Reasonable adjustments – Is it relevant that the employee didn't mention them?

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Shah v TIAA Ltd UKEAT/0180/19/BA

Katherine Anderson successfully represented the respondent employer in this appeal before the EAT.

The dispute arose from the claimant's back problems, which, it was agreed, made her disabled within the Equality Act 2010. She was unable to travel far and wanted to work mainly from home. This caused difficulty because her role, auditing the performance of National Health Service bodies, was "client facing" and required her to visit those bodies. She was eventually dismissed for reason of ill-health capability after an occupational health report and negotiations with her union representative. The respondent was concerned that she was not meeting her financial targets, i.e. the required amount of chargeable time billed to the respondent's clients. These receipts from clients funded her salary. There were not enough clients within the short travelling distance from her home that she could manage.

The ET recorded the issues as agreed at an earlier hearing. Among the claims was a claim for failure to make reasonable adjustments. The claimant contended that the respondent should have provided an ergonomic chair, allowed her to continue working mainly from home, limited her requirement to travel, reduced her chargeable hours target, and transferred her to a suitable alternative role – but she did not contend anywhere in her claim that the respondent should have kept her in the same role part time, working shorter hours, either with or without a corresponding reduction in her pay.

The ET found that the respondent's provision, criterion or practice (PCP) of requiring audit managers to travel to client sites put her at a substantial disadvantage because all her clients, bar one, were outside the areas to which she could travel. However, the ET found

that the adjustment of permitting her to work mainly from home was not reasonable as it would mean she could not attend client sites, which was indispensable, nor was it a reasonable adjustment for her target chargeable hours to be reduced, since that would involve paying her a full salary while she would only be able to charge about one fifth of the target amount, leaving her 80 per cent below target and the respondent substantially in deficit. The ergonomic chair was therefore of little relevance. There were no suitable alternative roles. The reasonable adjustments claim therefore failed.

By an amendment to the grounds of appeal before the EAT, the claimant criticised as perverse a finding by the ET that the claimant "never expressed any interest in working part-time because it would have involved a significant reduction in her remuneration package". Her Counsel submitted before the EAT that the claimant had given oral evidence at the ET hearing of a willingness to work reduced hours. She reminded the EAT that the duty to make adjustments fell on the employer; it was no excuse for a failure to make a reasonable adjustment that the employee had failed to suggest it before her dismissal. The employer should have proactively considered reducing the claimant's hours in the same role. Ms Anderson defended the ET's finding, submitting that the inference that the claimant was not interested in a change in her working hours that would have meant a substantial loss of pay was obviously a permissible one.

The EAT agreed that at the pre-dismissal stage, it was for the respondent to suggest reasonable adjustments, and that there was no onus on the claimant to make the running by proposing adjustments. In principle, an adjustment may be reasonable and a duty to make it could arise even if it had never occurred to the employee and she had never suggested it. On the other hand, the EAT observed, the fact that the employee has not thought to suggest an adjustment may be relevant to whether it is, on the facts, reasonable. An adjustment that the employee would inevitably reject may be unlikely to be one the employer is obliged to make.

At the post-dismissal stage, the EAT confirmed that the position is slightly different. The tribunal is entitled and bound to take account of the issues defined by the parties and agreed before the tribunal. As part of the employee's case, she has to substantiate her contention that the employer is in breach of the duty to make adjustments. To do so, the employee is likely as in this case to state what adjustments she contends the employer ought to have made but did not. Here, those were the adjustments set out in the list of issues.

In this case, the adjustments set out in the list of issues did not include any reference to part time work, still less to part time work with correspondingly reduced pay. The EAT agreed with Ms Anderson that, in the factual context, the ET was entitled to draw the inference that it did. The factual context included the point that the claimant was only able to perform about 20 per cent of her work and that this would be unlikely to change soon. If the claimant would have been interested in working for one fifth of her previous pay, there would have been some evidence of that at the time, as well as in the list of issues before the tribunal. The claimant's union representative had also never mentioned the possibility. He wanted reduced chargeable target hours but, implicitly, on full pay. That did not necessarily rule out reduced hours with reduced pay as a reasonable adjustment as a matter of law, but it was difficult to regard as reasonable an adjustment in which the employee has no interest because it cuts her pay by 80 per cent.

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