Reasonable Adjustments: Trial Periods and the Burden of Proof

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Stephen Wyeth reviews Rentokil Initial UK Ltd v Miller [2024] EAT 37 which deals with the issue of whether trial periods can be a reasonable adjustment in the context of existing case law and offers some useful discussion about how the burden of proof shifts in such cases.

The facts

1. Mr Miller, the claimant, commenced employment with Rentokil, the respondent, in a "field role" as a pest control technician in April 2016. His role was generally physically demanding and involved him working at heights using ladders for around 40 per cent of the time. In March 2017 the claimant was diagnosed with multiple sclerosis. Over the following months various adjustments and modifications were made to his working arrangements in an effort to enable the claimant to continue in his role but by the end of 2018 he was sent home on full pay. By this time, the respondent had determined there was no viable way in which the risks the claimant faced in his role because of his disability could be satisfactorily mitigated and they began exploring moving the claimant to a different role. In February 2019 the claimant applied for a service administrator role, a more junior role that supported his technician role.

2. At this time, it was standard practice for all candidates for jobs with the respondent to undertake maths and spelling assessments. The claimant was put through a process involving written tests on verbal usage and maths along with a standard interview with the Head of Operational Support who was the recruiting manager and not the claimant's line manager. The claimant performed poorly in the written tests and the recruiting manager concluded after the interview that the claimant had irrelevant skills and experience for the service administrator role (in particular, a lack of experience in the Excel spreadsheet program) and should not be offered the role. The respondent did not consider offering the claimant the position on a trial basis with or without additional training.

3. Thereafter the claimant went through a capability process with his line manager and the conclusion was that there were no other adjustments that could be made to enable the claimant to remain in his existing field role. As his application for the service administrator role was unsuccessful and there was no other suitable role for him, the claimant was dismissed at the capability meeting on 13 March 2019 and his internal appeal against dismissal was rejected.

4. Before the Reading Employment Tribunal, the claimant brought complaints of two failures to comply with the duty to make reasonable adjustments (ss20-22 Equality Act 2010 ("EqA")), discrimination arising from disability (s15 EqA) in relation to his dismissal, and unfair dismissal.

The Tribunal's decision

5. The tribunal (EJ Hawksworth sitting with members) rejected one of two complaints of a failure to make reasonable adjustments (relating to the hours of the claimant's role) but upheld the other complaint. The PCP relied upon for the successful complaint was the requirement that field staff work in their substantive roles. Unsurprisingly the tribunal found that this PCP was applied to the claimant and put him at a disadvantage in comparison to those who are not disabled. He was permanently restricted from working at height because of the risk of falling and his MS symptoms made him relatively slower at executing his tasks at work relative to an unaffected peer. He was, thus, at risk of dismissal from his substantive role.

6. As for overcoming the (inevitable) disadvantage arising from the PCP, the claimant identified the potential adjustment of an office-based role and pointed to the vacancies for two service administrator roles for which he had unsuccessfully applied. Accordingly, the ET found that this was enough to shift the burden to the respondent to satisfy the ET that its refusal to transfer the claimant to the service administrator role was not a failure to make a reasonable adjustment. Notably, the respondent did not call as a witness the Head of Operational Support - the recruiting manager who made the decision rejecting the claimant's application for the service administrator role. The ET went on to identify why the respondent had not proved that such a move would not have been reasonable.

7. In essence, the tribunal did not accept that the claimant had limited relevant experience as suggested by the recruiting manager because the alternative (more junior) role was a support role to the claimant's substantive role. Furthermore, any lack of Excel proficiency could have been addressed by training. As for his poor performance in the tests, the

respondent offered no evidence as to whether the claimant had to undergo the same or similar tests for his existing technician role (which also required some verbal and maths skills) and any concerns about the claimant's ability to perform the role arising from these could be met by offering the claimant a trial period.

8. In short, the ET concluded that the claimant was treated like any other candidate for the role of service administrator by the recruiting manager who applied a standard appointment process to his application for the role rather than considering it as a reasonable adjustment to overcome the existing predicament caused by his disability. The ET determined that it would have been a reasonable adjustment to transfer the claimant to the service administrator role *for a trial period of four weeks*. It followed that the failure to make this reasonable adjustment meant that the decision to dismiss was not justified for the purposes of the s15 EqA claim which therefore also succeeded (as did the unfair dismissal claim for similar reasons). The tribunal went on to find for remedy purposes that there was a 50 per cent chance that the trial period would have succeeded and the role made permanent.

The appeal

9. The respondent appealed on the following four grounds:

    a. a trial period is a process or tool of investigation not capable in law of amounting to an adjustment in itself;

    b. the existence of the two service administrator vacancies should not have shifted the burden of proof to the respondent regarding the duty to make reasonable adjustments;

    c. where an employer genuinely and reasonably concludes that an employee is not qualified or suitable for a role, it cannot be a reasonable adjustment to appoint them to it; and

    d. whether an adjustment is reasonable is purely objective and the mindset of the decision maker is irrelevant.

