

Health and Social Security Scrutiny Panel

Hearing with the Minister for Social Security

Thursday, 1st March 2018

Panel:

Deputy R.J. Renouf of St. Ouen (Chairman)

Deputy T.A. McDonald of St. Saviour (Vice-Chairman)

Deputy G.P. Southern of St. Helier

Witnesses:

Deputy S.J. Pinel of St. Clement, The Minister for Social Security

Mr. D. Newman, Employment Lawyer

Ms. S. Duhamel, Policy Director, Social Security

Ms. K. Morel, Policy Principal, Social Security

[14:01]

Deputy R.J. Renouf of St. Ouen (Chairman):

First of all, thank you, all of you, the Minister and your team, for making it to the meeting today, and I suppose particularly thanks to Mr. Newman, you have come from across the water, is that right?

Employment Lawyer:

It was surprisingly easy. I hope it is equally easy going back again.

The Deputy of St. Ouen:

Yes. This is a public hearing of the Health and Social Security Scrutiny Panel with the Minister for Social Security to discuss the Discrimination Disability (Jersey) Regulations, which are presently in draft and to be debated on 20th March, I believe. As this meeting is being recorded, we will proceed in the usual way. We will introduce ourselves and then I will ask the Minister to introduce herself and her team. I am Deputy Richard Renouf, Chairman of the Scrutiny Panel.

Deputy G.P. Southern of St. Helier (Vice-Chairman):

Deputy Geoff Southern, Vice-Chairman.

Deputy T.A. McDonald of St. Saviour:

Deputy Terry McDonald, member of the panel.

The Minister for Social Security:

Deputy Susie Pinel, Minister for Social Security.

Employment Lawyer:

I am Darren Newman and I am an employment lawyer in the U.K. (United Kingdom). I have been helping the department frame its discrimination laws.

Policy Director, Social Security:

Sue Duhamel, Policy Director.

Policy Principal, Social Security:

Kate Morel, Policy Principal.

The Deputy of St. Ouen:

Thank you. We are joined by Kellie Boydens, who is our Scrutiny Officer, and we give apologies for Senator Ferguson and Deputy Hilton, who could not be here this afternoon, but we are quorate as a panel with 3 of us. Minister, this public meeting really follows on a helpful briefing you and your team gave to the panel, as a result of which we briefly questioned one particular part of the regulations, which was under the definition of disability there was an exemption for persons who were addicted to alcohol, nicotine or other substances. Since then we, as a panel, have gone away and tried to do a bit of research surrounding that exemption and we have spoken to and had meetings with the Alcohol and Drug Service of the Health Department and with the charity Silkworth Lodge, is it? Anyway, they run Silkworth Lodge, Silkworth Charity Group. I have to say that those people who we have spoken to were surprised at the exemption, so therefore, Minister, can you tell us why the draft regulations make that exception for people who are addicted to alcohol, nicotine or other substances?

The Minister for Social Security:

It is a very difficult realm, if you like, to discern what is an addiction, which makes it incredibly difficult. Obviously the law in the U.K. and other jurisdictions has been studied hugely by Darren Newman and also by Kate Morel, our Policy Principal, and they are better able to explain the

reasons why we have put it in as an exception and answer your questions, so if I could hand over to Darren, please.

Employment Lawyer:

Thank you. I think the first point to make is that the exception that is being proposed in the regulations is exactly the same exception that we have in the Equality Act and also following on from the Disability Discrimination Act that was introduced in 1995, so it is something that has always been there. When it came to framing the definition of disability within these regulations, it was simply a question of: "Is that something that we need to replicate or is that something where we need to take a special view?" I do not think, hand on heart, a great deal of attention was paid to it. It was not something that had been flagged up as a particular problem with the U.K. regulations. In my experience as an employment lawyer in the U.K., which goes back to before the Disability Discrimination Act was in, it has never been something that has been highly contested, it is not something that is very widely debated within the U.K. disability framework. People would look at it and they would take a view. I think the reason for that is that in fact this is a narrower exception than it seems to be. I think some people would look at this and think alcoholics, for example, are not disabled or people who are addicted to drugs are not disabled. In fact, most people who have those addictions, to the extent where it seriously affects their life, are likely to have other mental or physical health conditions that would amount to a disability and so there are very few cases - in fact, I have never seen a case - where someone who is claiming they were discriminated against and it was a problem with alcohol has struggled to find that a disability is there. This is only an exception where it is the addiction per se, the actual consumption, the need to consume alcohol or the need to take drugs or smoke that is the disability, where there is no associated physical or mental health condition. It just has not been something that has been very high on a priority list. Sorry, Deputy Southern.

Deputy G.P. Southern:

I hear what you say. The information that we have got from the experts in the field of drug and alcohol addiction has suggested to us that over the past 20 years, 2 decades or so, thinking has changed on addiction to a more medical model. That is part of a trend that says it is a medical problem, addiction, and therefore you can seek treatment for it and therefore it should be treated in the same way as other disabilities in your functioning in a job. What do you feel about that change in the last 20 years?

Employment Lawyer:

I think that is absolutely right, and certainly it is true that there has been a change in attitudes towards addiction and it would be quite wrong to suggest that it was something that was free from being a medical issue. Certainly I would expect that Government, when dealing with its public

policy around these issues, will regard it as being part of its response in the realm of health, if you like. I note that in the mental health strategy, for example, alcohol is something that is very much part of that. Excluding it from the disability regulations does not prevent social policy interventions that accept that this is a health issue. Sorry.

Deputy G.P. Southern:

No, I was waiting for you to finish.

Employment Lawyer:

Oh, sorry. You just looked like you were urgently about to say something.

Deputy G.P. Southern:

No, no.

Employment Lawyer:

It does not prevent that. From my point of view as an employment lawyer - and this is something I have thought about much more since we had our meeting, because it challenged me to think: "How big an impact would it have if this changed?" - I think there are some interesting and difficult issues that arise if you take these 3 addictions, alcohol, nicotine and drugs, and put them in the realm of discrimination law so that people have rights to be accommodated. I think one of the things that has changed, we can regard addictions as a health-based issue. I do not think there is any debate about that, but when the World Health Organization is dealing with addictions, it is dealing with addictions in order to combat them; the idea is to fight the addiction. When you are dealing with disability discrimination, you are asking employers not to combat the disability, but to accommodate it. The question would be what are we going to ask employers to do to accommodate people with a drink or drug problem?

