



Freeneys Williams

Freeneys Williams Ltd.

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The Disability and Equality Agenda e-bulletin – May 2010

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1. New Equality Act

Some of the most significant changes to the new Equality Act can be found in the provisions relating to disability, most notably pre-employment health questionnaires and checks, discrimination by association and indirect discrimination. Read more at: <http://tinyurl.com/3a6dzwm>

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2. Mother wins long running battle for compensation

A mother who was allegedly discriminated against because of her disabled son won her long running battle for compensation earlier this month.

Sharon Coleman sued her former employers, a law firm called Attridge Law (now EBR Attridge), for disability discrimination. She claimed that her employers called her lazy and made it difficult for her to take time off work to look after her disabled son who had respiratory problems.

Sharon's case was extraordinary because she was claiming discrimination by association with a person from a legally protected group - in this case a disabled person.

The case was sent to the European Court of Justice to determine whether discrimination by association was prohibited under European law. For the outcome click:

<http://tinyurl.com/336tzab>

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3. New Coalition Government's plans for Access to Work

The government's new approach to supporting disabled people at work could make it easier for employers to make the most of the talents of disabled people, according to Employers' Forum on Disability (EFD). The coalition government published its programme for government on 20th May, which will see the reform of the Access to Work (AtW) programme so that disabled applicants can apply for jobs with funding already secured.

Read EFD's press release about the government's plans at: <http://tinyurl.com/28gqtt4>

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4. RADAR responds to ill-informed article about depression

A recent ill-informed and offensive article published by the Daily Mail about depression has led to the following response from RADAR:

We have all seen this before; celebrity hacks write totally ill-informed and offensive columns for the Daily Mail in the hope of generating as much outrage, and therefore publicity, for themselves and their careers as possible. It is a great pity that a newspaper which has done so much to tackle the stigma of mental health conditions should publish such an article, by someone who as Editor of the Independent on Sunday took a notable lead on mental health issues.

Like the attention-seeking of a toddler, and with a similar level of constructive and intelligent comment, these articles will usually disappear of their own accord eventually, but every so often an article comes along which is so ignorant, offensive and damaging that we feel compelled to respond.

To all those who would really rather we did not help to give Janet Street Porter the oxygen of publicity she is evidently seeking, we can only apologise in advance.

Let us begin with some basic facts. Firstly, depression is a major and sometimes debilitating health condition. It is not feeling sorry for yourself, it is not being in a bad mood, and it is not feeling under the weather, unable to cope or unhappy. Such insightful tips as getting a grip, pulling yourself together or any other such assistance from any number of books will no more cure or prevent depression than pleasant smells and blood-letting prevented or cured the Plague.

Secondly, depression is not always a result of external life experiences such as bereavement. Although stress and other negative life experiences can often be the triggers for depression, depression can happen to anyone, at any time. There does not have to be an obvious cause, but if you do experience depression, it is one of the most debilitating and least-understood illnesses you can have

Thirdly, depression is not only experienced by people who lack wealth, social status, or the ability to afford Jimmy Choo shoes. Stating that rich, socially-secure people with high-profile careers should not have depression is like stating that they should not get food poisoning or chicken pox: patently and utterly absurd - just ask Stephen Fry or, time travel permitting, Winston Churchill. Of course, people in powerful positions may find it easier to talk about depression – they have less to lose. In doing so they begin to make it easier for others to talk about it too – the millions living in poverty who are (as Janet rightly says) even more likely to experience depression - so for that reason we should thank them for it. The very last thing we should do is send them back into the closet by criticising them. How does that help the millions living in depression and poverty?

Fourthly, depression is a far more common condition than most people would credit. Many people have kept their experiences silent due to the ever-present stigma that is still attached to any form of mental health condition (and is perpetuated by the nonsense that has dribbled from Janet's pen); far from rubbishing those people who have been open about their experiences, someone with even the crudest understanding of depression would be congratulating them.

As with depression, stress-related conditions are genuine and debilitating, and certainly not the fashionable, trivial feelings of being frazzled that Janet Street Porter portrays. We now support people with depression to lead full lives- which is a lot easier if you are not living in fear of someone finding out your 'secret'. We don't cuff the sufferer around the ear and tell them to get on with dodging Doodlebugs (people who trivialise depression and stress often hark back to the 1st half of the 20th century), but then we used to treat fever by bloodletting anymore so what exactly is Janet's point? RADAR Empowerment Manager David Stocks, who has bi-polar disorder, said:

"The pressures of modern society for all people, whatever their background or social status, can lead to anxiety, depression or any other type of mental health condition. Depression is not trendy; it is a serious condition that can affect anyone. Try going into a hospital and speaking to a mental health patient about depression being trendy, and then you would see the stupidity of comments like these. Believe me, unless you have suffered from depression, you have no idea what it is like. It is not just a bad day, it is a world without colour, a world without hope and to many a world where life is not worth living. Reasoning such as "I have a good job, a good income, a good family" does not come into it: you cannot rationalise your way out of depression."

"That is the reality of depression and support is what people with depression need most, not condescending comments like it's the 'latest must-have accessory.'"

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5. Landmark disability discrimination case – woman wins payout

The woman at the centre of a landmark discrimination case in which the House of Lords clarified the UK's Disability Law has been awarded £125,000 compensation from her former employer. Elizabeth Boyle, who had developed vocal nodules which threaten speech, alleged she had been discriminated against by her former employer of 32 years, SCA Packaging. Read more at:

<http://tinyurl.com/2fa3tfm>

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6. Disability hate crime – how the “system” is failing

The desperately sad case of Michael Gilbert, a 26-year-old man who was shot, stabbed, kicked, jumped on, robbed and tortured for entertainment, before being murdered by his so-called friends, the Watt family of Luton, finally concluded recently with stiff sentences for those responsible. Read more about Michael's story and others', and how their requests for help were ignored at:

www.timesonline.co.uk/tol/comment/columnists/guest_contributors/article7113995.ece

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7. Swapping jobs – a reasonable adjustment

An EAT has upheld the employment tribunal's decision in the case of Chief Constable S. Yorkshire v Jelic that it might have been a reasonable adjustment to 'bump' a police officer who was not on restricted duties out of his job and into another one so as to be able to redeploy a disabled employee into that role - this was one he could do because it didn't involve face-to-face contact with the public. The EAT noted, however, that whether or not it is reasonable depends on the circumstances and won't be in every case and the fact that the police are a disciplined service i.e. they are required to do as they are told and work where they are told to makes it more reasonable for the police than perhaps other employees.

The full decision of the EAT is at the end of this Bulletin.

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Appeal No. UKEAT/0491/09/CEA

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal

On 24 February 2010

Judgment handed down on 29 April 2010

Before

THE HONOURABLE MRS JUSTICE COX

MRS L S TINSLEY

MR S YEBOAH

CHIEF CONSTABLE OF SOUTH YORKSHIRE POLICE

APPELLANT

MR M D JELIC

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

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SUMMARY

DISABILITY DISCRIMINATION

Reasonable adjustments

This appeal concerns the extent of a Chief Constable's duty of reasonable adjustments under the **Disability Discrimination Act** towards a serving police officer with chronic anxiety syndrome. The Employment Tribunal found that in the particular circumstances of the case it would have been reasonable (1) to swap the jobs being undertaken by the Claimant and another police constable in the circumstances; or alternatively (2) to medically retire the Claimant on a police pension and immediately re-employ him in a civilian support staff role in the Force. The Chief Constable appealed on several grounds, the main challenge being that the Tribunal was precluded as a matter of law from deciding that either of these could be reasonable adjustments under the Act. Appeal dismissed on this and other points, but appeal allowed on the basis of an inadequately reasoned decision on the medical retirement issue.

THE HONOURABLE MRS JUSTICE COX

1. The **Disability Discrimination Act 1995** (DDA) has applied to serving police officers in the employment field since October 2004. In this case Milorad Jelic (the Claimant) was a police officer with a disability. He was medically retired from the South Yorkshire Police in May 2008, and he complained that he had been the victim of unlawful discrimination. The Sheffield Employment Tribunal, in a reserved judgment dated 14 September 2009, upheld his complaint of disability discrimination by reason of the Chief Constable's failure to comply with the duty to make reasonable adjustments to accommodate him.

