DISCRIMINATION IN THE PROVISION OF GOODS AND SERVICES

Notes for a talk to the Employment Lawyers Association on 4/12/2014

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1. This paper is intended for employment lawyers with knowledge of litigating discrimination claims in the Employment Tribunal under Part 5 (Work) of the Equality Act 2010.

2. This talk is intended to provide an overview of the key distinctions between Part 5 (Work) and Part 3 (Services and Public Functions) of the Equality Act 2010. The most important differences are in the field of disability discrimination.

3. This talk is also intended to provide Employment Tribunal practitioners with an overview of the differences between litigating discrimination claims in the Employment Tribunal and in the County Court.

4. I’m grateful to www.practicallaw.com, who have kindly allowed me to include a copy of the practice note on discrimination that I wrote, and now edit, in the materials for the ELA talk. That practice note provides an overview of the topics that I will be discussing in more detail in this paper.

Recent Developments

5. As I will explain in my talk, there have been a host of recent decisions considering the impact of s.29 of the Equality Act 2010, some of which will not be known to employment lawyers:


7. Section 29 of the Equality Act 2010 prohibits service providers, and persons exercising public functions, from doing anything that constitutes discrimination, harassment or victimisation.

8. This talk will focus on the role of service providers, rather than persons exercising a public function. A service provider is a person concerned with the provision of a service, goods or facilities to the public or a section of the public, whether or not for payment (see s.29(1) and s.31(2) EA 2010).

9. The enforcement of s.29 is dealt with in Part 9 (Enforcement), parts of which will already be familiar to employment lawyers.

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1 This case is currently before the Court of Appeal, and judgment is expected imminently. The Appellant in Black v Arriva withdrew her appeal in August 2014.
PROCEDURE

Forum

10. Section 114(1) of the Equality Act 2010 provides that the County Court has jurisdiction to determine a claim relating to a contravention of Part 3 (services and public functions), (and also premises (Part 4), education (Part 6) and associations (Part 7)).

11. Regardless of the value of the claim, the High Court does not have jurisdiction to determine s.29 claims, albeit that on occasion a High Court judge sitting in the County Court will hear a high value case.

12. The High Court can hear a claim brought by way of judicial review, for example if a policy is challenged on the basis that if implemented, it would contravene s.29 of the Equality Act 2010. See for example R (on the application of Lunt) v Liverpool City Council [2009] EWHC 2356 (Admin), [2010] 1 CMLR 431.

13. The Administrative Court needs to be satisfied that such a claim was a genuine judicial review claim, rather than a s.29 claim dressed up as a judicial review. Thus in Hamnett v Essex County Council [2014] 1 WLR 2562, Singh J held that he did not have jurisdiction to hear a complaint that a traffic regulation order removing parking spaces for disabled persons with blue badges amounted to unlawful discrimination contrary to s.29 of the Equality Act 2010.

14. Singh J held that the Claimant’s complaint was an application for review under a statute, and not a judicial review. In his view, the High Court’s lack of jurisdiction in respect of s.29 claims was supported by a number of ‘practical considerations’ as follows:

‘In general the Administrative Court is not well suited to hear factual disputes of the sort that may arise under section 29 and other similar provisions of the 2010 Act. In suitable cases this can be done and there can be live evidence and
cross-examination but that is not normal, whereas the county court is used to conducting such trials on a daily basis.

64 The clear intention of Parliament is that claims under section 29 “must” be brought in the county court. There is an exception to that expressly made for claims for judicial review but that does not mean that it is always desirable that a case should proceed by way of judicial review. The procedure for a claim for judicial review under CPR Pt 54 is sufficiently flexible that justice can be done in all manner of cases. Permission is required before the case can proceed to a substantive hearing. Normally permission would not be granted where there is an adequate alternative remedy. The claimant has to have standing in the sense of a sufficient interest in the matter to which the claim relates: section 31(3) of the Senior Courts Act 1981. In contrast, a statutory claim under paragraph 35 of Schedule 9 to the 1984 Act can be brought by “any person.” These procedural rules mean that the Administrative Court can keep a tight rein on such a case if it is allowed to proceed by way of judicial review at all. None of that is possible in the case of a statutory claim such as the present case.

65 In those circumstances, in my view, when Parliament enacted the exception it did in section 113 of the 2010 Act, it cannot have intended that a statutory claim such as the present, which can be brought as of right under CPR Pt 8 and can be made by any person, should be embraced within the term “claim for judicial review.”

