Disability Discrimination and the Equality Act

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Lexis Nexis Employment Law Conference – 22-23 September 2011

1. This paper addresses the changes to the law of disability discrimination brought about by the Equality Act 2010 ("the Act"). More than in any other area of discrimination, the Act made substantial changes to perhaps the most progressive of all the statutory employment developments of the last 20 years.

2. It is proposed to deal with the following principal subject-areas:
   2.1 the definition of disability;
   2.2 types of discrimination;
   2.3 pre-employment health questionnaires.

Introduction

3. It is not easy now to remember a time when discrimination on the grounds of disability was both prevalent and permissible. The effect of the DDA 1995, a rare example of UK social legislation which pre-dated (and then exceeded) EU requirements, was to contribute to a sea-change in how disabled people are viewed and treated. Disabled people are more visible not just in the workplace but across society; disability discriminatory language is far less common than before; the UK provision for disabled sport is the envy of the world.[1] Yet there is no room for complacency: disabled people continue to face enormous challenges:

[1] Great Britain came second in the 2008 Beijing Paralympics medal table, behind China.

3.1 it is believed that there are over 10 million people in the UK with a limiting long term illness, impairment or disability;[2]

3.2 around 1 in 7 working age adults are disabled;[3]

3.3 the employment-rate gap between disabled and non-disabled people has decreased from around 36% in 2002 to around 29% in 2010;[4] however, to put this in context, the 2010 figures show that c.48% of disabled persons were employed as against a national non-disabled rate of c.78%;

3.4 disabled people are more likely to encounter hostility in the workplace: in 2008, 19% of disabled workers experienced unfair treatment at work as against 13% of non-disabled workers.[5]

4. The ET statistics for disability discrimination claims make interesting reading.[6]

Claims accepted by Employment Tribunals

	2008-09[7]	2009-10	2010-11
Disability Discrimination	6,600	7,500	7,200
Race Discrimination	5,000	5,700	5,000

5. Of the 6,800 disability claims <u>disposed of</u> in the period April 2009 to March 2010, 31% were withdrawn, 46% had ACAS-conciliated settlements, 7% were struck out not at a hearing, and 1% had a default judgment. The remainder went to hearing: 3% were successful, 3% were struck out at a PHR and 9% were unsuccessful following a full hearing.[8] Accordingly, just 1 in 5 DDA claims which went to a hearing was ultimately successful. Of the 72 successful claims, the average award was

[2] Family Resources Survey 2008/09
[3] *Ibid*.
[4] Labour Force Survey, Quarter 2, 2002 and Quarter 2, 2010
[5] Fairness At Work Survey, 2008
[6] http://www.justice.gov.uk/downloads/publications/statistics-and-data/mojstats/employment-trib-stats-april-march-2010-11.pdf
[7] From April Yr.1 until March Yr.2
[8] The statistics for successful claims are equally low across other discrimination types.

just over £14,000, the median award was just over £6,000 and the maximum award was £181,083.

Orientation

6. The disability provisions are scattered around the Act, and a quick orientation guide may be helpful.

6.1 The primary definition of disability is at s.6 (Pt.2, Ch.1).

6.2 Prohibited conduct referable to all the different protected characteristics is found at ss.13-27. Of particular relevance are: direct discrimination (s.13); discrimination arising from disability (s.15); indirect discrimination (s.19); the duty to make adjustments (ss.20-2); harassment (s.26); and victimisation (s.27).

6.3 The prohibition on discrimination in "Work" is found at Part 5 (ss.39-63). Within those sections, at s.60, is the new provision restricting a would-be employer's ability to make pre-employment enquiries about disability and health.

6.4 Ancillary provisions on prohibited conduct are found at Part 8 (ss.108-112). These deal with vicarious and secondary liability. There is nothing of particular interest to disability discrimination in these sections.

6.5 The enforcement provisions are found at Part 9 (ss.113-141). There is nothing of particular interest to disability discrimination in these sections.

