Weightmans

Weightmans Guidance Note [Spring 2017]

An Employer's Duties Towards Disabled Employees under The Equality Act 2010

– A Guide for Senior Managers

Summer 2017

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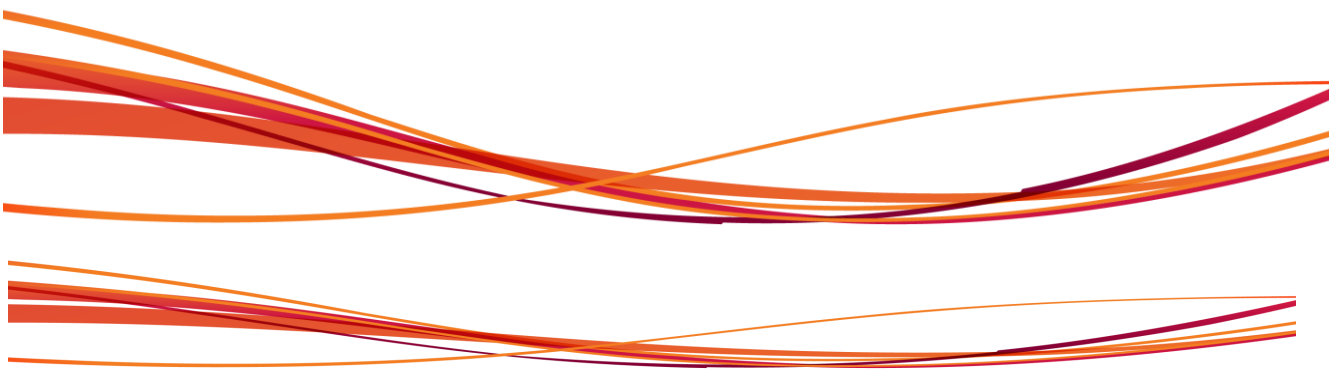

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Introduction

Protection for disabled job applicants, existing employees and ex-employees (amongst others) is set out in The Equality Act 2010 ('the Equality Act), which came into force on 1 October 2010 (at which time the previous disability legislation, the Disability Discrimination Act 1995 ('DDA'), was repealed).

The Equality Act is accompanied by a Code of Practice on Employment ('the Code of Practice') which provides practical guidance on the disability provisions of the Equality Act and, although the Code is not law, Courts and Employment Tribunals are expected to take it into account when interpreting the Equality Act.

The Equality Act's provisions covering disability discrimination in the workplace protect a wide range of individuals, including employees, contract workers, partners and office holders. However, this guidance note focuses on the protection provided for disabled job applicants, current employees and ex-employees under the Equality Act, taking into account the Code of Practice. This guidance note is up-to-date as at **early July 2017**.

1) The meaning of "disability"

1.1) In order to be protected against disability discrimination under the Equality Act, a person must either currently have a disability or must have previously had* a disability, as defined in the Act.** According to the Equality Act, a person has a disability if he or she:

- has a physical or mental impairment, which has a
- substantial and
- long-term
- adverse effect on the person's ability to carry out normal day-to-day activities.

All four elements of the statutory definition must be satisfied and it's recommended that expert medical advice (e.g. from an Occupational Health adviser) is always sought about an employee's disabled status. The Government has published 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' ('Disability Guidance'), which guidance is helpful in understanding how the issue of disability is assessed.

*[The Equality Act also provides protection against discrimination in respect of a past disability, even if that person is no longer disabled. For example, it would be discriminatory to unjustifiably reject a job applicant because he or she had previously experienced a period of mental illness].

**[However, both disabled and non-disabled people are protected against victimisation under the Equality Act, as explained below. Furthermore, the Equality Act also protects non-disabled people against discrimination or harassment by association and by perception, also as explained below].

1.2) **Physical or mental impairments**

a) Neither mental nor physical impairments are defined in the Equality Act (although, as explained below, Regulations provide that certain conditions do not amount to an impairment). Instead, the terms should be given their ordinary and natural meaning.

b) A disability can arise from a wide range of impairments such as:

- sensory impairments, e.g. those affecting sight or hearing;
- impairments with fluctuating or recurring effects such as rheumatoid arthritis, depression and epilepsy;
- progressive impairments, such as motor neurone disease, muscular dystrophy and forms of dementia;
- organ specific impairments, including respiratory conditions such as asthma, and cardiovascular diseases such as strokes and heart disease;
- developmental impairments, such as autistic spectrum disorders (ASD) and dyslexia;
- learning difficulties;
- mental health conditions and mental illnesses, such as depression, schizophrenia or eating disorders; and
- impairments resulting from injury to the body or brain.

c) People with certain impairments are deemed to be disabled for the purposes of the Equality Act without having to show that their impairment satisfies the remaining three elements of the statutory definition, namely those who:

- have been diagnosed with cancer, HIV infection or multiple sclerosis;
- those who are certified as blind, severely sight impaired, sight impaired or partially sighted by a consultant ophthalmologist; and
- those with severe disfigurements, with the exception of unremoved tattoos and piercings.

d) By contrast, certain conditions are deemed <u>not</u> to be qualifying impairments for the purposes of the Equality Act's definition of disability, namely:

- addiction to, or dependency on, alcohol, nicotine, or any other substance (other than in consequence of the substance being medically prescribed or administered);
- seasonal allergic rhinitis (e.g. hay fever), except where it aggravates the effect of another condition;
- a tendency to set fires;

- a tendency to steal;
- a tendency to physically or sexually abuse other persons;
- exhibitionism;
- voyeurism; and
- disfigurements which consist of a tattoo (which has not been removed), non-medical body piercing, or something attached through such piercing.

It should, however, be noted that:

- The above exclusions also apply where these tendencies arise as a consequence of an impairment which does constitute a disability for the purposes of the Equality Act. For example, a young man has Attention Deficit Hyperactivity Disorder (ADHD) which manifests itself in a number of ways, including exhibitionism. The ADHD would be regarded as a disability under the Equality Act although the young man would not be entitled to protection under the Act in respect of any discrimination which he experiences as a result of his exhibitionism. He would, however, be protected in relation to any discrimination that he experiences in relation to the non-excluded effects of his condition, such as inability to concentrate;

- However, and although the conditions listed above are excluded from protection, impairments caused by any of those conditions might amount to protected disabilities. In *Power v Panasonic* [2003], the EAT held that depression caused by alcohol abuse was not prevented from being a disability merely because addiction to alcohol is expressly excluded from being an impairment. This approach is reflected in the Disability Guidance, which explains that liver disease as a result of alcohol dependency will count as an impairment (paragraph A7).

e) Disability and obesity:

Periodically there have been challenges against discrimination based upon a person's obesity, one issue being whether obesity is a protected characteristic in its own right under the Equality Act or else whether it should be regarded as a disability. In the European Court of Justice case of *FOA, acting on behalf of Karsten Kaltoft v Kommunernes Landsforening, acting on behalf of the Municipality of Billund* [2014], the ECJ – on being asked to consider whether EU law protects obese workers from discrimination – found that:

- there is no general principle of EU law prohibiting discrimination on grounds of obesity;
- however, obesity might fall within the definition of "disability" under the Equal Treatment Framework Directive (2000) if it hinders a worker from full and effective participation in their professional life on an equal basis with other workers. Each case will depend on its facts, although the ECJ gave the examples of obesity-related reduced mobility or the onset of medical conditions which prevent a person from carrying out their work or which cause them discomfort when carrying out their professional activity.

The ECJ reached essentially the same conclusion as the EAT in *Walker v Sita Information Networking Computing Ltd* [EAT] (2012), namely that obesity is not an impairment of itself but that the effects of obesity may result in a claimant being disabled.

1.3) **Substantial**

a) Substantial means 'more than minor or trivial'. This is a relatively low standard, and the focus should be on what the disabled person cannot do, or cannot do without difficulty, rather than on what the disabled person can do.

b) In determining whether the effect of an impairment is substantial, any remedial measures which are used to treat or correct the impairment (e.g. a hearing aid or medication) should be ignored. (The only exception to this is where eyesight is corrected via spectacles or contact lenses). That said, where the effect of the treatment is to create a permanent (rather than a temporary) improvement (e.g. via corrective surgery), then this permanent improvement should be taken into account, as measures are no longer needed to treat the condition once the permanent improvement has occurred.

c) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out day-to-day activities, it is to be treated as having that effect if that effect is likely to recur. This might be shown by medical evidence of the prognosis or by statistical evidence. An employee will, therefore, have to show that the particular effect is likely to recur on at least one occasion during their lifetime. An employee may therefore be held to be disabled even if there is no immediate prospect of a recurrence of their condition.

d) Where an individual has a progressive condition which is likely to have a substantial adverse effect on the individual's normal day-to-day activities at some future stage, then that condition is to be treated as having such a substantial adverse effect now, even if it has yet to do so.

e) The cumulative effect of an impairment on more than one activity, taken together, could result in an overall substantial adverse effect. Further, the cumulative effect of more than one impairment should be taken into account. For example:

- A man with depression experiences a range of symptoms that include a loss of energy and motivation that makes even the simplest of tasks or decisions seem quite difficult. He finds it difficult to get up in the morning, get washed and dressed, and to prepare breakfast. He is forgetful and cannot plan ahead. As a result he has often run out of food before he thinks of going shopping again. Household tasks are frequently left undone, or take much longer to complete than normal. Together, the effects amount to the impairment having a substantial adverse effect on carrying out normal day-to-day activities;

- A person has mild learning disability. This means that his assimilation of information is slightly slower than that of somebody without the impairment. He also has a mild speech impairment that slightly affects his ability to form certain words. Neither impairment on its own has a substantial adverse effect, but the effects of the impairments taken together have a substantial adverse effect on his ability to converse.

f) An impairment which is consists of a severe disfigurement is to be treated as having a substantial adverse effect on an individual's ability to undertake normal day-to-day activities.