2. The Chief Constable's appeal from that decision raises some interesting questions concerning the extent of that duty. The Tribunal found that, in the particular circumstances of this case, (1) it would have been a reasonable adjustment to swap the jobs being undertaken by the Claimant and by PC Franklin at the time, so as to enable the Claimant's services to be retained; or, alternatively, (2) it would have been a reasonable adjustment to offer the Claimant medical retirement from the police force and immediate re-employment as a civilian in a police staff post, which was available and being advertised at the time his retirement was being considered.

The facts

3. The Claimant commenced service as a police constable, at the age of 40, in August 1997. He successfully completed his 2 year probationary period, and his service was uneventful until February 2002, when he was seconded to the Traffic Department in Sheffield. Whilst there he became unwell, developing what was subsequently diagnosed as a chronic anxiety syndrome. He was assessed at the time as suffering from occupational stress and was on sick leave for a period, returning to work in July 2002 on reduced hours and "recuperative duties", following a medical assessment by the Respondent's occupational health adviser, Dr. McAllister.

4. The Claimant then had further periods of sick leave for stress-related illness between 2002 and 2004. Dr. McAllister considered that he should return to work on reduced hours in a "non-confrontational environment" and, on his return in November 2004, he was assigned to the Community Service Desk at Stainforth. This involved work within the restrictions which applied to him and which involved little, if any, face to face contact with the public. Telephone contact was not a problem for him.

5. He gradually increased his hours of work and he was regarded as a conscientious worker. Although he was noted to have little resilience in the face of problems or setbacks in his working circumstances, he had no further, significant period of absence for almost 3 years.

6. In 2005 the Respondent amalgamated three units, including the Community Service Desk, to form the Safer Neighbourhood Unit (SNU). This merged unit moved from the Stainforth office to an office in Barnsley Road. The Claimant joined the SNU and continued to perform a similar role to that he had performed at Stainforth. In May 2005 the SNU moved, and the Claimant with it, to the Doncaster Police HQ in College Road.

7. In September 2005 Dr McAllister prepared a further report on the Claimant. Having noted that he was doing well in his current working environment, he continued, "...I am

afraid he is not fit for any front-line duties and I think the prospect of him returning to any sort of front-line duties before he has completed his service in six years time is looking increasingly remote.” He pointed out that the Claimant’s current role was a recuperative one, rather than a permanent post, and that if it could not be made permanent there would be a need for the Force “...to look for some sort of environment for him similar to the one he is currently in.”

8. As part of a district restructure, a new enquiry team had been formed, based at College Road, to which the Claimant was instructed to transfer for a short time in January 2006. It was unclear who had made the decision to move him there, but the work proved to be totally unsuitable for him and he returned to work at the SNU less than one month later, on 6 February.

9. Thereafter the Claimant continued to work successfully in the SNU, to the satisfaction of his supervisors. He was noted to have made “terrific efforts” in the post and to have fitted in and assisted others in the SNU team. Members of the team tended to find their own niches. The Claimant’s main task was inputting data on to the NCRS Database, which required specialist knowledge and experience, and compliance with various NCRS requirements.

10. In September 2006 Dr McAlister submitted a further report. He described the Claimant’s condition as a chronic anxiety syndrome, which would “probably attract the provisions of the DDA”. His condition was noted to fluctuate a great deal.

11. At his performance and development review in March 2007 the Claimant’s work in relation to NCRS was assessed as an area of strength. He was noted to be working to a consistently high standard and his expertise was such that his colleagues regularly turned to him for his advice.

12. In June 2007 Dr McAllister submitted a further report to Karen Lilley, the Respondent’s District Disability Liaison Advisor, and to Sergeant Gregory, as the Claimant’s supervisor. He advised that the Claimant’s condition was now a fixed feature, which was unlikely to change before his normal retirement date. Whilst he was fit to carry out his current duties, if his role changed so as to involve him in more face to face contact with members of the public, he would then struggle. If that were to be the case, then there might be no alternative but to consider moving him to another area of the organisation.

13. At this stage, and in response to this report, Ms. Lilley wrote to Kim Williams, Senior Personnel Officer and Disability Liaison Adviser for the Force. The Tribunal found that Ms. Lilley had received no training in respect of either the provisions of the DDA or practice and procedure in managing disability. Some of her descriptions of the Claimant’s abilities were also wrong. Her reference, for example, to the Claimant having no contact with the public at all in his current post was inaccurate, since he was managing a substantial amount of telephone contact without difficulty.

14. She noted that the Claimant had had only 5 days sickness absence since November 2004, so that his attendance was no longer an issue. She also acknowledged that the Claimant had a very high standard of knowledge of the law and of NCRS procedures. However, the main point she made was that the role of the SNU police constable had now

evolved. SNU officers were now required to deal directly with incidents and with members of the public who attended the police station, and to conduct investigations relating to missing from home enquiries. In effect she found that the Claimant was “carrying out the duties of the police staff operators, Band B...” Given his current status, Ms. Lilley sought advice as to whether it would now be appropriate to proceed with the UPP (Unsatisfactory Performance Procedure); whether he could be placed elsewhere in the organisation; or whether medical retirement would be appropriate.

15. There was no evidence before the Tribunal as to what, if any, reply was received from Kim Williams. However Graham Cassidy, the District Commander for Doncaster, sent an email to Chief Superintendent Redhall, the Respondent’s Head of Personnel. In this email he wrongly referred to the Claimant as having over 15 years left to serve (he had only 5), and he described him as having “no commitment or enthusiasm to do other than reluctantly turn up each day”, which the Tribunal found to be wholly inaccurate. In evidence Sergeant Gregory stated that these views were not shared by him and that they were totally unwarranted. In his email Commander Cassidy continued “I feel we need to medically retire him a.s.a.p.” and asked for the matter to be fast-tracked.

16. In response to this email Chief Supt Redhall, who was also found to have received no DDA training at the time, asked the Absence Management Team to start the process of referral of the Claimant for medical retirement. In evidence he stated that he assumed reasonable adjustments at regional level had been exhausted, and that he gave no further consideration to them. Reference was made in the Tribunal’s judgment to a number of the Respondent’s written policies and procedures relating to managing attendance, ill health and disability, with all of which the personnel dealing with the Claimant were found to be unfamiliar at this time.

17. On 9 July 2007, without any warning, the Claimant was asked to attend a meeting at Doncaster Police Station, with Acting Inspector Gregory, Ms. Lilley and his supervisor Sergeant Shaw. He learned that the purpose of this meeting was to discuss his medical retirement. Inspector Gregory described his own view as being that it was necessary for the Claimant to get his performance up to “the next level”, and to move out of his “comfort zone”. There was no discussion about any reasonable adjustments at this meeting, and the decision was taken to refer the Claimant to a “Selected Medical Practitioner” (SMP) to consider whether there were grounds to medically retire him. In an email following this meeting Ms Lilley referred to the Claimant as having “accepted” that the organisation was in a difficult position and that medical retirement was the best way forward.

18. On 6 August the Claimant went on sick leave with a frozen shoulder, for which he required surgery. However, Dr McAllister reported in September 2007 that the Claimant’s psychological well-being was also a factor in his continued sickness absence. He expressed the view that the referral process to the SMP had exacerbated his condition. In any event, the Claimant did not thereafter return to work before his retirement in May 2008.

19. On 4 January 2008 Inspector Gregory reported that the Claimant’s restrictions permanently limited him to the role of administration clerk rather than that of a warranted police constable. One week later the Claimant was sent an appointment with the SMP for 31 January.

20. In his report the SMP, Dr Hynes, noted that suitable, non-confrontational work would minimise the risk of further absences, but that the Claimant's chronic anxiety state might lead to further absences nevertheless. The Tribunal found that he "recommended the adjustment of working with limited public contact, non-confrontational and with reduction of targets to remove pressure." Nevertheless his opinion was that the Claimant was permanently disabled from performing the full duties of a police officer due to his condition.

21. The Claimant was sent a copy of Dr. Hynes' report, advised of his right of appeal against its conclusions, and informed that Chief Supt. Redhall would prepare a report on his suitability and aptitude for retention, to be sent to the Chief Constable. He was told that this report would be sent to him for his comments. The Claimant did not respond to or appeal against the SMP's report.

22. The suitability report was in fact prepared by Inspector Gregory, but it was never sent to the Claimant. It referred to the five key areas of work for the SNU constable, of which the Claimant could not carry out duties 1 and 3 at all, and could only partially carry out duties 4 and 5. He was able to carry out fully only the third requirement to "manage the district and SNU Procad lists, resolving and criming incidents as promptly as possible, ensuring that incidents are fully NSIR and NCRS compliant."

