DISCRIMINATION UPDATE PART 1:

(A) DISABILITY DISCRIMINATION AND ATTENDANCE MANAGEMENT
(B) WIDER DEVELOPMENTS IN THE LAW OF REASONABLE ADJUSTMENTS

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(A) Disability discrimination and attendance management

(i) The problem and context

1. Since the arrival of the DDA in 1995, many public sector and large private sector employers have adopted attendance or absence management policies that seek to make provision for what the policies often describe explicitly as "reasonable adjustments" in respect of disabled employees.

2. Usually what such policies provide for is some kind of mechanism for discounting absences that are deemed to be disability-related, via an adjustment to the "trigger points" or "consideration points" at which the various stages of the attendance management process take place (in terms of review meetings, warnings and ultimately dismissal). The decision as to whether particular absences are disability-related is usually left to an external medical or occupational health provider such as Capita.

3. Alternatively there may be some other means of relaxing the process, via a more general discretion not to issue a warning or not to dismiss, or via a special kind of leave specifically designed for disabled people (often called simply "disability leave"). This latter type of leave is of course really just another means of discounting disability-related absences for the purposes of the "standard" attendance management process.

4. This is all very laudable. However, these attempts essentially to embed the concept of reasonable adjustments within employers' own policy documents – with a view presumably to ensuring that relevant managers/HR personnel make adjustments where perceived to be necessary so as to minimise the risk of litigation – can have an unfortunate and paradoxical effect upon staff.

5. This is because the benefit of the various forms of discretion in effect to disregard disability-related absences, often becomes viewed as an *entitlement* by employees, so that in any situation where a decision is taken *not* to exercise an available discretion in a disabled employee's favour, that employee immediately considers that they have been denied a "reasonable adjustment" that the policy explicitly provides for. It only takes a visit to google or a conversation with a trade union representative, for that to translate into what appears to the employee to be an obviously good claim of disability discrimination by way of a failure to make reasonable adjustments.

6. It is not only employees in such a position that tend to find it hard to understand how there could be no available reasonable adjustments claim in the tribunal when a clear policy

provides in terms for possible reasonable adjustments that have on the face of it not been made. Most non-lawyers would find it difficult, including tribunal wing-members.

7. Indeed, dealing with such cases in the tribunal from an employer's perspective often involves a battle to move the debate away from simply whether or not the employer has applied its own policy properly, even when experienced Employment Judges are hearing the case: the tendency is to assume that the policy must have made provision for "reasonable adjustments" to be made, in order to correct some inherent substantial disadvantage to the disabled employee.

8. The employee usually says that as a disabled person with a particular disability causing higher absence levels, they are more likely to receive warnings and be dismissed than non-disabled people (and indeed, more likely to be subject to reduced pay). There is then an obvious attraction in looking merely at whether it was reasonable not to exercise the available discretion, in order to determine the claim, without analysing whether any substantial disadvantage actually exists giving rise to a *statutory* duty to do anything at all.

9. However, as I hope will become clear, in light of recent case law such an approach is wholly flawed and in the vast majority of cases (if not all) there simply will not be any substantial disadvantage.

10. The real issue currently is therefore not whether any reasonable adjustments claim is likely to succeed in this context, but rather whether any other type of claim might succeed: indeed, there are several ways in which such a claim might be put. The prime candidate is a s.15 EqA 2010 "discrimination arising from" a disability claim, and that is a question on which no direct authority is currently available.

11. I will deal firstly with the question of reasonable adjustments claims, before moving on to deal with s.15 claims. I will then address the possibility of an indirect discrimination claim arising out of the same circumstances, but as will become apparent, that particular issue will almost always be academic.

12. Moreover, a claim of direct disability discrimination cannot be supported and such possible claims are not examined here: the reason for the issuing of any sanction under an attendance management policy (and/or a reduction in pay) is not the disability itself, but rather the claimant's absence. Following *Malcolm*, the proper comparator is a non-disabled person (hypothetical or real) who has the same level of absence. Such a person would obviously be treated in the same way.

(ii) Reasonable adjustments claims

No substantial disadvantage

13. Section of the 20 Equality Act 2010 imposes a duty to make reasonable adjustments where a PCP puts the disabled person at a particular disadvantage in comparison with persons who are not disabled, the duty being to take such steps as are reasonable to have to take to avoid the disadvantage. Whatever the precise formulation of the attendance management policy/procedure in question (the PCP), a system of warnings and other sanctions in respect of specified levels of absence, has the same effect on all employees equally, whether disabled or not: anyone having the requisite levels of absence will be subject to oral warnings, review periods, backsliding periods, written warnings and ultimately dismissal. It is not enough to consider whether those warnings or sanctions might amount to a substantial disadvantage in general terms. What must be considered is whether they amount to a substantial disadvantage *in comparison with persons who are not disabled*.

14. If there is in addition, specific provision in the policy for disabled employees in the form of some discretionary mechanism for relaxing the standard policy, this provides a significant *advantage* to the disabled employee that non-disabled employees cannot benefit from. It follows that the disabled person would not be at any disadvantage in comparison with non-disabled people even if the policy did not contain any such specific and positively

advantageous discretion at all. Therefore, a mere decision not to exercise the positively advantageous discretion in a disabled employee's favour, can never lead to a substantial disadvantage in comparison with non-disabled people.

15. This point is amply made by Mr Justice Langstaff (President), in *Royal Bank of Scotland v Ashton [2011] ICR 632 (EAT)*.