1.4) **Long Term**

a) An impairment is deemed to have a long term effect if it has lasted, or is likely to last, for at least 12 months, or else is likely to last for the rest of the life of the person affected, if this is shorter. If an impairment ceases to have a substantial adverse affect on a person's ability to carry out day activities (e.g. because an illness goes into remission), the substantial adverse effect is treated as continuing if it is likely to recur.

b) Two consecutive impairments can be aggregated for the purposes of determining the duration of an impairment, provided that they are related. This is reflected in the Disability Guidance, which states that: "the cumulative effect of related impairments should be taken into account when determining whether the person has experienced a long-term effect". By way of an example:

- A man experienced an anxiety disorder. This had a substantial adverse effect on his ability to make social contacts and to visit particular places. The disorder lasted for eight months and then developed into depression, which had the effect that he was no longer able to leave his home or go to work. The depression continued for five months. As the total period over which the adverse effects lasted was in excess of 12 months, the long-term element of the definition of disability was met.

1.5) **Normal Day to Day Activities**

a) 'Normal day-to-day activities' are things that people do on a regular or daily basis, such as shopping, reading, writing, using the telephone, walking and travelling by various forms of transport, and taking part in social activities.

b) However, normal day-to-day activities do not include work of any particular form as this would not be 'normal' for most people and the activities carried out might be highly specialised. The same is true of other specialised activities such as playing a musical instrument or playing a particular sport to a high level of ability, such as would be required for a professional footballer or an athlete. That said, many types of work or specialised pastimes may still involve normal day-to-day activities. By way of two case examples on this point:

- 'normal day-to-day activities' must be interpreted as including irregular but predictable activities which occur in professional life, such as taking high-pressure examinations for the purpose of gaining promotion;

- walking, stair climbing and driving are normal day-to-day activities, even when carried out on a night shift between 2am and 4am (given the number of people who carry out night work).

c) Where a child under the age of six has an impairment that does not substantially affect their normal day-to-day activities, this will amount to a disability if the impairment "would normally have that effect on the ability of a person aged six years or over to carry out normal day-to-day activities". For example, walking could not naturally be said to be a "normal day-to-day activity" for a small baby. However, this would not prevent a baby's spina bifida from amounting to a disability: since the spina bifida would substantially affect the ability to walk of someone over the age of six, the baby will be considered disabled for the purposes of the legislation. In the

employment field, this will affect cases where employees claim disability discrimination arising from their association with disabled children.

2) The meaning of "discrimination"

2.1) Types of Discrimination

The Equality Act makes it unlawful for an employer to discriminate against a disabled person in a number of ways, namely:

a) Direct disability discrimination:

i) An employer directly discriminates against a disabled person (e.g. a disabled job applicant or existing employee) if, because of his or her disability, the employer treats the disabled person less favourably than it treats or would treat others. (It makes no difference that the discriminator is also disabled – it's still discrimination).

ii) For direct disability discrimination to occur, the less favourable treatment must be "because of" the claimant's disability: a Tribunal will consider the employer's conscious or subconscious reason for the treatment. The reason must, however, be the disability itself, not merely something related to the disability (which might instead fall within one of the other forms of outlawed discrimination). Furthermore, since the disability itself must be the conscious or subconscious reason for the treatment, there must be some evidence that the employer knew about the disability.

iii) In practice, direct disability discrimination often arises where an employer makes a stereotypical assumption about a disabled job applicant or employee without actually investigating whether their disability will have the anticipated impact.

iv) The Code of Practice explains that it is not possible for the employer to balance or eliminate less favourable treatment by offsetting it against more favourable treatment – for example, by providing extra pay to make up for the loss of job status.

v) It is not direct discrimination to treat a disabled person more favourably than a non-disabled person (e.g. by making reasonable adjustments for the disabled person, as described below).

vi) *Discrimination by Association*: direct discrimination by association occurs when a non-disabled employee is treated less favourably by an employer because of that employee's association with someone who is disabled, rather than because the employee is personally disabled. The Code of Practice provides the following examples:

- a lone father who cares for a disabled son has to take time off work whenever his son is sick or has medical appointments. His employer appears to resent the fact that the employee needs to care for his son and eventually dismisses him: such a dismissal may amount to direct disability discrimination against the employee by association with his son; and

- an employee is treated less favourably because she has campaigned to help a disabled colleague at work: this treatment may again amount to direct discrimination by association with the disabled colleague.

vii) *Discrimination by perception*: it is also direct disability discrimination if an employer treats an employee less favourably because the employer mistakenly thinks that the employee is disabled. For example:

- an employer selects that employee for redundancy on the incorrect belief that he/she has a progressive illness and is therefore likely to incur significant future sickness absence); this will amount to direct disability discrimination by perception.

b) Discrimination arising from disability:

i) According to the Equality Act:

"…1) A person (A) discriminates against a disabled person (B) if-

(a) A treats B unfavourably because of something arising in consequence of B's disability, &

(b) A cannot justify the unfavourable treatment (i.e. show that the treatment is a proportionate means of achieving a legitimate aim).

2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability…"

ii) In the case of discrimination arising from disability, there is no requirement for the disabled person to establish that their treatment is less favourable than that experienced by a non-disabled comparator. Instead, the focus is on whether the treatment amounts to a detriment, and whether it can be justified.

iii) Objective justification will require the employer to be able to show that the treatment is a 'proportionate means of achieving a legitimate aim'. It is for the employer to justify the treatment; it must produce evidence to support the assertion that the treatment is justified and not rely on mere generalisations. If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified.

iv) The distinction between discrimination arising from disability and *direct* discrimination can be explained by the following example:

- An employer dismisses an employee because she has had three months' sick leave. The employer is aware that the worker has multiple sclerosis and that most of her sick leave is disability-related, but its decision to dismiss the employee is taken solely because of her level sick absence and, indeed, the employer has dismissed non-disabled employees with similar absence records. In this scenario:
    - the employer's decision to dismiss is not because of the employee's disability itself and so would not amount to direct discrimination;

- however, the employee has been treated unfavourably because of something arising in consequence of her disability (i.e. her sick absence) and so the employer's actions will amount to discrimination arising from disability unless the employer can justify her dismissal. (It is irrelevant whether or not other workers would have been dismissed for having the same or similar length of absence, albeit that this might provide some evidence in support of the employer's justification argument).

v) The distinction between discrimination arising from disability and *indirect discrimination* (which is fully explained below) is as follows:

- indirect discrimination occurs when a disabled person is (or would be) disadvantaged by an unjustifiable provision, criterion or practice applied to everyone, which puts (or would put) people sharing the disabled person's disability at a particular disadvantage compared to others, and which puts (or would put) the disabled person at that disadvantage;

- by contrast, discrimination arising from disability only requires the disabled person to show that they have experienced unfavourable treatment because of something connected with their disability. If the employer can show that they did not know and could not reasonably have been expected to know that the disabled person had the disability, it will not be discrimination arising from disability. (However, as with indirect discrimination, the employer may avoid discrimination arising from disability if the treatment can be objectively justified as a proportionate means of achieving a legitimate aim).

vi) There must be a connection between whatever led to the unfavourable treatment and the disability: the consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability. Some consequences may be obvious, such as an inability to walk unaided or an inability to use certain work equipment; others may not be obvious, for example, having to follow a restricted diet. By way of example:

- A woman is disciplined for losing her temper at work. However, this behaviour was out of character and is a result of severe pain caused by cancer, of which her employer is aware. The disciplinary action is unfavourable treatment. This treatment is because of something which arises in consequence of the worker's disability, namely her loss of temper. There is a connection between the loss of temper that led to the treatment and her disability. It will be discrimination arising from disability if the employer cannot objectively justify the decision to discipline the worker.

In the case of *Hall v Chief Constable of West Yorkshire Police* [2015], the EAT confirmed that to establish a claim for discrimination arising from disability there need only be a "loose" causal link between the disability and any unfavourable treatment. It will be sufficient to show that the unfavourable treatment has been caused by an outcome or consequence of the claimant's disability; the employer's motivation is irrelevant. Employers have an opportunity to redress the balance and defend a claim by showing that either the unfavourable treatment was justified or else that they did not know or could not reasonably have known that the employee was disabled. (The need for only a loose causal link was subsequently reiterated by EAT in *Risby v LB Waltham Forest* [2016]).

c) Indirect disability discrimination:

i) Indirect discrimination arises where an employer applies a provision, criterion or practice to its staff which is not intended to result in anyone being treated less favourably, but which in practice disadvantages a group of people within the workforce who share a particular protected characteristic (such as a particular disability). In this scenario, where the relevant provision, criterion or practice disadvantages an individual within that group, he or she will have a claim for indirect disability discrimination unless the employer can objectively justify the application of its provision, criterion or practice. For example:

- An employer is looking to recruit a secretary and stipulates that he or she must be able to type at 100 words per minute. The employer interviews a prospective candidate who has arthritis in her hands (which amounts to a disability for the purposes of the Equality Act) and requires her (and every other candidate) to undergo a typing test as part of the assessment process. The disabled candidate fails to achieve a typing speed of at least 100 words per minute in the typing test and is not recruited. In this scenario, the prospective employer would have to be able to justify the need for that minimum typing speed if this requirement would disadvantage candidates with manual dexterity problems and if, in fact, this candidate failed the typing test because of her arthritic hands. If the prospective employer could not justify its requirement for a minimum typing speed of 100 words per minute (as opposed to the speed of typing which this candidate could in fact achieve) then this would amount to indirect disability discrimination.

ii) The Code of Practice explains that the phrase 'provision, criterion or practice' should be construed widely so as to include any formal or informal policies, rules, practices, arrangements, criteria, conditions, qualifications or provisions. It also might include a policy or criterion that has not yet been applied, as well as a 'one-off' or discretionary decision.

iii) According to the Equality Act, the imposition by an employer of a particular provision, criterion or practice will be objectively justified if it can be shown to be a 'proportionate means of achieving a legitimate aim', i.e.:

- the aim of the provision, criterion or practice must be legal and non-discriminatory (e.g. properly evidenced health and safety considerations may satisfy this element); and

- the means of achieving the aim must be proportionate: this involves a balancing exercise, weighing up the discriminatory impact of the provision, etc. on the individual as against the employer's reasons for applying it. Thus if there is a less discriminatory way of achieving the particular aim than applying the provision, criterion or practice in question, then the employer would have to adopt the alternative approach.

iv) In reality, few claimants are likely to rely upon a claim for indirect disability discrimination alone if, as is likely in the majority of cases, the application of a disadvantageous provision, criterion or practice will also trigger the duty to make reasonable adjustments and the protection against discrimination arising from disability.

v) *Are people protected against Indirect discrimination by association*?

