



Covid-19 and discrimination law: some tricky issues

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Covid-19: the great leveller?



Source: Doctors, nurses, porters, volunteers: the UK health workers who have died from Covid-19, The Guardian, 22 May 2020

Who is particularly affected?

- Disability
- Vulnerability
- Being from a BAME group
- Being pregnant/a new mother
- Having caring responsibilities - Sunday Times 24/5/20 reports *'Mothers driven back to sink, cooker and home schooling'*

Evidence of disparate impact

- Intensive Care National Audit and Research Centre, 17 April 2020
 - 34.5% of more than 4,800 critically-ill patients with COVID-19 were from BAME backgrounds
- Institute for Fiscal Studies, May 2020
 - “After stripping out the role of age and geography, **Bangladeshi** hospital fatalities are twice those of the white British group, **Pakistani** deaths are 2.9 times as high and **black African** deaths 3.7 times as high...”
- Public Health England, COVID-19: review of disparities in risks and outcomes, 2 June 2020
- Beyond the Data: Understanding the Impact of COVID-19 on BAME Communities, 16 June 2020

Disability

- Disability basics:
 - Section 6 Equality Act 2010
 - (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.
- Schedule 1
 - Para 2: Long term effects
 - Para 3: Severe disfigurement
 - Para 5: Effect of medical treatment
 - Para 6: Certain medical conditions
 - Para 8: Progressive conditions

Categories of protected people

Clinically **extremely** vulnerable

- Solid **organ transplant** recipients.
- People with specific **cancers**:
 - people with cancer who are undergoing active chemotherapy
 - people with lung cancer who are undergoing radical radiotherapy
 - people with cancers of the blood or bone marrow such as leukaemia, lymphoma or myeloma who are at any stage of treatment
 - people having immunotherapy or other continuing antibody treatments for cancer
 - people having other targeted cancer treatments which can affect the immune system, such as protein kinase inhibitors or PARP inhibitors
 - people who have had bone marrow or stem cell transplants in the last 6 months, or who are still taking immunosuppression drugs
 - People with severe respiratory conditions including all cystic fibrosis, severe asthma and severe chronic obstructive pulmonary (COPD).
- People with **rare diseases** that significantly increase the risk of infections (such as severe combined immunodeficiency (SCID), **homozygous sickle cell**).
- People on **immunosuppression therapies** sufficient to significantly increase risk of infection.
- Women who are **pregnant with significant heart disease**, congenital or acquired.

Categories of protected people

Clinically vulnerable

- **aged 70 or older** (regardless of medical conditions)
- under 70 with an underlying health condition listed below (that is, anyone instructed to get a flu jab each year on medical grounds):
- chronic (long-term) mild to moderate respiratory diseases, such as asthma, chronic obstructive pulmonary disease (COPD), emphysema or bronchitis
- chronic **heart disease**, such as heart failure
- chronic kidney disease
- chronic liver disease, such as hepatitis
- chronic neurological conditions, such as Parkinson's disease, motor neurone disease, multiple sclerosis (MS), or cerebral palsy
- **diabetes**
- a weakened immune system as the result of certain conditions, treatments like chemotherapy, or medicines such as steroid tablets
- being **seriously overweight** (a body mass index (BMI) of 40 or above)
- **pregnant women**

Shielding and vulnerability

Clinically extremely vulnerable

“If you’re clinically extremely vulnerable, you’re strongly advised to **stay at home at all times** and avoid any face-to-face contact to protect yourself.

This is called ‘shielding’ and the advice is:

1. Do not leave your house.
2. Do not attend any gatherings, including gatherings of friends and families in private spaces, for example, family homes, weddings and religious services.
3. Strictly avoid contact with someone who is displaying symptoms of coronavirus (COVID-19).

The Government is currently advising people to shield until 30 June 2020 and is regularly monitoring this position.”

Clinically vulnerable

“You are advised to **stay at home as much as possible** and, if you do go out, take particular care to minimise contact with others outside your household.”

