The Work Couch

Navigating today's tricky people challenges to create tomorrow's sustainable workplaces

RPC

Season 3

Episode 16 – Disability at work (Part 2): What is a "reasonable" adjustment? with Victoria Othen

Ellie: Hi and welcome to the Work Couch Podcast, your fortnightly deep dive into all things employment. Brought to you by the award-winning employment team at law firm RPC, we discuss the whole spectrum of employment law with the emphasis firmly on people. Every other week, we unpack those thorny HR issues that people teams and in-house counsel face today, and we discuss the practical ways to tackle them.

My name is Ellie Gelder. I'm a senior editor in the Employment, Engagement and Equality team here at RPC. And I'll be your host as we explore the constantly evolving and consistently challenging world of employment law and all the curve balls that it brings to businesses today. We hope by the end of the podcast that you'll feel better placed to respond to these people challenges in a practical, commercial and inclusive way.

This week, we're picking up our conversation on disability at work and the duty to make reasonable adjustments. Specifically, what amounts to a reasonable adjustment and how do employers assess this in practice? And I'm delighted to be joined once again by consultant employment lawyer at RPC, Victoria Othen, who is frequently advising clients from all sectors on the whole spectrum of equality and discrimination law.

Hi, Victoria. Thanks for coming back to pick up on this conversation, which is so topicalal right now.

Victoria: Hi again, Ellie. Really pleased to be here again. Yes, I agree. This is really an area that affects so many of our employer clients of all sectors and size. And we know that from the number of enquiries that we get regarding it.

Ellie: Yes, indeed, which is why we've decided to do this podcast. And as we learned in part one last time, the government announced earlier this year, its proposals to overhaul the disability benefit system, which includes the introduction of a right to try work guarantee.

Victoria: Indeed, Ellie, as we discussed last time, the right to try work guarantee, and that is quite a mouthful, I've stumbled over it several times, the right to try work guarantee will mean that people who are in receipt of disability benefits will be able to try work without having to worry that their benefits will be reassessed. The fact that a disabled worker is going to try work or is on a pathway to employment reportedly this will never lead to an immediate reassessment or award review of their disability benefits. So the aim is that they should not be penalised for trying work.

I really think it's worth saying that this reform, whilst its stated intentions are laudable, there's a risk that it might lead to an uptick in employment tribunal claims. I think for things like failures to make reasonable adjustments, because we know that generally, in general terms, there is a gap in knowledge amongst employers about the legal duty to make reasonable adjustments and a lot of employers do struggle with that area of the law.

Ellie: Yeah, absolutely. And you mentioned some research in part one last time about that. That leads us on perfectly then to our main point of discussion. First of all, where does an employer begin when working out what a reasonable adjustment might be?

Victoria: Well, I think the first thing to flag here is that often reasonable adjustments can be low or can in fact be of absolutely no cost to the employer. I think also it's an important thing to remember that what is reasonable is actually an objective test. It's not up to the employer to define. It's not up to the employee to define. Ultimately, this is a determination that would be made by an employment tribunal. But it's an objective test. What would be reasonable in any particular case will depend on all the circumstances. I think a really helpful place to start is to think about what areas of challenge may be faced by the disabled worker in question. In some cases, that will be more obvious. So perhaps those with specific physical disabilities, but with others, their areas of challenge may only effectively be known after detailed discussion with them or with others, perhaps those who know their duties and responsibilities well, line managers, perhaps, or human resources specialists, perhaps colleagues within IT who might know the potential limitations of software and hardware or perhaps in conjunction with occupational health or other medical advisors.

Ellie: And I just want to explore with you that term reasonable because we often hear it in the law, don't we? So what factors might be relevant when assessing the reasonableness of an adjustment?

Victoria: Yeah, you're right, Ellie. The word reasonable is used in all contexts of employment law and case law. And again, it's something that's really employers really struggle with because what is reasonable? Who defines reasonable? For the purposes of the duty to make reasonable adjustments, which is a legal obligation defined by Section 20 of the Equality Act. The Equality and Human Rights Commission guidance, is guidance which can be taken into account by employment tribunals, states that relevant factors include, and I'm going to list them here, the extent to which an adjustment is likely to be effective, the financial and other costs of making the adjustment, the extent of any disruption caused, the extent of an employer's financial resources, the availability of financial or other assistance, for example, access to work and the type and size of the employer. So you can see from that list of criteria what might be reasonable in one context might not be reasonable in another context. It really is fact specific.

Ellie: The first factor you mentioned, the extent to which the adjustment is likely to be effective, does that mean that if the adjustment wouldn't make any difference, that that would indicate that it wouldn't be a reasonable adjustment?