Under the Equality Act, the concept of associative discrimination only applies to direct discrimination and harassment. However, in the 2015 case of *CHEZ Razpredelenie Bulgaria*, the European Court of Justice held that a person may claim indirect discrimination by association under the EU Race Directive. Although the decision relates to the supply of goods and services, it has potentially far-reaching implications for discrimination in an employment context: because a general principle of EU law is at stake (non-discrimination), UK courts considering indirect discrimination claims would have an obligation to dis-apply any wording that conflicts with the Directive. They would also, where necessary, be able to "read in" words in order to make the legislation compatible with EU law. As a consequence, if everyone is intended to be the beneficiary of the rule against indirect discrimination, it becomes harder for businesses to identify with precision who might bring a claim arising out of a PCP which is potentially indirectly discriminatory. Furthermore, people who could not previously establish that they belonged to a disadvantaged group may seek to bring claims if they are "suffering alongside" a disadvantaged group.

d) Failure to comply with the duty to make reasonable adjustments:

According to the Equality Act, an employer discriminates against a disabled person if it fails to comply with the duty to make reasonable adjustments. This duty is explained in detail in paragraph 2.2 below.

e) Harassment:

i) The Equality Act prohibits three types of harassment, including harassment related to a 'relevant protected characteristic' which is defined as follows:

- a person (A) harasses another person (B) if A engages in unwanted conduct related to disability and that conduct has the purpose or effect of:
    - violating B's dignity, or
    - creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

In determining whether harassment has occurred, a Tribunal will have regard to all the circumstances of the case including, in particular, the perception of B.

ii) In most cases B will be a disabled person and the unwanted conduct will relate to his or her own disability. However, non-disabled people are also protected under the Equality Act against harassment by reason of the fact that they associate with a disabled person or are wrongly perceived to be disabled.

iii) *Third party harassment*: prior to October 2013, employers would be liable for the harassment of their employees by third parties such as customers or visitors provided that certain pre-conditions were met. However, the Government decided to remove the third-party harassment provisions as from 1 October 2013, believing them to be unnecessary on the basis that there are alternative legal remedies that employees can pursue if they consider that they have been subject to repeated harassment by a third party. For example, employees might still be able to argue that

their employer is itself guilty of 'normal' harassment if it consciously fails to protect the employee against harassment by a third party such as a valued customer whom the employer does not want to offend or embarrass. Furthermore, such behaviour by the employer would risk the employee resigning and claiming unfair, constructive dismissal.

f) Victimisation:

i) Victimisation occurs where a person (A) subjects another person (B) to a detriment because B has done, intends to do, or is suspected of doing or intending to do, any of the following protected acts:

- Bringing proceedings under the Equality Act;
- Giving evidence or information in connection with proceedings under the Equality Act, regardless of who brought those proceedings;
- Doing any other thing for the purposes of or in connection with the Equality Act; or
- Alleging that the discriminator or any other person has contravened the Equality Act (section 27(2), EqA)

ii) There is no protection if a person makes allegations or gives evidence which they know to be false (section 27(3)), but a person who complains mistakenly but in good faith is protected.

iii) By way of example, victimisation would occur where an existing employee has brought a discrimination claim against an employer for failing to stop harassment by colleagues and, subsequently, management fail to consider the employee for promotion because he's seen as a 'trouble-maker'.

2.2) **The duty to make reasonable adjustments**

a) The duty to make reasonable adjustments is unique to the protected characteristic of disability. Where the duty arises, the employer must effectively treat the disabled person more favourably than others in an attempt to reduce or remove that individual's disadvantage. The duty to make reasonable adjustments is a cornerstone of the protection for disabled people under the Equality Act and requires employers to take positive steps to ensure that disabled people can access and make progress in employment. The duty applies in recruitment and during all stages of employment, including dismissal. In practice, the majority of employment-related disability issues concern the duty to make reasonable adjustments and it is therefore worth considering this obligation in some detail.

b) The Equality Act explains that an employer discriminates against a disabled person if it fails to comply with the duty to make reasonable adjustments, and that this duty imposes three requirements on an employer, namely that:

i) Where a **provision, criterion or practice** applied by or on behalf of an employer puts a disabled person (e.g. a job applicant or an existing employee) at a substantial (i.e. more than minor or trivial) disadvantage in relation to a relevant matter in comparison with persons (e.g. fellow job

applicants or employees) who are not disabled, then the employer must take reasonable steps to avoid the disadvantage. By way of example:

- an employer who has a policy of only offering designated car parking to senior managers would have to consider providing a more junior employee with a designated parking space if his mobility impairment meant that he needed to park close to the office entrance;

ii) Where a **physical feature** of premises occupied by an employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, then the employer must take reasonable steps to avoid the disadvantage. For example:

- an employer might have to add stick-on hazard strips to make a glass door more visible for a visually impaired employee;

iii) Where a disabled person would, but for the provision of an **auxiliary aid or service**, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, then the employer must take reasonable steps to provide the auxiliary aid or service. For example:

- an employer might have to provide specialist software to help an employee use his computer after that employee develops a visual impairment.

c) A 'disabled person' for the above purposes is either an existing employee or else a disabled person who is, or who has notified the employer that he or she may be, an applicant for employment.

d) Substantial disadvantage:

i) In order for the duty to make reasonable adjustments to arise, the job applicant or employee must also be placed at a "substantial disadvantage" in comparison with persons who are not disabled. "Substantial" is defined as "more than minor or trivial". This is a low threshold, so it will often be relatively easy for a Tribunal to conclude that a claimant suffered such a disadvantage. However, Tribunals are obliged to identify clearly the nature and extent of the disadvantage suffered, otherwise they will be unable to determine properly what adjustments would have been reasonable.

ii) In *Perratt v The City of Cardiff Council* [2016], the EAT held that the duty to make an adjustment can apply to any provision criterion or practice which "bites harder" on the disabled employee than others (regardless of whether it applies equally to all employees). In *Perratt*, the EAT found that not being required to walk too far to get printing and allowing recording of meetings were both potentially reasonable adjustments that could have been made for the employee in question.

e) 'Provision, criterion or practice':

i) The phrase 'provision, criterion or practice' (PCP) should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions.

ii) It is arguable that a PCP will only give rise to a duty to make reasonable adjustments if it is related in some way to the job, rather than simply to the personal needs of the disabled person:

- in *Kenny v Hampshire Constabulary* [1998], a job applicant with cerebral palsy needed assistance going to the toilet. He was made a conditional offer of employment subject to the employer being able to make appropriate arrangements for his needs. The employer withdrew the offer when it realised it could not find any employees to provide the necessary assistance. The applicant claimed that the employer had failed to make reasonable adjustments. The EAT held that the employer's decision was not discriminatory because it was going too far to suggest that employers were under a statutory duty to provide carers to attend to an employee's personal needs.

- Paragraph 6.33 of the Code of Practice states: "…There is no requirement to provide or modify equipment for personal purposes unconnected with a worker's job, such as providing a wheelchair if a person needs one in any event but does not have one. The disadvantages in such a case do not flow from the employer's arrangements or premises."

However, it is arguable that the provision of assistance sought by Mr Kenny would now amount to an "auxiliary service" for the purposes of the new, extended reasonable adjustments duty under the Equality Act. If so, the focus would shift to whether the failure to provide that assistance was or was not reasonable on the facts.

f) Physical features:

The Equality Act and the Code of Practice explain that reasonable adjustments to overcome physical barriers would include:

- removing the physical feature in question;
- altering it; or
- providing a reasonable means of avoiding it;

and that physical features would include:

- any feature arising from the design or construction of a building;
- any feature of an approach to, exit from or access to a building;
- a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises; or
- any other physical element or quality.

g) 'Auxiliary Aids':

The Code of Practice explains that an auxiliary aid is something which provides support or assistance to a disabled person. It can include the provision of a specialist piece of equipment, such as an adapted keyboard or text to speech software, and auxiliary services such as the provision of a sign language interpreter or a support worker for a disabled worker.

h) Employer's knowledge:

i) The Equality Act and the Code of Practice explain that:

- As regards job applicants, an employer only has a duty to make an adjustment if it knows, or could reasonably be expected to know, that a disabled person is, or may be, an applicant for work. Therefore, an employer will not be obliged to make reasonable adjustments to premises or interview processes on the off-chance that a disabled person might apply for a job; in a work context, the duty is not anticipatory, but arises only in respect of particular disabled individuals. Furthermore, and whilst there are restrictions on when health or disability-related enquiries can be made of applicants prior to making a job offer, questions are permitted to determine whether reasonable adjustments need to be made in relation to the recruitment process;

- For existing employees, an employer only has a duty to make an adjustment if it knows, or could reasonably be expected to know, that an employee has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all that it reasonably can to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially. By way of an example of 'reasonable knowledge':