66 Accordingly I have come to the conclusion that this court does not have jurisdiction to entertain the present claim in so far as it is based on an alleged breach of section 29 of the 2010 Act, read with sections 15 and 20.

15. The County Court has power to grant any remedy which could be granted by the High Court in proceedings in tort, or on a claim for judicial review (see s.119(2) of the Equality Act 2010). Further, that an award of damages may include compensation for injury to feelings (s.119(4)).

**Time Limits**

16. Section 118(1) of the Equality Act 2010 provides that a claim may not be brought after the end of the period of 6 months starting with the date of the act to which the claim relates, or such other period as the county court thinks just and equitable.
17. The same principles as to when it is ‘just and equitable’ to extend time apply to the County Court and the Employment Tribunal. The doctrine of ‘continuing acts’ also applies. There is no compulsory mediation scheme for the purposes of Part 3.

**Allocation**

18. The main area of dispute at the case management stage is likely to be allocation. A Defendant will typically want the case allocated to the multi-track, so that it is heard by a Circuit Judge and the normal formalities of a trial apply; whereas a Claimant will typically want the case allocated to the small claims track in order to reduce any costs risk. Parties rarely want the case allocated to the fast track, although this is an option.

19. The small claims track is intended for the most straightforward claims and is the ‘normal track’ for claims which have a value of under £10,000. Practice Direction 26 gives examples of cases generally suitable for the small claims track at 26PD.8. Whilst discrimination cases are not included in that list, the list is not exhaustive.

20. A summary of the main differences between the two tracks are set out in the table below.

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<th>Small Claims Track</th>
<th>Multi-Track</th>
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<td><strong>Level of Judge</strong></td>
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<td>Circuit Judge</td>
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<td><strong>Appeal to</strong></td>
<td>Circuit Judge</td>
<td>Court of Appeal</td>
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<td><strong>Financial Limit</strong></td>
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<td><strong>Procedure</strong></td>
<td>Informal hearings</td>
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<td>– see CPR 27.14.</td>
<td>Costs potentially recoverable</td>
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21. Whilst employment lawyers may think that the Employment Tribunal adopts an ‘informal procedure’ – in fact the small claims track is far more informal than the Employment Tribunal.

22. The allocation of the case to a track will be decided at the Case Management Conference, if not agreed before. When deciding the track for a claim, the court must have regard to the matters set out at CPR 26.8(1), which include the financial value of the claim, the likely complexity of the facts, law or evidence, and the circumstances of the parties.

**Practice Direction**

23. There is a Practice Direction in respect of Proceedings Under Enactments Relating to Equality.²

24. That Practice Direction provides that *inter alia*:

   1. The Equality and Human Rights Commission is to be given notice of each claim by the Claimant in the case;
   
   2. That Rule 35.15 has effect in relation to an assessor who is to be appointed in proceedings in the County Court.

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Assessors

25. The role of an assessor is dealt with at CPR 35.15, which provides that:

2) An assessor will assist the court in dealing with a matter in which the assessor has skill and experience.

(3) An assessor will take such part in the proceedings as the court may direct and in particular the court may direct an assessor to –

(a) prepare a report for the court on any matter at issue in the proceedings; and

(b) attend the whole or any part of the trial to advise the court on any such matter.

(4) If an assessor prepares a report for the court before the trial has begun –

(a) the court will send a copy to each of the parties; and

(b) the parties may use it at trial.

(5) The remuneration to be paid to an assessor is to be determined by the court and will form part of the costs of the proceedings.

26. The leading case on the role of an assessor is Ahmed v Governing Body of the University of Oxford and another [2003] 1 All ER 915, in which the Court of Appeal clarified that although assessors assist Judges by helping them evaluate the evidence, the assessor does not decide the facts and the ultimate decision must be for the Judge.

27. In practice, some of the same individuals who sit as lay members in the Employment Tribunal will sit as assessors on discrimination cases in the County Court. Thus in Cary v Commissioner of Police for the Metropolis [2014] EWCA Civ 987 [2014] WLR (D) 320, CA, an issue arose about whether an assessor who sat as a lay member in the Employment Tribunal and had experience of discrimination cases generally but no specific experience of sexual orientation cases, could sit as an assessor on a sexual
orientation discrimination case. The Court of Appeal held that she could, and that assessors do not need to have specific expertise in relation to the type of discrimination at issue. The Court of Appeal agreed that the fact that an individual sat as a lay member in the Employment Tribunal in itself would not be sufficient to qualify him or her to sit as an assessor.

