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How reasonable are reasonable adjustments?

Recent developments in the law

The duty to make reasonable adjustments is both wide and complex, and not always fully understood by employers, HR and OH practitioners. Karen Jackson explains.

THERE is a duty under the *Equality Act 2010* (EqA) to make reasonable adjustments to help overcome the disadvantages faced by disabled people at work. However, it is the failure to meet this duty that remains the most common disability discrimination issue heard at the employment tribunals and the Employment Appeal Tribunal (EAT). Ever since the seminal case of *Archibald v Fife Council*[1], it has been widely understood that the duty is a very wide one, and while recent case law demonstrates that it continues to get wider, there are still circumstances where it does not apply.

DUTY UNDER THE EqA

The reasonable adjustments duty is the backbone of the disability discrimination legislation. It requires employers to take proactive steps, at all stages of employment, to alleviate the disadvantages caused by disability. Section 20 EqA stipulates three requirements:

- a provision, criterion or practice (s.20(3))
- a physical feature (s.20(4)) and/or
- an auxiliary aid (s.20(5)).

Where one or more of the requirements, or its absence (in the case of an auxiliary aid) is causing disadvantage, the burden is on the employer to address the disadvantage. The law may require an employer to treat a disabled person more favourably than one who is not. The person who is not disabled cannot claim discrimination or less favourable treatment.

The duty applies where a disabled person is (1) at a substantial disadvantage (2) as compared to a person or persons who are not disabled. The employer must (3) take such steps as it is reasonable to have to take (4) to avoid or alleviate the disadvantage.

Only if the adjustment requested meets the four criteria listed above is it a reasonable adjustment. If there is a disadvantage but it is minor or trivial, rather than substantial, the duty will not arise. If the adjustment is unreasonable (in terms of cost, practicality, disruption etc) it may not be a reasonable adjustment.

The adjustment sought must be able to alleviate the disadvantage. It does not have to be 100% certain to succeed but there must be a reasonable prospect it will work.

The comparison to non-disabled people may not always apply, but the disabled employee needs to be able to show that they are at a disadvantage that would not arise if they were not disabled. If there is a substantial disadvantage but there is no adjustment that can alleviate it, the duty does not apply.

A provision, criterion or practice (PCP) must be widely construed: it could be anything from a single management decision to general workplace rules, hours of work, other working arrangements and policies. The duty is on the employer but it is useful to consult with the employee to discover what types of adjustment might assist. The reasonable adjustments duty applies only to disabled employees who meet the statutory definition of disability, not to all employees who have been off sick.

MEETING THE DEFINITION

Most occupational health (OH) practitioners and human resources (HR) professionals will find themselves dealing with reasonable adjustments very frequently in practice. What is not evident, however, is how far practitioners really understand the concept of reasonable adjustments. For example, the duty only arises if the employee in question is disabled. Disability does not equate to sickness. A person who has been off sick long term will not necessarily meet the statutory definition of disability. If they do not then the duty does not arise.

The mere fact of accepting that the reasonable adjustment duty arises implies acceptance of the fact that the employee is disabled. It is not uncommon to see letters written by HR where the term 'reasonable adjustments' is applied but where the practitioner has not actually applied their mind to whether there is a disability. The requirement to make reasonable adjustments is not a blanket duty: it only arises if an employee is disabled. Caution should be shown in the language used. If it is suggested that an adjustment should be made, and there is thus far no clear evidence

of disability in statutory terms, the word 'accommodation' might be preferred.

If an employee is disabled, the duty still only arises subject to the application of a staged approach to the question of whether or not the employer in fact needs to take action. This test is often overlooked in practice when employers rush to make adjustments or consider them, without first looking at the test. We will briefly examine it here before going on to look at some recent cases from the past two years, which assist in clarifying and refining the duty.

WHEN DOES THE DUTY ARISE?

As noted above, the duty arises in respect of a disabled employee once a PCP, a physical feature, or the absence of an auxiliary aid, is identified that places the disabled employee at a substantial disadvantage as compared to a non-disabled employee. Only if the PCP, physical feature or auxiliary aid can be identified and substantial disadvantage can be demonstrated does the duty arise.

It will not always be necessary for a disabled employee to identify a direct comparator who is not disabled. Sometimes, the facts of a case will speak for themselves and tribunals will take a broader approach. The comparison is not as strict as it is with indirect discrimination where a claim will fail if a comparator cannot be identified.

The duty to make reasonable adjustments is wide but it does not mean that employers must do *everything possible* to assist disabled employees. In the first instance, it is for the employee to identify what it is that is causing the disadvantage. Only if there is a disadvantage that is substantial and the adjustment proposed could alleviate that disadvantage is there an obligation on the employer to act. There is useful guidance on this approach in the case of *Environment Agency v Rowan*[2].

