

DISCRIMINATION TRAINING

PLUSNET PLC

SHEFFIELD & LONDON

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Debbie Grennan and Julian Allsop


Guildhall
CHAMBERS

Agenda

1: The Basics

2: Disability & reasonable adjustments

3: Specific Questions

4: Q&A



THE BASICS



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THE EQUALITY ACT (1)

- Protected Characteristics

- Age
- Disability
- Gender Reassignment
- Marriage and Civil Partnership
- Race
- Religion or belief
- Sex
- Sexual Orientation

THE EQUALITY ACT (2)

- Prohibited Conduct
 - Direct Discrimination
 - Discrimination Arising from Disability
 - Indirect Discrimination
 - Failure to make Reasonable Adjustments
 - Harassment
 - Victimisation

(also, Discrimination by Association)

THE EQUALITY ACT (3)

- Part 3 of the Equality Act 2010
- Application to the provision of Goods & Services
 - Exclusions – under 18s, marriage & civil partnership.
 - Does not apply where the Equality Act otherwise applies (e.g. workplace discrimination, premises, education).
 - Does not apply to breach of equality clause or rule.
 - Does not apply to a breach of a non-discrimination rule.
 - No harassment protection in the provision of goods and services on the basis of religion or belief / sexual orientation

THE EQUALITY ACT (4)

- The Overarching Prohibition-

A person (a “service-provider”) concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.

THE EQUALITY ACT (5)

- **Secondary Prohibitions:**
 - Must not discriminate as to the terms on which the service is provided to the person requiring the service, by terminating the provision of the service or by subjecting the person to any other detriment.
 - Must not harass the person requiring the service or a person to whom the service-provider provides the service.
 - Must not victimise by not providing the service.
 - Must not victimise as to the terms on which the service is provided (etc as per first bullet above)
 - Must not fail to make reasonable adjustments.

THE EQUALITY ACT (6)

- Important provisos:
 - Applies to a person who is seeking to obtain or use the goods / services.
 - Applies to not providing a person with goods / services of the quality that the service-provider usually provides to the public (or the section of it that includes the person).
 - Applies to the the service-provider not providing the person with the service in the manner in which, or on the terms on which, the service-provider usually provides the service to the public (or the section of it which includes the person).

THE EQUALITY ACT (7)

- Reasonable Adjustments
 - Special provision for reasonable adjustments in this context provided by Schedule 2 of the Equality Act 2010.
 - Various exceptions relevant to this context set out in Schedule 3, perhaps the most interesting one being that set out in Part 8 of Schedule 3, relating to television, online broadcasting and distribution.

(will deal with both in more detail in the next section of this talk).

THE EQUALITY ACT (8)

- Accessory Liability
 - Vicarious Liability of Employers and Principals
 - Statutory Defence
 - Liability of Employees and Agents
- Liability can also arise following the end of a relationship if the discrimination arises out of and is closely connected to it.

THE EQUALITY ACT (9)

- Enforcement

- County Court
- Time limit of 6 months to bring a claim.
- Extension of time if just and equitable to do so.
- Can be a continuing act.
- Damages, including compensation for injury to feelings.
- Costs & Qualified One Way Costs Shifting
- Standing- company can pursue a claim against another company as long as the discrimination relates to a protected characteristic of a natural person.
- Territorial Jurisdiction

THE EQUALITY ACT (10)

- Remedies
 - Damages (including injury to feelings)
 - Injunction
 - Quashing orders
 - Declaration
 - Interest
 - Costs

THE EQUALITY ACT (11)

- Perhaps a convenient point to deal with this question:

A further important point for us is where customers are claiming damages but seeking to increase those damages on the basis of their disability (often mental).

It would be good to generally understand the kind of damages we could expect to pay out if we have discriminated against customers and what we can do if customers are making bogus claims to increase their claim.

THE EQUALITY ACT (12)

- Burden of proof – s.136 EqA 2010

If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

- Need good record keeping of decisions that are taken.