No substantial disadvantage: *RBS v Ashton* (EAT)

16. There, the EAT was concerned with the RBS attendance management and sick pay policies. Those policies provided that after a certain level of sickness absence, an employee's pay would reduce, and warnings and dismissal would ensue upon various "trigger points" being exceeded.

17. There was a discretion in the RBS policy for trigger points to be relaxed in cases of chronic or long-term disability.

18. The claimant in that case had benefited from some such extensions, but eventually was the subject of disciplinary action, consisting of the withdrawal of sick pay and a warning. The claimant contended that those measures amounted to failures to make reasonable adjustments. A tribunal upheld those claims, concluding that it would have been a reasonable adjustment for RBS to have exercised its discretion to defer the application of the disciplinary procedure and that the enforcement of the procedure constituted a failure to make a reasonable adjustment.

19. The EAT allowed the appeal on the basis that the PCP (consisting of the policy) could not give rise to a substantial disadvantage in comparison with non-disabled people.

20. Firstly, the EAT noted at para.39:

> *"In particular, if one steps back from the minutiae of the judgment this was the position. Everyone who worked for the employer was subject to the terms of a sickness absence policy. On its face no one, whether disabled or otherwise, was advantaged or disadvantaged compared to any other because they were all subject to the same policy. To the extent that someone who was disabled might suffer further periods of sickness than the non-disabled, the sickness policy provided in the claimant's case that she should continue to receive full pay."*

21. The EAT went on at para.40:

> *"It is difficult, therefore, to see that the sickness absence procedure itself could constitute a disadvantage to the claimant. If she was likely to be more absent than someone not suffering from her relevant disability she would be <u>benefited</u> (my emphasis) rather than disadvantaged when compared."*

22. In addition, the EAT noted that the policy in relation to absence (rather than pay) was usually enforced, but a discretion was sometimes exercised in the case of disabled employees.

23. The possibility of that discretion being exercised was also plainly a *<u>benefit</u>* for disabled employees. A decision not to exercise it could not amount to a *disadvantage* in comparison with persons who are not disabled: at worst, the disabled employee would be in the same position as everyone else in the event of the discretion not being exercised.

24. Indeed, the EAT commented, in relation to the "flexing" of trigger points that had in fact occurred in that case, that:

> *"it might seem, taking a view from a distance, that the claimant had received an <u>advantage</u>* (my emphasis) *in the way in which the scheme had been administered in her case, when compared to the way in which it had been applied both in the majority of cases of those who were disabled, and by comparison with anyone subject to the*

sickness absence policy who was not suffering from any long-term relevant disability or underlying medical condition." (para.43).

25. The point is reiterated more forcefully in the more recent EAT decision in *Newcastle upon Tyne Hospitals NHS Foundation Trust v Bagley [2012] EqLR 634.*

No substantial disadvantage: *Newcastle Hospitals NHS FT v Bagley* (EAT)

26. In *Bagley*, the EAT was concerned with claims brought by a Radiographer who had been injured in an accident at work which resulted in a substantial period of absence. During that absence she received a pay supplement called "Temporary Injury Allowance" (TIA), which topped up her sick pay to 85% of full pay. TIA was only available to those actually absent from work, and not to those working reduced hours on a phased return to work. The policy was also to pay only in respect of hours actually worked on a phased return.

27. The absence was initially for four months, but upon the claimant's phased return it was pointed out to her that in order to receive full pay, she would need to use annual leave in respect of the days she was not working. After she had used up her annual leave, the claimant was again absent on extended sick leave for a further 21 months. During this time, the claimant considered that she was medically unfit for full-time work, but did not want to return on a part-time basis because of the financial consequences. She received 85% of full pay throughout this absence.

28. The tribunal upheld the claimant's reasonable adjustments claim. *Inter alia*, the breaches consisted of refusing to pay TIA or otherwise to supplement the claimant's pay in respect of part-time hours, so that she could return to work on a part-time basis without suffering any financial detriment. In other words, the tribunal's view was essentially that the employer was under a duty to pay full-time pay (or at least 85%) for part-time work (60% of full-time hours had been proposed). It awarded £30,000 in injury to feelings and even £10,000 aggravated damages.

29. The EAT allowed the appeal, concluding that the claimant had not been put at any substantial disadvantage in comparison with non-disabled people. Leaving aside an aspect of the claim surrounding the refusal of the claimant's application for Permanent Injury Benefit (PIB) – which the EAT concluded should not have succeeded because the decision as to the PIB application was not the employer's, but that of an external body – the central conclusion was that the identified PCP of essentially paying people for the hours that they actually worked (i.e. the policy), applied to everyone equally. Consequently the claim had to fail because:

> "*[i]f a non-disabled person would be affected by the PCP in the same way as a disabled person then there is no comparative substantial disadvantage to the disabled person and no duty to make reasonable adjustments arises*" (para.72).

30. At para.74, the EAT went on to say with reference to *Ashton*:

> *"Thus in RBS v Ashton it was recognised that the sickness absence procedure applied equally to all employees who were all equally advantaged or disadvantaged by it and accordingly no duty to make reasonable adjustments arose: see paras.39-40 and para.79. (**Note that the particular policy at issue in that case happened to provide for additional periods of full pay to be paid to someone absent through a disability. However, that was a matter of discretion, not something that the employer was obliged to do given that there would have been no comparative disadvantage to the disabled person if such provision had been absent.)"***

31. It is worth pointing out at this juncture, that even if the policy in question does not frame any advantageous measure in favour of disabled people as discretionary but rather obligatory, it will still be discretionary for the purposes of the law: failing to provide the positive advantage despite it being "obligatory" under the *policy*, would still not be enforceable under s.20 of the Equality Act (reasonable adjustments) due to the absence of any substantial disadvantage in comparison with non-disabled people in the event of the positive advantage under the policy

not being provided: without it, the disabled employee is in the same position as everyone else. Whether any measure stated to be obligatory could be enforceable by a claimant by way of a breach of contract claim (depending on the status of the policy) is a topic for another day.

