A shifting balance

At what point does the burden of proof shift in reasonable adjustment cases? **Spencer Keen** explains

Broadly speaking, the Disability Discrimination Act 1995 (DDA 1995) places employers under a duty to make reasonable adjustments for a disabled worker if any of their provisions, criteria or practices place that worker at a substantial disadvantage when compared with a non-disabled worker.

CONSIDERING ADJUSTMENTS

In *Tarbuck v Sainsbury Supermarkets Ltd* [2006] IRLR 664, [2006] All ER (D) 50 (Jun), Mr Justice Elias held that a duty to make reasonable adjustments would not be breached simply because an employer failed to consider whether or not an adjustment was required. The line of authorities since *Mid-Staffordshire General Hospital NHS Trust v Cambridge* [2003] IRLR 566, [2003] All ER (D) 06 (Sep), suggesting that a simple failure to consider an adjustment could breach the duty, was overruled.

In *Tarbuck* the claimant was a business analyst and IT project manager who suffered from ulcerative colitis and depression. She claimed that her employer had failed to consult with her about her redundancy. Elias J stated at para 71:

"The only question is, objectively, whether the employer has complied with his obligations [to make a reasonable adjustment] or not…If he 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…Conversely, if he fails to do what is reasonably required, it avails him nothing that he has consulted the employee."

Following *Tarbuck*, tribunals considering the duty to make adjustments should only be concerned with what the employer did or did not do, and not with the employer's intentions.

POSITIVE DUTY

Although *Tarbuck* disposed of the notion that the duty could be breached by a mere failure to consider an adjustment, it did not answer the problematic question of when and how the burden of proof shifts in reasonable adjustments cases. The burden of proof provisions are contained in DDA 1995, s 17A(1C) and are in substantially identical terms to the provisions contained in most other areas of discrimination law. However, the duty to make reasonable adjustments is unique to discrimination law since it requires private employers to take positive steps in favour of disabled people.

Despite *Tarbuck* it was unclear whether the positive nature of the duty to make a reasonable adjustment required the burden of proof to shift at an earlier stage than was ordinarily prescribed by cases such as *Igen v Wong Ltd (Equal Opportunities Commission intervening)* [2005] EWCA Civ 142, [2005] All ER (D) 300 (Feb). In particular, could an employer be found liable as a result of failing to prove that it had made a reasonable adjustment even if no reasonable adjustment was identified?

Before *Tarbuck* a respondent was found to have breached the duty to make adjustments even though neither the claimant nor their GP could suggest any adjustments that could be made. In *Cosgrove v Caesar & Howie (a firm)* [2001] IRLR 653, [2001] All ER (D) 118 (Jun), Mr Justice Lindsay stated at para 7:

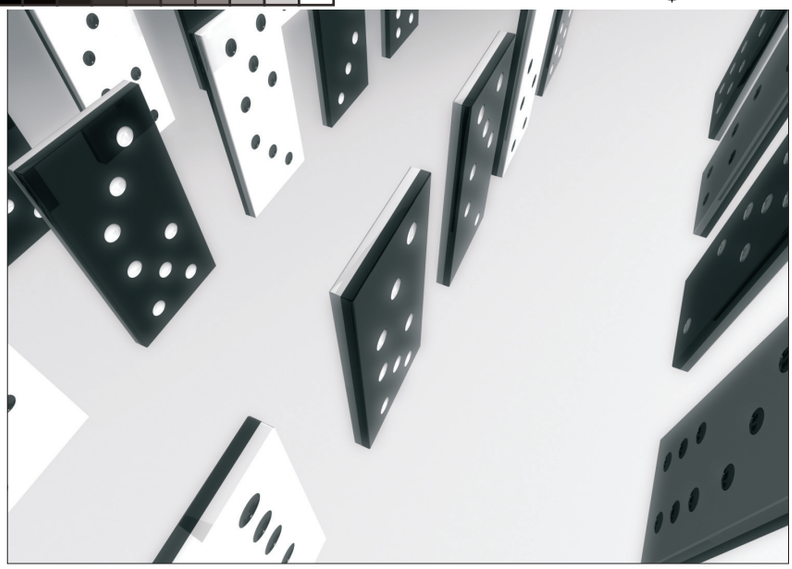
"There will, no doubt, be cases where the evidence given on the applicant's side alone will establish a total unavailability of reasonable and effective adjustments. But it does not seem to us to follow that because a former secretary, long absent from the firm and clinically depressed to the point of disability and her general practitioner also (the latter, at least, being unlikely to know what office or other practicabilities were open to the employer) could postulate no useful adjustment, that the s 6 duty on the employer should, without more, be taken to have been satisfied."

