

ACCESS TO, AND RETENTION OF, EMPLOYMENT OF DISABLED PERSONS – THE BRITISH LEGAL FRAMEWORK

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RESUMEN: Este capítulo analiza y evalúa la noción de discriminación en el empleo por motivos de discapacidad. Se divide en nueve apartados en los que: (i) se intenta definir el concepto de discapacidad; (ii) se trata la noción de conducta prohibida y sus diversas facetas; (iii) se realizan evaluaciones de la importancia de los

comparadores, (iv) la irrelevancia de las características del presunto discriminador, (v) los ajustes para personas con discapacidad, (vi) el acoso, (vii) la persecución, y (viii) contratación y encuestas sobre discapacidad; (ix) este análisis se completa con unas reflexiones finales.

ABSTRACT: This chapter analyses and evaluates the notion of discrimination in employment arising from disability. Divided into nine parts (i) a definition of the disability concept is attempted; (ii) the notion of prohibited conduct and its various facets is discussed; evaluations of (iii) the significance of comparators, (iv) the irrelevance of alleged discriminator's characteristics, (v) adjustments for disabled persons, (vi) harassment, (vii) victimisation and (viii) recruitment and enquiries on disability follow. (ix) Concluding thoughts round up this analysis.

PALABRAS CLAVE: concepto de características protegidas, concepto de discapacidad, conducta prohibida, comparadores.

KEYWORDS: concept of protected characteristic, disability concept, prohibited conduct, comparators.

1. PRELUDE

It is in contravention of British law for employers to discriminate against a disabled person whether it be in relation to access to employment or during the course of employment. The Equality Act 2010 protects the disabled by covering areas such as application forms, interview arrangements, aptitude and proficiency tests, job offers, terms of employment and pay, promotion, transfer and training opportunities, dismissal and redundancy, discipline and grievances. The British law on access to employment and during employment arising from disability is thus governed by the 2010 legislation and based on the notion of discrimination.¹

Prior to 2010 there had been substantive and important legislation treating various aspects of discrimination in the employment field.² As a result of that legislation numerous important cases on various aspects of disability discrimination have been heard in the British tribunals and courts.³ The Equality Act 2010⁴, which

¹ See the Disability Rights UK publication entitled “Disability Rights Handbook” (39th Edn) April 2014-April 2015, which is a guide to benefits and services for all disabled persons, their families, carers and advisers.

² For example the now repealed or revoked Equal Pay Act, 1970; the Sex Discrimination Acts 1975 and 1986; the Race Relations Act, 1976; parts of the Employment Act, 1989; the Disability Discrimination Act, 1995; the Employment Equality (Religion and Belief) Regulations, 2003; the Employment Equality (Sexual Orientation) Regulations, 2003; the Equality Act, 2006 and Employment Equality (Age) Regulations, 2006. For a fuller and more general discussion on this legislation the reader is referred to I.T.Smith and G.Thomas “Smith and Woods Industrial Law” particularly the 7th Edn. 2000 Butterworths chapter 5 entitled “Discrimination in Employment” (as well as the 8th Edn.).

³ In the field of disability discrimination see, *inter alia*, *Kapadia v London Borough of Lambeth* [2000] IRLR 14 (EAT); *O'Neill v Symm & Co.Ltd* [1998] IRLR 420 (EAT); *British Sugar v Kirker* [1998] IRLR 624 (EAT); *Clark v Novacold Ltd.* [1999] IRLR 318 (CA); *J.F.Heinz Co.Ltd. v Kenrick* [2000] IRLR 144 (EAT); *Kenny v Hampshire Constabulary* [1999] IRLR 76 (EAT); *S.Coleman v Attridge Law and Steve Law* Case C-303/06 (Preliminary ruling referred to the ECJ on Directive 2000/78/EC Arts. 1 and 2(1) and (3) and in the EAT [2010] ICR 242); *Borough of Lewisham v Malcolm* [2008] UKHL 43 (HL); *The Child Support Agency (Dudley) v Truman* [2009] ICR 576; *Vicary v British Telecommunications plc.*[1999] IRLR 680 (EAT); *Goodwin v Patent Office* [1999] IRLR 4; *Quinlan v B&Q plc.*(EAT 1386/97).

⁴ 2010 (ch. 15).

came into force on 1st. October 2010, repealed or revoked most of the previous legislation.

The Equality Act 2010 consolidates all previous legislation relating to discrimination into one Act which covers all fields of public life and, which includes the novel concept of “*protected characteristic*”⁵ of age, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, sex, sexual orientation, employment and disability.⁶ This chapter will focus solely on the employment “*protected characteristic*” relating to disabled persons.⁷ The reader should note that the disability discrimination case law heard under the previous legislation, some of which will be discussed briefly in this text, continues to apply until it is either confirmed or modified through the interpretation given by the judges taking into account the 2010 legislative provisions. Previous case law should thus be treated with caution until the tribunal or court has confirmed or otherwise a particular case. In at least one case, the 2010 Act has replaced a decision taken by the House of Lords case of *Borough of Lewisham v Malcolm* in 2008.⁸

The consolidation made by the 2010 Act of the repealed or revoked legislation on discrimination has an important advantage. Whereas there were some legislative inconsistencies in the previous discrimination laws, which consequently led to inconstant decisions being made by the tribunals and courts, the 2010 Act encourages *uniformity* throughout the judicial decision-making process in the area of the “*protected characteristics*” of discrimination.

In the field of employment, the Equality Act 2010 aims (a) at protecting disabled persons and (b) at preventing disability discrimination. The Act provides legal rights

⁵ As termed by the Equality Act 2010 s. 4.

⁶ The Equality Act 2010 is very complete and consists of 218 sections and 28 schedules. Furthermore, and unlike other legislation, this Act is drafted in plain language and has explanatory notes (which do not form part of the legal phraseology of the Act and are therefore **not** part of the law) for each of its parts. This, by reason of clarity to the layman making its contents more “user friendly.”

⁷ Enacted in ss. 6, 13 (direct discrimination), 14 (combined discrimination: dual characteristics), 15 (discrimination arising from disability), 19 (indirect discrimination) 20-22 (duty to make adjustments); 27 (victimisation); 28 (harassment); 60 (enquiries regarding disability and health) and appropriate Schedules of the Equality Act, 2010.

⁸ [2008] UKHL 43. See the judgment of Lord Bingham, with whom the other judges concurred, and note Lord Scott’s dictum regarding this appeal “raising difficult questions which have not previously come before the House as to the correct construction, or [...] application, of provisions of the Disability Discrimination Act, 1995.” Reference to this case will be made later on in this text.

by way of protection and “prohibited conduct”⁹ by way of prevention for the disabled in numerous areas.¹⁰

Divided into nine parts (following a prelude), this chapter proposes to analyse and evaluate the notion of discrimination in employment arising from disability. With this in mind the chapter will attempt a definition of the expression “disability.” There will then follow a discussion on the notion of “prohibited conduct” concept and its various facets. An evaluation of the significance of comparators, irrelevance of alleged discriminator’s characteristics, adjustments for disabled persons, harassment, victimisation and recruitment and enquiries about disability will follow. An epilogue proposes to round up this analysis.

