Reasonable Adjustments

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Introduction

The duty to make reasonable adjustments is a key part of the Equality Act 2010 ('EA') and places a positive duty on employers to enable disabled people to overcome barriers to employment. This note explores the legal framework of the duty with practical guidance for employment practitioners on how the duty is established and how it is discharged.

The Statutory Framework

The duty is defined by section 20 of the EA. It is applied to an employer by section 39(5). By section 21(1) and (2), failure to comply with the duty amounts to discrimination under the Act. In interpreting the legislation the courts must have regard to the 2011 Code of Practice issued by the Equality and Human Rights Commission ("the Code").

The duty to make reasonable adjustments applies to workers and employees during all stages of employment including recruitment [Schedule 8, part 2 EA], dismissal and even post-dismissal. It is a positive duty and extends to contract workers, trainees, apprentices and business partners.

Practical Tip

The Code emphasizes that employers need to take a pro-active approach to compliance and should be prepared to treat disabled people ***more favourably*** *than non-disabled people.*

"The duty to make reasonable adjustments is a cornerstone of the Act and requires employers to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers, job applicants and potential job applicants unfavourably and means taking additional steps to which non-disabled workers and applicants are not entitled."

Paragraph 6.2 Code of Practice on Employment

Part One: When Does the Duty Arise?

The duty is set out at section 20 EA. It puts an employer under an obligation to make reasonable adjustments in three circumstances:

1. where a PCP of the employer puts a disabled person at a substantial disadvantage compared to a non-disabled person;
2. where a physical feature puts a disabled person at a substantial disadvantage compared to a non-disabled person;
3. where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in comparison with non-disabled persons.

In order to establish the duty it is necessary to satisfy each element of the statutory provision. A tribunal considering whether or not the duty has been complied with should make explicit findings identifying:

- the relevant PCP [or physical feature or lack of auxiliary aid];
- the persons who are not disabled with whom the comparison is made;
- the nature and extent of any substantial disadvantage.

Only then can it go on to find what (if any step) it is reasonable for the employer to take to discharge the duty. (See the comments of HHJ Richardson in *Secretary of State for Work and Pensions (Job Centre Plus) v Higgins* UKEAT/579/12, [2014] ICR 341 as to the importance of applying the step-by-step guidance set out in *Environment Agency v Rowan* [2008] IRLR 20).

Practical Tip

In drafting the ET1 the claimant should, as far as possible, identify the following components of the claim:

- *the PCP or physical feature relied upon*
- *the substantial disadvantage compared to non-disabled persons caused by the PCP*
- *the steps the employer should have taken to alleviate the disadvantage.*

PCP

Identifying a physical feature or the lack of an auxiliary aid as a potential barrier to employing a disabled person can often be much more straightforward than identifying a PCP. Whereas the EA provides a statutory definition of a physical feature at section 20(10) and tells us that an auxiliary aid is taken to include a reference to an auxiliary service at section 20(12), the phrase PCP is not defined by the Act.

The Code emphasizes that the phrase should be construed widely to include any formal or informal company policies, rules, practices, arrangements, or qualifications, including one-off decisions and actions and discretionary decisions [See Code – para 6.10].

Commonly the PCP is simply the requirement that the disabled person is required to work their contractual hours, or perform the essential functions of their role. (See, for example *Croft Vets & Others v Butcher* UKEAT/0430/12/LA). This emanates from the House of Lords decision in *Archibald v Fife Council* [2004] UKHL 32 which established that it is an implied condition that a person is fit for the job they are employed to do.

Nevertheless, identifying the PCP, particularly in relation to employers' policies, can prove troublesome.

FirstGroup plc v Paulley [2014] EWCA Civ 1573

The Court of Appeal decision in *Paulley* provides useful guidance. Mr Paulley was a wheelchair user. In February 2012 he arrived at the bus station in Wetherby intending to catch the 99 bus to Leeds, and from there by train to Stalybridge where he was to have lunch with his parents. When the Claimant attempted to board the bus, however, the wheelchair space was occupied by a woman with a sleeping child in a pushchair. In accordance with company policy, the driver asked her to move but she refused, saying that the pushchair could not fold down. As a result, Mr Paulley had to catch the next bus. He brought a claim for disability discrimination against the bus company (a service provider under section 29 of the EA) in relation to FirstGroup's wheelchair policy, arguing that it had failed to comply with its duty to make reasonable adjustments; namely to **compel** (not just request) all other passengers to vacate the space in favour of a wheelchair user.

