NOTES FOR THE EMPLOYMENT LAWYERS ASSOCIATION

"DISABILITY DISCRIMINATION: KEY CONCEPTS AND PRACTICAL ISSUES"

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Introduction

1. This paper looks at some of the key legal and practical considerations when dealing with claims of disability discrimination. These are considered under the following broad headings:

   a. Establishing 'disability status';

   b. The burden of proof;

   c. Forms of disability discrimination;

   d. Pre-employment health questionnaires;

   e. Managing sickness absence and capability dismissals; and

   f. Other tactical / strategic considerations.

Establishing 'disability status'

2. Obviously, the 'gateway' to establishing any breach of disability discrimination legislation is for the Claimant to prove that they are a disabled person, within the meaning of the Equality Act 2010 ("EqA").

The legal definition

3. Section 6 (1) EqA provides as follows:

> "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."

4. Schedule 1, Part 1 EqA contains further detailed provisions relating to the definition of disability. Further guidance (and helpful practical examples) may be found in the Statutory Code of Practice on Employment, prepared by the Equality and Human Rights Commission ("the Code of Practice") – see in particular Appendix 1.

5. Some of the key points arising from the legislation and case law on disability status may be summarised as follows:

   a. It is not necessary to identify the particular cause of an impairment: **College of Ripon and York St John v Hobbs** [2002] IRLR 185;

   b. A "substantial" adverse effect on an individual's ability to carry out normal day-to-day activities means an adverse effect which is "more than minor or trivial";[1]

   c. "Long-term" means that the impairment has lasted for a period of 12 months or more, or is likely to do so, or is likely to last for the rest of the life of the person affected;

   d. "Likely" means "may well be" or "could well happen" – the test is not "more likely than not": **SCA Packaging Ltd v Boyle** [2009] UKHL 37;

   e. In assessing the adverse effects of an impairment, the effects of measures being taken to treat or correct it (including, in particular, medical treatment and the use of a prosthesis or other aid) are to be disregarded; [2]

   f. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur;

[1] Albeit there is nothing wrong as a matter of law to consider an impairment to be more than trivial, and yet still minor rather than substantial: **Anwar v Tower Hamlets College** [2010] UKEAT/0091/10.

[2] An "aid" in this context may include surgically inserted plates and pins: **Carden v Pickerings Europe Ltd** [2005] IRLR 14. Furthermore, counselling sessions conducted by a consultant psychologist may also be regarded as "medical treatment" for this purpose: **Kapadia v Lambeth London Borough Council** [2000] IRLR 14. Note, however, that this principle does not apply to the impairment of a person's sight, to the extent that it is correctable by the wearing of spectacles and contact lenses.

g. The cumulative effect of related impairments should be taken into account;

h. An impairment which consists of a severe disfigurement is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities;

i. Cancer, HIV infection and multiple sclerosis are each deemed to be a disability;

j. Any person certified by a consultant ophthalmologist to be blind, severely sight-impaired or partially sighted is deemed to be disabled;

k. The following are deemed not to amount to impairments:[3]

- Addiction to alcohol, nicotine or any other substance unless the addiction was originally the result of administration ofmedically prescribed drugs or other medical treatment;

- A tendency to: set fires; steal; physical or sexual abuse of other persons; exhibitionism; and vouyerism;

- Seasonal allergic rhinitis (or "hayfever") unless it aggravates the effect of any other condition;

l. However, an individual may have a condition (for example a depressive illness) that does amount to a disability in its own right, even if that condition was caused by an 'excluded condition' (such as alcoholism);[4]

m. With regard to "progressive conditions", if such a condition has an adverse effect which is not yet sufficiently "substantial" to qualify as a disability, it is treated as doing so if the condition is likely to result in the individual suffering such an impairment.

[3] See in particular Regs. 3 and 4 of the Equality Act 2010 (Disability) Regulations 2010 (SI 2010/2128)

[4] **Power v Panasonic (UK) Ltd** [2003] IRLR 151

6. An important consideration in claims of disability discrimination is the relevant time for assessment. Put simply, in determining whether or not a person is disabled, the Tribunal will generally apply the appropriate test to the Claimant's condition at the date of the alleged discriminatory act(s) – rather than, for example, at the date on which the ET 1 Claim Form is presented; or at the date of the Preliminary Hearing ("PH") – the purpose of which is to determine the question of disability status.[5]

7. Amongst other matters, it is necessary to bear this in mind when drafting instructions and questions for medical experts (as to which, see further below).

8. The following section of this paper concentrates on some of the practical issues which commonly arise in relation to the question of disability status, and practical guidance in respect of the same.

Pleadings

9. If acting for a Claimant, wherever possible avoid making generic assertions such as "the Claimant is a disabled person within the meaning of s. 6 EqA 2010". Whilst it is not necessary to set out an exhaustive history of the Claimant's medical condition, it is generally beneficial to provide a reasonably detailed description of:

   a. What impairment(s) the Claimant suffers from;

   b. Any medical diagnosis (or diagnoses) received;

   c. The adverse effects of the impairment (on the Claimant's ability to carry out normal day-to-day activities);

   d. What treatment / medical intervention has been received;

   e. Any relevant prognosis.

[5] Although it should be noted that it is unlawful to discriminate against someone because of a *past* disability, which may impact upon the relevant time for assessing disability status.

10. Plainly, there are circumstances in which a limitation deadline is fast approaching and the medical evidence available for review is scant (or non-existent). Even in such circumstances, however, it is generally preferable to provide *some* particulars of the impairment(s) relied upon; and the effects of those impairments on the Claimant's ability to carry out normal day-to-day activities (whilst expressly reserving the right to provide further and better particulars in due course, by reference to witness and/or medical evidence).

11. If acting for a Respondent, when drafting the ET 3, give careful consideration as to whether disability status should be conceded. As will no doubt have been observed from the legal section above, the 'threshold' for establishing disability status is relatively low (and certain conditions will automatically be deemed to constitute a disability). In a recent ELA briefing (March 2014), the Regional Employment Judge for London and the North West volunteered the following guidance:

> "Do not take bad points because it is likely to irritate the decision-maker. My particular bugbear is the denial or refusal to admit that a claimant is disabled unless, for example, he or she is lacking a limb. 'We haven't seen the medical evidence' is not a satisfactory excuse or standpoint. The legal test for disability is very low. Enormous time and effort is spent arranging for expert evidence or lining up preliminary hearings on the point, only for the respondent to concede disability a day or two before the hearing. That may not be reasonable conduct."

12. With the greatest of respect of the Regional Judge, there are cases in which an absence of disclosure (of medical evidence) will be a perfectly reasonable justification for not conceding disability at a very early stage of the proceedings. It is, however, fair to say that in certain cases it is blindingly obvious that a worker will be regarded by the Tribunal as a disabled person; and in such cases there is nothing to be gained from adopting an unrealistic and unreasonable stance on this issue (and potentially quite a bit to lose, in addition to attracting the ire of the Judge – see for example the discussion on costs below).

Preliminary Hearings

13. The issue of disability status is a matter which is obviously apt for determination at a PH. Sometimes the Tribunal will list a PH of its own volition (having reviewed the pleadings in the case), and issue directions in respect of the same.

14. More often, Tribunals will list a PH (Case Management), at which the issue of a further (substantive) PH – to deal with the issue of disability status (and possibly other matters, such as time limits) – will be discussed with the parties.

15. Parties should always endeavour to complete and submit a Case Management Agenda prior to any PH, setting out their respective positions on the relevant issues.

16. It is also necessary to have regard to the Presidential Guidance on General Case Management (available online) – see in particular:

    a. Pages 14 – 16, which address the issue of disability status (i.e. the legal requirements); and

    b. Pages 16 – 17, which address the issue of evidence in relation to disability status.

Disclosure of relevant medical records

17. Relevant medical records may encompass some or all of the following:

    a. GP records;

    b. GP reports;

    c. Hospital admission records;

    d. Occupational health reports (which will generally be in the possession of the Respondent);

    e. Other treatment records (e.g. relating to a course of physiotherapy or other forms of rehabilitation);

f. Other 'external' assessments – for example, fitness to work / work capability assessments, carried out for the purpose of assessing entitlement to government benefits.

18. In many cases Respondents will already have in their possession a body of medical evidence relating to the Claimant. The Claimant may, for example:

a. Have been referred on multiple occasions to Occupational Health (resulting in detailed OH reports); and/or

b. Previously have given written consent for the employer to request a medical report from their GP (in accordance with the Access to Medical Reports Act 1988).

19. As a general rule, it will usually be in the Claimant's best interests to provide early disclosure of relevant medical evidence to the Respondent. Assuming that the evidence is consistent with the matters raised in the ET 1, early disclosure may lead to an early concession on the part of the Respondent.

20. Upon receipt of medical records, it may appear to the Respondent that potentially significant information is missing – for example, there may be redacted sections; references to other reports / documents which have not been disclosed; or the records may cover a shorter period of time than the Respondent considers appropriate. In such circumstances, the Respondent should in the first instance write to the Claimant / the Claimant's representatives, specifying:

a. What additional information is sought;

b. The reasons for the request; and

c. A deadline for providing a response and/or disclosing the requested information.