Differences and similarities

- Aged 70 or older
- Obesity
- Pregnancy

Duty to make reasonable adjustments

- Section 20 Equality Act 2010
 - Owed to a disabled employee, not disabled persons with whom an employee is associated - Hainsworth v MoD [2014] IRLR 728
 - Application of provision, criterion or practice (PCP)
 - Puts disabled people, including the claimant, at a particular disadvantage
 - Triggers duty to take steps to avoid that disadvantage

Disability related discrimination

- Section 15 Equality Act 2010
 - Protection for disabled employees
 - Concept of not being treated unfavourably
 - Applies where unfavourable treatment is because of something arising in consequence of disability
 - Not a proportionate means of achieving a legitimate aim

Indirect discrimination

- Section 19 Equality Act 2020
 - Application of provision, criterion or practice (PCP)
 - Puts those sharing protected characteristic, including the claimant, at a particular disadvantage
 - Not a proportionate means of achieving a legitimate aim.

- Claimant must prove facts from which ET could conclude that there is a PCP which causes group and individual disadvantage

- No need to show *why* a provision, criterion or practice puts people sharing a protected characteristic at a particular disadvantage - *Essop and ors v Home Office and Naeem v Secretary of State for Justice* [2017] 1 WLR 1343

Return to work

- Covid-19 implications for protected characteristics
 - direct health risks – your own protected characteristics place you at greater risk of contracting Covid-19 and/or at greater severity
 - indirect health risks – you live with/care for others who are placed at risk of contracting Covid-19 by your social interaction
 - wider social impact – balancing caring responsibilities with work
 - 21/5/20 – Guardian reports that Dyson UK forced to cancel plans to re-open its UK campus in face of concerted opposition from staff to having to travel to work

Health and safety legislation

- Management of Health and Safety at Work Regulations 1999
 - Duty to carry out *'suitable and sufficient'* risk assessment (reg 3)
 - Duty to carry out assessment of risks to health and safety of pregnant women/new mothers if have women of childbearing age working (reg 16)
 - *Specific* obligation in the case of an *employee* pregnant woman/new mother put at risk which cannot be avoided to
 - Offer suitable alternative work on same terms and conditions; or
 - Suspend on maternity grounds *with pay* – see also ss.67-68 Employment Rights Act 1996

Management of Health and Safety

- Duty to establish and give effect to procedures to be followed in the event of *serious and imminent danger* (reg 8)

- Must enable people to stop work and go to a '*place of safety*' if exposed to such danger which is unavoidable
 - Not actionable
 - Report to HSE?

Employment Rights Act 1996

- Sections 44(1) and 100(1)
 - Right not to be subjected to detriment on the ground of leaving/refusing to return to work because of *serious and imminent danger*
 - Right not to be subjected to detriment for taking steps to protect self/others in such circumstances
 - Automatically unfair to dismiss for those reasons

- Only applies to employees

- When will rights be enforceable?

Personal Protective Equipment Regulations 1992

- Duty to provide suitable PPE where possible risk to health and safety at work which cannot be controlled in another way (reg 4)

Positive rights v disparate impact

- Positive rights
 - Health and safety legislation
 - Maternity suspension
 - Request flexible working – s.80F ERA 1996
 - Time off for dependents – s.57A ERA 1996
 - Right to parental leave – s.76 ERA 1996
 - Duty to make reasonable adjustments?

Positive rights v disparate impact

- Disparate impact
 - Duty to make reasonable adjustments
 - Disability related discrimination
 - Indirect discrimination

Redundancy and protected characteristics

- Direct or indirect discrimination?
- Drawing up criteria
 - LIFO
 - Attendance record/sickness absence
 - Skills/aptitude
 - Willingness to work in different locations

Redundancy and pregnancy

- Regulation 10 Maternity and Parental Leave Regulations 1999
 - Woman's role becomes redundant during ordinary or additional maternity leave
 - Entitlement to be offered suitable alternative employment *in preference to all others*
 - Offer not opportunity to apply – Sefton BC v Wainwright [2015] ICR 652

Thank you

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