

IN THE CENTRAL LONDON COUNTY COURT

Claim No.CL209468

BETWEEN

ROBERT ROSS

(Claimant)

And

RYANAIR LIMITED

(First Defendants)

And

STANSTED AIRPORT LIMITED

(Second Defendants)

JUDGMENT

THE ISSUE

1. During the course of his opening Mr Galbraith-Marten told me that Ryanair Limited (RA) and Stansted Airport Limited (STAL) both accepted that Mr Ross should not have had to pay for the hire of a wheelchair when he flew from Stansted Airport to Pertinent on the 27 March 2002, and on his return to Stansted Airport on the 2nd April 2002. The issue was for the court to decide which of the defendants was responsible for paying the sum of £36 incurred by Mr Ross on his outward and return journey to Pertinent. It was accordingly accepted that Mr Ross had been discriminated against.

BCKGROUND FACTS

2. RA operate flights out at Stansted Airport. Currently two thirds of flights leaving and returning to Stansted Airport are operated by RA.

3. RA is the largest low fair airline in Europe. It is clearly justifiably proud of its reputation, and it has made profits of around £30m in its last accounting quarter.

4. RA's contribution to STAL is considerable, both in terms of the revenue it pays directly, and, in indirect revenue ELS a consequence of money spent by RA's customers in the airport facilities such as the cafes, bars and shops.

5. Up until 1995 the majority if not all United Kingdom Airlines including RA paid for any cost incurred when a passenger in a wheelchair embarked on a flight.

6. A date which remains in dispute, in either 1995 or 1997 RA changed their policy. The documents suggest the change took place in 1995 and if that was right, it was prior to implementation of the Disability Discrimination Act 1995. Ms Conroy RA's General Manager of United Kingdom and European Airports in her statement suggested that the change of policy took place in 1997 (statements bundle page 12). From either 1995 or 1997 RA would only provide assistance to passengers travelling with their own or a hired wheelchair, and passengers who did not have their own or a hired wheelchair would have to pay to the provider for the provision of a wheelchair. Mr Ross was in the latter category

7. I am prepared to accept that the policy was implemented in 1995 prior to the commencement of the Act. The policy has remained in force until the present. STAL were aware of the change of policy, and have taken no steps enforce a different policy under the terms of the contractual arrangements between RA and STAL.

8. At present RA and Cyprus Turkish Airlines are the only airlines which operate from Stansted which require payment from passengers who want wheelchair assistance but do not own or hire their own wheelchair. Cyprus Turkish Airlines as from the 15th June 2003 have charged passengers who requested a wheelchair the sum of £20. Passengers who are registered disabled were exempt from paying the charge.

9. Ms Conroy referred in her evidence to a table at page 33 of the witness bundle, which set out details of the practice at the airports to which RA fly in relation to the payment of wheelchair assistance. Further at page 13 of the witness bundle she referred to a table setting out details of the practice at CAA

Airports. In evidence she said that at Manchester a charge is made to the airline; the passenger does not pay.

10. Mr-Cruickshank head of Aviation Policy of the British Airports Authority dealt with the position of all major British and European airports. In his witness statement he referred to airports of similar size to Stansted Airport, and confirmed that in those airports listed the airline was responsible for passengers from check-in gate to departure gate and from departure to reclaim. In his second statement he set out further research on the topic at page 140.

11. An airline called "My Travel Lite" which is another "no frills" operator flies out of Birmingham Airport, This airline has adopted the same policy as RA in relation to customers who ask for the provision of a wheelchair and do not have their own or hire a wheelchair. Mr Jeans who was employed by RA was the Managing Director of My Travel Lite.

12. Mr Ross was a regular customer of RA flying from Stansted to Perpignan on as many as four occasions a year. He rarely used a wheelchair, and if he had a choice he would not use one. He needed to use a wheelchair at Stansted Airport in order to get from the check-in point to the plane. He accepted that if the air fare was not so cheap he would not fly to Perpignan four times a year. He indicated however that whatever the price of a ticket he did not consider that he should be charged for the provision of a wheelchair. Mr Ross was clearly aware of RA's policy in relation to wheelchairs.