The PCP was identified by the judge at first instance as FirstGroup's policy of "requesting but not requiring" non-wheelchair users to vacate the

wheelchair space. The Court of Appeal disagreed. Quoting from a passage in *Finnigan v Chief Constable of Northumbria Police* [2013] EWCA Civ 1191; [2014] 1 WLR 445, Lewison LJ said that the PCP:

> "*…represents the base position before adjustments are made to accommodate disabilities. It includes all practices and procedures which apply to everyone, but excludes the adjustments.*"

The policy described by the judge included at least one adjustment (i.e. requesting the non-wheelchair user to vacate the space). The correct PCP would be a policy which allowed FirstGroup to operate its buses on a "first come, first served" basis. Then, if Mr Paulley was shown to be at a substantial disadvantage compared with non-wheelchair users, the next question would be whether the adjustment already in place went far enough.

> ***Practical Tip***
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> *In identifying the PCP, practitioners should be aware that it can be a 'notional' pre-adjustment policy. The correct approach is to strip out any adjustments that have already been made.*

In *General Dynamics Information Technology Ltd v Carranza* UKEAT/0107/14/KN, the EAT applied the same analysis to a case of sickness absence. Where an absence policy already includes an adjustment process for disabled workers, the adjustments should be stripped out in order to identify the correct PCP. **Only then is it possible to go on to the next step and establish whether the Claimant has suffered a substantial disadvantage compared to non-disabled persons.** HHJ Richardson made this observation:

> *"It is, I think, unsatisfactory to define a PCP in terms of a procedure which is intended at least in part to alleviate the disadvantages of disability. The PCP should identify the feature which actually causes the disadvantage and exclude that which is aimed at alleviating the disadvantage."*

Substantial Disadvantage

Section 212(1) defines substantial as more than minor or trivial. The threshold is set deliberately low: the Code emphasizing that

1. the purpose of the comparison is to determine whether the disadvantage arises **because of** the disability; and
2. in contrast to the position with direct and indirect disability discrimination, there is no requirement to identify a comparator or group whose circumstances are the same or nearly the same as a disabled person's [Code 6.16].

Comparator

The pool for comparison is non-disabled persons to whom the PCP or physical feature also apply but are not disadvantaged by it. However the comparator can still give rise to problems.

In *Griffiths v Secretary of State for Work and Pensions* UKEAT/0372/13/JOJ, the question before the EAT was whether the PCP – the operation of the attendance management policy – had placed the Claimant, who suffered from post-viral fatigue syndrome and fibromyalgia – at a substantial disadvantage in comparison with persons who were not disabled. It was held by the EAT that it did not.

> *"The appropriate comparator was a non-disabled person absent for sickness reasons for the same amount of time but not for disability-related sickness. If a claimant is treated at least as well as such comparators s/he cannot be at a disadvantage, let alone a substantial disadvantage.'*

On this basis the EAT found that the Claimant was at no disadvantage. As it was, with the adjustment, she was advantaged. The duty to make [further] adjustments was not established.

The reasoning in *Griffiths* was criticised by HHJ Richardson in *General Dynamics* as creating "insuperable problems" for disabled persons at the comparator stage. In his view the problems arose from the ET having wrongly defined the PCP in that case in terms of the absence procedures, rather than simply the basic requirement for consistent attendance. By focussing on the latter, the appropriate comparator suggested itself.

Knowledge

By schedule 8, part 3 EA, the duty to make reasonable adjustments is only established if the employer knows or could reasonably be expected to find out:

(a) [**at the recruitment stage**] that an interested disabled person may be an applicant for the work in question;

(b) [**once the candidate is successful**] that an interested disabled person has a disability and is likely to be placed at the relevant substantial disadvantage.