2. DEFINITION OF THE “DISABILITY” CONCEPT

Under the 2010 legislation¹¹ persons have a disability if (i) they have a physical¹² or mental impairment;¹³ and (ii) the impairment¹⁴ has a substantial¹⁵ and long term¹⁶

⁹ See chapter 2 of the 2010 Act ss. 13 (treating direct discrimination); 14 (combined discrimination: dual characteristics); 15 (disability discrimination); 19 (indirect discrimination); and 20 (adjustments) and so on, all of which will be treated presently.

¹⁰ Namely, employment, education, access to goods, services and facilities including larger private clubs and land based transport services, the purchasing and renting of land and property and functions of public bodies such as the issuing of licences.

¹¹ Equality Act 2010 s. 6 (1) (a) (b).and Sch. 1.

¹² The expression “physical” means exactly that. In *Rugamer v Sony Music Entertainments UK Ltd.* [2002] ICR 1498 (CA) it was held that imaginary and unreal psychological manifestations do not constitute physical impairments. Although the case was decided under a repealed statute and therefore caution is recommended, it is thought that such a decision would nevertheless be followed by the tribunals and courts when interpreting the 2010 Act provisions.

¹³ Mental health conditions or mental illnesses can include, *inter alia*, schizophrenia, eating disorders, depression, bipolar affective disorders, personality disorders, self-harming behaviour, and obsessive compulsive disorders.

¹⁴ It is not necessary to consider how the impairment is caused even if the cause is the consequence of a condition which is excluded. For example liver disease as a result of alcohol dependency would count as a impairment although alcohol is excluded from the scope of the definition. What a tribunal or court has to consider is *the effect of an impairment, not its cause.* See *Power v Panasonic UK. Ltd.* [2003] IRLR 151.

¹⁵ This word means more than a trivial or minor disability. Thus, stress, depression and every day frustrations at work or in a person’s private life do not constitute physical or mental disability *per se* because these impairments are of a temporary duration and minor nature and are unlikely to qualify under the “substantial and long term adverse effects” legislative

adverse effect on their ability to perform normal day-to-day activities.¹⁷ Persons who experienced a disability in the past are also included in the definition¹⁸, but only if that past disability fulfilled at that time the definition of disability.

*Progressive conditions*¹⁹ such as persons suffering from HIV, multiple sclerosis, cancer,²⁰ amyotrophic lateral sclerosis, muscular dystrophy, forms of dementia and lupus (SLE) are protected under this legislation *from the point of diagnosis*, and persons with visual impairments are automatically deemed to be disabled.²¹ Also protected are

requirements. In *Leonard v South Derbyshire Chamber of Commerce* [2001] IRLR 19 it was suggested that a tribunal should not ask itself what the person can perform; rather it should ask itself what that person cannot perform or can only perform with difficulty. In *Kapadia v London Borough of Lambeth* [2000] All ER (D) 785 it was held that “substantial adverse effect” should be examined in the light of the person not receiving any treatment for the impairment. Thus a person suffering from anxiety and who is receiving treatment for that complaint from a councillor is deemed not to be receiving such treatment.

¹⁶ “Long term” means that the effect of the impairment has lasted or is likely to last for at least twelve months or for the rest of the life of the person affected. Equality Act 2010 Schedule 1 Part 1 para. 1(a) (b) (c). The reader should note that special rules, to be discussed below, exist for disabilities which fluctuate or are of a recurring nature.

¹⁷ Day-to-day activities treat a day’s normal activities such as walking, shopping, eating, having a bath/shower, *etc.*... Whereas it is normal for a female to make herself up, that can constitute a day-to-day activity (see *Ekpe v Metropolitan Police Commissioner* [2001] ICR 1084) However, taking part in sports is not a normal day-to-day activity for everyone. Being confined only to certain groups of people, sports do not therefore constitute day-to-day activities. (See *Coca-Cola Enterprises Ltd. v Shergill*. Unreported EAT case heard on 2nd September, 2002). Performing one’s work may constitute day-to-day activities. (See *Law Hospital NHS Trust v Rush* [2001] IRLR 611) but compare the case where a person’s impairment fluctuates because of conditions at work. In these circumstances the person’s ability to perform day-to-day work needs to be taken into account when examining whether or not the impairment has a “substantial and long term adverse effect.” (See *Cruickshank v VAW Motorcast Ltd.* [2002] ICR 729). The reader is invited to note too The Equality Act 2010 (Guidance on the Definition of Disability) Appointed Day Order. 2011 S.I. 2011 No.1159.

¹⁸ Equality Act 2010 s. 6 (4) (a) (b) and Schedule 1 Part 1 para. 9 (1) (2).

¹⁹ *Ibid.* Schedule 1 Part 1 Para 8 (1) (2) (3).

²⁰ It is suggested that certain types of cancers which are quickly and easily curable over a short period of time could well be excluded by ministerial guidance made under s. 5 of the 2010 Act.

²¹ There is thus no requirement to establish that blindness or partial blindness has “a substantial [...] adverse effect on a person’s ability to carry out normal day-to-day activities” (under s.1 (b) of the 2010 legislation). See too the Disability Discrimination (Blind and Partially Sighted Persons) Regulations 2003 which provided for certified or registered blind or partially sighted persons being deemed to be disabled. It should be noted that some conditions

persons who have physical or mental impairments which *fluctuate* or have *recurring effects*²², which are *developmental*²³ or *organ specific*.²⁴

An impairment which consists of *severe disfigurement* is to be treated as having a substantial adverse effect on the ability of a person to carry out normal day-to-day activities.²⁵ Ministerial Regulations may however be made to exclude severe disfigurement in prescribed circumstances or in situations where the severe disfigurement is deliberately acquired.²⁶

The impairment is to be treated as having a substantial adverse effect of the ability of the person concerned to carry out normal day-to-day activities if (a) measures are being taken to treat or correct it and (b) but that, it would be likely to have that effect.²⁷ Measures include, in particular, medical treatment and the use of prosthesis or other aid but not, in connection with a person's sight to the extent that the impairment is correctable by spectacles, contact lenses or other way as may be prescribed.²⁸

Two matters arise in connection with the definition of physical or mental impairments. In the first instance, case law decided under the repealed legislation indicates that where the parties are in dispute as to whether or not there exists a

are specifically excluded from the definition. These include persons who have a tendency to be pyromaniacs or have addiction to medically non-prescribed substances, e.g. drugs, alcohol, nicotine or seasonal allergic rhinitis (as, for example, hay fever) unless it aggravates the effect of another condition. Also excluded are persons who have a tendency to physical or sexual abuse towards other persons, or are prone to exhibitionism or voyeurism.

²² Equality Act 2010 Schedule 1 Part 1 para. 2(2). The reader should note what is said in that paragraph, namely "likely to recur". This means that the physical or mental impairment, although non-existent at the moment could recur in the future. It therefore meets the impairment condition under the 2010 Act. See *SCA Packaging Ltd. v Boyle* [2009] ICR 1056 (HL). Examples of recurring conditions are rheumatoid arthritis, myalgic encephalitis (ME), chronic fatigue syndrome (CFS), epilepsy, depression, fibromyalgia, *etc.* The recurrence is only valid if it happened at the time when discrimination took place and not subsequently. See *Richmond Adult Community College v McDougall* [2008] ICR 431 (CA). The reader is reminded that caution is required until the pre-2010 cases have been confirmed or otherwise by the tribunals and courts.

