Appeal No. UKEAT/0243/15/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 18 April 2016
Judgment handed down on 26 August 2016

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

G4S CASH SOLUTIONS (UK) LTD APPELLANT

MR A POWELL RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL & CROSS-APPEAL

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APPEARANCES

For the Appellant	MR JOEL KENDALL (of Counsel) Instructed by: G4S Cash Solutions (UK) Ltd Legal Department Sutton Park House 15 Carshalton Road Sutton Surrey SM1 4LD
For the Respondent	MR ANDREW POWELL (The Appellant in Person)

SUMMARY

CONTRACT OF EMPLOYMENT - Implied term/variation/construction of term

DISABILITY DISCRIMINATION - Reasonable adjustments

After the Claimant became disabled through a back injury the Respondent gave him work in a new role ("key runner") at his existing rate of pay and led him to believe that the role was long-term. The following year, however, it said that it was only prepared to employ him in this role at a reduced rate of pay; and when the Claimant refused to accept these terms he was dismissed.

It was argued by the Claimant that there was a variation of his contract entitling him to work as a key runner at his existing rate of pay. The Employment Tribunal found that there was no such variation. The Claimant cross-appealed on this point. The Employment Tribunal had rejected his case, at least in part, because it considered that an employer was entitled to impose an adjustment on an employee without the employee's consent. This was an error of law.

However the Employment Tribunal went on to find that the Respondent was required, as a reasonable adjustment, to employ the Claimant as a "key runner" at his existing rate of pay. The Respondent appealed on this question. The Employment Tribunal had been entitled to reach this conclusion. Appeal dismissed. **O'Hanlon v Commissioners for HM Revenue & Customs** [2007] ICR 1359 CA and **Newcastle Upon Tyne Hospitals NHS Foundation Trust v Bagley** UKEAT/0417/11 considered.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal and cross-appeal arising out of proceedings in the London (South) Employment Tribunal between Mr Andrew Powell ("the Claimant") and G4S Cash Solutions UK Ltd ("the Respondent"). By its Judgment dated 9 February 2015 (followed by Written Reasons dated 6 May 2015) the Employment Tribunal (Employment Judge Lamb, Mr Plummer and Ms O'Hare) upheld his complaints of unfair dismissal and disability discrimination. The Respondent has appealed against that Judgment. In the course of reaching its decision the Employment Tribunal rejected a contention by the Claimant that his contract of employment had been varied in a particular way; by his answer and cross-appeal he has challenged that conclusion.

The Background Facts

2. The Respondent's business is concerned in part with automatic teller machines ("ATMs"): it not only replenishes them with cash but also maintains them. It employs engineers for this purpose. Some are first-line maintenance engineers ("FLM"); others are single-line maintenance engineers ("SLM"). The latter are more highly paid and better trained.

3. Beginning in May 1997 the Claimant was employed by the Respondent in a number of roles. He was successively a driver, a SLM engineer, a driver again, a vault officer, an FLM engineer and (in 2011) a SLM engineer again. The Employment Tribunal noted that when his role was changed, the Respondent served on him a full record of the changes in a lengthy detailed document specific to the new role.

4. As the years went by the Claimant had worsening problems with his lower back. By mid-2012 it was clear that he was no longer fit for jobs involving heavy lifting or work in confined spaces. At the Employment Tribunal hearing it was common ground that he had a disability for the purposes of the **Equality Act 2010** from this time onwards.

5. In the summer of 2012 the Respondent created a new role to support ATM engineers working in Central London. This role was described as "key runner". It involved driving from the Respondent's depot to various locations to deliver keys and parts to engineers. It enabled the engineers themselves to travel by public transport.

6. Following his return to work after a period of absence the Claimant began to work as a key runner while retaining his original salary as a SLM engineer. This remained the position until the termination of his employment. Whether this was his contractual entitlement by virtue of a variation in the terms of his contract was an issue before the Employment Tribunal and is the subject of the cross-appeal. I will return to it later in this Judgment. It is sufficient for the moment to say that the Employment Tribunal specifically found that the Claimant understood the change of role to key running to be long-term and that the Respondent's Mr Cox allowed him to believe that until May 2013.

7. By May 2013 the Respondent was considering discontinuing the key running role for organisational reasons. Mr Cox told the Claimant at a meeting on 24 May 2013 that the role was not permanent. He asked the Claimant to look through a list of vacancies and consider what alternative work he might be able to do. When the Claimant asked, Mr Cox said that if nothing was available the Respondent would have to dismiss him on medical grounds.

