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UK: Employment Update

Disability Discrimination: Putting an employee on a career break is not a reasonable adjustment

Where a provision, criterion or practice (PCP) of the workplace puts a disabled employee at a substantial disadvantage the employer is required to take reasonable steps to avoid the disadvantage. What is a reasonable adjustment is an issue that commonly arises in the context of trying to facilitate an employee's return to work after they have been absent due to ill health that qualifies as a disability.

The Employment Appeal Tribunal (EAT) considered what could be a reasonable adjustment in the case of C who was on long-term sick leave suffering from chronic fatigue syndrome. All the medical opinions were broadly that the demands of C's post were such that because of her condition she was unable to return to her job.

The employer, R, considered a variety of other posts which C rejected because she had insufficient IT skills. R offered to provide C with IT training and C was invited to attend two meetings to discuss how her return to work could be achieved. C failed to attend the meetings and R wrote to her advising her that, in her absence, R might have to consider employment options including termination. C resigned in response claiming constructive unfair dismissal and disability discrimination.

C argued that it would have been a reasonable adjustment to put her on a career break or to allow her to return to do non productive work.

The EAT held that reasonable adjustments are primarily concerned with enabling the disabled person to remain in or return to work with the employer. The PCP was the expectation that C would perform her full role within the contracted hours; C was placed at a substantial disadvantage because her disability prevented her from performing the role.

The EAT held that allowing C to return to work on a non productive basis was not a reasonable adjustment. The EAT considered that allowing a disabled employee a period of rehabilitation or a trial period in a new role were often a good idea as part of a consultation to ascertain what reasonable adjustments could be made; but were not of themselves reasonable adjustments. Equally, allowing C to take a career break was not a reasonable adjustment.

In the EAT's opinion R had done what employers should do and explored retraining C in IT but this was something she was unwilling to undertake. It had also proposed that she should attend the workplace to keep in touch with her fellow employees, again something she felt unable to do. R had ascertained that there was no job which C was capable of doing at the time whether part-time or otherwise, let alone her original post. In the circumstances the letter inviting C to a meeting and advising her that dismissal was one of the options that might be considered was both standard and reasonable and did not provide grounds for claiming constructive dismissal.

This case illustrates that it is easy to blur the lines between what amounts to a reasonable adjustment for the purposes of removing any substantial

Key Issues

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disadvantage caused by a PCP, and the process leading up to the reasonable adjustment itself. The exploratory process to identify what would be a reasonable adjustment should not be mistaken for the reasonable adjustment itself.

[Salford NHS Primary Care Trust v Smith]

Bonus buyout or be dismissed termination was fair

In the current financial climate many employers are exploring ways to cut costs including reducing pay or removing contractual benefits that are costly to provide. Unilaterally varying employees' contracts is a high risk strategy, more advisable is a negotiated change. Employees may however have to be induced to agree the new terms via a buyout payment. Should employees decline such an offer the employer has a stark choice: continue with the expensive arrangements for the 'refuseniks' or terminate the refuseniks and re-engage them on the new contracts. Will such a dismissal be fair? The EAT has recently explored this issue.

A large number of TNT employees were contractually entitled to receive an "end of sort (EOS) bonus" which had been introduced by TNT in 1983. The EOS bonus scheme was, however, discontinued for new starters in 2005. Employees starting after that date were entitled to an "attendance bonus" which had a lower value than the EOS bonus.

The financial state of TNT deteriorated significantly between 2007 and 2009. As a result, local operating managers were pressurised to reduce their costs as the long-term viability of the business was at risk if the decline could not be arrested. In addition TNT decided to discontinue the EOS bonus for a number of reasons: (1) it would reduce cost, (2) the bonus was divisive because an increasing proportion of employees did not receive it despite doing the same work as those who did and (3) the effect of the bonus was that night workers were being paid an overall rate which was 26% above the market rate for comparable work.

Other cost reduction initiatives were also taken including closing various hubs, applying reductions to sub contractor rates, zero pay increases for all employees and a reduction in the use of agency staff and temps.

TNT negotiated the removal of the bonus with the trade union and a final offer was made to those employees represented by the trade union. The offer included a buyout payment in exchange for giving up the bonus. When balloted on the offer the employees rejected it. This lead to TNT giving notice to terminate the contracts of each employee who had refused the offer coupled with an offer of immediate reengagement on the same terms as before but excluding the EOS bonus.

Each employee who was dismissed accepted reengagement on the new terms but under protest and reserved their right to claim unfair dismissal. Some of the unfair dismissal claims were subsequently settled by ACAS by means of a payment which was greater than the buyout payment originally offered.

The remaining employees continued with the unfair dismissal claims. They argued that it was inequitable for TNT to have offered to buyout the bonus as part of its negotiations and then to have withdrawn that offer when it was rejected by the ballot and then go on to terminate and reengage without making that buyout payment. As TNT had been in the position to buyout the EOS bonus, to be fair any dismissal resulting from failure of the negotiations should at least have included a payment equal to the buyout payment.

