

# VRA AGM and Conference - Thursday 26<sup>th</sup> June 2008

## Workshop 3: Making Reasonable Adjustments Clive Langman

The workshop will start with a focus that is probably new to many VRA members, although it implicitly underpins much adjustment activity...and that is how an Employment Tribunal determines reasonable adjustment. The stages of the workshop are:

1. The legal concept and application of reasonable adjustment.
2. Making adjustments.
3. Case studies:
  - a) modification to equipment and co-worker training.
  - b) job restructuring and equipment modification.
  - c) job carving and equipment modification.
  - d) use of job analysis and adjustment for short-term memory.
  - e) changes in employment policy, job sharing, flexible scheduling, changes in work environment and social support.
4. Group exercise: case study traumatic brain injury.

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## 1. Concept and Application of Reasonable Adjustment

It is discrimination by an employer to fail to make reasonable adjustments to overcome any arrangements, including physical features, placing the disabled at a substantial disadvantage, unless that failure is justified. The kind of adjustments the 1995 Act had in mind included the rearrangement of duties, working hours or place of work, the provision of a support worker or the alteration of premises. The duty to make reasonable adjustment is bounded by cost, cost/benefits, scale, disruption etc. Cases are cited that have set the parameters for reasonable adjustment:

**a) Employee:** In **Tarling v Wisdom Toothbrushes (1500 148/87. 24 June 1997)** the applicant had worked for the respondent for 18 years. By 1996 she was in increasing pain from a club foot and her productivity dropped. The employer sought advice about special chairs but did not install one. Instead Mrs Tarling was dismissed. Her complaint to the tribunal was upheld and her reinstatement was ordered. The employer subsequently bought a chair costing £1,000 of which £800 was paid for through the Access to Work scheme.

In **Morse v Wiltshire County Council (EAT 1 May 1998) (E0R80)** the applicant was a road worker who could not drive. His complaint to the ET was dismissed. The EAT said the tribunal had erred in its approach to reasonable adjustment and remitted the case for rehearing. The tribunal must go through a number of sequential steps:

1. Decide whether there is a duty on the employer in a particular case that is whether or not the employee is at a **substantial** disadvantage in comparison with able-bodied employees.
2. If so, whether the employer has taken such steps as it is reasonable in all the circumstances to prevent the substantial disadvantage occurring.
3. If not, enquire as to whether the employer could reasonably have taken any of the adjustments set out in the Act as examples.

An important decision came from **Mulligan v Inland Revenue (EAT 2 December 1999)** when it was determined that the duty of reasonable adjustment does not require the employer to accept a lower level of productivity. Mr Mulligan, with the use of one arm, had contended that targets should not apply to a disabled person because these represented a detriment. The employer had made a number of adjustments but successfully maintained that these should not extend to lowering the minimum performance standards.

In **Jones v the Post Office (EWCA, Civ 558, 2001)** Mr Justice Pill declared that the DDA rights must be considered in the context of an employer's duties generally and threw out an EAT decision based on sound medical opinion. The original tribunal was right to accept what appeared to be equally good medical advice. It was not for the tribunal to assess that evidence, only to assess its reasonableness i.e. even if disagreeing with it had to be respected provided it was plausible. In other words, the tribunal is to judge reasonableness not correctness.

A case that went to the Lords is **Archibald v Fife Council (House of Lords, 2004 UKHL 32)**. Mrs Archibald was a road sweeper who could no longer sweep roads. She was retrained as a clerk. However every time she applied for a post in the Council she was not selected as the most suitable applicant and she was dismissed after unsuccessfully applying for 100 posts.

The Lords said that an example in the Act of reasonable adjustments is transfer to other work, but it does not say at what grade, and held that there was nothing to prevent the Council from promoting Mrs A, and this would have occurred had it not been for the policy of competitive interviews. A disabled employee *can* be treated more favourably, for example, by exempting them from competition.

Finally, in respect of employees it is worth noting the Public Sector Equality Duty introduced in the 2005 Act. This new duty requires public sector employers to promote positive attitudes and equality of opportunity, and to prepare plans indicating how they propose to do this.

