered to pay in excess of £60,000 to the applicant argued that the frame of reference for tribunals is too large. The respondent questioned whether the tribunal should simply consider the figure the applicant puts forward. In this case the tribunal trebled the figure the applicant put forward.

6.3.2 Reinstatement/redeployment

A tribunal can also make recommendations to the respondent about its policies and practices. If the tribunal feels it is appropriate to do so, and has the applicant's support it can recommend that the applicant be reinstated to their position or redeployed to another post. The tribunal can recommend the respondent to undertake reasonable adjustments should the applicant wish to return to work.

In the case studies for the current study there were no examples of reinstatement, redeployment or of an order for reasonable adjustment. In one case, the tribunal chair enquired as to whether the applicant would like their job back but the applicant declined.

6.4 Conclusion

In this chapter we have reviewed the factors affecting the case outcomes. We have seen that the quality and credibility of written evidence was important for both applicants and respondents. As a separate issue, the use of medical records and reports, when appropriate, can influence the case outcome. The quality, consistency and credibility of witnesses called upon at the tribunal were frequently cited as an important factor influencing case outcomes.

The quality of representation was also very important; the case studies included examples of both positive and negative views of representation. The chapter also briefly examined the effects of last minute changes in representation, the impact of self-representation and the perceived power difference between applicants and respondents. Finally the attitudes of the tribunal, including the understanding and knowledge of the panel, were frequently cited as an influencing factor upon the outcome of a case.

7. Impact of DDA

7.1 Introduction

This chapter focuses on the impact of taking DDA Part II cases on both applicants and respondents. The difficulty of using employment tribunals, particularly in terms of stress and cost, has been examined in previous chapters. Whilst there is some overlap of themes between this chapter and the earlier ones, this chapter focuses more specifically on the wider consequences that DDA cases have on the day-to-day lives of individuals and the running of organisations, both whilst they are in progress and afterwards.

7.2 Impact on individuals

Applicants were not asked directly how they felt the case had impacted on them. However, in discussing their satisfaction with the process and outcomes, some important issues about impact were raised spontaneously.

7.2.1 Financial impact

Before looking at the financial consequences of taking cases on applicants, it is important to consider the employment position that many disabled people find themselves in. Only in understanding this context can we really appreciate how important gaining an award and avoiding legal costs might be.

A number of applicants in this study talked about experiencing financial difficulties before lodging their DDA claims, for example, as a result of losing sick pay after a substantial period of leave, or of being placed in lower paid roles as part of a reasonable adjustment.

Many also talked about how the alleged act of discrimination had led to financial difficulties. This was particularly the case for those who had been dismissed, some of whom found it hard to get a new job, or at least one with a similar wage. The following case study gives an example of the financial problems that disabled individuals who have been discriminated against can face.

A woman who was dismissed from her role in a healthcare trust described the experience of discrimination as "*financially devastating*". She had been on a salary of £22,000, which was hard to replace. For the first three months following the dismissal she had not been fit to work, let alone apply for any jobs. She has since recovered from her illness but has applied for over 200 jobs without success. She is currently working as a shop assistant.

Financial gain

Of those who won awards or a financial settlement, many seemed pleased with the amount they received. However, in the majority of such cases the financial impact appeared to be small and there were a number of associated problems (see Chapter 6 for more details). Many claimed that it only made up for what had been lost and no more.

> A man with anxiety and depression decided to settle the case when he realised he could not afford any more legal costs. In the end his settlement was sufficient to cover his costs. He was largely dissatisfied with the outcome and complained that:
>
> "*after two and a half years I'm no further forward and I've had to throw in the towel because basically I can't afford it*".

The amount won was often offset by the need to pay

substantial legal fees for advice or representation. For example, in one case the award was not enough to cover the cost of a solicitor (see Section 6.3.1). A few thought they deserved a higher sum.

A woman who was dismissed from her teaching role described the financial settlement she received as a "*fantastic benefit*" which helped with the salary she had lost. However, she believed she deserved more because she had lost her salary and working potential. She was happy with the settlement only because it still allowed her to go ahead and make a personal injury claim.

Often the financial impact was tainted by some dissatisfaction elsewhere in the process. Some thought that the money did not make up for the stress and ordeal they had gone through in making a claim. A woman who was yet to get to a full hearing described how:

"The maximum monetary compensation is minimal compared to what you have to put yourself through. Nobody outlined this to me at the beginning."

A woman with a hand injury who received £9000 compensation for being dismissed from her teaching role thought that the amount was not a lot given the distress she had been through. It did not improve her condition or help her get back to work and most of it was expected to go on lawyers' fees.

In many cases, money had not been the main objective behind taking a case, but obtaining justice, getting an apology and securing the rights of others (see Section 3.3.1 for more details). For a few applicants who thought their cases had failed to achieve these 'higher' aims, the financial gain was something of an irrelevance.

A woman who was discriminated against when she applied for a job because of her dyslexia was satisfied with the amount of settlement she received, which was the full sum she had asked for. However, she was dissatisfied with the 'gagging clause' that came with it, as one of her reasons for taking the case had been to help others and publicise it. She remained frustrated that her case had not been able to help others in similar circumstances.

Another problem associated with finance included getting hold of the money that had been awarded/offered. Three applicants among our case studies who received compensation orders were frustrated that their organisations had not yet made the payments, and that the tribunal system did not have the power to oversee this process. The situations had become so bad that in all three cases the respondents had been issued with court summons. This was particularly ironic for one applicant, who had accepted a settlement to avoid having to go to a tribunal hearing.

Financial loss

Many applicants complained about the huge expense of legal fees, and the financial losses they had accrued as a result of taking a case. Whilst legal fees are high by most people's standards, it is important again to remember the financial position for many disabled people, which can make them even more difficult to afford:

A man with depression made a claim against his organisation for dismissing him. In the interview he talked about how, since he was 'obviously' not working at the time and was on a pension of only £260 per month, he struggled to pay the legal fees. Although the settlement eventually covered his costs, the experience was so bad that he felt largely dissatisfied by

the outcome.

For those who lost their cases, the cost of legal fees was often particularly damaging. Two applicants were being sued by their representatives because they had been unable to pay what was owed.

A pub worker with ME said that the financial impact from losing his case had been devastating. As well as losing his home (he previously lived in the pub where he worked), he was facing a court summons for failing to pay all his solicitor's fees, which amounted to a few thousand pounds.

Sometimes applicants are issued by tribunals with an award of costs, which means they are obliged to pay for the respondent's legal fees in addition to their own. This had happened to one of the applicants in our case studies.

A woman with dyslexia who had lost her claims for disability discrimination and unfair dismissal described the outcome as a disaster. In addition to losing on both counts, the award of costs was in excess of £10,000. The costs have been referred to the county court and she is currently having to pay a solicitor again for more representation. They are trying to negotiate a smaller award but the woman was terrified of how high the costs might be.

In some cases, the cost of taking a case can have an indirect impact on the overall outcome through preventing the applicant from going ahead with a claim or taking out an appeal, or through leaving them no option but to settle before a hearing (see Section 4.3 for more details).

A man with depression who made a DDA claim for less favourable treatment was very upset when he lost. However, he had promised his wife that he would not go to appeal because he needed to draw a line under the case and had already spent all his redundancy package on making the claim.

In summary, it was clear from the case studies that taking a DDA case can impact financially on applicants. For those who gained financially through winning awards or making settlements, the positive impact was not deemed to be great, and was often off-set by the ordeal of the process and the cost of legal fees. For applicants who were unsuccessful, however, the losses accrued through taking cases were sometimes substantial.

7.2.2 Social/family impact

A major theme to emerge from the case studies was the amount of time and effort that goes into making a DDA claim. Under such circumstances it was hardly surprising to learn that taking a case can impact on an applicant's 'other' life away from the ET process. Some applicants described how it had "*taken over*"' their lives, or put their lives "*on hold*".

An applicant and his wife who took a DDA case out against his previous employer talked about the stress, time and effort involved in taking the case. They gave an example of working on the schedule of losses, which, although only a few pages long, took them both a whole weekend to complete. They were both working at the time and found it very difficult to motivate themselves to get down to the task after a full day at the office.

"*You really don't want to do this. You've got a job, your life's ticking along, everything's nice, do I really want this hassle*?"

When asked whether they would recommend taking a DDA case to others, the applicant advised people to think very hard before deciding whether to go ahead with it.

"*If you haven't got the will power and the determination to see it through to the end, don't even think about starting because it's going to take over your life.*"

Family and friends featured heavily in applicants' accounts as providing a huge source of help during the DDA process. Often they gave support and comfort in what was described as an "*isolating*" experience. Although the interviews were held only with applicants (except in a couple of instances), it was evident from a few individuals that the impact had not only been on themselves but also on those close to them. One applicant mentioned how the stress and strain he experienced impacted on his wife:

A man with motor-neurone disease who was involved in an ongoing claim against his employer for failure to make reasonable adjustments talked about the amount of work he was putting into the case. He also mentioned how he needed to stop himself from getting too involved because he could see that it was putting a strain on his life at home and on his wife.

In many cases, friends and family were actively involved in 'fighting the battle' alongside the applicant, and applicants spoke of them "*taking the case together*". For a few, the nature of their disability meant that they were reliant on others to carry out certain tasks.

A man with depression who made a DDA claim on the grounds of recruitment sought the help of a friend to deal with the administrative aspects of his case such as assembling the necessary documents. Eventually he felt so overwhelmed and stressed by the process that they arranged for letters from the respondent's representative to be sent to him via his friend.

A man with kidney problems who was represented by a friend in his case for unfair dismissal under the DDA described how he would not have been able to bring the claim alone because his thoughts were dominated by health concerns. He also mentioned how his wife had been very involved and had done lots of "*fighting*" on his behalf.

Where they were highly involved, friends and relatives were also vulnerable to being directly affected by the case. In the interview held with an applicant and his wife, they both talked about experiencing stress and strain (see above). They also mentioned how at times this had had negative effects on their relationship, leading them to bicker and argue about the case.

7.2.3 Impact on impairment and well-being

A number of applicants mentioned how the case had impacted on their impairment and/or their general health and well-being.

Physical activity involved in taking a case

Three applicants described how the physical work involved in the case had negative, but short-lived, effects on their impairments. Two applicants with Chronic Fatigue Syndrome described feeling tired and dizzy during their hearings because they went on so long.

Whilst tribunals were often praised for making adjustments during the proceedings (see Section 5.6.3), there is still considerable work that goes on before a hearing that may be damaging to an applicant's health.

For evidence in a DDA case against her employer, a woman with tenosynovitis (a Repetitive Strain Injury (RSI)-related problem) had to write out her medical history. The strain on her arms ended up having a very negative effect on her condition.

Obviously, the extent to which the physical effort of a case will impact on an applicant's impairment depends on the nature of their disability and how much help they have available. Nonetheless, for some individuals who lack the support of friends, relatives or advisory professionals, it can present a problem.

Stress

Many applicants, both those whose cases were and those whose cases were not successful, talked about the difficulties involved in making a claim and the negative impact it had on their well-being. The process was described as "*traumatic*', "*very stressful*", "*like a rollercoaster ride*" and applicants talked of the need for "*spiritual strength*" to see a case through (see Section 5.7.4). Having already experienced the ordeal of discrimination, some saw taking a case as a continuation of the trauma.

In many case studies, stress was a barrier which prevented individuals from going ahead with a claim or led them to withdraw or settle before a hearing (see Section 4.3 for more details). A couple of applicants told how they had been advised by medical professionals not to pursue a case for fear that it would have a negative impact on their health. Nevertheless many talked about battling on, despite the stress. An applicant with post-traumatic stress involved in an ongoing case described how:

> **"Emotionally I can't cope with it anymore. But I will feel deflated if I don't see it through as I have spent so much time on it."**

Three applicants claimed that the stress exacerbated their conditions or slowed their recovery, for example:

A woman diagnosed with thyroid cancer described how, at the beginning of her case, before she had acquired legal representation, she found the process very stressful and would often be feeling wound up and angry. At one stage she thought about giving up the case as it was affecting her health.

In another three cases, applicants claimed that their experience of the discrimination, coupled with the stress involved in making the claim, had led to the onset of new psychiatric conditions. Only one of these applicants described her disability as psychiatric.

A woman with depression, anxiety and a germ phobia, who lost her case for failure to make reasonable adjustments, described being upset by the outcome of her case and subsequently suffered from panic attacks.

A woman with dyslexia who was faced with an award of costs after her claim for DDA unfair dismissal was unsuccessful, thought she had been "*emotionally disabled*" by the process. At the time of the interview she was back on sickness benefit and believed she would not be well enough to work again.

A deaf applicant who was successful in his claim talked about how both the alleged act of discrimination and the events at the tribunal had been very stressful and how he was still on sleeping tablets and other medication for anxiety.

A few applicants who lost their cases mentioned how the outcome had a long-lasting impact on their well-being. They continued to be annoyed by what had happened, and found that they still got 'wound up' just thinking about it. A man who had a near-fatal kidney problem described his continued frustration:

"It still dominates me. I still lie awake at night – and it all started such a long time ago. It's been worse than the illness. It has had a far bigger effect on me than nearly dying, you know."

Impact of being defined as 'disabled'

Section 5.7.4 describes the major causes of stress that applicants face in taking cases. This section will consider one of them, namely being defined as 'disabled', since in addition to impacting on well-being, this may have longer-term consequences for an applicant's sense of identity.

The majority of applicants had not considered themselves to be disabled prior to taking a case. Some were not aware that their condition fell under the DDA definition. Others deliberately avoided using the label because it felt uncomfortable and they did not like the stigma attached to it. For many, disability was associated with incapacity.

An applicant diagnosed with multiple sclerosis, who was claiming Access to Work[1] when the alleged discrimination took place, stated that she had never previously considered herself to be disabled because the minute you admit to it is the minute the disability 'has won'.

Another applicant diagnosed with multiple sclerosis stated how she dislikes to think of herself as disabled even now because she still feels she has a lot to offer.

A few applicants talked about how confronting their disability had been a difficult and painful process which emerged incidentally from taking a DDA case.

A woman with RSI who had her disability contested at a preliminary hearing described how at times she wanted to "*pack the whole thing in*" because it got her down to hear time and time again and have it "*thrown in her face*" that "*X is disabled*" and "*X is a problem*". She felt like she was 'on the scrap heap', as if she was being told that she would never go anywhere. Although the respondent eventually conceded on

[1] Access to Work is a government programme (delivered through JobCentre Plus and its Disability Employment Advisers) which can defray the costs of adjustments for disabled people to help them get or keep jobs.

the definitional issue, she saw this as a 'double-edged sword' – good because it meant she could carry on with the case but bad because it meant hearing herself labelled as disabled again.

A woman who had a number of impairments including back and neck problems talked of her sleepless nights worrying about having to prove her disability at tribunal, and being poked and prodded by a doctor she did not know. She found having her disability contested even more demeaning than the act of discrimination.

For some applicants, it was also hard to admit the disability to other people. One applicant described how she had found it difficult having her personal information publicised to friends and family.

A woman who received a hand injury at work described how difficult it had been for her to seek out information for her case because it involved confronting the fact that she has a disability. Although she won her case, she was upset to have it reported in the papers and subsequently have friends and family previously unaware of her condition coming up to ask her about it.

However, contrary to the above examples, one applicant with depression found that learning that he was disabled during his case had been beneficial:

"I was sort of relieved to be labelled disabled, previously it was just this strange recurrent illness that I had. I saw each episode as a separate thing."

Positive impacts

Despite the stress, a number of applicants, particularly those

whose cases were successful, thought the process had been beneficial to their mental health. A couple of applicants with psychiatric conditions went so far as to see the case as playing a part in their healing process. One had actually been encouraged by her GP to take a case with the specific intention that it help her get over her illness.

A man diagnosed with depression who represented himself in a DDA recruitment case described his motivation behind making the claim:

"I've suffered an awful lot of injustices in my life, and there came a point – part of making myself well again – when I had to make the decision that no-one was going to shit on me ever again."

He described how he had been very nervous and "*like jelly*" before the hearing, but when he got in the room was "*flying*". At the time of the case study interview the applicant appeared defiant and determined, which he contrasted to previous times when he had been deeply despondent.

A couple of applicants told how, despite the stress of the process, they had gained strength through taking the case and seeking out the truth.

A woman who described her impairment as a mental, psychiatric and social illness described taking her case under the DDA as very stressful. However, just the fact that it was happening and she was being taken seriously also made it supportive. She thought the case had helped her a lot as it allowed her to clarify her perception of what had been going on at work.

In summary, the evidence from the case studies indicates that taking a case can have both negative and positive impacts on

an applicant's physical and mental health. Whilst the stress and work involved in the process exacerbated some conditions and led to other health problems, some applicants felt the case helped them to regain mental strength. In addition to the more obvious impacts that taking cases can have, it is important to appreciate the incidental impact on applicants' well-being that may come from having the subject of their disability brought to the fore.

7.2.4 Labour market participation

This section looks at the impact of taking a DDA case on an applicant's participation in the labour market, *ie* their ability to continue working with their current/previous employer or to find new work. It is important to bear in mind the difficult employment context that many disabled people find themselves in, irrespective of making DDA claims.

We should also be aware that any impact on labour market participation may ultimately have consequences for some of the other issues already described in this section, particularly financial circumstances and possibly health and well-being. A few applicants in this research, particularly those with progressive illnesses, described finding it hard to accept that they no longer have the same capacity to work as they had previously.

Staying in the same job

Applicants who had been dismissed by their employers were asked whether they would consider re-instatement. Although they often wanted to return to their jobs, many were afraid because they suspected that nothing would have changed as a result of the case. They did not feel they would be treated fairly again and in some cases the colleagues who had been part of the problem giving rise to the case were still likely to

be there.

A common theme to emerge during the case studies was the perceived 'nastiness' of respondents during the legal process, including former colleagues. Some applicants told how respondents had 'thrown mud' at them by, for example, claiming that they were stupid, behaviourally deranged, or accusing them of theft and lying. A few mentioned being surprised and hurt by the evidence given by their co-workers. It can be inferred from this that the act of making a claim may damage relationships with present or former colleagues, which serves only to worsen the prospect of returning to the same employer.

A woman who took out a case against her employer thought that the DDA was an excellent idea but recognised that taking a case would make it impossible to ever get the same job back.

"Everyone in the organisation pulls together and you're seen as some sort of traitor".

She was rather hurt by the involvement of some of her colleagues in the hearing because they were people she had gone out of her way to help in the past.

A respondent described how she thought it would be difficult for the applicant to return to work since lodging the case. He had accused some of his colleagues of discriminating against him, and some had been very upset, particularly as he had worked in the department for many years.

Trying to find other work

A number of applicants had experienced difficulties finding

other work since the discrimination had occurred. Although there may be a multitude of reasons for this, not to mention discrimination, some thought that the specific act of making a claim against their previous employer had hampered their success. Two applicants working for large public service organisations believed that their careers were finished in those areas as a result of making claims. One explained how her employer had gone out of his way to make it impossible to work in the same type of job again:

A woman who took out a case against her previous employer for dismissing her on the basis of her disability found herself being frequently knocked back when she applied for similar posts. She felt that as soon as a prospective employer found out who she was they did not want to know. Part of the problem was that her previous employer had refused to give her two references. However, she learned during the DDA case that the respondent had also spread gossip about her and effectively "*black-listed*" her from work in that field.

A teacher mentioned how she found it difficult to apply for other teaching roles after taking her case. She believed that schools were put off by both her disability and the fact that she had taken a case against her previous employer.

The logistical issues associated with taking a case can also make staying in the same role or finding new work difficult. Hearings typically take place during normal working hours and can be very time-consuming. One applicant mentioned how the delays in reaching the full hearing for her case had been frustrating. As well as it feeling as if there was a "*cloud hanging over*" her, she experienced complications trying to get time off when she had just started a new job.

Overall, therefore, the case studies suggested that the

process of taking a case can have a negative impact on applicants' participation in the labour market. The antagonism that can emerge between the two parties during a case can make returning to the same work more difficult and damage an applicant's reputation when seeking new employment, whilst the time and investment involved can make it logistically difficult to start a new job.

7.2.5 Impact on attitude towards the DDA and tribunal system

Applicants were asked how they felt about the DDA and the tribunal system, based on their overall experiences. There was considerable variability in the responses. Some had very positive experiences to tell, including how they had changed their opinion of legal professionals. Others had very scathing and bitter remarks to make, describing how they had been "*let down*" by the system, and saw it as a '"*joke*", a "*farce*" or, according to one applicant, even "*discriminatory*".

This section will not go over the points made in previous chapters. However, it is important to appreciate how attitudes toward the DDA and the legal system may influence an individual's likelihood of taking a case again. Often a heightened awareness of the legislation was coupled with disillusionment:

> **"I see why it (DDA) was put there, I applaud why it was put there but don't guarantee, don't bank on it. Don't count on it if you (don't) have to."**

A few applicants said they would be reluctant ever to use the Act again.

A man with anxiety and depression, whose case for DDA dismissal was eventually settled after a long battle, told how

he would not consider taking a further claim under the DDA based on his overall experience. It had taken a terrible toll both on his mental health and on his financial situation, and he felt largely dissatisfied with the outcome.

Some said that they would not appeal on the basis of their experience, even where there were grounds for such an appeal:

A woman diagnosed with depression, who lost her case, was told by her solicitor that she would have good grounds for making an appeal because the tribunal panel made a number of mistakes in the summing up. However, she said that she would not be doing so, partly because she could not afford it, but also because she thought the system is unfair and did not think she would win anyway.

Applicants' perceptions of the effectiveness of the DDA

One factor likely to affect applicants' willingness to use the DDA again is their perception of how effective it is in protecting disabled people. Whilst a financial reward was often stated as an incentive for taking a case, in the main, applicants were looking for a change that would benefit others (see Section 3.3.1). However, this was rarely achieved. In most instances the respondent was simply required to make a financial payment, either as an award or as a settlement, and to cover legal costs. Whilst the organisation may have gone on later to change some features of policy and practice (and our interviews showed that some did) many applicants were sceptical of the impact these relatively small fines had, and some were dissatisfied with the outcome as a result.

A man with rheumatoid arthritis who gained a settlement of £5000 from his employer claimed to be happy with what he received but did not think it was a lot of money for the respondent, merely "*tea takings for the week*". As it stood, he did not believe the case had changed any policies or practice, and was convinced that the organisation would continue to discriminate against its staff.

A couple of applicants thought that the tribunal system lacked the power to force respondents to change their ways and suggested alternative mechanisms through which this could be achieved. One such proposal was to give tribunals the authority to issue heavy fines on organisations that lose DDA cases. Another was to have an auditing system, much like that involved in Health and Safety legislation, whereby respondents are checked regularly for compliance with DDA regulations. Interestingly, the latter suggestion was also proposed by a respondent.

An applicant with depression, who was involved in an ongoing case against his employer for DDA dismissal, questioned how much power the Act actually has when organisations do not comply with it. Although individuals may benefit from taking cases, unless there is some independent review whereby companies which have been found guilty of discrimination are audited, he does not see how they are likely to change their behaviour.

For a minority of applicants, changing policies and procedures was not sufficient to reduce their cynicism since they did not believe that such changes would alter what happens in practice.

"These organisations just do what looks good, it's just window-dressing... The whole point is, you can have any policies you like, or you can have the DDA, but you can't change people's attitudes. Whilst attitudes stay the same, no progress can be made."

Another applicant similarly complained about the discrepancy between what organisations claim to do and what they do in practice. He was advised by his representative not to pursue his case because on paper the organisation looked as if it had made all the required reasonable adjustments. He agreed with her that this was so on paper but argued that physically the organisation had not made any changes. However, he realised that he was in a "*no-win situation*", which put him off taking this case and using the Act again in the future.

Overall, the evidence from the case studies indicates that the difficult experiences of taking cases and the resulting outcomes may lead to cynicism amongst applicants and a reluctance to use the Act again should the need occur.

7.3 Impact on respondent organisations

The respondent employers were asked more specifically how they believed the experience of having a DDA claim made against them had impacted on the organisation. Whereas in the case of applicants, it is important to consider how the experience could influence the likelihood of using the Act again, in the case of respondents it is necessary to learn how it affects their compliance with the Act and their employment of disabled people.

7.3.1 Impact on the business

Finance

Although applicants complained that the awards/settlements had little financial impact on employers, the issue of cost was raised by a number of respondents. One noted how organisations always lose out, no matter what the outcome, because they have at least to pay for their legal

representation. Although this particular organisation had been successful, the case had cost it £6,500 in legal fees.

It is true that, for some respondents, the question of finance did not appear to present too much of a problem. Indeed, a number offered settlements because they preferred to lose some money than to face the alternative outcomes. For example, one organisation offered a settlement to avoid having its name "*dragged through an employment tribunal and smeared*".

However, other organisations saw settling as a means of avoiding the higher expense of going to a full hearing.

The HR manager of a university eventually settled a DDA case even though he had been urged not to, because the case was unfounded. He felt bad about it but was responsible for managing a budget – the way he saw it was that the more they spent on litigation, the less they were able to spend on the university.

For a few respondents, particularly small organisations, there was genuine concern about financial costs and the subsequent impact on the business.

The manager of a small residential care organisation, which lost its case, described how it had not had any insurance, which resulted in thousands being taken straight out of the business. Including the award to the applicant and the legal fees he estimated it had cost around £7000. He saw this outcome as depriving the elderly people he was trying to care for.

The director of a small independent retail business expressed his anxiety about the potential costs and subsequent impact of a case on his business. Although the applicant lost the preliminary hearing, an appeal had been granted at the time of the case study. The director had been advised that the applicant would not succeed but meanwhile the prospect of another hearing and associated costs was hanging over him and affecting his efforts to organise a buyout of the company.

As was the case for applicants, the cost of a DDA case presented a barrier for some respondents. One director complained that, as a small business, his organisation did not have the financial resources to go ahead with a preliminary hearing to establish whether there was a case in the first place (he did not think there was one). He recommended some changes to the tribunal system:

"A low cost review of circumstances before the tribunal in some cases would make a lot of sense. There will be cases that need to go straight to tribunal, but this one makes my blood boil."

Resources and effort

A few respondents mentioned how they had devoted considerable time and effort to supporting their position during the cases, which had been a distraction from their normal working duties.

An HR director mentioned how her colleagues involved in the case were left feeling *"raw"* when their offer for settlement was finally accepted on the day of the hearing. They had spent so much time, energy and effort preparing for the case that it was strange to find that they were not going to have to say anything.

The case studies provided, overall, evidence that facing a DDA claim can have a negative impact on the business of respondent organisations through the cost and effort involved. It is important to consider how both of these may reduce the capacity of the organisation to make any subsequent improvements, although this issue was not identified in any of the case studies.

7.3.2 Changes to policy and practice

The interviewees in respondent employers were asked specifically whether they thought their organisation had learned any lessons as a result of having had a DDA case taken out against it. Many admitted that they could have done things better:

The acting head of HR for a health trust which lost its case against a former employee felt that, with hindsight, there were always things it would have been useful to know or to have done differently, such as keeping better records, being clearer with the individual, keeping up-to-date with the case law, maintaining diversity in the organisation, educating others as well as HR staff and looking more closely into the roles of managers and their relationships with staff.

Most respondents were able to list changes that had already taken place or that were planned as a result of the case.

Raising awareness

Although the great majority of respondents were aware of the DDA before the case in question, many thought the experience had raised awareness further.

The managing director of a recruitment services firm, which had a DDA case made against it withdrawn, thought that the case had had a huge impact on awareness-raising. It now

knows that it needs protection from DDA claims, such as insurance and having appropriate policies and procedures in place. It now knows that it needs to be "*incredibly sensitive and careful*". If the situation were to arise again he believed that his "*antennae would just go up*".

The chief officer of a voluntary sector organisation involved in an ongoing case admitted that he was not so well informed about the DDA before the case. If he had been aware of best practice, he believed that he would have followed it. As a result, the case has raised awareness of the need to follow procedures. Now he is keener on keeping proper records, and appraisals and keeping people up to speed.

Some organisations had plans actively to raise awareness themselves, recognising that there was still considerable ignorance in some sections of the organisation.

The interviewee of a steelworks company which lost a DDA case believed it would have acted more quickly to accommodate the employee had it known more about the legislation at the time. Since the hearing the company has circulated information on the Act and other employee issues, such as maternity leave, to business and operations managers in the company.

An encouraging number had set up training programmes to educate their staff about the legislation. Some of these included other employee legislative issues, such as health and safety. For the most part, such training schemes were limited to certain staff to reduce cost.

A local authority involved in an ongoing case for failure to make reasonable adjustments had received little training on DDA matters before the case was lodged. The personnel manager was very concerned about the impact that the case would have on its reputation as a fair employer. As a result, he had been looking into doing something about equality/disability training for all staff, starting with the senior managers.

Even an organisation with an extensive training programme on diversity already in place took advantage of the learning gained from the experience of facing a DDA case.

One public sector respondent had long employed a diversity adviser whose role it was to review all discrimination, employment tribunal and grievance cases to feed into future learning and development programmes for staff. Although it won its case, one of the weaknesses in its defence was that a manager had acted hastily and inappropriately. It went on to encapsulate this example in a training programme for managers which encourages them to tackle problems as they arise rather than let them build up.

Being honest and open

Another positive move exhibited by respondents was to develop the confidence to deal with disabled employees and job applicants in an honest and open manner. A few interviewees thought their staff were afraid to tackle problems arising with disabled individuals, such as extended absence, for fear of being discriminatory. However, they had learned from experience that failure to deal adequately with a problem as and when it arose meant that by the time it did come to their attention, neither side was in a good position to table a solution.

The head of HR at a university believed that it should have been more open with the applicant and involved the special needs officer at an earlier stage. She hoped that in the future staff would be more honest with employees about the extent to which their disability is affecting their work. They aim to have issues laid on the table for discussion, rather than try to be "*nice*" and protect the disabled employee.

The interviewee for a law enforcement agency believed that its DDA recruitment case had highlighted that it should not make assumptions about a person's disability, and must talk to the individual personally and try harder to negotiate solutions. She believed this lesson had made a change for the better in the organisation.

One organisation planned to help to staff feel less afraid of questioning disabilities at job interviews through improved recruitment and selection training.

Tightening up procedures

Despite the obvious improvements in some organisations which, it was hoped, would lead to better working environments for disabled staff, many respondents talked about changes that were focused more on 'saving their own skin' than on helping their employees. It must be noted that in some of these cases, the respondent genuinely believed it could do no more to accommodate disabled people and thought it a shame that it had come to this.

The finance and HR manager for a transport agency was "*disgusted*" when his organisation lost its case with an employee because he was adamant that discrimination had not occurred. The case reconfirmed to the interviewee the importance of adhering to rigorous HR policies and procedures which would stand up in a tribunal situation.

A local council was forced to settle a DDA recruitment claim because legally it "*didn't have a leg to stand on*". The interviewee claimed that the applicant's job offer had been withdrawn on the basis of unsatisfactory references, but there was nothing to show that it had not been due to discrimination. As a result of the case, it did not plan to change how disabled people were treated because it did not believe it had done anything wrong beforehand. However, it was making considerable efforts to safeguard its own position by, for example, including a conditionality clause in job offer letters. Although she believed that something positive had come out of the case, the interviewee also said:

"I just feel as a personnel officer it's awful that everything has to be tied up so tightly just to avoid this type of situation. There's no alternative is there?"

Organisations proposed to 'tighten-up' procedures in a number of ways. A few, like that above, made changes to existing structures such as job descriptions and job offer letters. A major concern for organisations was that in the future they would have better evidence to take to a tribunal to prove that discrimination had not taken place. As a result, many had begun to improve their documentation and ensure that they record every aspect of the employment of disabled staff.

The HR director of a multinational organisation stated that "*sadly*", lessons had been learned from their case. He believed that it had complied with the DDA "*absolutely down to the letter*" and said that now the organisation would have to spend more time and effort monitoring disabled staff in terms of documenting everything, and meeting with them only in pairs to enable staff to confirm verbal accounts.

Overall, it is clear from the case studies that many organisations used the experience of their DDA case to improve the employment of disabled employees, by educating and raising awareness of the legislation amongst their staff and developing the confidence to tackle the issues professionally. Often, however, the changes listed by respondents were predominantly for the benefit of the organisation; efforts to safeguard them in the event of future employment tribunals rather than prevent facing such cases in the first place.

7.3.3 Barriers and resistance to making changes

A number of organisations were reluctant to make all the necessary improvements as a result of their case. Some described barriers that made it difficult to implement any change.

Lack of resources

A minority of organisations mentioned the lack of resources; whilst they would have liked to have made improvements, they did not think they had the means to do so. This was most prevalent in small and public sector organisations.

> The senior policy officer of a local authority facing a DDA case for dismissing an employee was aware that issues concerning disabled employees could be resolved much sooner if managers out in the field were as aware of the legislation as those in the central HR function. However, this would require considerable expenditure on training. Whilst the authority was actively looking at its equal opportunities training provision, he was not yet sure how such a programme will be funded. As an employer, he accepted that the council was responsible for educating its staff, but believed they had done as well as they could on their existing resources.

The director of a small independent retail business was worried about the costs of an ongoing claim made against the organisation. He said that he did not have the time to be proactive on employment issues since he works "*flat out*", doing 70 hours a week. Consequently he did not see himself making any changes in the future.

Not a priority

However, for some organisations, changing procedures for better compliance with the DDA was simply not a priority.

The HR director of a large health care service organisation admitted that they did not have enough internal training on diversity and employment law but argued that at the moment it was not on their list of priorities.

