Impact on other employees - a relevant factor in the assessment of reasonableness

Mr J Hilaire v Luton Borough Council [2022] EAT 166

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Factual background and Employment Tribunal decision

The claimant was disabled under section 6 of the Equality Act 2010. The Employment Tribunal **("ET")** found he had the physical disability of arthritis and the mental impairment of moderately severe depression with somatic syndrome (meaning his depression arose in part due to concentration on physical pain). The ET considered only the mental impairment relevant to the issues before it and held that the respondent knew of the disability.

Due to a redundancy process involving a restructuring of the department in which the claimant worked, the respondent required the claimant to attend an interview. The respondent had the provision, criterion or practice **("PCP)** of requiring employees to attend an interview in the redundancy process. The respondent had allowed the claimant a short extension to the deadlines for both the application process and the interview date. The claimant sent an email on 4 October 2022 stating that '*even if I wasn't off sick….I still would not have attended this interview'*.

The ET found that the claimant was able to engage with the process if he wanted to but that he did not want to for reasons unrelated to his disability.

The issues to be determined at appeal were two-fold:

1) Had the ET correctly identified that there was no disadvantage?
2) Should further adjustments than delaying the interview have been considered?

Disadvantage

The respondent argued that the PCP considered by the ET regarded attendance only and impact on participation at an interview was therefore not an issue before the Employment Appeal Tribunal ("EAT"). The EAT did not accept this narrow interpretation of the PCP as a

‘sensible and benevolent’ reading of the ET decision (*DPP Law Ltd v Greenberg [2021] IRLR 1016*). The EAT considered that if a PCP requires attendance, it also requires participation and that the ET would naturally have in mind both attendance and participation as part of the PCP. Participation was therefore a relevant consideration before the EAT [para 30].

The EAT noted that the ET took a binary approach to the PCP, essentially considering whether the claimant could attend an interview or not. The EAT held this to be the wrong approach as the relevant test is whether the effects of the disability make it more difficult for the disabled employee to meet the PCP in comparison with persons who are not disabled. The EAT found that in this case, issues with memory, concentration and social interaction would at least hinder effective participation causing a disadvantage in comparison with a non-disabled employee. The EAT held that the ET should then have gone on to consider if this limitation was more than minor or trivial. The EAT considered that on this basis, this aspect of the ET's judgment was flawed [para 30].

The EAT then considered the issue of causation. Even if the ET were not entitled to conclude that the claimant was not disadvantaged by the PCP, they were entitled to conclude that this was not the reason for his non-attendance. This was a factual finding on causation, supported by evidence including the email from the claimant dated 4 October 2022. The ET were best placed to conclude that it was not the effects of disability which prevented his compliance with the PCP, rather it was a choice he made. The EAT concluded that on this basis, the appeal cannot succeed [para 31].

Reasonable adjustments

The respondent had made the adjustment of a short delay to the interview date. The EAT stated that to be an adjustment within the meaning of the Equality Act 2010 the step taken must have the potential to alleviate the disadvantage. The evidence before the ET pointed to a significant impairment from which recovery would be protracted. The EAT held that the short delay applied to the date of the interview could not be considered an adjustment in the circumstances [para 32].

The EAT then considered if other adjustments could have been made. The claimant had proposed several adjustments to the EAT including providing interview training, providing a line manager to support him, or ‘slotting’ him into a role without interview. The EAT considered that the only proposed adjustment that would have the potential to alleviate the disadvantage was to slot the claimant into the role without interview, however, this was a step which would have impacted others who had taken part in a process of selection. The EAT found that while the adjustment of slotting into a role can be reasonable (*Archibald v Fife Council [2004] IRLR*

651), it will not necessarily be. The ET is entitled to consider the surrounding circumstances and impact on other employees when determining if such a step is reasonable for the respondent to *have* to take [para 33].

Comment

1) The test to establish substantial disadvantage is not binary, 'can the individual meet the PCP or not?' The correct test is to consider if there is a disadvantage in comparison with non-disabled persons and then whether any such disadvantage is more than minor or trivial. The tribunal must then consider if it is the effect of disability that prevents compliance with the PCP or some unrelated reason.

2) The surrounding circumstances, including impact on other employees, can be relevant factors when determining if an adjustment is reasonable or not.

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