32. As a final point, it should be noted that the EAT in *Bagley* stressed that the tribunal had erred in apparently handling the substantial disadvantage question in the same way as disparate impact would be dealt with in the context of an indirect discrimination claim. It is important to bear in mind that:

> *"this sort of 'statistical' or Enderby v Frenchay Health Authority* [1994] ICR 112 *type discrimination ... has no place in a reasonable adjustments claim."* [para.87].

33. Thus, spending a lot of time and effort trying to establish a statistical case to the effect that a larger proportion of people with the claimant's particular disability are likely to be disadvantaged by an application of the policy in comparison with non-disabled people, is very likely to prove futile

Worry and stress as substantial disadvantage?

34. In *O'Hanlon v Revenue & Customs Commissioners [2007] ICR 1359 (CA),* the point was made that anybody would feel the financial pressure of reduced sick pay, and that this was not a relevant factor. This was not strictly in the context of the substantial disadvantage question (rather, it arose in the context of whether or not disability-related discrimination could be justified and also whether the proposed adjustment of additional sick pay was reasonable), but the view of the Court of Appeal was clear. Indeed, so clear that the EAT in *Bagley* did consider that the Court of Appeal had effectively made a pronouncement in respect of the substantial disadvantage question (see para.78 of *Bagley*, referring to para.46 of *O'Hanlon*), to the effect that such worry and stress alone could not amount to substantial disadvantage in comparison with non-disabled people.

35. In the same vein, without more the worry and stress of being subject to the absence management procedure and its attendant sanctions would be felt by any non-disabled person in the same position, providing an additional basis for the view that no substantial disadvantage can realistically arise in the present context by simply applying the standard attendance management policy to a disabled employee in the same way as it would be applied to anybody else.

Use of annual leave as substantial disadvantage?

36. The necessary additional factor beyond mere worry and stress, is not infrequently said to be that the claimant has had to use annual leave in order to avoid taking too much sick leave, and that this itself amounts to a substantial disadvantage because less annual leave is left over to be used as actual annual leave.

37. This contention is beguiling, but unfortunately for claimants the fundamental point remains the same. It does not amount to a disadvantage in comparison with non-disabled people, because anyone else subject to the same policy, disabled or not, faces the same consequences if absence reaches the specified levels and the policy is applied. The use of annual leave is a choice taken to mitigate the effects of the operation of the policy which, following *Ashton* and *Bagley*, does not place the claimant at a substantial disadvantage in comparison with non-disabled persons. Any non-disabled person with the same absence level would be faced with the same choice as to whether or not to use some annual leave in order to avoid possible sanction under the policy.

Reasonableness of the adjustment

38. As has been seen, in both *Ashton* and *Bagley*, the reasonable adjustments claims could not succeed because of the absence of any substantial disadvantage having been caused to the disabled claimant in comparison with non-disabled people.

39. But in any event, the EAT also went on to hold in *Bagley* that the adjustment that the tribunal had found to be reasonable (and that had not been made) was not in fact a reasonable one, because an obligation to pay 85% of the claimant's pay for a 60% level of work, could have significant implications for the employer generally as regards all of its part-time employees.

40. In this regard, the EAT relied on *O'Hanlon v Revenue & Customs Commissioners [2007] ICR 1359 (CA)*, where the Court of Appeal held that it will only be a very rare case where it might be appropriate for the tribunal to usurp the employer's function and decide that additional pay would be a reasonable adjustment.

41. [As an aside, the latter point is not to be confused with the outcome in *Meikle v Nottinghamshire County Council [2004] IRLR 703 (CA)*, where a reasonable adjustments claim was upheld in respect of a failure to make substantive adjustments which would have prevented the employee's absence from work. That absence resulted in loss of sick pay which was awarded as part of the claimant's remedy, but the notion of simply paying additional sick pay was not a reasonable adjustment that was upheld.]

42. In *O'Hanlon,* the Court of Appeal was particularly concerned that it would be invidious for an employer to have to determine the extent to which pay should be extended in individual cases in accordance with particular levels of stress and anxiety experienced by individual employees subject to a sick pay scheme causing reduced pay (see *O'Hanlon*, para.46), so as a matter of principle in the vast majority of cases simply paying additional pay would not be a reasonable adjustment. By the same token, it would be equally invidious for an employer to have to determine the extent to which sickness absence trigger points should have to be extended according to each employee's level of stress or anxiety over the prospect of disciplinary action.

43. Indeed, in *O'Hanlon*, the Court of Appeal took the view that "non-aggregation" of disability-related absences with absences that are not disability-related (i.e. essentially discounting them), for the purposes of the sick pay scheme, was not a reasonable adjustment. Moreover, that "non-aggregation" argument was put on the limited footing that essentially the disabled employee should benefit from an annual "allowance" in respect of disability-related absence, of the same number of days as the general sickness absence "allowance" afforded to all employees. That way, the argument ran, the disabled employee would still have the same number of sick days available for use in respect of general sickness absence (i.e. sickness absence that is not disability-related) as everyone else. However, even that proposition was rejected by the Court of Appeal.

