Disability discrimination claim for failure to make reasonable adjustments? – Rakova v London West Healthcare NHS Trust UKEAT/0043/19/LA

By Katherine Anderson

Background

Employees can often complain where they feel that their managers are not giving them the tools they need to do their jobs efficiently, effectively or productively. How does that situation relate to a disability discrimination claim for failure to make reasonable adjustments? – Rakova v London North West Healthcare NHS Trust UKEAT/0043/19/LA

This decision of the Employment Appeal Tribunal ('EAT') provides some guidance on the approach to be taken by the Employment Tribunals in claims of disability discrimination by reason of a failure to make reasonable adjustments – specifically in relation to the identification of the provision, criterion or practice ('PCP') and the 'substantial disadvantage'.

The Claimant was a disabled person for the purposes of the Equality Act 2010 for reason of three conditions which included dyspraxia and dyslexia. She was a Clinical Nurse Specialist working for the Respondent NHS Trust. Her role was clinical rather than administrative in nature, but she was required to perform administrative tasks arising from her clinical duties. In particular, she was required to keep accurate and clear records of patient care. Over time, it was apparent that she was having difficulties completing her patient care records.

The Claimant's complaints before the Employment Tribunal ('ET'), centred on *inter alia,* the software provided by the Respondent and other IT matters such as her access to the hospital guest Wi-Fi. She complained, for example, that the various software programs needed updates and that this was causing her computer to run slowly. The ET found, in relation to each of the three complaints which were in issue before the EAT, that the Claimant had not demonstrated that she had been placed at a substantial disadvantage. In the EAT's analysis, that conclusion, in each instance, seemed to be founded on a view that substantial disadvantage could not be demonstrated by a desire to be more efficient or, alternatively, that merely being able to show that the Claimant could only work in a less efficient way was not sufficient to evince a substantial disadvantage.

In considering the applicable law, the EAT noted that it was common ground between the parties that the ET must (so far as is relevant in this case) identify: (a) the PCP applied by or on behalf of the employer, and (b) the nature and extent of the substantial disadvantage suffered by the Claimant (see *Environment Agency v Rowan* [2008] ICR 218 EAT at paragraph 27, followed in *Royal Bank of Scotland v Ashton* [2011] ICR 632, and approved by the Court of Appeal in *Newham Sixth Form College v Sanders* [2014] EWCA Civ 734). The substantial disadvantage in issue must arise from the disability otherwise the duty will not arise (see *Newcastle Upon Tyne Hospitals Foundation Trust v Bagly* UKEAT/0417/11). In *Rowan* the EAT went on to warn that, unless it has identified both the PCP and the nature and extent of the substantial disadvantage, they will be unable to say what adjustments were reasonable to prevent that PCP placing the disabled person at a substantial disadvantage.

The EAT in *Rakova* held that it cannot be assumed that a desire to achieve greater efficiency does not reflect the suffering of a substantial disadvantage. A desire for greater productivity *could* be entirely unrelated to any disadvantage suffered by the employee in question, but it is also possible that, where the disability in question means that an employee is unable to work as productively as other colleagues, adjustments to enable her to be more efficient would indeed relate to the substantial disadvantage she would otherwise suffer. The ET may find that such disadvantages as were suffered by a particular complainant in terms of efficiency were entirely unrelated to her disabilities; alternatively, it may go on to find that the adjustments in questions would not serve to mitigate the disadvantage, or would not be reasonable. In this case, however, the ET appeared to have simply assumed that there is necessarily a disconnect between seeking to be more efficient (thus acknowledging that one is less efficient) and claiming that that reflects a substantial disadvantage. What the ET was required to do was to ask itself whether the Claimant's disabilities placed her at a substantial disadvantage. Where she was seeking adjustments to improve her efficiency, the question was whether she suffered a substantial disadvantage in that regard. The ET thus failed to identify the nature and extent of any disadvantage claimed by the Claimant, and that was an error of approach.

The EAT also found that the Claimant had identified as a PCP that she was to use the Respondent's conventional software. The EAT held that this was a requirement that was imposed on the Respondent's staff generally, including (before any adjustments were put in place for her or to the extent that those adjustments did not work) the Claimant. The ET had erred in finding that the Claimant had merely identified a practice referable to her. Had it

intended only to find that this PCP was *not being applied to the Claimant* because of the various adjustments that had been provided, it could (and should) have said so.

This latter finding provides some useful guidance in cases where adjustments have already been made for a disabled employee, which can make the identification of the PCP applied somewhat less straightforward.

May 2020

Katherine Anderson

Employment Barrister, 3PB

0117 928 1520
katherine.anderson@3pb.co.uk

3pb.co.uk