²³ As, for example, autistic spectrum disorder (ASD), dyslexia and dyspraxia.

²⁴ For example respiratory conditions such as asthma or cardiovascular diseases including thrombosis, heart disease and strokes.

²⁵ Equality Act 2010 Schedule 1 Part 1 para. 3 (1).

²⁶ *Ibid.* para. 3 (2) (3) respectively.

²⁷ *Ibid.* para. 5 (1) (a) (b).

²⁸ *Ibid.* para. 5 (2) (3).

physical or mental impairment, the burden of proof lies on the claimant to show that s/he suffers from either of the particular impairments.²⁹ The second matter treats medical opinion. A tribunal or court will take into account medical opinion expressed by a practitioner or specialist consultant on a particular physical or mental condition, but that medical opinion is neither final nor determinative that such condition actually exists. The tribunal or court will decide for itself as to whether or not a claimant suffers from a physical or mental disability as defined by the Act.³⁰

3. PROHIBITED CONDUCT

The protected characteristics of which there are nine have been pointed out above.³¹ The concept of “protected characteristics” is a new one introduced by the 2010 legislation. These “protected characteristics” are of importance because they indicate the areas of discrimination covered by the Equality Act 2010. Disability features therein as one of those areas of discrimination and it is that characteristic which this chapter focuses upon. The different kinds of prohibited conduct in relation to disability discrimination will be evaluated and analysed. The concept of “prohibited conduct” has been created by the 2010 legislation and includes direct discrimination,³² harassment,³³ victimisation,³⁴ combined discrimination,³⁵ discrimination arising from disability³⁶ and indirect discrimination.³⁷ Although not in the order they appear here, it is proposed to analyse below each of those “prohibited conduct” issues.

3.1. Direct discrimination

A person discriminates against another if because of a protected characteristic, (in this case disability) that other is treated less favourably than he treats or would treat

²⁹ See *Millar v Inland Revenue Commissioners* [2006] IRLR 112.

³⁰ See *Abadeh v British Telecommunications plc.* [2001] ICR 156.

³¹ See p.1.

³² Equality Act 2010 s. 13.

³³ *Ibid.* s.28.

³⁴ *Ibid.* s.27.

³⁵ *Ibid.* s.14 which is a new concept introduced by the 2010 Act.

³⁶ *Ibid.* s.15.

³⁷ *Ibid.* s.19.

others.³⁸ That statutory definition makes clear that direct discrimination is unlawful; but there exist other shades of discrimination also which are considered to constitute direct discrimination.

3.1.1. Direct discrimination by association

One of those shades is discrimination because of their association with a disabled person. In *S. Coleman v Attridge Law and Steve Law*, Ms. Coleman's son Oliver was born disabled. He suffered from a rare impairment affecting his breathing and his hearing. Coleman brought an action against her employer claiming that she was forced to resign as a legal secretary by reason of (a) harassment by her employer and (b) being refused flexible time which other employees were granted. She claimed to have been targeted because she had a disabled son whereas her colleagues without disabled children were granted flexible working arrangements. Prior to giving its judgment, the Employment Tribunal sought a preliminary ruling from the European Court of Justice (ECJ) to determine whether the Directive³⁹ protects employees who are treated less favourably or harassed because of their association with a disabled person. In June 2008 the ECJ held⁴⁰ that discrimination by association in the workplace was unlawful.⁴¹ Non-disabled employees can thus bring a claim for associative direct discrimination (and harassment).⁴²

³⁸ *Ibid.* Chapter 2 Prohibited Conduct s. 13(1). This new definition applies to all the protected characteristics including disability discrimination.

³⁹ Council Directive 2000/78/EC of 27th November, 2000 establishing a general framework for equal treatment in employment and occupation [2000] O.J. L 303/16 -22 Arts. 1 and 2 (1) and (2).

⁴⁰ [2008] ICR 1128.

⁴¹ The ECJ in Case 306/06 said that the Directive “must be interpreted as meaning that the prohibition of direct discrimination is not limited only to people who are themselves disabled. Where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation and it is established that the less favourable treatment of that employee is based on the disability of his child whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination laid down by Arts. 2(2)(a).”

⁴² The Employment Tribunal's decision in the *Coleman* case was, on appeal, upheld by the Employment Appeal Tribunal (EAT). It said that the concept of associated discrimination is an extension of the scope of the Act (at that time the now repealed Disability Discrimination Act 1995) and “fully in conformity with the aims of the legislation as drafted.” Words could thus be read in (the now repealed) Disability Discrimination Act 1995 to give effect to European Union law. See Underhill J.'s dictum in *EBR Attridge LLP (formerly Attridge Law)* and another

3.1.2. Direct discrimination by perception

The concept of perceptive discrimination constitutes an innovation made by the Equality Act 2010 in relation to direct discrimination. The perception that a person suffers from a disability could well constitute unlawful discrimination. This is direct discrimination against a person by reason of others thinking that such a person is disabled. This concept applies whether or not that person is disabled.

3.1.3. Deferred direct discrimination

Where an employer expresses the view that persons with a particular protected characteristic, such as disability, would not be considered for employment, such conduct could well constitute deferred direct discrimination. It should be noted that this type of discrimination is *intended* by the 2010 legislation by reason of the expression “or would treat” which is found in s.13 (1) (3). A tribunal or court would thus interpret the legislative intent as including this type of discrimination. For this type of discrimination to be effective the claimant must show (a) that s/he had the firm *intention* of applying for the job and (b) that s/he had the necessary *qualification* for that job. Where both these requirements exist, the claimant would have been shown to have suffered from less favourable treatment.

3.2. More favourable treatment of a disabled person

Where the prohibited characteristic is disability there will be no discrimination made where a disabled person is treated, or would be treated, in a manner allowed by the 2010 Act and another person who is not disabled is not treated in the same manner.⁴³ Thus treatment which is more favourable to the disabled person is allowed under the legislation and therefore does not constitute discrimination. To put it another way, non-disabled persons cannot claim that they are being discriminated.⁴⁴

v Coleman [2010] ICR 242. The 2010 Act therefore need not contain additional provisions as these are not required.

⁴³ Equality Act 2010 Chapter 2 Prohibited Conduct s. 13 (3).

