DISABILITY DISCRIMINATION
The Duty to Make Reasonable Adjustments

An Update

A. Introduction

1. Where, in the rank of importance and use, does the duty to make reasonable adjustments stand, now that s.15 Equality 2010 ("The Act") has revived claims of discrimination arising from a disability? Will they become more or less common, harder to defend or easier to beat? Given that there is no justification defence for claims under s.20, and the difficulty faced by employees who seek to challenge justification defences advanced by their employer, it is likely, if not inevitable, that greater reliance will be placed upon reasonable adjustments claims, rather than less. Certainly s.15 claims under the Act will become more common, but the true battlefield will remain s.20 particularly following the now familiar judgment in ***Fareham College Corporation v Walters***[1], that the duty to make reasonable adjustments applies to dismissals. There has, therefore, never been a more important time to remind oneself of manner in which s.4A DDA 1995 or s.20 Equality Act 2010 ("The Act") has been construed and tailored by the courts.

2. This paper is therefore intended to provide a digestible reference guide which provides a summary of fundamental decisions relating reasonable adjustment claims, and to consider the direction and tactics which can and should be adopted in relation to cases currently progressing towards or in the employment tribunal. The vast majority, if not all of the cases, relate to the DDA (and therefore references are to s.4A), however, almost without exception the principles apply equally to s.20 of the Act.

3. The other essential points of reference must always be:
   - Sections 20 to 22 of The Act – the duty to make reasonable adjustments
   - Section 136 of the Act – the burden of proof provisions
   - The Equality and Human Rights Commission Equality Act 2010 Statutory Code of Practice - Employment ("The Code")

[1] UKEAT/0396/08/DM

B. Disability

4. It is pertinent to remind oneself of the test of disability in s.6 (and see also Equality Act 2010 (Disability) regulations 2010/2128)

6 Disability

(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.

(i) "Physical or mental impairment."

5. It is not necessary to categorise an impairment as either physical or mental (***Ministry of Defence v Hay***[2]). The courts have repeatedly afforded a broad construction and interpretation of the categories of capabilities, capacities and/or abilities which must be considered when assessing the affect of an impairment on day to day activities. There is no need for a person to establish a medically diagnosed cause for their impairment, rather the tribunal must focus on the effect of the impairment, not the cause (see the Code Appendix 1 §6-7). An impairment will be considered whether it is an illness itself, or a symptom resulting from that illness. A tribunal is not required (nor one might properly argue, is it able) to identify the cause of an impairment; that it exists is sufficient for the purposes of the definition. Thus, in ***Hewett v Motorola***[3] the EAT held that difficulties in understanding normal social interaction fell within the scope of the term "understanding" in the case of an autistic man, whose emotional but not intellectual intelligence was limited.

6. However, when identifying the impairments said to be suffered by a claimant, a tribunal must disregard any impairment which is specifically excluded by virtue of Regulation 4(1) of the Disability Discrimination (Meaning of Disability) Regulations 1996 – now Equality Act 2010 (Disability) Regulations 2010/2128 esp. s.4) – see ***Governing Body of X Endowed Primary School v (1) Special Educational Needs and Disability Tribunal & (2) Mr and Mrs T.***[4] This remains the case whether the

[2] UKEAT/0571/07
[3] [2004] IRLR 545
[4] [2009] EWHC Admin 1842, (HC)

impairment is "free-standing condition" or the product of a condition, such as ADHD or Aspergers.

7. By way of example, an individual with Aspergers Syndrome may be prone to violent episodes, which clearly would have a substantial and long term effect on his/her ability to carry out day-to-day activities, but absent any other impairment, the tribunal would not be able to find that he/she was disabled within the meaning of s.6 of the Act as a consequence. Where there are other symptoms or impairments that arise from the same condition (i.e. the individual also suffers from a lack of concentration or social skills) then the tribunal must determine whether those non-excluded impairments were an *effective cause* of the substantial disadvantage suffered (see ***Governing Body of X Endowed Primary School*** supra, applying ***Edmund Nuttall Limited v Butterfield***.[5]) If the other conditions were non-symptomatic, then it may well be that the individual will not satisfy the requirements of s.6 of the Act.

8. The case is of considerable significance for those defending claims under s.20, because it appears to be authority for the point that no duty under s.20 can arise in respect of an act caused by an excluded impairment. Thus, if an employee were to suffer from a condition which required a frequent or lengthy period of absence and also made him prone to violent outbursts, the s.20 duty would arise in respect of the absences, possibly requiring an adjustment to the capability or sickness absence policy, but would not arise in respect of the violent outbursts, and therefore no amendment to the disciplinary policy would be necessary. He could therefore be dismissed without any adjustment having to be made to the disciplinary policy – particularly the sanctions to be applied.

(ii) "Substantial … adverse effect."

9. A substantial disadvantage is one which is more than minor or trivial (see s.212 of the Act and the Code Appendix 1 §8-10 – see below). I would recommend that the guidance from the Code is sent to any medical expert who is to produce a report for the tribunal on the issue of disability. It is particularly helpful to consider where an employer can conduct day-to-day activities but suggests that this causes him or her discomfort or stress. If the guidance is given to experts, it will avoid the need for

[5] [2005] IRLR 751, per Peter Clark at 29

PHRs to be fought (together with the incidental costs) where, had the passages been considered, the issue of disability would have been conceded.

