Case No: A2/2009/2526/EATRF

Neutral Citation Number: [2011] EWCA Civ 28

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
MR JUSTICE BURTON
UKEAT/0220/08 and UKEAT/0511/08

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/01/2011

Before :

LORD JUSTICE RIX
LORD JUSTICE ELIAS
and
LORD JUSTICE TOMLINSON

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Between :

X	**Appellant**
- and -	
(1) MID SUSSEX CITIZENS ADVICE BUREAU **(2) LYNN CHALLIS**	**Respondents**
(1) EQUALITY & HUMAN RIGHTS COMMISSION **(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT** **(3) THE CHRISTIAN INSTITUTE**	**Interveners**

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Mr John Lofthouse and **Mr Spencer Keen** (instructed by **Charles Russell LLP**) for the **Appellant**
Mr Paul Michell and **Mr Ed Williams** (instructed by **Bates, Wells & Braithwaite LLP**) for the **Respondents**
Mr Declan O'Dempsey and **Ms Olivia-Faith Dobbie** instructed by the **First Intervener**
Ms Kassie Smith instructed by the **Treasury Solicitor** for the **Second Intervener**
Mr John Bowers QC instructed by **The Christian Institute** for the **Third Intervener**

Hearing dates : 18 and 19 October 2010

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Judgment

Lord Justice Elias :

1. This appeal raises the question whether the appellant, a volunteer worker at the Citizens Advice Bureau ("CAB"), is protected from acts of discrimination on grounds of disability. This depends on whether she falls within the protection of the Disability Discrimination Act 1995 as amended, when read with the Directive 2000/78/EEC which establishes a general framework for equal treatment in employment and occupation ("the Framework Directive"); and if not, whether she can rely on the Directive to give her directly enforceable rights.

2. Although this case is about disability, it is common ground that if the appellant is protected as she claims, then she and other similarly placed volunteers would also be protected from discrimination on the other grounds identified in the Framework Directive, and on the grounds identified in the related sex and race directives (Council Directives 2006/54/EC and 2000/43/EC respectively). Between them these directives cover, in addition to discrimination on grounds of disability, discrimination on grounds of racial or ethnic origin, sex, sexual orientation, religion and belief, or age.

3. The case raises an issue of some importance and interest to the voluntary sector. Accordingly, in addition to the representations advanced by the parties, three bodies were permitted to intervene. The Equality & Human Rights Commission ("EHRC") did so and broadly supported the appellant. The Secretary of State intervened in support of the respondent, as did the Christian Institute. All submitted detailed written observations and the EHRC and Secretary of State were also permitted to make oral submissions. We are grateful for their respective contributions which have helped to elucidate the issues in this case. It is important, however, to emphasise that the only question with which we are concerned is whether this particular voluntary worker is protected by the legislation in issue. I seek to resolve only such issues of principle as enable me to reach a conclusion on that question. Volunteers come in many shapes and sizes, and it cannot be assumed that all will have the same status in law.

The facts.

4. The appellant applied on 28 April 2006 to be a volunteer with the respondent CAB, indicating that she would like to volunteer for 4 to 5 hours per week. She had a number of academic and practical qualifications in law. Her purpose in seeking this post was to obtain the qualifications and experience to establish her own business. For the purposes of the preliminary hearing it was assumed - and it may be that it is not disputed - that she is disabled.

5. She was given a volunteer agreement which she signed on 12 May 2006 and which was described as being:

> "binding in honour only … and not a contract of employment or legally binding".

6. It was emphasised to her that she was under no legal obligation to attend work but that it was anticipated that there would be a level of trust and a hope that the expectations reflected in the agreement would be honoured.

7. The appellant undertook a nine month training period. Thereafter, as a voluntary advisor, she carried out a wide range of advice work duties. No attendance records are kept for volunteers, but the claimant frequently did not attend on the days she was expected, approximately 25-30 per cent of the time. No objection was ever taken to this or to her changing her working days.