21. If the Claimant fails to respond, or the Respondent is dissatisfied with the response, the Respondent will need to consider making an application to the Tribunal for specific disclosure.

Expert reports

22. At an early stage of the proceedings, careful consideration should be given to whether expert medical evidence is (or may be) required; and if so, in relation to what. It is generally good practice for the parties to liaise with each other in relation this issue *prior to* any PH taking place; and to ascertain whether a common approach is possible – e.g. in relation to the number / type of experts who may be required.

23. In **De Keyser v Wilson** [2001] IRLR 324 at 330, the EAT gave guidance as to the procedure to be adopted for obtaining expert medical evidence in disability discrimination cases. In **De Keyser**, it was emphasised that the preferred course will usually be the *joint* instruction of an expert(s).

24. This process will generally involve:

a. Identifying what type of expert(s) will be required (e.g. an orthopaedic consultant or a clinical psychologist) – in some cases, the nature of the Claimant's condition may render it necessary to have experts from more than one specialist field;

b. One party proposing a list of named experts whom it would be content to instruct (attaching CVs and details of relevant qualifications / experience / expertise etc);

c. The other party selecting / agreeing a named expert from that list;

d. Alternatively, if none of the named experts are deemed to be suitable / appropriate, explaining why and providing a further list for consideration by the other party;

e. The parties seeking to agree whether an examination of the Claimant by the medical expert is required, or whether it is sufficient for the report to be based on the existing medical documentation;

f. The parties seeking to agree what documentation is to be provided to the medical expert;

g. The parties seeking to agree a joint letter of instruction, which should include a list of specific questions to be answered by the appointed expert;

h. In the event that the parties are unable to reach agreement on some or all of the above matters, requiring the Tribunal to determine the outstanding issue(s), having regard to representations from both sides (whether oral and/or in writing).

25. Whilst the default position is the joint instruction of an expert(s), there may be circumstances in which one or both parties consider that it is necessary to instruct their 'own' expert. This may be the case if, for example, the claim is a particularly high value one, or where the medical issues are particularly complicated (and, accordingly, it is considered appropriate to obtain a broader spectrum of expert opinion). If the Tribunal agrees that this is a sensible approach, both parties will be responsible for instructing an appropriate expert and disclosing the respective reports. However, even in a 'non-joint' expert case, the Tribunal may order that the parties seek to agree a 'common' letter of instruction to their respective experts.

26. Furthermore, in a 'non-joint' expert case, the Tribunal will usually issue directions for the experts to meet following the production of their reports; to discuss the medical position amongst themselves; and to produce a supplemental report, setting out (preferably in terms which are readily understandable to a lay person): (a) those matters which are agreed upon; and (b) those which give rise to a material difference of opinion.

27. Serious disputes in relation to medical evidence tend to arise in circumstances where:

a. The Tribunal has ordered the joint instruction of an expert;

b. One party is dissatisfied with the report; and

c. The dissatisfied party seeks permission to obtain, or does obtain (without first obtaining the Tribunal's express permission) its own 'additional' expert report.

28. In such cases, the party seeking permission to obtain and/or admit into evidence the 'additional' expert report will bear the burden of persuading the Tribunal that it is in the interests of justice (and in accordance with the overriding objective) to do so.

Asking questions of experts / requiring attendance at a Preliminary Hearing

29. Following the production of an expert report(s), the Parties will generally have permission to put written questions to the expert(s).

30. In the field of civil litigation, the CPR makes it clear that it will be the exception rather than the rule for experts to attend Court, give oral evidence and be subjected to cross-examination. Paragraph 5 of the PD to CPR, r. 35 provides as follows:

> "Cross-examination of experts on the contents of their instructions will not be allowed unless the court permits it (or unless the party who gave the instructions consents). Before it gives permission the court must be satisfied that there are reasonable grounds to consider that the statement in the report of the substance of the instructions is inaccurate or incomplete. If the court is so satisfied, it will allow the cross-examination where it appears to be in the interests of justice."

31. Whilst the CPR are not directly applicable to Tribunal proceedings, this guidance is likely to be a relevant consideration for Tribunals when considering an application from one or both parties to require the attendance of expert witnesses at a hearing.

32. More generally, Part 35 of the CPR (and the accompanying Practice Direction) is a useful source of information and guidance on the issue of expert evidence; and can provide considerable support for any representations made in the context of Tribunal proceedings.

Witness statements

33. Whilst medical records and expert medical reports will play an important part in the Tribunal's assessment of whether or not the Claimant was a disabled person at the relevant time, the Claimant will also need to prepare a signed witness statement, setting out the nature of his impairment(s), and the adverse impact which it has had on his day-to-day life.

34. Although it is common for legal representatives to prepare first drafts of witness statements (based on the client's instructions), it is important to ensure that the content of the statement accurately reflects the speaking style of the individual concerned. If there is a striking 'mismatch' between the style of the written statement and the oral evidence given by the

witness, this may give rise to doubts (on the part of the Tribunal) as to the authenticity and genuineness of the evidence given by that witness.

35. Those acting on behalf of Claimants should also give careful consideration to whether it would (or may) be helpful to adduce witness evidence from persons *other than* the Claimant – for example, close family members or friends, who are in a position to describe (from an 'external' perspective) how the impairment(s) have affected the Claimant on a day-to-day basis.

Costs

36. In circumstances where a Claimant considers that a Respondent's refusal to concede disability status is unreasonable, consideration should be given to sending a without prejudice save as to costs letter. This letter should generally:

    a. Set out the reasons (in reasonable but not necessarily exhaustive detail) why the Claimant considers that the Respondent's approach to the issue is wholly unrealistic;

    b. Provide the Respondent with a window of opportunity to concede the issue of disability status (thereby eliminating the need for a contested PH on the issue); and

    c. Specify the consequences of the Respondent failing to concede disability status, followed by a finding (at a contested PH) that the Claimant is a disabled person.

37. With regard to (c) above, rather than making a generalised statement that the Claimant "reserves his rights to make an application for costs at the relevant time", it is generally good practice to try and identify (as precisely as possible) the costs which are likely to be incurred by the Claimant in preparing for and attending a PH on the issue (which the Claimant will say were attributable to the Respondent's unreasonable conduct of the proceedings).

38. A Respondent should be very wary of failing to engage with the points made in a costs warning letter: a failure to do so may itself be regarded as unreasonable conduct: **Peat v Birmingham City Council** [2012] UKEAT/0503/11/CEA.

39. Rules 74 – 84 of Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("the ET Rules") set out the relevant provisions in relation to costs orders, preparation time orders and wasted costs orders.

The burden of proof

40. A detailed analysis of the law relating to the burden of proof in discrimination cases is outside the scope of this paper. For present purposes, however, the position may be summarised as follows:

    a. A Claimant is required to demonstrate a *prima facie* case of unlawful discrimination;

    b. In other words, a Claimant must prove (on the balance of probabilities) facts from which a Tribunal could reasonably and properly conclude, in the absence of any other explanation, that he had been subjected to unlawful discrimination;

    c. If the Tribunal is satisfied that the Respondent *does* have a 'case to answer', the burden of proof shifts to the Respondent to prove (on the balance of probabilities) that it did not discriminate against the Claimant.

41. This is often referred to as the 'reverse burden of proof'; and is a very important consideration when assessing the prospects of successfully establishing or defending a complaint of unlawful discrimination.

42. Section 136 EqA is the statutory provision which articulates the 'reverse burden of proof' principle. However, one must look to case law for detailed guidance on the operation of this legal principle. A recent decision of the EAT, which provides a useful reference point for further research and guidance on this issue, is **Fraser v University of Leicester** [2014] UKEAT/0155/13/DM.

Forms of disability discrimination

43. Complaints of disability discrimination may involve the following:

    a. Direct disability discrimination (s. 13 EqA);

    b. Discrimination arising from disability (s. 15 EqA)

    c. Indirect disability discrimination (s. 19 EqA);

    d. Failure to make reasonable adjustments (s. 20 EqA);

    e. Harassment related to disability (s. 26 EqA);

    f. Victimisation (s. 27 EqA).

44. Some of the key concepts in relation to these heads of claim are considered below.

Direct disability discrimination

45. Section 13 EqA provides as follows:

> "(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.
> ….
> (3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.
> …"

46. Section 13 (3) makes it clear that more favourable treatment of a disabled person (for example, by making a reasonable adjustment) will not constitute direct discrimination against a non-disabled person.

47. With regard to the test for direct discrimination, the Tribunal must consider:

a. Whether the Claimant was subjected to a detriment; and

b. If so, whether that constituted less favourable treatment because of disability.