> *8. A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people.*
>
> *9. Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation.*
>
> *10. An impairment may not directly prevent someone from carrying out one or more normal day-to-day activities, but it may still have a substantial adverse long-term effect on how they carry out those activities. For example, where an impairment causes pain or fatigue in performing normal day-to-day activities, the person may have the capacity to do something but suffer pain in doing so; or the impairment might make the activity more than usually fatiguing so that the person might not be able to repeat the task over a sustained period of time.*

10. When determining whether there is a substantial disadvantage the comparison is not with the population at large, but with the level of individual's abilities *but for* the impairment (see ***Paterson v Met. Police***[6]).

11. If an individual's impairment affects just one area whether mobility, understanding, emotional intelligence etc., the approach demonstrated by the courts suggests that it is almost inevitable that the impairment will be found to have had an adverse effect on normal day-to-day activities per se (see, for example ***Ekpe v Met Police*** (approved by Elias P in ***Paterson***) an impairment which effected an officer's ability to undertake the exams which were necessary for promotion).

12. However, the Claimant's aptitudes must be judged against the populous as a whole when determining whether the condition complained of had an adverse effect. Thus, in ***Chief Constable of Lothian and Borders Police v Cumming***[7] an applicant's inability to meet certain physical requirements of the test to secure entry into the Police Force, because of limited eyesight, was not found to amount to a relevant adverse effect on that person's ability to carry out normal day-to-day activities. Many people do not have 20:20 vision and very few of those would regard themselves as disabled.

[6] EAT/0635/06
[7] EAT 0077/08

(iii) Normal day-to-day activities.

13. Following the decision of the ECJ in ***Chacon Novas v Eurest Colectividades SA*** [2006] IRLR 706 ECJ, "day-to-day activities" must be construed so as to include both professional and every day activities. The EAT in ***Paterson v Met. Police*** (supra) held:

> "*We must read s.1 DDA in a way which gives effect to EU law. We think it can be readily done, simply by giving meaning to day-to-day activities <u>which encompasses activities which are relevant to participation in professional life</u>.*" (emphasis mine).

14. Consequently, practitioners and employers will have to give consideration as to whether a particular activity is relevant to a particular profession. For example, a requirement to sit an examination or test may well be relevant to many professional callings, and thus consideration must be given as to whether an employee or applicant is disadvantaged by such tests. The central focus must be on *what is being tested*; if it is to determine an individual's capabilities by assessing his or her aptitudes, activities or abilities which are deemed relevant to the role, it is difficult to see how the test would not be deemed a day-to-day activity for the purposes of the Act.

15. The test of whether a specialist skill may properly be classified as a day-to-day activity is whether that skill is common across a range of industries, rather than restricted to a small number or one (***Chief Constable of Dumfries and Galloway v Adams***[8]). In that case, night working was found not to be so specialist that it could not be said to be a 'day-to-day activity.'

(iv) The effect of medical treatment s.6(1).

16. It is well known that on-going medical treatment must be disregarded when determining when an impairment amounts to a disability (i.e. one assesses the effect of the condition as if it were not mitigated or ameliorated by medicine or treatment). It is easy to forget, however, that one must still consider the effect of

---

[8] [2009] ICR 1034

any concluded treatment upon the impairment (see ***Carden v Pickerings Europe Ltd***[9]). An employee's medical records may well contain a reference to treatment which was not within the employer's knowledge but which may have the effect of rendering an impairment a disability for the purposes of the act.

(v) The likelihood of a condition recurring and/or lasting 12 months

17. When determining whether a condition is long-term, one must decide whether it has lasted or is likely to last 12 months or for the rest of the person's life (formerly s.2(1) DDA now Schedule 1 Part 1 s.2(1)(a) of the Act), and/or whether it is likely to recur in the future due to some underlying susceptibility (s.2(2) DDA and now Schedule 1 Part 1 s.2(1)(b) of the Act) if it is not currently symptomatic.

18. Likely, both within ss.2(1)(a) and s.2(1)(b), should be interpreted as meaning "could well happen" not that it was probable that it would happen – see **SCA Packaging Limited v Boyle**.[10] Lord Rodger of Earlsferry gave the following guidance on how the phrase "likely" should be interpreted:

> *Paragraph 6(1) applies to people who are undergoing … a continuing course of treatment or its equivalent. So it makes sense to interpret "likely" against that background. I would accordingly hold that it refers to the kind of risk of an impairment recurring ("it could well happen") that would make it worthwhile for a doctor or other specialist to prescribe a continuing course of treatment to prevent it.*
>
> *Therefore, where someone is following a course of treatment on medical advice, in the absence of any indication to the contrary, an employer can assume that, without the treatment, the impairment is "likely" to recur. If the impairment had a substantial effect on the patient's day to day life before it was treated, the employer can also assume – again, in the absence of any contrary indication – that, if it does recur, its effect will be substantial.* [§42]

[9] [2005] IRLR 720
[10] [2009] UKHL 27

19. In that case the claimant had a chronic problem with hoarseness caused by nodules that had formed on her throat. The condition was treated with surgery and by a health "management regime" which prohibited her from raising her voice, allowed for her to rest her voice and to sip water when she required and to take exercise. The question for the tribunal to determine was whether the impairment would have been likely to have had a substantial adverse effect on her ability to speak and communicate if she had not been able to follow the management regime. The Respondent argued that the surgery had precluded the recurrence of nodules, such that it was not likely that that nodules would recur and the condition would not therefore be likely to have an substantial adverse effect if the claimant were not able to follow her management regime.