8. In circumstances which did not arise for adjudication at the preliminary issue stage, the claimant was asked to cease to attend as a volunteer. She submits that the reason is connected to her disability. Hence her claim for disability discrimination.

The law.

9. The following articles of the Framework Directive are material. Article 1 sets out the purpose of the Directive in the following terms:

> The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the member states the principle of equal treatment.

10. Article 2 then defines the concept of discrimination, which is not in issue here. Article 3 defines the scope of the Directive. Paragraph 3.1 is as follows:

> 1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:
>
> (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
>
> (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
>
> (c) employment and working conditions, including dismissals and pay;
>
> (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

11. The Directive does not, therefore, seek to give effect to the principle of non-discrimination in all areas of human activity. It limits the scope to what might, in general terms, be described as activities in the labour market. It is concerned with all aspects of work, and whilst the term "worker" is not specifically used in the Directive, there is a reference to "working conditions." It will be noted that "occupation" is

only expressly referred to in paragraph (a) in the context of ensuring that there should be no discrimination with respect to "conditions of access."

"Worker" and "occupation".

12. There is no authority in EU law which has considered the meaning of "occupation" but many which have considered the meaning of "worker". In *Allonby v Accrington & Rossendale College and Others* [2004] ICR 1328 the ECJ emphasised (with reference to Article 141 EC, relating to the principle of equality for men and women) that:

> "the term worker … cannot be defined by reference to the legislation of the Member States but has a Community meaning. Moreover, it cannot be interpreted restrictively".

It then defined the concept of "worker" as follows:

> "... In order to be treated as a worker, a person must pursue an activity which is genuine and effective, to the exclusion of activities on such a small scale to be regarded as purely marginal and ancillary. The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration."

13. This reflects the approach which has been adopted by the court in a series of cases concerning the freedom of movement provisions: see e.g. *Kurz v Land Baden-Württemberg* [2002] ECR I-10691 para 32, which refers to a whole line of authorities including the seminal case of *Lawrie-Blum v Land Baden-Württemberg* [1987] ICR 483, and more recently the observations of the Advocate General in *Wippel v Peek and Cloppenburg GmbH & Co KG* [2005] ICR 1604, where he also placed emphasis on "the receipt of remuneration".

The Disability Discrimination Act 1995.

14. So far as the disabled are concerned, the Directive is given effect by the Disability Discrimination Act 1995 as amended ("the 1995 Act"). The domestic legislation does not use the concept of "occupation" at all. In so far as it applies in the employment field, its scope is defined in/by section 4. The particular provision in issue in this case is section 4(2)(d) which is as follows:

> 'It is unlawful for an employer to discriminate against a disabled person whom he employs -
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> …
>
> (d) by dismissing him, or subjecting him to any other detriment.'

15. "Employer" and "employees" derive their meaning by reference to the definition of 'employment', which is contained in section 68 of the 1995 Act:

> "Employment" means, subject to any prescribed provision, employment under a contract of service or of apprenticeship or a contract personally to do any work, and related expressions are to be construed accordingly.'

16. Under domestic law, therefore, the persons primarily protected by the 1995 Act are those who have contracts, whether it be a contract of service or a contract for services. In the absence of a contract, the person providing the work or services cannot be in employment at all. That is not to say that all other persons providing work or services are outwith the protection of the 1995 Act if they do not have a contract. Special provision is made for such persons. For example, a certain category of office holders, some of whom will not have contracts, is expressly covered by section 4A, and partners and barristers are caught by sections 6A and 7A respectively. However, it is conceded that the appellant does not have a contract and therefore falls outside the scope of section 4(2)(d), and that she does not fall within any of these special provisions.

17. Subsection (4)(1) is relied on by the appellant. It reads in material part as follows:

> " '(1) It is unlawful for an employer to discriminate against a disabled person -
>
> (a) in the arrangements which he makes for the purpose of determining to whom he should offer employment.'"

