



STRUCTURAL ISSUES IN DISABILITY DISCRIMINATION CLAIMS

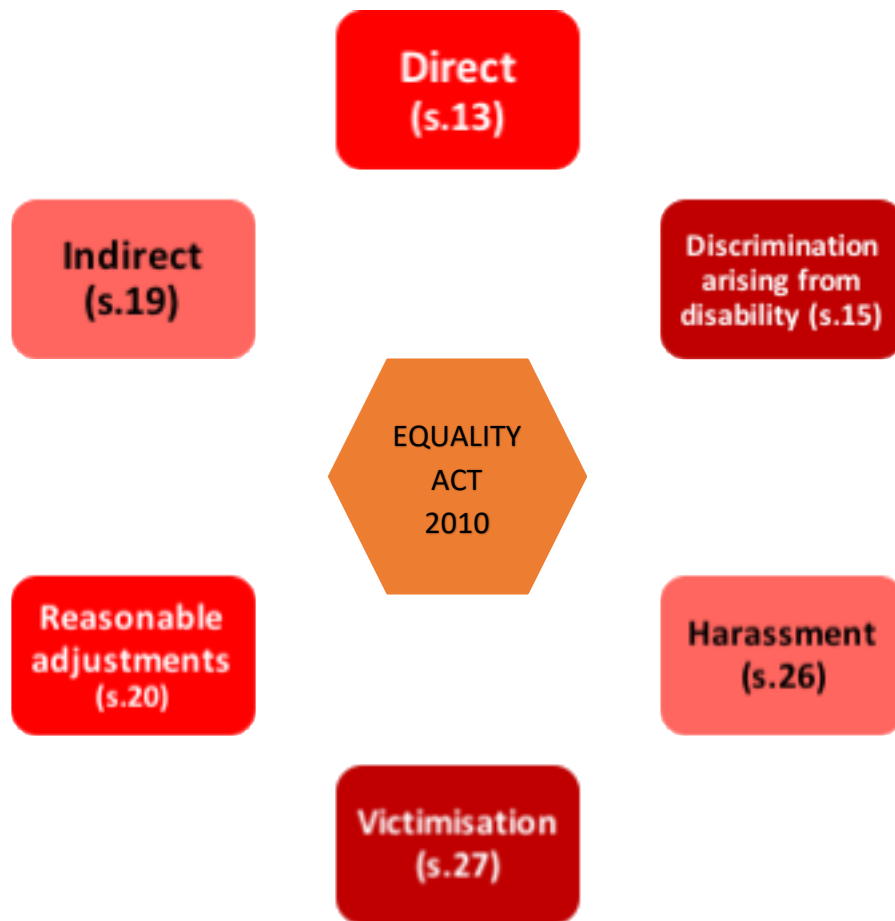
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Preface

1. These notes are prepared to supplement the presentation made at the Employment and Discrimination Annual Seminar on the topic: “**Structural Issues in Disability Discrimination claims**”. It is hoped that these notes will provide a useful aid to the thoughts shared in the seminar. If any questions arise, please feel free to contact me via chambers.

Introduction

2. This talk is about the structuring of disability discrimination claims in the Employment Tribunal.
3. In particular, I focus on the **options available** to the claimant when composing the pleaded claim, but also I consider the **tactics available** to all parties in addressing the structure of any particular disability discrimination claim.
4. I want to therefore establish two key objectives. Firstly, to ensure that practitioners have a **firm foundation** in dealing with the initial stages of discrimination litigation in the employment tribunal. I propose to look at our foundations by laying out a plan, a blue print of discrimination claims and those aspects that are most relevant and potent in disability claims.
5. Secondly, I will discuss **tactical advantages and disadvantages** to certain types of claims. It is my view that certain ‘types’ of discrimination claim are far more effective in the disability context than others, even if the differences between them seem subtle. There are opportunities to take at the very early stage of litigation to strengthen or weaken a case depending on what steps are taken from the outset. I want to ensure that we are aware of some of those, as well as perhaps avoiding some of the tactical mistakes that might hamper a claim later down the line.
6. That said, I must also stress that this presentation is designed to be 20 mins long. Therefore, I apply a broad brush to some of the issues that arise. I hope that it will be thought-provoking and get the creative juices going. I do not presume to have all of the answers on some of the more debatable elements of litigation strategy. However, it is important that we are thinking about such tactical elements even at the outset of litigation, because we might be missing a trick or two if we don’t.