At both stages the assessment to be conducted by the employer is an objective one, which depends on the individual circumstances in each case. However, in practical terms the employer needs to exercise its duty with care because its obligations to make reasonable enquiry under at each stage differ.

1. What steps should an employer take during the recruitment process to determine the applicant's disability?

Any questions at the recruitment stage must be geared to enabling the disabled person to take part in the selection process on an equal footing to a non-disabled person: the purpose of the EA being to ensure that all applicants are assessed equally, irrespective of their disability.

An employer is therefore **not permitted** to ask any job applicant about their disability or health until the applicant has been offered a job (on a conditional or unconditional basis) or has been included in a pool of successful candidates to be offered a job when a position becomes available either as part of the application process or during an interview [Section 60(1) EA].

Section 60(6) EA provides that questions relating to previous sickness absence are questions that relate to disability or health and are therefore **not permitted** except in very limited circumstances; namely:

- to establish whether the applicant will be able to undergo an assessment or require reasonable adjustments to be able to do so;
- to establish whether the applicant can carry out a function that is intrinsic to the job;
- to monitor diversity;
- to establish if the applicant can benefit from any measures aimed at improving disabled people's employment rates;
- where a particular disability is required in relation to that work, to establish that the applicant has that disability.

Practical Tip

Employers should take care to ensure that questions relating to health and disability at the recruitment stage are confined to enabling all applicants to take part in the selection process, monitoring diversity and improving disabled people's employment rates unless direct questions concerning disability are intrinsic to the work that the applicant is required to do.

2. Once the selection process has been completed, how can an employer reasonably be expected to find out whether a worker has a disability?

The employer is under no duty to make reasonable adjustments unless he knows or ought to know both of the disability **and** that the person is disadvantaged by it. The second element only comes into play where the first is established. Whether or not an employer knows or should have known of the disability is a question of fact, to be determined objectively *(Wilcox v Birmingham CAB* [2011] EqLR 810).

A worker will normally be asked to fill in a health questionnaire before they start work. However the employer should not rely exclusively on the information provided to them by the worker. The disabled person may withhold information about a disability for reasons of confidentiality (which is permitted by the EA), or they may not be aware that their condition amounts to a disability (for example in cases of mental illness). Where the disabled person deliberately withholds information, the employer is more likely to be able to deny knowledge, provided that it gave the disabled person a reasonable opportunity to disclose their condition. [Code, para 6.2). However, where the disabled person fails to recognize their condition, the employer must be more pro-active.

Constructive Knowledge

The employer is expected to take reasonable steps to find out if a worker or employee is disabled. Usually that will mean referral to OH. Where OH decides that the worker is disabled the employer is imputed with knowledge. However, the converse is not always the case. An employer cannot rely blindly on an OH report which denies disability; in deciding whether reasonable adjustments are necessary the employer must form its own judgment of the worker's condition, which may require further medical evidence to be obtained (*Gallop v Newport City Council* [2014 IRLR 211).

In *Gallop*, Rimer LJ made this observation:

"…this case illustrates the need for the employer, when seeking outside advice from clinicians, not simply to ask in general terms whether the employee is a disabled person within the meaning of the legislation but to pose specific practical questions directed to the particular circumstances of the putative disability. The answers to such questions will then provide real assistance to the employer in forming his judgment as to whether the criteria for disability are satisfied."

In *Donelien v Liberata UK Limited* UKEAT/0297/14/JOJ, the EAT emphasized that, whilst the employer must make its own decision as to the employee's disability, each case turns on its own facts. In *Donelien* the employer had done all it could reasonably be expected to do to find out.

Note that the employer can be fixed with knowledge even if unaware of the specific diagnosis. (*Jennings v Barts and the London NHS Trust* [2013] EqLR 326).

If an employer knows or ought reasonably to know that the employee or worker has a disability, the prudent thing is to consult or perform a risk assessment even though not to do so is not a breach of duty.

