SUMMARY

2012/4: When is an adjustment to accommodate a disability too expensive to be reasonable? (UK)

<p>An employer withdrew a job offer to a disabled employee upon realising that the cost of adjustments to enable the employee to do the job would exceed £250,000 a year. The employee alleged direct disability discrimination and a failure on the part of her employer to make reasonable adjustments. The employee was unsuccessful at first instance in the Employment Tribunal (“ET”) and appealed. The Employment Appeal Tribunal (“EAT”) dismissed the appeal.</p>

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Facts

Ms Cordell, a profoundly deaf employee of the Foreign and Commonwealth Office ("FCO") posted to the British Embassy in Warsaw, was approached to take up the position of Deputy Head of Mission in the British Embassy in Astana, Kazakhstan. To perform this role she required full time English speaking lipspeaker support. The FCO had a 'reasonable

adjustments policy' which set out that an offer of a post was conditional upon whether and at what cost arrangements can be made to accommodate an individual's disability. This would be determined by the Director of HR following an assessment and recommendation by a member of the disability team in the HR department upon which the individual could comment. This policy had come into force after Ms Cordell was posted to Warsaw. Ms Cordell had been provided with the required support during her posting in Warsaw and her previous posting in London.

Ms Gallagher, on behalf of the FCO, undertook the assessment and initially estimated that the cost of providing Ms Cordell with lipspeaker support for the proposed three year posting would exceed £1,000,000. Ms Cordell disagreed and proposed an alternate shift pattern under which the support could be provided. Ms Cordell costed her proposal at a little over £200,000 *per annum*. While Ms Gallagher suggested Ms Cordell's proposal was altogether optimistic, she revised her own costing down to about £300,000 per annum. As the ambassador-designate had agreed that the posting could be reduced to two years, the total cost of the support was assessed as being a little over £600,000. The Director of HR, noting the cost and the potential difficulty of finding sufficient lipspeakers prepared to work in Astana, decided that the adjustments required for Ms Cordell were not reasonable. As Ms Cordell could not complete the posting without the support, the offer of the posting to Astana was withdrawn.

Ms Cordell raised a grievance, which was not upheld, and then commenced proceedings in the ET alleging:

• direct disability discrimination (under s.3A(5) of the Disability Discrimination Act 1995 (the "DDA"); and

• a failure by the FCO to make reasonable adjustments for her disability (under s.3A(2) of the DDA).

Direct disability discrimination, under s.3A(5) of the DDA (now under s.13(1) of the Equality Act 2010 (the "EqA")), occurs when, on the grounds of his disability, a disabled person is treated less favourably than a person who does not have that particular disability whose circumstances (including his abilities) are the same or not materially different from those of the disabled person.

Under s.3A(2) of the DDA (now under s.20 of the EqA), an employer discriminates against a disabled person if the employer fails to comply with their duty to make reasonable adjustments. That duty arises in circumstances set out in s.4A(1) of the DDA Ð i.e. if a physical

feature, premises, or provision, criteria or practice used by the employer places a disabled person at a substantial disadvantage in comparison with persons who are not disabled, the employer must take such steps as are reasonable to prevent it having that effect.

Ms Cordell, in support of her application, referred to a so-called "Continuity of Education Allowance" ("CEA") provided to FCO staff posted abroad. The CEA was an allowance provided to FCO staff with school age children to enable the children to continue their education during the period when their parent or parents were posted abroad. It was capped at £25,000 per annum per child plus the cost of up to three journeys a year for each child to visit its parents. Ms Cordell compared her treatment unfavourably to the recipients of CEA, who were financially supported to undertake their postings.

Employment Tribunal judgment

The ET did not find direct disability discrimination or a failure by the FCO to comply with its duty to make reasonable adjustments.

The ET thought that Ms Cordell and the FCO staff receiving CEA were in materially different circumstances and as such the FCO staff in receipt of the CEA were not the relevant comparators: i.e. to ignore that the CEA recipients had children and Ms Cordell did not, was, in the ET's opinion, artificial. The ET noted that this was especially so since Ms Cordell would have received a CEA if she had children of school age and logically a complainant cannot be their own comparator.

