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DISABILITY DISCRIMINATION UPDATE

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DEFINITION OF DISABILITY

1. Disability is defined in s. 6(1) of the EQA. A person (P) has a disability if
 - a. P has a mental or physical impairment and
 - b. The impairment has a substantial and long-term adverse effect upon P's ability to carry out normal day-to-day activities.

Substantial impairment

2. s. 212 now specifies that “**substantial**” in the Act means “**more than minor or trivial**”. Previously this interpretation was given only in the Guidance and in the Statutory Codes, but it will now apply wherever “**substantial**” is used in the Act.
3. In *J v DLA Piper LLP*¹ the EAT gave tribunals some guidance on how best to determine whether a person has a substantial impairment. Although the tribunal should make separate findings about impairment and adverse effect,

¹ [2010] IRLR 936

“... the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in paragraph 38 above, to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings”.

4. Schedule 1 has made it simpler for a claimant to show substantial impairment. Under paragraph 4 of Schedule 1 of the DDA, the claimant had to show that one of 8 functions were affected; mobility, manual dexterity, physical coordination, continence, ability to lift or otherwise move every day objects, speech hearing or eyesight, memory to or ability to concentrate learn or understand or perception of the risk of physical danger. Schedule 1 of the EQA does not have any such list, although there is provision for the making of regulations if required. As a result, it is no longer necessary to identify any particular element – there may be a combination which means that the claimant is suffering a substantial adverse effect.

5. The government explained its reasoning for removing the list of capacities in the green paper “Discrimination Law Review: Framework for a Fairer Future”, July 2007, when it stated: *“8.5...This requirement was included in the Disability Discrimination Act in 1995 as there were concerns that, without such a qualification, the protection of the Act would be too wide reaching. Fawa In practice, this concern has proved unfounded. 8.6 There is also evidence of confusion about the purpose of the list of “capacities” and it has often incorrectly been described as a list of normal day-to-day activities. Furthermore, it has sometimes proved difficult for some people, particularly those with a mental impairment, to show how their impairment affects one of the “capacities”. In order to put this right, we propose to remove the list of “capacities” from the definition of disability.”*

6. It is doubtful as to how much difference this will make as tribunals will undoubtedly look to the former capacities for some framework for normal day to day activities.
7. The Government issued for consultation revised guidance under the Act: “Guidance on matters to be taken into account in determining questions relating to the definition of disability” (see www.odi.gov.uk/equalityact).
8. This guidance is little changed from the current, expansive, guidance issued in May 2006.
9. Whilst obviously the guidance does not refer to the capacities, it does under “Adverse effects on the ability to carry out normal day to day activities” provide guidance on what effects impairments might have using what are, in effect, the previously listed capacities – such as walking (D18); manual dexterity (D19); ability to co-ordinate (D20); continence (D21); ability to lift or carry (D22); ability to speak, hear and see (D23 – D27); ability to learn concentrate or understand (D28); and ability to understand risk of physical danger (D30). The Appendix replicates the present guidance by setting out examples of what it would be reasonable to regard as having a substantial adverse effect on normal day to day activities.
10. The removal of the list of capacities may, however, make it easier for those with mental health issues to bring themselves within the definition as they have been poorly served by this list of capacities. Mental health issues were problematic for the purposes of the DDA definition, in that they did not always fit into the capacities set out in Schedule 1 to the Act.

Day to Day Activities

11. The EQA has not changed the meaning of “normal day-to-day activities”. The accompanying Explanatory Notes give the example of a man with a disability who cannot lift or move heavy loads. Those functions are not part of normal day-to-day activities. However, lifting or moving moderately heavy daily objects like chairs are deemed to be normal day-to-day activities. Equally, travelling to work is deemed to be a normal day-to-day activity.
12. There is also a distinction between day to day activities and highly specialist skills. In **Chief Constable of Dumfries and Galloway Constabulary v Adams**², the EAT drew a distinction between highly specialist skills (such as those of a horologist or a silversmith) and those skills or activities which were common to a range of employment situations. Here, the claimant, a police officer, suffered from ME. Officers were expected to work night shifts until past 4 am. The claimant experienced his most acute symptoms between 2 am and 4 am, which meant that he could not do the night shift. The Chief Constable argued that working night shifts was not a normal day-to-day activity – this was a specialist activity for police officers which therefore fell outside the DDA. The EAT considered **Chacón Navas v Eurest Colectividades SA**³ in which the ECJ had used the phrase “professional life” in determining when protection applied, and concluded that night shifts involved

“...very ordinary physical activities at work at a time of night when there are many other people in other forms of employment doing the same thing. These are, to our mind, exactly the sort of circumstances that the DDA and the European Court of Justice had in mind”.

The EAT held that tribunals had to consider whether the activity in question was one which was common to different types of employment. It need not be an activity common to most jobs and equally, it need not be an

² [2009] IRLR 612

³ [2006] IRLR 706

activity carried out on a daily basis as long as it was not infrequently carried out.