The above cases refer to applicants in employment. There were also a number of early cases that gave guidance on recruitment and dismissal procedure.

**b) Recruitment:** The case of **Williams v Channel 5 (230126, 24 October 1997)** emphasised the need for the employer to act swiftly. Mr Williams did not complete the third day of a re-tuning training programme because it involved a video without sub-titles. He later completed the course with one-to-one training but, by then, all the jobs had gone. The tribunal held that failure to make adjustment to the training course was an act of discrimination. The employer's argument that no duty arose until there training was completed was rejected. Employers should plan ahead.

Likewise a deaf applicant succeeded in **Murphy v Sheffield Hallam University (2800489/98, 11 November 1998)** because no interpreter was available at the interview.

**c) Dismissal:** In **Smith v Carpets International (180050/97, 11 Sept 1997)** in a case of a warehouseman with controlled epilepsy, the company doctor concluded that it was dangerous for him to work because of the amount of heavy machinery and fork-lift activity. A risk assessment concluded that no adjustments could be made to the work. The following year his consultant reported he was fit to return but the company doctor disagreed arguing that the consultant did not know the specific dangers of the workplace. The employee was offered alternative work but refused and was eventually dismissed. The employer accepted that this was less favourable treatment because of his disability but that this was justified. The tribunal held that the reasons were material and substantial and that reasonable investigations had been carried out regarding adjustment. It was not reasonable to totally adjust the way the work was carried out.

**d) The carrying out of assessments:** A key recent case is **Spence v Intype Ltd (EAT 27.04.07 0617/06)** when the EAT ruled that an employer's failure to obtain an up-to-date medical report before dismissing a disabled employee was not, in itself, capable of amounting to a breach of the duty to make a reasonable adjustment. The issue was whether or not the necessary adjustments had been made. On a separate point, when assessing whether the employee's condition was long-term, the tribunal should have disregarded events occurring after the date on which the alleged discrimination occurred. In **Mid Staffordshire General Hospitals NHS Trust v Cambridge (EAT 2003 IRLR 566)** the EAT held that a proper assessment of what is required to eliminate the disabled person's disadvantage is a necessary part of the duty to make reasonable adjustments.

In a later case, **Tarback v Sainsbury's Supermarkets Ltd (EAT 2006 IRLR 664)** the EAT rejected this analysis, noting that if there was separate stand alone duty to make an

assessment of a disabled person's situation then one would have expected it to be expressly mentioned in the DDA list of various reasonable adjustments.

The EAT in *Tarbuck* also endorsed **British Gas Services Ltd v McCaull (EAT 2001 IRLR 60)** in which it was held that there is no automatic breach of the duty to make reasonable adjustments simply because the employer is unaware of the duty; the key question is what steps that employer did or did not take. In this case the EAT held there was no basis for making a distinction between an employer's failure to consult a disabled person and to obtain an up-to-date medical report. Both are part of the procedures that an employer will sensibly adopt when determining what adjustments are reasonable. However, if a failure to consult cannot, in itself, constitute a breach of the duty then neither can a failure to obtain a medical report. The issue is whether reasonable adjustments have been made, whether by luck or judgement is immaterial.

In short, in *Spence* the EAT ruled that the carrying out of an assessment itself does not comply with the duty to make reasonable adjustments. However it will make an employer better informed of the steps to be taken. The DDA is not concerned with how these steps are determined. This means that an employer who has not carried out an assessment may nevertheless make all the necessary reasonable adjustments. However the EAT went on to state that the carrying out of an assessment is always a good practice and in many cases a failure to consult will result in a finding of unfair dismissal. Accordingly, employers are well advised to conduct an assessment, regardless of whether they are strictly required to do so under the DDA. The employee in *Spence* was granted leave to appeal and the Disability Rights Commission sought to intervene as it considered this case and *Tarbuck* to have been wrongly decided.