8. The Claimant consulted solicitors. They argued on his behalf that the Respondent was attempting to change his terms and conditions. He presented a grievance. Then, however, the Respondent decided to make the key running role permanent and to confirm that it was available for the Claimant. However the key running role did not require engineering skills of the kind which a SLM engineer held. The Respondent was prepared to make it permanent only at the rate for an FLM engineer. The basic salary would reduce by some £207 per month before tax - a reduction of the order of 10% in broad terms. The Claimant was unwilling to accept this reduction. No other suitable vacancy could be identified. An impasse had been reached. The Claimant was dismissed on 8 October 2013. A subsequent appeal was dismissed. The Respondent still remained willing to offer him the key running job but only at "the rate of pay for the job".

The Variation Issue

9. At the Employment Tribunal the Claimant was represented by counsel and the Respondent by a solicitor. The Claimant gave evidence; the Respondent called five witnesses including Mr Secrett and Mr Cox. The issue concerning variation was defined in the following way:

> **"Did the discussions and conduct of the parties in relation to the Claimant's role and duties amount to a contractual variation of the Claimant's employment thus assigning him to the key running role/-duties on a permanent basis at the SLM engineer salary level."**

10. It was the Claimant's case that he had been reassigned to the role of key runner at a return to work interview with a section manager, Mr Secrett, on 13 September 2012 and that the permanent nature of the assignment had been confirmed by Mr Cox, his line manager, thereafter. It was the Respondent's case that the reassignment was never intended to be permanent; the role of key runner at this time was not certain to be a permanent role; and the Claimant was not offered, and did not accept, permanent reassignment. This was an important

feature of the parties' submissions at the Employment Tribunal hearing: the Employment Tribunal noted that their representatives put the issue at the forefront of their submissions.

11. In the course of its findings of fact the Employment Tribunal set out material which might point in favour of one party or the other. It recorded (paragraph 39) that Mr Secrett disputed the Claimant's evidence that he was reassigned in September 2012; but it noted that the Claimant's evidence was consistent with what had been said in a later grievance procedure. It noted that in December 2012 the Claimant had signed a document headed "individual employee rehabilitation" which said that he would be the subject of further onsite assessments and that "until we have Peter's complete assessments, your duties will consist of running keys and meets" (paragraph 41). It recorded Mr Cox's concession in cross-examination that it was indeed the Claimant's understanding that the reassignment was long-term and that he allowed that understanding to continue.

12. The Employment Tribunal said the following (at paragraph 43):

> **"43. On this state of the evidence, the Tribunal finds that Mr Powell understood that the change of role to key running was long term and Mr Cox allowed him to believe that, until May 2013. However, the discussion was always in the context of making adjustments for Mr Powell's disability. Mr Powell understood that it was a long term change of role, because he understood, according to all medical advice he had received, as had management, that his back condition was permanent in the sense that no permanent cure could be found for his susceptibility to further recurrences of back pain and restrictions of movements which might cause absences."**

13. In due course the Employment Tribunal rejected the Claimant's contention that his contract had been varied so that he was entitled to the key runner job at the SLM rate for the following reasons:

> **"75. We have set out the relevant facts. What is clear is that the employers in this case were seeking to make reasonable adjustments for an employee whom they understood to be disabled. They were therefore fulfilling their statutory duty. An employer is entitled to insist on an adjustment, irrespective of whether the employee suggests it. It follows that an adjustment can be effective without the consent of the employee, albeit, it may be difficult to put into effect in practical terms, and therefore it differs from a variation of contract, which requires consent.**

76. It is also an important feature of making reasonable adjustments that their duration is measured by the effect they have upon the alleviation or elimination of the disadvantage caused by the disability. Therefore, they may be limited in time or indefinite. They may also be subject to a change in circumstances: for example, there may be a change in the effects of the disability; a deterioration in terms of the impairment; or a change in the work concerned, which has an effect upon the disabled employee. All of these changes of circumstances must be the subject of consideration by the employer, and adjustments, if it is reasonable to make them.

77. It was submitted by Mr Sonaike that there must have been a contractual variation in this case, given that Mr Powell's rate of pay remained unchanged for the 12 months or so during which he was working to amended duties. We cannot agree with that submission. It does not address the relevant facts of this case, which include the regular reconsiderations of Mr Powell's role, together with the regular referrals to OH, which he always knew might have an effect on the arrangements for his work.

78. There was never a time in our judgment, when the parties agreed, expressly or by implication, that Mr Powell's contract of employment had been varied so that, as a permanent change to his work, he would continue in the key running role at his previous rate of pay as an SLM engineer. If there had been such a contractual variation, it would have been followed up by a written confirmation, consistently with the previous history, which we have set out of such written confirmations when he changed role.

79. We do not lose sight of the fact that Mr Powell understood that the change to his role was long term, and Mr Cox allowed him to believe that, but that understanding by Mr Powell could not last beyond May 2013, when Mr Cox made the position absolutely clear on behalf of the employers. Furthermore, because the actions on both sides were consistent with the making of reasonable adjustments because of Mr Powell's disability, it is not necessary to imply that there must have been a contractual variation."

