Disability Discrimination

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Seminar Topics

- Test for Disability
- Direct Discrimination & Knowledge
- Indirect Discrimination
- Reasonable Adjustments
- Discrimination Arising from Disability
- Comparators
Test for Disability

- S.6 EqA
- Part 1, Schedule I EqA
- Burden on the claimant to satisfy this test
- of the disability (or lack of) can be an issue depending on who you represent
- Can be actual or constructive
Direct Discrimination

- S.13(1) EqA 2010:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
Direct Discrimination

- Concentration here is on the phrase ‘because of’
- Conscious or subconscious reason for doing something towards another on the ground of one of the protected characteristics
- Generally well-understood – the greater problems lie in demonstrating it which gives rise to tests of proof and looking for the signs (see *Glasgow City Council v Zafar* [1998] ICR 120 and *Anya v University of Oxford* [2001] ICR 847)
Indirect Discrimination

- S.19 EqA

**Indirect discrimination**

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are—

- age;
- disability;
- gender reassignment;
- marriage and civil partnership;
- race;
- religion or belief;
- sex; sexual orientation.
Indirect Discrimination

- In the context of disability discrimination generally, it is difficult to see how a PCP would discriminate against disabled people in a way that would not give rise to a claim under s.15 EqA or s.20 EqA
  - These alternative claims avoid the need to show group disadvantage
  - Therefore, it is better to look for claims in other sections before coming to s.19
Reasonable Adjustments

• **S.20 EqA**

**Duty to make adjustments**

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(3) The first requirement is a requirement, where a provision, criterion or practice of A’s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
Reasonable Adjustments

- Identifying the PCP is critical – no claim can begin without this
- Job descriptions, contracts, staff handbooks, letters, notices and memos – any requirement which need not be set down in writing as well
- The PCP needs to be something the employee cannot change or has little or no control over
- In the context of disability claims some thought needs to be given to the question of how much the claimant can control his own condition by medication etc
Reasonable Adjustments

• One way of framing the PCP can be to look at the *substantial disadvantage* and work backwards from there

• **Mason v Royal Mail Group** [2008] ET diabetic postman who was repeatedly forgetful and failed to deliver parcels. He was dismissed. The PCP was derived from the substantial disadvantage which was that a postman must have sufficient powers of concentration. No occupational health assessment had been done to assist with this.
Reasonable Adjustments

• *Substantial disadvantage* can be developed from thinking in the same terms of *less favourable treatment, particular disadvantage* and *unfavourable treatment*

• Threshold pretty low

• Without identifying the PCP and disadvantage you cannot then suggest adjustments that the employer should take – the burden is on the employer from this point but it does help in formulating a case for the employee
Discrimination Arising from Disability

• S.15 EqA

15 Discrimination arising from disability
(1) A person (A) discriminates against a disabled person (B) if—
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.
Discrimination Arising From Disability

- Eg someone with colitis who had to visit the toilet a lot – any discrimination because of frequent visiting would fall under s.15 as opposed to discrimination because of the disability itself which would fall under s.13
- Another example would be the blind man with the dog entering a restaurant with a ‘no animals allowed’ rule
- ‘Because of’ phrase appears again – enquiry into the mental processes will be necessary
Discrimination Arising From Disability

• If you get past stage 1 the question of objective justification arises
• ‘proportionate means of achieving a legitimate aim’
• Must be legal and discriminatory in itself
• Measuring proportionality comes down to asking whether some less discriminatory measure could have been implemented
Comparators - why have them?

- The comparative exercise is at the heart of disability discrimination
- Emphasis is on *equal* rather than *fair* treatment
- It is an evidential tool used in order to answer the following:
  - Was the claimant treated less favourably
  - If so, was the reason a protected characteristic
- Often merged into one question – “the reason why” (*Shamoon v CC of RUC*)
Comparators - why have them?

