

SUMMARY

2013/37 Employer need not waive competitive interview requirement for disabled candidate (UK)

<p>Following an internal restructure, a disabled employee argued that it would have been a reasonable adjustment for her to have been appointed to a vacant role without being competitively interviewed for the post. The Employment Appeal Tribunal (‘EAT’) rejected the appeal and upheld the employment tribunal’s decision that an employer’s duty to make reasonable adjustments does not extend to appointing internal candidates if they do not meet the essential criteria of the job they are applying for.</p>

Summary

Following an internal restructure, a disabled employee argued that it would have been a reasonable adjustment for her to have been appointed to a vacant role without being competitively interviewed for the post. The Employment Appeal Tribunal ('EAT') rejected the appeal and upheld the employment tribunal's decision that an employer's duty to make reasonable adjustments does not extend to appointing internal candidates if they do not meet the essential criteria of the job they are applying for.

Facts

The Claimant, Mrs Wade, commenced employment with Sheffield Hallam University in 1980 as an assistant librarian. Her role evolved over the intervening years and she was promoted to the role of subject librarian and later senior departmental manager (a role which was also known as information specialist). Following the diagnosis of an allergic condition, the

University made adjustments to Mrs Wade's role, which principally involved allowing her to work from home.

In 2004, following a restructuring exercise, changes were made to Mrs Wade's department. Mrs Wade was absent from work from 2004 (the reasons for this are not stated in the judgment) and in December 2005 she was placed on gardening leave. Astonishingly, this remained the case until Mrs Wade was dismissed in January 2012.

In 2006, Mrs Wade applied for an internal vacancy (the job title of the vacant role was 'information specialist') but she was unsuccessful as the panel felt that she lacked the ability to lead teams and work within the newly restructured department, and these were two of the essential criteria for the role. Two years later, in 2008, the same role became vacant. At this time Mrs Wade was told that her old role was redundant and, as a result, she would be given priority for the vacant role, provided she met the essential criteria at the interview.

The interview was conducted on 4 April 2008, but had to be abandoned as Mrs Wade became unwell due to an allergic reaction. To accommodate Mrs Wade's condition the University arranged for the interview to be held at a different, more favourable, location, later that month. As before, Mrs Wade was unsuccessful as she did not meet the essential criteria for the role. It was clear from the panel's feedback that part of the problem was Mrs Wade's inability to see how the needs of the Faculty had changed and her view that this new post was simply an extension of her previous role.

At the employment tribunal, Mrs Wade argued that the University had failed to comply with its duty to make reasonable adjustments and that it should have appointed her to the role without requiring her to undergo a competitive interview process. The employment tribunal found that the requirement to take part in a competitive interview was a provision, criterion or practice which put Mrs Wade at a substantial disadvantage. However, the tribunal went on to find that the reasonable adjustment sought was "*tantamount to requiring the employer to automatically appoint her when it does not believe she is appointable. We do not accept that that would be a reasonable adjustment.*"¹

In its judgment the tribunal considered the case of *Archibald – v – Fife Council*² in which the House of Lords found that disapplying a competitive interview process can amount to a reasonable adjustment. The tribunal held that *Archibald*:

*"is not authority for the proposition that that will always be the case. The question must depend upon the particular circumstances of the case including the extent to which the proposed step is practicable."*³

The tribunal held that although the University was under a duty to make a reasonable adjustment (because Mrs Wade was placed at a substantial disadvantage) there was no breach of that duty because the adjustment contended for was unreasonable. Mrs Wade subsequently appealed to the EAT against this finding.

