

SUMMARY

2011/54: No duty to offer disabled employee career break (UK)

<p>The duty on an employer to make reasonable adjustments is limited to steps which would alleviate a disabled employee’s disadvantage, by enabling the individual either to remain at work or to return to work if on sick leave. The obligation did not extend to offering a disabled employee a career break or submitting suggestions of potential rehabilitative work arrangements to her doctor.</p>

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Facts

Mrs Smith was employed by Salford Primary Care Trust (the 'Trust') as an occupational therapist in a managerial position. In March 2007, she was suffering from chronic fatigue syndrome and took long term sick leave. Whilst away from work, her role ceased to exist and she consequently had several meetings with her manager to discuss other possible roles that she could do upon her return to work.

Mrs Smith also had several meetings with the Trust's occupational health ('OH') adviser, who advised in January 2008 that she was not fit to come back to work and that any return would need to be gradual and focused upon helping her back to work 'in some capacity'. The OH adviser consulted Mrs Smith's doctor (general practitioner, 'GP') in March 2008 and suggested

that she might begin a phased return to work over the summer. As an alternative, he suggested that she might benefit from the option of a career break.

Mrs Smith, however, decided that she did not wish to return to her previous role or her former workplace in any capacity. She rejected alternative roles in different workplaces and turned down the Trust's offers of administrative work as she had no IT skills. She also rejected the Trust's offer of IT training.

Mrs Smith failed to attend two meetings with the Trust, who subsequently wrote to her in June 2008, detailing the efforts that had been made to find her a role. The Trust again offered IT training and invited Mrs Smith to a further meeting. It was also made clear that if Mrs Smith did not attend, then the Trust might have to consider terminating her employment.

At this point, Mrs Smith resigned, saying that she had lost all confidence in the Trust's willingness to facilitate her return to work. She subsequently brought a claim for constructive dismissal and maintained that the Trust had failed in its duty to make reasonable adjustments to facilitate her return to work.

The Employment Tribunal's Decision

The ET identified the relevant provision, criterion or practice ('PCP') in this case as being the expectation that Mrs Smith would perform her full role within the contracted hours. Given that she was unable to multi-task or set up the 'emotional barriers' that she needed to deal with her work, the ET concluded that she was placed at a substantial disadvantage and that the Trust had failed to make reasonable adjustments. The ET found that the Trust should have tried to provide Mrs Smith with something to do by way of rehabilitation and that a proposal of rehabilitative working arrangements should have been made to allow Mrs Smith's GP to sign her back to work. However, the ET rejected the submission that a career break would have been a reasonable adjustment. Given the Trust's failure to make reasonable adjustments, the ET held that it was reasonable for Mrs Smith to conclude that the relationship of trust and confidence had broken down and so she was entitled to treat herself as constructively dismissed. The Trust appealed to the Employment Appeal Tribunal ('EAT') and Mrs Smith cross-appealed the finding that a career break was not a reasonable adjustment.

The Employment Appeal Tribunal's Decision

The EAT allowed the Trust's appeal and dismissed the cross-appeal. The EAT clarified that reasonable adjustments are primarily concerned with enabling a disabled person to remain in or return to work with the employer. Adjustments that do not alleviate a disabled person's disadvantage could not qualify as reasonable adjustments within the meaning of the Disability

Discrimination Act 1995 ('DDA'). The EAT cited consultations, trials and exploratory investigations as particular examples of adjustments that would not qualify.

The EAT disagreed with the ET's finding that it would have been a reasonable adjustment for the Trust to come up with a proposal for some sort of rehabilitative duties that Mrs Smith could have taken to her GP. Making a proposal for non-productive work was not in itself a reasonable adjustment, as it would not have alleviated the disadvantageous effect of the PCP on Mrs Smith. Rejecting Mrs Smith's cross-appeal, the EAT held that offering a disabled employee a career break would not have been a reasonable adjustment. It would have been highly irregular, resulting in Mrs Smith losing sickness benefits, and would not have alleviated the effect of the PCP on Mrs Smith. Whilst agreeing with the ET that the PCP in question was a requirement for Mrs Smith to perform her full role in her contracted hours, the EAT commented that a career break itself would not have facilitated a return to work or alleviated her inability to multi-task.

Finally, the EAT also overturned the ET's finding of unfair constructive dismissal. The Trust's letter to Mrs Smith was both standard and reasonable in the circumstances and its earlier behaviour had not undermined trust and confidence. The ET had wrongly asked whether Mrs Smith reasonably believed that trust and confidence had been destroyed, whereas the correct question was whether the Trust's conduct, viewed objectively, was calculated or likely to destroy trust and confidence. The ET had also failed to take into account the fact that Mrs Smith had resigned at a time when she was not yet fit to return to work and discussions surrounding reasonable adjustments were still ongoing.

Commentary

This is a useful case in setting the boundaries for what may or may not qualify as a reasonable adjustment. The duty is limited to steps that would alleviate the disadvantage caused to a disabled person as a result of a PCP. In other words, a distinction should be drawn between 'procedural' and 'substantive' steps. Specifically, the EAT has said that consultations and trial periods do not themselves alleviate the disadvantage and so cannot qualify as reasonable adjustments. In this type of case, reasonable adjustments are primarily concerned with enabling an individual to remain in work or to return to work. Although steps taken as part of a process of getting an employee back to work may be reasonable or helpful in themselves, this does not automatically mean that they will constitute reasonable adjustments for the purposes of the employer's duty under disability discrimination legislation (which is now contained in the Equality Act 2010 in place of the DDA). Tribunals therefore need to identify both the PCP and the disadvantage caused, assess whether the proposed adjustment would alleviate that particular disadvantage and, if so, determine whether it was reasonable in the

circumstances.

Subject: Disability discrimination

Parties: Salford NHS Primary Care Trust - v - Smith

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