DISCRIMINATION

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INTRODUCTION

1. Discrimination is governed by the Equality Act 2010 (EqA 2010). The key concepts are:
   1.1. Protected characteristics
   1.2. Prohibited conduct:
      1.2.1. direct discrimination
      1.2.2. discrimination by association and perception
      1.2.3. indirect discrimination & the justification defence
   1.3. Harassment
   1.4. Victimisation

   In the context of disability discrimination,

   1.5 there is also discrimination arising out of disability and

   1.6 the duty to make reasonable adjustments.

2. Claims of discrimination in an employment context must be brought by an eligible claimant. Eligible claimants are:

   a. employees (ss 39, 83(2)(a) and 83(4) EA 2010); s 83 defines employee broadly, see below.

   b. apprentices (ss 39, 83(2)(a) and 83(4));

   c. people who are engaged under 'a contract personally to do work', which is a broad category that includes 'workers' and some self-employed people (ss 39, 83(2)(a) and 83(4));

   d. Crown employment (ss 39, 83(2)(b), 83(4), 83(7) and 83(9));

   e. House of Commons and House of Lords staff (ss 39, 83(2)(c) and (d) and 83(4) to (6));

   f. police officers (ss 39 and 42 EA 2010);

g. armed forces personnel (ss 39 and 83(3));

h. contract workers (s 41 EA 2010);

i. LLP partners (ss 44 to 46 EA 2010);

j. office-holders (ss 49 to 50 EA 2010);

k. individuals who were previously in any of the above categories (eg former employees) (s 108 EA 2010); and

l. applicants for positions which fall into any of the above categories (ss 39(1) and (3) and 40(1)(b) EA 2010 in respect of (a)-(c) and (e)-(h) above, s 45 in respect of LLP Partners, s 41 in respect of contract workers and ss 49-50 in respect of office holders).

3. *'Employee'* is defined in s. 83(2) ERA 1996 as a person in employment. That includes a person who is employed under a contract of employment, a contract of apprenticeship or contract personally to do work. This therefore includes limb (b) workers under s. 230(3) ERA 1996 as long as they are engaged *personally* to do work for the employer. Self-employed workers are not included in the definition of s. 83(2) EqA 2010.

PROTECTED CHARACTERISTICS

Age

4. In s. 5 EqA 2010, age means a reference to a person of a particular age group; and age group means a group of persons defined by age, i.e. the over 50s. Who is in what age group can be relative and depends on the facts. Age dismissal can affect younger people as well as older ones or where there is a cut-off age.

5. Unlike most protected characteristics, excepting disability, direct age discrimination can be justified. As Baroness Hale of Richmond JSC said in *Seldon v Clarkson Wright and Jakes [2012] ICR 716* at para. 65: *"where it is justified to have a general rule, then the existence of that rule will usually justify the treatment that results from it."* In *Seldon,* the Supreme Court held that it was justified to have a compulsory retirement age for partners to allow for succession planning and to give younger partners a chance of partnership.

Disability

6. In s.6 EqA 2010, a person has a disability if that person has 'a physical or mental impairment' which has a 'substantial and long-term adverse effect on [the person's] ability to carry out normal day-to-day activities'. A disability means the type of disability affecting the employee in question – disabilities are not to be lumped together as one. The question of disability is judged as at the date of the discriminatory act. Each of the elements in the definition must be satisfied and so the EAT has said that an ET should ask:

   First, is there a physical or mental impairment?
   Second, if so, does it affect the employee's ability to carry out day to day activities?
   Third, if so, is the affect substantially adverse?
   Fourth, if so, is it long-term? (*Goodwin v Patent Office [1999] IRLR 4*).

   The Government has published '*Guidance on matters to be taken into account in determining questions relating to the definition of disability*' (2011) ('the Guidance') which should be consulted for meaning and explanation of s. 6

7. *'Impairment'* is not defined in EqA 2010 but certain conditions are excluded, including addictions, tendencies to set a fire, to steal or to physical or sexual abuse, as well as exhibitionism and voyeurism. Meanwhile, the Act does expressly identify some impairments are automatically qualifying as disabilities, including cancer, HIV and multiple sclerosis (schedule 1 EqA 2010). The Guidance gives plentiful examples of impairments falling within s. 6.
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8. *'Day to day activities'* means the activities done ordinarily, not specifically done for work or specialist activities – watchmaking is a commonly-given example. Day to day activities means walking, talking, climbing stairs, brushing your hair, the ability to do up your bra, using a computer, cooking etc.

9. '*Substantial'* is defined as '*more than minor or trivial'*. The focus should always be on what the person *cannot* do rather than what the person *can* do. The effect can be the result of more than one physical or mental impairment. An ET should also

be mindful of whether there are reasonable mitigating steps than the employee can take to control the substantial adverse effect – i.e. coping strategies.