6.6 Schedule 1 contains supplementary provisions on disability.

6.7 Schedule 8 contains supplementary provisions on reasonable adjustments in work.

6.8 Schedule 21 contains further supplementary provisions on the duty to make reasonable adjustments, in the particular context of alterations to premises.

These statutory provisions should be considered alongside the full Explanatory Notes.

7. Finally, regard must also be paid to:

7.1 The Equality Act 2010 (Disability) Regulations 2010 (SI 2010/2128). These substantially reproduce the former Disability Discrimination (Meaning of Disability) Regulations 1996 and amount to a wasted opportunity to gather all the relevant statutory material in one place.

7.2 The *Guidance on matters to be taken into account in determining questions relating to the definition of disability*. This was issued by the Office for Disability Issues under s.6(5) of the Act, with effect from 1 May 2011.[9] Section 6(5) makes special provision for a Minister of the Crown to issue guidance about matters to be taken into account in deciding any question relating to the definition of disability, and an adjudicating body must take account of that guidance as it thinks is relevant.[10]

7.3 The EHRC's *Code of Practice on Employment (2011)*, brought into effect on 6 April 2011. The *Code of Practice* was issued by the EHRC under powers contained in the Equality Act 2006. A failure to comply with a provision of the *Code of Practice* shall not of itself make a person liable in civil proceedings, but the *Code* is admissible in evidence and "*shall be taken into account by a court or tribunal in any case in which it appears…to be relevant*" (Equality Act 2006, s.15(4)(b)).

Disability

8. Subject to a few exceptions, disability is a gateway provision for the purposes of the Act. Save for a few cases, a claimant who fails to prove that he is disabled will lose his claim. One wonders how many of the DDA claims dismissed following a PHR were dismissed by reason of that failure.

[9] This *Guidance* was issued after the publication of the 2011 Butterworths Employment Law Handbook, and can be found online at http://odi.dwp.gov.uk/docs/law/ea/ea-guide-2.pdf.
[10] Schedule 1, paras.10-16.

9. In fact, the Act contains little new in terms of changing the on the definition of disability. The core definition remains, essentially, unchanged, at s.6(1):

> "A person (P) has a disability if-
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

10. It could be argued that by emphasising the distinction between the existence of the impairment on one hand (s.6(1)(a)) and its substantial and long-term adverse effect on the other hand (s.6(1)(b)), Parliament is taken to have confirmed the decision in *J v. DLA Piper* [2010] ICR 1052. There, the EAT rejected an argument to the effect that the existence of an impairment could necessarily be inferred from the existence of a substantial adverse effect. Whether in practice this makes a lot of difference is open to question, but claimants would be well-advised to clarify exactly what impairment they are relying on. The old law requiring a mental impairment to be clinically well-recognised is no more, but *J v. DLA Piper* does suggest that a reference to "stress" or "anxiety" will not suffice. It is also important to remember that the EAT held that the existence of an impairment could <u>often</u> be inferred from its adverse effect, and that in difficult cases, a tribunal should consider whether there is an impairment in the light of its findings as to whether there is a substantial and long-term adverse effect.

11. A person who has cancer, HIV infection or multiple sclerosis is deemed disabled under the Act (Sch.1, para.6). So is a person who is certified as blind, severely sight impaired, sight impaired or partially sighted by a consultant ophthalmologist (Equality Act 2010 (Disability) Regulations 2010, reg.7). The Regulations also set out the automatic exclusions from

disability: addictions to/dependency upon any substance other than in consequence of the substance being medically prescribed, seasonal allergic rhinitis (hayfever), a tendency to set fires, steal or physically/sexually abuse other persons, exhibitionism and voyeurism. Severe disfigurements are treated as not having a substantial adverse effect where they consist of a "*tattoo (which has not been removed)*" or any non-medical body piercing: reg.5. This would suggest that a severe disfigurement left by a removed tattoo would not be excluded from the definition of disability.

12. The Act applies in relation to a past disability as it applies in relation to a person with a current disability: s.6(4). So, a person cannot be treated less favourably than another because he was diagnosed with cancer from which he recovered. However, it is important to note that the duty to make reasonable adjustments is unlikely ever to apply to a person with a past disability as there is no longer anything putting that person at a substantial disadvantage with non-disabled persons.

