EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2012/23: Stairlift costing € 6,000 was reasonable accommodation (NL)

<p>A stairlift costing € 6,000 was a reasonable and not a disproportionately expensive adjustment for a supermarket cashier who was unable to use the staircase. </p>

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Facts

The plaintiff was a part-time cashier (16 hours per week, i.e. 40% of full time) in a supermarket. She was hired in 1998. In 2008, by which time she was 45 years old and had been employed for ten years, she called in sick on account of an ankle problem. Her ankle was operated on and she was declared fit to work again in 2010. However, she continued to experience difficulty walking. This created a challenge for her, as she worked on the ground floor but was unable to climb the staircase to the first floor, where the toilets and staff canteen were located. She suggested that her employer install a stairlift to enable her to reach the first floor. The employer refused to do this on account of the cost and, instead, it applied for a permit to dismiss the plaintiff. The permit was granted on the grounds that the plaintiff had been unfit for work for over two years and that there was no likelihood of her becoming fit in the near future. Accordingly, the supermarket dismissed the plaintiff.

Judgment

The plaintiff brought an action before the local Lower Court for unfair dismissal. In an interim judgment, the court held that the plaintiff qualified as a disabled employee within the

meaning of the Dutch law on Equal Treatment in Employment on Grounds of Disability and Chronic Illness, which is (part of) the transposition of Directive 2000/78. The court also held that a stairlift was, in itself, a reasonable adjustment. The employer should therefore have investigated whether installing a stairlift would constitute a "disproportionate burden", before deciding to dismiss the plaintiff. The employer was ordered to investigate how much the installation of a stairlift would cost, taking into account any existing subsidy.

The employer informed the court that installing a second-hand stairlift would cost about € 10,000 excluding the additional costs of an "escape chair" and other adjustments necessary to comply with fire-safety regulations. The employer estimated that the total expense would amount to at least € 12,000 and that a subsidy, if available at all, would not exceed 40% of the total cost (corresponding to the plaintiff's parttime percentage).

The court considered this estimate to be exaggerated and proceeded from the assumption that the total cost would amount to € 10,000 minus 40% subsidy = € 6,000. This was roughly seven times the employee's average monthly salary of € 845 gross, which meant that if the employer had had a stairlift installed, it would have recouped its investment in a period of time that was short in comparison with the many years during which the plaintiff could have continued working as a cashier in the supermarket. Therefore the dismissal was declared to be unfair (mainly because the employer had failed to investigate the possibility of a stairlift) and the court awarded the plaintiff € 14,000 gross in compensation.

Commentary

This judgment contrasts with the English judgment reported in the previous issue of EELC. The English case concerned an adjustment costing £250,000, which amounted to five times the employee's annual salary. Although the Employment Appeal Tribunal found this to be excessive, it did consider the claim seriously. The adjustment in this Dutch case would have cost an estimated € 6,000 which was the equivalent of about seven months' salary. Although the court found it not to be excessive, it is clear that the court would not have seriously considered an adjustment costing anywhere near five years' salary. The British seem to be taking the obligation to provide disabled employees with reasonable adjustments more seriously than the Dutch.

Comments from other jurisdictions

Austria (Martin Risak): The Austrian Act on the Employment of Persons with Disabilities (*Behinderteneinstellungsgesetz*) states in §7c(4) that the removal of conditions which may disadvantage disabled staff, especially barriers, is not discriminatory if it would be unlawful or if inappropriate burdens would make it unacceptable for the employer. In establishing

whether a measure constitutes an inappropriate burden, the law gives examples of what should be given particular consideration, namely the cost of the measure, the economic resources of the employer, available public funding and the time elapsed since the enactment of the employer obligation.

Though this duty on the employer has existed since 2005 there are no published court decisions to provide any guidance - an indication that either everything is fine or that employees with disabilities are reluctant to make claims. A possible reason might also be that this duty is only mentioned in the context of indirect discrimination and not as a standalone employer obligation, i.e. it cannot be enforced independently but only in connection with an act of discrimination of the employer.

