SERJEANTS' INN

MANAGING SICKNESS ABSENCE

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Introduction

1. This paper is intended to provide some insight into the established principles of the law in this area and draw the reader's attention to some recent developments of which those carrying out litigation in this field should be aware.

2. Its focus is the law which applies to civilian police staff. Police officers do not have the right to claim unfair dismissal, so any reference in this paper to that right is of course irrelevant to them. However, police officers do enjoy the rights contained in the Equality Act 2010 and at least one of the recent cases of interest arose from the sickness absence management of a police officer[1]

3. The sections of the paper which deal with disability discrimination will therefore be relevant to them subject to the possible effect of **P v Commissioner of Police for the Metropolis** [2016] IRLR 301 (immunity from suit) in discrimination claims, which will be dealt with in another talk to be presented at this seminar.

Justification for Dismissal on Ill Health Grounds

4. The legal rights which tend to be engaged when an employee is subjected to an absence management procedure which (by its very nature) may result in dismissal are generally these:

   (a) contractual rights;

   (b) the right not to be unfairly dismissed contained in Section 94 of the Employment Rights Act 1996;

[1] *Buchanan v Commissioner of Police of the Metropolis* [2016] IRLR 918

(c) the duty to make reasonable adjustments in relation to disabled employees[2] contained in Section 21 of the Equality Act 2010;

(d) the duty not to treat an employee unfavourably, without justification[3], because of something arising in consequence of the employee's disability contrary to Section 15 of the Equality Act 2010[4];

5. Of course, not every employee who is managed under an absence management procedure will be disabled. This paper does not deal with the definition of disability which is to be found in Section 6[5] and Schedule 1 of the Equality Act 2010[6].

6. The employer has the following defences to disability discrimination claims:

(a) lack of knowledge to both claims for failure to make reasonable adjustments and claims for breach of Section 15 of the Equality Act 2010[7];

(b) justification under Section 15 of the Equality Act 2010 if the employer can show that the dismissal was in pursuit of a legitimate aim pursued proportionately;

(c) under Section 21, the employer has a defence if he can show that the adjustment for which the employee contends would have been unreasonable.

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2 By virtue of Section 42 of the Equality Act 2010, employee, for the purposes of this right, includes police officers and police cadets

3 Defined by Section 15(1)(b) as 'proportionate means of achieving a legitimate aim'

4 ditto

5 Section 6 of the Equality Act 2010 provides that:

(1) A person (P) has a disability if–
(a) P has a physical or mental impairment, and
(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

6 Para 2 Sch 1 of the Equality Act 2010 provides that:

(1) The effect of an impairment is long-term if–
(a) it has lasted for at least 12 months,
(b) it is likely to last for at least 12 months, or
(c) it is likely to last for the rest of the life of the person affected.
(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

7 Section 15(2) of the Equality Act 2010 and Paragraph 20 of Schedule 8 of the Equality Act 2010

7. The defence of justification and unreasonableness may well cover the same ground and rely on the same facts. Indeed, if the Claimant's case is well pleaded, it is likely that, in the majority of cases, the focus of the Employment Tribunal's examination of the facts should, and will be, on the often related issues of the reasonableness of the adjustments for which the Claimant contends and whether the dismissal itself can be shown to be a proportionate means of achieving a legitimate aim. For those defending these cases, that is the best place to focus efforts on evidence gathering.

8. There are of course other rights which might arise:

   (a) Section 19 of the Equality Act 2010, entitled 'indirect discrimination' the duty not to apply provisions, criteria or practices to employees that put disabled employees at a particular disadvantage without justification is generally regarded as otiose given the protection provided under Sections 15 and 21 of the Equality Act 2010. The defence of justification which is available to an employer under Section 19 would generally make it harder for an employee to succeed under Section 19 than under Section 21 under the same facts.

   (b) Section 13 of the Equality Act 2010, entitled 'direct discrimination', the duty not to treat a disabled employee less favourably than an employee without his disability because of his disability. To succeed in a claim under Section 13 of the Equality Act 2010, the employee must show that he was dismissed because of his disability. This requires him to show that in effect that a person without his disability but with the same sickness absence record would have been treated differently[8] or that the reason why he was treated less favourably was because he was disabled which, in this context, would, for practical purposes, most likely require an allegation of animus or ill motive towards him[9]. A claim on the same facts under Section 15 will always be easier to establish.

[8] The relevant comparator is someone who does not have the particular disability of the disabled person, whose relevant circumstances are the same as, or not materially different from, those of the disabled person (eg see High Quality Lifestyles Ltd v Watts [2006] IRLR 850 and Aylott v Stockton on Tees Borough Council [2010] IRLR 994, CA

[9] Following the approach suggested in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL.

9. Sections 13 and 19 of the Equality Act 2010 are not considered further in this paper.

Factual Scenarios

10. As is the case in pursuing or defending any form of litigation, establishing the precise underlying factual picture is the basis of a successful claim or defence.

11. Sickness absence management cases tend to fall into one of the following scenarios:

    (a) persistent intermittent sickness absence for which the employee gives varying reasons;

    (b) persistent intermittent sickness absence for a single underlying reason;

    (c) long term consecutive absence due to an injury arising from an accident;

    (d) long term consecutive absence due to an underlying illness or treatment;

    (e) the employee no longer being capable of doing his own job due to injury or illness;

    (f) the employee becoming a risk to himself or other employees due to illness or injury.

12. Many employers have procedures under which employees 'clock up' sickness absences and once certain levels are met, sickness absence management procedures and warnings are triggered. Justification for dismissal in this kind of case may be said to rest on breach of contractual obligations rather than the principle that the employee is no longer capable of carrying out the job he was employed to do which underlies the law of unfair dismissal in this area. In such cases, it is sensible to plead 'some other substantial reason' as an alternative basis for dismissal. Depending on which category into which the particular case of sickness falls, a different approach will need to be taken. It plainly makes a big difference if there is a single underlying illness or injury. Absence due to an injury sustained in a car accident is far less likely to result in the employee falling into the definition of disability than the development of a chronic illness. If there is no identifiable underlying cause, the employee is very

unlikely to be disabled and the employer may be dealing with a case of absenteeism (which may be misconduct) rather than capability.