14. At this appeal the Claimant has represented himself. He has, however, relied upon a cross-appeal drafted on his behalf by his counsel. He submits that the Employment Tribunal's reasoning contains an error of law. Contrary to paragraph 75 an employer cannot require an employee to accept an adjustment. If an employee agrees to an adjustment it will be effective both as a reasonable adjustment and as a variation to the terms of the contract. This legal error must have affected the Employment Tribunal's conclusion in paragraph 78. Alternatively the conclusion in paragraph 78 was perverse.

15. On behalf of the Respondent Mr Kendall accepts that the Claimant was given the role of key runner at SLM salary, that he understood it to be "long-term" and was allowed by Mr Cox to believe this until May 2013. He stresses however that the issue for the Employment Tribunal was whether there was an agreement that this would be permanent. There was in truth no such agreement because the change of role took place in the context of Occupational Health referrals

which might have an effect on the arrangements for his work. A mere change of working practice over a period of time cannot, of itself, give rise to an implication of a variation of contract: see **Aparau v Iceland Frozen Foods plc** [1996] IRLR 119 EAT and **North Lanarkshire Council v McDonald** UKEATS/0036/06. He submits that paragraph 75 was not central to the Employment Tribunal's reasoning.

16. In my judgment there is no doubt that paragraph 75 of the Employment Tribunal's Reasons contains an error of law. If an employer proposes an adjustment which is incompatible with the terms of the contract of employment, the employee is entitled to decline it: the adjustment will not be effective without agreement, that is to say without a variation of the contract. No doubt in the vast majority of cases such agreement will be forthcoming; but there will be cases where an employee does not agree with a proposed adjustment. In such a case an employer is not entitled to impose it if the adjustment is incompatible with the terms of the contract of employment.

17. Paragraph 75 must have been included in the Employment Tribunal's Reasons because it formed part of its reasoning for rejecting the Claimant's case. It is not entirely easy to see what role it played in the subsequent reasoning. It seems to lie behind paragraphs 77 and 79 of the Employment Tribunal's Reasons; and I have been unable to avoid the conclusion that it forms part of the Employment Tribunal's basis for the conclusion in paragraph 78.

18. In my judgment it is clear that there was a variation of the contract between the Claimant and the Respondent in the latter part of 2012. Until that time he was employed by the Respondent as a SLM engineer at the rate of salary for that job. It is clear that the Claimant and the Respondent agreed to replace his obligation to work as a SLM engineer with an obligation

to work as a key runner at the same rate. The real question between the parties related to the terms of this variation. Employers and employees often agree such variations: it is not at all unusual for there to be an agreed change to an employee's work or location on terms that one or other or both parties may bring it to an end, or on terms that it shall last for a particular duration or the completion of a particular job. The word "secondment" is often used to describe such a variation. However, the position may not be so straightforward where the change takes place in the context of a disability: there may be no intention that the employee will ever return to the previous work, or that the adjustment will last for a particular duration or that one or other or both parties may bring it to an end.

19. I would expect the Employment Tribunal in such a case to make careful findings as to what was said and done on each side at the time of the variation. Key meetings appear to have involved Mr Secrett in September 2012 and Mr Cox in December 2012 (and perhaps thereafter as well). Having made those careful findings, I would expect the Employment Tribunal to have careful regard to the objectivity principle. The terms of a contract - or a variation - are not to be ascertained by looking at the subjective intentions of the parties, but by assessing the words and conduct of the parties objectively, having regard to the context.

20. I do not discern this approach in paragraphs 75 to 79 of the Employment Tribunal's Reasons. There are no clear findings as to what was said at the time it was agreed, as it plainly was, that the Claimant would be employed as a key runner. The finding that the Claimant believed his role to be long-term, and Mr Powell allowed to believe it, coupled with the application of an objective test to the words and conduct of the parties, might suggest that the variation was permanent, in the sense that neither party had a unilateral right to insist on a return to the role of SLM engineer or to some other role. The fact, on which the Employment

Tribunal placed reliance, that the Respondent did not confirm the variation in writing may mean that the Respondent subjectively did not intend the variation to be permanent; but whether the words and conduct of the Respondent, viewed objectively, lead to this conclusion may be a different matter. I have come to the conclusion that the Employment Tribunal did not in the end make clear findings of fact as to what was said and done by the parties, and what were the terms of the varied contract, at least in part by reason of the mistaken approach set out in paragraph 75 of its Reasons. I do not think the finding in paragraph 78 can safely stand.

