X v MID SUSSEX CITIZENS ADVICE BUREAU AND OTHERS [2011] EWCA CIV 28

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In its judgment of 26 January 2011, the Court of Appeal held that neither the Disability Discrimination Act 1995 ("DDA 1995") nor Directive 2000/78/EEC establishing a general framework for equal treatment in employment and occupation ("the Framework Directive") afford protection from discrimination on grounds of disability to unpaid volunteers. The Court has declined to make reference to the ECJ on the correct interpretation of the scope of the Framework Directive.

FACTUAL BACKGROUND

It was common ground for the purposes of these proceedings that the Appellant is disabled within the meaning of that term in the DDA 1995. The nature of the Appellant's disability was not, however, a matter before the Court of Appeal.

The Appellant had a number of practical and academic qualifications in law. In April 2006, she applied to volunteer as a legal adviser at the Respondent citizens advice bureau, indicating that she wished to devote 4 to 5 hours per week to the task. In May 2006, the Appellant signed a volunteer agreement with the Respondent which stated on its face that it was *"binding in honour only … and not a contract of employment or legally binding"*; she then undertook nine months of training with the Respondent, after which she was allowed to act as a voluntary legal adviser – an unpaid role. As a volunteer, the Appellant enjoyed a flexible schedule: she was not required to volunteer at any particular times and was able to change the times at which she did volunteer at short notice or without notice.

In circumstances that were not before the Court of Appeal, the Respondent asked the Appellant to stop attending as a volunteer. The Appellant alleged that the Respondent had terminated her volunteering for reasons connected with her disability, in breach of the DDA 1995.

The sole issue before the Court of Appeal was whether the law on disability discrimination - enshrined in DDA 1995, the Framework Directive – applies to volunteers. The Employment Tribunal and the Employment Appeal Tribunal below had held that it does not.

THE GROUNDS OF APPEAL

In the Court of Appeal, the Appellant argued that the Respondent was prohibited from discriminating against a disabled person in the allocation of volunteering positions by:

(1) Article 3.1(a) of the Framework Directive prohibiting discrimination against the disabled in the *"conditions for access to…occupation",* which should be enforced in the UK either by Marleasing consistent interpretation of the national implementing legislation (DDA 1995) or by giving direct effect to the Framework Directive under the principles developed in C-144/04 *Mangold v Helm* [2004] ECR I-9981 and C-555/07 *Kucukdeveci v Swedex GmbH* ("the European law ground"); or

(2) section 4(1)(a)[1] of the DDA 1995 prohibiting discrimination against the disabled by an employer in the arrangements that it made *"for the purpose of determining to whom [it] should offer employment"* contrary to ("the domestic law ground").

Both grounds were, to some extent, premised on the Appellant's claim that obtaining a voluntary position at the CAB significantly assists the volunteer in gaining a permanent CAB position, noting that there was evidence that in some areas up to 80% of paid CAB advisers had been volunteers first.

The Equality and Human Rights Commission ("EHRC"), intervening on behalf of the Appellant, argued in the further alternative that a volunteer is entitled to protection from disability discrimination on the grounds that:

(1) a volunteer is a "worker" within the meaning given to that term under European law; and/or

(2) the work carried out by a volunteer legal advisor is "vocational" work or training falling within Article 3.1(b) of the Framework Directive.

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1. NB: Section 4 of the DDA 1995 is repealed, subject to savings and transitional provision, with effect from 1 October 2010. Section 39 of the Equality Act 2010, an equivalent provision drafted in almost identical terms, came into force on that date.

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THE COURT OF APPEAL DECISION

The Court of Appeal first considered the domestic law argument. Elias LJ, giving the leading judgment with which Rix and Tomlinson LJJ agreed, held that it was *"obvious"* that the Respondent's purpose in taking on volunteers is to *"secure advisors to provide advice to clients of the CAB; the purpose is not to create a potential pool from which staff can be drawn"* (paragraph 37). He accepted that a by-product of the volunteering process may be to *"improve the employability of the relatively small proportion of volunteers who may at some later date seek a full time position"* (paragraph 38), but that was not the purpose of volunteering. He noted that most voluntary advisors have no wish to become permanent staff members and that all paid CAB positions are externally advertised and open to all. In light of the foregoing, the Appellant's submission that the volunteering position was an arrangement made for the purpose of determining to whom the CAB should offer full time employment, which came under section 4(1)(a) DDA 1995, was rejected. The Court of Appeal rejected the EHRC's argument on vocational training for similar reasons (paragraphs 40 to 42).