For a few, HR issues fell behind the other aims of the business. For example, an interviewee from a small retail distribution organisation involved in an ongoing case against a former employee stated that his first priority was to turn the business around as it had recently been making a loss. Only after he had achieved that would he consider looking at HR.

The head of HR for a government agency described how disability was not high up on the government's agenda, as it was overshadowed by performance and pay.

"Performance is king and if something doesn't have a performance link to it, then you don't do it basically."

Since disability is not regarded as a performance issue, she believed it did not receive the attention it deserves.

In some cases the needs of the business and those of employees were thought to conflict, making it an issue of

choice rather than priority. One HR director complained that the aspect of the DDA he finds most difficult is that it:

"... potentially stops you from making the best decision for the business. Whilst I can understand it as an HR professional, I end up being seen as stopping somebody from making the decision they want to make. Even though the individual may be able to do the job, there is always the, Ah, what would the opportunity have been if I could have had that other person?"

An employee for a public sector organisation which withdrew a job offer to a deaf applicant because he was unable to do the telephone work complained that the DDA encourages disabled employees to feel that they should be the priority. In her view, the customers' needs have to come first, not just those of the employees.

Overall, the case studies identified resistance amongst some respondents to implement any changes as a result of their case. Some did not believe they had the finance or resources to make the improvements, whilst others simply did not consider it a high enough priority.

7.3.4 Attitudes towards the DDA and employment tribunals

The respondents in the case studies were asked to talk about their general opinions of the DDA and the employment tribunal system on the basis of their experience. It is important to consider how having a DDA case taken against them can impact on employers' attitudes towards the legislation, since these may ultimately affect their willingness to comply with it and employ disabled staff in the future.

Cynicism

Although many respondents admitted to having made mistakes, the case studies indicated a strong feeling of cynicism amongst some organisations. In one case the cynicism was extreme and had had a devastating effect on the employment of any staff, let alone disabled staff:

The manager of a small family-run residential home which had to pay a substantial award after losing a case complained bitterly of the new "*modern methods*" of dealing with staff issues. He felt that the whole case had been unfair and that he had been discriminated against as an employer. As a result of the case, he and his wife planned to sell the business and retire. He claimed that they would not be employing anyone else and would stop providing jobs for the area.

One respondent highlighted the dangerous consequences that employment cases can have on organisations. He wished more time was spent educating people 'upfront', since when they lose at tribunals there is the risk that they will become cynical and feel that they have not had 'a fair run'. In the long term, he believes the move towards a 'litigant' society will force some organisations to take their business elsewhere.

A solicitor similarly highlighted the unwanted side-effects of facing DDA claims. As a representative, she had seen how losing at tribunal can have a devastating effect on employers. She had often had to counsel managers who became very distressed and frustrated when they lost their cases, and wondered whether tribunal chairs realise the impact of their decisions. However, contrary to the HR director, she did not appear to believe that this would be prevented through better awareness since, in her experience, it is often the more 'clued-up' managers who end up facing DDA claims. The

reason they become cynical is because they have tried hard to comply with the legislation and are left wondering what else they could have done.

This was certainly echoed in the interviews for this study. Many respondents talked about being fully aware of the DDA and seeing it as just 'part and parcel' of what they do. Many claimed to have made huge efforts to comply with the legislation and accommodate the needs of disabled employees.

The HR director of a university involved in an ongoing DDA case felt that it had gone beyond what was necessary for the employee. She believed that the applicant had received better treatment than non-disabled employees and the university had tried to offer as much flexibility as possible by, for example, being lenient with sickness absence.

For many of these respondents, facing a case was seen as frustrating because they honestly did not know what else they could have done. Although they often admitted to faults elsewhere in the system, such as breach of contract or unfair dismissal, they were often adamant that they had 'followed the letter' of the DDA.

A few organisations had gone a step further towards embracing diversity by, for example, setting up work placement schemes for disabled school children. Their view in such cases where they felt they had worked hard to help disabled people, was that facing a DDA case came as a huge blow:

An HR employee from a local authority described how her organisation had worked hard to help disabled people, not only through accommodating their own employees but by giving temporary help to others "*to set them on their way*".

"We've been trying really hard to accommodate people and when you get something like this you think 'don't deserve it'… and that hurts, you know. When you feel that you're working very hard to positively employ disabled people it's a bit of a kick in the teeth."

Some individuals even took it personally:

"The claim has become a personal slight on my integrity. I do not accept that I have discriminated against (applicant). In fact I went out of my way to help him."

Often such cynicism seemed to be compounded by the respondents' experiences with the legislation and tribunals; not only were they facing what they saw as an unwarranted case but they also felt that they were in danger of losing because of the vagaries of the tribunal system and the complications with the legislation. Where respondents had made mistakes, they sometimes found it very difficult to show that this was not due to discrimination. For example, one interviewee, who had withdrawn a job offer from a disabled applicant on receipt of unsatisfactory references, complained how the law makes it very difficult to decipher disability from other issues.

"It makes it very difficult for the employer to be able to separate out the performance issues from the ones of disability… It seems to me that the onus is on disability rather than the effectiveness of the employee."

Aside from the law, there were also negative opinions of the tribunal system, which was considered variable, like a 'lottery', and biased, such that panels will *"bend over backwards to find in favour of the applicant"* (see Chapter 5 for more details).

An HR manager for a large financial services organisation which lost its case against an employee expressed her frustration at losing because it had done everything it could to assess whether the applicant was disabled:

"What could we have done that would have satisfied the tribunal that we have satisfied the Act?"

The interviewee admitted that the case had made her cynical towards the DDA.

Blaming the applicant

The reaction to facing a claim was often to be sceptical of the applicant's motives and to look on him/her as 'playing the disability card'.

"This should have been a straightforward case of breach of contract and what actually happened was because the lady was disabled we were hit with the DDA."

One respondent argued that the applicant had done "*no favours to the concerns of disabled people*" by bringing DDA into the case.

An HR director involved in an ongoing case explained why he had not been prepared to negotiate. He believed that the applicant's claim was not genuine and that he was trying to abuse the system:

"No, and I won't (negotiate) because he's taking the you know what."

The managing director of a construction company facing a number of jurisdictions in a claim, who was adamant that no discrimination had occurred, thought that the DDA was used because:

"If you throw enough dirt at somebody, something is bound to stick."

The HR manager for a university which settled a case described how he had been very annoyed when he received the IT1 notice. He believed that the DDA had been "*hijacked*" by people who are not really disabled.

"I believe in equality, but people who are abusing it... Disabled people don't take cases...(they are) better workers because they are so grateful that they're being employed."

A couple of organisations accused applicants of being 'serial litigants' and criticised the legal system for "*allowing them to get away with taking out spurious cases*" Thus one HR employee talked about how the organisation had discovered that the applicant had previously taken out a discrimination case against another employer:

"There seem to be certain people who recurrently go down the same route and it's like they get cleverer and cleverer with it and they know the areas to trip you."

She criticised the way the law allows "*people like her to take advantage of people*" and provides them with an *"open cheque book"*.

Overall, it emerged from the case studies that the effect of facing a DDA case, contrary to leading to improvements, can sometimes create cynicism in respondent organisations, particularly in those who believe there is nothing else they could have done. The reaction is often to blame the applicant. Although there were not enough '360 degree' cases for us to know whether any of the accusations levied at applicants were justified, it is nonetheless evident that a few respondents chose to point the blame elsewhere, rather than focus more heavily on how they could improve the situation in the future.

7.3 5 Impact on individuals

It is important to remember that organisations are made up of human beings, who, like applicants, may feel personally affected by the experience of a DDA case. Although there was no mention of any impact on health, it was clear that some had and continued to have strong emotional reactions to the case. A few respondents talked about how they felt as if they had been personally attacked:

The managing director of a small firm involved in an ongoing case described how many personal allegations had been made against him by the applicant's representative. He described finding this difficult because he considered himself a close friend and had personally lent the applicant money in the past to help with his son's education.

A number described the hearing as a distressing ordeal:

The manager of a family-run business which lost its case described how his wife had been petrified and very nervous in front of the tribunal. He reported that she took pride in being professional and caring at work. When the applicant's representative began to question her credibility in the proceedings she was so upset that she "*went for him*".

However, contrary to the above negative impacts, one respondent described how she had personally gained from the experience. Through succeeding at an employment tribunal she believed that she had gained confidence to face other DDA cases in the future.

7.4 Conclusion

The evidence from the case studies indicates that the act of taking or facing a DDA case can have long-term impacts on

the lives of applicants and the running of respondent organisations. For the applicants, some of the impacts were positive, such as the financial gain from winning an award or settlement and the strength and confidence developed through the experience. However, in the majority of cases the impacts were deemed to be negative. Many applicants were left with huge legal costs, including those who had gained a financial award, some found that the experience made obtaining work or returning to work more difficult, and some believed the work and stress involved in the process had a negative impact on their physical and mental well-being, and that of their families. Whilst awareness of the DDA was certainly raised by the experience, it was often coupled with disillusionment and a reluctance to turn to the Act again should the need arise.

The impacts on the respondents were also mixed. Many respondents had learned from the experience, and were making positive steps to improve the employment of disabled people by, for example, raising awareness of the legislation amongst staff. However, a minority of organisations complained about the cost and resources of taking cases, which they saw as having a negative knock-on effect on their business. Some also placed a stronger emphasis on efforts to safeguard their position in the event of another case by, for example, monitoring disabled employees more closely. There were also a few examples where the experience had led to cynicism and a tendency to accuse the applicant of 'playing the disability card'.

On balance, the consequences mentioned by both applicants and respondents were more negative than they were positive. Although the success of a case did appear to influence whether the interviewee believed the impacts were mostly positive or negative, there were nonetheless a

number of ‘winners’ who listed unwanted consequences. This may not come as any great surprise. Whilst there may be room for improvement in the system, winning a case may not easily detract from the fact that making or facing a claim is a difficult and sometimes lengthy process which requires a considerable investment of time, energy and money.

8. Part III Case Studies

In this chapter we look at the issues and themes pertaining to Part III of the DDA (The Provision of Goods and Services and the Sale and Letting of Property), as highlighted in case studies conducted of both actual and potential cases.

The two previous monitoring studies contained an objective to identify all the actual cases brought under Part III of the Act and report on the characteristics of the cases. The Monitoring Report (Phase 1) identified nine cases which had been lodged in the County Court or Sheriff's Court under the Act between 2 December 1996 and 9 July 1998. The Monitoring Report (Phase 2) reported a further 44 cases which had been lodged between 9 July 1998 and 1 February 2001, giving a total number of known 53 cases. Considering that the first time period was of 19 months and second time period was 30 months, the increase in the number of cases being brought through the courts is not dramatic.

There is no evidence that there has been a massive growth in the tendency to make claims since 2001. The duty to make reasonable adjustments came into force in December 1999 and the DRC came into being in 2000, and these factors are likely to have had an impact on the rate or cases being brought through the courts. The next factor that is likely to have an impact on the rate of cases is the duty to make physical adjustments, scheduled to come into force in 2004.

This study was not concerned with identifying all cases but was mainly concerned with exploring and analysing the views and experiences of participants (of all types) in actual and potential cases. We are not therefore able to present numbers of cases lodged to date. However, following our

efforts to secure case study participants we estimate that the number of actual Part III cases is still fewer than 100.

We interviewed 18 people about 12 different cases. Five were actual claimants, six were potential claimants, six were claimant representatives and one was an actual defendant. Of these 12 cases, five had actually been lodged at the time of the study and seven had not been lodged. Of the five actual cases, two were awaiting a hearing at the time of the research and three had been withdrawn or settled prior to a hearing.

However, the distinction between potential and actual cases was much less distinct in Part III cases than in Part II cases. From the perspective of a claimant whose complaint against a service provider had been taken up by the DRC, for example, there was often very little difference. Indeed one claimant did not even know whether their case had been lodged at a county court.

Almost all of the case studies involved service providers in the private sector, and the majority involved leisure and tourism services. Most service providers were large companies, though the contact that the claimant or potential claimant had with the company may have been with a small branch establishment.

8.1 The provisions of Part III of the Act

8.1.1 The Act

Part III of the DDA introduces rights of access for disabled people to goods, facilities and services. The provisions of the Act are discussed in more detail in the case law review (Chapter 9).

Section 19 of the Act makes it unlawful for a provider of services to discriminate against a disabled person in a

number of ways. Specifically a service provider may not discriminate against a disabled person;

- by refusing to provide to a disabled person a service which the service provider provides to members of the public,
- in the standard or manner of service which the service provider provides to the disabled person,
- in the terms on which the service provider provides a service (or goods or facilities).

In addition, Section 21 of the Act places a general duty on service providers;

- to amend policies, procedures and practices which prevent disabled persons using a service,
- to provide auxiliary aids or services,
- to remove or alter physical or communication barriers.

A failure to discharge such a duty may amount to a separate act of discrimination. However, the last of these duties (removal of physical barriers) was not in force at the time of this research.

The concept of discrimination against disabled people in access to goods, facilities or services is based upon unjustifiable less favourable treatment of the disabled person for a reason related to disability (Section 20).

Part III of the Act also covers disability discrimination in the sale, letting and management of premises (Sections 22 to 24), using a similar model to less favourable treatment in relation to goods, facilities and services. However, there is no duty of reasonable adjustment in the sale, management and letting

of premises.

8.1.2 The procedure

Claims under Part III of the DDA may be processed via the County Court or in Scotland, via the Sheriff's Court. Most cases are automatically referred to the small claims arbitration procedure. Claimants can, however, request that the case be transferred to trial and heard in open court. Proceedings must generally be initiated within six months of the alleged discrimination. However, a two-month extension may be granted if the parties agree to be referred to the Disability Conciliation Service or for Alternative Dispute Resolution, in Northern Ireland. Legal Aid is not available for cases using the small claims arbitration procedure.

8.2 Origins of goods and services cases

In this section we first look at what triggered the initial complaint in the case studies we conducted. In particular, we focus on the elements of the incident which prompted the claimant or potential claimant to make a complaint to the service provider and, if applicable, the key elements that triggered the claimant to go on to make a formal claim via the County or Sheriff's Court.

We then go on to consider the level of awareness of the DDA amongst the claimants and potential claimants, the defendants and potential defendants and the advisers and representatives to whom they turned. We review the impact that this awareness had on a claimant's decision to make a claim.

We also look at other barriers and facilitators that claimants and potential claimants experienced when taking or attempting to take a case. Finally, we briefly consider whether

a particular factor was perceived by claimants and potential claimants as a barrier or facilitator to taking a case, even if it was not directly experienced.

8.2.1 Triggers and motivation

Four of the claimants and potential claimants reported incidents which related to a refusal of a service which the service provider provided to members of the public. Four reported incidents related to the standard or manner of service received or the terms on which a service had been offered. Four believed that they had been discriminated against by the service providers failing to provide auxiliary aids or services.

Widening access

Many claimants and potential claimants spoke about the need to make official complaints and to lodge cases in the court in order to widen access for other disabled people.

A potential claimant considered taking a case under the Act in order to challenge a company policy of refusing all disabled people access to horse-riding facilities. She argued that using a general label and blanket ban was unjustifiable, as it did not take account of the range of abilities and disabilities.

Conversely, a claimant who did lodge a case wanted to challenge a company because she believed that the policy on disabled customers was too narrow. This company advertised its services as suitable for disabled people but when she asked for an adjustment, a company representative replied that "*disabled only refers to wheelchair users*".

While the service providers attitudes are very different in

these two cases, the response from the claimant and potential claimant are similar in that they were both concerned about widening access to services for disabled people.

Another claimant spoke about the change of attitudes she had experienced towards guide dog access over her life time. When she was younger guide dogs were not allowed into restaurants, shops etc. She felt that they were accepted in most places now. She had seen attitudes change and believed they can change further. She took a case because "*Most disabled people sit back and don't speak up for themselves. The people who do are the ones who make changes happen*".

Surprise at a blatant refusal of service

In a few cases, claimants reported being shocked to be refused a service or access to some premises in an overt way. They had accessed the service from other providers in the past, so they were particularly shocked to be refused when they went to a new provider. They challenged staff at the time of the incident, but the employees of the (potential) defendant generally replied that they were being refused on grounds of health and safety.

For example, one claimant who had been refused entry to a club, questioned the doorperson's decision and tried to persuade him by mentioning that they had accessed other clubs in the town with no difficulty. The doorperson replied that the other clubs should not have allowed access.

Another claimant found a refusal of service very insulting because he had been using a similar service for years and he felt that "*they had made a judgement about [him] on the spot without asking [him] how [he] had managed in the past*".

Intense feeling of humiliation

Several claimants and potential claimants (and their representatives) spoke about intense feelings of humiliation or embarrassment that they (or their clients) experienced. This was a key motivator in the claimant's decision to pursue a case further. One claimant found the experience of being refused entry to some premises very humiliating because the refusal took place in front of a queue of people.

However, the sense of humiliation felt by claimants and potential claimants was not restricted to those who were refused access in front of many people. A well-educated adult with a physical disability was told that he would be sold some goods if his 'carer' took responsibility for the use of the product. The defendant's employee, in a telephone call, further explained that they offered the product on those terms to a four year old child whose parents signed the form. The (potential) claimant felt a sense of personal humiliation at the comparison being made and further commented that this sense of humiliation was not diminished by the fact that there were no witnesses to the comparison.

Unsolicited financial compensation

In some cases, claimants and potential claimants initially complained directly to the service provider, quoting the Act either in a letter of complaint or verbally. They then received an unsolicited refund or some small financial compensation. In some cases, claimants and potential claimants received vouchers from the company although they had not requested any refund or compensation. Such actions, when not accompanied by an apology or a review of procedures, tended to confirm to the (potential) claimant that they were being discriminated against and prompted them to take the

case further, perhaps contacting the DRC or another organisation for assistance. The essential problem perceived by these claimants was that the service providers had not actually addressed their complaint of discrimination.

One claimant received a letter that said it was up to the discretion of the individual company to allow concessions if the person was not 'registered' disabled but enclosed some free tickets as a 'good will gesture'. However, the claimant's family had not asked for discounted tickets at any point, even although another member of the party was 'registered' disabled. The letter and free tickets exacerbated the claimant's concerns because she felt that it demonstrated that the company did not recognise that the claimant was complaining about discrimination.

Sometimes the refund also marked the company's final refusal to provide the service to the (potential) claimant. An agency which offered short breaks and other leisure pursuits in exchange for their branded gift vouchers, suggested some alternatives to a customer with mobility problems. The customer refused initial alternatives because they were of a lower standard and was awaiting a resolution when the service provider lodged a refund in the potential claimant's bank account without the individual's agreement.

Taking a case on behalf of a child

Amongst the 12 case studies conducted, three complaints were pursued by parents on behalf of a child. Although these parents spoke about feeling angry or hurt on behalf of their children and this being a reason they got involved in making a complaint, all spoke also about making facilities available to other disabled people or changing attitudes generally. They felt that they were not just making the complaint on behalf of

their own child but trying to make a difference to other disabled people. This theme of widening access for all is discussed further at the start of Section 8.2.1.

> A parent spoke about being driven to get a service provider to make an adjustment to make a leisure activity possible for her child. However, this interviewee was further motivated because she was convinced that there was a wider need in the community for these adjustments. The service provider had replied to her initial requests by saying that her child was severely disabled and they could not justify spending money to make adjustments for such *"rare and unusual needs"*. She was convinced that her child's needs were not unique. When the adjustments were made she was pleased to see other disabled people in the town being able to access the service provider's facilities.

Consumer complaints

While most of the claimants were conscious of discrimination from the initial stages of their complaint, there were a couple of case studies where the claimant and potential claimant were not initially conscious of discrimination but rather viewed the complaint as a general consumer complaint. They initially wanted something rectified, but the evidence that they had been discriminated against later became apparent to them. One potential claimant simply wanted his deposit refunded when the travel agent was unable to confirm some adjustments that he requested. When he sought advice on how to get his money back, an adviser mentioned the DDA. Another potential claimant initially just wanted to stop a trustee claiming the payout from a critical illness policy as part of an insolvency process. However, while researching the law he became very aware that the application of the insolvency laws would affect

a disabled bankrupt differently from how they would affect a non-disabled bankrupt.

8.2.2 Awareness of the DDA

Almost all the claimants involved in the cases we studied were aware of the DDA at least in general terms prior to the incident in question. Indeed most had been aware of the Act since its introduction. A couple of claimants, although aware of the Act generally, were not aware of the goods and services provisions which are in force but had heard of other parts of the Act. For example, one interviewee was on a parish committee which was considering how to make some buildings more accessible in line with provisions coming into effect next year, but did not realise that he might have a case until he contacted his local Citizens Advice Bureau.

Amongst those who were aware of goods and services provisions, few were aware of the specific forms of discrimination. So although a potential claimant may have known that the Act contained some protection for disabled people as consumers of goods and services, they may not have known that discrimination can take two forms (1) by treating that person less favourably than he treats, or would treat others, if treatment is for a reason related to disability and is not justified, or (2) by unjustifiably failing to comply with duties to make reasonable adjustments where that failure makes it impossible, or unreasonably difficult, for disabled persons to make use of goods, facilities and services.The first might be expressed by:

- refusing to provide a service
- providing a poorer standard or manner of service, or
- providing the service on different terms.

The second form might be expressed by:

- failing to amend policies, procedures and practices, or
- failing to provide auxiliary aids or services.

While it may seem unreasonable to expect people without legal backgrounds to make these distinctions, we found that such knowledge played an important part in the early stages of a complaint. Claimants and potential claimants sometimes found themselves explaining to a potential defendant why the defendant might be required to provide an auxiliary service.

In addition, the concept of discrimination against disabled people in Part III is based upon unjustifiable less favourable treatment. The idea that less favourable treatment had to be unjustifiable was not always understood by claimants and potential claimants in the early stages.

Self-identification and the definition of disability

As discussed in Section 3.2.1, a key factor in whether a person was able to draw upon the Part II provisions of the DDA was the extent to which they were aware that they themselves were covered by the Act as a result of their condition or impairment. In Part II cases this was a complex issue, with some applicants not clearly identifying themselves as disabled prior to the case. The definition of disability within the Act was, for some applicants, a broader definition than they had previously used. So although they had heard of the DDA, they did not realise that it might apply to them, until they were advised by a third party. In other cases, the nature of a progressive illness or the onset of a mental illness meant that applicants were coming to terms with a new self-image that encompassed their disability, in parallel with the (alleged) discrimination taking place.

In contrast, all the claimants and potential claimants interviewed about Part III cases were very clear that they were disabled. They either knew they were disabled within the meaning of the DDA or they presumed this to be the case.

All but two of the claimants and potential claimants had been disabled from birth or for many years. Some were very active in disability rights or advocacy groups. Generally they had a condition or impairment which fitted the stereotypical image of a disabled person, and were recognised as disabled persons by the service providers. Almost half the claimants and potential claimants were wheelchair users, several were blind and several had a moderate or severe learning impairment.

While in Part II cases, many respondents disputed the applicants' disabilities and challenged whether applicants met the DDA definition of disability, in Part III cases claimants and potential claimants frequently expressed the view that the service providers overstated a disability, in order to justify denying a service. Indeed the conflict in Part III cases tended to centre on a dispute about the level of the claimant's abilities rather than disabilities. In only one case, did a potential defendant express the view that the customer was 'not disabled'. This service provider said, "*the [disability] policy only covers wheelchair users*".

Some claimants commented that the barriers they experienced arose from prejudices. They also were often inconvenienced by the standard way in which services, buildings and equipment were designed. The barriers they experienced were seen as being imposed from outside. That is, they were disabled by society rather than simply by their impairment or condition.

Claimants' awareness of rights under the DDA

Notably, claimants and potential claimants were more likely to have doubts about whether the service provider was covered by the Act, than whether they themselves were covered by the Act. This was particularly true where the potential defendant was in the travel sector.

One potential claimant did not lodge a claim under the Act because her understanding was that international airlines were exempt from the Act. The potential claimant later thought that the airline might be covered due to the fact that the airline had a UK office. The claimant never made a distinction between transport (which is exempted) and ticketing services and customer services (which may be covered by the Act).

A potential claimant was unsure about whether his case would be covered. A travel agent had promised him certain conditions and reassured him that once he had paid his deposit they would be able to confirm those conditions. The travel agent was unable to get agreement from the airline involved and then the travel agent refused to return his deposit when they were unable to confirm those conditions. The potential claimant was uncertain who had discriminated against him, the travel agent or the airline.

Although most claimants were aware of the provisions of the Act in general terms, very few were able to articulate their case in the terms set out in the DDA. One claimant's representative found that one of the most difficult aspects of advising people on taking a DDA case was that of explaining that the treatment is capable of being justified. The aspects of the case that the (potential) claimant finds most offensive is not always the element which is most viable as a legal case. Claimants' degree of understanding of the specific

provisions of the Act varied considerably. This representative commented that "*there is a simplistic view that if you are disabled and complain that will be enough*".

Defendants' awareness of the Act very poor

It would appear that service providers were even more uncertain than claimants and potential claimants, about whether their services were covered by the Act.

Very few defendants and potential defendants were interviewed. This was partly because more than half of the complaints which featured in the case studies were not lodged so it was not appropriate to contact the service provider. It was, therefore, not possible to directly collect information on the defendant's awareness of the Act prior to the incident. However, in the view of claimants and potential claimants, the service providers and their employees were generally not aware of the Act or its provisions.

> A claimant recounted that the service provider contacted the Tourist Board to enquire whether they were entitled to refuse access to him and his guide dog. The Tourist Board told the service provider that they were entitled to refuse dog owners access to their premises if they so wished.

Awareness of DDA amongst advisers and representatives

Staff from the DRC, the Equality Commission for Northern Ireland, Citizens Advice Bureaux, and the RNIB provided advice to people involved in the cases we studied. Awareness amongst the advisers was mixed. While all the advisers involved in the case studies appear to have been aware of the DDA in a general sense, some were not sufficiently confident in their knowledge to take a case forward and this uncertainty seems to have been a key reason why some of the potential

cases were never pursued. This is discussed further in Section 8.2.3.

Even those advisers who were more knowledgeable and experienced were not sure how to apply the DDA to some of the complaints that were presented to them.

One adviser, in a case in which an agent refused to arrange a leisure break with disabled access, commented:

"I could see that the client had been treated badly, but they had been refunded their money so there didn't seem to be much of a case on the face of it. Initially I couldn't see where the discrimination was. Then I thought the discrimination is the discrimination of not being able to go".

8.2.3 Barriers/facilitators to taking a case

The triggers that prompted an individual to take action have already been discussed above in Section 8.2.1. Whether that initial trigger was enough to prompt the individual to take legal action depends on a number of moderating variables.

Cost is a major barrier

Cost as a major barrier to taking a case was mentioned by actual claimants, potential claimants who chose not to take a case, representatives and defendants.

One potential claimant expressed the opinion that "*many disabled people are on low incomes or benefits, so the thought of having legal expenses is just a no-no really*". Another potential claimant felt that if costs had been available "*it would have swung the balance*".

Claimants supported by the DRC, ECNI and the RNIB commented that the financial support for the case was very

important to them continuing the case. A claimant who had DRC support for his case believed that "*the DDA is toothless, unless the DRC takes up the cases*".

Concurring with that view, a respondent to a case, believed it was very hard for an individual to take action in the county court, saying "*there is no legal aid for such cases; there needs to be more financial support for county court claimants*".

A potential claimant contemplated taking a case for around six weeks. He didn't go to a solicitor because he was concerned about costs and knew that he would incur solicitor's fees and court fees. He thought the injury to him would be deemed to be minimal; it was not like losing a job. He guessed that the compensation to him would be small, maybe as a token £100-£200, and that the court fees alone would be around £150-£200.

Representatives expressed concern about county court administrative costs. One claimant representative believed that "*Everyone has this perception that small claims don't cost much to pursue ... which isn't the case*". This representative felt strongly that the initial county court fees of almost £200 was too much for cases which only awarded damages of a few hundred pounds if they were successful. In particular, this representative felt that the £80 for the allocation questionnaire[1] was unjustified, as all DDA cases started in the small claims court.

Self-confidence

There was generally a high level of self-confidence amongst the claimants interviewed in these case studies. These claimants and potential claimants were generally well-educated and several had knowledge of the DDA or the legal system. Many were currently or had previously been very

[1] Allocation Questionnaire: Procedure to determine whether case is to be heard in the County Court or the Small Claims Court.

active in disability rights or advocacy groups. Most had directly challenged the service provider at the time the (alleged) discrimination had occurred.

In contrast to the experiences of applicants in the Part II case studies, self-confidence was not mentioned as a barrier to taking a case or making a complaint. However, several mentioned that they were a particularly confident person and believed that lack of confidence was a possible barrier to other disabled people:

> **"People don't feel confident about bringing an action. I mean many disabled people aren't confident anyway and it's almost at the disabled person's door to prove something rather than the other way round."**

Another claimant commented that:

> **"Disabled people traditionally haven't had a voice...(bringing a case) involves getting someone who hasn't had a voice to stand up for themselves, with the odds stacked against them"**

The role of advice and representation

In the main, the claimants were aware of the DDA prior to the (alleged) discrimination and had considered whether the complaint might have been covered by the Act prior to seeing an adviser. Very occasionally an adviser was instrumental in making the claimant or potential claimant think about the complaint in terms of discrimination.

One such adviser thought that although the client had a strong discrimination case, she lacked the experience of the DDA or knowledge to push it further. The complaint in this case was partially resolved with a letter to the service

provider quoting other consumer legislation (Package Holiday Regulations). The adviser in this case informed the potential claimant about the DDA, but relied on the potential claimant to urge the adviser to take the case forward. The client, who was not aware of the goods and services provisions in the DDA prior to meeting the adviser, did not urge the adviser to take the case forward.

Another (non legal) adviser spoke about the difficulty of finding a representative who felt confident taking on a case which involved a number of different pieces of legislation, including the DDA. She commented that representatives feel they do not have the expertise to take the case and "*If they don't, then who does? It is uncharted waters*". If the DDA interacts with some other part of law, then finding an expert in both is a serious problem.

Amongst this very small number of cases, we noticed a lack of confidence at the local CAB level in advising on DDA Part III cases. This is not surprising given that CAB advisers are generalists rather than specialists. While local CAB advisers we interviewed felt that they did not know enough about the DDA, the potential claimants actually advised by the CAB did not express any doubts about the quality of their advice on the DDA. It should be noted that the claimants and potential claimants who were advised by a local CAB tended to be the claimants and potential claimants who did not know very much about the DDA prior to the incident. Perhaps due to their own lack of knowledge of the DDA, these claimants and potential claimants were not in the best position to judge the expertise of the advisers. Potential claimants were also notably impressed with the personal attention and interest shown by staff in local CAB offices to their complaints.

Claimants and potential claimants who knew more about the

Act at the time of the incident either dealt with it themselves or contacted the DRC, the ECNI or a disability organisation. The caseworkers and legal representatives from these organisations were specialists in the field and were confident of their expertise. The claimants and potential claimants although quite knowledgeable themselves considered these advisers and representatives very knowledgeable.

However, some claimants and potential claimants commented that the caseworkers seemed very stretched for time resources and so were unable to follow up a case properly or take much of an interest in a case. Some claimants and potential claimants spoke about having to make a quick decision on whether to lodge a claim, because the case was almost out of time. They were dissatisfied with this because they had been in contact with the advising organisation immediately after the incident but felt that very little had been done in the interim period, and so then had to make a decision within a couple of days.

One claimant, in a case involving failure to make reasonable adjustments to a leisure facility, withdrew her case. She felt that the caseworker did not have time to pursue the case and that she was encouraged not to pursue the case further because it was too much trouble.

Evidence

Evidence and its availability did not feature highly as a barrier to taking a case. In particular, defendants do not generally dispute whether claimants are covered by the DDA definition of disability, so expensive medical evidence is rarely required. One representative mentioned that as not many Part III cases have yet been taken, the cases to date have been 'penalty cases', that is straightforward breaches of the Act.

Occasionally a potential claimant identified a lack of written evidence as the reason why they chose not to lodge a case. For example, a potential claimant mentioned that one factor in deciding not to take a case to court was that he had nothing in writing from the service provider. He had only received verbal confirmation from the provider that he could book certain facilities. If he had received confirmation in writing and they then declined he would have pursued it further. He did not believe that a verbal agreement was enough to present in court. However, if his deposit had not been returned he would have gone reluctantly to court.

Other interviewees identified the prospect of giving evidence in court as a deterrent to potential claimants. A representative commented that many people are worried about starting court proceedings because they may eventually be required to present evidence in court.

Time and stress

Several potential claimants did not pursue a claim because they were discouraged by the time and stress involved in taking a case.

A potential claimant commented that even if he was willing to spend the money to take a case, he would still have to look at whether he had the energy and time to take a case. This individual and others decided that going to court was not worth the time and stress involved. A typical view amongst the potential claimants was that they were *"too busy and [they] had no energy or drive to take it further"*.

Time and energy can also affect whether a claimant withdraws early. A claimant, taking a case on behalf of her son, became ill, and could not continue taking the case because of the time and energy involved.

A representative commented that she would have pursued the case further if the client had urged her to do so but she did not want to push him to take a case further than she felt he could manage. She was very aware that he had been stressed by the incident and was concerned about causing extra strain.

The issue of choice

The smaller number of Part III cases than Part II cases suggest that people who experience discrimination when accessing goods and services may be less likely to turn to the DDA than people who experience discrimination in the area of employment. The argument is made that disabled people may simply choose another service provider rather than start court proceedings. In contrast, applicants and potential applicants in Part II cases do not have the same options in respect of employment and so are more likely to turn to the law when they are dismissed from a job, or fail to be recruited when applying for a job.