48. The legal formulation of the less favourable treatment test has been articulated thus:

> "…the ultimate question is – necessarily – what was the ground of the treatment complained of (or – if you prefer – the reason why it occurred)."
>
> **Amnesty International v Ahmed** [2009] IRLR 884 (at para. 36)

49. Accordingly, the test for direct discrimination is frequently referred to as the "reason why" question. Importantly, it is not a "but for" test. Furthermore, it is trite law that:

a. A Claimant is not required to prove any discriminatory 'motive' or intention to discriminate on the part of the alleged perpetrator; and

b. The protected characteristic (e.g. disability) need not be the sole or principal cause of the detrimental treatment complained of; it is sufficient if the protected characteristic had a significant influence on the treatment complained of.

50. In order to corroborate an allegation that they have been treated less favourably because of disability, Claimants may choose to compare their treatment to that of an actual comparator (e.g. a particular colleague(s), whose circumstances are / were materially the same, but who is not a disabled person); and/or a hypothetical comparator.

51. Section 23 EqA provides that on a comparison of cases for the purpose of a direct discrimination claim (or an indirect discrimination claim under s. 19 EqA), "there must be no material difference between the circumstances relating to each case."

52. Whilst the 'comparator analysis' may provide valuable assistance Tribunals tasked with answering the "reason why" question, care should be taken to ensure that sight is not lost of this critical question. In **Edinburgh City Council v Dickson** [2009] UKEATS/0038/09/B1, the EAT observed that:

"…The present case affords a good example of the complication and artificiality that can be involved in seeking to define the characteristics of the hypothetical comparator…"

53. The EAT also cited the comments made by Lord Nicholls in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285, who cautioned that there is a risk of "arid and confusing disputes about the identification of the appropriate comparator" in direct discrimination claims.

54. With regard to the nature of the comparison involved in claims of direct disability discrimination, it is also important to have regard to section 6 (3) EqA, which provides that:

"In relation to the protected characteristic of disability –

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability."

55. This provision is significant, since it requires a focus on the "particular disability" of the Claimant, rather than disability in general. In other words, the Tribunal must consider whether the "reason why" the Claimant was subjected to detrimental and less favourable treatment was because (for example) his employer had a stereotypical and negative attitude towards people with clinical depression (i.e. a *particular type* of disability).

Associative discrimination

56. Another important statutory provision is section 24 EqA, which provides that for the purpose of establishing direct discrimination, the Claimant need not actually possesses the protected characteristic relied upon (e.g. disability). This means that claims may be brought on the basis that a Claimant, whilst not personally disabled, has been treated less favourably because of his association with another person who *is* disabled (for example, a friend, child or other relative). Prior to the coming into force of the EqA, the European Court of Justice confirmed that direct discrimination by association (frequently referred to as 'associative discrimination')

was contrary to the Equal Treatment Framework Directive, and therefore prohibited: **Coleman v Attridge Law** [2008] C-303/06.

57. Note, however, the recent decision of the CA in **Hainsworth v Ministry of Defence [2014] EWCA Civ 763** (discussed in the section on reasonable adjustments below).

Perceived discrimination

58. Another issue which has generated considerable academic debate is whether it is necessary, in order to establish a complaint of direct disability discrimination, to prove that the Claimant (or someone associated with the Claimant) is a disabled person; or whether it is sufficient to show less favourable treatment because the perpetrator *believed* (genuinely but wrongly) that the Claimant (or someone associated with the Claimant) was disabled. This is frequently referred to as 'perceived discrimination'.

59. Under the old law (the Disability Discrimination Act 1995), the EAT expressed the view that treatment on the basis of a mistaken perception that an employee was suffering from a particular disability did *not* fall within the definition of direct disability discrimination. In **Aitken v Commissioner of the Metropolis of the Police** [2010] UKEAT/0226/09/ZT, Slade J held (at para. 76):

> "The DDA requires an actual disability; albeit that since ***Coleman*** the disability may be that of a person associated with the complainant...The language of DDA Section 3A(1) and (5) requires that the discrimination of which complaint is made be for a reason related to or on grounds of an actual particular disability..."

60. The EAT's decision was upheld by the CA, albeit the CA held that owing to the factual findings of the Tribunal, it was:

> "…unnecessary to attempt an answer to such questions as whether a person has to have an actual disability in order to succeed in a claim for disability discrimination, whether direct or disability-related, and whether less favourable treatment on the ground of a wrongly perceived or imagined disability is unlawful discrimination contrary to the 1995 Act."[6]

[6] [2012] ICR 78, at para. 62

61. In **J v DLA Piper** [2010] ICR 1052, the EAT considered that extending the scope of the DDA to encompass cases of perceived disability discrimination could not be done without a reference to the European Court of Justice. While the EAT could "see the analogy with the case of associative discrimination", it did not regard it as "self-evidently correct". In particular, the EAT was concerned that "What the putative discriminator perceives will not always be clearly identifiable as a 'disability'."

62. The EAT recognised that in circumstances where, for example, a manager discriminates against an employee because he believes her to be 'depressed':

> "...the question whether the effects of the perceived...depression, are likely to last more or less than 12 months may never enter his thinking, consciously or unconsciously (nor indeed, in the case of perceived 'depression', may it be clear what he understands by the term)."

63. The EAT posited the rhetorical question: "In such a case, on what basis can he [the manager] be said to be discriminating 'on the ground of' the employee's – perceived – disability?" Although it did not consider the question necessarily to be "unanswerable", it also did not consider that the position was so clear that it could dispose of the issue without a reference to the ECJ.

64. On the facts of the particular case, however, the EAT declined to make a reference to the ECJ. This was because, *inter alia*, the reference would have to proceed on the basis of assumed facts, rather than clear factual findings about "what was going on inside the heads of the alleged discriminators" at the material time.

65. In **Aylott v Stockton-On-Tees Borough Council** [2010] EWCA Civ 910**,** the Court of Appeal considered, *inter alia*, whether the respondent's *assumptions* about the claimant's medical condition could justifiably support a finding of direct disability discrimination. At para. 46 of the CA's judgment, Mummery LJ stated:

> "...I am unable to accept that, in the circumstances of this case, the ET's reference to the Council's 'stereotypical view of mental illness' was too vague to support the finding of direct discrimination. Direct discrimination can occur, for example, when assumptions are made that a claimant, as an individual, has characteristics associated with a group to which the claimant belongs, irrespective of whether

the claimant or most members of the group have those characteristics: see *R (European Roma Rights) v Prague Immigration Officer* [2005] 2 AC 1."

(Emphasis added)

66. The facts of this case may, however, be distinguished from those of 'pure' perceived discrimination, on the basis that it was common ground in **Aylott** that the Claimant, who suffered from bipolar affective disorder, was in fact disabled under the DDA at the material time. In short, the claimant *did* "belong" to a "group" of persons suffering from a disability; and the employer's "assumptions" did not relate to the existence or otherwise of a disability, but rather the manifestations of that particular disability.

67. Thus, it can be seen that the position under the DDA 1995 was far from clear.

68. The EqA does not contain any express prohibition on treating someone less favourably because they are wrongly believed to possess a particular protected characteristic. However, the intention behind the formulation of the direct discrimination test is easy to discern: perceived discrimination is prohibited under the EqA. For example, the explanatory notes (para. 59) suggest that the test of direct discrimination is:

> "...broad enough to cover cases where the less favourable treatment is because of the victim's association with someone who has that characteristic (for example, is disabled)...or because the victim is wrongly thought to have it (for example, a particular religious belief)"
>
> (Emphasis added)

69. The explanatory notes (para. 63) also provide the following illustrative example of direct discrimination (albeit in a non-disability context):

> "If an employer rejects a job application form from a white man who he wrongly thinks is black, because the applicant has an African-sounding name, this would constitute direct race discrimination based on the employer's mistaken perception."

70. Furthermore, the Code of Practice states as follows:

> "2.11
> Non-disabled people are protected against direct disability discrimination only where they are perceived to have a disability or are associated with a disabled person (see paragraphs 3.11 to 3.21)…"

….

"Discrimination by perception
3.21
It is also direct discrimination if an employer treats a worker less favourably because the employer mistakenly thinks that the worker has a protected characteristic. However, this does not apply to pregnancy and maternity or marriage and civil partnership."

71. So, it would seem that the position in principle is clear: treating somebody less favourably because they are (wrongly) thought to be a disabled person will constitute unlawful direct disability discrimination. However, quite how the practical difficulties identified by the EAT in **J v DLA Piper** are resolved by Tribunals remains to be seen.

Discrimination arising from disability

72. Section 15 EqA was a significant new provision relating to disability discrimination. It was intended to address the 'gap in protection' left as a consequence of the House of Lords' decision in **Malcom v Lewisham Borough Council** [2008] IRLR 700.

73. Importantly, section 15 EqA does not require any form of comparative exercise to be carried out: the test is one of *unfavourable* treatment (not less favourable treatment).

74. Section 15 EqA provides as follows:

"(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.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

75. As a preliminary observation, it important to note that the wording of section 15 EqA requires the Claimant to *be* a disabled person; compare and contrast with the position under section 13 EqA.