13. There is no change at all in the statutory framework for "substantial adverse effect" – the previous caselaw on this aspect of disability will continue to apply. Section 212 defines "*substantial*" as "*more than minor or trivial*". The *Guidance* states that the requirement of substantiality "*reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people*" (at B1). As before, tribunals will have to focus on what claimants cannot do, and not on what they can do.

14. The requirement that there should be some adverse effect on a person's ability to carry out normal day-to-day activities sits uneasily with the assumption that impairments which manifest themselves in very occasional serious symptoms are disabilities. Most people would assume that epilepsy is a disability, but many people with the condition may go

months or years without suffering any symptoms at all. The same observation may be made about other asymptomatic conditions such as hypertension: the statutory provisions do not appear to make allowances for such impairments notwithstanding their seriousness.

15. The principal amendment to the pre-Act law on disability lies in the welcome decision not to re-enact Sch.1, para.4(1). This provided that:

> "An impairment is to be taken to affect the ability of the person concerned to carry out normal day-to-day activities only if it affects one of the following-
>
> (a) mobility;
>
> (b) manual dexterity;
>
> (c) physical co-ordination;
>
> (d) continence;
>
> (e) ability to lift, carry or otherwise move everyday objects;
>
> (f) speech, hearing or eyesight;
>
> (g) memory or ability to concentrate, learn or understand; or
>
> (h) perception of the risk of physical danger."

16. Para.4(1) was broad enough to cover most impairments no matter the effect. However, in many cases, the statutory language was stretched to the point of distortion in order to do so. For example, some cases of depression became marked by strenuous efforts by claimant representatives to highlight examples of the individual having difficulty concentrating (which often damaged other parts of the case), when the primary symptom of depression might be an inability to socialise with other people or extreme tearfulness. Similarly, cases of dwarfism did not readily fit into the para.4(1) mould.

17. Now there is no fetter upon the meaning of "normal day-to-day activity" although, as indicated above, the requirement that it be day-to-day

suggests that, strictly speaking, it should continue to exclude asymptomatic or irregularly symptomatic conditions.

"Associative" and "Perceptive" Discrimination

18. It was observed above that disability is routinely a gateway requirement to protection under the Act. The following few paragraphs address the two of the three types of discrimination in which, arguably, disability is not a prerequisite.[11]

19. In *EBR Attridge Law LLP v. Coleman* [2010] IRLR 10, the EAT determined that it was possible for the DDA to be construed so as to prohibit discrimination against a person (A) on the ground of A's association with a disabled person (B). The EAT acknowledged that this required a judicial gloss on the statutory provisions, but this was required following the judgment of the ECJ in the same case.

20. Similar arguments were deployed by the claimants in the EAT in separate cases in the EAT, namely *J v. DLA* (see above) and *Aitken v. Commissioner of Police for the Metropolis* (UKEAT/0226/09/ZT), in the context of claims of so-called "perceived" disability discrimination. This kind of discrimination arises where X treats A less favourably because X wrongly believes that A is disabled. In *J v. DLA Piper*, Underhill P declined to order a reference but expressed reservations about whether the tort of "perceived" discrimination could exist in the context of disability. In *Aitken*, Slade J held that "perceived" disability discrimination was not actionable.

21. There is no doubt that the Act is designed to confirm the existence of both associative and perceptive discrimination as actionable torts. The

[11] The third type of discrimination is victimisation, in which it is long-established that it is not necessary for the complainant to bear the protected characteristic.

examples in the Explanatory Notes to s.13 include an example of perceived discrimination (albeit not disability discrimination). The *Code of Practice*, at para.2.11, states:

> "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."

At para.7.10(b), the *Code* makes it clear that harassment on the ground of a wrongly perceived characteristic or association with a person with a protected characteristic is also intended to be prohibited. Finally, para.8 of the *Guidance* states that "*In order to be protected by the Act, a person must have an impairment that meets the Act's definition of disability, or be able to establish that any less favourable treatment or harassment is because of another person's disability*".