However, the findings from the cases we studied did not completely support this view. Only one potential claimant mentioned that being able to access other service providers had influenced his decision not make a claim. However, he did not believe this was the main reason why he chose not to pursue a case.

There was no noticeable difference in the level of perceived choice between claimants who had made a claim under the DDA and potential claimants who had not gone down that route. Almost all claimants and potential claimant could easily use alternative providers for a similar service and had in fact done so after the incident.

One claimant had easily accessed an alternative restaurant at the time but had taken a case because "*service providers don't know that it is illegal to refuse services to someone with a guide dog. They haven't heard of the DDA and are convinced it is not illegal*". Another claimant was refused access to a club. He had previously, and has since, accessed many alternative clubs, and even returned to the club in question, this time accompanied by a friend so he could gain access. He had taken a case more because he was shocked by being refused access than because he was running out of alternatives. Other claimants had similarly had a choice of providers to choose from but took a case because they believed discrimination was the issue.

One claimant did, however, feel that she had few options available to her and was motivated to take a case in order to gain access to her chosen provider. She had requested an auxiliary service from a local store in order to make the store accessible to her needs. She had a choice of two further stores where this service was provided. During the period when auxiliary services were not being provided at her store of choice, she had to use the other stores. However, she had to walk much further to these shops, crossing two roads and carrying her shopping much further. She wanted to use the store 100 yards away from her home and asserted that it was her right to do so.

Several potential claimants commented that, although they could access other providers, they felt strongly that they should not have to go to another provider. They felt it was a question of rights rather than consumer choice. Also several potential claimants and claimants felt motivated to make the service more accessible to others. One interviewee, in a case involving failure to provide auxiliary aids at a swimming pool for a disabled child, commented that

"It's not like he never gets to go swimming. He goes swimming twice a week at his [residential] school, but the point is he and others should be able to go to use their local swimming pool."

In very few cases did claimants and potential claimants have no alternative providers from which to choose. Two interviewees had tried to access unique leisure facilities, for which there was no obvious alternative. One had taken a case, motivated by a sense of injustice. The other, although also motivated by a sense of injustice, had not taken a case, principally because his adviser was not confident in her knowledge and expertise of the DDA.

In summary, claimants and potential claimants commented on:

- Their right to use the provider of choice
- The inconvenience of using another provider
- The importance of widening access for disabled people who may have less choice.

Other factors

Various other reasons for not pursuing a legal case were given by potential claimants. One potential claimant thought that winning a case would not set a precedent or have any overall impact on policy or practice. He wanted a change in policy applying to all service stations and did not think taking an individual case would actually achieve that.

8.3 Process

Most cases started with a letter of complaint (from the claimant), usually via normal consumer complaint channels, though many claimants and potential claimants did mention

the DDA. Then if they were unhappy with the response to their own efforts, most claimants and potential claimants contacted the DRC, the Equality Commission for Northern Ireland, Citizens Advice Bureau or an organisation which represented people with their type of impairment.

Sometimes a complaint letter from such an organisation or a meeting between the organisation and the service provider led to at least a partial resolution to the problem. In five of the 12 cases we studied, however, the case went on to become a formal claim.

8.3.1 Conciliation

Three claimants attended conciliation meetings. One case appeared to have been referred to Disability Conciliation or Alternative Dispute Resolution (in Northern Ireland). The other claimants appeared to have attended an unofficial conciliation meeting with their representative.

All three claimants involved in conciliation attempts, felt disappointed with the results of the meetings. Some were very unsure about the scope of such a meeting prior to the day and felt ill-prepared. Claimants were not clear about the roles of caseworkers from the DRC or ECNI and independent conciliators.

A claimant described how he had gone to the conciliation meeting without first clarifying his objectives. He mainly wanted an apology and a commitment from the company to change policies, practices and procedures. The claimant recalls that his representative asked him to put a figure on his injury to feelings prior to the meeting, which he considered a strange request at first but then thought "*why not, I have been through a lot*". Now he thinks the financial claim confused the discussion.

The meeting appeared to be going well and one of the company representatives appeared, to the claimant, to be admitting that they had made a mistake and wanted to improve their service. Then another company representative mentioned that they had only been authorised to pay a particular amount as a goodwill gesture and that it should not be interpreted as compensation. The announcement made the claimant suspicious of the whole process. He began to wonder if the fundamental changes being promised by one of the representatives could actually be delivered, when the other company representative was saying they were not senior enough to make decisions on the compensation issue. He was concerned that that the conciliation process was just a way to "*buy him off*". He took a break from the meeting, during which he spoke to a friend who helped him refocus on his aims. After that he decided that his aims could not be met by conciliation.

Another claimant was equally frustrated by the focus on financial compensation during a conciliation meeting. She had attended the meeting with clear questions she wanted answered and which she had provided to the defendant in advance. However, she felt that the defendant evaded the questions, her own representative "*did not say much*" and she left feeling that the defendant was *"trying to buy [her] off."*

Another claimant was very dissatisfied with the outcome of a conciliation meeting. The conciliator informed the ECNI that the case had been successfully conciliated, but the claimant was very annoyed when she learned that her claim had been dropped, as she had not considered the case successfully conciliated. The limitation period had, by that point, been exceeded so a claim was no longer viable. However, the changes she had been promised by the service provider during the meeting (*ie* the terms of the conciliation), were not

followed through. She continued to have difficulty with the service provider.

8.3.2 The county court

One representative commented that it is a very daunting thing to take a case to a county court. It is a very formal process. Even small claims courts which are intended to be 'user friendly' are still seen as very formal by claimants, as there are procedures to follow and lots of forms that must be used.

This representative further commented that when Part III cases get to court, it is likely that the judge dealing with the case may not have dealt with a DDA case before, and may not even know what the Act is about. She remarked that employment tribunals are more 'up to speed' with the DDA and the idea of disability discrimination. A county court judge may not be as sympathetic to the concept of disability discrimination.

This view concurs with the evidence from the Monitoring Report (Phase 1) in which it was reported that

> **"In all of the case study cases that were heard in court, the case in question was the judge's first DDA case. Some of these judges themselves pointed out to the parties that there was very little case law and admitted that the DDA was new to them. In several of these cases, it was necessary for an adviser or representative to provide the judge with copies of the Act and/or codes of practice and guidance because they did not have copies themselves."**

8.3.3 Legal arguments

Definition of disability

The definition of disability was a less significant issue in Part

III cases than in Part II cases. Occasionally, service providers used a very narrow definition of disability, for example, one company's disability policy covered only wheelchair users. In only one of the 12 actual and potential cases was the claimant's disability disputed by the service provider at the time of the incident. More commonly, the claimant or potential claimant felt that the service provider had overstated the effects of the disability, by saying an individual's impairment was so severe, that they could not cater for the individual. This is reported in Section 8.2.2 in relation to self-image.

None of the five actual cases had proceeded to court by the time of the research. However, there were no indications that the defendants were planning to dispute the claimants' disability in the two cases which were awaiting hearing. There was also no indication that the defendants in the three cases that were settled or withdrawn, had at any stage considered challenging the case on Part 1 of the Act, *ie* on whether the claimant was defined as disability for the purposes of the Act.

The justification defence

The justification defence was thought by representatives and defendants to be an important part of Part III cases. One representative referred to the case of *Rose vs Bouchet* which concerned a blind man who wanted to rent a flat, but was refused by the landlord. The landlord's reasons for refusing were that the steps up to the property would be dangerous for a blind person as there was no proper handrail, that access to the flat was unsafe and that the bathroom was too small. The court found that the landlord's less favourable treatment was justified because, in the landlord's opinion, the refusal was necessary for health and safety reasons and the landlord's opinion was reasonable in the circumstances. The key

element of the decision, is that the court ruled that the defendant had a reasonably held belief and indicated that service providers needing to make snap decisions are justified in considering subjective criteria alone. The court dismissed the importance of seeking an opinion from the individual of their capabilities or other evidence when making the 'snap' decision.

The case went to appeal and hence set the standard for the justification defence. The representative commented that it is quite a low threshold. All that defendants have to prove is that they had a reasonably held belief that they were doing what was right in treating someone less favourably. This representative felt that it is quite easy for defendants to justify less favourable treatment in Part III cases, especially when using health and safety issues as part of their defence. It should be noted that this view is not reflected in Part III justification cases included in the case review (see Sections 9.3.5 and 9.3.6).

8.4 Outcomes and impact

In this section we look at the outcomes of the cases we studied. None of the cases amongst the sample had been heard at the time of the study, so we are not able to report on the legal decisions and remedies here. However, we can look at the outcomes of the cases which were concluded whether they were lodged or not.

Three complaints were not concluded at the time of the research. Two of these cases were awaiting a hearing at the time of the study, and one had not been lodged under the DDA.

Nine complaints had been concluded by the time of the research. Three cases had been settled or withdrawn prior to a

hearing and six had never been lodged under the DDA. Most had been partially resolved, though few claimants were completely happy with the conclusion. The outcomes discussed here therefore relate to the general outcomes of the nine cases which were concluded.

8.4.1 Personal impact on the claimant or potential claimant

Interviewees involved (as claimants, defendants or representatives), in cases that had been lodged were asked about the impact that taking a case had had on them, the organisation or their clients. Generally, for the claimant and defendants involved in the Part III cases, the impact of taking or defending a case has been much less than for applicants and respondents involved in Part II cases. The personal impact of cases on applicants in Part II cases is discussed in detail in Section 7.2. Many applicants were left with large legal costs, found it difficult to return to work, experienced reduced physical and mental well-being, and a disillusionment with the Act and tribunal system. However, this comparison must be taken in context. Few of the cases in our case studies had been lodged and none of the cases had been completed. Presumably, the impact on a claimant would increase with the amount of time a claimant is involved in pursuing a claim.

Claimants reported mixed feelings when asked about the personal impact of the case. Where the case had a major impact on a claimant, it would seem that this was more as a result of the (alleged) discrimination rather than as a result of the strains of going through a legal process and funding a court case.

For example, one claimant expressed a sense of satisfaction in taking a case which, although settled out of court, resulted in a change in practice at the defendant's company. He did not

find the process stressful, but remained extremely disturbed and angry about the event.

Another parent who had taken a case on behalf of her child commented that, on one hand, it had made the claimant stronger because "*he realises that because of his disability he will have to stand up for himself*". In the other hand, the interviewee commented that the claimant has not been able to go anywhere since the events at the defendant's premises – "*he is terrified that a similar incident will happen again, that he will be singled out and have his disability questioned*".

Another claimant did not regret taking a case but reported that the failure to make adjustments had a negative impact on her health whilst the problem was unresolved. She had a heart attack and attributed this to the problems she had encountered with the service provider and the series of unresolved complaints.

8.4.2 Financial impact on the parties

The financial impact on claimants and potential claimants or on defendants and potential defendants was fairly minimal for both parties in most cases. This reflects the fact that few claims amongst the case studies had progressed to a court hearing, with all the required collection of evidence and representation by a solicitor or counsel. Those cases that had been lodged had been supported by the DRC, the ECNI or the RNIB, so the claimants had not incurred any costs. In the main, the settlements reached were fairly modest sums of compensation, which appeared to be of little consequence to either party. In the three settlements after proceedings had been issue, involved sums of £2,000 or less. One settlement made prior to issuing a case was less than £1,000.

In a couple of cases the defendants did pay for new

equipment. Whether the investment in equipment resolved the complaint depended on whether other issues, such as staff attitudes, were also addressed.

In one case a potential claimant had asked for fairly modestly priced equipment but was delighted with the equipment that was eventually installed. The potential claimant had requested that the local council install some equipment that she had researched would cost a few hundred pounds. Although resistant to her request, the council eventually installed much higher specification equipment worth several thousand pounds. Interestingly, the potential claimant was insistent that the equipment should not be paid for with charitable funds. In this case the (potential) claimant believed that she successfully challenged the service provider's opinions and attitude. If the auxiliary aids had been obtained but the attitudes had not been challenged, the potential claimant would not have been as satisfied with the outcome.

In another case the claimant was less concerned with new equipment than with staff attitudes. The defendant paid several thousand pounds for new equipment but the claimant was not convinced that the equipment would cover the needs of such a large organisation. The claimant was also disappointed that the company had not acknowledged the discrimination and believed that the issue of staff training had not been addressed.

Similarly, whether the compensation was well-received by claimants, depended on whether other issues had been addressed.

One claimant who had received a relatively large compensation settlement for injury to feelings commented:

"The money side was fine. It was more than I wanted or expected. But it didn't compensate me for what happened. It hasn't changed the likelihood of it happening to others."

Following a meeting to conciliate a claim, one claimant with a learning disability received a letter from the service provider offering season tickets. The claimant had been disappointed with the attitude of the service provider throughout the conciliation process. She felt the defendant's attitude was "*how much money do you want?*" She was concerned that the service provider was not addressing her questions about policy and practice.

These findings concur with the findings from Part II cases in the current study, where applicants who had failed to achieve an apology or change of practice, found the financial award irrelevant.

Our findings also concur with findings reported in the Monitoring Report (Phase 1) on the motives behind plaintiffs' and potential plaintiffs' actions. Many interviewees responded that they were looking for justice. They emphasised that they were not interested in a financial settlement but instead wanted the service providers to know that what they had done was wrong and illegal and therefore to apologise. Some plaintiffs and potential plaintiffs in the previous study also reported wanting to ensure the providers would not discriminate in future. Others reported a desire to publicise the DDA.

8.4.3 Impact on policies/procedures/practices of the defendant

Most of the information on the impact of the complaint or claim on the policies, procedures and practices of the

defendant or potential defendant was provided indirectly by the claimant or potential claimant or their representatives. Generally the claimants and potential claimants were not satisfied with the level of change that they observed following their complaints and claims.

Following the complaint, one service provider had amended their promotional literature to make it clear that disabled people would not be permitted to use the horse-riding facilities at a holiday camp. The (potential) claimant would have preferred it if the new policy was to assess abilities and disabilities on an individual basis.

Another service provider made a public apology to the potential claimant when an article about the complaint was published on the internet but the claimant was still unsure if the controversial policy has been amended.

Individuals who had been to conciliation were similarly disappointed with the subsequent changes made by the defendants and potential defendants. Some were particularly displeased that they did not see changes, promised during the conciliation process, materialise.

8.5 Conclusion

In the main, claimants and potential claimants reported a desire to widen access for disabled people as the key reason they made a formal complaint or lodged a case. Claimants were particularly motivated to take a lodge a case if they were surprised by a refusal of service (which they had not been refused before) or if they had been humiliated by the staff.

Financial compensation offered immediately following the complaint, or as part of a settlement, was only well received by claimants and potential claimants if the service provider

also indicated that they believed they had made a mistake and would be reviewing their policies and practices. If compensation was offered in the early stages of a complaint without such an indication, the claimants and potential claimants often became more concerned and pursued the case further.

Generally, general awareness of the DDA was high amongst claimants and potential claimants but sometimes they did not have the detailed knowledge to frame the complaint in terms of the specific forms of discrimination described in the Act. Advisers also occasionally had trouble framing the complaint in the terms of the Act. There was little direct evidence of defendants' awareness of the Act but in the view of claimants and potential claimants, awareness of the Act amongst service providers remains low.

Cost, time and availability of representation remain the major barriers to taking cases. Amongst the claimants and potential claimants we interviewed, self-confidence and knowledge of the Act was a major facilitator to making claims and complaints. The availability of alternative service providers, was not seen as a factor which influenced claimants' and potential claimants' decision to lodge a case.

Claimants and potential claimants were often confused about the role of conciliation and the relationship between the conciliation service and the DRC or the ECNI. Few claimants and potential claimants had been satisfied with the outcome of the conciliation process.

The impact on both parties was generally fairly low, but this partly reflects the fact that none of the cases we studied had been concluded through the courts at the time of this study, and so the investment in time and money had not been as

large as in Part II cases. At the same time, potential claimants and claimants who had withdrawn their claims were not, in the main, completely satisfied with the conclusion to their case.

9. DDA: Legal Background and Case Review

9.1 Scope of review

There is now a considerable body of authoritative case law on Parts I and II of the Act. This review offers commentary on key cases on these Parts decided by the Employment Appeal Tribunal (EAT) and Court of Appeal during the period April 2001 to March 2003. It has been updated to include coverage of a House of Lords judgment, handed down in June 2003. Reference is made to earlier cases where necessary to provide a context for more recent developments. Cases for inclusion were identified using legal databases[1], legal and professional publications and the Employment Appeal Tribunal's database of judgments[2].

In contrast, reported cases on Part III of the Act remain few and far between. An earlier Monitoring Report noted that its researches found 53 Part III cases issued up to February 2001.[3] Of these, only six had been resolved by the court.[4] In the absence of a national source of information about Part III cases[5], the number of cases disposed of by a court to date is unknown, though likely to be still small. Cases brought under Part III of the Act are generally heard in the county courts. County court decisions are not reported in official law reports, nor are they covered by commercial legal databases.

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1 Westlaw; Lexis-Nexis; Lawtel.

2 www.employmentappeals.gov.uk.

3 Monitoring the Disability Discrimination Act 1995 (Phase 2), p.8.

4 Nineteen were still pending; 15 had been settled without a full hearing, and the outcomes of a further 3 were unknown. See p.139.

5 As noted in the Monitoring Report (Phase 2) at p.8.

Consequently, commentary on Part III case law is necessarily confined to those few cases which have been reported, either because they have been heard on appeal by the Court of Appeal or the High Court, or in one case in the Consistory Court[1]; to those commented upon in legal or professional publications, and to cases listed on the Disability Rights Commission website as having been resolved by a court[2].

9.2 Part I DDA: definition of disability

Disability is defined in sections 1 to 3 of the DDA, as amplified in Schedules 1 and 2 to it. Regulations[3] on the meaning of disability exclude specified conditions from the definition and statutory Guidance[4] must be taken into account, where relevant, by employment tribunals. The definition of disability continues to give rise to confusion, as evidenced by the number of cases arising since the last Monitoring Report in which the statutory definition has been considered.

Section 1 DDA provides:

> *"A person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities."*

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[1] A court of the diocese (in the Church of England) exercising jurisdiction to authorise works on a church.

[2] www.drc-gov.org.

[3] Disability Discrimination (Meaning of Disability) Regulations 1996, SI 1996/1455. These exclude addiction to alcohol, nicotine or any other substance; a tendency to set fires, steal, to physical or sexual abuse of others, exhibitionism, voyeurism; hay fever.

[4] Guidance on matters to be taken into account in determining questions relating to the definition of disability (1996) HMSO.

9.2.1 Meaning of impairment

Goodwin v The Patent Office[1] sets out four questions to be addressed by the employment tribunal in deciding whether or not a person has a disability. Tribunals should ask:

- Does the applicant have an impairment?
- Does the impairment have an adverse effect on the ability to carry out normal day-to-day activities?
- Is the adverse effect substantial?
- Is the adverse effect long-term?

The EAT in *Rugamor v Sony Music Entertainment UK Ltd; McNicol v Balfour Beatty Rail Maintenance Ltd*[2] had considered the first of these questions when deciding whether 'functional overlay' was a physical impairment. Both applicants claimed to have a physical impairment, but uncontested medical evidence could find no organic cause for the symptoms experienced by either. Rather, it suggested that the cause was 'functional or psychological overlay'. The EAT held that functional overlay could not be a physical impairment because of the lack of organic disease. Whether or not there is a physical or mental impairment depended on diagnosis of an underlying physical or mental condition, not on whether a physical or mental function or activity was affected. The parties had not presented enough evidence to show whether or not it was a mental impairment.

The EAT's reasoning in *College of Ripon York St John v Hobbs*[3] conflicts with its approach in *Rugamor*. In *Hobbs*, as in *Rugamor*, a medical report had concluded that there was no underlying organic disease causing the symptoms experienced by the applicant. Nevertheless it decided that

1 [1999] IRLR 4.

2 [2001] IRLR 644.

3 [2002] IRLR 185.

she did have a physical impairment, reasoning that it was not necessary to distinguish between a medical condition and the symptoms that arise from it in order to satisfy the definition of disability. Here, the physical manifestations of 'stress reaction' amounted to a physical impairment.

The Court of Appeal has now provided authoritative guidance on the correct approach to be taken. On appeal in *McNicol v Balfour Beatty*[1], it approved *Hobbs*, stating that an impairment may result from an illness or consist of an illness, the only proviso to this being that a mental illness must be clinically well-recognised.[2] In reaching this conclusion, it referred to both Schedule 1 to the Act and Part 1 of the Guidance, which provides that "it is not necessary to consider how an impairment was caused". In *McNicol's* case the employment tribunal had been entitled, on the evidence before it, to conclude that functional overlay did not amount to a physical impairment. However, it is now clear that applicants may rely on the effects of an impairment as well as its cause to satisfy the first component of the definition.

The Court of Appeal's approach appears to have been applied in *Gibbs v Institute for Optimum Nutrition*,[3] a case decided by the EAT shortly after *McNicol.* The applicant had pains in her arms, neck and lower body, for which no evidence of physical cause was found. Nevertheless, whether or not she had an impairment was not at issue, argument focussing instead her ability to carry out day-to-day activities.The EAT commented that "there is no need for the Applicant to give a name to her disability".

In cases where an applicant relies upon mental illness to

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1 [2002] IRLR 711, *Rugamor* having dropped his appeal before hearing.

2 As stipulated by Schedule 1 para. 1(1) to the Act.

3 EAT/1139/01, heard on 16 August 2002.

establish impairment, the onus is on him to show, on the balance of probabilities, that it is 'clinically well-recognised'. According to the Guidance, illnesses listed in the World Health Organisation Classification of Diseases are so recognised. *Morgan v Staffordshire University*[1] suggests that satisfying the condition may not be straightforward and is dependent upon medical evidence. The applicant claimed to have a mental impairment, relying on periodic references in her medical notes to 'anxiety', 'nervous debility', 'depression' and 'acute stress reaction'. These were insufficient to establish a 'clinically well-recognised' mental illness. The EAT went on to set out four routes whereby this might be established.

- Proof of a mental illness specifically mentioned as such in the World Health Organisation's International Classification of Diseases (WHOICD).
- Proof of a mental illness specifically mentioned in another classification of very wide professional acceptance.
- Proof by other means of a medical illness recognised by a respected body of medical opinion.
- Mental impairment which results not from mental illness, but which exists as a matter of medical opinion and possibility.

This last route would depend upon 'substantial and very specific medical evidence'. Where WHOICD is relied upon, medical evidence is needed to show how the applicant's symptoms fit the diagnostic guidelines. If medical evidence is disputed, tribunals should call for further expert evidence. Tribunals should insist that the parties indicate in good time whether impairment is an issue and why.

All four routes listed by the EAT through which the 'clinically well-recognised' condition may be established depend upon

1 [2002] IRLR 90.

detailed diagnosis of mental illness. While this may be inevitable given the wording of Schedule 1 paragraph 1(1), it does mean that the demands placed on the applicant to prove mental impairment by way of mental illness are greater than those to show physical impairment or mental impairment other than mental illness. For the former, proof of the underlying cause remains necessary; for the latter, evidence of the effects of impairment will suffice.

Difficulties in establishing that a mental illness is 'clinically well-recognised' are demonstrated in two cases. In the first, *Blackledge v London General Transport Services Ltd*[1], different professional classifications were used by medical experts acting for the applicant and the respondent. The applicant's psychiatrist diagnosed post traumatic stress disorder with co-morbid alcohol and drug dependant syndrome, using diagnostic criteria set out in WHOICD-10. However, the psychiatrist instructed by the respondents reported that the applicant's condition did not fit the diagnostic criteria in an alternative classification of mental disorders developed by the American Psychiatric Association. The tribunal considered that differences between the two definitions were not significant and concluded that the applicant was not disabled. On appeal to the EAT, it was held that the reasoning of the tribunal was fundamentally flawed. It had conflated diagnostic criteria in the two classifications. The case was remitted back to a fresh tribunal for the WHOICD-10 to be applied.

The second case, *Fraser v Scottish Ambulance Service,*[2] illustrates the crucial role played by medical evidence in showing mental impairment resulting from or consisting of a mental illness. The applicant failed to provide sufficient evidence that she had a mental illness that was 'clinically well-recognised'. Her doctor told the tribunal only that as at

1 EAT/1073/00, heard on 3 August 2001.

2 EAT/0032/02, heard on 30 January 2003.

the date of the hearing she was treating the applicant with anti-depressant and anti-anxiety drugs. She gave no formal diagnosis of a clinically well-recognised illness in terms of the WHOICD, or of disease in other qualifying circumstances. Without this, the tribunal was unable to find that the applicant had a mental impairment. On appeal, the EAT held that the tribunal had been entitled to reach this conclusion.

9.2.2 Adverse effect on normal day-to-day activities

The second question set out in *Goodwin*[1] to be addressed by tribunals in deciding whether or not a person has a disability is:

> does the impairment have an adverse effect on the ability to carry out normal day-to-day activities?

An impairment will have an adverse effect only if one of an exhaustive list of functional capacities affects ability to carry out normal day-to-day activities. Schedule 1 paragraph 4(1) lists these as: mobility; manual dexterity; physical co-ordination; continence; ability to lift, carry or otherwise move everyday objects; speech, hearing or eyesight; memory or ability to concentrate, learn or understand; or perception of risk.[2]

In *Goodwin,* the EAT emphasised that when assessing adverse effect tribunals must focus on what the applicant cannot do, or can only do with difficulty, not on the things that the person can do. This guidance is approved by the Scottish Court of Session in *Law Hospital NHS Trust v Rush*[3]*.* The employer's evidence that the applicant had no apparent difficulty in carrying out her nursing duties was wrongly excluded by the tribunal. However, the fact that she had managed to perform those duties could not justify rejection of her evidence that she had difficulty in carrying out normal day-to-day activities. Reiterating *Goodwin,* the Court of

1 [1999] IRLR 4.

2 See Schedule 1 para. 4(1).

3 [2001] IRLR 611.

Session confirmed that the tribunal must look to what applicants cannot do, or only do with difficulty, not at what they can do.

The Court of Session has also clarified the relationship between performance of work-related duties and ability to carry out day-to-day activities. The Guidance states at paragraph C3 that,

> *"The term 'normal day-to-day activities' does not, for example, include work of any particular form, because no particular form is 'normal' for most people."*

In *Rush*, the tribunal had excluded evidence of performance of nursing duties, following paragraph C3. The Court of Session disagreed with this approach, stating that there is no principle that evidence of the nature of an applicant's duties at work, and how he or she is able to perform those duties must be excluded, particularly if they include 'normal day-to-day activities'. Such evidence can be relevant to the issue of the credibility of the applicant.

The relationship between work and normal day to activities is further considered by the EAT in both *Cruickshank v VAW Motorcast Ltd*[1] and *Coca-Cola Enterprises Ltd v Shergill*[2]. In *Cruickshank* the applicant had occupational asthma which was exacerbated by fumes at his workplace. The tribunal found that he did not have a disability because the adverse effect resulting from his impairment was substantial only when he was at work. The EAT held that this was the wrong approach. Account may need to be taken of ability to carry out day-to-day activities performed within the work environment, as well as outside of it. Tribunals must identify the particular context within which performance of day-to-day activities is to be examined. Where, as here, an employee

1 [2002] IRLR 24.

2 EAT/003/02.

has been dismissed because of the effect of his impairment upon his capacity to work, his working environment provides the context within which ability to perform day-to-day activities must be assessed.

Cruickshank interprets paragraph C3 of the Guidance broadly to widen the context within which day-to-day activities may be assessed. *Coca-Cola Enterprises Ltd v Shergill* takes a restrictive view of what might constitute a normal day-to-day activity. In addition to excluding work from the list of these, paragraph C3 of the Guidance also excludes 'playing a particular game, taking part in a particular hobby, playing a musical instrument, playing sport, or performing a highly skilled task'. Despite this, a tribunal found that playing football, snooker and cycling were normal day-to-day activities for a 29 year old man. It took the view that exclusion of fitness activities by paragraph C3 of the Guidance did not reflect current social attitudes. The EAT remitted the case to a new tribunal, holding that it was for Parliament, not the employment tribunal, to decide that the Guidance no longer reflects society. It added that an impairment that prevented a person from 'normal endeavours of fitness' would probably fall within the definition, but that an inability to play a particular sport did not.

In *Ekpe v Commissioner of Police for the Metropolis*[1], the EAT considered the question of what constitutes a 'normal' day-to-day activity. The applicant was unable to put rollers in her hair and could only apply make-up with difficulty with her left hand. At tribunal, it had been held that she was not disabled because neither activity was a 'normal' day-to-day activity, being 'activities carried out almost exclusively by women'.

The EAT held that this was perverse in that it would exclude from normal day-to-day activities anything carried out

1 [2001] IRLR 605.

almost exclusively by women (or men). The tribunal should have focused instead on whether any of the capacities listed in paragraph 4 (1) of Schedule 1 (see above) had been affected. If any had been, as was manual dexterity in *Ekpe*, some adverse effect on normal day-to-day activities would be 'almost inevitable'. What is 'normal' for the Act is best defined as anything that is not abnormal or unusual. Anything done by most women, or most men, is a normal day-to-day activity.

The tribunal in *Ekpe* was also criticised for taking an item by item approach to ability to perform day-to-day activities. It should not have addressed each example of alleged loss of ability as distinct issues. Rather, taking the evidence as a whole, its duty was to assess the impact overall of impairment on listed capabilities.

9.2.3 Long-term adverse effects

In order to meet the definition of disability, an adverse effect on ability to carry out normal day-to-day activities must be long-term.[1] An effect will be long-term if:

- it has lasted for at least 12 months;
- the period for which it lasts is likely to be at least 12 months; or
- it is likely to last for the rest of the life of the person affected.[2]

The date at which assessment of adverse effect should be made may be crucial to a determination of whether or not it is long-term. Should duration be assessed as at the time of the alleged discriminatory act, or may account be taken of effects up to and including the date of the tribunal hearing? Differently constituted panels of the EAT have taken differing approaches to determination of the relevant date of disablement.

1 Section 1(1) DDA.

2 Schedule 1 para. 2(1).

In *Greenwood v British Airways plc*[1], it had been decided that the tribunal should consider adverse effects up to and including the date of the tribunal hearing. If, as in *Greenwood,* substantial adverse effect has been experienced for over 12 months by the time of hearing, the long-term condition is satisfied. The EAT followed this reasoning in *Collett v Diocese of Hallam Trustees.*[2] At tribunal it had been decided that the relevant date of disablement should be the time of the alleged discrimination. The EAT disagreed. In reaching its decision the employment tribunal had not paid sufficient heed to the Guidance, which states:

> *"... in assessing the likelihood of an effect lasting for any period, account should be taken of the total period for which the effect exists. This includes any time before the point when the discriminatory behaviour occurred as well as time afterwards."*[3]

The tribunal had fallen into error by not taking account of the whole period when ignoring time between the alleged discriminatory act and the hearing. The case was remitted to a differently constituted tribunal. In *Condappa v Newham Health Care Trust*[4], a tribunal fell into error by failing to include the period before the applicant had been dismissed.

The date for assessment of disability appeared settled following these cases. However, the EAT returned to the issue in *Cruikshank v VAW Motorcast*[5] and took a different approach. Matters raised in the case again included whether disability should be assessed as at the time of the employer's allegedly discriminatory act or at the time of the tribunal hearing. The EAT reasoned that the essential question for tribunals is whether 'an employer discriminates against a

1 [1999] IRLR 600.

2 EAT/1400/00, heard on 17 December 2001.

3 SI 1996/1996, Part IIB, para. 8.

4 EAT/452/00.

5 [2002] IRLR 24.

disabled person' and that use of the present tense implies that disability must be assessed as at the time of the acts complained of.[1]

Doyle suggests that the proper approach is for tribunals to judge whether applicants have satisfied the definition as at the date of the alleged discriminatory act, but to do so with the benefit of hindsight of events occurring after that act and a subsequent hearing.[2]

The exercise of hindsight as envisaged in the Guidance and highlighted by Doyle, may mislead tribunals if applied to prognosis of recurrent conditions. Such conditions, where symptoms produce intermittent substantial adverse effect, are deemed to be long-term if likely to recur.[3] In *Mills v London Borough of Hillingdon*[4] the EAT pointed out that an applicant may have satisfied the long-term requirement even though her condition, here a depressive illness, may not be present throughout the relevant period. The likelihood of recurrence is a question of fact for the tribunal to determine on the basis of evidence presented to it.

The applicant in *Latchman v Reed Business Information Ltd*[5] was unable to satisfy this evidential burden. On appeal, the EAT had to consider whether bulimia and depression, either together or individually, and which had not lasted for 12 months, were likely to recur. The correct test of 'is likely' is drawn from the Guidance at paragraph B7 which states:

> *"It is likely that an event will happen if it is more probable than not that it will happen."*

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1 Ibid at [25].

2 Doyle B, *Disability Discrimination: Law and Practice,* 2003 (4th Edition, Jordans).

3 Schedule 1 para. 2(2).

4 EAT/0954/00.

5 EAT/1303/00, judgement delivered on 20 February 2002.

Tribunals must, however, look at the existence or not of the likelihood of a recurrence, not at what in fact happened. Hindsight may mislead if tribunals wrongly focus on whether the impairment in fact lasted for 12 months, rather than on whether the minimum duration was likely to have been 12 months. The correct approach is for them to look at what the likelihood of recurrence was, or would have seemed to have been, at the date of the allegedly discriminatory behaviour.

9.2.4 Substantial adverse effect

The adverse effect on ability to perform normal day-to-day activities must be substantial to satisfy the definition of disability. The Guidance makes clear that substantial means more than merely minor or trivial and gives examples of factors that tribunals should take into account when assessing the extent of adverse effect.