The appellant's case.

18. The appellant's case is that she is protected from disability discrimination in one of two ways. Her principal submission is that the voluntary post is an "occupation" within the meaning of Article 2 of the Framework Directive; a secondary submission is that the post of volunteer is one which constitutes a relevant arrangement within the meaning of section 4(1) of the 1995 Act. The submission is that in making available voluntary work for advisors, the CAB is entering into an arrangement for the purpose of determining to whom the CAB should offer employment as full time advisors. Once full time they are employed under contract by the CAB.

19. As to the primary argument, the appellant accepts that since the concept of "occupation" is not found in the domestic law, if the post does fall within the scope of the Directive, it can only be given effect either by interpreting the domestic legislation in accordance with the Directive, if that is possible; or by giving direct effect to the Directive. The former involves the application of the well known principles developed by the ECJ in the *Marleasing* case [1990] ECR 1-04135; and the latter, which involves giving the Directive effect even against a private party, rests upon the principles recently developed by the ECJ in *Mangold v Helm* [2005] ECR 1-9981 and *Kucukdeveci v Swedex PNBH* [2010] EUECJ C-340/08; [2010] IRLR 346. The submission is that these cases enable fundamental rights of the EU to be enforced horizontally against private parties, notwithstanding that provisions derived from directives can in general only be enforced as against the state and cannot be enforced horizontally against private citizens or bodies. Although *Mangold* and *Kucukdeveci*

are both age discrimination cases, it is submitted that the obligation not to discriminate on the grounds of disability would likewise be treated as a fundamental right.

20. A rather different case was advanced by the EHRC as intervener. The Commission submitted that whatever the scope of domestic law, the volunteer fell either within the concept of "employment" or "occupation" as defined in the Directive; and it ran a further submission, not in fact dissimilar to the appellant's domestic law argument, that the post involved "vocational training" within the meaning of Article 3(1)(b) and that the CAB had denied the appellant access to such training. Like the appellant it contended that effect could be given to these provisions by either of the means already identified i.e construction of the domestic law or direct enforcement of a fundamental right.

21. I have some reservations about permitting an intervener to raise a wholly distinct argument not advanced by the appellant at any stage in the proceedings. However, since the submissions are purely issues of law which rely on the facts already found, and the point is of some importance, I think it right to consider them.

The hearings before the employment judge.

22. There were two hearings before the employment judge. They arose in this way. At the first hearing the judge understood that there were two claims being advanced. The first was that the claimant had been discriminated against contrary to section 4(2)(d) of the 1995 Act in that her employment had been terminated. This depended upon the claimant being in "employment" as defined in section 68. The second was that she had been discriminated against with respect to a work placement contrary to section 14C.

23. The employment judge, Ms Stacey, rejected both grounds. As to the first, she held that the claimant was not in employment within the meaning of the 1995 Act because there was no contract between her and the CAB. There was no legal underpinning of the relationship. She noted that this conclusion was in line with a number of EAT authorities which have held that CAB volunteers did not fall within the concept of "employment": see e.g. *Bruce v Leeds CAB* (EAT/1355/2001) and *South East Sheffield CAB v Grayson* [2004] IRLR 353. She also expressed the view that the arrangements fell outside the terms of the Framework Directive, but noted that she had not heard argument on that point.

24. The employment judge also dismissed a claim, not now advanced, that the claimant was discriminated against with respect to a "work placement" within the scope of section 14C of the 1995 Act. A work placement is defined in section 14C(4) as "practical work experience undertaken for a limited period for the purpose of a person's vocational training." The judge concluded that the work was neither for a limited period nor was it for the purposes of a person's vocational training. The employment judge's observations with respect to this latter argument are pertinent to submissions now being advanced before this court with respect to the domestic law argument, and indeed the submissions of the Commission with respect to the vocational training argument:

> "X's arrangement with the CAB was neither for the dominant nor sole purpose of the vocational training. A by product of X's volunteering for the CAB was that she would receive training that could possibly be useful generally on her CV in the Welfare Rights and Advice field and possibly in obtaining a solicitor's training contract or para-legal work, but that was neither the sole nor the dominant purpose of the arrangement - it was to give advice as a volunteer."