13. In her oral evidence Miss Conroy confirmed that airlines have ground operators who are the agents of the airlines. RA made a deliberate decision not to pay for passengers who did not have their own wheelchair, but might be disabled. Other airlines did pay the charge. Except for Kerry in Great Britain and Ireland no airport paid for the cost of providing wheelchair assistance. She broadly accepted the facts pleaded in the second defendant's Part 18 response at page 41 in the pleadings file, and agreed that the airline had the first point of contact with the customer. On the facts of this case she conceded that it was not reasonable to require Mr Ross to walk from the check-in to the aircraft at Stansted Airport. It was not she accepted, appropriate to class a wheelchair as a "frill". RA have a Customer Service desk in Satellite 3 at Stansted Airport. At present they are the sole occupants of Satellite 3.

14 Mr David O'Brien the Director of Flight and Ground Operations for RA confirmed that he signed the contract between the first and second defendants when RA had begun the business of another "no frills" airline called Buzz. He said that in discussions with Miss Stewart Customer Services Director of STAL he mentioned RA's wheelchair policy and he signed the agreement subject to RA's policies and procedures. He accepted that there was no written reservation relating to disabled passengers, and that he could draw a line through clauses 5.3 and 5.4 of the agreement.

15 Mr Cruickshank head of Aviation Policy at BAA confirmed that in his view individuals in Mr Ross position should not have to pay the cost of a wheelchair BAA provided the wheelchair service from point of arrival to check in. The airline My Travel Lite in making the charges for wheelchair use was in breach of contract with the owners of Birmingham Airport.

16 Mr Butler, the Business Development and Planning Director at Stansted confirmed RA provide to their customers with low prices, punctual service and a low rate of baggage loss. RA had a desk in Satellite 3 where customers are able to ask their staff questions. RA could make announcements to their passengers in Satellite 3. It was RA's responsibility to deliver baggage onto the carousel when passengers returned to Stansted. The provision of a carousel did not involve STAL taking responsibility for putting baggage onto it.

17. I have deliberately made limited reference to the oral evidence because it was accepted by Counsel that substantial parts of the evidence given did not in the final analysis assist on the issue which I have to decide.

THE DOCUMENTARY EVIDENCE

General documentation

18. I was referred to a substantial number of documents relating to the responsibility of airlines for passengers and the current position relating, to disabled passengers. On the 13th June 1961 ground handling arrangements at Heathrow Airport were entered into in an agreement known as the ARBUK Agreement. Paragraph 4 provided:-

"Division of responsibilities was agreed for portorage etc. in the terminal buildings i.e. the airlines accepted responsibility for all services from the check-in desk outwards and to the customs hall inwards "

19. (a) On the 13th November 1998 Mr Davies the Secretary General of BATA (British Air Transport Association) wrote to Mr Jowett the Chief Executive of the Airport Operators Association, and stated inter alia

"I would, however, like to take the opportunity of clarifying the situation as far as the provision of services to those of special needs is concerned. We have always recognised that once a passenger

has checked in, it is airlines responsibility to ensure that the appropriate level of service is available. The actual service can, of course, be provided by the airline, the handling agent or the airport. I must reiterate however that we have never suggested that it is the airport's responsibility to provide these and I would want your members to clearly understand this."

(b) The IATA air handling manual AHM 176 states at paragraph 4.1

"Necessary steps should be taken to ensure that the Handling Company is in a position to ensure safe handling of PRMs by ensuring that appropriate devices are made available, such as, but not limited to, wheelchairs and lifting systems."

(c) The IATA airport handling manual 810 - Annex A in paragraph 4.1.3 states:

"When requested by the Carrier

(a) provide

or ,

(b) arrange for –

Special equipment, facilities and specially trained personnel as available for assistance to Disabled passengers.

(d) The ICAO Circular 1999 provides guidance material for implementing the standards and recommended practices in Annex 9.