22. There is no doubt that the new formulation of direct discrimination ("…*because of a protected characteristic*") is sufficiently broad to encompass both associative and perceived discrimination. The same is true of harassment ("*unwanted conduct related to a protected characteristic*"). In neither case is there any requirement that the complainant should have the protected characteristic. However, in the case of discrimination arising from a disability, the less favourable treatment must be less favourable treatment of B "*because of something arising in consequence of B's disability*".

23. It is not clear how perceived discrimination would operate in the context of disability. What does the claimant have to prove was in the discriminator's mind? It would be a rare case where an employer laboriously trawled through the statutory definition of disability before deciding to treat an employee less favourably, and a rarer case still where the employee could prove that that was what was in the employer's

mind. Where perceived discrimination issues arise, it might well be where there is a scarcity of information, not least because of the restrictions on pre-employment health enquiries.

Example: An employer notes that there is a 6-month employment gap on an applicant's cv; upon questioning, the applicant states that he was ill over that period and couldn't work; the employer asks no further questions. He assumes that the employee may be prone to future absences and rejects the application. The employer has not turned his mind to the statutory definition of disability. If the applicant was in fact disabled, he might well have a claim for direct discrimination and/or discrimination arising from a disability. But as a non-disabled person (who had a one-off six-month illness) it is not clear whether he is so protected. Also, does it matter whether the employer suspects rather than believes that the person is disabled? This is an area where future developments may be watched with interest.

Types of Discrimination

Direct Discrimination (s.13)

24. Direct disability discrimination is essentially unchanged from its pre-Act incarnation (save, as discussed above, the claimant him/herself need not be disabled). The substitution of "*on the ground of*" by "*because of*" is of no consequence. It is still necessary for a comparative exercise to be conducted. There must be "*no material difference between the circumstances of each case*": s.23(1). Section 23(2) makes it clear that in a direct disability discrimination claim, the comparator's relevant circumstances must include his/her abilities. So, where a driver develops narcolepsy and loses his job upon being forced to give up driving, the comparison for the purposes of a s.13 claim must be with someone who

retains the ability to drive. Broadly speaking, direct discrimination in disability claims is focused on the prejudice surrounding the fact of disability, as distinct from the effects of the disability.

25. The only additional point worth making is that s.13(3) blocks a non-disabled person from bringing a complaint of discrimination where he has been treated less favourably than a disabled person.

Discrimination Arising from Disability

26. One of the most significant developments in the Act from a disability perspective is the introduction of a brand new tort: discrimination arising from disability.

27. The DDA established a tort of disability-related discrimination. Proof of this tort involved a somewhat convoluted albeit workable comparative exercise. It was also regarded as being somewhat toothless because respondents could avail themselves of an unchallenging justification defence akin to a range of reasonable responses test: *Post Office v. Jones* [2001] IRLR 384. However, the tort was totally emasculated by the decision in *Malcolm v. LB Lewisham* [2008] IRLR 700, in which the House of Lords introduced a comparative test whose application meant that it would never be possible to show that the claimant had been less favourably treated.

28. The Act has overturned *Malcolm* and gone on to make substantial refinements to the law. Section 15 provides:

> "(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."

29. There are five essential points to make about this new tort.

30. First, section 15 avoids the previous difficulties of the comparative exercise by simply removing the need for any comparator. It is, of course, open to B to prove that he was treated "*unfavourably*" by pointing to how a non-disabled person was treated in the same circumstances. However, the statutory requirement is for the claimant to prove that s/he was unfavourably treated, a requirement that will ordinarily be fulfilled by showing that s/he was subjected to a "detriment".[12] This is likely to cover any disadvantage above and beyond an unjustified sense of grievance.

31. Second, the causative test in s.15 ("*because of something arising in consequence of B's disability*") is startlingly wide. In particular:

31.1 there is apparently no requirement for the disability consequence to be the sole or the main reason for the treatment;

31.2 the phrase "*something arising in consequence of…*" does not suggest that the "*something*" needs to have a very proximate or direct relationship with the words "*in consequence of*". Accordingly, indirect or remote consequences of a disability might well give rise to liability.