    - A worker who deals with customers by phone at a call centre has depression which sometimes causes her to cry at work. She has difficulty dealing with customer enquiries when the symptoms of her depression are severe. It is likely to be reasonable for the employer to discuss with the worker whether her crying is connected to a disability and whether a reasonable adjustment could be made to her working arrangements (paragraph 6.19 Code of Practice);

- If an employer's agent or employee (such as an occupational health adviser, a HR officer or a recruitment agent) knows, in that capacity, of a job applicant's, a potential applicant's or an existing employee's disability, then the employer will not usually be able to claim that it doesn't know of the disability and that it therefore has no obligation to make a reasonable adjustment. The Court of Appeal has held that if an employee discloses confidential information about their health to their employer's occupational health provider, the employer should only be deemed to have knowledge of the information actually provided to it by the occupational health provider. However, the position may be different if the worker consents to the disclosure of the information;

    - By way of an example of 'inputted knowledge': an occupational health adviser is engaged by a large employer to provide them with information about their workers' health. The OH adviser becomes aware of a worker's disability that is relevant to his work, and the worker consents to this information being disclosed to the employer. However, the OH adviser does not pass that information on to HR or to the worker's line manager. As the OH adviser is acting as the employer's agent, it is not a defence for the employer to claim that it did not know about the worker's disability. This is because the information gained by the adviser on the employer's behalf is attributed to the employer (paragraph 5.18 Code of Practice);

- Information will not be attributed to the employer if it is gained by a person providing services to employees independently of the employer. This is the case even if the employer has arranged for those services to be provided. By way of example:

    - An employer contracts with an agency to provide an independent counselling service to workers. The contract states that the counsellors are not acting on the employer's behalf while in the counselling role. Any information obtained by a counsellor during such counselling would not be attributed to the employer (paragraph 5.19 Code of Practice).

ii) Overall, therefore, an employer won't be protected from potential liability if, objectively, there is some information or behaviour which ought reasonably to alert the employer to the possibility that a job applicant or an existing employee has some underlying medical condition which might amount to a disability.

iii) If a job applicant does not ask for adjustments in advance but turns out to need them when he or she arrives for their interview, then the employer must still make whatever adjustments might be reasonable in the circumstances, although it might be reasonable to re-schedule the interview if in fact any required adjustments are impractical at such short notice.

i) <u>When is an adjustment 'reasonable'?</u>

i) An employer will not breach the duty to make adjustments unless it fails to make an adjustment which is "reasonable". This is a fact-sensitive question. The Equality Act does not specify any particular factors that should be taken into account in determining whether an adjustment is 'reasonable'. Instead, the Code of Practice explains that the following are some of the factors which might be relevant:

- The **effectiveness** of the proposed adjustment in preventing the substantial disadvantage;

- the **practicability** of the adjustment;

- the extent of any **disruption** caused in making the adjustment;

- the **financial and other costs** of making the adjustment (and please see sub-paragraph m) below for further details);

- **the extent of the employer's financial or other resources** (if an adjustment costs a significant amount then it is more likely to be reasonable for an employer to make it if it has substantial financial resources; the employer's resources must be looked at across its whole organisation, not just for the branch or section where the disabled person is or would be working. This is again an issue which the employer has to balance against the other factors);

- 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**.

ii) Ultimately the test of the 'reasonableness' is an objective one and will depend on the circumstances of the case. There is no objective justification defence available under the Equality Act in respect of an employer's failure to make reasonable adjustments: the proposed adjustments are either reasonable or they are not.

iii) There is no onus on the disabled employee to suggest what adjustments should be made (although it is good practice for employers to ask the employee concerned). However, where the disabled person does so, the employer should consider whether such adjustments would help overcome the substantial disadvantage, and whether they are reasonable.

j) Examples of reasonable adjustments:

i) The Code of Practice provides examples of reasonable adjustments and explains that:

- a good starting point for an employer is to conduct a proper assessment, in consultation with the disabled person concerned, of what reasonable adjustments may be required;
- any necessary adjustments should be implemented in a timely fashion;
- it may be necessary for an employer to make more than one adjustment; and
- it is advisable to agree any proposed adjustments with the disabled worker in question before they are made.

ii) The examples of adjustments which it might be reasonable for employers to have to take include:

- making adjustments to premises (e.g. widening a doorway or providing a ramp);
- providing information in accessible formats (e.g. producing manuals on audio tape);
- allocating some of the disabled person's duties to another person (e.g. a job involves occasionally going onto the open roof of a building, but the employer transfers this work away from an employee whose disability involves severe vertigo);
- transferring the disabled person to fill an existing vacancy (e.g. an employer should consider whether a suitable alternative post is available for an employee who becomes disabled (or whose disability worsens) where no reasonable adjustment would enable the employee to continue doing their current job. Also, see sub-paragraph iv) below)*;
- altering the disabled person's hours of working or training (e.g. allowing a disabled person to work flexible hours to enable him to have additional breaks to overcome fatigue arising from his disability, or permitting part-time working or different working hours to avoid the need to travel in the rush hour);
- assigning the disabled person to a different place of work or training, or arranging home working (e.g. relocating an employee's work station to an accessible place);

- allowing the disabled person to be absent during working or training hours for rehabilitation, assessment or treatment;

- giving, or arranging for, training or mentoring (whether for the disabled person or any other person) (e.g. all workers are trained in the use of a particular machine, but an employer provides slightly different or longer training for a worker with restricted hand or arm movements);

- acquiring or modifying equipment (e.g. providing special equipment, such as an adapted keyboard for someone with arthritis or a large screen for a visually impaired person);

- modifying procedures for testing or assessment (e.g. a person with restricted manual dexterity would be disadvantaged by a written test, so the employer might give that person an oral test instead);

- providing a reader or interpreter (e.g. a colleague reads mail to a person with a visual impairment at particular times during the working day. Alternatively, the employer might hire a reader);

- providing supervision or other support (e.g. providing a support worker, or arranging help from a colleague, for someone whose disability leads to uncertainty or lack of confidence);

- allowing a disabled employee to take a period of disability leave (e.g. an employee who has cancer needs to undergo treatment and rehabilitation, and his employer allows a period of disability leave and permits him to return to his job at the end of this period);

- participating in supported employment schemes (e.g. a disabled employee has been participating in a supported employment scheme where he saw the post advertised. As a reasonable adjustment he asks the employer to let him make private phone calls during the working day to a support worker at the scheme);

- employing a support worker to assist a disabled employee (e.g. an adviser with a visual impairment is sometimes required to make home visits. The employer employs a support worker to assist her on these visits);

- modifying disciplinary or grievance procedures (e.g. a woman with a learning disability is allowed to take a friend (who does not work with her) to act as an advocate at a meeting with her employer about a grievance so that the woman is not patronised or disadvantaged);

- adjusting redundancy selection criteria (e.g. when an employer is taking absences into account as a criterion for selecting people for redundancy, it might consider discounting periods of disability-related absence);

- modifying performance-related pay arrangements (e.g. a disabled woman who is paid purely on her output needs frequent short additional breaks during her working day – something her employer agrees to as a reasonable adjustment. It is likely to be a

reasonable adjustment for her employer to pay her at an agreed rate (for example, her average hourly rate) for these breaks).

* iii) It is important to remember that in the case of companies in a Group structure, where staff are employed by the Group company, then it may be necessary to consider the possibility of alternative work anywhere within the Group in the relevant geographical area (or further afield, if the employee is prepared to move) if the individual cannot return to his/her normal job and if there are no vacancies within their normal Business Unit.

*iv) With regard to the example of transferring the disabled person to fill an existing vacancy, it's worth mentioning the following cases:

- In *Archibald v Fife Council*, the House of Lords stated that reasonable adjustments include allowing disabled persons to "trump [fellow] applicants for new jobs, even if a disabled employee is not the best candidate, provided that the disabled employee is suitable to do that work". (Given that reasonable adjustments include training, there is therefore an argument that if the disabled person would be a suitable candidate with reasonable training, then that person should still trump other candidates and be provided with the training).

- The principle set out in *Archibald* appeared to have been adopted in *Waddingham v NHS Business Services Authority* [2015], in which an employment tribunal upheld a claim for failure to make reasonable adjustments, brought by a disabled NHS employee who failed to achieve the required score in a competitive interview for an internal post. The employee, whose existing position was at risk of redundancy, indicated that he wanted to proceed with the interview, despite having been signed off sick while he was receiving cancer treatment. The tribunal found that:

    - While it was necessary to have some form of assessment, the employer should have carried this out on the basis of existing data about his performance, including appraisals from previous posts;

    - However, it was not necessary to lower the pass mark to accommodate the employee's impaired performance at interview;

    - The failure to appoint the employee to the role also amounted to discrimination arising from his disability: he was unsuccessful because of his poor performance at interview, which had been adversely affected by his condition. Rejecting a justification argument, the tribunal doubted whether there could be a legitimate aim of selecting the best candidate for the job, in a context where a disabled candidate can lawfully be given more favourable treatment than a non-disabled candidate. A more appropriate aim may be to appoint a person who could perform to the required standard.