Under the general heading "Airports" paragraph 22 states:

"Contracting states should encourage airport authorities to provide a special handling service for persons with disabilities comprising (a) staff trained and qualified to meet their needs, from their arrival at the Airport until they are seated on board the aircraft and visa versa and (b) the appropriate equipment to assist them".

Under the general heading "Ground Transportation" paragraphs 23 and 24 state:

"23. Airport authorities, operators or ground handling operators should provide vehicles or equipment for the transport of persons with disabilities within the airport.

24. Operators and airport authorities should be encouraged to provide a means of transport between airports so that persons with disabilities can be transported at the same cost and in the same confident safety as other passengers."

Under the general heading Services paragraph 29 provides

"Operators should ensure that services are provided to persons with disabilities when a request for such services made at least 48 hours prior to departure and they should make reasonable efforts to accommodate requests not made within this time limit. Services to be provided upon request should include:

Assisting in proceeding to the boarding area.

Assisting in proceeding to the general public area 01 in some cases to a representative of another operator."

Under the same heading paragraph 37 provides

"Persons with disabilities needing assistance should be board separately (normally prior to all other passengers) and disembark separately (normally after all other passengers). If requested operators and airport authorities should make arrangements for assisting persons with disabilities without bound/inbound governmental clearance and with baggage delivery."

20. In a letter dated 18th September 2000 Mr Grant Senior Manager Airports of British Airways wrote to Me Cruickshank and stated:

"A key service provided to disabled passengers at the airport is the provision of a wheelchair and baggage assistance service. The responsibility for the provision of this service is currently provided between both airport operator and airline. BAA offers the Skycap service, free of charge to disabled passengers, ensuring that both passenger and luggage are swiftly and courteously delivered to the customer's chosen airline. From the point of check-in responsibility transfers to the airline to ensure that the passenger passes through security screening and arrives at the gate in good time to pre-board their flight. A similar process happens in reverse for arriving passengers. While the airlines cost into their overall product the provision of their part of the service, I believe the airport's element is covered through airport user charges."

21. In October 2002 the ACI (Airports Council International) representing European airports stated in answer to a question "should community legislation lay an obligation on airlines or on airports to provide the package of assistance to PRMs?"

"Every passenger has a contract with the air carrier with which it is travelling. A person whether a PRM or not, becomes a passenger from the moment of check-in. From this time on and until the baggage delivery the air carrier is responsible for ensuring that assistance which may be required by its passengers is provided. Air carriers must be obliged to fill their contractual obligations vis a vis their customers, within which the air carrier must make sure that special assistance, as detailed in paragraph 71, is at the disposal of their passengers that are PRMs. The costs of the assistance provided would then be financed as explained in the response to the previous question.

Airport operators already fully accept their responsibility for providing the appropriate physical infrastructure for accommodating PRMs."

22. The Code of Practice and the revised Code of Practice under the Disability Discrimination Act 1995 deals with the duties placed by Part III of the Act on those providing goods, facilities or services to the public and those selling, letting or managing premises I was referred to paragraphs 2.4, 2.10 and the example 2.13, 2.14, 2.17, 2.18, 2.19, 2.20, 2.25, 2.26, 2.27, the example relating to airports under 2.30, 2.36 and the example 2.38, 2.39, 3.21, 3.22, 4.19, 4.26, 4.28, 4.30, 4.31, 4.32, 4.33, 5.4, the second example under 5.5 and 5.12

23. The Department of Transport in March 2003 published A Code of Practice called "Access to Air Travel for Disabled People". The purpose of the Code is described as "to improve the accessibility of air travel to disabled people, it is aimed at all those involved in air travel including travel agents, tour operators, UK airlines (scheduled, "no frills" and charters), UK airports, ground handling companies and retailers.

Paragraph 2.14 provides -

"It is a general principle, accepted by members of the British Air Transport Association and the Airport Operators Association, that the costs of providing assistance to disabled passengers at airports should not pass direction to those disabled passengers. This principle is also reflected in the European Voluntary Commitments."