44. The overriding point however is that discounting disability-related sick leave generally would amount to facilitating absence from work. It is now well established that an adjustment will not be reasonable if it does not achieve anything in terms of getting the disabled employee back into work or keeping them there.

45. This point is reiterated at paras.19-23 of *Ashton*. In particular, at para.23 the EAT refers with approval to *Romec Ltd v Rudham (13.07.07, UKEAT/69/07*), where the EAT had said that the critical question is:

> *"would extending the programme* [i.e. making the proposed adjustment] *have enabled the claimant to return to full duties as an engineer, thus removing the disadvantage he suffered compared with the non-disabled comparator?"*

46. If there is "a prospect" of the proposed adjustment achieving that effect, then it will be reasonable (a point that will be returned to later on in Part B). In *Romec*, the claimant was absent from work and participating in a rehabilitation programme designed to get him back into his full duties, which was not working. The proposed adjustment was to extend the period of the rehabilitation programme to give the claimant what the tribunal described as "*the opportunity to prove himself or otherwise*". The EAT was clear that that was not the correct approach.

47. As the EAT put it at para.69 of its judgment in *O'Hanlon* (using words in which Hooper LJ saw "much force": para.57 CA judgment):

> *"The Act is designed to recognise the dignity of the disabled and to require modifications which will enable them to play a full part in the world of work, important and laudable aims. It is not to treat them as objects of charity which, as the tribunal pointed out, may in fact sometimes and for some people tend to act as a positive disincentive to return to work."*

48. In the same vein, more recently in *Salford NHS Primary Care Trust v Smith [2012] EqLR 1119*, the EAT held that proposed adjustments of providing the claimant with a "career break", or alternatively some form of "non-productive work", were not capable of amounting to reasonable adjustments, because there was plainly no prospect of either enabling the claimant to return to work. The issue is about the capacity of the proposed adjustment to get the employee *back to their duties*, not simply to keep him or her *in employment* (which could obviously be achieved by simply granting additional sick leave).

Reasonableness of the adjustment: *Archibald v Fife Council* [2004] IRLR 651 (HL)

49. An additional point that is often raised, is to refer to *Archibald* in order to argue that the law of reasonable adjustments can in fact require a form of positive discrimination, and on the basis of that judgment to assert that it can be a reasonable adjustment to relax the policy in respect of disability-related absences.

50. However, *Archibald* was considered in argument in both *Ashton* and *Bagley* (according to the reports of those cases), and evidently did not prevent the conclusions in them.

51. Moreover, *Archibald* concerned the question of whether there could be circumstances in which an employer could be obliged to offer an alternative position to a disabled employee that would amount to a promotion, in order to alleviate the disadvantage in question and keep the employee at work. The House of Lords decided that there could.

52. That principle has no application here: the promotion in *Archibald* was a reasonable means of keeping the employee in work. Extension of sickness absence might avert termination of the employment contract, but does not keep the claimant at work. Rather, it does the opposite in facilitating *absence* from work, and that is not a reasonable adjustment.

***Ashton* and *Bagley*: a new approach**

53. While the end results in *Ashton* and *Bagley* were the same as in *O'Hanlon* (in that the claims were dismissed), as already noted in *O'Hanlon* the claim failed because the Court of Appeal considered that the proposed adjustments (concerning pay, rather than absence) could not be reasonable.

54. The Court of Appeal was however firmly of the view that the PCP in that case (application of the relevant policy as to reduced sick pay) *did* cause substantial disadvantage in comparison with non-disabled people. This is made clear (*obiter*) at para.78 onwards in *O'Hanlon*, where the Court of Appeal refers at length and with approval to the decision of the EAT below. At para.55 of its judgment, the EAT had said (and the Court of Appeal agreed entirely at para.86 of its own judgment):

> "*It is plainly no answer to a claim of this kind to assert that the same rules apply to all. The whole premise of this provision is that the disabled employee may be disadvantaged by the application of common rules. Unlike other forms of discrimination, the employer may be obliged to take positive steps which involve treating the disabled employee more favourably than others are treated to remove or alleviate the consequences of the disability."*

55. The reason why the conclusion reached there on the substantial disadvantage question is so different from that which was reached in *Ashton* and *Bagley*, is because *O'Hanlon* was

decided before *Lewisham London Borough Council v Malcolm [2008] AC 1399 (HL),* whereas *Ashton* and *Bagley* were decided after. *Malcolm* is of course authority for the proposition that the proper comparator is someone who is in the same relevant circumstances as the claimant, but who has no disability. The EAT in *Ashton* refers specifically to *Malcolm* at para.46, and expressly approves the view as to substantial disadvantage that is completely the opposite of that expressed *obiter* in *O'Hanlon*:

> *"Mr Morton would argue that the comparison here should have been with persons who were not sick by reason of disability. Those who were sick by reason of disability would necessarily be more likely to be subject to the trigger points and more likely, therefore, to be exposed to a disciplinary hearing and more likely, therefore to be subject to a loss of sick pay in consequence. We have little hesitation in thinking that, in particular bearing in mind that any comparison here should be a comparison of those who but for the disability are in like circumstances (see [Malcolm]), Mr Linden's submission is correct"* [That submission was that the comparison was properly with *"all other employees in the employment of the employer subject to the sickness absence policy but not disabled"* (para.45)]

56. This represents a fundamental change in the basis on which such claims should be decided, and is controversial in light of the view expressed in *Fareham College Corporation v Walters [2009] IRLR 991 (EAT)*, that *Malcolm* did not apply to the comparative exercise in a reasonable adjustments claim. That view has been turned on its head, Langstaff J having considered *Walters* in *Ashton* and glossed over this issue (paras.17 and 18). This new approach has significant advantages for employers in terms of creating much greater certainty.