Practical Tip

Employers should consider all the information available to them when assessing whether a worker is disabled within the meaning of section 6 EA. A referral to OH should ask specific questions relating to the worker's impairment and whether it has a substantial and long-term effect on the worker's ability to carry out normal day-to-day activities. If it remains unclear whether the worker is disabled or not, the employer should seek further medical advice. The employer should also take into account information gathered from return to work meetings, discussions with the employee and information from the employee's GP.

Part Two: Discharging the duty: what is "reasonable"?

Unlike Section 15 EA - discrimination arising out of a disability – there is no justification defence to a claim of reasonable adjustments. The only question is whether the proposed adjustments are reasonable.

Where does the duty lie?

The duty to determine what are reasonable adjustments lies with the employer, not the worker (*Ridout v TC Group [1999] IRLR 628 EAT)* but in practice it is sensible to consult with the worker and agree any adjustments before implementing them. Where a disabled person does propose adjustments, the employer should consider them according to the criteria set out below if it is satisfied that the worker is at a substantial disadvantage and that the adjustment would have a remedial effect.

All employers have a duty to make reasonable adjustments, although what is reasonable may depend on the circumstances of the employer. Generally speaking, larger employers should be prepared to go further in making adjustments. An employer cannot require a disabled person to pay its costs of complying with the duty [EA section 20(7)].

The responsibility to discharge the duty lies with the employer, not the employee or worker. In *The Environment Agency v Donnelly* UKEAT/0194/13/MC the claimant, who was disabled within the meaning of the DDA, brought a claim for reasonable adjustments because she was not allocated a parking space in the car park outside her place of work. As she worked flexitime she did not arrive early enough to be sure of securing a place. The employer argued that the claimant could have come into work earlier, thereby negating the need for an allocated space. Having decided that the correct PCP was that the claimant was required to walk a distance from her car to the office in prevailing cold weather and on uneven surfaces, the EAT had no difficulty in upholding the ET's decision that it was for the employer, not the claimant to make the necessary adjustment.

Identifying the steps

Although in the workplace the onus is not on the claimant to identify what are reasonable adjustments, it is self-evident that the first thing any ET must do in deciding whether the duty is discharged is to identify clearly the step or steps that the employer should have taken. This was emphasized in the *Higgins* case by HHJ Richardson:

"The duty to make an adjustment is a duty to take a "step" or "steps" to avoid the disadvantage. Just as the Tribunal should

expect to identify the PCP, the comparators and the nature and extent of the substantial disadvantage, so it should expect to identify the step or steps which it was reasonable for the employer to have to take to avoid the disadvantage."

> ***Practical Tip***
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> *If a claimant's ET1 is poorly pleaded, a request for particulars of what steps it is said should have been taken and were not should be made in order that the employer can identify what evidence needs to be brought to meet the claim.*

Factors to be taken into account

The Code sets out some of the factors that might be taken into account when deciding what constitutes a reasonable adjustment.

- **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.**

In deciding whether or not adjustments are reasonable, the ET applies an objective assessment (*HM Land Registry v Wakefield* [2009] All ER (D) 205 (Feb) EAT).

Effectiveness of the Adjustment

The EAT has consistently emphasized that the focus of deciding whether an adjustment is reasonable should be on the practical effect of the adjustment and whether or not it overcomes the PCP or physical barrier which is impeding the disabled person from working. (See, for example, *Chief Constable of West Midlands Police v Gardner* [2012] EqLR 20). A real prospect of effectiveness is sufficient to make the adjustment reasonable *(Leeds Teaching Hospital NHS Trust v Foster* [2011] EqLR 1075).

Croft Vets is a case in point. The claimant suffered from work related stress when her responsibilities increased following the expansion of the practice. She resigned when the respondent did not act on the recommendations made by a clinical psychiatrist to whom they referred her. She claimed constructive unfair dismissal and that the employer had failed to make reasonable adjustment by not paying for the therapy recommended by the psychiatrist. The employer argued (1) that it is outside the scope of reasonable adjustments to pay for private medical treatment; and (2) the adjustment must be job-related and the employer has no obligation to pay for treatment to improve an employee's health.