LATEST GUIDANCE

Two recent cases have given guidance on how to approach the burden of proof in reasonable adjustments cases—*Latif v Project Management Institute* [2007] IRLR 579, [2007] All ER (D) 148 (May) and *HM Prison Service v Johnson* UKEAT/0420/06.

KEY POINTS

- According to DDA 1995, s 4A(1), where a provision, criterion or practice applied by or on behalf of an employer, or any physical feature of premises occupied by the employer, places a disabled person at a substantial disadvantage, the employer has a duty to take reasonable steps to prevent that effect.
- To reverse the burden of proof onto the employer, the claimant must show:
  - that he was a disabled worker;
  - that he was substantially disadvantaged by the respondent's PCP in comparison with others who were not disabled;
  - that a particular adjustment would have assisted him; and
  - that the particular adjustment he suggests would have been reasonable in all the circumstances.



Latif

In *Latif* the respondent was a qualifications body which conferred a project management qualification. The claimant was registered blind and required certain adjustments to be made to help her prepare for and take examinations. She made certain suggestions about what adjustments might be made. The Employment Appeal Tribunal (EAT) found that merely establishing that a provision, criterion or practice placed the disabled person at a substantial disadvantage was not a sufficient prima facie case to shift the burden of proof under DDA 1995, s 17A(1C). Although proving that a provision, criterion or practice has caused a substantial disadvantage would engage the duty, it would not provide the basis from which an inference could be drawn that the duty had been breached. To draw such an inference there must be evidence of an adjustment which at least on its face appears reasonable, and which would mitigate or eliminate the disadvantage. If such a potentially reasonable adjustment was identified the burden would then shift.

Interestingly, the EAT indicated that the claimant would not, in every case, have to propose a detailed adjustment before the burden shifted, and recognised that the tribunal could suggest an adjustment so long as it gave the respondent the opportunity of dealing with the suggestion.

If a suggestion made by the tribunal is sufficient to reverse the burden, there would appear to be a low threshold for proving a prima facie case that the adjustment was reasonable. However, *HM Prison Service v Johnson* provides further important guidance about the degree of particularity with which a claimant is required to show reasonableness before the burden shifts.

Johnson

In *HM Prison Service v Johnson* the claimant was a prison psychologist who developed a depressive illness amounting to a disability that was at least partly caused by an episode of bullying at work. Mr Justice Underhill indicated that the adjustment should be identified with sufficient specificity to enable the kind of assessment of reasonableness, envisaged by DDA 1995, s 18B, to be carried out. Section 18B lists a number of factors that the tribunal must take into account when assessing reasonableness, such as the cost of the adjustment. Underhill J continued at para 90:

"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 a finding be made."

The claimant must therefore be able to suggest an adjustment with sufficient precision for a tribunal to be able to assess whether it might be reasonable having regard to its cost, the practicability of implementing it, the nature and size of the employer's undertaking and the other factors mentioned in s 18B. Generally, this test would require a higher standard of proof the more serious the suggested adjustment. For instance, less particularity is likely to be required for the suggestion that it was reasonable to provide an orthopaedic chair than for the suggestion that it was reasonable to transfer the claimant to a different department and to provide him with an assistant. Using this test, the more complex the suggested adjustment, the less likely it is that the mere suggestion of it, for instance by the tribunal, will be sufficient to reverse the burden of proof.

"The duty to make reasonable adjustments is unique to discrimination law since it requires private employers to take positive steps in favour of disabled people"

SHIFTING THE BURDEN

The point at which the burden of proof shifts in reasonable adjustments cases has now been clarified. Broadly speaking, before the burden of proof shifts a claimant will have to show:

(i) that he was disabled;
(ii) that he was substantially disadvantaged by the respondent's provision, criterion or practice in comparison with others who were not disabled;
(iii) that a particular adjustment would have assisted him; and
(iv) that the particular adjustment he suggests would have been reasonable in all the circumstances.

The degree of detail required for the proof of (iii) and (iv) is low but must be based on fact. The degree of detail will also vary depending on the type of adjustment that is suggested. If the claimant is able to satisfy these steps the onus will shift to the respondent to provide an adequate explanation for its behaviour.

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