57. Previously, on the basis of the *obiter* approach in *O'Hanlon* detailed above, it remained open to claimants to contend that they were in fact clearly subject to a substantial disadvantage in comparison with non-disabled people, thereby shifting the focus of the litigation to the question of whether, in the particular circumstances of the case, the adjustment contended for would be reasonable or not. There would almost always need to be a costly full hearing to deal with that largely factual question.

58. By comparison currently, on the *Ashton/Bagley* "no substantial disadvantage" basis, it ought to be possible to secure the strike out of this type of reasonable adjustments claim as having no reasonable prospects of success (although, the general reticence of tribunals in relation to striking out any kind of discrimination claim needs to be borne in mind). As a note of caution, it is worth pointing out that s.23 EqA 2010 (specifying that the circumstances of a comparator should not be materially different from those of the claimant) does not cross-refer to s.20 (reasonable adjustments). Whether the appellate courts will revisit this issue in a claim under the EqA 2010 and undo the effects of *Ashton/Bagley* remains to be seen.

59. Claimant lawyers on the other hand, should be aware that there is in any event another, more effective way of putting the claim that will at least have the benefit of securing a full hearing and creating a greater degree of litigation risk for the employer. I now turn to address that issue.

(iii) Section 15 "arising from" claims

60. In *O'Hanlon*, alongside the unsuccessful reasonable adjustments claim, the claimant brought a claim of "disability-related" discrimination. That cause of action under section 3A(1) of the DDA 1995 was similar, but not identical to, discrimination "arising from" a disability under s.15 of the Equality Act 2010.

61. Section 15 provides as follows:

> **15 Discrimination arising from disability**
>
> (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.

62. The Court of Appeal in *O'Hanlon* concluded *obiter* that although there would not be a failure to make reasonable adjustments by not adjusting a pay policy to continue paying a sum of money to a disabled employee which would otherwise cease, or by discounting disability-related absences to achieve the same effect in terms of additional pay, at the same time the loss of pay and available sick leave *did* amount to disability-related discrimination (albeit at a time pre-*Malcolm*).

63. Given that the purpose of the s.15 cause of action is essentially to undo the effects of *Malcolm* in the context of what was previously "disability-related" discrimination, it is to be fully expected that what constituted "disability-related" discrimination prior to *Malcolm*, will now constitute discrimination "arising from a disability" under s.15. Thus, it is difficult to see how the issuing of a warning, loss of pay, or indeed dismissal resulting from disability-related absence, could conceivably amount to anything other than "unfavourable treatment because of something arising in consequence of the claimant's disability". The warning etc will obviously amount to "unfavourable treatment", which is because of something (absence) which arises in consequence of the claimant's disability.

Justification

64. However, the "disability-related discrimination" in *O'Hanlon* was found to have been justified, so that the claim nevertheless failed. Indeed, at para.67 the Hooper LJ quoted from the EAT's judgment below as follows:

> *"89. ... The challenge to the tribunal's finding on justification was effectively doomed to fail once the tribunal found that increasing sick pay was not in the circumstances an adjustment a reasonable employer would be required to make. If the objective test for imposing the duty did not bite, then there was never any real possibility that the more subjective test of justification would not be satisfied. That is not inevitably so in all cases, but in our view it is here where the same failure to make full pay lies directly behind both discrimination claims."*

65. Hooper LJ considered this conclusion to have been "*unassailable"* (para.68 of *O'Hanlon*). On the face of it therefore, if an *O'Hanlon* or indeed a *Bagley*-style adjustment is not capable of being a reasonable adjustment (which will be the case currently other than in very exceptional circumstances), there is a decent argument that the discrimination "arising from" a disability that nevertheless arises, ought to be justified. If it was *easier* under the old test to establish justification than it was to establish that the adjustment was not reasonable, then even if the new test of justification presents a slightly higher hurdle, it may still be a hurdle that is no higher than that of showing that the adjustment was not reasonable anyway. Thus, if the adjustment is not reasonable, the discrimination "arising from" a disability remains justified even applying the new justification test. Nevertheless, it would be dangerous to ignore the fact that the test of justification being referred to in the passage cited above (s.3A(3) DDA 1995) is not the same test of justification that applies now.

66. Disability-related discrimination could be justified if the reason for the treatment was both "*material to the circumstances of the particular case and substantial*" (*DDA 1995, s.3A(3)*).

67. While this did not amount to a general test of "reasonableness", it was established that the test for justification did nevertheless involve something similar to the "range of reasonable responses" test in unfair dismissal law (*Jones v Post Office [2001] IRLR 384 (CA)*; *Williams v J Walter Thompson Group Ltd [2005] IRLR 376 (CA)*). Thus:

(a) the word “material” meant that there must be a “reasonably strong connection between the employer’s reason and the circumstances of the individual case” (Jones, per Arden LJ at 37); and

(b) “if credible arguments exist to support the employer’s decision, the employment tribunal may not hold that the reason for the discrimination is not substantial. If, however, the employer’s reason is outside the band of responses which a reasonable employer might have adopted, the reason would not be substantial” (Jones).

68. This was generally considered to represent a low threshold of fairly subjective justification.

69. By contrast, s.15 now adopts the *Bilka-Kaufhaus* test of objective justification that has long been familiar in relation to indirect justification. It may well be that the new formulation of the justification defence in this context will prove to be more exacting.

