

Discrimination Update – Cases in 2007

1. This paper is intended to stimulate some thought in relation to the recent developments effecting discrimination law. It will focus in particular on disability discrimination and the duty to make reasonable adjustments under s.4A DDA 1995. For convenience, the subject has been divided into two areas: the duty to make reasonable adjustments and evidence in discrimination cases; however, the division is obviously artificial as there is considerable overlap between the two.

2. The paper considers the following areas in particular:
 - Whether an employer is under a duty to consult or assess an employee following the decision in *Tarbuck v Sainsbury's Supermarkets Ltd* [2006] IRLR 664, EAT.

 - On whom the burden of proof rests where it is alleged that an employer has breached its duty to make reasonable adjustments under s.4A DDA 1995, and whether the test is objective or subjective at each stage.

 - Whether an employer is bound to pay a higher level of sick pay to disabled employees, following *O'Hanlon v Commissioners for HM Revenue and Customs* [2007] EWCA Civ 283.

 - What the ET's role is when confronted with disputed medical evidence and the nature of the test it should apply

1. The duty to make reasonable adjustments (s.4A DDA 1995)

(a) Is there a duty to consult or assess after *Tarbuck*?

3. The law remains in an unsatisfactory state resulting from the conflicting authorities of *Mid Staffordshire General NHS Trust v Cambridge* [2003] IRLR 566, EAT and *Tarbuck v Sainsbury's Supermarkets Ltd* [2006] IRLR 664 EAT (Elias P). Despite consideration in three further cases, the uncertainty as to which approach should be preferred remains, albeit the uncertainty is more academic than practical given the EAT's repeated obiter statements of approval for *Tarbuck*. Nevertheless, an awareness of the ratio of *Tarbuck* and vitally, how it may be evaded, is essential for the practitioner.

The Initial Position

4. Para 5.20 of the Disability Rights Commission Code of Practice ("The Code") provides:

5.20 As mentioned above, it might be reasonable for employers to have to take other steps, which are not given as examples in the Act. These steps could include... conducting a proper assessment of what reasonable adjustments may be required."

5. In *Mid Staffordshire* the EAT went further and held that a full and proper assessment of the employee was a necessary part of the duty to make reasonable adjustments, and that a failure to carry out such an assessment and to consult with the employee would constitute a breach of duty. In essence,

therefore, if an employer failed to assess or consult it was liable, irrespective of whether or not it had made any adjustments or whether they were reasonable.

6. This approach was followed in ***Southampton City Council v Randall*** [2006] IRLR 18, EAT (HHJ Birtles) in which it was held that if s.4A were not interpreted so as to equate a failure to assess with a breach of duty, the DDA would be deprived of its teeth because an employer could simply close its mind to any disadvantage suffered by a disabled employee and/or to any adjustment which might ameliorate it.

Tarback and later consideration.

7. In ***Tarback v Sainsbury's Supermarkets Ltd*** [2006] IRLR 664, EAT, the current President of EAT sounded a clear change in approach, holding that there was no duty to consult with a disabled employee prior to making any reasonable adjustments:

"The only question is, objectively, whether the employer has complied with its obligations or not. That seems to us to be entirely in accordance with Archibald v Fife Council [2004] ICR 954. If he does what is required of him, then the fact that he failed to consult about it or did not know that the obligation existed is irrelevant. It may be an entirely or fortuitous and unconsidered compliance: but that is enough..."

It will always be good practice for the employer to consult and it will potentially jeopardise the employer's legal position if he does not do so - because the employer cannot use the lack of knowledge that would have

resulted from consultation as a shield to defend a complaint he has not made reasonable adjustments - there is no separate and distinct duty of this kind" (emphasis mine) per Elias P at [71] to [72].