28. In Cary, the Court of Appeal observed that disputes over the identity and qualifications of the assessor should not arise on the first day of the trial (as had happened in Cary). Instead, before any CMC, the parties should consider (a) whether there is any reason not to have one or more assessors; (b) in respect of what matter(s) the assistance of the assessor(s) should be sought; (c) what sort of assessor (s) that should be; and (d) his or her identity(ies), and if possible reach agreement on the issues. If the parties cannot agree these issues, then the remaining issues should be considered by the court at the same time as directions for trial i.e at a Case Management Conference.

29. The Court of Appeal noted that when the court nominates a proposed assessor, having satisfied itself as to the appropriateness and availability of the person in question, it is required to notify the parties and provide details of the proposed assessor's qualifications, which are most likely to be in the form of a CV, 21 days before any appointment. The Court of Appeal warned courts that the process should not be left to take place immediately before the trial, since if the objection is upheld it will be necessary to select another assessor and give a new notification.

**Costs**

30. As a result of the Jackson reforms, Qualified One-Way Costs Shifting now applies to proceedings which include a claim for damages for personal injuries; under the Fatal Accidents Act 1976, or which arose out of death or personal injury and survives for the benefit of an estate by virtue of section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 (see CPR 44.13).
31. The effect of Qualified One-Way Costs Shifting is that Defendants, including successful Defendants, cannot recover their costs against Claimants unless the court grants permission for an order for costs to be enforced, or one of the limited exceptions within CPR 44.15 apply.

32. It is clear that Qualified One-Way Costs Shifting applies to an ordinary personal injury claim, but it is a matter of controversy whether it also applies to a discrimination claim in which it is alleged that the discrimination in question caused an injury to health.3

33. Further, and more controversially, there is a debate amongst practitioners (which has not yet been decided by any Judge) as to whether Qualified One-Way Costs Shifting could apply to discrimination claims which do not include a claim for damages for injury to health, but do include a claim for injured feelings. This argument is advanced on the basis that injured feelings themselves are a personal injury, despite the fact that in a number of employment cases the courts have accepted that there is a distinction between a personal injury and injured feelings (see for example Sheriff v Klyne Tugs Ltd [1999] IRLR 481 at [11] and Taylor v XLN Telecom [2010] IRLR 499 at [9]).

SUBSTANTIVE LAW

Territorial Scope

34. As employment lawyers will be aware, the Equality Act 2010, unlike the previous discrimination legislation,4 is silent as to its territorial scope. However the Act contains the following relevant provisions:

(1) Section 29(9) provides that: ‘In the application of this section, so far as relating to race or religion or belief, to the granting of entry clearance (within the meaning of

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3 As in the Employment Tribunal, claimants in the County Courts can recover compensation for personal injury caused by unlawful discrimination.

4 For example s.19(2)(b) of the Disability Discrimination Act 1995 provided that “a person is a ‘provider of services’ if he is concerned with the provision, in the United Kingdom, of services to the public or a section of the public”, the Equality Act 2010 contains no such definition.
the Immigration Act 1971), it does not matter whether an act is done within or outside the United Kingdom.’

(2) Section 29(1) provides that: ‘Subsection (9) does not affect the application of any other provision of this Act to conduct outside England and Wales or Scotland’.

(3) Similarly, s.114(5)(b) provides that it does not matter whether the act complained of under s.115 (Immigration Cases) occurs outside the United Kingdom.

(4) Section 30(3) in respect of ships and hovercraft provides that ‘It does not matter whether the ship or hovercraft is within or outside of the United Kingdom’.

35. The Statutory Code of Practice states at 3.18-9 that:

The Act does not limit the scope of the services and public functions provisions to activities which take place in Great Britain. Whether or not an act which takes place outside Great Britain is covered by the Act’s provisions will be determined by the county court or the Sheriff court. The exception to this is services provided by an information society service provider where different territorial rules apply. See paragraphs 11.9 and 11.10 for further details of this provision.

There are a number of specific cases where the Act expressly provides for particular provisions of the Act to apply (or potentially apply) outside the UK: for example, the Act applies to the provision of services and the exercise of public functions in relation to race and religion or belief discrimination in the granting of entry clearance where the act in question takes place outside the UK.

36. Part 5 (Work) has been held to apply to employment relationships when there is a sufficiently close link between the employment relationship and Great Britain. This approach echoes the approach taken by the courts to questions of territorial jurisdiction in claims of unfair dismissal (see Lawson and ors v Serco Ltd and ors [2006] ICR 250 and Ravat v Halliburton Manufacturing and Services [2012] UKSC 1).