10. *'Long term effect'* is defined in Schedule 1 EqA 2010 as a condition which either (i) has lasted for 12 months or (ii) will last for 12 months or (iii) will last a lifetime. *'Likely to'* means *'could well happen'* not that it is more likely than not to happen– *Boyle v SCA Packaging [2009] IRLR 746.*

11. The period of 12 months is to be judged as at the date of the discriminatory act and not at the date of trial.

Gender Reassignment

12. Gender reassignment is the process of transitioning from male to female or vice versa. This is what is protected under s. 7 EqA 2010. Intersex and non-binary and asexuality are not covered by the Act. Nor is simply wearing clothes associated with the other sex or makeup (cross-dressing) unless it is linked to a proposed transition – cross dressing without an intention to reassign is not the purpose of this section.

13. Contrary to belief, it is not necessary to transition with medical supervision or to have medical procedures to be protected under s 7 EqA 2010. A procedure and psychiatric counselling may result in a Gender Reassignment Certificate, at which point the person will be entitled to a new birth certificate in his or her new sex. A GRC will not be granted without that full being procedure being followed. But it is not a prerequisite of s. 7 that medical or psychiatric intervention has been sought.

14. Equally, because s. 7 refers to someone who *'has undergone a process or part of a process',* a person who began but did not continue or complete the process is still protected under the EqA 2010.

15. Note that is enough if the employee is '*proposing'* to transition; in this context proposing means serious consideration, and not just a passing fancy – *Taylor v Jaguar Land Rover Ltd ET Case No 1304471/18,* where an ET found that the employee did now intend to live as a woman and had been harassed and victimised during her employment.

16. Under s. 16 EqA 2010, A discriminates against B who has the protected characteristic of gender reassignment and is absent from work because of gender reassignment, if he treats B less favourably than he treats or would treat someone who was absent for sickness, injury or some other matter. This section applies, as is clear from s. 16(2), because the person is proposing to undergo, is undergoing or has undergone the process (or part of the process) mentioned in section 7(1).

Marriage and civil partnership

17. S. 8 EqA 2010 refers to marriage and civil partnership, including between same sex couples. This protected characteristic refers to the actual status of *being* married or in a civil partnership – which means protection does not extend to those people who are not married or are widowed, divorced or cohabitating. Nor is there protection for someone who announces that he or she is getting married or entering into a civil partnership– until the person actually has the relevant status, s.8 does not bite. There may however be claims for sex or sexual orientation discrimination.

18. There has been judicial debate on whether the section applies to being married as such or being married to a particular person. The answer seems to be that it is related to being married to, or in a civil partnership with, to someone as opposed to in a close relationship with them - *Hawkins v Atex Group [2012] IRLR 237,* which emphasised that the reason for the less favourable treatment should be marriage specific. S. 8 could also extend to left because the employee was having marital difficulties, i.e. a church minister – *Gould v Trustees of St Johns Downshire Hill [EAT/0015/17].*

Race

19. In s.9 EqA 2010, '*race*' is defined as to include national origin, colour, ethnic origin, and nationality.
    19.1. National origin is not the same as nationality – i.e. someone can be British born but of Ukrainian nationality.
    19.2. Nationality can also be sub-divided, i.e. English and Scottish, or Spanish and Basque.

20. Ethnic origins, as opposed to national origins, is an identifiable group through a blend of some or all of shared customs, descent, beliefs, traditions and characteristics based on a common past – *Mandla v Dowell Lee [1983] IRLR 209*. This includes travellers. Caste is not a protected characteristic under the EqA 2010 but in *Chandhok v Tirkey [UKEAT/0190/14]*, Langstaff J held that it *could* fall under s. 9 if it closely related to *'ethnic origins'*.

21. Nationality and race are not the same as religion, although in some cases it can be both – i.e. Jews are both a religion and a race *R v Governing Body of JFS [2010] IRLR 136*. Muslims and Rastafarians are a religion but they are not a nationality or a race. Sikhs are both a race and a religion (*Mandla*).

22. Being a migrant worker is not if itself a basis for race discrimination *Onu v Akiwu [2016] IRLR 719* as it is not a protected characteristic.

23. It is not necessary for the employee the employee to have the protected characteristic of race; as we will see with direct discrimination, the test of less favourable treatment is *because of* the protected characteristic and not because he or she has the protected characteristic. Therefore in *Wethersfield Ltd v Sargent [1999] IRLR 94,* the employee was discriminated against when she refused to obey an order not to hire cars to people of ethnic origin.

