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Equalities briefing five:
"Perceived discrimination": the scope of the definition of disability

Rachel Crasnow, a leading member of the Cloisters' employment and discrimination team examines to what extent the Equality Act 2010 protects a victim of disability discrimination in cases where the victim is mistakenly perceived by others to be disabled.

The problem

The Equality Act 2010 supposedly removes the confusion as to whether a person can suffer discrimination because they are perceived to have a protected characteristic. However, does the Act really achieve this or will future clarification by the ECJ be needed?

Under the 2010 Act the definition of direct discrimination is widened so that it will be unlawful to treat someone less favourably "because of" "a" protected characteristic; guidance in the Explanatory Notes says this applies even if the alleged victim is mistakenly held to have that protected characteristic, see the notes to section 13 at [63]. This would prohibit discrimination on grounds of perceived sexuality, race or religion where the victim does not in fact possess the protected characteristic, but the alleged discriminator acts on the basis that they do; however how will this work for disability? Could a person be directly discriminated against because they are wrongly perceived to have a mental illness?

Before the 2010 Act the EAT in *HM Prison Service v Johnson* [2007] IRLR 951 did not permit claims where the complainant was not in fact disabled. The EAT held that for liability to arise under the DDA, there must be a disability from which the claimant is in fact suffering. However the case of *English v Thomas Sanderson Blinds Ltd* [2009] IRLR 206 which concerned harassment on the basis of sexual orientation, arguably supports the contention that less favourable treatment on the basis of incorrectly assumed disability would be in within the scope of the DDA or Equality Act. The majority of the Court of Appeal in that case found that the Framework Directive

covered the situation where a person is harassment on the grounds that he was genuinely or not genuinely believed to be gay.

Could a Claimant now argue that s/he was discriminated against on the perception basis as an alternative to the actual basis, that is, even if s/he fails to establish that there was **actually** a disability under the 2010 Act?

This scenario was foreseen by HHJ Underhill in *J v DLA Piper UK plc* UKEAT/263/09 where he said at [62] -

> The concept of "perceived disability" presents issues different from those presented by the question whether a person (either a claimant or a person with whom he or she is "associated") is in fact disabled. What the putative discriminator perceives will not always be clearly identifiable as "disability". If the perceived disability is, say, blindness, there may be no problem: a blind person is necessarily disabled. **But many physical or mental conditions which may attract adverse treatment do not necessarily amount to disabilities, either because they are not necessarily sufficiently serious or because they are not necessarily long-term.** If a manager discriminates against an employee because he believes her to have a broken leg, or because he believes her to be "depressed", the question whether the effects of the perceived injury, or of the perceived depression, are likely to last more or less than twelve months may never enter his thinking, consciously or unconsciously (nor indeed, in the case of perceived "depression", may it be clear what he understands by the term). In such a case, on what basis can he be said to be discriminating "on the ground of" the employee's – perceived – disability? … [emphasis added]

The judge did not resolve this issue as the EAT refused permission for Ms J to advance her claim on the alternative basis that if she was not in fact disabled, she had been less favourably treated by having a job offer withdrawn shortly after telling HR of her history of depression because she was perceived to have a disability. The EAT added it would have been unwilling to extend the scope of the DDA to perceived disability without a reference to the ECJ.

Two opposing perspectives

To resolve problems of perceived disability after the 2010 Act it has to be remembered that section 6 of the 2010 Act defines a disabled person as having a physical or mental impairment that -

> has a substantial and long-term adverse effect on [a person's] ability to carry out normal day-to-day activities.

In the light of this definition what would have to be proved to show that a person is perceived as disabled? There seem to be two opposing approaches to this.

A Claimant might argue that it is sufficient that an employer behaves in a particular way because s/he perceives *some* adverse effect on the employee's ability to do the job in question arising from a perceived medical or physical impairment as sufficiently significant to qualify in itself as a

disability without needing to have resolved how long term it was perceived to be. This makes sense since it is unlikely in such a perceived case there would have been much of an analysis of the length of time for which the impairment might continue.

The opposing employer might state that such an interpretation would not comply with the current technical definition of 'disability', see Case C-13/05 *Chacón Navas* [2006] IRLR 706. The employer might add that such a low threshold would mean that workers could find it easier to bring perception cases than actual disability cases, and that perception cases would be run in the alternative.

As to this it has to be recognised that an employee who fears that s/he might fail to establish s/he has a disability within the meaning of section 6, would plead as an alternative that discrimination because of a perceived disability. Potentially any job applicant rejected because of the employer's perception that they would be difficult to work could seek to set up such a claim of perceived discrimination. This seems even more of a possibility now that the 2010 Act has taken steps to outlaw pre-employment offer medicals: see section 60 and Cloisters Briefing 1 "Changes to health Enquiries".