Elias LJ went on to consider and reject the Appellant's European law ground. In doing so he stated at paragraph 59:

> *"I wholly reject the premise underpinning the submission of both the appellant and the [EHRC] that because the principle of non-discrimination is so important in EU law, the only reasonable inference is that the Directive was intended to apply to volunteers. The logic of that argument is that the principle should apply to all fields of human activity, but no-one suggests that this is the case. The Directive is plainly limited in its field of operation, and the only question is whether CAB volunteers fall within or without its scope."*

He went on to say that, even on a broad and generous purposive interpretation of the Framework Directive, there was no doubt that the Appellant (an unpaid volunteer without a contract) fell outside the scope of its protection for two key reasons:

1. There is genuine debate about the desirability of bringing volunteers within the scope of anti-discrimination law. In this regard, Elias LJ noted that the European Commission at one stage proposed an amendment to a draft version of the Framework Directive that explicitly extended its application to volunteers. The European Council chose not to introduce the amendment, suggesting that even at European level there are differences of opinion about the treatment of

volunteers (paragraph 60).

2. It is inconceivable that draftsman of the Framework Directive would not have referred specifically to volunteers if the intention was to include them within its scope. Further, the fact that the European Commission thought it necessary to introduce an amendment dealing with volunteers suggests that it considered volunteers to fall outside the scope of the Framework Directive as drafted. The European law concept of a "worker" was restricted to persons who are remunerated for what they do (see, e.g. Kurz v Land Baden-Wurttemberg [2002] ECR I-10691) and there was no reason to suppose that the "overlapping" concept of occupation should cover non-remunerated work (paragraph 61).

Elias LJ considered that the prohibition on discrimination in relation to occupation in the Framework Directive was aimed at the rules of practices restricting entry into a profession or particular sector of the job market rather than a specific job – e.g. the need for lawyers in many Member State to pass a bar exam or similar (paragraph 62).

Having held that the Framework Directive did not apply to the Appellant, Elias LJ declined to comment at any length on the extent to which the Directive might be given effect between private parties in the UK - save to note that he was not attracted to a distinction between Kucukdeveci (where the fundamental European law right to protect from age discrimination as expressed in a particular Directive was given direct effect in a case involving private parties) and the present case based the differing nature of the subject of discrimination (age discrimination vs. disability discrimination). Elias LJ considered that the status of protection from disability discrimination as a fundamental European law right was, at the very least, a question referable to the ECJ.

The Court of Appeal declined to refer the matter to the ECJ, considering its interpretation of the Framework Directive acte claire.

COMMENT

It is interesting to note that in *Kucukdeveci* what the ECJ held to be directly effective as against individuals was *"**the principle of non-discrimination** on grounds of age, as given expression in Directive 2000/78"* (emphasis added). No doubt, part of the ECJ's motivation in so framing its judgment was not to be seen to be departing too radically from the orthodoxy that Directives do not have "horizontal" direct effect. However, if horizontal

direct effect is to be given to the general principle of non-discrimination on grounds of age and not to the Directive itself, it must logically follow that any limitations upon the field of application of the general ***principle*** set out in the Directive are irrelevant when giving direct effect to the principle: otherwise, a court would simply be giving horizontal direct effect to the Directive.

Applying that logic to the present case, one might have argued for the Appellant that the implication of *Kucukdeveci* is that there is general principle of non-discrimination on grounds of disability which ***in itself*** is directly effective as against individuals and which renders all forms of discrimination against disabled persons unlawful, regardless of the ways in which the prohibition on disability discrimination is circumscribed elsewhere in European legislation. There was no attempt to run this argument in this case; and one can readily understand why – if accepted, it would lead courts systematically to ignore the will of the European legislature, an unpalatable outcome.

Nevertheless, the above argument does highlight an important query concerning *Kucukdeveci,* viz. what has direct effect against the individual: the general principle of non-discrimination, the Directive or such parts of the Directive that reflect the general principle? It is a question meriting further reference to the ECJ, which shall have to await a case in which the relevant arguments are made.

Kassie Smith appeared for the Secretary of State in the Court of Appeal

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