21. I do not find **Aparau** and **McDonald** particularly helpful to the question the Employment Tribunal had to decide. In those cases the question was whether there was a variation at all: silence was insufficient material from which to find a variation. In this case there was without doubt a variation: the Employment Tribunal had to find what the terms of the variation were.

Reasonable Adjustments - The Employment Tribunal's Reasons

22. The Employment Tribunal, having found against the Claimant on the variation issue, went on to find in his favour that the Respondent failed to make the reasonable adjustment of allowing him to work as key runner at the salary rate of a SLM engineer. Having reached that conclusion it also found as a consequence that dismissal amounted to discrimination arising from disability and was unfair.

23. The Employment Tribunal applied guidance set out in **Environment Agency v Rowan** [2008] ICR 218 EAT at paragraph 27. It answered the "Rowan questions" as follows:

> **"92. The provision criterion or practice was a requirement to be fit to do the SLM work.**
>
> **93. The substantial disadvantage to which Mr Powell was subjected, compared to employees who were not disabled, was that he was unable to carry out his duties as an SLM engineer and therefore be contractually entitled to the rate of pay for that job. That disadvantage was therefore either dismissal or a reduction in pay.**

94. That adjustment, which was reasonable to make to remove that disadvantage, was to employ him in the key running role, as a permanent position, without reduction in his pay.

95. In reaching that conclusion, we take into account the fact that the employers were treating this as a new role, in which they had a free hand to determine the rate of pay; and in so far as it involved an element of positive discrimination, then it was justified in the interests of securing the continued employment of Mr Powell, at relatively small cost, in the long term, to the employer.

96. Therefore, we find that the Respondent discriminated against Mr Powell by failing to make reasonable adjustments and by dismissing him, because they dismissed him for his refusal to agree to a lower rate of pay."

24. In answering the questions in this way, the Employment Tribunal built upon an assessment which it already set out in paragraphs 86 to 90 of its Reasons:

"86. The Tribunal's conclusion is that it starts with the consideration that the employers in this case had a duty to consider making an adjustment for Mr Powell which would enable him to remain in employment, at the same rate of pay but in a role which was different to that which he had occupied as an SLM engineer. They had that discretion.

87. The rate of pay for the role which was finally offered to Mr Powell, was determined by HR. It took into account existing rates of pay, in other roles, but it was not the subject of negotiation, either individual or collective, and it is clear that the Respondent company had a free hand in deciding what the rate should be.

88. The difference between the rate of pay Mr Powell had as an SLM engineer at the time when he was fulfilling the key running role, and the rate of pay which was offered to him in the same role, equivalent to that of an FLM engineer, was about £2,484 per annum. Therefore, given his age and the prospect that he would be employed for at most probably another 15 years, the difference over that period of time would be £37,260. From the Respondent's point of view, there would be a slight increase in the additional cost to them, but no evidence was put before the Tribunal to enable us to calculate what that additional cost would have been.

89. It is clear that this is a company with very substantial resources, for whom that additional annual cost would have been easily affordable. There is no evidence that anyone was [particularly] concerned about it during the time that Mr Powell was employed; and Mr Wood was able to offer reinstatement with back pay calculated at the higher rate.

90. The main objection put forward by the Respondent to paying Mr Powell at the higher rate, according to the evidence of the witnesses, was that it would cause discontent amongst other employees if they came to know that Mr Powell had been given this special treatment. We make two comments about that proposition. Firstly, no evidence was put before us about anyone else being in the same position. This was treatment which was completely individual and restricted to the circumstances of Mr Powell's case. If anyone complained, the employer had an obviously available argument that what they were doing was a reasonable adjustment for a disabled employee, and that the law required it. Secondly, there was in fact no evidence before the Tribunal about any complaints been made [sic] by any other employees throughout the whole of the year or so and Mr Powell was in key running role at this higher, original rate of pay."

Statutory Provisions and Guidance

25. The duty to make reasonable adjustments is imposed upon an employer by section 39(5) of the **Equality Act 2010**. The duty is defined in section 20 and schedule 8 of the Act. The key provision for the purposes of this case is section 20(3):

> **"20(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."**

26. I should also refer to section 20(7):

> **"20(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty."**

27. The *Statutory Code of Practice on Employment* (2011) sets out guidance on factors which might be taken into account in deciding whether it is reasonable to make a particular adjustment. It is relevant to quote three paragraphs of this guidance:

