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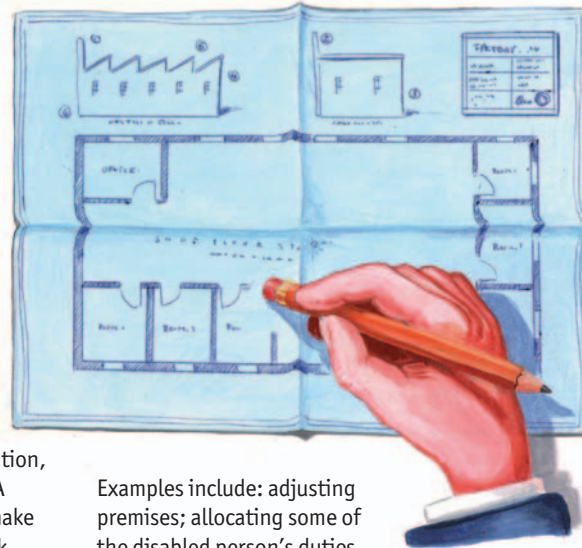
What constitutes a 'reasonable adjustment' when it comes to accommodating employees with disabilities? Vanessa Nicholls explains

The Disability Discrimination Act 1995 (DDA) prohibits three forms of disability discrimination. First, direct discrimination: this occurs when an employer, on the ground of the disabled person's disability, treats that person less favourably than it has treated, or would treat, a person in similar circumstances who does not have the disability. This covers discrimination based largely on stereotype or prejudice, and it is not possible to defend this type of treatment. Second, disability-related discrimination: where an employer unjustifiably treats a disabled person unfavourably, not on the grounds of the person's disability, but for a reason relating to it. For example, suppose an employer does not recruit an applicant because their epilepsy means they cannot drive. This would be unlawful unless the employer could justify the need for the applicant to drive. Third, and in practice, the most important aspect of disability discrimination legislation, an employer discriminates under the DDA where it fails to comply with its duty to make reasonable adjustments to any of its work arrangements that put a disabled person at a substantial disadvantage when compared with non-disabled persons.

Here, we focus on the third type of discrimination, the employer's duty of reasonable adjustment. It is important to note that the duty arises only where the employer's policies or practices, or the physical features of its premises, put the disabled person at a disadvantage compared with non-disabled people. Furthermore, the disadvantage caused must be more than minor or trivial. Employers are not expected to comply with this duty if they did not know, or could not reasonably be expected to know, that the individual is disabled and is likely to be put at a disadvantage. However, there have been many cases where employment tribunals have held, with the benefit of hindsight, that the employer knew sufficient information

about the employee that it ought to have realised they were disabled and therefore acted unlawfully because they failed unjustifiably to make reasonable adjustments.

The DDA itself lists some of the steps that an employer might need to take to comply with its duty to make reasonable adjustments.



Examples include: adjusting premises; allocating some of the disabled person's duties to someone else; transferring the disabled person to another existing vacancy; altering the disabled person's hours of work/training; assigning the disabled person to a different place of work/training; allowing the disabled person time off work for rehabilitation, assessment or treatment; giving or arranging training or mentoring for the disabled person or any other person; acquiring or modifying equipment; modifying testing/assessment procedures; and providing supervision or other support.

It is important to emphasise that the duty is to take whatever, if any, steps are reasonable in the circumstances of the particular case. Factors affecting whether a particular adjustment would be reasonable are: the effect that the adjustment would have on the disabled person's disadvantage; the extent to which it is practicable to make

the adjustment; the cost to the employer of making the adjustment; the extent of the employer's financial and other resources; what financial or other assistance may be available to the company to make the adjustment; and the nature of the employer's activities and its size.

There are recent cases that address three important aspects of the duty of reasonable adjustment. First, the recent line of case law addressing whether an employer's failure to consult with a disabled employee can, itself, amount to a failure to make a reasonable adjustment. Second, the case of *Spence v Intype Libra*, which went further and asked whether an employer's failure to obtain an up-to-date medical report on a disabled employee and consult him on it constituted a failure to make a reasonable adjustment.

Finally, in a very recent case, *Environment Agency v Rowan*, the employment appeal tribunal (EAT) considered the matters an employment tribunal should identify to determine whether the duty to make reasonable adjustments is triggered.