Religion and Belief

24. S. 10 EqA 2010 covers religion or belief. Religion is defined as *any religion'* and includes *'lack of religion'*. In other words, a person can be discriminated against for having no religion as well as for having a particular religion. It is not necessary to show that the employee is an atheist – a lack of belief means simply that, see *Forstater v CGD Europe [2021] IRLR 706*. Belief is defined as '*any religious or philosophical belief*'. In *Forstater*, the EAT defined this as '*a precise definition of those aspects of the belief that are relevant to the claims in question'*.

25. s. 10 EqA 2010 applies to the religion or belief of the employee, not the religion or belief of the discriminator. So for example, in *Lee v McArthur [2018] IRLR 1116,*

the '*gay cake*' case, the bakers refused to supply the claimant a cake with a gay marriage slogan because their Christian beliefs meant they did not believe in gay marriage; their refusal was not because the claimant himself was gay. It would have been different had they refused to serve him at all because of his sexual orientation. On the other hand, where the owners of a B&B refused to allow a gay couple to have a room with a double bed, that was held to be discrimination in the field of goods and services – *Hall v Bull [2013] 1 WLR 3741.*

26. Religion includes the manifestation of that relief, for example wearing a cross or a Star of David. In *Eweida v UK [2013] IRLR 213,* the European Court of Human Rights held that it was irrelevant to the exercise of an Art. 9 right (freedom of religion) that the religious belief was not widely shared by other members of the faith. The interpretation of religion in s 10 EqA 2010 should be interpreted in the same way as Art. 9.

27. As far as belief is concerned, the tests were set out in *Grainger v Nicholson [2010] IRLR 4*, where the employee asserted that his belief in global warming was a belief within 2003 Regulations. Burton J set out the relevant tests to be applied:

    27.1. Was the belief genuine?

    27.2. Was this a belief, rather than an opinion based on the present state of information available?

    27.3. Was the belief clearly related to a weighty and substantial aspect of human life and behaviour?

    27.4. Has the belief attained a certain level of cogency, seriousness, cohesion and importance?

    Since then, belief has been extended to a belief in the public broadcasting functions of the BBC, stoicism, anti-foxhunting, freemasonry and ethical veganism. The most notable decision recently on this matter was *Forstater,* where the employee's gender-critical views were held to be a protected belief; this was followed in *Mackereth v Department of Work and Pensions [2022] IRLR 721,* where the employee's Christian belief that a person could not change their sex meant he refused to use preferred pronouns for trans people; the EAT held this to be a protected belief.

28. Beliefs that are extreme and hostile to precepts of society will not earn protection. So for example, beliefs in Holocaust denial or that the world is dominated by a Satanic new order have been denied protection, as would be any belief which is inherently contrary to the rights set out in the Convention of Human Rights – see *Forstater*.

Sex

29. s. 11 EqA 2010 concerns sex discrimination, namely discrimination against men and women. s. 212 unhelpfully defines a woman as a '*female* of any age and a '*male*' as a man of any age. This can and will present problems; although sex may presently mean the biological sex that is recorded on the birth certificate, there will be arguments if the employee identifies as a female, despite being born male, that person is a woman for the purposes of s 9 EqA 2010. Or vice versa.

30. A person with a Gender Recognition Certificate (GRC) has the right to be deemed to be the sex assumed, including a change to the birth certificate.

31. The action must be less favourable treatment because of sex. However, that does not mean that it is acceptable to treat someone *more* favourably – *Eversheds LLP v de Belin [2011] IRLR 448*, where, in a redundancy exercise, a solicitor who had been on maternity leave was given overly-favourable scoring for her period of absence and so was retained over a male solicitor , who was made redundant. Without those amendments, he would have scored more than her and been retained. Had the female solicitor still been on maternity leave when the redundancy exercise took place, she would have had the right to be offered the post without any competition (reg. 10 Maternity and Parental Leave Regulations 1999).

Sexual Orientation

32. Sexual orientation is defined in s. 12 EqA 2010 as orientation towards the opposite the sex, the same sex or both sexes. On the basis of that definition, asexuality would not seem to be included within the definition.

33. The definition also includes a wrongful perception that someone is gay (or straight) leading to less favourable treatment – *English v Thomas Sanderson Blinds Ltd [2009] IRLR 206* (i.e. thinking that someone is gay). In fact, when the liability hearing took place, it was held that the employee's colleagues knew that he was not gay and pretended that he was – as a result, there was no perceived discrimination.

Pregnancy and maternity

34. Pregnancy and maternity is listed as a protected characteristic under s. 4 EqA 2010 but it is not given its own definition with the other protected characteristics as in ss. 5-12. Under s.18 EqA 2010, it is a prohibited act if the employee is treated unfavourably because she is pregnant or has a related illness in the 'protected period' or is on compulsory maternity leave or has taken or seeks to take ordinary or additional maternity leave. The protected period is from the start of the pregnancy until 2 weeks after the end of the pregnancy or the end of maternity leave, whichever is the later.

