

# **Handling a discrimination case**

**Session 2**

**Disability cases**

**presented by John Sprack for LawWorks September 2023**

# Unique features of disability cases

- Only someone who is disabled can bring a claim for disability discrimination
- Quasi-exceptions: associative and perceived disability
- As a result, the crucial initial question is: is C disabled?
- In addition to the usual four forms of discrimination (direct, indirect, harassment, victimisation) there are two others
- Discrimination because of something arising from a disability (s 15 EqA 2010)
- Failure to make reasonable adjustments (s 20/21 EqA 2010)
- In addition to the Act itself, reference needs to be made to Employment Statutory Code of Practice, chapters 5 and 6:
- <https://www.equalityhumanrights.com/sites/default/files/employercode.pdf>

# Is C disabled?(1)

- In practice, the employer may concede that they are
- Ensure the concession states the precise disability and the start/end dates
- if their defence is silent on whether disability is disputed, the ET will routinely ask the employer
- If they don't, you should ask the ET to pose the question to the employer, again seeking clarity on the disability conceded and relevant dates
- If the point is in dispute, then it is frequently resolved at a preliminary hearing
- The onus is on C to prove disability
- It can be done without expert evidence, but it is usually wise to be backed by medical evidence

# Is C disabled? (2)

## Impairments, deemed disability, excluded conditions

- Does C have an impairment, physical or mental? (not defined and often difficult to distinguish from the effects)
- Is it deemed to be a disability? (cancer, HIV, multiple sclerosis, certified visual impairment)
- Is it excluded eg addiction to alcohol, nicotine, seasonal hay fever, tendency to set fires/steal/commit physical or sexual abuse etc? (SI No 2128/2010)
- Leave aside the effects of medical treatment to alleviate the impairment, except spectacles, and assess the situation without correcting measures

# Is C disabled? (3)

## The statutory definition

The definition is in s 6(1) EqA 2010

- physical or mental impairment
- substantial adverse effect
- long term (Sch 1)
- on C's ability to carry out normal day to day activities

Consider each element separately

Refer to the Guidance: <https://www.gov.uk/government/publications/equality-act-guidance/disability-equality-act-2010-guidance-on-matters-to-be-taken-into-account-in-determining-questions-relating-to-the-definition-of-disability-html>

# Is C disabled? (4)

## The questions to ask: EqA 2010 s 6 and Sch 1

- What is C's impairment?
- Is it deemed to be a disability?
- Is it one of the excluded conditions?
- Does it have adverse effects on the worker's ability to carry out normal day to day activities?
- Is that ability substantially affected (clearly more than trivial)?
- C need not be completely unable to carry out the activity - could be eg more slowly, only in a particular way, painful
- Disregard medical treatment/aid
- Is the substantial adverse effect long-term?
- The focus is on what C cannot do: *Leonard v South Derbyshire Chamber of Commerce* [2001] IRLR 19 EAT

# A few points of interpretation

## Based on the Guidance

- There is no need to consider causation of an impairment (Guidance A7)
- On the effects of treatment, it does not need to be medication or a physical aid - consider diabetes controlled by diet as well as by metformin, insulin etc (EqA Sch 1 para 5, Guidance B14)
- “Likely” occurs in the context of whether an effect is long-term, whether an effect will recur, is an adverse effect likely to be substantial.
- In each case, interpret as “It could well happen”(C3)
- “Normal” day-to-day activities does not mean most people do it but does exclude highly specialised activities (D5)
- It does include activities relevant to participation in professional life: *Paterson v MPC* [2007]IRLR 23 EAT
- Note the two lists of factors which it is reasonable (or unreasonable) to regard as having a substantial effect on normal day-to-day activities (Appendix to Guidance)

# Medical evidence (1)

## Letter to doctor

- Letter to GP or consultant
- Remember: they are probably not expert in applying the statutory definition
- Get client's authorisation and attach it
- Ensure your letter does not appear biased - it is likely to be disclosed to the ET and the other party
- In the letter, describe C's work and areas of difficulty
- Ask for a description of C's impairment



# Medical evidence (2)

## Letter to doctor (cont)

- Ask for a view on whether her ability to carry out normal day-to-day activities is adversely affected to a substantial degree
- Ask for specific examples of such an effect (use what C has told you)
- If any medication/aids/treatment involved, how would her abilities be affected without them?
- When did the adverse effects start for C and when are they likely to end? might they be recurring?
- Please address any particular issues raised by C eg in a mobility case - difficulty using stairs, driving, using public transport
- Can you suggest any reasonable adjustments to help her?
- Before undertaking report, let us know of any fee

# Medical evidence (3)

## ET procedure for expert medical evidence

- In *De Keyser Ltd v Wilson* [2001] IRLR 324 EAT set out guidelines for obtaining medical evidence for ET
- It is preferable for the parties to instruct an expert jointly
- If one side cannot afford to share the cost and the other goes ahead, both sides should agree the terms of instruction
- The letter of instruction should set out the questions in detail, impartially
- ET may set out a timetable for instructing experts and getting their reports - should be generous as doctors are busy and deadlines cannot be enforced
- If each side instructs their own expert, the experts should meet and agree to as many issues as possible

# Reasonable adjustments (1)

## The triggers and the approach by ET

- There are three 'triggers' for the duty to make reasonable adjustments (s 20)
  1. Provision, criterion or practice (PCP)
  2. Physical feature
  3. Auxiliary aid

Does not apply to associative discrimination

- The approach for the ET is set out in *The Environment Agency v Rowan* [2008] IRLR 20 EAT:
  - A. What is the PCP or physical feature or lack of auxiliary aid which causes difficulty for C
  - B. The nature and extent of the disadvantage suffered by C (may reverse the first two in practice)
  - C. Any non-disabled 'comparators' not placed at a similar disadvantage
  - D. What adjustments might alleviate the disadvantage?

