SUMMARY

2013/6 Volunteers without contracts are not protected by discrimination law (UK)

<p>The Supreme Court has ruled that an unpaid Citizens Advice Bureau volunteer (‘X’), who did not have a contract, was not protected by the Disability Discrimination Act 1995 (the ‘DDA’) or the Equal Treatment Framework Directive 2000/78/EC (the ‘Directive’). The Supreme Court refused to refer the matter to the European Court of Justice, on the grounds that the interpretation of the Directive was not open to ‘reasonable doubt’. The DDA was repealed on 1 October 2010 and replaced by the Equality Act 2010, but this contains substantially the same provisions.</p>

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Facts

The case involved X, who volunteered with the Mid Sussex Citizens Advice Bureau (the

'CAB') from 12 May 2006. X had entered into a "volunteer agreement", but this stated that it was "*binding in honour only and [was] not a contract of employment or legally binding*". The agreement stipulated that the CAB hoped to offer X one and a half days per week during her basic training, and 94 sessions per year thereafter. However, the agreement recognised that due to changing personal circumstances, this might not always be possible. X indicated that she would be available to volunteer on Tuesdays, Thursdays and Fridays, but due to health issues, she did not always attend and sometimes changed days. Indeed, she was absent for around 25 to 30% of the proposed working time, but the CAB did not raise any objections to this.

On 21 May 2007, the CAB asked X to cease her volunteer work. X subsequently submitted a claim to the Employment Tribunal (the 'ET'), alleging that she had been discriminated against on the grounds of disability, contrary to the DDA. The CAB denied the claim.

The Employment Tribunal's Decision

Despite X's arguments to the contrary, the ET concluded that there was no contract in place between X and the CAB. Therefore, X could not be considered to be dismissed from 'employment' for the purposes of the DDA, as section 68 of that Act required "*a contract of service or of apprenticeship or a contract personally to do any work*".

Further, the ET found that X was not undertaking a "work placement" within the meaning of section 14C(1) of the DDA, on the basis that the volunteer work was not for a limited period, and it was not for the sole or dominant purpose of vocational training.

X also tried to argue that she came within the scope of section 4(1)(a) of the DDA which prohibits an employer from discriminating against a disabled person in the arrangements made for the purposes of determining who to employ. X claimed that the CAB's volunteering arrangements were used to decide who should be offered employment. However, the ET rejected this argument as the volunteers were not given preferential treatment over external candidates, and it was not the case that volunteers would automatically be given a paid position, should a vacancy arise. The ET decided that the aim of the Directive did not alter the meaning of section 4(1)(a) of the DDA.

The ET therefore held that it did not have jurisdiction to hear X's case, as X was a volunteer, outside the scope of the protection afforded by the DDA and the Directive. X appealed to the Employment Appeal Tribunal (the 'EAT').

The Employment Appeal Tribunal's Decision

X's main argument was that the volunteer arrangements between her and the CAB fell within the ambit of the Directive. She primarily relied on Article 3(1)(a) of the Directive, which prohibits discrimination in "*conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions*", arguing that "occupation" could cover voluntary activity. The judge, Burton J, rejected this contention, concluding that the concept of 'occupation' did not encompass unpaid work. In reaching this decision he pointed to the following: X could not cite any European Law indicating that 'occupation' could mean unpaid employment, there are no express provisions in the Directive extending protection to unpaid voluntary workers, and no European body had suggested that the UK has failed to comply with the obligations under the Directive.

X also reiterated that she fell within the scope of section 4(1)(a) of the DDA. Burton J dismissed this ground of appeal. Given the tribunal's finding of fact, there was no substance in X's allegation that the voluntary arrangements were a "necessary step" towards employment.

The Court of Appeal's Decision

X appealed to the Court of Appeal (the 'CA'), relying on the same arguments. The Equality and Human Rights Commission (the 'EHRC') (supporting X), the Secretary of State for Culture, Media and Sport, and the Christian Institute (both supporting the CAB) were all given permission to intervene and make submissions. The CA dismissed the appeal and upheld the ET's decision.

The CA said that the major issue was whether X could bring herself within the scope of the Directive. It concluded that although a "broad and generous interpretation" should be given to the Directive, X still fell outside its scope. Although the CA's reasoning largely reflects the reasons given by the ET and the EAT, the judge, Elias LJ, raised some interesting points. He commented that the EU concept of 'work' is restricted to paid individuals, and given that the concept of 'occupation' overlaps, he saw no reason to suggest that the latter was intended to cover unremunerated work. Elias LJ also found it to be inconceivable that those drafting the Directive would not have included a specific provision for unpaid workers, had it been their intention for them to be included within its scope. The CA did not consider it necessary to define 'occupation', as it was satisfied that it did not cover X's position.

The Supreme Court's Decision

In an unanimous judgment delivered by Lord Mance, the Supreme Court (the 'SC') dismissed X's appeal, predominantly agreeing with the reasons provided by the CA.

The SC confirmed that since there was no contract in place, X did not prima facie fall within

the DDA, as the definition of 'employment' required a contract between the parties. However, the real question was whether, on proper interpretation, X's voluntary role could fall within the Directive, and more specifically than that, whether it could be considered an 'occupation' for the purposes of Article 3(1)(a). If so, it may have been possible to interpret the DDA in line with the Directive, so as to cover X. In concluding that X's role was not caught by the Directive, the SC explored the following points.