**e) Training:** All disabled employees should have equal access to a company's training programmes. The employer must make reasonable changes to improve the accessibility of a training programme. Changes might include:

- providing individual training for disabled employees to use any adaptations or special equipment used in the workplace
- providing training over a longer period for employees who can only attend a training course for a limited number of hours per day
- re-training employees who become disabled to allow them to remain in their present job or take a different job
- providing training material in different formats, making sign language interpreters available and allowing trainees to bring a personal care attendant on a course
- adjusting physical training locations

The employer should also ensure that they:

- train other staff to understand their policy towards disabled people
- provide disability equality training for all staff who have contact with the public
- give the example of good practice by setting standards within the organisation
- ensure the services they are providing are accessible to disabled people

## **Employment Tribunals:How a claim is assessed.**

Claims are made to regional Employment Tribunals. There is substantial website guidance available ([www.employmenttribunals.gov.uk](http://www.employmenttribunals.gov.uk)). Legal aid is not available. An issue for any applicant to consider is whether or not it is financially worth their while bringing a case. Whilst there is no need for an applicant to instruct a solicitor or barrister there can be little doubt that appropriate expertise helps parties to focus on the legal issues a tribunal must consider. However, even if successful, the remedy (compensation) in some cases may not meet the legal costs and if benefits (such as the jobseeker's allowance or incapacity benefits) have been paid, pending a hearing, these have to be repaid. Some solicitors will work on a 'no win, no fee' basis and, unlike personal injuries litigation, the law allows solicitors to work for a fixed percentage of any compensation.

Trade unions provide free expert support for their member. Others may consult the Citizens Advice Bureau and expert support is often freely provided. ACAS provides impartial advice to applicants and employers. A number of human resource companies and free-lance HR consultants act for applicants and respondents. They have a range of fee paying arrangements. Their quality varies considerably.

Tribunal membership consists of an Employment Tribunal Judge, a solicitor or barrister, employed by the Employment Tribunals Service, or a part-time chairperson drawn from private practice but with extensive experience of employment law. They are accompanied by two lay members selected from a competitive procedure run on behalf of the Department for Constitutional Affairs. Historically the members have been nominated by the TUC and CBI so every tribunal has a 'trade union' and 'employer' member. These days there is open competition and applications are invited. The members do not 'take sides' but consider the merits of the arguments. Their role is to advise the chair on non-legal issues and contribute towards the judgement. For example, a tribunal may conclude that an employer failed to follow the correct procedure in a claim for unfair dismissal but that, if the correct procedure had been followed, the applicant would have lost his job anyway. The Employment Judge might want to know how long it might reasonably have take to have run the correct procedure, including a right of appeal, so the applicant would be compensated for a loss of earnings during this period. Common enquiries Judges to members relate to such matter as personnel procedure, wage rates and labour market circumstances. Members receive specific training for hearing DDA cases.

Tribunals follow procedural guidelines in determining the validity of a claim. The arrangements prior to any hearing are subject to a case management discussion (CMD) and, sometimes, a pre-hearing chaired by the Employment Judge. Typically such hearings occur when an employer denies a disability. This process requires the parties to make explicit their case and meet deadlines for providing information. Failure to comply may result in a case being struck out. Cases are run in the normal court procedure of evidence in chief and cross examination. In respect of matters commonly arising in cases of reasonable adjustment Tribunals are likely to consider the following issues:

### **Failure to make adjustment:**

1. Did a provision, feature or practice applied by or on behalf of an employer place the complainant at a substantial disadvantage in comparison with non-disabled persons?
2. (If applicable) Did the physical features of the employer's premises place the complainant at a substantial disadvantage in comparison with non-disabled person?
3. Was the employer made aware of the claimant's disability?
4. Did the employer take such steps as reasonable to take in all the circumstances to prevent the provision, criterion, practice or feature having a disadvantageous effect?

A 'no' response to Q1 does not necessarily lead to a claim failing if Q2 applies. A 'yes' response to Q1 leads straight to Q3. Positive answers to Q3 and a negative one to 4 will lead to a complaint succeeding.