8. What Elias omitted to indicate was how a tribunal was to approach the matter where an employee alleged that his or her employer had failed to consult him or her and that, had such consultation occurred, it would have led to certain adjustments being identified and adopted. Could the objective test under s.4A DDA allow for considerations of matters which the employer may or may not have discovered or concluded had an assessment be carried out? Vtally, *on whom did the burden of proving such adjustments would or should have been made lie?*

9. When ***Hay v Surrey County Council*** [2007] EWCA Civ 9 was heard by the Court of Appeal, practitioner's hopes that the higher court would resolve the conflict or remove the uncertainties touched upon above were misplaced. The Court of Appeal refused to consider the matter because the parties had agreed that ***Tarbuck*** was the correct authority. As a matter of legal precedent, this was correct – where there are two inconsistent decisions of the EAT, the ordinary practice is to follow the more recent decision providing that it is clear that it is not per incuriam (see ***Blue Diamond Services Ltd v McNeish*** [2003] WLR 22827036 per Burton J at [9]) – but it did little to assist practitioners.

Developments since Tarbuck

10. Two further cases relating to s.4A have reached the EAT and provided a platform for further consideration of *Tarbuck* and its application; fortuitously both were heard by Elias P. In the first, *Spence v Intype Libra Ltd* UKEAT/0617/06, the Claimant was signed off work and the case revolved around the efforts that the employer made to facilitate his return to work in the same or an altered post. The Claimant alleged that the Respondent had failed to make reasonable adjustments in that it had failed to adopt a solution that would enable him to return to work, and had failed to obtain and consult upon a medical report to this end. The ET judgment (described as impressive) found that there was disability related discrimination because the Claimant's absences were related to his disability, however the decision was justified and no reasonable adjustments could have been made to allow him to return to work. The Claimant argued that *Tarbuck* was wrongly decided (in light of the decision of the Scottish EAT in *Rothwell v Pelican Hard Copy (Scotland) Ltd* [2006] IRLR 24) or could be distinguished, alternatively that a failure to obtain and consider a medical report was quite separate to a failure to consult and so could constitute a breach of the duty under s.4A(1).

11. The EAT rejected the suggestion that there was any distinction between a duty to consult and one to obtain and consider a medical report holding that “they are all part of the procedures which an employer will sensibly adopt when determining what adjustments, if any, are reasonable” (para [38]). Elias again referred to the test in *McCaul*, namely whether the necessary reasonable adjustment has been made or not, and after considering *Archibald*, added “the duty is not an end in itself but is intended to shield the employee from the substantial disadvantage that would otherwise arise” (para [43]).

12. This is the better argument, in the author’s view. An analogy which demonstrates the distinction between obtaining medical reports and consultation with the employee is the employer’s duties under the ERA 1996 to inform and consult in redundancy situations. There as here, consultation may be pointless if neither party is in possession of the information which would allow sensible, practicable and effective discussion. How can an employer sensibly discuss an employee’s return to work if he has no idea of the effect of that individual’s disabilities and thus what his/her capabilities and limitations are? Thus, if it is later found that *Tarbuck* was wrongly decided, *Spence* should not be a bar to a claimant pointing to a failure to obtain a medical report as a reasonable adjustment.

13. It appears that Elias was wise to the possible ramifications of his judgment and was at pains to stress that, whatever the legal position might be, an employer should always adopt best practice:

"It is important to emphasise precisely what are the implications of this analysis. As was made plain in paras 69 and 72 of the Tarbuck case, it will always be good for practice employer to carry out an assessment of the disabled person's situation, whether by consultation, obtaining a medical report, or in any other way..."

The desirability of carrying out an assessment is not in issue and nothing this decision is intended to state or indicate otherwise. Indeed, in many circumstances the failure to consult will have a consequence of rendering an otherwise potentially fair dismissal unfair. Accordingly, in order to avoid liability under unfair dismissal law, if for no other reason, it will generally be prudent and desirable to consult." [49]-[50]

14. Elias considered the conflicting legal authorities, and noted that in neither ***Rothwell*** nor ***Southampton City Council v Randall*** was any doubt cast upon ***Mid Staffordshire***, and thus reliance on these EAT decisions fell foul of the trap which the CA had been alive to in ***Hay*** – there was no adversarial argument in the cases as to the correctness of the legal principle, only a discussion of whether in *fact* there was a failure to consult. Accordingly he held that neither was of any assistance to him (para [45]).

