Court of Appeal: Decision not to deploy disabled employee on overseas assignment was not disability discrimination

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Owen v AMEC Foster Wheeler Energy Ltd and another
(Judgment handed down on 14 May 2019)

The Facts

The Claimant (hereinafter referred to as "**C**") is disabled with double below knee amputations and type 2 diabetes, hypertension, kidney disease, ischaemic heart disease and morbid obesity.

He worked as a chemical engineer for the First Respondent (hereinafter referred to as "**R1**"). The Second Respondent (hereinafter referred to as "**R2**") is the Operations Director at R1.

In September 2015, C's line manager informed him that a client of R1 wanted him to be part of a project management team in Sharjah, Dubai, UAE for a 12-month duration. The global mobility department were made aware in order to make the necessary preparations for the secondment.

A third-party occupational health organisation was responsible for implementing procedures to those deployed on assignments overseas. C was required, in accordance with the procedure, to complete a medical questionnaire and then undergo a pre-assignment medical assessment. Within the medical questionnaire, he disclosed some, but not all, of his medical problems. He omitted to disclose his amputations or his kidney problems.

The medical assessment took place in October 2015 and following its completion, Dr Sawyer (who completed the assessment), wrote to the R1, copying in C, expressing concerns. Following discussions between various individuals, R2 decided that C should not be deployed on the assignment.

C presented tribunal claims on 13 March 2016.

The ET unanimously dismissed C's claims of direct disability discrimination. By a majority, the ET rejected C's claims of indirect discrimination and failure to make reasonable adjustments. The EAT dismissed C's appeal. Permission to appeal to the Court of Appeal (CoA) was granted on 16 July 2018.

The Law: The Equality Act 2010 (hereinafter referred to as "the Act")

Section 13 provides:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> ..."

Section 19 provides:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.
>
> (3) The relevant protected characteristics are— ... disability".

Section 20 provides: "...

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. ..."

Section 23 provides:

"(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

(2) The circumstances relating to a case include a person's abilities if—

(a) on a comparison for the purposes of section 13, the protected characteristic is disability;

(b) on a comparison for the purposes of section 14, one of the protected characteristics in the combination is disability."

The ET Decision

Direct Discrimination

By a unanimous decision, the ET rejected C's claim of direct disability discrimination. C alleged he had overheard someone claim that R2 had said "someone like [C] is not representing the company". The absence of this in C's grievance proved fatal and therefore was not established on the balance of probabilities.

C also said that the decision not to send him on the assignment was an example of direct disability discrimination. The ET utilised the "hypothetical comparator" with the characteristics of someone without a disability who had been assessed as high risk and accordingly found no evidence to determine that a comparator would have been treated differently and that the correct procedure had been followed.

The tribunal stated that the medical assessment of Dr Sawyer provided a complete non-discriminatory explanation for the decision not to deploy C to Dubai.

Indirect Discrimination

The PCP identified in respect of the indirect discrimination claim was the requirement to pass a medical examination to a certain level before sending an employee on an international assignment.

It was accepted by the Rs that such a requirement was a provision, criterion or practice (PCP) that could result in a particular disadvantage in consequence of C's disabilities i.e. failing the medical assessment and not being approved for deployment. The salient issue therefore was whether that PCP was a proportionate means of achieving a legitimate aim.

The legitimate aim was "*ensuring that those who go on a global assignment are fit to do so, that health risks are properly managed, and that individuals are not subject to health risks as a result of the assignment*" [1]. The majority held that the PCP was a proportionate means of achieving a legitimate aim.

Reasonable Adjustments

C relied on two separate PCPs in terms of his reasonable adjustments claim.

The first PCP was the same PCP identified in respect of indirect discrimination. The second PCP was unanimously rejected and did not form part of the appeal to the CoA.

The first PCP was rejected by a majority on the following analysis: "*there was no reasonable adjustment that could have been made to avoid the disadvantage, since such a medical assessment was necessary. Once the assessment found that C was high risk, the only reasonable course to avoid the risk was not to deploy him overseas. There was a follow up on 12 October 2015, and a risk assessment was unnecessary given that the medical assessment was by its nature a risk assessment*" [2].

The EAT Decision

HHJ Eady QC dismissed the appeals as follows:

In respect of the direct discrimination claim, the challenge centred around the construction of the comparator (as a person without a disability) who had received a similar assessment of being high risk if deployed on an assignment due to medical concerns. C also challenged the

[1] para 27 of the CoA judgment
[2] para 30 of the CoA judgment

lack of explanation as to why his risks would be higher than if C remained in the UK and on that basis, the ET's reasoning was flawed. HHJ Eady QC held that the information provided to the Rs was clear; the assignment was high risk.