When analysing the development of the Directive over time, the SC noted that its scope had been very carefully defined, various aspects differed according to the context, and it had been amended from time to time following reconsideration by the European Commission (the 'Commission'). As a result, the SC found that "*the Commission clearly did not have in mind voluntary activities as falling within the scope of the reformulated Article 3*" (which refers to 'occupation'). Similarly, the Commission's original proposal and the appended impact assessment, which ultimately resulted in the Directive, focused "*exclusively on situations of employment or self-employment, and did not consider or address voluntary activity in any shape or form*".

Another point advanced by the SC, linked with the above, was that if there had been any intention that the Directive should apply to voluntary activity (and protect dismissed volunteers), one would have expected the concept of 'occupation' to have been extended to Article 3(1)(c), dealing with "employment and working conditions, including dismissals and pay", and not just Article 3(1)(a). The SC found the omission of any reference to voluntary workers to be "quite striking" if they intended to protect them against dismissal on discriminatory grounds. On similar lines, the European Parliament had proposed an amendment to extend Article 3(1)(a) to include 'unpaid or voluntary work', but this was not accepted by the European Council. Consequently the SC noted that X's case "*runs contrary to a deliberate choice made by the European legislator*".

Further, the SC emphasised that the Commission keeps the implementation of the Directive under review, but it had never suggested that the United Kingdom (or any other Member State) had failed to implement the Directive correctly, by failing to include voluntary activity in its remit.

X and the EHRC had submitted that the concept of 'occupation' must be understood as operating alongside and at the same level as 'employment' and 'self-employment', and that accordingly, it must encompass voluntary work. However, when the SC explored the reference to 'occupation' in context, they found that "*access... to occupation*" contemplates access to a sector of the market, rather than particular employment or self-employment. Therefore it would be contradictory to treat 'occupation' as operating on the same level as employment

and self-employment, or as envisaging voluntary work.

Finally, the SC indicated that neither X nor the EHRC had suggested that all volunteers were covered by the Directive. Lord Mance remarked that if some volunteers were caught, and some were not, this would leave us with a multi-factorial test which would lead to uncertainty and disputes.

The SC declined to refer the matter to the European Court of Justice, on the basis that there is no scope for reasonable doubt that the Directive does not cover volunteers. It regarded the English language material as clear, and commented that no other language versions threw any doubt on the conclusion.

Commentary

Disability discrimination is, of course, now covered by the Equality Act 2010 rather than by the DDA. However, essentially the same definition of 'employment' applies (as it does for the purposes of all the protected characteristics under the Act). Accordingly, the SC's ruling can be taken as conclusively establishing that volunteers are not covered by the Equality Act 2010 when they do not have a contract.

Although the SC adopted both a literal and purposive approach in examining the scope of the Directive, looking at both its precise wording and the intentions of the European Commission and European Parliament, it is inconceivable to think that matters of policy were not at the forefront of their minds. In particular, the points made by volunteering organisations supporting the CAB in this case, that an alternative finding would undermine the nature of volunteering and create practical barriers and additional costs for charities and other volunteering organisations.

Although the Supreme Court's ruling is confined to the definition of 'employment' in domestic discrimination legislation, this is not dissimilar to the definition of 'worker' which applies in other employment law contexts. It may therefore be relevant to the status of unpaid interns. It is important to remember that this case turned on specific facts. There was no legally binding contract and no mutuality of obligation (there was no requirement for X to turn up for work, and no requirement for CAB to pay X for her services). Therefore employers would do well to be careful in the arrangements they make for interns or those on work placements. If, for example, there is an obligation to work set hours and the employer is happy to reimburse the individual for expenses they incur, they may, at the very least, be 'workers' for the purpose of working time and minimum wage rights, and be entitled to protection from detriment related to whistleblowing (although the National Minimum Wage Act 1998 expressly excludes genuine volunteers for charitable organisations from its provisions). Further, if the internship

or placement is for the purposes of vocational training, or determining who should be offered employment, the individual may fall within the remit of the Equality Act 2010.

Comments from other jurisdictions

Austria (Martin Risak): In Austria the courts would have had to deal with another legal question, had a similar case been brought there. The Act on Equal Treatment (*Gleichbehandlungsgesetz*) as well as the Act on the Employment of Persons with Disabilities (*Behinderten- Einstellunsgesetz*), which transpose European anti-discrimination legislation, not only cover employees but also "employee-like persons". This group of people is defined as persons who, though they do not work under an employment contract, are similar to employees, due to their economic dependence on their contractual partner. At first glance one might suppose that employee-like persons are only persons who deliver paid work. However, it is arguable that the concept of "employee-like persons" also includes people who deliver unpaid work in situations where it is common to do so in order to gain work experience and where such unpaid "voluntary" work is a quasi- prerequisite for paid employment. Such persons, although they are not paid, are in an economically vulnerable position similar to employees and in the same need of protection against discrimination. There are no published decisions of the Austrian courts dealing with this question, but I do not consider it too unlikely that courts will accept this argument in the future.

Germany (Paul Schreiner): In Germany the same distinction has to be made. If the placement is for the purpose of later employment it will probably fall within the scope of the German Equal treatment Act (*Allgemeines Gleichbehandlungsgesetz*, the 'AGG'), since this also covers the application procedure – which might entail an internship – and applicants are protected under this Act. If the placement is simply for charitable purposes however, the AGG will not apply.

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