



Albion Chambers, Broad Street, Bristol BS1 1DR

Telephone 0117 927 2144

Fax 0117 926 2569

DX 7822 Bristol

clerks@albionchambers.co.uk

www.albionchambers.co.uk

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Albion Chambers EMPLOYMENT NEWSLETTER

'Related to' or 'arising from' – a difference without consequence?

The new form of disability discrimination under the Equality Act 2010

Background

Section s. 3A (1)(a) of the Disability Discrimination Act 1995 prohibited less favourable treatment "for a reason which related to the person's disability." It was a concept introduced into the Act in October 2004 by amendment, but what did it mean? It came to apply to any situation in which someone was treated less favourably as a result of the effect of their disability. It did not matter that someone without the disability would have been treated the same.

Let us consider an example; typist A typed at 100 words/minute. She was considered slow. Typist B typed at the same speed, but because of an arthritic disability. Typist C typed at a speed 200 words/minute. If A and B were both dismissed because of their speed, B could have complained that her dismissal was because of disability and had been 'disability-related'. It did not matter that A, a reasonable comparator, was also dismissed for her slow speed. The simple fact was that B's speed was an effect of her disability. There was, however, the defence of justification that was available to the employer in these circumstances. This was the situation that prevailed for many years, following the decision in *Clark v Novacold* [1999] ICR 951.

Then came the decision in *Lewisham LBC v Malcolm* [2008] UKHL 43 about which much has already been said and written. It turned the concept of disability-related discrimination on its head and required claimants to find a comparator who would not have been treated in the same way who did not have the same disability. In the example above, B's claim would fail; the employer was able to point to A and say that the treatment was no longer discriminatory. This considerably narrowed the claims that could be brought and claimants had to look

to other parts of the Act for help; specifically the provisions related to reasonable adjustments which were formulaic and presented separate problems of their own.

Equality Act 2010

Section 15 of the Equality Act, which came into force on 1st October, reads as follows;

"(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"

So what are the differences? To start with and most significantly, section 15 is specifically designed to reverse the effect of *Malcolm*; no comparator is now required. It is just a question of less favourable treatment on the prohibited grounds, and no longer is a comparison with someone 'to whom the reason does not apply' needed.

The other point to note is sub-section (2) which contains a defence in a case where the employer is ignorant of the employee's disability. Such a defence was not available under the old s. 3A (1). The wording mirrors that which was contained in the old s. 4A relating to adjustments claims. The fact that an employer needs to have been 'expected to know' and 'know' is not quite as conjunctive as it sounds. There was a decision last year in the EAT (*Grey v Eastern and Coastal Kent PCT* [2009] IRLR 429) which was brutally literal in terms of its approach to the wording; if all four of the

provisions are met, the Respondent has a defence;

- i. Does not know that the disabled person has a disability;
- ii. Does not know that the disabled person is likely to be at a substantial disadvantage compared with persons who are not disabled;
- iii. Could not reasonably be expected to know that the disabled person had a disability; and,
- iv. Could not reasonably be expected to know that the disabled person is likely to be placed at a substantial disadvantage in comparison with persons who are not disabled.

The test in *Grey* was considered and diluted by a differently constituted EAT more recently in *Alam v Secretary of State for DWP* [2009] UKEAT 0242/09/0911 (Lady Smith in the chair). The new test requires a tribunal to ask two questions;

- i. Did the employer know both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)? If the answer to that question is: "no" then there is a second question, namely,
- ii. Ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)?

If the answer to that second question is: "no", then the section does not impose any duty to make reasonable adjustments under s. 4A and the employer will qualify for the exemption. The same test should therefore apply under s.15 (2) now;

"If the employer could not reasonably have been expected to be aware of the relevant effect, no duty to make reasonable adjustments arises because the reasonableness of his ignorance would make it unreasonable to impose on him the duty to adjust."

The EAT relied upon the case of *Ridout v TC Group* [1998] IRLR 628, a case where a prospective employer had knowledge of the Claimant's disability but was reasonably ignorant of its effects; the Employment Tribunal and the EAT dismissed the



◀ Claimant's complaint. The approach in that case was consistent, Lady Smith said, with the analysis of the law that her Tribunal had reached.

The third point to note about s. 15 is that the new wording appears to exclude discrimination by association (the prohibition arises because of something in connection with 'B's disability'). The decision in *Coleman v Attridge C-303/06 [2008] ICR 1128* was one which specified that associative discrimination was covered by the Framework Directive and there should have been no difficulty in maintaining such a claim, but section 13 of the Act makes it expressly clear that the cover prevails.

Fourthly, the extended, objective definition of justification is now to be found in s.15 (1)(b) ('a proportionate means of achieving a legitimate aim'). The extent to which this will make a difference remains to be seen. The use of the extended definition is consistent with all other provisions of the Act which strives towards a uniformity of approach to as many types of discrimination as possible.