THE EQUALITY ACT (13)

- Statutory Guidance
 - EHRC Code of Practice- 'Services, public functions and associations Statutory Code of Practice'
 - EHRC Publication- 'What Equality Law Means for your Business'

DISABILITY & REASONABLE ADJUSTMENTS



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Disabled?

s.6 EqA 2010 – statutory definition

Disability

(1) A person (P) has a disability if—

(a) P has a **physical** or **mental impairment**, and

(b) the impairment has a **substantial** and **long-term** **adverse effect** on P's **ability to carry out normal day-to-day activities**

Disabled? (continued)

Schedule 1 EqA 2010 – supplementary provisions

- Long term = 12 months in duration, or is likely to last 12 months, likely to last for the duration of the person's life, or likely to recur.
- Severe disfigurement = substantial adverse effect.
- Deduced effect of medical treatment
- HIV, Cancer & MS = disability

Disabled? (continued) (ii)

- Statutory on each element of disability has been provided in the Guidance on the Definition of Disability.
- Remember, some disabilities are not readily apparent.

Duty to make reasonable adjustments- adjusted

- Ss.20 & 21 EqA 2010
- Schedule 2 sets out how reasonable adjustments apply in this context.
- S. 20 modified by Paragraph 2 of the Schedule 2

*For the purposes of this paragraph, the reference in section 20(3), (4) or (5) to a disabled person is to **disabled persons generally**.*

- Also modified by Paragraph 3 of Schedule 3

Duty to make reasonable adjustments-adjusted (2)

(3) *The first requirement is a requirement, where a provision, criterion or practice of A's puts disabled persons generally at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

(4) *The second requirement is a requirement, where a physical feature puts disabled persons generally at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to*

(a) to avoid the disadvantage, or

(b) to adopt a reasonable alternative method of providing the service or exercising the function.”

(5) *The third requirement is a requirement, where disabled persons generally would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.*

Duty to make reasonable adjustments-adjusted (3)

- ***Roads v Central Trains Ltd*** 104 Con LR 62 - CA

Section 21 of the 1995 Act created a double test: does the particular feature impede people with one or more kinds of disability and, if so, has it impeded the claimant?

- See also, ***Ross v Ryanair and another*** [2005] 1 WLR 2447
- Extent of Reasonableness of the Adjustment, see EHRC Code of Practice at pp 7.13, 7.24, 7.28- 7.39 for guidance

Knowledge of disability?

- May not be an absolute defence like it would be in an employment case as there is no equivalent to Part 3 of Schedule 8 EqA which provides for the exception.
- However it might be relevant to the assessment of whether a service provider has complied with its duty to make reasonable adjustments (see para 7.26 of the Guidance).

Human Rights Aspects

- Art 3 – Freedom from torture or inhuman or degrading treatment
- Art 5 - Right to liberty and security
- Art 8 – Respect for private and family life, home and correspondence
- Art 9 - Freedom of thought, belief and religion
- Art 10 - Freedom of expression
- Art 14 - Protection from discrimination in respect of these rights and freedoms

Case law examples

- ***Paulley v FirstGroup Plc*** [2017] 2 All ER 1
- ***Ross v Ryanair*** [2004] EWCA Civ 1751
- ***Campbell v Thomas Cook Tour Operators*** [2015] 1 WLR 207
- ***RBS Group Plc v Allen*** [2010] 1 EGLR 13

- ***Edwards v Flamingo Land Ltd [2013] EWCA Civ 801***
- ***Chez Razpredeleine Bulgaria AD v Komisia za zashtita ot diskriminatsia (Case C-83/14) EU:C:2015:480***
- ***Blackburn and another v HMRC [2013] UKFTT 525***
- ***Bishop Electrical Co Ltd v Revenue & Customs Commissioners [2013] UKFTT 522***

SPECIFIC QUESTIONS



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Question 1

A customer has requested that we communicate only through electronic means and predominantly through social media. However, they are consistently complaining and blocking our responses through those channels.