> **"6.25. Effective and practicable adjustments for disabled workers often involve little or no cost or disruption and are therefore very likely to be reasonable for an employer to have to make. Even if an adjustment has a significant cost associated with it, it may still be cost-effective in overall terms - for example, compared with the costs of recruiting and training a new member of staff - and so may still be a reasonable adjustment to have to make.**
>
> **…**
>
> **6.28. The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:**
>
> - **whether taking any particular steps would be effective in preventing the substantial disadvantage;**
> - **the practicability of the step;**
> - **the financial and other costs of making the adjustment and the extent of any disruption caused;**
> - **the extent of the employer's financial or other resources;**
> - **the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and**
> - **the type and size of the employer.**
>
> **6.29. Ultimately the test of the 'reasonableness' of any step an employer may have to take is an objective one and will depend on the circumstances of the case."**

28. The guidance goes on to give examples of reasonable adjustments in practice: see paragraph 6.33. Many of these examples will involve additional cost to the employer concerned. An example is given of transferring a disabled worker to fill an existing vacancy: but this example does not include any element of pay protection. Another example given is "modifying performance-related pay arrangements for a disabled worker".

Submissions

29. Mr Kendall's submissions begin with the way in which the Employment Tribunal defined disadvantage. He accepts that the PCP was a requirement to be fit to do the SLM job; he accepts that the disadvantage was that the Claimant was unable to carry out these duties and was liable to dismissal: see for formulations of this kind **Archibald v Fife Council** [2004] ICR 954 HL at paragraph 42 and **Griffiths v Secretary of State for Work and Pensions** [2016] IRLR 216 CA at paragraph 47. But he criticises the Employment Tribunal's further conclusion that the disadvantage was "either dismissal or a reduction in pay". There was never any question of the Respondent reducing the Claimant's pay for the SLM job. A non-disabled person unable to do the SLM job but able to do the key runner job would be paid at the rate for the key runner job: there was no comparative disadvantage. He relied for support on cases concerned with sick pay and benefits such as **O'Hanlon v Commissioners for HM Revenue & Customs** [2007] ICR 1359 CA and **Newcastle Upon Tyne Hospitals NHS Foundation Trust v Bagley** UKEAT/0417/11.

30. Mr Kendall submits that, having defined disadvantage in this way, the Employment Tribunal approached the duty to make reasonable adjustments from the wrong starting point: see paragraph 86 of its Reasons. In effect it imposed a secondary duty relating to the Claimant's pay although, by providing the key runner job, albeit at a reduced rate of pay, the

Respondent had already complied with its duty to make adjustments. Moreover, paragraph 86 erred in focusing upon the Respondent's reasoning rather than the question whether it was objectively reasonable for the Respondent to have to take the step in question.

31. Further, Mr Kendall submits that the Employment Tribunal's approach is fundamentally contrary to the purpose of the reasonable adjustment provisions in disability legislation. This is to assist persons who have disability to obtain employment and integrate them into the workforce. It is not to treat them as objects of charity. For this proposition he relies on **O'Hanlon** at page 1373F, quoting the earlier decision of the Employment Appeal Tribunal. The Employment Tribunal's approach, if applied across the board to persons with disability, might have huge implications for the Respondent's budget.

32. In response to these submissions the Claimant, with the assistance of the written answer prepared by his counsel, makes the following points.

33. Firstly, there can be no doubt that the duty to make reasonable adjustments was in play; on any basis the requirement to work as a SLM engineer placed the Claimant at a disadvantage because he was unfit for the role and liable to be dismissed. However the fact that he would face a reduction in pay by virtue of transfer to a different role was a further disadvantage of which the Employment Tribunal was entitled to take cognizance. The Employment Tribunal was not imposing a distinct secondary duty; simply applying the single duty which undoubtedly existed. Paragraph 86 of the Reasons was doing no more than stating that the Respondent had the power, if it chose to do so, to retain his existing salary when employing him as a key runner.

34. Secondly, the Employment Tribunal had not erred in law in its approach to the duty to make reasonable adjustments. The purpose of the duty is to alleviate the disadvantage to disabled persons to the extent that it is reasonable to have to do so. The Employment Tribunal had considered the evidence before it and reached a tenable view on the question of cost. The Respondent had paid the Claimant for doing the key runner job at the rate for a SLM engineer for a year; it put forward no financial evidence suggesting that it was unable to do so.

Conclusions

35. The Employment Tribunal was correct, in paragraphs 92 to 96 of its Reasons, to set out its conclusions by reference to the different elements of section 20(3) of the **Equality Act 2010**. This is in accordance with the familiar and valuable guidance set out in **Rowan**. It is important, however, to appreciate that in respect of the reasonable adjustment which the Employment Tribunal upheld, paragraphs 94 to 96 state summary conclusions following from its earlier findings.

36. The Employment Tribunal identified the PCP in paragraph 92: it said this was the "requirement to be fit to do the SLM work". No complaint is made by either party of this definition and I do not think the precise wording mattered in this case. It could have been put even more simply as the Respondent's requirement that he do the SLM engineering work.

