ISSN 1759-2925

DISCRIMINATION LAW ASSOCIATION

Briefings

NOVEMBER 2022 | VOLUME 77 | **1026-1036**

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Unpicking disability discrimination: alleviating the disadvantage and identifying the consequence of the disability

Mr H Ahmed v Department for Work and Pensions [2022] EAT 107; July 14, 2022

Facts

Mr H Ahmed (HA) is disabled; he had been employed by the Department of Work and Pensions (DWP) since 2007. By December 2016 he had accumulated 22 days' sickness absence in the previous 12 months. He was subject at that time to a regime where eight days absence in a rolling 12 months was a trigger point for consideration for management action under the DWP's absence policy. He claimed that the provision, criterion or practice (PCP) which required him to achieve a particular rate of attendance to avoid being subject to the absence management procedure, placed him at a substantial disadvantage.

HA also made complaints that other PCP's, such as *'being required to be flexible when taking his scheduled morning breaks'* and the requirement to *'undertake an excessive workload'*, also placed him at a substantial disadvantage because of his disability.

HA had been assessed by occupational health and reasonable adjustments recommended. It was his contention that these adjustments were not being adhered to and, as a result, the respondent made repeated requests for him to work during his break and take on additional work. He submitted he was subject to unfair criticism as a result of refusing these requests.

Employment Tribunal

The ET rejected HA's reasonable adjustments claim under s20 of the Equality Act 2010.

The ET recognised that further to *Griffiths v SoS for Work and Pensions* [2015] EWCA Civ 1265; Briefing 777 [2016], the application of a PCP requiring attendance at a particular level, which creates the risk of disciplinary action, could put a disabled employee at a substantial disadvantage. However, the ET found in this case that a reasonable adjustment had been made to the absence management procedure by increasing the trigger days from eight to 11. Going further, the ET stated it would not be reasonable for the DWP to allow HA to take more than 11 days absence without the absence management procedure being invoked.

The ET found that HA was asked to be flexible with his break times and take on additional work but he had refused, and that no disciplinary action was taken as a result. Therefore, it considered there was no substantial disadvantage.

It stated that the criticism HA was subjected to arose from his difficult behaviour, and was not related to his disability. Further to the evidence provided, and on the basis of his conduct at the hearing, the ET considered that that claimant was *'a very difficult employee to manage'* [para 13] and despite his social anxiety it had no evidence that his behaviour was a consequence of his disability. Therefore, the ET did not conclude that his disability was an effective cause of his conduct which resulted in the criticism.

Employment Appeal Tribunal

The EAT noted that the purpose of the adjustments recommended by occupational health were to alleviate levels of stress suffered by HA at work and were intended to reduce the risk of stress as a reaction to work.

It found that the ET did not address why the DWP considered the moving of the trigger days in the absence management procedure from eight to 11 was sufficient to have met the threshold for a reasonable adjustment and fulfil the purpose of alleviating the disadvantage faced by HA. It also noted that some absence may have resulted from the DWP's failure to implement a stress reduction plan.

Further, the ET did not explore whether there were any other adjustments which would have been reasonable for the DWP to make to alleviate the disadvantage. Nor did the ET address the respondent's admitted failing in implementing a stress reduction plan.

With regards to the other claims, the EAT found that there was never an occasion where HA actually had to be flexible with regards to his breaks (despite requests) and so the adjustment in place was not disturbed. Similarly, where the PCP was to take additional work, again HA did not actually do this additional work, and so the adjustment was not disturbed.

When looking at the criticism which HA was subjected to for refusing to be flexible and take on additional work, the EAT found that the ET had conflated the unfavourable treatment complained of (the criticism) with the consequence of the disability. The ET appeared to consider the unfair criticism was a consequence of the disability, rather than the unfavourable treatment. The ET failed to consider whether the claimant's response to being asked to be flexible, and take on additional work, was because of the attempted removal of the adjustments and therefore another consequence of his disability in the broad sense, as per *Risby v London Borough of Waltham Forest* UKEAT/0318/15/DM.

... it is essential to consider whether the adjustment made actually alleviates the disadvantage faced by a disabled employee.

The judge stated that those matters which had been argued successfully on appeal should be remitted for consideration by the ET. Accordingly, the ET will consider the broader issue of reasonable adjustments to the absence management plan and what steps would be reasonable for the employer to have to take to alleviate it. It will also consider whether HA's behaviour was a consequence of his disability in the broad sense.

The EAT invited submissions on whether this should be the same of differently constituted ET panel.

Implications for practitioners

This case illustrates the ongoing difficulty, particularly for litigants in person, of correctly defining the PCP. In this case the PCP had been reformulated multiple times before reaching the EAT. Accordingly, this task requires careful thought at the beginning of a matter and should not be reverse engineered based on the disadvantage alleged.

Additionally, which may not come as a surprise, it is essential to consider whether the adjustment made actually alleviates the disadvantage faced by a disabled employee. If not, an employer then has to consider whether there are any other adjustments which would be reasonable to make to alleviate the disadvantage.

Finally, it is important to correctly identify the consequence of the disability; the unfavourable treatment complained of cannot also be a consequence of the disability.

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