

Chapter 12: Disability discrimination

Page 473

1. Which of the 'medical' or 'social' model approaches to the protection of the disabled do you prefer? Give reasons for your answer.

Author's answer: In terms of the 'medical' model, a person's disability is seen as not attributable to external environmental influences, but to the individual's own impairment which functions to marginalize his/her capacity to engage in normal day-to-day activities. Here, the disabled person's medical condition is seen as something that requires fixing, as a passive recipient of medical care, leading to the marginalisation and objectification of that person. This can be distinguished from the 'social' model, which views the difficulties that disabled persons face as something that is wrought by societal structures that act as barriers. As such, here the limitations that the disabled face are perceived as not their fault or attributable to their own medical impairments, but problems with society. The main deficiencies with a legal regime protecting the disabled that is predicated on the 'medical' model is that it invariably objectifies the disabled and secondly, consistently demands that the disabled person provide persuasive evidence of their disability. In some cases, the UK disability discrimination regime departs from the 'medical' model, e.g. insofar as it permits discrimination by perception or discrimination by association claims, but by and large, it is wedded to it. This means that there is less impetus for far-reaching and pro-active measures to be adopted by employers to identify potential barriers to the disabled in the workplace. Moreover, employers also know that they can challenge legal proceedings brought by their disabled workers by simply alleging that they do not satisfy the medical definition of 'disability'.

2. Do you agree that the formal equality model (conferring a right to equal treatment) is insufficient in the context of disability? If not, why not? If so, why?

Author's answer: The formal model of equality assumes that one group is in the same position and deserving of the same treatment as another (different) group. For example, men and women are different. Nevertheless, the formal model dictates that they should be treated consistently. However, this model breaks down in the case of the disabled, since by definition, the disabled are incapable of doing all of the same things as the able-bodied. This gives rise to the proposition that the disabled ought to be treated differently from the able-bodied, i.e. that they should not be treated consistently with the able-bodied, but that they should be treated more favourably. If this point is accepted, then it stands to reason that a disability discrimination regime should encompass a degree of substantive equality to reflect the fact that structural societal hurdles mean that the disabled are beginning a metaphorical race a few yards removed from the able-bodied. The recognition of substantive equality in the disability discrimination regime finds its expression in the concept of the employer's duty to make reasonable adjustments.

Page 505

1. Compare and contrast the legal concepts of direct disability discrimination and 'discrimination arising from disability'. To what extent does the decision of the Court of Appeal in *Stockton on Tees BC v Aylott* conflate the two concepts?

Author's answer: Direct disability discrimination arises where the treatment of an individual is less favourable than the treatment experienced by a comparator because (i) he/she has, or is perceived to have, or (ii) someone he/she is closely associated with has, a particular disability, i.e. 'but for' the fact of the particular disability, the treatment experienced by the individual claimant would have been different, or the 'reason why' he/she was treated in a particular way could only be attributed to the particular disability. As such, in the context of a direct disability discrimination claim, the claimant must establish that the less favourable treatment was attributable to disability itself. This can be contrasted with the 'discrimination arising from disability' legal concept. This applies where the reason for the less favourable treatment is the effect or impact of the disability, rather than the disability itself, or disability generally. This distinction has been blurred by *Aylott* to some extent insofar as *Aylott* enjoins a court or tribunal to remove certain behavioural traits associated with a mental illness from the characteristics of the hypothetical comparator in the context of a direct disability discrimination claim where the claimant suffers from a mental illness. For example, where a claimant suffers from a mental illness which causes him to experience difficulties in achieving satisfactory performance of his everyday tasks or work duties, the hypothetical comparator will be constructed as someone not having the disability who does not suffer from such performance difficulties. This lowers the bar for claimants, since it is easier for them to show that they have been treated less favourably than such a hypothetical comparator. However, it arguably moves the concept of direct disability discrimination closer to the concept of 'discrimination arising from disability', since the hypothetical comparator in the context of the latter type of claim will also be someone who is not disabled, and who is not experiencing performance difficulties. Therefore, in cases involving mental illness, the more or less identical nature of the hypothetical comparator (ie in both a direct disability discrimination and discrimination arising from disability claim, the hypothetical comparator will not be disabled, will not possess some of the behavioural traits of the claimant, or the effects or impact of the claimant's disability) does arguably operate to assimilate the two concepts.

3. Compare and contrast the employer's duty to make reasonable adjustments and the concept of indirect disability discrimination.

Author's answer: There are a number of crucial differences between these two concepts, despite the fact that both are designed to achieve forms of substantive equality. First, the duty to make reasonable adjustments requires evidence of the disabled claimant suffering a 'substantial disadvantage', whereas in an indirect discrimination claim, the claimant need only establish a 'particular disadvantage', which is a lower hurdle to negotiate. Secondly, in the latter type of claim, the employer has a proportionality defence, whereas this is not available in the context of the duty to make reasonable adjustments. Another difference between the two claims is that the duty to make reasonable adjustments involves the application of preferential treatment for disabled employees, i.e. more favourable treatment than the non-disabled group. This can be contrasted with an indirect disability discrimination claim, which entails the achievement of an equality of results or outcome where an ostensibly neutral provision, criterion or practice is applied equally by the employer to all employees and workers. Finally, there is no need for a disabled claimant to show group disadvantage in the case of the duty to make reasonable adjustments, whereas this is an inherent part of satisfying the test of indirect disability discrimination.