13. Establishing the underlying reason for sickness absence is of course key. A properly composed referral to occupational health asking the right questions will lay the ground for the successful defence of a claim. A poorly composed referral will only create problems.

14. The Court of Appeal adverted to this risk in the case of **Gallop v Newport City Council** [2014] IRLR 211. In that case, the employer asked occupational health if Mr Gallop was 'covered by the DDA legislation'. The simple advice OH gave was that he was not. The employer sought to rely on the defence of lack of knowledge to a claim for failure to make reasonable adjustments and the ET agreed with the employer on the basis of the OH reports. The Court of Appeal found at paragraph 41 that the ET had fallen into error:

> **[the ET] considered that Newport was entitled to deny relevant knowledge by relying simply on its unquestioning adoption of OH's unreasoned opinions that Mr Gallop was not a disabled person. In that respect the ET was in error; and the EAT was wrong to agree with the ET.**

15. The Court of Appeal reminded employers that it is they who have to make a judgment as to whether an employee is disabled (para 42), even though the determination of that issue can only happen if an employee brings a claim before an ET (para 42). Following **Gallop** a well composed referral to OH should:

(a) not simply ask for an opinion as to whether the employee falls within the definition of a disabled person for the purposes of the Equality Act 2010 (para 44);

(b) ask in turn whether each part of the test for disability is satisfied rather than approaching the issue as a single issue (para 40); the OH adviser should be asked:

(i) whether the employee has a physical or mental impairment: if so

(ii) does the impairment has a substantial (i.e. more than trivial) adverse effect on the employee's ability to carry out normal day-to-day activities[10];

(iii) to define the adverse effect;

(iv) to define the normal day-to-day activities on which he or the employee relies[11];

(v) to state whether the effect of the impairment has:

(a) it has lasted for at least 12 months;

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected;

(d) If the impairment has ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, is that effect is likely to recur.

(c) pose specific practical questions directed to the particular circumstances of the putative disability;

(d) the answers to such questions should provide assistance to the employer in forming his judgment as to whether the criteria for disability are satisfied.

16. In my experience, an employee is most likely to be found not to be disabled because he does not fulfil the 'long term' duration part of the test. This part of the test sets an objective limit and the evidence as to whether the impairment has lasted less than that limit is something a qualified physician is likely to be able to give fairly definitive

[10] The EAT has recently reconfirmed that activities carried out at work can constitute day to day activities (see Banaszczyk v Booker Ltd [2016] IRLR 273 applying European Case Law of relating to disability laid down in Chacón Navas v Eurest Colectividades [2006] IRLR 706, Ring v Dansk Almennyttigt Boligselskab [2013] IRLR 571 and Paterson v Commissioner of Police and the Metropolis [2007] ICR 1522,

[11]

independent advice. The other parts of the test tend to be heavily dependent on what the employee himself reports to OH or his employer and can be difficult to challenge.

17. I myself would add that the referral ought to set out:

    (a) a clear definition of the thing the employee says he cannot do (which will either be or relate to the PCP which will later become part of a reasonable adjustments claim);

    (b) a question asking the OH adviser's opinion on whether he agrees and if so how this problem may be overcome. It is very important that reasonable adjustments alleviate the disadvantage caused by the PCP.

18. The above two matters fall outside the definition of disability. However, they are highly relevant to the issue of making reasonable adjustments which should, wherever possible, be done on the basis of medical advice and objective evidence. The input of an occupational therapist is often invaluable.

19. The essence of what should be happening is this: the employer needs to identify with clarity and precision the 'thing' that is preventing the employee from coming back to work and work through and propose potential solutions to overcome that thing.

Legal Themes

20. Certain themes currently pervade the law relating to the management of sickness absence which arise in litigation:

    (a) whether the appropriate reason for dismissal in cases of persistent intermittent absence should be capability or conduct[12]. Since the question of whether a dismissal is unfair is generally dependent on the correct procedure being followed, it is important that the route to be taken is identified up front or that a conscious decision is made to follow both routes in the alternative. Two further consequences of following the conduct route are that the employer will be able to argue contributory fault;

[12] See **Ajaj v Metroline West Ltd** UKEAT/0185/15/RN

however, the employee will be able to argue that he is entitled to an uplift on any compensation awarded by virtue of Section 207Aof TULR(C)A 1992;

(b) the extent to which an employer has to seek alternative employment for an employee who is dismissed because his ill-health prevents him from doing the job that he was employed to do[13]. This issue must be considered under both unfair dismissal and disability discrimination law. There is old authority in the context of unfair dismissal law suggesting that seeking alternative employment was part of a fair capability dismissal procedure; however, the most recent restatement of the law does not include such a requirement. Dismissed employees have long argued that it is a reasonable adjustment to provide them with alternative work where available and a recent decision of the EAT has approved such a finding by an ET even to the extent that the employer should provide pay protection if the role is less well paid;

(c) the extent to which lack of knowledge can be relied upon in defending disability discrimination claims and precisely whose knowledge should be taken into account; there is also tension between the defence of lack of knowledge in disability discrimination claims and the employer's duty to inform himself of the employee's illness in unfair dismissal claims although there is arguably a concurrent duty to find out under discrimination law due to the requirement that constructive knowledge is sufficient[14];

(d) how the PCP should be/can be defined in reasonable adjustment cases. Is this the employee's choice or is it something the ET itself must determine? Both litigators and employment tribunals seem to experience problems in defining the PCP properly[15];

(e) justifying dismissals of disabled persons. Dismissing an employee because of disability related absence will almost always amount to prima

[13] See G4S Cash Solutions (UK) Ltd v Powell [2016] IRLR 820
[14] See Gallop v Newport City Council [2014] IRLR 211; CLFIS (UK) Ltd v Reynolds [2015] IRLR 562, CA; Gallop v Newport City Council (No.2) [2016] IRLR 395, EAT
[15] See Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216

facie disability discrimination contrary to Section 15 of the Equality Act 2010. However, the focus should be on the employer's defence. If the employer can show the dismissal to be in pursuit of a legitimate aim achieved through proportionate means, there is no breach of Section 15. What exactly needs to be justified and how[16]?