Case law considered in earlier Monitoring Reports has affirmed substantial as more than minor or trivial (*Goodwin v Patent Office*[1]); as a requirement that can be satisfied by the cumulative impact of impairment on adverse effects on a range of day-to-day activities (*Vicary v British Telecommunications plc*[2]) and as a matter for tribunals, not medical experts to determine (*Abadeh v British Telecommunications plc*[3]).

Ekpe v Commissioner of Police for the Metropolis[4] and *Kirton v Tetrosyl Ltd*[5] expand upon on the approach that tribunals may take in assessing substantiality. In *Kirton,* the applicant had mild incontinence as a result of surgery for prostate cancer. The tribunal found that this did not have a substantial adverse effect on his ability to perform day-to-day activities, and in doing drew on the experience of one or two members

1 [1999] IRLR 4.

2 [1999] IRLR 680.

3 [2001] IRLR 23.

4 [2001] IRLR 605.

5 [2002] IRLR 840.

of the panel who experienced mild incontinence. On appeal, the EAT upheld the tribunal's right to take into account its own experience in evaluating both expert medical and factual evidence presented to it.

In *Ekpe*, the EAT commented that tribunals are permitted to give weight to their own observations of the applicant when assessing whether an adverse effect is substantial. Here, an applicant who claimed to be able to do little with her right hand had been observed using it extensively. The EAT warned, however, that tribunals should be aware that an applicant's behaviour at tribunal may not be representative of behaviour generally. It advised tribunals seeking to rely on observation to make this clear at the hearing and to raise any relevant issues with medical experts if present.The EAT again confirmed that tribunals may take account of how an applicant presents herself at a hearing in *Leonard v South Derbyshire Chamber of Commerce*[1], subject to the proviso that capabilities within the 'strange adversarial environment of a hearing' may not be a reliable indicator of ability to perform day to activities.

Leonard also revisits the role of the Guidance in assessing disability. While the EAT approved its use by the tribunal, it was critical of the way in which it had been 'slavishly' applied as a checklist.The tribunal had been diverted from a correct focus on what the applicant could not do, or could only do with difficulty, by running through examples to balance what she could not do against what she could. Instead, the tribunal should have made an overall assessment of whether an adverse effect is substantial. Just because there are many things that an applicant can do, it does not follow that adverse effect cannot be substantial.

Paragraphs C6 and C7 of the Guidance must not be ignored

1 [2001] IRLR 19.

when determining whether an adverse effect is substantial. Paragraph C6 notes that tribunals should take account of indirect effects of impairment. In *Leonard* the tribunal had paid insufficient attention to the impact of tiredness resulting from depression, thereby failing to apply C6 properly. C7 directs tribunals to take account of the indirect effects of mental illness upon physical ability to sustain performance of tasks over a reasonable period of time. Failure to do so in *Leonard* also contributed to the EAT's substitution of a finding that the applicant was disabled for the tribunal's decision that she was not.

9.2.5 Deduced effects of treatment

In assessing whether the adverse effect resulting from an impairment is substantial, tribunals must apply a 'but for' test by discounting the effects of any medical treatment when making the calculation.[1] Correction of poor eyesight by glasses or contact lenses is not to be discounted[2], nor is concluded treatment which has permanently improved the condition such that it no longer has substantial adverse effect. Case law considered in earlier Monitoring Reports has established that the correct approach for tribunals is to look first at an applicant's ability to perform day-to-day activities whilst on medication or receiving treatment, then to deduce what that person's ability would be 'but for' that medication or treatment (*Goodwin v Patent Office*[3]).

More recent cases emphasise that applicants must present conclusive medical evidence to tribunals asked to assess the 'deduced effects' of treatment. In November 2002 the Court of Appeal dismissed an appeal brought on the ground that the tribunal, in finding that the applicant was not disabled, had failed to give proper consideration to the deduced effects of psychotherapy. The applicant in *Woodrup v London Borough of Southwark*[4] had an anxiety disorder for which

1 Schedule 1 para. 6(1) and (2).

2 Ibid para. 6(3).

3 [1999] IRLR 4.

4 [2002] EWCA Civ 1716.

she was receiving psychotherapy. A letter from her psychiatrist stated that were she to leave psychotherapy prematurely, her progress so far would be jeopardised. Other than this, the only evidence available to the tribunal relevant to deduced effects was her own surmise as to what would happen to her without treatment. On the basis of this limited medical evidence, the tribunal had been entitled to conclude that the applicant had failed to discharge the burden of proof resting on her to show that without treatment, her impairment would have substantial adverse effect on her ability to carry out day-to-day activities. *Kapadia v London Borough of Lambeth*[1] was distinguishable on the grounds that in that case the tribunal had ignored clear medical evidence of the deduced effects of an impairment without medication, here there was no such evidence.

The Court of Appeal in *Woodrup* made clear that deduced effects cases will not succeed in the absence of persuasive medical evidence. Simon Brown LJ commented,

> **"In any deduced effects case of this sort the claimant should be required to prove his or her alleged disability with some particularity. Those seeking to invoke this particularly benign doctrine under paragraph 6 of the schedule should not readily expect to be indulged by the tribunal of fact. Ordinarily, at least in the present class of case, one would expect clear medical evidence to be necessary."[2]**

Tribunals will not infer the deduced effects of medication or treatment in the absence of relevant and focussed medical evidence. In *Ganase v Kent Community Housing Trust*[3] an application to appeal to the Court of Appeal against the tribunal's decision that the applicant's impairment did not have a substantial adverse effect on ability to carry out day-

1 [2000] IRLR 699, considered in *Monitoring the Disability Discrimination Act 1995 (Phase 2).*

2 [2002] EWCA Civ 1716 at [13]; [2003] IRLR 111 at [13].

3 [2002] EWCA Civ 58.

to-day activities was dismissed. Permission had been sought on the basis that the tribunal had not excluded the impact of medication when reaching its decision. The EAT had previously concluded that this was not an error of law because nothing in the evidence presented to the tribunal had suggested that the impact would be different but for the medication.The Court of Appeal held that as no evidence was addressed to the tribunal on the medication point, there was no real prospect of success for a further appeal.

Faced with conflicting medical evidence as to the deduced effects of continuing medication or treatment, tribunals are entitled to chose between them. Thus, in *Vyas v London Borough of Camden*[1] a tribunal had not erred in law in holding that an applicant with ischaemic and coronary heart disease was not disabled where evidence from one medical expert reported that if medication were discontinued he would experience substantial adverse effect on ability to carry out day-to-day activities, but that from another disagreed, pointing out that medication was taken to prevent another heart attack, not to alleviate the symptoms of angina. Thus ability to carry out day-to-day activities was not being improved by taking the medication and the applicant failed the 'but for' test.

9.2.6 Progressive conditions

Progressive conditions are included within the definition of disability from the moment that they begin to effect a person's ability to carry out day-to-day activities, so long as the effect is likely to become substantial in the future.[2]The Government has indicated its intention to extend coverage of progressive conditions to include HIV infection from the time at which it is diagnosed, and cancer from the time at which it is diagnosed as a condition that is likely to require substantial treatment.[3]

1 EAT/1153/01/RN.

2 Schedule 1 para. 8(1).

3 *Towards Inclusion - Civil Rights for Disabled People* (2001), Department for Education and Employment, para. 3.11.

Mere diagnosis of a progressive condition is not sufficient to satisfy the provision. In *Mowat-Brown v University of Surrey*[3] an employment tribunal had decided, on the basis of medical evidence, that the applicant's multiple sclerosis was not likely to develop to a point at which it would have a substantial adverse effect on his ability to carry out day-to-day activities. On appeal to the EAT, the appellant argued that the tribunal should look at the condition, rather than at the prognosis for individuals. Asking applicants to show a future likelihood of substantial disadvantage was tantamount to asking for proof that the condition was progressive and this defeats the object of the provision on progressive conditions.

The EAT disagreed. The correct question is whether, on a balance of probabilities, the applicant has established that the condition, in her case, is likely to produce substantial adverse effects. Applicants may discharge the burden of proof either through statistical evidence or by presenting individual medical evidence of their prognoses. It is interesting to note in the light of *Mowat-Brown*, that although the Government plans to amend the progressive condition provision with regard to cancer and HIV infection, it has no similar plan so far as multiple sclerosis is concerned.

The progressive condition provision has also been considered in *Kirton v Tetrosyl Ltd*[2]. Here, the applicant had mild incontinence as a result of surgery to treat prostate cancer. In addition to finding that he did not meet the definition of disability, because any adverse effect on his ability to carry out day-to-day activities was not substantial, the tribunal also held that the progressive condition provision did not apply because the incontinence resulted from surgery to treat prostate cancer, not from the cancer itself. The EAT rejected an argument that the provision should be interpreted widely to include impairments arising from

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1 [2002] IRLR 235.

2 [2002] IRLR 840.

treatment of a progressive condition, as well as the progressive condition itself.

The Court of Appeal, however, has applied the wider interpretation.[1] The purpose of paragraph 8(1) of Schedule 1 is to bring within the ambit of the Act those who have a progressive condition and who are not covered by section 1. The trigger is the advent of symptoms as a result of the condition. Here, symptoms were the result of standard surgery for prostate cancer, that surgery carrying a 40% chance of sphincter deficiency. Incontinence was, therefore, a result of cancer, notwithstanding the intervening act of surgery. A narrow and restrictive construction of paragraph 8(1) could not be justified.

9.2 7 Medical evidence

Many of the cases included above highlight the central importance for applicants of obtaining medical evidence informed by the definition of disability given within the Act. For example, in *Fraser v Scottish Ambulance Service*[2] failure to provide formal evidence that the applicant had a clinically well-recognised disease, or its duration, precluded the tribunal from making the 'quantum leap' from use of the term 'depression' to a qualifying disability. Similarly, the applicant in *Gibbs v Institute for Optimum Nutrition*[3] failed to satisfy the tribunal that she met the definition of disability. It noted that she had not produced any medical evidence specifically directed at the definition of disability in the Act, relying instead on a report prepared 3 years earlier for a personal injury claim.

Previous Monitoring Reports have noted the widespread reliance on medical evidence by tribunals and the difficulties

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1 *Kirton v Tetrosyl Ltd* [2003] All ER (D) 190 (Apr).

2 EAT/0032/02, hearing date 30 January 2003.

3 EAT/1139/01, hearing date 16 August 2002.

faced by applicants called upon to provide it.[1] In *De Keyser Ltd v Wilson*[2] the EAT has recognised that encouraging the use of experts may run counter to "inexpensive, speedy and robustly 'common-sensical' determinations by the 'Industrial Jury' ", but that in some cases their use is necessary. It gives guidance to tribunals designed to limit increases in costs, delay and complexity resulting from their use. Although the case concerns constructive dismissal and breach of contract, the guidance is relevant to employment tribunals deciding cases brought under the DDA.

The guidelines include the following:

- Parties should explore the need to instruct experts with the employment tribunal.
- Joint instruction of a single expert on agreed terms is to be preferred.
- Instructions should not be partisan and should detail specific questions and general issues for the expert to address.
- The tribunal may impose a timetable for exchange of reports where there is no joint expert and may consider whether failure to follow guidelines constitutes unreasonable conduct when determining costs.[3]

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1 *Monitoring the Disability Discrimination Act 1995 (Phase 2)* notes that witnesses were called in 787 of the 1,757 cases that went to hearing. A medical witness was called in 23.8% of these. See Leverton S, *Monitoring the Disability Discrimination Act 1995 (Phase 2). In-house report 91,* (2002) Department of Work and Pensions at 4.5 and 9.6. See also, Meager N, Doyle B et al, *Monitoring the Disability Discrimination Act (DDA) 1995,* (1999) Research Report RR119, Department for Education and Employment, at 5.8.

2 [2001] IRLR 324.

3 Ibid at [36] - [37].

9.2.8 The role of tribunals when definition is at issue

Goodwin v Patent Office[1] affirms that tribunals should adopt an inquisitorial or interventionist role when the definition of disability is at issue.[2] This is because some disabled persons may be unable or unwilling to accept that they have a disability and may need assistance from the tribunal. The EAT notes that a refusal to accept that they have a disability may indeed be a symptom of it. In *Goodwin* tribunals are directed to bear in mind the additional need to take a purposive approach to interpretation of social legislation such as the DDA. However, more recently the EAT has interpreted the interventionist role of tribunals narrowly.

In *Rugamor v Sony Music Entertainment UK Ltd; McNicol v Balfour Beatty Rail Maintenance*[3] the EAT comments that the inquisitorial role accorded to the employment tribunal in *Goodwin* means no more than that it should conduct hearings in a fair and balanced manner. Intervention and questioning of witnesses should be limited to that necessary to ensure due consideration of the issues raised by, or necessarily implicit in, the complaint being made. The role does not extend so far as to place on the employment tribunal a duty to conduct a free-standing inquiry of its own, or require it to attempt to obtain evidence beyond that placed before it by the parties.[4]

On appeal in *McNicol* (*Rugamor* having dropped his appeal), the Court of Appeal upheld this limited view of the tribunal's inquisitorial role. It confirmed that the onus is on applicants to prove that they fall within the definition of disability. In borderline cases this may be difficult, but it is not the duty of tribunals to obtain evidence or ensure that adequate medical

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1 [1999] IRLR 4.

2 Rule 9 of the Industrial Tribunals' Rules of Procedure 1993 stipulates that the role of tribunals contains an inquisitorial element.

3 [2001] IRLR 644.

4 Ibid at [47].

evidence is obtained by the parties. The Court of Appeal considered that sensible and sensitive use of tribunals' flexible and informal procedures, and of its case management powers would enable it to do justice by reminding parties at directions hearings of the need for qualified and informed medical evidence.

9.2.9 Regulations and Guidance

The Guidance on the Meaning of Disability has no legal status, though section 3(3) of the Act requires tribunals to take account of it in any matter to which it appears relevant. Early tribunal decisions placed considerable reliance on the Guidance, as directed by *Goodwin*[1]. Tribunals continue to refer to the Guidance on matters concerning definition of disability, though (as noted above in *Leonard v South Derbyshire Chamber of Commerce*[2]) care must be taken to avoid applying examples given in the Guidance as a checklist. As the EAT notes in *Coca-Cola Enterprises Ltd v Shergill*[3], tribunals may not decided for themselves that the Guidance no longer reflects society's view of what constitutes day-to-day activities. It is for Parliament to keep the appropriate definitions of disability under review. Failure to apply the Guidance properly continues to give grounds for a successful appeal against a tribunal's decision that an applicant is not disabled.

An alleged conflict between the Guidance and Regulations issued on the meaning of disability[4] was considered by the EAT in *Power v Panasonic UK Ltd*[5]. Regulation 3(2) excludes addictions, including that to alcohol, from impairments for the purposes of the Act. In *Power,* the tribunal held that the applicant, who had an addiction to alcohol and related depression, was not disabled. The majority had concluded

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1 [1999] IRLR 4.

2 [2001] IRLR 19.

3 EAT/003/02, hearing date 2 September 2002.

4 Disability Discrimination (Meaning of Disability) Regulations 1996, SI 1996/1455.

5 EAT/747/01.

that Regulation 3(2) superseded, and should be given greater weight, than the Guidance, which provides at paragraph 11 that tribunals should not have regard to the cause of a disability, even if that cause is an addiction otherwise excluded from the Act. The minority view was that the Guidance should be given full weight even if it conflicts with the express terms of the Act because the employment tribunal is under a statutory duty to refer to it.

The EAT could see no conflict. It considered that the purposes for which Regulations and Guidance were introduced are different, though these are not elaborated upon. According to the EAT, how the impairment was caused is immaterial. What the tribunal must decide in *Power* and similar cases is whether the applicant has an impairment which is excluded by the Regulations from being treated as a disability within the meaning of the Act. The tribunal had regarded the core question as being:

> *"did the Applicant become clinically depressed and turn to drink, or did the events lead to alcohol addiction, producing depression?"*

This concentration on the cause of impairment revealed an error of approach sufficient for the case to be remitted by the EAT for a rehearing on the issue of disability.

Part II DDA: Employment Provisions

9.2.10 Scope of employment provisions

Post employment exclusions

The House of Lords has recently considered whether sex, race and disability discrimination legislation protects employees after the contract of employment has been

terminated. In *Relaxion Group plc v Rhys-Harper, D'Souza v London Borough of Lambeth, Jones v 3M Healthcare Limited and others*[1], it decided that an employment relationship may continue despite termination of the employment contract, thereby extending the scope of anti-discrimination legislation beyond dismissal. The ruling overturns Court of Appeal decisions on race and disability discrimination, including that in *Kirker v British Sugar plc & another*[2].

In *Kirker,* the Court of Appeal had examined the scope of section 4(2) of the Disability Discrimination Act in four conjoined actions. Section 4(2) provides,

> *"It is unlawful for an employer to discriminate against a disabled person whom he employs".*

Actions were brought by applicants alleging victimisation. Acts complained of included victimisation by way of failure to supply references and refusal to return business cards after dismissal. In all four cases the employment tribunals had held that the wording of section 4(2) precluded them from hearing complaints of discrimination or victimisation arising from acts committed by a former employer after termination of employment. The EAT reluctantly agreed that use of the present tense in the phrase "whom he employs" did not extend the protection of the DDA to ex-employees. It noted a disparity between race, disability and sex discrimination legislation, the latter having been interpreted to apply post-termination following a ruling from the European Court of Justice in order to give effect to Equal Treatment Directive 76/207/EC.[3]

The Court of Appeal could find no error in law in the decisions reached by the employment tribunal.

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1 [2003] UKHL 33.

2 *Kirker v British Sugar plc & another; Jones v 3M Healthcare Ltd; Angel v New Possibilities NHS Trust; Bond v Hackney Citizen's Advice* [2002] EWCA Civ 304; [2002] ICR 1124.

3 In *Coote v Grenada Hospitality Ltd (no 2)* [1999] IRLR 452.

> *"On its plain meaning section 4(2) of the 1995 Act is simply unavailable to a person who seeks to make a claim in the Employment Tribunal in respect of acts of discrimination and victimisation alleged to have been committed by a former employer after the termination of the employment relationship."*[1]

The phrase '*whom he employs'* must be construed narrowly to mean "with whom he has a contract of service". A wider construction would allow employees to bring actions for alleged victimisation for post termination acts committed many years after employment has ended.

A majority of the House of Lords disagreed with this line of reasoning. Ending a contract of employment does not bring to a conclusion all aspects of the relationship between employer and employee. An employee's right to benefits such as internal appeals and grievance procedures remains, as might a duty to respect an employer's confidentiality. Given the continuing nature of the employment relationship, an arbitrary line cannot be drawn at the point of termination of contract before which protection from discrimination is granted as a benefit of employment, but after which it is not. The House of Lords accepted that a line must be drawn between what is prohibited and what is not, but this will depend upon what is reasonable in the circumstances of each case. For Lord Hobhouse, the key question was,

> *"Does the conduct complained about have a sufficiently close connection with ...employment?"*

Where an employer's normal practice is to give references to former employees on request, refusal to do so might constitute less favourable treatment than another on the grounds of disability, sex or race, though it is less likely to be reasonable the greater is the lapse of time since termination

1 *Op cit* at para [12].

of the employment contract. Their Lordships agreed by a majority of 4 to 1 that, on the facts of each of the conjoined cases brought under the DDA, a sufficiently close connection with employment existed and that the protection afforded by section 4(2) consequently applied.[1]

Exempted occupations; statutory office holders and applicants for statutory office

Section 4 of the Act sets out the scope of the employment provisions. Discrimination against applicants and employees by employers is unlawful in prescribed circumstances, subject to occupational exemptions which, with the exception of the armed forces, are due to be removed by October 2004.[2]

Against this background of a move towards inclusivity of occupational coverage, the exclusion of job applicants for, and holders of, statutory office as highlighted in a recent case, may appear anomalous. In conjoined appeals the EAT considered whether statutory office holders are 'employees' within the meaning of the Act, and whether section 64(2) may be applied to applicants for statutory office in the face of its exclusion of statutory office holders.

The applicants in *Photis v KMC International Search & Selection, The Department of Trade & Industry; Bruce v KMC International Search & Selection, The Department of Trade & Industry; Heyes v Lord Chancellor's Department*[3] had applied unsuccessfully for positions as part-time lay members of the Employment Tribunal and as a part-time medical member of the Appeals Service. At tribunal it was

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[1] 2000/43/EC for race; 2000/78/EC for equal treatment in employment, including on the grounds of disability.

[2] Exempted occupations are listed in section 64. The Government has signalled its intention to remove exemptions other than for the armed forces in *Towards Inclusion-Civil Rights for Disabled People* at 3.34.

[3] EAT/732/00; EAT/766/00; EAT/960/00, hearing date 6 December 2001.

decided in relation to *Heyes* and *Bruce* that these positions were not 'employment' as defined within Section 68 of the Act[1], *Photis* being brought under the Race Relations Act 1976.

The EAT upheld the tribunal's finding. It moved on to consider whether section 64(2), which applies protection under the employment provisions to service for the purposes of a Minister of the Crown other than as a statutory office holder, might nevertheless include applicants for statutory office. It concluded that it could not. 'Service' must be construed to include prospective service just as 'employment' includes prospective employment. The EAT noted that section 66 of the Act does not provide statutory office holders and applicants with a right of enforcement through employment tribunals, redress must instead be sought through proceedings for judicial review.

The applicants' argument that their rights to a fair trial under Article 6 of the European Convention on Human Rights failed to sway the EAT. The acts complained of pre-dated implementation of the Human Rights Act 1998, which incorporated the Convention into domestic law and which was not to be given retrospective effect.[2]

Constructive dismissal

An employer may discriminate against a disabled person in recruitment, in a range of matters arising during employment, or by dismissing him or subjecting him to any other detriment.[3] It has been held by the EAT in *Commissioner of the Metropolis v Harley*[4] that dismissal did not include constructive dismissal.

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1 Section 68: "'employment' means, subject to any prescribed provision, employment under a contract of service or of apprenticeship or a contract personally to do any work..."

2 As had been held by the House of Lords in *R v Lambert* [2001] 3 All ER 577.

3 Section 4(1) & (2) DDA.

4 [2001] ICR 927, discussed in *Monitoring the Disability Discrimination Act 1995 (Phase 2),* at p.30.

The EAT revisited the issue in *Catherall v Michelin Tyre plc*[1]. While acknowledging that *Harley* had held that section 4(2)(d) of the DDA does not apply to constructive dismissal, it noted that another division of the EAT had interpreted an identical provision in the Race Relations Act 1976 to include it.[2] In *Catherall* the EAT chose not to follow *Harley,* seeing no reason why the term 'dismissal' should be construed narrowly so as to exclude constructive dismissal. Conflicting decisions of the EAT has left the scope of the term 'dismissal' uncertain and in need of future clarification by the appeal courts.

Small employer exemption

Employers who employ fewer than 15 employees are currently exempted from the provisions of Part II of the Act.[3] The Government has stated its intention to remove the small business exemption by October 2004.[4] The compatibility of the exemption with Article 6 of the European Convention on Human Rights has been tested at appeal court level. In *Whittaker v Watson (t/a P & M Watson Haulage) & another*[5], the employment tribunal found that it had no jurisdiction to hear the applicant's case alleging a failure to make reasonable adjustments without justification, because the employer had only six employees. An appeal asserted that the small business exemption in section 7(1) was incompatible with Articles 6 and 14 of the European Convention on Human Rights and should be disapplied.

Courts, as pointed out by the EAT in dismissing the appeal, have no powers to disapply primary legislation. Section 3(1)

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1 EAT/915/01, judgement delivered on 21 October 2002.

2 *Specialist Fabrication v Burton* [2001] IRLR 263, in which section 4(2)(c) of the RRA 1976 was at issue.

3 Section 7 DDA. The figure has been reduced from 20 to 15 employees by the *Disability Discrimination (Exception for Small Employers) Order 1998 SI 1998/2618.*

4 *Towards Inclusion-Civil Rights for Disabled People* at 3.31.

5 EAT/157/01, hearing date 7 February 2002

of the Human Rights Act 1998 directs them to read and give effect to primary and secondary legislation, 'so far as it is possible to do so', in a way that is compatible with Convention rights. If satisfied that a legislative provision is incompatible, and satisfied also that it cannot be read so as to be compatible, a court may make a declaration of incompatibility. It may not disapply the offending piece of legislation.

The EAT next considered the question of whether it is a court for the purposes of section 3(1) of the Human Rights Act and concluded, with some puzzlement, that it is not.[1] Given that neither the EAT, nor the employment tribunal, may make declarations of incompatibility, the appeal was dismissed. Leave was granted to appeal to the Court of Appeal, this being a court with jurisdiction to grant declarations of incompatibility.

Employees on secondment

The small business exemption has also arisen, somewhat peripherally, in *Seabridge & another v Construction Projects Training Ltd*[2], a case in which employment relationships arising from secondment of employees from one employer to another is considered. An application brought against a training organisation, to whom the applicant had been seconded as part of his College course, was rejected. The training organisation was wholly owned by the College. As such, it had no employees and the employment tribunal had no jurisdiction under Part II of the DDA to hear claims brought against it because of the small business exemption.

The EAT upheld the tribunal's decision not to permit the applicant to add the College as a respondent. The onus was on the applicant to identify respondents correctly at the time

1 Section 4(5) Human Rights Act 1998 lists relevant courts.

2 [2001] EWCA Civ 1492.

of making the application. It commented that employees on secondment from one company to another act on behalf of the latter company, and that this does not create an employment relationship between the first company (which remains his employer) and the second.

On a further application to appeal to the Court of Appeal, it was decided that the application was out of time, but that in any event in the absence of evidence of employment such as a contract of employment or a pay slip, the College could not be said to 'employ' the student, who was left without redress under the DDA. The case emphasises to applicants the importance of identifying employers correctly at the time of making the application, and that this may be problematic where complex employment structures are in place.

Executors of deceased applicants

Section 8(1) of the Act provides that a complaint may be presented to an employment tribunal by any person that another person has unlawfully discriminated against. In *The Executors of the Late Gary Soutar v James Murray & Co (Cupar) Ltd*[1] the EAT in Scotland was asked to decided whether 'any person' could include the executors of a deceased person. The employment tribunal had identified a difference in relevant law within England and Wales and Scotland. In England and Wales, personal representatives are able to rely on section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 to raise or continue discrimination complaints. However, it noted with regret that no similar provision exists in Scotland. This led to the anomalous result that, although the employment tribunal has no territorial restriction on its jurisdiction, a case brought by personal representatives in England and Wales could be heard, whereas if brought across the border in Scotland, it could not.

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1 EAT/592/01, hearing date 30 October 2001.

The EAT accepted that this was a 'highly unsatisfactory' position and looked to the common law of Scotland for a solution. Here, it found a right on the part of executors to pursue claims on behalf of deceased persons, subject to some exceptions. Nothing in the use of the word 'person' in section 8(1) of the DDA brought it within an exception to the common law rule that the executor of a deceased person is deemed to be that person. The application could thus be heard.

The EAT has ended an anomalous disparity in protection from discrimination in England and Wales and Scotland. Executors in England and Wales are authorised to raise or proceed with discrimination claims by virtue of section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934; in Scotland their authority rests within the common law.

Trade organisations and qualifying bodies

It is unlawful for trade organisations to discriminate against a disabled person in prescribed ways.[1] Like employers, trade organisations are also under a duty to make reasonable adjustments to arrangements or physical features of premises that place a disabled person at a substantial disadvantage in comparison to persons who are not disabled. The sex and race discrimination legislation covers bodies authorised to grant professional qualifications as well as trade organisations.[2] *General Medical Council v Cox*[3] raises the questions of whether qualifying bodies are similarly covered by the DDA, and whether the General Medical Council (GMC) can be classed as a trade organisation within the meaning of section 13 of the Act.

The case concerned a wheelchair user who applied to study medicine at Oxford University. Because of her restricted

1 Sections 13 & 14 DDA.

2 Section 13 Sex Discrimination Act 1975; section 12 Race Relations Act 1976.

3 [2002] TLR 165.

mobility, she would be unable to follow the full training for clinical students or to complete some pre-registration training. The University, regarding her as a good candidate, sought a ruling from the GMC that the training she would be able to undertake, and the range of skills she would be able to acquire, would be acceptable for registration as a medical practitioner. It asked permission from the GMC for it to make reasonable adjustments to the clinical programme to accommodate the applicant's disability, also for approval of a modified pre-registration year. The GMC responded that it was prevented by the Medical Act 1983 from adjusting medical training to cover a lesser order of knowledge, though it recognised that it had power to vary pre-registration experience to accommodate disability under section 10(4) of that Act.

The EAT allowed an appeal by the GMC against the employment tribunal's ruling that it is a trade organisation within the meaning of section 13(3) of the Act. While the GMC's activities benefit the medical profession by maintaining its status and reputation as might be expected of a trade organisation, its predominant purpose is to protect the public by setting standards that are not compromised by self-interest. This purpose, and the fact that the GMC is accountable to the Privy Council, is incompatible with the notion of the GMC as a trade organisation.

Having held that the GMC is not a trade organisation, the EAT moved on to determine whether qualifying bodies are included within Part II of the DDA. It concluded that they are not. The omission by Parliament of provisions parallel to those in sex and race discrimination legislation must be deliberate. It reasoned that proscribing sex and race discrimination by qualifying bodies does not impact upon academic or professional standards, whereas proscribing

disability discrimination might operate to the detriment of public safety by lowering them. Faced with a possible conflict between disability discrimination and public safety, "Parliament arguably puts the latter first".[1]

Since *GMC v Cox* was decided, the Government has agreed to a recommendation that the DDA should apply to qualifying bodies.[2] The Disability Rights Commission has further recommended that examining bodies be covered.[3]

9.2.11 Meaning of discrimination: less favourable treatment

Discrimination in Part II of the DDA may take two forms. An employer discriminates against a disabled person by treating that person less favourably than he treats others if treatment is for a reason related to that person's disability and is not justified.[4] A failure to make reasonable adjustments to features of working arrangements or premises which cause substantial disadvantage to a disabled person is also discriminatory unless justified.[5] Both forms of discrimination are justified where an employer shows that the reason for the otherwise discriminatory act is both material to the circumstances of the particular case and substantial.[6] Cases since the last Monitoring Report in which the justification defence has been considered are examined below. In this section, we focus on the first form of discrimination: less favourable treatment.

For a reason related to disability

The reason for less favourable treatment must relate to a

1 Ibid at [18].

2 As noted in *Legislative Review. First Review of the Disability Discrimination Act 1995. Consultation,*(May 2002) Disability Rights Commission at p.7.

3 Ibid.

4 Section 5(1).

5 Section 5(2).

6 Sections 5(3) & (4).

disabled person's disability. The Court of Appeal has given guidance on how the necessary nexus between an employer's reasons for allegedly discriminatory actions and the actions themselves is to be established. In *Deltron Components Ltd v Parsons*[1], the Appeal Court dismissed an application for leave to appeal against the employment tribunal's decision that an employee had been subjected to less favourable treatment for a reason related to his disability. It ruled that the nexus is established by answering a single question: has the complainant been treated less favourably than others because of his disability? In answering that question, employment tribunals should follow the steps set out for racial discrimination cases in *King v Great Britain-China Centre.*[2]

In *Deltron*, a blind sales operator was selected for redundancy from a pool in which he was the sole eligible employee. The employment tribunal found that throughout his employment he had been subjected to humiliating remarks on the grounds of his disability. It held that his dismissal amounted to less favourable treatment for a reason related to his disability.

On appeal to the EAT, the respondent employer argued that the tribunal had erred in law by assuming that because disability was a factor in his treatment, that treatment must have been less favourable than that which would have been afforded to a person who was not disabled. It should instead, it was argued, have split the essential question into two parts as demanded by the House of Lords for racial discrimination cases in *Glasgow City Council v Zafar.*[3] The law lords in that case advised a split into (a) less favourable treatment, and (b) examination of the grounds for that treatment. 'Rolling up' the questions into one had resulted, according to the respondents, in the tribunal's assumption that because the

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1 [2002] EWCA Civ 323.

2 [1992] ICR 516.

3 [1998] 2 All ER 953; [1998] ICR 120.

complainant had been treated less favourably in other respects, the dismissal itself must have been on grounds of his disability.

The Court of Appeal approved the approach taken by the employment tribunal. It had adopted the principles set out in *King v Great Britain-China Centre* for racial discrimination and properly applied these as the test of less favourable treatment set out in section 5(1) of the DDA. The principles in *King* permit tribunals to draw inferences of discrimination from primary findings of fact. Subject to the proviso that the burden of proof for showing less favourable treatment rests with the applicant, if there are matters which could give rise to an inference of such treatment, tribunals must look to see if any explanation given by a respondent employer is unsatisfactory or inadequate. If it is, it is open to that tribunal to draw an inference of discrimination.

On the facts in *Deltron,* no explanation had been given by the respondents as to why it had permitted humiliating treatment to continue. The tribunal was thus able to raise an inference that in selecting the applicant for redundancy, one of the employers' reasons, if not the principal reason, arose from his disability. No error of law arose from its application of the principles in *King* to less favourable treatment under the DDA. The tribunal had given full reasons for its decision and application for leave to appeal was dismissed.

The guidance given by the Court of Appeal in *Deltron* confirms that inferences of discrimination may be drawn from the facts of disability discrimination cases by application of the principles developed for racial discrimination in *King v Great Britain-China Centre.* The principles had been applied by the EAT in *Rowden v Dutton Gregory Solicitors*[1]*,* a case in which the employment tribunal

112 [2002] ICR 971.

was criticised for failing to draw inferences from the lack of merit in an employer's explanation of its treatment of an employee with a disability. The relevance of the *King* principles is now beyond doubt.