But what of the main difference;

'disability-related' to 'something arising in consequence'? Surely, 'arising from' is broadly than 'related to'? It conveys a potentially longer chain of causation. Let us consider another example; A misses some training because he is attending hospital to have treatment for a condition that amounts to a disability. He is subsequently dismissed for redundancy when his points score in a redundancy process was lower than a colleague's simply because he did not have that training certificate. One can see that his redundancy could be said to have arisen as a consequence, at least in part, of his disability. One can see the argument, but the difference may well prove to be illusory. A claim of disability-related discrimination could have been brought in those circumstances just as easily. In the example of the typists above, B's dismissal would certainly have 'arisen from' her disability. That should be enough.

Conclusions

The key wording change with the new use of 'something arising in consequence' is unlikely to inflict change in the manner of approach. We are back in a pre-Malcolm

world now, but even simpler than that, with no comparator whatsoever being required.

Even more troublesome for employers, the objective justification test is not one of subjective reasonableness; it sets the bar higher. That said, it should not be any easier to prove than an adjustments claim. It is difficult to conceive of a case in which an employer could establish that an adjustment was unreasonable and not also be able to run the justification defence successfully.

With a defence of ignorance now in statutory form, the scope for respondents to run that line of argument may be wider and I can think of a number of cases in which that might have borne fruit recently. The decision in *Alam* has obviously reined in the breadth of the arguments, but I suspect that ignorance as a defence may feature more frequently in the future.

Disability-related discrimination is back; it has a new name, new clothes and it is slightly more muscular than before, but it is back.

John Livesey

Reassuringly for the lawyers this is obviously going to be a 'balancing' exercise; was the treatment proportionate in all the circumstances? What was the *discriminatory effect* of the treatment in the context of the employer's reasons for it?

Treatment is considered proportionate if it is an 'appropriate and necessary' means of achieving a legitimate aim but European Law, now reflected in the Equality Act has stated that 'necessary' does not mean that the treatment was the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means.

From much of the work that we see and do, it is important to remind clients that a higher financial cost of using a less discriminatory approach will not by itself afford the employer the defence of justification. Cost can only be taken into account as part of the employer's defence of its treatment of the employee if there are other good reasons for having treated the employee in that way.

Where an employer has failed to comply with a duty to make reasonable adjustments it will struggle on the objective test to demonstrate that this was proportionate because if an adjustment is reasonable (in all the circumstances) how can failing to make it be proportionate (in all the same circumstances).

The new test does narrow or limit the discretion of the employer. It does, as John says 'raise the bar'. Justification used to be

The defence of justification

As set out in John Livesey's article in this Newsletter, The Equality Act 2010 introduced the defence of objective justification. The employer (and service providers) can defend a claim of 'discrimination arising from disability' and 'indirect discrimination' if the employer can show, on the balance of probability, that its conduct is a 'proportionate means of achieving a legitimate aim' (ss.15 and 19 Equality Act 2010). John identified this as being 'more troublesome' to the employer. This short article elaborates on why that might be the case.

It is the same test for claims against employers and service providers; another nod to the streamlining and simplification of discrimination law that lay at the heart of introducing this legislation.

What is a 'Legitimate aim'?

Not surprisingly it should be legal and of itself should not be discriminatory. The stated aim must represent a real, objective consideration.

The Employment Code states that the health, welfare and safety of employees and workers may amount to legitimate aims but that specific associated risks must be clearly

identified and supported by evidence.

Whilst reasonable business needs and economic efficiency may be legitimate aims, an employer or service provider solely aiming to reduce costs cannot expect to satisfy the test. The employer cannot argue that to discriminate is cheaper than not to discriminate and expect to satisfy the requirement that this amounts to a legitimate aim.

It seems that, as ever, the advice to clients who are employers is that there must be well documented reasons for adopting a stated aim and that this should not only be about cost.

Far-reaching and potentially discriminatory actions on the part of the employer must be the subject of discussion and reflection and those discussions must be recorded. Employers should always take advice to ensure that the aim of their actions is legitimate under the requirements of the Act.

What is proportionate?

For the employer successfully to deploy this defence it must be established that not only was there a 'legitimate aim' but also that the treatment to which the employee was subject was proportionate.

about demonstrating that the employer's reason for the less favourable treatment was 'material to the circumstances and substantial', and tribunals did not substitute their own view on what was material and substantial, but asked themselves whether it fell within a reasonable range. From 1st October that has changed. Whilst the definition of a 'legitimate aim' provides a more expansive list for the employer, it is clear that 'proportionality' is going to be more challenging for them.

Gone is the idea of the 'reasonable opinion' and in comes a far stricter, objective analysis of the facts and circumstances of the individual claim. This is important as it means that whilst it may be easier for an employer to show that the discriminatory treatment could be justified, it is harder to now demonstrate that in fact it was justified.

Liz Cunningham

Pre-employment health questionnaires

Since the introduction of the Equality Act, employers are prevented from asking candidates questions about their health that are unrelated to the job role. As a consequence those with mental health issues, a medical condition or a disability will not be forced to disclose their condition prior to the offer of employment unless it hinders their ability to do the job.