Once the duty has arisen, the burden then shifts to the employer. The employer should consult with the disabled employee to explore the types of adjustment which might assist. For example, an employee with severe dyslexia may require specialist computer software only and no further adjustments to enable him or her to do their job. A person with long-term depression might need adjustments to hours to alleviate the effects of medication or to avoid excessive fatigue, which can trigger symptoms. Often the person with the disability is the person best placed to make appropriate suggestions. The employer might be able to make the adjustments and avoid specialist intervention. Sometimes a trial arrangement might be appropriate. The EqA *Employment Statutory Code of Practice*[3] suggests at para.6.2:

'It is a good starting point for an employer to conduct a proper assessment, in consultation with the disabled person concerned, of what reasonable adjustments may be required. Any necessary adjustments should be implemented in a timely fashion, and it may also be necessary for an employer to make more than one adjustment. It is advisable to agree any proposed adjustments with the disabled worker in question before they are made.'

There may be occasions when the employee is unable to make suggestions as to adjustments. The fact that an employee, or his or her GP or specialist cannot suggest any adjustments does not absolve the employer of the responsibility to investigate further. Only after satisfying itself that nothing more can be done is an employer able to reach a decision that it need do no more. This ought reasonably to be the subject of consultation with appropriately qualified healthcare or disability practitioners.

WHAT IS REASONABLE?

The duty is a reasonable one. If an adjustment is not reasonably practicable or is unreasonable in terms of costs or disruption to the organisation then it may not be a reasonable adjustment. The EqA Code of Practice provides useful guidance on the factors which may be taken into account in determining whether an adjustment is reasonable.

A number of cases from 2010 to 2012 serve usefully to illustrate the most up-to-date law in this area.

The Court of Appeal helpfully reiterated in the 2010 case of *Aylott v Stockton on Tees Borough Council*[4] that the duty applies to all stages of employment, from recruitment to dismissal and sometimes even beyond. For example, a disabled employee dismissed on grounds of capability following a long-term absence with no prospect of a return might require adjustments to be made to the appeal process. They might need to make special arrangements in relation to their disability for the appeal meeting. The former employer is obliged to assist. An example might be obtaining a sign language interpreter for a profoundly deaf person or organising a meeting in a mobility-friendly venue for an employee who is mobility impaired. Only once the reasonable adjustment duty has been explored and exhausted will it be possible to make a lawful dismissal on capability grounds following long-term sickness absence.

We have said that a duty to make an adjustment only arises if it can alleviate the substantial disadvantage. In *Leeds Teaching Hospital v Foster*[5], the EAT considered how far it was necessary for an employer to understand the prospects of success of a proposed course of action. The question arose as to whether the action needed to be certain to eliminate the disadvantage, or was it enough that there was just a small possibility that the disadvantage would be eliminated?

which was only payable to staff who were off work altogether. Bagley commenced the phased return but became concerned that she could not afford to be on part-time wages. However, she could not work full-time for reasons of her disability.

Bagley used up her accrued holiday to boost her pay but, in May 2009, asked if she could apply for NHS Permanent Injury Benefit (PIB), which would top up her salary to 85% of earnings. She then went off sick again and once more was in receipt of the disablement allowance. Over a year later, the Trust wrote to Bagley stating that if she was not fit for work then it would have to consider terminating her employment.

On termination, Bagley's disablement allowance ceased and she started to receive PIB. She brought a tribunal claim for a failure to make reasonable adjustments.

At first instance, the tribunal found that a failure to make a reasonable adjustment had taken place because the Trust:

- had failed to pay the disablement allowance or PIB so as to facilitate a phased return
- had required her to agree to a permanent reduction in hours before considering her application for PIB
- had failed to support her through a 'maze' of policies and had 'washed its hands' of matters concerning Bagley's finances.

The tribunal held that this case was at the top of the *Vento* guidelines for injury to feelings, and awarded Bagley £30,000 for a 'hurt that will last forever'. The Vento guidelines – named after *Vento v Chief Constable of West Yorkshire*[10] and updated in 2010 in *Da'Bell v NSPCC*[11] – set down three bands of award for injury to feelings. They are the lower band, from £600 to £6,000, for less serious cases; the middle band from £6,000 to £18,000, for serious cases that do not merit an award in the upper band; and the top band, from £18,000 to £36,000, for only the most serious cases, where there has been a long campaign of discriminatory harassment.

The tribunal also awarded aggravated damages against the Trust because it had acted in a high-handed and oppressive manner (partly because it took the Trust six months from the filing of the employment tribunal claim for them to acknowledge that Bagley was disabled).

On appeal, however, the EAT found that the tribunal had erred in finding failures in the reasonable adjustment duty. It had also erred in making an excessive award for injury to feelings and in making any aggravated damages at all.