25. When the appeal came to the EAT it was argued that the Employment Tribunal had in part misunderstood the claim. The appellant was also claiming that the CAB had made arrangements for the purpose of determining who should be offered employment contrary to section 4(1)(a), and the employment judge had not ruled on that issue. The EAT suggested to the Employment Tribunal that it might review its original decision to consider this question, and that is what it did.

26. This led to a second decision in which the Tribunal made further findings of fact material to that submission. These included a finding that volunteers frequently subsequently become employed by the CAB as full time advisors; being a volunteer provides appropriate experience for a paid advisor's position. There was evidence that in some areas about 80% of paid advisors would have been volunteers first. It is, therefore, beneficial for an applicant for a full time job to have gained experience as a volunteer first. The employment judge stated in terms that:

> "in practice it is likely that the experience of having been a volunteer is a very great advantage and is clearly relevant in obtaining paid positions at the CAB and indeed elsewhere."

27. However, the employment judge also found that it is far from automatic that volunteers will be given vacant full time posts. Volunteers are not given preferential treatment in applying for paid jobs with the Bureau. All paid posts are advertised externally and an open recruitment exercise adopted: nor is it a requirement of appointment to a paid post within the Bureau that a candidate should have any background or training within the CAB service.

28. Bearing in mind these findings, the employment judge concluded that section 4(1)(a) was not in play for reasons which are similar to those which caused her to dismiss the claim under section 14C. There was no arrangement whose purpose was to determine to whom employment should be offered. The judge's reasoning is encapsulated in the following paragraph:

> "….when one poses the relevant question: are the volunteering arrangements for the purposes of determining to whom employment should be offered, the answer is "no" - the engaging of volunteers is to provide volunteer advice and other work to support the CAB's charitable aims. It is a by product, and not a purpose, that in engaging and training volunteers the CAB develops a cadre of individuals who are likely to develop skills suitable for paid employment which can lead to paid work at the CAB. But that is not the sole, dominant or indeed any part of the actual purpose of the arrangement."

29. The Framework Directive does not appear to have figured greatly in this essentially domestic law argument. Employment Judge Stacey simply observed that the aim of the Directive did not alter the meaning and interpretation of section 4(1)(a).

The decision of the EAT.

30. The focus of the argument shifted before the EAT. The principal argument was that the volunteer fell within the meaning of "occupation" within the Directive and that accordingly the tribunal had jurisdiction to consider whether the termination of her voluntary status was unlawful discrimination. It was conceded that in the light of the employment judge's decision the appellant did not have a contract, but whilst that posed a problem under domestic law read on its own, because it meant that the appellant was not in employment under section 68, it was no answer to a claim under the Directive that she was in an occupation. The appellant also renewed the submission that by requiring the appellant to cease to be a volunteer, the CAB had discriminated contrary to section 4(1)(a) in the arrangements it made for offering employment.

31. Burton J rejected both grounds of appeal. As to the latter, his reasoning was essentially the same as the employment judge (see paras 42-45). Burton J held that given her findings of fact, the employment judge's conclusion that the appointment of volunteers did not constitute an arrangement for the purpose of determining who should be offered employment was impeccable.

32. As to the Directive argument, Burton J found that the post was not an "occupation" within the meaning of the Directive. The judge held that the concept of "occupation" did not embrace unpaid work, as the appellant had submitted, but rather would cover "a profession or qualification or area of work, access to which may be necessary for employment (including self employment)."