23. The proposal to medically retire the Claimant was considered by the Chief Constable at some time prior to 11 March 2008, following his meeting with Chief Supt Redhall, who acknowledged in evidence that there had been no consideration of reasonable adjustments at that time. The Claimant was handed a letter informing him of the outcome by Ms Lilley on 7 April. He was told that the Chief Constable had approved his retirement from the police service with the provision of an ill health pension. His last day of service was 4 May 2008. The Claimant wrote a lengthy letter dated 10 May to Chief Supt Redhall, complaining that his disability had been caused by the Respondent and asking for consideration to be given to providing him with an injury on duty award. No such award was made. He referred in addition to the lack of any reasonable adjustments, stating that "The organisation has never helped me in these areas".

24. On 4 July 2008 the Claimant presented his claim to the Employment Tribunal. The hearing took place over 8 days in May 2009.

The Tribunal's decision

25. The Claimant had originally complained of direct discrimination, disability related discrimination and harassment, in addition to discrimination by reason of the failure to make reasonable adjustments. Further particulars of his claims were provided, together with written clarification of the reasonable adjustments claim. Case management and preparation for the hearing led to further refinement of the issues.

26. In opening the case at the hearing the Claimant's counsel, Mr Snarr, explained that a number of the matters originally particularised were now no longer being pursued. As often happens, the issues narrowed still further during the hearing. On the sixth day of the hearing, the Claimant withdrew his allegations of direct discrimination and harassment, and made it clear that he was pursuing his complaint of disability related discrimination only in relation to the decision medically to retire him. The reasonable adjustments claim was also advanced on the basis that such adjustments, if made, would have avoided the Claimant's medical retirement.

27. There was no dispute that the Claimant was, at all material times after 5 December 2005 (following amendments to the DDA), a person with a disability, by virtue of his chronic anxiety syndrome. Thus, by the time of the parties' closing submissions, the Tribunal had to determine the following claims:

- (i) a complaint of unjustified disability related discrimination in respect of the Claimant's dismissal;
- (ii) a complaint of discrimination by reason of the failure to make reasonable adjustments, identified as follows:
 - (a) the Claimant should have been deployed into a non client-facing officer role; or
 - (b) the Claimant should have been allowed to continue working in the SNU with a non client-facing restriction (i.e. the present arrangements should have been maintained); or
 - (c) the Claimant ought to have been transferred into a police staff role, with or without the benefit of medical retirement.

28. The Tribunal rejected the first claim of unjustified disability related discrimination, following the decision of the House of Lords in **Lewisham London Borough Council v Malcolm** [2008] IRLR 701, and there is no criticism made of that decision in this appeal.

29. In relation to the alleged failure to make reasonable adjustments, there was no dispute that the Respondent had applied a provision, criterion or practice, namely a requirement that all police officers working in the SNU should be able to carry out duties involving face to face interaction with members of the public, or "clients". Nor was it in dispute that, by reference to a non-disabled comparator, that requirement placed the Claimant at a substantial disadvantage, namely his medical retirement, by virtue of his disabling condition. The Tribunal therefore had no hesitation in finding that the Respondent was under a duty to make reasonable adjustments to accommodate the Claimant. The question was whether he was in breach of that duty, in failing to make any of the adjustments said to be reasonable in the circumstances of this case.

30. The Tribunal set out in some detail the parties' submissions, and they directed themselves, correctly, to the relevant statutory provisions and the case law. They made some general observations on the evidence at the outset, expressing concern as to the lack of training and experience in handling DDA cases amongst those making decisions as to the Claimant's future at the relevant time; as to the transfer of the Claimant to a wholly unsuitable job in the enquiry team in January 2006; and as to the way that Sergeant Gregory "*appeared to equate the making of reasonable adjustments with people being in comfort zones from which they were to be removed if at all possible*". We note that Mr Jones, appearing on behalf of the Respondent, fairly accepted in his closing submissions below that some criticism of the Respondent was appropriate; that Commander Cassidy's comments

were not “wholly balanced”; that there had been a failure to consult; and that the Respondent had failed to follow his own disability procedures.

31. However, the Tribunal then reminded themselves, correctly, that the question they had to determine was whether the Respondent was in breach of his duty; and that what a reasonable adjustment would or would not be was a matter which was “*to be considered objectively.*”

32. They found on the evidence that the duty to make reasonable adjustments arose for fresh consideration in June 2007, when it was necessary to review the adjustments which had been made for this Claimant since November 2004. Dr McAllister’s report of 4 June 2007, referring to the Claimant’s condition as a “fixed feature” which was unlikely to change before his retirement date, was sufficient to trigger the need to give further consideration to his position. This was particularly the case when, as the evidence showed, the role of police officers in the SNU was moving much more towards direct enquiries and face to face interaction with the public.

33. Some consideration was found to have been given, albeit in a dismissive way, to alternative roles for the Claimant, as shown by Ms Lilley’s email to Kim Williams. Reference was made there to the Claimant effectively carrying out the duties of a police staff SNU operator, though there was no suggestion that he could be transferred to such a role. Further, the response of Commander Cassidy, which the Tribunal described as “*extremely negative*” was found to have governed the Respondent’s approach to the Claimant thereafter. The Tribunal repeated, however, that “*we again caution ourselves against any approach which might tend to lead us away from considering the ultimate question, which is what adjustments in the particular circumstances of this police constable’s case could have been objectively considered.*”

34. Bearing in mind that “*the initial onus*” was on the Claimant, they then considered, in turn, the three adjustments that he advanced as reasonable in his case.

35. They looked first at the second adjustment advanced, which was simply to maintain the current position in the SNU and enable the Claimant to continue as he had done since 2004. This, they found, would not have been reasonable. Whilst those arrangements had worked well in the past for all concerned, the evidence showed that the role of the SNU was changing as at June 2007, with a greater emphasis on face to face contact with the public. There was also a trend towards civilianisation of those tasks within it which could be performed by someone who was not a police officer. A reasonable Chief Constable would need to balance his duty towards his officers in that unit with his duty to the public to provide effective policing.

36. The Tribunal’s decision in relation to the other two adjustments being advanced was set out at paragraphs 9.2.6 to 9.2.8 as follows:

“**9.2.6 Deployment of the Claimant into a non client-facing (police officer) role**

We find that a reasonable Chief Constable would in the circumstances which prevailed here have carried out a search for suitable roles so as to permit the Claimant to move from a police officer role where he had begun to be unable to be accommodated (SNU) to one where he could continue to be accommodated. The Respondent is a large organisation and there might have been any number of positions available. In any event there was certainly the role which a reasonable Chief Constable would have identified that being the role of PC Franklin. The reasonable Chief Constable being aware of the Claimant’s particular strengths in the field of National Crime Reporting Standards would so have realised the

symmetry with the role in which P C Franklin was then engaged. The reasonable Chief Constable would have noted that while due regard would have to be had to any views which P C Franklin might express, nevertheless regard would also be had to the fact that P C Franklin was not on restricted duties and so would have no difficulty in taking on a role which involved the face to face contact which the SNU role had begun to develop. The Chief Constable would also no doubt have been comforted by the fact that in what was a disciplined service P C Franklin putting it bluntly could simply be ordered to move, whether or not he liked it. That would be done in the same way as the Claimant had been ordered to move out of SNU and into the enquiry team in 2006, whether or not he liked it. We are sustained in the view that this would be a reasonable adjustment because Mrs Lily herself, when it was put to her in cross-examination, acknowledged that such a swap may well have been a reasonable adjustment. Such an arrangement also seems to be in line with the Respondent's written procedures.

Mr Jones has suggested that this proposed reasonable adjustment goes well beyond the example contained in Section 18B(2) of transferring to fill an existing vacancy. We agree that that is correct, in so far as there was not an existing vacancy, but rather a job which P C Franklin was doing which the Claimant could do and a job which the Claimant was, or would be finding difficult to do but which P C Franklin could do. We reject Mr Jones suggestion that this would be akin to a bumping exercise. That is wrong because it is not being suggested that P C Franklin should lose his job, but rather that he should lose his existing job and start doing the Claimant's job. Nor is the situation akin to a job being created. P C Franklin's job already existed and there was a need for it. We take the view that we are not limited to the examples provided in Section 18B(2) and, as they are only examples we are permitted to apply the spirit of the legislation as exemplified in Archibald rather than treating the statutory examples as rules of law. Insofar as the Respondent may have been disadvantaged in his defence of this case on reasonable adjustments we are of the view that that disadvantage stems from their own spectacular failure to consult rather than the absence of any opportunity to challenge the reasonableness of any adjustments within the context of these proceedings. It is simply an example of the warning given by the EAT in Tarbuck that failure to consult at the time will potentially jeopardise the employers defence.

