

X v Mid Sussex Citizens Advice Bureau & Chalis:

Is a volunteer worker afforded protection from acts of disability discrimination, whether under the Disability Discrimination Act 1995 (and, therefore, by extension the Equality Act 2010) or by recourse to the Framework Directive? The Court of Appeal has decided not, in agreement with both the Employment Appeal Tribunal and the Employment Tribunal. X has sought permission to appeal to the Supreme Court.

Background:

X was a volunteer advisor at a Citizens Advice Bureau (“CAB”). She was not paid and provided her services under a volunteer agreement which was described as being “binding in honour only...and not a contract of employment or legally binding”. She undertook a nine month training period and, thereafter, carried out a wide range of advice work duties. X arranged to attend the CAB on certain days. She frequently did not attend on the days she was expected but no objection was ever taken to this or to her altering her working days. X was asked to cease to attend as a volunteer and she claims that the reason is connected to her disability.

The Tribunal & the Employment Appeal Tribunal:

It was assumed for the purposes of X’s claim that she was a disabled person. The tribunal decided that there was no contract between X and the CAB and, therefore, she was not in employment as defined in section 68 of the 1995 Act. There was no legal underpinning of the relationship and this conclusion was in line with a number of EAT authorities, most recently *South East Sheffield CAB v Grayson*. X’s claim under section 4(2)(d), therefore, failed. The tribunal also found that X was not undertaking a work placement within the meaning of section 14C of the 1995 Act as her work was not for a limited period and nor was it for the purposes of a person’s vocational training. Finally, the tribunal rejected X’s claim that the volunteering arrangements were made for the purpose of determining who should be offered employment, such that she had been discriminated against by virtue of section 4(1)(a) of the 1995 Act. Whilst X’s work would clearly be relevant in obtaining paid work at the CAB and up to 80% of paid advisors had been volunteers first, the tribunal found that it was far from automatic that volunteers would be given vacant paid positions. Volunteers are not given preferential treatment in applying for paid jobs with the CAB and all paid posts are advertised externally and subject to an open recruitment exercise. The tribunal observed

that the aim of the Framework Directive did not alter the meaning and interpretation of section 4(1)(a) of the 1995 Act.

X appealed to the EAT. The focus of the argument shifted somewhat, the principal submission being that a volunteer fell within the meaning of “occupation” in Article 2 of the Framework Directive. The EAT (Burton J) held that, given the tribunal’s findings of fact, its conclusion that the appointment of volunteers did not constitute an arrangement for the purpose of determining who should be offered employment was unimpeachable. As to the argument based on the Framework Directive, Burton J concluded that the concept of “occupation” did not embrace unpaid work and referred to a profession or qualification or area of work, access to which may be necessary for employment (including self employment).

The Court of Appeal:

X appealed to the Court of Appeal, relying on the same arguments. The EHRC, the Secretary of State and The Christian Institute were all given leave to intervene. Elias LJ gave the only judgment and conclusively rejected her appeal. The Court held that the arrangements were not for the purpose of determining who should be offered employment for the reasons given below. The EHRC was allowed to pursue an argument based on a submission that a volunteer is capable of falling with the EU concept of “worker” and that a voluntary post could be a form of vocational training within the meaning of Article 3 of the Directive. The Court concluded that, to be vocational training, the purpose of the activity must be to train for a job and that was not the purpose of a volunteer adviser for the reasons given by the tribunal in connection with the section 14C argument. That left the arguments under the Directive.