35. There is no need for a comparator. This is because pregnancy is treated as a uniquely female condition - *Webb v Emo Air Cargo [1994] IRLR 482* . As such, there is no issue of less favourable treatment – like s. 15 EqA 2010 (discrimination arising from disability) the treatment must be unfavourable.

Equal Pay

36. Equal pay is linked to sex discrimination but it is not a protected characteristic of itself - ss. 64ff EqA 2010. Equal pay is essentially a contractual claim but is governed by principles of discrimination.

37. Equal pay arises where A does equal work to B. Equal work is defined in s. 65 EqA 2010 as one of the following: like work, work rated as equivalent and work of equal value. Like work is work which is broadly similar and where the differences are of no material relevance; work rated as equivalent is where the worker and the employee have agreed a job evaluation by assessing the work with reference to a series of values; and equal value is where independent job experts (or, occasionally,

the ET) determines the value of the work, although it is the ET that makes the decision.

38. In essence, the right to equal pay arises where A does equal work to B and there is no material factor explaining the pay differential. A material factor is an explanation which is genuine, relevant and unconnected with sex (s. 69 EqA 2010). A and B must be of the opposite sex. In the case of direct discrimination, it is sufficient if the explanation (the material factor) meets that description. It does not have to be a good reason or one with which the ET agrees. On the other hand, if the PCP is indirectly discriminatory, s. 69(2) the usual principles of objective justification apply (see above). For example where there is occupational gender segregation with men mostly doing one type of work and women another, a pay policy which only pays bonus to one group will require objective justification. This is the essence of the local authority and supermarket mass equal claims – see for example *Redcar & Cleveland BC v Bainbridge [2008] IRLR 776*.

39. Where equal work is established, and there is no material factor defence, s. 66 EqA 2010 implies into A's contract a sex equality clause which is no less favourable than the contract in B's clause. This happens automatically entitling A to arrears of pay to a maximum of 6 years (5 in Scotland).

40. It is important to distinguish between equal pay and discrimination. Equal pay is concerned only with contractual terms. If a term is discretionary, like a bonus, then the claim must be brought as a discrimination claim. The distinction is important because there are different time limits applicable An equal pay claim may be brought during the period of employment and then up to six months after the end of the employment. A discrimination claim can only be brought within three months of the act of discrimination.

FORMS OF DISCRIMINATION

Direct discrimination

41. s. 13 EqA 2010 sets out the definition of direct discrimination as where '*A discriminates against B if because of a protected characteristic, A treats B less*

favourably than A treats or would treat others'. *'Because of'* has the same meaning as *'on the grounds of'*, the previous wording before EqA 2010.

42. It is therefore necessary for an ET to find the reason why the less favourable treatment took place. Was it because of the protected characteristic? Or was it for some reason unconnected with the protected characteristic? It is necessary to distinguish between '*but for'* and '*because'*. *'But for'* only applies where the less favourable treatment is a proxy for discrimination – for example, in *James v Eastleigh BC [1990] ICR 554,* where women could gain free admission to municipal swimming pools at the age of 60 whereas men had to be 65, those being the respective retirement ages at the time. Everyone who was male and between 60 and 65 was less favourably treated – but for being a man, they too would have had free admission.

43. Motive for the less favourable treatment is irrelevant, as is intention or unconscious discrimination. Often discrimination can take the form of a stereotypical assumption, i.e. women with children will take more time off; people of colour are lazy or less well educated; various nationalities are dishonest; gay men are hysterical. This also applies to a feeling of discomfort that someone *'will not fit in'* because they come from a different background or culture. The issue is whether there is less favourable treatment, not what the discriminator meant by it. So for example, Amnesty International's refusal to offer a placement in Somalia to a woman of Somalian origin partly because of risks to her safety (as well as a perception of bias by Somalian authorities on Amnesty's part) was held to be direct discrimination - *Amnesty International v Ahmed [2009] ICR 1450.*

44. Save for age and some parts of disability discrimination, direct discrimination cannot be justified.

45. Less favourable treatment means that the employee must be put to some sort of disadvantage or detriment– this is an objective test, as an unreasonable reaction or sense of grievance will not be seen as a detriment in law, but the employee's feelings are clearly relevant. For example a female prison officer forced to search

male prisoners was held to be less favourable treatment - *Home Office v Saunders [2006] ICR 318.*

46. *'Because of'* does not mean *only* because of – it is enough if the reason for the less favourable treatment was '*more than minimal or trivial*' – *Igen v Wong [2005].* The important thing is to show that the protected characteristic was the reason, or part of the reason, for the discrimination.

47. It is irrelevant if the discriminator has the same protected characteristic as the employee – s. 24 EqA 2010. This negates the '*I can't have discriminated against someone because I'm also black/Jewish/gay'* defence.