Paragraph 4.15 provides:

"The services to be provided upon request include:

Assistance with registration at check-in

Assistance in Proceeding to the Gate."

Documents - Specific documentation relating to the parties to these proceeding

24. In an internal memo dated the 15th August 1995 headed "Wheelchair Service Stansted" RA set out details of their new policy, which was to be effective from Monday 21st August 1995.

25. A letter dated the 24th December 2001 from Miss Conroy confirmed the policy in the following terms:-

"RA will only provide assistance to passengers travelling with their own wheelchair (to be booked in advance up to a maximum before per flight).

Passengers who do not have their own wheelchairs will NOT receive any form of assistance.

There is no longer a supplier at Stansted to offer a "pay as you go" facility for passengers who do not have their own wheelchair. Please adhere to this and advise all passengers accordingly at the point of check-in in order to avoid disappointment on arrival at Stansted.

If the passengers do not have their own wheelchair, there will be no assistance at Stansted.

This is in accordance with Ryanair Policy."

26. The reservation record relates to Mr Ross' booking of the relevant flight, shows that it was booked over the internet and it was confirmed to him by email.

27. On the 26th February 2002 RA entered into in agreement with Groundstar Stansted Limited, their handling agents which was valid from the 18 March 2002 until the 17 March 2007. The handling charges included under Section 4 paragraphs 4.1.3(a), (b) (2) up to max 4 special assistance per flight. The reference to the Sections is to those in the IATA handling manual AHM810.

28. On the 10th April 2002 STAL entered into an agreement with Groundstar Stansted Limited. STAL under the agreement granted Groundstar a non exclusive licence to provide services at the airport subject to the terms and conditions of the agreement. The licensee (Groundstar) agreed to perform the

obligations set out in Schedule 3 to the agreement Schedule 3 provided that the licensee should comply with particular legislation including the Disability Discrimination Act 1995.

29. Paragraph 5 of Schedule 3 provided in relation to passengers and baggage handling:

"The licensee shall:-

5.1 At the Company's request (but after consultation with the Licensee and other providers of ground handling services at the Airport) make available sufficient of the check-in desk facilities licensed to the licensee to any Airport User who wishes to self handle at check-in, charging a fair and reasonable fee representing an apportioned part of the fee payable by the licensee for the relevant check-in facilities.

5.2 Ensure that staff receive substantial and continued customer service and operational training.

5.3 Have facilities to ensure that Special Needs Passengers (meaning disabled or elderly passengers or other passengers requiring special assistance are met at their point of arrival at the airport and transported through the airport without delay or interruption and to the reasonable satisfaction of the Company provided such services may be provided by a sub-contractor approved by the Company such approval not to be unreasonably withheld or delayed.

5.5 Provide and maintain to an acceptable standard specialist equipment facilities for assistance to disabled and other special need passengers from their point of arrival at the airport provided such services may be provided by a subcontractor approved by the Company such approval not to be unreasonably withheld or delayed.

30. Similar provisions to those in paragraphs 5.3 and 5.4 of the third Schedule cited above are contained in the agreement between STAL and RA signed by Mr O'Brien, following the acquisition by RA of the Buzz business.

31. Mr Ross is supported in these proceedings by the Disability Rights Commission. In response to a letter from a Miss Curtis of the Disability Rights Commission, Miss O'Neil RA's Customer Standards Manager wrote on the 3 September 2002 and stated inter alia:-

"If RA is guilty of discrimination (which we deny) it is discrimination in favour of wheelchair bound passengers. This is because we personally absorb third party charges levied by totally separate handling companies at Stansted, Gatwick, Dublin, Leeds, Bradford, Manchester and Shannon Airports, despite the fact that in many cases these charges are greater than the total airfare paid us. In the case of such wheelchair bound passengers, we actually spend more money to carry them to/from our aircraft than they pay us for the entire fare. While given the substantial numbers involved, we will not extend the subsidy to non wheelchair bound passengers because if these passengers are not wheelchair bound, they are clearly capable of walking to/from the airport check-in areas, and it is not unreasonable to ask them to walk to the aircraft. If they wish to avail of the third party wheelchair assistance services (which is clearly in their case discretionary) we ask them to pay the third party provider direct for these Services. At 50 of the 56 airports we fly to no such charges are levied and therefore the issue does not arise."

