SUMMARY

2018/36 An expectation that a disabled employee should work long hours was potentially discriminatory (UK)

The Court of Appeal has confirmed that an expectation that a disabled employee would work long hours was a 'provision, criterion or practice' in a disability discrimination claim regarding reasonable adjustments. It also held that, on the facts, the employer's conduct had caused the employee to resign and this entitled him to claim constructive unfair dismissal.

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Background

The Claimant, Mr Carreras, worked in a brokerage firm. He regularly worked long hours, from 9am to 9pm. He was involved in a bad accident and suffered an injury, causing him to take time off work. His symptoms included headaches, fatigue, dizziness and difficulty concentrating. These symptoms continued after his return to work.

For six months after his return, he worked a maximum of eight hours a day. Then he began to work from 8am to 7pm. He then received requests to work later into the evening, which he agreed to do. Thereafter, it was assumed that he would continue to work these longer hours. Mr Carreras found this difficult, but initially made no formal complaint. He feared that he would lose his bonus or his job if he did not work these longer hours.

After about five months of both sides working under the assumption that he would work late, Mr Carreras objected to the longer hours by making a formal complaint. Later that day, there was a heated exchange between Mr Carreras and Mr Mardel, one of the owners of the business. Mr Mardel raised his voice, reprimanded Mr Carreras in front of other staff members and told him that if he did not like it, he could leave. Mr Carreras left the office and resigned on the same day.

The firm wrote to Mr Carreras, reminding him of his post-termination restrictions. In response to that, Mr Carreras wrote an email explaining his reasons for resigning. Mr Carreras soon left the UK to join his wife in the USA. He later gave evidence in his Employment Tribunal claim to suggest he may have stayed if Mr Mardel had asked him to.

Mr Carreras brought claims in the Employment Tribunal for disability discrimination and constructive unfair dismissal. He claimed that the firm failed to make reasonable adjustments in relation to the expectation to work longer hours. He argued that the firm had required him to work these hours.

Legal background

Disability discrimination: reasonable adjustments

Section 20 of the Equality Act 2010 (EqA) requires an employer to make reasonable adjustments in cases where there is a 'provision, criterion or practice' (PCP) that puts a disabled employee at a substantial disadvantage, compared with a non-disabled employee. The employer must take steps that are reasonable to avoid the disadvantage:

Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
The duty comprises the following three requirements.
The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

Constructive dismissal

A constructive dismissal occurs where an employer does not actually dismiss an employee, but where an employee resigns and is able to show that they were entitled to do so by virtue of the employer's conduct. The employer must have committed a "repudiatory" or "fundamental" breach of the employment contract. The employer's conduct must have been sufficiently serious as to justify the employee resigning. The employee must resign in response to the breach and must do so without delay, to avoid being found to have waived the breach.

Employment Tribunal judgment

The Employment Tribunal dismissed Mr Carreras's claim.

Disability discrimination

The Employment Tribunal held that Mr Carreras's impairments did amount to a disability, and that the firm was aware of them. It also accepted that he was requested, and thereafter was expected, to work longer hours. However, it held that the firm had not imposed the PCP complained of, which was that he was required to work these hours. It held that Mr Carreras had never been required or forced to work in the evenings. At most, there had been an expectation that he would work late, but this was not the same as being required or forced to do so.

The Employment Tribunal acknowledged that there were factors that may have led Mr Carreras to decide that it was in his interests to work late. However, in the Employment Tribunal's view, this could not be described as being forced to do so.

Constructive dismissal

The Employment Tribunal accepted that the firm's conduct gave rise to a constructive dismissal claim. However, it held that Mr Carreras did not resign in response to the breach. He had gone abroad to join his wife after resigning. He only gave full reasons for his resignation after he was reminded of his post-termination restrictions. He also indicated that he might have stayed with the firm, if asked.

Mr Carreras appealed to the Employment Appeal Tribunal (EAT).

Employment Appeal Tribunal judgment

The EAT upheld Mr Carreras's appeal.

Disability discrimination

The EAT held that the Employment Tribunal had taken an overly technical and narrow view of what might constitute a PCP. The EAT stated that the definition of PCP should be construed widely.

It acknowledged that the concept of a "requirement" might be taken to imply an element of compulsion. However, it was not limited to that. An expectation or an assumption placed on an employee may be enough. The EAT noted that the Employment Tribunal had recognised that employees can feel obliged to work in ways that are detriment of their health. In that context, an employer's expectation could well be construed as a requirement. In this case, Mr Carreras's employer had requested, then expected, him to work late. He therefore felt obliged to work late. That was a PCP.

