SERJEANTS' INN

DISCRIMINATION ARISING FROM DISABILITY

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Discrimination arising from disability

Introduction

1. This paper considers the practical application of section 15 of the Equality Act 2010 ("EA10"), the prohibition against discrimination "arising from" disability. After a brief reminder about the legal definition of disability, we look at the words of section 15, the two-stage test for causation, some recent cases, the defences available to respondents and some practical tips for responding to claims.

Disability in the EA10

2. Of the nine protected characteristics listed in section 4 of the EA10, disability is the subject of the most elaborate definition and protection. Disability discrimination and harassment is prohibited in each field of application of the EA10 and is frequently litigated in the employment and services or public functions contexts. Disability also falls within the scope of the public sector equality duty.

3. The talk by Jonathan Davies dealt with disability discrimination and the important case of *Griffiths v The Secretary of State for Work and Pensions* [2015] EWCA Civ 1265; [2016] I.R.L.R. 216, in the context of managing sickness absence. Lord Justice Elias' judgment contains an authoritative summary of the key disability provisions and how they relate to each other: paras. 13–27 of the judgment.

4. The two kinds of protection which apply only to disability and not the other protected characteristics are the prohibition on discrimination arising from disability and the duty to make reasonable adjustments. These provisions are specially tailored to safeguard participation and access for disabled people.

Definition of disability

5. Many readers will be familiar with the definition of disability in section 6 and schedule 1 of the EA10. See also the Equality Act 2010 (Disability) Regulations 2010, which include conditions deemed to be disabilities and conditions expressly excluded from the definition. See also the official "*Guidance on matters to be taken into account in determining questions relating to the definition of disability*" issued by the Secretary of State under section 6(5).

6. By way of broad summary, a claimant relying on the protected characteristic of disability in a discrimination claim is required to plead and prove:
    a. The particular mental or physical impairment relied on;
    b. Its day-to-day effects;
    c. Substantial adverse impact;
    d. Long-term (lasted or likely to last for at least 12 months).

7. Disability is frequently admitted by employers who may have detailed occupational health and welfare information about the claimant on file. Otherwise, the threshold test of disability is worked through on a case-by-case basis, by reference to the wording of section 6 and schedule 1, medical records, expert evidence, experience and common sense.

Section 15: "arising from"

8. EA10, part 2 (key concepts), chapter 2 (prohibited conduct), section 15 states:

    "Discrimination arising from disability
    (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."

9. From a respondent's perspective, a good way of approaching or triaging the merits of a section 15 claim is:
    a. Did the respondent in fact know about the disability?
    b. Should the respondent have known about the disability?
    c. What is the "something" which the claimant relies on?
    d. Did the respondent treat the claimant unfavourably because of that something?
    e. Can the respondent justify such treatment?

10. Notice there are two stages or two causal links required for the section 15 claim ("arising in consequence" and "because of") and two defences (knowledge and justification). Also note there is no comparator stage in a section 15 claim. The comparator was dropped

following consultation and reform of the elements of "disability related" discrimination in the Disability Discrimination Act 1995.[1]

11. The government gave two examples of the operation of section 15 in the Explanatory notes to the EA10:

    - "An employee with a visual impairment is dismissed because he cannot do as much work as a non-disabled colleague. If the employer sought to justify the dismissal, he would need to show that it was a proportionate means of achieving a legitimate aim.
    - The licensee of a pub refuses to serve a person who has cerebral palsy because she believes that he is drunk as he has slurred speech. However, the slurred speech is a consequence of his impairment. If the licensee is able to show that she did not know, and could not reasonably have been expected to know, that the customer was disabled, she has not subjected him to discrimination arising from his disability…"

12. See also the Equality and Human Rights Commission's *Employment Statutory Code of Practice*, chapter 5.

13. Judicial guidance on the causation test is found in *Basildon and Thurrock NHS Foundation Trust v Weerasinghe* [2016] I.C.R. 305, EAT. Perhaps unsurprisingly, Langstaff P cautioned against a "deliciously vague" approach to causation and concluded that the EA10 requires Employment Tribunals to approach causation in two stages:

    > "26 The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The tribunal has first to focus on the words "because of something", and therefore has to identify "something"—and second on the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages. In addition, the statute requires the tribunal to conclude that it is A's treatment of B that is because of something arising, and that it is unfavourable to B. I shall return to that part of the test for completeness, though it does not directly arise before me.