33. In any event, he did not consider that any effect could be given to the Directive even if the statute failed properly to transpose the full meaning of "occupation" into domestic law. Neither the *Marleasing* nor the *Mangold* principles could assist the employee in this case (and the ECJ decision in *Kucukdeveci* had not been determined at that stage.)

The grounds of appeal.

34. The appellant repeats the arguments that failed to find favour with Burton J. As I have indicated, the EHRC has sought to identify two other routes by which the appellant might be brought within the scope of the Directive. The Commission submits that a volunteer is capable of falling within the EU concept of "worker"; and that the work carried out by the voluntary advisors was vocational work within the meaning of Article 3.

35. I will first deal with the purely domestic argument and then consider the various submissions based on the applicability of the Framework Directive.

The domestic law argument.

36. The argument is that the evidence before the employment judge established that obtaining a voluntary CAB post significantly assists the employee to gain a permanent paid advisor's post. That permanent post is undoubtedly "employment" within the meaning of section 68. Accordingly the voluntary post must be seen as a stepping stone in the access to employment, and that is enough to bring it within section 4(1)(a). The establishment of a cadre of voluntary CAB advisors constitutes an "arrangement which [the CAB] makes for the purpose of determining to whom [it] should offer employment".

37. I wholly reject this submission, essentially for the reasons given by both judges below. An arrangement is not for the purpose of determining who should be offered employment if that is not what it is designed to achieve. It is obvious that the purpose here is to secure advisors to provide advice to clients of the CAB; the purpose is not to create a potential pool from which full time staff can be drawn. Most voluntary advisors have no wish to obtain a permanent staff post. Furthermore, the pool from whom persons are chosen to fill those posts is in fact far wider than volunteers, as the employment judge found. All paid positions are externally advertised and are open to everyone.

38. Nor is the purpose to improve the employability of the relatively small proportion of volunteers who may at some later date seek a full time position. That may be one of the effects or by-products of this arrangement, but it is not its purpose.

39. It is also relevant to note the surprising consequence of this argument, if it were correct. Very many volunteers do not seek or want permanent positions. Indeed, they often do part time unpaid voluntary work, with the more limited commitment which such work demands, as an alternative to full time employment. Yet if the argument is correct, it means that all CAB volunteers will be protected by the discrimination legislation, whether they are looking for full time jobs or not. The fact that being a volunteer improves the employment opportunities for the few who are ambitious for a full time CAB advisor's job confers legal protection on all. Indeed, the appellant herself was not seeking such a position.

The vocational training argument.

40. The EHRC's submissions were that the voluntary post was a form of vocational training, and that the appellant had been denied access to it in breach of Article 3(1)(c). The concept of "vocational training" includes, so it was submitted, any form of volunteering which in essence trains the participant in a skill, albeit that there is no formal training contract relationship.

41. I do not accept that submission. The argument is essentially the same as the domestic section 14C argument which was unsuccessfully advanced before the employment judge and not pursued further, and it fails for essentially the same reasons. The observations of the employment judge reproduced above at paragraph 24 are equally applicable here and I respectfully endorse them. To be vocational training, the purpose of the activity must be to train for a job. It is not the purpose of the CAB when it appoints volunteers to provide training to enable these workers to become full time workers, either with the CAB or with any other employer.

42. Nor can the advisors, on any sensible meaning of the term, be described as carrying on vocational training. They are not being trained for anything; they are providing services for third parties in the same way as full time staff would do. The fact that their volunteering provides experience which will improve the chance of obtaining a full time CAB post, or indeed other employment, is irrelevant. A middle manager is building up experience which will help him to become a senior manager, but it would be an abuse of language to describe him as undergoing vocational training.

Employment or occupation?