13. In the case of **Chief Constable of Lothian and Borders v Cumming**⁴, the EAT re-iterated the limitations of the impact of **Chacon Navas** and **Paterson**. The claimant was employed in the Lothian and Borders Police in a civilian post. She had impaired vision in her left eye due to mild amblyopia. She was appointed as a special constable. She subsequently applied to join the regular force. Her application was rejected on the basis that she failed the eyesight standard set by Scottish ministers for recruitment as a police constable. She brought proceedings in the employment tribunal against the employer, alleging disability discrimination. However, she insisted that she was not, in any way, impaired in her ability to exercise her duties as a special constable, and would not be impaired in respect of her ability to carry out the duties of a regular constable. The tribunal had to determine whether she had a disability within the meaning of s.1 of the DDA.

14. The tribunal held that the claimant suffered the following three adverse effects as a result of her impairment. Firstly, she was learning to drive, and when carrying out any manoeuvre that required her to look over her left shoulder, she had to twist her head right round over her left shoulder to enable her to see behind her with her right eye. Secondly, when she was carrying out "close reading work" approximately every 20 minutes she had to take a break of about five minutes in order to refocus her vision. Thirdly, as a result of squint correction surgery which she had undergone as a child she had been left with a mild residual squint and scarring on her left eye.

⁴ [2010] IRLR 109

15. In addition, the tribunal held that the employer's refusal to consider her application to join the regular force constituted an "adverse effect" in itself, on the basis of the EAT decision in **Paterson v Commissioner of the Police of the Metropolis** and the ECJ decision in **Chacon Navas v Eurest Colectividades SA**. It stated that: "if participation in professional life is also a day-to-day activity then the refusal to allow the claimant to go forward into that professional life amounts ... to a substantial effect. It is an effect of the impairments. Thus the claimant is a person who has long-term impairments that have a substantial adverse impact on her ability to carry out her day-to-day activities. She is therefore a disabled person within the meaning of s.1 and is entitled to the protections afforded to such persons by the DDA." In the alternative, the tribunal held that even if the refusal to consider her application was not an "adverse effect" for the purposes of s.1, the other three matters were substantial so that she was disabled within the meaning of s.1.

16. The employer appealed. The EAT upheld the appeal. It held that the tribunal had erred in finding that the claimant was disabled within the meaning of s.1 of the DDA. 27. In particular, a refusal to allow a claimant to progress in her professional life is not an adverse effect on normal day-to-day activities for the purposes of s.1 of the DDA. If it were, a person who themselves suffered no other adverse effects from a subsisting physical impairment would be rendered disabled if a potential employer rejected their application on the ground of that impairment. The status of disability for the purposes of the DDA cannot be dependent on the decision of the employer as to how to react to the employee's impairment.

17. In addition, the list of day-to-day activities given in the guidance was a description of a person's use of their body (or, in the case of mental activities, their mind) in a particular way. Making an application to enter a profession, or for any job, does not imply any particular physical activity,

and a potential employer's refusal to progress the application is not a physical effect. In that regard, **Paterson** and **Chacon** are not authority for the broad proposition that being afforded general participation in or access to professional life is a day-to-day activity.

18. In the present case, it followed that the tribunal had erred in holding that the claimant had established that her impairment had a “substantial” adverse effect because it prevented her moving forward in her professional life. Moreover, the tribunal's alternative conclusion that, leaving aside the refusal to progress the application, the adverse effects of the impairment were substantial was perverse. The only conclusion reasonably open to it was that whilst the claimant's eyesight impairment gave rise to some adverse effects, they were limited and minor in character.
19. Whilst the outcome of this decision is unsurprising, it is unfortunate that Lady Smith chose to state the following in her illustration of the error of the tribunal: “For example, a person with a scar who applied for a promotion that involved considerable contact with the public would be regarded as “disabled” if the application was rejected because of the scar, but not disabled if the application was accepted. Such a case would plainly not fall within the intention of the legislation.” In fact para. 3 of Schedule 1 expressly provides that those with a severe disfigurement i.e. scarring meet the requirement of substantial adverse effect so that, as long as the scar is “long term” they will be disabled for the purposes of the Act.
20. The judgment also ignores the impact of **Coleman** in that the focus under the directive is indeed the treatment and the reason for it, rather than the attributes of the person complained of. In the scarring case treatment would clearly be on grounds of disability – and thus would be contrary to the Directive.

“Likely”

21. The House of Lords considered the meaning of the word “likely” for the first time in **SCA Packaging Ltd v Boyle**⁵. The claimant suffered from throat nodules; she implemented a number of measures including not speaking loudly, not clearing her throat, not speaking on the phone for lengthy periods, using dehumidifiers and drinking a lot of water. The question for the tribunal was whether her symptoms were “likely” to recur without these measures, and applied the probabilities test. The N.I. Court of Appeal applied a different test, namely that it “could well happen”. On appeal, the House of Lords (with the EHRC intervening) agreed that the proper test was it “could well happen”, overruling **Latchman v Reed Business Information Ltd**⁶ in which the EAT had applied the balance of probabilities test. Parliament could not have intended cases on disability discrimination to turn on the identification of a point on the spectrum of “likelihood”. Whilst not a clear cut definition, it is certainly more claimant-friendly. In her judgment, Baroness Hale suggested⁷ that the same definition of “likely” would apply wherever that word appears in the same group of statutory provisions. “Likely” was used in paragraph 2 of Schedule 1 of the DDA namely in the context of whether an impairment to likely to last longer than 12 months. The EQA Guidance has adopted this form of wording.
22. Disability should be determined on the basis of the evidence at the time and not on the basis of what has happened since - **Richmond Adult College v McDougall**⁸.