Deputy G.P. Southern:

Indeed. As you say, it does not prevent consideration of this as a medical matter that should be dealt with appropriately, but it does open the door as you soon as you say the exemption will be addiction to alcohol or other drugs. It opens the door to potential discrimination, because that is the exemption. I think finding a way around that potential discrimination by saying there is often some mental or physical impact from it, which opens the door to protection again, I think that is a rather obtuse way ...

Employment Lawyer:

It comes down to what it is that we are trying to accommodate. For example, if an employer is faced with somebody whose behaviour is challenging or has other behaviours in the workplace

that they may be attributed to the mental health issue or the stress issue that they are dealing with, you can see what an employer needs to do to accommodate that. If what the employer is dealing with is simply the effects of consuming alcohol, for example, what do we ask an employer to do to accommodate it? Can I try an example?

The Deputy of St. Ouen:

Go on. Yes, please, because I want to explore some examples.

Employment Lawyer:

A typical reasonable adjustment might be suppose you had somebody who is H.I.V. (human immunodeficiency virus) or has H.I.V. and is taking medication. Very often a side effect of that medication is fatigue and tiredness immediately after the medication is taken, so it is a common enough reasonable adjustment to say the employer will adjust working hours so that somebody with H.I.V. can come into work later than other people, when they are going to be better able to do it. Now, suppose we say: "I am an alcoholic and one of the things that I do is consume alcohol. That very often means that in the morning, I have trouble getting up or I have trouble getting to work and that affects my ability to concentrate, so I would like you, employer, as a reasonable adjustment, to allow me to come in late - particularly on Mondays - and accommodate that." Now, would that be a reasonable adjustment or would that not be a reasonable adjustment? I have got nothing in the U.K. law that tells me one way or the other, but you would have to take it as seriously as a reasonable adjustment to the H.I.V. point.

Deputy G.P. Southern:

But the key is the level of reasonableness, whether it is reasonable.

Employment Lawyer:

Yes.

Deputy G.P. Southern:

If I put back to you the example, still on the alcohol situation: "In order to recover and maintain my status, I will follow the 12-step programme in A.A. (Alcoholics Anonymous)". If that means my meetings are 12 o'clock to 1.30 and that is when we do our session and that I really do not want to be working then, I want to be able to do that in order to function properly, I am an alcoholic and my treatment programme is there, again, would that be a reasonable thing to ask and to have granted or not?

Employment Lawyer:

It might well be.

Deputy G.P. Southern:

One says there is a level of reasonableness which is always going to be tested in the law in any case. I will take another example ...

Employment Lawyer:

But I think my first point was also reasonable.

The Deputy of St. Ouen:

On your first point, which was the H.I.V. point, the H.I.V. sufferer, could you get a similar scenario where you have somebody who is a drug addict now taking methadone to deal with their addiction? Methadone, as a drug, might have similar effects to the H.I.V. drugs you were mentioning, that they would need some reasonable accommodations, a bit of time in the morning for that methadone drug to take its effect. Can that employee start a little bit later? Is it exactly the same as the H.I.V. scenario you put forward?

Employment Lawyer:

If you accept that as a disability, then yes, it is.

Deputy G.P. Southern:

Yes.

Employment Lawyer:

As is the alcohol and consuming alcohol, as also would be not being on methadone, but taking the drugs itself.

[14:15]

The Deputy of St. Ouen:

Yes, but can you draw a distinction between the addiction, which is the medical condition, and the behaviours that arise from that? Because no employer or business or shop is obliged to accept all and any behaviours that can arise as a result of medical conditions.

Employment Lawyer:

That is true, but they do have to accept different behaviours potentially if they are arising from a disability.

The Deputy of St. Ouen:

Yes.

Employment Lawyer:

So it would open that question and then a tribunal would have to think about how it was going to frame reasonableness, but it would have to frame reasonableness, accepting that addiction to alcohol is no different, in principle, from any other condition that somebody might have that affects their ability to concentrate at work or to turn up. What you could not do is say: "You are an alcoholic, so we are only going to make adjustments for you if you are doing these 12 steps" or something: "It would be unreasonable for us to otherwise accommodate you if the law is saying that alcoholism is a disability." I do not see how you would draw that distinction.

The Deputy of St. Ouen:

Why would that be unreasonable?

Employment Lawyer:

Because it would suggest that there would be something then about alcoholism as a disability that was less worthy of adjustment than other disabilities, but you would almost be creating a deserving and undeserving disability, if you like. There is the disability where you are doing your best.

The Deputy of St. Ouen:

No, I do not ...

Deputy G.P. Southern:

It is surely the other way around. If you accept alcohol as a disability, then it is on a par with the other disabilities.

Employment Lawyer:

Yes.

Deputy G.P. Southern:

It is levelling the playing field, rather than having to take the secondary symptoms and saying: "This qualifies you."

Employment Lawyer:

My point would be that if what you are saying is: "It would be reasonable to expect to make an adjustment to accommodate your treatment, but not necessarily reasonable to expect me to accommodate the behaviours that spring from your addiction, because that would not be a reasonable thing" where does that distinction come from?

Deputy G.P. Southern:

Is there no distinction between someone who has mental health problems but is not addressing them and shouts at every customer that comes in the door?

Employment Lawyer:

Yes.

Deputy G.P. Southern:

There is no difference between that and the symptoms that might be shown by the alcoholic, surely. It comes down in both cases to are you trying to come halfway towards the employer's demands that you do not shout at the customers?