# Reasonable adjustments (2)

## What is the PCP?

- What is a PCP? Some examples which crop up in practice:
- selection criteria for recruitment, promotion, transfer, redundancy etc
- working hours
- attendance policies
- the way a disciplinary investigation or hearing is conducted
- deadlines
- the duties required within a particular job

# Reasonable adjustments (3)

## Physical feature

- The physical feature can be temporary or permanent; common examples:
- heat or cold
- ventilation
- stairs/lack of lifts/lack of bannisters
- inaccessible toilets
- lack of suitable parking
- unsuitable furniture

# Reasonable adjustments (4)

## Auxiliary aids

- An auxiliary aid provides help or support to a disabled person; examples:
- computer software
- wheelchair
- sign language interpreter
- voice to text software

# Reasonable adjustments (5)

## Knowledge required on employer's part

- The knowledge requirement is set out in Sch 8 para 20(1) EqA 2010
- The employer is under no duty if it does not know, and cannot reasonably be expected to know both
  1. that the worker has a disability; and
  2. that the worker is likely to be placed at a substantial disadvantage as a result of the PCP, physical feature or lack of an auxiliary aid
- if adjustments are required, it is wise for the worker to make the employer aware, in writing, of 1 and 2

# Reasonable adjustments (6)

**Some examples: which of the three triggers is most applicable?**

- C is told that she must attend large face-to-face meetings of clients to take feedback on her work; this causes her panic attacks as she needs to avoid large groups of people
- D has mobility problems which cause him difficulty in walking up and down stairs; he works on the ground floor but colleagues are on the 2nd floor
- E is dyslexic and has difficulties in reading the computer screen to enter the data which is part of her job



# Reasonable adjustments (7)

## The questions to consider

- Is the employer under a duty to make reasonable adjustments (PCP, physical feature, absence of auxiliary aid)?
- Did the employer know or should they have known that the worker had a disability?
- And that they were likely to be placed at a substantial disadvantage as a result of a failure to make a reasonable adjustment?
- Consider the possible adjustments which may assist the worker
- Bear the Access to Work Scheme in mind <https://www.gov.uk/access-to-work/print>
- And the advice of specialist charities/agencies dealing with particular disabilities
- A list of 29 impairments, possible reasonable adjustments applicable to each, and specialist organisations and publications can be found at:
- [https://www.equalityhumanrights.com/sites/default/files/proving\\_disability\\_and\\_reasonable\\_adjustments.pdf](https://www.equalityhumanrights.com/sites/default/files/proving_disability_and_reasonable_adjustments.pdf)

# Reasonable adjustments (8)

## The test

- What is reasonable?
- For the factors to consider, see Employment Code 6.28 - to summarise, effectiveness, financial costs, help available from Access to Work, type and size of employer
- For examples, see Employment Code 6.33
- The test is an objective one -for the ET to decide (contrast unfair dismissal): Code 6.30
- It is enough is there is a prospect of it working (need not be a good prospect)

# Discrimination arising from disability

## DAFD - s 15 EqA 2010

- Why did the employer treat C unfavourably?
- Was the reason something arising in consequence of C's disability (DAFD)?
- No comparator needed: "unfavourably" not "less favourably than"
- Can the employer show that the treatment was a proportionate means of achieving a legitimate aim?
- The classic example is dismissal for poor attendance, some of the absence being caused by the disability
- It is not direct discrimination because a non-disabled employee with a similar attendance record would also have been dismissed
- But the reason for the dismissal is something arising in consequence of the disability

# Discrimination arising from disability

## DAFD - the justification defence

- Was the unfavourable treatment a proportionate means of achieving a legitimate aim?
- 'Proportionate' involves balancing the loss to the worker (eg of losing their job) against the employer's legitimate aim
- Is there a rule or policy? Can it be justified?
- Can its application to C's case be justified? Any discretion? Can the failure to exercise it be justified?
- NB: Whether the employer was justified should only be considered after any applicable reasonable adjustments are made
- The knowledge requirement for the employer is actual or constructive knowledge of the disability - not of the effects upon C (contrast reasonable adjustments)

# Other forms of discrimination

## Those which also apply to other protected characteristics

- Direct discrimination “because of” “less favourably than”
- Comparator (actual or hypothetical) required
- No justification defence for the employer
- Applies to associative discrimination
- Indirect discrimination - usually covered by “reasonable adjustments”, where there is no requirement for a pool of other disabled persons
- Justification defence available for indirect
- May be useful if employer did not have the knowledge for reasonable adjustments
- Harassment and victimisation: same law applies as for other protected characteristics

# Which claim?

- If there is a specific event complained of eg dismissal, non-promotion, could be direct or DAFD in the alternative
- Might a reasonable adjustment have solved the problem?
- If so, claim reasonable adjustments and direct/DAFD
- Note there are likely to be different time limits so consider the arguments for “conduct extending over a period”, “just and equitable” (dealt with Session 1)



**Any questions**