Victoria: In many cases, yes, but not necessarily. So I'm thinking in particular about a case, a 2010 case, called *Noor v Foreign and Commonwealth Office* in which a disabled job applicant who had dyslexia brought a claim on the basis that the interview process caused him to suffer a disadvantage.

The EAT, so that's the Employment Appeal Tribunal held, that even though the claimant would still not have been offered the job, that was not fatal to his case. Now, that principle was considered, again, just to elaborate on it with a little bit more explanation, in another case called *Dominique v Toll Global Forwarding Ltd,* there's a mouthful. That was a case from 2013. That also illustrates the same point. Again, the Employment Appeal Tribunal, who considered that case, they held that the employer should have made reasonable adjustments to its redundancy criteria. So here we're talking about a redundancy selection process. It held that even though an adjustment wouldn't have made any difference to the outcome, and to the fact that the disabled employee in this case was dismissed, it did find that it was possible for that employee to be placed at a disadvantage in relation to the interview process itself, and for the adjustment to relate to the person's experience of that process, rather than the overall outcome. So there we were talking about the disadvantage being the experience of the interview process rather than the dismissal itself.

Ellie: Yeah, I think some employers will be really surprised that they might have to adjust redundancy selection criteria, interview selection criteria, even if those adjustments would not have made any difference to the final selection outcome as you've just explained. So it's really helpful to hear these real-life examples. If we look now at the whole employment life cycle, you've just mentioned an interview process at redundancy stage, but what will employers need to think about in terms of reasonable adjustments at the recruitment stage?

Victoria: Yeah, so going right back to the beginning, before an employee even becomes an employee, we need to remember that the Equality Act applies to job applicants as well as workers and employees. And it's really important to make adequate and reasonable enquiries to find out firstly, if a job applicant is or could be disabled. And secondly, if they are, or could be disabled, what actions may be required to eliminate any substantial disadvantage to that applicant. This will be especially important in situations where the applicant indicates that they would encounter difficulties with the applications process, but they've not provided specific details.

So obtaining that information helps the employer to assess its obligations, both legally and practically. Now, there is, of course, a balance to be struck between respecting a person's privacy about sensitive personal information, which health information will be, on the one hand, but also on the other hand, making adequate enquiries to assess which reasonable steps need to be taken to avoid any disadvantage which could be posed by the recruitment process. So it's really crucial to communicate sensitively throughout the recruitment process and to really think about all communications written website or on applications forms or elsewhere. Drawing again on case law, a few years ago in the case of *AECOM Ltd v Mallon.* Job applicants in that case were required to complete an online application form, obviously really common these days. In that case, to access the form, applicants had to provide a password consisting of eight digits, including a special character. Again, really common scenario. Now, the claimant, Mr. Mallon, he had dyspraxia. He informed AECOM of his wish to apply for the role and he also provided information about his dyspraxia and how the condition affects people generally. He asked then whether he could make his application orally by telephone because of his disability, but AECOM refused the request and told him, no, you have to complete the online form as with all other applicants. He was advised to inform the HR team if he was struggling with any aspect of the form. Mr. Mallon did not inform the HR team about how his disability caused him difficulties and in particular in relation to creating a password and the reason that he gave for this was that there was a reported "fear of being laughed at in light of previous experiences with another employer". Ultimately, his job application was therefore unsuccessful.

Now, the Employment Appeal Tribunal held that AECOM had constructive knowledge of his disability and the disadvantage faced by him. In other words, they knew he was dyspraxic and had they made reasonable enquiries about the effect of his condition, for example, by telephoning him, it would have had the required knowledge of the effect of this disability and the substantial disadvantage for him. Consequently, the duty to make reasonable adjustments, for example, by sending the form to him or by creating a password for him and emailing it to him, that came into play in that particular case.

Ellie: And can you just explain what are the legal risks of making those enquiries, asking somebody about their health or disability pre-employment?

Victoria: Yeah, so pre-employment, there are certain requirements under the Equality Act and they are really important considerations. I just want to go through them in a little bit of detail and really try to unpick what they mean.

So under section 61 of the Equality Act, an employer must not ask about the health of an applicant either before offering work to that applicant or where the employer is not in a position to offer work, they should not ask those questions before including the applicant in a pool from whom it intends to select.

So asking an applicant a prohibited pre-employment health question will not in itself amount to discrimination. I think that's important to say. So it's not, it does not amount to discrimination to ask those questions. The problem is where a job applicant is then rejected and they bring a claim or argue that an employer's decision was "in reliance on information given in response to such a question", the burden of proof will automatically shift to the employer to show that no direct discrimination took place. Now, I'm aware that that's a really complex legal situation.