9.2.7 Transferring the Claimant to a Police Staff role with or without medical retirement.

Although none of the proposed reasonable adjustments were actually considered at the time, the speculation involved in considering these two versions of the same type of adjustment gives rise to particular difficulty. If it had been proposed that the Claimant should resign on the basis that he would then be guaranteed a civilian job as a SNU Band B Operator, that would have meant a significant reduction in salary (approximately 50%) and it would be subject to a staff pension, de novo, rather than a continuation in the police pension scheme. Alternatively, a package which comprised medical retirement followed by a civilian job would have been the better option for the Claimant financially. We conclude that the adjustment which a reasonable Chief Constable would have adopted would have been that which, consistent with the needs of the Force in terms of its delivery of policing services, would have the best maintained the Claimant's earnings. The Tribunal's task of fully assessing the reasonableness of either of these two sub-species of adjustment has been hindered by the paucity of information before us but, making the best of what we do have, we conclude that an alternative reasonable adjustment to that of swapping roles with P C Franklin would have been to offer the Claimant medical retirement and subsequent fresh employment as a civilian in the SNU Band B Operator role as advertised at the very time that his medical retirement was being considered (see the advertisement at page 1290).

9.2.8 Insofar as the Respondent is contending for it, we do not accept that an employee's apparent acquiescence in a medical retirement has the effect of discharging the employer from its duty to consider making reasonable adjustments so as to obviate a termination. If an employee fails to engage with the employers overtures and will not enter into the consultation which is being offered, then that is a different case. However, that is not the situation which prevailed here. While the Claimant was invited to appeal against the referral to the SMP and/or the SMP's opinion, that is a different thing from an invitation to

be consulted prior to the medical retirement approach being pursued and as a means to find alternatives to it.”

The Appeal

1. Deployment into a non client-facing role

37. On behalf of the Chief Constable, Mr. Jones raises three grounds of appeal against the Tribunal’s decision on this issue. He submits first that, as a matter of law, it was not open to the Tribunal to find that it would have been a reasonable adjustment to swap the Claimant’s job with that of PC Franklin. Such a measure, he contends, falls well outside anything contemplated as reasonable by the DDA, and in particular section 18B, which contains important guidance as to the lengths to which a reasonable employer should go in accommodating a disabled person, and which refers only to transferring a disabled person to fill an “existing vacancy”. PC Franklin’s job was clearly not a vacant position because he was occupying it at the time.

38. He contends that there is no obligation upon an employer to create a post for a disabled person, referring to **Tarbuck v Sainsbury’s Supermarket Ltd** [2006] IRLR 664. He submits that if Parliament had intended an employer to be required to create a vacancy for a disabled person, by removing another employee from his post, then the legislation would have said so expressly. Such a serious step has significant implications for the rights of other employees. The decision as to what is reasonable requires the balancing of competing and conflicting factors: accommodating the disabled person, fulfilling the needs of the organisation; having regard to the expectations and entitlements of other employees; and ensuring harmonious relations in the workplace. This legislation already places limitations on the ways in which a Chief Constable can deploy his forces and this is, essentially, a step too far. No support for such a step is to be found in **Archibald v Fife County Council** [2004] IRLR 651 and the Tribunal were wrong to suggest that there was. Further, extending an employer’s duty to include steps such as that identified in the present case would create real uncertainty for employers seeking to understand the scope of their statutory duty to accommodate disabled people in the workforce. It was therefore an error of law to find this to be a reasonable adjustment, which the Respondent should have made.

39. The starting point, in considering these submissions, is the relevant legislation. In light of Mr Jones’ observations as to the limitations placed upon Chief Constables by the DDA, we begin by stating the obvious. Parliament has decided that disabled police officers are to be protected by this legislation in just the same way as employees. By virtue of the **Disability Discrimination Act 1995 (Amendment) Regulations 2003**, which came into effect on 1 October 2004, section 64A provides that, for the purposes of Part 2 of the Act (discrimination in the employment field) the holding of the office of Constable shall be treated as employment by the Chief Officer of Police, as regards any act done by him in relation to a Constable or that office.

40. Secondly, the Act applies to any person who has a physical or mental impairment which has “*a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities*” (section 1(1)). There is no dispute in this case that the Claimant satisfied this test and that he was, thereby, seriously disadvantaged for the reasons identified.

41. Thirdly, the duties placed upon employers, and Chief Constables, towards disabled workers and police officers are different from those contained in the **Sex Discrimination Act**

and **Race Relations Act**. As is now well understood, discrimination can occur, both when people whose circumstances are the same are treated differently, and when people in different circumstances are treated in the same way. As Lady Hale pointed out in **Archibald** (at paragraph 47) the DDA operates in a different way from the legislation prohibiting direct discrimination on grounds of sex and race, which ignores differences and requires men and women, or black and white people, to be treated in the same way. The DDA, on the other hand, acknowledges the different circumstances of disabled people and entails a measure of positive discrimination. Employers are required to take reasonable steps to help disabled people, which they are not required to take for others, in order to achieve for them substantive equality and to assist their integration in the working environment.

“Pregnancy apart, the differences between the genders are generally regarded as irrelevant. The 1995 Act, however, does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment.”

The questions for the House in that case included the same question that arose for this Tribunal, namely how far that obligation goes.

42. In relation to the duty to make reasonable adjustments, the DDA provides, so far as material, as follows:

“3A Meaning of “discrimination”

....

(2) For the purposes of this Part, a person also discriminates against a disabled person if he fails to comply with a duty to make reasonable adjustments imposed on him in relation to the disabled person.

...

4E Office-holders: duty to make adjustments

(1) Where-

(a) a provision, criterion or practice applied by or on behalf of a relevant person ...

.....places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the relevant person to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the provision, criterion or practice...having that effect.

17A Enforcement, remedies and procedure

....

(1C) Where, on the hearing of a complaint under subsection (1), the complainant proves facts from which the tribunal could, apart from this subsection, conclude in the absence of an adequate explanation that the respondent has acted in a way which is unlawful under this Part, the tribunal shall uphold the complaint unless the respondent proves that he did not so act.

18B Reasonable adjustments: supplementary

(1) In determining whether it is reasonable for a person to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular, to-

- (a) the extent to which taking the step would prevent the effect in relation to which the duty is imposed;**
- (b) the extent to which it is practicable for him to take the step;**
- (c) the financial and other costs which would be incurred by him in taking the step and the extent to which taking it would disrupt any of his activities;**
- (d) the extent of his financial and other resources;**
- (e) the availability to him of financial or other assistance with respect to taking the step;**
- (f) the nature of his activities and the size of his undertaking;**
- (g) where the step would be taken in relation to a private household, the extent to which taking it would-**
 - (i) disrupt that household, or**
 - (ii) disturb any person residing there.**

(2) The following are examples of steps which a person may need to take in relation to a disabled person in order to comply with a duty to make reasonable adjustments-

- (a) making adjustments to premises;**
- (b) allocating some of the disabled person's duties to another person;**
- (c) transferring him to fill an existing vacancy;**
- (d) altering his hours of working or training;**
- (e) assigning him to a different place of work or training;**
- (f) allowing him to be absent during working or training hours for rehabilitation, assessment or treatment;**
- (g) giving, or arranging for, training or mentoring (whether for the disabled person or any other person);**
- (h) acquiring, or modifying equipment;**
- (i) modifying instructions or reference manuals;**
- (j) modifying procedures for testing or assessment;**
- (k) providing a reader or interpreter;**
- (l) providing supervision or other support.**

(3) For the purposes of a duty to make reasonable adjustments, where under any binding obligation a person is required to obtain the consent of another person to any alteration of the premises occupied by him-

- (a) it is always reasonable for him to have to take steps to obtain that consent; and**
- (b) it is never reasonable for him to have to make that alteration before that consent is obtained.**

(4) The steps referred to in subsection (3)(a) shall not be taken to include an application to a court or tribunal.

(5) In subsection (3), ‘binding obligation’ means a legally binding obligation (not contained in a lease (within the meaning of section 18A(3)) in relation to the premises, whether arising from an agreement or otherwise.

(6) A provision of this Part imposing a duty to make reasonable adjustments applies only for the purpose of determining whether a person has discriminated against a disabled person; and accordingly a breach of any such duty is not actionable as such.”