⁵ [2009] IRLR 746

⁶ [2002] ICR 1453

⁷ Paragraph 52

⁸ [2008] IRLR 227

Long term

23. There is authority to the effect that two conditions or more can be considered in order to determine whether a claimant is experiencing “substantial adverse” effects (see **Ginn v Tesco Stores Ltd**⁹). But there is no such authority in relation to long term. This was considered by the EAT in **Patel v Oldham Metropolitan Borough Council**¹⁰.

24. Mrs. Patel (“P”) had worked as a teacher until her dismissal. She was dismissed in February 2007, following her absence from work on sick leave since 5 October 2006. A claim was submitted to the Employment Tribunal, based on a number of matters including disability discrimination, on 25 July 2007 (there was considerable delay in arranging the PHR in this case). The medical evidence was that P had low grade myelitis and went on to develop a secondary myofascial pain syndrome. However, the myelitis did not last for 12 months, nor was there evidence that it was likely to last for 12 months. The Tribunal found that P was not a disabled person – in particular, whilst the affect upon her of the pain she experienced as a result of her conditions was not doubted, the effects did not meet the qualification of “long term” in respect of what were found to be two separate impairments.

25. P appealed. Leave to appeal was granted on only one ground – whether effects of a condition which has developed from a different condition may be aggregated with the duration of the effects of the original condition for the purposes of meeting the requirement that the effects are “long term”.

26. The appeal was allowed. Mrs Justice Slade stated (at [15]): *“There is no authority on the question of whether the duration of the effects of an impairment which is likely to develop or has developed from a different impairment can be*

⁹ UKEAT/0197/05/MAA

¹⁰ [2010] IRLR 280

aggregated with the duration of the adverse effects of that impairment. The Court of Appeal in McNicol approved the dictum of Lindsay J in College of Ripon & York St John recognising the blurring of distinctions in the DDA between an underlying fault or medical condition and its manifestations. So too in my judgment fine distinctions between one medical condition and its development into another are to be avoided. I adopt the observation of Mummery LJ in McNicol at paragraph 19: 'It is left to the good sense of the tribunal to make a decision in each case on whether the evidence available establishes that the applicant has a physical or mental impairment with the stated effects.' Thus in my judgment the effect of an illness or condition likely to develop or which has developed from another illness or condition forms part of the assessment of whether the effect of the original impairment is likely to last or has lasted at least 12 months. "

SCOPE OF THE DDA/EQUALITY ACT

27. When the Employment framework directive was being implemented (Council Directive 2000/78/EC) there was some lobbying for the coverage of volunteers, as it was said that they would fall within the scope of "occupation". The issue had not been considered by the higher courts until recently in the case of **X v Mid Sussex CAB**¹¹. The Claimant was a volunteer part time advisor at the CAB. She had no contract. She left in circumstances which she alleged amounted to discrimination on grounds of her disability. She argued she was protected by the EU Directive, and that the DDA should be 'read down' to provide that protection.
28. Burton J, in the EAT ordered that the claim should be struck out. He held that "employment" in the Directive requires a material contract between the parties. He observed there was no jurisprudence to suggest that "occupation" meant unpaid employment; also, that the Directive offered protection only in relation to "access" to occupation. He held that the

¹¹ [2010] IRLR 101

Directive was not intended to protect volunteers in the Claimant's position and declined to make a reference to the ECJ on the point.

29. The Equality and Human Rights Commission and the government intervened in the appeal and Court of Appeal gave judgment in January 2011¹², rejecting the appeal.

30. Elias LJ rejected the submission of the appellant and EHRC that the Framework Directive must have been intended to apply to volunteers. His reasons for why the appellant falls outside the scope of the Directive were in summary that:

- a. it is far from obvious that it is desirable to include volunteers within discrimination
- b. it is inconceivable that the draftsman of the Directive would not have dealt specifically with the position of volunteers if the intention had been to include them
- c. the term occupation in the Directive is concerned with access to a particular sector of the job market rather than with the particular job which someone seeks or holds

31. In September 2009, prior to the decision in *Mid Sussex CAB* being promulgated, the Scottish employment tribunal agreed to a referral to the ECJ in the case of **Mahboob Masih v Awaz FM**, on whether volunteers are covered by the provisions of the Directive. Mr Masih, a Church of Scotland Minister, worked as a volunteer for the station and his services were terminated following a "lively" debate about religion and the views of a prominent Muslim speaker. This decision has been appealed to the Scottish EAT and will be heard in 2011 (EATS 0052/0).