⁴⁴ See too Employment – Statutory Code of Practice. Equality and Human Rights Commission, 2011 (hereinafter entitled “the Code of Practice”) which explains in some detail and gives excellent guidance on the provisions of the Equality Act 2010. The main purpose of this Code of Practice is to provide “a detailed explanation of the Act.” It assists tribunals and courts “when interpreting the law and helps lawyers, advisers, trade union representatives, human resources departments and others who need to apply the law and understand its

3.3. The occupational requirements exception

A new exception has been enacted by the 2010 legislation to what would otherwise constitute direct discrimination. Where there is an occupational requirement that a disabled person is to perform a particular type of work, and the disabled person does not meet that occupational requirement, this would not amount to disability discrimination if s/he is rejected. It should be noted that the “application of the requirement is a proportionate means of achieving a legitimate aim”.⁴⁵

3.4. Combined discrimination; dual characteristics

The new concept of combined discrimination dual characteristics has been introduced by the Equality Act 2010: «A person discriminates against another “if, because of a combination of two relevant protected characteristics” he treats a person “less favourably” than he “treats or would treat a person who does not share either of those characteristics”». ⁴⁶ What this means is a less favourable treatment in respect of a combination of two relevant protected characteristics. Such characteristics may include disability⁴⁷, as well as one of the other protected characteristics, namely age, gender reassignment, race, religion or belief, sex and sexual orientation.⁴⁸ Two combinations only are permitted under the Act (which talks of dual characteristics), for example, disability discrimination and one other kind of discrimination which can be either age,

technical details.” (para. 1.9.). The Equality and Human Rights Commission issued this Code under the Equality Act 2006 provisions. “It is a statutory Code. This means [that] it has been approved by the Secretary of State and laid before Parliament.” (para. 1.2.) The Code “does not impose any legal obligations. Nor is it an authoritative statement of the law; only tribunals and courts can provide such authority. However the Code can be used in evidence in legal proceedings....Tribunals and courts must take into account any part of the Code [which] appears to them relevant to any questions arising in proceedings.” (para. 1.13.)

⁴⁵ Equality Act 2010 Sch. 9 Part 1 para. 1 (a) (b) (c). This exception applies not only in relation to employers but also in relation to others such as contract workers and employment agencies, etc... An example of such a situation could be where an organisation which runs homes for the mentally retarded advertises to recruit or employs a disabled person who shares those characteristics to act as a helper. The fact that s/he does not meet the occupational requirement and is rejected does not constitute direct disability discrimination.

⁴⁶ *Ibid.* s. 14(1).

⁴⁷ *Ibid.* s. 14(2).

⁴⁸ Dual discrimination claims cannot be made in respect of the prohibited characteristics of marriage and civil partnership and pregnancy or maternity because a comparator is not required for those prohibited characteristics.

sex, race and so on. Thus the claimant may make three claims, one relating to combined discrimination and two *separate* claims relating to each of the other protected characteristics. The comparator for less favourable treatment is a person who does not share any of those two characteristics.⁴⁹ Multiple discrimination claims in circumstances where no contravention has taken place under the 2010 legislation in respect of *one* of the protected characteristics cannot be brought. Furthermore, a claim cannot be upheld by a tribunal or court if the employer is able to prove that the treatment did not amount to direct discrimination with regard to either of the prohibited characteristics. Thus indirect discrimination and harassment cannot apply to dual discrimination claims.

3.5. Discrimination arising from disability

A person discriminates against a disabled person if (a) s/he treats the disabled person unfavourably, (b) this treatment is in consequence of the disabled person's disability and (c) s/he cannot show that the treatment was a proportionate means of achieving a legitimate aim.⁵⁰ There is however no disability discrimination if it is shown that the alleged discriminator did not know, and could not reasonably be expected to know, that the person had a disability.⁵¹

This provision inserted into the 2010 legislation is innovative in that it did not exist as such under the previous (repealed/revoked) legislative provisions. The accompanying explanatory notes to the 2010 Act state that s.15 aims⁵² "at re-establishing an appropriate balance between enabling a disabled person to make out a case of experiencing a detriment which arises because of his or her disability and providing an opportunity for an employer or other person to defend the treatment."⁵³

⁴⁹ See *Babl v Law Society* [2004] EWCA Civ. 1070 (CA). The Vice-President of the Law Society claimed that she had been discriminated against on the grounds that she was (a) a female and (b) of Asian origin. Both the EAT and the Court of Appeal (CA) (disagreeing with the Employment Tribunal (ET) decision that she could compare herself with a white male) held that each ground of complaint was to be treated *separately*.

⁵⁰ Equality Act 2010 s. 15 (1) (a) (b).

⁵¹ *Ibid.* s. 15 (2).

⁵² See too the Statutory Code of Practice 2011 Chapter 5 at pp. 71-72 where useful guidance will be found on this topic.

⁵³ See to the House of Lords case of *London Borough of Lewisham v Malcolm* [2008] UKHL 43. The provisions of the Disability Discrimination Act 1995 which formed the legal basis for the *Malcolm* case decision has now been revoked and replaced by s.15 of the 2010 Act. The House of Lords in *Malcolm* rejected the reasoning in *Clark v TDG Ltd./a Novacold* [1999] ICR 951.

Thus direct discrimination occurs where the employer treats someone less favourably because of disability itself. By contrast the discrimination arising from disability is whether the disabled person has received unfavourable treatment because of something arising in consequence of his/her disability. Unfavourable treatment does not amount to discrimination arising from disability if the employer can show that the treatment is a “proportionate means of achieving a legitimate aim.” If the employer can show that he did not know of the disabled person’s disability and could not have reasonably expected to know that the disabled person had a disability, the unfavourable treatment does not amount to discrimination arising from disability.⁵⁴ Furthermore, s.15 of the 2010 Act makes it clear that a comparator is not required. The employer who wishes to defend the claim will need to prove that the action taken, as for example dismissal, is proportionate to achieving the legitimate aim.

3.6. Indirect discrimination

A person discriminates against another if s/he applies a provision, criterion or practice which is discriminatory in relation to that other’s protected characteristic.⁵⁵ A provision, criterion or practice is discriminatory in relation to a relevant protected characteristic if (a) it is applied or would apply, to persons who do not share that characteristic; (b) it puts, or would put,⁵⁶ persons who actually do share that characteristic⁵⁷ at a particular disadvantage⁵⁸ compared with persons who do not share it;⁵⁹ (c) it puts or would put a person with that characteristic at a disadvantage; and (d)

⁵⁴ Paraphrase of paras. 5.3; 5.11-12 and 5.13 of the Code of Practice, 2011.

⁵⁵ Equality Act 2010 s.19(1).

⁵⁶ “would put” applies to provisions, criteria and practices which have not yet occurred but which would have a discriminatory effect if they did occur. See explanation in the Code of Practice para. 4.7.

⁵⁷ i.e., persons who have the same disability.

⁵⁸ The word “disadvantage” is not defined in the Equality Act 2010. It could mean the denial of an opportunity or choice, deterrence, rejection, or exclusion. A disadvantage does not have to be quantifiable and the worker does not have to experience actual loss, whether economic or otherwise. It is sufficient that the worker can reasonably say that s/he would have preferred to be treated differently. The courts have found that the word “detriment”, which is a similar (not identical) concept to “disadvantage” is something that a reasonable person would complain about. An unjustified sense of grievance would probably not qualify under the 2010 legislative provisions. See the Code of Practice para. 4.9.