[12] See *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285.

32. A paradigm example of s.15 discrimination is provided at para.5.3 of the *Code*:

> "An employer dismisses a worker because she has had three months' sick leave. The employer is aware that the worker has multiple sclerosis and most of her sick leave is disability-related. The employer's decision to dismiss is not because of the worker's disability itself. However, the worker has been treated unfavourably because of something arising in consequence of her disability (namely, the need to take a period of disability-related sick leave)."

33. But it is not difficult to imagine more complicated situations:

> A worker with a disability takes three months' disability-related sick leave. He thereby misses the test from a course that he had been undertaking and which he had a reasonable chance of passing. Soon after, the employer conducts a redundancy exercise and gives the employee a relatively low score under "continuing education" because of the missed test. The relatively low score proves decisive and the employee is dismissed. So, in this case, the dismissal is because the employee failed to score sufficiently in the redundancy scoring exercise, which in turn is (or may be) because he missed the opportunity to pass the test, which in turn is because he was on sick leave arising from his disability. Is the dismissal something arising in consequence of a disability?

34. It is difficult to know how tribunals will approach this. It may be that a commonsense approach will prevail and that the more remote the consequence, the less likely it is that the tribunal will hold that it arises from the disability. However, any such refinement is arguably inconsistent with the plain wording of the Act and does not appear to be supported by the *Code*. At para.5.10, the *Code* states that "*The*

consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability".

35. Third, the new justification defence is a substantially tougher proposition for respondents than its predecessor under the DDA. A respondent will have to satisfy the European model of objective justification in order to satisfy the statutory defence.

36. Fourth, there is a further defence to s.15 discrimination: knowledge. Where the employer does not know and cannot reasonably be expected to know that the employee has the disability, there can be no liability. Intriguingly, however, once the employer knows or is deemed to know about the disability, there is no further express defence relating to knowledge of the consequence: X may know that A has a disability; but he does not know that the matter for which he has treated A unfavourably arises out of A's disability. The lack of an express defence is consistent with an informal obligation being put on employers, once they discover that an employee is disabled, to make appropriate enquiries about the likely/possible consequences of that disability. On the other hand, it may also be possible for lack of knowledge of the consequences of disability to be pleaded as a justification (see above).[13]

37. Fifth, it would be good practice to think carefully about whether there is also at least one reasonable adjustment claim. The redundancy example above may or may not be a case of discrimination arising from disability, but it is an obvious case for the employer to have adjusted the employee's scores upwards i.e. make an adjustment. There will be few cases when a s.15 claim could not also be deployed as a reasonable adjustment claim, a point which was equally true in the brief post-*Malcolm* DDA era.

[13] In this context, the example at para.5.09 of the *Code* is reasonably helpful.

Indirect Discrimination (s.19)

38. Another Equality Act innovation is the extension of indirect discrimination to disability. It is doubtful, however, whether this development is of any practical significance. Indirect discrimination claims operate best where groups who share a protected characteristic have another shared feature e.g. female workers are more likely to have childcare obligations. This is only rarely going to happen in the case of disabled workers as a group, for it is not a homogenous group. Even if it is assumed that indirect discrimination is a more precise tool than that, and allows comparison to be made between workers who share a particular disability, the fact remains that it will not generally be easy to point to shared features of people who have the same disability.

39. Chapter 4 of the *Code* addresses indirect discrimination and contains 13 examples of the tort. None of these examples is a disability example.

40. Further, even where it is possible to construct an indirect disability discrimination claim, it will ordinarily be at least as effective to claim a failure to make a reasonable adjustment.

Reasonable Adjustments (ss.20-22)

41. The Equality Act modifies the pre-existing law on reasonable adjustments. Its essence is unchanged, but the framework and language are altered.

42. The duty to make adjustments "*comprises…three requirements*" (s.20(2)):

> "(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in

comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

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

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

43. It will be noted that there are two changes to the pre-existing law. First, the duty to make any adjustment depends upon a substantial disadvantage being shown in relation to "a relevant matter". Second, the requirement relating to the provision of an auxiliary aid is new.

