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## Swapping disabled employee's role held to be a reasonable adjustment

The Employment Appeal Tribunal ("EAT") has this week upheld a tribunal's ruling that, for the purposes of the Disability Discrimination Act 1995 ("the DDA"), it would have been a reasonable adjustment for the employer to swap the disabled employee's role with that of a non disabled employee.

This case, *Chief Constable of South Yorkshire v Jelic*, concerned a police constable who was diagnosed with chronic anxiety syndrome and unfit for front line duties in 2002. He was therefore moved to a role which involved no face to face contact with members of the public in 2004, after repeated periods of stress related sickness absence. After this move, the claimant performed their role to a high standard and had no significant periods of sickness absence.

However, in 2007, the duties of the role were re-assessed and the claimant referred, without warning, to a doctor to discuss his medical retirement. A report was produced by the doctor stating that the claimant was permanently disabled from performing the full duties of a police officer. The claimant did not appeal against the findings of the report and was retired on an ill health pension in May 2008. He then raised a claim against his former employers for disability related discrimination and discrimination by reason of failure to make reasonable adjustments.

The employment tribunal held that, in light of the House of Lords decision in *Lewisham v Malcolm*, there was no disability related discrimination. However, it did find that the respondent was under a duty under the DDA to make reasonable adjustments to accommodate the claimant and it had breached this duty by failing to either swap the claimant's job with a police offer who did not deal with members of the public on a face to face basis or to offer the claimant medical retirement and subsequent employment as a civilian.

On appeal to the EAT, the respondent argued, amongst other matters, that although transferring employees to fill existing vacancies is a measure contained within the DDA, swapping jobs with other employees went well beyond what was envisaged as a reasonable adjustment. The EAT disagreed, holding that although it was not a reasonable adjustment to allow retirement and redeployment in a civilian post, the swapping of jobs was a reasonable adjustment in the circumstances. The EAT accepted that such an action was not a reasonable adjustment in every situation and for every employer, but the nature of the police force meant that it was reasonable in this case. Again, this decision emphasises the burden that is placed on employers to consider all potential reasonable adjustments to premises or working practices to take account of the needs of a disabled employee or job applicant.

## Tribunal holds football assistant referee retirement age of 48 unlawful



The claim of *Martin and others v Professional Game Match Officials Limited* was brought by a number of football assistant referees after they were forced to retire at the age of 48, as per the respondent's policy. Claims for unfair dismissal and age discrimination were raised by the claimants and the employment tribunal's decision has this week been released.

Initially, the tribunal found that the claims for unfair dismissal were not valid, as the claimants did not fit into the definition of "employee" for the purposes of the Employment Rights Act 1996. However, it did consider the claims for age discrimination under the Employment Equality (Age) Regulations 2006 ("the Regulations"). As the retirement age of 48 was lower than the current statutory retirement age of 65, it was directly discriminatory. Therefore, the tribunal had to consider whether this retirement age was a proportionate means of achieving a legitimate aim.

It held that there was a legitimate aim to the discrimination, namely creating a career route for match officials of appropriate ability. However, if went on to hold that a policy could only be a proportionate means of achieving a legitimate aim if it could be shown there was no less discriminatory way of achieving such an aim. The tribunal identified that there were a number of alternative measures that could have

been taken including objective fitness and competence assessments which had no regard to age. It also noted that the Dutch football authorities had abolished their upper age limit in 2000 and there was no evidence to suggest that this had caused any difficulties.

The tribunal then went on to state that, even if it had found that the retirement policy was appropriate, the respondent had not justified why the retirement age was the specific age of 48 as opposed to any other age. It should be noted that this judgement is a tribunal decision, thus is not binding, and may be liable to appeal, but it serves to illustrate the potential difficulty in justifying a retirement age below the statutory retirement age.

## Court of Appeal rules closed procedures legitimate in tribunal proceedings



The Court of Appeal ("CoA") has this week confirmed in the case of *Tariq v The Home Office* that a party and their legal representatives may be excluded from part of the proceedings in an employment tribunal in the interests of national security. This decision arose from the claimant's allegations of racial and religious discrimination further to his suspension as an immigration officer after members of his family were arrested, and one convicted, on terrorism charges. The Home Office defended its actions, justifying the suspension and withdrawal of security clearance as there was concern over whether the claimant could be

pressurised into abusing his position.

The Home Office further argued that much of its evidence to deny the allegations within the claim could not be disclosed to the claimant or his legal team in the interests of national security. The tribunal accepted this and held that some of the evidence should be given in private, with a special advocate to be appointed to represent the claimant's interests. The claimant appealed this to the Employment Appeal Tribunal ("EAT"), on the basis the use of these closed procedures was incompatible with his right to a fair trial under Article 6 of the European Convention of Human Rights ("ECHR") and EC law.

The EAT upheld the tribunal's decision but also held that Article 6 of the ECHR entitled the claimant to be given details of the allegations made against him in sufficient detail to enable his legal representatives to effectively challenge them. The claimant again appealed, but the CoA dismissed the appeal, holding that closed procedures in an employment tribunal are lawful, though the disadvantaged party has the right to be informed of the gist of the allegations against them.

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