¹² [2011] EWCA Civ 28

TYPES OF DISABILITY DISCRIMINATION

32. There are four different types of disability discrimination under the EQA (s. 25(2)).

Direct discrimination

33. Under s. 13(1), A discriminates against B if because of a protected characteristic he treats B less favourably than he would treat others. Under s. 13(3), if the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B by treating the disabled person more favourably than he treats B. This preserves the difference between disability discrimination and other types of discrimination explained by the cases including *Clark v Novacold*¹³ and *Archibald v Fife Council*¹⁴

34. Note the change from “**on the grounds of**” to “**because of**”. Direct discrimination is now wide enough to include associative discrimination. This follows the decision of the ECJ in *Coleman v Attridge*¹⁵. Paragraphs 59 and 63 of the Explanatory Notes emphasise that the words “**because of**” remove the former specific requirement that the claimant must have the protected characteristic.

35. There were concerns expressed at the replacement of “**on the grounds of**” with “**because of**”. It was feared that the effect would be to destroy the caselaw which has succeeded in widening the application of discrimination legislation. The Labour Government justified it by asserting that the words would make the legislation “**more accessible to non-**

¹³ [1999] IRLR 318

¹⁴ [2004] IRLR 651

¹⁵ [2008] IRLR 722, and see also [2010] IRLR 10

specialists". Whether this is an appropriate reason to alter the wording is open to debate.

36. In principle, s. 13 should also cover perceived disability discrimination, given that disability is a protected characteristic, that all the protected characteristics are covered by the section and that the Government says that perceived discrimination is covered by the Act. However, there are practical difficulties. An employer may perceive an employee to be Muslim or gay; it is harder to define how he might perceive an employee as suffering from an impairment which has a substantial and long-term adverse effect upon that employee's ability to carry out normal day-to-day activities, in other words, actually to satisfy s. 6. Cases of perceived discrimination under the DDA have not succeeded - see **Aitken v Commissioner of the Police for the Metropolis**¹⁶ and **J v DLA Piper**. In the latter case, Underhill J pointed out that although there were superficial similarities between associative discrimination and perceived discrimination, it did not follow that they were analogous. **"What the putative discriminator perceives will not always be clearly identifiable as disability"**. Further, the EAT could not make such a finding without a reference to the ECJ, which in this case it declined to do. In the former case, Slade J referred to the judgment of Lawrence Collins LJ in **English v Thomas Sanderson Blinds**¹⁷ when he noted that the DDA referred to the disabled person's disability and therefore differed from other discrimination statutes. The EAT found there had to be an actual disability and not a perceived one.

37. At the Bill stage, an attempt was made to introduce an amendment expressly to cover discrimination by perception and association. The Solicitor-General, Vera Baird, opposed it, arguing that the words **"because**

¹⁶ UKEAT/0226/09 - note Aitken will be heard by the Court of Appeal in March 2011.

¹⁷ [1999] ICR 543

of” did not change the meaning of “on the grounds of” and therefore that there was already adequate protection in the Act. However, to introduce the specific protection of association and perception “would run the risk of excluding other cases which the courts have held are covered by the words ‘on grounds of’...and future cases which the Government would want the equally broad and flexible formulation ‘because of’ to extend to”. The Parliamentary Joint Committee on Human Rights disagreed with this explanation, but no further amendment was made.

38. Whilst the courts so far (the EAT specifically) have been disinclined to accept arguments as to treatment on the basis of “perceived” disability being covered by the DDA in order to comply with the EC Directive (see above), it remains to be seen how “perceived” disability will work in practice under the Equality Act. It will be tortuous for a person bringing a claim to have to show that an employer perceived them to have a physical or mental impairment which has a substantial and long term adverse effect on their ability to carry out normal day to day activities? A looser approach would mean that those who would not meet the definition but who have been less favourably treated because of their impairment will claim direct discrimination on the basis of perception; however this may be a means of avoiding the sometimes stringent requirements of the definition of “disability”. Either way, a reference to the ECJ looks highly probable on this issue.

Comparators for direct disability discrimination

39. In *Aylott v Stockton-on-Tees BC*¹⁸ the tribunal found that Mr. Aylott had been dismissed for direct and/or disability-related reasons. On his direct discrimination claim, the Court of Appeal held that the tribunal was also entitled to find that a stereotypical view of bi-polar affected disorder was a

¹⁸ [2010] IRLR 994

sufficient ground for establishing direct discrimination, which in effect bypassed the need for a comparator at all.

40. Prior to the **Aylott** judgment, the EAT had considered in **Eagle v Rudd** the appropriate comparator for direct disability discrimination, in particular where reasonable adjustments are in play.