20. Whether something "is likely" must be judged exclusively by reference to evidence relating to the likelihood _at the time of_ the alleged discrimination, and not with the benefit of hindsight (***Richmond Adult Community College v McDougall.***[11] It is not possible to have regard to a Claimant's condition after the alleged discrimination up to the date of the hearing. The statute therefore requires a 'prophecy' to be made by the tribunal.

3. The questions to be asked by the Tribunal in s.20 Claims

21. In ***Environment Agency v Rowan***[12], (approved in ***Fareham College Coropration v Walters***[13]) the EAT set clear guidelines as to the minimum factual findings that a tribunal should make prior to any determination as to whether there had been a breach of s.4A had been breached. These are as follows:

(a) The provision criterion or practice applied by or on behalf of an employer, or
(b) The physical feature of premises occupied by the employer;
(c) The identity of the non-disabled comparators (where appropriate)
(d) The nature and extent of the substantial disadvantage suffered by the Claimant.

[11] [2008] EWCA Civ 4, (CA)).
[12] [2008] IRLR 20
[13] [2009] IRLR 991 at §55

22. In ***Royal Bank of Scotland v Ashton***[14] the EAT stated that that guidance was "worth restating" (§16), and stressed that, whilst a tribunal did not have to identify all four, it must *at the very least* identify (a) and (d). Consequently, it began its judgment with a clear warning to tribunals and practitioners as to the dangers of losing sight of this:

> *The Act demands an intense focus by an employment tribunal on the words of the statute. The focus is on what those words require. What must be avoided by a Tribunal is a general discourse as to the way in which an employer has treated an employee generally or (save for in certain specific circumstances) as to the thought processes which that employer has gone through §2*

23. Having made the factual findings in accordance with ***Environment Agency v Rowan*** (above), the tribunal should adopt a 2-stage test objective test (see ***Churchill Stairlifts***). Firstly, it must determine what steps the employer could have taken to prevent the substantial disadvantage (in this regard a proposed adjustment of looking into ill-health retirement failed in ***Tameside Hospital NHS Foundation Trust v Mylott***[15] because it did nothing to ensure that the claimant, an employee, remained in employment without the relevant disadvantage – see §53[16]). Secondly, it must determine whether on the facts of the case (and applying the criteria once located in s.18B DDA 1995) it was reasonable for it to have taken those steps.

24. It is, however, a very different objective test to that for unfair dismissal – here the tribunal must make a real enquiry into the steps an employer might take and reach its *own* decision, based on its own assessment: the question is not whether a reasonable employer acting reasonably might have done what the employer did. The tribunal must conduct the enquiry afresh.

25. However, that enquiry is not an enquiry into whether the employer's actions were reasonable, whether in the thought process adopted or the manner in which it came

[14] [2011] ICR 632, EAT
[15] UKEAT/0352/09/DM
[16] "That is self-evidently true: ill health retirement involves leaving the job, not doing it. That raises the question whether the duty under [s.20] extends in an appropriate case to enabling a disabled employee who is no longer able to do the work (or any available alternative) to leave the employment on favourable terms. We find it hard to see how it can. We can identify … no [PCP] which has an "adverse" effect on the employee which offering ill-health retirement would prevent or mitigate…"

to make any adjustment. The focus must always be on whether it took steps which prevented the disadvantage, and that alone – see ***RBS v Ashton*** *(supra)* at §13:

> *It follows… that it is irrelevant to the questions of whether there has been or whether there could be a reasonable adjustment or not what an employer may or may not have thought in the process of coming to a decision as to whatever adjustment might or might not be made. It does not matter what process the employer may have adopted to reach that conclusion. What does matter is the practical effect of the measures concerned.*

26. Useful comments were also made to the same effect in ***Tarbuck v Sainsbury's Supermarkets Ltd***[17] at §71, ***Spence v Intype Libra Ltd*** [18] at §49-50 and ***Hay v Surrey County Council***[19] at §28-30.