43. I turn to the major issue in this case. The appellant has focused on the concept of "occupation." Mr Lofthouse, her counsel, was not contending that the volunteer's post was employment as defined in EU law, not because of the lack of a contract which takes it outside the definition in section 68 of the 1995 Act, but because of the absence of any sort of remuneration. The EHRC has hedged its bets by asserting that the appellant falls either within the concept of employment or occupation. It submits that neither the absence of a contract nor remuneration precludes that conclusion.

44. Before considering these submissions in detail, it is important to identify certain uncontroversial features of this legislation which set the context in which the appellant's submissions have to be analysed.

45. First, the commitment to equal treatment and non-discrimination is one of the fundamental principles of the EU. Those principles protect the dignity and autonomy of the individual and secure that each individual is recognised as being of equal worth: see the observations of Advocate General Poiares Maduro in *Coleman v Attridge Law* [2008] ICR 1128, para.10.

46. Second, it is widely recognised that volunteering by and for the disabled is highly desirable and should be encouraged. We were referred to various reports to make good that uncontroversial submission. These included "*Improving the Life Chances of Disabled People*" (January 2005) issued by the then Prime Minister's Strategy Unit, "*Recruiting, Retaining and Developing Disabled Volunteers: Guidance for Volunteer Opportunity Providers*" (April 2007) published by the former Disability Rights Commission ("DRC") and "*Volunteering for All?*" published recently by the Institute for Volunteering Research. In addition, our attention was drawn to recital 6 of the Framework Directive which talks of the need to take appropriate action for the social and economic integration of the disabled; and recital 16 which states that the provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination against them.

47. Third, the voluntary sector is a substantial one, as evidenced by statistics from the National Council for Voluntary Organisations. In 2007/08 some 73 per cent of adults in England took part in a voluntary activity, 64 per cent of them undertook informal volunteering, and 43 per cent undertook formal volunteering, 27 per cent of people giving their time at least once a month, with an estimated total of 1.75 billion volunteer hours. At the same time, the disabled as a group are under represented in the voluntary sector. There are a whole series of barriers which inhibit volunteering: see the report of the DRC, *"Recruiting, Retaining and Developing Disabled Volunteers: Guidance for Volunteer Opportunity Providers"* (April 2007), p.10

48. Fourth, there are conflicting views about whether the voluntary sector ought to be subject to discrimination laws. Mr Justice Burton referred to a Disability Rights Task Force report dated December 1999 which found that it was "far from self evident" that it was desirable to bring the voluntary sector into the scope of discrimination law, certainly as far as the disabled are concerned. More recently, in July 2010 a charity called "Volunteering England" conducted an inquiry into the alleged poor treatment of some volunteers by the bodies for whom they worked. They published an interim report in which they noted that there were strongly divergent views as to whether employment rights should be extended to volunteers; some who were consulted saw legislation as an unwelcome fetter on the volunteer and thought it important that volunteering was kept wholly distinct from employment.

The submissions.

49. Both the appellant and the EHRC submit that the appellant is in an occupation. They each gave different meanings to that concept which were more of a description than a definition. The appellant adopted the definition which had been formulated after discussion with Burton J in the EAT. It relies heavily upon the decision of Stanley Burnton J, as he was, in *R (Payir) v Secretary of State for Employment* [2006] ICR 188 which in turn had been taken from a series of ECJ decisions which discussed the concept of "worker" in EU law. It is as follows:

> "Occupation is the carrying out of a real and genuine activity which is more than marginal in its impact upon the person or entity for whom such activity is carried out and which is not carried out for remuneration or under any contract."

Mr Lofthouse submits that whilst this definition is derived from the definition of "worker", it is not co-extensive with it. He cites certain kinds of office holders who provide services but who are not regulated by contract, as other examples of someone in an occupation. They are specifically covered by the 1995 Act.

50. The EHRC proposed a different formulation. Without nailing their colours to either the occupation or employment mast, they submitted that these concepts should be broadly construed to include all those forms of volunteering which are (in all but the contractual relationship) effective forms of work. Typically this would be where the volunteer is providing work in a disciplined and structured environment.