37. The Employment Tribunal then considered, in paragraph 93, whether the PCP placed the Claimant at a substantial disadvantage compared to employees who were not disabled. Contrary to the submission of Mr Kendall, I see no error of law in the way in which the Employment Tribunal approached this issue. The Employment Tribunal was plainly entitled to say that the Claimant was at a disadvantage because he was unable to carry out his duties as a

SLM engineer and therefore be contractually entitled to the rate of pay for the job. Something was therefore going to have to give. Either he would be dismissed or he would have to accept something at a lower rate of pay - the choices he was actually faced with in 2013 by the Respondent.

38. At this point in its reasoning the Employment Tribunal was not considering comparative disadvantage by reference to the key runner job. It was simply stating the obvious about the Claimant's disadvantage because he was unfit to do the SLM job. It is true that it would have been sufficient for the Employment Tribunal to say that the Claimant was liable to be dismissed: see **Archibald** at paragraphs 11 to 12, 42 and 62. In this case, however, the Claimant was actually faced with a choice between dismissal or taking a job at a lower rate of pay, and the Employment Tribunal did not err in law in saying that he was disadvantaged in these ways when non-disabled persons would not have been.

39. In truth this case was not about comparative disadvantage: as in most cases concerned with the duty to make reasonable adjustments (other than attendance management cases, as to which see most recently **Griffiths v Secretary of State for Work and Pensions** [2016] IRLR 216 CA) the PCP could be easily defined and the comparative disadvantage was plain to see. The real issue related to the adjustment. Was it reasonable for the Respondent to have to place the Claimant in the key runner role while keeping his existing pay?

40. The question whether the Claimant's pay should be protected in this way was the real issue in the case: the Respondent had been prepared to offer him the key runner job at the lower rate of pay. He, however, wished to retain the rate of pay which he had been led to believe was long-term and which he had actually been paid for the last year. This was what the Respondent

was asked to consider at the time it dismissed him. This is, I think, the point which the Employment Tribunal was making in paragraph 86 of its Reasons.

41. I agree with Mr Kendall that the language in paragraph 86 is not well chosen. The duty to make reasonable adjustments is not a duty to consider; it is a duty to take a concrete step or steps. If it was not objectively reasonable for the Respondent to have to take a particular step, it would not be in breach of duty merely because it had failed to consider taking it. But, looking at paragraphs 86 to 96 of the Employment Tribunal's Reasons as a whole, and bearing in mind that it stated the law correctly in its Reasons, I do not think the Employment Tribunal fell into this error. Read as a whole, the Employment Tribunal decided that it was objectively reasonable for the Respondent to have to take the step in question.

42. I come then to Mr Kendall's root and branch attack on the Employment Tribunal's finding. Did it reach a finding which is fundamentally contrary to the purpose of the reasonable adjustment duty, as he submits?

43. It is inherent in the legislative scheme of the **Equality Act 2010** that the duty to make reasonable adjustments may require the employer to treat an employee more favourably than others: see **Archibald** at paragraphs 47 and 68 (Baroness Hale). It is also well established that the duty may require an employer to transfer an employee to a different role; in principle, if it is reasonable for the employer to be required to make this adjustment it may even be to work at a higher grade and without competitive interview: this was the "step" which the House of Lords remitted to the Employment Tribunal for consideration in **Archibald**.

44. I can see no reason in principle why section 20(3) should be read as excluding any requirement upon an employer to protect an employee's pay in conjunction with other measures to counter to the employee's disadvantage through disability. The question will always be whether it is reasonable for the employer to have to take that step.

45. 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):

> **"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."**

46. The issue is thrown into sharp relief in a case of this kind, where the reasonable adjustment involves a transfer to a different role. But 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.

47. 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". Suppose, for example, that there is a choice between keeping an employee in an existing role, paying for support and assistance, or transferring the employee to a new role where no support or assistance is required but the pay is lower, such that an Employment Tribunal considers it reasonable for the employer to have to protect the employee's pay. I see no reason in principle why the one should be a "step"

within section 20(3) but the other should not be. The latter may indeed sometimes be less costly for the employer than the former.

48. The 2011 *Code of Practice* is not an authoritative statement of the law. But I find the example of modifying performance-related pay helpful as illustrating how adjustments to pay may be required in combination with other adjustments. The example is:

> **"A disabled worker who is paid purely on her output needs frequent short additional breaks during her working day - something her employer agrees to as a reasonable adjustment. It may be a reasonable adjustment for her employer to pay her at an agreed rate (for example, her average hourly rate) for these breaks."**

49. This in effect protects the employee's pay; and the underlying assumption of the illustration is that it may be reasonable, as a component of an adjustment, to ensure that the employee is paid in respect of time when she was not working. In my experience this is not unusual when an employee is permitted additional absence for illness, rehabilitation or training. All this seems to me to be in accordance with the policy of the **2010 Act**, and I do not think it offends against any of its provisions.