15. A final point which is worthy of note which was addressed by the EAT was whether a tribunal could take into account evidence of a claimant's condition which occurred after the date of dismissal when determining whether the Claimant was disabled within the meaning of s.1 DDA. There was conflicting authority *Greenwood v British Airways plc* [1999] IRLR 600, EAT followed the old Code para B8 which suggested that one could, whilst *Latchman v Reed Business Information* UKEAT/1303/00 held that "it was not what has actually later occurred but what could earlier have been expected to occur which is to be judged." Elias held that *Latchman* should be followed, noting that the Code had been amended in the 2006 version to remove the words "as well as time afterwards" (see paras [28] – [29]).

16. *Project Management Institute v Latif* UKEAT/0028/07 is worthy of mention because it demonstrates the manner in which the ratio in *Tarback* may be manipulated, if not altogether avoided, albeit that Elias heard the matter on appeal.

17. In the case, Ms Latif is and was registered blind. She wished to sit an exam and suggested that they should assess her to determine her particular difficulties. She also suggested that she should be able to take the exam using her own laptop with screen reading software or that her software be installed onto the examination centre's computer. The Respondent allowed a reader/recorder and afforded her twice the time for the exam, but it did not conduct any assessment to determine precisely what her needs were. It rejected Ms Latif's suggestions on the grounds that they were unnecessary, unduly costly, posed a potential security risk and gave rise to a real risk of cheating. Ms Latif passed the exam but brought proceedings alleging a breach of the section 4A duty.

18. The ET held that there was a breach of duty, but followed *Mid Staffordshire* finding that there was a breach of s.4A because the respondent had failed to carry out a proper assessment of Ms Latiff's condition, which Ms Latif accepted on appeal was an error of law. The ET found in addition, however, that the respondent had acted unreasonably in "adopting an inflexible approach without adequately listening to what Ms Latif had to say", citing various facts in support of the finding, and that the proposed adjustment would have emerged had proper consultation occurred.¹ On this basis alone the EAT held that there was sufficient evidence to justify the conclusion that there had been no reasonable adjustment in the circumstances of the case (para [34]). Elias added that his was a good example of the situation envisaged in *Tarbuck* where a failure to carry out a proper assessment may well result in a respondent failing to make adjustment which it ought to have made.

19. In practical terms the case demonstrates that which practitioners may have expected following *Tarbuck*, namely, if the employer cannot demonstrate that it has consulted or assessed or obtained a medical report, then it hands the ET a carte blanche to find that, had it taken such steps, it would inevitably have identified various reasonable adjustments which could have been made and, notwithstanding those that were, such a failure amounted to a breach of s.4A. It will then be very difficult if not impossible for the employer to appeal such a finding on the basis it is perverse. Thus, whilst the case does not restore the 'strict liability' which had been established in *Mid Staffordshire*, it goes some way to recreating it through the backdoor.

¹ A good phrase was used by the ET which is of assistance to those preparing and arguing cases alike, and a warning to employer's – the employer, the ET found, failed to consult and thereby 'treated the blind as a generic class rather than focusing on [insert name]'s particular needs' (para [27])

(2) The burden of proof in s.4A– where does it lie?

20. It will be recalled that this was the conundrum that remained unanswered in *Tarbuck, Hay or Spence*.

21. Fortunately it was at the heart of the EAT’s decision in *PMI v Latif* (above – UKEAT/0028/07). The start point, as the EAT identified, must be the statute - section 17A(1C) of the DDA provides:

“Where, on hearing a complaint under subsection (1), the complainant proves facts from which the tribunal could, apart from this subsection, conclude in the absence of an explanation that the respondent has acted in a way which is unlawful under this Part, the tribunal shall uphold the complaint unless the respondent proves that he did not so act.”

22. Further, s.53A(8) creates the obligation to observe the Code: if a provision in the Code is relevant to any issue before a tribunal, it must be taken into account. The EAT drew on para 4.43 of the Code² and held that the burden falls on the claimant to establish:

(1) That the duty to make reasonable adjustments arose (this requires a claimant to prove not only that there was a provision criterion or practice (s.4A(1)(b)), but also that s/he was placed at a substantial disadvantage (s.4A(1)(b)) (para [53]-[54]);

² “To prove an allegation that there has been a failure to comply with the duty to make reasonable adjustments, an employee must prove facts from which it could be inferred in the absence of an adequate explanation that such a duty had arisen, and that it had been breached. If the employee does this the claim will succeed unless the employer can show that it did not fail to comply with its duty in this regard.”