Direct discrimination -associative discrimination

48. In *Coleman v Attridge [2008] IRLR 722,* the ECJ held that Article 5 of the Framework Employment Equality Directive applied to those associated with those with disabilities so that the employer had discriminated against the employee by treating her less favourably for taking time off to look after her disabled son, for whom she was the sole carer. That was a claim for direct discrimination.

49. However, in *Hainsworth v Ministry of Defence [2014] IRLR 728,* the claim was for failure to make reasonable adjustments. The employee worked as a teacher on a British Army base in Germany. Her daughter, aged 17, was born with Downs Syndrome but there were no facilities for her care and education on the bases in Germany and so she was being cared for and educated in the UK. The employee unsuccessfully applied for a compassionate transfer to the UK and then brought a claim for reasonable adjustments. The MOD applied to strike out the claim on the grounds that s.20 EA 2010 did not apply in circumstances where the reasonable adjustments were required not for the employee but for a family member.

Direct discrimination - perceived discrimination

50. Discrimination can also occur when the discriminator thinks that the employee has a protected characteristic and treats him or her less favourably because of that perception – for example, *Chief Constable v Coffey [2019] IRLR 805,* where a police officer was refused a job as she was incorrectly perceived to be disabled. In *English v Thomas Sanderson* (see above) where a preliminary hearing established

that perception could be direct discrimination under s. 13 EqA 2010, but the liability hearing concluded that the employee's colleagues knew that he was not gay but harassed him pretending that he was. The claim was therefore dismissed.

Indirect discrimination

51. Indirect discrimination is defined in s.19 EqA 2010 as where A discriminates against another (B) if A applies a provision criterion or practice ('PCP'), which is discriminatory in relation to a particular protected characteristic of B's. The essence of indirect discrimination is that it is not directly discriminatory because of a protected characteristic but the PCP, which appears to be neutral and applicable to everybody, puts both B and others with whom B shares the protected characteristic, to a disadvantage. So for example, a rule that women cannot do overtime is directly discriminatory because it applies to and is aimed at women. But a rule that everyone must do overtime is indirectly discriminatory to women because many women have childcare responsibilities and so cannot do overtime. As with direct discrimination, motive and intention are irrelevant.

52. A PCP is usually more than a one-off decision and suggests an ongoing state of affairs. A PCP should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A PCP may also include decisions to do something in the future – such as a policy or criterion that has not yet been applied – as well as a one-off or discretionary decision

53. *'Disadvantage'* means that the employee himself or herself must be personally disadvantaged by the PCP and also that others sharing the PCP would be; it is not however necessary to show that *every* person with the protected characteristic. suffers that disadvantage. In *Essop v Home Office (UK Border Agency) [2017] IRLR 558,* the employee was one of a group of 49 civil servants employed by the Home Office. Six were chosen as test employees. The Home Office requires officers to pass a Core Skills Assessment as a pre-requisite for promotion but the BAME pass rate was significantly lower than for white and for younger candidates. There was no explanation for this disparity. The Supreme Court held that s. 19(2)(c) EqA

2010 did not require an employee to show why he or she was put at a disadvantage, only that he or she *was* at that disadvantage and other members of the group.

54. Whether a group with a protected characteristic is at a disadvantage in comparison with others without that protected characteristic must be determined by statistics and a proper comparison by comparing advantage and disadvantage within the appropriate pool. The pool must be drawn so as only to include people affected by the issue in question - *Grundy v British Airways [2008] IRLR 74*. In *Naeem v Secretary of State for Justice*, which was heard together with *Essop*, the employee was an imam employed as a Muslim chaplain in the Prison Service. The Prison Service operated an incremental pay scale with increases dependent primarily on length of service, although at the time of the claim, it was transitioning to an accelerated model. The Prison Service did not employ salaried Muslim chaplains until 2001, and so Christian Chaplains tended to earn more than Muslim Chaplains because they had been employed longer. The Supreme Court held that the appropriate pool had to include those affected by the PCP and this clearly included Christian chaplains. The PCP was the incremental pay scheme based on length of service and therefore everyone belonged in the pool.

55. Unlike direct discrimination, indirect discrimination can be objectively justified. This involves showing that there was a legitimate aim and that the means used were no more than was necessary and proportionate to achieve that aim.

    55.1. A legitimate aim is based upon a real need on the part of the employer to do something – *Bilka-Kaufhaus GmbH v Weber von Hartz [1987] ICR 110,* or a genuine business need *Department of Work v Boyers [2020] UKEAT/0282/19/AT*. The means must actually achieve that aim. A desire to save costs is not of itself a legitimate aim, but it can be coupled with another factor in what is known as '*costs plus*'.

