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**Advice for Unions on the 2006  
Disability Equality Duty**  
prepared for the TUC by the Disability  
Rights Commission  
September 2007

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## **The Disability Equality Duty and Trade Unions**

This is a supplement to the Advice for Unions on the 2006 Public Sector Disability Equality Duty (revised edition, June 2006), with advice prepared by experts at the Disability Rights Commission on how the law can be used by trade unions to strengthen their negotiating position with employers subject to the Disability Equality Duty.

**Disability  
Rights  
Commission**

## **The Disability Equality Duty and Trade Unions**

### **How to use the duty effectively**

This note builds on “Advice for Unions on the 2006 Public Sector Disability Equality Duty (revised edition June 2006)” and has been prepared by the Disability Rights Commission in consultation with the TUC. It explains how the law can be used by trade unions to strengthen their negotiation position with employers subject to the DED.

### **What the DED requires: summary**

The Disability Equality Duty came into force in December 2006.

The Duty, known as the general duty, requires every public authority, in carrying out its functions, to have due regard to the need to:

- Promote equality of opportunity
- Eliminate unlawful discrimination
- Eliminate disability related harassment
- Promote positive attitudes towards disabled people
- Encourage participation by disabled people in public life
- Take steps to take account of disabled person’s disabilities, even where that involves treating disabled people more favourably than others

Regulations made under the Disability Discrimination Act 1995 (as amended by the DDA 2005) require certain listed public authorities to produce disability equality schemes which set out how the authority is going to meet its general duty and its duties under the regulations. Most of these had to be in place by 4<sup>th</sup> December 2006.

The Disability Equality Scheme should include:

- A statement of how disabled people have been involved in the development of the scheme
- The authority's methods for assessing the impact of its policies and practices, or likely impact of its proposed policies and practices, on equality for disabled people (impact assessment)
- The steps which the authority proposes to take towards fulfilling its general duty (the action plan)
- Arrangements for gathering information on the effect of its policies and practices on disabled people and in particular its arrangements for gathering information on:
  - Their effect on recruitment, development and retention of disabled employees
  - Their effect, in relation to an educational body or local education authority, on the educational opportunities available to, and on the achievements of, disabled pupils and students, and
- The extent to which in the case of other authorities the services it provides and other functions it performs take account of the needs of disabled persons
- The authority's arrangements for making use of the information it has collected, in particular for reviewing the effectiveness of the steps in the action plan; and preparing subsequent schemes

An authority must, within three years of the scheme being published, take the steps set out in the action plan and put into effect its arrangements relating to information. It also has to report annually on the steps set out in the action plan which the authority has taken; the results of the information gathering and the use it has made of the information.

## **So now that the schemes are in place, how should the duty be used?**

Getting Disability Equality schemes in place was only the beginning of the work on disability equality. The key to making

the duties successful is to ensure that disability is truly mainstreamed throughout the organisation. Unions have a key role to play in keeping up the pressure on this.

### **To start with..**

Make sure that you have a copy of your authority's disability equality scheme. You can use this to see if any issue you are dealing with is raised there; whether there are any steps the authority has committed to that it has not taken; and to see how the authority reports at the end of the year.

### **Bargaining**

When bargaining around, for example, pay, terms and conditions for employees, introduction of new HR policies etc, Unions can use the duties to ensure that proper regard is had to disability equality. Any new practices policies or procedures should be subject to disability equality impact assessments. These should identify any potential adverse impact, as well as any missed opportunity to actively promote equality, and indicate how it is proposed that any adverse impact be dealt with. They should consider every aspect of the duty – so not just promoting equality of opportunity generally, and eliminating discrimination and harassment, but also promoting positive attitudes, and public participation.

Similarly, when dealing with issues relating to disabled members of the workforce – for example, the introduction of a new IT system – ensure that an impact assessment has been done in relation to it. Also, remember that the requirement to have due regard to the need to eliminate discrimination adds an anticipatory element to the duty to make reasonable adjustments – in the case of IT introduction, public sector employers should think in advance about the effect that introducing a new system will have and whether it might lead to discrimination (i.e. a failure to make reasonable adjustments).

### **What if there isn't an impact assessment?**

If a public authority has not undertaken an impact assessment, it will be very difficult – if not impossible – for them to show that they have had due regard to the need to promote disability equality. It would be possible in these circumstances for a trade union to challenge a decision on the basis that the public authority is in breach of its statutory duty to promote disability

equality and to take legal action on this basis. It would do this by means of “judicial review”, which is defined as being a claim to review the lawfulness of an enactment; or a decision, action or failure to act in relation to the exercise of a public function

### **How have the duties been used so far in legal action?**

It is only relatively recently that people have begun to use the duties in legal proceedings. The first time that a court fully considered the equivalent duty to promote race equality was in the case of *Elias v Secretary of State* [IRLR] 2005 788. Mrs. Elias was born in Hong Kong in 1924 and registered as a British subject. She and her family were interned by the Japanese until the liberation of Hong Kong in 1945. As a result, she suffered serious psychological effects. However, she could not benefit from the UK government’s non-statutory compensation scheme for those who were interned by the Japanese, because, so far as civilian internees were concerned, the scheme was restricted to “British civilians”. For the civilian internee to qualify, they either had to have been born in the UK or have a parent or grandparent born in the UK. She brought proceedings for judicial review claiming that the criteria adopted operated as direct discrimination on grounds of national origins or, alternatively, that they are indirectly discriminatory and could not be justified.