[1] Now ancient history: in *Malcolm v Lewisham LBC* [2008] UKHL 43; [2008] 1 A.C. 1399, the House of Lords overturned the Court of Appeal case of *Clark v TDG Ltd (t/a Novacold Ltd)* [1999] 2 All E.R. 977 regarding the proper construction of the comparator. The House of Lords held that the appropriate comparator was someone who acted the same way as the claimant, but did not suffer from the disability; and not someone who had not acted in the way that caused the employer to treat the employee as it did. This approach was less sensitive to the reasons why disabled claimants found themselves in a particular situation, and thus less protective. But again, no comparator is required for section 15 of the EA10.

27 In my view, it does not matter precisely in which order the tribunal takes the relevant steps. It might ask first what the consequence, result or outcome of the disability is, in order to answer the question posed by "in consequence of", and thus find out what the "something" is, and then proceed to ask if it is "because of" that that A treated B unfavourably. It might equally ask why it was that A treated B unfavourably, and having identified that, ask whether that was something that arose in consequence of B's disability.

28 The words "arising in consequence of" may give some scope for a wider causal connection than the words "because of", though it is likely that the difference, if any, will in most cases be small; the statute seeks to know what the consequence, the result, the outcome is of the disability and what the disability has led to."

14. See also *Pnaiser v NHS England* [2016] I.R.L.R. 170, mentioned in Jonathan Davies' talk, where Simler J summarised the proper approach to section 15:

"31 ...
(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the

disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in *Land Registry v Houghton* UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of *Weerasinghe* as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages — the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.

(i) As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

The trend

15. Section 15 claims are (at least in my recent experience) becoming more popular and more frequently litigated. There are a number of reasons for this.

16. First, see *Griffiths*, Elias LJ said at para. 27:

> "… it is in practice hard to envisage circumstances where an employer who is held to have committed indirect disability discrimination will not also be committing discrimination arising out of disability, at least where the employer has, or ought to have, knowledge that the employee is disabled. Both require essentially the same proportionality analysis."

17. Why would a claimant now plead indirect discrimination only? Or not seek to amend to add section 15 to an existing claim?

18. Second, section 15 might offer claimants more flexibility and scope for argument about the personal impact of their disability in the circumstances. Some claimants will be encouraged by an interesting EAT case: *Risby v London Borough of Waltham Forrest*, UKEAT/0318/15/DM, 18 March 2016.

19. The appellant in *Risby* suffered from paraplegia. His employer moved a workshop for managers like the appellant to a venue he could not access. The appellant had a short temper, which was not something related to his disability. He became very angry: shouted at junior and senior colleagues, swore, and drew racially loaded analogies to describe his own treatment. He was suspended and ultimately dismissed.

20. The ET concluded that the appellant had not been discriminated against. However, the EAT allowed the appeal: Mr Justice Mitting presiding. The appellant had established that the discipline for his misconduct arose from his paraplegia, notwithstanding part of the cause was also the appellant's short temper, not related to disability. See for instance paragraph 18 of the judgment:

> "If he had not been disabled by paraplegia, he would not have been angered by the Respondent's decision to hold the first workshop in a venue to which he could not gain access. His misconduct was the product of indignation caused by that decision. His disability was an effective cause of that indignation and so of his conduct, as was, of course, his personality trait or characteristic of shortness of temper, which did not arise out of his disability. On the Employment Tribunal's own analysis of the facts, this was a case in which there were two causes of conduct that gave rise to his dismissal, one

of which arose out of his disability. In concluding otherwise, the Employment Tribunal erred in law..."

21. On the face of it, this might be an expansive and therefore uncertain approach to causation as a legal test. The links in the causal chain are not as strong or close as, say, cases of unfavourable treatment of a person with cerebral palsy because of their speech, or a restaurant refusing entry to a blind person because of their guide dog.

22. So far as we can tell, the employer in *Risby* was concerned not about the appellant's paraplegia, but his bad-tempered outbursts, which had an impact on other employees. The judgment does not turn on medical symptoms or causes related to the appellant's disability, but on the cause of his misconduct and dismissal in all the circumstances of the case.

23. On the other hand, there is nothing illogical in the *Risby* approach. The case involved a stark dispute *about* disability access, during which the appellant lost his temper. His case was that he was trying to make a point specifically in relation to his treatment as a disabled person. His misconduct was related to that. The EAT therefore held that discipline for the misconduct arose from disability. In doing so Mitting J applied the case of *Weerasinghe* (above) and also *Hall v Chief Constable of West Yorkshire* [2015] IRLR 893, where Laing J approached the test by asking: what was the "effective cause" of the unfavourable treatment?

24. Respondents may have little trouble distinguishing *Risby*, because of the unusual facts. But what if the disability in issue were a mental condition, rather than a physical one? Depending on the condition, the link between disability and conduct may be more or less difficult to grasp, as a matter of medicine. Is a particular claimant with, for instance, a mood disorder, more prone to confrontation with their colleagues? If so, was that the effective cause of the conduct, in all the circumstances? Such questions may require expert medical input, regarding the disorder generally and how it impacted on the claimant at the particular time of the misconduct.