Perhaps not surprisingly, in these proceedings RA wish to distance themselves from the suggestion that passengers not in a wheelchair are clearly capable of walking from the check-in areas to the aircraft. This was not the case with Mr Ross and no doubt is not the case with a number of other passengers.

THE PROCEEDINGS

32. The claim was originally brought against RA only but in the light of their defence, STAL were added as second defendants. The services and facilities allegedly provided by RA are set out in paragraph 4 of the Amended Particulars of Claim, and the services and facilities allegedly provided by STAL in paragraph 4A. As against RA it is contended that they have unlawfully discriminated against Mr Ross under the terms of Section 19(1)(d), Sections 21(1) and 19(1)(b), Sections 21(2) and Section 19(1) (d) and Section 21(4) and Section 19(1)(b). As against STAL it is contended that they have discriminated against Mr Ross under Section 21(2) and Section 19(1)(b) and Section 21(4) and Section 19(1)(b). Mr Ross claims as damages the costs of hiring the wheelchair of £36 and the cost of purchasing a wheelchair for use at Stansted Airport in the sum of £300. In addition he claims damages for injury to his feelings.

33. RA specifically deny that it provides the services and facilities alleged, and it contends that in so far as the matters alleged are services and/or facilities they were provided by STAL. Further, RA relied upon the provisions of Section 19(5)(b) STAL denied liability and contended that when a disabled passenger is checked in responsibility for providing mobility assistance for that passenger to proceed to board the aircraft rested with the airline. In final submissions Mr Galbraith-Marten submitted that although it would be open to the court theoretically defined both defendants' liable it was appropriate in the circumstance of this case to hold that RA were liable to Mr Ross.

THE PROVISIONS OF THE ACT

34. Section 19 provides:

Discrimination in relation to goods, facilities and services.

1. It is unlawful for a provider of services to discriminate against a disabled person-
 - (a) in refusing to provide, or deliberately not providing, to the disabled person any service which he provides, or is prepared to provide, to members of the public;
 - (b) failing to comply with any duty imposed on him by Section 21 in circumstances in which the effect of that failure is to make it impossible or unreasonably difficult for the disabled person, to make use of any such service;
 - (c) in the standard of service which he provides to the disabled person or the manner in which he provides it to him; or
 - (d) in the terms on which he provides a service to the disabled person.
2. For the purposes of this Section and Section 20 and 21 -
 - (a) the provision of services includes the provision of any goods or facilities;
 - (b) a person is "a provider of services" if he is concerned with the provision, in the United Kingdom, of services to the public or to a section of the public; and
 - (c) it is irrelevant whether a service is provided on payment or without payment.
3. The following are examples of services which this Section and Section 20 and 21 apply:-
 - (a) access to and use of any place which members of the public are permitted to enter,
 - (b) access to and use of means of communication,
 - (c) access to and use of information services;
5. Except in such circumstances as may be prescribed, this Section and Section 20 and 21 do not apply to -
 - (b) any service so far as it consists of the use of any means of transport.

35. Section 20 provides.

Meaning of "Discrimination"

1. For the purposes of Section 19, the provider of services discriminates against a disabled person if
 - (a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply, and
 - (b) he cannot show that the treatment in question was justified.
2. For the purposes of Section 19, a provider of services also discriminates against a disabled person if -
 - (a) he fails to comply with a Section 21 duty imposed on him in relation to the disabled person: and
 - (b) he cannot show that his failure to comply with that duty is justified.
5. Any increase in the cost of providing a service to a disabled person which results from compliance by a provider of services with a Section 21 duty shall be disregarded for the purposes of sub-section (4)(e).