> *"The only question is, objectively, whether the employer has complied with his obligations or not…. If he [the employer] 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 entirely fortuitous and unconsidered compliance: but that is enough. Conversely, if he fails to do what is reasonably required, it avails him nothing that he has consulted the employee."*

> "*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*"

Tarbuck per Elias P at para 72

> "*… it will always be good practice for the employer to carry out an assessment of the disabled person's situation, whether by consultation, obtaining a medical report, or in any other way…. Indeed, in many*

[17] [2006] IRLR 664
[18] [2007] UKEAT/0617/06
[19] [2007] EWCA Civ 93

circumstances the failure to consult will have the consequence of rendering an otherwise potential fair dismissal unfair.... "

Spence per Elias P at para 49 - 50

27. Thus the following acts or omissions will <u>not</u> lead to a breach of section 20 of themselves:

    (i) The failure to consult with the disabled employee as to the nature of his disability or the adjustments required (Tarbuck)
    (ii) The failure to conduct a work place assessment or obtain a medical report (Spence)
    (iii) The failure to conduct a risk assessment (Hay)
    (iv) The failure to consider a particular adjustment (***British Gas Services Ltd v McCaull*** [20]followed and applied in ***The Royal Bank of Scotland Group Plc v Allen***[21])

28. Of course, if an employer does not obtain medical or OH advice and/or fails to consult with an employee, then it is easy for a tribunal to find that had it sought such advice or information, it would have identified certain adjustments, and that the employer's failure to make those adjustments constituted a breach of s.20.

4. The Burden of Proof

29. The correct and current position is that set out in ***Project Management Institute ("PMI") v Latiff***.[22]

    (i) C must prove that the duty to make reasonable adjustments arose – i.e. there was a PCP and that caused him or her a substantial disadvantage;

    (ii) C must identify the "broad nature" of adjustments which should have been made [§55] (at any stage during the hearing will be sufficient [§57]).

    (iii) R must show that the suggested adjustments were not reasonable given its particular circumstances; and, if relied upon,

[20] [2001] IRLR 60,EAT
[21] [2009] EWCA Civ 1213 (CA) – county court claim
[22] [2009] IRLR 991 at §55

(iv) [R must prove that it did not known and ought not reasonably to have known of the substantial disadvantage and its effect.]

30. Further helpful guidance was given as to the application of the principle by the EAT in ***HM Prison Service v Johnson***[23]:

> *"A tribunal deciding whether an employer is in breach of its duty under s.4A must identify with some particularity what "step" it is that the employers are said to have failed to take. Unless that is done the kind of assessment of reasonableness required by the Act… is not possible.*
>
> *We are not to be taken as saying that it was incumbent on either the claimant, in advancing the case, or the tribunal, in deciding it, to identify a precise alternative posting, with every detail worked out. The degree of specificity required would depend on the nature of the evidence and the issues. In some circumstances a finding that there were "plenty of other jobs" which a claimant could have been moved to might be sufficient (at least for liability purposes). But it is necessary that findings be made."*

Does the Claimant have to prove that the reasonable adjustment would have prevented the substantial disadvantage and if so what evidence is required?

31. Two decisions of the EAT, handed down on the same day, have put the matter beyond doubt. The first, ***Lancaster v TBWA Manchester***[24] arose in the circumstances of a redundancy dismissal. The Claimant argued that the criteria used were subjective and, given the claimant's disabilities of panic and social anxiety disorders, they put him at a substantial disadvantage. The adjustment he proposed was the use of objective criteria. The issue of law before the EAT was whether C had to prove that the adjustment would be effective to eliminate the disadvantage or whether it was enough to prove that there was a chance that it would.

[23] [2007] IRLR 951
[24] UKEAT/0460/10/DA

32. The EAT considered the two competing judgments of HHJ Peter Clark in ***Romec Limited v Rudham***[25] in which he said that if there was a "real prospect" that the proposed measure would remove the disadvantage it would be satisfy the burden of proof, and compared in with the comments of HHJ McMullen QC in ***Cumbrian Probation Board v Collingwood***[26] that:

> *It is not a requirement in a reasonable adjustment case that the Claimant prove that the suggestion made will remove the substantial disadvantage. In this case the proper approach to Dr Taylor's evidence in the context of the other material was that the Claimant should be given a chance, not that the matter should be concluded to his satisfaction irrespective of whether that was reasonable or not.*

33. The EAT agreed with that expression and added

> *In so far as there is a difference between his HHJ Clark in Romec and HHJ McMullen QC in Cumbria, in our judgment an adjustment which gives the claimant 'a chance' to achieve a desired objective does not necessarily make the adjustment reasonable. The material question for an ET in considering its effect, which is one of the factors to which regard is to be paid in assessing reasonableness, is the extent to which making the adjustment would prevent the PCP from having the effect of placing the Claimant at a substantial disadvantage. §46*

34. That approach was shared by the EAT in ***Leeds Teaching Hospital NHS Trust v Foster.***[27] In that case an employee remained on sick leave, having raised a grievance that he had been bullied and harassed by his line manager. OH had advised that his sickness was caused by problems at work and he would not be fit to return until they had been resolved. The Trust investigated the grievance but rejected it. Consequently, they refused to allow the claimant to be redeployed to another department away from the manager about whom he had made a complaint, saying that there was no basis to do so, notwithstanding that C's TU representative believed that this had been offered.

---

[25] UKEAT/0069/07/DA at §39
[26] UKEAT/0079/08/JOJ at §50
[27] UKEAT/0552/10/JOJ

35. C refused to return to the same role and OH advised that although the Trust believed that the dismissal of C's grievance should have resolved the issues of bullying which C had raised, rightly or wrongly, for C the problem still existed and therefore whilst he thought that was the case he would not be fit for work unless he were redeployed to another post. The Trust rejected this advice and C was placed on the redeployment register. C's ill health meant that he was not able to be re-deployed into a post that was found for him. After the 3-month period, C was dismissed on grounds of ill-health, the Trust refusing to consider the cause of that ill-health as part of the process. On appeal, the Trust found that the period for redeployment could have been extended by 3 months but that it would have been unlikely to have made any difference.