On the other hand it would be very easy for employers resisting a discrimination complaint to say they perceived something less than an actual disability as defined in section 6. For instance in such a case the victim might say she was perceived as being actually disabled but the discriminator might counter-argue that she was seen as being as merely briefly depressed.

For this reason it might be argued that the effectiveness of the objective of the Directive would be damaged if an employer could simply escape liability by saying, for example, s/he did not consider the requisite element of the disability being long-term and this would render meaningless the protection provided against discrimination on the ground of perceived disability.

How might the ECJ consider such a reference?

As Underhill J contemplated sooner or later it seems likely that a reference will be made on this to the ECJ; how might it consider the point.

The starting point is that the Framework Directive 2000/78/EC EC sets out a general framework as regards employment and occupation for combating discrimination on the grounds referred to in Article 1 which include disability, with a view to putting into effect in the member states the principle of equal treatment."

So the question is: how would the ECJ interpret the Directive in a case where there is a dispute as to how the alleged discriminator perceived the victim?

We do know that the Directive is not limited in effect to complainants who are disabled where a non-disabled person suffers discrimination as a result of

their association with a disabled person. This follows from the language of Article 1 of the Directive, and was confirmed by the ECJ in Case C-303/06 *Coleman v Attridge Law* [2008] IRLR 722. Of course this does not fully resolve the question how the ECJ would construe the Directive in a case of perceived discrimination.

Yet parts of the opinion of Advocate General Maduro in *Coleman* seem to apply just as persuasively to cases of perceived as association disability discrimination -

> [22] … where the employee who is the object of discrimination is not disabled herself…[the]… ground which serves as the basis of the discrimination she suffers continues to be disability. The Directive operates at the level of grounds of discrimination. The wrong that it was intended to remedy is the use of certain characteristics as grounds to treat some employees less well than others; what it does is to remove religion, age, disability and sexual orientation completely from the range of grounds an employer may legitimately use to treat some people less well. Put differently, the Directive does not allow the hostility an employer may have against people belonging to the enumerated suspect classifications to function as the basis for any kind of less favourable treatment in the context of employment and occupation. As I have explained, this hostility may be expressed in an overt manner by targeting individuals who themselves have certain characteristics, or in a more subtle and covert manner by targeting those who are associated with the individuals having the characteristics.
>
> [23] Therefore, if someone is the object of discrimination because of any one of the characteristics listed in Article 1 then she can avail herself of the protection of the Directive even if she does not possess one of them herself. It is not necessary for someone who is the object of discrimination to have been mistreated on account of 'her disability'. It is enough if she was mistreated on account of 'disability'. Thus, one can be a victim of unlawful discrimination on the ground of disability under the Directive without being disabled oneself; what is important is that that disability – in this case the disability of Ms Coleman's son – was used as a reason to treat her less well. The Directive does not come into play only when the claimant is disabled herself but every time there is an instance of less favourable treatment because of disability.

After Case C-303/06 *Coleman v Attridge Law* [2008] IRLR 722, the EAT in *Aitken v Commissioner of Police of The Metropolis* (UK/EAT/0226/09/ZT) held the DDA required an actual particular disability to be proved and said that in *Coleman*, this was the complainant's son with whom she was closely associated: [77]. However the EAT in *Aitken* neither analysed the Directive nor considered whether an actual disability is required by virtue of Article 1. So Underhill J.'s comments about the need for a reference may well be revisited.

The ECJ might also look at the approach taken in other countries.

In the United States, complainants used to have to satisfy the definition of disability under the Americans with Disabilities Act 1990 ("ADA"), in order to gain the protection under the legislation just as they do in the UK under the Equality Act 2010[1].

Interestingly, in 2009 the ADA Amendments Act came into force, which amended the ADA by broadening the ADA's definition of disability. This included widening this definition for "perception" cases. An employee who is "regarded as" disabled need not prove that her or his perceived impairment meets the definition of an actual disability, unless the impairment is merely transitory or minor. In contrast, prior to 2009 an employee had to show her or his perceived disability qualified as an **actual** disability in order to bring a complaint under this head.

Therefore one implication of the perceived disability complaint under the ADA may be that employers are prevented from arguing there is no perceived disability **and** that in any event the worker's medical condition justified their actions.

Finally

It is only a matter of time before a case brought under the Equality Act 2010 raises the question how section 6(1) and Section 13 are to work together when a non-disabled person alleges that they received less favourable treatment because they were perceived to be disabled. That is even more likely now that pre-employment medical reports are restricted: see section 60 and Cloisters brief 1 "Changes to health enquiries". Perhaps it should be recalled that in *Coleman* the ECJ said at [51] –

> Where it is established that an employee in a situation such as that in the present case suffers direct discrimination on grounds of disability, an interpretation of Directive 2000/78 limiting its application only to people who are themselves disabled is liable to deprive that directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee.

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[1] Countries including Ireland, the Netherlands and New Zealand prohibit discrimination based on "imputed" disability.