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Disability Discrimination

Stephen Morrall and Charles Urquhart of Middleton Potts describe the legislation, recent cases interpreting it, and what constitutes discrimination under the 1995 Act.

Introduction

Disability discrimination law is a fast evolving area of the law in England and Wales. This article sets out the basic concepts of what constitutes a "disability", what constitutes "discrimination" and some of the factors that tribunals, employees and employers should consider in a disability discrimination dispute.

The legislation

Disability discrimination in England and Wales is prohibited by the Disability Discrimination Act 1995 (the "Act"), the Disability Discrimination (Employment) Regulations 1996 (the "Regulations"), various Disability Discrimination Codes of Practice and the Human Rights Act 1998. The working of this legislation is overseen by the Disability Rights Commission whose aim is to reduce discrimination, promote equal opportunities for disabled persons, and to encourage good practice. Finally, the Secretary of State has issued guidance notes (the "Guidance") to interpret the legislation.

The Act covers applicants for jobs, apprentices, contract workers and employees. From last year employers employing less than fifteen employees are now also covered by the Act. The protections afforded under the Act are binding irrespective of any agreement to the contrary.

What constitutes a disability?

In every claim brought under the Act a tribunal has to consider whether the applicant is in fact disabled. The Act provides the following definition: "a person has a disability... if he or she has a physical or mental impairment which has a substantial long-term adverse effect on his/her ability to carry out normal day-to-day activities." (Disability Discrimination

Act 1995 s.1) The Act provides guidance on the various parts of the definition and this has been augmented by the Regulations and case law.

"Mental impairment"

Under the Act "mental impairment" is defined as meaning "a clinically well-recognised illness" (Disability Discrimination Act 1995 Schedule 1, para 1(1)). In the case of *Morgan v Staffordshire University* [2002] I.R.L.R. 190 (EAT), the judge introduced a test to interpret what constitutes a clinically well-recognised illness. The test suggests that a patient will only have a mental impairment if there exists either:

- (i) the proof that his/her mental illness is specifically mentioned in the World Health Organisation's International Classification of Diseases; or
- (ii) proof that his/her mental illness is mentioned in a similar publication; or
- (iii) proof that his/her mental illness is recognised by a respected body of medical opinion.



Stephen Morrall

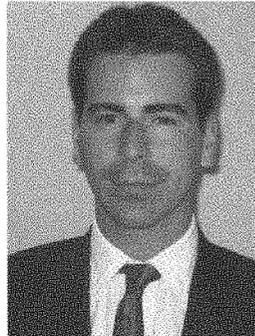
If the mental impairment does not fall within one of these categories the person will not be disabled within the meaning of the Act. Several cases have provided specific examples of what does and what does not fall within the Act, for example: the addiction to alcohol or nicotine and any other substance is considered not to amount to impairment; nor is the tendency to steal or start fires or to physically or sexually abuse others. Hay fever will not constitute an impairment except where it aggravates the effect of another condition.

"Physical impairment"

An applicant suffering from a "physical impairment" does not have to show that he is suffering from a condition that is clinically well-recognised (*College of Ripon and York St. John*

v Hobbs [2002] I.R.L.R. 185). The test is simply whether the applicant can produce evidence that there is something wrong with him. A tribunal will consider what the applicant cannot do (or can only do with difficulty), i.e. struggling to walk up stairs, rather than what the applicant can do i.e. walk at all. The fact that a person is able to reduce the effect of the condition, for example in the case of a person with an arm injury, by carrying smaller loads, does not mean that they are not disabled.

It is important to remember that a physical impairment may not be obvious to the casual bystander. Only a small proportion of the disabled have an obvious disability (e.g. people in wheelchairs). Detailed tests are often required to determine the extent of a person's disability and there is no substitute for medical evidence in disability discrimination cases.



Charles Urquhart

- mobility;
- manual dexterity;
 - physical co-ordination;
 - continence;
 - ability to lift, carry or otherwise move everyday objects;
 - speech, hearing or eyesight;
 - memory or ability to concentrate, learn or understand;
 - perception of the risk of physical danger (Disability Discrimination Act 1995 Sch.1, para 4).

The Guidance advises that an activity will not be considered to be normal if relevant only to a particular person or group. However what is "normal" should be decided with reference to the applicant's sex. The definition of what is "normal" does not depend on whether the majority of people do it. For example, it is normal to wear make-up but only 50% of the population do so.