## 2. Making Adjustments

The most commonly required adjustments (Needels and Schmitz, 2006) are:

- provision of equipment adapted for a disabled person
- modification of the workplace or premises
- changing the location of a job
- redesigning work duties
- reallocation of worker to another job
- flexible working hours
- special leave or additional time off work
- additional support on the job

Essentially the objective is to achieve a 'good fit' between the client and the job. The necessary work-site tasks to undertake this (with some overlapping between them) are:

- undertaking job and tasks analyses
- assessing work station accessibility and usability
- job design

Obviously we have not got the time to develop these techniques today. The point is that adjustment refers to:

- physical/environmental circumstances
- tools/aids/adaptations
- social circumstances

**Environmental engineering** refers to changes made to the job site or work station to facilitate the worker's adaptation to the work setting and promote independent task performance.

**Prosthetic Aids** involves the design and use of materials or devices to compensate for an inability to perform specific tasks such as check lists, electronic signalling devices, telememo devices, personal directories, and microcassette recorders.

**Cognitive orthotic devices** refers to a specific type of prosthetic aid which performs a specific cognitive process or task required in a certain job. Many of these devices take the form of microcomputer software, such as spell checkers.

**Social circumstances.** Accommodating neurological impairments imposes particular challenges. There are several ways in which cognitive deficits may be addressed including:

- environmental engineering
- prosthetic aids and assistive devices and cognitive orthotic devices.

In addition

- job restructuring
- flexible scheduling,
- position transfer
- relocating the work space

may be remedies that assist some workers.

The Job Accommodation Network (JAN) database (Morgan Town, West Virginia) is described. Beginning in 1992, a computerised data system identified 396 TBI clients. Subjects discussed up to three accommodation needs with JAN consultants:

1 The most common type (61%) was modifying work activities. Such modifications often took the form of flexible scheduling, modifying communication formats with supervisors and co-workers (e.g. receiving/giving written as opposed to verbal instructions), and colour coding materials.

2 The next most frequent accommodation need (60%) involved an assistive device. Breaking down this category further showed 20% were computer-related product needs. Typical accommodations in this category included time management systems (either computer or paper-based), buying headsets to reduce extraneous sounds and purchasing modified keyboards.

3 The third area of accommodation needs was work station modifications (18%) which included erecting sound barriers to reduce distractions, repositioning materials for easier access and individual task lighting. With specification of the problems, employers and employees were able to target appropriate accommodation solutions.

Other examples of adjustments include:

- a chemical detector for a worker with anosmia, so that he would be alerted by the presence of ammonia gas in a warehouse
- split-screen software for a clerical worker who could not read a computer screen past the left mid-line
- a ladder with locking castors and side rails to allow a worker with a balance problem replace ceiling lights, part of his job
- allowing a worker reporting stress a period of time without telephone interruptions so they could concentrate on production
- relocating the worker to a less distracting work area
- using one worker as a mentor for another.

VR clients sometimes have difficulties in accepting the use of compensatory strategies due to a variety of reasons such as embarrassment, considering they do not have a problem, or being pessimistic about their value. Suggestions for ensuring the optimal use of compensatory mechanisms:

- capitalising on strengths
- involving the client in the development of strategies
- improving efficacy by helping the client to understand the potential value of the technique
- monitoring the effectiveness and value of strategies because the client's needs and abilities will change over time
- introduce strategies gradually to avoid overwhelming the client.

**In addition to adjustment I would add that placement and retention strategies can be enhanced by utilising:**

**A) self-management**

**B) natural supports in the workplace.**

When asked to run this workshop it was suggested that I might like to consider other disabilities/conditions for the case studies than the main ones on today's agenda, this is fine...but it also needs to be recognised that individuals with similar characteristics and job duties can have different accommodation needs. For example, a person who has difficulty organising their daily schedule may benefit from the use of a computerised pocket organiser. On the other hand, some individuals with cognitive problems would find such devices difficult to programme or confusing to use and might benefit more from a simple paper-and-pencil organiser with 'things to do today' section.

In the circumstances I've decided to present a number of case studies of VR clients with different conditions and how they have been accommodated. There is then a larger TBI case study for the group to consider.