76. As to what may constitute discrimination arising from disability, the explanatory notes to the EqA provide the following illustrative example:

> "An employee with a visual impairment is dismissed because he cannot do as much work as a non-disabled colleague. If the employer sought to justify the dismissal, he would need to show that it was a proportionate means of achieving a legitimate aim."

77. Another commonly cited example is that of an employee who is regularly absent from work (owing to a disability); and who is subjected to disciplinary or other unfavourable action as a consequence. It will not be an answer to such a claim for an employer simply to state that it applies its absence policy equally to all employees. Rather, the employer will be required to justify its conduct – i.e. to demonstrate that its treatment of the Claimant constituted a proportionate means of achieving a legitimate aim. This is frequently referred to as the 'objective justification' defence.

78. In **R (Elias) v Secretary of State for Defence** [2006] IRLR 934, Mummery LJ summarised the position thus (at para. 151):

> "…the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."

79. In **Hardys & Hansons plc v Lax** [2005] IRLR 726, the Court of Appeal emphasised (in the context of an indirect sex discrimination claim) that the Tribunal must *not* apply a range of reasonable responses test in determining whether treatment is objectively justified. Pill LJ held (at para. 32):

> "The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the appellants' submission (apparently accepted by the EAT) that, when reaching its

conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances..."

80. Gage LJ stated (at para. 59) that:

> "...'justifiable' requires an objective balance between the discriminatory effect of the condition on the employee and the reasonable needs of the employer. I agree with Pill LJ that it requires the employment tribunal to assess the reasonable needs of the business taking into account the principle of proportionality. In my view the reasonably necessary test is much the same as a test of proportionality and rather different to a margin of appreciation."

81. For Respondents seeking to advance a defence of objective justification, it is important to be able to articulate, clearly and concisely (and preferably at an early stage of the proceedings):

a. What aims it was seeking to achieve, by treating the Claimant in the manner complained of;

b. Why those aim(s) were legitimate; and

c. Why the means adopted (to achieve those aim(s)) were reasonably necessary.

82. With regard to (c) above, it will be necessary to give careful consideration to the practicality and/or feasibility of what may the Claimant may put forward as 'less restrictive alternatives' (in support of a contention that the means which *were* adopted by the Respondent were disproportionate).

83. With regard to the 'knowledge defence' contained in subsection (2) of section 15 EqA, the burden is on the Respondent to show both that:

a. It did not know that the Claimant was a disabled person; and

b. It could not reasonably have been expected to know that the Claimant was a disabled person (i.e. constructive knowledge).

84. In practical terms, this means that a Respondent is not entitled to pray in aid the 'ignorance defence', in circumstances where it should have been apparent to a reasonably diligent employer that the Claimant was a disabled person. In any case where knowledge is in issue (which it frequently is in reasonable adjustments claims, also), it is important to consider:

a. What evidence was before the Respondent at the time (e.g. sick notes and/or occupational health reports); and also;

b. What investigations one would ordinarily have expected an employer to have carried out in the circumstances.

85. In **Gallop v Newport City Council** [2014] IRLR 211, the CA emphasised that an employer will not be entitled to rely on the 'lack of knowledge defence', in circumstances where it *uncritically accepts* a conclusion (which ultimately transpires to be incorrect), expressed in an Occupational Health (or other medical) report, that a worker is not a disabled person. Rimer LJ provided the following guidance to employers:

> "42. …The problem with certain types of disability, or claimed disability, is that it is only when eventually the ET rules on the question that it is known whether the claimant was in fact a disabled person. In the meantime, however, the responsible employer has to make his own judgment as to whether the employee is or is not disabled. In making that judgment, the employer will rightly want assistance and guidance from occupational health or other medical advisers.
>
> 43. That assistance and guidance may be to the effect that the employee is a disabled person; and, unless the employer has good reason to disagree with the basis of such advice, he will ordinarily respect it in his dealings with the employee. In other cases, the guidance may be that the opinion of the adviser is that the employee is not a disabled person. In such cases, the employer must not forget that it is still he, the employer, who has to make the factual judgment as to whether the employee is or is not disabled: he cannot simply rubber stamp the adviser's opinion that he is not.
>
> 44. I add that this case illustrates the need for the employer, when seeking outside advice from clinicians, not simply to ask in general terms whether the employee is a disabled person within the meaning of the legislation but to pose specific *practical* questions directed to the particular circumstances of the putative disability. The answers to such questions will then provide real assistance to the employer in forming his judgment as to whether the criteria for disability are satisfied."

Indirect disability discrimination

86. Section 19 EqA provides as follows:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

87. Logically, the first step is to identify *what* provision, criterion or practice ("PCP") was *actually applied* by the Respondent *to the Claimant* (and which is said by the Claimant to be indirectly discriminatory against him, as a person suffering from a particular disability).

88. In the context of indirect disability discrimination, illustrative examples of potentially discriminatory PCPs include the following:

a. A requirement to work full-time;

b. A requirement to travel long distances;

c. A prohibition on home working;

d. A requirement to carry out heavy manual lifting;

e. The application of a sickness absence / capability / disciplinary policy;

f. Taking into account sickness absence as part of a redundancy, appraisal, promotion or other form of assessment / selection process;

g. Requiring employees who are no longer capable of performing their contracted role to participate in a competitive recruitment process for an alternative role (rather than offering automatic redeployment to a suitable alternative role).

89. Unlike the duty to make reasonable adjustments (as to which, see below), the concept of indirect disability discrimination requires a Claimant to establish not only personal disadvantage (as a result of the application of the PCP in question), but also group disadvantage. For this reason, it is often looked upon as a 'lesser form' of protection for disabled persons than section 20 EqA. The relevant 'group comparison' requires a comparison to be made between the effect(s) of the PCP on: (a) persons who share the Claimant's particular disability; and (b) those who do not.

90. As to the issue of "particular disadvantage", once again careful consideration should be given as to how this ought to be / has been defined. This is an area where (in particular) what may appear to be a small pleading point can have a very substantial impact on the eventual outcome of the case. For example, imagine a scenario in which a Claimant is not short-listed for a promotion (and therefore not interviewed for the post), owing to a poor score under the Respondent's sickness absence criterion. The "particular disadvantage" in such a case could be defined simply as "failing to award the Claimant a promotion." However, defining the particular disadvantage in this way would afford the Respondent an opportunity to defend the claim on the basis that even if the Claimant had been short-listed for interview, there were far better qualified candidates for the role – and that, as such, the application of the PCP did not put the Claimant at the particular disadvantage complained of (on the basis that he would never have been offered the promotion anyway, irrespective of his record of sickness absence).

91. On the other hand, the Respondent may be placed in a more difficult position if the Claimant defines the particular disadvantage as:

> "Failing to: (a) award the Claimant a promotion; (b) short-list the Claimant for interview; (c) interview the Claimant; (d) afford the Claimant a fair and reasonable opportunity to

demonstrate his suitability for the role; and/or (e) give proper consideration to the Claimant's skills, abilities, qualifications and experience when carrying out the short-listing and selection process."

92. If group disadvantage can be made out on the facts, the Claimant must also demonstrate that he was personally put at the "particular disadvantage" complained of.

93. It is only if the Claimant is able to satisfy all of these elements that the Respondent will be required to justify the application of the PCP, by reference to the objective justification test discussed above.

Failure to make reasonable adjustments

94. Section 20 EqA provides for three main 'categories' of reasonable adjustments claims – namely those where a disabled person is put at a substantial disadvantage:

a. Because of a PCP which is applied to him (s. 20 (3) EqA);

b. Because of a physical feature (s. 20 (4) EqA); and/or

c. Because of a failure to provide an auxiliary aid (s. 20 (5) EqA).

95. Buried within Schedule 8 to the EqA (specifically, Part 3, para. 20 (1)) is the following important provision:

> "A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—
>
> (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;
>
> (b) in any other case referred to in this Part of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."

96. In **Wilcox v Birmingham CAB Services Limited** [2011] UKEAT/0293/10/DM, the EAT confirmed (at para. 37) that an employer is only under a duty to make reasonable adjustments if:

a. The employee is disabled;

b. The employee is likely to be placed at a substantial disadvantage (in comparison with non-disabled employees) as a result of a relevant matter; and

c. The employer knows, or ought reasonably to have known, both (a) and (b) above.

97. In other words, there must be knowledge on the part of the employer (whether actual or constructive) of the Claimant's disability *and* the substantial disadvantage from which he suffers / is likely to suffer.

98. In **Hainsworth v Ministry of Defence [2014] EWCA Civ 763**, the CA was required to determine whether the duty to make reasonable adjustments extends to a duty to make reasonable adjustments for the benefit of a *non*-disabled worker, because of their *association* with a disabled person (for example, making adjustments to cater for a non-disabled worker's caring responsibilities for a disabled person). The CA held that it did not.

99. The CA observed that previous case law (see **Coleman v Attridge Law** – discussed above) had confirmed that claims of associative discrimination can apply to *direct* discrimination claims. However, it held that the wording of the EqA and Article 5 of the Equal Treatment Framework Directive only applies to reasonable adjustments *for the assistance of disabled employees or prospective disabled employees*.