37. This same approach was applied to Part 3 in Campbell v Thomas Cook Tour Operations Ltd (No.2) [2014] EqLR 655. In Campbell, the Claimant was disabled and had
difficulties walking. She booked a holiday with Thomas Cook in Tunisia. Unfortunately the indoor swimming pool at her hotel was closed throughout her holiday, and the Claimant was unable to access alternative pools at nearby hotels because no taxis equipped for disabled access were available and Thomas Cook refused to make alternative taxi arrangements for her.

38. HHJ Robinson held that he should adopt the same approach to territorial scope of the Equality Act 2010 as the employment cases cited above, and that ‘it is not enough simply to show that both service provider and disabled person are based in Great Britain. In common with the employment cases, a greater connection with Great Britain must be shown’.

39. HHJ Robinson held that there was a sufficiently close connection between the circumstances of the case and Great Britain, because Thomas Cook and the Claimant had entered into contractual arrangements which included the use of an indoor swimming pool, and Thomas Cook had employees based in Tunisia who were able to discharge the duty to make reasonable adjustments. Accordingly, he held that Thomas Cook had failed to make reasonable adjustments and awarded the claimant £3,500 compensation for her injury to feelings.

Judicial Functions, Courts and Discrimination

40. Paragraph 3 of Schedule 3 to the Equality Act 2010 provides that s.29 does not apply to a judicial function or anything done on behalf of, or on the instructions of, a person exercising a judicial function.

41. The meaning of the term judicial function was considered in *R (Howard) v Official Receiver* [2014] 2 WLR 1518, where the High Court held that the Official Receiver came within paragraph 3 of Schedule 3, even though the decision in question had not involved an adversarial procedure or court or tribunal proceedings.
42. It is a matter of controversy whether this exception applies to matters that we would consider to be case management matters, such as the availability of a sign language interpreter, or other reasonable adjustments required by a disabled claimants or witnesses appearing in the courts. Indeed in *CPS v Fraser* at UKEAT/22/13 [2014] ICR D18, EAT at [66] it was held obiter that the exception should be limited to judges’ core adjudicative and listing functions.

43. There are sound policy reasons for arguing that the exception should not apply to such case management matters – particularly when in some courts decisions about reasonable adjustments are left to administrative staff (and therefore would not fall within the exception), whereas in other courts such decisions are for the Judiciary.

44. The 2013 Equal Treatment Bench Book, guidance for the Judiciary on matters of equality and diversity⁵, states that the Ministry of Justice has been successfully sued in respect of an occasion when a Judge proceeded with a hearing even though he was aware the loop system did not work, and the claimant could not hear.⁶ It is unknown whether the Ministry of Justice relied upon the exception or not, and if it did, why the court disapplied the exception to the Judge’s decision.

45. If the exception does apply to all case management decisions, then it is arguably incompatible with the United Nations Convention on the Rights of People with Disabilities 2006 (“UNCRPD”), which has been incorporated into both domestic and EU law (see discussion on this issue in *U v Butler & Wilson Ltd* (2014) UKEAT/0354/13, [2014] All ER (D) 34 (Sep) at [63 -65]). Article 5 and 13 of UNCRPD impose positive obligations on the UK to address and remove the obstacles faced by disabled persons in realising their rights, and requires the UK to ensure

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⁵ The advice in the Bench Book must be taken into account by every judge and justice hearing a case involving a disabled person (as per Brooke LJ at [43] in *R (King) v Isleworth Crown Court* (unrep)), and endorsed by Cox J at [59] in *Crown Prosecution Service v Fraser*.

⁶ See p11 of the November 2013 Equal Treatment Bench Book.
effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations.

**Nature of Duty to Make Reasonable Adjustments: A Trap for the Unwary**

46. Unwary employment lawyers should be aware of paragraph 2 of Schedule 2 to the Equality Act 2010. This provides that the reference to a disabled person in s.20(3), (4) and (5) of the Act is to disabled persons *generally*. This provision has a significant impact on the nature of the duty to make reasonable adjustments for the purposes of Part 3.

47. For the purposes of Part 3, s.20 when read with paragraph 2 of Schedule 2 to the Equality Act 2010, reads as follows:

   (2) The duty comprises the following three requirements.