    55.2. The employer must show that apart from the measure adopted by the respondent, there is no other means of achieving the employer's legitimate aim which is not discriminatory or at least is less discriminatory: *Barry v Midland Bank plc [1999] ICR 859*. On the other hand, the employer only needs to show it acted reasonably in selecting the means – there may be several different ones. The role of the ET is to take into account the reasonable needs of the

business when deciding proportionality– *Hardys & Hanson v Lax [2005] IRLR 726*.In *Naeem*, although there was disadvantage to Muslim chaplains, that disadvantage was no more than was necessary as the transition to a new shorter pay scale took its course; it was a proportionate means of achieving a legitimate aim. Where the respondent is in the process of departing from a discriminatory system in an attempt to remove the particular disadvantage, the ET has to bear in mind if there are alternative means of proceeding which would eliminate or reduce the disadvantage more quickly.

Harassment

56. s. 26 EqA 2010 deals with harassment in relation to age, disability, gender reassignment, race, religion or belief, sex or sexual orientation. There are three sorts of harassment but all of them involve the concept in s 26(1) that (i) the conduct is unwanted, (ii) that it is related to a protected characteristic and (iii) it has the purpose or effect of violating B's dignity or creating an intimidating, hostile degrading or offensive environment for B. It is not necessary that A *purposely* engages in this conduct intending it to have that effect – the second half of the definition shows that purpose is not necessary as long as B's dignity is violated or there is an intimidating, hostile, degrading or offensive environment for B.

57. s. 26(2) relates to unwanted conduct a sexual nature; s. 26(3) relates to unwanted conduct of a sexual or relating to gender reassignment or sex and A treats B less favourably than A would treat B had B not submitted to or rejected the conduct – in other words, a form of victimisation.

58. The test here is both subjective and objective, as provided by s. 26(4) EqA 2010. B must genuinely have felt violated; but it must have been objectively reasonable for B to feel like that. The harassment must be more than '*trivial acts causing minor upsets*' - see *Grant v Land Registry [2011] IRLR 748*. In that case, there was no detriment where a gay employee was outed by his manager when he had in fact already come out at work

59. Dismissal can be harassment - *Urso v Dept. for Work and Pensions [2017] IRLR 304*.

Victimisation

60. Victimisation in s. 27 EqA 2010 is defined as where A subjects B to a detriment because B does a protected act or A believes that B may have done a protected act. In other words, A punishes B for the protected act, whether consciously or otherwise. It is therefore necessary to prove that the employer knows about the protected act as otherwise it could not have acted on the basis of it.

61. A protected act is defined in s. 27(2) EqA 2010 as:

    (a) Bringing proceedings under the 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 the Act;

    (d) Making an allegation that A or another person has breached the Act.

    Unlike a protected disclosure ('whistleblowing') under the Employment Rights Act 1996, the disclosure does not have to be reasonable but it cannot be made in bad faith (s. 27(4)). The more unreasonable the allegation, the less likely it is to be in good faith. The test is whether the employee acted honestly in doing the protected act - *Saad v Southampton University Hospitals NHS Trust [2019] ICR 311*.

62. Victimisation also applies to making a claim of equal pay.

63. Again the key to victimisation is less favourable treatment and so it necessary to ask why the employer acted as it did and whether it was because of the protected act? – *Nagarajan v London Transport [1999] ICR 877*.

64. In deciding why the employer acted as it did, the ET has to distinguish between taking action (or inaction) because of a protected act and an action connected with the protected act; for example, refusing to accept the result and repeated making unreasonable allegations - *Devonshires Solicitors v Martin [2013] ICR 305*.

Specific discrimination for disability – discrimination arising from disability

65. Discrimination arising from disability is where A treats B unfavourably because of something arising out of B's disability and A cannot show the treatment was a proportionate means of achieving a legitimate aim.

66. The key points here are

66.1. There is no comparator involved – instead of *less* favourable treatment s.15 speaks of *unfavourable* treatment, as it does in s. 18 EqA 2010 and pregnancy/maternity.

66.2. The unfavourable treatment is not because of B's disability but because of something arising in consequence of B's disability.

For example, suppose that an employee is often late because her difficulty standing means she prefers to travel outside rush hour. She is disciplined or dismissed for lateness; the reason for the treatment is not disability but lateness. However, the lateness is something arising in consequence of B's disability. The employer must therefore justify the treatment on the usual principles. An extreme example was shown on *City of York v Grosset UKEAT/0015/16/BA* where the employee was Head of English at a secondary school and suffered from cystic fibrosis. He was subjected to extreme overwork. He was dismissed for showing 15 and 16 year old pupils the X rated film "*Halloween*". The ET concluded that showing the film arose as a consequence of disability and the EAT upheld it. Another extreme example is *Risby v London Borough of Waltham Forest (2016) UKEAT/0318/15/DM*, where the employee, a paraplegic, was frustrated as being made to go to Council premises which had no proper disability access, lost his temper and used a racial slur. The EAT held that again the swearing and language was the *something* that prompted the disciplinary procedure but it arose *in consequence* of the employee's disability.