FOUNDATIONS

7. In the above diagram, I have set out most of the types of disability discrimination claims that practitioners encounter. I am conscious that most of us will have dealt with countless numbers of each type of claim and so I do not intend to go over the basics of each in any great detail.
8. Instead, let us focus on the strategy involved in crafting a discrimination claim from a top-down perspective. Where are the stronger suits; where are the weak points to be avoided. Every case has its own facts, but it is my view that there are some starting principles that we should always apply when dealing with a disability claim, whether from a claimant's perspective or from a respondent's.
9. Before looking into the individual aspects, let me indicate where I am going with this in the short time we have. Firstly, I will look at **direct discrimination**. I will also touch on some of the correlations between direct discrimination and **harassment**.
10. Secondly, I will touch very briefly on **indirect discrimination**. The main reason for this is that it is my view that when dealing with a disability claim, indirect discrimination is a weaker vessel than the other disability-only options, particularly **s.15 discrimination** and/or **reasonable adjustments**.
11. I will not address **victimisation** in this session, chiefly because of time constraints but also because it is a distinctive area of discrimination claim that doesn't really fit in to my premise for



this talk. If you have a burning desire to talk about victimisation, please find me afterwards and I would be happy to have a chat about it then.

12. Finally, as already mentioned, **s.15 discrimination** and the interplay with **reasonable adjustments** will form the last element of this session. Again, this is not a small topic in its own right, but I hope to give us some foundational sign-posts to setting up a claim on one or both of these heads.

Direct discrimination

13. Direct discrimination is the big cheese of the discrimination menu. It is the hardest hitting and most publically sensitive. It has a number of distinct advantages.

Equality Act 2010

Section 13: Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

14. One of the points that practitioners will be mindful of is that because direct discrimination applies to most of the other protected characteristics, many of the foundational principles are derived from non-disability cases. There is the benefit of uniformity across the discrimination spectrum. Associative discrimination and also perceived discrimination can be employed under a direct discrimination head.
15. Perhaps the biggest advantages in pleading a direct disability discrimination claim are:
 - a) No justification defence available to a finding of direct discrimination.
 - b) The burden of proof provisions under **s.136 Equality Act 2010** (EA).
16. The restriction on a respondent justifying their discriminatory conduct is an obvious attraction to claimants. Even if the respondent protests with a myriad of apparently good reasons for the conduct, this is of no relevance if a Tribunal finds that the action was discriminatory.
17. However, although this sounds good in theory, in practice of course Tribunals are usually very interested in why conduct happened. In most cases, the question of whether there is a **non-discriminatory reason** for the conduct complained of is highly relevant to causation. So it would be a mistake to think that a direct discrimination claim ties the hands of a respondent in this regard. In practice, the respondent will have the opportunity to explain their actions.
18. Linked to this point about causation is the apparent benefit of the reversal of the burden of proof under **s.136 EA**. This provision stems from sex discrimination legislation (see **s.63A Sex Discrimination Act 1975**) and now applies universally via the Equality Act, (n.b. pre-Equality Act 2010 cases such as **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 refer to s.63A SDA, although establishing principles now relevant to s.136 EA).
19. Generally speaking, the burden of proof (usually on the claimant) is reversed to the respondent if the claimant can establish a *prima facie* case of direct discrimination (which I call the “1st hurdle”). The onus then shifts on to the respondent to provide a non-discriminatory explanation for the conduct (see the causation point mentioned above).