Employment Lawyer:

It is absolutely right. It is all a question of reasonableness, so it is absolutely true that a tribunal would have to draw a distinction between what is it reasonable to expect a business to accommodate and what is not reasonable to expect a business to accommodate. Shouting at customers, I think I can see that being even. Time off is a more difficult thing, is it not, because it seems to me reasonable to accommodate time off, so if somebody says: "I am going to consume a lot of alcohol tonight, because that is my pattern of behaviour, and tomorrow I am going to be less fit for work than I otherwise would be. Accommodate that, please" why would it not be reasonable to expect an employer to accommodate it?

Deputy G.P. Southern:

Because it goes to does it have an impact on the ability to do the job.

Employment Lawyer:

But so does any other reason that you have got less ability to concentrate during the day.

Deputy G.P. Southern:

The response, while being reasonable, is to try and help support that person in not having the symptoms that interfere with the job. Failing that, ultimately the sanction that any employer has is saying: "You are not doing the job properly. Here is a first warning, second warning and off you go, thanks."

Employment Lawyer:

Yes, so here I suggest there is a potential problem. We are looking at a particular response, a positive obligation that we are placing on employers really, because I think this is where most of

the cases are going to be, a positive obligation that we are placing on employers. This is a very positive law, where we are making a duty to make positive adjustments to people who have got a disability. If we bring into that positive adjustments to somebody whose pattern of behaviour is resulting in them not doing the job as effectively, with the suggestion being that: "Well, it is all a question of reasonableness", my worry is that you then level down what we expect employers to do because part of the reasonableness is going to come out of: "Here is a situation where somebody has been drunk at night and has turned up late in the morning." I am not entirely sure that the disability community of Jersey would welcome that parallel being drawn and I am not entirely sure that they would think throwing that into the case law, so that as "reasonableness" emerges from the tribunal that they have to take into account a level playing field around those 2 issues. I think they are different.

The Deputy of St. Ouen:

It seems to me that we are getting confused, because there is always the requirement that an employee, disabled or not, must be capable of doing the job and that means keeping to the reasonable requirements of the job. If you have got to be at work between 8.00 a.m. and 5.00 p.m. at night, that goes without saying, because you are dealing with the public. If you cannot do that because of your behaviour, you are incapable of doing the job, and it is not a discrimination to exclude somebody who is incapable of doing the job. But if only because of their addiction, when they first applied for that job - they might have been a shortlist and had to disclose their health history - and the employer sees that this person has had drink problems in the past, has perhaps gone through a course of treatment, and that person may indeed be in recovery and not drinking, so there is no question of behaviour, but the employer, under the regulations, would be free to say: "Oh, there is a risk here. I am going to discriminate and not employ the person who is an alcoholic, but is no longer drinking, because I can."

Employment Lawyer:

Yes, I think there are 2 points there I would like to address. First is the issue of adjusting working hours or adjusting the nature of the job. That is very much in play when it comes to disability discrimination, so if someone has a disability that means they cannot work the hours that they are given, it might well be a reasonable adjustment to change the hours. If somebody is employed to do a job and there is an aspect of the job that they cannot do because of their disability, then it is very much within the realm of a reasonable adjustment to change the job so that they can do that. It is perfectly possible that somebody who cannot meet the requirements of the job because of their consumption of alcohol would have a very good case to say: "Change the requirements of the job", just as anyone with any other disability would have that case. A tribunal would not, I think, be able to draw a distinction in whether the adjustment was reasonable according to what the disability was that caused the disadvantage.

The Deputy of St. Ouen:

To go back to our unfortunate person who has mental health difficulties and can only shout at the top of their voice while working in a shop, would an employer be obliged to adjust and change the job for that person?

Employment Lawyer:

I do not think that would be regarded as a reasonable adjustment, so I think we can be reasonably confident about that. The interesting or the difficult part of reasonable adjustments is when you move away from that relatively straightforward case to a more difficult case, where somebody is simply not able to do an aspect of the job. If it is simply impossible for them to do the job in anything like a reasonable way, then of course that is a relatively easy case to deal with, but when we are drafting legislation, you have to think about the hard cases, not the straightforward cases.

Deputy G.P. Southern:

Is it not the case that employers, certainly large employers on the Island, are dealing on a weekly and monthly basis with sometimes senior management who are alcoholics ...

Employment Lawyer:

I would imagine.

Deputy G.P. Southern:

... and whose behaviour from time to time may fall short of what is required? The question is what do I do with this person, who may or not be talented, but is an alcoholic and has lapses every now and then, which we cannot tolerate, so what do we do? Do we get rid of the member of staff or do we try and support them? Now, increasingly, it seems to me, we have got a positive attitude around alcoholism and in particular addiction in its broader sense that says that we will treat it as, if you like, a medical problem, and like any other medical problem we will try and support this worker to perform the job, because he is worthwhile to us and we are worthwhile to him.

Employment Lawyer:

Absolutely, and that ...

Deputy G.P. Southern:

As soon as you say: "But alcoholism per se is not covered by disability discrimination" then you open the door to the alcoholic, saying: "Hang on, if it admit I am an alcoholic, I am in trouble. I could be out" rather than I admit I am an alcoholic and seek support from my management structure.

Employment Lawyer:

I just do not accept that, purely from the basis that this is not the be all and end all of employment obligations. You have got an unfair dismissal law. Unfair dismissal would already regard alcoholism per se as a health issue. There is no question about that. If someone had come to the employer and said: "I am going to have a problem with my attendance because I have got this issue" an employer would treat that to be reasonable in the same way as any other long-term health issue. That is very well-established. It is certainly established in the U.K. and it has not been affected by the fact that addiction has not been covered by the Disability Discrimination Act and now the Equality Act. The difference is that when you pass a discrimination law, you create a different legal obligation, which is not just: "Will I behave reasonably to help this person do the job?" but: "Will I change the job? Will I take a hit?" Because it is not just about helping somebody through a problem. If we make this a disability, it will be about accepting the problem as the status quo and adjusting to it accordingly. That is not something that they are currently obliged to do under employment law, even though there is an obligation to behave reasonably if someone has got that mental health problem. For example, a tribunal would not expect an employer to change a job description to accommodate somebody who is going to have very high alcohol consumption, albeit it would treat it as a health issue in terms of going through the process of attempting to find treatment and attempting to get them up to the standard of everybody else. Under disability discrimination law, you are going to apply a different standard to some people. That is the essence of a reasonable adjustment. It is positive discrimination in favour of disabled people.