41. In **Eagle Place Services Ltd v Rudd**¹⁹, a solicitors' services company dismissed a solicitor specialising in personal injuries. His caseload was entirely concerned with Coral UK, the betting company. Mr. Rudd had detached retinas in both eyes, which meant that he had to take frequent breaks from his desk. He began a trial period working at home 2 days a week. However before the trial ended he was dismissed on the purported grounds of breach of trust and confidence. The tribunal did not accept that trust and confidence was the reason for the dismissal. Instead, it held that the Firm took the view that Mr. Rudd could not now bill enough chargeable hours so that his employment was un-commercial. The Firm argued that (i) the case the appropriate comparator post-**Malcolm** would be a person who was not disabled but whom the Firm viewed as non-commercial and (ii) it would have behaved the same way to a non-disabled employee. The EAT rejected these arguments. It said

The comparison (if one is required) must be between a disabled claimant unreasonably believed to be a commercial liability by reason of the reasonable adjustments and a fellow employee who is not disabled with similar adjustments in place in respect of whom it is reasonable to infer that the employer would not have behaved unreasonably

Dismissal of a non-disabled employee in the same circumstances would have been manifestly unreasonable - the House of Lords in **Malcolm** did not intend tribunals to draw "an absurd comparison" as

¹⁹ [2010] IRLR 486

suggested by the Firm. Further, given that it was accepted that reasonable adjustments could in fact be made for the claimant, the Firm could not undo its legal obligation to make those adjustments by then arguing that to make them was non-commercial. That would be to negate the purpose of the Act. The EAT also took a dim view of the contention that an employer was entitled to maintain that it would have behaved irrationally to a comparator who did not have the disability. The EAT said

“It is one thing to find, as in *Bahl* that a named individual has behaved unreasonably to both the claimant and named comparators; it is quite another to find that a corporate entity such as Nabarro or its service company would behave unreasonably to a hypothetical comparator when it had no good reason to do so. Accordingly the decision of the employment tribunal cannot be faulted whether the discrimination was direct or disability-related. The discrimination might be both direct and disability-related but if we are wrong about this it is certainly disability-related”.

42. In **JP Morgan v Chweidan**²⁰, the EAT held that where a claim for disability-related discrimination fails, the same facts probably should not support a finding of direct discrimination. The appeal against the EAT judgment is to be heard in May 2011 and may provide some clarity on the interface between direct discrimination and disability related discrimination.

Disability-related discrimination
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43. Under s. 15(1), A discriminates against 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.**

²⁰ [2010] EAT/0286/09

44. The concept of disability-related discrimination was introduced as a consequence of the knock-out blow dealt to disability-related discrimination by **Lewisham B.C. v Malcolm**²¹. For nearly 20 years, the law on disability-related discrimination was recognised as having been definitively stated by the Court of Appeal in **Clark v Novacold**. In that case, Mummery LJ pointed out that concepts from other discrimination legislation should not be imported into the DDA because unlike them, the DDA did not require a like for like comparison. Instead, s. 5 of the DDA referred to “**others to whom that reason does not apply**”. The Court of Appeal held that s. 5 should be construed as focussing on the reason for the treatment, not the similarities between claimant and comparator. Therefore, the comparator for a disabled person who had been dismissed for absence from work for a disability-related reason was another employee without the disability, not another employee without the disability who had been off work for the same period. The latter would draw the comparison required by the SDA and RRA, but not required by the DDA, namely a comparator whose circumstances which were not materially different.

45. This long-standing ruling was reversed by **Malcolm**. Mr. Malcolm was a schizophrenic. He sub-let his Council flat at a time when he was not taking his medication, a fact related to his disability. The Council issued possession proceedings in the county court. Mr. Malcolm argued that this constituted disability-related discrimination. One issue for the House of Lords was whether **Novacold** was correctly decided. Were the appropriate comparators persons without the disability who had sub-let their flats or persons without the disability who had not sub-let? The House of Lords took the view that it was the former (Lady Hale dissenting on this point). Lord Scott pithily described the latter comparison as “**pointless**” because

²¹ [2008] IRLR 700

the Council would not have sought possession of a flat which had not been sub-let. He referred to Mummery LJ's example of the blind man refused entry into a restaurant with his guide dog because the owner did not allow dogs into the restaurant. Mummery LJ had said that the reason for the refusal was disability-related – had the man not been blind, he would not have wanted to take the dog into the restaurant. Lord Scott disagreed; in his view, the problem was the dog and not the disability. He said that there had been **“over-concentration on the refusal to admit the dog”**. Similarly, the Council's reason for re-possessing the flat was not related to Mr. Malcolm's disability but to his having sub-let it. The fact that there was a connection between his disability and his having sub-let was not the reason for the Council's treatment of him.

46. In her judgment, Lady Hale reviewed the Parliamentary history of the Disability Bill and noted that the original wording proposed, namely **“he treats him less favourably than he treats or would treat others who do not have the disability”** was replaced at the House of Lords committee stage by **“he treats him less favourably than he treats or would treat others to whom the reason does not or would not apply”**. The reason for this change (and concurrent changes to the provisions for premises and housing) was expressly because the original wording focussed on the disability rather than on the reason for the treatment. The example given by Lord Henley made this clear. Two applicants cannot type – one because he never learned and the other because he has arthritis. Both are rejected and someone gets the job that can type and is a person without the disability. On the construction **“less favourably than he treats or would treat others who do not have the disability”** both the applicant who has arthritis and the applicant who simply can't type are treated the same, because they can't type. On the construction **“less favourably than he treats or would treat others to whom the reason does or would not apply”** the applicant with arthritis is treated less favourably than the person who got the job because

the reason he can't type is related to his disability. Lady Hale maintained that **Novacold** was correctly decided because the conclusion reached by the Court of Appeal was precisely the one intended by Parliament when it changed the wording of the relevant sections. She pointed out that disability-related discrimination could be justified and it was at that point that the employer could seek to explain why he had acted as he did. However, on the facts of this particular case, she held that the reason for the treatment was not related to Mr. Malcolm's disability.