"Substantial adverse effect"

To establish the existence of a disability under the Act the physical or mental impairment must have a "substantial adverse effect" on the applicant. The Guidance states that "substantial" means "a limitation beyond the normal differences in ability which may exist among people". A tribunal might therefore consider the following in assessing whether the impairment was "substantial": the time taken to perform an activity; the way in which that activity is carried out; the cumulative effects of an impairment; and the ability of the applicant to adapt his/her behaviour. One should consider that whether an adverse effect is substantial or not may vary according to the time at which the assessment is made as the condition of the patient will often change.

The protections afforded under the Act are binding irrespective of any agreement to the contrary

Progressive conditions and disfigurement

Special provision is made under the Act for progressive conditions and disfigurement. If an applicant has a progressive condition (such as cancer or multiple sclerosis) and as a result of that condition he has an impairment which has (or had) an effect on his/her ability to carry out normal day-to-day activities that condition will be treated as having a substantial adverse effect. Severe disfigurement will also automatically be deemed to have a substantial adverse effect on that person's ability to carry out normal day-to-day activities.

"Long term"

An applicant will only be disabled if his impairment has a substantial "long-term effect". This means it must have lasted at least twelve months; or is likely to last at least twelve months; or is likely to last the rest of the applicant's life. A "disabled person" under the Act can also be someone who has been disabled in the past, provided that the effects lasted twelve months or more after the first occurrence.

"Normal day-to-day activities"

A tribunal will consider the effect of an applicant's impairment on his/her ability to carry out normal day-to-day activities, taking into consideration the person's:

Treatment

The Act states that "*an impairment which would be likely to have a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day-activities, but for the fact that measures are being taken to treat or correct it, is to be treated as having that effect.*" (Disability Discrimination Act 1995 Sch.1, para 6(1)). An "impairment" must therefore be judged on its full effect without taking account of any care or treatment involved to cure it. An exception is made in the case of sight defects, resolved through the use of glasses or contact lenses.

The above definition applies only to *continuing* medical treatment as this may have the effect of masking or improving the disability. However where treatment for an impairment has been terminated, the effect of that treatment should be considered when assessing the disability.

If the final outcome cannot be determined or if the termination of the treatment would result in a relapse in the person's condition the medical treatment must be disregarded. On the other hand where the treatment is intended to create a permanent improvement, this must be taken into account. "Treatment" includes counselling with a qualified professional.

Discrimination

The Act states that it is unlawful for an employer to discriminate against any disabled person during the course of that person's employment at an establishment in the UK, in particular in relation to:

- arrangements made for deciding who should be offered employment;
- refusing to offer, or deliberately not offering, employment;
- opportunities for promotion, transfer, training or other benefit or refusal to offer those opportunities;
- the terms on which he offers that person employment;
- by dismissing him or by subjecting him to any other detriment (including harassment). (Disability Discrimination Act 1995 s.4).

An employer discriminates against a disabled person if "he, for a reason which relates to his disability, treats him less favourably than he treats or would treat others to whom that reason does not or would not apply and he cannot show that the treatment in question is justified" (Disability Discrimination Act 1995 s.5(1) (a) & (b)).

An employer can discriminate against an employee in two ways:

- (a) if he treats the employee less favourably (section 5 of the Act); or
- (b) if he fails to comply with the duty to make reasonable adjustments (section 6);

in either case without justification.

Justification must be "material to the circumstances of the particular case" (i.e. relevant to the facts) and "substantial" (Disability Discrimination Act 1995 s.5(3)). It has been stated that justification means "a balancing exercise between the interests of the disabled employee and the interests of the employer" (Baynton v Saurus General Engineers Ltd [1999] I.R.L.R. 146 (HL)). It is not up to the tribunal to decide whether the employer's assessment of the employee's disability and any action taken in consequence was correct. The action that the employer takes must simply be material and substantial in the circumstances even if the tribunal would have come to a different conclusion.

An employer cannot discriminate after the termination of the contract of employment.

The Act seeks to ensure that the employer treats disabled persons fairly along with other employees. However it is not meant to prevent an employer maintaining the right people in the right jobs nor to require him to discriminate positively in favour of disabled persons.

Less favourable treatment amounts to discrimination where the employer is under a duty to make a reasonable adjustment but fails to do so without justification.

Duty to make reasonable adjustment (Section 6)

This duty requires the employer to make reasonable adjustments in the work place to prevent arrangements or

features having an effect that is discriminatory and he is guilty of discrimination if he fails to do so without justification. For example, the employer could install ramps or special sanitary facilities. This applies to "arrangements for determining to whom employment should be offered, and any term, condition or arrangement on which employment, promotion, transfer, training or any other benefit is offered or afforded" (Disability Discrimination Act 1995 s.6(2)), and any physical feature "whether permanent

or temporary, including any feature arising from the design or construction of a building on the premises, any feature on the premises or any approach to, exit from or access to such a building, any fixtures, fittings, furnishings, furniture, equipment or materials in or on the premises and any physical element or quality" (Disability Discrimination (Employment) Regulations 1996 reg.9) of premises occupied by the employer which might cause the disabled to be at a disadvantage in comparison with persons who are not disabled.

