Does an employer who fails to make reasonable adjustments to its dismissal procedure act unreasonably for the purposes of unfair dismissal?

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Knightly v Chelsea & Westminster Hospital NHS Foundation Trust [2022] EAT 63

If an employer fails to make a reasonable adjustment to its dismissal procedure, in breach of section 20 of the Equality Act 2010, does this necessarily mean that the employer has acted "unreasonably" for the purposes of unfair dismissal? This was the question before the Employment Appeal Tribunal, which answered with an emphatic no.

The facts

The Claimant began working for the Respondent in 2009, providing support to women experiencing mental health problems during pregnancy. This job was highly demanding, requiring her to deal with patients and to provide leadership within the team.

For the entire period of her employment, the Claimant suffered terribly with stress, anxiety and reactive depression. It was not contested that this made her disabled. From 2012 onwards, there were serious problems with the Claimant's attendance. She was given a great deal of latitude and support, but the issue persisted. She was absent on grounds of ill health for an entire year from August 2015, and on her return (to a different, less demanding role) was only able to work part-time. Friction developed between her and the colleague tasked with managing the situation, prompting her to submit a bullying and harassment complaint. She then took further leave on grounds of ill-health, from March 2017 until her dismissal in January 2018.

Throughout 2017, her consistent position was that she would not be able to return to work in the foreseeable future, and that there were no steps which the respondent could take to enable her to do so, and that she wished to apply for ill-health retirement. A long-term sickness absence hearing was held on 11 January 2018, at which the claimant repeated this position. She had not brought a companion to the hearing, nor submitted any documents or written representations despite having had more than two months to do so. She asked for any decision on dismissal to be delayed pending her application for ill-health retirement, and the hearing was adjourned. However, since such a delay was not regular practice, the Claimant was later telephoned informing her that she had been dismissed; this was followed up by a letter dated 25 January, summarising the reasons for dismissal and notifying her of the right to appeal within ten days.

On 7 February – more than ten days later – the Claimant asked for a two-week extension of time to lodge an appeal. This request was refused, and when the Claimant submitted a three-line summary appeal on 14 February 2018, this was not considered because it was out of time.

The case at first instance

The Claimant brought a claim for unfair dismissal, and for discrimination under sections 15 (discrimination arising from disability) and 20 (failure to make reasonable adjustments) of the Equality Act.

The ET found for the Respondent, save for one part of the reasonable adjustments claim: namely, that the Claimant should have been granted the two-week extension to submit an appeal which she had asked for, in an adjustment of its normal practice. The ET added that had it been so required, it would not have found that there was any likelihood of the appeal succeeding, had it been allowed to proceed. A provisional award of £3,000 was made for injury to feelings.

The ET rejected the other part of her reasonable adjustments claim, that the Respondent should have altered its absence management procedures and attendance requirements more generally. Its view was that all reasonable steps had been taken, bearing in mind the impact of her attendance record on colleagues and the service provided to the public.

Next the ET dealt with the section 15 claim. The Claimant contended that the capability proceedings and eventual dismissal were unfavourable treatment for a reason arising out of her disability, namely her attendance record. This was agreed, as was the existence of a legitimate aim for this treatment; at issue was its proportionality. The ET found that it was proportionate to hold a long-term sickness absence hearing, given that five formal reviews had been held first, and the Claimant's position was that she could not return to work. It was also proportionate to have dismissed her, for essentially the same reasons.

Finally, the ET considered the claim for unfair dismissal. It was common ground that the reason for dismissal was capability, and the claim turned on reasonableness. The ET tackled separately the issues of whether a fair procedure was adopted, and whether dismissal for that reason was within the range of reasonable responses. Regarding the procedure, which it found fair, it addressed the potential inconsistency with its finding that the Respondent had failed to make a reasonable adjustment. The difference was that while it would have been a reasonable adjustment to grant an extension, failure to do so was not outside the range of reasonable responses required of the employer. It also found that dismissal by reason of capability was reasonable, given the scale of the problem and failure of attempts to solve it. Interestingly, the EAT criticised this separation of the issue of reasonableness into procedural fairness and overall fairness, but considered that the relevant question had been answered nonetheless (paragraph 27).

The Appeal Tribunal's decision

The Claimant appealed on four grounds.