43. It is well established that the test of reasonableness is an objective one (see Collins v Royal National Theatre Board Ltd [2004] IRLR 395 CA and Smith v Churchill Stairlifts plc [2006] IRLR 41). As the House of Lords emphasised in Archibald, what is reasonable will always depend on the particular circumstances in an individual case. The task of determining the reasonableness of proposed adjustments in this field is a task that has been entrusted to Employment Tribunals. In this respect the Tribunal’s fact finding role is therefore of particular importance.

44. In Archibald the House decided that, on the facts of that case, the Employment Tribunal had erred in finding that the employers had not failed to comply with their duty to make reasonable adjustments. Ms Archibald was dismissed in circumstances in which she had become totally incapable of doing the job for which she was employed, but was able to do other, vacant jobs within the organisation. It was held that the duty to make reasonable adjustments could include transferring, without the necessity for competitive interviews, a disabled employee from a post she can no longer do to one that she can, and for which she is qualified and suitable, even if that post is at a slightly higher grade than her own. The Tribunal had therefore erred in concluding that they could not even consider whether that was a reasonable adjustment, and the case was remitted in order for them to do so.

45. We do not accept Mr Jones’ submission that a tribunal is precluded, as a matter of law, from holding that it would be a reasonable adjustment to create a new job for a disabled employee, if the particular facts of the case support such a finding. We find ourselves in agreement, on that point, with the observations of the EAT in Southampton City College v Randall [2006] IRLR 18, where at paragraph 22 they said:

“We are mindful that each case is fact specific. In this case, the appellant (employer) did nothing and did not consider reasonable adjustments at all. Further, s.6(3) [now 18B] does not, as a matter of law (our emphasis), preclude the creation of a new post in substitution for an existing post from being a reasonable adjustment. It must depend upon the facts of the case.”

46. The facts of that case reveal the reasons for what might, at first blush, be regarded as a surprising result. It was not being suggested that the employer should have created a post which was not otherwise necessary. In fact, the College had embarked upon a substantial reorganisation and restructuring process. The Claimant’s line manager conceded in evidence that he had had ‘a blank sheet of paper’ for this process and for the job specifications which resulted. The Tribunal held that it would have been possible in these circumstances to devise a job which would both take account of the employee’s disability and harness the benefits of his successful career and experience, but the employer was found not to have taken this or any other reasonable step to accommodate a long-serving and valuable employee. The EAT found that this conclusion was open to the tribunal on the specific facts of the case.

47. In our view there is nothing in **Tarbuck**, which undermines this reasoning. In that case, during a redundancy exercise, the employers failed to interview the disabled employee for a vacant post being advertised internally, and for which she was suited. In fact, nobody was interviewed for it at any stage because the employers finally determined, in what was found to be a “highly fluid situation”, that the post should not be filled. In the circumstances, the EAT upheld the Tribunal’s decision on the specific facts of the case that there was no less favourable treatment of the employee, and no failure to make a reasonable adjustment for her. As Elias P explained at paragraph 49:

“[The Claimant’s] case has never been that....she should have a post specifically created for her. Nor can there be an obligation on the employer to create a post specifically, which is not otherwise necessary, merely to create a job for a disabled person.”

48. That, however, was not the case in **Randall** and nor is it the case in the present appeal, where there were two jobs, both considered necessary at the time and both being carried out by the Claimant and another police officer. We do not find that **Tarbuck** assists Mr Jones on this point.

49. Nor do we regard as fatal to the Claimant’s case the absence, in section 18B(2), of a reference to swapping postholders within an organisation as a potentially reasonable adjustment. It is clear from the opening words of that subsection that what follows is an illustrative, but non-exhaustive, list of examples of the steps that might be taken by way of adjustment. Paragraph 5.18 of the DRC’s Code of Practice also makes this clear, and the matter was put beyond doubt by the House of Lords in **Archibald** (see e.g. paragraphs 14, 43 and 57). The House was not concerned there with the facts arising in the present case, which is why no reference is made to whether such a step could be found to be reasonable. But the Tribunal were not in error in having regard to **Archibald** when deciding not to regard the examples given in section 18B(2) as “*rules of law*”.

50. As Mr Snarr points out, more than one of the adjustments there referred to might be found to be reasonable in any case, as might different adjustments which are not referred to, or indeed a combination of the two. **Randall** provides a good example of a step, found to be reasonable on the facts, but which is not referred to in section 18B(2). The reference to transferring an employee to fill an existing vacancy at paragraph (c) is therefore illustrative, but not determinative, of the employer’s duty in relation to deployment in any particular case.

51. What is required of employers in relation to adjustments is, of course, limited to what is reasonable. In the course of his submissions Mr Jones advanced a number of different, hypothetical scenarios in seeking to make good his submission that swapping jobs is “a step too far” and outside the scope of the DDA. In relation to some of them he may well be right. It may well not be a reasonable adjustment, for example, for an employer to require a woman working flexible hours due to childcare responsibilities to swap her job with that of a disabled person working longer hours. Equally, it may not be reasonable to force someone out of a job for which they are well suited to one that they are not, in order to accommodate a disabled employee. However, in our view these examples serve only to emphasise the fact specific nature of the inquiry to be undertaken in every case.

52. Since each case will turn on its own facts, we recognise that the scope of the duty of reasonable adjustments on employers cannot be precisely defined. However, the duty to act reasonably towards employees is not an unfamiliar concept in employment law. In the field of accommodating disabled employees we consider that certainty for employers is

sufficiently achieved by the application of objective standards of reasonableness in the particular circumstances of each case. It must be assumed that reasonable employers will wish to comply with the legislation and therefore to take all reasonable steps to accommodate those amongst their employees who are, or become, disabled and are thereby disadvantaged at work.

53. The problem for the Respondent in this case is that no consideration at all was given to reasonable adjustments for the Claimant, once the role of SNU officer changed and it became necessary to reassess his situation. It was not being suggested by the Respondent that the Force had considered, but rejected as unreasonable, the step of swapping the Claimant's job with that of PC Franklin. Nor had there been any consultation with the Claimant as to any adjustments that he considered might be made. We shall return to this point when considering Mr Jones' second ground of appeal, but the clear finding of the Tribunal was that any disadvantage for the Respondent in defending the reasonable adjustments claim arose from the Force's "*spectacular failure to consult*" the Claimant at the relevant time.

54. As **Tarbuck** makes clear, whilst there is no separate and distinct duty of reasonable adjustment on an employer to consult a disabled employee about what adjustments might be made, his failure to do so will potentially jeopardise his legal position. This is because he cannot use the lack of knowledge that would have resulted from a consultation as a shield to defend a claim that he has not made reasonable adjustments.

55. The only question in such cases is therefore whether, objectively, the employer has complied with his obligations or not. If he has, it matters not, so far as the law is concerned, that he failed to consult the employee at the time. If he has not, it avails him nothing that he had consulted the employee about any adjustments that might be made.

56. The Tribunal in this case directed themselves correctly on the law. In particular, they recognised expressly that the matter had to be looked at objectively; that the list of examples of reasonable adjustments in section 18B(2) is non-exhaustive; and that the law may require an employer to treat a disabled employee more favourably than one who is not disabled.

57. In our judgment there is no basis for the suggestion that swapping job roles goes beyond the intention of Parliament, or that a Tribunal is precluded from deciding in any case that it would be a reasonable adjustment, if the facts support such a finding. Indeed, in the course of argument, Mr Jones fairly conceded that if two employees, one of whom had a disability, presented a joint request to an employer to swap their jobs in order to accommodate the needs of the disabled person, and they were each equally qualified and suited to both jobs, then a Tribunal would be entitled to conclude that a refusal to make that adjustment was unreasonable in the circumstances.

58. Whilst Mr Jones submitted that it would only be in exceptional circumstances that such a finding could be made, it must follow that Tribunals are not precluded from so finding as a matter of law. The question then becomes whether the Tribunal, in the particular circumstances of this case, were entitled to decide that swapping the Claimant's job with that of PC Franklin would have been a reasonable adjustment.

59. In his second ground of appeal under this head Mr Jones does not challenge the Tribunal's decision as perverse. His complaint is that there was real unfairness caused to the

Respondent in the way that the Tribunal dealt with this matter, so that their decision should not stand.