In considering the question of whether the adjustments sought were reasonable, the ET looked at the cost and practicality of the adjustments and decided that it would not be reasonable to make the adjustments. The ET calculated the cost of the adjustments to be at least £249,500 a year which amounted to:

• five times Ms Cordell's annual salary;

• more than the entire personnel cost of the local staff at the Embassy in Astana;

• almost equivalent to the personnel cost of the entire diplomatic staff at the Embassy;

• over £200,000 more than had been spent to date to make adjustments for any other individual

FCO staff member;

• equal to almost half of the annual disability budget of the FCO;

• £100,000 more expensive than the cost of providing the same service in Warsaw; and

• £180,000 more expensive than the cost of providing the same service in London.

The ET also found that there was genuine uncertainty about the availability of lipspeakers for such a difficult posting (which would be regarded as a less attractive destination than Warsaw). The ET considered that the adjustments were not reasonable and, as such, the FCO had not failed in its duty to make reasonable adjustments.

Ms Cordell appealed the ET's decision, on both direct discrimination and reasonable adjustments. She suggested that the ET had relied on the comparisons with other costs (such as the cost of local staff) in reaching its decision and that most of these comparisons were irrelevant to the issue of whether it was reasonable to make the adjustment. She also submitted that the ET's decision was perverse given the amount the FCO was prepared to pay in CEAs.

Employment Appeal Tribunal judgment

The EAT considered that determining whether direct discrimination has occurred requires two questions to be answered. Firstly, whether the disabled person has been treated less favourably than an actual or hypothetical comparator with the same characteristics (other than his or her disability). Secondly, whether that treatment was on the grounds of the disability. The first question is known as the "less favourable treatment question" and the second, the "reason why question".

The EAT, noting the real challenges that come with identifying an appropriate comparator when no actual comparator exists, preferred to focus on the "reason why question". They suggested that, while the two questions should produce the same answer, the reason why question was the more fundamental. Ms Cordell preferred to focus on the less favourable treatment - comparing herself to colleagues with children who benefitted from the CEA and saying that in both cases the FCO was making an allowance to enable an employee to take an overseas posting who would not otherwise be able to do so. The fact that, in one case the difficulty lay in the cost of educating children and in the other in the cost of lipspeaker support, was irrelevant. The EAT did not accept this.

Starting by looking at the reason why question, the EAT said that the posting in Astana was withdrawn owing to the cost of the adjustments, along with ongoing uncertainty over whether lipspeaker support could be provided at all. While this related to Ms Cordell's disability, her

disability was not the ground on which the posting was withdrawn and as such no direct disability discrimination had occurred. The EAT held that the circumstances of the applicant and the beneficiaries under the CEA policy were different - they may both have needed financial support in order to accept an overseas posting but there was no general FCA policy to give support to anyone who needs it for any reason. There may well be other circumstances where a member of staff might be deterred from accepting an overseas posting because of financial consequences but where no support was available. Because the circumstances of the applicant and those staff members with school age children were materially different, there was no direct discrimination when the FCO paid the CEA allowance and not the cost of lipspeaker support.

The EAT noted that Ms Cordell's "*real point as regards the CEA policy is simply that it is wrong that the FCO should not be prepared to pay the sums in question in order to enable her to work overseas as a disabled employee when it is prepared to pay broadly commensurate sums to, or for the benefit of, members of staff with school-aged children". In terms of what was considered "broadly commensurate*", the court decided that CEA costs could potentially amount to up to about £175,000 per family per year if there were a number of children.

However, although the EAT thought that this was a relevant question when considering the Ôreasonableness' of the adjustment, it felt it did not give rise to direct discrimination which would bypass the question of reasonableness or proportionality completely.