25. Seemingly more clear cut were the facts in *Burdett v Aviva Employment Services Ltd* (UKEAT/0439/13/JOJ), EAT, 14 November 2014. The claimant committed assaults in the workplace, but he had schizophrenia and there were medication issues. He was dismissed. The employer was undoubtedly acting for the legitimate reason of maintaining

appropriate standards of conduct in the workplace and protecting other employees. Hence the ET upheld dismissal.

26. However, this was overturned on appeal to the EAT by (HHJ Eady Q.C). Of course preventing assaults and upholding proper conduct is a legitimate aim. But the ET had failed to engage with the issue of blameworthiness or culpability, and failed to consider whether a sanction or response short of dismissal would have met that legitimate aim. Which brings us to the defences to section 15 claims.

Defences

27. Section 15(1)(b) sets out a justification defence for respondents: "[the employer] cannot show that the treatment is a proportionate means of achieving a legitimate aim". The burden of proof is clearly on the respondent.

28. It should be straightforward to identify and present the legitimate aim, if one is available on the facts. Maintaining appropriate standards of conduct in the workplace, for instance, is obviously a legitimate aim. An employee's conduct might be explicable in light of their disability, but it might go so far as to irreparably damage trust and confidence in the employment relationship so that, for instance, dismissal is a proportionate outcome. In a misconduct case, a lot will depend on whether the employee demonstrates insight.

29. Proportionality involves a balancing exercise: weighing factors for and against the proposed action and considering alternatives. For an authoritative general statement on proportionality analysis, see *Bank Mellat v HM Treasury* (No 2) [2014] AC 700 (not an employment case) per Lord Sumption:

> "20 … the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community…"

30. Recall the case of *Burdett v Aviva*. The appeal was upheld because the ET had failed to properly engage with the question of proportionality, in particular the questions identified in sub-paras. (iii) and (iv) by Lord Sumption above.

31. The second defence is the knowledge defence in section 15(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”. Constructive knowledge. Again the burden is expressly on the employer (“if A shows that A did not know”).

32. If the employer treated the employee unfavourably because of something arising in consequence of the disability, but the employer did not know about the disability at the time of the unfavourable treatment, that is a defence. One potentially taxing question is knowledge of what? On a straightforward interpretation, the answer must be knowledge of “the disability”, not more detailed knowledge of its effects and consequences. If the employer knew about the employee’s disability, they will probably be held to have known of the impact/effects/symptoms.

33. It is worth returning to the definition of disability in section 6 of the EA10 for another reason. In a recent case I was involved in, an issue arose as to whether the claimant met the test of “long term” disability, taking a timeline or staged approach to each of the acts of discrimination complained of. Again, paragraph 1 of schedule 2 of the EA10 defines “long term” disability as *inter alia* one which has “lasted for at least 12 months”. Was the claimant legally disabled in relation to the earlier allegations? When did the clock start to run?

34. The question for the ET will be whether the effect of the claimant’s disability had lasted (or was likely to last) for at least 12 months, based on the evidence/circumstances prevailing at the time of the alleged discriminatory act. “Long term” is not based on subsequent events and hindsight: see another HHJ Eady QC case in the EAT, *Chief Constable of Sussex v Millard* (UKEAT/0341/14/DA), 22 February 2016.

Practical considerations and tips

35. The burden of proof is on the claimant to prove disability and to prove what arises in consequence of that disability. It is perfectly proper for a respondent to press the claimant, from an early stage, to particularlise the following:
    a. What disability is relied upon;
    b. How does it meet the test in section 6 and schedule 1;
    c. What is the claimant’s case on the two-stage test referred to in *Weerasinghe* –
        i. The “something” relied on (the “because of” what question);
        ii. How does that something arise from the claimant’s disability?

36. A respondent might have admitted disability at the outset of the claim, e.g. to avoid an unnecessary debate about the application of section 6 to an obvious disability. However, a proper understanding of the disability (symptoms, effects) will always remain important. Precisely what does the claimant say arose in consequence of the disability? Is that a recognised consequence or symptom of the particular disability relied on? Lists of symptoms summarised on the *NHS choices* website are probably not admissible evidence. An expert might be required to address causation.

37. Finally, the burden of proving why the respondent treated the claimant in a particular way will usually fall on the respondent. But there is also scope for the respondent to advance a positive case on what arose from the claimant's disability, in appropriate cases. For instance in a loss of temper case, did the loss of temper arise from the disability or was it an ordinary case of misconduct, which would have happened in any event? This may require expert medical evidence and careful cross-examination.

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