(f) the extent to which the absence management procedure itself should be subject to the scrutiny of the anti-discrimination legislation. The answer for reasonable adjustments claims seems be that the ET should focus on the bigger picture[17]; the answer in claims under Section 15 seems to be that each and every stage of the procedure must be justified individually[18].

21. The following are the most important recent cases in the realm of sickness absence management:

(a) contractual sickness absence rights: **Sparks v Department for Transport** [2016] ICR 695, CA;

(b) fairness of capability dismissals: **Court of Session in BS v Dundee City Council** [2014] IRLR 131;

(c) fairness of conduct dismissals where the employee has dishonestly reported sick: **Ajaj v Metroline West Ltd** UKEAT/0185/15/RN;

(d) knowledge defence and attribution of discriminatory reason to decision-maker: **Gallop v Newport City Council** [2014] IRLR 211; **CLFIS (UK) Ltd v Reynolds** [2015] IRLR 562, CA; **Gallop v Newport City Council (No.2)** [2016] IRLR 395, EAT;

(e) reasonable adjustments: **Griffiths v Secretary of State for Work and Pensions** [2016] IRLR 216; **G4S Cash Solutions (UK) Ltd v Powell** [2016] IRLR 820;

[16] **Dominique v Toll Global Forwarding Ltd** EAT 0308/13, the EAT, Simler J; ***Buchanan v Commissioner of Police of the Metropolis*** [2016] IRLR 918
[17] See **Griffiths v Secretary of State for Work and Pensions** [2016] IRLR 216
[18] ***Buchanan v Commissioner of Police of the Metropolis*** [2016] IRLR 918

(f) the interpretation of Section 15: **Hall v Chief Constable of West Yorkshire Police** [2015] IRLR 893; **Pnaiser v NHS England** [2016] IRLR 170;

(g) the justification defence: **Dominique v Toll Global Forwarding Ltd** EAT 0308/13, the EAT, Simler J; ***Buchanan v Commissioner of Police of the Metropolis*** [2016] IRLR 918

Contractual Rights

22. The law of contract applies to civilian police workers engaged on contracts of employment. Whilst often ignored, the common law is the starting point in litigation involving sickness absence management. The case law reminds us of two contractual matters which may be relevant:

(a) *the doctrine of frustration*: the Court of Appeal has accepted in **Notcutt v Universal Equipment Co (London) Ltd** [1986] ICR 414 that the doctrine of frustration can apply where an employee is so ill he can no longer perform his obligations under the contract of employment. The consequence of finding of frustration is that the contract comes to an end without either party terminating it which prevents there being a dismissal for the purposes of Section 94 of the Employment Rights Act 1996. Frustration arises where further performance of the contract is rendered impossible or radically different from the performance contemplated because of some supervening event which is not the fault of either party. However, there are two important considerations which should be taken into account which in most cases would render the frustration argument difficult and risky:

(i) frustration cannot apply where the parties have foreseen the alleged frustrating event and made provision for what should happen[19];

(ii) even if frustration does apply, the provisions of the Equality Act 2010 prohibiting disability discrimination would apply if the employee was defined as disabled.

(b) *is the sickness absence management procedure contractual?* There is a risk a court could find that all, or parts of, the sickness absence management procedure give rise to contractual rights which may be enforceable by injunction. Whilst the failure to follow one's own procedure may, but not necessarily, give rise to a finding of unfairness in unfair dismissal proceedings, the failure to follow a contractual provision could well give rise to claim for injunction and an order from a court requiring the employer to follow the correct procedure in proceeding for breach of contract: **Sparks v Department for Transport** [2016] ICR 695, CA [20]. This will depend largely on the wording of the documents said to form the agreement and the issue of whether the provision relied on is apt for incorporation;

Unfair Dismissal

23. Sections 94 and 98 of the Employment Rights Act 1996 set out three stages for determination of fairness or otherwise of a dismissal (see **Tansell v Henley College Coventry** [2013] IRLR 174, EAT):

19 Lord Brandon's speech in Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal [1983] 1 AC 854 at 909:

> "There are two essential facts which must be present in order to frustrate a contract. The first essential factor is that there must be some outside or extraneous change of situation, not foreseen or provided for by the parties at the time of contracting which either makes it impossible for the contract to be performed at all, or at least renders its performance something radically different from what the parties contemplated when they entered into it. The second essential factor is that the outside event or extraneous change of situation concerned, and the consequences of either in relation to the performance of the contract, must have occurred without the fault or the default of either party to the contract'.'

(a) what was the reason for the dismissal?

(b) did it come within one of the reasons covered by sub-ss (1)(b) and (2)?

(c) if so, was it fair under sub-s (4)?

24. It is important to note that in conduct and capability cases the employer's subjective belief is sufficient to establish a *prima facie* fair reason for dismissal (see **Trust Houses Forte Leisure Ltd v Aguilar** [1976] IRLR 251; **Maintenance Co Ltd v Dormer** [1982] IRLR 491, EAT. It does not therefore matter that the employer may be mistaken in his view of the facts or his belief.