Deltron also confirms that disability does not have to be the principal reason for less favourable treatment. Section 5(1) is satisfied if it is one of a numbers of reasons. This again confirms the EAT's reasoning in *Rowden.* It commented,

> *"Section 5(1) does not require that the reason which relates to the person's disability has to be the only reason for the less favourable treatment so long as it has a significant influence on the outcome."*[1]

Furthermore, the EAT held that the wording of section 5(1), which provides that the reason for less favourable treatment must 'relate to' the disability, is capable of being interpreted more broadly than parallel provisions in the sex and race discrimination legislation. These confine discrimination to less favourable treatment 'on the ground of sex'[2], or 'on racial grounds'[3]. Use of the phrase 'which relates to' permits a wider and more inclusive approach to the reasons for less favourable treatment.

On the facts of *Rowden,* and taking a broad view of whether the employer's reasons for dismissing the applicant 'related to' her disability, the EAT saw no reason why an inference of discrimination should not be drawn from the facts. The employer alleged that its reasons for dismissal related to conduct, but the employment tribunal had found little or no justification for allegations made in a dismissal letter. The employer's failure to adjust its disciplinary process to accommodate disability-related sickness absence not only amounted to a breach of its duty to make reasonable

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1 Ibid at [11].

2 Sex Discrimination Act 1975, Section 1(1)(a).

3 Race Relations Act 1976, Section 1(1)(a).

adjustments under section 6, but also raised an inference of less favourable treatment for a reason related to disability.

The decisions in *Deltron* and *Rowden* make it easier for applicants to show that less favourable treatment was for a reason related to disability, though it remains open for employers to show that the treatment was justified. *Shrubsole v Governors of Wellington School*[1] emphasises that the relationship between the reason for less favourable treatment and disability need not be direct. A teacher was dismissed following a period of sickness absence for anxiety stress disorder because the school's governors believed that she had no intention of returning to work. The employment tribunal found that this reason was not related to her disability.

The EAT held that the tribunal had erred in law. Where there is no direct link between the reason for less favourable treatment and disability, tribunals must ask whether the reason has a relationship to the disability in the sense that it is linked to it. Here, the school's belief that she did not intend to return to work arose from her continued sickness absence. This was due to anxiety stress disorder which, in turn, prevented her from returning to work. The tribunal's finding that the employer's reason and the applicant's disability were not related was based on an incorrect assumption that it need look no further than the characteristics of the reason for dismissal. Alternatively, its finding was perverse.

The relationship between reasons for less favourable treatment and disability has not become so elastic that it is satisfied wherever a person who has a disability is afforded less favourable treatment. The nexus, direct or indirect, must still be established. In *London Clubs Management v Hood*[2] it was not. An issue before the employment tribunal was

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1 EAT/328/02, judgement delivered 18 February 2003.

2 [2001] IRLR 719.

whether non-payment of sick pay to a disabled employee was for a reason related to his disability. The tribunal decided that it was. It had, however, addressed the wrong question. Instead of asking whether non-payment of ordinary sick pay was for a reason related to his disability, it should have asked whether non-payment of discretionary sick pay was for such a reason, ordinary sick pay having been withdrawn for all employees as a matter of company policy. On this reasoning, the reason for alleged less favourable treatment was related to company policy, not to the applicant's disability.

Comparators

Discrimination by less favourable treatment demands comparison with treatment afforded to others for whom the disability-related reason for it does not apply. *Clark v TDG Ltd t/a Novacold*[1] has established that, unlike sex and race discrimination, comparison need not be on a 'like for like' basis and may be made using a hypothetical comparator to whom the reason for less favourable treatment would not apply. The effect of this is to ease the burden for applicants in showing that treatment is less favourable, and to require employers to justify it.

Despite clear guidance from the Court of Appeal, the employment tribunal applied the wrong comparator in *Cosgrove v Caesar & Howie*[2]. The applicant had been dismissed on capability grounds following a year's absence for a depressive illness. Her complaint that she had been subjected to less favourable treatment was dismissed. The tribunal found that there was no evidence to suggest that her employers would have treated differently anyone who had similarly been absent from work for over a year.

On appeal to the EAT, this was held to be a significant error of

1 [1999] IRLR 318, CA.

2 [2001] IRLR 653, EAT, hearing date 13 December 2002.

law. The employment tribunal had applied the wrong comparator despite referring itself to *Clark. Cosgrove* confirms that the correct approach is to ask:

- What was the 'material' reason for the less favourable treatment?

  (In *Cosgrove,* the material reason was long-term sickness absence.)

- Was the material reason one which related to disability?

  (In *Cosgrove,* sickness absence was for depression, a mental impairment falling within the definition of disability.)

- Would the employer have dismissed some other to whom that material reason would not apply?

  (In *Cosgrove,* the employer would have no reason to dismiss someone to whom the material reason did not apply.)

Applying this approach, the employment tribunal had erred in looking only to whether some other person absent from work for over a year would equally have been dismissed.

Knowledge of disability

Previous case law has considered the question of whether an employer can be said to act for a reason related to disability when it has no knowledge of that disability. In the early case of *O'Neill v Symm & Co. Ltd*[1], the EAT had held that an employer can only act for a reason which relates to disability where it has either actual knowledge of the disability, or it is aware of material features of it. The notion of a 'reason which relates to' disability was thought to connote knowledge of the disability.

1 [1998] IRLR 233.

The Court of Appeal disapproved this line of reasoning in *Clark v TDG Ltd t/a Novacold*[1], and the issue of employers' knowledge was revisited in *H J Heinz & Co. Ltd v Kenrick*[2]. *Kenrick* stipulated than an objective test of employers' knowledge of disability must be applied. A reason for less favourable treatment may include reasons deriving from how a disability manifests itself even where there is no knowledge of the disability as such.

The stricter ruling on employers' knowledge in *Kenrick* appears to have been followed in *Cosgrove v Caesar & Howie*[3], in which the employer's lack of awareness that the applicant's depressive illness brought her within the definition of disability in the Act, was no bar to a finding that it had subjected her to less favourable treatment.

Justification of less favourable treatment

Less favourable treatment of a disabled person constitutes discrimination under the Act only where the employer is not able to justify it.[4] The burden of proof to show justification rests on the employer. Less favourable treatment is justified if, but only if, the reason for it is both material to the circumstances of the particular case and substantial.[5] This is itself subject to the proviso that in cases in which a duty to make reasonable adjustments has also arisen, but has not been met, the less favourable treatment cannot be justified unless it would have been justified even if the reasonable adjustments had been made. This section 5(5) proviso is discussed further below.

A number of cases discussed in previous Monitoring Reports

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1 [1999] IRLR 318.

2 [2000] IRLR 144.

3 [2001] IRLR 653.

4 See section 5(1)(b).

5 Section 5(3).

have provided guidance on application of the justification defence for less favourable treatment. *Baynton v Saurus General Engineers Ltd*[1] established that the material circumstances of a case must include those of the employee/job applicant as well as those of the employer. Tribunals should balance the interests of each when weighing up whether a reason for less favourable treatment is material to the circumstances of the particular case. This reasoning has been approved by the Court of Appeal in *Jones v Post Office*, discussed below.

The threshold of justification is set low. In *H J Heinz & Co Ltd v Kenrick*[2] The EAT held that the wording of the defence in section 5(3) precludes tribunals from taking a broad approach to justification whereby they might regard the materiality and substantiality of reasons as necessary, but not always sufficient, conditions for justification. Less favourable treatment, it noted, 'is' justified if the conditions are met, not 'may' be so justified. The *Kenrick* low threshold has been widely applied in cases subsequent to the case.[3]

The key condition within the justification defence is that reasons for less favourable treatment must be both material to the circumstances of the particular case and substantial. The Court of Appeal considered the meaning of the condition in *Jones v Post Office*[4]. 'Material' was held to demand a "reasonably strong connection between the employer's reason and the circumstances of the individual case".[5] This must be satisfied by factual enquiry. 'Substantial' requires that the ground for discrimination 'carry real weight'.[6] This

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1 [1999] IRLR 604.

2 [2000] IRLR 144.

3 See for example, *Jones v Post Office* [2001] IRLR 384; *A v Hounslow London Borough Council* EAT/1155/98; *Callaghan v Glasgow City Council* [2001] IRLR 724.

4 [2001] IRLR 384.

5 Ibid at [37].

6 Ibid at [39].

echoes the Code of Practice for Employment, which defines substantial as meaning "more than minor or trivial".[1] In *Jones,* Arden LJ comments,

> *"The word 'substantial' does not mean that the employer must necessarily have reached the best conclusion in the light of all known medical science. Employers are not obliged to look for the Holy Grail. It is sufficient if their conclusion is one which, on critical examination, is found to have substance."*[2]

Jones sets out five questions to be posed by tribunals when faced with a claim of justification.

a. What was the employee's disability?

b. What was the discrimination by the employer in respect of the employee's disability?

c. What was the employer's reason for treating the employee in this way?

d. Is there a sufficient connection between the employer's reason for discrimination and the circumstances of the particular case (including those of the employer)?

e. Is that reason on examination a substantial reason?

Importantly, the Court of Appeal in *Jones* also held that the wording of the justification defence confines the role of the tribunal to considering whether the reason given for less favourable treatment can properly be described as both material and substantial. If, on the basis of suitably qualified and expert evidence it can be so described, then the tribunal must hold that the defence is established. The tribunal is precluded from substituting its own decision for that of the employer because it considers that the employer reached the wrong decision on the evidence before it at the time that the decision was taken. According to Pill LJ,

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1 Code of Practice for Employment at 4.6.

2 [2001] IRLR 384 at [31].

> *"Where a properly conducted risk assessment provides a reason which is on its face both material and substantial, and is not irrational, the tribunal cannot substitute its own appraisal."* [1]

On this reasoning, justification of less favourable treatment will only fail where an employer is unable to show that its decision is based upon properly conducted risk assessment or investigation, or on properly formed expert opinion. Provided it falls within a "range of responses open to a reasonable decision maker"[2], an employer's decision that its reason is material to the circumstances of the particular case and substantial will not be irrational.This interpretation of the test of justification has been criticised as being too subjective to comply with the EU Framework Directive on Employment, due for implementation by 2006.[3]

Jones provides authoritative guidance for tribunals faced with justification defences to a complaint of less favourable treatment discrimination.[4] Failure to apply the *Jones* approach is an error of law. In *Hashimoto Ltd v McIntosh*[5] the tribunal's decision was given whilst the Court of Appeal's judgement in *Jones* was pending. Nevertheless, the EAT held that in the light of *Jones,* it had applied the wrong test of justification. The tribunal had followed *Baynton* by

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1 *Jones* at [25].

2 Ibid. at [26].

3 Whittle R, "The Framework Directive for equal treatment in employment and occupation: an analysis from a disability rights perspective", (2002) *European Law Review,* vol. 27, 303-326.

4 It is unclear whether the *Jones* approach should be applied to justification defences for failures to make reasonable adjustments. See *Wright v Governors of Bilton School* [2002] ICR 1463; *Wroe v Bradford & Northern Housing Association* EAT/41/01; EAT/391/01; EAT/392/01; *Johnson v Camden & Islington Community Health Service and others* EAT/900/01 below.

5 EAT/1151/01, judgement delivered 25 October 2002.

considering the evidence as a whole, looking at the interests of both sides, and deciding 'in the round' whether the employer's conduct was justified. Following *Jones* it was clear that it should have posed the five questions set out by the Court of Appeal in that case. In addition, the tribunal should have explicitly considered whether there was a reasonably strong connection between the employer's reason and the circumstances of the individual case, and whether the reason was substantial in the sense that it carried real weight and was of substance.

The EAT in *Hashimoto* noted that the principles in *Jones* have lowered the threshold for justification previously thought to exist. The low threshold has been challenged on the ground that it is incompatible with human rights protected in the European Convention on Human Rights which was incorporated into U.K. law by the Human Rights Act 1998. An argument was raised in *A v London Borough of Hounslow*[1] that the requirement that a reason be 'substantial' should be interpreted so as to set a relatively high threshold for justification. This asserted that Article 8 of the Convention, which guarantees a right to family life, is broad enough to encompass a right to work, earn a living and develop relationships through work. Another line of argument sought to establish employment as a possession, which would then invoke Article 1 of the First Protocol, which protects individuals from being deprived of their possessions.

Neither argument succeeded, the EAT holding that Articles cited had no application to the case. In any event, it pointed out that interference with rights protected under Article 8 is permitted where it is in accordance with the law[2]. The DDA provides that legal authority. A refusal of employment opportunity that was justified under the Act would not breach Convention rights.

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1 EAT/1155, hearing dates 12 January & 11 July 2001.

2 Article 8(2).

The quality of risk assessment or investigations undertaken, and of expert evidence relied upon as the basis of reasons for less favourable treatment, has assumed a central significance post-*Jones.* 'Proper' risk assessment and the 'properly formed opinions of suitably qualified doctors' are the foundation stones of reasons that are material to the circumstances of the particular case and substantial. In *Joy v Connex South Central*[1] a question arose as to whether an employer has to obtain up-to-date medical evidence as a pre-requisite for proper risk assessment. The applicant, who had been on sickness absence for over 12 months pending quadruple heart by-pass surgery, was dismissed. At tribunal, it was held that the less favourable treatment was justified, as was a failure to make reasonable adjustments. The applicant had been certified unfit to perform even light duties by his general practitioner and this was the evidence relied upon by the tribunal.

On appeal to the EAT, the applicant argued that the employer had not presented 'proper' evidence necessary to establish the justification defence as set out by *Jones.* It had not obtained up-to-date medical evidence from suitably qualified doctors, here specialist cardiologists, nor had it carried out a properly conducted risk assessment. Without more recent and expert medical evidence than the GP's certificate, the tribunal could not hold that the employer's reason for dismissal (long-term sickness absence and no date for return to work) was material and substantial as set out in *Jones.*

The EAT rejected this argument. It held that is not always necessary for an employer to obtain up-to-date evidence in order to establish justification, although where the medical position is disputed this will be necessary.[2] In *Joy* it was clear

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1 EAT/975/01, judgement delivered on 13 November 2002.

2 Employers may, however, be obliged to obtain up-to-date medical evidence in order to show that they have not breached the duty to make reasonable adjustments. See, for example, *Wilding v British Telecommunications plc*, 10 June 1999, unreported.

from the GP's certificate that the applicant was unfit to work and that no date had been set for surgery. No further medical evidence was necessary. No medical evidence had been put forward by the applicant to challenge the GP's opinion, therefore there was no evidence before the tribunal to suggest that an improper risk assessment had been conducted, nor that the employer's reasons were not based upon properly formed medical opinion.

The case serves to highlight a consequence of *Jones* for applicants. Where justification is likely to be pleaded by respondent employers, applicants will need to challenge medical evidence by producing their own. Furthermore, this must be available to employers at the time that they make their decisions. In *Jones* itself, medical evidence commissioned by the applicant and presented to the tribunal was rejected on the ground that it had not been available to the employer at the time when it took its decision to restrict Mr Jones' driving duties.The tribunal is, however, permitted to admit evidence unavailable at the time a decision was taken, where the purpose of doing so is to establish the decision-maker's credibility or the rationality of the decision.

This situation arose in *Surrey Police v Marshall*[1]. A job offer as a finger print expert was withdrawn after the Police Force's Occupational Health Adviser reported that the applicant's bipolar disorder posed a potential and unacceptable health and safety risk to herself and others.The occupational health report had been compiled on the basis of a report from the applicant's GP and from her letter of application which detailed her condition. No report was commissioned from the specialist psychiatrist having care of the applicant, nor was the applicant examined.

At tribunal the Police failed to show that its less favourable

1 [2002] IRLR 843.

treatment of the applicant was justified. Applying *Jones*, the tribunal held that the decision was irrational in that it was based on an improperly conducted risk assessment and had not been taken on the basis of suitably qualified medical evidence. It refused to admit expert medical evidence commissioned by the Police after the job offer had been withdrawn and which supported the view that its Occupational Health Adviser had been entitled to reach the decision that she did on the evidence before her.

The EAT considered whether the tribunal had erred in law by refusing to admit the evidence. It held that this evidence was material, not to whether the Occupational Health Adviser's assessment of risk was right or wrong, but as to whether the decision she reached was one that she could properly have come to on the basis of the evidence in her hands at the time she made it. The former was not admissible following *Jones,* the latter would frequently be necessary or desirable to establish the rationality of the decision.

In *Kenrick*[1] the EAT held that less favourable treatment for a reason related to disability may occur even if the employer is unaware that the person so treated is disabled. Following on from this, does lack of awareness of disability prevent an employer from justifying less favourable treatment for a reason related to disability? Apparently conflicting decisions on this issue have now been resolved and it is clear that lack of awareness of disability does not preclude the justification defence from succeeding.

The EAT in *Quinn v Schwarzkopf Ltd*[2] had directed that an employer could not claim that its less favourable treatment of a disabled person was justified, when it had also alleged that it did not know during the employment that the person was disabled. It had, however, commented in *Farnsworth v*

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1 [2000] IRLR 144.

2 [2001] IRLR 67, now overruled by the Court of Session.

London Borough of Hammersmith[1] that knowledge is not a necessary ingredient of justification of less favourable treatment. *Callaghan v Glasgow City Council*[2] resolves the issue, confirming that knowledge of disability is relevant to justification of less favourable treatment, but is not an essential element of it. What matters is the treatment metered out by the employer in the particular circumstances of the case and whether the reason for it is material and substantial as set out in *Jones*.

Hoyer (UK) Ltd v Capaldi[3] has subsequently remitted a tribunal decision to a fresh tribunal on the ground that it had misdirected itself in law by applying *Quinn* instead of *Callaghan.*

The effect of section 5(5) of the DDA on justification of less favourable treatment

As indicated above, where a duty to make reasonable adjustments has arisen, but has not been met, less favourable treatment cannot be justified unless it would have been justified even if the reasonable adjustments had been made. *Jangra v Gate Gourmet London Ltd*[4] provides guidance as to how section 5(5) should be applied by tribunals. The case had been remitted by the EAT to the employment tribunal for it to determine whether less favourable treatment of the applicant was justified. Less favourable treatment was held to be justified, and a new appeal was lodged by the applicant. The ground for appeal was that the less favourable treatment would not have been justified if the employer had complied with the duty to make reasonable adjustments which had been triggered in her case.

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1 [2000] IRLR 691.

2 [2001] IRLR 724.

3 EAT/1154/01, hearing date 18 April 2002.

4 EAT/608/01, judgement delivered 25 October 2002.

The EAT set out a 3-stage exercise for application of section 5(5).

> (1) In a case where an employer seeks to justify less favourable treatment, is the employer under a section 6 duty to make reasonable adjustments?
>
> (2) If so, has the employer failed, without justification, to comply with that duty under the terms of section 5(4)?
>
> (3) If so, then the less favourable treatment cannot be justified unless it would have been justified even if the employers had complied with that duty.

In *Jangra,* the EAT held that the tribunal had rightly decided that the employer had not failed, without justification, to comply with the duty to make reasonable adjustments. None were available, given the applicant's inability to perform the function of her job of preparing airline meals, or any other job. The third stage of the exercise did not arise for consideration and the appeal was dismissed.

9.2.12 Meaning of discrimination: the duty to make reasonable adjustments

The second form of discrimination arises where an employer unjustifiably fails to comply with a section 6 duty.[1] The section 6 duty to make reasonable adjustments is triggered when either arrangements made by, or on behalf of an employer, or the physical features of his premises, create a substantial disadvantage for a disabled person in comparison with someone who is not disabled.

In such circumstances, the employer is under a duty to take ‘such steps as it is reasonable in all the circumstances of the case’ for him to take in order to prevent the substantial disadvantage from occurring. The Act gives examples of

1 Section 5(2).

steps that might be regarded as reasonable adjustments[1] and lists factors to consider when deciding whether a particular step would be reasonable[2]. Unlike discrimination by less favourable treatment, where the relevance or otherwise of employers' knowledge of disability has been left to be determined by case law, the Act spells out that a duty to make reasonable adjustments only arises where an employer knows, or could reasonably be expected to have known, that a person was disabled.

Cases reported since the last Monitoring Report have added to an already extensive body of case law on the duty to make reasonable adjustments. The duty applies where employers' arrangements or physical features of premises create substantial disadvantage. The first two cases below clarify the scope of the term 'arrangements'.

Employers' 'arrangements'

In *Mills v London Borough of Hillingdon*[3], a care worker with depression was moved to a temporary post in the respondent's Personnel Department on the promise of a future permanent post. In the event, the permanent post was never created and the applicant resigned. She alleged that the non-creation of the permanent post was an arrangement made by the employer which had placed her at a substantial disadvantage compared to someone who was not disabled. The EAT, noting that no definition of 'arrangement' is given in the Act, considered that it indicates some positive steps taken by an employer whether by a scheme of work or instructions as to how work should be performed. Positive steps may trigger substantial disadvantage. It concluded that an omission or a single act in isolation could not form part of an 'arrangement'.

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1 Section 6(3).

2 Section 6(4).

3 EAT/0954/00, hearing date 18 October 2001.

Archibald v Fife Council[1] has also considered the meaning of the term 'arrangement'. A female road sweeper who retrained herself after an accident failed at numerous interviews for sedentary jobs. She argued that the 'arrangement' of competitive interviews for posts placed her at substantial disadvantage. The employment tribunal found that she had not been discriminated against and she appealed to the EAT. It emphasised that, as the Act does not oblige an employer to treat a disabled person more favourably than it would treat others[2], there can be no duty to transfer an employee to a higher grade job without competitive interview.

The EAT also considered whether a policy of open competition could be regarded as an 'arrangement' within the meaning of the Act. It reasoned that the term points to 'either a formal arrangement or informal working practice', and is capable of including a policy of open competition. However, the EAT did not consider that the policy placed the applicant at substantial disadvantage in this case as it was applied to everyone. Alternatively, the policy was justified by the employer's interests in appointing on merit.

'Substantial disadvantage'

The section 6 duty to make reasonable adjustments is triggered by substantial disadvantage to a disabled person resulting from employers' arrangements or premises. When facing cases in which a breach of the duty is alleged, tribunals are not entitled to assume this on the facts presented to them. The EAT in *London Clubs Management v Hood*[3] remitted a case to the employment tribunal where it had not expressly considered the issue of whether the applicant had been placed at substantial disadvantage by non-payment of sick pay. This is an essential part of the first of the sequential steps

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1 EAT/0025/02, hearing date 12 December 2002.

2 See section 6(7).

3 [2001] IRLR 719.

set out in the early case of *Morse v Wiltshire County Council*[1] for application in section 6 cases. If tribunals conclude that an applicant has been placed at substantial disadvantage by an arrangement or feature of premises, thereby triggering the duty to make reasonable adjustments, they must give their reasons.

What are 'reasonable adjustments'?

Cases continue to exemplify what does and does not constitute a reasonable adjustment. *Arnold v Pointon York Ltd*[2] suggests that obtaining external assistance to support a disabled person might be a reasonable adjustment. The EAT has held in *London Clubs Management v Hood*[3] that payment of sick pay may be required as a reasonable adjustment. In *Rowden v Dutton Gregory Solicitors*[4], an employer was found to have breached its section 6 duty by failing to amend arrangements for its disciplinary procedures for an employee unable to attend through depression.

On the other hand, *Bruce v Cavalier, Thompsons Solicitors*[5] makes clear that the duty does not stretch so far as imposing an obligation on employers to provide training, or to await the acquisition of relevant skills, for a disabled job applicant who lacks relevant experience. Nor does it demand that essential requirements of the job be removed to enable a job applicant with a disability to be appointed. In *Johnson v Camden & Islington Community Health Service and others*[6], the EAT confirmed that it would not be reasonable to remove domiciliary visits from the job description of a health visitor to facilitate appointment of an insulin-dependent diabetic nurse.

1 [1998] ICR 1023.
2 EAT/0649/00, hearing date 16 October 2001.
3 [2001] IRLR 719.
4 [2002] ICR 971.
5 EAT/1283/00, hearing date 11 June 2002.
6 EAT/900/01, hearing date 2 September 2002.

The duty to make reasonable adjustments falls squarely on the employer, not the employee. An employer cannot avoid its duty by arguing that the employee and her medical advisers were unable to suggest reasonable adjustments. The employment tribunal in *Cosgrove v Caesar & Howie*[1] had erred in law by deciding that an employer had not breached its section 6 duty in such circumstances.

The employment tribunal is under no duty to go beyond the evidence and submissions before them when deciding whether or not an adjustment is reasonable. In *Johnson v Camden & Islington Community Health Service and others* (above), the EAT held that there is no duty on the employment tribunal to consider the reasonableness of adjustments which have been considered and rejected by an employer, and which have not been suggested to be reasonable by the applicant. If an applicant chooses not to challenge evidence that suggested adjustments are not reasonable, it is 'unrealistic and inappropriate for the EmploymentTribunal to take a different view'.[2]

On the other hand, where evidence relevant to the reasonableness of an adjustment is available, tribunals should admit it. In *Pendragon Motor Co.Ltd. t/a Statstone (Wilmslow) Ltd v Ridge*[3] the EAT ruled that the employment tribunal had erred in excluding video footage of the applicant bending, lifting and carrying. The applicant had lodged a complaint of discrimination, asserting that the respondent employer had breached its duty to make reasonable adjustments by refusing to modify his job by removing car valeting duties which he claimed placed him at substantial disadvantage because of a back problem. The video footage was relevant both to the reasonableness of the proposed adjustment, and to the state of the employer's knowledge of disability.

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1 [2001] IRLR 653.

2 Ibid at [33].

3 EAT/962/00, hearing date 5 November 2001.

Breach of the duty to make reasonable adjustment

Where the duty to make reasonable adjustments is triggered, it is the duty of an employer "to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take".[1] Section 6(4) lists factors to be taken into account in determining whether it would be reasonable for an employer to have to take a particular step.[2] An employer who fails to take reasonable steps, without justification, will be in breach of section 6 of the Act.[3]

An early case, *Morse v Wiltshire County Council*[4] laid down a series of sequential steps to be followed by the employment tribunal when determining whether the duty to make reasonable adjustments has been breached.

> (1) Has a duty to make reasonable adjustments arisen in the circumstances of the case?
>
> (2) Has the employer taken such steps as are reasonable, in all the circumstances of the case, for him to have to take in order to prevent a substantially disadvantageous effect? If not,

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1 Section 6(1)(b).

2 These include the extent to which the step would prevent the effect in question; its practicability; financial and other costs to the employer accruing from taking the step; its potential for disruption of the employer's activities; the extent of the employer's financial and other resources; the availability of external assistance, both financial and other.

3 The Government has accepted a recommendation from the Disability Rights task Force that the availability of justification for a failure to make reasonable adjustments should be removed on the ground that if an adjustment is reasonable, an employer cannot be justified in not making it. See *Towards Inclusion - Civil Rights for Disabled People. Government Response to the Disability Rights task Force* (March 2001), Department for Education and Employment, at 3.25 and 3.26.

4 [1998] IRLR 352

(3) Has the employer shown that its failure to make reasonable adjustments is justified?

The test of justification set out in *Morse* is considered below.

The Court of Appeal has held in *H. M. Prison Service v Beart* [1] that it is not an error of law for the employment tribunal to fail to follow these sequential steps, provided that it is apparent from its reasoning that it properly applied itself to a consideration of whether the statutory requirements of the Act have been satisfied. Here, the Prison Service failed to relocate an executive officer to a new place of work as recommended by its Occupational Health Adviser. The recommendation followed a period of sickness absence for depression which had been exacerbated by conflict between the officer and her line manager. The EAT had upheld the employment tribunal's decision that the Prison Service had unjustifiably breached its duty to make reasonable adjustment.

The Prison Service appealed to the Court of Appeal, contending that the EAT had failed to apply the steps in *Morse,* which had not been cited at tribunal, and had upheld a tribunal decision that was wrong in approach to law and fact. Had it applied the steps, it would have found that re-location was not reasonable given the medical evidence that her illness was still on-going.

The Court of Appeal held that the tribunal had:

(1) found that the officer had been placed at substantial disadvantage by having to continue working with a line manager who had contributed to her depression; and

(2) applied the test of reasonableness of the steps that might have been taken to prevent detrimental effect,

1 [2003] EWCA Civ 119.

despite the omission of *Morse*.

Furthermore, it had been entitled to take the view that justification was not an issue as no reasons had been given by the Prison Service for its failure to relocate. On these findings, the Court of Appeal concluded that the tribunal had not erred in its approach.

Morse established that the issue of whether an employer failed to take steps which it ought reasonably to have taken is to be decided by reference to an objective test of what it did or did not do.[1] This is reinforced in *Bradley v Greater Manchester Fire and Civil Defence Authority*[2]*; British Gas Services v McCaull*[3]*; Johnson & Johnson Medical Ltd v Filmer*[4] and *Andrews v Metal Castings Ltd*[5]. In the last case it had been asserted that an employer who does not have in mind either the provisions of the Act or the Code of Practice cannot be said to have taken reasonable steps to have met the duty to make reasonable adjustments.The EAT applied an objective test.

> *"Whether they cast their minds to the right provisions, or looked at the right Code of Practice, or followed the right procedures, at the end of the day, is only part of the picture."*[6]

What matters is whether the employer in fact failed to take steps which it ought reasonably to have taken.

The objective test focuses attention on what an employer did, or ought to have done, rather than on whether or not it was

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1 *Morse v Wiltshire County Council* [1998] IRLR 352 at [46].

2 EAT/253/00, hearing date 27 April 2001.

3 [2001] IRLR 60.

4 EAT/34/02; EAT/35/02, hearing date 21 October 2002.

5 EAT/1336/00, hearing date 7 February 2002.

6 Ibid at [14].

aware that a section 6 duty to make reasonable adjustments had been triggered. In *McCaull*[1], an employer, ignorant of his duties under section 6, was nevertheless able to claim that it had made all reasonable adjustments. Ignorance of the duty was no bar to a successful defence that the duty had not been breached. An earlier view, in *Quinn v Schwarzkopf Ltd*[2] that ignorance of the duty precluded an *ex post facto* defence, is no longer good law and has been overruled on appeal.[3]

An employer may breach its section 6 duty to make reasonable adjustments if it fails to obtain up-to-date medical evidence before deciding that none are available. The employment tribunal in *Wilding v British Telecommunications plc*[4] held that a employer had acted unreasonably in relying on out-of-date medical evidence when dismissing a disabled employee. A reasonable employer would have sought up-to-date evidence of the employee's capabilities and prognosis before concluding that no reasonable adjustments could be made. The case reached the Court of Appeal on the separate issue of an employee's duty to mitigate his losses (considered below), where the tribunal's finding on the reasonableness of the employer's actions were left undisturbed.

Section 6(6) and knowledge of disability in relation to the duty to make reasonable adjustments

The duty to make reasonable adjustments does not arise, and therefore cannot be breached, where an employer does not know or could not reasonably be expected to know that an employee is disabled, or that a disabled person has applied for a job or may do so.[5]

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1 [2001] IRLR 60.

2 [2001] IRLR 67.

3 [2002] IRLR Court of Session.

4 10 June 1999, unreported.

5 Section 6(6).

In *Farley v H. M. Prison Service*[1] the EAT considered how actual or constructive knowledge might be shown. Its findings suggest that in the absence of medical confirmation of disability, employers will not be held to have sufficient knowledge of it. An administrative assistant had disclosed that she had chronic fatigue syndrome amounting to a disability when applying for her job. Her sickness absences exceeded the level accepted by the Service, her probationary period was consequently extended and she eventually resigned. Thereafter she lodged a complaint, arguing that the sickness monitoring scheme was an 'arrangement' which placed her at substantial disadvantage, and which should have been adjusted to take account of her disability. The Prison Service relied, in defence, on a medical report from its Occupational Health adviser, which stated that she was not disabled within the terms of the Act. This was proffered as evidence that it could not reasonably have known that the applicant was disabled, and that the section 6 duty to make reasonable adjustments had consequently not arisen.

The employment tribunal found in favour of the Prison Service. Although the applicant had disclosed that she had chronic fatigue syndrome, they did not have knowledge that this amounted to a disability and were therefore protected by section 6(6). The EAT dismissed the applicant's appeal. Disclosure by a 'lay, interested source' was insufficient to fix the Prison Service with actual knowledge for the purposes of section 6(6). This would require confirmation by medical opinion. Neither did the Service have constructive knowledge of disability. The medical opinion obtained did not specifically address a point raised by the applicant, that of the impact of chronic fatigue syndrome on the degree and duration of minor ailments. The EAT considered whether the tribunal had been entitled to infer that, had the opinion done so, it would have confirmed the effects described by the

1 EAT/359/01, hearing date 19 April 2002.

applicant, thereby giving the Service constructive knowledge of disability. It concluded that on the evidence before it, the tribunal was entitled not to make an inference of constructive knowledge.

An applicant's case was similarly dismissed by the employment tribunal in *Tuck v Fish Brothers*[1]. On appeal, the EAT held that the tribunal had applied the wrong test to the state of knowledge under section 6(6). It failed to find expressly that the employer could not reasonably have been expected to have known of the applicant's disability. This omission led it to neglect factors, known to the employer, which would have reasonably have indicated that the applicant was disabled.