60. Mr Jones submits that the Respondent had inadequate notice of this proposed adjustment. He was therefore denied the opportunity of preparing and adducing detailed evidence relating to PC Franklin and his post, and of addressing the practicalities and reasonableness of swapping the two posts. The allegation that these jobs could have been swapped was not pleaded. It was first alluded to in the Claimant's witness statement, served shortly before the hearing. The Claimant was advancing a number of different claims and a wide range of detailed allegations relating to his treatment at work. Those representing the Respondent spent a great deal of time identifying the evidence necessary to address those allegations. In any event the oblique reference to PC Franklin in the Claimant's witness statement did not indicate that the swapping of the two jobs was being advanced as a reasonable adjustment. The point was therefore not dealt with by the relevant witnesses for the Respondent in the witness box. Thus there was no, or insufficient, evidential foundation for the Tribunal's finding that the jobs could and should have been swapped.

61. In argument before us and without objection from Mr Snarr, who was ready and able to deal with the matter, Mr Jones went beyond what was essentially a pleading point in the grounds of appeal. His essential complaint is that what happened below offended fundamental principles of fairness and natural justice. He submits that this job swap suggestion was advanced only at the eleventh hour, by which time the Respondent was unable, realistically, to adduce the evidence necessary for the matter to be properly examined. The Tribunal therefore erred in law in arriving at a finding on a matter which had not been adequately identified as an issue in the case, and on which there was insufficient evidence before them to permit a reasoned conclusion.

62. In view of the unfairness said to have been caused to the Respondent we have examined carefully the way in which this matter arose before the Tribunal.

63. The starting point is the Claimant's ET1, in which he pleaded that, from March 2007 onwards, he *"...began to request transfer to a different role in order that his restrictions...could be reasonably managed."*

64. The Respondent requested further particulars of these transfer requests in his ET3, and the Claimant responded (at paragraphs 7-8) that, at or around March 2007, he *"did not specifically request a transfer, but did indicate a particular role that may be suitable, which was the National Crime Recording Standards officer role"* (i.e. PC Franklin's role). He further clarified that he had spoken to Sgt Hunter on a few occasions about his workload and his inability to cope, and that no alternative roles, other than the NCRS role, were put forward by him when registering his concerns with his supervisors. At paragraph 14(a) he stated that during his time in the SNU he had *"repeatedly asked for a no client contact role"* but that his *"requests were ignored"*.

65. In his amended ET3 the Respondent pleaded in response that *"The Respondent accepts that the Claimant informally expressed an interest to his supervisors in respect of the National Crime Recording Standards officer role however that post was already filled, it had been for some time and therefore the role was not a vacant post."* In response to the Claimant's paragraph 14(a) the Respondent pleaded that *"...there was not a no-client contact*

role that formed a substantive police officer role. It is denied therefore that this could be a possible reasonable adjustment.”

66. By order of the Tribunal the Claimant provided written clarification of his reasonable adjustments claim on 16 January 2009. At paragraph 4 he alleged that he had *“repeatedly asked for a role that did not involve client contact, which exacerbated his condition. This request was ignored.”* At paragraph 9 he alleged that, as an alternative to terminating his contract, he *“could have been transferred to a non-operational role that would have taken account of his disability, with reasonable adjustments, as aforementioned.....Alternatively [he] could have been transferred to a staff role.”*

67. In his witness statement, served three days before the hearing, when responding to the assertion in the Respondent’s amended ET3, the Claimant referred at paragraph 158 to the National Crime Reporting no-client role being undertaken by PC Franklin, which he said would have been an alternative to maintaining the status quo and keeping him in his current SNU role. He then explained why. PC Franklin *“was not in the department for recuperative or restrictive reasons. This officer was fit for front line duties and or working on incidents, crimes and dealing with members of the public on the front counter for the SNU department.....I believed the NCRS role was more commensurate to my illness and told my supervisors this.* In the following paragraph he stated that he had *“never been told what other jobs [he] was considered for by the organisation if at all any existed.”* At paragraph 166, amongst the reasonable adjustments he said could have been considered, he referred to *“transferring me to another post”*.

68. The agreed note of evidence before us shows that, at the hearing, Ms Lilley was asked some supplemental questions about reasonable adjustments by Mr Jones in her evidence in chief. They were prefaced by his statement that *“There are three roles that the tribunal are considering – in respect of potential job being considered, SNU role, procad role & NCRS role”*. In relation to the NCRS role the following exchange appears:

- “Q Did it involve any face to face contact?**
- A It is something he could have done [NCRS role].**
- Q Was it ever considered?**
- A No because it was not vacant.**
- A Post already occupied by a police officer, district command team was of the view that we shouldn’t remove people from their posts.**
- A About middle of 2008 – PC Franklin took over the role.”**

69. There does not appear to have been any dispute that the Claimant could in fact have done PC Franklin’s job, which involved no face to face contact with the public; and there is no challenge in this appeal to the Tribunal’s finding that he could, or as to the “symmetry” of the two roles. Sgt Gregory gave evidence, for example, that there was *“Nothing [the Claimant] could not do on the issue of NCRS.*

70. Ms Lilley was then cross-examined by Mr Snarr about this, as follows:

- “Q Why [not] put him into a non front facing role?**
- A If there was a post available.**
- Q Why not on PC Franklin’s role?**

- A District View is that they wouldn't swap
- A I am not aware that it was ever considered –
- A In hindsight it may have been a possibility
- Q Do you not think it is a reasonable thing to do?
- A It may have been.”

71. Ms Lilley referred to this again a little later on. She stated that she was unaware whether PC Franklin had any restrictions and said that “*District Command view was that they did not want to dispossess other officers of their roles. It may have been a reasonable adjustment to do that.*” In answer to questions from the Employment Judge she stated that she thought she would have considered “*vacant police posts*”, and in re-examination she confirmed that in July 2007 she would have looked at “*only vacant police officer posts.*”

72. In his written closing submissions, developed orally before the Tribunal, Mr Snarr referred, when addressing reasonable adjustments, to evidence showing that at the time the Claimant was referred for medical treatment and when he was retired the Respondent had non-public facing officer roles; that “*an example of such a role is that of the NCRS officer post filled by PC Franklin*”; and that Ms Lilley’s response to the adjustment of a non-public facing officer role was that, though such roles existed within the Respondent’s force there was “*none available*” at the time. He set out the Claimant’s case in relation to PC Franklin’s role, referring to Ms. Lilley’s evidence in cross-examination and submitting that swapping the two roles would have enabled the Respondent to “*retain the services of both officers*” and that in all the circumstances it was a reasonable adjustment to make. Whether or not PC Franklin’s role would have become a civilianised role after the Claimant had been transferred into it was a matter which went only to remedy and was not relevant to the reasonableness of the adjustment at the time.

73. Mr Jones’ submissions for the Respondent on this point are referred to by the Tribunal at paragraph 7.2. Reminding them that section 18(B) referred only to transferring someone to an existing vacancy, he submitted that the Claimant’s suggestion was akin to an exercise in “bumping”, that the legislation made no reference to taking someone out of a job they were doing to make it available for a disabled person; and that they had been told nothing of PC Franklin’s circumstances.

74. Late disclosure of Home Office guidance to police forces on the DDA, after the hearing concluded, led to further written submissions on this guidance being submitted by the parties, to which the Tribunal had regard in coming to their conclusions.

75. This guidance referred to the need for deployment of disabled officers to be looked at on an individual basis; to the need to consider redeployment to “*another existing role/post*” only if impairment warranted a move to another job; and to the need to consider seeking to redeploy into “*a suitable, available, existing police post*” within an officer’s capabilities. Mr Snarr submitted that the guidance did not stipulate that the existing role should be vacant; that an existing role could include an existing role undertaken by an existing officer; and that ‘availability’, in the context of a reasonable adjustment, could require an employer to make the role available in certain circumstances. Mr Jones submitted that the guidance clearly contemplated that the role should be vacant and that swapping jobs was not envisaged.

76. We mention these competing submissions, not in order to indicate our own view as to their respective merits, but to show how this issue evolved before the Tribunal, and how it was being addressed by the parties below.

77. Against this background, we reject the Respondent's submission that he was effectively ambushed by an "eleventh hour" suggestion as to the reasonableness of a job swap with PC Franklin, or that there was unfairness to him in the way that the Tribunal dealt with this issue.