It can have specific legal implications if pre-employment health questions are asked and then subsequent to that, a job applicant is rejected from a post. So I think it's really important in those situations for employers to think carefully and preferably to take legal advice because it's a really difficult area to navigate.

Ellie: And are there any exceptions to that prohibition you've just outlined?

Victoria: Yes, so in relation to the pre-employment health questions, there are a number of exceptions. So in other words, there are situations in which employers can ask those questions. Now, those questions must be necessary. First of all, that's important to remember. Pre-employment health questions will not be prohibited where they are deemed to be necessary for a series of reasons. And for the sake of clarity, and brevity, I will describe the main situations in which they could be deemed to be necessary. First of all, to establish if an applicant will be able to undergo an assessment, for example, an interview process. Secondly, to establish if reasonable adjustments might be needed for that assessment. Thirdly, to establish if a particular applicant will be able to carry out functions which are " intrinsic to the work concerned". And another example is to monitor diversity, finally in connection with permitted positive action. So there are exceptions, but they need to be considered carefully.

Ellie: Okay, so let's go back to the employment lifecycle and the duty to make reasonable adjustments, which often crops up in terms of performance management, promotion and also attendance management. So can you just talk us through those?

Victoria: It does, really crops up really often in those situations. So often employers really struggle with considering how policies and procedures might need to be adjusted, not just physical equipment or premises. So if we look for example, firstly, performance management and promotion. There's a first instance decision, so a case from the employment tribunals called *Waddingham v NHS Business Services Authority*. So that was a case in which the claimant who was undergoing treatment for cancer, she applied unsuccessfully for a job, having been made redundant by the same employer case, an employment tribunal held that her performance at interview was affected by cancer treatment and that it would have been a reasonable adjustment for the employer to assess her suitability for the role without requiring a competitive interview, for example, by referring to previous appraisals. Now, the claimant in that case was awarded over £100,000, £115,000 in compensation in compensation. So that is a pretty clear example of how getting it wrong can be extremely costly. And we mentioned last time, the fact that menopausal symptoms can amount to a disability. There was a case decided last year in the Scottish employment tribunal called *Shearer v South Lanarkshire Council,* which involved a claimant being required to relocate. Now the claimant suffered from menopausal symptoms, stress, anxiety and depression and it was agreed by the parties that this amounted to a disability at the relevant period of time. The tribunal held in that case that the employer should have allowed the claimant to continue working in her existing job location because her aggravated symptoms were inextricably linked to the instruction to move to her other place of work and this was confirmed by occupational health reports.

So there's a couple of cases which might be of help to employers but it's important to remember they are first instance decisions. Now that means they're not binding on subsequent case law decisions but it is a reminder in employment tribunals of how far the duty to make reasonable adjustments can extend.

Ellie: So have you got some examples of what the appellate courts are saying in relation to this kind of stage of the employment life cycle?

Victoria: Yes, I think there's two really helpful cases. One is a pretty well-known case called *Archibald v Fife Council*. That was a 2004 case in which at that time the House of Lords held that where an employee is off sick and is certified as medically unfit to perform their current role, it can actually be considered a reasonable adjustment to automatically place that person in a vacant role without a competitive selection process, even where such a post is at a higher grade. So that could mean giving disabled employees priority over others, such as those at risk of redundancy. So again, the duty to make reasonable adjustments can reach much further than you think. In other words, there was an employee here, couldn't perform his contractual role but it was held that placing him in a vacant role at a higher grade was held to have been a reasonable adjustment in that case.

In addition, there was a case last year called *Rentokil Initial v Miller*, a 2024 case, which the EAT considered. In that case, Mr. Miller, who was diagnosed with multiple sclerosis, in his particular circumstances, it was found that there was no way for him to continue in his contractual role and he applied for a desk-based role, but then he performed poorly in standard of written tests. Now, a manager who considered his application decided that he didn't have relevant skills or experience and he was not offered the alternative role. But an employment tribunal upheld his claim that Rentokil had failed to make a reasonable adjustment when it didn't offer him a trial in the alternative role. It found that he was entitled to be treated more favourably than other candidates. In other words, he should not have been required to undergo a normal competitive recruitment process because there was a reasonable chance that he would have performed better in the trial than the written test suggested. So again, a really helpful example of how far that duty to make reasonable adjustments can extend in those situations.

