Community Legal Service
Criminal Defence Service

Albion Chambers, Broad Street, Bristol BS1 1DR
Telephone 0117 927 2144 **Fax** 0117 926 2569
DX 7822 Bristol **Email** clerks@albionchambers.co.uk
www.albionchambers.co.uk

Number 7 May 2008

Albion Chambers EMPLOYMENT NEWSLETTER

Over-adjusting; what is now 'reasonable' under the DDA?

Section 3A (2) imposes a duty upon an employer to make reasonable adjustments in respect of a disabled employee's employment. The duty to make adjustments relates to any *'provision criterion or practice'* which is applied to the workforce as a whole and in relation to any *'physical feature'* of the premises (s.4A (1)). Some examples of what an employer should be considering can be found in s.18B.

It is unfortunate that an employer now has to dig around the amended Act to find the three sections relevant to its duty in respect of making adjustments. It is more unfortunate that it also has to consult a number of authorities on the issue for further guidance, some of which appear to be conflicting.

In this article, I will examine a few of the recent decisions in this area and consider the extent to which the higher courts' approach to certain adjustments has been altered.

Consultation

Knowing that an employee is disabled, does an employer have an initial, duty to consult with him/her to consider what adjustments might be necessary in respect of their work? In *Mid Staffordshire General Hospitals NHS Trust v Cambridge [2003] IRLR* the EAT found that an employer had a duty to make initial inquiries as to the employee's needs. A failure to make those inquiries, with or without input from the employee himself, lay at the very heart of the duty under s.4A. However, in *Tarbuck v Sainsburys [2006] IRLR 664*, the EAT had concluded that no discreet duty existed in that respect. The two can be reconciled as follows; whilst there is no stand alone duty to consult with an employee in respect of adjustments that might be required, it would be difficult to imagine how an employer could fulfill its broad duties under s.3A as a whole without having undertaken that exercise at some stage within the process.

In *Spence v Intype Libra* EAT 0617/06, the point was taken a little way further. In that case, the employers failed to obtain an up to date medical report on the Claimant before dismissing him for incapability as a result of absence brought about by a debilitating vascular disease. The failure to obtain such a report was not, the EAT found, a breach of the duty under s.3A of itself. Focusing upon whether reasonable practical steps had been taken to ameliorate the effects of the Claimant's disability, the EAT were satisfied that they had. Obtaining a medical report would not have been such a step *by itself*. The employer's duty had to be considered in the round; they could not have stuck their heads in the sand and said that they had no duty to obtain a report therefore did not know what to do, but they *could* say that they had done all that was required of them under s.3A, given what they reasonably knew about the Claimant's condition.

Sick pay

One might have suspected that one of the 'provisions' that might have been adjusted to assist the disabled at work would have been the terms of a company's sick pay scheme; surely the manner in such a scheme applies to an employee with a bad record for absence with colds and other bugs, should not be the same as its application to an employee who has a similar record, but all relating to a specified disability? Wrong.

In *O'Hanlon-v-Revenue and Customs [2007] 404 CA*, the Court of Appeal had to deal with the problem. Mrs. O'Hanlon had exhausted her sick pay entitlement, having been off work for some considerable time with depression. HMRC had a familiar sick pay policy of 26 weeks full pay and 26 at half rate in any four-year period. Her claim was a simple one; that she should have received full pay during the whole period of any absence caused by her disability because her disability required the employer to make that adjustment and it was a reasonable one to make in the circumstances. Alternatively, that an adjustment should have been made which prevented the employers from aggregating periods of leave together which related to her disability.

The tribunal, the EAT and the Court of Appeal each rejected the claim. Hooper LJ felt that the Claimant's first argument was a step too far under s.3A and the rationale for the both arguments was the financial hardship suffered by the Claimant. It would be invidious, the Court felt, to leave an employer to judge whether an employee was suffering hardship before concluding that the duty to alter its sick pay scheme kicked in.

That second argument would also place a burden on employers to decide which, of any sickness absences, should or should not be counted since, in many cases, it would not be easy for an employer to judge why any one period of absence had been occasioned.

Tests and standards

Two recent authorities have examined the extent to which an employer's entrance standards and requirements should be altered to cater for disabled applicants.

In the Northern Irish case of *Arthur v* ▸

Northern Ireland Housing Executive [2007] NICA 25, an applicant with dyslexia was allowed an extra 20% time to complete an aptitude test. He still scored too low (98) to obtain an interview (the threshold was 117) and he therefore brought a claim in respect of the employer's alleged failure to make greater adjustments. The problem that the employer had was that it had actually ignored its own policy of not testing disabled candidates unless it was appropriate to do so. Whilst the manager had to accept that he did not know of the policy, the Claimant's expert clinical psychologist had to accept that allowing him to go straight to interview without a test would have been to have given him a *'differential boost'*. Both experts also agreed that the Claimant's score broadly accorded with his academic ability.

Ultimately, the employer's breach of its code had not left it in breach of the duty under the Act. The adjustment that *had* been made was sufficient to have removed any substantial disadvantage and, since none remained, there was no duty to make any further adjustments.