44. Relevant matter. Schedule 8 addresses reasonable adjustments in the case of work. Its operation is conspicuously cumbersome. Para.2(3) and (4) provide as follows:

"(3) In relation to the first and third requirements, a relevant matter is any matter specified in the first column of the applicable table in part 2 of this Schedule.

(4) In relation to the second requirement, a relevant matter is-

(a) a matter specified in the second entry of the first column of the applicable table in Part 2 of this Schedule, or

(b) where there is only one entry in a column, a matter specified there."

45. Part 2 of Schedule 8 contains the "applicable tables". There are 14 such tables in all, covering the different types of work covered by the Act.[14] In order to illustrate how the "relevant matters" interact with the tables, here is the table under Part 2, para.5 ("Employers"):

Relevant Matter	**Description of Disabled Person**
Deciding to whom to offer employment	A person who is, or has notified A that the person may be, an applicant for the employment
Employment by A	An applicant for employment by A An employee of A's

46. So, the obligation to make reasonable adjustments in the case of PCPs and auxiliary aids applies both in terms of deciding to whom to offer employment and in employment itself. The obligation to make reasonable adjustments in the case of physical features does not apply to the process of deciding to whom to offer employment.

47. Auxiliary Aids. The duty to provide auxiliary aids arises where lack of such an aid would put the worker at a substantial disadvantage. The *Code* states that an auxiliary aid is "*something which provides support or assistance to a disabled person. It can include provision of a specialist piece of equipment such as an adapted keyboard or text to speech software*".[15] Auxiliary aids include auxiliary services, for example,

[14] I.e. employment, principals in contract work, partnerships, LLPs etc
[15] Paragraph 6.13.

provision of a sign language interpreter or a support worker for a disabled worker.[16] Such adjustments fell to be made under the DDA, so this innovation is one of language rather than one of substance.

48. Insofar as the law on reasonable adjustments has undergone any significant change it lies in the decision not to re-enact DDA, s.18B(1) or (2). Section 18B(1) set out 7 factors which a tribunal was required to take into account in determining whether it was or would be reasonable to make a particular adjustment e.g. the extent to which taking the step would be effective, the cost of the step etc. There is no longer any instruction to take into account any particular factor. However, it seems highly likely that the obligation to make adjustments will continue to depend to a large degree on the extent to which making the adjustment will reduce or remove the substantial disadvantage.[17] Although s.18B(1) DDA has now been consigned to history, s.22(1) of the Act establishes a power to make regulations to prescribe matters to be taken into account in determining what is a reasonable step.

49. Of course, the cost of an adjustment is also likely to be a relevant consideration. Section 20(7) provides that where a person is subject to a duty to make reasonable adjustments, he is not entitled to require the disabled person in respect of whom the duty is owed "*to pay to any extent A's costs of complying with the duty*". This is not a prohibition on asking a disabled worker to contribute to the cost of a step.

50. Section 18B(2) has also not been re-enacted. This section provided examples of steps which might have to be taken. It was merely illustrative and will not be missed. In any case, the *Code* contains plenty of examples of steps which might have to be taken, at para.6.33.

[16] Section 20(11).
[17] See *Environment Agency v. Rowan* [2008] IRLR 20.

Harassment and Victimisation (ss.26-27)

51. There is nothing of note in the Act in terms of harassment and victimisation in the context of disability.

Pre-Employment Health Enquiries

52. Few innovations in the Act attracted the level of attention of the new restrictions on pre-employment health enquiries. However, there is considerable misunderstanding about the nature of the restrictions and the means for enforcing any breach of the law.

53. Section 60(1) provides:

> "A person (A) to whom an application for work is made must not ask about the health of the applicant (B)-
>
> (a) before offering work to B, or
>
> (b) where A is not in a position to offer work to B, before including B in a pool of applicants from whom A intends (when in a position to do so) to select a person to whom to offer work."