- However, the principle established by the *Archibald* case has its limitations: in a subsequent case (*Wade v Sheffield Hallam University* [2013]) the Employment Appeal Tribunal held that it would not have been a reasonable adjustment for the employer to waive its requirement for a disabled candidate to undergo a competitive interview process and meet the core competencies of the job: it could not be a reasonable adjustment for

the employer to appoint someone to a role where the person failed to meet the essential requirements of the job);

- The Code of Practice refers only to an "existing vacancy". However, depending on the circumstances employers might be required to redeploy a disabled employee even where no vacancy exists:

    - **Creating a new role**: in *Southampton City College v Randall* [2006], the EAT upheld a Tribunal's decision that it would have been reasonable for an employer to devise a new job which took into account the employee's disability. As a matter of law, the creation of a new post is not precluded from being a reasonable adjustment. However, whether such an obligation arises depends on the facts. In this case, the employer was undertaking a reorganisation and accepted that it had "a blank sheet of paper" so far as job specifications were concerned;

    - **Swapping with another employee**: In *Chief Constable of South Yorkshire Police v. Jelic*, the EAT upheld an Employment Tribunal's decision that:

        - swapping the Claimant's role with an existing role that was already filled by another police officer was capable of being a reasonable adjustment. Whilst the Tribunal recognised that the current post holder would have to be consulted before being transferred, it found that he could have been ordered to move whether he liked it or not, since the police force was a 'disciplined service';

        - swapping jobs was not equivalent to 'bumping' for redundancy purposes, because the person being transferred was not losing his job but was instead being given another role. It was also not the same as creating a role, as the post already existed;

        - the examples of reasonable adjustments in [the DDA] were illustrative but not exhaustive, and therefore swapping post holders was not prohibited by law.

It therefore now appears that swapping people between jobs to accommodate disabled employees might constitute a reasonable adjustment in certain circumstances. Assuming that an employer has a contractual right to transfer staff between roles, it should arguably consider re-deploying disabled employees into both vacant and filled posts, although an employer is not normally under a duty to create a new post to accommodate a disabled employee. However, it should be borne in mind that the EAT made it very clear that the 'special nature of the police service was as important part of the factual matrix in this case'. On the facts, swapping the disabled employee's role with another employee's job was a viable reasonable adjustment because police staff had to obey orders. It might therefore be argued that in less regimented organisations swapping employees' roles may not be a realistic option. That said:

- if the employer has an express contractual power to move staff between roles then a Tribunal might well query why it didn't exercise this power, having first had due regard to the circumstances of the current incumbent*; and

- it's always worth asking colleagues if they would be prepared to swap roles to accomodate a disabled colleague, and it would be prudent for employers to provide documentary evidence to substantiate that they have considered this adjustment.

  *(Consultation with the non-disabled employee who currently occupies the relevant post will form a necessary part of this process. In addition to the various legal obligations owed towards disabled employees, management need to bear in mind that they also owe a duty of care towards all their staff and should treat them fairly and with dignity. Thus there should be proper consultation with any non-disabled colleague before management decide to transfer him/her to a suitable alternative role, so as to free up their current role for the disabled employee. If the non-disabled employee puts forward good reasons why he/she should not be transferred out of their current role (e.g. health or domestic-related) then these reasons must be properly considered by management before deciding upon a particular course of action).

- In *O'Hanlon v Commissioners of HM Revenue & Customs* [2006], the EAT held that an employer would only very rarely be obliged, as a reasonable adjustment, to give more sick pay to a disabled person than it would otherwise give to a non-disabled person on sick leave. In coming to this decision, the EAT commented that the purpose of the disability discrimination legislation was to enable disabled persons to play a full part in the world of work, not to "treat them as objects of charity". (The O'Hanlon decision was later unsuccessfully appealed to the Court of Appeal, on a narrower basis than was argued before the EAT).

  In *G4S Cash Solutions (UK) Ltd v Powell* [2016], the EAT considered the extent to which an employer may be required to maintain a disabled employee's existing salary level indefinitely when transferring them to a new (less well remunerated) role, as a reasonable adjustment. The EAT held that pay protection was no more than another form of cost for an employer, analogous to the cost of providing extra training or support, and that there was no reason in principle why one should be a "step" within section 20(3) of the EqA 2010, but the other should not. The question will always be whether it is reasonable for the employer to have to take that step. The EAT rejected G4S's submission that the decision in *O'Hanlon* meant that pay protection could never be a reasonable adjustment. The EAT noted that the legislation envisages an element of cost to the employer if an adjustment is one which is reasonable for the employer to have to make; this is not a matter for charity, but a legal requirement reflecting the expectations of Parliament and society. The objective is to keep employees in work, and there was no reason why a package of measures for this purpose, which includes some pay protection, should not be a reasonable adjustment.

  The EAT concluded that while it will not be an "everyday event" for an employer to provide long-term pay protection in this situation, cases can be envisaged where this may be a reasonable adjustment as part of a package to get an employee back to work or to keep an employee in work. The financial considerations will always have to be weighed in the balance by the tribunal. The EAT also noted that, in changed circumstances, an adjustment may eventually cease to be reasonable, for example if the need for a job were to disappear or the economic circumstances of the business changed.

k) Can a failure to make a reasonable adjustment be justified?

The Equality Act does not permit an employer to justify a failure to comply with a duty to make a reasonable adjustment: it is the question of 'reasonableness' which alone determines whether the adjustment has to be made, which test involves an objective standard.

l) The co-operation of other employees:

The Code of Practice explains that in some cases a reasonable adjustment will not work without the co-operation of other employees. Subject to considerations about confidentiality, employers must seek to ensure that such co-operation is given. (If the disabled employee does not agree to the employer involving other colleagues then the employer must not breach confidentiality by telling the other employees about the disabled person's situation).

m) The cost of making reasonable adjustments:

i) The Equality Act makes it clear than an employer/prospective employer is not usually entitled to require a disabled person to contribute to the cost of making any reasonable adjustments, although the cost of the possible adjustments, together with the financial and other resources available to the employer, will be relevant to whether the adjustments will be reasonable. However, paragraph 6.25 of the Code of Practice warns:

> "…Even if an adjustment has a significant 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…"

Employers should not, however, conclude from this that an adjustment needs to be "cost effective" to be reasonable. Large (and particularly public sector) employers might well, given their resources, be expected to make adjustments that are not, strictly, cost-effective. The reasonable adjustments duty anticipates that employers might have to incur reasonable additional costs in order to alleviate disadvantages suffered by disabled employees.

ii) Nevertheless, even an employer with substantial resources will not necessarily be required to make very expensive adjustments. Money is by no means limitless even in large organisations, and balancing a disabled person's need for adjustments against other spending priorities will always involve difficult judgements. In determining whether the cost of a potential adjustment is reasonable or not, a Tribunal will look at all the relevant facts of the particular case, such as:

- The short and long-term cost, e.g. is the employer faced with a one-off expenditure which in fact equates to a modest sum if divided by the likely remaining working years of the employee concerned, or is the employer faced with ongoing regular expenditure for the remainder of the employee's likely working life (and, if so, for how long is this likely to be?

- The significance of the employee to the business: it might be argued to be reasonable for an employer to spend more on an employee who makes a significant contribution to the organisation;

- How effective would the proposed adjustment be, if funded? If the adjustment is likely to have only a limited prospect of success then it might be unreasonable to spend much on it;

- The availability of financial assistance for the employer, e.g. grants of funding via the Access to Work scheme.

There have been comparatively few cases which have considered the issue of cost, but two that merit mention are set out below.

iii) In the case of *Cordell v Foreign & Commonwealth Office* (2011), the EAT had to consider whether adjustments required to support a deaf senior diplomat in a new overseas posting were reasonable. In doing so, the EAT made the following comments:

- the law did not require the FCO to compensate Ms Cordell for her misfortune "at whatever cost";

- cost is "one of the central considerations in the assessment of reasonableness", although it must of course be weighed against other factors including the degree of benefit to the employee;

- 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. The Equality Act requires tribunals to make a judgment, ultimately, on the basis of what they consider right and just in their capacity as an industrial jury. That is not to say that tribunals should simply stick a finger in the air;"

- A tribunal's assessment of what an employer would reasonably be expected to spend can be influenced by a variety of factors (besides the points made in the Code of Practice and the degree to which the employee would benefit from the adjustment), including:

    - the size of any budget dedicated to reasonable adjustments (though this cannot be conclusive as it's determined by the employer);

    - what the employer has 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.

    However, such considerations can only help up to a point. Ultimately "there remains no objective measure for calibrating the value of one kind of expenditure against another."

The EAT recognised the difficulty which tribunals (and employers) face in making a judgement on the question of the extent to which cost alone can make a proposed adjustment unreasonable for the purposes of disability discrimination law. Even in a large organisation, balancing a disabled person's need for adjustments against other spending priorities will never be easy. The EAT has

given tribunals a very broad discretion, which is likely to make decisions difficult to overturn on appeal.

iv) In *Croft Vets Ltd and others v Butcher* [2013], the EAT considered (amongst other matters) whether it would have been a reasonable adjustment for an employer, on the recommendation of a clinical psychiatrist, to pay for an employee with work-related stress and depression to have private medical treatment:

- According to her GP, the employee had suffered from work-related stress for two years and had "classical depression". The employer referred the employee to a private consultant psychiatrist, Dr Parry, whose report suggested that it was predominantly work-related stress that had triggered the severe depressive episode. Dr Parry recommended that the employer pay for the employee to have sessions in cognitive behavioural therapy (CBT) and further psychiatric sessions. He stated, however, that there was no guarantee that Mrs Butcher's health would improve to the extent that she would be able to return to work. In October 2010, the employer responded to Dr Parry's correspondence, asking further questions. He did not reply until January 2011;

- The employee resigned on 23 November 2010, claiming that she had received no communication from her employer since she had met with Dr Parry and that her intolerable workload had caused her stress and depression. The employee brought and succeeded with a Tribunal claim for disability discrimination (failing to make reasonable adjustments) and constructive dismissal: in the tribunal's view, the employer should have made the adjustments suggested by Dr Parry and paid for the employee to have private psychiatric counselling and CBT.