The EAT rejected these submissions and upheld the ET's decision that the adjustment was reasonable. Supperstone J said that the adjustments were job-related in that they involved payment for a specific form of support to enable the claimant to return to work.

We accept … that the issue in this case is not the payment of private medical treatment in general, but, rather, payment for a specific form of support to enable the Claimant to return to work and cope with the difficulties she had been experiencing at work.

> ***Practical Tip***
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> *Claimants should be prepared to bring medical evidence to support their argument that a particular measure or course of treatment would support a return to work.*

Thus a career break or transferring a disabled worker to a rehabilitative rather than a productive role where the PCP is the requirement that the worker perform their full range of duties is not "reasonable" as it does not enable the worker either to remain in or return to work (*Salford NHS Primary Care Trust v Smith* [2011] EqLR 1119**)**.

Nor is enabling a claimant to leave employment on more favourable terms than a non-disabled person. In *Tameside Hospital NHS Foundation Trust v Mylott* (UKEAT/0352/09/DM) 11 March 2011, the EAT decided that the employer had not breached its duty to make reasonable adjustments

by not looking into the possibility of ill-health retirement.

> *"The whole concept of an adjustment seems to us to involve a step or steps which make it possible for the employee to remain in employment and does not extend to, in effect, compensation for being unable to do so."*

Practicability and the requirements of others

Back to Mr Paulley. Having accepted that a disabled wheelchair user was clearly disadvantaged compared to a non-disabled person by a PCP of "first come, first served", the Court of Appeal nevertheless rejected Mr Paulley's argument that it would have been reasonable for the bus company to compel rather than request other passengers to vacate the wheelchair space. The first problem for the bus company was one of practicability. There was no legal means of enforcing any such requirement and it would put drivers, faced with a recalcitrant passenger, in an impossible position. The second problem was that there might be situations where other people were in need of the space – the blind person with the guide dog; the woman with the buggy on her way to a hospital appointment; the six able-bodied passengers who are standing in the space because the bus is full – and it would be invidious to expect the driver to deny them the space, or make choices as to whose needs were greater.

Cost and the resources of the employer

Most adjustments are inexpensive, and even adjustments that, on their face, appear to be expensive, may nevertheless be reasonable taking into account the cost to the business of recruiting and training a new member of staff. Where, however, the costs of the adjustment are disproportionate, it may not be so. In *Cordell v Foreign & Commonwealth Office* [2012] ICR 280, EAT, the EAT held it was not reasonable for the respondent to provide the claimant with lipspeaker support at a cost of five times the claimant's salary in order for her to take up a new role. Underhill J said cost 'is in truth one of the central considerations in the assessment of reasonableness'. He further stated:

> *"The [ET's] judgment of what level of cost it 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. Besides the points made in the [Code], and of course the degree to which the employee would benefit from the adjustment, the relevant considerations may include . . . the size of any budget dedicated to reasonable adjustments; what the employer had 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."*

This is a useful statement of principle for employers affirming the importance of cost in determining whether or not an adjustment can be said to be reasonable.

Reasonable Adjustments in practice

1. During the application process

In *Burke v College of Law and another* [2011] EqLR 454, EAT, the claimant, who had MS, was sitting the LPC exams. Adjustments had already been made including providing the claimant with more time to complete the papers. However the exam board refused the claimant's request for permission to take the exams at home and, failing that, even more time to complete them. The EAT held that the time restriction was a competence standard and that no further adjustment to that already provided by the respondent was required.

Likewise in *Lowe v Cabinet Office* [2011] EqLR 803 the EAT rejected a claim by an applicant for the Civil Service who had Asberger's Syndrome that further adjustments should be made to the selection process. The further adjustments sought would mean two of the competences being tested would have to be discarded: namely building productive relations and communicating with impact. It was not reasonable to remove them as it would have destroyed the purpose of the process.

Note that even where proposed adjustment to the interviewing process would not have resulted in a disabled applicant being appointed, it does not necessarily mean that the employer should not have made it. *Noor v Foreign and Commonwealth Office [2010] UK/EAT/470/10 [2011] ICR 695*.