100. In **Environment Agency v Rowan** [2008] IRLR 20 (a case decided under the DDA 1995 rather than the EqA, but still cited as important guidance), the EAT held (at para. 27) that a Tribunal considering a claim that an employer has failed to comply with the duty to make reasonable adjustments must identify:

a. The provision, criterion or practice applied by or on behalf of an employer; or

b. The physical feature of premises occupied by the employer [or, under the EqA, the auxiliary aid which has not been provided];

c. The identity of non-disabled comparators (where appropriate); and

d. The nature and extent of the substantial disadvantage suffered by the Claimant.

101. This guidance was recently reviewed and endorsed by the EAT in **McCarthy v Jaguar Cars Limited** [2013] UKEAT/0320/13/SM.

102. With regard to the identity of non-disabled comparators, they need not be persons whose circumstances are (but for the disability) materially the same as the Claimant's (note that section 23 EqA does not apply to section 20 EqA). Accordingly, for the purpose of a reasonable adjustments claim, there may be a more 'general' comparison to be carried out between the Claimant (a disabled person) and non-disabled persons.

103. If a Claimant is able to demonstrate a (comparative) substantial disadvantage – which, consistent with the section on 'disability status', means "more than minor or trivial" – attention then turns to whether the Respondent "failed to take such steps as it is reasonable to have to take to avoid the disadvantage."

104. Importantly, a Claimant is not obliged to demonstrate that the reasonable adjustment contended for *would have* avoided the disadvantage in question. In **Leeds Hospital NHS Trust v Foster** [2011] UKEAT/0552/10/JOJ, the EAT held (at para. 17) that:

> "…there was no need for the Tribunal to go as far as to find that there would have been a good or real prospect of Mr Foster being redeployed if he had been on the redeployment register between January and June 2008. It would have been sufficient for the Tribunal to find that there would have been just *a* prospect of that. That is the effect of what the Employment Appeal Tribunal (Judge McMullen QC presiding) held in **Cumbria Probation Board v Collingwood** (UKEAT/0079/08/JOJ) at [50]. That is not inconsistent with what the Employment Appeal Tribunal (Judge Peter Clark presiding) had previously said in **Romec Ltd v Rudham** (UKEAT/0069/07/DA) at [39]. The Employment Appeal Tribunal was saying that if there was a real prospect of an adjustment removing the disabled employee's disadvantage, that would be sufficient to make the adjustment a reasonable one, but the Employment Appeal Tribunal was not saying that a prospect less than a real prospect would not be sufficient to make the

adjustment a reasonable one. When those propositions were put to [Counsel for the Appellant] he did not disagree with them."

(Underlining added)

105. As to considerations of reasonableness, para. 6.28 of the Code provides the following guidance:

"The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

• whether taking any particular steps would be effective in preventing the substantial disadvantage;

• the practicability of the step;

• the financial and other costs of making the adjustment and the extent of any disruption caused;

• the extent of the employer's financial or other resources;

• the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

• the type and size of the employer."

106. Illustrative examples of steps which may constitute reasonable adjustments include the following:

a. Providing specialist equipment, such as ergonomic desks, chairs and computer equipment;

b. Re-allocating certain duties to another person(s);

c. Altering hours of work;

d. Permitting home / remote working;

e. Permitting other forms of flexible working;

f. Implementing a phased return to work;

g. Paying for external treatment / support which help to facilitate a return to work;

h. Offering redeployment to a suitable alternative vacancy (possibly with the provision of training, mentoring and other forms of support);

i. Discounting or disregarding periods of disability-related absence from work (e.g. for the purpose of a redundancy selection process).

Harassment related to disability

107. Section 26 (1) EqA provides that a person (A) will harass another (B) in circumstances where he:

> "(a) engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of:
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

108. It is important to note that the unwanted conduct must be "related to a relevant protected characteristic" (which includes disability); however, it is not necessary for the person making the complaint (of harassment) to actually possess the protected characteristic in question. So, a worker who witnesses his manager making offensive remarks about a colleague's disability will be entitled to bring a complaint of harassment related to disability, notwithstanding that he: (a) was not the direct target of the insults; and (b) is not himself a disabled person.

109. Section 26 (4) EqA provides that in deciding whether unwanted conduct has the *effect* of violating the complainant's person's dignity; or creating an intimidating, hostile, degrading, humiliating or offensive environment for the complainant, the tribunal must take into account:

a. The perception of the claimant;

b. The other circumstances of the case; and

c. Whether it is reasonable for the conduct to have that effect.

110. Thus, section 26 EqA imports an *objective* element to the test of harassment. In practice, this means that a Respondent may avoid liability in circumstances where an oversensitive employee complains of harassment, and the Tribunal accepts that the *purpose* of the conduct complained of was not to violate the complainant's dignity or create an offensive (etc) environment for them.

111. This issue was recently considered by the EAT in **Heafield v Times Newspapers Ltd** [2013] UKEATPA/1305/12/BA. The Claimant, a Catholic sub-editor of The Times, was offended when an editor shouted across the newsroom (twice in quick succession): "Can anyone tell what's happening to the fucking Pope?" The context of this outburst was a delay in the production of a news story regarding the Pope. The Tribunal held that the use of bad language was evidently merely an expression of bad temper and not intended to express hostility to the Pope or Catholicism and that it did not constitute harassment related to religion. The EAT upheld the Tribunal's finding, stating as follows (at para. 10):

> "Turning to the *effect* of what Mr Wilson said, the Tribunal found at paragraph 88 of the reasons that the Appellant was upset by it; and it seems, arguably over-generously, to have treated that as meaning that he had suffered the proscribed consequences. But it held that the case fell within the proviso in paragraph (2) of regulation 5 – in other words, that, to the extent that the Appellant felt his dignity to be violated or that an adverse environment had been created, that was not a reasonable reaction. In my judgment that conclusion was plainly right. What Mr Wilson said was not only not ill-intentioned or anti-Catholic or directed at the Pope or at Catholics: it was *evidently* not any of those things. No doubt in a perfect world he should not have used an expletive in the context of a sentence about the Pope, because it might be taken as disrespectful by a pious Catholic of tender sensibilities, but people are not perfect and sometimes use bad language thoughtlessly: a reasonable person would have understood that and made allowance for it. The Tribunal quoted the following passage from our judgment in **Dhaliwal**:

" … [N]ot every racially slanted adverse comment or conduct may constitute the violation of a persons dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers and Tribunals are sensitive to the hurt that can be caused by racially offensive comments or conduct, or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred, it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

Those observations are as applicable to the question of reasonableness as to the question of whether a claimant's dignity has in fact been violated in the first place. The facts of the present case seem to me a good illustration of the kind of case in which the imposition of legal liabilities is undesirable and outside the scope of the legislation."

Victimisation

112. As a concept, victimisation may be understood as 'retaliation' (in the context of disputes involving allegations of unlawful discrimination). Section 27 EqA provides as follows:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

113. Generalised (or indeed specific) complaints of unfair, unreasonable and/or unlawful treatment will *not* constitute "protected acts" for the purpose of section 27 EqA; the complaints must relate to conduct which is prohibited under the EqA. In **Durrani London Borough of Ealing** [2013] UKEAT 0454/2012/1004, the EAT held (at para. 22):

> "I would accept that it is not necessary that the complaint referred to race using that very word. But there must be something sufficient about the complaint to show that it is a complaint to which at least potentially the Act applies. As Mr Davies points out, the Tribunal found as a fact that the Claimant did not attribute any treatment (at the time) to the fact that he is British of Pakistani origin. That finding of fact alone means that there is no evidence that an employer, seeking to cause detriment to the Claimant as a result of making the complaints he did, could have been victimising him for a complaint made by reference to, under, or associated with the relevant Act."

114. With regard to the issue of causation, it is not a defence to a claim of victimisation for an employer to say that it would have treated somebody who made a complaint about something *other than* discrimination in exactly the same way as it treated the Claimant (who *did* raise a complaint of discrimination). A cautionary tale for employers is the EAT's decision in **Woodhouse v West North West Homes Ltd** [2013] IRLR 773.

115. In this case, over a period of four years, the Claimant lodged ten internal grievances alleging race discrimination; and seven Tribunal claims against his employer. The Respondent eventually dismissed him, citing of a fundamental breakdown in trust and confidence (a potentially fair reason for dismissal).

116. The Claimant complained that his dismissal constituted unlawful victimisation. The Tribunal found that almost all of the Claimant's underlying grievances were "empty allegations without any proper evidential basis or grounds for his suspicion." The Tribunal went on to reject his complaint of victimisation, on the basis that that the Respondent would have dismissed any employee who had brought a similar number of meritless grievances and claims.

117. The EAT overturned this decision on appeal. It held that the Tribunal had been wrong to base its conclusion (that there had been no victimisation) on a comparative assessment, stating (at para 84).