50. The principal case upon which Mr Kendall relied is **O'Hanlon v Commissioners for HM Revenue & Customs**. In that case the Claimant was entitled under sick pay rules to a maximum of six months full pay in any 12-month period and half pay for a further six months. She claimed as a reasonable adjustment that her employers should have paid for all disability related sickness absence at full rate. She was unsuccessful before the Employment Tribunal.

51. The Employment Appeal Tribunal (Elias P presiding) accepted that the duty to pay money to an employee who was absent sick was in principle capable of falling within the duty to make adjustments. In this it followed and applied **Meikle v Nottinghamshire County**

Council [2005] ICR 1 CA (see paragraphs 59 to 62, Keene LJ). The Employment Appeal Tribunal did not rule out in principle the possibility that a claim for enhanced sick pay might be sustainable. But it found that it would be a rare and exceptional case; and the Employment Tribunal had been entitled to reject the employee's argument. In a passage on which Mr Kendall places strong reliance, Elias P said this:

> **"68. First, the implications of this argument are that tribunals would have to usurp the management function of the employer, deciding whether employers were financially able to meet the costs of modifying their policies by making these enhanced payments. Of course we recognise that tribunals will often have to have regard to financial factors and the financial standing of the employer, and indeed section 18B(1) requires that they should. But there is a very significant difference between doing that with regard to a single claim, turning on its own facts, where the cost is perforce relatively limited, and a claim which if successful will inevitably apply to many others and will have very significant financial as well as policy implications for the employer. On what basis can the tribunal decide whether the claims of the disabled to receive more generous sick pay should override other demands on the business which are difficult to compare and which perforce the tribunal will know precious little about? The tribunals would be entering into a form of wage fixing for the disabled sick.**
>
> **69. Second, as the tribunal pointed out, the purpose of this legislation is to assist the disabled to obtain employment and to integrate them into the workforce. All the examples given in section 18B(3) are of this nature. True, they are stated to be examples of reasonable adjustments only and are not to be taken as exhaustive of what might be reasonable in any particular case, but none of them suggests that it will ever been necessary simply to put more money into the wage packet of the disabled. 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."**

The argument in the Court of Appeal was on a narrower point. Hooper LJ said that he considered the approach taken by the Employment Appeal Tribunal to have "much force" (paragraph 57).

52. In my judgment the decision in **O'Hanlon**, provides no support for excluding pay protection in principle from the ambit of section 20(3): if enhanced sick pay is within its ambit, albeit in a rare and exceptional case, I can see no reason why ordinary pay should not be. Moreover, some care must be taken to read the words of Elias P in paragraphs 68 and 69 in context: as he emphasised, it was not a single claim turning on its own facts, but a claim which inevitably applied to many others.

53. As Elias P himself observed, within individual claims Employment Tribunals often have to have regard to financial factors including the financial standing of the employer. The issue of cost was discussed in **Cordell v Foreign and Commonwealth Office** [2012] ICR 280 EAT, a case which I drew to the attention of the parties. Underhill P said:

> **"30. We will address those points in turn, but we should say by way of preliminary that a decision about what steps are reasonable for the purpose of section 4A(1), as glossed by section 18B(1) - and particularly in this context about how much it is reasonable for an employer to be expected to spend - cannot be a product of nice analysis. There is no objective measure that can be used to balance what are in truth two completely different kinds of consideration - on the one hand, the disadvantage to the employee if the adjustments are not made and, on the other, the cost of making them. The Act requires tribunals to make a judgment, ultimately, on the basis of what they consider right and just in their capacity as (and the hackneyed phrase has real meaning here) an industrial jury. That is not to say that tribunals should simply stick a finger in the air. Their judgment of what level of cost it is reasonable to expect an employer to incur can be informed by a variety of considerations that may help them to see the required expenditure in context and in proportion. Besides the points made in the Commission's Code of Practice, and of course the degree to which the employee would benefit from the adjustment, the relevant considerations may include (and we are not intending to be exhaustive): the size of any budget dedicated to reasonable adjustments (though this cannot be conclusive - see below); what the employer has chosen to spend in what might be thought to be comparable situations; what other employers are prepared to spend; and any collective agreement or other indication of what level of expenditure is regarded as appropriate by representative organisations. But such considerations can only help up to a point: even when they have been identified, they can be of no more than suggestive or supportive value (a point which it is necessary to bear in mind when deciding how much time and effort should be put into investigating them). Ultimately there remains no objective measure for calibrating the value of one kind of expenditure against another."**

54. The remark of Elias P in **O'Hanlon** that the objective of the legislation was not to treat disabled person as "objects of charity" must again be read in the context of the appeal, where the proposed adjustment was simply to augment sick pay. As we have seen, the objectives of the legislation plainly envisage an element of cost to the employer; if an adjustment is one which it is reasonable for the employer to have to make, it is not a matter for charity, but a legal requirement reflecting the expectations of Parliament and society. The objective is to keep employees in work, and I see no reason why a package of measures for this purpose, which includes some pay protection, should not be a reasonable adjustment.