1. Given its findings on the extension of her appeal, the ET should have found that her dismissal was unfair.
2. The ET's reasons for finding that her dismissal was fair were inadequate, particularly in light of this apparent inconsistency.
3. The ET took into account an irrelevant consideration when deciding her dismissal was fair, namely that her appeal would have failed anyway.
4. If her dismissal was indeed procedurally unfair, it would follow that it was not a proportionate means of achieving a legitimate aim for the purposes of section 15 of the Equality Act.

The EAT began by setting out the legal framework for each of the three claims. These were three different torts, it stated, each with different legal ingredients and legislative aims. Most important among these, for the purposes of the present case, was that in the Equality Act claims the tribunal must decide for itself whether the decision of the employer was a reasonable one; whereas for unfair dismissal, the question is whether the employer's actions fell outside the "range" of reasonable responses. The fact that one of these torts has been committed does not mean that any of the others necessarily will have been (paragraphs 37-40). This paved the way for dismissing the Claimant's first ground of appeal, that a failure to make a reasonable adjustment necessarily constituted unreasonable behaviour for the purposes of unfair dismissal. Instead, said the EAT, it would depend on the facts of each case (paragraphs 45-49).

The second ground (inadequate reasons) was dismissed on the basis that the ET had indeed been alive to the above issue, and dealt with it correctly (paragraphs 50-53). Nor had the ET found that the dismissal was fair merely because a fair procedure would not have changed the outcome, thus committing "*Polkey* heresy": rather that, notwithstanding the refusal of an extension to lodge an appeal, the overall procedure was fair, taking into account the strength of the reasons to terminate the Claimant's employment. This disposed too of the third ground of appeal (paragraph 54).

The Claimant's final argument failed by default, because it relied on the dismissal being considered unfair. The EAT described it as "wrong in any event", because it fell into the same error of conflating the ingredients of different legal torts. The fairness and the proportionality of a dismissal were not identical legal concepts (paragraphs 56-57).

Comment

The EAT has delivered an unambiguous statement that a failure to make reasonable adjustments does not necessarily equate to unreasonable behaviour for the purposes of unfair dismissal. Drawing this out into a wider point, the EAT explained that one *legal* conclusion made by a tribunal was not a relevant consideration when reaching another legal conclusion; what may be cross-applicable is a *factual* conclusion that the Tribunal has already reached.

The EAT did consider when a failure to make a reasonable adjustment *might* make a dismissal unfair.

> [41] [It] *will depend on the relationship between the adjustment in question and the dismissal. Where, for example, the adjustment would have meant that the dismissal of the employee became unnecessary, it is likely that in practice the dismissal would also be held to be unfair.*

In that scenario, said the EAT, such a failure would in addition likely be disproportionate for the purposes of section 15 of the Equality Act (paragraph 41).

It is worth saying that the facts of this case were unusual, in that the Claimant agreed she was unable to work and indeed had a broader reluctance to stay with the NHS, due to additional (unrelated) litigation she was taking against it. Her attendance record had been poor for many years; her job was an important, patient-facing role; and the employer had taken all reasonable steps to accommodate her disability. One of the key reasons for holding that the procedure was fair was the strength of the reasons for dismissal; it is sensible to infer that in a more borderline case, something which constitutes a failure to make a reasonable adjustment is more likely also to affect the reasonableness of dismissing an employee.

The EAT also commented on the relationship between unfair dismissal and a claim under section 15 (discrimination arising from disability). Having already cited the judgment of Sales LJ (as he then was) in *York City Council v Grosset* [2018] ICR 1492, which drew the distinction between a "range" of reasonable responses (unfair dismissal) and what the tribunal considered reasonable (section 15), it considered that:

> [39] *Sales LJ might have added that the law of unfair dismissal arguably places a greater emphasis on procedural fairness than the concept of proportionality, which is more focussed on outcomes. It was suggested by Mr Jones* [for the Respondent] *that he could have added that the test for proportionality (or, as it is often put, objective justification) may be based on matters which were not in the mind of the employer at the time of the unfavourable treatment complained about, whereas of course the W Devis & Sons Ltd v Atkins [1977] AC 931 principle means that the law of unfair dismissal focusses on what was in the mind of the employer at the time of dismissal.*

The key takeaway, it would seem, is that practitioners must be careful about drawing links between a claimant's unfair dismissal and discrimination claims. The safer approach is simply to tackle each head of claim on its own terms.

1 June 2022

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