70. The test to be applied is an objective one, and not, as in unfair dismissals, a band of reasonable responses approach. This was made clear by the Court of Appeal in *Hardy & Hansons Plc v Lax [2005] ICR 1565 (CA)*. The Court held there was no scope, in discrimination law, for a test based on the “band of reasonable responses” equivalent to that which applies in the law of unfair dismissal. The test is what is objectively justified. The principle of proportionality requires the tribunal to take account of the reasonable needs of the business, but it is for the tribunal to make its own judgment as to whether the rule imposed is “reasonably necessary”. It is not enough that the view is one which a reasonable employer could take.

71. *Lax* has been widely applied in considering justification under the current formulation across other strands of discrimination: *MacCulloch v ICI plc [2008] IRLR 846* (age), and *Loxley v BAE Systems Land Systems (Munitions & Ordnance) Ltd [2008] IRLR 853* (age); *Eweida v British Airways Plc [2010] IRLR 322 (CA)* (religion or belief); *London Borough of Islington v Ladele [2010] IRLR 211 (CA)* (religion or belief) and *Cherfi v G4S Security Services* UKEAT 0379/10 (religion or belief).

Legitimate aim

72. Establishing that there is a legitimate aim behind a policy for the management of attendance, ought to be relatively straightforward, and largely self-evident: employees are paid to be at work and perform their duties. If the employee has excessive absence, the situation has to be managed.

73. No employer, however large, can tolerate unlimited amounts of sickness absence, even if during the latter stages of a lengthy absence the employee is receiving nil pay: the employer will need to know whether the employee is ever coming back (and if so, when), or whether a permanent replacement can be recruited.

74. If the excessive absence is not continuous but is rather more erratic, the situation is arguably even more difficult to manage because the employee’s attendance will be less predictable, turning the organisation of cover or re-arranging of shifts or duties at short notice into a logistical headache that drains managerial resources. Moreover, excessive absence is obviously costly, and the employer will perfectly legitimately want to reign in such costs and avoid developing an “absence culture”.

75. Following the Court of Appeal’s recent judgment in *Woodcock v Cumbria Primary Care Trust [2012] IRLR 491*, purely saving money on its own will not amount to a legitimate aim, but if the saving of money is bound up with some other operational objective (in that case, achieving a redundancy where the work an employee had been performing was genuinely no longer required), a legitimate aim will be established.

76. In *Woodcock*, the claimant had been dismissed for redundancy with no consultation, because the delay that would have been caused by consultation prior to issuing notice of termination

would have resulted in his contract terminating after his 50th birthday (following a 12 month notice period), leading to substantially increased redundancy compensation for him under the terms of his contract (he actually received a payment of £220,000, but termination after his 50th birthday would have increased the costs by at least £500,000). Importantly, the Trust had already resolved to dismiss him for redundancy before it realised the significance of the timing issue. It then sought to dispense with consultation in order to avoid its effects. The aim of saving that money, in combination with the genuine need for a redundancy, was found to constitute a legitimate aim.

77. The lack of consultation was proportionate, because on the evidence the consultation process held no value anyway: the result (dismissal prior to his 50th birthday) would have occurred in any event since there was no reason why the consultation could not have taken place during the lengthy notice period.

78. Of course on one level, any decision that a commercial business makes is ultimately directed at maximising the profit margin. But in the present context, the saving of money is a side-effect or contributory factor in the wider organisational objective of managing absence fairly and effectively. Thus on the basis of *Woodcock*, and against the backdrop of the conceivable adjustments in this context not being reasonable for the purposes of that parallel cause of action, I would not expect an employer to have much difficulty in demonstrating a legitimate aim.

Proportionality

79. Any employer that has developed an attendance management policy, will have given consideration to the amount of absence in each individual case it is prepared to allow (and pay for), and there is usually a lengthy monitoring and improvement process before any drastic decisions are taken. If such a policy is a contractual policy, or at least agreed with a recognised union, so much the better for the employer, because the employee can be said to have agreed to its terms.

80. It seems unlikely that the courts would be willing to go behind a carefully considered policy of this kind, and find that the amount of absence permitted by it is objectively unreasonable. This is clear from the sentiments expressed by the Court of Appeal in *O'Hanlon.* Rather, the issue is likely to be whether a decision not to exercise an available discretion under such a policy or a decision to exercise the discretion only to a limited extent, is proportionate in the circumstances. The outcome will therefore involve a balancing exercise which depends on the circumstances of each case.

81. Guidance on the way in which this balancing exercise should be carried out was provided by the Court of Appeal in *Hardys & Hansons plc v Lax*. The Court held that it is for the employment tribunal to weigh the real needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. This approach is now well established, as demonstrated by its recent reiteration by the Supreme Court in *Chief Constable of West Yorkshire Police and anor v Homer [2012] ICR 704.* Baroness Hale described the correct approach, with reference to *Lax,* as *"well settled".* She went on to say at para.22:

> "*To be proportionate, a measure has to be* both *an appropriate means of achieving the legitimate aim* and *(reasonably) necessary in order to do so.*"

82. How will this work in practice in the present context? By way of an example, if a particular claimant has been dismissed entirely in accordance with the applicable policy, under circumstances where an available discretion has not been exercised in the employee's favour in a perfectly legitimate – but perhaps harsh – way, the claimant may well have a good claim. Imagine there is medical evidence which suggests strongly that a few more days of absence will enable the employee to recover sufficiently to return to his or her duties. But the relevant manager or HR officer takes the view that enough is enough, they have heard it all before (etc), and since the policy leaves it up to them to decide whether to disregard those final

additional disability-related absences, they feel justified in deciding not to. After all, a line has to be drawn somewhere.