The EAT focussed on the fact that the duty to make reasonable adjustments is not a general duty. It is a duty, where there is a PCP which can be identified, and which places disabled people at a disadvantage as compared to non-disabled people, to take such steps as are reasonable to stop the PCP placing them at that disadvantage. In this case, a non-disabled person would have been affected in the same way by the confines of the pay policies and, therefore, there is no comparative disadvantage. Paying only for work done in a phased return is not a disadvantage. Bagley was in the same position as anyone else returning to work part-time, for example a new mother wanting family-friendly hours. Also, in line with the decision in *O'Hanlon v HM Revenue and Customs Commissioners*[12], paying 85% of salary for 60% of work would not have been a reasonable adjustment. The EAT considered the financial implications for the Trust if it adopted this policy.

The EAT held that the award for injury to feelings was perverse and 'manifestly excessive'. The tribunal's response to the way the Trust had handled the case was overblown. Two letters from the claimant which the Trust had ignored was not a reason to award aggravated damages. In any event, the Trust had apologised profusely. The tribunal also made the award based on its criticism of the fact that the Trust had told Bagley that she would be financially better off remaining at home. This was true. The injury-to-feelings award was reduced from £30,000 to £11,000 and the aggravated damages were reduced to zero on the basis that none of the conduct of the Trust met the high-handed and oppressive test for aggravated damages. The EAT indicated that the tribunal had allowed itself to be carried away by its sympathy for Bagley.

The upshot of this case, together with another recent judgment from the EAT in *Royal Bank of Scotland v Ashton*[13], is that the reasonable adjustments duty should not be seen as a general duty to support a disabled person. Tribunals must go through the formula

CONCLUSIONS

- **The duty** to make reasonable adjustments is not a blanket duty: it only arises if an employee meets the statutory definition of disability. Disability is more than sickness
- **The reasonable** adjustment duty is wide and far-reaching, but it is not a general duty to assist disabled employees
- **There are** a number of circumstances in which the duty will not arise
- **There must** be a substantial disadvantage, which the adjustment must have some prospect of alleviating
- **The law** does not require employers to make adjustments at whatever cost
- **Sometimes** it will be reasonable to refuse an adjustment on the basis of cost alone
- **The general** rule remains that it is not a reasonable adjustment to pay for work not done, other than in the most exceptional circumstances or if the employer is responsible for the absence by not making adjustments

of analysing whether there is a PCP, whether it causes disadvantage, and whether there are steps that would alleviate that effect.

While offering a phased return to work may be a reasonable adjustment, this does not mean that employers should have to pay for work not done. Remember, however, that following *Meikle v Nottinghamshire County Council*[14], it will be a reasonable adjustment to pay an employee who is off work because of an employer's failure to make a reasonable adjustment. For example, if an adjustment has been identified and the employer's tardiness in implementing the adjustment is causing the employee to remain off work, it will be a failure in the duty to refuse to pay in these circumstances. This is, as the law currently stands, the only exception to the rule that it will never be a reasonable adjustment to pay for work not done. ■

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Notes

1 Archibald v Fife Council 2004. ICR 954, HL.

2 Environment Agency v Rowan 2008. ICR 218, EAT. Occupational Health at Work 2004; 1(2): 12.

3 Equality and Human Rights Commission. Employment Statutory Code of Practice. London: TSO, 2011. http://goo.gl/WCHO5

4 Aylott v Stockton on Tees Borough Council. 2010 IRLR 994, CA.

5 Leeds Teaching Hospital NHS Trust v Foster. 2011 UKEAT/0052/10.

6 Chief Constable of South Yorkshire Police v Jelic. 2010 UKEAT/0491/09.

7 Cordell v FCO 2011. UKEAT/0016/11. Occupational Health at Work 2012; 8(4): 9–10.

8 Yorkshire Housing v Cuerden. 2010 UKEAT/0397/09.

9 Newcastle upon Tyne Hospitals NHS Trust v Bagley. 2012 UKEAT/0417/11.

10 Chief Constable of West Yorkshire v Vento. [2002] EWCA Civ 1871. 2003 IRLR 102. http://goo.gl/QjjDA

11 Da'Bell v NSPCC. UKEAT/0227/09. [2010] IRLR 19. http://goo.gl/A1WXB

12 O'Hanlon v HM Revenue and Customs Commissioners. 2007 ICR 1359, CA. Occupational Health at Work 2006; 3(3): 8–9; and Occupational Health at Work 2007; 4(1): 11.

13 Royal Bank of Scotland v Ashton. 2010 UKEAT/0542/ 09LA.

14 Meikle v Nottinghamshire County Council. 2005 ICR 1, CA. Occupational Health at Work 2004; 1(2): 9.