25. In assessing fairness in all the circumstances, the correct test is whether the employer acted reasonably, not whether the tribunal would have come to the same decision; in many cases there will be a 'range of reasonable responses', so that provided that the employer acted as a reasonable employer could have acted, the dismissal will be fair: **Iceland Frozen Foods Ltd v Jones** [1982] IRLR 439, EAT. The Employment Tribunal is not to substitute its own view. The range of reasonable responses test applies to the procedure followed as well as the substantive decision to dismiss: **Sainsbury's Supermarkets Limited v Hitt** [2003] IRLR 23, CA.

Capability Dismissal

26. Dismissing an employee because of his sickness absence record will constitute a *prima facie* fair reason for dismissal under Section 98 of the Employment Rights Act 1996[21]. The question for the Employment Tribunal will almost always be whether the procedure followed in dismissing the employee was fair/fell within the band of reasonable responses and whether dismissal itself was a fair sanction/a sanction that fell within the band of reasonable responses.

[21] Section 98(2)(a) provides that 'A reason falls within this subsection if it relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do'. Section 98(3)(a) provides that " 'capability', in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality".

27. Ill-health capability dismissals, however, cover a range of factual situations which may require a different approach:

(a) the employee may be incapable of doing the job because the nature of the job itself causes the illness: eg **Glitz v Watford Electric Co Ltd** [1979] IRLR 89, EAT (adverse reaction to duplicator fumes); **Jagdeo v Smiths Industries Ltd** [1982] ICR 47, EAT (employee allergic to solder fumes). In such a case, it is possible that there may ultimately be a common law (health and safety based) duty on the employer to dismiss the employee, rather than letting him continue to run the risk of physical injury: **Coxall v Goodyear GB Ltd** [2002] IRLR 742, CA;

(b) the employee's state of health may make him a danger to his co-workers: **Harper v National Coal Board** [1980] IRLR 260, EAT (epileptic fits); **Converform (Darwen) Ltd v Bell** [1981] IRLR 195, EAT (risk of heart attack could justify dismissal if it made it unsafe for employee to continue job, but not so here where employee was factory works manager).

(c) the requirements of the business may be such that good health is essential **Taylorplan Catering (Scotland) Ltd v McInally** [1980] IRLR 53 EAT), and the terms of the contract may make such a requirement explicit (**Leonard v Fergus and Haynes Civil Engineering Ltd** [1979] IRLR 235, Ct of Sess);

28. The test for whether the employer has acted fairly/within the band of reasonable responses in cases where the employer relies on ill-health as the reason for dismissal has of course been refined by the decisions of the appellate courts. Sickness absence situations are not all the same and a different approach may be required according to the circumstances. However, if the employer is relying on capability as the fair reason for dismissal, as set out most recently in a judgment of the **Court of Session in BS v Dundee City Council** [2014] IRLR 131 the focus of the Employment Tribunal will be on the following three 'themes':

(a) first, in a case where an employee has been absent from work for some time owing to sickness, the critical question is whether in all the

circumstances of the case any reasonable employer would have waited longer before dismissing the employee;

(b) secondly, there is a need to consult the employee and take their views into account. This is a factor that can operate both for and against dismissal – if the employee states that he is anxious to return to work as soon as they can and hope that they will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him;

(c) thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered.

29. Some older authorities suggest there is an obligation under unfair dismissal law to seek to fit the employee into some other suitable job. However, there is no duty to create a new job: **Merseyside and North Wales Electricity Board v Taylor** [1975] ICR 185, QBD; **Taylorplan Catering (Scotland) Ltd v McInally** [1980] IRLR 53, EAT.

30. The requirement to seek out medical opinion and advice clearly dovetails with the requirement.

Misconduct Dismissals

31. The wording of Section 98(2)(a) tends to suggest that ill health only provides a fair reason for dismissal on capability grounds where the ill health relates to his capability to perform the work he is employed to do. However, persistent intermittent absences for ill health may also justify dismissal. The employer will however have to decide whether to dismiss the employee on misconduct or ill health grounds.

32. Section 98(2) (b) provides that "A reason falls within this subsection if it relates to the conduct of the employee".

33. The employer must then establish a genuine belief in that misconduct based on reasonable grounds derived from an adequate investigation in accordance with the test contained in **British Home Stores Ltd v Burchell** [1980] ICR 303n.

34. In some situations, a dismissal for misconduct is the appropriate course of action:

(a) where the employee is not genuinely ill or where he has mispresented the seriousness and symptoms of his illness constitutes misconduct, and would usually permit an employee to dismiss him because of gross misconduct: **Ajaj v Metroline West Ltd** UKEAT/0185/15/RN. The employer is entitled to look behind a doctor's note if he suspects the employee is malingering: see eg **Hutchinson v Enfield Rolling Mills Ltd** [1981] IRLR 318, EAT (employee participated in demonstration while 'off sick');

(b) persistent absenteeism where the individual instances may be minor and not medically verifiable: **International Sports Co Ltd v Thomson** [1980] IRLR 340, EAT; **Rolls Royce Ltd v Walpole** [1980] IRLR 343, EAT; **Lynock v Cereal Packaging Ltd** [1988] ICR 670, EAT.

(c) failure to comply with sickness absence reporting procedures;

(d) where the employee has been on long-term sickness absence, it may be fair to dismiss him or her for misconduct if he or she refuses to undertake lesser duties (but still within the remit of the contract) as an element of a planned phased return to work: **Rochford v WNS Global Services UK** UKEAT/0336/14 (24 September 2015, unreported).

Equality Act 2010

35. The legal landscape changes dramatically if the employee is disabled within the meaning of Section 6 of the Equality Act 2010. The employer will be under a duty to make reasonable adjustments in relation to the employee. This paper does not deal

with the definition of disability itself. This will largely be a question of fact in each case in spite of the extensive case law on the subject.