⁵⁹ Once it is clear that there is a provision, criterion or practice which puts, or would put, workers sharing a protected characteristic at a particular disadvantage, the next stage is to consider a comparison between workers with a protected characteristic and those without it.

it cannot be shown by the employer that it is a proportionate⁶⁰ means of achieving a legitimate aim.⁶¹

It should be born in mind that it is not enough that the provision, criterion or practice puts, or would put, at a particular disadvantage a group of persons who share a protected characteristic. It must also have the effect (or be capable of having it) on the individual worker concerned. It is thus not enough for a worker merely to establish that s/he is a member of the relevant group. S/he must also show that s/he has personally suffered (or could suffer) the particular disadvantage as an individual.⁶²

There is no definition in the Act of the expression “provision, criterion or practice”. This expression would be construed widely to mean any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. The expression may also include decisions to perform something in the future, a one-off or discretionary decision by the employer.⁶³

Six matters should be noted at the outset. Firstly, that indirect discrimination has been extended by the 2010 Act to apply to disability. Secondly, that the Act applies closely the definition given by the Directive. Thirdly, indirect discrimination applies

The circumstances of the two groups must be sufficiently similar for a comparison to be made and there must be no material differences in circumstances. It is important to make clear which protected characteristic is relevant. Having regard to disability, this would not be disabled persons as a whole but persons with a particular disability –for example, with an equivalent level of visual impairment–.

⁶⁰ The question of whether the provision, criterion or practice is a proportionate means of achieving a legitimate aim should be approached in two stages: namely (i) is the aim of the provision, criterion or practice legal and non-discriminatory, and one which represents a real, objective consideration?; (ii) If the aim is legitimate, is the means of achieving it proportionate, i.e., appropriate and necessary in all the circumstances?

⁶¹ Equality Act 2010 s. 19 (2)(a)(b)(c)(d). With regard to (d) above, if the person applying a provision, criterion or practice can show that it is “a proportionate means of achieving a legitimate aim then, it will not amount to indirect discrimination. This is often known as the “objective justification” test. The test applies, *inter alia*, to disability discrimination. The concept of legitimate aim is taken from the European Union law as well as relevant decisions of the Court of Justice of the European Union (CJEU), formerly known as the European Court of Justice (ECJ). The expression “legitimate aim” is not defined by the 2010 Act. It is suggested by the Code of Practice (para. 4.28) that the aim of the provision, criterion or practice should be legal, should not be discriminatory in itself and must represent a real, objective consideration. The health and safety of individuals may qualify as legitimate ends provided that risks are clearly specified and supported by evidence.

⁶² Source: The Code of Practice para. 4.23.

⁶³ These are some suggestions made by the Code of Practice at para. 4.5.

to all the protected characteristics apart from that of pregnancy and maternity.⁶⁴ Fourthly, an important distinction exists with regard to the defence of justification between direct and indirect discrimination. In the case of direct discrimination the defence of justification does not apply whereas indirect discrimination can be justified *if it is a proportionate⁶⁵ means of achieving a legitimate aim*. Fifthly, when deciding whether or not a “provision, criterion or practice” indirectly discriminates, the Employment Tribunal in applying an *objective* test needs to balance, on the one hand the discriminatory effect of the provision, criterion or practice and on the other, the employer’s justified needs and interests.⁶⁶ Finally, discrimination by perception⁶⁷ is applicable to cases of indirect discrimination.

4. COMPARATORS

The 2010 Act provides that when comparing cases for the purposes of direct,⁶⁸ indirect⁶⁹ and combined⁷⁰ discrimination “there must be no material difference between the circumstances relating to each case”.⁷¹ It is not necessary however, for the circumstances of the persons being compared –namely the worker and the comparator– to be identical in every way. What matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator.

Sometimes it is not always possible to identify an actual person whose relevant circumstances are the same or not materially different, so the comparison will need to

⁶⁴ Although in pregnancy and maternity situations indirect sex discrimination could apply.

⁶⁵ This word is not defined by the 2010 legislation! The word “proportionate” is taken from various EU Directives and its meanings have been clarified by the CJEU. EU law treats “proportionate” if it is an “appropriate and necessary means” of achieving a legitimate aim. Yet “necessary” does not mean that the provision, criterion or practice is the only way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means. (Source: Code of Practice para. 4.30 and 4.31.).

⁶⁶ i.e., there must be a real need for the provision etc. [...] and furthermore it must be “a proportionate means of achieving a legitimate aim”; in other words, it must be reasonably necessary and appropriate. See *Network Rail Infrastructures Ltd v Gammie*. Unreported EAT case. March 2009, (Source: Financial Times).

⁶⁷ See p.5 *ante* for a definition.

⁶⁸ Equality Act, 2010 s.13. See discussion at pp. 5 et seq. *ante*.

⁶⁹ *Ibid.* s. 19. See discussion at pp. 8 et seq. *ante*.

⁷⁰ *Ibid.* s. 14. See discussion at p. 7 *ante*.

⁷¹ *Ibid.* s. 23(1).

be made by a *hypothetical comparator*.⁷² In some instances a person identified as an actual comparator turns out to have circumstances that are not materially the same. Nevertheless that treatment may help to construct a hypothetical comparator. Constructing a hypothetical comparator may involve considering elements of the treatment of several persons whose circumstances are similar, though not identical, to those of the claimant. When examining all those elements an Employment Tribunal may conclude that the claimant was *less favourably treated*⁷³ than a hypothetical comparator would have been treated.⁷⁴

The comparator in direct disability discrimination is the same for other types of discrimination. However, for disability, the relevant circumstances of the comparator and the disabled person, including their abilities, must not be materially different.⁷⁵ An appropriate comparator would be a person who does not have the disabled person's impairment but who has the same abilities and skills as the disabled person (regardless of whether those abilities and skills arise from the disability itself).

5. IRRELEVANCE OF ALLEGED DISCRIMINATOR'S CHARACTERISTICS

It is irrelevant, as far as direct discrimination⁷⁶ is concerned, that the alleged discriminator enjoys the same protected characteristics as the person who is being discriminated against. It is equally irrelevant, in the case of combined discrimination⁷⁷ that the alleged discriminator has one or both of the protected characteristics.⁷⁸

⁷² *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR337 (HL).

⁷³ In the case of "less favourable treatment" a comparator is required, whereas no comparator is required for "unfavourable treatment".

⁷⁴ Source: Code of Practice paras. 3.23, 3.24, 3.25 and 3.26.

⁷⁵ Equality Act 2010 s.23 (2) (a). Although not a disability case see *Eweida v British Airways* [2010] EWCA Civ. 80 (CA).

⁷⁶ Under the Equality Act 2010 s.13.

⁷⁷ *Ibid.* s. 14.

⁷⁸ *Ibid.* s. 24 (1) (2) (a) (b).

6. ADJUSTMENTS FOR DISABLED PERSONS

The 2010 legislation makes new and detailed provisions for reasonable adjustments⁷⁹ to be made in the case of disabled persons in employment. The employer's reasonable duty to make adjustments comprises three requirements.⁸⁰ Firstly, to avoid a substantial disadvantage where a provision, criterion or practice applied by or on behalf of an employer puts a disabled person at a substantial disadvantage compared to those who are not disabled.⁸¹ Secondly, to remove or alter a physical feature⁸² or provide a reasonable means of avoiding such a feature where it puts a disabled person at a substantial disadvantage⁸³ compared to those who are not disabled.⁸⁴ The third requirement (which is a new one) is that the employer is to

⁷⁹ The duty to make reasonable adjustments applies in recruitment and during all stages of employment, including dismissal. It may also apply after employment has ended. The duty relates to all disabled workers of an employer and to any disabled applicant for employment. The duty also applies in respect of a disabled person who has notified the employer that s/he may be an applicant for work. (Equality Act 2010 Schedule 8 paras. 4 & 5.