"…The comparison here between somebody who has made groundless complaints of race discrimination and somebody else who has made groundless complaints of a different variety is exactly of that [unhelpful] character. Therefore, the analytical tool used here by the Employment Tribunal was that of an unhelpful comparison to answer a question that required no comparative analysis in any event."

118. The EAT also noted, however, that the Respondent had failed to allege (at the original Tribunal hearing) that the Claimant's allegations of race discrimination were both false *and* had been brought in bad faith. This is a potential line of defence for an employer faced with a victimisation claim: see section 27 (3) EqA.

Pre-employment health questionnaires

119. Pre-employment enquiries about applicants' health are thought to be one of the principal reasons why disabled work-seekers often fail to reach the interview stage – either because they are deterred from submitting applications, or because some employers are reluctant to select individuals with health issues.

120. Section 60 EqA provides that except in certain specified situations, it is unlawful for an employer to ask about a job applicant's health before that person has been:

a. Offered a job (whether on a conditional or unconditional basis); or

b. Included in a pool of successful candidates to be offered a job when a suitable position arises.

121. In the discussion which follows below, health questions asked in these *prima facie* 'prohibited' circumstances are referred to as "pre-selection" questions.

122. The limited class of cases in which pre-selection health enquiries can be made are as follows:

(a) For the purpose of establishing whether B will be able to comply with a requirement to undergo an assessment or establishing whether a duty to make reasonable adjustments is or will be imposed on A in relation to B in connection with a requirement to undergo an assessment

123. Employers are entitled to ask questions which seek to establish whether or not a candidate will be able to participate effectively in an assessment to test their suitability for the role in question (e.g. an interview which takes a particular form); and whether any reasonable adjustments are required.

124. Section 39 (1) EqA provides that employers must not discriminate against persons:

a. In the arrangements A makes for deciding to whom to offer employment;

b. As to the terms on which A offers B employment;

c. By not offering B employment.

125. An employer may, therefore, legitimately ask on an application form whether candidates have any health issues which they feel will require the employer to make a reasonable adjustment(s) to the recruitment process. The explanatory notes to the EqA provide the example of a candidate with a speech impairment, who may require additional time to complete an interview. There is, however, no positive duty on employers to enquire whether candidates have any medical problems necessitating reasonable adjustments during the recruitment process (although it may be prudent to do so).

(b) For the purpose of establishing whether B will be able to carry out a function that is intrinsic to the work concerned

126. With regard the question of what will constitute an "intrinsic function" of a particular job, the explanatory notes provide the example of a job in a warehouse, where the employee's duties involve the manual lifting and handling of heavy items. As these are considered to be "intrinsic functions" of the role in question, the employer would be permitted to ask the "questions about his health to establish whether he is able to do the job (with reasonable adjustments)."

127. Neither the Act nor the explanatory notes make it clear precisely how such "questions about his health" could/should be phrased.[7] However, it seems likely that asking a role-specific, closed question, such as "Do you have a medical condition that would prevent you (without assistance) from manually lifting or handling heavy objects?" would probably be permissible.

(c) For the purpose of monitoring diversity in the range of persons applying to A for work

128. In order to ensure that this exception is engaged, it would be wise for employers wishing to monitor diversity amongst job applicants to ask such questions in an anonymised form – for example, ensuring that the questions appear in a self-contained attachment or schedule to the application form, which is sent not to the recruitment panel, but to the particular individual / department within the organisation whose role it is to monitor diversity.

(d) For the purpose of taking action to which section 158 would apply if references in that section to persons who share (or do not share) a protected characteristic were references to disabled persons (or persons who are not disabled) and the reference to the characteristic were a reference to disability

129. In essence, this exception permits an employer to ask pre-selection health questions for the purpose of supporting *positive* action in employment for disabled people. Section 159 EqA permits, in certain circumstances, positive action by employers in relation to appointments and promotion. In order to be lawful conduct, the recruitment or promotion must be a proportionate means of achieving one of the specified aims within section 158 EqA; namely:

a. Enabling or encouraging persons who are disabled to overcome or minimise their disadvantage;

b. Meeting their different needs; or

c. Enabling or encouraging persons who are disabled to participate in the relevant activity.

[7] The explanatory notes emphasise that an employer "would not be permitted to ask the applicant other health questions until he or she offered the candidate a job."

130. Furthermore, an employer will only be entitled to treat someone with a protected characteristic *more favourably* than someone who does not have that characteristic, if the employer reasonably thinks that:

a. Persons who share a protected characteristic suffer a disadvantage connected to the characteristic; or

b. Participation in an activity by persons who share a protected characteristic is disproportionately low;

and

c. The person in question is "as qualified as" other applicants to be recruited or promoted;

d. The employer does not have a policy of treating persons of the particular under-represented or disadvantaged group more favourably in connection with recruitment or promotion than persons who do not share the relevant characteristic; and

e. The more favourable treatment is a proportionate means of achieving the aim of overcoming or minimising the disadvantage, or encouraging participation.

131. The explanatory notes emphasise that "The question of whether one person is as qualified as another is not a matter only of academic qualification, but rather a judgement based on the criteria the employer uses to establish who is best for the job which could include matters such as suitability, competence and professional performance." Accordingly, employers who elect to take positive action may be afforded a reasonable margin of discretion by Tribunals. However, it is clear from section 159 (4) EqA that appointing or promoting 'quotas' of individuals who possess a protected characteristic, regardless of merit, will be unlawful.

(e) For the purpose of – if A applies in relation to the work a requirement to have a particular disability, establishing whether B has that disability

132. This exception permits an employer to ask pre-selection health questions to establish whether candidates have a particular disability, where there is an occupational requirement for the successful candidate to be disabled. In order for a particular disability to constitute an "occupational requirement" for the role, the employer needs to show that, having regard to

the nature or context of the work, applying the requirement is a proportionate means of achieving a legitimate aim (Schedule 9, para. 1 (1)).

133. The explanatory notes state that "an organisation for deaf people might legitimately employ a deaf person who uses British Sign Language to work as a counsellor to other deaf people whose first or preferred language is BSL." This example suggests that the qualifying threshold for a particular disability to constitute an occupational requirement for a specific role is fairly low; it seems there is no need for a particular disability to be indispensable to a candidate's ability to perform the advertised role.

134. Section 60 (14) EqA provides a final exception to the prohibition on asking pre-selection health questions, namely: "This section does not apply to anything done for the purpose of vetting applicants for work for reasons of national security."

135. One particularly grey area is whether employers are entitled, in accordance with section 60 EqA, to ask pre-selection questions about a job applicant's absence record. Given that the majority of work absences are likely to be for reasons related to sickness, there is a significant risk that asking candidates to disclose details of their absence record (albeit not specifically asking how many days a candidate has been absent from work on account of ill-health) will fall foul of section 60. In practice, requesting information about candidates' absence records at the pre-selection stage may increase the risk of a disability discrimination claim from an unsuccessful candidate.

136. Furthermore, section 60 (5) expressly recognises how the 'reverse burden of proof' may operate in circumstances where an applicant for work has been asked questions about his health. It provides as follows:

> "In the application of section 136 to the proceedings, the particulars of the complaint [that the employer's conduct in reliance on information given in response to a question about the applicant's health constitutes unlawful disability discrimination] are to be treated for the purposes of subsection (2) of that section as facts from which the tribunal could decide that A contravened the provision."

137. If an employer does act in contravention of section 60 EqA, this will not in itself constitute an act of unlawful disability discrimination. However, failing to act in accordance with section 60 EqA may result in an investigation by the Equality and Human Rights Commission, whose enforcement powers include fining employers up to £5,000.

138. It is critical that employers have in place a clear system of retaining candidates' job applications for a reasonable period of time (perhaps twelve months after the applicant is notified that they have been unsuccessful), and ensuring that selections are made (and recorded) so far as possible on the basis of objective, measurable criteria.

139. Under the EqA, employers remain free to ask (relevant) health questions once a job offer has been made; and it is legitimate to make offers conditional upon receipt of a satisfactory medical questionnaire or examination. However, in the event that the medical questionnaire or examination does disclose medical concerns, the employer will have to consider very carefully whether the successful candidate would nevertheless be able to carry out the role with the aid of reasonable adjustments.

Managing sickness absence and capability dismissals

140. It goes without saying that employers should have in place clear and comprehensive policies, dealing with the management of sickness absence and capability issues (arising from ill health). These policies should, amongst other matters:

a. Contain clear parameters – for example, 'trigger points' for reductions in pay / the institution of capability proceedings (which may have a number of different stages, both informal and formal);

b. Clarify the respective obligations of employer and worker – for example, the worker's obligation to provide medical certificates / attend appropriate assessments by Occupational Health;

c. Encourage consultation and communication; and

d. Permit a degree of flexibility – for example, where it may be a reasonable adjustment to modify or disapply a particular provision of the policy.

141. No matter how hard both parties try, there are circumstances in which the termination of employment is an option which legitimately falls to be considered. Employers are, however, often very nervous about effecting capability (ill health) dismissals, having regard to the obvious potential for a disability discrimination claim.