51. The principal basis of each of these submissions is that a purposive approach to the construction of EU law must be adopted, and that having regard to the context and purpose of this legislation, as reflected in some of the recitals, and the importance of the fundamental rights which the Framework Directive is designed to protect, it must be inferred that the Directive was intended to catch voluntary workers like the appellant.

52. It is particularly important for the disabled to be able to secure voluntary work to assist their integration into the labour market. A broad and generous interpretation of these European concepts is appropriate, which reflects the approach of the ECJ when interpreting the meaning of "worker" in Article 141 concerned with equal pay: see *Allonby v Accrington and Rossendale College* [2004] ECR 1-873, paras 55-56.

53. The respondent and the Secretary of State advance a host of reasons why this analysis will not do. They do not dispute that some volunteers may well be caught by the legislation. But they submit that nobody who works without any contractual obligations and without any pay can fall within the scope of this Directive.

54. They point out the inherent uncertainty in the concepts suggested by the appellant and the Commission. They are descriptions, not definitions, and provide no proper basis for determining which workers would fall within and which without the legislation. This was also a point urged forcefully in the written submissions of Mr Bowers QC for the Christian Institute who emphasised the difficulties which voluntary organisations would face if the scope of the Directive were to be so vague and uncertain. They also suggest that the concepts are arbitrarily chosen and have no merit other than that they cover the appellant's case. They submit that the history of this provision suggests that something much more specific was envisaged, and that there are a number of other matters which point decisively against treating this volunteer as someone in "occupation."

55. The Directive was plainly not intended to cover all fields of endeavour; it applies the concept of equal treatment to certain contexts only. Had the intention been to cover voluntary workers, a specific definition would have been adopted. It is inconceivable that the draftsman would have intended such a large and important area of activity to be covered without expressly saying so and without carefully defining its scope. This is particularly so given that currently volunteers are treated differently in different EU countries.

56. A related argument is that the language of the Directive suggests that the focus is the integration of minority groups into the labour market. Reliance is placed on the following observation of Moore-Bick LJ in *Jivraj v Hashwani* [2010] IRLR 797, a case in which the issue was whether the appointment of an arbitrator fell within the scope of the Directive (para 21):

> "The recitals to the Directive and the structure and language of Article 3(1) as a whole indicate that it is concerned with discrimination affecting access to the means of economic activity, whether through employment, self-employment or some other basis of occupation."

It is submitted that work carried out voluntarily and for no remuneration is not a means of economic activity.

57. Furthermore, the respondent and the Secretary of State rely heavily on the fact that there was a proposal which emanated from the European Parliament which in terms suggested that the Framework Directive should be amended to include "unpaid and voluntary work" in addition to the concept of "occupation". The European Commission accepted that amendment and put it into the draft which went before the Council of Ministers for adoption. At that stage it was rejected. The significance of this rejection is that it shows that none of these Community institutions considered that voluntary workers already fell within the scope of the term "occupation", otherwise the amendment would have been otiose. Moreover, the fact that the Council did not agree to their inclusion militates against a construction which achieves precisely that effect.

58. Other more subsidiary points are made. It was emphasised that the language adopted by the member states faithfully reflects the concepts used in the Directive. They do not include volunteers. Furthermore, at no stage has the European Commission ever suggested that states have failed properly to implement the Directive because of the failure specifically to extend the protection it affords to volunteers. Concerns have been expressed about the failure in other respects fully to transpose the Directive, such as concerns over the definition of disabled, but this is not one of them.

Discussion.

59. In my judgment the submissions of the CAB and the Secretary of State are correct. In particular, I wholly reject the premise underpinning the submission of both the appellant and the Commission 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.