- The employer appealed to the EAT, which upheld the tribunal's decision and commented as follows with regard to reasonable adjustments:

    - The tribunal had been entitled to find that the employer applied a provision, criterion or practice (PCP) that employees should be able to attend work and perform their roles. This placed Mrs Butcher at a substantial disadvantage owing to her mental impairment;

    - In the present case, Dr Parry's suggested adjustments were job-related in the required sense. Medical evidence suggested that Mrs Butcher was suffering from predominantly work-related stress. The adjustments would have "involved payment for a specific form of support" to help her to return to work and to cope with her work-related difficulties;

    - The adjustment recommended by Dr Parry in this case, that the employer fund psychiatric sessions and counselling, aimed to help Mrs Butcher to return to work and deal with the substantial disadvantage arising from the PCP identified;

    - There were reasonable prospects that if the suggested adjustment were made they would have been successful; and

    - The tribunal had been entitled to find that between 19 August and 23 November 2010 the employer took no steps to resolve Mrs Butcher's concerns, and that it

would have been reasonable for the employer to at least have addressed the proposed adjustments with her in writing.

At first glance, a decision that an employer was obliged to fund a disabled employee's private medical treatment might seem surprising and concerning for employers. However, the EAT emphasised that this was not a case about employers generally being obliged to pay for private health care. Simply, the tribunal had been entitled to find a breach of the duty on the facts of the case. It was clearly key that the employee's health problems were to a large extend caused by her work. There is likely to be further case law in this area, as one issue is whether, and to what extent, an employer must be to blame for an employee's mental health problems before it is obliged to pay for treatment.

n) The duty to make reasonable adjustments is only owed to people who are disabled – there is no duty owed to non-disabled people by association with disabled ones:

In a clear and definitive Judgment, the Court of Appeal in *Hainsworth v Ministry of Defence* [2014] has determined that the employer's duty to make reasonable adjustments is limited to employees with disabilities. Importantly, the obligation does not extend to employees who care for those with disabilities. Whilst "associative discrimination" applies to direct disability discrimination and harassment, this judgment means that where, for example, an employee makes a request for a change to normal working practice because they care for someone with a disability, the positive duty to make reasonable adjustments does not apply. This is a reassuring decision for employers, which limits the employer's legal obligations and risk when dealing with requests from carers of those with disabilities. It is now clear that a request linked to an employee's own disability engages the duty to make adjustments where they are reasonable; a request linked to someone else's disability does not. However, of course, an employer may wish to consider making adjustments in any event for those with caring responsibilities where business need allows.

2.3) **Comparing the different forms of discrimination in practice**

The way in which the different forms of unlawful discrimination operate in practice is demonstrated by the following examples:

a) A woman with arthritis in her hands applies for a secretarial job. There is a question on the application form about disability (allegedly for the purpose of implementing any necessary adjustments within the assessment process), and she indicates that she has arthritis in her hands but that this condition does not affect her typing. The employer rejects her application because it nevertheless wrongly assumes that she will not be able to carry out the job due to her arthritis...

…this is unlawful direct discrimination which cannot be justified.

b) In the same situation, the woman instead declares on the application form that her arthritis does affect her typing speed. She is called for an interview and is asked to undertake a typing test as part of the selection process, which test requires that she types at a minimum speed of 100 words per minute. The woman fails the typing speed element of the test because of her arthritis and, as a consequence, she is turned down for the job. This is not direct discrimination, as the

reason for the rejection was not the fact that she was disabled but was instead the fact that the woman had failed the typing test. However:

i) this may amount to discrimination arising from disability as the employer has treated the woman unfavourably (by rejecting her job application) because of something arising in consequence of her disability (namely the fact that she cannot type at the required speed and so failed the typing test)…

ii) furthermore, this may also amount to indirect disability discrimination on the basis that the requirement to type at 100 words per minute is a selection criterion which puts those with hand-related disabilities at a particular disadvantage and which has disadvantaged this woman.

…however, whether or not the rejection of the woman will amount to either discrimination arising from disability or indirect disability discrimination will depend upon whether the employer can in either case objectively justify its treatment of the woman. (However, justification would not be possible if the employer had failed to make a relevant reasonable adjustment – see below).

c) In the above example, there is a duty on the employer to make reasonable adjustments to its selection arrangements. When the woman is asked to undertake a typing test as part of the selection process, she tells the employer that she will need to use an adapted keyboard in order to take the test. It is likely to be a reasonable adjustment for the employer to provide the necessary adapted keyboard (as an auxiliary aid) or else to allow the woman to use her own keyboard, thereby ensuring that she is not placed at a substantial disadvantage by the typing test. If it fails to do so and then rejects the woman because she has failed the typing test – when she would have passed the test if provided with the adapted keyboard...

…then the employer will be unlawfully discriminating against her by failing to make the adjustment. (Of course, it might also have been a reasonable adjustment, depending upon the facts of the case, for the employer to reduce the required typing speed).

d) Because of the way in which she has been treated, the disabled woman makes a claim against the employer under the Equality Act. Six months later, the same employer advertises a further secretarial vacancy. The woman applies again but the employer rejects her application because she has previously made a claim under the Equality Act...

…this is unlawful victimisation.

3) The employer's duties towards disabled job applicants and employees:

The Equality Act makes it unlawful for an employer to discriminate against a disabled person in relation to the recruitment, employment or the retention of staff.

3.1) Job applicants

a) According to the Equality Act, it is unlawful for an employer to discriminate against or victimise a disabled person:

- in the arrangements which it makes for deciding to whom it should offer employment;
- as to the terms on which it offers that person employment; or
- by not offering that disabled person employment.

"Arrangements" include job adverts, the application process (e.g. the format and content of application forms) and the decision-making process (e.g. the physical arrangements, location and timing of interviews, and the job and person specifications). Arrangements will also include the policies, criteria and practices used in the recruitment / decision-making process. The terms on which an employer might offer employment include such things as pay, bonuses and other benefits.

b) Also according to the Equality Act:

- the duty to make reasonable adjustments applies to an employer; and
- it is unlawful for an employer to harass a disabled job applicant (and, as explained above, an employer is potentially liable for both harassment by fellow employees and for third party harassment).

c) Employers must therefore take care to avoid discriminating against disabled people throughout the recruitment process:

i) Specifying the job: the Code of Practice advises that:

- Job descriptions should accurately describe the job in question and should not include unnecessary requirements;
- Employers should ensure that criteria relating to skills or knowledge are not unnecessarily restrictive;
- The inclusion of criteria that relate to health, physical fitness or disability must be objectively justified by the requirements of the actual job in question.

Employers must always remember that they must make reasonable adjustments for disabled applicants during the recruitment process.

ii) Advertising the job: the Code of Practice advises that:

- An employer must not discriminate in its arrangements for advertising jobs or by not advertising a job. Neither should they discriminate through the actual content of the job advert.
- Job adverts should accurately reflect the requirements of the job, including the job description and person specification if the employer uses these.
- Adverts must not include any wording that suggests that the employer may directly or indirectly discriminate, or that reasonable adjustments will not be made for disabled

people, or that disabled people will be discriminated against, or that they should not bother to apply;

- When recruiting through recruitment agencies, job centres, career offices, schools or online agencies, an employer must not instruct them to discriminate, or cause or induce them to discriminate. Furthermore, any agencies involved should be made aware of the employer's equality policy, as well as other relevant policies. They should also be given copies of the job descriptions and person specifications for posts they are helping the employer to fill.

iii) The Application Process: the Code of Practice advises that:

- An employer must not discriminate during the application process. The adoption of a standardised process (albeit one that allows for reasonable adjustments to be made) should facilitate this;

- An employer must make reasonable adjustments for disabled applicants during the application process and must provide and accept information in accessible formats, where this would be a reasonable adjustment (e.g. if online forms are not accessible to disabled people, the form should be provided in an alternative way).

iv) The selection, assessment and interview process: the Code of Practice advises that:

- An employer must not discriminate in the arrangements for deciding to whom to offer employment, include shortlisting, selection tests, use of assessment centres and carrying out interviews (and should be prepared to make any required reasonable adjustments);

- An employer should ensure that its processes are fair and objective and that decisions are consistent, and should maintain records that will allow them to justify each decision and the process by which it was reached and to respond to any complaints of discrimination;

- Staff involved in the selection process should receive training on the employer's equality policy (if there is one);

- An employer is not required to make changes in anticipation of applications from disabled people in general – although it would be good practice to do so. It is only if the employer knows or could be reasonably expected to know that a particular disabled person is (or may be) applying, and that the person is likely to be substantially disadvantaged by the employer's premises or arrangements, that the employer must make reasonable adjustments;

- Employers should adopt the following good practice guidelines into their selection procedures:

    - Wherever possible, more than one person should be involved in short-listing applicants;

- The marking system, including the cut-off score for selection, should be agreed before the applications are assessed, and applied consistently;

- Where more than one person is involved in the selection, applications should be marked separately before a final mark is agreed between the people involved;

- Selection should be based only on information provided in the application form, CV or, in the case of internal applicants, any formal performance assessment reports; and

- The weight given to each criterion in the person specification should not be changed during short-listing;

- Ability tests, personality questionnaires and other similar methods should only be used if they are well designed, properly administered and professionally validated and are a reliable method of predicting an applicant's performance in a particular job;

- Employers should tell all applicants in advance if they will be expected to take a test and should give them an outline of what will be involved (thereby enabling disabled applicants to ask for reasonable adjustments);

- By the interview stage, an employer should already have asked whether reasonable adjustments are needed for the interview itself (e.g. via the application form or in the letter inviting a candidate for interview). However, it is still good practice for the interviewer to ask on the day if any adjustments are needed for the interview and the employer will be under a duty to make a reasonable adjustment from the time that they first learn of the disability and the disadvantage. However, the extent of the duty is less than might have been the case if they had known (or ought to have known) in advance about the disability and its effects;

- An employer can reduce the possibility of unlawful discrimination by ensuring that staff involved in selection panels have had equality training and training about interviews; and

- Except in the particular circumstances permitted under the Equality Act, questions about disability or health must not be asked at the interview stage or at any other stage before the offer of a job (whether conditional or not) has been made, or where the person has been accepted into a pool of applicants to be offered a position when one becomes available.

v) Job offers:

An employer must not discriminate against a person in the terms on which the person is offered employment: in general, an employer should not offer a job to a disabled person on terms which are less favourable than those which would be offered to other people.

d) Prohibition of pre-employment health questions:

i) According to the disability lobby, there is considerable discrimination against disabled people (particularly those with mental health issues) in recruitment, and people are often put off even

applying for jobs because of pre-employment health questions. Section 60 of the Equality Act is intended to address this problem, in that it:

- Prohibits employers from asking potential recruits questions about health, other than for prescribed reasons; and

- Shifts the burden of proof automatically to the employer where a job applicant who has been asked a prohibited health question brings a direct disability discrimination claim.

ii) Except for very limited reasons (as explained below), Section 60 Equality Act prohibits an employer from asking any (external or internal) job applicant about their health or any disability until the person has either been:

- offered a job either outright or on conditions, or
- included in a pool of successful candidates to be offered a job when a position becomes available (for example, if an employer is opening a new workplace or expects to have multiple vacancies for the same role but doesn't want to recruit separately for each one).