142. With regard to the law of 'ordinary' unfair dismissal, the EAT confirmed in **DB Schenker (UK) Rail Ltd v Doolan** [2011] UKEATS/0053/09/BI that the familiar '*Burchell test*' is relevant and applicable in a capability dismissal case. Lady Smith went on to state (at para. 35):

> **"…**the issue for the Tribunal was whether a reasonable management could find, from the material before them that the Claimant was not capable of returning to the post of Production Manager. The Tribunal also required to bear in mind that the decision to dismiss is, properly, a managerial one, not a medical one. Whilst medical or other expert reports may assist an employer to make an informed decision on the issue of capability, the decision to allow someone to return to work or to dismiss for reasons relating to capability is, ultimately, one which the employer has to make. It is not a decision that is to be dictated by the author of a report. Quite apart from considerations of his duty not to dismiss an employee unfairly, an employer owes a common law duty of reasonable care to the employee and, in cases, such as the present, requires to make his own assessment of the risk of a return to work causing a recurrence of the employee's ill health, albeit that any such assessment will normally be informed by the content of an expert report or reports."

143. Lady Smith also cautioned Tribunals against the risk of substituting their own views for those of management, stating (at para. 37):

> "…a tribunal requires to guard against being carried along by sympathy for a long standing employee whose employers have concluded that he is not fit to return to his job in circumstances where he was keen to try to return to work and, in all cases, to resist the temptation to test matters according to what they would have concluded and decided if they had been in the employer's shoes."

144. In **BS v Dundee City Council** [2013] CSIH 91, the Court of Session identified (at para. 27) three "important themes" in cases concerning dismissals on grounds of capability (following a significant period of sickness absence):

a. It is essential to consider the question of whether the employer can be expected to wait longer [before dismissing];

b. There is a need to consult the employee and take his views into account. In practical terms if the employee states that he is anxious to return to work as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him; and

c. There is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that is required of the employer is to ensure that the correct question is asked and answered.

145. The Court of Session also considered the possible relevance of length of service in such cases, stating (at para. 33):

> "…The critical question in every case is whether the length of the employee's service, and the manner in which he worked during that period, yields inferences that indicate that the employee is likely to return to work as soon as he can. In the present case the Tribunal did not address this question; they merely treated length of service as a factor that in itself was automatically relevant. In our opinion that is not the correct approach..."

Other tactical / strategic considerations

146. This final section of the paper addresses some of the other legal and practical issues which commonly arise in proceedings involving complaints of disability discrimination.

Time limits

147. Discrimination, harassment and victimisation claims must be brought before a Tribunal within three months of the act complained of (section 123 (1) EqA), unless the Tribunal considers it would be "just and equitable" to extend this statutory time limit. Any act extending over a period shall be treated as done at the end of that period (commonly known as a 'continuing

act') and a deliberate omission shall be treated as done when the person in question decided upon it (section 123 (3) EqA).

148. A commonly encountered issue is whether a number of acts that occurred over a period of time together constituted an "act extending over a period" or should be classed as individual acts. If they qualify as a 'continuing act', time runs from the last act. Conversely, if they are regarded as separate acts, the three-month time limit will apply to each act, often resulting in the earlier acts being out of time.

149. The leading authority on this issue is **Hendricks v Metropolitan Police Commissioner** [2003] IRLR 96, in which the CA held (at para. 52):

> "The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period'. I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be sidetracked by focusing on whether a 'policy' could be discerned. Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed."

150. In **Aziz v FDA** [2010] EWCA Civ 304, the CA Appeal affirmed the principle that in considering whether separate incidents formed part of "an act extending over a period" (under the now repealed Race Relations Act 1976), one relevant but not conclusive factor was whether the same individuals or different individuals were involved in those incidents.

151. In **JobCentre Plus v Jamil** [2013] UKEAT/0097/13/BA, a case in which the Claimant complained of a long-standing failure to make a reasonable adjustment (specifically, permitting the Claimant to work closer to home), the EAT held (at para. 24) as follows:

> "Reference to a 'continuing state of affairs' is helpful in the present context, where the issue is whether in the words of section 123, 'conduct extends over a period', and failure to do something is treated as occurring when the person in question decides on it. Those concepts here apply to a duty which is a continuing duty. If there is such a duty it requires to be fulfilled on each day that it remains a duty. Throughout the

employment of the Claimant it did so. The problem for the Respondent here was that a move of the Claimant to Uxbridge was, on the face of it, not unreasonable. It was therefore, in practice, for the Respondent to show why, in the particular circumstances of this case (or for that matter the changed circumstances after 1 April 2011, when the Claimant went off ill and when she understood that her fixed-term contract would not be renewed as from the following August) the proposed step would not have been one which it was reasonable for the employer to have to take. To look for a policy which is itself discriminatory is to be diverted from the enquiry necessary here."

152. If the Tribunal is satisfied that complaints are *prima facie* out of time, it may nevertheless permit such complaints to proceed, if it considers that it is "just and equitable" to extend time. This test permits Tribunals a substantially greater degree of flexibility than the "not reasonably practicable" test which applies to complaints of unfair dismissal.

153. The burden is on the Claimant to persuade the Tribunal that it would be just and equitable to extend time; in **Robertson v Bexley Community Centre [2003] IRLR 434**, the CA held (at para. 25):

> "…time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."

154. Whilst the EAT has acknowledged that Tribunals have a "broad discretion" when deciding whether or not to extend time, it has also emphasised that:

> "...it is always necessary, in the exercise of the discretion to extend time on the basis that it is just and equitable to do so, for a tribunal to identify the cause of the claimant's failure to bring the claim within the primary time limit."
>
> **Accurist Watches v Wadher** [2009] UKEAT/0102/09/MAA (para. 15)

155. As to what other factors are likely to be relevant, in **British Coal v Keeble** [1997] IRLR 336 the EAT suggested that valuable guidance is to be found in section 33(3) of the Limitation Act 1980; the EAT observed (at para. 8):

"That section provides a broad discretion for the Court to extend the limitation period of three years in cases of personal injury and death. It requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia, to –

(a) the length of and reasons for the delay;
(b) the extent to which the cogency of the evidence is likely to be affected by the delay;
(c) the extent to which the party sued had cooperated with any requests for information;
(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;
(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action."

Dealing with postponement applications

156. It is not uncommon for Respondents in disability discrimination claims to be faced with applications for the postponement of a hearing on grounds of ill health – sometimes at a very late stage (including on the morning of the hearing, and even during the hearing itself).

157. Helpful guidance as to the approach which Tribunals should adopt was provided by the EAT in **Iqbal v Metropolitan Police Authority** [2012] UKEAT/0186/12/ZT. In this case, the Claimant made an application for an adjournment during the hearing, on the basis that his depression meant that he was unable to continue. The Claimant had consulted doctors about his condition, and an occupational health report in the hearing bundle referred to the Claimant suffering from depression and other psychological problems; however, no formal medical evidence was submitted in support of the application to adjourn. The Tribunal decided to refuse the Claimant's application; as a result, he withdrew his claims and they were dismissed by the Tribunal.

158. The EAT acknowledged the practical difficulties which such applications present. It carried out a review of other relevant decisions (including **Teinaz v London Borough of Wandsworth** [2012] IRLR 721), before providing the following guidance:

a. If there is medical evidence that a litigant is unfit to continue with a hearing, he ought generally to be granted an adjournment, whatever the inconvenience to the other parties (although see **Transport for London v O'Cathail** and **Riley v CPS** below);

b. The Tribunal is entitled to be satisfied that the reason for the requested adjournment is genuine;

c. The onus is on the applicant to prove the need for the adjournment;

d. Where there is no direct medical evidence as to the litigant's fitness to continue, the Tribunal should consider what medical evidence it has, including material in the hearing bundle; and

e. In the interests of fairness, the Tribunal should consider making a short adjournment for further enquiries to be made (in relation to the Claimant's medical condition – if that is uncertain).

159. There are, however, circumstances in which an application to postpone may legitimately be refused by a Tribunal – even if the medical evidence indicates that the Claimant is not fit to participate in the proceedings.

160. In **Transport for London v O'Cathail** [2013] IRLR 310, the Claimant's case was originally listed for hearing in October 2010. It was adjourned on grounds of the Claimant's medical unfitness, and re-listed for 21 to 28 February 2011. On day 1 of the re-listed hearing, the Claimant sought a further adjournment, producing a letter from his GP stating that he was unfit to attend. This medical evidence was not challenged by the Respondent. Nevertheless, the Respondent objected to the postponement application. The Tribunal decided to reject the postponement application; went on to consider the claims in the Claimant's absence (on the basis of the documentary evidence before it); and dismissed the claims.

161. The Tribunal's reasons for refusing the adjournment included the staleness of the proceedings; the previous adjournment at the Claimant's request; costs; the effect on other pending claims; proportionality; and the extent to which the claims could be determined on the basis of documentary evidence.