78. In **Project Management Institute v Latif** [2007] IRLR 579 the EAT considered the way in which the burden of proof is effected by the identification of reasonable adjustments before a Tribunal hearing a DDA claim. They held that unless there is evidence before the Tribunal of an adjustment which at least on its face appears reasonable and which would mitigate or eliminate the substantial disadvantage to which the employee was subjected, the burden does not shift to the employer. Furthermore, an employer was held to be entitled to know what it is alleged he has unreasonably failed to do. Reference was made to paragraph 4.43 of the **Disability Rights Commission Code of Practice** in this regard.

79. We agree. We also agree with the EAT's observations at paragraphs 53 – 55, as follows:

“53

... It seems to us that by the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made. It would be an impossible burden to place on a respondent to prove a negative; that is what would be required if a respondent had to show that there is no adjustment that could reasonably be made. Mr Epstein is right to say that the respondent is in the best position to say whether any apparently reasonable adjustment is in fact reasonable given his own particular circumstances. That is why the burden is reversed once a potentially reasonable adjustment has been identified.

54

In our opinion the paragraph in the code is correct. The key point identified therein is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made.

55

We do not suggest that in every case the claimant would have had to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.”

80. We recognise that the Respondent was faced in this case with a set of detailed allegations and different claims, to which he had to respond and which he had to prepare to meet. This, however, is a feature of discrimination cases, where allegations of continuing discriminatory treatment can extend over a lengthy period of time and involve a number of different incidents and personnel. Effective case management ensures that the issues in such

cases are properly identified, and we note that, in this case, some sensible pruning of the Claimant's case was carried out both before the hearing began, and again at its end.

81. We accept, too, that our recital of the relevant passages in the pleadings and in the evidence dealing with the proposed PC Franklin job swap tends to give them a prominence which they would not have as part of a detailed claim being advanced on a number of different fronts.

82. However, we are unanimous in our conclusion that they show the Claimant's case on this point to have been adequately identified and understood in the pleadings and particulars served in advance of the hearing; and show too that it was sufficiently addressed during the evidence and in the parties' submissions at the end. We reject the suggestion that this point was merely a "footnote" in the Claimant's case, or that it was somehow "buried" out of sight amongst all the other allegations being made.

83. On the contrary, by the time this case was heard, there was clearly "some indication" as to what adjustments the Claimant was contending should have been made; and sufficient material for this Respondent to understand the broad nature of the "non public-facing duties" adjustment proposed, and the suggestion being made that the Claimant could have done PC Franklin's job. Indeed, the Respondent had pleaded to it in paragraph 32 of his amended ET3. Further, during the hearing evidence was given about the NCRS role and the specific job swap being proposed, and Ms Lilley responded to it. The Tribunal were therefore fully entitled to deal with it. The relevant evidence and reasoned findings upon it are clearly expressed at paragraph 9.2.6.

84. We can identify no injustice to the Respondent in the circumstances of this case. We note too that there was no objection during the hearing to the Claimant advancing this point; and that no application was made to recall any witness to deal with it, or for an adjournment to call further evidence on the reasonableness of the proposal. The issues were refined and then further refined by the Tribunal, as set out at paragraph 3 of the reasons. Nothing has been put before us on appeal to support the submission that there was evidence which the Respondent would have wished to adduce on the reasonableness of this adjustment, but which he was denied the opportunity of adducing at the time.

85. The reason for this seems clear. The Respondent had decided that only transfers to vacant posts could be, or needed to be, considered, and he therefore gave no consideration at all to the adjustment proposed. Nor did those responsible for dealing with the Claimant consult him about any adjustments that might be made to avoid retiring him from the Force, when the ability and willingness of each of these officers to swap roles and carry out each other's duties could have been clarified. Any disadvantage to the Respondent in this respect must therefore be regarded as the result of the Force's total failure to consult, rather than the absence of an opportunity to address it fully below.

86. In our judgment therefore the Tribunal were entitled to conclude as they did, for the reasons they gave. In particular, in this case we consider that they were entitled to have regard to the nature of the police force as a disciplined service; and to the fact that, even if PC Franklin had objected to this adjustment, the Respondent could have instructed him to swap jobs with the Claimant, an instruction with which he would have to comply. In so deciding they no doubt had regard to the fact that the Claimant had himself had to comply with an instruction to move to the enquiry team in early 2006, albeit only for a short time. Further,

the documentary evidence before them included the PNB Joint Guidance on improving the management of ill-health retirement which referred, at paragraph 41, to the general duty of a police officer “*to obey lawful orders*”. The special nature of service in the police force was an important part of the factual matrix in this case.

87. We turn, then, to the Respondent’s third ground of appeal (paragraph 6(b)(i)).

88. Mr Jones submits that the Tribunal erred in making a general finding, at paragraph 9.2.6, that the Respondent was in breach of his duty to make reasonable adjustments in failing to carry out a search for suitable roles, so as to move the Claimant to a role outside the SNU where he could be accommodated. A failure to conduct a search is part of the consultation process and therefore does not of itself constitute a breach of the statutory duty (see **Tarbuck**); and this finding was insufficiently specific to amount to a breach of that duty. The Claimant did not show that the search would have revealed a suitable job which would have eliminated the disadvantage caused, so as to require the Respondent to provide an explanation.

89. We can deal with this point shortly. The suggestion that the Tribunal found a separate breach of duty by the Respondent in failing to conduct a search is in our view misplaced, and results from a misreading of the Tribunal’s decision.

90. The Claimant did not suggest that there was any officer’s job other than PC Franklin’s to which he could have been moved. Nor did the Tribunal find that there was any other job available for him that would have been found upon a search. The opening sentences in paragraph 9.2.6 do not amount to a finding by the Tribunal that the failure to conduct a search amounted in itself to a breach of the duty to make reasonable adjustments. They were well aware of the law and had directed themselves correctly on the approach to be taken to determining whether there was a breach of that duty and to the effect of the decision in **Tarbuck**. In our view paragraph 9.2.6, read as a whole, simply reflects the evidence before them that no search for any suitable alternative jobs had been undertaken at any stage; and their view that if, hypothetically, a reasonable Respondent had carried out such a search, he would have realised both that PC Franklin and the Claimant could carry out each other’s jobs, and that it would be a reasonable adjustment for them both to swap jobs in the circumstances.

91. There was no error of law in so finding. In circumstances where the duty to make adjustments was established, and where the evidence showed both that there was an apparently reasonable adjustment which could be made, and that the Respondent understood the broad nature of the adjustment proposed, the burden of proof shifted to the Respondent to provide an adequate explanation why he did not act unlawfully. The only explanation advanced was that the Respondent did not consider himself required, legally, to swap the two posts, not that it would be unreasonable for him to do so. Once the Tribunal concluded that there was no legal bar to finding that a job swap was a reasonable adjustment, and that it would have been a reasonable step to take, section 17A required them to uphold the complaint.

2. **Causation**

92. In relation to the Claimant’s transfer to a civilian post Mr Jones submits that, in the absence of any consultation by the Respondent, the Tribunal erroneously applied a presumption that the breach of the duty to make reasonable adjustments was established.

93. He contends that the Tribunal adopted an impermissibly broad interpretation of the EAT's observations in **Tarbuck**, conflating the failure to consult with the duty to make reasonable adjustments. He suggests that they effectively adopted a default position wrongly assuming, without further inquiry, that the Claimant would have been found and would have accepted suitable, alternative employment. In doing so they are said to have sidestepped the obligation to address causation and to evaluate hypothetically what would have occurred if there had been consultation, i.e to ask themselves whether a suitable vacancy would have been available at the relevant time and whether the Claimant would have accepted it?

94. Mr Jones points out that the Tribunal expressly recognised at paragraph 9.2.7 the paucity of the evidence before them relating to the alternative adjustment proposed. He submits that the evidence did not satisfactorily establish that the SNU Band B staff post became available before the decision was made to retire the Claimant some time before 11 March 2008. The finding as to an absence of consultation relates to a time (prior to July 2007) when no suitable job vacancy was identified. Further, the Tribunal never properly considered whether the Claimant would have been appointed to or would have accepted any alternative post. His failure to engage with or to challenge any part of the medical retirement process, and his lengthy absence from work on sick leave since August 2007 rendered him a highly unlikely candidate for redeployment to a civilian role. Yet the Tribunal failed to address these important factual issues in deciding what would have happened if the Respondent had consulted. These circumstances do not permit of any sensible inference other than that the Claimant would not have been redeployed in any event.

95. We do not accept these submissions. We agree with Mr Snarr that, in suggesting that Tribunals must always engage in a hypothetical inquiry as to what would have happened if an employer had properly consulted the disabled employee, Mr Jones is seeking to add a further, unwarranted element into the task to be undertaken by Tribunals in cases where employers have failed to carry out any consultation, and are faced with reasonable adjustment claims.