As well as holding that the scheme was indirectly discriminatory, the Court held that the Secretary of State was also in breach of his duties under s.71 of the Race Relations Act as amended, which requires specified persons, in carrying out their functions, to have due regard to the need to eliminate unlawful racial discrimination. The court said that given the obvious discriminatory effect of the scheme, the Secretary of State could not possibly have properly considered the potentially discriminatory nature of the scheme and assumed that there was no issue which at least needed to be addressed. Nor was it sufficient that there was careful consideration of the policy during the course of the litigation. The purpose of s.71 is to ensure that the body subject to the duty pays due regard at the time the policy is being considered – that is, when the relevant function is being exercised – and not when it has become the subject of challenge.

More recently, both the race equality and the disability equality duties were raised in a case where the decisions of the National Institute for Clinical Excellence (NICE) were challenged. In the case of *EISAI Ltd and NICE (defendant) The Alzheimers Society (1st Interested Party) - and – Shire Pharmaceuticals Ltd( 2nd Interested Party)* Case No: CO/85/2007, one of the grounds of challenge to NICE's decision on the use of a particular drug for the treatment of early stage alzheimers was that there was a failure by NICE, both in its Appeal panel and the drafting of its guidance, to consider its anti-discrimination obligations and its obligations under the equality duties both in relation to disability and race (in particular as the guidance discriminated against those with learning difficulties and whose first language is not English). Whist the case failed on the majority of grounds, the court did hold that the approach of the Appeal Panel was flawed, in that no proper consideration was given to NICE's duties as a public authority to promote equal opportunities and to have due regard to the need to eliminate discrimination. It was unreasonable and unlawful to overlook that responsibility. A similar view is taken of the Guidance, particularly as there is no evidence that before issuing the Guidance the "due diligence" duties were considered or complied with or that any thought was given to present or imminent obligations under anti-discrimination law. The Court ordered NICE To revise its guidance.

## How would a union be able to take action?

In order to bring a judicial review, a Union would have to demonstrate that it had 'standing', that is a 'sufficient interest' in the proceedings. In practice a broad approach is taken to the question whether a person seeking judicial review has a 'sufficient interest' so that for example responsible and relevant pressure groups will be regarded as having 'standing' to apply for judicial review. It is not uncommon for trade unions to seek judicial review – for example, seven trade unions challenged the new regulations on sexual orientation on the basis that they did not meet the requirements of the EU Directive (R (on the application of Amicus – MSF section and others) v Secretary of State for Trade and Industry and Christian Action Research

Education and others (Interveners), [2004] IRLR 430). Where the issue relates to a matter which affects or potentially affects their membership and falls within the broad business of the trade union concerned the a Union should have standing.

If a trade union discovers for example that a local authority employer has failed to have 'due regard' to the matters set out in the general disability duty - as evidenced by the absence of any proper impact assessment - in developing a 'capability' or sickness procedure, or in respect of recruitment and promotion policies; flexible working policies; pay and bonus policies, reasonable adjustment policies; and potentially in procurement, it may seek judicial review of their decision.

## **What can the court do?**

A successful judicial review might result in a quashing order (as its name suggests, quashing any unlawful action) or an order requiring a public authority to do something that the law requires of it (mandatory order) or preventing it from doing something that the law prevents it from doing (prohibiting order). A court may also grant declaratory relief – declaring whether a particular act was lawful or unlawful and, importantly, whether it is valid or void for being *ultra vires*. It is often this declaration – especially when accompanied with publicity – which has the desired effect of altering a public authority's course of action.

## **Individual case work**

Where a union official is representing an individual in a disability issue, the duty can also be used as follows:

- To add force to the duty to make reasonable adjustments. What is "reasonable" for a public authority, with a duty to promote equality, is likely to be greater than an employer without such a duty
- A failure to comply with the duty may be used as evidence of discrimination

- Information gathered to comply with the specific duties can be used to draw an inference of discrimination because a discernible pattern of less favourable treatment is demonstrated

## **In conclusion ...**

The disability equality duty is a powerful tool, which can be used in everyday situations on behalf of disabled members, and which should be an integral part of your bargaining strategy. It can also be used in the courts, and Unions, as well as the Disability Rights Commission and, from October, the Commission for Equality and Human Rights, can use the duty to bring public authorities to account for actions which fail to promote disability equality. Training on the duties will be particularly beneficial, and if you are in any doubt about what you can use the duties in a particular situation, and in particular about what you can say to an employer, you should contact your legal officer.

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