

“How reasonable do I have to be?!”

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Key issues:

- How to particularise a failure to make reasonable adjustments (“RAs”);
 - How to prove substantial disadvantage;
- Assessing the “reasonableness” of any RAs;
 - The burden of proof in RA claims.

(and a Q&A!)

s.20 Equality Act 2010

s.20 Duty to make adjustments

- (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.
- (4) The second requirement is a requirement, where a physical feature 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.
- (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

How to identify a provision, criterion or practice (“PCP”)?

- Must be applied to the instant Claimant
- Can be a one-off
- Must be neutral in nature (i.e. something that could be applied to others, a “*state of affairs*”)
- Can be formal or informal, oral/by convention or in writing, provided is an “*expectation*”



There are often several right answers!

Key case – RAs:

- *Ishola v LfT* [2020] EWCA Civ 112 – Lady Justice Simler:

“38. In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one.”

PCP examples:



Is it really a PCP....?



How to identify substantial disadvantage?

- s.212(1) Equality Act 2010:

“substantial” means more than minor or trivial

- Assessed by comparison with persons who are not disabled
- Again, must be suffered by the instant Claimant

Substantial disadvantage examples:



Assessing the “reasonableness” of any adjustment:

- This is an objective question – will it be effective in ameliorating the substantial disadvantage to C?
- The ET can substitute its own view for that of R, or conclude that a different adjustment than that sought by C was reasonable
- Practical result of measures is key, not whether R operated a fair process in assessing reasonableness of any adjustment
- If dealing with multiple RAs, can consider the reasonableness of these as a whole (*Burke v The College of Law & Anor [2012] EWCA Civ 37*)

Reasonable (and unreasonable) adjustment examples:



The burden of proof in RA claims:

- Is R's duty to make RAs, but ET tends to expect C to identify proposed RAs
- C must show broad nature of RA proposed. Burden then shifts to R to show either:
 - Substantial disadvantage wouldn't have been eliminated/reduced by the proposed RA;
 - RA proposed is not "reasonable".

- S.136(2) Equality Act 2010:

"If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred."

Duty of the ET to make reasonable adjustments:

- Invite ET to consider this ahead of any final hearing (ET may require medical evidence in support of any request)
- ET can have regard to the practical guidance in the Judicial College's Equal Treatment Bench Book (July 2024)
- Consider also Presidential Guidance 'Vulnerable parties and witnesses in Employment Tribunal proceedings' (22/04/20)
- More recent shifts in approach – can be reasonable to allow recording of a preliminary hearing (*Abanda Bella v Barclays Execution Services Ltd & Ors* 2024 EAT 16)

Q&A/Discussion