(2) the broad nature of the adjustment that should have been made to ameliorate the disadvantage and evidence to support it sufficient to allow the employer to “engage with the question of whether it could reasonably be achieved or not” (para [54]-[55]).

23. The burden then shifts to the respondent to prove that the adjustment was not reasonable (s.18B(1)); *and* (one assumes), where there is a argument under s.3A(6), that the less favourable treatment was justified (s.3A(3)). It should be noted that the test under s.3A(3) is akin to a subjective test requiring the respondent to prove only that it had turned its mind to the matter and considered that the circumstances were material and substantial, once this is done the tribunal cannot substitute its own view (see ***Smith v Churchill Stairlifts plc*** [2006] IRLR 41 at [46 – 49]).

24 During the course of the hearing, the QC representing Ms Latif identified a new reasonable adjustment, namely the use of a stand alone computer with the examination questions entered on Word and with her screen reading software installed. This had not been suggested in the pleadings or by Ms Latif, but the tribunal were to accept that the s. 4A duty had been breached on the basis that it was a reasonable adjustment and should have been adopted. The ET noted that the onus created by the act did not fall on the disabled person to suggest adjustments but on the employer to conduct a proper assessment (which is precariously close to ***Mid Staffordshire***), and found that had the respondent listened to Ms Latif, rather than merely following its own previous practice for the blind, it would have hit upon the suggested adjustment or something akin to it.

25. The EAT considered the case of *Cosgrove v Caesar and Howie* [2001] IRLR 653, which is authority for the point that there is no duty on a claimant to identify reasonable adjustment and that in an appropriate case it is open to the Tribunal to find that there is a failure to make reasonable adjustments even though the suggested reasonable adjustment was not made by the Claimant. It then held that a reasonable adjustment might be identified at the hearing and/or, where the claimant is unrepresented, by the tribunal itself inviting arguments to the contrary from the employer:

"We accept, however, that the proposed adjustment might well not be identified until after the alleged failure to implement it, and in exceptional circumstances, as here, not even until the tribunal hearing. Indeed, in certain circumstances we think it would be appropriate for the matter to be raised by the tribunal itself, particularly if the employee is not represented..." (para [57])

(3) Is it a reasonable adjustment to pay sick pay?

26. The Court of Appeal's awaited decision in *O'Hanlon v Commissioners for HM Revenue & Customs* [2007] EWCA Civ 283, provides some solace for employers.

27. In the case, the Claimant suffered from severe depression and consequently had a prolonged period of sickness absence (365 days in a 4 year period, 320 of which were on account of her disability). Her pay was halved after 26 weeks and reduced to nil after 52 in accordance with the respondent's sick pay scheme. She brought claims under s.4A alleging that the employer

should have made reasonable adjustments by paying her full pay for all disability related absence and under s.3A alleging less favourable treatment on the grounds of her disability.

28. The ET found that she was substantially disadvantaged by the sick pay scheme but that the respondent had made a reasonable adjustment by allowing her to return part-time between periods of absence. Further, the ET found that the sick pay scheme applied equally to disabled and non-disabled and therefore there was no less favourable treatment, but, if there were, then the treatment was justified. The EAT upheld the initial reasoning, but found that the appropriate comparator was someone who had not been on disability related sickness absence. The treatment was therefore less favourable but was justified on the basis of "powerful economic reasons" which the ET had identified.

29. On appeal Mrs O'Hanlon argued that two reasonable adjustments could have been made – either paying her full pay throughout her sickness absence or by distinguishing periods of disability related absence from normal sickness absence so that the two were not aggregated for the purposes of the sick pay scheme (thereby entitling her to 26 weeks at full pay and 26 weeks at half pay for both sickness and disability related absence in any 4 year period).

30. The Court of Appeal noted that the only reason advanced by the claimant as to why the sick pay scheme should not apply to her was because of the financial hardship it caused her. It endorsed that EAT's comments that it would be invidious to expect employers to decide whether to increase sick

pay on the basis of the financial hardship and stress suffered by an employee, and that it would be a very rare case in which it would be a reasonable adjustment to pay a higher level of sick pay.

