EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2011/55: Reasonable adjustment need not have ‘good prospect’ of removing disabled employee’s disadvantage (UK)

<p>Under UK disability discrimination legislation, a proposed adjustment does not need to have a ‘good or real prospect’ of removing a disabled employee’s disadvantage in order to be regarded as reasonable. It is sufficient that there is merely some prospect that it will succeed.</p>

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Facts

Mr Foster was employed by the Leeds Teaching Hospital NHS Trust (the "Trust’) as a senior security inspector. In October 2006, his relationship with his line manager broke down and he went on long term sick leave as a result of stress. Shortly afterwards, Mr Foster raised a grievance against his manager. In June 2007, an occupational health doctor confirmed that Mr Foster’s stress was work-related and that he would be unable to return until the problems were resolved. In September 2007, his grievance was rejected by the Trust.

In January 2008, there was some confusion between Mr Foster’s trade union representative and the Trust. The union representative thought that the Trust had agreed to redeploy Mr Foster to a department where he would no longer be working with his line manager, whereas the Trust had in fact agreed that he could return to a different role within the same

department. The Trust believed that Mr Foster's illness and his grievance were separate issues and that if he was fit to return to work outside of the department, then he was also fit to return within it. In June 2008, the Trust decided that Mr Foster should be placed on its redeployment register for three months in order to check whether any roles outside the department became available during that time. Although a potential redeployment did arise, Mr Foster was too ill to take it. Mr Foster never returned to work. He was eventually dismissed in February 2009 on the grounds that an occupational health doctor could not predict the likelihood of his situation changing in the foreseeable future. He subsequently brought tribunal claims for disability discrimination (on the basis that the Trust had failed to make reasonable adjustments) and unfair dismissal.

The Employment Tribunal's Decision

Under the relevant legislation, the Disability Discrimination Act 1995 ('DDA'), the Employment Tribunal ('ET') had to establish whether the employer had met its duty to make reasonable adjustments. Section 4A(1) of the DDA, provided that where an employer's provision, criterion or practice ('PCP') placed a disabled employee at a substantial disadvantage in comparison with non-disabled employees, then the employer had a duty to make reasonable adjustments.

The ET found that if the Trust had made the adjustment of placing Mr Foster on the redeployment register in January 2008, rather than in June 2008, then there would have been a 'real' or 'good' prospect of Mr Foster returning to work. The ET therefore found that the Trust had breached the required duty and that, in the circumstances, it had also unfairly dismissed Mr Foster. The Trust appealed against this decision to the Employment Appeal Tribunal ('EAT').

The Employment Appeal Tribunal's Decision

Upholding the ET's decision, the EAT stated that it had not been necessary for it to go as far as finding that there would have been a 'good' or 'real' prospect of Mr Foster being redeployed if he had been placed on the redeployment register in January instead of June 2008. All that had been necessary was for the ET to find that there was a prospect of the proposed adjustment removing Mr Foster's disadvantage.

The EAT went on to say that the ET would, in any event, have been entitled to conclude that there would have been a 'good' prospect of removing the disadvantage, given that around 5,000 employees worked in Mr Foster's department. With such a large number of employees, it was likely that a redeployment opportunity would have arisen during the first half of 2008.

The EAT also ruled that the Trust's failure to make reasonable adjustments had set the wheels in motion for Mr Foster's dismissal, so the ET had been entitled to find the dismissal unfair.

Commentary

Although the DDA has now been replaced by the Equality Act 2010, the latter has substantially similar provisions relating to reasonable adjustments at sections 20 and 21. Even where it is shown that an adjustment might remove a disabled person's disadvantage, this does not necessarily mean that it will be a reasonable adjustment. The test of reasonableness is an objective one, depending on the circumstances of the case. Guidance on the relevant factors is set out in a statutory code of practice published by the UK's Equality and Human Rights Commission.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): it is sometimes said that in the UK employees and their counsel are more readily inclined to invoke anti-discrimination law than are their Dutch counterparts, and that UK case law affords employees more protection against discrimination than Dutch courts (and, presumably, the courts in many other European jurisdictions) tend to grant them. One theory holds that this is the case because employees in The Netherlands have a greater level of protection against dismissal and against loss of income as a result of disability than British employees do. The idea is that, not having much other protection, employees in the UK need recourse to the anti-discrimination laws more than do their Continental colleagues. Whether or not this theory is accurate, the case reported above illustrates certain differences between the UK and The Netherlands rather nicely.

Mr Foster was dismissed in February 2009, two and a half years after he fell ill. All he could do was claim monetary compensation on the basis of unfair dismissal. How much he got is not reported, but I suspect it may not have been much by Dutch standards. He could not prevent being dismissed nor could he claim reinstatement. In this respect, the law in England and Wales seems more employer-friendly than Dutch employment law.

On the other hand, would a Dutch court have found that Mr Foster's employer discriminated against him by not making a reasonable adjustment? Would his lawyer have even considered entering such a claim? I doubt it. More likely, Mr Foster would have applied for an order to transfer him to a department/role away from his line manager. He would have been supported in such an application by the fact that, under Dutch law, an employer that does not do all it reasonably can to allow a disabled worker to return to work, even if only in a different position, on a part-time basis and/or with certain restrictions, risks (i) having to continue paying the employee's salary for in excess of two years, (ii) not being able to dismiss the

employee and (iii) having to pay increased national insurance contributions.

The issue of workers who call in sick with stress following a break-down of their relationship with their manager (or their colleagues) is one with which every Dutch employment lawyer is well acquainted. Occupational doctors often have difficulty diagnosing the employee's condition: does it qualify as 'sickness' within the meaning of the law, in which case the employee is protected against dismissal (for at least two years) and against loss of income (up to at least 70%), or is the employee absent from work for other reasons and, if so, is he to blame or must the employer bear the consequences? There are guidelines and there is case-law on this question, but the issue remains vexed.

In this case, Mr Foster's employer believed that his illness and his grievance against his manager were separate issues and that if Mr Foster was fit to return to work outside of his own department, then he was fit to return within it. This is a typical employer's response, but a Dutch court might well see things differently. In any event, a Dutch court would not be likely to utilise anti-discrimination law to arrive at its conclusion.

Subject: Disability discrimination

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Court: Employment Appeal Tribunal

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