36. At the ET, the ET found that the PCP was the requirement to work in C's original department, apart from the 3 months when he was on the redeployment register. The ET held that that PCP placed C at a disadvantage because C's disability (his stress) was the result of working in that department, and he could only be expected to return to work there once the factors which had caused his stress had been eliminated. C argued that the additional period for redeployment would have been a reasonable adjustment and the ET found that there would have been a real or a good prospect of his securing an alternative role if he had been provided the appropriate support and the longer period and upheld his complaint. The EAT held:

> *In fact, there was no need for the Tribunal to go so far as to find that there would have been a good or real prospect of [C] being redeployed if he had been on the redeployment register between January and June 2008. It would have been sufficient for the Tribunal to find there would have been just **a** prospect of that. §17*

37. It found that there was no inconsistency between *Cumbria* and *Romec*:

> *The Employment Appeal Tribunal was saying that if there was a real prospect of an adjustment removing the disabled employee's disadvantage, that would be sufficient to make the adjustment a reasonable one, but the Employment Appeal Tribunal was not saying that a prospect less than a real prospect would not be sufficient to make the adjustment a reasonable one. §17*

38. In ***Tameside Hospital NHS Foundation Trust v Mylott***[28] the then President of the ET, The Honourable Mr Justice Underhill, considered the extent to which a tribunal would require evidence in order for a claimant to establish that a step was reasonable or had a real prospect or preventing a disadvantage. In that case the ET found that a Trust should have undertaken the following steps as reasonable adjustments following a complaint by the claimant who suffered from severe mental illness exacerbated by stress:

(i) initiated an independent review of management practices in one of its departments[29], rather than insisting that he should raise the matter through its Bullying and Harassment Procedure; and

(ii) Made a finding in relation to the claimant's allegation that he was bullied by a specific manager (the process having failed to consider it at all).

39. The Trust argued that there was no evidence before the tribunal to justify the conclusion that the steps would have prevented the effect complained of (namely the anxiety state due to the employee's mental health which prevented him from being fit to work). There were occupational health reports, but these merely indicated that the claimant's concern that there had not been a proper grievance investigation had to be resolved before he would be fit to work.

40. The Honourable Mr Justice Underhill rejected the Trust's argument stating:

> *We cannot say that the Tribunal was not entitled to reach the conclusion that the steps pleaded would or might have mitigated the anxiety from which the Claimant was suffering and so have facilitated his return to work. The OHD reports formed part of the evidence supporting such a conclusion, but the Tribunal was also entitled to take a common-sense view: for example in relation to breach [ii], it was legitimate for it to take the view that the Trust's continued failure to address his grievance about how he had been treated by Ms Holyroyd on 25 January would have prolonged his "situational*

[28] UKEAT/0399/10/DM

[29] Which had been OH's recommendation.

anxiety", and thus conversely that making findings on that question would have helped to resolve it. §50

41. In ***Leeds Teaching Hospital Trust v Foster*** the EAT considered the guidance in ***Johnson*** for the need for some specificity and held that the finding that there was a good or real prospect that a suitable job would be available met that requirement (see §20). In noted that the Trust was a significant employer of 15,000 workers, 5,000 of whom worked in the same location as C, and held:

> *On those facts alone, it was, we think, open to a Tribunal to find that there was a good prospect, let alone a prospect, that a post at [C's] level outside the Security Department would have been available, and would have been suitable for him, in the first six months of 2008.*
>
> *In the circumstances, the burden of proving that there was not a good chance of such a post becoming available during that period passed to the Trust. That is entirely understandable since the likelihood of the availability of other posts for [C] would have been far easier for the Trust to assess than [C]. In the event the Trust did not prove that because it called no evidence…. §21-22*

42. It is essential therefore that employers adduce evidence that is relevant to the chance of the adjustment preventing the disadvantage and do not rely on mere assertions or argument. Witnesses and supporting documents will be required.

43. A didactic example, however, of the need for a claimant to adduce some evidence to demonstrate how the proposed adjustment would have prevented the disadvantage is provided by ***Aitken v The Commissioner of Police of the Metropolis.***[30] In that case, a police officer who suffered from OCD, depression and anxiety amongst other conditions, had become aggressive at a Christmas party, and was found amongst other matters to have made sexist remarks to a WPC, stated that he wanted to punch and break the nose of another WPC who had left service, stated that he had had thoughts about beating his girlfriends head in with a baseball bat and oscillated violent between aggression and anxiety as he continued to drink excessively. The dream claimant, then.

[30] [2011] EWCA Civ 582.

44. He was suspended from his role because of fears expressed by an OH practitioner who did not specialises in OCD that he could pose a danger to himself and others. C later returned to a non-public facing role for a short period before an OH assessment recommended that C should have no public contact whatsoever. The Official Medical Practitioner found that he was unable to fulfil the ordinary duties of a police officer but could perform full-time officer based role provided that he had minimal contact with the public and limitations were in place. C appealed against that decision and the appeal was successful, he therefore lodged a claim under s.4A in relation to the failure to make adjustments in the period of his suspension and his removal from the non-public facing role. Later a specialist found that C presented no danger to himself or the public.