In relation to the indirect discrimination claim, various challenges were made to the ET's reasoning but importantly, the EAT discerned that there was no error of law in the ET's rationale on the point of justification; it had been entitled to conclude that the requirement of C to reach a certain level in terms of the medical assessment was a proportionate means of achieving a legitimate aim and was permissible in light of the expert evident from Dr Sawyer.

Finally, the EAT held that an appropriately staged approach had been adopted by the ET on the issue of the reasonable adjustments claim and it had been entitled to say the Rs had gone far enough.

Grounds to Court of Appeal

Four grounds of appeal were advanced before the CoA.

Ground 1: In holding there was no less favourable treatment because of disability, contrary to section 13 of the 2010 Act, the ET misdirected themselves and erred in focusing on the R1's explanation or motivation for why it refused the overseas assignment (a duty of care to its employees), rather than on the reason itself (the conclusions of a medical assessment, which were indissociable from the facts constituting C's disability) [3].

Ground 2: The ET further misdirected themselves and erred in constructing the hypothetical comparator for the section 23 of the Act comparison and impermissibly ascribed facts constituting the disability to the hypothetical comparator [4].

Ground 3: In relation to the duty to make reasonable adjustments, the ET erred in failing to follow the structured approach required for section 21 of the 2010 Act and impermissibly shifted from dealing with the provision, criterion or practice at issue to an unstated different one [5].

[3] para 46 of the CoA judgment
[4] para 47 of the CoA judgment
[5] para 50 of the CoA judgment

Ground 4: In relation to the claim for indirect discrimination, having misdirected themselves on section 13 and having misapplied section 21, the ET were not in a proper position to address the proportionality test, addressing it on a restricted basis and so failed to carry out the required balancing act; their conclusion on section 19 was therefore unsafe [6].

The Court of Appeal Decision

Lord Justice Singh, giving the lead judgment, rejected all the grounds of appeal.

Ground 1 and 2

The Court of Appeal considered s23(1) of the Act and in particular the requirement that, when making a comparison of cases for the purposes of either a direct or indirect discrimination claim, there must be "no material difference between the circumstances relating to each case" and s23(2) confirms that where the protected characteristic is disability, a person's abilities are included for the purpose of s13.

Singh LJ considered the authorities of *High-Quality Lifestyles Ltd v Watts* [2006] IRLR 850 and *Stockton-on-Tees Borough Council v Aylott* [2010] EWCA Civ 910; [2010] ICR 1278; in *Aylott*, Mummery LJ cited with approval the EAT judgment in *Watts.* He went on to consider that one of the difficulties of C's argument was that there was no real comparator in the present case at all, thereby creating a situation where it is difficult to see how s13 could apply to the circumstances. Here, Singh LJ considered that Counsel for C's submissions were not apt for alleging a breach of s13 and, if anything, should have formed the basis of a s15 claim (which does not require a comparator).

Ground 3

Singh LJ emphasised that an appeal lies from the ET to EAT only on a question of law and that the question of what would be a reasonable adjustment is a matter of fact and degree. The Court of Appeal were asked to accept that an impermissible shift had taken place from an identified PCP to an unstated different one. They did not accept that such a shift was evident from the ET's reasoning and concluded the Rs acted at all material times on the basis of independent advice and the ET "*correctly focussed on the question of the*

[6] para 52 of the CoA judgment

reasonableness of any adjustment that could be made to avoid the disadvantage caused to C by the PCP which it recognised did exist" [7].

Ground 4

The Court of Appeal reminded itself that HHJ Eady QC in the EAT had appreciated C's concerns that there was no express acknowledgment of that which seemed to be missing from Dr Sawyer's advice, namely precisely why the secondment to Dubai posed a higher risk for C than remaining in the UK. However, this point had evidently been filled by the evidence of Dr Patterson, whose witness statement was before the ET.

Whilst the CoA noted that the ET didn't refer to Dr Patterson's evidence specifically within the part of their decision dealing with indirect discrimination, the reference within the reasonable adjustments part of their decision confirms their awareness of it generally. The Court held that the ET did not fall into error in respect of ground 4 and reached its factual conclusions based on the evidence before it.

C's appeal was dismissed.

Comment

Whilst this case may be perceived as quite fact sensitive, it is nevertheless helpful for Respondents who regularly deal with international secondments. It serves as a useful reminder in respect of a multitude of claims under the Equality Act and, most importantly for Claimants and their lawyers, to consider carefully how claims are pleaded given the obvious constraints at appellate level.

The Court's reminder that the concept of disability is not a binary one and that it is not always the case that an individual's health will be irrelevant when looking at their ability to do a job are also important.

Finally, any employer in the situation of R1 would be well advised to ensure they have comprehensive procedures in place, including access to health care professionals and doctors to manage and advise appropriately in scenarios such as this.

It is understood that C has applied for permission to appeal to the Supreme Court so this is certainly a case to watch.

[7] para 84 of the CoA judgment

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