### **3. Case studies**

#### **Case study 1 Jane: modification to equipment and co-worker training**

**Jane** is a gregarious 18 years old who loves cooking. A trial placement was arranged for her with a fast food chain. Although it was apparent the manager had some misgivings in respect Jane's visual impairment her personality persuaded him to 'give her a chance' to show that she would make a good employee.

**Transport;** the job coach worked with Jane and her parents to get her to and from work. Trial runs were made with public transport and Jane's mum helped out by driving Jane when this was necessary.

**Modifications:** indelible marks were made on oven dials to facilitate the right settings.

**Co-worker training:** during her induction period Jane was given careful step by step instructions accompanied by a sequenced picture chart. Whenever Jane had difficulty remembering a task co-workers referred to the chart. Staff taking written orders were given felt tip pins and asked to record them legibly for Jane and to state the nature of the order.

**Social mentoring:** Jane is now employed 24 hours a week. She occasionally becomes frustrated when unable to keep up with orders and her output declines. In such a circumstance Jane has been encouraged to do what other staff do, complain and ask for assistance. One particular member of staff has befriended Jane and often chooses to work alongside her when the restaurant is busy.

### **Case study 2 - Wayne: job restructuring and equipment modification**

**Wayne** is a clerk in a large computer supplies company undertaking filing, data entry and photocopying in a busy order department. He is autistic and seldom initiates discussion. He works with methodical accuracy but slowly. The following measures were taken to provide natural supports and enable Wayne to be more productive.

**Job restructuring:** Wayne used to finish his work and sit there waiting for the next task to be allocated. His job was restructured so that when a task was completed a backlog of office data for computer entry, that had been accumulating over a period, was always on hand.

**Equipment modification:** to file the data Wayne had to use a computer program that was overly complicated for the task in hand. A staff programmer was brought in to streamline the program and make it more user-friendly.

**Changes in how tasks are done:** at the suggestion of a co-worker the format on the data sheet was changed to enable Wayne match the contents against his program and make data entry more easy.

### **Case study 3 Gabby: job carving and equipment modification**

**Gabby** is a clerical assistant in a government department. She is restricted by cerebral palsy. The following adjustments were made:

**Job carving:** job analyses were undertaken in the department to identify tasks compatible within Gabby's capabilities. Three that did not typically get completed, and in which Gabby was interested, were identified. They performed the basis of a job description for a new post within the department.

**Equipment modification:** a template was purchased to put across the keyboard and reduce the prospect of hitting two keys at the same time.

**Co-worker support:** female staff volunteered to accompany Gabby to the staff restaurant so that she would not feel left out.

**Environmental accommodation:** Gabby was located in a ground floor office to reduce the travelling distance from the car park to the office. Grab rails were fitted in a ground floor toilet. She remains brought to and from work by a taxi paid for by Access to Work.

#### **Case study 4 Mick: use of job analysis and accommodation for short-term memory**

**Mick** works in a nursing home as an assistant. However, until some creative job development and adjustments were made his short-term memory was proving an insurmountable obstacle to holding down a position.

**Job analysis and creation:** during the VR process it was identified that close relative's of Mick owned a nursing home. They were willing to employ him in some role provide he could work reliably without constant supervision. A job analysis identified three tasks that Mick could do and in which he expressed an interest: folding laundry, tidying a garden area and clearing the dining room after meals. A 20 hours per week job was created around these tasks.

**Accommodation for short-term memory:** at first the duty manager tried posting a daily list of activities but this did not work, particularly when outside and there was nobody there to prompt him.

A co-worker noted that Mick regularly checked his mobile phone every day for text messages. His daily tasks were then posted onto his phone appearing every time he checked it. This accommodation was so successful that Mick got into such a routine that the need to prompt him declined over a period.

**Co-worker support:** co-workers were encouraged to get Mick to check his phone and not to distract him from his routine.

#### **Case study 5 Joe: changes in employment policy, job sharing, flexible scheduling, changes in work environment and social support.**

**Joe** had 9 years experience as a technical writer for a magazine before he began to lose time as a consequence of mental health issues. The following adjustments allowed him to keep and succeed in his job.