45. At the ET C argued that a reasonable adjustment would have been seeking objective advice from a specialist in OCD rather than relying on the "subjective an uninformed view of colleagues and occupational health doctors." Had this step been taken at any early stage, it was said, C would never have been suspended.

46. That argument was rejected by the EAT and subsequently by the Court of Appeal which found that C had raised no point of law, stating:

> *It is argued … that he would no longer have been perceived as a risk to his colleagues or the public…. There was no evidential basis for the assertion, nor was it self evident, that such an adjustment … would have meant that the Claimant's conduct would no longer be perceived as a risk by his colleagues or by the public…* §66

47. Before adding,

> *Users of the tribunal system in discrimination cases and their professional advisers are reminded that they need evidence to prove facts; they need facts on which to base legal submissions; and they need real, not imaginary, questions of law for an appeal to the EAT and to this Court. §72*

5. Comparators

48. When determining whether a PCP, namely a Sickness Absence Policy, puts a disabled person at a substantial disadvantage is the relevant comparator class:

(v) All other employees in the employment of the company to whom the PCP applied but who were not disabled "that is employees going about their business day to day and not regularly sick, as well as those who from time to time might be"? or

(vi) All other employees to whom the PCP applied who were not sick by reason of disability?

49. In **RBS v Ashton** (Supra) the EAT found unanimously it was the former group: "We have little hesitation in thinking that in particular bearing in mind that any comparison here should be a comparison of those who but for the disability are in like circumstances [group (i)] is correct" (see §45-46).

6. What factors fall to be considered to determine whether an adjustment is reasonable?

50. The Act contains no equivalent provision to what was s.18B in the DDA 1995. Instead, the factors listed in s.18B DDA have been moved to paragraph 6.28 of the Code:

The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

- *whether taking any particular steps would be effective in preventing the substantial disadvantage;*
- *the practicability of the step;*
- *the financial and other costs of making the adjustment and the extent of any disruption caused;*
- *the extent of the employer's financial or other resources;*
- *the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and*
- *the type and size of the employer.*

51. There is very little guidance as to how these factors are to be applied. In ***Cordell v Foreign and Commonwealth Office***[31] the then President of the EAT, the Honourable Mr Justice Underhill gave some helpful guidance. The facts of the case were that the claimant ("C") was profoundly deaf but had successfully worked for the FCO with the assistance of professional "lip speakers" costing approximately £60,000 - £70,000 a year In January 2006 she was posted to Warsaw to lead the political/military press and communications team. Again lip speakers were provided at an annual cost of £146,000. In October 2009 she was invited by the ambassador-designate to Kazakhstan and Kyrgyzstan to be Deputy Head of Mission in Astana for a period of 3 years.

52. The FCO calculated the costs of providing lips speakers in that location as being £309,000 per annum, with one of costs of £64,000, so that the total cost of adjustments in the placement was in excess of £1 million. In the event, following a reduction in the posting to two years and a re-costing, the new cost was £606,000. FCO refused to provide lip speakers on the basis the cost meant that it was not reasonable and C could apply for equalling challenging posts which cost less to service, and in consequence C brought a claim under s.4A DDA as well as other claims. She relied in part upon the fact that the FCO operated a policy called the "Continuity of Education Allowance" ("CEA") for meeting the school fees of members of staff who are or were posted abroad. A maximum sum of £25,000 p.a., and travel costs 3 to 4 times a year, per child for a maximum period of 5 year was provided. Consequently, with a large family with children who all fell in the higher bracket, the total cost could be £175,000. The ET rejected her claim. The EAT upheld that decision.

53. In so doing, the EAT considered the factors in s.18B, noting "although financial cost is only explicitly mentioned under head (c), it also underlies heads (d) and (e) and will often be relevant to head (b)" [§26]. It approved the ET's references to paragraphs 5.31 and 5.36 of the DRC Code (which has been incorporated in the Code) relating to the fact that it would be reasonable for an employer to spend at least as much on an adjustment as it would cost to recruit and train a replacement and the fact that it is good practice for larger employers to have a budget for reasonable adjustments. The EAT then noted that:

---

[31] UKEAT/0016/11/SM

There is no objective measure that can be used to balance what are in truth two completely different kinds of consideration – on the one hand, the disadvantage to the employee if the adjustments are not made and, on the other, the cost of making them.

Their judgment of what level of cost is reasonable to expect an employer to incur can be informed by a variety of considerations that may help them to see the required expenditure in context and in proportion…. the size of any budget dedicated to reasonable adjustments (though this cannot be conclusive – see below); what the employer has chosen to spend in what might be thought to be comparable situations; what other employers are prepared to spend; and any collective agreement or other indication of what level of expenditure is regarded as appropriate by representative organisations. But such considerations can only help to a point… ultimately there remains no objective measure for calibrating the value of one kind of expenditure against another. §30

7. Practical considerations

(i) Medical reports

54. Where there is an issue over genuineness or the existence of a physical impairment, it is open to a Respondent to seek to disprove the existence of such impairment, if necessary by seeking to prove that the claimed impairment is not genuine (***Hospice of St Mary of Furness v Howard***[32]).