• Hypothetical or otherwise - not a necessary requirement in Direct Discrimination
• For example, where there is evidence of motive from other evidence eg discriminatory comments can avoid trying to infer motive using a comparator
• Judicial criticism of the use of comparators in *D’Silva v NATFHE* and *Edinburgh City Council v Dickson*
Comparators - *D’Silva*

- Claimant alleged discrimination by a failure to provide legal representation and to reply to correspondence
- Findings were that no representation was provided due to lack of trust and confidence expressed by Claimant in legal advice and genuine oversight with respect to correspondence
- No discrimination
- EAT rejected appeal that ET had failed to consider a comparator
Comparators - *Dickson*

- Community worker found to have watched pornography at work
- He said he had no memory and alleged he had suffered a hypoglycaemic episode
- The employer unreasonably discounted the explanation and there was a finding of unfair dismissal
Comparators - Dickson

• This is how the ET formulated the comparator:

“...someone who offered an explanation that was, prima facie, equally capable of being a complete answer to the same kind of allegation of misconduct. Examples might be someone who offered to prove that they had been sleepwalking or had had a seizure, perhaps even have offered to prove temporary insanity. It would be an explanation that was not based in an employee's disability but that would nonetheless be one that meant that the comparator would not be held culpable for their actions.”
Comparators - *Dickson*

- ET found for the claimant
- EAT overturned the analysis on the basis that there was no evidence that the claimant’s disability had played any role in the decision to reject his explanation
- Use of a comparator was irrelevant and an artificial exercise
Comparators - who?

• In s.13 EqA the words “treats of would treat others” emphasises the actual and hypothetical nature of the exercise

• There is a comparator which is a hybrid of the actual and hypothetical – by creating a hypothetical comparator by looking at the way an actual person has been treated even though there will be circumstances which are dissimilar to the claimant
Comparators – who?

• EHRC Code of Practice on Employment :

“An employer dismissed a worker at the end of her probation period because she had lied on one occasion. While accepting that she had lied, the worker explained that this was because the employer had undermined her confidence and put her under pressure. In the absence of an actual comparator, the worker compared her treatment to two male comparators; one had behaved dishonestly but had not been dismissed, and the other had passed his probation in spite of his performance being undermined by unfair pressure from the employer. Elements of the treatment of these two comparators could allow a tribunal to construct a hypothetical comparator showing the worker had been treated less favourably because of sex.” (para 3.26)
Comparators - who?

• Reasonable Adjustment cases
• No need to look for a comparator (see of the EHRC Code) in the same like for like fashion as with direct discrimination
• Comparators will help sometimes, but in some cases the facts will speak for themselves and the ET will judge the reasonableness of the employer’s position

• **Fareham College v Walters** [2009] IRLR 991
Comparators

- Discrimination Arising from Disability
- There is no need for a comparator at all – see s. 23 EqA (which refers to comparators in claims under s.13, 14 and 19 EqA)
- This is because under the current test for s.15 claims a tribunal moves quickly to consider objective justification and the sort of questions raised by formulating a comparator will be answered at this stage
Comparators - characteristics

• For the Claimant to propose but the ET can reject it if invalid. It can select or formulate its own comparator
• Greatest controversy is over choosing the characteristics
• Consider s.23(1) EqA:

“On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case”
Comparators - characteristics

- “no material difference”?
- In a factually complex case what factors are going to be relevant to the question of explaining the employer’s actions
- The comparator then fits into the factual scenario minus the protected characteristic
- Consider the facts of Stockton on Tees BC v Aylott [2011] ICR 1279
Comparators

• **Aylott**
Claimant was bi-polar, struggled with personal relationships and presented a list of complaints to the employer. The complaints were investigated but rejected. He was moved to a different team and required to meet deadlines with weekly monitoring. His performance was unsatisfactory and he was suspended pending a disciplinary investigation. The claimant became unwell, the suspension was withdrawn and the disciplinary proceedings were discontinued. He remained in sick leave for five months until dismissed on health grounds.
Comparators

- **Aylott** continued

The claim of direct disability discrimination was successful. The comparator was someone who had been absent from work for five months but who did not have the claimant’s disability.

At the CA, it was argued that two additional factors ought to have been added to the comparator (i) the team move and (ii) past behaviour and performance.
Comparators

- **Aylott** continued
- The CA rejected the arguments because the team move and performance issues flowed from the disability and therefore had to be left out of the comparator
Comparators

- Not a clone
- The risk of doing this is that you create a comparator the same as the claimant with the result that the treatment meted out to it is the same – the claim will certainly fail then
- **Watts v High Quality Lifestyles** [2006] IRLR 850 EAT (HIV+ support worker dismissed after a risk assessment concerning infection risks from cuts and bites)
- Note that in disability claims, the comparator does not have to have the particular disability suffered by the claimant
The End!

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