2. In employment

The sorts of steps that an employer may need to take in order to comply with the duty to make reasonable adjustments are set out at paragraph 6.33 of the Code. They are:

- making adjustments to premises;
- providing information in accessible formats;
- allocating some of the disabled person's duties to another worker;

- transferring the disabled worker to fill an existing vacancy;
- altering the disabled worker's hours of work or training;
- assigning the disabled worker to a different place of work or training, or arranging home working;
- allowing the disabled worker to be absent during working or training hours for rehabilitation, assessment or treatment;
- giving or arranging time off for training or mentoring;
- acquiring or modifying equipment;
- modifying procedures for testing or assessment;
- providing a reader or interpreter;
- providing supervision or other support;
- allowing a disabled worker a period of disability leave;
- modifying disability or grievance procedures;
- adjusting redundancy selection criteria;
- modifying performance-related pay arrangements.

The courts have held that reasonable adjustments could include:

- transferring a disabled employee without competitive interview from a post she can no longer do due to her disability to a post which she can do, even if it means moving the disabled person on to a higher grade (*Archibald v Fife Council*);
- swapping jobs with another worker (*Chief Constable of South Yorkshire Police v Jelic* [2010] IRLR 744);
- adjusting redundancy selection criteria to prevent a disabled worker being substantially disadvantaged by low scores on performance and accuracy (*Dominique v Toll Global Forwarding Limited* UKEAT/0308/13/LA)
- assessing an employee's suitability for an alternative role in a redundancy situation other than by interview when the employee was repeatedly unable to attend (*London Borough of Southwark v Charles* UKEAT/0008/14/RN)

There is no requirement on an employer to create a post specifically for a disabled person where that post is not otherwise necessary (*Tarbuck v Sainsbury's Supermarkets Ltd* [2006] IRLR 744).

3. Dismissal

In *Fareham College v Walters* UKEAT/0396/08/1408 the Employment Appeal Tribunal held that a decision to dismiss a disabled employee **can** amount to a failure to make reasonable adjustments if the employer could have made an adjustment, such as a phased return to work or transferred them to another job, which would have avoided the dismissal. In other words, where the dismissal is so bound up with a failure to make reasonable adjustments, the dismissal itself can be an unlawful act of discrimination.

> ***Practical Tip***
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> *Employers should consider very carefully the alternatives to dismissal and whether they are reasonable before reaching a decision to dismiss a disabled employee.*

There is no obligation on an employer to avoid dismissal by placing a disabled person into a role that the employer does not believe that they can perform (*Wade v Sheffield Hallam University* UKEAT/0194/12) Nor is there a requirement to adjust a penalty of dismissal for gross misconduct where by doing so the employer would be seen to be condoning the act (*Gomez v Glaxosmithkine Services Unlimited* [2011] EqLR 804, EAT).

General Dynamics Information Technology Ltd v Carranza UKEAT/0107/14/KN

In this case, the issue before the EAT was, was the employer in breach of a duty to make reasonable adjustments by not disregarding a final written warning and dismissing the claimant? The claimant was disabled within the meaning of the EA. He had had many lengthy periods of time off sick leading to a final written warning being issued. The letter was carefully framed, setting out all the matters that had been taken into account before issuing the warning. The Claimant then had two short periods off sick and the employer did not take any further action against him. He was then off for 3 months with an injury unrelated to his disability and was dismissed.

The EAT decided that the fact that the respondent had not dismissed the claimant for two relatively short periods of absence following the final written

warning provided no basis for saying that it should disregard it. HHJ Richardson said this:

> *"It would be remarkable and in my view regrettable if an employer, by showing leniency to a disabled person in respect of some short periods of absence late in an absence management procedure, thereby became required by law to disregard all disability-related absence prior to that time whatever the impact on the business of so doing."*

4. Post-Termination duty to make adjustments

The employer should be aware that by operation of section 108 EA the duty to make reasonable adjustments may continue after employment is terminated (see Code para 6.8). An example would be in relation to the hearing for an appeal against dismissal even after the contract of employment had ended.