55. However, if a medical report has been produced as a result of joint instruction, it is not appropriate to cross-examine the claimant alleging that he or she exaggerated the symptoms recorded in the report (***Mahon v Accuread Ltd***[33]).

(ii) Preliminary hearings.

56. In ***SCA Packaging Ltd v Boyle*** the House of Lords questioned the appropriateness of the wholesale use of preliminary hearings to determine the issue of disability. Lord

[32] [2007] IRLR 944
[33] UKEAT 0081/08

Hope recited the maxim from *Tiling v Whiteman*[34] that points of law are often treacherous shortcuts and, consequently, the tribunal's power to deal with issues at a separate hearing should be "exercised with caution and resorted to only sparingly", moreso where the issue involved mixed questions of fact and law. The essential criterion is *whether there is a succinct, knockout point which is capable of being decided after only a relatively short hearing*. The test, Lord Hope, surmised was unlikely to be met where the preliminary issue could not be entirely divorced from the merits of the case or the issue required the consideration of a substantial body of evidence.[35] Accordingly, he concluded that the separation of the question of disability for harassment or discrimination on the grounds of that disability "*will rarely be appropriate even if the parties are in favour of it*" [§10].

(iii) Time Limits **- *Matuszowizc v Kingston Upon Hull City Council*** [36]

57. The case is of fundamental importance to any practitioner considering a claim under s.4A, now section 20. It has already proved to be the downfall of many ill-informed claimants whose case is based upon an employer's continued failure to make reasonable adjustments over a period. In the past such claims have been issued at the end of the period in question, i.e. where a claimant alleges that adjustments would have enabled him or her to return to work following a period of sick leave but no adjustment was made and the claimant was dismissal following a capability procedure, the accepted wisdom being that one could argue that the trigger date for limitation purposes was the last date on which the failure to make the adjustment occurred, and therefore the claim form should be filed 3 months after the date of dismissal.

58. ***Matuszowizc*** turned the accepted wisdom on its head. In the case the Court of Appeal considered the nature of a claim under s.4A and the effect of Schedule 3 which governs the time limits for bringing such claims, however the decision is equally binding in relation to **s123(4)** of the Act given the almost identical manner in which it is drafted. The Court held:

(i) A claim under s.4A was a claim of omission, and consequently

[34] [1980] AC 1, 25
[35] See also *Chris Ryder v Northern Ireland Policing Board* [2007] NICA 43 per LCJ Kerr at para 16
[36] [2009] EWCA Civ 22, CA

(ii) The time limit from bringing such a claim began either:

(a) on the date that the employer did an act which was inconsistent with the duty to make reasonable adjustments (Sch. 3 Para 3(4)(a)), or

(b) On the date when a reasonable employer would have made the reasonable adjustment argued for (Sch. 3 Para 3(4)(b))

(iii) The effect of paragraph 3 of Schedule 3 is to eliminate continuing omissions from the computation of time by deeming them to be acts committed at a notional moment. Consequently, a claimant could not rely upon an extension of time by relying on para 3(3)(b) which provides that "any *act* extending over a period shall be treated as done at the end of that period."

59. Accordingly, claimants must file claims within 3 months of the date on which either:

(a) an employer refuses to make a suggested or appropriate adjustment, or does an act that demonstrates that it will not make such an adjustment; or

(b) In the absence of such any act, the date on which a reasonable employer being aware of the need for such an adjustment would be likely to have made it.

7. Reasonable adjustments – some examples considered

(i) Creating new roles and/or promoting an employee.

60. Put simply, a reasonable adjustment may include (on the facts of the case) the requirement to create a new job for the employee (where the Respondent has the ability to do so – it is very unlikely that this will be of general application to all employers see ***Southampton College v Randall***[37]) or promoting him or her (see ***Archibald v Fife*** supra)).

[37] [2006] IRLR 18

61. However, the employer is under no duty to make such an extensive adjustment to the job formerly occupied by the employee that it can fairly be said that it has been adjusted out of existence (see ***Hay v Surrey County Council***[38]).

(ii) Dismissals and failures to make reasonable adjustments

62. The decision of the EAT in ***Fareham College Corporation v Walters***[39] mitigates, to some extent, both the decisions in *Lewisham* and *Matuzowizcs*. In the case, the tribunal found that the employer's failure to allow the claimant to return to work on a phased basis and/or in a temporary alternative role amounted to a PCP which placed her at a substantial disadvantage in comparison with non-disabled employees who were able to work without such an adjustment and who were not therefore at risk of being dismissed on the grounds of capability.

63. The claimant, when asked by the respondent whether she would accept an alternative position, had indicated that she wished to continue work in her former role as a lecturer, however, no actual alternative roles were identified or discussed. The tribunal found that there were other roles which would have been suitable and the failure to offer them amounted to a breach of s.4A. Further, it held the respondent was not saved by the fact that the claimant remained absent from work on sick leave - that absence did not preclude the respondent from making the necessary enquiries and planning for the claimant's return to work.

