Impact on UK Employers of Cuts in State Disability Benefits

Emma O'Byrne

Emma O'Byrne is a member of the Employment Team at Russell-Cooke, a London-based law firm. She advises both employers and employees on a range of contentious and non-contentious employment matters. Ms O'Byrne studied law at Nottingham University before being called to the Bar in 2005 and then training to be a solicitor. She is a member of the Employment Law Association.

George Osborne, the UK's Chancellor of the Exchequer, recently announced that significant cuts in welfare benefits will be introduced to bring the British economy 'back from the brink'. He revealed that Employment Support Allowance (ESA), which is the main incapacity benefit in the UK, will be limited to one year, after which this benefit will be withdrawn. This is expected to affect around one million people.

The Chief Executive of the charity Scope has voiced his concerns over the proposed reforms. In reaction to the proposals announced in late October, he commented that:

> "... in terms of employment the Government has not delivered on its promise to support disabled people into work penalising those on ESA and JSA [Job Seekers Allowance] who worked and paid national insurance in the past and who now cannot rely on getting the support they need when they need it, in an increasingly difficult employment market."

Scope has set up a campaign to gather the views of disabled people who may be affected by the cuts and is encouraging people to sign a petition. Scope's website indicates that disabled people fear that they will be forced to return to the workplace, into roles that they are not capable of doing.

With this in mind, the following represent some of the key employment law issues that employers in the UK should be aware of.

EQUALITY ACT 2010

Disability Discrimination

The introduction of the Equality Act, the majority of which came into force on 1 October, sets out the new law in relation to disability discrimination. The Equality Act preserves much of the law on disability discrimination that was contained in the Disability Discrimination Act 1995. In addition, it extends protection in the workplace for disabled people and makes it easier for them to establish that they have been discriminated against.

Under the Equality Act it is discriminatory for an employer to:

- discriminate directly, by treating a job applicant less favourably than others because of any disability; and
- discriminate by treating an employee unfavourably because of something arising as a consequence of someone's disability without objective justification.

The latter point replaces "disability related discrimination" under the old law. This new strand of discrimination was introduced to overcome difficulties caused by the House of Lords' decision in *London Borough of Lewisham v Malcolm*, which made it very difficult for disabled people to succeed in claims of disability-related discrimination. Unlike the regime that it replaces, there is no comparator required, which is likely to make it easier for employees to establish disability discrimination.

In addition, it is discriminatory for an employer to fail to make reasonable adjustments for a disabled worker who is placed at a substantial disadvantage. Reasonable adjustments can include physical adjustments to the workplace and the adaptation of working conditions such as a phased return to work, a reallocation of duties, provision of a support worker or a change in reporting line. More recently, employment tribunals have applied a more purposive approach when deciding what is a reasonable adjustment.

Moreover, it is discriminatory for an employer to:

- victimize a person because he/she has made or intends to make a claim for disability discrimination under the Equality Act or because he/she has done or intends to do certain other things in connection with the Act; and
- subject a person to any harassment that is related to a disability.

Furthermore, employers should note that the Equality Act extends statutory protection to those "associated" with disabled people, such as their carers and parents. It gives effect to the ruling of the European Court of Justice (ECJ) in *Coleman v Attridge Law and another* on the interpretation of the European Union Equal Treatment Framework Directive. The Equality Act therefore entrenches the rights of those associated with a disabled person to bring a claim if he/she has been treated less favourably or subjected to harassment because of the disabled person whom he/she is associated with. This entrenches the rights of a potentially wider group of employees in the workforce to bring claims for disability discrimination, even if

it is not expected that many associative disability discrimination claims will be made.

In addition, the Act extends statutory protection to those who are incorrectly perceived as having a disability. This type of discrimination applies where those who are believed to have a disability are subjected to less favourable treatment as a result of this perception. Liability for employers may be extensive, as discrimination awards are uncapped in the UK, although they are not punitive in nature but are based on actual losses suffered and any injury to feelings or health. It will be interesting to see in what circumstances a tribunal will decide that an employer has discriminated against someone based on an incorrect perception that the person in question has a disability, given that it is usually no easy matter to satisfy the definition of disability for these purposes. One imagines that this is most likely to happen where either the employer or an occupational health doctor has declared in clear terms the belief that an employee has a disability for the purposes of the Equality Act. Employers will not be able simply to avoid all mention of this, given that they continue to be under an obligation to consider whether reasonable adjustments are needed.

The Act extends the scope of disability discrimination law to cover indirect discrimination. Indirect disability discrimination occurs where an employer applies a provision, criterion or practice (PCP) which puts a disabled person at a particular disadvantage when compared with non-disabled people and the employer cannot justify this treatment as a proportionate way of achieving a legitimate aim. The concept of a PCP is fairly wide and can include informal practices as well as formal policies. Furthermore, unlike other areas of disability discrimination, an employer is not required to have knowledge of an individual's disability. Employers are advised to review their policies, practices and criteria (including selection criteria), to check whether they could potentially cause a particular disadvantage to a disabled employee, in order to reduce the prospects of an indirect discrimination claim.

Where the lack of an auxiliary aid would put a disabled person at a substantial disadvantage, the Act explicitly requires employers to take such steps as it is reasonable to take to provide the auxiliary aid. An auxiliary aid is defined in the Equality and Human Rights Commission (EHRC) Code as something that provides support or assistance to a disabled person. It can include a specialist piece of equipment (for example, an adapted keyboard) and services, such as a support worker for a disabled worker.