36. Section 21 provides -

Duty of providers of services to make adjustments:

1. Where a provider of services has a practice, policy or procedure which makes it impossible or unreasonably difficult for disabled persons to make use of a service which he provides, or is prepared to provide to other members of the public, it is his duty to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to change that practice, policy or procedure so that it no longer has that effect.
2. Where a physical feature (for example one arising from the design or construction of a building or (the approach of access to premises) makes it impossible or 'unreasonably difficult for a disabled person to make use of such service, it is the duty of the provider of that service, to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to -
 - (a) remove the feature;

- (b) alter it so that it no longer has that effect;
- (c) provide a reasonable means of avoiding the feature; or
- (d) provide a reasonable alternative method of making the service in question available to disabled persons.

4. Where an auxiliary aid or service (for example, the provision of information on audio tape or of a sign language interpreter) would -

- (a) enable disabled persons to make use of a service which a provider of services provides, or is prepared to provide, to members of the public; or
- (b) facilitate the use by disabled persons of such a service.

It is the duty of the provider of that service to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to provide that auxiliary aid or service.

MY DECISION

37. No serious factual dispute emerged on the oral evidence given in this case, save for the dispute involving Mr O'Brien in relation to the negotiations arising for the acquisition of Buzz Airline, I am in no position to resolve this dispute, and it is not necessary for me to do so for the purpose of these proceedings.

38. I propose to consider initially the case brought against R A and then if necessary the case brought against STAL, it being accepted that in an appropriate case the court could find concurrent liability under the provisions of the Act, although in his final submission Mr Galbraith-Marten invited me to find that RA were liable Mr Ross.

39. In paragraph 4 of the Amended Particulars of Claim the claimant sets out services and facilities which it is alleged are provided by RA. It is denied on behalf of RA that they provide "services" - see Section 19.1 or "facilities" -see Section 19(2)(a)

40. In his final submissions Mr Langstaff QC counsel for STAL relied upon an observation of Mr Tager QC counsel for RA to the effect that it was safe to conclude that until 1995 in the United Kingdom and Europe there was a clear understanding between airports and airlines that the airline would provide a wheelchair service, Mr Langstaff submitted that there was no doubt that the evidence established that there was such a custom and that it was notorious, certain and reasonable. Indeed, the custom clearly appears to have been in operation since 1960 on the basis of the documents cited above commencing with the ARBUK Agreement in 1961. Whether this is a case where a term could be implied or reliance could be placed on the overriding customer practice may not matter much in the circumstance of this case, but, Mr Langstaff submitted that RA could not: render any such term no longer effective unless a waiver could be established. I accept Mr Langstaff's submissions.

41. RA provide ground handling services under the terms of their agreement with Groundstar.

42. I find that the services RA provide include:

- (a) Check-in. I do not accept Mr Tager QC's submission that this process is just a means of a passenger identifying himself. I agree with Mr. Galbraith-Marten that check-in does not just involve identification of the passengers who are to fly, but it is rather the commencement of the contractual term It is the start of the service provision which continues until the customer on return removes his baggage from the carousel;
- (b) Taking in baggage,
- (c) Issuing a boarding card. The boarding card is the key that opens the door beyond the security check to facilities in the departure lounge and to embarkation onto the airplane.
- (d) The provision of a customer service desk at the entrance to satellite 3 at Stansted where are a staff answer customers questions. There is a facility for public address announcements to be made by Ryanair staff from this customer service desk.
- (e) Assistance at the departure gate
- (f) delivery of baggage to the carousel on the return flight

43. I agree with Mr Galbraith Marten when he submitted that RA provide a different level of service in comparison to other airlines. It is a modest service, but RA does provide a service. RA has chosen for commercial reasons to provide this modest service, and their policy as cited above does nothing to assist m helping passengers with Mr Ross' type of disabilities to get from check in to the airport.

44. I reject Mr Tager QC's analysis of the role and activities of RA at Stansted. I conclude that RA are and were a provider of services within Section 19 of the Act.