20. However, in order to establish an arguable *prima facie* case, the claimant still has some work to do.
21. For example, it is not enough to show that the claimant has been badly treated. There is no protection under direct discrimination for “unfavourable treatment”, but only “less favourable treatment” (**s.13(1) EA**). The issue is one of equal treatment, not protection from bad treatment. This can afford a respondent a defence that I like to call the “Brent defence” – named after the particularly horrendous manager from the BBC hit comedy *The Office*, David Brent. The point is that if a respondent can show that the complainant was treated as badly as the other non-disabled employees, then it potentially has a non-discriminatory reason for the treatment.
22. Secondly, appropriate comparators (in order to show un-equal treatment) need to be identified and pleaded. Depending on the facts, this can be tricky. **Section 23(2) EA** requires that the circumstances must not be materially different between complainant and comparator, including the person’s abilities. The fact that there is divergent case law at an appellate level (cf. *Watts v High Quality Lifestyles Ltd* [2006] IRLR 850; *Aylott v Stockton-on-Tees Borough Council* [2011] ICR 1278) seems to illustrate the point. Further, it is not necessarily an error of law for the Tribunal to take a *Shamoon* approach to the issues and instead focus on the question of the reason for the treatment and work backwards from there.
23. In addition, there are potential problems with the establishment of inferences required to enable a Tribunal to make a finding of discrimination. Unreasonable behaviour alone by an employer is potentially not enough (see *Glasgow City Council v Zafar* [1998] ICR 120 (HL) and Court of Appeal in *Bahl v The Law Society* [2004] IRLR 799; cf. *Wong v Igen Ltd* [2005] ICR 931).
24. In most cases, the respondent will attack the claimant on the 1st hurdle (establishing a *prima facie* case) and have a fall-back position to provide a non-discriminatory reason for the treatment (the 2nd hurdle). The respondent has two bites of the cherry.
25. In the majority of direct discrimination cases, the key question that the Tribunal is interested in is the reason for the treatment. The threshold is fairly high: “because of” the claimant’s disability (s.13(1) EA).
26. Generally speaking, there are two types of causation in direct discrimination. Firstly, the *James* type (based on *James v Eastleigh Borough Council* [1990] IRLR 288), where the conduct complained of is obviously discriminatory. A *but-for* approach is useful in a *James* type case.
27. Secondly, and in my view forming the vast majority of cases, the *Nagarajan* type (from *Nagarajan v London Regional Transport* [1999] IRLR 572). A *but-for* approach to causation is not appropriate here. Instead the test is whether the protected characteristic had a **material influence** (more than trivial) on the outcome, for example where there was some sort of discriminatory motivation, including if subconscious, on decisions or conduct, the question always being what was the reason for the treatment. The effect of this is that the respondent is given the opportunity to provide an explanation for the treatment.

Conclusion on direct discrimination

28. Every case will turn on its own facts, but in the main most practitioners would accept that proving a direct discrimination claim can be difficult. Even with the beneficial burden of proof



provisions and inferences, it is a major evidential challenge for a claimant to disprove a respondent's non-discriminatory excuse(s).

29. There are also a number of technical challenges to navigate. A respondent may attack on the grounds of disability itself, or on the establishing of the 1st hurdle (with the knowledge of being able to further rebut on the 2nd hurdle if need be).
30. A further element to consider is that of the atmosphere in a Tribunal room where direct discrimination is claimed. It is a serious thing to allege because somewhere down the line it will need to be put that there was some form of discriminatory reason for the treatment. That reason is not a by-product of a practice or policy, but something that goes to the heart of the decision making processes of the employer, that materially influenced outcomes.
31. Therefore, although it can be tempting to make an accusation of direct disability discrimination, I would advise caution in doing so. Disability discrimination has a number of alternatives to direct discrimination that should be considered as alternatives before pleadings are laid down.

Harassment

32. Dealing very briefly with harassment (**s.26 EA**), there are certain cases where a pleading of harassment should be made in place of direct discrimination. This will depend on the facts, but principally if we are talking about bad behaviour, then harassment is usually more appropriate because of the “**unwanted conduct**” provision of **s.26(1)(a) EA** (see above in relation to less-favourable treatment).
33. At first glance, it might also be considered that the provision “purpose or effect” is a lower threshold than for a direct discrimination claim. However, as touched on above, causation in a direct discrimination claim can be established on an innocent motivation (particularly a **James** type case) or on subconscious stereotyping.
34. The two key elements are, firstly, the assessment of the **impact** of the treatment and, secondly, whether it is **related** to the protected characteristic. In addressing both issues, the context of the complained-of treatment will be key. The appellate decisions have cautioned on “hyper-sensitivity” in harassment claims (e.g. **Richmond Pharmacology v Dhaliwal** [2009] IRLR 336).
35. Importantly too, even if conduct is unwanted, it needs to be sufficiently “related” to the protected characteristic to become harassment. It is now well established that this is a lower threshold than the test of “because of” for direct discrimination. It will be an objective test for the Tribunal, having regard for all of the circumstances. As the very recent example of **Hartley v Foreign and Commonwealth Office** UKEAT/0033/15 (27 May 2016, unreported) shows, the whole of the circumstances are important in this analysis, not solely the perception of the person who made the remark.
36. Therefore, there are clear cases where, on the facts, a claim of harassment is a stronger card to play than a claim for direct discrimination. However, caution needs to be employed with regard to the objective impact of the conduct. Are the facts strong enough to support a finding that the unwanted behaviour was sufficient bad to amount to harassment?