The approach of the EAT

10. In addressing ground one, HHJ Auerbach sitting alone undertook a very useful review of the relevant authorities before reaching his conclusion that a trial period of itself can amount to a reasonable adjustment in accordance with the wording of s20(3) EqA. The

duty on a respondent is "to take such steps as it is reasonable to have to take "to avoid" the substantial disadvantage" at which the PCP puts the disabled claimant". HHJ Auerbach acknowledged the "much-cited" decision of Elias P in Tarbuck v Sainsburys Supermarkets Limited [2006] IRLR 664 EAT (a failure to consult an employee about reasonable adjustments is not of itself a breach of the duty) and Spence v Intype Libra Limited UKEAT/0617/06 (again, Elias P) (likewise, obtaining a medical report is not a reasonable adjustment). In Smith v Churchill Stairlifts plc [2006] ICR 524 CA due to his disability Mr Smith was unable to carry a radiator cabinet that he was required to show to potential customers. The ET at first instance had indicated that a trial period of the claimant selling without having to carry the cabinet would have been a reasonable adjustment but found against Mr Smith for other reasons. Although the Court of Appeal held there was a failure to make reasonable adjustments because the ET was wrong about the comparator group, HHJ Auerbach was not content to rest his decision on Smith because whether a trial period could be a reasonable adjustment as a matter of law did not appear to be a live issue in that case.

11. Most notably, HHJ Auerbach rejected the observations of the EAT in The Environment Agency v Rowan [2008] ICR 218 in which HHJ Serota QC commented that the EAT "…had considerable difficulty in seeing how an investigation or trial period as such can be regarded as a reasonable adjustment" albeit that it did not decide the point. In Rowan the EAT suggested that trial periods are part of a process that is concerned with determining what steps should be taken and are akin to a consultation or obtaining medical or other specialist reports and do not of themselves mitigate or prevent or shield the employee from anything.

12. In "respectful disagreement" with the observations in Rowan, HHJ Auerbach concluded that offering an employee a trial period in a different role (as in the circumstances of this particular case) was not analogous to consulting the employee or seeking a medical report (neither of which involve a change to the employee's substantive terms, working conditions or arrangements). In the present case putting the claimant in the service administrator role on a trial basis would have effected a substantive change to what he was doing albeit it that it remained to be seen how it would work out and for how long. It did not merely involve postponing the claimant's inevitable dismissal by four weeks. Using HHJ Auerbach's own language: "it would not be just a short stay of execution, but held out the prospect of the axe being lifted entirely."

13. As for the burden of proof (the second ground of appeal) HHJ Auerbach provided some useful context when applying the test in Project Management Institute v Latif [2007] IRLR

579 EAT. The burden is on the employee initially to show that the PCP was applied and that it placed them at the substantial disadvantage asserted and to identify some at least potentially or apparently reasonable adjustment that could be made. If they do, then the burden may pass to the employer to show that it would not have been reasonable to expect them to make that adjustment. Thus, the ET was right in its approach in this case.

14. As for ground three, reference was made to the seminal case of Archibald v Fife Council [2004] ICR 954. HHJ Auerbach made it clear that whether an employer ought reasonably to have put an employee into a given role (on a trial basis or not) is an objective question for the tribunal to decide on the facts found from all the evidence. The ET is not bound to defer to the view of either party. That said, plainly a usually relevant consideration for the ET will be whether the employee met essential requirements of the role (skills, qualifications, knowledge, experience etc.). Evidence produced by the employer showing the contrary should be carefully considered and weighed by the ET. According to the EAT the issue for objective determination is "whether *this* employer ought reasonable to have put *this* employee (on a trial or not) into *this* role" to be determined on the basis of information that was available at the time when the decision fell to be taken.

15. The EAT was satisfied that the ET had decided that it was not enough for the respondent to show that the claimant had not performed well enough by the standards applied in a competitive exercise. The performance assessment needed to be looked at through the prism of s20 EqA. The decision was based on the recruiting manager's assessment rather than a manager who had the benefit of knowing how the claimant had performed in his substantive role.

16. As for ground four, quite simply the EAT was satisfied that the ET did not depart from this correct statement of the law. Accordingly, the EAT dismissed the respondent's appeal in its entirety.

Comment

17. Any practitioner advising on reasonable adjustments should familiarise themselves with this authority not least because it provides a very useful summary of the key case law in this area. Of all the forms of discrimination, it is not an exaggeration to say that complaints involving a failure to make reasonable adjustments present employers with possibly the greatest risk of an adverse finding against them. The fact that the tribunal is obliged to form its own conclusion as to what is reasonable creates a level of uncertainty for any employer when faced with this category of complaint. That said, the decision of the EAT

in this case is not exactly groundbreaking. This case illustrates the logic of how, why and when a trial period will be a reasonable adjustment and why the earlier observations in Rowan are not hard to unpick. Not offering Mr Miller this opportunity was only ever going lead to one outcome – dismissal. As such the respondent needed to be ready to justify that decision. The EAT did emphasise that tribunals are not bound in every case where the employee was facing dismissal, to conclude that the employer ought to have given them a trial period in a particular other role (see paragraph 36). Whilst as a matter of law there is nothing to prevent an employer putting a disabled employee through a competitive selection process for the purposes of redeployment, ultimately if the employee is unsuccessful the consequences of this will require careful thought and justification. The (surprising) absence of, and thus lack of evidence from, the decision maker to explain why a move to the vacant role was inappropriate undoubtedly hindered the respondent's ability to defend this complaint. Need it be said, advisers for an employer must identify at an early stage exactly who will be required to tender relevant and necessary evidence. In a reasonable adjustments case this will almost certainly involve the person responsible for deciding whether or not to make the necessary adjustment.

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