To clarify, once a job offer has been made, questions about health are permitted and, at that stage, the employer can consider whether reasonable adjustments can be made. This has to be seen as progressive move in my view. Determining whether or not to offer a candidate a job should not be influenced at all by any duty to make reasonable adjustments that may be triggered if that candidate was put in the post. It is naïve to imagine that employers don't allow the prospect of having to make adjustments to influence their decisions. Clearly there are many conditions that will be apparent at interview stage that a potential employee will notice. But an interviewer meeting a candidate who has previously suffered with mental health issues, and knows that they have, will often find it hard not to speculate about the risk that the illness may recur, and not offer the job as a result. That is unfair and discriminatory.

Having offered the job, the potential employer can then quite properly asks about any health issues that may affect the candidate's ability to do the job – and it will be a matter of the particular facts of the case whether disclosing a previous mental issue may be necessary. But if they have done so, the candidate would have a potentially strong claim if the offer was withdrawn and the potential employee could not demonstrate why a previous mental health issue would materially affect the candidate's ability to do the role.

I consider the changes to the law to assist employers – it removes the temptation to reflect on matters that are not relevant to the job. It will stop them – consciously or sub-consciously – discriminating. That has to be a good thing; it eliminates the risk of a candidate claiming that they were not offered the job for a discriminatory reason.

What can the employer ask having made the offer? Clearly any physical or mental health concerns that may affect the candidate's ability to carry out the role is going to be justifiable. It seems sensible then to state in the offer letter why a particular question is being asked and to which aspect of the job it relates; i.e. *'We are pleased to offer you the position of external window cleaner at Canary Wharf. Given the nature of the work as set out on the job description please can you disclose to us whether you suffer from or have ever suffered from vertigo?'*

Clearly a medical condition of vertigo is going to compromise the candidate's ability to do part of the job. More seriously there can be no criticism of an employer asking a candidate for a job that involves driving whether she has any medical condition that has caused her to stop driving at any time, 'including but not limited to... Epilepsy, diabetes etc. etc'. This is justified as not only will the employer reasonably want to know whether that condition may recur (in which case she is not able to do the substantial part of the job) but also what effect that may have on insuring the candidate to drive the vehicle. In the latter case, the issue will potentially be one of a reasonable adjustment but remember the extra cost alone will not afford the defence of justification.

So, it is also advisable to spell out in an offer letter that the request enables the employer to assess what if any reasonable adjustments need to be made.

It is of course available to the employer to withdraw the offer if the information that is revealed justifies it on the basis that they are not fit for the role.

Interestingly of course, an employer still has to find out from candidates

attending an office or assessment centre for interview whether there are any reasonable adjustments that need to be made so that the interview and selection process is fair. So is there a prohibition on asking the question on the application form *'having read what the interview and selection process involves, are there any reasonable adjustments that you consider need to be made?'*

Let's look at the case of a Type 1 diabetic who has applied for a job and among the information sent out with the application form are the details about the selection process. The candidates are told that they:

"will attend to make a twenty minute presentation followed by an interview of up to half an hour, though this may be more. The interview panel will comprise three members of the company. Candidates are advised that though they will be given an interview time, this may be altered on the day if we are running late."

Good practice would require that the interviewing company asks whether there are any reasonable adjustments that need to be made to accommodate any disabilities. The diabetic candidate is likely to have to respond to that by saying 'I will need to test my sugar levels at some time in the morning so if the panel is running late I will need a break during my presentation and interview'. This seems a reasonable adjustment to the interview and selection process requested after what appears to be a proper question to the candidates in the application form. In the event of the candidate not being offered a job will it be for the potential employer to show that the disability, and its effect, was not considered if a claim is brought? Yes, it seems so. And the claimant will cite a pre employment question relating to her health as part of the discriminatory culture. The prohibition on pre-employment health enquiries seems on the face of it at odds with the requirement to ensure that all candidates are given equal opportunity during the selection process.

The employer doesn't commit an act of discrimination by asking the question about a candidate's health but the employer's conduct in reliance on information given in response may lead to a conclusion that he has done so.

There is certainly work to be done in considering the wording of application forms, the information sent to candidates in advance of interview and the structure and form of selection processes, to ensure that the risks of a discriminatory inference being drawn from conduct during the process is minimized in light of the legislation.

Liz Cunningham

Albion Chambers Employment Team



Adam Vaitilingam QC
Call 1987
QC 2010 Recorder
Clerk Michael Harding



John Livesey
Call 1990
Part-time Employment Judge
Clerk Michael Harding
Team Leader



Nicholas Sproull
Call 1992
Clerk Julie Hathway



Jason Taylor
Call 1995
Clerk Michael Harding



Liz Cunningham
Call 1995
Clerk Michael Harding



David Chidgey
Call 2000
Clerk Michael Harding



Richard Shepherd
Call 2001
Clerk Michael Harding



Gemma Borkowski
Call 2005
Clerk Michael Harding



Monisha Khandker
Call 2005
Clerk Michael Harding
(on sabbatical until
Summer 2011)



Simon Emslie
Call 2007
Clerk Michael Harding



Philip Baggley
Call 2009
Clerk Michael Harding



Emily Brazenall
Call 2009
Clerk Michael Harding

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