When we write out to him (as we can't get through electronically) he raises another complaint and states that the letter causes a panic attack.

Should we be taking a sterner line on this and, if so, what are our risks?

Question 2

We also recently had a case where the Ombudsman made a decision that was accepted by our customer but, despite that fact, they have since issued a small claim. This is on the grounds of pain / suffering caused by Plusnet as exacerbated by the individuals mental illness. They are seeking to distinguish the claim from the Ombudsman decision (although not very succinctly) on the grounds that Ombudsman will only award compensation for inconvenience with an objective test i.e. without taking the customers mental illnesses into consideration, they will not fine a company. Can we do anything to prevent this / get claims struck out?

Question 3

We do not always offer chat facilities, which some of our hearing impaired customers prefer, for example.

The reason for this is if there is a high call demand then advisors are taken away from operating chat and put on the phone to manage call queues.

As alternatives exist, such as Next Generation Text Relay, are we obliged to have other communication methods available?

Question 4

We would like to understand a little bit more about ensuring customers are on an equal footing. For example, we ask our customers to set up their own equipment or perform faults checks.

For customers who are unable to do these due to an impairment, our understanding is we should send an engineer free of charge, however Plusnet policy is not to do this, or to get the customer to agree to an engineer charge.

Question 5

Another customer demanded the following adjustments a few of which are contradictory and some impossible to achieve:

- I must be allowed to pace myself and focus on my health conditions
- I will not be able to act within your timeframes. I require 4-5 times longer than any provision, criterion or practice (PCP) that you may have.
- Do not write to me at all unless this has been agreed by me in advance. (My email address is not accessed regularly and your post will be put in a pile unopened with everyone else's post, and is unlikely to be read or dealt with for many months).

Question 5 - continued

- I need to be able to communicate with you by phone and sometimes by email. Please provide me with a direct dial telephone number (with no press button 1, 2, etc. and left holding for lengthy periods listening to music) and your personal email address (if I don't already have these contact details).
- I will communicate with you by phone. I will record phone calls I make and you make to me from time-to-time for my records. I will try to email a copy of any recording to you for your records.
- If you need to communicate with me, then please phone me on
 - i. If it's a technical issue we need to discuss then please phone to arrange a mutually convenient future time.
 - ii. If it's a simple issue, or an outcome you need to communicate with me, then please ask me if it is a convenient or good time to speak.
 - iii. If I am unable to answer the phone because I am completely incapacitated or not at home, then please either call again, or leave a message. I will return your call in the order calls are left as soon as possible.

Question 5 – continued (ii)

- You are not to communicate with me before 9.00 a.m. or after 6.00 p.m. Monday to Friday, or at all on a Saturday or Sunday unless it is either:
 - i. A matter of urgency or an emergency.
 - ii. A matter that can alleviate stress, anxiety and distress.
 - iii. A matter that we have agreed that I would be contacted about.
- In circumstances when it is necessary for me to write to you, then I will attach a voice recording to an email so that your admin staff can type it up for my final amendment/approval before it is actioned. Alternatively, you can supply me with voice recognition software suitable for a desktop that runs Windows Vista Home.
- I need to be allowed to ask questions as they arise because I won't remember what it is I need to ask later in a conversation.
- Any questions you ask need to be simple and asked one at a time.

Question 5 – continued (iii)

- I need time to gather my thoughts. If I am rushed, interrupted, or spoken over when I am talking I will lose track of what it is I want to say, and what it is I am being asked.
- I need time to provide explanations of what I am saying as I can be misunderstood.
- I won't give any explanation if I think the facts are obvious or should be known. So you will need to be precise if you are in any doubt.
- I need a supportive 'can do' attitude. I don't want negatives or provisions, criterion or practices made known to me that will cause me disadvantage.
- I require reasonableness, common sense, fairness and justice in all matters involving me.