1. Could an employer breach its duty simply by failing to consult with a disabled employee over what adjustments it might be reasonable to make?
2. Could an employer's failure to obtain an up-to-date medical report on a disabled employee amount to a failure to make reasonable adjustments?
3. Recently, the EAT has outlined the correct approach for employment tribunals to take when considering a claim that an employer has failed to comply with the duty to make adjustments. Can you pinpoint any of the four factors that an employment tribunal must identify?

To find out the answers to these questions turn to page **48** >>



What would you have done?

What's your view of the subject discussed on page 11? Here, you can compare your answers with those of Vanessa Nicholls

1. Under current case law, there is no breach of the duty to make reasonable adjustments merely because an employer fails to consult the employee on what adjustments it might be reasonable to make. In *Tarbuck v Sainsbury's Supermarkets*, a disabled claimant applied unsuccessfully for internal vacancies when her job was under threat of redundancy. One of the grounds on which an employment tribunal found her employer had discriminated against her under the DDA was because it had failed to make a reasonable adjustment by not consulting with her to agree the particular steps to be taken to eliminate her disadvantage in the competition for jobs. At odds with previous case law, the employment appeal tribunal (EAT) held that the duty to make reasonable adjustments relates to what the employer does (or fails to do), not what the employer thought about doing, or discussed.

In practice, however, employers should always carry out a full assessment of what steps may be reasonably required to prevent a disabled person being placed at a substantial disadvantage, and this should always include consultation with the individual as well as appropriate advisers, such as occupational health professionals.

The wisdom of this approach can be

illustrated by a subsequent case, *Scottish and Southern Energy v Mackay*. In this case, the Scottish EAT agreed with the *Tarbuck* approach and held that a failure to discuss options for alternative work with a disabled employee on long-term sickness absence was not of itself a failure to make reasonable adjustments. In the circumstances, however, it upheld a tribunal's judgment that the employer's lack of consultation rendered the employee's dismissal unfair.

2. In *Spence v Intype Libra* (subsequent to *Tarbuck*), the EAT held that an employer's failure to obtain an up-to-date medical report and consult the employee on it did not, of itself, amount to a failure to make reasonable adjustments. A tribunal found that the disabled claimant, Mr Spence, had been dismissed unfairly (the employer had not followed the minimum statutory dismissal procedure) but rejected his DDA claims. The EAT dismissed Mr Spence's appeal. In so doing, it focused on what reasonable adjustments the employer had or had not made. In its view, if the duty of reasonable adjustment was intended to cover obtaining information, this would have been expressly referred to in the legislation.

Employers must, however, be cautious about this judgment. A prudent employer will always seek to obtain a medical report on an employee, to ensure it is fully informed. Furthermore, the reality is that employees often bring DDA claims alongside claims such as unfair dismissal. In many circumstances where an employer is considering terminating an employee's employment by reason of ill health/capability, failing to obtain an up-to-date medical report, or properly consult the employee, will render a potentially fair dismissal unfair.

To find out more about how employers fall foul of the DDA, see EEF's award-winning publication *Managing Sickness Absence*, tool 14.4, 'Why employers lose DDA cases and what you can do about it'.

3. In *Environment Agency v Rowan*, the EAT clearly spelled out the approach which tribunals should take when considering a claim that an employer has failed to comply with the duty to make adjustments. They must identify: (a) the provision, criterion or practice ('PCP') applied by or on behalf of an employer, or (b) the physical feature of premises occupied by the employer, (c) the identity of non-disabled comparators (where appropriate); and (d) the nature and extent of the substantial disadvantage suffered by the claimant.

The EAT stated that identifying the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the PCP applied by the employer and the physical feature of premises, so it is necessary to look at the overall picture.

Without identifying (a) to (d) above, tribunals cannot judge if any proposed adjustment is reasonable. They would be unable to say what adjustments were reasonable to prevent the PCP, or feature, placing the disabled person concerned at a substantial disadvantage.

The facts of this case are illustrative. Mrs Rowan was disabled as a result of a back injury, was unable to sit for long periods of time and required regular bed rest. A tribunal found that the employer had failed to consider reasonable adjustments such as a trial run of home-working.

The EAT overturned this decision on the basis that the tribunal had not identified how a requirement to work in the office put the claimant at a substantial disadvantage and had not explained how a trial period of home-working would have alleviated any such substantial disadvantage. These were both essential issues to be considered before any finding of failure to make reasonable adjustments could be reached.

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