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DISABILITY DISCRIMINATION UPDATE

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EQA s. 6 **definition of disability**

P has a disability if

- a. P has a mental or physical impairment and
- b. The impairment has a substantial adverse effect on P's ability to carry on normal day to day activities



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EQA Schedule I

- There is no qualifying list of 8 functions which must be affected as previously under DDA
- Claimants can have a combination of affected functions amounting to a disability
- Now simpler to show substantial impairment



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Day to Day Activities

YES

- Lifting or moving moderately heavy objects
- Travelling to work
- Working night shifts

NO

- Lifting or moving heavy objects
- Watch making



Likely to recur

- SCA Packaging v Boyle [2009]– The House of Lords held that the test is “*could well happen*” not the balance of probabilities
- Latchman v Reed Business Information overruled



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Long term

Patel v Oldham MBC [2010] IRLR 280

- possible to combine associated illnesses / conditions when assessing if 12 month requirement met.



- s. 13 (1)– A discriminates against B if because of a protected characteristic he treats B less favourably than he would treat others
- s. 13(3) – If B is not disabled A does not discriminate against B by treating the disabled person more favourably than he treats B



- Wording changes from “*on the grounds of*” to “*because of*”
- Associative discrimination covered – Coleman v Attridge
- Perceptive disability discrimination – a step too far? J v DLA Piper



Disability Related Discrimination

- s. 15 – A treats B unfavourably because of something arising in consequence of B’s disability and a cannot show that the treatment is a proportionate means if achieving a legitimate aim
- What does “*arising in consequence*” mean?



The demise of the dog

- The section dispenses with the need for a comparator by referring to treating B “*unfavourably*” rather than “*less favourably*”
- The section was aimed at overcoming the result of Malcolm
- For pre-EQA cases, the comparator is a person without the disability in the same circumstances



- s. 15(1) The test is the same as in Bilka-Kaufhaus
- The objective justification imposes a higher standard than previously
- 2 stage test: Is there a legitimate aim? Are means of achieving this aim proportionate?



s.15(2) - knowledge

- A does not discriminate against B if he does not know or could not reasonably have known of B's disability
- What is the test for determining whether A could not reasonably have known about B's disability? The EQA is silent on this.
- How pro active should employer be?



- s. 19 – this is an entirely new concept to disability law. A PCP is discriminatory to a person with a protected characteristic if
 - A applies it or would apply it to persons with whom B does not share the characteristic
 - It puts or would put persons with whom B shares the characteristic at a particular disadvantage
 - It puts or would put B at a that disadvantage
 - A cannot show it is a proportionate means of achieving a legitimate aim



When is indirect discrimination useful in disability context?

- S.19 can be used where the employer has not discriminated for a disability –related reason (s.15) or was not under a duty to make reasonable adjustments (s. 22) because he has no knowledge of the disability
- s. 23(2) – a comparison for the purposes of s. 19 doesn't have to include a person's abilities where the protected characteristic is disability

Limits of s19 complaints

- S.19 cannot be used for associative or perception cases as the person discriminated against must have the disability: s21(2)

Reasonable Adjustments

- s. 20(2) - the duty arises in 3 “requirements”
- Where a PCP places the disabled person at a disadvantage
 - Where a physical feature places the disabled person at a disadvantage
 - Where a disabled person but for an auxiliary aid at a disadvantage would be placed at a disadvantage
- in relation to a matter in comparison with persons who are not disabled



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What is the duty?

Where one of the 3 requirements applies, A must take such steps as are reasonable to have to take to avoid the disadvantage



Schedule 8 paragraph 5

- Where the relevant matter is considering to whom to offer employment, a person who is or has notified A that he may be an applicant
- Where the relevant matter is employment, a person who is an applicant for employment by A or an employee
- A contract worker during the contract

CC of S. Yorkshire
Police v Jelic

- A reasonable adjustment is by definition treating the employee **more favourably**
- This can include foregoing the usual internal competitive interviews Archibald v Fife CC or swapping employee posts to accommodate the disabled person Jelic or not dismissing: Aylott v SBC [2010] IRLR 994 (but not giving greater sick pay: O'Hanlon & Ashton)

- The adjustment must be objectively reasonable
- Focus is on practical result of measures which can be taken.
- Eg of where feasibility of reasonable adjustment ignored: Wilson v DWP [2010] EAT/0289/09; refusal to allow home working was not a failure to make reasonable adjustments.

Schedule 8 paragraph 20 - no duty arises where A does not know or could not reasonably be expected to know:

- that an interested disabled person is or may be an applicant
- that an interested disabled person has a disability and is likely to be placed at a disadvantage referred to in the 1st – 3rd requirements

Comparators for reasonable adjustment cases:

- An employer cannot argue that having made a reasonable adjustment he is justified in dismissing the employee because it is uneconomic to employ him
- An employee cannot argue that he would have dismissed a comparator irrationally



Matuszowicz v Kingston-upon-Hull BC

- A deliberate omission dates from the time of the decision not to do it
- A negligent omission is to be dated from a time determined by the relevant circumstances

Sedley LJ – claims should be issued in time and tribunals should show understanding



Pre-employment Health Enquiries

s. 60 – before offering, only if it is necessary to establish:

- Whether the applicant needs reasonable adjustments to be made for the recruitment process
- Establishing whether the applicant can fulfil a function intrinsic to the job
- Monitoring/positive action
- GOR (where proportionate)



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Health queries (2)

After offering

An employer can offer the job subject to satisfactory health checks but will be liable to a discrimination claim if he rejects because of the disability



Remedy under s. 60

- The EHRC has power to take action but not individuals
- But the fact of asking is something from which an employment tribunal can draw an inference



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Scope of protection under EQA

- X v Mid Sussex CAB [2011] EWCA Civ 28.
DDA does not cover volunteers
- EQA no different



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