Defence of Lack of Knowledge

36. The two causes of action that are likely to be in play if the employee is disabled are breach of the duty to make reasonable adjustments contrary to Section 21 of the Equality Act 2010 and a claim for discriminatory dismissal under Section 15 of the Equality Act 2010. To both of these causes of actions the employer has a defence of lack of knowledge. However, the employer has to show that he lacked both actual and constructive knowledge. It is therefore unlikely that such a defence will succeed in absence management cases, given the procedural need to refer to OH and obtain medical opinion, unless the employee has actively sought to conceal information or refused to co-operate with the absence management process.

37. Section 15(2) of the Equality Act 2010 provides that:

> **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.**

38. Paragraph 20 of Schedule 8 of the Equality Act 2010 applies to claims by an employee against his employer and provides that:

> **(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—**
>
> **(a) […]**
>
> **(b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.**

39. In **Eastern & Coastal Kent plc v Grey** [2009] IRLR 429 the EAT, under Judge Clark, held that this defence only applies if it is shown cumulatively that the employer:

(a) did not know that the disabled person has a disability;

(b) did not know that the disabled person was likely to be at a substantial disadvantage compared with persons who are not disabled;

(c) could not reasonably have been expected to know that the disabled person had a disability; and

(d) could not reasonably have been expected to know that the disabled person was likely to be placed at a substantial disadvantage in comparison with persons who are not disabled.

40. In **Secretary of State for the Department for Work and Pensions v Alam** [2010] ICR 665, the EAT, under Lady Smith, specifically disagreed and held that the subsection poses only two questions:

(a) did the employer know both that the employee was disabled and likely to suffer substantial disadvantage? If the answer is 'no', then the second question arises.

(b) ought the employer to have known both that the employee was disabled and that he was likely to suffer substantial disadvantage? If the answer is 'no' there is no duty to make reasonable adjustments.

41. In **Wilcox v Birmingham CAB Services Ltd** [2011] EqLR 810, EAT however, Underhill P considered that fundamentally there was no inconsistency here.

42. The majority of employers ask new recruits if they consider themselves to have a disability. If the employee reports having a disability, it will be very difficult for the employer to claim later that he was not fixed with knowledge. Constructive knowledge is sufficient. Furthermore, in unfair dismissal law, an employer prior to dismissing an employee is required to take steps to discover the employee's medical condition and his likely prognosis. That obligation itself is likely to fix the employer with actual or constructive knowledge of any disability.

43. However, a recent judgment of the Court of Appeal has stressed the need to focus on the state of knowledge and state of mind of the decision maker himself and to ignore the state of mind of those supplying the information on which his decision is based where that information is tainted by discrimination: **CLFIS (UK) Ltd v Reynolds** [2015] IRLR 562, CA. In that case, a direct age discrimination case, the Claimant was dismissed on the basis of representations made by another employee to the dismissing officer. There was no allegation that the thought processes of the dismissing officer himself were tainted by age discrimination. The claim failed on that basis. The Court of Appeal held that the correct approach in a tainted information case is to treat the conduct of the person supplying the information as a separate act from that of the person who acts on it.

44. In **Gallop v Newport City Council (No.2)** [2016] IRLR 395, EAT, following **CLFIS (UK) Ltd v Reynolds**, Mr Gallop sought to argue, for the purposes of a direct discrimination claim, that the knowledge of occupational health of his disability ought to have been imputed to the decision-maker in question (para 41). The EAT rejected this submission on the basis of **CLFIS (UK) Ltd v Reynolds**. The EAT held that the employment tribunal had been entitled to conclude that because the dismissing officer, had had no actual knowledge of Mr Gallop's disability, and there had been no evidence that his decision to dismiss had been because of an intention or motivation stemming from Mr Gallop's disability, discrimination on that ground had not been a consideration. That approach betrayed no misdirection or error of law. In this appeal, the appellant was acting in person. The issue of whether the dismissing officer had constructive knowledge does not seem to have been dealt with in any detail. One might have thought that in an absence management process, the obligation on the employer to find out about the underlying cause of the employee's absence is likely to fix the employer with constructive knowledge if he fails to do anything to find out or fails to make proper enquiries of OH. He ought not to be able to rely on his own failure to ask or enquire.

The Duty to Make Reasonable Adjustments

33. Section 21 of the Equality Act 2010 imposes the duty by reference to Section 20. Section 20 provides that:

> **(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**
>
> **(2) The duty comprises the following three requirements.**
>
> **(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**

34. It is principally for the employer to explore possible adjustments, not for the employee to suggest them: **Cosgrove v Caesar & Howie** [2001] IRLR 653, EAT.

35. The correct approach towards deciding whether an employer has failed to make reasonable adjustments is set out in two cases: **Morse v Wiltshire County Council** [1998] ICR 1023 and **Environment Agency v Rowan** [2008] IRLR 20. Broadly, there are two stages to the test: firstly, whether the duty arises at all in the circumstances of the case; secondly, whether it has been complied with.

36. In **Morse v Wiltshire County Council**, the EAT gave guidance on how a tribunal should deal with a case of alleged failure to make reasonable adjustments. It should:

    (a) decide whether Section 20 imposes a duty on the employer in the particular circumstances of the case;

    (b) decide, if there is such a duty, whether the employer has taken such steps as are reasonable to take in order to prevent provision, practice or criterion having the effect of placing the disabled person at a substantial disadvantage if it does, are the steps, if any, that the employer has taken, sufficient to comply with the duty.