The Deputy of St. Ouen:

Are you saying that an employer would be obliged to change the job description?

Employment Lawyer:

It is a regular ... in any particular case, it depends on whether that is a reasonable thing to require the employer to do, but it is certainly within the normal scope of a reasonable adjustment for an employer to say: "Can I change the job? Can I change the job that someone is doing so that they are no longer going to do this thing that is going to be a problem for them?" whether that is their working hours or the seniority of the job or particular tasks or particular environments. For instance, allowing someone to work at home rather than work in the office is a very regular reasonable adjustment that is talked about. These are serious obligations that we are placing on employers. Sorry, yes.

The Deputy of St. Ouen:

I recall we have mentioned in past hearings whether there is an obligation on an employee to work with an employer, because one can imagine all kinds of disabilities which may be capable of being

mitigated or corrected by pieces of equipment or different working practice or something like that that an employer might wish to introduce, but if an employee is resistant to that, what is the onus on an employee to make reasonable adjustments for the work he or she is in?

Employment Lawyer:

Starting from the proposition that almost any question, the first answer is: "It depends on the circumstances", but just putting that aside, I think if you got a situation where there is a very clear: "But you could do this", so there is a very clear: "You could take this medication and you would be fine" or: "You could use this piece of equipment and if you use this piece of equipment, then you would be fine" it is difficult to see how a tribunal would find that it is a failure to make reasonable adjustments for the employer to say: "Well, come on, help us out. Meet us halfway, use this equipment." I think that is difficult to apply in the context of treatment and counselling for addiction, because different people will respond differently to that. The effectiveness of treatment for addiction is not as straightforward as: "Do this thing and then you will be fine", it is a: "Work with us over a long period of time and hopefully you will make progress." I do not think it can be part of disability discrimination law to require someone to try to cure their disability. I think that is a very problematic thing to put into the realm of disability discrimination.

[14:30]

The Deputy of St. Ouen:

To be fit for work, in a work context?

Deputy G.P. Southern:

It is adjusting with whatever to the demands of the job, to be able to do the job?

Employment Lawyer:

It could be a factor that would be taken into account, the extent to which an employee co-operated with that. If an employee says: "That just does not suit me. I have got this addiction. I do not find the treatment helpful. I would rather live with the addiction" we would see what the tribunal makes of it. There is no case law anywhere in the world, as far as I am aware, that deals with this. Jersey would be breaking new ground on that. It would be interesting to see what the tribunal makes of it.

Deputy G.P. Southern:

How do you respond to the comments from Jason Mourant, who says that: "Failure to recognise addiction to non-prescriptive drugs and alcohol could ultimately deter people from seeking help, as there would be a possibility that they might be discriminated against, due to them not being

protected by the law. This in itself would undo the years of great work carried out in this sector by organisations and statutory drug and alcohol services.” How do you feel about that?

Employment Lawyer:

I feel, first of all, the position in Jersey at the moment is that there is not a discrimination thing there. I would be saying that that is the position now. The position in the U.K. is that there is not that position there now, and frankly, I do not see campaigns for it. As I said at the beginning, this is not something that is at the forefront of campaigns for people who are representing or advocating on behalf of people with drug addiction or alcohol addiction. I am sure if you asked them they would say: “Yes, we would rather have that in than not” because why would you not, but it is not something I have seen any evidence of that happening in the U.K. I think if that was a sound basis, I would see evidence of that or someone would be able to point to evidence of it, because you have got the perfect testing ground. You have got 20 years of this, if not more, in the U.K. and I do not see that there.

The Deputy of St. Ouen:

We have seen some papers prepared for the Select Committee in the U.K. They are recent, are they not? It is perhaps coming, it is under discussion. I do not know what is happening with the ...

Employment Lawyer:

It is a thing to discuss. We have looked at some academic work on this as well. I think one of the problems I have always pulled us back to is there is sometimes a debate in the academic world and around the advocacy groups about conceptualising addiction as a disability. That is contested in itself. Even if you talk to academics and campaigners, conceptualising addiction as a disability is not an absolutely straightforward thing, but for me it always comes down to: “What is the practical legal right you are creating?” It is one thing to say a sense of inclusion and regarding people with addictions as being part of the community of people who deserve support because there is a medical issue, but the second issue for me is always: “What reasonable adjustments are we talking about?” What is an employer going to have to do that they currently do not have to do? What is it that we are going to ask them to do and where might that be difficult? Because there are some things you can ask them to do where you could say that would be a very reasonable thing to ask an employer to do, give somebody some time off to attend counselling. That seems like a good reasonable thing to do. Can we do that without also asking them to do something that seems unreasonable and how do we draw the distinction, one between the other?

The Deputy of St. Ouen:

It is the behaviours you are worried about, it seems to me, and whereas the behaviours of somebody with mental health difficulties have to be accommodated, the behaviours of people with addictions do not have to be accommodated.

Deputy G.P. Southern:

Can I just draw you to 3.3 and 3.5 of the memorandum submitted to the UK Drug Policy Commission?

Employment Lawyer:

Do you have a copy of it?

The Deputy of St. Ouen:

I do not know, because I am not sure that the Minister and the team have had those. Do you want to read that out?

Deputy G.P. Southern:

It says here: "Many people incorrectly assume that the disability discrimination legislation does in fact cover drug addiction. Even the recent Impact Assessment for the Welfare Reform Bill states: 'Problem drug use is an internationally recognised mental illness, so all problem drug users are covered under the Disability Discrimination Act.'" Effectively the attitude of those in charge, it is saying that it will be, it is already in effect.

Employment Lawyer:

That is what they are saying.

Deputy G.P. Southern:

You are saying incorrectly. I will just move on to 3.5. This committee then said: "We invite the Committee to consider the above anomalies and to consider if and how impairment due to substance addiction should be included within the legislation (Equalities Bill and the Disability Discrimination Act) ..."