45. I turn to consider whether the breaches alleged against RA have been made out. In paragraph 6 of the Amended Particulars of Claim it is alleged that they have been guilty of discrimination under Section

19(l)(d) in relation to the terms on which RA provided the service to Mi Ross. The nature and extent of the assistance provided by RA is set out in the Policy reminder dated the 24 December 2001 cited above. RA's service was offered to Mr Ross on less favourable terms because of the nature of his disability or for a reason related to his disability. On the evidence I accept the submission that RA were and are discriminating unlawfully against different classes of the disabled. They cannot escape liability of asserting that they are treating the more disabled in a more favourable manner. I find that RA have discriminated under the provisions of Section 19(l)(d).

46. Mr Tager QC made two submissions based on the provisions of Section 19(5) of the Act. He invited me to accept that the service provided by RA consisted of the use of a means of transport, the service was the carrying of passengers and luggage to their destinations. That service, he said, and anything ancillary to it was excluded from the Act under the provisions of Section 19(5). Anything ancillary might by way of example involve transport on a bus to get passengers from the terminal to the airplane.

47. As a refinement to this submission he also contended that if there was liability in relation to the services pleaded at paragraph 4(c) of the Amended Particulars of Claim and if RA as part of the service provided the use of a wheelchair this was likewise a means of transport and was excluded under the provisions of Section 19(5).

48. I reject Mr Tager QC's submissions. It is to be noted that Part V of the Act deals specifically with public transport and has provisions relating to the use of taxis and public service vehicles.

49. Paragraph 2.36 of the Code of Practice and the example state:-

"Part III of the Act does not apply to any service so far as it consists of the use of any means of transport. However this does not mean the transport providers are wholly exempt from Part III. They still have a duty to avoid discrimination against disabled people and to make reasonable adjustments for them in respect of matters like timetables, booking facilities, waiting rooms etc. at airports, ferry terminals and bus coach and rail stations

A wheelchair user has no protection under Part III of the Act if a ferry on which he wishes to travel is not accessible. However, if he is refused service in the buffet car of the ferry terminal because of his disability that is likely to be unlawful."

50. An escalator and travelator could be described as a means of transport, but I accept that they* do not come within the ambit of the exclusion in Section 19(5). I consider that the use of a wheelchair is in a similar category and is not within the ambit of the exclusion, of Section 19(5). Mr Langstaff QC made the point, correctly in my judgment, that the service in this case was one of providing access to an airplane and not pushing in a wheelchair. Section 19(5)(b), would apply to the airplane which is a means of transportation within the section. I reject Mr Tager QC's narrow definition of service, and accordingly the reliance on Section 19(5) by RA fails.

51. I turn next to consider the allegation under Section 21(1) and 19(l)(b). No issue of justification was raised by either of the defendants. As appears from the evidence the reasons for RA's policy were commercial. They could, and in my judgment should have changed that policy so as to pay the cost of providing for all passengers who required a wheelchair.

52. Under paragraph 9 it is alleged that RA discriminated under Section 21(2) and Section 19(l)(b) of the Act. It was contended on behalf of the claimant that the provisions of these Sections apply to someone using the facilities of an airport. The Section it was contended is broadly drafted and applies to RA. In this case the distances involved in moving from the point of check-in to the place where the airplane departed prevented Mr Ross from enjoying the services. Accordingly, RA were in breach of these provisions of the Act in failing to provide a reasonable alternative method of making the service available to Mr Ross, namely, by providing a wheelchair free of charge. This breach is also established

53. Finally, the claim against RA is brought under Sections 21(4) and 19(l)(b) of the Act which relates to the provision of auxiliary aids. I find that a wheelchair comes within the definition of an auxiliary aid, and RA are in breach of the provisions of these sections by failing to provide Mr Ross with a wheelchair.

54. In the light of my findings in relation to RA it follows that STAL were not under a duty on the facts of this particular case, and accordingly are not liable to Mr Ross. It is to be noted that Mr Galbraith-Marten made it clear that in relation to the infrastructure of the airport STAL have done a great deal to provide proper facilities for the disabled.