⁸⁰ *Equality Act 2010* s. 20 (2).

⁸¹ *Ibid.* s. 20 (3).

⁸² All physical features are covered whether they are temporary or permanent. Physical features include steps, kerbs, staircases, exterior surfaces, paving, building entrances and exits, emergency exits, internal and external doors, gates, toilets and washing facilities, lighting and ventilation, escalators and lifts, floor covering, signs, furniture and temporary and moveable items, and so on.

⁸³ A substantial disadvantage is one which is more than minor or trivial. Whether a disadvantage exists in a particular case is a question of fact (not law) which is assessed on an objective basis. The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly –and unlike direct and indirect discrimination– under the duty to make adjustments there is no requirement to identify a comparator or a comparator group whose circumstances are the same or nearly the same as the disabled person's. (Equality Act 2010 s.23(1) and Code of Practice para. 6.16.

⁸⁴ Equality Act 2010 s. 20 (4) (9). A physical feature may consist of the design or construction of a building; an approach to, exit from or access to a building; a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises.; or any other physical element or quality [s.20(10)(a)(b)(c)(d)].

provide an auxiliary aid⁸⁵ or an auxiliary service where a disabled person would, but for the provision of that auxiliary aid, be put at a substantial disadvantage compared to those who are not disabled.⁸⁶ In each of those three situations the 2010 Act talks of “such steps as it is reasonable to have to take, in all the circumstances of the case, in order to make adjustments...” What is meant by reasonable steps? The Act does not specify any particular steps which should be taken into account. What is a reasonable step for an employer to take will depend on the circumstances of each individual case.⁸⁷ What is certain is that the test of the “reasonableness” of any step an employer may have to take is an objective one.⁸⁸

Where the provision, criterion or practice or the need for an auxiliary aid relates to the provision of information the employer must take reasonable steps to ensure that the information is provided in an accessible format.⁸⁹ An employer or other person who is subject to a duty to make reasonable adjustments is not, (subject to an express provision to the contrary), entitled to require the disabled person to pay for the costs of those adjustments.⁹⁰

Limitations exist to the employer’s duty to make reasonable adjustments. The employer has the duty to make reasonable adjustments if he knows or could reasonably be expected to know that a disabled person is, or may be, an applicant for work.⁹¹ For disabled workers already in employment, an employer only has a duty to

⁸⁵ An auxiliary aid is something which provides support or assistance to a disabled person. It could include the provision of specialist equipment such as text to speech software, adapted keyboard, etc... The expression also includes auxiliary services such as sign language interpreter or the provision of a support worker for a disabled worker.

⁸⁶ Equality Act, 2010, s. 20 (5) and (11).

⁸⁷ Helpful factors which **might** be taken into account when deciding what is a reasonable step for the employer to take could include: (i) whether any particular steps would be effective in preventing the substantial disadvantage; (ii) the practicability of the step; (iii) the financial and other costs of making the adjustment and the extent of any disruption caused; (iv) the extent of the employer’s financial and other resources; (v) the availability to the employer of financial and other assistance to assist in making the adjustment; and (vi) the type and size of the employer. (Source: The Code of Practice 2011 para. 6.28).

⁸⁸ See Code of Practice, 2011 para. 6.29. The Code treats “Reasonable adjustments in practice” and gives some excellent practical advice on this issue. (See paras 6.32 to 6.35).

⁸⁹ Equality Act 2010, s. 20 (6). An accessible format could include an audio tape or a text in Braille.

⁹⁰ *Ibid.* s. 20 (7).

⁹¹ There exist restrictions on when health and disability -related enquiries can be made prior to making a job offer. In spite of those restrictions, questions are permitted to determine whether

make an adjustment if he knows or could reasonably be expected to know that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage.⁹² If the employer does not know and could not reasonably be expected to know of the disability, he would have a defence.⁹³

Should the employer not comply with the duty to make reasonable adjustments he would be liable for unlawful discrimination, thus entitling the disabled worker to take a claim to the Employment Tribunal.⁹⁴

The Secretary of State may make Regulations which prescribe (i) matters to be taken into account in deciding whether it is reasonable for the employer to take a step for the purposes of a prescribed provision and (ii) descriptions of persons to whom the first, second and third requirement does not apply.⁹⁵ Furthermore, Regulations may treat such matters as to what is and what is not a provision, criterion or practice; things which are or are not to be treated as physical features or as alterations of physical features or as auxiliary aids.⁹⁶ Other matters might well include those forward looking and inspirational issues enumerated by the Code of Practice.⁹⁷ What is certain is that all these suggestions are illustrative. They are not exhaustive!

reasonable adjustments need to be made in relation to an interview or other process designed to assess a person's suitability for the job. See the discussion at pp. 14 & 15 *post*. (For further details see Code of Practice paras. 10.25 to 10.43).

⁹² The employer must do all which is reasonable to find out of the worker's disability. What is reasonable will depend on the circumstances. The assessment of what is reasonable is an objective one.

⁹³ Equality Act 2010 Sch. 8 para. 20 (1) (a) and (b).

⁹⁴ *Ibid.* s.21 (1) (2) (3).

⁹⁵ *Ibid.* s.22 (1) (a) (b).

⁹⁶ *Ibid.* s.22 (2) (a) to (e).

⁹⁷ These include, inter alia, making adjustments to premises; allocating some of the disabled person's duties to another worker (see *Chief Constable of South Yorkshire Police v Jelic* [2010] unreported EAT case); transferring a disabled worker to fill another vacancy; (see *Garrett v Lidl Ltd* [2009] unreported EAT case) altering the disabled worker's hours of work or training; assigning the disabled worker to a different place of work or training or arranging home working; allowing the disabled person to be absent from work or training hours for rehabilitation, assessment or treatment; giving, or arranging for, training or mentoring (whether for the disabled person or other worker); acquiring or modifying equipment; modifying equipment for testing or assessment; providing a reader or interpreter; providing supervision or other support; allowing a disabled worker to take a period of disability leave; participating in supporting employment schemes such as Workstep; employing a support worker to assist a disabled worker; modifying disciplinary or grievance procedures for a disabled worker; adjusting redundancy selection criteria for a disabled worker; modifying

Finally, it should be noted that if two or more persons are subject to a duty to make reasonable adjustments with regard to the same disabled person, each of them has an obligation to comply to the duty so far as is reasonable for each of them to do so.⁹⁸

7. HARASSMENT

A person harasses another if s/he engages in unwanted conduct related to⁹⁹ a relevant protected characteristic and the conduct has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.¹⁰⁰ In deciding whether the conduct has the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment, three matters need to be taken into account, namely the perception of the person allegedly harassed,¹⁰¹ the other circumstances of the case and whether it is reasonable for the conduct to have that effect.¹⁰²

The statutory provisions on harassment apply to seven prohibited characteristics,¹⁰³ and some sub-sections of the Act¹⁰⁴ treat harassment of a sexual

performance-related pay arrangements for a disabled worker; or a combination of steps. See Code of Practice 2011 paras. 6.33 and 6.34.