Wright v Governors of Bilton High School[2] considers a related scenario, that where an employer claims to be unaware not of the fact of disability, but of its extent. Does a duty to make reasonable adjustments arise where the employer lacks actual or imputed knowledge of the extent of disability? The EAT held that section 6(6) will not provide a defence in such circumstances. Rather, the state of knowledge of extent of disability will be relevant to whether or not the employer is able to justify failing to make reasonable adjustments.

The EAT provided guidelines for actual or constructive knowledge cases under section 6 of the Act.

(1) An employer is not under a duty to make reasonable adjustments where it lacks knowledge of the fact that a person is disabled and likely to be placed at substantial disadvantage. (Section 6(6)).

(2) In the absence of a section 6(6) defence, the duty arises. Whether or not an employer has made reasonable

1 EAT/0380/01, hearing date 26 March 2002.

2 [2002] ICR 1463.

adjustments is an objective question and does not depend on the employer's knowledge of disability, either actual or imputed.

(3) Failure to make reasonable adjustments may be justified as set out in section 5(2) of the Act.

(4) Evidence that the employer made all reasonable inquiries of the disabled person, sought medical advice and carried out a reasonable assessment of the person's medical condition, may be relevant to justification. Evidence that it, nevertheless, remained ignorant of the true extent of the disability and its effects, possibly as a result of lack of co-operation on the part of the employee, may establish justification following the approach taken to justification in *Jones v Post Office*[1].

Justification of a failure to make reasonable adjustments

Breaches of the section 6 duty to make reasonable adjustments will be justified where an employer is able to show that the reason for failure is both material to the circumstances of the particular case and substantial.[2] The defence is, however, to be removed by the Government in response to a recommendation from the Disability Rights Task Force in its Final Report.[3] In the interim, some confusion arises from the fact that differently constituted divisions of the EAT have taken differing approaches to the justification defence.

As seen above, in *Wright v Governors of Bilton School*, the EAT's guidelines for section 6 cases apply the approach to justification set out in *Jones v Post Office* in relation to discrimination by less favourable treatment. It notes that this is,

1 [2001] IRLR 384.
2 Section 5(4).
3 Supra note 157.

> *"...a case strictly concerned with justification under section 5(1)(b) and (3), [less favourable treatment and its justification] but applicable equally to justification under sections 5(2)(b) and (4) [failure to comply with the duty to make reasonable adjustments and its justification]."*[1]

Similarly, in *Wroe v Bradford & Northern Housing Association Ltd*[2], the EAT appeared to endorse application of the *Jones* test when it observed that it was not clear from its reasoning whether the employment tribunal was following its own stricture not to substitute its judgement for that of the employer.

The EAT in *Johnson v Camden & Islington Community Health Services and others*[3], however, doubted whether the reasoning in *Jones* (see above) could be applied to justification of failures to make reasonable adjustments. The issue did not strictly arise for decision, but the EAT pointed to differences between the "band of reasonable responses" approach taken in *Jones* and the objective test of justification set out in the early case of *Morse* (see above) for failure to make reasonable adjustments.

The fundamental difference between the tests is that under the *Jones* formula, justification is made out where an employer's decision that its reason for less favourable treatment is material and substantial falls within a band of responses open to a reasonable decision maker. If the reason falls within that band, the employment tribunal cannot substitute its own view because it believes that the employer reached the wrong decision on the evidence available to it. *Morse*, however, applies an objective test whereby the tribunal must reach its own conclusion as to whether the reason for failure to make reasonable adjustments was

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1 [2002] ICR 1463.

2 EAT/41/01; EAT/391/01; EAT 392/01, hearing date 6 February 2002.

3 EAT/900/01, hearing date 2 September 2002.

material and substantial. If not satisfied that it is, it should substitute its own judgement for that of the employer.

In *Johnson*, the EAT recognised that it was not being asked to consider the extent, if any, to which *Jones* might be regarded as overruling *Morse*. However, it commented that nothing in its judgement should be regarded as having that effect. The question as to which approach should be adopted in justification of failures to make reasonable adjustments remains open.

As noted above, ignorance of the duty to make reasonable adjustments is no bar to a successful defence that the duty had not been breached.[1] The objective test of justification focuses attention on what an employer did, or ought to have done, rather than on whether or not it was aware that a section 6 duty to make reasonable adjustments had been triggered. *Callaghan*[2] observes that, though not precluded, it may be difficult for employers to establish a successful justification defence in cases where reasonable adjustments have not been considered.

A justification defence may succeed even where the employer has not given direct evidence of a reason justifying a failure to make reasonable adjustments. In *H. M. Prison Service v Beart*[3], the Court of Appeal held that under an objective test of justification, as set out in *McCaull*, it is open to tribunals to find a material and substantial reason for the failure within the circumstances of a case and in the absence of evidence from the employer as to justification.

9.2.13 Remedies: Mitigation of losses

The Court of Appeal has confirmed the duty on successful applicants to mitigate their losses. The onus rests on the unsuccessful respondent employer to show that it was

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1 See for example *British Gas Services Ltd v* McCaull[2001] IRLR 60; *Schwarzkopf Ltd v Quinn* [2002] IRLR 602.

2 *Callaghan v Glasgow City Council* [2001] 724.

3 [2003] EWCA Civ 119.

unreasonable for the successful applicant not to take mitigating steps it has proposed. *Wilding v British Telecommunications plc*[1] sets out the relevant test of reasonableness. A senior manager had been retired on medical grounds. His complaint under the Act succeeded and after the liability hearing he was offered, and refused, part time work by the respondent employer. At the remedies hearing the employment tribunal decided that the applicant had acted unreasonably in refusing to return to work, given that he had previously maintained that he was anxious to return.

He appealed to the EAT on the grounds that the tribunal had failed to apply an objective test to the reasonableness of his behaviour, speculating as to what might be going through his mind, rather than looking objectively at whether his reasons could be objectively justified. The EAT could find no error in the tribunal's approach, and the applicant appealed to the Court of Appeal.

His appeal was dismissed. The employment tribunal had applied the correct objective test of reasonableness and had been entitled to look at the applicant's state of mind as part of the circumstances of the case. Sedley LJ set out the correct approach.

> *"... it is not enough for the wrongdoer to show that it would have been reasonable to take the steps he has proposed: he must show that it was unreasonable of the innocent party not to take them. This is a real distinction. It reflects the fact that if there is more than one reasonable response open to the wronged party, the wrongdoer has no right to determine his choice. It is where, and only where, the wrongdoer can show affirmatively that the other party has acted*

1 [2002] EWCA Civ 349.

unreasonably in relation to his duty to mitigate that the defence will succeed."[1]

9.2.14 Impact of the Human Rights Act 1998

As noted above, the small employer exemption in section 7(1) has been challenged unsuccessfully in the EAT on the ground that it is incompatible with Articles 6 and 14 of the European Convention on Human Rights which was incorporated into U.K. law by the Human Rights Act 1998.[2] The low threshold for satisfaction of the justification defence has been held not to be in breach of rights protected by the Convention.[3] Similarly, claims that the time limits for lodging a complaint under the Act infringe a right to a fair trial have not succeeded.

Schedule 3 to the Act prevents a tribunal from hearing a complaint of disability discrimination which has been presented more than three months after the act complained of unless, in all the circumstances of the case, it considers that it is just and equitable to do so. In *Chima v Westinghouse Signals Ltd*[4] the employment tribunal found that the claim had been made outside the statutory time limit and considered whether it was just and equitable for them to extend the limit in the circumstances of the case. After reviewing principles developed in relation to a parallel time limit in sex discrimination legislation, they concluded that it would not be just and equitable to extend the limit.

On appeal to the EAT, one argument presented on behalf of the applicant was that Articles 6 and 14 of the European Convention on Human Rights guaranteed him a constitutional right of access to the court which was being denied him by application of time limits. Article 6 of the

1 Ibid at [55].

2 *Whittaker v Watson (t/a P & M Watson Haulage) & another* EAT/157/01, above.

3 *A v London Borough of Hounslow* EAT/1155, above.

4 EAT/1106/00, hearing date 2 May 2002.

Convention entitles citizens of signatory states[1] the right to a fair and public hearing; Article 14 prohibits discrimination on various grounds including disability, but cannot be relied upon in isolation. It may be invoked only where another substantive right has been breached. The tribunal had, asserted the applicant, breached his constitutional right of access to the courts by not permitting his complaint to proceed. The EAT declined to consider the point. As the argument had not been presented at the tribunal hearing, it could not be introduced at appeal stage. The EAT could find no error of law in the way the employment tribunal had approached the case.

Article 6 of the Convention had also been raised unsuccessfully in the earlier case of *Llangaratne v British Medical Association*[2]. The applicant alleged that the composition of the employment tribunal and the EAT were incompatible with Article 6(1) of the Convention, which entitles citizens to a fair and public hearing before an '*independent and impartial tribunal*'. He argued that as a member of each tribunal was nominated by the Trade Union movement, and as the BMA represents the interests of the medical profession, the independence and impartiality of the tribunal and EAT was compromised. The Court of Appeal found the allegation "wholly without foundation"[3]. Peter Gibson LJ held,

> *"In my judgement, there is no reason whatever to think that art 6(1) of the Convention has even arguably been infringed."*[4]

The possibility of bias and breach of Article 6 of the Convention surfaced again in *Obasa v Chisholm; McIlvenny; Northamptonshire County Council*[5]. On appeal to the Court

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1 Including citizens of the UK.

2 Court of Appeal, 23 November 2000, unreported.

3 Ibid at [9].

4 Ibid.

5 [2003] EWCA Civ 107.

of Appeal, the appellant alleged that the findings of the tribunal were openly partial and that an objective onlooker would have had reasonable apprehension of bias. Thus, her entitlement to be heard by an independent and impartial tribunal, as set out in Article 6, had been infringed.

The Court of Appeal stated that the relevant test of bias is whether the fair-minded and informed observer, having considered all the facts, would conclude that there was a real possibility that the tribunal was biased. If a tribunal, on the evidence, reached a conclusion that was open to it, as here, no fair minded observer could think that the tribunal was biased. A tribunal was entitled to express its opinion that the appellant had a disposition to attribute to race or disability discrimination those who criticised her.

9.3 Part III DDA: goods, facilities and services; premises

9.3.1 Scope of Part III provisions: goods, facilities and services

Part III of the Act prohibits discrimination against disabled people in the provision of goods and services and in relation to premises. Its provisions are supported by a revised Code of Practice for Rights of Access[1] which may be used in evidence in legal proceedings under the Act. It is supplemented by Regulations issued under Part III.[2]

So far as goods, facilities and services are concerned, it is unlawful for a 'provider of services' to discriminate against a disabled person:

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1 Code of Practice: Rights of Access: Goods, Facilities, Services and Premises (2002) HMSO.

2 Disability Discrimination (Service and Premises) Regulations 1996, SI 1996/1836; Disability Discrimination (Services and Premises) Regulations 1999, SI 1999/1191; Disability Discrimination (Providers of Services)(Adjustment of Premises) Regulations 2001, SI 2001/3253. These last Regulations are due to come into force in October 2004.

(a) by refusing to provide, or deliberately not providing, to the disabled person any service which he provides, or is prepared to provide, to member of the public;

(b) in failing to comply with duties imposed by section 21 of the Act (see below) where that failure makes it impossible or unreasonably difficult for the disabled person to make use of the service;

(c) in the standard of service provided, or manner in which it is provided, to the disabled person;

(d) in the terms on which he provides a service to the disabled person.[1]

Who is a 'provider of services' for the purposes of this part of the Act? The statutory definition given is that a person "concerned with the provision, in the United Kingdom, of services to the public" is a provider, irrespective of whether that service is paid or unpaid.[2] *In Re Holy Cross v Pershore*[3] has held that the incumbent, churchwardens and Parochial Church Council of a church are all 'providers of services', 'services' being taken in its general sense and not limited to the concept of public worship.

The Act gives a non-exhaustive list of services falling within the Act:

(a) access to and use of any place which members of the public are permitted to enter;

(b) access to and use of means of communication;

(c) access to and use of information services;

(d) accommodation in a hotel, boarding house or other similar establishment;

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1 Section 19(1).

2 Section 19(2)(b) & (c).

3 [2002] Fam 1.

(e) banking or insurance facilities, or those for grants, loans, credit or finance;

(f) entertainment, refreshment or recreation facilities;

(g) facilities provided by employment agencies (or under section 2 of the Employment and Training Act 1973);

(h) professional or trade services, or services offered by local or other public authorities.[1]

Following *In Re Holy Cross*, services (in the broad or general sense) offered by a church must be regarded as a 'service'. The list is expanded by examples given in the Code of Practice for Rights of Access.[2]

Part III of the Act does not apply to education or transport, though education is now covered in Part IV by virtue of the Special Educational Needs and Disability Act 2001. An early case considered the extent of the educational exemption in section 19(5)(a). In *White v Clitheroe Royal Grammar School*[3] an insulin-dependent diabetic pupil had been excluded from a watersports holiday because the organising teacher was unwilling to take on the extra responsibility which it was felt his condition would impose. The pupil had previously experienced a hypoglycaemic attack whilst on a school skiing trip. The School argued that school trips were excluded from the DDA.

At a preliminary hearing, the county court examined the scope of the educational exemption in section 19(5)(a). This provides that duties under the Act do not apply to "education which is...provided at" a school. The court interpreted the provision narrowly, having regard to the general policy of the

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1 Section 19(3).

2 See para. 2.14. The examples include places of worship.

3 Preston County Court, Claim no. BB 002640, preliminary hearing date 11 December 2001 Comment: Casserley C, *Legal Action* (May 2002) at p.20.

DDA to prohibit unjustified discrimination.[1] Only activities clearly within the wording of the exemption should thus be excluded. The court reasoned that while a service did not have to be physically provided at a school's premises to fall within the exemption, it excluded only "systematic instruction provided as part of the services of the school to those who attend that school". Activities "leading to the development of character or mental powers" organised by a school are not exempted.

9.3.2 Meaning of discrimination: less favourable treatment

As in Part II of the Act, discrimination may take two forms. A provider of services discriminates against a disabled person by treating that person less favourably than he treats, or would treat others, if treatment is for a reason related to disability and is not justified.[2] A provider of services also discriminates against a disabled person by unjustifiably failing to comply with duties to make reasonable adjustments where that failure makes it impossible, or unreasonably difficult, for disabled persons to make use of goods, facilities or services.[3] In this section we focus on the first form of discrimination.

Less favourable treatment discrimination takes the same statutory form as under the employment provisions in Part II of the Act, with the important proviso that justification, discussed below, is markedly different. Given the correspondence between the two sets of provisions, decisions on less favourable treatment discrimination in employment are likely to be of relevance to cases brought under Part III. The early indications are that courts are indeed applying reasoning from the existing body of case law on less favourable treatment in employment cases to decide cases

1 As noted by Casserley, above.

2 Section 20(1)(a) and (b).

3 Section 20(2)(a) and (b); 21(1).

on less favourable treatment brought under Part III. Two cases consider the requirement that a reason be 'related to' disability and the issue of who is the appropriate comparator in Part III less favourable treatment cases.

In the first of these cases, *R v Powys County Council, ex parte Hambridge (No 2)*[1], less favourable treatment was considered by the Court of Appeal. The appellant appealed against a decision to dismiss an application for judicial review of the respondent's policy of taking into account Disability Living Allowance when setting charges for home care services. The Council had divided service users into three bands, those in receipt only of Income Support; those in receipt of Income Support and Disability Living Allowance or attendance allowance, and those not in receipt of Income Support. Those in the second band, including the appellant, were required to pay more than those in the first, but less than those in the third band.

The appellant case was that she was being charged more than service users in the first band because she had more money than they did, but that as this was solely because she was in receipt of Disability Living Allowance and so amounted to unjustified less favourable treatment for a reason related to her disability. The Court of Appeal was not persuaded by this argument. It held that the less favourable treatment was not for a reason related to her disability, but to the fact that she had more money than those in the first band. The reason why she had more money was not part of the reason for the difference in treatment. The causal link necessary to establish that a reason 'relates to' disability had not been established. As Doyle notes[2], this reasoning takes a narrower approach to less favourable treatment for a reason related to disability than that taken by the Court of Appeal in relation to Part II cases in *Clark*.

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1 (2000) BMLR 133; [2000] 2 FCR 69.

2 Doyle B, *Disability Discrimination: Law and Practice* (4th Edition, 2003) Jordans, at p. 137.

In the second case, *White v Clitheroe Royal Grammar School*[1], the claimant alleged that the School's refusal to allow him to take part in the watersports holiday amounted to unjustified less favourable treatment for a reason related to his diabetes. It was common ground that he was disabled within the meaning of the Act. The School argued that it had decided to exclude him because of his behaviour on a previous school trip, during which he had failed to monitor his condition resulting in a hypoglycaemic attack. Its reason was not related to his disability, but to his behaviour. It suggested that the proper comparator was someone with the same disability who monitors the condition properly.

The court set out three questions to be asked in the case:

(a) was the decision to exclude the claimant for a reason related to his disability; if so

(b) was he treated less favourably than others; if so

(c) can the School show that its treatment of the claimant was justified?

Addressing the first question, the court found that the School had excluded the claimant for a reason related to disability. It was an "over-simplification" to suggest that the decision was not "inextricably related to disability". Moving on to the second, it drew assistance from the Court of Appeal's decision in *Clark v TDG Ltd (t/a Novacold)*[2] in deciding that the appropriate comparator for less favourable treatment cases in Part III must be someone who is not disabled.

The District Judge noted that Mummery LJ in *Clark* had illustrated his reasoning on this point by reference to comments made by the Minister for Social Security and Disabled People during the second reading of the Bill for the

1 Supra.

2 [1999] IRLR 318.

Act, and to an example of less favourable treatment given in the Code of Practice on Rights of Access. Both of these illustrations related to the provision of goods and services. The reasoning applied in *Clark* to the comparator issue in less favourable treatment cases in employment was therefore equally applicable to less favourable treatment cases under Part III. The High Court has similarly applied the reasoning in *Clark* to a case on premises, discussed below.[1]

Turning to the final issue of justification, the court concluded that the School had not been justified in excluding the claimant from the school trip. Its reasoning on this point is discussed below under 'Justification of discrimination in Part III'.

Although there is, as yet, very little reported case law on Part III of the Act, the Disability Rights Commission's website includes brief details of some cases concluded by the courts. These give a flavour of the range of circumstances giving rise to claims of less favourable treatment discrimination, and of the courts' response.

Refusal of access to a restaurant or café is reported in three decided cases, the claimant being successful in all three.[2] In two cases wheelchair users were refused service, in the other a visually impaired claimant and his assistance dog were denied entry. In a similar case, a visually impaired claimant was told that his dog would have to sit at the rear of the restaurant.[3] A claimant with learning difficulties succeeded in her claim that she had been discriminated against by a pub which had refused to serve her for a reason related to her disability.[4] The defendant pub's argument that it had asked her to leave because of inappropriate behaviour, not because of her disability failed. A claimant also succeeded in showing

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1 *North Devon Homes Ltd v Brazier* [2003] EWCA 574 (QB).

2 DRC/00/429; DRC/01/117; DRC/01/37 11.

3 *Purves v Joydisc Ltd* DRC/00/127.

4 *McKay v(1) Thomas and (2) Scottish & Newcastle Retail Ltd* DRC/00/332.

unjustified less favourable treatment for a reason related to disability when a utilities company refused to accept her signature on a contract for service unless countersigned by a neighbour.[1] The claimant had a neurological condition that caused her to shake, but had full mental capacity. Damages were awarded by the court in all these cases, up to a level of £3000.

In an important case supported by the Disability Rights Commission but yet to be heard by the courts, the Commission has issued proceedings against a general practitioner in respect of his refusal to prescribe a Viagra-like drug to a patient who is HIV positive.[2] The refusal was on the ground that the patient's partner is HIV negative. Issues in the case are likely to include the definition of disability; rights of access to health services under Part III of the Act, and justification. The case is likely to be heard in November or December 2003.

9.3.3 Meaning of discrimination: the duty to make reasonable adjustments

A duty to make reasonable adjustments arises in three sets of circumstances. First, where the practices, policies or procedures of a service provider make it impossible or unreasonably difficult for a disabled person to make use of those services, the service provider is under a duty to take reasonable steps to change the practice, policy or procedure so that it no longer has that effect.[3] This part of the duty came into force in October 1999.

Second, where a physical feature of premises makes it impossible or unreasonably difficult for disabled persons to make use of a service, the provider is under a duty to take reasonable steps in order to:

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223 *Dexter v Npower plc* DRC/00/171.

224 DRC/02/5602.

225 Section21(1).

(a) remove the feature;

(b) alter it so that it no longer has that effect;

(c) provide a reasonable means of avoiding the feature; or

(d) provide a reasonable alternative method of making the service available to disabled persons.[1]

The last duty listed came into force in October 1999; the other three are due to come into force in October 2004.

Third, where an auxiliary aid or service would enable a disabled person to make use of a service, or facilitate its use, the service provider must take reasonable steps to provide that aid.[2] Service providers are not required to take steps which would fundamentally alter the nature of the service or of his trade, business or profession.[3]

As yet, there is no case law at appellate level on the Part III duty to make reasonable adjustments and it remains to be seen how the courts will apply these provisions, which differ significantly from the duties to make reasonable adjustments under Part II. The county court has considered the duties in *White v Clitheroe Royal Grammar School*[4](see above) and *Baggley v Kingston Upon Hull City Council*[5].

In *White v Clitheroe Royal Grammar School* it posed the questions:

(a) was there a policy or procedure that made it unreasonably difficult for the pupil to participate in a school-organised holiday;

(b) did a duty to make reasonable adjustments arise, and

1 Section 21(2).

2 Section 21(4)(a) and (b).

3 Section 21(6).

4 Claim no. BB 002640, hearing date 29 April 2002.

5 Claim no. KH 101929.

if so was it met;

can the School show that any failure to meet a duty to make reasonable adjustments was justified?

The court found that the School's policy of supporting a teacher who refused to take a disabled student on school holiday could make it unreasonably difficult for a student to make use of the service offered, in that it created a potential for discrimination by a teacher which would be routinely supported by the Headteacher. The policy was only later qualified by Governors to include the requirement that the teacher must have acted fairly, legally, responsibly and on the basis of a risk assessment. The duty to make reasonable adjustments had, therefore been breached. Furthermore, the court held that the School had failed to justify the breach (see below under 'Justification of discrimination in Part III').

Baggley v Kingston Upon Hull City Council[1] concerned a wheelchair user who was directed to the back of the hall when attending an all-standing concert, and who consequently unable to see. This practice, he alleged, had made it unreasonably difficult for him to make use of the service.The defendant had failed to meet its duty to make reasonable adjustments, triggered by his difficulty, in that it failed to provide an alternative method of making the service available to him as required by section 21(2)(d) of the Act. Alternatively, it had failed to provide him with an auxiliary aid, in the form of a viewing platform, as required by section 21(4)(b).The Council argued that it had not breached its duty to make reasonable adjustment because none was available. It had considered, and rejected, two options: a permanent platform costing £20,000, and use of a temporary one costing between £400 and £800 each time. After the concert it installed a permanent platform at a much lower cost. The

1 As noted by Casserley C, *Legal Action* May 2002, 20.

court agreed that neither option available to the Council at the time of the concert was reasonable. It emphasised however, that in the face of the anticipatory duties imposed by Part III, the decision had been "a close-run thing".

A case included on the Disability Rights Commission's website illustrates the duty to make reasonable adjustments under Part III. A golf club was found to have breached its duty to make adjustments when it refused to allow a motorised golf cart, used by a claimant with multiple sclerosis, onto the greens.[1] In so deciding, the court rejected a defence put forward by the golf club that it held a reasonable opinion that its refusal was justified by health and safety concerns.

9.3.4 Physical features

The Consistory Court, a specialist court of the diocese (in the Church of England) having jurisdiction to authorise works on a church, has considered the application of duties to adjust physical features of a premises, due to come into force in October 2004, to churches.[2] Parishioners and local people challenged a decision taken by the incumbent of a listed church and the churchwardens to replace the pews with chairs.[3] This was later modified to replacement in the side aisles only. An argument in favour of replacement was that it was necessary to meet the duties to remove or alter physical features of premises.

The Court commented that churches may have to be physically adapted by 2004, so as to remove obstacles to full accessibility for all. It noted that Regulations[4] provide that fixtures, fittings and furniture are to be treated as physical features of premises for the purposes of the Act and that fixed pews might make it impossible or unreasonably difficult for

232 *Roper v Singing Hills Golf Course Ltd* DRC/00/212.

233 Section 21(2).

234 *In Re Holy Cross v Pershore* [2002] Fam 1.

235 Disability Discrimination (Services and Premises) Regulations 1999 (SI 1999/1191), Reg. 3.

disabled persons to make use of services provided by the church. Commenting that churches should "go the extra mile and comply with the spirit of the new legislation", it held that any works or schemes should aim to provide for full access to and from the church and its principal parts and should afford disabled people a reasonable degree of choice as to where they could sit. Nevertheless, the duties did not extend so far as requiring a church to enable a disabled person to use every seat or pew, what is reasonable must be judged sensitively on the facts of every case. Here, the duty to make reasonable adjustments would be met by removing the pews in the side aisles to achieve sufficient space for disabled people.

9.3.5 Justification of discrimination in relation to provision of goods, facilities and services

As in Part II of the Act, less favourable treatment of a disabled person and a failure to make reasonable adjustments under Part III are only discriminatory where they are not justified.[1] The justification defences in Part III are, however, markedly different to that in Part II. In relation to goods, facilities and service, justification is shown if a two-stage test is satisfied by reference to one of five conditions. The first stage of the test requires that the service provider be of the opinion that one of the five conditions has been met; the second that this opinion is reasonable in all the circumstances of the case.[2]

The five conditions are:

(a) treatment is necessary in order not to endanger the health or safety of any person (which may include that of the disabled person);

(b) the disabled person is incapable of entering into an enforceable agreement, or of giving informed consent;

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[1] Sections 20(1)(b); 20(2)(b).

[2] Doyle comments that the defence is based upon a mixture of a subjective test (the first stage) and an objective test (the second stage). Doyle B, *Disability Discrimination: Law and Practice,* (4th Edition 2003) Jordans, at p. 151.

(c) refusal or deliberate non-provision of service is necessary because the service provider would otherwise be unable to provide that service to members of the public;

(d) standards of service offered, or in the terms on which it is offered, are necessary in order for that service to be provided to the disabled person or to other members of the public;

(e) the difference in the terms on which the service is offered to a disabled person reflects the greater cost to the service provider of offering it to the disabled person.

(Service providers are not permitted, however, to pass the cost of compliance with duties to make reasonable adjustments on the disabled persons.[1])

There is no authoritative case law available as yet on justification under Part III of the Act, although the defence has been considered in relation to less favourable treatment and failure to make reasonable adjustments in *White v Clitheroe Royal Grammar School*[2] (see above). Having found that the School had treated the claimant pupil less favourably for a reason related to his disability in excluding him from a school holiday, the county court posed the question:

> *"can the School show that this treatment was justified at the time the decision was made by the reasonably held opinion that it was necessary in order not to endanger the health and safety of [the claimant] or any other person?"*[3]

The court's reasoning focused on the second stage of the test for justification. It commented that the School had given a 'knee-jerk' reaction, rather than conducting a reasoned

1 Section 20(5).

2 Claim no BB 002640, hearing date 29 April 2003.

3 Ibid at [35].

assessment of the implications of any increased risk arising from the possibility of hypoglycaemic attack. It was not reasonable for the School to hold an opinion that exclusion was necessary in order not to endanger health and safety in circumstances where the School had not consulted the pupil or his family, had not undertaken a risk assessment involving the professional suppliers of the holiday and the pupil's medical advisers. It concluded that the School's decision to exclude the pupil was not justified. It,

> *"could not be said to be based on a reasonably held opinion that it was necessary in order not to endanger [the pupil's] health or safety."*[1]

This conclusion was similarly applied to the School's attempt to justify its policy of supporting teachers who decided not to take disabled pupils on school holidays for health and safety reasons.

9.3.6 Discrimination in relation to premises

Scope of provisions on premises

Part III of the Act extends to the disposal and letting of premises. Section 22 provides that it is unlawful for "a person with power to dispose of any premises" to discriminate against a disabled person:

(a) in the terms on which he offers to dispose of the premises to a disabled person;

(b) by refusing to dispose of premises to a disabled person;

(c) in his treatment of the disabled person in relation to any list of persons in need of premises of that description. [Such as a local authority housing list.]

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1 Ibid at [42].

These provisions apply to owners who wholly occupy their premises only if they use the services of an estate agent, or advertise the premises.[1]

It is also unlawful for a person managing premises to discriminate against a disabled person:

in the way he permits the disabled person to make use of any benefits or facilities;

by refusing or deliberately omitting to permit the disabled person to make use of any benefit or facilities; or

by evicting the disabled person, or subjecting him to any other detriment.[2]

Finally, it is unlawful for a person whose licence or consent is required for the disposal of any tenanted premises to withhold his licence or consent to disposal of premises to the disabled person.[3] Small dwellings are exempted where the occupier is in continued residence and shares accommodation (other than storage space) with persons outside his household.[5]

Meaning of discrimination in relation to premises and the justification defence

Discrimination takes only one form in relation to premises. A person discriminates against a disabled person by treating that person less favourably than he treats others if treatment is for a reason related to that person's disability and is not justified.[5] Justification is similar to, though not identical with, the defence for failure to make reasonable adjustments in relation to goods, facilities and services. Again, a two-stage

1 22(2).

2 Section 22(3).

3 Section 22(4).

4 Section 23.

5 Section 24(1)(a) and (b).

test must be satisfied by reference to a list of conditions. The first stage requires that the person holds an opinion that one of the conditions is satisfied; the second demands that the opinion be a reasonable one for him to hold in all the circumstances of the case.

Conditions specified in an exhaustive list are:

> (a) the treatment is necessary in order not to endanger the health or safety of any person (including that of the disabled person);
>
> (b) the disabled person is incapable of entering into an enforceable agreement, or of giving an informed consent;
>
> (c) in relation to managed premises, the treatment is necessary in order for the disabled person or the occupiers of other premises forming part of the building to make use of a benefit or facility;
>
> (d) in relation to managed premises, refusing or deliberately omitting to permit the disabled person to make use of benefits or facilities is necessary in order for occupiers of other parts of the premises forming part of the building to make use of benefits or facilities.[1]

The High Court, hearing an appeal from the county court, has considered the application of provisions relating to premises in *North Devon Homes Ltd v Brazier*[2].

The appellant, noted to be a 'problem tenant', appealed against the grant of a possession order in favour of her landlord under section 8 of the Housing Act 1988. It was accepted that she had breached her tenancy agreement by persistent anti-social behaviour towards her neighbours. It

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1 Section 24(3).

2 [2003] EWHC 574 (QB).

was common ground that she was fell within the definition of disability by virtue of 'psychotic illness, possibly schizophrenia'. The appellant contended that the possession order constituted eviction and was therefore unlawful under DDA. The county court had ruled that although the possession order was unlawful under the DDA, in the circumstances of the case it was not appropriate for the Act to override a discretion accorded to the courts by the Housing Act 1988.

On appeal, the High Court considered first whether the appellant had been subjected to less favourable treatment. Applying the reasoning in *Clark v Novacold Ltd*[1], it examined whether the reason for eviction related to disability. It held that it did, finding that,

> *"...the overwhelming preponderance of her bizarre and unwelcome behaviour is attributable to her mental illness, which forms her disability."*[2]

It rejected an argument that the appropriate comparator was another tenant behaving as the appellant had done, and concluded that she had been subjected to less favourable treatment.

Was this justified on the basis that it was necessary "in order not to endanger the health or safety of any person (including the disabled person)"? Applying stage one of the two-stage test of justification, it found that there was no evidence that the respondent landlords had ever formed this opinion. Of itself, this finding was enough to defeat the justification defence, which requires that both stages be satisfied. Nevertheless, the High Court moved on to the second stage. At the county court, the Recorder had found on the facts before him that,

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1 [1999] IRLR 318.

2 Ibid at [18].

"Although the neighbours underwent a great deal of uncomfortableness, and are still experiencing these difficulties, they are not such as to endanger 'the health or safety of any person'."[1]

In the absence of objective evidence that it would have been reasonable for the landlords to have held an opinion that eviction was necessary in order not to endanger the health and safety of neighbours, the less favourable treatment could not be justified.

The High Court parted company with the county court by holding that evictions which are not justified by the defence set out in section 24 of the DDA are barred.The county court's decision to grant a possession order in the face of its finding that the landlord had breached section 22 (3)(c) of the DDA could not stand.This was tantamount to aiding an unlawful act contrary to section 57 of the Act. Powers accorded by the Housing Act 1998 should, it suggested, be read to be compatible with limitations on interference with the appellant's right to respect for her home as set out in the DDA.

1 Ibid at [20].

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1. Wider Interviews: Guide and Notes

1.1 Background notes for interviewers

There are several objectives for these interviews:

1. Most important is to find out as much as possible about the respondent's experience and perceptions of how the DDA is functioning to date. The discussion guide should not constrain the interviews, therefore. Some of the headings and questions set out below them may not be appropriate to any particular respondent, and respondents may also raise other issues which we should also record.

2. A secondary, but important, objective is to identify any cases which they are aware of, including cases which have been withdrawn or settled before a hearing, or cases 'not brought'; and to take their views and suggestions on cases which might be appropriate case-studies. These interviews are a key source of information on 'potential cases'.

3. Important to stress that case-studies will be confidential and written up anonymously, and no information will be published or passed on to the DRC or DWP or anyone else, without the participants' consent.

4. Fourth, we should ask them for suggestions of other individuals/organisations likely to have experience of the operation of the DDA, as possible contacts for interviews/information/case studies.