On the issue of whether the FCO had failed to make reasonable adjustments, the EAT noted that there was no objective method by which the disadvantage suffered by an employee if adjustments are not made could be balanced with the cost of making them. A tribunal asked to adjudicate upon whether adjustments were reasonable was to do so "*on the basis of what they consider right and just*". Informing this, the tribunal was to have regard to all relevant considerations including:

• the benefit to the employee of the adjustments being made;

• the size of the budget of the employer which may be used to make adjustments;

• what the employer had spent in comparable situations;

• what other employers are prepared to spend in comparable situations; and

• any collective agreement or other indication of what level of expenditure is regarded as

appropriate by representative organisations.

These considerations, while helpful, were to be of no more than suggestive or supportive value to the tribunal making the decision. The EAT said that the ET, when making the cost comparisons Ms Cordell considered irrelevant, was undergoing this exercise and attempting to put the cost of making the adjustments into context. This was perfectly legitimate.

Finally, on the issue of whether the Tribunal's decision that the adjustments were not reasonable was perverse, the EAT held that it was not. Ms Cordell's submission was that in light of the payments falling to be made under the CEA policy, the only possible conclusion the Tribunal could have reached was that it was unreasonable not to make the payments for her lipspeaker support. The EAT did not think this could be said, as there might be various reasons for paying the CEA and what an employer is prepared to pay for other things can only be suggestive of what it may be reasonable to pay for an adjustment.

The EAT expressed its sympathy for Ms Cordell's situation but noted that the law did not require the FCO to compensate her "at any cost". It therefore dismissed Ms Cordell's appeal.

Commentary

The judgment in the case is of interest for several reasons. Firstly, the EAT's determination on the "reason why question". The EAT determined that the job offer was withdrawn because of the cost and practicality of finding lipspeaker support and whilst this related to Ms Cordell's disability, it was not on the grounds of her disability and therefore could not amount to direct discrimination.

Another interesting aspect of this case is that it is one of the only appellate decisions to consider the question of how far cost alone can make an adjustment unreasonable. The EAT has recognised how difficult it is to make a decision on this issue: resources are always limited and even large organisations (such as the FCO) have to balance different spending priorities. The EAT has essentially given tribunals a very large discretion to decide what they think is Ôright and just' in the circumstances. This will mean that, provided the tribunal considers all the relevant factors, it will be very difficult to overturn their decision on appeal.

This case was brought under the DDA, which has now been replaced by the EqA. Section 15 of the EqA contains a new provision under which Ms Cordell could have brought a claim if these facts had arisen after 1 October 2010, namely "discrimination arising from disability".

Under this section a person discriminates against a disabled person if he treats her unfavourably because of something arising in consequence of her disability and he cannot

show that the treatment is a proportionate means of achieving a legitimate aim. If Ms Cordell could have brought her claim under this provision, the ET would have had to decide if the withdrawal of the job offer was unfavourable treatment because of something arising in consequence of her disability and whether this treatment was a proportionate means of achieving a legitimate aim. The UK courts have traditionally said that cost alone cannot be a proportionate means of achieving a legitimate aim, although cost can be joined to other factors to amount to justification (known as “costs plus”). However, this area of law is currently in a state of flux and the “costs plus” rule is being criticised. Further guidance from the courts in this area would be useful.

Comments from other jurisdictions

Germany (Markus Weber): According to Section 81(4)(5) of the German Social Security Code IX (¤ 81 Abs. 4 Nr. 5 Sozialgesetzbuch IX (SGB IX)) every employer is obliged to equip the working place of disabled employees with all necessary (technical) equipment. Therefore an employer may not reject a disabled applicant in view of the fact that the respective working place is not accessible for handicapped employees. However, he may do so if the adjustment would lead to "disproportionate" costs for the employer. As the case may be, there may be no costs for the employer at all as the agency for seriously disabled persons grants financial support for any required adjustment (¤ 81 Abs. 4 S. 2 SGB IX). The support of the agency is not limited to financial support of structural adjustments, also the subsidisation of personnel costs (e.g. for lip-speaker support) is not unlikely. In the event major adjustments are necessary, the amount that exceeds the agency’s subsidy is relevant in order to determine whether the financial burden for the employer is disproportional. In the end it depends on the financial capability of the employer if the cost involved is really disproportionate. Only if the cost is truly disproportionate may the employer reject a disabled applicant on the grounds of the job requirements.

