Even lawyers can falter when identifying the PCP in a failure to make reasonable adjustments claim, but PCPs are not designed to be 'traps for the unwary'

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Mrs A Martin v City and County of Swansea: EA-2020-000460-AT (Previously UKEAT/0253/20/AT)

The facts

The claimant, who worked for the Housing Department of the respondent local authority, went through a series of redeployment trials and absences due to stress related ill health before commencing a period of sickness absence from which she did not return. She was dismissed because of absence and subsequently brought claims before the ET of unfair dismissal and disability discrimination including for discrimination because of something arising in consequence of disability and failure to make reasonable adjustments.

In considering the claim of failure to make reasonable adjustments, the ET concluded that the PCP asserted by the claimant – which it considered to be the application of the respondent's Management of Absence Policy – could not place her at a substantial disadvantage in comparison with non-disabled persons because there was flexibility and discretion built into the drafting of the Management of Absence Policy to accommodate disadvantages that might be faced by employees with disabilities.

The EAT (HHJ James Tayler) commented that as a starting point it was surprising that a claimant who was unfit for her role and asserted that, with appropriate assistance such as any necessary training, she could be placed into an alternative role, should fail even to get to the stage of assessing whether the respondent was required to make a reasonable adjustment because no workable PCP was asserted. He stated, *"Litigants in person often struggle with discussions about PCPs at preliminary hearings for case management, seeing it as a jargon term that is difficult to decipher. Even lawyers can falter when identifying the PCP. However it is clear that PCPs are not designed to be traps for the unwary and a practical and realistic*

approach should be adopted at the case management stage to identify a workable PCP which should not thereafter be over-fastidiously interpreted with the result that a properly arguable reasonable adjustments claim cannot be advanced, particularly when dealing with litigants in person." Citing HHJ Eady QC in *Carreras v United First Partners Research*, he added, *"Where a party is represented the employment tribunal can expect the PCP to be properly identified and so representatives should always consider how the PCP is pleaded with great care. A preliminary hearing for case management will often be a good opportunity to review whether the PCP as pleaded is workable and, if not, to consider whether an amendment might be required to rephrase the PCP. But whatever PCP is finalised it should be given a reasonably generous reading when determining the claim."*

HHJ Tayler considered that it was clear that the claimant did not merely assert that the PCP was the terms of the Management of Absence Policy, but contended it resulted from the application of the policy to her resulting in her dismissal because she was absent from work and was not fit to undertake the duties of her role, even though the employer had a discretion to find her an alternative role. As a disabled person, she was at increased risk of absence that could result in dismissal. The ET had erred in law in holding that because there was a discretion in the policy to move the claimant to an alternative role, that could avoid the substantial disadvantage, the consequence was that the PCP did not put her at a substantial disadvantage. The application of the policy put her at a disadvantage because she was a greater risk of absence than people who are not disabled and so, because the discretion to find an alternative role might not be exercised in her favour, she was at a greater risk of dismissal. The real question in this case was whether the respondent had taken such steps as were reasonable to avoid the disadvantage.

Comment

Whilst this case confirms that the PCP in a reasonable adjustments claim must be properly identified, it offers something by way of reassurance to lawyers who represent claimants who may worry that their client's case could flounder on the ground that the PCP on which they relied was not sufficiently well pleaded. It may also do something to deter respondents' lawyers from taking overly technical points on pleading. In addition, that an employee has been dismissed under their employer's capability or absence management procedure is a reasonably common scenario, and this judgment provides a useful guide to practitioners on how to correctly identify the PCP in such cases.

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