96. Deciding whether a proposed adjustment is reasonable or not requires an objective assessment to be carried out by the Tribunal on the evidence before them. An adjustment is either reasonable or it is not. A further inquiry into what would have happened if there had been consultation would necessarily involve the Tribunal in speculation as to what proper consultation would have achieved, and what the employer's response would then have been to the proposed adjustment. In our view this would run contrary both to the provisions of section 17A and to the decision in **Tarbuck**, that an employer cannot use lack of knowledge as a shield to defend a reasonable adjustments claim. The Tribunal were well aware of this and did not misinterpret or misapply that approach.

97. We agree with Mr Snarr that this Tribunal carefully and correctly explained why they decided that the two alternative adjustments proposed were reasonable. We reject entirely the suggestion that they conflated the failure to consult with breach of the duty to make adjustments, or that they erroneously adopted a default position.

98. We also reject the submission that the evidence did not show the SNU staff role to be available before or at the time that the Claimant was retired. We note that it is not being suggested that the Claimant was not suited to this role, or that it was not open to the Tribunal to find that he was.

99. The duty to make reasonable adjustments subsisted until the termination of the Claimant's employment, and the Respondent did not suggest that it would be unreasonable to consider him for this post because it was onerous to require him to make adjustments for the Claimant towards the end of his employment. Nor was it submitted on his behalf in closing that this staff role was not available before the decision to retire the Claimant had been made.

100. The evidence showed that the Respondent advertised this vacant post from February 2008. The interview date for applicants was 27 March and the commencement date was 1 April (see paragraph 9.2.7 and the reference to the advertisement). The Tribunal found that the decision to retire the Claimant was communicated to him on 7 April and his last day as a serving officer was 4 May 2008. There was therefore evidence that this post was available before or at the time of the Claimant's retirement; and it is implicit from the decision in paragraph 9.2.7 that the Tribunal found that the Respondent must have known about it when the decision to retire him was made.

101. Nor do we accept the submission that the Claimant's prospects of appointment to this staff post were illusory. The evidence showed that the Claimant had had a very good attendance record between 2004 and 2007; and that it was the Respondent's referral of the Claimant for medical retirement which had exacerbated his chronic anxiety syndrome and prolonged his absence from work, and which had led ultimately to his retirement. The Tribunal were entitled to find on the evidence that the Claimant's apparent acquiescence in the medical retirement process was an entirely different situation from that which would have existed if he had been properly consulted about alternatives to his retirement; and that it did not in any event discharge the Respondent from his duty to make reasonable adjustments. Mr Snarr also drew our attention to Ms Lilley's evidence that the Respondent's own recruitment policy, providing that no job should be advertised if there was an employee waiting to be redeployed, applied to officers applying for staff roles.

102. It seems to us that determining what may have happened subsequently, if the adjustment had been made, is relevant only to remedy and not to whether the adjustment proposed was a reasonable one for the Respondent to make at the relevant time.

3. Transfer to an existing staff role

103. Mr Jones submits that the Tribunal erred in finding that it would have been an alternative, reasonable adjustment for the Respondent to medically retire the Claimant and then redeploy him in a police staff post. He challenges this finding on two grounds.

104. He submits first that retirement envisages the termination of an employee's relationship with his employer whereupon he will often, as here, become entitled to a pension. Being required both to provide a medical retirement pension for a former employee and to re-employ him in an alternative post falls well outside the parameters of a reasonable adjustment under the DDA and goes beyond anything said in **Archibald**. Upon cessation of the working relationship the duty to make adjustments ceases. It was therefore not open to the Tribunal, as a matter of law, to find this to be a reasonable adjustment.

105. Mr Jones submits, alternatively, that the Tribunal's finding on this point was insufficiently explained. Such a finding has serious implications for the police service. Police forces will be obliged to consider, if not to offer alternative, civilian employment to every disabled officer who is medically retired on a pension. Significant numbers of officers become injured and disabled in the course of their duties and are medically retired. This

decision could therefore have serious implications for the open, competitive selection process for support staff posts and for appointment to those posts on merit. The Tribunal had no or insufficient regard to the Respondent's case that such a course was not in the best interests of the Force and, further, that it would compromise the effective use of finite public resources and the delivery of effective police services to the public. Nor did they explain why these arguments were rejected. The effects of this decision may be profound and the matter required a much fuller assessment than was given to it in paragraphs 9.2.7 and 8, where their reasoning falls unacceptably short.

106. In relation to Mr Jones' first ground we prefer Mr Snarr's submission, that if there is found to be a duty to make a reasonable adjustment by transferring the Claimant to a particular staff role, that duty does not end merely because his role as a police officer comes to an end. The duty to make reasonable adjustments arises when the employer becomes aware that the employee is unable to carry out his work by reason of his disability. In this case the Respondent was under that duty from 9 July 2007 right up to the date of the Claimant's retirement on 4 May 2008. Since the duty to make a reasonable adjustment by transferring the Claimant to a staff role arose before he retired, it is wrong to suggest that the cessation of his service as a police officer automatically severed the legal obligation to make that adjustment. In our judgment the Tribunal were not precluded from considering whether there was a breach of the duty to make a reasonable adjustment, by transferring him to a staff role, simply because the Claimant received a medical pension, receipt of which was specific to his service as a constable, and for which he had been found to meet the necessary criteria. As a matter of law it was therefore open to the Tribunal to consider whether this was a reasonable adjustment in all the circumstances.

107. However, we find that Mr Jones is on stronger ground in his alternative challenge to this finding.

108. We recognise that the Respondent was vulnerable as a result of his failure to consult. We accept too that there was no suggestion that the Claimant could not satisfactorily carry out the work required in the SNU staff post. Mr Snarr reminds us that he was arguing for redeployment into this post with or without the benefit of medical retirement, so that even if we are with Mr Jones on this point, we should find that the Tribunal would in any event have found the "lesser" (i.e. without pension) adjustment to be reasonable and we should say so here.

109. We are all troubled, however, by the very brief analysis of both aspects of this adjustment in the Tribunal's judgment. The "speculation" referred to by the Tribunal in considering these two versions of the same adjustment is said to have given rise to particular difficulty. Reference is made to the fact that their task of assessing the reasonableness of either version was hindered by a "paucity of information".

110. We have sympathy for the Tribunal in this respect, in a case involving a multiplicity of issues, some of which crystallised only towards the end of the hearing, and where the subsequent disclosure of relevant documentation led to additional, written submissions from both parties after the hearing concluded.

111. We are persuaded, however, that their decision on what is clearly a point of some importance is inadequately reasoned and cannot stand. Only brief reference is made, for example, to the needs of the Force in terms of its effective delivery of policing services, and

there is no explanation as to why an adjustment which would have “best maintained the Claimant’s earnings” was found to be consistent with that aim.

112. Mr Snarr submits that the Respondent did not raise before the Tribunal all the points he relies upon now, in terms of the importance of the issue and its serious implications for police resources and fair selection processes for staff posts. However, it is clear from the agreed note of evidence that Karen Lilley gave some evidence about the effects of such a step upon an officer’s pension and about the discretionary nature of the Chief Constable’s decision as to pension entitlement. Further, the written representations submitted by Mr Jones after the end of the hearing show that he did raise a number of points going to the reasonableness of this proposed adjustment, which do not appear to have been addressed. Reference is made, for example, to competing demands for funds, and to the relevant guidance and policy documents and the absence of anything to suggest that retirement on a pension and immediate redeployment could be a reasonable adjustment for disabled officers. Whilst we accept that this may well not be determinative of the issue, Mr Jones is correct in submitting that the Tribunal did not address these matters, or indeed make any reference at all to the documentation dealing with these issues. Nor did they address the other points he made in paragraphs (v) to (viii) of his submissions.

113. For these reasons there is merit in the Respondent’s submissions on this ground; and the Tribunal’s decision that the Respondent was in breach of his duty to make this, alternative reasonable adjustment cannot stand. We therefore allow the Respondent’s appeal. Given the paucity of information and competing considerations referred to, we do not consider it appropriate to adopt the course proposed by Mr Snarr, namely to substitute a finding as to the reasonableness of redeployment to a staff post without pensioned retirement. If necessary, this matter will therefore have to be remitted to a fresh Tribunal for determination on evidence, and with the benefit of full submissions from the parties.

114. All the other grounds of appeal are dismissed for the reasons we have given.