In *Hart v Chief Constable of Derbyshire (6th December 2007)*, the EAT had to consider a similar situation in respect of a probationary police officer whose disability, a spinal problem, prevented her from completing certain core tasks that were fundamental to her being able to qualify as a full constable.

The EAT recognised that it could be appropriate to alter a job description to enable an employee to perform it around their disability, but here, the problems caused by the Claimant's condition rendered her unable to perform acts of restraint and other physical tasks. The Chief Constable's decision to confer the rank of constable on an individual meant that she would be regarded as having achieved a certain nationally recognised standard. Even if her more physical duties could be shared to others, her status would have misrepresented to others what her capabilities truly were, particularly to other police authorities. Her claim also failed.

Conclusions

It would appear that the message that practitioners should take from these recent authorities is that, when considering whether a duty to make reasonable adjustments has been breached, examine;

(i) Whether the Claimant is at a substantial disadvantage without the adjustment contended for;
(ii) Whether the adjustment will have the effect of ameliorating the impact of the disability (consultation on its own would not have that effect);
(ii) Whether the adjustment is a reasonable one to make, given all of the circumstances of the case.

The newer authorities do not contain anything that is particularly novel. They do remind employees that the extent to which an employer should discriminate positively in respect of the disabled has definite limits. As an employer, by all means bend over, but not backwards.

John Livesey

Costs v wasted costs

The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 changed the test to be applied by Employment Tribunals in considering applications for costs orders. These changes were built upon by The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, which introduced four concepts new to the Employment Tribunal – Preparation Time Orders; Consideration of the paying party's means; Unless Orders; and Wasted Costs. The purpose of this article is to consider the inter-relationship of Costs and Wasted Costs.

Power

The power to award costs is contained in rules 38-48 of the 2004 Rules. The general power is contained in rule 38. Rule 39 contains provision for circumstances (very rare) in which a costs order must be made. Of greater relevance is rule 40 which deals with the circumstances in which a costs order may be made. Such orders are always discretionary. The crucial paragraphs are 40(2) and (3) which read:

(2) (2) A tribunal…shall consider making a costs order against a paying party where, in the opinion of the tribunal… any of the circumstances in paragraph (3) apply…
(3) The circumstances…are where the paying party has in bringing the proceedings, or he or his representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by the paying party has been misconceived.

Pursuant to rule 41 the costs order may be for up to £10,000, or such sum as the parties agree, or such sum as is assessed by the County Court. Rule 41(2) provides that the ET

'may have regard to the paying party's ability to pay when considering whether to make a costs order or how much that order should be.'

It will be seen therefore that a party who is the victim of abusive behaviour from the other party may apply for costs against them. That party may also be subject to such an order if it is their representative who is abusive.

Such an order might be unfair, and so Rule 48 provides that a wasted costs order may be made against a party's representative where costs have been incurred:

'(3) (i) as a result of any improper, unreasonable or negligent act or omission on the part of any representative, or (ii) which, in the light of any such act or omission occurring after they were incurred, the tribunal considers it unreasonable to expect that party to pay..'

A representative is defined as a *"legal or other representative…but it does not include a representative who is not acting in pursuit of profit".*

During the course of our professional lives it will be very rare for any of us even to consider accusing an opponent of such behaviour. When it does arise, however, the issue is should one apply for costs under rule 40 or 48?

Inevitably, perhaps, the answer is usually both. The advantage of an application under rule 40 is that there is no need to demonstrate that the behaviour of the representative has caused any costs, whereas this is ordinarily required under rule 48 (subject to rule 48(3)(ii) above).

If, however, one limits one's costs application to rule 40, there is a risk that the ET will find that, as the blame lies with the representative, it will exercise its discretion and refuse to make an order against the party itself. Further, the party may be a man of straw. If either happens it is useful to have rule 48 to fall back on.

Conversely the representative may claim that they were only acting on instructions and that a wasted costs order would be unfair on them. If the blame lies somewhere between the party and their representative the ET might make an order against both the party and their representative

In Practice

So, to take a real life example, suppose your opponent, who is neither a solicitor nor ▸

barrister, but an *'employment consultant'* has surprised you by revealing several days into a hearing, that he is not registered for the provision of representation (as he must be) pursuant to the Compensation Act 2006. Suppose that the Judge permits him to continue to conduct the hearing providing he thereafter acts not for profit. Suppose also that he is so unable to formulate a question or stick to the point that the hearing takes six days when it should have taken three. When it comes to costs what is your application?

Not being registered is a criminal offence. But it has not caused any extra costs in itself. So a wasted costs application on that ground could not succeed. An application under rule 40 could succeed, but is the ET really likely to penalise the party rather than the representative, when they were as duped (into paying his bills, which he was not entitled to render) as everybody else?

Answer – no, but the ET did make a reasonably hefty wasted costs order (nearly £7,000) against the representative for the costs wasted by the extra three days.

In *Mitchells v Funkwerk Information Technologies EAT/0541/07* an Employment Tribunal made a wasted costs order against the firm of solicitors representing the Claimant. The ET found that the Claimant's case was hopeless and that her solicitor should have advised her to drop her case after she had been cross-examined. The EAT allowed the appeal in part because the ET had not considered causation, namely if the advice had been given would the client have taken it?