⁹⁸ Equality Act 2010 Sch 8 para. 2 (5).

⁹⁹ Unwanted conduct relating to a protected characteristic must be construed broadly. It does not have to be because of a protected characteristic. It could include conduct relating to the worker's own protected characteristic. For example if a worker who suffers from a hearing impairment is verbally abused because he wears a hearing aid, that could amount to harassment related to disability. It could also include conduct which has a connection with a protected characteristic as for example a worker who has a son with severe disfigurement. His colleagues at work make offensive remarks to him about his son's disability. The worker could have a claim for harassment related to disability. Such a claim, it will be noticed, would be a claim based on *harassment by association*. Thus, those two examples taken from the Code of Practice (para. 7.9) show that there is a *connection* with a protected characteristic and so the worker can bring a claim for harassment by reason of disability.

¹⁰⁰ Equality Act 2010 s.26 (1) (a) (b) (i) (ii).

¹⁰¹ In ascertaining the perception of the worker the test needs of necessity to be *subjective* as it depends as to how the worker regards the violation of his/her dignity, intimidation, etc... It may therefore be said that *harassment by perception* is certainly included.

¹⁰² Equality Act, 2010, s. 26 (4) (a) (b) (c).

¹⁰³ Namely, age, disability, gender, reassignment, race, religion and belief, sex and sexual orientation. [*Ibid.* s.26 (5)].

¹⁰⁴ Equality Act 2010 s. 26 (2) (3).

nature. Harassment in this chapter is evaluated only in respect of disability. Some changes to the law on harassment by reason of disability have been made by the 2010 legislation and the definition of harassment is new. Thus the definition talks (as we have seen above) of “related to”¹⁰⁵ disability whereas the repealed legislation talked of “on the grounds of” disability.¹⁰⁶

There could be circumstances where employers may be liable for harassment of their employees or job applicants by third parties, (for example clients or customers), who are not under the employer’s direct control. The employer has a duty to prevent third part harassment from arising where the employee or job applicant has been harassed by a third party on at least two previous occasions and the employer is aware of the harassment but fails to take reasonable practical steps to prevent such third party harassment.¹⁰⁷ The employer will be liable for harassment by a third party whether or not the harassment has been committed by the same third party or another third party.

The employer may have a defence against third party harassment liability if he can show that he took reasonable steps to prevent it happening.¹⁰⁸

8. VICTIMISATION

It is victimisation for an employer to subject a worker to a detriment because a worker has done a “protected act” or because the employer believes that the worker has done or may do a protected act in the future.¹⁰⁹ The protected acts include (i) bringing proceedings under the Equality Act 2010; (ii) giving evidence or information in connection with proceedings under that Act; (iii) doing any other thing for the purposes of and in connection with that Act; and (iv) making an allegation (whether

¹⁰⁵ *Ibid.* s.26 (1) (a).

¹⁰⁶ This change of phraseology could have an important effect on the burden of proof in cases relating to harassment by reason of disability.

¹⁰⁷ Equality Act 2010 s. 40 (1) to (4).

¹⁰⁸ The Code of Practice (para. 10.24) gives examples of reasonable steps which the employer may take. They include having a policy on harassment; notifying third parties that employee harassment is unlawful; including a term in commercial contracts notifying customers (third parties) of the employer’s policy on harassment and requiring them to adhere to it; encouraging employees to report acts of harassment by third parties; taking action on every complaint of harassment by a third party.

¹⁰⁹ Equality Act 2010, s. 27 (1) (a) (b).

or not express) that another person has contravened that Act.¹¹⁰ A worker need not have a particular characteristic in order to be protected against victimisation under the Act. To be unlawful, victimisation has to be linked to a “protected act.”¹¹¹ For example a non-disabled worker gives evidence at an Employment Tribunal hearing on behalf of a disabled colleague where disability discrimination is claimed. If the non-disabled colleague is subsequently refused promotion because of that action, s/he would suffer victimisation in contravention of the Act.¹¹² The 2010 Act definition of victimisation is a new one.¹¹³

The word “detriment” in the context of victimisation is not defined by the Act. The Code of Practice suggests that a detriment consists of anything which the individual concerned might reasonably consider that changes his position for the worse or puts him/her at a disadvantage.¹¹⁴ A “detriment” might also include a threat made to the complainant which s/he takes seriously and it is reasonable for him/her to take seriously.¹¹⁵ An unjustified sense of grievance on its own would not constitute a detriment. Detrimental treatment amounts to victimisation if a “protected act” is one of the reasons for the treatment, but it need not be the only reason.

Victimisation does not require a comparator. The worker need only show that s/he has experienced a detriment because s/he has done a protected act or because the employer believes (rightly or wrongly) that s/he has done, or intends to do, a protected act.¹¹⁶

¹¹⁰ *Ibid.* s.27 (2) (a) to (d).

¹¹¹ *Ibid.* s.27 (2) (c) and (d).

¹¹² Protected acts can occur in any field covered by the Act and in relation to any part of the Act.

¹¹³ There is no longer a requirement to **compare** treatment of an alleged victim with that of a person who has not made or supported a complaint under the Act.

¹¹⁴ A disadvantage could include being rejected for promotion, denied the opportunity to represent the organisation at external events, excluded from opportunities to take on training, overlooked in the allocation of discretionary bonuses or performance-related awards and so on. (Source: Code of Practice para. 9.8).

¹¹⁵ There is no need to demonstrate physical and economic consequences. See *St. Helen's Borough Council v Derbyshire* [2007] ICR 841 (HL). The employer sent letters to female employees warning them that if they pursued their claim for equal pay and won the case, redundancies would occur. Hence, those letters constituted undue influence with the aim of making them give up the claim which constituted victimisation.

¹¹⁶ There is no time limit within which victimisation must occur after a person has done a protected act.

Where a worker has acted in bad faith, such as acting maliciously giving false evidence or information or making a false allegation of discrimination, s/he cannot make a claim for victimisation.¹¹⁷ If however a worker gives evidence or provides information or makes an allegation in good faith but it turns out that it is factually wrong, or provides information in relation to proceedings which are unsuccessful, s/he will be protected from victimisation.¹¹⁸

It should be noted that only an individual is enabled to make a complaint of victimisation.¹¹⁹

9. RECRUITMENT AND ENQUIRIES ABOUT DISABILITY AND HEALTH

A new provision has been enacted in the 2010 legislation to the effect that a prospective employer to whom an application for work is made must not ask about the health or disability of the applicant *before* offering the applicant (on a conditional or unconditional basis) work or where the prospective employer is not in a position to offer the applicant work, prior to including the applicant in a pool of applicants from whom the prospective employer intends to select a person to whom to offer work.¹²⁰ Thus it is unlawful for a prospective employer to ask questions on disability and health during the application process which includes the interview.

It is also unlawful for an employee or agent of the employer to ask questions on disability and health. This means that the employer cannot refer the applicant to an occupational health practitioner nor can he ask an applicant to fill in a questionnaire provided by the occupational health practitioner.

The reason for these statutory prohibitions is to ensure that disabled applicants are assessed objectively on their ability to perform the job applied for and that they are not rejected by reason of their disability.