162. The EAT overturned the Tribunal's decision, principally on the basis that "since the medical evidence had not been challenged and stated in plain terms that the claimant was unfit to

attend, the practical consequence of the tribunal's decision nevertheless to proceed was to deny any opportunity to participate in the hearing and was unfair."

163. The CA held that the EAT had been wrong to overturn the Tribunal's decision. It concluded that there had been "no error of law in the judgment of the ET refusing to exercise its broad discretion to grant the adjournments requested." Mummery LJ held (at paras. 43, 45 and 47 respectively):

> "'Justly' means that overall fairness is paramount in the exercise of the discretion. The claimant did not have a monopoly of the fairness factors in this case. It would not be fair for TfL to be repeatedly denied a hearing on the ground of the claimant's recurrent health problems."
>
> "Overall fairness to *both* parties is always the overriding objective. The assessment of fairness must be made in the round. It is not necessarily pre-determined by the situation of one of the parties, such as the potentially absent claimant who is denied an adjournment."
>
> "…Article 6 of the Convention does not compel the ET to the conclusion that it is always unfair to refuse an application for an adjournment on medical grounds, if it would mean that the hearing would take place in the party's absence. There are two sides to a trial, which should be as fair as possible to both sides. The ET has to balance the adverse consequences of proceeding with the hearing in the absence of one party against the right of the other party to have a trial within reasonable time and the public interest in prompt and efficient adjudication of cases in the ET."

164. In **Riley v Crown Prosecution Service** [2013] EWCA Civ 951, the Tribunal decided to strike out a claim (rather than grant a further postponement of the proceedings), on the basis that it was not possible to have a fair trial in the foreseeable future. In support of its application to strike out, the Respondent's relied on the following matters:

a. The mounting costs of the proceedings;

b. The dimming of recollections of its witnesses;

c. The worry and stresses of the respondent's witnesses;

d. The fact that some witnesses had left the respondent's employment; and

e. The absence of any definite prognosis of any recovery sufficient to take part in the proceedings in the foreseeable future.

165. The Tribunal regarded some of these matters as more significant than others, but ultimately reached the conclusion that:

a. There was no prognosis of when, if ever, the Claimant would be in a position to be well enough to take part in the proceedings; and

b. Having regard to the balance of prejudice, a fair trial was not possible

166. This decision was upheld by the CA; Longmore LJ held as follows:

> "27. It is important to remember that the overriding objective in ordinary civil cases (and employment cases are in this respect ordinary civil cases) is to deal with cases justly and expeditiously without unreasonable expense. Article 6 of the ECHR emphasises that every litigant is entitled to 'a fair trial within a reasonable time'. That is an entitlement of both parties to litigation. It is also an entitlement of other litigants that they should not be compelled to wait for justice more than a reasonable time. Judge Hall-Smith correctly found assistance in remarks of Peter Gibson LJ in Andreou v The Lord Chancellors Department which are as relevant today as they were 11 years ago:-
>
> > 'The Tribunal in deciding whether to refuse an adjournment had to balance a number of factors. They included not merely fairness to Mrs Andreou (of course an extremely important matter made more so by the incorporation into our law of the European Convention on Human Rights, having regard to the terms of Article 6): they had to include fairness to the respondent. All accusations of racial discrimination are serious. They are serious for the victim. They are serious for those accused of those allegations, who must take very seriously what is alleged against them. It is rightly considered that a complaint such as this must be investigated, and disputes determined, promptly; hence the short limitation period allowed. This case concerned events which took place very many years ago, well outside the normal three months limitation period. The Tribunal also had to take into account the fact that other litigants are waiting to have their cases heard. It is notorious how heavily burdened Employment Tribunals are these days.'

> 28. It would, in my judgment, be wrong to expect Tribunals to adjourn heavy cases, which are fixed for a substantial amount of court time many months before they are due to start, merely in the hope that a claimant's medical condition will improve. If doctors cannot give any realistic prognosis of sufficient improvement within a reasonable time and the case itself deals with matters that are already in the distant past, striking out must be an option available to a Tribunal. Like Wilkie J I can see no error of law and would dismiss this appeal."

167. In addition to the relevant case law, it is particularly important to have regard to the recently published Presidential Guidance on Seeking a Postponement of a Hearing (available online). Ensuring familiarity with this guidance is critical, since applications which fail to comply with it may not be considered by Tribunals. The guidance includes the following example, which is likely to be of particular relevance for claims involving disabled Claimants:

> "When a party or witness is unable for medical reasons to attend a hearing. All medical certificates and supporting medical evidence should be provided in addition to an explanation of the nature of the health condition concerned. Where medical evidence is supplied it should include a statement from the medical practitioner that in their opinion the applicant is unfit to attend the hearing, the prognosis of the condition and an indication of when that state of affairs may cease."

168. The guidance also provides that any postponement application should expressly state *how* a postponement would help further the overriding objective.

Failure to comply with Tribunal orders and directions

169. Orders of the Tribunal are not always complied with in practice. In the context of disability discrimination claims, this may involve a failure on the part of the Claimant to provide relevant medical or witness evidence, or to submit to an assessment by an independent expert.

170. In **GCHQ v Bacchus** [2012] UKEAT/0373/12/LA, the Claimant refused to co-operate with the obtaining of a psychiatric report by the Respondent, declining to attend any of three experts put forward by the Respondent (while obtaining his own psychiatric report). The Tribunal concluded that his refusal was unjustified, but refused to stay or strike out the claim, instead deciding that it would hear the claim with no expert psychiatric evidence on either side. The Respondent appealed.

171. The EAT held that the Tribunal had erred in its approach. It should have applied the approach articulated by the CA in **Lane v Willis** [1972] I WLR 333, specifically:

> "The principles upon which a court should, in aid of obtaining a medical examination of one of the parties to the action, act when deciding whether to take the somewhat strong course of staying the action if a medical examination is not afforded, are by now clear. An order for a medical examination of any party to an action has been well said to be an 'invasion of personal liberty'. Accordingly it should only be granted when it is reasonable in the interests of justice so to order. When the refusal of a medical examination is alleged to be unreasonable, the onus lies on the party who says it is unreasonable and who applies for the order to show, upon the particular facts of the case, that he is unable properly to prepare his claim (or defence) without that examination."

172. In the EAT's view, if the Tribunal had adopted this approach, it would have concluded that the Respondent, given the issues in this case:

a. Could not properly prepare its case without expert evidence; and

b. Was significantly disadvantaged as a consequence.

173. In the circumstances, the EAT decided to make an "unless order", requiring the Claimant to present himself for examination by a certain date, with the consequence that his case would be struck out for non-compliance if he failed to do so.

174. A similar issue arose in **Ahmed v Bedford Borough Council** [2013] UKEAT/0064/13/SM. Here, the Claimant unreasonably failed to comply with the Tribunal's order that he be examined by a medical expert for the purposes of a PH on the issue of disability status. In this instance, however, the Tribunal elected to strike out the entirety of the Claimant's claim (which included complaints of race, religious and disability discrimination) as a result.

175. The EAT overturned the decision to strike out the claims, remitting the matter back to a different Employment Judge to decide the matter afresh. It held that the issues arising for consideration in such a situation were:

a. Whether the conduct in question was scandalous, unreasonable or vexatious;

b. Whether a fair trial was still possible; and

c. Whether the sanction of strike out was proportionate.

176. In the EAT's view, there had been insufficient consideration of relevant matters – including, for example, whether a lesser sanction (such as an unless order) was appropriate.

177. In circumstances where an unless order *has* been issued by the Tribunal, and the party which is subject to the order fails to comply with it, the claim (or those parts of it which are subject to the order) will automatically be struck out, without further reference to the parties: **Scottish Ambulance Service v Laing** [2012] UKEATS/0038/12/BI; and **Richards v Manpower Services Ltd** [2013] UKEAT 0014/13.

178. A party whose claim or response (or part of it) has been struck out by virtue of non-compliance with an unless order may apply to the Tribunal for relief from sanction.

179. In **Neary v Governing Body of St Albans Girls School** [2010] IRLR 124, the CA provided the following guidance:

a. What is required in each case is for the Tribunal to decide the case rationally and not capriciously, and to consider all the relevant factors and avoid considering irrelevant ones;

b. In its decision, the Tribunal should make clear the facts that it has regarded as relevant, and demonstrate that it has weighed the factors affecting the proportionality of the sanction and reached a tenable decision about it; and

c. The onus will be on the party seeking relief from sanction to show that the Tribunal had failed to consider all relevant matters, or had taken into account irrelevant matters.

180. Finally, it is necessary to be aware of the content and application of the ET Rules; in particular (in this context):

a. Schedule 1, Rule 38 – which includes the power to make an unless order, the procedure for notifying parties that a dismissal (of a claim or response, in whole or in part) has occurred, and the procedure for applying to set aside such an order (in the interests of justice); and

b. Schedule 1, Rule 37 – which sets out the grounds on which a Tribunal may decide to strike out all or part of a claim or response (which includes non-compliance with an order of the Tribunal).

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