83. The question for the tribunal would then be, was it a proportionate decision? Assuming that the application or enforcement of a carefully considered attendance management policy would be regarded as an "*appropriate*" means of properly managing attendance, the question will be: was it objectively "*reasonably necessary*" not to discount the disability-related absences? Balancing the cost of a few more days of (possibly even unpaid or half-pay absence), against the loss of the employee's job and ostensibly continued good service in light of the medical evidence, this would probably not be found to have been a proportionate decision.

84. That result might well be different however, if (for example) there has been a history of such medical evidence, the promise of which not having been lived up to on other occasions already. Or, if the medical evidence is equivocal about the extent to which attendance problems would be resolved by granting the few extra days.

85. By way of further example, there may well be cases where the evidence is that the employee cannot manage full-time work any longer, and the reasonable necessity of dismissing under the attendance management policy may well be tempered by the possibility of the employee returning to part-time work: the reasonable necessity of dismissal would then depend on the availability and feasibility of alternative part-time work. If there is some available that the claimant would be willing and able to do, dismissal is not likely to be a proportionate means of achieving the legitimate aim of managing attendance effectively.

Conclusion

86. There is an infinite array of different possible factual scenarios, but the key point is that the result in any case of this nature, is going to depend very heavily on what the circumstances are on a case by case basis, making accurate prediction of the outcome for settlement purposes difficult. I would anticipate that most of the time however, the employer is likely to be successful, unless there is some fairly obvious feature of the case which points to an arbitrary or even frustration-driven exercise of the discretion which does not accord with common sense on the basis of the evidence.

(iv) Indirect discrimination claims

87. The third potential way of putting the type of claim under the spotlight here, is an indirect discrimination claim.

88. However, I deal with this issue briefly because it seems to me that the need for such a claim is never likely to arise. Establishing *prima facie* indirect discrimination, subject to the defence of objective justification, is always going to be more difficult in this particular context than it is under s.15, where discrimination occurs essentially as a matter of course.

89. That being the case, and given that the defence of objective justification at issue under both causes of action is exactly the same (meaning that the obstacle of the employer's defence will have to be overcome either way), it is difficult to see what the point of pleading an indirect discrimination claim would be.

90. Thus for claimant lawyers there is nothing to be gained, and for respondent lawyers, the defence will be the same as that which would be used under s.15, except that an additional element can be relied on in terms of seeking to establish that there is not even any discrimination that requires justification in the first place.

91. While Sedley LJ pointed out in *Eweida v British Airways Plc [2009] IRLR 78 (CA)* that disability discrimination law did not require "group disadvantage" in the same way as other strands of discrimination, he was talking about reasonable adjustments claims (indirect disability discrimination did not exist under the 1995 Act). Arguably therefore, "group disadvantage" remains an issue in indirect disability discrimination claims under the EqA

2010, providing the primary means by which a respondent might challenge the existence of any indirect discrimination requiring justification. The claimant would have to be able to show that there were other individuals with his or her particular disability, who were affected in the same way, before the claim could get off the ground.

(B) Developments in the law of reasonable adjustments

92. Leaving the specific attendance management context behind, what follows is a brief round-up of some recent and important appellate decisions on aspects of the general law of reasonable adjustments.

(i) Must an adjustment be sure to work to be reasonable?

93. Following the *Tarbuck* line of authorities to the effect that mere consultation as to possible adjustments cannot constitute a reasonable adjustment in itself (since it does not actually achieve anything without more) it has long been well understood that an adjustment needs to achieve something towards returning the employee to, or keeping the employee in, his or her actual duties.

94. See, for a recent example, *Salford NHS Primary Care Trust v Smith [2012] EqLR 1119*, where the EAT held that proposed adjustments of providing the claimant with a "career break", or alternatively some form of "non-productive work", were not capable of amounting to reasonable adjustments, because there was plainly no prospect of either removing the disadvantage suffered and enabling the claimant to return to work. And of course *O'Hanlon*, to the effect that monetary adjustments are unlikely to be reasonable for essentially the same reason.

95. What has not always been clear is the extent to which a tribunal needs to be *sure* that a proposed adjustment will have that effect.

***Noor v Foreign & Commonwealth Office* [2011] ICR 695; [2011] EqLR 448 (EAT)**

96. Here, the claimant suffered from dyslexia and dyspraxia, and applied for a job at the FCO. The external advert he had responded to different from an internal advert, meaning that his application and interview responses did not deal with a particular key competency that internal candidates had dealt with. The claimant claimed that reasonable adjustments to his interview process had not been made.

97. At a PHR, an employment judge struck out the claims. It was accepted that he had been put at a substantial disadvantage in comparison with non-disabled people in that his condition made it more difficult to respond on the spot to questions regarding the competency he had not been aware of in advance. However, the judge concluded that the proposed adjustment of interviewing him a second time would not have worked such that he would have obtained the job, and therefore could not be said to be reasonable.

98. The EAT allowed the appeal and ordered that the case proceed to a full hearing in the tribunal. The central error by the judge below was that she said that in order for an adjustment to be reasonable, s.18B(1)(a) of the DDA 1995 requires that taking the step would prevent the disadvantage. It does not say this. According to the EAT:

> *"... it is certainly not the law that an adjustment will only be reasonable if it is completely effective."*

99. While the chance that it would not be effective will clearly have implications for any award of compensation, the claim can be upheld even if the proposed adjustment might not actually make any difference to the end result.

100. That of course begs the question as to what the threshold of possible success is in order to produce a finding of liability?