In the event the employer rejects an application without having verified the necessary adjustment measures and in particular without having contacted the agency for seriously disabled persons, the applicant may argue that the rejection was for discriminatory reasons. According to Section 15(1) of the German Non-Discrimination Act (¤ 15 Abs. 1 *Allgemeines Gleichbehandlungsgesetz* (AGG)) the person is entitled to damages if the employer does not prove that the rejection had no discriminatory background.

The Netherlands (Peter Vas Nunes): The judgment reported above addresses two questions, both of which are interesting from a legal point of view as well as important for everyday practice:

how to identify an appropriate hypothetical comparator?
how much may a reasonable accommodation cost?

Re 1°: comparator

It is understandable that the EAT dodged the plaintiff's contention that she - a deaf employee without children - should be compared to a hypothetical unimpaired employee with CEA-eligible children. Directive 2000/78 provides that direct discrimination shall be taken to occur "*where one person is treated less favourably than another is, has been or would be treated in a comparable situation*" on one of the protected grounds, such as disability. Directives 2000/43 (race) and 2006/54 (sex) contain similar definitions. This definition, like that of the English DDA, makes clear that discrimination cases are all about comparing individuals with other (real or hypothetical) individuals (*less favourably than*) and comparing situations with other (real or hypothetical) situations *(in a comparable situation*).

Until a few months ago the relevant Dutch anti-discrimination laws contained a definition of direct discrimination (referred to as *unequal treatment*) that, although generally held to be compatible with EU law, downplayed the comparison element. It defined direct discrimination, almost by way of a circular definition, as "*making a distinction*" on certain grounds. On 3 December 2011, following lengthy prodding by the European Commission, the definition was brought in line with that of Directive 2000/78. The government stated that the changed definition brings no material change in the law. Nevertheless, the amendment may bring increased awareness among Dutch courts, which have a tendency to avoid identifying a comparator, that allegations of discrimination frequently cannot be adequately adjudicated without comparing persons and/or situations.

In this English case, the plaintiff alleged that she was not promoted to the vacant position in Astana because of her deafness. At first sight this contention seems plausible and the plaintiff's non-promotion did indeed constitute direct disability discrimination, which by law cannot be justified. The only defence against the allegation was to argue that (i) the plaintiff was not treated less favourably than someone in a comparable situation, i.e. that the person who got the position or would be getting it was not a comparator and/or (ii) that the non-promotion was not on the grounds of disability. Both defences seem to rest on one and the same argument: we are turning down your application for a transfer to Astana, not because of your deafness but because of the cost of providing you with lipspeaker support. Perhaps this is why the plaintiff compared herself, not to an unimpaired colleague without children, as might seem logical, but to an unimpaired (hypothetical) colleague with children: sending someone with CEA-eligible children to Astana will cost you almost as much as providing me with

lipspeaker support.

Although I can see the logic of this reasoning, it requires mental acrobatics which, I expect, a Dutch court would find too far removed from common sense to take seriously.

Re 2°: accommodation:

To my knowledge there have been few Dutch rulings, if any, where the question of how much an accommodation may cost was addressed so head-on as in this case. On the one hand, having to spend five times an employee's salary on accommodating his or her disability strikes me as patently absurd. On the other hand, the plaintiff had a point where she compared that cost to the cost of providing CEA assistance to two or three children. She compared (the cost of) the adjustment she sought to (the cost of) children: providing a bachelor with lipspeaker support is almost as costly as having a married couple with children.

The EAT identified five considerations to take into account when balancing the individual's need for a costly accommodation against the costs for the employer, but in the end the EAT failed to be more explicit than the rather broad and vague but hard-to-criticise statement that (in the author's words) "*what an employer is prepared to pay for other things can only be suggestive of what it may be reasonable to pay for an adjustment*".

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