64. The EAT upheld the tribunal's judgment holding that:

- Comparators S.4A of the DDA, unlike the SDA and RDA, required no like for like comparison. Accordingly, it was not for the claimant to show that a non-disabled employee whose situation was otherwise the same as hers would have been treated more favourably. Accordingly, the respondent did not establish that there was no less favourable treatment merely by evidencing that it had dismissed a non-disabled employee on capability grounds after an identical period of sickness absence.

[38] [2007] EWCA Civ 93, CA
[39] UKEAT/0396/08/DM

- S.4A applies to dismissals, with the result that a dismissal can itself be an unlawful act of discrimination by failure to make reasonable adjustments

65. In the case, the employer laid itself open to criticism and a finding that it failed to make reasonable adjustments. Its conduct provides a list of 'actions to be avoided at all costs':

- The manager dealing with the capability procedure did not have any knowledge or understanding of the claimant's underlying condition;
- The respondent did not have up to date medical reports as to the claimant's position or prognosis;
- The manager who concluded that it was unlikely that the claimant would be able to return to her position on a full time basis was unable to explain the reasoning which led him to that conclusion;
- The respondent failed to consider that allowing the claimant to return using a phased return or in an alternative role might only be necessary in the short term, and therefore in dismissing the possibilities due to the difficulties such steps would have on educational delivery, failed to demonstrate that the adjustments were not reasonable under s.18B.

66. The effect of the *Malcolm* has inevitably been an increase in the requirement for an employer to make a positive case, supported by evidence, to demonstrate that proposed adjustments were not reasonable. A failure to conduct sensible and thorough inquiries into the financial or other viabilities of such adjustments, or the failure to provide such evidence to the tribunal at all or in an intelligible form may very well lead to a finding that section 4A was breached (see for example ***London Underground Ltd v Vuoto***[40]):

> *"There were a number of options found to be open to him, including having the proposed adjustment referred to more senior management with a view to obtaining additional funding, or consideration being given as to how the shifts could be reorganised to minimise any financial effects. In fact the Tribunal found that no research had been undertaken on the actual financial implications of the Claimant's adjustments, if any, and no evidence of any*

[40] UKEAT/0123/09

financial effects was produced to the Tribunal. The Tribunal found that Mr Burnett:

"Simply chose not to research the financial implications. He did not wish to depart from the roster and wanted all employees wherever possible and regardless of their abilities to work rostered shifts.""

(iv) Differing medical opinions as to adjustments, fitness for work etc.

67. It is not uncommon for there to be some dispute between an employee's GP or consultant and the employer's occupational health team. The difference in opinion often stems from a difference in approach, the former rely on their medical qualifications to enable them to diagnose conditions and offer informed and accurate prognosis, the latter on their awareness of the requirements of the employer's workplace and the employee's job functions (whether adjusted or not).

68. Claimants will often argue that an employer has failed to make reasonable adjustments because it has not given precedence to the views of the specialist who is treating him. How should the practitioner or tribunal resolve this dispute? In ***Heathrow Express Operating Company v Jenkins***[41], the EAT gave clear guidance that an employer will discharge its duty under s.4A if it can reasonably rely upon the advice of OH. The facts of the case are complex, but the salient parts of the judgment are set out below:

> *"It seems to us that management were fully entitled to rely on the report of the specialist in occupational health, particularly in circumstances where they are obliged by legislation to give particular weight to his views.*
>
> *The employers were put in a position where they could make an informed and considered assessment of the conflicting evidence; they were in a position of some difficulty with apparently conflicting reports. They referred back to the OH specialist who was advising them and they chose to act on his advice so far as the safety critical aspect of the work was involved. [The line manager] reached a similar conclusion in relation to the safety related*

[41] UKEAT/0497/06/MMA

aspects. We can see nothing perverse or irrational in those decisions." [82-83]

69. One example of such reasonable reliance derives from ***Hay v Surrey County Council*** (supra), in which a claimant sought to argue that it was improper for her employer to rely on the advice of an OH specialist who had never examined her. The case was robustly rejected by the Court of Appeal:

> *"We are entitled to assume, as Surrey was entitled to assume, that Dr Sperber, as an occupational health professional, would have looked at the whole situation of Ms Hay's health in the context of her account of the nature of her work.*
>
> *There was some suggestion in argument that this report should be discounted, as [the doctor] had never examined or treated Ms Hay. However the report is a careful account of the whole history, taken from proper records, and informed by the professional insight of a consultant surgeon who is an FRCS with orthopaedic speciality. No responsible employer could have ignored it.*
>
> *What ET should have done was consider whether Surrey's conclusion that Ms Hay had to be redeployed was justified. On the medical evidence there was only one possible answer, and it was the medical advice on which Surrey relied…. Here Surrey carefully considered Ms Hay's work in light of professional advice. A formal risk assessment would have added nothing because it would have to have been conducted on the basis of the [medical advice].*

70. It is hoped that this hand-out will have awoken or reminded its reader to some of the potential knock out points and, equally importantly, to some of the pitfalls in relation to s.20 claims.

Andrew Midgley

Old Square Chambers

November 2011