Furthermore, the Equality Act prohibits an employer from asking a job applicant to complete a pre-employment health questionnaire except where there are permissible reasons, which can be summarized as follows:

Assessing the duty to make reasonable adjustments. An employer is under a duty to make reasonable adjustments for a disabled job applicant during the interview process (for example, accommodating an individual's reduced mobility by providing a suitable venue for interview). The EHRC Code states that an employer is only permitted to ask questions about a candidate's health to assess whether reasonable adjustments need to be made for the selection stage and not the job itself.

Establishing whether the applicant can carry out a function that is intrinsic to the job. There is little guidance on the meaning of intrinsic in this context. It is as yet unclear how broadly this will be interpreted by tribunals. The EHRC Code suggests that there will not be many situations where this exception will apply.

Monitoring diversity. The EHRC's guidance states that any information retained for the purposes of monitoring diversity should be kept separate from other information about candidates and should not be reviewed by any decision-makers involved in the hiring process.

Requiring a job applicant to have a specific disability. An exception can also be made where there is an occupational requirement to have a particular disability, for instance where an employer wants a blind project worker with personal experience of blindness. In such cases, the occupational requirement must be a proportionate means of achieving a legitimate aim.

Taking positive action. Another permissible reason would be for the purposes of taking positive action permitted under other provisions of the Equality Act. The EHRC Code explains that this exception will apply in situations where employers can show that the questions are being asked to improve the employment rate of disabled workers.

Vetting applicants. Finally, an exception can be made for the purpose of vetting applicants for national security work.

The aim of placing limits on the use of pre-employment health questionnaires is to prevent discrimination at the selection stage.

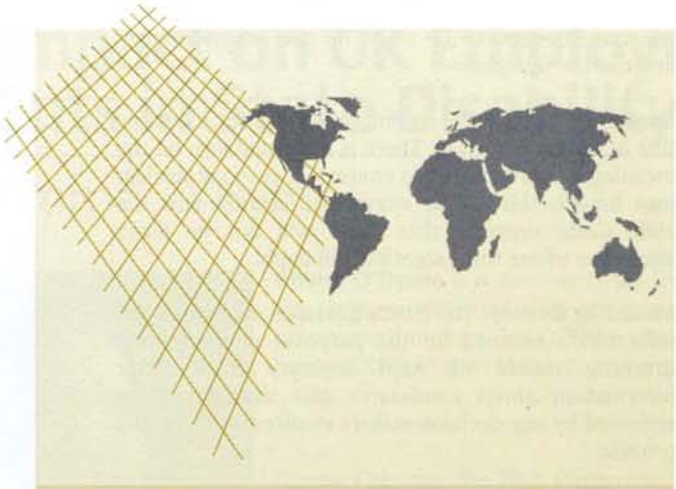
The EHRC has powers to investigate the use of prohibited questions and take enforcement action, where necessary (for example, if there is evidence to suggest that an employer routinely asks prohibited questions as part of its selection criteria).

Before issuing a pre-employment health questionnaire, employers should therefore establish that the questions asked fall within one or more of the permissible reasons. Failure to do so will expose the employer to potential disability discrimination claims.

Furthermore, it is currently proposed that from April 2011 it will be unlawful to discriminate directly because of a combination of two protected characteristics, i.e. disability, age, race, sex, marriage and civil partnership, pregnancy and maternity, religion or belief, gender reassignment and sexual orientation. It is not yet clear how this will work in practice or what impact this will have on employers.

Contractual Sick Pay & Permanent Health Insurance

Some employers may feel there is an additional financial exposure, when hiring disabled employees, to higher contractual sick pay payments (where an employer has contractually agreed to continue paying salary at a full or lower rate during periods of sickness) and to higher



permanent health insurance premiums. Permanent health insurance is an insured benefit which provides employees with income, paid for by the insurer, if they become permanently disabled and are unable to work in the capacity in which they were previously employed, for as long as this continues to be the case. However, removing or reducing the level of contractual sick pay, or any permanent health insurance benefit, for disabled employees could expose an employer to a range of disability discrimination claims, including direct disability claims that are not capable of being justified.

There are also significant risks associated with dismissing an employee who is about to benefit from permanent health insurance. Permanent health insurance schemes will typically pay out between 50% and 75% of an employee's pay, for as long as he/she is incapacitated by illness or injury, following a medical assessment and in accordance with the criteria under the policy. Employees usually lose the benefit entirely, or are only entitled to reduced benefits, if they are dismissed. Furthermore, an employer is obliged to take all reasonable steps to secure permanent health insurance benefits on behalf of its employees from the insurers. This may include pursuing legal action against an insurer if it appears reasonable that the medical assessment made by the insurer is incorrect. This is because the employer will have contracted with the employee who receives the benefit, but the employee will have no direct relationship with the insurer.

An employer who dismisses an employee who is about to benefit from permanent health insurance with the purpose of depriving the employee of this benefit can be sued for breach of contract. The damages awarded can be very large, given that permanent health insurance usually lasts until the age when the employee would have retired.

Unfair Dismissal

If an employer dismisses a disabled employee with one year's service in a discriminatory way, that dismissal is likely to be an unfair dismissal. The compensatory award is based on the losses suffered by the employee. The maximum unfair dismissal compensatory award is currently £65,300*. In addition, the employee can be awarded a basic award which is based on age, length of service and salary. The current maximum basic award is £11,400.

EMPLOYER AWARENESS OF OBLIGATIONS

As it seems likely from the Government's proposals that more disabled employees will be forced back to work, UK employers need to ensure that they are fully aware of their obligations to disabled job applicants and employees (and non-disabled job applicants and employees who are associated with a disabled person or are perceived to be disabled) and that their procedures and practices do not expose them to a range of potentially costly claims. Ω

* €1 = £0.85; US$1 = £0.63 as at 12 November 2010