There are however six exceptions to this general rule when the employer may lawfully ask questions on disability and health.¹²¹ The first exception relates to the

¹¹⁷ Equality Act 2010 s.27 (3).

¹¹⁸ Source: Code of Practice paras. 9.12 to 9.14.

¹¹⁹ Equality Act 2010 s. 27 (4).

¹²⁰ *Ibid.* s.60 (1) (a) (b).

¹²¹ *Ibid.* ss.60 (6) (a) to (e) and (14).

*reasonable adjustment required for the recruiting process.*¹²² The second exception relates to *monitoring purposes.*¹²³ The third exception treats the implementation of *positive action*¹²⁴ *measures.*¹²⁵ The fourth exception is to do with *occupational requirements*¹²⁶ while the fifth exception treats *national security.*¹²⁷ The final exception is to do with a *function which is intrinsic to the job.*¹²⁸

¹²² *Ibid.* s.60 (6) (a). The employer may ask questions which relate to *reasonable adjustments* necessary for the assessment and interview designed to assess the applicant's suitability for the job. This means that any information on disability or health obtained by the prospective employer for the purpose of making *adjustments* to recruiting arrangements should as far as possible, be held separately. Nor should that information form part of the decision-making process regarding an offer of employment, whether or not the offer is conditional.

¹²³ *Ibid.* s.60 (6) (c). It is lawful for the prospective employer to ask questions about disability and health for purposes of *monitoring* the diversity of applicants.

¹²⁴ Where an employer reasonably thinks that persons who share a protected characteristic (i) experience a disadvantage connected with that characteristic, [Equality Act 2010 s. 158 (1) (a)]; (ii) have needs that are different from the needs of persons who do not share that characteristic, [*Ibid.* s. 158 (1) (b)]; or (iii) have proportionally low participation in an activity compared to others who do not share that protected characteristic, [*Ibid.* s. 158 (1) (c)]; the employer may take action which is *proportionate* to meet the aims of the Act. These aims are: (i) to enable or encourage persons to share the protected characteristic to remedy or *minimise* that disadvantage [*Ibid.* s. 158 (2) (a)]; to *meet* those needs, [*Ibid.* s. 158 (2) (b)]; or (iii) to enable or encourage persons who share the protected characteristic to *participate* in that activity [*Ibid.* s. 158 (2) (c)].

¹²⁵ Equality Act, 2010. s.60 (6) (d). It is lawful for a prospective employer to ask whether a person is disabled in order that that latter may benefit from any measures aimed at *improving disabled persons' employment rates.* This could include the guaranteed interview scheme whereby any disabled persons who meet the essential requirements of a job are offered an interview. When asking questions about, for example, eligibility for a guaranteed interview scheme, the prospective employer should make clear that this is the purpose of the question.

¹²⁶ *Ibid.* s.60 (6) (e). There is a need to demonstrate an *occupational requirement* if a person with a *particular* impairment is needed for the job. Where the prospective employer can demonstrate that a job has an occupational requirement for a person with a specific impairment, it is lawful for the prospective employer to ask questions relating to a person's disability or health to enable the employer to establish that the applicant has that impairment.

¹²⁷ *Ibid.* s.60 (14). It is lawful for the prospective employer to ask disability or health questions where it is a requirement for the job that the applicant needs to be vetted for purposes of national security. There are various types of vetting but the most common ones are positive vetting for more delicate tasks and negative vetting for less delicate missions.

¹²⁸ *Ibid.* s.60 (6) (b). A prospective employer may ask about disability and health (before the offer of a job is made or before the applicant is put in a pool of candidates to be offered

Should an applicant disclose voluntarily information on his disability or health, the prospective employer should ensure that in responding to that disclosure he only asks further questions which are permitted (as explained herein). The employer must not respond by asking questions about the applicant's disability or health that are irrelevant or outside the parameters of legality.

Can the employer lawfully make enquiries *after* a job offer has been made? Although job offers may be made conditional on satisfactory responses to pre-employment disability or health enquiries or satisfactory health checks, employers must ensure that they do not discriminate against a disabled job applicant on the basis of any such response.¹²⁹ If a prospective employer is not in a position to offer a job, but has accepted applicants into a pool of persons to be offered a job when a vacancy occurs, it is lawful for the employer to ask disability or health-related questions at that stage.¹³⁰

10. EPILOGUE

By replacing the previous multitudinous anti-discrimination legislation with a single law thus making it easier to understand, and by strengthening protection in some situations, the Equality Act 2010 protects people from discrimination in the workplace and in wider society.

vacancies when they arise) where the question relates to an applicant's ability to carry out the function that is intrinsic to the job. Within the job description, only functions which are necessary to the job should be included. Where a disability or health-related question would determine whether a person can carry out this function with reasonable adjustments in place such a question is lawful.

¹²⁹ For example, it will amount to direct discrimination to reject an applicant purely on the grounds that a health check reveals that s/he has a disability. Employers should also consider at the same time whether there are reasonable adjustments which should be made in relation to any disability disclosed by the enquiries or health checks.

¹³⁰ An employer can avoid discriminating against applicants to whom he has offered jobs subject to satisfactory health checks by ensuring that any health enquiries are relevant to the job in question and that reasonable adjustments are made for disabled applicants. It is very important that occupational health practitioners who are employees or agents of the employer understand the duty to make reasonable adjustments. If a disabled person is refused a job because of a negative assessment from an occupational health practitioner during a process in which reasonable adjustments were not adequately considered, this could amount to unlawful discrimination if the refusal was by reason of disability.

With regards to disability, the 2010 Act has extended the protection to disabled persons against *indirect discrimination*;¹³¹ it has introduced the concept of “*discrimination arising from disability*” to replace protection under previous legislation lost as a result of a legal judgment;¹³² it applies the detriment model to protection against *victimisation*, aligned with the employment law approach;¹³³ it harmonised the thresholds for the duty to make *reasonable adjustments*¹³⁴ for the disabled person; it extended protection against *harassment*¹³⁵ of employees by third parties; it made it more difficult for disabled persons to be unfairly screened out when applying for jobs by restricting the circumstances in which employers can ask job applicants *questions on their disability or health*.¹³⁶

The United Kingdom had adopted the United Nations Convention on disability rights¹³⁷ for the purpose of protecting and promoting the rights of the disabled. Having done so, the coalition government states that¹³⁸ “We want the UK to be a leader in equality... At our best we are defined by our tolerance, freedom and fairness. There is also a strong economic argument for equality. If people are not able to reach their full potential, the economy suffers. We are working towards a fairer society by improving equality and reducing discrimination and disadvantage for all at work, public and political life, in people’s chances.”

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¹³¹ See pp. 8-10 *supra*.

¹³² See pp. 2 and 7-8, and in particular p.8 *supra*.

¹³³ See pp. 14-15 *supra*.

¹³⁴ See pp. 11-13 *supra*.

¹³⁵ See pp. 13 - 14 *supra*.

¹³⁶ See pp. 15 - 17 *supra*.

¹³⁷ United Nations Convention on the Protection of the Rights and Dignity of Persons with Disabilities” (A /61/611).

¹³⁸ Source: “Creating a Fairer and More Equal Society” Department of Culture, Media, Sport.