Ellie: And to go back to your point that reasonable adjustments can actually be a low or no cost to the employer. Have you got any examples from practice that you can give us that might be appropriate during employment?

Victoria: Of course, yes. You're absolutely right, Ellie, adjustments can be really simple and cost neutral or can result in no additional cost or inconvenience in the workplace. So a few examples I can think of, it can be as simple as changing the length of particular meetings or the format. Perhaps dimmable lighting or expressing clear deadlines or communicating deadlines. Also making adjustments to policies and procedures, particularly things like trigger points for attendance and performance policies. Another thing that really is helpful. We see this so many times that employees ask for flexible working. That's something which often employers are reluctant to consider but can actually work out to be beneficial for both parties. And then adjusting communication. So that might be verbal, it might be the style or format of certain written communications.

Ellie: And actually while we're here, Victoria, I mentioned last time the brilliant neuro inclusion masterclass programme that you are spearheading together with RPC and Auticon. And that's actually a very timely example of a reasonable adjustment.

Victoria: Indeed it is there's a recent case in which which was reported in the national press in which it was found that obliging employees to attend neurodiversity awareness training can potentially constitute a reasonable adjustment. And I think in general there's an increasing demand for employer clients for guidance on how to implement neuroinclusive work environments. So yes, I am thrilled to be delivering this masterclass, as you say, in partnership with Auticon. Auticon are a global IT consulting business and social enterprise, and their whole aim is to promote neuro inclusion in the workplace. They themselves exclusively employ adults on the autistic spectrum in permanent roles as IT consultants. They provide training based on their own lived experience and perspectives. So we combined, we put our heads together and we offer a combined masterclass that offers and covers both the legal and human perspectives. And in that we include loads of interactive elements to really arm attendees with practical takeaways to help them take back to the workplace.

Ellie: Yeah, it's so brilliant. We've had wonderful feedback from clients already. So we're almost out of time, but can I just ask you to finish off by running through your top tips for employers when they are looking to comply with their duty to make reasonable adjustments?

Victoria: Yeah, I would say, first of all, don't delay, don't procrastinate a decision on reasonable adjustments. We see this time and time again, employers just don't know what to do, so they don't do anything at all. But delaying really can lead to more problems later down the line. It's a case of really taking the initiative and often things are not as complicated as you might perceive them to be. Secondly, do ask for the employees' views on what they would consider to be reasonable. Consultation is really important and a failure to consult with a disabled worker can in itself mean that, you know, a duty to make reasonable adjustments has not been affected. At the same time, though, it's important to bear in mind that they may not know what adjustments they may need. They may, I think they will always be able to give helpful information, but they may not precisely know what adjustments they would need. That may be the case often where a person might have a neurodivergent or mental health condition, but they may be able to give information and in discussion and dialogue with the employer further investigation can then establish what those adjustments could be. Also, I think there are some really helpful resources out there, such as the Equality and Human Rights Commission guidance, really helpful plain language guidance and the ACAS code as well. ACAS is a really helpful source of information on reasonable adjustments. Look as well at the Access to Work Scheme and occupational health guidance, but also other free resources from charities. So the ADHD Foundation or Scope or Disability Rights UK. They all have really, really helpful resources on their websites about reasonable adjustments. And then you might want to think about medical evidence medical evidence is invariably helpful. So occupational health advice or advice from a workplace specialist advisor. Document everything. So when reasonable adjustments have been decided and implemented, it's really important to document when they were implemented, how they were implemented. So that there's a clear demonstrable record of what has been done by whom and when. Just a couple of points to bear in mind as well. Confidentiality, so that's clearly going to be paramount, but if an employee consents, it may be helpful to inform colleagues of the adjustment so that they are aware and encouraged to be supportive. And I think finally keeping dialogue open and really thinking about the language that is used in communications. It's important to adopt neutral language, sensitive language, emotionally intelligent language and to avoid any description which could be deemed to be prejudged or generalising.

So just really carefully thinking about what is communicated in each particular case.

Ellie: Thank you. Some excellent practical takeaways there. Thanks so much, Victoria, for this really insightful and helpful two-part podcast.

Victoria: No problem, Ellie, really enjoyed every moment of it, thank you.

Ellie: If you would like to revisit anything we discussed today, you can access transcripts of every episode of The Work Couch podcast by going to our website: www.rpclegal.com/theworkcouch. Or, if you have questions for me or any of our speakers, or perhaps suggestions of topics you would like us to cover on a future episode of The Work Couch, please get in touch by emailing us at theworkcouch@rpclegal.com – we would love to hear from you.

Thank you all for listening and we hope you'll join us again in two weeks.