60. I accept that a broad and generous interpretation of the Directive should be given consistent with a purposive approach which EU law dictates is the proper way of interpreting provisions of this nature. But even adopting that approach, I have no doubt that the appellant falls outside its scope. I say this for the following interrelated reasons in particular. First, it is far from obvious that it would be thought desirable to include volunteers within the scope of the discrimination legislation relating to employment. As I have indicated, there is a genuine debate about that. Indeed, when the matter was specifically addressed by the European Commission and a proposed amendment was introduced, the European Council chose not to introduce it. They must have had doubts as to its desirability.

61. Second, it is inconceivable that the draftsman of the Directive would not have dealt specifically with the position of volunteers if the intention had been to include them. Volunteers are extensively employed throughout Europe, and it is unrealistic to believe that they were intended to be covered by concepts of employment and occupation which would not naturally embrace them. The concept of worker has been restricted to persons who are remunerated for what they do. The concept of occupation is essentially an overlapping one, and I see no reason to suppose that it was intended to cover non-remunerated work. Moreover, it is plain that the views of the Community institutions have been that the voluntary sector is not covered by the Directive; hence the attempt specifically to include them by amendment. That, of course, is not a decisive consideration; the common perception may have been wrong. But it carries considerable weight and the strength and consistency of that understanding jars with the submission that it is obvious that the draftsman must have intended to include volunteers within the scope of the Directive.

62. Mr Lofthouse rhetorically asks what the concept of "occupation" is intended to cover. He says that the failure to identify its meaning is a significant weakness in the respondent's case. I do not accept that. In my judgment it is enough to say that whatever it covers, it is not this appellant or those similarly placed. In fact, however, I suspect that Burton J is right in concluding that the concept of "occupation" was intended to refer to a class or category of jobs, and that the concept of "employed"

and "self employed" was intended to refer to particular jobs. That would explain why the Directive in terms forbids discrimination with respect to access to an occupation but does not, for example, provide that there should be no discrimination with respect to the terms of the occupation. In other words, it 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 job, be it described as a profession or occupation. It is concerned with access to a particular sector of the job market rather than with the particular job which someone seeks or holds. In my judgment in so far as any assistance is provided by certain other instruments referred to in the recitals to the Directive, such as Convention No.111 of the International Labour Organisation and the Community Charter of the Fundamental Social Rights of Workers - and in my view that assistance is limited - it supports this analysis, as Burton J thought: see paragraph 32 of his judgment.

63. This analysis is consistent with the fact that the concept of worker under EU law is not defined by reference to those with a contract; it is capable of embracing all those who perform work for another for remuneration, whether pursuant to a contract or some other relationship. There is no need for a concept of occupation to capture those employed in a particular job.

64. But even if that analysis is wrong and the concept of occupation is capable of identifying a particular post falling outside the definition of employment or self employment, for reasons I have given I do not think that it would include volunteers. It follows that the appeal fails.

65. Given my conclusion on the primary issue, it is not necessary to consider whether, if the Directive were applicable, it would be possible to give effect to it in circumstances where private parties are involved. Suffice it to say that whilst I recognise certain difficulties in applying the *Marleasing* principle so as to achieve the interpretation advanced by the appellant, there is on the face of it a strong argument that *Kukukdeveci* would permit the Framework Directive to be directly enforced. I am not attracted to the argument of the Secretary of State that whereas protection from age discrimination may be a fundamental EU right, protection from disability discrimination would not be. In any event, there is at the very least a referable question as to whether the principle in *Kukukdeveci* would apply in the circumstances of this case. Had it been necessary to refer the substantive issue, I would have made a reference on that point also. However, I do not accept that there is sufficient doubt as to the outcome to merit a reference to Europe on the substantive issue. Certain French authorities relied on by Mr O'Dempsey to create that doubt did not on careful analysis lend real support to his submissions. I am satisfied that the appellant's case would fail before the ECJ.

Disposal.

66. I would dismiss this appeal.

Lord Justice Tomlinson:

67. I agree.

Lord Justice Rix:

68. I also agree.