37. In **Environment Agency v Rowan** [2008] IRLR 20, EAT Judge Serota expanded on the steps that constitute step (a) above. The tribunal should first identify:

    (a) the provision, criterion or practice applied by or on behalf of the employer;

(b) the physical feature of the premises occupied by the employer;

(c) the identity of non-disabled comparators (where appropriate); and

(d) the nature and extent of the substantial disadvantage suffered by the Claimant (This may involve a consideration of the cumulative effect of both arrangements and physical features in which case it would be necessary to look at the overall picture: **Smiths Detection Watford Ltd v Berriman** UKEAT/0712/04CK & UKEAT/0144/05/CK (9 August 2005)).

38. The EAT in **Environment Agency v Rowan** went on to comment that an 'employment tribunal cannot properly make findings of a failure to make reasonable adjustments without going through that process. Unless the employment tribunal has identified the four matters at (a) (d) it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage'. **Rowan** was approved by the Court of Appeal in **Newham Sixth Form College v Sanders** [2014] EWCA Civ 734.

39. It is now well established that procedural failings on the part of an employer in considering whether it needs to make reasonable adjustments do not constitute of themselves breach of the duty, as was suggested in **Southampton City College v Randall** [2006] IRLR 18, EAT, at para 27.

40. The EAT (Elias P) held in **Tarbuck v Sainsbury Supermarkets Ltd** [2006] IRLR 664, EAT (at para 71) that '[t]he only question is, objectively, whether the employer has complied with his obligations or not', and that was said on the basis that the duty involved the taking of substantive steps rather than consulting about what steps might be taken. That statement has been since been applied in **Latif v Project Management Institute** [2007] IRLR 579, and also approved and applied by another division of the EAT: **HM Prison Service v Johnson** [2007] IRLR 951, per Underhill J at para 76.

41. Defining the PCP is key. Most of the problems which arise in failure to make reasonable adjustments claims arise because of the way in which the PCP has been pleaded. The case law says this:

(a) the finding of a PCP is one of fact for the tribunal to make on the evidence before it: **Jones v University of Manchester** [1993] IRLR 218. In a claim under Section 20 of the Equality Act 2010, reasonableness of the employer's actions is not relevant to the question whether it has imposed a PCP, which is instead an objective question of fact (with reasonableness arising later in the process): **Wolfe v North Middlesex University Hospital NHS Trust** [2015] ICR 960, EAT.

(b) it is for the Claimant to identify the provision, criterion or practice that he wishes to challenge: **Allonby v Accrington and Rossendale College** [2001] IRLR 364, CA, para 12 per Sedley LJ. It was said in that case that it is no defence for the alleged discriminator to be able to define a different provision, criterion or practice from the same facts that could be non-discriminatory.

(c) in some cases, PCP may be expressly defined by the employer. In other cases, the Employment Tribunal may need to formulate it by analysing the employer's practice or behaviour. There is no need for PCP to be explicitly stated. It need not be something formal in nature or expressed in writing: **Cast v Croydon College** [1998] ICR 500 CA, para 27. Evidentially, it will be easier for Claimant to prove the application to him of PCP, where it is a formal policy or procedure. So, for example, an employer who has no policy relating to working flexibly from which female employees who have childcare responsibilities might have sought to take advantage, nonetheless applies a PCP to those employees that can be challenged

(d) there may be a number of different formulations consistent with the underlying facts. If an employee can realistically identify a PCP capable of supporting their case… it is nothing to the point that [their] employer can with equal cogency derive from the facts a different and unobjectionable requirement or condition: **Allonby v Accrington and Rossendale College** [2001] IRLR 364, CA.

(e) nonetheless, a court or tribunal will have to determine as a first step whether the PCP actually existed and whether it was applied to the Claimant. The failure to identify the PCP, in accordance with the adduced facts could result in the failure of an otherwise strong claim: **Francis v British Airways Engineering Overhaul Ltd** [1982] IRLR 10, EAT.

(f) even where a PCP is identified that does accurately reflect the factual situation, there may be more than one way to describe that PCP. The way in which the PCP is formulated will affect who falls into the pool for comparison, which will in turn affect whether disparate impact is demonstrated or not. However, an appeal court will reformulate the PCP is the characterisation of it does not match the real substance of the complaint (see **Azmi v Kirklees Metropolitan Borough Council** [2007] ICR 1154 and **Ladele v London Borough of Islington** [2009] ICR 387, EAT).

42. The Court of Appeal's decision in **Griffiths v Secretary of State for Work and Pensions** [2016] IRLR 216, CA raises the central issue for disability discrimination law of whether absence management policies need to be modified to comply with the duty of reasonable adjustment and is a good example of an appeal court reformulating the PCP so that it logically and accurately reflects the facts to enable the assessment of adverse impact to be properly carried out.

43. The claimant, who had been absent from work for disability-related reasons, was given a warning under the employer's attendance management procedure. She claimed that it would have been a reasonable adjustment for the trigger point to be delayed. The EAT accepted the employer's argument that since the same policy applied to everyone, the Claimant could not be said to have been placed at “a substantial disadvantage” when compared with a non-disabled person, as required to trigger the reasonable adjustment duty. The problem with the EAT's reasoning was that it treated different people the same, as much a potential error as treating the same people differently. The Court of Appeal ruled that the reasonable adjustment duty is engaged when an employer's absence management procedure adversely affects employees whose disability makes it more likely that they will be absent from work. Just because the policy applied equally to all employees did not mean that it did not disadvantage those who were disabled. In so finding, Lord Justice Elias holds that

the relevant provision, criterion or practice was not the attendance policy as such. It was that the employee must maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions (see para 47).

> **"Once the relevant PCP is formulated in that way … it is clear that … a disabled employee whose disability increases the likelihood of absence from work on ill health grounds, is disadvantaged in more than a minor or trivial way", since the risk of their being absent from work on ill health grounds is "obviously greater".**

44. That formulation harks back to one of the earliest reasonable adjustment cases to be heard by the House of Lords, **Archibald v Fife Council** [2004] IRLR 651 HL in which the PCP was defined as the requirement to be able to carry out the essential functions of one's job (see paragraph 42).