47. Following **Malcolm** it was in a number of recent cases (for example, **Truman v Child Support Agency (Dudley)**²² and **Aylott v Stockton-on-Tees BC**) that **Malcolm** was to be followed in the employment context. This meant that disability related discrimination, as contained in section 3A(1) DDA has in effect the same meaning as direct discrimination in section 3A(5) DDA.

48. The 2010 Act in effect reinstates disability-related discrimination. Section 15 is aimed at re-establishing the balance between allowing a disabled person to show that he has experienced a detriment arising out of his disability, and allowing the employer to show why that treatment was justified. The Explanatory Notes give the example of a landlord ejecting a person with cerebral palsy because she thinks that his slurred speech means that he is drunk. If she did not know that he was a disabled person, then she would escape liability under s. 15(2). If she did know that he had cerebral palsy, she would have to justify her actions. (And of course if she had barred him because he had cerebral palsy that would be direct discrimination).

49. Less favourable treatment arising from disability can be not because of the disability as such but by something auxiliary to it, like a wheelchair. It can

²² [2009] IRLR 277

also encompass low marking on a performance test where the disabled person is at a disadvantage.

50. The section dispenses with the need for comparator – the focus is purely upon the treatment “**because of something arising in consequence of B’s disability**”. There will be no more talk of dogs in this context. The EHRC Code of Practice suggests that a typical example is a woman disciplined at work for losing her temper, when that temper loss is caused by the pain she is suffering as a result of cancer²³. The phrase “**arising in consequence**” is not defined and will prompt litigation as to its meaning. Clearly, tribunals should give it a purposive interpretation in line with the Directive. There is one previous authority in 2004 after **Novacold** and before **Malcolm**. This is **Murphy v Slough BC & Governors of Langley Wood School**²⁴. The Claimant was unable to have children and therefore had a child via a surrogate mother. After the child was born, she sought to take paid leave. When this was refused, she claimed that she had been treated less favourably for a disability-related reason. The EAT upheld her appeal that this was indeed a disability-related reason, but found that it was justified because of cost constraints.

51. The section imports the usual concept of objective justification, a far higher standard than that previously applied.

52. s. 15(2) provides that A does not discriminate if he does not know or could not reasonably have known about B's disability. There is likely to be considerable litigation over what A could reasonably be expected to have known. The Explanatory Notes do not assist. The EHRC Code²⁵ suggests that where a previously good employee becomes depressed and late for

²³ EHRC Code paragraph 5.9

²⁴ EAT/1157/02

²⁵ Ibid paragraph 5.15

work, is openly emotional and upset and is suddenly prone to making errors, an employer should be reasonably expected to know this might be connected to a disability and to explore matters with him. It remains to be seen whether this is the case.

Indirect discrimination

53. Indirect discrimination was not featured in the DDA. However, s. 19 provides that A discriminates against B if he applies to B a PCP which is discriminatory in relation to a relevant protected characteristic of B's. s. 19(2) provides that a PCP is discriminatory in relation to a relevant protected characteristic 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 to persons with whom B does not share it;**
- c. **It puts or would put B at that disadvantage;**
- d. **A cannot show it to be a proportionate means of achieving a legitimate aim.**

54. The concept of indirect discrimination will prove useful for those claimants who cannot show that the employer had knowledge of their disability and who therefore cannot invoke disability-related discrimination (s. 15) or failure to make reasonable adjustments (s. 21). It does not appear to embrace associative or perceptive discrimination given that, unlike section 13, the section provides that B must have the disability.

55. s. 23(1) provides that when drawing comparisons under s. 13, 1(s. 14 is not yet in force, and possibly will never be) and s. 19, there must be no material difference between the circumstances in each case. However, s. 23(2) provides that

The circumstances relating to a case include a person's abilities if

a. on a comparison for the purposes of s. 13, the protected characteristic is disability;

b. on a comparison for the purposes of s. 14, one of the protected characteristics in the combination is disability.

56. This raises an interesting question for claims of indirect discrimination. Who is in the comparator pool? Since the material circumstances do not have to include a person's abilities, this should ensure that the pool for comparison is not limited. For example, in a "no dogs" case, s.23 should be interpreted as meaning that the comparison is with those who are not visually impaired and thus do not have a dog. To give section 19 any meaningful application, the comparison cannot include by way of material circumstances any of the manifestations or characteristics of the disabled person which cause the particular disadvantage. This will surely be the subject of litigation.

Duty to make reasonable adjustments
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57. The Act sets out one overarching duty to make reasonable adjustments (section 20), provides that a failure to comply with the duty is discrimination (section 21) and deals with the application of the duties in the different areas covered by the Act in a variety of schedules.