67. The employer must have knowledge of the disability, whether actual or constructive or through an agent like an occupational health doctor. Without that knowledge, the employer will not be liable. This is not the same as the rule that an employer who knows that a worker is disabled must also know that there is a link between the 'something' and the disability. It is a different question. The test for causation is an objective one, and so the motive behind it is not relevant.

Specific discrimination for disability – reasonable adjustments

68. ss. 20-22 EqA 2010 gives another cause of action to disabled employees. The employer is under a duty to make reasonable adjustments for a disabled employee to allow that employee to be able to work. Like s. 15 EqA 2010, this duty is dependent upon the employer's actual or constructive knowledge of the employee's disability.

69. The duty has three basic requirements:

69.1. By s. 20(3), where there is a PCP which puts the disabled employee at a substantial disadvantage compared with those who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage;

69.2. By s 20(4), where there is a physical feature which puts the disabled employee at a substantial disadvantage compared with those who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage;

69.3. By s. 20(5), where a disabled person would but for the provision of an auxiliary aid, be put to a substantial disadvantage compared with those who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

70. As to these three requirements

70.1. PCP is defined above in the section on indirect discrimination. For example, this could mean hours or place of work, qualifications or the need to comply with some requirement. An employer is not usually obliged to extend sick pay when the contractual sick pay policy runs out, except perhaps where the employer's conduct has caused the absence on sick leave or prevented an earlier return.

70.2. A physical feature could mean a staircase, the distance of an office, temperature or the design of the toilets.

70.3. An auxiliary aid could mean something like voice-activated computers or an assistant to help the employee complete his or her work.

Where a cost is involved in making the reasonable adjustments, the employee must not be asked to contribute to it.

71. In each case, the duty is to make *reasonable* adjustments, not *any* adjustments. What is reasonable is a matter of fact in each case. For example, it is not reasonable to ban all use of perfumes or aerosols in a particular workplace where all other employees were ordered not to use them but the public had access to the room in question and could not be prevented from using them - *Dyer v London Ambulance NHS Trust (2014) UKEAT/0500/13/LA*. The employer does not have to believe that a reasonable adjustment will eliminate the substantial disadvantage, only that there is a prospect that it will. But if it is clear that it will never work, it is not reasonable to take those steps. Paragraph 6.28 of the EHRC Code sets out the factors which an ET should consider in considering reasonableness. Cost is of course an important factor, as is the reaction of other employees and whether the employee is agreeable and willing to cooperate.

72. The employer is obliged to make reasonable adjustments whether the employee suggests any or not – *Cosgrove v Caesar & Howie [2001] IRLR 653*.

Pre-contract health enquiries

73. Under s. 60(1) EqA 2010, an employer must not ask a job applicant for details about his or her health and about any disabilities before offering work or putting the applicant into a pool of applicants to whom the employer intends to offer work when it is in a position to do so. This does not give the applicant a cause of action in an employment tribunal but, under s. 60(2), the EHRC can enforce it as an unlawful act under Part 1 EqA 2006. s. 120(8) EqA 2010 stipulates that enforcement of s. 60 is limited to the EHRC alone.

74. An example of an enquiry which is not permitted includes a question in an application form concerning how much work a person has missed as a result of sickness.

75. This prohibition applies to employers, employment agencies and authorised agents conducting any job recruitment process in England, Scotland or Wales involving internal or external applicants for work, and also when selecting a pool of candidates who may be offered work in the future.

Work' for these purposes means (s. 60)(9)):

75.1. employment;

75.2. contract work;

75.3. a position as a partner;

75.4. a position as a member of an LLP;

75.5. a pupillage or tenancy in barrister's chambers (including Scottish equivalents);

75.6. an appointment to a personal or public office; or

75.7. the provision of an employment service.

76. Enquiries are permitted concerning intrinsic elements of the job s.60(6) and also whether any reasonable adjustments are required for the job interview.

Burden of proof

77. s.136 EqA 2010 sets out the burden of proof in discrimination claims:

> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

78. There is therefore a two stage process.

78.1. First, the ET must find facts (adduced by either the employee or the employer) from which it could deduce discrimination in the absence of any explanation of the employer. If it does so,

78.2. The employer has the burden of proof of giving an explanation for the treatment that is in no way connected with discrimination. If the employer cannot do this, the ET *must* find there has been discrimination. On the other hands, if the facts are not established from which the ET could deduce discrimination, the employer has no burden to discharge.

When is discrimination unlawful?

79. Discrimination is unlawful when it falls under one of types of discrimination set out above and in, a work context, falls within the relationships in Part 5 Chapter 1 (Employment) of the EqA 2010 identified in the opening paragraphs.