45. In a sickness absence management case, the correct PCP is almost always likely to be the requirement the requirement to be able to carry out the essential functions of one's job. It's as simple as that!

What is reasonable?

46. Thus in **Griffiths,** it was held that there was thus a duty to make reasonable adjustments, but the adjustment duty is limited to that which is "reasonable". In this case, it was open to the employment tribunal to conclude that it would not be reasonable to expect the employer to entirely ignore the claimant's disability-related absence and revoke the warning she was given. As Lord Justice Elias put it:

> **"an employer is entitled to say, after a pattern of illness absence, that he should not be expected to have to accommodate the employee's absences any longer. There is nothing unreasonable, it seems to me, in the employer being entitled to have regard to the whole of the employee's absence record when making that decision."**

47. Therefore, what is reasonable and what is not will be a matter for the employment tribunal.

48. The concept of a 'step' was considered recently by the Court of Appeal in **Griffiths**, albeit in the very different context of an attendance management procedure. Elias LJ said (paragraph 65):

> **In my judgment, there is no reason artificially to narrow the concept of what constitutes a "step" within the meaning of s.20(3). Any modification of, or qualification to, the PCP in question which would or might remove the substantial disadvantage caused by the PCP is in principle capable of amounting to a relevant step. The only question is whether it is reasonable for it to be taken.**'

49. In **O'Hanlon v Comrs for Revenue and Customs** [2007] ICR 1359, CA, it was held that there was no breach of the duty to make reasonable adjustments where the employer operated a sick pay scheme which had the effect of reducing the level of sick pay available to a woman (who was disabled within the meaning of the Act) who had been absent for more than a permitted number of days as a result of absences related to her disability. The Court of Appeal upheld the decision of the EAT in which Elias J had held that requiring the employer to provide full sick pay in such a situation could act as a disincentive for the employee to return to work. That was contrary to the re-integration of the disabled into the workforce, which was the purpose of the legislation.

50. However, rather surprisingly in the light of Hanlon, the EAT in **G4S Cash Solutions (UK) Ltd v Powell** [2016] IRLR 820 upheld the finding of an employment tribunal that where an employee has become disabled and has been reassigned to a new and less well-paid position, it was a reasonable adjustment for the employer to be required to protect the employee's pay.

51. Dismissing an appeal by the employer, HH Judge David Richardson says that there is no reason why the duty of reasonable adjustment "should be read as excluding any requirement upon an employer to protect an employee's pay in conjunction with other measures to counter the employee's disadvantage through disability. The question will always be whether it is reasonable for the employer to have to take that step." He adds that "many forms of measure which it will be reasonable for an employer to have to take will involve a cost to the employer. It may be direct, in the form of provision, training or support. It may be indirect, in that measures will render the disabled person's employment less productive so that the employer is, in effect, subsidising the employee's wages when compared with those of a non-disabled person." Looked at that way, he concludes, "I see no reason in principle why pay protection, which is no more than another potential form of cost for an employer, should be excluded as a

'step' … I do not expect that it will be an everyday event for an employment tribunal to conclude that an employer is required to make up an employee's pay long-term to any significant extent – but I can envisage cases where this may be a reasonable adjustment for an employer to have to make as part of a package to get an employee back to work or keep an employee in work." Finally, the judge pointed out that circumstances may change so that an adjustment that is reasonable at one time may become unreasonable in the future because the employer's financial position has changed or because the alternative job is no longer needed.

Section 15: Discriminatory Dismissal

52. Section 15 of the Equality Act 2010 provides that:

> **(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, and**
>
> **(b) A cannot 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.**

53. In **Land Registry v Houghton** UKEAT/0149/14 (12 February 2015, unreported) Judge Clark reported that it applies simply where 'A treats B unfavourably', not 'less favourably', and uses the relatively neutral formulation 'because of something arising in consequence of B's disability'.

54. In **Hall v Chief Constable of West Yorkshire Police** [2015] IRLR 893, a disabled claimant was dismissed for gross misconduct after an absence involving disability-related sickness, following an allegation that she had been seen working in a pub during her absence and was falsely claiming that she was sick. The Employment Tribunal found that she had been dismissed on the false premise that she was faking her illness. In fact, she was ill and was undergoing heart surgery. The Employment Tribunal rejected her claim finding that:

> **"We agree that the disability has to be the cause of the [force]'s action; not merely the background circumstance. We do not think that the**

motivation for the unfavourable treatment was [Miss Hall]'s disability; rather we conclude that it was the genuine, albeit wrong, belief that Miss Hall in taking sick leave was falsely claiming to be sick. The tribunal therefore does not find that the unfavourable treatment was 'because of something arising in consequence of the disability'." Miss Hall appealed.

55. The EAT found that the tribunal had made three errors:

(a) firstly, it appeared to consider that it was necessary for the claimant's disability to have been the cause of the respondent's action in order for her claim to succeed;

(b) secondly, it made a contrast between the cause of the action and a background circumstance. This left out of account a third logical possibility present on the looser language of s.15(1); ie a significant influence on the unfavourable treatment, or a cause which is not the main or the sole cause, but is nonetheless an effective cause of the unfavourable treatment;

(c) the third error was its reference to the motivation for the unfavourable treatment – it was clear from the authorities that to inquire into the motivation for unfavourable treatment was to ask the wrong question.

56. The EAT went on to find those were material errors of law. If the tribunal had directed itself correctly, the only possible conclusion to which it could have come was that the necessary causal link between the claimant's disability and the unfavourable treatment had been established. Accordingly, the appeal succeeded.

57. The employer's counterbalance to this potentially wide liability is that:

(a) there is available an employer defence of justification, ie the usual formulation that 'the treatment is a proportionate means of achieving a legitimate aim' (sub-s (1)(b)) and

(b) this liability does not apply if the employer did not know, and could not reasonably have been expected to know, that the employee had the disability (sub-s (2)).