Employment Lawyer:

The Equality Bill. Is that from 2009?

Deputy G.P. Southern:

"... including more explicit recognition of this disorder within the definition of disability." No date on this, except to a reference to another paper in 2008. It may be 2009, correct?

Employment Lawyer:

February 2009, I think, yes.

Deputy G.P. Southern:

I have got nothing after 2009, so yes, absolutely. So there is an argument and a debate going on.

Employment Lawyer:

There is absolutely a debate about where dealing with addictions falls in healthcare strategies, social security strategies, that sort of thing. My question is as Jersey takes on disability discrimination for the first time, how straightforward is it to simply have nothing reflecting the U.K.'s position that addiction in terms of alcohol and drugs will not be covered? Are there any consequences from that that might not be consequences that we would have wanted to see? I do not see that there is a need to take a new stand on discrimination law in order to address some of the issues that have been talked about here in terms of recognising addiction as a mental health problem. I do not see a contradiction between those things at all, because disability discrimination is a very specific kind of obligation and there would be ripples about taking that out. It is difficult to know exactly where they would stop.

The Deputy of St. Ouen:

Can I ask the Minister a question arising from that? Mr. Newman has expressed a possible nervousness in departing from the statute in the U.K. or the same sort of provisions that exist in the U.K. Minister, you consulted on the definition of disability and pointed this out in the consultation document. Did you go to the Drug and Alcohol Service of the Health Department to ask them to consider the issue?

The Minister for Social Security:

They were part of the consultation.

The Deputy of St. Ouen:

In what way were they part of the consultation?

Policy Principal, Social Security:

They were sent the consultation and they did not respond.

The Minister for Social Security:

But they were able to, had they wished to.

The Deputy of St. Ouen:

Yes. But in seeking to make an express carve-out for persons who were addicted, it was simply on the basis that this is what is done in the U.K., is it, without seeking any specific local input?

The Minister for Social Security:

A lot of our reasoning behind the regulations that we produce, which you have had from the word go, was the results of the consultation. If Drug and Alcohol Services, as they did, did not respond, then we could not take their response into consideration.

The Deputy of St. Ouen:

There were a handful of responses. I note that 3 responses were noted in your consultation report, which were concerned about the exemption and thought perhaps that addiction should be included within the definition, but despite listing those 3 and listing the comments, you decided not to.

Policy Principal, Social Security:

Yes, and I think the outcome paper explains why. In a number of cases, the comments had taken an incorrect interpretation of what was in the law in assuming that an addict is excluded from the law when it is the addiction that is excluded, as Darren explained before.

The Deputy of St. Ouen:

Yes, so if they have got other difficulties which create a difficulty ...

The Minister for Social Security:

It would be covered anyway.

Employment Lawyer:

One of those responses was particularly concerned about excluding cirrhosis of the liver, for example, from disability discrimination, which is clearly included, it is just not excluded. I think we should also say when you look at those responses, if you look at those full responses, some of them were quite full-on critiques coming from a particular position. It is not as if the point on addictions leapt out. Some of them were taking really quite trenchant points. I think most of them were also not from within Jersey; they were certainly not from within the disability community within Jersey. They were disability rights activists from the U.K. who spotted the consultation and tried to organise a bit of a pile-on. One of them was also from Guernsey, which it is obviously very helpful to have the view from Guernsey as to what is going on. What is going on with Guernsey is they have not drafted anything yet and they have been thinking about this since 2013, and I believe they are currently on course to come up with a draft by 2020. Yes, they had a lot of things to say, but at some point you have just got to do something.

The Deputy of St. Ouen:

Yes, and we still got to plough through all those.

Deputy G.P. Southern:

Can I take you to the actual phrase and the wording of this exemption and ask what your thinking about this is? As it is proposed, we are adopting this: "Addiction to alcohol, nicotine or any other substance is not a disability unless the addiction was originally as a result of the administration of medically prescribed drugs or other medical treatment." Can you tell me what you think the logic or the reasoning around that particular part-exemption is?

Employment Lawyer:

First of all, it is simply we have taken the same scope as the U.K., so it is the same exemption. I think if we look at where it came from in terms of the U.K., there is, frankly, a moral judgment being taken about there being a difference between an addiction that has been - I am trying to think of the right word - caused by medical intervention and addiction that has arisen from within somebody. Now, that is not to deny that there is a medical background to that, but that is simply what that distinction draws.

Deputy G.P. Southern:

But it is effectively to place the moral above the physical or the ...

Employment Lawyer:

It is to basically think that if we are excluding addictive behaviours, it seems particularly harsh to exclude addictive behaviours that have come about as a result of medical treatment and so they have not been excluded.

The Deputy of St. Ouen:

But yet those addictions that have arisen as a result of medical treatment might still give rise to the behaviours which you think it would be unreasonable for an employer to have to accommodate.

Employment Lawyer:

I am not qualified to say what behaviours opioid addiction or a painkiller addiction leads to. I do not think they are the same as the behaviours that untreated alcoholism leads to, but I am not qualified ...

Deputy G.P. Southern:

Nobody said they were the same, but an addiction to prescribed drugs is fairly commonplace.

Employment Lawyer:

Yes.

Deputy G.P. Southern:

Either because they have been prescribed or because they are on the black market and have particular highs or lows or whatever.

Employment Lawyer:

One thing that is interesting, I think, is I am struggling to think of any disability discrimination case I have seen where that was the disability that has been claimed. Since 1995, have I seen so much as one? I do not think I have seen it. I do not think I have seen one report. I do not think I have read about it. I think if one had come about, it would have been pointed out, because everyone would have gone: "Here is one."

Deputy G.P. Southern:

But it gets included through the back door with some mental ...

Employment Lawyer:

It does suggest that the exclusion or the difference between the exclusion based on addiction and something that is medically prescribed is not something that is causing any friction or problems because we are not seeing any borderline issues being litigated, so we are not seeing an example of: "I am refusing to employ you because of your addiction and I think you are excluded" and someone says: "Mine is a medically included one" and we then argue about whether that is true or not. Those cases just do not happen. Now, what you draw from that, I draw from that that this is an uncontested area of the law that is not causing practical problems for people, because the areas that are contested and that cause practical problems, I see cases. We are talking about 14,000, 15,000, I think, off the top of my head, so that might not be an accurate figure, but it is something of that order, of disability discrimination cases every year. They are not about this.