Indirect discrimination

37. I make only a small point on indirect discrimination under **s.19 EA**. Simply put, there are going to be few cases where an alternative pleading of s.15 discrimination and/or a failure to make reasonable adjustments will not be more potent. These two alternatives are unique to disability claims and should be taken advantage of.
38. For example, there is no need to identify a PCP or provide evidence of group disadvantage for the purposes of a s.15 claim. Similarly, there is no objective justification defence to a reasonable adjustments claim once the duty arises (cf. the test of reasonableness of adjustments).

Turning to S.15 Discrimination and Reasonable Adjustments

39. These two heads of claim, unique to disability claims in the Employment Tribunal, are a rich vein of litigation potential. At present, they represent the law's best effort at what might be understood as positive discrimination: the onus on employers to make allowances or remove obstacles that cause disadvantage to disabled persons. Many of us as practitioners will be well acquainted with both heads of claim. Reasonable adjustments has courted particular interest in the appellate courts as the technical elements of PCPs, comparison exercises, substantial disadvantage and reasonableness have been defined and re-defined.
40. My purpose for this section is to consider the interplay between the two in pleadings and the tactical decisions to putting each forward (or opposing them in turn).

Section 15 – Discrimination arising from disability

Equality Act 2010

Section 15: 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.

41. Most of us will be familiar with the statutory language. The initial advantages of s.15 become obvious: no need for a comparator (see **s.23 EA**), a broader causative link between the treatment and the disability, the standard of “unfavourable” treatment rather than “less-favourable”. These advantages would have a practical impact on the disability claim in our example (see presentation slides). An employee who is dismissed (unfavourable treatment) because of his inability to do a particular role (something) arising in consequence of his disability (back problem) would establish the first stage of the two-prong test. The question would then of course turn to objective justification (more on this below).
42. However, what is the true answer to the claimant's conundrum in our example? Is it to plead a reasonable adjustments claim, pointing at some adjustment that could be made to alleviate the disadvantage? And where does this alter to become an ‘making allowances’ type of case. What about the interplay between objective justification (proportionate means to a legitimate end) in a s.15 claim to the question of whether adjustments are reasonable in **s.20**?



43. It becomes clear that there is a large degree of potential overlap between s.15 and reasonable adjustments. How do we know which one to plead or how to differentiate if pleading both?

44. I find HHJ Richardson's summary of the differences between s.15 and reasonable adjustments

HHJ Richardson in ***Carranza v General Dynamics Information Technology Ltd*** [2015] IRLR 43:

"The focus of these provisions is different. Section 15 is focused on making allowances for disability: unfavourable treatment because of something arising in consequence of disability is prohibited conduct unless the treatment is a proportionate means of achieving a legitimate aim. Sections 20–21 are focused on affirmative action: if it is reasonable for the employer to have to do so, it will be required to take a step or steps to avoid substantial disadvantage."

a useful starting point. How does this play out in practice?

45. Firstly, it is important in our minds to distinguish between the old and the new. The old, pre-Equality Act 2010 concept of "disability-related discrimination" (**s.3A Disability Discrimination Act 1995**) is dead. Significantly, the comparator aspect (that caused some controversy) has been done away with. As HHJ Richardson put it in ***Carranza***, s.15 "swept away" some of the previous difficulties: *"Discrimination arising from disability is broadly defined and requires objective justification."*

46. In a s.15 claim, the structure of a pleaded case is best kept as straightforward as possible. All of the various elements need to be particularised, namely the **unfavourable treatment**, the **"something"** that caused the treatment and the **causative link** between the something and the disability.

47. The question of knowledge is expressly relevant in a s.15 claim (see **s.15(2)**). The usual test arises in respect of whether the respondent could not reasonably have been expected to know about the disability.

Structural differences - reasonable adjustments

48. When compared with the relatively straightforward pleading exercise for a s.15 claim, the same for a claim for a failure to make reasonable adjustments can seem a little bit more difficult. There are the technical and evidential elements of PCPs to contend with. There is the question of whether substantial disadvantage arises and how far the comparison exercise needs to go to establish the duty to make adjustments. Most of the elements have been subject to extensive appeals, which is hardly surprising given the interplay between the written statute and the realities of disability in the work place. Another factor complicating the history and development of reasonable adjustments was the attractiveness of this head of claim as a way of getting around the old problems with disability-related discrimination.