Germany (Markus Weber): According to Clause 81(4) Nr 5 of the German Social Security Code IX (§ 81 Abs. 4 Nr. 5 Sozialgesetzbuch IX (SGB IX)) every employer is obliged to equip the workplace of disabled employees with all necessary (technical) tools. Therefore an employer may not terminate an employment contract with a disabled employee, if her condition prevents her from accessing the workplace or other relevant rooms on the premises. However, it may do so if the adjustment would lead to “disproportionate” costs to the employer, provided that all other requirements regarding the termination of disabled employees are fulfilled. It may be, of course, that there are no costs at all to the employer, given that the Agency for Seriously Disabled Persons provides subsidies for required adjustments (§ 81 Abs. 4 S. 2 SGB IX). It is not uncommon for the Agency to bear the full cost of disabled access. If major adjustments are necessary, whether this is disproportionate should be calculated based on the excess payable by the employer over and above the aid provided by the Agency. Ultimately, it will depend on the financial strength of the employer.

If the employer terminates the employee's contract without assessing the necessary adjustments, the employee may bring a claim challenging the termination as unfair and arguing that it was unjustified and therefore void. The claim is likely to be successful if the cost of the adaptation (less the subsidy of the Agency) would not have been disproportionate for the employer. Further, he may claim that the termination happened for discriminatory reasons, in particular if the employer did not contact the Agency to ask for a subsidy. According to Article 15(1) of the German Non-Discrimination Act (*Allgemeines Gleichbehandlungsgesetz*, “AGG”) a person is entitled to damages if the employer fails to prove that the termination was not discriminatory. As these matters depend on the financial strength of the employer in each case, it is not unlikely that a German labour would rule that costs of € 6,000 for the installation of a stairlift are reasonable, given that the employer in this case was a supermarket.

United Kingdom (Rebecca Rule): In the UK, employers have a duty to make reasonable adjustments for disabled employees. Whether there is a breach of this duty will depend on whether a particular adjustment was "reasonable". This is fact-sensitive. The test of what is reasonable is objective and determined by the tribunal. The cost of the possible adjustment, taking into account the financial resources of the employer, will be relevant to whether the adjustment is reasonable.

The recent Employment Appeal Tribunal ("EAT") case of *Cordell - v - Foreign Commonwealth Office* (reported in last month's issue of EELC) provides guidance on how tribunals should approach the issue of cost when considering the employer's duty to make reasonable adjustments. The case involved the employer withdrawing a job offer from a deaf employee when it realised that the cost of providing necessary lipspeaking support would amount to approximately five times the employee's annual salary. The EAT decided that the cost of the adjustment was excessive, but still gave serious consideration as to whether it was reasonable.

The EAT said that cost is "*one of the central considerations in the assessment of reasonableness*". However, this must be weighed up with other considerations set out in the Equality and Human Rights Commission Code of Practice, (such as the degree of benefit to the employee), as well as other factors. These might include what the employer has chosen to spend in comparable situations, the size of any budget dedicated to reasonable adjustments (though this cannot be conclusive because the size of the budget is determined by the employer) and any other indication of what level of expenditure is regarded appropriate by representative organisations, such as unions. A tribunal must ultimately make a judgment balancing on the one hand, the disadvantage to the employee if the adjustments are not made and, on the other, the cost of making them.

The case at hand is interesting in that it tells us what expenditure on a potential adjustment the Dutch court considered reasonable in this case. However, the decision does not seem to give much guidance about the type of factors the court will take into account when deciding if an adjustment is reasonable in other cases. From a UK perspective, we are left with several questions. For example, would it be the case that an adjustment costing seven times the salary would always be considered reasonable by Dutch courts? Did it make a difference that the employee had been employed for ten years before she hurt her ankle? Was the employer a very large undertaking which could afford to spend a lot on adjustments? Did the court take the employer's size into account when deciding the case?

Subject: disability discrimination

Parties: X - v - Em-Té Supermarkten B.V.

Court: rechtbank, sector kanton (Lower Court), ‘s-Hertogenbosch

Dates: 22 December 2011 and 24 May 2012

Case number: 782542a

Internet publication: www.rechtspraak.nl > LJN: BV 2279 (interim judgment) and BW 7246 (final judgment)

Creator: Kantonrechter 's-Hertogenbosch (Cantonal judge 's-Hertogenbosch)
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