[14:45]

Deputy G.P. Southern:

We hear this a lot - I hear this in lot - in terms of debate in Jersey, that there is no evidence that there is a problem because nobody has looked for it or the law does not cater for it. It seems to me that this medicalisation approach to alcoholism, to other addictions, is something that has changed over the past 20 years and this particular law has not kept up with it.

Employment Lawyer:

I think I was making a slightly different point, because I absolutely agree with you that saying: "We do not have a problem with discrimination in Jersey" is a reason not to pass a law through.

Deputy G.P. Southern:

I am frightened that if I say I am an alcoholic, I am going to get sacked. I am not going to say, so it will not come up per se, alcoholic, but the behaviours and the underlying treatment may well do, so you get through the back door.

Employment Lawyer:

I think my point would be that if we were seeing an issue or a problem around the distinction between an addiction which is originating from medical treatment and an addiction which is not originating from medical treatment and people were treated unfavourably, they were dismissed or ... it is mainly dismissed, they were dismissed and they wanted to say: "I think that this is discrimination" I would see cases about this, because I see cases about all the other things that people are getting sacked over.

Deputy G.P. Southern:

Except if you make an exemption of the addiction.

Employment Lawyer:

Yes, but not if it is medically caused, and my point is that if that boundary between - which is what we were discussing - a medically caused addiction and a non-medically caused addiction was a difficult area or something that led to anomalies or strange results, then we would see that come through. My point is that this is a settled and not contested area.

The Deputy of St. Ouen:

We can say it is not contested because we are not working in the area, we are not aware of it, but the difficulty for the panel is that we have submissions from at least 2 people who are working in the area. They are saying things like: "This will be a huge setback for our society. It could potentially have catastrophic effects for those that suffer with this illness, together with their families. The addicts do not choose to be dependent on a mood-altering substance." Minister, those are the people who are involved with the people we are trying to exclude here, so politically do you think we should take account of what these experts are saying?

The Minister for Social Security:

I think we have to take account of what everybody is saying, which is why we did the consultation and the outcomes of and therefore the very few, I think - was it not, Kate? - amendments to the

regulations that we had anyway on the basis of that consultation. In the cases of people choosing not to answer the consultation, then it makes it quite difficult. Obviously, as in the case of the one that you quoted earlier, then they are, in my view, going to be very adamant about the geography of their world and the way they see it. When you come to writing very complicated legislation it is where do you start and where do you stop and when is it a choice and when is it a medically induced addiction? I think the reason it is phrased as it is is to allow for that.

Policy Director, Social Security:

Can I just make a point about your 2 submissions from the 2 ...

The Deputy of St. Ouen:

The Silkworth Lodge and Drug and Alcohol.

Policy Director, Social Security:

Yes. Those are letters written by health professionals, yes, and they are seeing it from a health perspective. They are absolutely right that we do need to take addiction issues very seriously and we do do that. There has been increasing awareness of that and increasing support provided for people with addiction problems. But they are not lawyers, they do not understand. They have been asked a legal question and they are responding with a health response. So if you ask us, who are more interested in the legal side of it, about the health issues around addiction, we would not have a very good response either. You need to put those responses in context, that they are responses from people who do not understand discrimination legislation. That is obviously why we have Darren here today, and I will stop talking now, but you do have to think about the understanding from a legal point of view. As a lawyer yourself, you will understand how sometimes what a lawyer understands by words is not quite the same as what a straightforward layman understands by it. We just have to understand those comments in context.

The Deputy of St. Ouen:

Very well, I think we hear that. Can I move on and put to the Minister some examples which you might encounter as the Minister involved with the Back to Work programme? What would your response be if you are trying to place persons with an employer through the Back to Work scheme but you become aware that the employer turns down an employee on the basis that he has previously had a drink problem and may still be addicted, but the drink problem is not manifesting itself?

The Minister for Social Security:

We have a system in the Back to Work area of most places doing a sort of R.A.G. (red, amber, green) system and there is support, huge support. Obviously somebody in a green category

would be far easier to place in a work situation and somebody at the other end of the scale is going to be far more difficult. We have now 2 occupational therapists employed within the Back to Work scenario to support - in addition to the Back to Work support mentors that they get as well - if somebody has a condition that makes it difficult for them to be accepted into the workplace. We have done a lot. We also have, as you will be aware, a mental health nurse now to assist in all of that. People will not be made to be put into a workplace scenario if they are not able to function properly within those environments.

[Note: The Social Security Department clarified that the Minister was referring to two Health Advisers in the Occupational Support Unit (OSU). These advisors are not occupational therapists. One is a mental health nurse and the other has experience in supporting clients with drug and alcohol issues.]

The Deputy of St. Ouen:

No, but this is a case which would not be unusual where somebody has battled their addiction and is not drinking, but they are still addicted if they were to drink. What would your reaction be to the employer who rejected them because of their previous history?

The Minister for Social Security:

I do not think that has ever occurred and I do not think it would, because there is so much support to talk the employer and the potential employee through these situations. I am not aware of that ever having happened.

The Deputy of St. Ouen:

That is fortunate. Would you take on to the Back to Work scheme people who told you they were on methadone treatment or that they were attending the A.A. to try to deal with their addiction?

The Minister for Social Security:

We do. We take everybody on who presents themselves before us who needs the support that we can provide.

The Deputy of St. Ouen:

Okay, thank you. Minister, we have not had the opportunity to research significantly the U.N. (United Nations) Convention on the Rights of Persons With Disabilities, but I understand that the Government's disability strategy looks forward to the time when Jersey can sign up to that convention. It seems to me that the definition of persons with disabilities under the convention talks about full and effective participation in society on an equal basis with others, with no conditions being excluded from falling within the purview of this provision. I was wondering if you had taken advice on whether this exclusion that is being made from the disability regulations is

consistent with Jersey's wish to subscribe to the U.N. Convention on the Rights of People With Disabilities.