49. Perhaps the recent decision in ***Griffiths v Secretary of State for Work and Pensions*** [2016] IRLR 216 will put the question of comparison to one side for the time being and focus will turn to the reasonableness of the adjustment in question. And here lies the main distinction that I want to emphasise between the s.15 claim and the reasonable adjustments claim.



Advantages / Disadvantages

50. What, in practice, is the difference between something being objectively justified for s.15 purposes and reasonable for the purposes of a failure to make adjustments under s.20 EA? The relevance of this question is important, because if a **duty** to make adjustments can be established in a s.20 case, then, subject to reasonableness of the proposed adjustment, there is no scope for objective justification. Essentially this means that if it could be done then it must be, a failure to do so resulting in a successful claim.
51. The objective justification test is fundamentally one for the Tribunal to determine based on a proper analysis of all the circumstances, including the commercial practices of the business in question and the needs of the employer, (see for example *Hensman v Ministry of Defence* [2014] EqLR 670; *Monmouthshire County Council v Harris* UKEAT/0010/15, unreported).
52. The objective justification test is the same shared across other discrimination claims, most notably indirect discrimination, and practitioners will be familiar with the basic principles. Justification is an objective test – not a band of reasonable responses as in unfair dismissal. The two distinct limbs must be considered separately and it may amount to an error of law to blur them together (*MacCulloch v ICI plc* [2008] IRLR 846).
53. In disability cases, the question of proportionality often comes to the fore. There is the understandable policy tensions between business efficacy on the one hand and the aim of encouraging disabled people to be full participants in the working world, hence the language of “making allowances”.
54. The test of proportionality is a judicial balancing act –the discriminatory impact on the one hand and the reasonable need on the other. Where one side can obtain a degree of imbalance in their favour, there often can rest the case. In practice, cases will turn on evidence and common sense.
55. It would be a grave mistake for an employer to turn up at a Tribunal seeking to rely on generic ideas of commercial pressures or business need without producing hard evidence to support its position. Similarly, care must be taken by respondents when pleading their justification defence. Generic themes can be undermined by lack of specific evidence. It is best practice to particularise your objective defence at the earliest stage.
56. If s.15 is about the employer not subjecting the employee to the unfavourable treatment without justification, the test of reasonableness of adjustments is about the positive duty of an employer **to do** something. The test is again an objective one, but with the particular requirement to alleviate the disadvantage caused. Essentially, an adjustment that would not address the disadvantage caused by the PCP is in difficulty of being considered reasonable. If the adjustment will not fix the problem, then the claim is not going to succeed.
57. It is perhaps this distinction that is key when it comes to framing a disability claim. If there are **no obvious adjustments** that can help alleviate the substantial disadvantage, then your only realistic option may be a **s.15** claim on the broader points about proportionality. Conversely, if it is obvious that a legitimate aim was in play and there is a real risk that the steps will be



considered proportionate, then a reasonable adjustment claim may need to be carefully pleaded to avoid a knock-out blow if run down a blind s.15 alley.

58. A final point should be made about the danger of a reasonable adjustment being stretched too far, for example where making allowances are sought in the form of a reasonable adjustment



59. claim, where they would be more appropriately pleaded as a s.15 claim. This may be for tactical reasons (potency of justification defence for instance), but it may also be because of a lack of understanding to the different aims of the two heads of claim.

Conclusion

60. A strong strategy for a is to try to work in both a s.15 element and a reasonable adjustment element. This provides cover for the two types of defence that will be employed – reasonableness of adjustments and objective justification. It may become obvious at a later stage which of the heads of claim will carry the weight of the claim at Tribunal, but from a pleadings perspective you want to have these both in if you can.

61. Section 15 should usually be considered as an “in the alternative” pleading alongside a direct discrimination claim, unless there are obvious reasons for not doing so.

62. A reasonable adjustments claim should be considered from the bottom up – i.e. is the proposed adjustment actually likely to make a difference? If there is nothing concrete to point to that would alleviate the disadvantage, then it may be better to focus on a s.15 claim.

63. Indirect discrimination seems to me to be redundant in disability claims. There is no obvious reason to rely on it when s.15 and/or reasonable adjustments could be pleaded instead.

64. Harassment should be considered as an alternative to direct discrimination where the facts and evidence are appropriate. Otherwise, be cautious about pleading it at all for the general sake of credibility and even costs.