80. The employer is liable, as is any servant or agent of the employer. Vicarious liability is dealt with in s. 109 EqA 2010 which makes an employer liable for the acts of employees (as defined in s. 83(2)) in the course of their employment. In the course of employment means that the employee must have been doing something connected with work even if doing it unlawfully. An assault at work would therefore fall within s. 109; an assault in a pub unconnected with work, other than that the two people involved are colleagues, is not in the course of employment. There may be fine lines to be drawn when the event outside work is a work event – *Chief Constable of Lincolnshire Police v Stubbs [1999] IRLR 81*. In that case, a female police officer was sexually harassed at a drinks event immediately after work and also at a leaving party. Both events were held to be in the course of employment.

81. An employer can escape liability under s. 109(4) if it can show that it took all reasonable steps to prevent the employee from committing the discriminatory act or any other act of that description. The burden on proof is on the employer to show that the steps it took were reasonable, including regular and up to date training, and to act when a discriminatory act or practice comes to its attention. Stale, out of date training will not afford the employer the statutory defence – see *Allay (UK) Ltd v Gehlen [2021] IRLR 348*.

82. The statutory defence only applies to employees and not to agents. In the case of agents, the issue is whether the agent was acting in the course of his or her authority; this is not the same as asking whether the employer /principal authorised the discrimination, which is not the test.

83. The employer is not liable for the acts of a sub-agent - *Kemeh v Ministry of Defence [2014] IRLR 377*. The contrast in that case was that the claimant, suffered two acts of race discrimination whilst stationed in the Falklands as a military cook. The first was from his sergeant, for which the MoD was liable. The second was from a

butcher employed as a sub-agent of the company which had the catering contract for the base. The MoD was not liable for that action.

84. Where the employer might not be liable because of the statutory defence, it is prudent to sue the employee personally as second respondent.

85. An employee is not liable for the action of third parties, i.e. customers or suppliers.

PERMITTED DISCRIMINATION

Positive action

86. Positive action is permitted to mitigate disadvantage suffered by people with a protected characteristic to reduce under-representation in relation to particular activities and to meet their particular needs. For example, this could take the form of special training – s. 158 EqA 2010.

87. s. 159 EqA 2010 concerns recruitment and promotion. An employer can take a protected characteristic into account when making a decision whom to hire or promote *but* only as a tie breaker where the candidates are as qualified as each other, and not a matter of preference for someone with that protected characteristic. This can include advancing one disability over another. A general policy of favouring one group is not lawful.

88. In addition, the employer can only act if it *reasonably* thinks that a group with a protected characteristic is disadvantaged; that reasonable belief must be based on research and proper consideration and must be evidence based, perhaps after consultation with unions. That action must be a 'proportionate means' of achieving the stated aims of enabling or encouraging that group to overcome or minimise the disadvantage, meeting their different needs or enabling or encouraging them to participate in an activity where they have a disproportionately low participation, as set out under ss 158(2) and 159(2) EA 2010, and the steps taken must be proportionate. Guidance is given in the *EHRC Code of Practice on Employment*.

89. s.193 EqA 2010 permits charities to restrict the provision of supported employment to persons who share protected characteristics if the provision of the benefit is a proportionate means of achieving a legitimate aim (see Q&A [69]) or if it is provided for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic.

Occupational requirements

90. The EqA 2010 permits people with a protected characteristic to be employed to the exclusion of others where there is an occupational requirement – for example, acting or modelling in terms of sex or race (paragraphs 1 and 5, Schedule 9). Paragraph 1 states:

> *A person (A) does not contravene a provision mentioned in sub-paragraph (2) by applying in relation to work a requirement to have a particular protected characteristic, if A shows that, having regard to the nature or context of the work—*
> *(a) it is an occupational requirement,*
> *(b) the application of the requirement is a proportionate means of achieving a legitimate aim, and*
> *(c) the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it).*

This would also apply to hiring only women to work in a refuge for abused women or in a changing room for women. Particular sorts of counselling, e.g. for rape victims, might exclude not only men but trans women, even those with a GRC Certificate. In each case, it is necessary to ask what is the aim of the policy and are the means to achieve it proportionate? These matters are not simply a given – could there be less discriminatory means used rather than the use of an OR?

91. There are also exemptions in the case of religion where it is lawful to employ only one sex where the religious tenets require it, i.e. Catholic priests or Orthodox Rabbis or Imams – Schedule 9, paragraph 2. Similarly, the defence under

paragraph 2 has been applied to religion institutions which applied religious precepts that gay men could not be priests –*Pemberton v Inwood [2018] EWCA Civ 564.*

92. In cases of disability, the Armed Forces are exempt from action for not employing disabled people and older people as soldiers– Schedule 9, paragraph 4(2) EqA 2010.

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