The Minister for Social Security:

Again, Chairman, may I defer to Darren, who has been part of ...

The Deputy of St. Ouen:

Can I just ask if you have taken advice and then you can ... on that issue as a Minister?

Deputy G.P. Southern:

Have you taken advice?

The Minister for Social Security:

No. Well, not personally.

The Deputy of St. Ouen:

As a department.

The Minister for Social Security:

This is why I was deferring to Darren. [Laughter]

The Deputy of St. Ouen:

I was thinking of Jersey legal advice, but no problem, let us hear.

Employment Lawyer:

It is certainly something that we looked at it. In the U.K., which is a signatory to the convention, the European Union is also a signatory to the convention. The convention itself does not mention addiction, so it is silent on the point. There is no exception from it, but it is certainly not expressly included. There is not, if we want to get really technical, a definition of disability within the U.N. convention, so it is an open question to an extent as to whether it is covered. What I do think is interesting is that the U.K. has recently been subjected to an analysis by the council that is responsible for overseeing the U.N. convention, and they have done a very thorough working over of everything to do with disability and the way disability is dealt with in the U.K. Recently the Equality Commission published an extensive document taking each of the recommendations that was made by the United Nations about the way in which the U.K. needs to deal with its ... change the way it deals with disability. Addiction is not mentioned in any of those recommendations. I think the important thing to bear in mind about the convention is that it is coming from a human rights perspective and it thinks about overall how does a country deal with disability within its

overall system rather than what specific pieces of legislation have what definition. That falls within it. We might look towards it, but it is not their emphasis, it is not their priority. The recommendations tended to be based around human rights conditions around disability and a lot to do with the benefit system and a lot to do with access to work and a lot to do with particular things to do with women and girls. It really did not look at the details of the legislation at all. There is not a straightforward match between saying: "This convention says this, so our discrimination law has to say this" because you meet the convention not just through your disability regulations, but through the whole way in which the States approaches issues of disability. As I say, the U.K. has this exception and it has of course the problem with the U.N.

The Deputy of St. Ouen:

Minister, would you think it appropriate to seek legal advice on that matter, as Jersey is trying to move towards signing up to the convention?

The Minister for Social Security:

Appropriate?

The Deputy of St. Ouen:

As to whether our discrimination regulations should exclude addiction?

The Minister for Social Security:

We have not done any more than Darren has already said, so not at this stage. We have tried to, as with all our other laws, make the regulations pertinent to Jersey as opposed to being sort of far tighter as might be in the U.K. and the U.S. (United States). It has to be something that can be adaptable to a Jersey situation, which is not necessarily commensurate with a large jurisdiction.

The Deputy of St. Ouen:

Disability in Jersey is unlikely to be different from disability elsewhere.

The Minister for Social Security:

No, but the legislation is generally shorter and simpler in Jersey, whatever it is. It is not just disability, it is everything else.

The Deputy of St. Ouen:

Yes. Minister, in your consultation report you comment: "We have also made provision for specific conditions not to be treated as amounting to a disability, including addictions and conditions that consist of a tendency to steal. Our aim here is to avoid requiring employers and service providers

to accommodate individuals with harmful personality disorders.” Do you therefore consider addiction to alcohol as a personality disorder?

The Minister for Social Security:

Again, we would revert back to what we have been saying all afternoon. You mention the case of alcoholism. When is it an addiction and when is it not? At what stage does it become an addiction? As Darren has often quoted, reasonable adjustments come into the equation, so it has ...

The Deputy of St. Ouen:

But is addiction a personality disorder?

The Minister for Social Security:

It depends what the effect of the addiction displays within the character involved. Some addicts show no signs of addiction whatsoever; others do. Again, you cannot do a broad brush on the whole thing. It is very difficult to confine it to what an addiction is.

The Deputy of St. Ouen:

So does the fact of their addiction arise because of their personality? Their personality is somehow warped, is that what might be the case, in your view?

The Minister for Social Security:

I would not personally consider that to be the case at all. I think addiction can arise from all sorts of things.

Employment Lawyer:

I think if I may, as someone who was involved in drafting the consultation document, I look at that paragraph and I feel we could have perhaps drafted that better because there is an elision going on there, I think, with the harmful personality disorders, which is a tendency to abuse others.

[15:00]

If you happen to be just straightforwardly psychotic, that should not be something that the employer needs to make an adjustment for, and the addictions, which I think on reflection I would have phrased that more carefully so that the phrase “personality disorder” was not attached to that part of the sentence.

The Deputy of St. Ouen:

Okay, thank you. That makes that clear.

Employment Lawyer:

I think these things, when you are putting them together, are very long and complicated documents and I do not think it is always possible to spot every infelicity in the wording when you are trying to get a paragraph that is readable and not overly technical. But I think on that one that could have been better put.

The Deputy of St. Ouen:

Okay, point taken.

Deputy G.P. Southern:

Infelicity. I will use that one of these days.

Employment Lawyer:

Infelicity. I get very few opportunities to say the word "infelicity" but in a formal setting like this, I thought I might just get away with it. **[Laughter]**

Deputy G.P. Southern:

Wonderful. Can I just follow up with the second half of the question? Does the Minister not accept that addiction is an illness?

The Minister for Social Security:

I think, yes, it is, can be a mental health illness, yes.

Deputy G.P. Southern:

Can be or is?

The Minister for Social Security:

Again, it depends on the level of addiction as to whether it then becomes a mental health issue. Yes, I do accept that that could be the case, yes.