55. An interesting submission was made by Mr Langstaff QC on the proper construction of Section 19(l)(b). He contended that as Mr Ross hired a wheelchair and could afford to do so, there could be no breach of Section 19(l)(b). Mr Galbraith Marten answered this submission by contending that Sections 19 and 21 had to be considered together, and they did not focus on the means of a disabled person. The focus he said was on disabled persons as a class, and on the person in particular in Section 19(l)(b) who could not make use of the service. If the duty arises a service provider cannot say to a disabled person that he or she should make their own arrangements, and as a result the provider cannot be in breach. On this issue I accept the submissions of Mr Galbraith-Marten.

DAMAGES

56. It is accepted that Mr Ross should recover the £36 which he spent as the cost of hiring a wheelchair and a pusher. In addition, he claims £300 being the cost of a wheelchair which he purchased to enable him to avail himself of the service to wheelchair owners offered by RA. Mr Tager QC said that that expenditure was not caused by the pleaded discrimination. Rather Mr Ross took a commercial decision to enable him to enjoy the free assistance offered by RA. Mr Langstaff QC submitted that the test was whether it was a reasonable expense in mitigating his loss, if so, it would be properly claimable. It was as a result of his treatment that he expended the sum of £300. Mr Galbnuth Marten submitted that it was a causation issue. Mr Ross only bought the wheelchair because of RA's failure to provide one without cost and the relative causative link has he said been made out. On this issue I agree with Mr Galbraith Marten's submission. The purchase was brought about because of RA's failure to provide a wheelchair without cost.

57. On the quantum of claim for injury to his feelings, I was referred to a Scottish authority *Purves v Joydisc Ltd* [2003] IRLR at page 420. Mr Purves was blind and had a guide dog. One of his friends made a reservation for a table at the defendant's restaurant and she told the assistant manager that Mr Purves was blind and would be accompanied by his guide dog. On the following day the manager of the restaurant said that no dogs were allowed in it, and accordingly the reservation was cancelled. Mr Purves was extremely angry and upset and he recovered £350 damages in the Sheriff's Court. The Sheriff Principal Iain MacPhail QC in giving his judgment said:-

"£750 is the least that may now days be awarded for the very slightest injury to feelings, deserving of damages, caused by discrimination on the ground of disability. In the present case the insult and humiliation suffered by the pursuer was significantly greater than a very slight injury. The defendant's refusal to provide him service in their restaurant simply because he was blind. As a result he was extremely angry and very upset. Although the Sheriff had correctly identified certain mitigating circumstances, most effective mitigation would have been an apology, but no apology or explanation were ever offered

In various circumstances applying the five principles set out in *Armitage v Johnson* the appropriate award was £1000"

58. Counsel in this case all accept this is a useful authority. Mr Galbraith-Marten however suggests that on the facts the award should be £2000. Mr Tager QC submitted that £750 was a minimum award and that this was a minimum case. Mr Ross had been treated with a similar fashion before when he flew with RA. Mr Langstaff QC submitted that this was a case for a modest award, and he mentioned a figure of £1000.

59. Mr Ross was aware of RA's policy in relation to wheelchairs. He clearly felt that despite this policy, the commercial advantage of flying with RA to Perpignan outweighed his sense of injury to his feelings. In all the circumstances I consider the sum of £1000 represents an appropriate level of award to compensate Mr Ross for the injury to his feelings. There will accordingly be a judgment for damages against RA in the sum of £1336.

60. The claimant seeks a declaration that he has been discriminated against. This is in very broad and general terms and as Mr Langstaff QC pointed out the Act does not allow a court to grant a declaration, although of course the court has the power in the exercise of its discretion to do so. At the conclusion of submissions, it was left that when I gave judgment the parties would consider the position and make submissions as to whether it was appropriate to grant declaratory relief, and if so, upon what precise terms. These are matters that can be considered when judgment is handed down.

61. Likewise I shall reserve until that time the question of the costs of these proceedings.

62. Finally I should like to express my grateful thanks to all counsel for the detailed assistance they have given me both on the law and on the facts in this case.

Judge Crawford Lindsay QC