58. The duty to make reasonable adjustments largely reflects the provisions in the DDA, but the wording is a little different. For example, the DDA referred to "practice policy or procedure" whereas s. 20 refers to the usual PCP "provision, criterion or practice". There is no definition of this PCP but one can assume that it should be widely interpreted.

59. Once again, it does not appear to embrace associative or perceptive discrimination given that, unlike section 13 (direct discrimination) the

section provides that B must have the disability. Before having to meet the requirement, the disabled person must be at a “**substantial disadvantage**”.

60. The duty to make reasonable adjustments arises in one of 3 ways (s. 20(3)-(5)):

- a. Where a PCP places a disabled person at a disadvantage in relation to a relevant matter in comparison with persons who are not disabled, A is under a duty, to take such steps as are reasonable to have to take to avoid the disadvantage.
- b. Where a physical feature places a disabled person at a disadvantage in relation to a relevant matter in comparison with persons who are not disabled, A is under a duty, to take such steps as are reasonable to have to take to avoid the disadvantage. The EHRC Code²⁶ gives the example of glass doors in a corridor which would put a partially sighted person at a disadvantage.
- c. Where a disabled person would but for the provision of an auxiliary aid be put at a disadvantage in relation to a relevant matter in comparison with persons who are not disabled, A is under a duty, to take such steps as are reasonable to have to take to avoid the disadvantage. An aid can be human (a sign language interpreter) animal (a guide dog) or inanimate, like a specialist keyboard.

61. Schedule 8 of the EQA is similar to the provisions of the DDA but is more expansive, and spells out the requirement that reasonable adjustments include the provision of auxiliary aids. The Explanatory Notes suggest reasonable adjustments could include adjusting seats or providing application forms in large script.

²⁶ EHRC Code paragraph 6.12

62. Schedule 8 paragraph 5 defines 3 categories of interested employees covered by the employer's duty to make reasonable adjustments.

- a. A person who is or who has notified A that the person may be an applicant.
- b. An applicant for employment with A.
- c. An employee.

Paragraph 5(2) also provides that the first second and third requirements also apply to disabled contract workers whilst they are supplied to B.

63. Some general points:

- a. As regards the first and third requirements, where information is concerned, it has to be provided in an accessible form.
- b. Where there are reasonable adjustments to be made, A is not entitled to ask the disabled person to pay towards them (s.20(7)).
- c. As regards the second requirement, physical feature includes removing, altering or avoiding it.
- d. s. 3A(6) of the DDA provides that treatment cannot be justified if a reasonable adjustment which should have been made would impact on the justification. The EQA does not contain this provision. Nevertheless it is difficult to see how an employer could show that the treatment was proportionate in the absence of reasonable adjustments.

64. The basic principles of making reasonable adjustments are those set out in **Archibald v Fife Council**. The employee had been working as a manual worker but then became disabled after minor surgery. The Council's policy was to require employees who were not fit to perform their jobs to be sacked and if they were to apply for an alternative job, it had to be by competitive interview. The employee failed 100 interviews for clerical and

APT&C jobs, probably because she was viewed as a manual worker. The issue was to what extent whether the duty to make reasonable adjustments involved positive discrimination. The House of Lords held “arrangements” under s. 6(1) of the DDA were undefined; the words applied to the job description for a post and the risk of facing dismissal as much as to an employer's arrangements for deciding who gets what job. Therefore, once the claimant became incapable of carrying out her role, the Council should have looked for other roles for her even if it meant foregoing the usual competitive interview. The duty to make reasonable adjustments not only contemplates positive treatment but requires it. In the recent case of **Chief Constable of South Yorkshire Police v Jelic**²⁷, the EAT held that reasonable adjustments included swapping roles between employees to allow a disabled employee to remain in employment.

65. In **Lancashire Care NHS Foundation Trust v Reilly**²⁸, an employment tribunal found that the managers of the Respondent closed their mind to the consideration of reasonable adjustments following the raising of the grievance by the Claimant. The EAT rejected an implicit premise by the appellant employer - which never surfaced as an explicit submission- that employment tribunals have no right to question management decisions and should accept at face value all explanations which are given to them. The EAT stated that there is an extensive jurisprudence setting out very clear limits to the way in which tribunals should approach their task. But this does not mean that a tribunal is precluded from reaching the view that this tribunal reached, namely that the Respondent closed their mind to the consideration of reasonable adjustment.

²⁷ [2010] IRLR 744

²⁸ UKEAT/0254/09/CEA

66. What is reasonable? The test is objective, and must clearly depend on the circumstances. The EHRC Code²⁹ suggests that a number of factors could be taken into account, such as practicability, costs, the employer's resources and size and so on.

67. Recent case law has emphasised that there is an objective test regarding whether the adjustment is reasonable: **RBS v Ashton**³⁰. Here the bank failed to extend the benefits of its sick pay scheme to the employee, when it was beyond that which was given to non-disabled employees when sick. The EAT found the Tribunal had failed to focus upon the practical result of measures which could have been taken and followed **O'Hanlon**³¹ when finding that there was no reasonable adjustment when sick pay was not extended.