55. The other case which Mr Kendall pressed upon me in support of his submissions is **Newcastle Upon Tyne Hospitals NHS Foundation Trust v Bagley** UKEAT/0417/11. In that

case and NHS employee suffered an injury at work by virtue of which she had a disability. There was a benefit available to her, TIA, which would potentially increase her earnings to 85% of full pay, but it was available only to employees who were absent, not to employees on a phased return to work. I would observe in passing that the position within the NHS has now changed; the injury benefit now payable is available in connection with a phased return to work; and it was plainly unsatisfactory that the old TIA should not have been available to help injured employees on an agreed phased return to work. But I would also observe that the benefits concerned were only available in any event to employees who had been injured at work; they were not general benefits for persons with a disability.

56. The employee argued that, along with changes to her duties and hours, the Trust should have paid her TIA or an equivalent to supplement her part-time work. The Employment Tribunal accepted that argument. The Employment Appeal Tribunal allowed the appeal, applying **O'Hanlon**. The foundation of the employee's claim was her disability, not the fact that her injury was at work. Her argument would have involved not only re-writing the terms of TIA (which the Employment Tribunal had misunderstood) but also extending a very generous benefit to all persons who had a disability or at least means testing them all, see paragraphs 90(d)-(e) of the Employment Appeal Tribunal's judgment.

57. I think, however, that some care needs to be taken with part of the reasoning in **Bagley**. The PCP in that case was defined as the Trust's policy of paying people for the work they do. The Employment Appeal Tribunal said (paragraph 90(a)):

> **"90(a) It has failed to recognise that, in relation to pay, the Claimant is in fact in exactly the same situation as anyone else returning to work on a part-time basis for whatever reason, whether that be because of an accident or because of maternity or childcare reasons. Accordingly, the PCP does not place her at a disadvantage in comparison with someone not disabled."**

58. However this part of the reasoning seems to depend on the particular formulation of the PCP. **Archibald** shows that in most cases a PCP can be defined quite simply. In **Bagley** the employee worked full time: her contract required her to do so. Her disability prevented her from working full time rendering her liable to dismissal. The requirement to work full time plainly placed her at a disadvantage compared to persons who were not disabled. The true question was what steps it was reasonable for the employer to have to take to alleviate that disadvantage. The PCP selected in **Bagley** may have obscured the real question.

59. I do not think that **Bagley** can or should be read as saying that the law can never countenance a package of adjustments which includes a payment to an employee for time not worked. Policies relating to "disability leave", "rehabilitation leave" and "phased return" are now common in the employment field; it is not unusual (though by no means universal) for them to contain some payment for time not worked.

60. 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 of reasonable adjustments to get an employee back to work or keep an employee in work. They will be single claims turning on their own facts: see **O'Hanlon**. The financial considerations will always have to be weighed in the balance by the Employment Tribunal: see **Cordell**. I make it clear, also, that in changed circumstances what was a reasonable adjustment may at some time in the future cease to be an adjustment which it is reasonable for the employer to have to make; the need for a job may disappear or the economic circumstances of a business may alter.

61. I do not, however, accept that the Employment Tribunal erred in law or was perverse in the conclusion it reached. The effect of its decision was to say that the Respondent should have continued an arrangement which had already been in place for nearly a year and which it had led the Claimant to expect to be long-term. The Employment Tribunal took into account and analysed such financial evidence as it had bearing on the question whether it was reasonable for the Respondent to have to take a step in question. The main reason for not paying the Claimant the SLM rate was said to be the likelihood of discontent from other employees: this is an unattractive reason, and the Employment Tribunal was entitled to reject it for the reasons it gave in paragraph 90.

62. It follows that the appeal will be dismissed.

63. If I had not thought that the appeal should be dismissed, I would have allowed the cross-appeal and remitted the question whether there was a variation of the contract of employment to the same Employment Tribunal for reconsideration. I am inclined to think that, since the appeal is dismissed, there is no practical point in remitting the variation issue: the Claimant was in fact paid at the SLM rate until his dismissal, and his compensation for disability discrimination will be based on the reasonable adjustment which the Employment Tribunal found to exist. If either party wishes to contend that there is any practical point in remitting that issue, they must do so in writing within 14 days of this Judgment, and I will consider the matter. Otherwise there will be no Order on the cross-appeal.