Judgment

The EAT rejected Mrs Wade's appeal. It noted that adjustments had been made after Mrs Wade was unwell at her first interview, but the adjustment Mrs Wade sought was to disregard the essential criteria for the job. The EAT agreed with the tribunal that it would be unreasonable to expect an employer to redeploy a redundant employee to a role for which she was deemed not appointable. The EAT noted that Mrs Wade did not "*narrowly miss being appointed to this job...she was not appointable by reason of being found wanting under the majority of the eight essential criteria.*"⁴

The EAT also produced some useful guidance on how the burden of proof operates in cases involving the duty to make reasonable adjustments and the dicta of the EAT in *Project Management Institute v Latif* was approved. In that case the EAT said:

*"the claimant must not only establish that the duty has arisen, but that there are facts from which it could be reasonably inferred, absent an explanation, that it has been breached. There must [also] be evidence of some apparently reasonable adjustment which could be made."*⁵

Finally, the EAT agreed with the tribunal that the case of *Archibald* is not authority for the proposition that forgoing a competitive interview process will be reasonable in every case; ultimately it will be a question of what is reasonable and practicable in the circumstances of each specific case.

Commentary

This judgment adds to the case law in this area and its facts are not dissimilar to those of *Lowe - v - Cabinet Office*⁶. In the case of *Lowe* an employment tribunal held that a job applicant's request that the employer dilute the essential criteria required for the role was not reasonable and the employer was entitled to demand that the essential criteria be met.

This case now considers the position in relation to internal applicants and it will come as a relief to employers that when redeploying redundant staff they are still entitled to demand that the essential criteria of the new role are met. Employers should however remember that in this case Mrs Wade fell far short of the standard required and the situation may be more complicated if an internal candidate is closer to the required benchmark.

It is interesting to note that in this case the EAT commented that the mindset driving the litigation was Mrs Wade's erroneous belief that the job she was being interviewed for was the job she had done since 1986; this belief was presumably based on the identical job titles before and after the restructuring exercise. This erroneous belief also appeared to be one of the fundamental reasons why Mrs Wade was deemed not appointable for the role. This case serves as a clear reminder that when discussing "new roles" with redundant employees it is vitally important to ensure that the employee understands exactly how the new role differs from their old role; this not only gives the employee a better chance of being successful at interview, but the added clarity may also help to avoid the kind of frustration and misunderstanding that fuelled this litigation.

Commentary from other jurisdictions

Austria (Martin Risak): The Austrian Act on the Employment of Persons with Disabilities (*Behinderteneinstellungsgesetz*) states that indirect discrimination based on disability may be justified if it is based on a legitimate aim and constitutes an appropriate requirement. Justification is only possible where the employer has already attempted to remove all obstacles that may disadvantage the employee (where these measures are not unlawful and do not pose an undue burden on the employer).

In the case at hand, the employee argued that the job interview and the requirement that she needed to be qualified for the job discriminated against her based on her disability, and therefore she should have been employed without any prior procedure. She did not state what accommodations to the workplace and role might have assisted her based on her disabilities. Although no case law exists, I very much doubt that an Austrian court would have been persuaded by her arguments – provided the required qualifications were not discriminatory, they would appear to constitute a legitimate aim and appropriate requirements, assuming the disability could not be compensated for by reasonable adjustments.

Germany (Paul Schreiner): In Germany too, the employer is obliged to make reasonable adjustments to the workplace to allow disabled employees to work. Those adjustments could involve different technical infrastructure at the workplace, for example. They could also include adjustments to the employee's duties, as long as the work to be done is included in the employee's job description. In the case at hand, as I understand it, the employee was made redundant and she applied for a different position. Under German law the employer would first of all need to apply for a dismissal permit, dismissal of a disabled employee only being possible by means of a particular procedure with the authorities. Part of the procedure involves checking whether the employee has been terminated because of his or her disability and in practice. Whether the employee could be redeployed is often debated as part of this

procedure. Since the employee in the case at hand was simply not able to fulfil the requirements of the position in question; termination would also have been possible under German law.

Footnotes

¹UKEAT/0194/12/LA paragraph 15.

²2004 S.C. (H.L.) 117.

³UKEAT/0194/12/LA paragraph 15.

⁴UKEAT/0194/12/LA paragraph 19.

⁵[2007] IRLR 579 paragraph 54.

⁶ET/2203187/10.

Subject: Disability discrimination

Parties: Mrs A D Wade – v - Sheffield Hallam University

Court: Employment Appeal Tribunal

Date: 15 April 2013

Case Number: EKEAT/0194/12/LA

Internet publication: http://www.bailii.org/uk/cases/UKEAT/2013/0194_12_1504.html

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