68. The appeal courts have also recent stressed the need to ensure reasonable adjustments are feasible: in **Wilson v DWP**³² the refusal to allow home working was not a failure to make reasonable adjustments.

69. **Aylott v Stockton-on-Tees BC**³³ also confirmed that the duty to make reasonable adjustments applies to dismissal.

Knowledge and reasonable adjustments

70. Schedule 8 paragraph 20 provides:

A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know –

²⁹ The EHRC Code paragraph 6.28

³⁰ EAT 2010 0542/09

³¹ [2007] ICR 1359

³² [2010] EAT/0289/09

³³ [2010] IRLR 994

- (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;**
- (b) in any other case referred to in this Part of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.**

The wording, which differs from the DDA, is odd in that it suggests that as long as the employer knows the applicant is interested in the job, he does not need to know he is a disabled person; whereas he has no liability to a disabled employee unless he knows of the disability.

71. In **Marks & Spencers plc v Powell**³⁴ the EAT found in the context of a reasonable adjustments case under the DDA, the Tribunal had erred in identifying the non-disabled comparator as: **“A person who is on long-term sickness absence but who was not threatened with disciplinary proceedings immediately on their return to work.”** Rather the comparator should have been a non-disabled person on long-term sickness absence who was threatened with disciplinary proceedings on their return to work.

72. In **Matuszowicz v Kingston upon Hull City Council**³⁵ the Court of Appeal considered whether a failure to make reasonable adjustments is an act or an omission, and held that it is an omission. There is a distinction between a deliberate omission (which dates from the time of the decision to make a deliberate omission) and an inadvertent omission. By definition an omission by inadvertence or negligence is not subject to a deliberate decision; as a result, it must be accorded a notional date, to be determined by the relevant circumstances. In this case, however, the Court of Appeal held that there was a continuing omission and so the claim was in time. By way of guidance, Sedley LJ referred to two ways in which an employee

³⁴ [2010] EAT/0258/10

³⁵ [2009] IRLR 288

might protect himself against problems with time issues. First, the claim should be issued promptly. Second, there may be circumstances which make it just and equitable to extend time and tribunals should show sympathy in those situations and extend time accordingly.

OTHER PROVISIONS CONCERNING DISABILITY

73. s. 27 deals with victimisation. There is no change to the existing law.

74. s. 39 applies the discrimination provisions to employees with a protected characteristic.

75. s. 40 deals with harassment of employees with a protected characteristic. Harassment itself is dealt with in s. 26.

76. s. 41 deals with discrimination against contract workers with a protected characteristic.

PRE-EMPLOYMENT HEALTH ENQUIRIES

77. s. 60 of the EQA makes radical changes to the scope of pre-employment enquiries. It provides that an employer cannot ask a job applicant about his or her health. This includes making those enquiries of a job applicant or, where a pool of potential employees is being created, making those enquiries before including the applicant in such a pool. The provision, which follows a recommendation from the Parliamentary Joint Committee on Human Rights, is designed to prevent people with disabilities from being deterred from applying for jobs when faced with Health Questionnaires as part of the application process.

78. However, there are exceptions to this general rule – they are questions which are “**necessary for the purposes of**”

- a. **establishing whether the job applicant will be able to comply with a requirement to undergo an assessment (such as a selection test) and whether a duty to make reasonable adjustments will arise in relation to such an assessment**
- b. **establishing whether the job applicant will be able to carry out a function that is intrinsic to the work concerned**
- c. **monitoring diversity**
- d. **taking positive action to advantage people with a particular disability in compliance with s. 158**
- e. **establishing whether the applicant has a particular disability where this is an occupational requirement which is a proportionate means of achieving a legitimate aim**

79. **“Work”** has a wide meaning, including contract work, pupillage, partnership or appointment to a public or private office. The EHRC has power to enforce this provision (s. 60(2)) but it cannot be the subject of an individual claim. However, s. 60(5) provides that evidence about an employer asking this question could give rise to an inference of discrimination requiring the employer to show that no discrimination took place (s. 60(5)).

80. This means that it is acceptable to ask applicants whether they have a disability which would require the employer to make a reasonable adjustment to the recruitment process. It would also be acceptable to ask an applicant whether he or she can meet the intrinsic requirement of a job, for example a job involving heavy moving or lifting in a warehouse (perhaps by making reasonable adjustments) or a job as a scaffolder which involves climbing. It is not acceptable to ask the applicant other health questions, such as “have you suffered from a mental illness?”

81. An offer can be made to an applicant conditional on satisfactory health checks; but the mere fact that he or she might have a disability cannot be

the basis of a rejection if it is not relevant to the job and reasonable adjustments can be made to accommodate it.

82. Fit notes will not as such affect the law on disability discrimination but if a GP fills in a fit note, its recommendations³⁶ may well have to be taken into account as a possible reasonable adjustment. Fit notes will be evidentially significant in the context of disability discrimination claims.

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³⁶ Fit notes can provide for four options- phased return, amended duties., altered hours, workplace adaptations

³⁷ With many thanks to Daphne Romney and Catherine Casserley at Cloisters.