A duty to make reasonable adjustments – protecting the pay of a disabled employee

What is the law?

Under the Equality Act 2010 there is a duty to make reasonable adjustments if a provision criterion or practice applied by an employer places a disabled person at a substantial disadvantage compared with a non-disabled person.

The Employment and Human Rights Commission (EHRC) Code lists a number of factors at paragraph 6.9 which might be taken into account when deciding what the reasonable steps are for an employer to have to take. These are the:

- extent to which the adjustment would have ameliorated the disadvantage
- extent to which the adjustment was practicable
- financial and other costs of making the adjustment, and the extent to which the step would have disrupted the employer's activities
- financial and other resources available to the employer
- availability of external financial or other assistance
- nature of the employer's activities and the size of the undertaking

Paragraph 6.33 of the EHRC Code gives examples of adjustments that might be reasonable for an employer to make. These include:

- allocating some of a disabled person's duties to another person
- altering a disabled person's hours of working
- assigning a disabled person to a different place of work or training
- allowing a disabled employee to take a period of disability leave

How has it been interpreted?

The case of *Archibald v Fife Council [2004]* also established that in some cases an employer's duty might extend to appointing a disabled employee to an alternative post without a competitive recruitment process.

In the case of *G4S Cash Solutions (UK) Limited v Powell* the EAT considered whether protecting the pay of a disabled employee redeployed to a more junior role was a reasonable adjustment. Mr Powell worked for the company as an engineer maintaining the company's ATM machines. He suffered with back pain and by mid 2012 he was no longer fit for jobs involving heavy lifting or work in confined spaces. It was accepted that he was disabled under the Equality Act 2010.

In 2012 G4S created a new role of 'key runner' supporting ATM engineers working in Central London. The role involved driving from the company's depot to various locations to deliver materials to the engineers. After a period of sickness absence Mr Powell commenced work

as a key runner while retaining his pre-existing salary. He understood the change of role was long-term.

By 2013 G4S was proposing to reduce the pay for the role on the basis that it did not require engineering skills, and when Mr Powell refused to accept the reduced salary he was dismissed.

In considering whether protecting Mr Powell's pay was a reasonable adjustment the EAT concluded that while it will not be an 'every day event' for an employer to provide long-term pay protection, there are cases where this may be a reasonable adjustment with a view to getting an employee back to work or to keep an employee in work. The case provides another useful illustration of the breadth of the duty to make reasonable adjustments.

The issue that often arises in advising clients is cost. While the cost of possible adjustments together with the size and administrative resources of the employer will be relevant the EHRC Code states that *"even if an adjustment has a considerable cost associated with it, it may still be cost-effective in overall terms – for example compared with the costs of recruiting and training a new member of staff – and so may still be a reasonable adjustment to have to make."*

When is an adjustment not reasonable?

In *Cordell v Foreign and Commonwealth Office [2011]* an ET held that the cost of providing lip reading services to a profoundly deaf diplomat at a cost of £250,000 per year were unreasonable and this was upheld on appeal. The EAT in the case gave guidance on how tribunals should approach the issue of cost and stated that as well as taking into account the degree of benefit to the employee and the EHRC Code, factors might include:

- the size of any budget for reasonable adjustments
- what the employer has chosen to spend in comparable situations
- what other employers are prepared to spend
- any collective agreement or other indication of what level of expenditure is regarded as appropriate by representative organisations

However it held that *"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."* Nor is there any *"objective measure for calibrating the value of one kind of expenditure against another."*

This is a difficult area and will always be fact-specific. As there is no defence if an adjustment is deemed reasonable, organisations should always obtain expert opinion on the efficacy and practicality of an adjustment as well as legal advice.

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