Conclusion

When considering applying for costs consider where the blame lies. If your real target is the representative do not be frightened of applying for both costs and wasted costs.

Nicholas Sproull

SORRY, BUT WE ARE CHANGING YOUR HOURS

How about if, as an employer, you could keep moulding the contracts of your workforce whether or not they agree? After all, management are paid to manage. To regulate, for example, contractual hours to match the changing needs of the business has to be in furtherance of that legitimate and fundamental aim. The obvious answer is to insert a clause in the initial contract allowing for unilateral variation. Will it work? The answer is 'not necessarily' and certainly not unless the language is clear. Until recently there has been a relative lack of reported litigation on the topic.

In an obiter judgment in *Wandsworth LBC v da Silva [1998] IRLR 193 CA*, Lord Woolf commented that a variation clause giving unilateral power to vary to the employer should be couched in clear terms and that it should not be so widely drafted as to be liable to produce an unreasonable result.

The intention of the parties in relation to a variation clause was considered in *Security and Facilities Division v Hayes and others [2001] IRLR 81*. In that case there was nothing in the contract that allowed the employer to reduce a night subsistence allowance unilaterally. It was stated [paragraph 44] that it seemed inherently improbable that the right to make a unilateral variation of the subsistence allowances was intended by the parties.

It therefore seems that a clause enabling an employer to have a blanket power to vary the contract of an employee unilaterally is going to be difficult to uphold if the clause can be used, for example, to reduce working hours, thus lowering the pay of the employee.

It may be possible for an employer to argue that the employee has more than one contract. For example, in a case where a retainer for on-call duties is paid in addition wages for the main job. In *Land and Wilson v West Yorkshire Metropolitan County Council [1981] IRLR* 87 full-time firemen were additionally paid on a retained standby basis over and above their salaries under their substantive posts. They were held to have been employed under one contract by the EAT, which held that it was wrong to treat them as having two separate contracts. They found that there was a dismissal upon the removal of the 'retained' duties. *'The employer was not entitled to remove only the retained duty which was an important part of the contract as a whole. By seeking to terminate only the retained part they were in the result terminating the whole contract and offering a new contract shorn of the retained duty.'*

The Court of Appeal disagreed and found that the supplemental element of their work was truly that; although they were employed under one contract, it was divisible. The firemen could, themselves, stop undertaking their standby work without jeopardising their substantive work, so why should it not operate in the opposite manner from the employer's perspective? A provision that the supplemental element could be terminated upon reasonable notice was implied into that part of the contract and the employers were not, therefore, in breach of the contract and the firemen's claims failed.

The conduct and choices of an employee faced with a unilateral alteration to his contract was recently considered in a judgment of 3rd March 2008 in *Robinson v Tescom Corporation UKEAT/0567/07/JOJ.* The case involved an employee being given managerial responsibility for two geographical areas of the UK where previously he was only responsible for one, thus involving a considerably greater degree of travelling. The employee initially stated that he would work under protest under the varied terms treating the change as a breach of contract and dismissal. Following an unsuccessful grievance the employee the refused to sign the varied terms and conditions and was dismissed summarily for gross misconduct, having then restricted his work to the original geographical area. The tribunal agreed that the options open to an employee were four fold; he could acquiesce in the variation, secondly, resign and claim constructive dismissal, thirdly, refuse to work under the new terms so that the onus would be on the employer to dismiss or otherwise discipline or, fourthly, he 'stand and sue'. The employee in this case had erred in that he adopted a 'stand and sue' approach by adopting ACAS advice but then, despite his earlier position, had expressly declined to work to the varied job description he initially said he would work within. His appeal was dismissed.

Accordingly, whilst employers may want to have the power to alter their employees' terms to suit their needs, it appears that their ability to do so is severely limited and, most would probably say, rightly so. The insertion of a variation term requires enormous foresight; it is only likely to be upheld if is not drawn so widely as to enable the employer to undertake a wholesale contractual overhaul. Only if the contract is clear, tightly drawn and coincides with the intentions of the parties at the time of signing is the clause likely to assist the employer. As an alternative, the separation of tasks into different contracts also appears to be a route that may benefit the employer in certain limited circumstances (where the contracts and the tasks under them could be regarded as divisible). The recent guidance in Robinson is, at least, a helpful reminder of the fundamentals at stake in these types of situations and a useful toolbox for an employee faced with such a problem.

Michael Cullum

Albion Chambers Employment Team

Adam Vaitilingam Call 1987 Recorder
Clerk Michael Harding

Myles Watkins Call 1990 Deputy District Judge (Civil) **Clerk** Michael Harding

John Livesey Call 1990
Part-time Employment Judge
Clerk Michael Harding

Michael Cullum Call 1991 Recorder
Immigration Judge **Clerk** Michael Harding

Nicholas Sproull Call 1992
Clerk Julie Hathway

Jason Taylor Call 1995
Clerk Michael Harding

Richard Shepherd Call 2001
Clerk Michael Harding

Gemma Borkowski Call 2005
Clerk Michael Harding