**Changes in employment policy:** after three hospitalisations the employer agreed to a change in contractual terms whereby Joe receives payment per short-term assignment and article. Flexibility was built into the arrangement to allow for a continuity of payment.

**Job sharing:** if Joe is unable to meet a deadline due to a health-related problem two other employees have been identified to cover the additional work.

**Flexible scheduling:** the new contract is based on working a certain number of hours per week. When the hours are worked is not an issue so Joe is allowed to come in late, leave early or have time off for health reasons.

**Social support:** with the difficulty of returning to work after an absence co-workers agreed to offer Joe encouragement and, if ever absent, to keep him informed of office developments.

#### **4. Group case study exercise**

At the age of 14 Abby sustained a very severe brain injury when she was kicked on the left side of her head by a horse. PTA is reported as being "of at least four weeks duration". As she recovered, Abby was noted to have some physical weakness affecting her right side. Initially, she also lost the capacity to speak. She was discharged from hospital two months after her injury and made good physical progress but she was still mute and showed difficulties in understanding what was said to her. In September following discharge she had a Grand Mal fit and, subsequently, continued to be prescribed medication for epilepsy. When reviewed as an outpatient one year after her accident, Abby had regained her ability to speak but showed considerable difficulties in expressing herself and understanding language. There remained a mild weakness on her right side.

Following injury Abby was unable to re-integrate into her usual school. She attended a boarding school, where she obtained GCSEs in Art (E) and Pottery (C). She left school to attend a Child Care Foundation course at a local college, being taken by a taxi four days a week.

By the following Easter Abby was reported to be "struggling" at college due to fatigue. She was subsequently allowed to work at home and earned credits towards a Level 1 in Caring Services.

On leaving college Abby was taken by her support worker to see the local DEA. However, no support was forthcoming. The DEA declined to offer support on the basis that the level of reported fatigue contra-indicated future employability.

In September of the same year, with the assistance of her mother and support worker, Abby obtained a position as a care assistant working two afternoons a week from 2.00 pm to 5.00 pm. Whilst she was able to maintain an appropriate relationship with the residents of the old people's home, she had difficulties with the staff. It was reported that when told to do two or three tasks she would forget what she had to do or muddle her instructions. Responses were described as "inappropriate". She left after a period of three months.

Abby then obtained a position as a volunteer classroom assistant working two afternoons a week. Her job was to support the children at play times and listen to them reading. An attempt was made to increase the number of hours worked by Abby by attending school a further two mornings a week to assist the children with mathematics and English. However Abby could not answer the questions asked by the children and this attendance was dropped.

Because Abby was only attending the school two afternoons a week during term time, Abby's mother and support worker looked for alternative positions.

The following November Abby was offered a position as an assistant caretaker at a local Study Centre, totalling six hours per week. Following a medical examination the authority accepted KW as a permanent member of staff but subject to her not lifting any heavy objects and always having a support worker present. She continues to undertake this Permitted Work.

## **Clinical Information**

Over the years Abby has been seen by a wide range of specialists who made various observations in respect of her employability. Abby's mother describes her daughter as having problems with:

fatigue  
memory  
planning  
disinhibition  
mood swings  
irritability/temper

A neuropsychologists concluded that KW was "probably of at least average ability" before the injury but her principal difficulties are now;

- severe impairment in language skills adversely affecting both verbal expression and comprehension as well as the level of reading and writing. In addition, Abby showed problems with immediate repetition of verbal information and mental arithmetic.
- difficulty remembering and reporting verbal information. Whilst it was considered this could be due principally to the language difficulties, it was possible that memory function was also impaired (visual memory is probably affected little, or not at all, by language impairment but this area was also problematic).
- reduced visual spatial reasoning and visual motor speeds (suggesting that intellectual difficulties may be wider than those relating to language skills).

**What sort of adjustment strategies do you consider could be used to facilitate a higher/increased level of employment for Abby?**

**Are these adjustments 'reasonable' as required by the DDA?**