The duty can even extend as far as reinstatement. In *Hinsley v Chief Constable of West Mercia Constabulary* (UKEAT/0200/10/DM), the claimant was employed as a probationary constable. Approximately one month after she resigned the claimant was diagnosed with depression. She then made a request for reinstatement saying that her decision to resign had been made when she was in a depressed state. The respondent refused on the grounds they had no power under Police Regulations to reinstate her. The claimant subsequently made a claim for disability discrimination saying that the employer had failed to make a reasonable adjustment by not reinstating her. The claim was rejected by the ET but succeeded on appeal. The PCP was not reinstating officers who had resigned. The substantial disadvantage was that a person with depression was more likely to resign as a result of a depressive episode. Reinstatement was therefore a reasonable adjustment.

Last Word: Attendance Issues - Section 15 or Reasonable Adjustments*?*

In *General Dynamics* HHJ Richardson offered the opinion that claims relating to dismissal for poor attendance can be difficult to analyse as claims for failure to make a reasonable adjustment and are better considered under the provisions of section 15 EA.

"Section 15 is focused upon making allowances for disability: unfavourable treatment because of something arising in consequence of disability is prohibited conduct unless the treatment is a proportionate means of achieving a legitimate aim. Sections 20-21 are focused upon affirmative action: it if is reasonable for the employer to have to do so, it will be required to take a step or steps to avoid substantial disadvantage.

. . .not every case involves a breach of the duty to make reasonable adjustments, and dismissal for poor attendance can be quite difficult to analyse in that way."

> ***Practical Tip***
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> *"… Parties and Employment Tribunals should consider carefully whether the duty to make reasonable adjustments is really in play or whether the case is best considered and analysed under the new, robust, section 15."*

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Daniel enjoys a good reputation especially for strong advocacy and good client handling skills, commended by the Court of Appeal for his “impressive advocacy” and “excellent arguments”.

He has vast experience of a broad range of work in the employment field: unfair dismissal (express or constructive); unlawful discrimination (direct/indirect); all forms of disability discrimination (including dyslexic pupils in schools); harassment; victimisation; whistleblowing; unlawful deduction of wages; collective redundancy; transfer of undertakings, trade union membership/activities; working time; national minimum wage; holiday pay**;** bonuses; High Court injunctions regarding confidential information and enforcing restrictive covenants; breach of contract; equal pay.

Daniel has acted for a wide range of clients, predominantly respondents, in different sectors, such as railways (British Rail pre privatisation as well as several private rail companies post privatisation); airlines (Air 2000/First Choice); retail (John Lewis Partnership; health (several NHS Trusts and nursing care homes); local government (several local authorities); professional (law, patent attorney and accountancy firms); small businesses and charities.

He has also acted successfully for a number of individuals, particularly under the Bar Public Access Scheme, such as consultant neurologist, senior investment banking analyst, group marketing director and senior care worker; also for an NHS Trust medical director and manager of a golf club both sued in their personal capacities in high profile cases.

He has often been instructed in cases raising novel or difficult points.

Recent cases include **Kalu v Brighton & Sussex University Hospitals NHS Trust & Others (2015) CA 21/04/15** – successful appeal on behalf of NHS Trust and individual consultants against a decision of the EAT regarding the exclusion of evidence relating to previous proceedings in support of claims for racial discrimination and victimisation; and **Jinks v London Borough of Havering (2015) EAT 23/02/15** – successful appeal on behalf of claimant regarding what may constitute a service provision change within TUPE 2006 Regulations.

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Jennifer returned to 2TG in 2012 to specialise in employment law. She is an experienced advocate and appears regularly in the Employment Tribunal for a broad range of clients including both claimants and respondents in the public and private sectors. Jennifer’s expertise covers atypical work, all aspects of discrimination law (including pregnancy and maternity discrimination, disability discrimination, race and religious discrimination), unfair and wrongful dismissal, redundancy, whistleblowing and TUPE claims. She also has a particular interest in collective labour law.

Jennifer gained a distinction in the LLM in Labour Law at King’s College London in the academic year 2011/2012. She was awarded the Dickson Poon School of Law Prize for the Best Labour Law Student.

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