There is no duty imposed on an employer under Section 6 if it does not know or could not know that the person has a disability and is likely to be affected by arrangements or physical features.

In the case of *Morse v Wiltshire County Council* [1998] I.R.L.R. 352 the judge formulated the following test to determine whether an employer is in breach of his duty to make reasonable adjustments:-

1. decide whether there is a duty on the employer to make a reasonable adjustment to the arrangements or physical features.
2. decide whether the employer has taken reasonable steps in order to ensure the disabled person was not placed at a substantial disadvantage.
3. if the employer fails to comply, decide whether the employer has shown that the failure was justified in the circumstances.

An employer can discriminate against an employee in two ways... but the Act does not require him to discriminate positively in favour of disabled persons...

The Act sets out examples of the type of factor to be taken into account in determining whether it is reasonable for an employer to have to take a particular step under point 2 above. These include whether the discriminatory effect would be avoided by taking that step; whether it is practicable for the employer to take the step; the financial and other costs that would be incurred by the employer and the extent to which taking it would disrupt any of his activities; the extent of the employer's financial and other resources; and the availability to the employer of financial or other assistance (Disability Discrimination Act 1995 s.6(4)).

The Act provides examples of the sort of steps that an employer may have to take in relation to a disabled person in order to comply with his duty to make reasonable adjustments: making adjustments to premises; allocating some of the disabled employee's duties to another person; transferring the disabled employee to fill an existing vacancy; altering his working hours; assigning him to a different place of work; allowing him to be absent during working hours for rehabilitation, assessment or treatment; giving him, or arranging for him to be given, training; acquiring or modifying equipment; modifying instructions or reference manuals; modifying procedures for testing or assessment; providing a reader or an interpreter; providing supervision (Disability Discrimination Act 1995 s.6(3)).

Performance Related Pay

What happens when an employer pays a higher salary to an employee who is not disabled than to one who is on the basis of higher performance? Is this discriminatory? The legislation provides that this may be justified unless the employer fails in its duty to make reasonable adjustments to the arrangements or physical features of premises which place a disabled person at a substantial disadvantage and result in reduced performance by him.

Enforcement

If an employee believes that he/she has been discriminated against he/she must present a complaint to an Employment Tribunal. The normal time limit for bringing such a complaint is 3 months beginning when the act complained of was done, although there is a discretion which allows a claim

to be considered after this deadline if in all the circumstances of the case the Tribunal considers it just and equitable to do so.

If a complaint for discrimination succeeds, the Employment Tribunal is authorised to order the following remedies:

- a declaration as to the rights of the employee and the employer in the circumstances
- ordering the employer to pay compensation to the employee;
- recommending that the employer take within a specified period reasonable action to reduce the adverse effect on the employee of any matter to which the complainant arises. (Disability Discrimination Act 1995 s.8)

There is no limit on the amount of compensation that may be awarded as the object is to put the employee in the position that he/she would have been in had the discrimination not been committed. Accordingly awards can be large and sometimes appear unjustified.

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Compensation for injury to feelings is recoverable and may well be substantial in appropriate cases, following a pattern established in sexual and race discrimination cases. Indeed where discrimination results in the disabled employee losing his/her job, the compensation could be even higher given the difficulty that people with disabilities face in securing employment.

Where a tribunal hears a disability discrimination case, it may make a restricted reporting order where evidence of a personal nature is heard, i.e. evidence of a medical or other intimate nature which is likely to cause significant embarrassment to the employee if reported.

The Future

The Work and Pensions Secretary, Andrew Smith, announced on 22 January 2003 that he would publish a draft Disability Bill later this year that would "significantly advance the rights and opportunities of disabled people up and down the country". This Bill will make changes to the Act in the ways that it affects the public sector, transport and premises and it will widen the definition of "disability". The law encompassing disability discrimination is evolving, providing ever greater protection for the disabled and we await the publication of the draft Bill to see how this will affect employees and employers alike.

After training at Middleton Potts, Charles Urquhart qualified in 2002 and joined the Corporate and Commercial Department. He now undertakes a wide variety of work predominantly for overseas clients and their UK branches and subsidiaries advising on employment law, commercial agreements, mergers, acquisitions and joint ventures and corporate reorganisations.