1. Introduction

1.1 Explain project, and objectives *(use Project Brief, which they should have received, for reference)*.

1.2 Explain purpose of wider interviews, and how they fit into the project as a whole, and stress confidentiality/anonymity of information collected.

1.3 Clarify what their particular experience/knowledge of the Act consists of (in particular ascertain the extent to which it is based on primary experience with cases/potential cases). Also clarify their role – *eg* whether they advise or represent potential applicants/claimants or respondents/defendants.

2. General: Key developments in the interpretations and development of the DDA

In this section we want to ask for their views on how the Act is working in practice, and issues and problems arising. The following two sections focus specifically on issues arising under Parts II and III of the Act. The aim of this section is to draw out any broad opinions about the legislation, which will help to set their views on subsequent detailed questions in context.

2.1 We are particularly interested in your views on any key issues/developments in the past two years (*ie* since the second stage of the DDA Monitoring study was completed). Examples of such issues might be:

- Significant trends in types of cases being brought (*eg* recruitment, dismissal, failure to provide goods and

services)

- Significant trends in type of discrimination being alleged (*eg* less favourable treatment, failure to make adjustments)
- Reasons for patterns in terms of the types of cases being brought/not being brought under the DDA
- Reasons for the comparatively high proportion of DDA cases that are settled or withdrawn
- Factors affecting success rates
- Access to justice issues (*eg* availability of advice, accessibility of tribunals/ courts, funding of cases)
- Significance of the growth of multiple jurisdiction cases.
- Problems arising from the way the DDA is drafted
- Problems arising from the way the DDA has been interpreted by Tribunals/ Courts

We are seeking general views on the Act, its effectiveness and implementation.
We do not need to prompt, as the subsequent sections will raise the key issues for the project.

3. Issues relating to Part II of the DDA (employment provisions)

Here we want to find out as much as possible about their experience of cases being brought to Tribunals (and potential cases not being brought, and why). We need to focus on the kinds of cases being brought (which part of the Act, what reasons for discrimination are being cited), what reasons for discrimination are succeeding and why, what kinds of applicants and what kinds of respondents, who is advising/representing them, and what impact this support/representation has, and what outcomes are occurring. Our main focus is on the past two years.

3.1 Are they aware of any changes over the past two years in the patterns regarding the nature of applicant's impairments/disabilities in cases being brought under PartII? *ie* what are the circumstances of people typically taking claims — and are there any differences between those who take claims, those who have a possible case but do not take claims, those who settle/ withdraw, those who are successful and those who aren't?

3.2 Have there been any notable changes over the past two years in any other patterns in terms of the personal characteristics of applicants (including age, sex and ethnic origin, for example)?

3.3 What about employers — any experience/views on the size, type and sectors of employer being taken to tribunals?

3.4 What about other actors involved in the process — *eg* legal representation, support from trades union, disability organisations

- What difference does their involvement make?
- To what extent are the various advisors and representatives now sufficiently well-informed about the Act to provide adequate support to applicants/ respondents?
- What about financial support for applicants (or lack of it) — how important is this in pursuing claims under the Act?
- To what extent does the involvement of (legal) representatives influence the outcome of cases? The data suggest that legally-represented cases are more likely to succeed at Tribunal. Explore the process behind this — how much is it due to legal representation actually making a difference, and how much does it reflect some

kind of filtering process (*ie* 'weak cases' being filtered out by representatives, or representatives refusing to take weak cases, meaning that some applicants go ahead on their own?

- More generally, is there any evidence that 'weak cases' are less likely to be taken, now that knowledge of the Act is more widely established?

3.5 Is there any variation between tribunals in interpretation of the Act? What patterns can be observed, and why?

3.6 Nature of (alleged) discrimination, *ie* what changes have there been in the past two years in the sections of the Act under which cases are mainly being brought?

3.7 What factors do they consider are most important in leading to cases being rejected at the initial hearing stage? (*ie* cases brought under the DDA but which fall down at the first stage)?

3.8 Have there been changes to the use made by employers of the justification defence for alleged discrimination?

3.9 What factors are influencing the success rate of the defence of justification?

- Availability/quality of medical evidence?
- Interpretation of justification in case law?
- The decision in the *Post Office v Jones* case
- Other factors?

3.10 What are their views on the reasons for the relatively small number of recruitment cases and the reasons why recruitment cases are less likely than other sub-

jurisdictions to succeed at tribunals?

3.11 What do you consider to be the main barriers to the process of bringing DDA cases? To what extent are these leading to cases being withdrawn or not being brought? *eg*: availability of support/information/finance

- lack of knowledge/expertise about DDA among solicitors/advisors
- accessibility of tribunals and the tribunal system to disabled people, including comprehensibility of forms and procedures
- unwillingness/fear of conflict with employer *etc.*
- adequacy or inadequacy of remedies and enforcement
- availability/cost of medical evidence
- any others?

3.12 What has been the impact of ACAS on the outcome of DDA cases? (Influenced the desire/ability to settle, settlement would have been achieved without ACAS intervention, *etc.*). What is your opinion of the effectiveness of the conciliation process? Ask the same question about Mediation UK, the conciliation service used by the DRC Helpline.

3.13 What is the significance and impact of multiple jurisdiction claims (*eg* DDA plus unfair dismissal, or sex discrimination) *ie*:

- To what extent are DDA claims failing, because DDA is being used as a 'last resort', *eg* to beef up an unfair dismissal claim, or in cases where unfair dismissal would not apply, (*eg* because the person does not have two years' service)?

- To what extent are DDA claims 'sidelined' or regarded as the claim of lesser significance in multiple jurisdiction claims?
- To what extent are the arguments, defences and justifications common in cases heard by the Tribunals under other jurisdictions (*eg* unfair dismissal) influencing the way in which DDA cases are being heard, and the decisions in such cases?

3.14 Explore with the interviewee which are the critical parts of the Act on which cases are succeeding or failing, and whether there have been any changes over time. To what extent are cases failing on the definition of disability and not getting as far as discussion of the substantial issues of discrimination?

- Has awareness and understanding of the definition increased over time and/or been made clearer by existing judgements and case law?
- Which part of the definition is most critical in cases (definition of impairment, day-to-day activities, substantial, duration of impairment *etc.*)
- What changes have there been in the patterns of the applicant's impairments/disabilities being held to fall within the definition, and outside the definition?
- Are there particular groups for whom the definition of disability is presenting particular problems?
- What changes have there been in the pattern and importance of use of medical evidence by applicants and respondents where the parties disagree on whether the applicant is disabled?

4. Issues relating to Part III of the DDA (Goods and Services Provisions)

As with Part II, get a picture of any patterns in existing cases, regarding the nature of the disabilities involved, the characteristics of the claimants (what types of service providers are facing potential claims?); the nature of the discrimination (what examples of discrimination are occurring in practice?); the characteristics of the goods and services involved and the characteristics of the organisation supplying them.

Although they may not know of many specific examples, take down all that are mentioned and their views on why there are not many cases to date. We are equally interested in examples of potential cases that did not get as far as being brought.

4.1 It is difficult to establish the number of Part III cases. Do they have any estimate of the number that have been brought?

4.2 What are their views on the reasons for the relatively small number of cases?

- Low level of awareness of DDA provisions among potential claimants
- Low awareness of procedures for taking cases
- Perceived cost of taking a case
- Advisers and professionals less familiar with Part III than with other jurisdictions

Phased implementation of provisions of Part III

4.3 Are they aware of any patterns regarding the nature of claimants' impairments/disabilities in cases being

brought under Part III? *ie* what are the circumstances of people typically taking claims — and are there any differences between those who take claims, those who have a possible case but do not take claims, those who are successful and those who are not?

- Any other patterns in terms of the personal characteristics of claimants (including age, sex and ethnic origin, for example)
- What about providers — any experience/views on the size, type and sectors of organisations being taken to court under Part 111 of the DDA

4.4 What about other actors involved in the process — *eg* legal representation, support from disability organisations, advisory organisations *etc:*

- What difference does their involvement make?
- To what extent are the various advisors and representatives sufficiently well-informed about Part III to provide adequate support to claimants/ defendants?
- What about financial support for claimants (or lack of it) — how important is this in pursuing claims under the Act?

4.5 What are there views on the operation of the legal/court process for Part III cases? Are any of the following perceived as barriers to the effective implementation of the process?

- availability of legal aid/advice/support
- accessibility/disability-friendliness of court system (including comprehensibility of forms/ procedures)
- ignorance of district judges of the DDA
- (in-)appropriateness of the small claims process for complex discrimination cases

- timing — dates by which cases must be brought; notice of cases being heard *etc*
- any other barriers?

Close and thank

2. Case-Study Discussion Guide: Applicants Part II Cases (actual cases, ongoing or completed)

Note for interviewers:

The content of the interview will vary with the content of the case in question, and cannot be generally specified for all cases in advance. The discussion guide should be used as an 'aide memoire' to prompt the main areas of questioning. Some questions will not be relevant to all cases. If the case is ongoing rather than completed, questions should be adjusted appropriately.

The aim of the interview is to obtain as much information as possible on the interviewee's experience of the case, and their views about the way in which the DDA operated in that case - strengths, weaknesses, barriers etc.

The interviewee should be encouraged to 'tell their story' of the case, in their own words. The interviewee should not be restricted to answering specific questions in the discussion guide, but should also be encouraged to describe their experience of the Act, and to raise any issues which they regard as important or relevant.

Where the interviewee offers an opinion or view about the way the Act is operating, the interviewer should attempt to establish the facts on which the opinion is based, and the extent to which the opinion is based on experience of the

case in question (rather than simply being based on general views about what ought to happen).

Interviewers should ensure that they are fully briefed, before the interview, on all the facts about the case of which we are currently aware (including interview notes from other parties in the case study), and should, wherever, possible, formulate the questions used in terms of the details of the case in question, rather than in general terms.

Note: where possible, interviews will be tape-recorded. Make sure that you have the interviewee's consent for this, and explain that this is to make it easier for us not to have to take notes during the interview. Stress confidentiality, and explain that the tapes will be erased once we have taken notes from them. If the interviewee has any concerns about the tape recording, conduct the interview without it, and take notes accordingly.

2.1.1 Introduction

Explain project, and objectives.

Explain purpose of case-studies, and how they fit into the project as a whole, and stress confidentiality/anonymity of information collected.

Ask interviewee to describe the nature of their impairment/disability, its date of onset (where relevant) and its main effects on normal day-to-day activities and their ability to work.

Ask interviewee briefly to describe their work history:

Current job (if in work)

Previous jobs (if any)

Periods of unemployment or outside the labour market

Ask interviewee if they are prepared to give their age and ethnic origin.

2.1.2 Origins of case

This section is concerned with the applicant's account of how the case came about; when and how they realised that they had a potential DDA case, and what prompted them to pursue it (or not to pursue it, where relevant).

Ask the applicant to describe in their own words, the background to the case:

- details of the employer (activity, sector, size); the occupation and tasks of the job in question (*ie* the applicant's job or the job they were applying for); their length of service with the employer (if relevant).
- the act of discrimination, when and how it occurred, and any relevant background circumstances.
- When and how did the applicant realise that the circumstances amounted or might amount to discrimination under the DDA?
- Were they in receipt of advice at this stage, and in deciding whether they had an actionable claim? If so, from whom, and how did this advice come about (how did they come into contact with the adviser, were they referred to him/her; by whom; and why did they choose this adviser? *etc.*)
- did they raise the issue with the employer before taking the case (*ie* before submitting the IT1). If so, with whom did they raise the issue (*eg* line manager, personnel/HR manager *etc.*), and what happened as a result? Did they take it through any other procedure (*eg* internal grievance procedure *etc.*);

- was there any attempt to resolve/settle/conciliate the situation? and if so, was this before or after the IT1 was submitted? (*see also 4.2 below*)

When, and how did they first become aware of the DDA? In particular were they aware of it before the case in question?

What awareness did they previously have of the tribunal system; and how (*eg* direct previous involvement, through involvement of friend/colleague, the media)?

What prompted them to bring a claim (or consider bringing one). *eg* desire for justice; desire to publicise case for others; wanted a settlement (financial); wanted re-employment *etc.* (*do not prompt initially*)

How confident were they from the outset, about their chances of winning the case? And why? Did this perception change? And why?

Had they previously considered themselves to be a disabled person?

Establish (or confirm) whether the case was a 'stand alone' DDA case, or whether any other jurisdiction(s) were involved (and which ones). Did the applicant regard the DDA element as the 'main' part of the case, or did they primarily see it as (for example) a question of unfair dismissal, with the disability element a more minor part. Did their view on this change with the course of the case? If so, why?

2.1.3 Advice, support, representation and conciliation

Identify all third parties involved in the case on the applicant's side or as conciliators, including

- advisers whether formal (*eg* union, CAB, disability organisation, solicitor, etc.) or informal (friend, relative, colleague *etc.*):
- representatives (where they were represented at any hearing) *eg* union, solicitor, barrister etc.
- conciliators (*eg* ACAS)
- any involvement of/contact with the DRC (*eg* via the helpline) or the Equality Commission in NI.

For each type of involvement, identify how and when the third party became involved, the reasons for choosing them as adviser/rep, and any links (including cross-referrals) between them.

Establish whether the applicant paid any of the third parties involved for their participation in the case (*if possible establish amount of payment, but treat this question sensitively*). Establish also:

- the extent of any *pro-bono* involvement (*eg* where legal advisers were prepared to take or advise on DDA cases without a fee);
- where the case was actually taken, whether any legal representation was provided on a 'no win, no fee' basis or a contingency fee basis.
- whether the applicant received any financial support from a third party to pursue the case (if so, from whom and how much?)

Obtain their views on the quality of any advice, support and representation they received in the case (at any stage), where appropriate. Ie, for all third parties involved (advisers, solicitors, barristers, ACAS) ask:

- how satisfied they were with the role played by each of

these parties; and

- if satisfied or unsatisfied to any extent, why was this?

Was there any (further) advice, support or representation which the applicant would have liked to have had in the case, but which they did not receive? If so, what? and why was it not received (cost, availability etc)?

If the applicant did not have any representation, do they feel that this had any effect on the course of the case? What effect?

2.1.4 Withdrawn or settled cases (section to be asked only in those cases)

Cases withdrawn before a hearing

Establish:

Applicant's reasons for withdrawal in their own words; but identify, where possible,

- how far withdrawal was a 'free choice' on the part of the applicant (*eg* where they discovered or decided that there was little chance of success, or that in fact they had no case under the Act),
- how far it was constrained by external factors - *eg* financial concerns about the cost of taking the case; fear of, or pressure from the employer; concerns or fears about the process itself;
- how far it was constrained by personal factors (*eg* their own health).

Timing of withdrawal, and in particular:

- whether withdrawal followed any tribunal process (*eg* after a pre-hearing review; a directions hearing; orders for further/better particulars), and if so, why did the

withdrawal occur/

Involvement of any other parties in the decision to withdraw; which parties and what role did they play?

Do they still feel that withdrawal was the right decision? How satisfied are they with the outcome?

2.1.5 Settled cases

Establish:Timing of settlement (*eg* without IT1 being submitted; after IT1, but before any hearing; after one or more hearings or pre-hearing discussion)

Was settlement reached:

- via ACAS conciliation (form COT3); or
- by a valid compromise agreement; or
- by a settlement outside these formal processes

2.1.6 Circumstances of settlement:

who initiated the settlement process

- who else was involved (adviser, legal rep, ACAS, tribunal chairman ...)
- terms of settlement (*handle question sensitively, and stress confidentiality*). Check first whether a confidentiality clause was involved in the settlement (*if so, do not pursue details for fear of voiding the settlement agreement*)

Applicant's satisfaction with settlement outcome.

2.1.7 Heard cases

Establish (or confirm) what the outcome was and any remedy or award made.

Overall, how satisfied were they with the outcome? Why?

What were the most important factors which influenced the outcome of the case (positively or negatively)? *do not prompt initially but we are looking for factors such as:*

- the role and quality of representation
- advice or conciliation; financial resources
- medical or other evidence presented
- attitude of Tribunal; etc. etc.

Was the tribunal accessible to their disability? *(NB establish accessibility both in terms of physical aspects of the premises, but also the accessibility of the process and the hearing itself)*

What adjustments, if any, did the tribunal make for their disability?

Did the tribunal understand the nature of their disability/impairment?

General satisfaction with how the tribunal

- handled case;
- decided case; and
- explained decision.

Overall, how clear did they find the tribunal proceedings?

General satisfaction with:

- time taken for case to come to Tribunal
- duration of case/hearings

Close interview with thanks. Stress confidentiality etc

3. Case-Study Discussion Guide: Respondents Part II Cases (actual cases, ongoing or completed

Note for interviewers:

The content of the interview will vary with the content of the case in question, and cannot be generally specified for all cases in advance. The discussion guide should be used as an 'aide memoire' to prompt the main areas of questioning. Some questions will not be relevant to all cases. If the case is ongoing rather than completed, questions should be adjusted appropriately.

The aim of the interview is to obtain as much information as possible on the interviewee's experience of the case, and their views about the way in which the DDA operated in that case - strengths, weaknesses, barriers etc.

The interviewee should be encouraged to 'tell their story' of the case, in their own words. The interviewee should not be restricted to answering specific questions in the discussion guide, but should also be encouraged to describe their experience of the Act, and to raise any issues which they regard as important or relevant.

Where the interviewee offers an opinion or view about the way the Act is operating, the interviewer should attempt to establish the facts on which the opinion is based, and the extent to which the opinion is based on experience of the

case in question (rather than simply being based on general views about what ought to be the case). NB if the respondent has been involved in more than one case or potential case, attempt, wherever possible to distinguish views based on the case in question, from views based more generally on cases experienced.

Interviewers should ensure that they are fully briefed, before the interview, on all the facts about the case of which we are currently aware (including interview notes from other parties in the case study), and should, wherever, possible, formulate the questions used in terms of the details of the case in question, rather than in general terms.

Note: where possible, interviews will be tape-recorded. Make sure that you have the interviewee's consent for this, and explain that this is to make it easier for us not to have to take notes during the interview. Stress confidentiality, and explain that the tapes will be erased once we have taken notes from them. If the interviewee has any concerns about the tape recording, conduct the interview without it, and take notes accordingly.

3.1.1 Introduction

Explain project, and objectives.

Explain purpose of case-studies, and how they fit into the project as a whole, and stress confidentiality/anonymity of information collected.

Ask interviewee to describe their organisation (and the establishment relevant to the case, if different), in particular:

- main activities (sector);
- number of employees;

- part of organisation and occupation of relevant job (ie the job the applicant is/was in, or would have been if recruited)

Establish (where not already known):

- interviewee's position and role within the organisation;
- their involvement/contact with the case in question

When, and how did they first become aware of the DDA? In particular were they aware of it before the case in question?

3.1.2 Origins of case

This section is concerned with the respondent's account of how the case came about

Ask the respondent to describe in their own words, the background to the case:

- the act of (alleged) discrimination, when and how it occurred, and any relevant background circumstances.
- In this case, had the DDA complaint been raised with them prior to legal proceedings being issued? If so, how was it raised, and with whom (*eg* line manager, personnel manager/HR manager *etc.*)?
- had the case been pursued through any internal process (*eg* grievance procedure, domestic appeal, Trade Union machinery) before litigation?
- When and how did the respondent realise that the circumstances amounted to or might be regarded as potential discrimination under the DDA?
- what was their initial reaction to the notification of the claim/IT application? (*explore in the context of any previous experience of litigation*)

- Were they in receipt of advice at this stage? If so, from whom, and how did this advice come about (how did they come into contact with the adviser, were they referred to him/her; by whom, and why did they choose them etc.)?

Had they previously considered the applicant to be a disabled person? if no, was this because

- they were unaware of the applicant;
- they were unaware of the applicant's condition/ impairment; or
- they were aware of the applicant's condition, but did not regard it as a disability?

Establish (or confirm) whether the case was a 'stand alone' DDA case, or whether any other jurisdiction(s) were involved (and which ones). Did the respondent regard the DDA element as the 'main' part of the case, or did they primarily see it as (for example) a question of unfair dismissal, with the disability element a more minor part. Did their view on this change with the course of the case? If so, why?

What attempts made, if any, to compromise or settle the claim? (*NB settled cases are considered further below)*

Were any adjustments offered or made by the employing organisation to accommodate the applicant's disability?

if yes, establish

- nature of adjustment offered/made, and timing (*eg* before, during or after the DDA claim).
- How were appropriate adjustments identified, and was advice sought/provided (*eg* consultation with the applicant, DEA, Occupational Health Adviser)
- reasons why adjustment(s) were offered/made (*eg* respondent recognised they were in the wrong; part of

conciliation or attempt at settlement)

In addition (or alternatively) were any adjustments considered?

If yes

- what adjustment(s)?
- why were some (if any) rejected?
- by whom were they rejected *eg* by the respondent before offering the option to the applicant; or by applicant after an offer was made?

In the interviewee's view, did discrimination for a reason related to the applicant's disability, occur? In particular:

- was there less favourable treatment of the disabled person in comparison with other persons?
- if yes, was it for a reason related to their disability?
- if yes, what was the justification?

How confident were they from the outset, about their chances of winning the case? And why? Did this perception change? And why?

3.1.3 Advice, support, representation and conciliation

Identify all third parties involved in the case on the respondent's side or as conciliators, including

- advisers (*eg* employer organisation/trade body, health and safety or medical adviser, insurance company, solicitor, *etc.*). NB distinguish between in-house and external advisers
- representatives (where they were represented at any hearing) *eg* solicitor, barrister etc.

- conciliators (*eg* ACAS)
- any involvement of/contact with the DRC (*eg* via the helpline), or the Equality Commission in NI

In each case, identify how and when the third party became involved, reasons for choice of adviser/rep, and any links (including cross-referrals) between them.

Obtain their views on the quality of any advice, support and representation they received in the case (at any stage), where appropriate. For example, for all third parties involved (advisers, solicitors, barristers, ACAS) ask:

- how satisfied they were with the role played by each of these parties; and
- if satisfied or unsatisfied to any extent, why was this?

Was there any (further) advice, support or representation which they would have liked in responding to the DDA claim, but which they did not have? If so, what? And why (cost, availability, lack of awareness *etc.*)?

If the respondent was not represented or advised in the case, do they feel that this has had any effect on the course of the case? What effect?

3.1.4 Withdrawn or settled cases (section to be asked only in those cases)

Cases withdrawn before a hearing

Establish:

Respondent's understanding of the reasons for the case being withdrawn. NB treat sensitively, but try to ascertain whether withdrawal was entirely driven by the applicant, or

whether 'encouragement' on the part of the respondent or its agents was also relevant.

Settled cases

Establish:

Timing of settlement (*eg* without IT1 being submitted; after IT1, but before any hearing; after one or more hearings or pre-hearing discussion)

Circumstances of settlement:

- who initiated the settlement process
- who else was involved (adviser, legal rep, ACAS, tribunal chairman ...)
- terms of settlement (handle question sensitively, and stress confidentiality)

Respondent's satisfaction with settlement outcome.

3.1.5 Heard cases

Establish (or confirm) what the outcome was and any remedy or award made

What were the most important factors which influenced the outcome of the case (positively or negatively)? *do not prompt initially but we are looking for factors such as:*

- the role and quality of representation, advice or conciliation;
- financial resources;
- medical or other evidence presented;
- attitude ofTribunal; etc. etc.

Respondent's general satisfaction with how the tribunal

- handled case;
- decided case; and
- explained decision.

Overall, how clear did they find the tribunal proceedings?

General satisfaction with:

- time taken for case to come to Tribunal
- duration of case/hearings

3.1.6 6. General issues of policy/practice

Does the employer have a specific personnel/HR function or department?

Does the employer have an EO or diversity policy? (if yes, establish whether it is a written policy)

Does the employer have a policy on the employment of disabled people? if yes, is it specific disability policy, or part of wider EO policy? (in all cases, establish whether policies are written policies).

Obtain copies of written policies if possible/appropriate

Is the employer a Disability Symbol user?

Is there a member of management designated to deal with DDA/disability issues?

Had anyone undergone external DDA training or disability awareness or equality training? (If yes, establish whether this was prior to the case being brought or subsequently).

Had staff/managers undergone internal DDA training or

disability awareness/equality training? (If yes, establish whether this was prior to the case being brought or subsequently).

Does the organisation have any previous experience of employment tribunal cases (*eg* unfair dismissal)?

How did their experience of defending a DDA case differ, if at all, from previous experience of defending litigation?

Does the organisation have any previous experience of DDA cases (part II or part III?)

What lessons have been learnt as a result of the case (will it result in any changes of policy or practice)?

Does the interviewee have any general views on the DDA, and do they see any particular problems with the legislation?

Close interview with thanks. Stress confidentiality etc

4. Case-Study Discussion Guide: Advisers/ Representatives Part II Cases (actual cases, ongoing or completed)

Note for interviewers:

The content of the interview will vary with the content of the case in question, and cannot be generally specified for all cases in advance. The discussion guide should be used as an 'aide memoire', to prompt the main areas of questioning. Some questions will not be relevant to all cases. If the case is ongoing rather than completed, questions should be adjusted appropriately.

In particular, the detail of the interview will need to be adjusted according to whether the adviser/representative is representing the applicant or the respondent in the case.

The aim of the interview is to obtain as much information as possible on the interviewee's experience of the case, and their views about the way in which the DDA operated in that case - strengths, weaknesses, barriers etc.

The interviewee should be encouraged to 'tell their story' of the case, in their own words. The interviewee should not be restricted to answering specific questions in the discussion guide, but should also be encouraged to describe their experience of the Act, and to raise any issues which they

regard as important or relevant.

Where the interviewee offers an opinion or view about the way the Act is operating, the interviewer should attempt to establish the facts on which the opinion is based, and the extent to which the opinion is based on experience of the case in question (rather than simply being based on general views about what ought to be the case). NB if the adviser/representative has been involved in more than one case or potential case, attempt, wherever possible to distinguish views based on the case in question, from views based more generally on cases experienced.

Interviewers should ensure that they are fully briefed, before the interview, on all the facts about the case of which we are currently aware (including interview notes from other parties in the case study), and should, wherever, possible, formulate the questions used in terms of the details of the case in question, rather than in general terms.

Note: where possible, interviews will be tape-recorded. Make sure that you have the interviewee's consent for this, and explain that this is to make it easier for us not to have to take notes during the interview. Stress confidentiality, and explain that the tapes will be erased once we have taken notes from them. If the interviewee has any concerns about the tape recording, conduct the interview without it, and take notes accordingly.

4.1.1 Introduction

Explain project, and objectives.

Explain purpose of case-studies, and how they fit into the project as a whole, and stress confidentiality/anonymity of information collected.

Ask interviewee to describe the nature of their organisation, where relevant — *eg* if they are legal representatives, do they represent both types of parties or focus on the applicant/plaintiff or respondent/defendant side; if advice organisations, what is their remit, main client group(s) *etc.*

When, and how did they first become aware of the DDA? In particular were they aware of it before the case in question.

Have they been involved in any other DDA cases? How many? Part II only or Part II as well? Obtain brief details.

Financial circumstances of their involvement in the case (are they being paid by the party, is it *pro bono*, is it a conditional fee arrangement, a 'a no win, no fee' arrangement; is there a subsidy from any source *etc.* ?)

Had they had any training on advising/representing DDA cases? (get details)

Any more general disability awareness/equality training?

Previous experience of advising/litigating on DDA?

Awareness of the Act and information pertaining to it: (*NB it will not be practicable to test interviewees' detailed knowledge of the Act, but we should explore the extent to which they have, or have read, some of the relevant literature)*. Ask what information and literature they have copies of, and/or have read about the Act. Check for:

- the Act itself
- regulations made under the Act
- statutory guidance on the meaning of disability
- employment code of practice

- guidance literature issued by official or related sources: especially DRC or Equality Commission in NI
- guidance literature issued by other sources: Trade Unions, trade associations *etc.* (*specify*)

4.1.2 Origins of case

This section is concerned with the adviser/representative's account of how the case came about; when and how they realised that they had a potential DDA case, and what prompted them to pursue/defend it (or not to pursue/defend it, where relevant).

Ask the interviewee to describe in their own words, the background to the case:

- the act of (alleged) discrimination, when and how it occurred, and any relevant background circumstances.
- When and how did the interviewee become involved in the case
- at what stage, and why, did they realise that the circumstances amounted or might amount to discrimination under the DDA?
- did they themselves seek further advice or guidance at any stage; from whom? when? Any involvement of DRC or ACAS (part II)?

Was the applicant/respondent aware of the DDA (in general terms, or as it applies to their case) before contact with the interviewee? Was the interviewee the main or first source of the applicant/respondent's knowledge of the DDA?

In the interviewee's view, did discrimination for a reason related to the applicant's disability, occur? In particular:

- was there less favourable treatment of the disabled

person in comparison with other persons?

- if yes, was it for a reason related to their disability?
- if yes, what was the justification?

How confident were they from the outset, about their client's chances of winning the case? And why? Did this perception change? And why?

Establish (or confirm) whether the case was a 'stand alone' DDA case, or whether any other jurisdiction(s) were involved (and which ones). Did they regard the DDA element as the 'main' part of the case, or did they primarily see it as (for example) a question of unfair dismissal, with the disability element a more minor part. Did their view on this change with the course of the case? If so, why?

4.1.3 Withdrawn or settled cases (*section to be asked only in those cases)*

Cases withdrawn before a hearing

Establish:

Adviser/representative's interpretation of applicant's reasons for withdrawal. Examine, in particular:

- how far withdrawal was a 'free choice' on the part of the applicant (*eg* where they discovered or decided that there was little chance of success, or that in fact they had no case under the Act),
- how far it was constrained by external factors - *eg* financial concerns about the cost of taking the case; concerns or fears about the process itself;
- how far it was constrained by personal factors (*eg* their own health).

- (*where adviser/rep is acting for applicant)* did they advise withdrawal? why?

Timing of withdrawal, and in particular:

whether withdrawal followed any tribunal process (part II) *eg* after a pre-hearing review; a directions hearing; orders for further/better particulars, and if so, why did the withdrawal occur/

4.1.3 Settled cases

Establish:

Timing of settlement (*eg* without IT1 being issued; after IT1, but before any tribunal hearing; after tribunal hearing)

Circumstances of settlement:

- who initiated the settlement process
- who else was involved (adviser, legal rep, conciliator ...);
- did interviewee advise their party to settle? why (or why not?)
- terms of settlement (*handle question sensitively, and stress confidentiality*); Check whether a confidentiality clause was involved in the settlement (*if so, do not pursue, as this might void the settlement agreement*)

Adviser/rep's view on whether settlement outcome is satisfactory.

Was settlement reached:

- via ACAS conciliation (form COT3); or
- by a valid compromise agreement; or
- by a settlement outside these formal processes?

4.1.4 Heard cases

Establish (or confirm) what the outcome was and any remedy or award made

What were the most important factors which influenced the outcome of the case (positively or negatively)? *do not prompt initially but we are looking for factors such as:*

- the role and quality of representation, advice or conciliation;
- financial resources;
- medical or other evidence presented;
- attitude of Tribunal etc. etc.

Adviser/representative's view on how the tribunal

- handled case;
- decided case; and
- explained decision.

Overall, how clear did they find the tribunal proceedings?

Adviser/rep's view (where relevant) on:

- use of directions hearing
- use of pre-hearing review or pre-hearing discussion
- time taken for case to come to tribunal
- duration of case/hearings

(*where adviser/rep acted for applicant)*: any barriers difficulties for client in using the tribunal system?, *eg*

- Was the tribunal accessible to the applicant's disability? (*NB establish accessibility both in terms of physical aspects of the premises, and also the accessibility of the*

process and the hearing itself)

- What adjustments, if any, did the tribunal make for the applicant's disability?
- Did the tribunal understand the nature of the applicant's disability/impairment?

Any issues arising (if not already covered, and *where relevant*) relating to tribunal's:

- interpretation of definition of disability under the Act?
- knowledge of the Act and supporting guidance, codes of practice?
- use of medical evidence; witnesses *etc.*;
- interpretation of 'reasonable adjustment';
- understanding of test 'for a reason which relates to the disabled person's disability';
- understanding and application of 'less favourable treatment' formula
- application of the 'justification' defence;
- use and application of their remedy powers;
- application of 'out of time' rules
- *etc. etc.* as appropriate to case

4.1.5 General issues

On the basis of their experience in this case, what problems do they identify in advising on/litigating DDA cases?

(*where adviser/rep acted for applicant)*: Any other barriers (not already mentioned) to use of DDA for client? *eg*

- availability of support/information/finance;
- lack of knowledge/expertise about DDA among

solicitors/advisors;

- unwillingness/fear of conflict with employer *etc.*
- what others?

If ACAS (part II) or any other conciliation involved in case:

- how effective was conciliation process?
- were conciliators adequately trained/experienced on DDA/disability issues

5. Case-Study Discussion Guide: Potential Applicants, Part II

Note for interviewers:

The content of the interview will vary according to the circumstances of the potential case in question, and can only be broadly specified in advance. The discussion guide should be used as an 'aide memoire' to prompt the main areas of questioning.

The aim of the interview is to obtain as much information as possible on the interviewee's reasons for not pursuing a case, and the factors that may have influenced them.

The interviewee should be encouraged to 'tell their story' of the case, in their own words. The interviewee should not be restricted to answering specific questions in the discussion guide, but should also be encouraged to raise any issues which they regard as important or relevant.

Where the interviewee offers an opinion or view about the way the DDA is operating, the interviewer should attempt to establish the facts on which the opinion is based, and the extent to which the opinion is based on experience of the potential case in question (rather than simply being based on general views about what ought to happen).