This includes asking such a question as part of the application process or during an interview. Questions relating to previous sickness absence count as questions that relate to health or disability. This prohibition applies whether the employer asks the question of the applicant or of some other person, such as the applicant's former employer by way of a reference request. Further, the Code of Practice clarifies that the prohibition applies where an agent or employee of the employer 9such as an OH practitioner), rather than the employer itself, asks the questions, except again in the very limited circumstances described below.

iii) As paragraph 10.39 of the Code of Practice explains, job offers can be made conditional on satisfactory responses to pre-employment disability or health enquiries or satisfactory health checks, and an employer can ask questions once it has made a job offer or included someone in a group of successful candidates. At that stage, an employer can make sure that a candidate's health or disability would not prevent them from doing the job, having proper regard, of course, as to whether there are reasonable adjustments that would enable them to do the job: employers must not discriminate against job applicants on the back of the results of such enquiries or checks.

iv) If, in the absence of one or more of the exceptional circumstances outlined below, an employer does ask questions about an applicant's health or disability before making a job offer (or including the candidate in a pool), then:

- A job applicant can bring a claim against the employer if:
    - the employer asked prohibited health- or disability-related questions; and
    - the applicant believes that there has been unlawful discrimination as a result of the information that they gave (or failed to give) when answering such questions;
- The Equality and Human Rights Commission can take legal action against the employer if it asks job applicants any prohibited health- or disability-related questions (irrespective

of whether there's been any subsequent discrimination against a disabled candidate). This includes sending a candidate a questionnaire about their health for them to complete before the employer has offered them a job.

v) Section 60 does, however, permit an employer to ask questions about health or disability for the purpose of:

- finding out if an applicant needs any reasonable adjustments to be made to the recruitment process, e.g. to an assessment test or for an interview;
- finding out if a person (whether they are a disabled person or not) can take part in an assessment as part of the recruitment process, including questions about reasonable adjustments for this purpose;
- monitoring the diversity of applicants;
- ensuring that an applicant who is a disabled person can benefit from any measures aimed at improving disabled people's employment rates (e.g. the guaranteed interview scheme. (The employer should make it clear to job applicants that this is why the question is being asked);
- determining whether a job applicant has a specific impairment where this is an occupational requirement for a particular job (e.g. recruiting a Deafblind project worker who has personal experience of being Deafblind);
- vetting applicants for the purposes of national security; and
- where the question relates to a person's ability to carry out a function that is intrinsic (i.e. absolutely fundamental) to that job. Where a health- or disability-related question would mean that an employer would know if a person can carry out that function with reasonable adjustments in place, then it can ask the question (pages 73 to 76 of the EHRC Recruitment Guide).

3.2) **Existing Employees**

a) According to the Equality Act, it is unlawful for an employer to discriminate against or victimise a disabled employee:-

- as to the employee's terms of employment;
- in the way that the employer affords the disabled employee access to, or by not affording him/her access to, opportunities for promotion, a transfer, training or for receiving any other benefit, facility or service;
- by dismissing the disabled employee (which includes constructive dismissal); or
- by subjecting him/her to any other detriment.

Terms of employment include such things as pay, working hours, bonuses, occupational pensions, sickness or maternity and paternity leave and pay.

b) Also according to the Equality Act:

i) The duty to make reasonable adjustments applies to an employer; and

ii) It is unlawful for an employer to harass a disabled employee (and, as explained above, an employer is potentially liable for both harassment by fellow employees and third party harassment).

c) Employers must therefore take care to avoid discriminating against disabled employees throughout their employment:

i) Terms and conditions of service:

It might, for example, be a reasonable adjustment to change an individual's hours of work whose disability means that he has difficulty using public transport during the rush hour, or to allow them to work flexibly.

ii) Induction, training and development:

The Code of Practice explains that:

- it's important for employers to make sure that induction procedures do not discriminate, considering whether any changes are needed to remove the indirectly discriminatory effect of a provision, criterion or practice. They must also consider whether any reasonable adjustments are required to enable disabled workers to participate fully in any induction arrangements;

- To avoid discrimination, employers should ensure that managers and supervisors who select workers for training understand their legal responsibilities under the Act;

- Employers should be mindful of their duty to make reasonable adjustments in relation to training and development. For example:

    - if a worker with a mobility impairment is expected to be attending a course, it is likely to be a reasonable adjustment for the employer to select a training venue with adequate disabled access. Likewise, an employer may need to make training manuals, slides or other visual media accessible to a visually impaired worker (perhaps by providing Braille versions or having materials read out), or ensure that an induction loop is available for someone with a hearing impairment;

- Any criteria used to select workers for training should also be regularly reviewed to make sure they do not discriminate;

- Workers who have been absent for disability-related reasons may need additional training on their return to work. It is good practice for employers to liaise with the worker either before or shortly after their return to work to consider whether any additional training is needed.

iii) Benefits:

Employers must not discriminate in respect of the provision of benefits such as canteens, social clubs, dedicated car parking spaces, bonuses, health care, company cars and rights to special leave, e.g:

- Re bonuses, a sales person takes every Thursday afternoon as unpaid leave for a disability-related reason. As a reasonable adjustment, his/her employer reduces his/her sales target to reflect their absence. Their team's target is also reduced by a proportionate amount;

- If an employer offers private health insurance to its workers as a benefit, the employer and the insurer must not exclude a worker who is a disabled person, nor offer them different terms, unless the employer can objectively justify any difference in treatment.

iv) Appraisals:

The Code of Practice explains that:

- Employers should be aware of the duty to make reasonable adjustments when discussing past performance. For example, they should consider whether a disabled employee's performance would have been more effective had a reasonable adjustment been put in place, or introduced earlier. Appraisals may also provide an opportunity for workers to disclose a disability to their employer, and to discuss any adjustments that would be reasonable for the employer to make in future;

- To avoid discrimination when conducting appraisals, employers are recommended to:

    - make sure that performance is measured by transparent, objective and justifiable criteria using procedures that are consistently applied;

    - check that, for all workers, performance is assessed against standards that are relevant to their role;

    - ensure that line managers carrying out appraisals receive training and guidance on objective performance assessment and positive management styles; and

    - monitor performance assessment results to ensure that any significant disparities in scores apparently linked to a disability are investigated, and steps taken to deal with possible causes.

v) Promotion, transfer and career development:

Employers must ensure that arrangements for promoting staff, developing their careers or for transferring staff between jobs do not discriminate against disabled people (both at the assessment stage and also in the practical arrangements necessary to enable a promotion or transfer to take place or, indeed, in the new job itself). This includes looking at how an employer

gives disabled people access to secondment opportunities, work shadowing, having access to a mentor or attending an event that may help a worker to develop their career.

vi) Managing sickness absence:

The Code of Practice explains that:

- It is important to ensure that sick absence policies and procedures are non-discriminatory in design, and applied to workers who are sick or absent for whatever reason without discrimination of any kind. This is particularly important when a policy has discretionary elements such as decisions about stopping sick pay or commencing attendance management procedures.

- When taking attendance management action against a worker, it will often be appropriate to manage disability-related absences differently from other types of absence. Recording the reasons for absences should assist that process;

- Employers are not automatically obliged to disregard all disability-related sickness absences, but they must disregard some or all of the absences by way of an adjustment if this is reasonable. If an employer takes action against a disabled worker for disability-related sickness absence, this may amount to discrimination arising from disability, indirect discrimination and/or a failure to make reasonable adjustments if the decision cannot be justified. For example:

    - During a six-month period, a man who has recently developed a long-term health condition has a number of short periods of absence from work as he learns to manage this condition. Ignoring these periods of disability-related absence is likely to be a reasonable adjustment for the employer to make. Disciplining this man because of these periods of absence will amount to discrimination arising from disability, if the employer cannot show that this is objectively justified.

  The EAT in Royal Liverpool Children's NHS Trust v Dunsby [2005] confirmed that:

  "…The provisions of the Disability Discrimination Act 1995 [now superceded by the Equality Act] do not impose an absolute obligation on an employer to refrain from dismissing an employee who is absent wholly or in part on grounds of ill health due to disability…It is rare for a sickness absence procedure to require disability related absences to be disregarded. An employer may take into account disability related absences in operating a sickness absence procedure."

- Workers who are absent because of disability-related sickness must be paid no less than the contractual sick pay which is due for the period in question. Although there is no automatic obligation for an employer to extend contractual sick pay beyond the usual entitlement when a worker is absent due to disability-related sickness, an employer should consider whether it would be reasonable for them to do so. In addition, if the reason for absence is due to an employer's delay in implementing a reasonable adjustment which would enable the worker to return to the workplace, maintaining full pay would be a further reasonable adjustment for the employer to make. For example:

- A woman who has a visual impairment needs work documents to be enlarged. Her employer fails to make arrangements for a reasonable adjustment to provide her with these. As a result, she has a number of absences from work because of eyestrain. After she has received full sick pay for four months, the employer is considering a reduction to half-pay in line with its sickness policy. It is likely to be a reasonable adjustment to maintain full pay as her absence is caused by the employer's delay in making the original adjustment.