54. Section 60(1) is commendably straightforward: it is a prohibition on any questions about the health of an applicant prior to his being offered work[18],[19] or being placed in a pool of applicants.

55. The *Code* states that the prohibition includes asking questions about health (including whether or not the person has a disability) as part of an application process or during an interview. It also states that "*Questions*

[18] "Work" is defined at s.60(9) as "employment, contract work, a position as a partner, a position as a member of an LLP, a pupillage or tenancy, being taken as a devil, membership of a stable, an appointment to a personal or public office, or the provision of an employment service".

[19] A reference to offering work is a reference to making a conditional or unconditional offer: s.60(10).

relating to previous sickness absence are questions that relate to disability or health" (para.10.25). The *Code* also suggests that it would be unlawful for an agent or employee of an employer to ask questions about disability or health. This means that an employer cannot refer an applicant for employment to an occupational health practitioner or ask an applicant to fill in a questionnaire provided by an occupational health practitioner before the offer of a job is made.

56. There are 6 exceptions to the basic rule. In each case, a question may only be asked where it is "*necessary*" for the particular exception:

56.1 Questions will be permitted in order to establish "*whether B will be able to comply with a requirement to undergo an assessment or establishing whether a duty to make reasonable adjustment is or will be imposed on A in relation to B in connection with a requirement to undergo an assessment*": s.60(6)(a). This is limited to questions that should be asked about the recruitment process and tribunals ought to be astute to scrutinise questions which go further than is necessary. The *Code* approves an application form which states: "*Please contact us if you are disabled and need any adjustments for the interview*", although it is arguable that the statement should say no more than "*Please contact us if you need any adjustments for the interview*".

56.2 Questions asked in order to establish "*whether B will be able to carry out a function that is intrinsic to the work concerned*": s.60(6)(b). There will be many jobs where a certain level of fitness is a pre-requisite. The *Code* provides the example of scaffolders, and proposes that it would be lawful to ask questions related specifically to an applicant's ability to climb ladders and scaffolding to a significant height. That is

uncontentious, but it is less obvious whether it would be permissible to ask questions about an individual's power to concentrate i.e. questions that might be thought to be aimed at revealing whether the applicant has any mental health issues. The *Code* suggests that the exception should be narrowly applied "*because, in practice, there will be very few situations where a question about a person's disability or health needs to be asked – as opposed to a question about a person's ability to do the job in question with reasonable adjustments in place*". This is problematic – asking an applicant whether or not s/he could do the job with reasonable adjustments in place, in circumstances where the employer does not even know if there is a disability, would be nonsensical (and arguably an even more obvious breach of s.60(1)).

56.3 Questions for monitoring diversity in the range of persons applying to A for work: s.60(6)(c). A monitoring process ought to be conducted with a proper separation of information between those who are conducting the monitoring and those who are making the recruitment decisions. A monitoring policy in which all interviewees are asked at interview whether they are disabled is unlikely to pass muster.

56.4 Questions for taking action to which s.158 (positive action) would apply: s.60(6)(d).

56.5 Questions where A applies a requirement to have a particular disability e.g. a requirement for a disfigured actor: s.60(6)(e). Having such a requirement must be objectively justified: s.60(8).

56.6 Questions where applicants are being vetted for work for reasons of national security: s.60(14).

57. Critically, a contravention of s.60(1) is only enforceable as an unlawful act by the EHRC under Part I of the Equality Act 2006. As of 20 September 2011, not a single unlawful act notice had been issued by the EHRC under EA 2006, s.21.

58. However, an individual may still refer to and rely upon a breach of s.60 when bringing a disability discrimination claim. Section 60(3) provides that an employer's conduct in reliance on information given in response to an impermissible question may be a contravention of a relevant disability provision e.g. an employer who asks whether the applicant is disabled and then states that he doesn't consider recruiting disabled applicants. Section 60(5) provides that where such a question is asked in circumstances where there is a disability discrimination complaint, that may have the effect of reversing the burden of proof under s.136.

JAMES LADDIE

MATRIX CHAMBERS

20 September 2011