The EAT held that the dismissals were for some other substantial reason and had been in the range of reasonable responses of a reasonable employer. TNT had attempted to negotiate with the employees. The buyout offer made during the course of negotiations was in order to secure an agreement and remove the risk of industrial action and/or litigation arising out of the dismissal. When TNT took the decision to dismiss coupled with an offer of reengagement it exposed itself to the risk of litigation and/or industrial action. It was reasonable for TNT to take the view that, as it had not received the benefit which the lump sum buyout offer had sought to achieve, it was not required to make that offer where it would not receive the benefit.

In this case the removal of the bonus represented a drop in income of quite some significance, 18% in some cases. The EAT took this into account and also considered whether the employer had taken it into account but concluded that, in light of the financial situation of the company and the other steps taken, it was a reasonable step for the employer to take. The dismissal was accordingly fair.

This case illustrates that a carrot and stick approach to varying contractual terms can work. Terminating and reengaging where a buyout offer has been rejected can be fair, however much will turn on the position the employer finds itself in. The Tribunal will look at what other cost cutting measures have been implemented including whether these have been made at all levels, what the level of acceptance of the changes is and whether alternatives have been explored.

[Slade & Others v TNT (UK) Ltd]

Social networking: ACAS Guidance published

Social networking is an everyday feature of modern life including in the workplace. Employers should be alive to the use and potential for misuse of social networking media at all stages of the employment cycle from recruitment through to termination and have appropriate policies and practices in place. For example employees should be advised of the extent to which use of social networking sites during office hours is permitted, if at all, and should be reminded on a regular basis. Dismissing for excessive use where an employer had not made its policy clear or where it has been inconsistent in the treatment of if its employees, could lead to a finding of unfair dismissal.

ACAS have recently produced a number of fact sheets on managing the impact of social networking including in the context of recruitment and disciplining employees. This can be found here.

Summary dismissal during notice can accelerate termination

If an employee who is working out their notice period is summarily dismissed before their notice expires when does their employment come to an end? The effective date of termination is important as it will dictate whether the employee can bring an unfair dismissal claim or not.

C started employment with M on 1 February 2010. She received written notice advising her that her employment relationship would end on 1 February 2011 "at the latest".

Just before the written notice expired C lodged an unfair dismissal claim on 11 January 2011 referring to the fact that her employment was due to end on 1 February 2011. Subsequently, C received a letter dated 21 January informing her that the company no longer required C to be on garden leave and that her employment would terminate that day with immediate effect.

C then brought a second claim namely that she had been unfairly dismissed on 21 January 2011 because she had previously asserted her statutory right to bring an unfair dismissal claim and this rendered her dismissal on 21 January automatically unfair.

The EAT had to decide when C had been dismissed. M argued that it was on 21 January when it summarily dismissed her and therefore she did not have the one year's service necessary to claim unfair dismissal.

The EAT held that as C had a single contract of employment there could not have been two different dates on which it came to end. The EAT held that the effect of the summary dismissal letter on 21 January was to bring forward the date on which C's notice would have expired (i.e. 1 February) to the date on which she had been summarily dismissed even if the effect of that was to leave C without the necessary period of continuous service to present a complaint of unfair dismissal.

Accelerating an employee's termination date to deprive them of the necessary continuous service to claim unfair dismissal may sound attractive but is not risk free as is illustrated by this case. An employee does not need to have one year's service to bring an unfair dismissal claim where it is claimed the reason for the dismissal is because the employee asserted one of a number of statutory rights including the right not to be unfairly dismissed.

C's case will return to the Employment Tribunal which will assess whether C was summarily dismissed because she brought a claim of unfair dismissal. If the Tribunal considers this was the reason for her dismissal her claim of unfair dismissal will succeed.

Employers who are considering terminating employment before one year's service is achieved should consider whether the employee has grounds for asserting the dismissal is discriminatory or because the employee has made a protected disclosure or asserted one of the protected statutory rights. In all of these cases the Tribunal would have jurisdiction to hear an unfair dismissal claim.

[M-Choice UK Limited v Aalders]

Gender Equality Reporting: "Think, Act, Report"

The Equality Act 2010 requires public sector employers to consider gender equality within the workplace and to publish relevant gender equality data. The Government has, however, elected not to impose a legislative requirement on private sector employers to produce gender pay gap reports. Instead it favours a voluntary approach. To this end the Equalities Office has published the "Think, Act, Report" aimed at establishing a voluntary approach to gender equality reporting.

Annexed to the Think, Act, Report is a transparency framework for reporting; this is split into three sections: narrative measures, workforce measures and pay measures. The framework then indicates what each of the suggested measures shows and their suggested suitability.

The Think, Act, Report can be accessed here. The ACAS guide on voluntary gender analysis and reporting that was published alongside can be accessed here.