The management of disability-related sickness absence continues to create challenges for managers and result in subsequent case law: in *Griffiths v The Secretary of State for Work and Pensions* [2015], the Court of Appeal:

- Held that an absence management policy, under which all employees, both disabled and non-disabled, were treated equally, was capable of placing a disabled employee at a substantial disadvantage and that therefore the duty to make reasonable adjustments was engaged. The CA held that the PCP was the requirement to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions. By formulating the PCP in this way, it became clear that this was a requirement that would substantially disadvantage disabled employees, whose disability increases the likelihood of absence from work;

- The CA emphasised that the duty to make reasonable adjustments goes beyond equal treatment and requires employers to take positive steps. Thus an employer should have regard to the duty to make reasonable adjustments when issuing disciplinary warnings for sickness absence. (This didn't mean that such warnings should not be issued, but rather that an employer should consider whether it would be reasonable not to issue them or to vary them in some way (e.g. by adopting a more lenient trigger point);

- Nevertheless, the CA dismissed a claim that an employer had failed to make reasonable adjustments by not extending the point at which disciplinary action could be taken under its attendance management policy and by failing to disregard periods of sickness absence. It held that, on the evidence, the tribunal had been entitled to conclude that neither of these steps were reasonable for the employer to take. (In relation to the extension of the trigger point for future periods of absence, there was no obvious period by which the point should be extended. Moreover, if future absences were likely to be long, a relatively short extension of the trigger point would be unlikely to remove the disadvantage. That said, the CA noted that in different circumstances where the periods of absence were short, it may be that such an adjustment would be reasonable. However, in the circumstances of this case, the tribunal was entitled to find that the adjustment was not a reasonable one for the employer to make).

- Whether or not an adjustment is reasonable is a question for determination by the tribunal, and the CA's only role was to determine whether the conclusion reached by the tribunal, that the adjustments were not reasonable, could be sustained on the evidence.

vii) Disciplining staff:

The Code of Practice explains that Employers should ensure that when conducting disciplinary and grievance procedures they do not discriminate against a disabled employee. For example, if an

employee is disabled then an employer must make reasonable adjustments so that he or she can participate in the disciplinary procedure, as far as is reasonable, to the same standard as a non-disabled person. This is especially important when it comes to completing and/or reading documents and attending meetings. For example, a disabled employee might need:

- documents to be provided in a different format, e.g. on audio CD, in large print or in Braille for people with a visual impairment;
- meetings to be held in an accessible room, for people with a mobility impairment;
- a British Sign Language (BSL) interpreter to be present if the employee is a deaf person who uses BSL;
- someone to help them complete a form if they have dyslexia;
- a personal assistant or family member to accompany them, in addition to their 'official companion' (i.e. the trade union representative or colleague), even if they do not normally use one at work;
- changes to the process, such as more breaks to ask for an explanation from their official companion, if they have a learning disability.

The employer should also consider whether it should make reasonable adjustments to the standards which it applies to staff where these standards place disabled workers at a substantial disadvantage compared to people who are not disabled (e.g. tolerating swearing from someone who has 'Tourett's syndrome').

viii) Termination of employment:

The Code of Practice explains that there are extra steps which an employer needs to undertake before it dismisses a disabled employee, both as regards the consideration of dismissal process itself and with regard to the decision about whether to dismiss. For example:

- Where an employer is considering the dismissal of a disabled worker for a reason relating to that worker's capability, it must first consider whether there are any reasonable adjustments that could be made which would help improve the performance of the employee, or else whether it could transfer the employee to a suitable alternative role. Thereafter, the employer would need to consider whether any adjustments were required to enable the employee to properly participate in the dismissal process itself.

In practice, this means that before an employer considers dismissing an employee because of his/her disability, it should have thoroughly explored all other options for making reasonable adjustments which would keep them at work. This includes looking at any changes which the employer could make to its working arrangements, or to the physical features of its workplace, or whether you can provide additional equipment. For example, where an employee is finding working full-time difficult because of increasing fatigue, the employer might consider whether it is reasonable to let them work part-time.

ix) Redundancy dismissals:

There are particular requirements when an employer is considering a redundancy situation to make sure that disabled people are not being placed at a disadvantage for reasons relating to their disability. Where necessary, an employer must make reasonable adjustments to both the selection criteria and the process. For example:

- An employer knows that one of its employees is a disabled person. It selects employees from the redundancy pool on the basis of their absence over the past two years. The disabled person has taken a lot of time off work in relation to their disability. If the employer cannot objectively justify this decision, it is likely to be discrimination arising from disability and/or indirect discrimination. A better approach would be for the employer to exclude disability-related absences from the absence record which is used to score employees against that criterion (this would probably also be a reasonable adjustment).

x) In addition, if an employee in the redundancy selection pool is a disabled person, the employer must make 'reasonable adjustments' if these are needed to remove barriers which the person faces and which a non-disabled person would not face. For example:

- A manufacturer is making some employees redundant. One of the criteria for redundancy is flexibility, in the sense that the manufacturer wants to retain people who can operate every machine on the employer's production line. A disabled person cannot operate one of the machines because of the nature of their impairment. The employer decides that it is a reasonable adjustment to the criterion to adjust the employee's mark so as to ignore the absence of that machine, so they score the same as a worker who has operated that machine to a satisfactory standard.

However, an employer need only make changes to the criteria if the employee needs these to overcome a substantial disadvantage. An employer should review each of the criteria in turn and how the disabled person is scored against them, making adjustments to each of them where necessary. The employer is only required to do what is reasonable.

xi) An employer also needs to ensure that any disabled person being considered for redundancy or who wishes to apply for voluntary redundancy does not face a disadvantage in obtaining information, being made aware of the procedure to be adopted or when receiving communications about the redundancy.

3.3) **After the termination of employment:**

a) Where a disabled person's employment has come to an end, it will still be unlawful for his/her former employer to discriminate against the disabled person or to harass him/her, provided that the discrimination or harassment arises out of the employment relationship which has come to an end and is closely connected to it and would, if it had occurred during the employment relationship, have been unlawful.

b) In addition, an employer's duty to make reasonable adjustments continues to apply if the ex-employee is at a substantial disadvantage. One scenario where this provision might apply would be where a disabled ex-employee continues to enjoy life-time membership of the Work's Social Club.

4) Miscellaneous employment-related provisions:

4.1) **Duties towards contract workers:**

The Equality Act makes it unlawful for a principal to discriminate against a disabled contract worker: in essence, the Equality Act treats the principal as if it were, or would be, the actual employer of the disabled contract worker. The only difference is that the principal and the contract worker's employer may both have certain obligations as regards the duty to make reasonable adjustments.

4.2) **Liability of employers and principals:**

a) Employers:

Under the Equality Act, employers will be liable when they discriminate against disabled job applicants, current employees and past employees. In addition, an employer will be vicariously liable for the discriminatory actions of its employees where these are carried out in the course of their employment, subject to a so-called employer's 'statutory defence': in discrimination proceedings against an employer for an alleged discriminatory act by its employee, it's a defence for the employer to show that it took 'all reasonable steps' to prevent the employee committing such a discriminatory act. (In order to successfully rely upon the statutory defence, an employer will typically need to demonstrate that it operated an equal opportunities policy, educated staff about their obligations towards disabled colleagues, investigated complaints and disciplined those who unreasonably failed to adhere to the employer's equal opportunities approach, etc).

b) Principals:

The Equality Act establishes the liability of principals for the discriminatory actions of their agents which are carried out when acting under the principal's authority. Again, it does not matter whether the principal knows about or approves of those acts (Section 109(3)). Therefore, an employer can be liable to its employees for discrimination or harassment carried out by an agent of the employer, such as a contractor or consultant or an employment agency. As with employers' liability for the acts of its employees, principals' liability for acts of agents do not extend to criminal offences (section 109(5) Equality Act).

4.3) **Personal liability of employees and agents:**

The Equality Act provides that employees and agents will be personally liable for their acts of discrimination, irrespective of whether the employer successfully pleads the statutory defence in the case of a discriminatory act by an employee. An employee or agent will have a defence, however, if he or she reasonably relied upon a statement by the employer or principal that the act complained of was not discriminatory. (In this scenario, the employer or principal would commit a criminal offence if it knowingly or recklessly makes a statement which is false or misleading in a material respect).

4.4) **Enforcement:**

a) Disabled job applicants, employees and former employees who believe that they have suffered discrimination may present a complaint to an Employment Tribunal. There is no minimum

qualifying period of service required on the part of the employee before he can bring a claim for disability discrimination.

b) A person must bring a claim within three months of the alleged conduct taking place. If a person wants to make a claim after the three month period then it is at the Tribunal's discretion as to whether they grant permission to allow them to do so.

c) If an Employment Tribunal finds in favour of the Claimant in a claim then it can:

- make a declaration regarding the rights of the complainant and/or the respondent;
- order compensation* to be paid for the financial loss which the Claimant has suffered (e.g. loss of earnings), and damages for injury to feelings; and/or
- make an appropriate recommendation that the employer take action to remove or reduce the adverse effect in question within a given period.

* There is no maximum limit on the amount of the compensation that a Tribunal may award. Compensation can include injury to feelings and compensation for personal injury, and can be substantial, e.g. where the act of discrimination has resulted in the loss of a job, or the loss of future earnings prospects.. A Tribunal will typically order sufficient compensation so as to put the claimant in the same position, as far as possible, that they would have been in if the unlawful act had not taken place.

[ml / 30.6.17]