Employment Lawyer:

There is an interesting sort of question with all disabilities that exist on the spectrum, at what point have you got a variation from the mean and at what point have you got something that you can claim as an impairment. I think one point to make is that in the Jersey definition we have been very wide and inclusive in terms of what the definition of disability is, much more so than the U.K., much more so than the U.S. The U.S. requires the effect to be a significant impact on major life

activities; the U.K. requires a significant adverse impact on day-to-day activities, which people in the disability community find very intrusive and problematic. So we have set the bar much wider in terms of any condition, which can have the effect of affecting somebody's ability to participate or engage, and there is a sort of phrase around that. What that does mean is if you take away the exception for addiction to alcohol, nicotine and drugs, there is a much lower threshold than you would find in say the U.S., where there is some acceptance of alcoholism being a disability, but only when it has reached a certain level, which has a significant impact on major life activities. The definition we have got in Jersey would not require you to get to that level, so it would cover a much wider group of people with addictions than might otherwise be. The point the Minister made at the beginning, drawing the distinction between someone who is addicted to the point where you can call it an impairment and it is appropriate to treat it as a health issue and an addiction, which is a personality trait, which might be a preference, a habit that is more compelling than some other habits might be, that would be a difficult line for the tribunal to draw and that is what they would have to try to figure out in deciding who has protection and who has not.

Deputy G.P. Southern:

Just trying to sum up in my head what it is that you are saying. Are you saying that we have kept, in this particular paragraph, the terms exactly used by the U.K. and there has not been great challenge in the U.K., so therefore the system works? But in their terms it only works by having a back door in, one that says: "If this affects your work, and to the extent it is affecting your work then it will count", not the addiction per se, but the capabilities, the result of that?

Employment Lawyer:

The condition, there would need to be another impairment other than the addiction per se.

Deputy G.P. Southern:

So it works by the back door, because if you do not open the front door, you can go around the back and say that the issue ...

Employment Lawyer:

The issue is really anxiety, depression, stress, whatever, yes.

Deputy G.P. Southern:

"These conditions mean I need extra support"?

The Deputy of St. Ouen:

I think we have largely dealt with that issue and we do not really have too many other questions around the disability regulations, except I suppose to make the observation that the regulations

relating to reasonable adjustments and the like, particularly people who are on premises or run premises or employers in business, you have set out in the regulations some very broad principles/actions, it seems to me, but people who own properties or people who employ persons, how are they going to know precisely what it is they must do in the period before the regulations are enforced in order to make reasonable adjustments for disabled persons?

The Minister for Social Security:

As you will be aware, it is a 2-stage implementation and if it is adjustments to properties, then this is a sort of flashing up the sign, if you like, that may be required. But there are many exceptions to it and you are not going to be asked to put a glass escalator up the side of Mont Orgueil Castle, for instance, or if people's premises are too small to incorporate a lift or a disabled toilet. So if the business involved or employer involved cannot physically, under any circumstances, impose that sort of change to their premises, they will not be forced to do so. But if they can reasonably do so, we would ask them to.

The Deputy of St. Ouen:

How are they going to be able to assess what is a reasonable adaptation?

The Minister for Social Security:

There are all sorts of caveats with it. We understand, which is why it is a 2-stage implementation, because there is planning, for instance, and as we know planning can take a long time to approve or to disapprove something. If, within reason, they can improve - or however you want to put it - their properties and are able to do so and get planning permission, then we will expect them to do it, but if they cannot then ...

The Deputy of St. Ouen:

You mention there the words "within reason". Is there going to be any guidance issued by your department as to what is reasonable?

Policy Principal, Social Security:

Yes. J.A.C.S. (Jersey Advisory and Conciliatory Service) obviously will provide guidance. They are already providing training specifically on the draft regulations and there will be some more technical guidance probably than usual, so explaining about signage and that sort of thing.

Employment Lawyer:

The building by-laws that are already in place in terms of access to buildings are already very much on board with this. In some of the meetings we had with Property Holdings, this is an issue they are very much switched on to and have been for some time. So the expertise is there to be

reflected in appropriate guidance and I am sure that will be produced. I would also say that - and it sounds like a very glib phrase - compliance is a journey, not a deadline, and since what we are looking at is reasonableness, where people are in that journey is going to be part of the reasonableness that we are looking at. We will expect people to progressively get better at accommodating people, particularly when it comes to mobility, as we run up to the deadline and as we get past it. But I am going to say, as someone who comes from the U.K., one of the really impressive things about the way Jersey does this, particularly from the employment side, is the amount of free training that is available to employers and the extent to which they get a very personal service because of the size of the Island. This would be done a very faceless way in the U.K., but the amount of ongoing support and help that people can access through J.A.C.S. I think is a particularly impressive part of how the system works.

The Minister for Social Security:

That is also in advance of the law being agreed and for at least a year afterwards or however much time people need on a personal level, on a company level, the training by J.A.C.S. is provided.

The Deputy of St. Ouen:

Yes.

The Minister for Social Security:

But also a lot of the changes, as exemplified by the Co-op recently in an autism type of fashion, is just on a Monday not closing the shop, but taking down the lights and closing down the noises for an hour so that people who are in that situation can go shopping without the distractions that make it so difficult for them. That is a fairly easy remedy, it is just thinking about it and implementing it.

The Deputy of St. Ouen:

Indeed.

Deputy T.A. McDonald:

It is all about awareness really, is it not?

The Minister for Social Security:

Absolutely.

Deputy T.A. McDonald:

It was so simple and so effective for people on the spectrum and really they have done themselves a power of good by leading the field.

The Minister for Social Security:

Indeed.

Deputy T.A. McDonald:

Do you think there are other areas where there are remedies like that that could be put into place?

The Minister for Social Security:

I am sure there are.

Deputy T.A. McDonald:

Are people thinking about it?

The Minister for Social Security:

It is a matter of people being proactive, which in this case they have done, and at no detriment to themselves really, but a huge advantage to people on that spectrum.

Deputy T.A. McDonald:

Absolutely, and the respect and admiration of fellow customers who accepted the reasons for it.

The Minister for Social Security:

I think the first and foremost with anything like this law, for instance, is recognition that people have a problem in situations and once you recognise it then it is a matter of turning the tables and trying to remedy it.

Deputy T.A. McDonald:

Yes.

The Deputy of St. Ouen:

Minister, thank you for meeting with us and thank you for dealing with our questions in the way you have. I think we will call this meeting to a close and thank you once again.

The Minister for Social Security:

Thank you, and a safe journey home to everybody.

[15:10]