***Leeds Teaching Hospital NHS Trust v Foster* [2011] EqLR 1075 (EAT)**

101. According to the EAT in *Foster,* the threshold is a relatively low one, of whether the proposed adjustment merely has "a prospect" of removing the relevant disadvantage. There does not have to be a "good" or even "real" prospect of that occurring.

102. In *Foster,* the claimant had been off sick for some time with stress (from October 2006), said to be derived from a breakdown his relationship with his line manager. A grievance in relation to that issue was not upheld.

103. The medical position was that by early 2008, the claimant was fit to return to work so long as it was in a position which did not involve being managed by the same line manager. Eventually in September 2008, the line manager in question left the respondent's employment, and the occupational health doctor advised that a phased return to in the same department would now therefore be feasible. The respondent agreed to the phased return, but the claimant did not go back to work. Eventually he was dismissed in February 2009.

104. He claimed unfair dismissal and a failure to make reasonable adjustments. The proposed adjustment was one of putting the claimant on the "redeployment register" in January 2008 when he was fit to return to work. The tribunal upheld the claims, finding that there was a "good" or "real" prospect of the proposed adjustment removing the disadvantage.

105. The EAT dismissed the appeal. It said at para.17:

> *"In fact, there was no need for the Tribunal to go as far as to find that there would have been a good or real prospect of Mr Foster being redeployed ... It would have been sufficient for the Tribunal to find that there would have been just* a *prospect of that."*

106. This view was, according to Keith J, consistent with the EAT's judgment in *Romec Ltd v Rudham (EAT/0069/07/DA)*, where the EAT had said that an adjustment "may be reasonable" if there was a "real prospect" of it having the desired effect.

107. Keith J in *Foster* however, took the view that just because the EAT had said that a real prospect would be sufficient, that did not mean that something less than a real prospect would be insufficient.

108. Thus, the position now arguably involves a low threshold: it will be enough where a large employer is concerned, and where redeployment is at issue, for a tribunal to conclude that there is probably "a prospect" of another position being found, irrespective of whether or not there is any evidence of any actual available post. As Keith J said at para.21:

> *"The Trust was a significant employer in the area. The Tribunal found that it had about 15,000 employees, 5,000 or so of whom worked at the location where Mr Foster worked. ... On those facts alone, it was, we think, open to the Tribunal to find that there was a good prospect, let alone a prospect, that a post ... would have become available, and would have been suitable for him, in the first six months of 2008."*

109. A fairly loose and speculative test therefore applies, akin to an assessment of what "could have been" for *Polkey* purposes in the unfair dismissal context. Indeed, much the same assessment will often need to be conducted for remedy purposes in respect of a reasonable adjustments claim where the "prospect" of the adjustment working consists of the prospect of the employee remaining in employment.

110. Respondents should take note, and make sure to adduce evidence to the effect that there were not in fact any suitable and available posts at the relevant time if at all possible, so as to show that there was in fact *no* prospect of the proposed adjustment redeployment having the desired effect for the claimant: if no evidence is called by a large respondent on that issue, the claimant is very likely to succeed.

(ii) Cost of adjustments and reasonableness

***Cordell v Foreign & Commonwealth Office* [2012] ICR 280 (EAT)**

111. Finally, the cost of implementing a proposed adjustment will clearly be an important factor in the reasonableness or otherwise of making it. In *Cordell*, the EAT has recently given some helpful guidance on how tribunals should approach that issue.

112. The case concerned a profoundly deaf diplomat, who had had an offer of a posting to Khazakhstan withdrawn because sending her there would have necessitated providing her with a professional "lipspeaker" whilst abroad. She had been provided with lipspeakers on a previous posting to Warsaw, at an average annual cost of £146,000. The cost of making similar provision for the posting to Khazakhstan was estimated at over £300,000 pa. There was also some uncertainty as to whether it would even be practically possible to provide such assistance at all, in terms of being able to find a lipspeaker willing to go. The issue was whether making such an adjustment was reasonable, such that the FCO was liable for its decision not to do so. The tribunal concluded that the proposed adjustment was not reasonable, and that the FCO had not failed in its duty.

113. The EAT considered that the tribunal had been perfectly entitled to reach that conclusion. When assessing how much an employer might be required to spend, there is "*no objective measure*" that could be used to balance the employee's need against the needs of the employer. This does not mean that a tribunal will be entitled to "*stick a finger in the air*". Rather, "*The 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."*

114. The relevant considerations may include:

(i) The size of any budget dedicated to reasonable adjustments;
(ii) What the employer has chosen to spend in comparable situations;
(iii) What other employers are prepared to spend;
(iv) Any collective agreement or other indication of what level of expenditure is regarded as appropriate.

115. What will not be a significant consideration, is an attempt to compare the value of some other wholly unrelated benefit paid to other employees for entirely different reasons, as a means of suggesting that the employer should be prepared to spend a similar amount on the proposed reasonable adjustment. In *Cordell* itself, reference had been made to an allowance sometimes paid in respect of education costs for the children of staff who are posted abroad. The tribunal had considered that argument, and had been entitled to reject it.

116. *Cordell* is obviously an unusual case, but the guidance will nevertheless be helpful in more common scenarios where the cost of the adjustments involved cannot simply be dismissed as negligible, such as a proposed adjustment of purchasing particular and expensive software or equipment. It also is worth noting that para.6.25 of the Equality Act Code of Practice on Employment (Equality and Human Rights Commission), suggests – in far from absolute terms – that an adjustment will begin to appear unreasonable if it costs more that the cost of recruiting and training a replacement member of staff.

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