31. Consideration was then given to the question of less favourable treatment and whether the decision was justified. The Court of Appeal accepted that it did not appear that the respondent had applied its mind to the relevant factors to determine whether the matters it relied upon for justification were material and substantial (following the test in *Post Office v Jones* [2001] ICR 805) but rejected the argument that this necessarily entailed a finding in the claimant's favour. Rather, it held that the failing did not make any difference to the decision because the claimant had failed to identify any factor which would have led to a different decision.

(4) Medical Evidence

32. As the volume of disability discrimination cases has increased so has the frequency of challenges to the medical evidence that is relied upon by the employer and/or the conclusions drawn from it. There was some uncertainty as to the nature of the appropriate function of the ET when faced with such a dispute and the nature of the test to be applied – should it be perversity, within the band or reasonable responses or is it objective or subjective.

33. Practitioners may have been surprised to learn that ET's function is limited to the consideration of whether or not the employer's decision to rely on the

medical evidence was justified, and consequently that the test is subjective (as in section 3A(3) DDA).

34. The matter was addressed in two recent cases (the first of which the author accepts would struggle to be described as a 2007 case!). In ***Heathrow Express Operating Co. v Jenkins*** UKEAT/0497/06 the claimant had a period of sickness absence which was caused by an accident at work. She suffered from agoraphobia. The argument was whether the employer's decision to dismiss her on capability grounds was justified or whether it had failed to make reasonable adjustments to allow her to return to work; it was accepted that if she was unfit to work then there could be no failure to make reasonable adjustments.

35. All turned on the medical evidence. The claimant's treating psychiatrist believed that she was 90% recovered and would be able to return to work full time within 12 months if she was allowed to return to work on a part-time basis. The OH physician, who was adamant that the psychiatrist was not the appropriate person to determine whether or not the Claimant was fit to return to work, particularly given the safety critical elements of her job, stated she was not fit to return to work in her former role because of the safety critical roles. The employer considered alternative employment, but none being available, followed the OH advice and dismissed, the general manager being concerned, having conducted a risk assessment, that it was not safe for the claimant to fulfil the non safety critical elements of her job.

36. At the ET the Claimant successfully argued that the employer could not reasonably have formed the conclusion that she was unfit for work (and

consequently that the duty to make reasonable adjustments arose). The EAT, however, overturned the decision on the basis that the ET had applied the wrong test:

"Parliament could not have intended that medical issues of this nature should be determined by the Employment Tribunal. It simply does not have the expertise properly to assess material of this nature. Provided the decision is justified, that is, is one which is sensible and for a material and substantial reason as required by s.3A(3), that is enough." [72].

37. As mentioned previously, the test under section 3A(3) DDA is a subjective one. Accordingly, applying ***Jones v Post Office***, the employer must show that it considered the appropriate material (namely a medical report in the proper form) if its decision is to be justified and material. However, in citing ***Jones*** the EAT added a further layer to the test, for in ***Jones*** Pill LJ had introduced elements which smacked somewhat of the range of reasonable responses, or at least brought an element of the objective into a subjective test:

"Consideration of the statutory criteria may also involve an assessment of the employer's decision to the extent of considering whether there was evidence on the basis of which a decision could properly be taken. Thus if no risk assessment was made or a decision was taken otherwise than on the basis of appropriate medical evidence; or was an irrational decision as being beyond the range of responses open to a reasonable decision maker, a test approved by Sir Thomas Bingham MR in a different context in R v Ministry of Defence, Ex p Smith [1996] ICR 740, 777-778, the

employment tribunal could hold the reason insufficient and the treatment unjustified"

37. In **Hay v Surrey County Council** [2007] EWCA Civ 9, the Court of Appeal affirmed that the test was one of justification: "What the ET should have done was to consider whether Surrey's conclusion that Ms Hay had to be redeployed was justified" (para [28]) but again obliquely hinted that it contained subjective elements "The ET did not merely make a judgment on matters on which legitimate differences were possible."

38. Thus, in so far as definite conclusion may be drawn from the two cases, it would appear the employer must show that its decision to rely on the medical evidence and that the conclusions it drew from it were justified, in that there were material and substantial reasons for believing that the correct medical specialist had been instructed and a suitable risk assessment carried out, if appropriate, and the tribunal is entitled to consider objectively whether or not the decision taken on the basis of the medical evidence was justified and reasonable.

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