In his judgment, Elias LJ recognised that a broad and purposive interpretation to EU discrimination law was necessary. However, he rejected the premise that the only reasonable inference was that the Directive was intended to extend to volunteers, observing that the logic of that argument was that the principle of non-discrimination should then apply to all fields of human activity, which was plainly not the case. The Court considered it far from obvious, given the genuine debate on the subject, that it would be desirable to include volunteers within the scope of legislation concerning non-discrimination in employment. Indeed, the European Council chose not to introduce a proposed amendment specifically covering volunteers and so must have had doubts as to its desirability. Elias LJ pointed out that the concept of “worker” had been restricted in EU law to persons who receive

remuneration for their services and he understood the concept of “occupation” as an overlapping one so was not intended to cover non-remunerated work. He considered that Burton J had probably been right to conclude that “occupation” was intended to refer to a class or category of jobs whilst “employment” and “self-employment” referred to specific jobs. Consequently, the Directive is concerned with rules or practices imposed by professional or other collective bodies which can, by granting qualifications or licences of some sort, restrict the right of someone to enter into a particular type of job or sector of the labour market, be it described as a profession or an occupation.

It was not necessary to go on to consider whether, if the Directive had been applicable, it would have been possible to give effect to it in circumstances where private parties are involved (as Directives are conventionally only enforceable against the state). However, Elias LJ expressed the view that, whilst there may have been difficulties in applying the *Marleasing* principle so as to achieve the interpretation advanced by X, on the face of it there was a strong argument that *Kucukdeveci* would permit the Framework Directive to be directly enforced because the case involved a fundamental principle of EU Law.

Comment:

The Court of Appeal’s judgment has been met with little surprise by employment law advisers and commentators as it follows a line of EAT cases dismissing claims by volunteers seeking to enforce employment rights. Many employers will take comfort from the judgment in respect of their voluntary workers – that is, individuals who provide their services to an organisation without being paid in circumstances where there is no intention to create legal relations. However, it leaves an important section of the workforce unprotected and one wonders whether the law might have developed differently if the claim had been based on a different protected characteristic, such as race, gender or sexual orientation and had concerned harassment. Under the 1995 Act, reasonable adjustments can be costly so a claim by a disabled volunteer is bound to trigger policy concerns about the potentially prohibitive costs to organisations if they are required to make adjustments in relation to their volunteers.

It should be remembered that the case did turn on the specific facts of X’s circumstances, in particular the abnegation of any legally binding agreement and the lack of both mutuality of obligation and remuneration in respect of X’s services. Employers should examine carefully their specific arrangements in respect of unpaid workers, in particular individuals undertaking internships and work placements. If there is an obligation to work set hours and, for

example, a reimbursement of expenses, such individuals may, at the very least be “workers” so triggering certain statutory rights in respect of working time and minimum wages (although section 44 of the National Minimum Wage Act 1998 exempts genuine ‘voluntary workers’ from the right to receive the minimum wage) as well as protection from discrimination and from detriment by reason of whistleblowing. Furthermore, if the internship or placement is for the purposes of vocational training or for determining who should be offered employment, the individual may well fall within the express provisions of the Equality Act 2010 (ie, sections 39 and 55). In *Treasury Solicitors Department v Chenge*, the EAT (Burton J) upheld a tribunal’s decision that a ten day, unpaid structured vacation placement scheme fell within the ambit of vocational training in section 13 of the RRA 1976. Section 13 of the 1976 Act is drafted more narrowly than section 55 of the Equality Act 2010, which expressly includes work experience.

The judgment will be of interest to lawyers practising in the field of EU law. Although only *obiter*, Elias LJ has given the green light to individuals seeking to enforce fundamental EU rights under Directives directly against private parties in accordance with the ECJ’s judgment in *Kucukdeveci*. And the Court has signalled that protection from disability discrimination is likely to be a fundamental EU right in the same way that protection from age discrimination was determined to be by the ECJ in *Kucukdeveci*.

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Cases referred to:

X v Mid-Sussex Citizens Advice Bureau & Challis [2011] EWCA Civ 28

South East Sheffield CAB v Grayson [2004] IRLR 353

Marleasing SA v La Comercial Internacional de Alimentacion SA Case C-106/89 [1991] 1 ECR 4135

Kucukdeveci v Swedex PNBH Case C-340/08 [2010] IRLR 346

Treasury Solicitors Department v Chenge [2007] IRLR 386