SUMMARY

2014/5 Paying for a disabled employee’s private counselling was a reasonable adjustment (UK)

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Facts

Mrs Butcher worked for Croft Vets Ltd (the 'Employer') as a finance and reception manager. In 2007 the Employer decided to open a new purpose built hospital. The Employer acknowledged in Mrs Butcher's appraisal letter that her "job is so multi-faceted that it is not sustainable in its present form with the additional responsibilities of the new hospital". At about the time the hospital opened, Mrs Butcher also had to implement new telephone and IT systems, which both suffered from teething troubles. From late 2008 Mrs Butcher's mother was seriously ill, which the tribunal accepted would have adversely affected Mrs Butcher's ability to perform her duties in 2008 and 2009. At around this time Mrs Butcher also completed a protracted house move.

In 2010, Mrs Butcher was asked to concentrate on debt collection after the Employer decided that she had failed to report the company's bad debt position accurately. Mrs Butcher's other duties were re-distributed.

During late April 2010 a colleague expressed concerns about having found Mrs Butcher staring out of the window in tears. Mrs Butcher was then signed off sick. The Employer gave her the choice of continuing with her job based on her current job description and taking steps to improve her performance, or narrowing her job description with a commensurately lower salary. Mrs Butcher remained off sick with stress and depression and never returned to work.

In June 2010, the Employer expressed a wish to refer Mrs Butcher to a private consultant psychiatrist they had used in the past for other employees for a report on her condition that would allow them to consider any steps they could take to facilitate her return to work. This was triggered by a sick note from Mrs Butcher. Such sick notes usually include information about the employee's condition.

In August 2010, Mrs Butcher visited the consultant, who noted that Mrs Butcher had a family history of depression and acknowledged her stressful personal circumstances. Nevertheless, the consultant reported that it was mainly work-related stress that had triggered Mrs Butcher's current severe depression.

The consultant recommended that the Employer pay for Mrs Butcher to see a clinical psychologist for treatment including cognitive behavioural therapy and fund a further six psychiatric sessions at a cost not exceeding £750. However, the consultant found that there was no guarantee this would improve Mrs Butcher's health sufficiently to enable her to return to work, and estimated that there was only a 50% chance of return.

The Employer responded to the consultant a month later with a number of further questions. In November 2010, before the consultant replied, Mrs Butcher resigned, having heard nothing from her Employer.

Mrs Butcher succeeded at the tribunal with claims for unfair constructive dismissal, failure to make reasonable adjustments and that the dismissal was an act of discrimination arising from disability.

EAT Decision

The EAT upheld the tribunal's decision and, in particular, confirmed that the Employer had failed to make reasonable adjustments for Mrs Butcher.

Constructive dismissal

Constructive dismissal arises where an employee resigns as a result of an employer's repudiatory breach of contract.

The EAT confirmed that the tribunal was entitled to find that Mrs Butcher was constructively dismissed. Mrs Butcher had claimed that her Employer's failure to make reasonable adjustments (dealt with below) had caused her resignation (i.e. her constructive dismissal). The tribunal held that the Employer should have consulted with Mrs Butcher about the consultant's recommendations. The EAT confirmed that there was no error of law on the part of the tribunal. A duty to consult had arisen from the implied term of mutual trust and confidence and the Employer should have contacted Mrs Butcher following the consultant's recommendations.

Disability

Under both the Disability Discrimination Act 1995, which was in force at the time, and the Equality Act 2010 (which has since replaced it), a person has a disability if they have a physical or mental impairment which has a substantial and a long-term adverse effect on their ability to carry out normal day to day activities. The effect of an impairment is 'long term' if it has lasted at least 12 months or is likely to last for at least 12 months. It was not disputed that Mrs Butcher was disabled.

An employer only has a duty to make reasonable adjustments for an employee who is disabled if the employer knows, or ought reasonably to know, that the employee is disabled and likely to be placed at a disadvantage because of the disability.

The EAT found that following the consultant's report, the Employer knew that Mrs Butcher had a disability and that she was likely to be placed at a substantial disadvantage in fulfilling the essential functions of her job.

Provision, Criterion or Practice

For the duty to make reasonable adjustments to arise, the employer must be using a provision, criterion or practice ('PCP') that puts the disabled person at a substantial disadvantage in comparison with someone who is not disabled.

The EAT noted that the Employment Tribunal was entitled to find in this case that the relevant PCP was that Mrs Butcher should 'be able to return to work performing the essential functions of her job'. The EAT agreed that the tribunal was entitled to make this finding

regardless of whether Mrs Butcher was working on full or restricted duties.

It was held that Mrs Butcher's disability placed her at a substantial disadvantage in comparison with a non-disabled person in the same employment, as Mrs Butcher's disability put her at risk of dismissal because she could not perform the essential functions of her job. As such, the PCP placed Mrs Butcher at a substantial disadvantage because of her disability.

Reasonable Adjustments

Once a PCP that puts the disabled employee at a substantial disadvantage has been identified the employer has a duty to take such steps as are reasonable to avoid the disadvantage (in other words, a duty to make reasonable adjustments).

The EAT rejected the Employer's submission that the option to carry out reduced duties for a reduced salary was a reasonable adjustment. It held that this adjustment would not have removed Mrs Butcher's disadvantage and assisted her return to work. There was cogent evidence that Mrs Butcher was unable to perform her limited duties even before she went off sick and was on full pay. The EAT went on to consider whether the scope of reasonable adjustments required an Employer to fund private medical treatment.