   (3) The first requirement is a requirement, where a provision, criterion or practice of A’s puts a disabled person *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 a disabled person *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, **or (b) to adopt a reasonable alternative method of providing the service or exercising the function.**

   (5) The third requirement is a requirement, where a disabled person *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.

48. In *Roads v Central Trains Limited* (2004) 104 Con LR 62, the Court of Appeal held that the inclusion of the words ‘disabled persons generally’ creates a double test for substantial disadvantage as follows:

‘first (in paraphrase), does the particular feature impede people with one or more kinds of disability; secondly, if it does, has it impeded the claimant’.

49. Accordingly, the Court of Appeal held that the Judge should have first considered the question of impeded access (the substantial disadvantage in question) in relation to wheelchair users as a class, *and* then asked it and answered it in relation to Mr Roads.

50. If a court does not consider the effect of the requirement on disabled persons *generally*, and only considers the position of the individual disabled person pursuing the claim (as happened in *Roads* and in *Finnigan v Northumbria Police Chief Constable* [2014] 1 WLR 445), then this is an error of law.

51. The meaning of the term ‘disabled persons generally’ has not yet been resolved by the courts. Arguably, the *Roads* decision is supportive of the view that Part 3 is intended to address the needs of disabled persons who suffer from the most common kinds of disabilities such as the examples given by the Court of Appeal of impaired vision and impaired mobility. Arguably the needs of disabled persons with rare conditions fall outside of Part 3.

52. This view is supported by paragraphs 7.24 – 5 of the Code of Practice, which provide that:
Service providers are not expected to anticipate the needs of every individual who may use their service, but what they are required to think about and take reasonable steps to overcome are barriers that may impede people with different kinds of disability. For example, people with dementia, mental health conditions or mobility impairments may face different types of barriers.

Disabled people are a diverse group with different requirements – for example, visually impaired people who use guide dogs will be prevented from using services with a ‘no dogs’ policy, whereas visually impaired people who use white canes will not be affected by this policy. The duty will still be owed to members of both groups.

53. The duty to make reasonable adjustments for the purposes of Part 3 is not solely a duty that is measured in relation to each individual disabled person who wants to access a service provider’s services. Rather, the duty is an anticipatory one, and is owed to disabled people generally. This is made clear in the Statutory Code of Practice, in particular at paragraphs 7.20 – 21:

In relation to all three areas of activity (services, public functions and associations) the duty is anticipatory in the sense that it requires consideration of, and action in relation to, barriers that impede people with one or more kinds of disability prior to an individual disabled person seeking to use the service, avail themselves of a function or participate in the activities of an association.

Service providers should therefore not wait until a disabled person wants to use a service that they provide before they give consideration to their duty to make reasonable adjustments. They should anticipate the requirements of disabled people and the adjustments that may have to be made for them. Failure to anticipate the need for an adjustment may create additional expense, or render it too late to comply with the duty to make the adjustment. Furthermore, it may not in itself provide a defence to a claim of a failure to make a reasonable adjustment.

54. However, an act of discrimination can only occur if a service provider fails to comply with its duty with respect to an individual disabled person/s. This is because the statutory tort remains a personal one, and a disabled person must be personally affected
by a requirement in order to pursue claims under s.20 and s.21 of the Equality Act 2010.

Knowledge of Disability

55. Employment lawyers will be accustomed to defending complaints of disability discrimination on the basis that at the relevant time the employer did not know of the individual’s disability. That is because Part 3 of Schedule 8 to the Equality Act 2010 provides that an employer is not subject to a duty to make reasonable adjustments if it did not know or could not reasonably be expected to know that the interested disabled person had a disability or was likely to be placed at a disadvantage.

56. However, there is no corresponding provision in respect of Part 3 (Services and Public Functions) or Part 6 (Education), and there is nothing in the Act to suggest that Schedule 8 (which is entitled “Work: Reasonable Adjustments) would apply to other Parts of the Act.

57. Accordingly, the duty to make reasonable adjustments can apply, even if a service provider could not reasonably be expected to know that the interested disabled person had a disability or was likely to be placed at a disadvantage (see also 7.22 of the Statutory Code of Practice).

58. However, the service provider’s lack of knowledge may be relevant to the reasonableness of the steps that it is required to take. By way of example, the Statutory Code of Practice provides at 7.26 that:

Once a service provider has become aware of the requirements of a particular disabled person who uses or seeks to use its services, it might then be reasonable for the service provider to take a particular step to meet these requirements. This is especially so where a disabled person has pointed out the difficulty that they face in accessing services, or has suggested a reasonable solution to that difficulty.