



We are all aware that employers must consider making reasonable adjustments to the working environment on behalf of disabled employees. Just what is a reasonable adjustment is far more difficult to determine.

A recent case involving G4S led to the Employment Appeal Tribunal concluding that in some circumstances it might be a reasonable adjustment to maintain a salary at the previous level even though a disabled person's adjusted job did not warrant the previous salary.

As always, the facts of the case may have led to that conclusion and there is no doubt that the size and resources of this company were a factor.

This case also shone a spotlight on a code of practice called the Employment Statutory Code of Practice. This was drawn up by the Equality Human Rights Commission following the introduction of the Equality Act 2010.

While this Code of Practice is not in itself legally binding, it is influential on tribunals and was considered in some detail in this case. The code is a lengthy document covering all forms of discrimination, but in particular it does give a considerable number of examples of what adjustments an employer might make in a variety of circumstances for a disabled person.

The code considers three different categories of potential adjustment designed to avoid putting a disabled person at a substantial disadvantage.

1. This should not be a 'provision, criterion or practice' which would have that effect; so, for example, if there was a company policy providing car parking close to an office only for managers, then a disabled person who was not a manager could argue that they were put at a substantial disadvantage and that would arguably be indirect disability discrimination.

2. The removal or alteration of a physical feature.

3. The provision of what are generally described as 'auxiliary aids'.

The Act itself does not specify factors which would amount to a reasonable adjustment but, as mentioned above, the Code provides a number of examples. Just what is 'reasonable' will depend in part on the resources of the employer.

- These are a few examples suggested by the Code:
- Moving furniture or widening a doorway
- Producing instruction manuals in Braille
- Reallocation of work duties
- Priority when a suitable alternative job becomes vacant
- Varying work hours or retraining
- Modifying disciplinary or grievance procedures or redundancy criteria



## HR Broadcast –

## Reasonable adjustments for a disabled person – can this include maintaining salary at the same level?

- Adjusting pay rates, for example where somebody is paid entirely on output and might need more frequent breaks
- Being more lenient in respect of sickness absence

The G4S case itself involved an employee who had suffered a back injury, but not while at work. Mr Powell was involved in security work at ATMs. G4S created a new role for Mr Powell but kept his salary at the same level. Crucially, however, G4S did not say at the time when they created the role that maintaining salary would only be for a limited amount period. Therefore Mr Powell was led to believe that maintaining salary would be long-term.

A year later the employer said that they would only continue this role at a reduced rate of pay. Mr Powell refused and was dismissed. The Employment Tribunal concluded that this amounted to disability discrimination but the employer appealed to the Appeal Tribunal.

The EAT considered a number of factors which are mentioned in the Code as being matters to be taken into account when deciding whether or not it would be reasonable in all the circumstances for an employer to make adjustments. For example such matters include:

- The financial costs of taking any step
- The financial costs of making any adjustment

- That the employee should not be required to contribute to the costs of any adjustment
- The financial and other resources of the employer
- The type and size of the employer

The EAT took the view that pay protection is no different to any other form of cost of adjustments. They also stated in terms that 'discomfort' from other employees was an 'unattractive reason', as the tribunal put it, for not paying the higher rate.

It is very clear that this kind of decision causes difficulties for employers not just by having to consider maintaining pay rates but because there will be differentials with other employees who are not disabled. That must effectively be regarded as social policy which is the purpose of the whole of the Act and the linked Codes and guides.

None of this means that an employer can never dismiss a disabled person if they cannot continue with their existing work and no reasonable adjustments can be made after considering the criteria described above. It does mean that employers must take the greatest care in following a capability process and explore all the options first. Failure to do so could well lead to a claim of both unfair dismissal and disability discrimination.