The EAT noted that previous case law required an adjustment to be 'job-related'. The EAT considered that the adjustment of paying for private psychiatric counselling in this case was sufficiently job-related to fall within this test. This was because the medical opinion said that Mrs Butcher was suffering from predominantly work-related stress, and the adjustments would have involved specific support to help her return to work and cope with her difficulties in performing her job.

Although the medical opinion had not guaranteed that the counselling would work, the EAT thought there were "reasonable prospects" that the adjustment would have been successful. This was sufficient to make it reasonable for the Employer to have made the adjustment and pay for the private treatment.

The EAT further found that the adjustments were within the scope of the Code of Practice (the 'Code') in force at the time. The EAT referred to an example in the Code under "giving, or arranging for, training or mentoring (whether for the disabled person or any other person)" where a disabled person returns to work following a stroke and the employer pays for a work mentor and offers time off for mentoring.

Commentary

At first sight, this may seem quite a worrying decision for employers. Paying for private medical treatment is not something that most employers would expect to have to do for disabled employees. This was not a situation where the employer was being required to adjust the workplace or working conditions. Instead, the decision took quite a broad view of what might be a job-related adjustment. Arguably, any treatment which might help the employee to get better and so return to work could fall within this category.

Despite this decision, it is important to remember that this case turns on its own facts. The EAT was not saying that it would always be a reasonable adjustment to pay for private medical treatment for disabled employees. Rather, it found that this was a conclusion that the tribunal was entitled to come to on the facts of the case. The EAT stressed that the issue in this case was not the payment of private medical treatment in general but a specific form of support which would enable Mrs Butcher to return to work by mitigating the effect of the PCP. However, it is worth noting that this decision was reached despite evidence from the Employer that this treatment was available on the NHS and that Mrs Butcher had not taken any steps to obtain the recommended treatment.

The EAT also seems to have been particularly influenced by the fact that Mrs Butcher suffered from work-related stress, against a background of an excessive workload. It appears that tribunals will expect more from an employer by way of reasonable adjustments where that employer is somehow at fault in causing or continuing the disabled employee's difficulties. There is likely to be more case law in this area to determine to what extent the employer must be at fault for similar treatment to be seen as a reasonable adjustment.

In addition, tribunals must still make an assessment of whether such an adjustment is reasonable considering factors such as the size and resources of the business. This was seen in *Cordell v Foreign and Commonwealth* Office[1] where providing an English lip speaker for a deaf diplomat at a cost of £250,000 a year was found to be unreasonable.

Nevertheless employers should be cautious of ignoring any recommendations for treatment, particularly from their own consultant. Where an employee is suffering from work-related stress, any support that the employer can provide can help to show that it is meeting its duty to help the employee to return to work. Initiatives such as a confidential employee assistance helpline or workplace mentoring may be particularly useful in such situations.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): It is difficult to comment on this judgment from a Dutch perspective because both parties would most likely have acted differently, given (i) that the concept of constructive dismissal is almost non-existent in Dutch law and (ii) that employees are entitled to continued payment of (at least 70% of) their salary during periods of incapacity due to illness - whatever the cause of the nature of the illness - for up to two, sometimes even three years. A Dutch employee in Mrs Butcher's position would be very unlikely to have considered using anti-discrimination law to support her claim. Besides, it is uncertain whether Mrs Butcher's impairment - depression - would have qualified as a disability, seeing that only permanent or long-lasting impairments qualify as such and that there is no statutory provision defining 'long-term'. Moreover, I find it hard to imagine that a medical practitioner in The Netherlands, in correspondence with an employer, would mention the nature of the employee's impairment, let alone go into medical details, as happened in this case.

Finally, there is an interesting difference between UK and Dutch legal practice, on which I would like to remark. The Disability Discrimination Act 1995, on which Mrs Butcher based her claim, provides that "Where a provision, criterion or practice applied by or on behalf of an employer [...] places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to take in order to prevent the provision, criterion or practice [...] having that effect".

In other words, the duty to provide a disabled employee with reasonable accommodation exists only where not doing so would lead to unequal treatment. The first sentence of Article 5 of Directive 2000/78 also links the "accommodation duty" to unequal treatment, but it does so less explicitly, merely providing that: "In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided" (emphasis added). The link between the duty to provide accommodation and equal treatment is similarly vague in the Dutch Disability Discrimination Act. In practice, it is sufficient for a Dutch employee to argue, "I am disabled, therefore my employer must provide me with reasonable accommodation". The intermediary step that employees must take in the UK ("step 1: I am disabled, step 2: my employer is applying a PCP that places me at a disadvantage, therefore, step 3: my employer must accommodate me") is skipped over. Whether this difference in approach has practical significance is another matter. I suspect that if an employee is disabled he will always be able to take step 2 without difficulty.

Norway (Are Fagerhaug): AccordiNg to the Norwegian Working Environment Act, if an employee (whether "disabled" or not) suffers reduced capacity for work as a result of an

accident, sickness, fatigue or the like, the employer shall, as far as possible, implement the necessary measures to enable the employee to retain or be given suitable work. Thus, there is rarely a need for an employee to rely on the legislation regarding disability discrimination in order to claim adjustments or other reasonable accomdation.

The employer's obligation to implement necessary measures is not static, and the extent of the obligation will depend on a concrete assessment of the situation as a whole. Even though it is not normal that the obligation will include covering the employee's medical expenses for psychological counselling, we cannot exclude that such measures may be considered part of the obligation in a given situation. We do however find it unlikely that the outcome of this particular case would have been the same in Norway.

Subject: Disability discrimination; duty to make reasonable adjustments

Parties: Croft Vets Ltd –v- Butcher

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