Interviewers should ensure that they are fully briefed, before the interview, on all the facts about the potential case of which we are currently aware (including interview notes from

the potential representative if applicable), and should, wherever, possible, formulate the questions used in terms of the details of the potential case in question, rather than in general terms.

Note: where possible, interviews will be tape-recorded. Make sure that you have the interviewee's consent for this, and explain that this is to make it easier for us not to have to take notes during the interview. Stress confidentiality, and explain that the tapes will be erased once we have taken notes from them. If the interviewee has any concerns about the tape recording, conduct the interview without it, and take notes accordingly.

5.1.1 Introduction

Explain project, and objectives.

Explain purpose of case-studies, and how they fit into the project as a whole, and stress confidentiality/anonymity of information collected.

Ask interviewee to describe the nature of their impairment/disability, its date of onset (where relevant) and its main effects on normal day-to-day activities and their ability to work.

Ask interviewee briefly to describe their work history:

> Current job (if in work)
>
> Previous jobs (if any)
>
> Periods of unemployment or outside the labour market

Ask interviewee if they are prepared to give their age and ethnic origin.

5.1.2 Origins of potential case

This section is concerned with the applicant's account of how the potential case came about.

Ask the applicant to describe in their own words, the background to the potential case:

- Details of the employer (activity, sector, size); the occupation and tasks of the job in question (*ie* the applicant’s job or the job they were applying for); their length of service with the employer (if relevant).
- The act of discrimination, when and how it occurred, and any relevant background circumstances.
- Did they raise the issue with the employer? If so, with whom did they raise the issue (*eg* line manager, personnel/HR manager *etc.*), and what happened as a result? Did they take it through any other procedure (*eg* internal grievance procedure *etc.*);
- Was there any attempt to informally resolve the situation? If so, what happened?

5.1.3 Awareness of the DDA

This section is concerned with when and how they realised that they had a potential DDA case, and what prompted them to initially consider pursuing it.

- When and how did they first become aware of the DDA? In particular were they aware of it before the potential case in question?
- When and how did the applicant realise that the circumstances described amounted or might amount to discrimination under the DDA?
- Were they in receipt of any advice at this stage? If so,

from whom, and how did this advice come about (how did they come into contact with the adviser, were they referred to him/her; by whom; and why did they choose this adviser? *etc.*) Did they contact or receive advice from any of the following?

❍ Formal advisers (*eg* union, CAB, disability organisation, solicitor, etc.)

❍ Informal advice (*eg* friend, relative, colleague *etc.*):

❍ The DRC (*eg* via the helpline) or the Equality Commission in NI.

■ Was the advice they received generally encouraging or discouraging in terms of taking a case? (*If they received conflicting advice or assessments of their likely success note this.*)

■ Were they initially aware of what would be involved in taking a case – *eg* of the tribunal procedure? If so, how had they got this knowledge (*eg* direct previous involvement, through involvement of friend/colleague, the media)?

■ Did they have any concerns about the tribunal procedure? If so, what were these?

■ What motivated them to consider bringing a claim? *eg* desire for justice; desire to publicise case for others; wanted a settlement (financial); wanted re-employment *etc.* (*do not prompt initially)*

■ How confident were they at the outset, about their chances of winning a case? And why? Did this perception change? If so, when and why?

■ Prior to considering taking a case, had they considered themselves to be a disabled person?

5.1.4 Reasons for not pursuing the case

Try to establish the applicant's reasons for not pursuing a

case in their own words; but identify, where possible:

- At what point the decision was made not to pursue the case
- How far the decision not to pursue the case was a 'free choice' on the part of the potential applicant (*eg* where they discovered or decided that there was little chance of success, or that in fact they had no case under the Act),
- Did any other parties influence the decision not to take the case? If so, which parties and what role did they play? Establish the *content* of any advice received and from whom, and which advice was considered most influential.
- Obtain their views on the *quality* of any advice or support they received in making their decision not to go ahead with pursuing a claim) stage). Ask where appropriate:
  - how satisfied they were with the role played by each of these parties; and
  - if satisfied or unsatisfied to any extent, why was this?
- Was there any (further) advice or support which the potential applicant would have liked to have had access to, but which they did not receive? If so, what? and why was it not received (cost, availability etc)?
- How far was the decision constrained by external factors - *eg* financial concerns about the cost of taking the case; fear of, or pressure from the employer; concerns or fears about the tribunal process itself?
- If financial costs were a concern, what did they think these might amount to?
- How far was the decision constrained by personal factors (*eg* effect on their own health or impact on family)?

- Do they still feel that the decision not to pursue a case was the right one? Explore the reasons for their view. If they regret the decision, what are their reasons for this?
- Looking back what do they feel were the most important factors in stopping them from pursuing a case?
- Do they have any views on what kind of help or assistance might have encouraged them to continue with the case?

Close interview with thanks. Stress confidentiality etc

6. Case-Study Discussion Guide: Advisers/ Representatives Potential Part II Cases

Note for interviewers:

The content of the interview will vary with the content of the potential case in question, and can only be broadly specified in advance. The discussion guide should be used as an 'aide memoire', to prompt the main areas of questioning

The aim of the interview is to obtain as much information as possible on the interviewee's experience of the case, and their views on the reasons why the potential case was not pursued.

The interviewee should be encouraged to 'tell their story' of the case, in their own words. The interviewee should not be restricted to answering specific questions in the discussion guide, but should also be encouraged to describe their experience of the Act, and to raise any issues which they regard as important or relevant.

Where the interviewee offers an opinion or view about the way the Act is operating, the interviewer should attempt to establish the facts on which the opinion is based, and the extent to which the opinion is based on experience of the potential case in question (rather than simply being based on general views about what ought to be the case). NB if the adviser/representative has been involved in more than one

case or potential case, attempt, wherever possible to distinguish views based on the case in question, from views based more generally on cases experienced.

Interviewers should ensure that they are fully briefed, before the interview, on all the facts about the potential case of which we are currently aware (including interview notes from the applicant if available), and should, wherever, possible, formulate the questions used in terms of the details of the case in question, rather than in general terms.

Note: where possible, interviews will be tape-recorded. Make sure that you have the interviewee's consent for this, and explain that this is to make it easier for us not to have to take notes during the interview. Stress confidentiality, and explain that the tapes will be erased once we have taken notes from them. If the interviewee has any concerns about the tape recording, conduct the interview without it, and take notes accordingly.

6.1.1 Introduction

Explain project, and objectives.

Explain purpose of case-studies, and how they fit into the project as a whole, and stress confidentiality/anonymity of information collected.

Ask interviewee to describe the nature of their organisation, where relevant — *eg* if they are legal representatives, do they always represent applicants or sometimes represent respondents; if advice organisations, what is their remit, main client group(s) *etc.*

When, and how did they first become aware of the DDA? In particular were they aware of it before the case in question.

Have they been involved in any other DDA cases? How many?

Part II only or Part III as well? Obtain brief details.

Had they had any training on advising/representing DDA cases? (get details)

Any more general disability awareness/equality training?

Previous experience of advising/litigating on DDA?

Awareness of the Act and information pertaining to it: (*NB it will not be practicable to test interviewees' detailed knowledge of the Act, but we should explore the extent to which they have, or have read, some of the relevant literature)*. Ask what information and literature they have copies of, and/or have read about the Act. Check for:

- the Act itself
- regulations made under the Act
- statutory guidance on the meaning of disability
- employment code of practice
- guidance literature issued by official or related sources: especially DRC or Equality Commission in NI
- guidance literature issued by other sources: Trade Unions, trade associations *etc.* (*specify*)

6.1.2 Origins of case and awareness of DDA

This section is concerned with the adviser/representative's account of how they came into contact with the potential applicant, and when and how they realised that they had a potential DDA case.

Ask the interviewee to describe in their own words, the background to the case:

- The act of (alleged) discrimination, when and how it

occurred, and any relevant background circumstances.

- When and how did the interviewee become involved in the potential case
- At what stage, and why, did they realise that the circumstances amounted to or might amount to discrimination under the DDA?
- Did they themselves seek further advice or guidance at any stage; from whom? when? Any involvement of DRC or ECNI?
- Did the potential claimant appear to be aware of the DDA in general terms before contact with the interviewee?
- Did the potential claimant appear to be aware of the DDA in respect of how it applied to their particular case before contact with the interviewee?
- Was the interviewee the main or first source of the claimant's knowledge of the DDA?

In the interviewee's view, did discrimination for a reason related to the potential claimant's disability

- Was there less favourable treatment of the disabled person in comparison with other persons?
- If yes, was it for a reason related to their disability?
- If yes, what was the justification?

How confident were they from the outset, about their client's chances of winning the case? And why? Did this perception change? And why?

Establish (or confirm) whether they viewed the case as a potential 'stand alone' DDA case, or whether any other jurisdiction(s) might have been involved (and which ones). Did they regard the DDA element as the 'main' part of the case, or did they primarily see it as (for example) a question of

unfair dismissal, with the disability element a more minor part. Did their view on this change at any stage? If so, why?

6.1.3 Reasons why the case was not pursued

Examine, in particular:

- Whether they advised the potential applicant to pursue or not to pursue a case.
- What were their reasons for giving this advice? Were any of the following factors involved:
  - Perceived likelihood of success (*Explore reasons for answer)*
  - Thought potential applicant might not meet the criteria for a disabled person
  - Cost of pursuing the case which potential applicant could not meet
  - Adviser having to prioritise what cases can be supported and did not have the resources for this one
  - Potential applicant not very keen to take legal route
- In their view did the potential applicant agree with their advice or take a different view. If different, what was the applicant's view?
- How far do they think the decision not to pursue the case was a 'free choice' on the part of the potential applicant (*eg* where they discovered or decided that there was little chance of success, or that in fact they had no case under the Act),
- How far it was constrained by external factors - *eg* financial concerns about the cost of taking the case; concerns or fears about the process itself;
- How far it was constrained by personal factors affecting

the potential applicant (*eg* their own health or potential impact on their family).

■ Following the decision not to pursue the case, to your knowledge did the potential claimant take any further action, and if so, what was this?

6.1.4 General issues

■ Now, looking back do they feel that the decision not to pursue the case was the right one for the potential applicant? Explore whether the reasons for their view are related to legal issues and/or to personal circumstances of the potential claimant..

■ Are there any changes to the process of taking a DDA case that might make a difference to potential applicants like this person – *ie* encourage them not to drop a case *etc*..

■ On the basis of their experience in this case, what problems do they identify in advising on DDA cases?

❍ availability of support/information/finance for potential applicants;

❍ shortage of advisers/representatives with knowledge/expertise about DDA;

❍ complexity of legislation (*probe on which parts of the law*)

❍ difficulties in predicting success

❍ any others?

7. Case-Study Discussion Guide: Claimants Part III Cases (actual cases, ongoing or completed)

Note for interviewers:

The content of the interview will vary with the content of the case in question, and cannot be generally specified for all cases in advance. The discussion guide should be used as an "aide memoire" to prompt the main areas of questioning. Some questions will not be relevant to all cases. If the case is ongoing rather than completed, questions should be adjusted appropriately.

The aim of the interview is to obtain as much information as possible on the interviewee's experience of the case, and their views about the way in which the DDA operated in that case - strengths, weaknesses, barriers etc.

The interviewee should be encouraged to "tell their story" of the case, in their own words. The interviewee should not be restricted to answering specific questions in the discussion guide, but should also be encouraged to describe their experience of the Act, and to raise any issues which they regard as important or relevant.

Where the interviewee offers an opinion or view about the way the Act is operating, the interviewer should attempt to establish the facts on which the opinion is based, and the extent to which the opinion is based on experience of the

case in question (rather than simply being based on general views about what ought to happen).

Interviewers should ensure that they are fully briefed, before the interview, on all the facts about the case of which we are currently aware (including interview notes from other parties in the case study), and should, wherever, possible, formulate the questions used in terms of the details of the case in question, rather than in general terms.

Note: where possible, interviews will be tape-recorded. Make sure that you have the interviewee's consent for this, and explain that this is to make it easier for us not to have to take notes during the interview. Stress confidentiality, and explain that the tapes will be erased once we have taken notes from them. If the interviewee has any concerns about the tape recording, conduct the interview without it, and take notes accordingly.

7.1.1 Introduction

Explain project, and objectives.

Explain purpose of case-studies, and how they fit into the project as a whole, and stress confidentiality/anonymity of information collected.

Ask interviewee to describe the nature of their impairment/disability, its date of onset (where relevant) and its main effects on normal day-to-day activities and their ability to work.

Ask interviewee if they are prepared to give their age and ethnic origin.

7.2.1 Origins of case

This section is concerned with the claimant's account of how

the case came about; when and how they realised that they had a potential DDA case, and what prompted them to pursue it.

Ask the claimant to describe in their own words, the background to the case:

- details of the organisation/service provider against which the case was taken (nature of the services provided; sector and size of organisation, if known)
- the act of discrimination, when and how it occurred, and any relevant background circumstances. (*What was the nature of the goods/facilities/services that the claimant was seeking to access, what were the barriers to access etc., what reasons were given at the time for any denial of access, or for any discrimination in the standard of service provided etc)*
- Was this the first occasion that the claimant had experienced this discrimination from the provider concerned? (*If there were previous occasions, obtain details about their occurrence and any action they had taken.*)
- When and how did the claimant realise that the circumstances amounted or might amount to discrimination under the DDA?
- Were they in receipt of advice at this stage in deciding whether they had an actionable claim? If so, from whom, and how did this advice come about (how did they come into contact with the adviser, were they referred to him/her; by whom; and why did they choose them *etc.*)
- Did they raise the issue with the service provider before starting legal proceedings; did they take it through any other procedure (*eg* customer complaints procedure *etc.*); and if so, what response did they receive and what

happened as a result?

- Was there any attempt to resolve/settle/conciliate the situation? and if so, was this before or after legal proceedings were initiated? (*see also 4.2 below)*

When, and how did they first become aware of the DDA? In particular were they aware of it before the case in question? Were they aware that it covered access to services and not just employment?

What prompted them to bring a claim (or consider bringing one). *eg* desire for justice; desire to publicise case for others; wanted a settlement (financial); *etc.* (*do not prompt initially)*

How confident were they from the outset, about their chances of winning the case? And why? Did this perception change? And why?

Had they previously considered themselves to be a disabled person?

7.1.3 Advice, support, representation and conciliation

Did they experience any difficulty finding someone to advise them about the case? If so, ask for details about these difficulties.

Identify all third parties involved in the case on claimant's side or as conciliator, including

- advisers whether formal (*eg* CAB, disability organisation, solicitor, etc.) or informal (friend, relative, colleague etc.)
- representatives (where they were represented at any hearing) *eg* solicitor, barrister etc.

- conciliators
- any involvement of/contact with the DRC (*eg* via that helpline) or the Equality Commission in NI.

For each type of involvement, identify how and when the third party became involved, reasons for choice of adviser/rep, and any links (including cross-referrals) between them.

Establish whether the claimant paid any of the third parties involved for their participation in the case (*if possible establish amount of payment, but treat this question sensitively*). Establish also:

- the extent of any *pro-bono* involvement (*eg* where legal advisers were prepared to take or advise on DDA cases without a fee);
- where the case was actually taken, whether any legal representation was provided on a "no win, no fee" basis or a contingency fee basis.
- whether the claimant received any financial support from a third party to pursue the case (if so, from whom and how much?)

Obtain their views on the quality of any advice, support and representation they received in the case (at any stage), where appropriate. For example, for all third parties involved (advisers, solicitors, barristers) ask:

- How satisfied they were with the role played by each of these parties; and
- If satisfied or unsatisfied to any extent, why was this?

Was there any (further) advice, support or representation which the claimant would have liked to have had in the case, but which they did not receive? If so, what? and why was it not

received (cost, availability etc)?

If the claimant did not have any representation, do they feel that this had any effect on the course of the case? What effect?

7.1.4 Withdrawn or settled cases (*section to be asked only in those cases)*

Cases withdrawn before a hearing

Establish:

Claimant's reasons for withdrawal in their own words; but identify, where possible,

- how far withdrawal was a 'free choice' on the part of the claimant (*eg* where they discovered or decided that there was little chance of success, or that in fact they had no case under the Act),
- how far it was constrained by external factors - *eg* financial concerns about the cost of taking the case; concerns or fears about the process itself;
- how far it was constrained by personal factors (*eg* their own health).

Timing of withdrawal, and in particular whether it occurred following any court hearings, and if so why did they withdraw at this stage?

Involvement of any other parties in the decision to withdraw; which parties and what role did they play?

Do they still feel that withdrawal was the right decision? How satisfied are they with the outcome?

Settled cases

Establish:

Timing of settlement (*eg* without summons being issued; after summons, but before any court hearing; a court hearing)

Circumstances of settlement:

- who initiated the settlement process
- who else was involved (adviser, legal rep, conciliator)
- terms of settlement (*handle question sensitively, and stress confidentiality*) Check whether a confidentiality clause was involved in the settlement (*if so, do not pursue for fear of voiding the settlement agreement*)

Claimant's satisfaction with settlement outcome.

7.1.5 Heard cases

Establish (or confirm) what the outcome was and any remedy or award made.

What were the most important factors which influenced the outcome of the case (positively or negatively)? *do not prompt initially but we are looking for factors such as:*

- the role and quality of representation,
- advice or conciliation;
- financial resources;
- the quality of the medical or other evidence presented;
- attitude of court; etc. etc.

Was the county court (sheriff court in Scotland) accessible to their disability (NB establish accessibility both in terms of

physical aspects of the premises, but also the accessibility of the process and hearing itself.)

What adjustments, if any, did the court make for their disability?

Did the court understand the nature of their disability/impairment?

General satisfaction with how the court:

- handled case;
- decided case; and
- explained decision.

Overall, how clear did they find the court proceedings?

General satisfaction with:

- time taken for case to come to court
- duration of case/hearings

Overall satisfaction with the outcome of the case, including the level of any compensation they received if successful.

Ask of all claimants:

Finally, what impact do you consider the case has had on you? In particular, has it had any impact on your physical or mental health? Would you encourage anyone else in your position to take a similar case and what would be your reasons?

Close interview with thanks. Stress confidentiality etc

8. Case-Study Discussion Guide: Defendants Part III Cases (actual cases, ongoing or completed)

Note for interviewers:

The content of the interview will vary with the content of the case in question, and cannot be generally specified for all cases in advance. The discussion guide should be used as an "aide memoire" to prompt the main areas of questioning. Some questions will not be relevant to all cases. If the case is ongoing rather than completed, questions should be adjusted appropriately.

The aim of the interview is to obtain as much information as possible on the interviewee's experience of the case, and their views about the way in which the DDA operated in that case - strengths, weaknesses, barriers etc.

The interviewee should be encouraged to "tell their story" of the case, in their own words. The interviewee should not be restricted to answering specific questions in the discussion guide, but should also be encouraged to describe their experience of the Act, and to raise any issues which they regard as important or relevant.

Where the interviewee offers an opinion or view about the way the Act is operating, the interviewer should attempt to establish the facts on which the opinion is based, and the extent to which the opinion is based on experience of the

case in question (rather than simply being based on general views about what ought to be the case). NB if the defendant has been involved in more than one case or potential case, attempt, wherever possible to distinguish views based on the case in question, from views based more generally on cases experienced.

Interviewers should ensure that they are fully briefed, before the interview, on all the facts about the case of which we are currently aware (including interview notes from other parties in the case study), and should, wherever, possible, formulate the questions used in terms of the details of the case in question, rather than in general terms.

Note: where possible, interviews will be tape-recorded. Make sure that you have the interviewee's consent for this, and explain that this is to make it easier for us not to have to take notes during the interview. Stress confidentiality, and explain that the tapes will be erased once we have taken notes from them. If the interviewee has any concerns about the tape recording, conduct the interview without it, and take notes accordingly.

8.1.1 Introduction

Explain project, and objectives.

Explain purpose of case-studies, and how they fit into the project as a whole, and stress confidentiality/anonymity of information collected.

Ask interviewee to describe the nature of their organisation (and relevant establishment, if different):

- main activities (sector and type of services);
- size of organisation/establishment
- part of organisation/establishment in which (alleged) discrimination occurred

Establish (where not already known):

- interviewee's position and role within the organisation;
- their involvement/contact with the case in question

When, and how did they first become aware of the DDA? In particular were they aware of it before the case in question?

Whether there is someone within their organisation who specifically deals with DDA Part III issues, and whether they feel that person has enough time to address these issues.

8.1.2 Origins of case

This section is concerned with the defendant's account of how the case came about;

Ask the defendant to describe in their own words, the background to the case:

- the act of (alleged) discrimination, when and how it occurred, and any relevant background circumstances.
- In this case, had the DDA complaint been raised with them prior to legal proceedings being issued? If so, with whom in their organisation had it been raised and what action had followed?
- Was the case pursued through any internal or industry-based procedures (*eg* customer complaints procedure, ombudsman, trade arbitration or conciliation procedures) before litigation? If yes, ask them to describe the outcome.
- When and how did the defendant realise that the circumstances amounted to or might be regarded as potential discrimination under the DDA?
- What was their initial reaction to the notification of the claim/summons?

- Were they in receipt of advice at this stage? If so, from whom, and how did this advice come about (how did they come into contact with the adviser, were they referred to him/her; by whom, and why did they choose them etc.)?
- Did they experience any difficulties in obtaining advice? If so, ask them to describe the difficulties.

Did they consider the claimant to be a disabled person? if no, was this because

- they have no direct knowledge of the claimant;
- they were unaware of the claimant's disability; or
- they were aware of the claimant's condition, but did not regard it as a disability?

What attempts were made, if any, to compromise or settle the claim? (*NB settled cases considered further below)*

Were any adjustments offered or made to accommodate the applicant's disability?

if yes, establish

- Nature of adjustment offered/made, and timing (*eg* before, during or after the DDA claim).
- Reasons why adjustment(s) were offered/made (*eg* defendant recognised they were in the wrong; part of conciliation or attempt at settlement)

In the interviewee's view, did discrimination for a reason related to the claimant's disability occur? In particular:

- Was there less favourable treatment of the disabled person in comparison with other persons?
- If yes, was it for a reason related to their disability?
- If yes, what was the justification?

How confident were they from the outset, about their chances of winning the case? And why? Did this perception change? And why?

8.1.3 Advice, support, representation and conciliation

Identify all third parties involved in the case on the defendant's side or as conciliators, including

- Advisers (*eg* employer/trade organisation, health and safety or medical adviser, insurance company, solicitor, *etc.*). NB distinguish between in-house and external advisers
- Representatives (where they were represented at any hearing) *eg* solicitor, barrister etc.
- Conciliators
- Any involvement of/contact with the DRC (*eg* via the helpline), or the Equality Commission in NI

In each case, identify how and when the third party became involved, reasons for choice of adviser/rep, and any links (including cross-referrals) between them.

Obtain their views on the quality of any advice, support and representation they received in the case (at any stage), where appropriate. Ie, for all third parties involved (advisers, solicitors, barristers) ask:

- How satisfied they were with the role played by each of these parties; and
- If satisfied or unsatisfied to any extent, why was this?

Was there any (further) advice, support or representation which they would have liked in responding to the DDA claim, but which they did not have? If so, what? And why (cost,

availability, lack of awareness *etc.*)?

If the respondent was not represented or advised in the case, do they feel that this has had any effect on the course of the case? What effect?

8.1.4 Withdrawn or settled cases (section to be asked only in those cases)

4.1 Cases withdrawn before a hearing

Establish:

Defendant's understanding of the reasons for the case being withdrawn. NB treat sensitively, but try to ascertain whether withdrawal was entirely driven by the claimant, or whether 'encouragement' on the part of the defendant or its agents was also relevant.

Settled cases

Establish:

Timing of settlement (*eg* without summons being issued; after summons, but before any court hearing; after court hearing)

Circumstances of settlement:

- who initiated the settlement process
- who else was involved (adviser, legal rep)
- terms of settlement (handle question sensitively, and stress confidentiality)

Defendant's satisfaction with settlement outcome.

8.1.5 Heard cases

What legal process was involved? Was it:

- County court small claims procedure?
- Ordinary procedures of the county court? or
- High Court proceedings (*unlikely*)?

Establish (or confirm) what the outcome was and any remedy or award made.

What were the most important factors which influenced the outcome of the case (positively or negatively)? *do not prompt initially but we are looking for factors such as.*

- the role and quality of representation, advice or conciliation;
- financial resources;
- medical or other evidence presented;
- attitude of court; etc. etc.

Defendant's general satisfaction with how the court

- handled case;
- decided case; and
- explained decision.

General satisfaction with:

- time taken for case to come to court
- duration of case/hearings

8.1.6 General issues of policy/practice

Does the organisation/establishment have a specific personnel/HR function or department?

Does the organisation have an EO or diversity policy? (if yes, establish whether it is a written policy)

Does the organisation have a disability policy? if yes, is it specific disability policy, or part of wider EO policy? (in all cases, establish whether policies are written policies).

Obtain copies of written policies if possible/appropriate

Is the employer a Disability Symbol user?

Is there a member of management designated to deal with DDA/disability issues?

Had staff/managers undergone external DDA training or disability awareness or equality training? (If yes, establish whether this was prior to the case being brought or subsequently).

Had staff/managers undergone internal DDA training or disability awareness/equality training? (If yes, establish whether this was prior to the case being brought or subsequently).

How did their experience of defending a DDA case differ, if at all, from previous experience of defending litigation?

Does the organisation have any previous experience of DDA cases (part II or part III?)

What lessons have been learnt as a result of the case? *eg* will it result in any changes of policy or practice? (*If yes, probe on what sort of changes, such as changes to premises or to the way in which customers are served.)*

Does the interviewee have any general views on the DDA, and do they see any particular problems with the legislation?

9. Case-Study Discussion Guide: Advisers/ Representatives Part III Cases (actual cases, ongoing or completed)

Note for interviewers:

The content of the interview will vary with the content of the case in question, and cannot be generally specified for all cases in advance. The discussion guide should be used as an "aide memoire", to prompt the main areas of questioning. Some questions will not be relevant to all cases. If the case is ongoing rather than completed, questions should be adjusted appropriately.

In particular, the detail of the interview will need to be adjusted according to whether the adviser/representative is representing the claimant or the defendant in the case.

The aim of the interview is to obtain as much information as possible on the interviewee's experience of the case, and their views about the way in which the DDA operated in that case - strengths, weaknesses, barriers etc.

The interviewee should be encouraged to "tell their story" of the case, in their own words. The interviewee should not be restricted to answering specific questions in the discussion guide, but should also be encouraged to describe their experience of the Act, and to raise any issues which they

regard as important or relevant.

Where the interviewee offers an opinion or view about the way the Act is operating, the interviewer should attempt to establish the facts on which the opinion is based, and the extent to which the opinion is based on experience of the case in question (rather than simply being based on general views about what ought to be the case). NB if the adviser/representative has been involved in more than one case or potential case, attempt, wherever possible to distinguish views based on the case in question, from views based more generally on cases experienced.

Interviewers should ensure that they are fully briefed, before the interview, on all the facts about the case of which we are currently aware (including interview notes from other parties in the case study), and should, wherever, possible, formulate the questions used in terms of the details of the case in question, rather than in general terms.

Note: where possible, interviews will be tape-recorded. Make sure that you have the interviewee's consent for this, and explain that this is to make it easier for us not to have to take notes during the interview. Stress confidentiality, and explain that the tapes will be erased once we have taken notes from them. If the interviewee has any concerns about the tape recording, conduct the interview without it, and take notes accordingly.

9.1.1 Introduction

Explain project, and objectives.

Explain purpose of case-studies, and how they fit into the project as a whole, and stress confidentiality/anonymity of information collected.

Ask interviewee to describe the nature of their organisation,

where relevant — *eg* if they are legal representatives, do they represent both types of parties or focus on the claimant or defendant side; if advice organisations, what is their remit, main client group(s) *etc.*?

When, and how did they first become aware of the DDA? In particular were they aware of it before the case in question?

Have they been involved in any other DDA cases? How many? Part 111 cases only or Part 11? Obtain brief details.

Financial circumstances of their involvement in the case (are they being paid by the party, is it *pro bono*, is it a conditional fee arrangement, a "a no win, no fee" arrangement; is there a subsidy from any source *etc.*)

Had they had any training on advising/representing DDA cases? (get details)

Any more general disability awareness/equality training?

Previous experience of advising/litigating on DDA?

Awareness of the Act and information pertaining to it: (*NB it will not be practicable to test interviewee's detailed knowledge of the Act, but we should explore the extent to which they have, or have read, some of the relevant literature)*. Ask what information and literature they have copies of, and/or have read about the Act. Check for:

- the Act itself
- regulations made under the Act
- statutory guidance on the meaning of disability
- goods and services code of practice
- guidance literature issued by official or related

sources: especially DRC or Equality Commission in NI

- guidance literature issued by other sources: disability organisations, Trade Unions, trade associations *etc.* (*specify*)

9.1.2 Origins of case

This section is concerned with the adviser/representative's account of how the case came about; when and how they realised that they had a potential DDA case, and what prompted them to pursue/defend it.

Ask the interviewee to describe in their own words, the background to the case:

- The act of (alleged) discrimination, when and how it occurred, and any relevant background circumstances.
- When and how did the interviewee become involved in the case?
- At what stage, and why, did they realise that the circumstances amounted or might amount to discrimination under the DDA?
- Did they themselves seek further advice or guidance at any stage; from whom? when? Any involvement of the DRC?

Was the claimant/defendant aware of the DDA (in general terms, or as it applies to their case) before contact with the interviewee? Was the interviewee the main or first source of the claimant/defendant's knowledge of the DDA?

In the interviewee's view, did discrimination for a reason related to the claimant's disability occur? In particular:

- Was there less favourable treatment of the disabled person in comparison with other persons?

- If yes, was it for a reason related to their disability?
- If yes, what was the justification?

How confident were they from the outset, about their client's chances of winning the case? And why? Did this perception change? And why?

9.1.3 Withdrawn or settled cases (*section to be asked only in those cases)*

Cases withdrawn before a hearing

Establish:

Adviser/representative's interpretation of claimant's reasons for withdrawal. Examine, in particular:

- How far withdrawal was a 'free choice' on the part of the claimant (*eg* where they discovered or decided that there was little chance of success, or that in fact they had no case under the Act),
- How far it was constrained by external factors - *eg* financial concerns about the cost of taking the case; concerns or fears about the process itself;
- How far it was constrained by personal factors (*eg* their own health).
- (*where adviser/rep is acting for claimant)* Did they advise withdrawal? why?)

At what stage did the withdrawal take place and why? (*eg*, before the planned hearing, after a directions hearing etc.)

Settled cases

Establish:

Timing of settlement (*egbefore the planned hearing, after a directions hearing etc.*)

Circumstances of settlement:

- Who initiated the settlement process
- Who else was involved (adviser, legal rep, conciliator)
- Did interviewee advise their party to settle? why (or why not?)
- Terms of settlement (*handle question sensitively, and stress confidentiality*); Check whether a confidentiality clause was involved in the settlement (*if so, this might constrain the interview for fear of voiding the settlement agreement*)

Adviser/rep's view on whether settlement outcome is satisfactory.

9.1.4 Heard cases

What legal process was involved? Was it:

- County court small claims procedure?
- Ordinary procedures of the county court? or
- High Court proceedings (*unlikely*)?

Establish (or confirm) what the outcome was and any remedy or award made ?

What were the most important factors which influenced the outcome of the case (positively or negatively)? *do not prompt initially but we are looking for factors such as*:

- the role and quality of representation, advice or conciliation;
- financial resources;

- medical or other evidence presented;
- attitude of Court; etc.
- judiciary's understanding of DDA cases

Adviser/representative's view on how the court

- handled case;
- decided case; and
- explained decision.

Adviser/rep's view (where relevant) on:

- time taken for case to come to court
- duration of case/hearings

(*where adviser/rep acted for claimant*): Any barriers or difficulties for client in using the court system?, *eg*

- Was the court accessible to their disability? (*NB establish accessibility both in terms of physical aspects of the premises, and also the accessibility of the process and the hearing itself)*
- What adjustments, if any, did the court make for their disability?
- Did the court understand the nature of their disability?

Any issues arising (if not already covered, and *where relevant*) relating to the court procedures:

- interpretation of definition of disability under the Act?
- knowledge of the Act and supporting guidance, codes of practice?
- use of medical evidence; witnesses *etc.*;
- understanding and application of "less favourable treatment" formula

- application of the “justification” defence;
- use and application of their remedy powers;
- application of “out of time” rules
- any other issues

9.1.5 General issues

On the basis of their experience in this case, what problems do they identify in advising on/litigating in Part 111 DDA cases?

(*where adviser/rep acted for claimant)*: Any other barriers (not already mentioned) to use of DDA for client? *eg*

- availability of support/information
- cost of taking the case;
- lack of knowledge/expertise about DDA among solicitors/advisors;
- stress involved in taking a case and possible impact on health *etc.*
- any others?

If any conciliation involved in case:

- how effective was conciliation process?
- were conciliators adequately trained/experienced on DDA/disability issues

Impact of case

Finally, are you aware of any impact that the case has had on the claimant or defendant? (*eg on physical or mental health of claimant, or on business etc. of defendant)*

Close interview with thanks. Stress confidentiality etc

Notes

You can contact the DRC Helpline by voice, text, fax, post or email. You can speak to an operator at any time between 08:00 and 20:00, Monday to Friday.

If you require this publication in an alternative format and/or language please contact the Helpline to discuss your needs. It is also available on the DRC website: **www.drc-gb.org**

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