58. In **IPC Media Ltd v Millar** [2013] IRLR 707, EAT it was held that this section essentially performs the same function as the old disability-related discrimination prior to its emasculation in **Malcolm** [2008] IRLR 700, HL). It was also held that:

(a) the phrase 'because of' has the same meaning as the previous terminology of 'reason' or 'grounds',

(b) that this requires a consideration of whether the proscribed factor operated on the mind of the alleged discriminator (consciously or unconsciously) to a significant extent (see further more recent guidance from the EAT in **Pnaiser v NHS England** [2016] IRLR 170.

If so, was such treatment a proportionate means of achieving a legitimate aim?

59. Unfavourable treatment because of something **arising in consequence of a disabled person's disability** is not unlawful where the treatment is a proportionate means of achieving a legitimate aim.

60. The case law states that:

(a) the burden of proving the defence falls squarely on the Respondent: **Rainey v Greater Glasgow Health Board** [1987] ICR 129. Evidence is important because consideration of the defence requires the Employment Tribunal to carry out a balancing exercise between the needs of the employer and the rights of the employee. That exercise cannot be carried out in an evidential vacuum;

(b) The classic test for establishing whether or not discrimination may be justified is found in **Bilka-Kaufhaus GmbH v Weber Von Hartz** (Case

170/84) [1986] IRLR 317. There the Court of Justice of the European Union said that the national court (or tribunal) must be satisfied that the measures having a disparate impact 'correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end' (para 36). In subsequent cases (see especially **R v Secretary of State for Employment, ex p Seymour-Smith and Perez** [1999] IRLR 253 and also **Kutz-Bauer v Freie und Hansestadt Hamburg**: C-187/00 [2003] IRLR 368) the CJEU expanded on this, ruling that is for the national court (or tribunal) to ascertain:

(i) whether the measure in question has a legitimate aim, unrelated to any discrimination based on any prohibited ground;

(ii) whether the measure is capable of achieving that aim; and

(iii) whether in the light of all the relevant factors, and taking into account the possibility of achieving by other means the aims pursued by the provisions in question, the measure is proportionate.

(c) to be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and a (reasonably) necessary means of doing so. It is important for Tribunals to be clear about the three elements of the test. “Appropriate”, “necessary” and “proportionate” are not interchangeable: see **Homer v Chief Constable of West Yorkshire** [2012] UKSC 15, [2012] ICR 704.

(d) Furthermore, where there is a link between the reasonable adjustments said to be required and the disadvantages or detriments being considered in the context of indirect discrimination and disability-related discrimination, it is important to ensure that any failure to comply with a reasonable adjustment duty is considered as part of the balancing exercise in considering questions of justification. in **Dominique v Toll Global Forwarding Ltd** EAT 0308/13, the EAT, Simler J presiding, rejected the argument that there is a legal obligation on tribunals to consider the extent of any failure to comply with the duty to make reasonable adjustments before considering questions of

justification of indirect discrimination and/or discrimination arising from disability (see paragraphs 47 -52). In the absence of a provision equivalent to the former Section 3A(6) DDA, the EAT saw no basis for reading such a requirement into the Equality Act 2010. However, at paragraph 51 of its judgment, the EAT went on to say:

> **We cannot accept that there is a legal requirement to consider questions of failure to comply with reasonable adjustments before considering questions of justification of indirect or disability-related discrimination, as Mr Perfect submits. The statute does not require this and, absent a provision equivalent to s 3A(6), we cannot see any basis for reading such a requirement into the 2010 Act. Nevertheless we agree with Mr Perfect that, where there is a link between the reasonable adjustments said to be required and the disadvantages or detriments being considered in the context of indirect discrimination and disability-related discrimination, it is important to ensure that any failure to comply with a reasonable adjustment duty is considered as part of the balancing exercise in considering questions of justification. This is because it is difficult to see as a matter of practice how a disadvantage that could have been addressed or prevented by a reasonable adjustment that has not been made can, as a matter of practical reality, be justified.**

61. In ***Buchanan v Commissioner of Police of the Metropolis*** [2016] IRLR 918, the claimant, was a trained police motorcyclist. He was involved in a serious motorcycle accident while responding to an emergency call: the brakes on his motorcycle failed. As a result he developed serious post-traumatic stress disorder and was unable to return to work. When he had been absent for eight months, the police force began to take steps under its unsatisfactory performance procedure, which was derived from the Police Performance Regulations 2012 (SI 2012/2631). The claimant was given a series of dates to return to work as his case moved through the steps of the procedure, but did not return on those dates. The police force was fully aware from medical advice that he was unable to comply with the dates as he remained seriously ill. He brought a claim that the steps taken under the procedure amounted to discrimination arising from disability under s.15 of the Equality Act 2010.

62. The question that arose on appeal is in a claim brought under Section 15 what had to be justified by the employer where a disabled employee is dismissed in accordance

with a sickness absence procedure? Is it the procedure itself, or is it the particular treatment of the claimant?

63. The employment tribunal thought it was the employer's procedure itself as a whole that had to be justified, and that this had been done. On appeal, however, HH Judge David Richardson in the EAT holds that in a case such as this it was the application of the procedure to the claimant that had to be justified. He says that “if the treatment is the direct result of applying a rule or policy, it will usually be the rule or policy which has to be justified.” However, in most attendance management cases, the procedures allow a series of responses to individual circumstances. In such a case, “the ET was required by s.15(2) to look at the treatment itself and ask whether the treatment was proportionate.” Here that meant looking at each of the steps under the procedure taken by the employer that was found to be unfavourable treatment arising from disability and asking whether it was a proportionate means of achieving a legitimate aim.

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SERJEANTS’ INN CHAMBERS

30 November 2016