Constructive dismissal

The EAT also found that the Employment Tribunal had not correctly applied the law on constructive dismissal. It had placed undue weight on the fact that Mr Carreras would have retracted his resignation if asked, and on the fact that he had decided to join his wife in the US. Neither of these factors detracted from the breach of contract in response to which Mr Carreras had resigned.

The firm appealed to the Court of Appeal.

Court of Appeal judgment

The Court of Appeal dismissed the appeal.

Disability discrimination

The court agreed with the EAT that the Employment Tribunal had taken too narrow an approach when interpreting the term "required". The Employment Tribunal was wrong to dismiss Mr Carreras's claim on the basis that the term was equivalent to 'coerced' or 'forced'. It could, depending on the context, mean a strong form of request, or an expectation that he would work late. It was clear that Mr Carreras felt under pressure to work late (because of a repeated expectation or assumption that he would do so). The idea of being 'required' to do something could well encompass this.

Constructive dismissal

The Court of Appeal also agreed that the Employment Tribunal was wrong in not finding that the firm's breach of contract had caused Mr Carreras to resign.

Commentary

The Court of Appeal's decision has confirmed that the test for determining a PCP should be a broad and liberal one. It should not be interpreted in an overly narrow, technical or unnatural way. The employee in this case felt under pressure that he should work late: that was enough for it to amount to a 'requirement' of the job.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes, BarentsKrans): The concept of constructive dismissal does not exist as such in Dutch law. However, where an employee resigns with immediate effect ('summary resignation') for an 'urgent reason', s/he is entitled to damages. Discrimination by an employer in connection with an employee's disability would normally qualify as an 'urgent reason'.

Mr Carreras suffered from headaches, fatigue, dizziness and difficulty concentrating. These symptoms continued after his return to work. His employer was aware of this. It knew that his impairments amounted to a disability. Yet it continued pressuring him to do more than he could, instead of making reasonable adjustments. I cannot say for sure whether a Dutch court would have accepted Mr Carreras' resignation as having been for an 'urgent reason'. The court may have held against him the fact that he failed to make a formal complaint or to ask for less demanding working hours. Fear of losing his job may have been accepted as a sufficient reason for this failure, but fear of losing a bonus would probably not. However, let me assume for the sake of this commentary, that a Dutch court would have found in favour of Mr Carreras on this point. In that case, he would have been entitled to damages.

As per Article 7:677 (3)(a) of the Civil Code ('Article 677'), the amount of damages an employee who has resigned summarily for an 'urgent reason' can claim, equals the salary he would have earned during his notice period in the event the employer had dismissed him giving regular notice. This period rarely exceeds four months. Depending on the employee's length of service, the notice period varies between one and four months. In other words: 'Article 677 damages' tend to be small.

The case reported above does not reveal what the outcome of the case was or is likely to be. Perhaps the case is now back in the Employment Tribunal to determine the amount of unfair dismissal compensation.

Article 17 of Framework Directive 2000/78 provides that: "Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to

this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive." In its judgment in Arjona Camacho (C-407/14), the ECJ held that, although this does not require Member States to provide for punitive sanctions, "in order for the loss and damage sustained as a result of discrimination on grounds of sex to be the subject of genuine and effective compensation or reparation in a way which is dissuasive and proportionate, that article requires Member States which choose the financial form of compensation to introduce in their national legal systems, in accordance with detailed arrangements which they determine, measures providing for payment to the person injured of compensation which covers in full the loss and damage sustained." In brief: compensation for discrimination must be full.

This raises the following question: does the fact that the law specifies 'Article 677 damages' mean that no other remedy is available, such as a claim for breach of contract or tort? If so, Article 677 would seem to be at odds with the Framework Directive and the courts should disapply it.

My contention is that Article 677 is not exhaustive as regards remedy. An employee who resigns summarily for an urgent reason, such as discrimination, can claim more than just 'Article 677 damages'. I base this view on the law in respect of the converse situation, where the employer is the summarily dismissing party. If the employer has no 'urgent reason' to do so, the employee can claim full compensation, possibly even on top of Article 677 damage'. Suppose, for example, that an employee loses his job at age 60, and that it is almost 100% certain that he will be unable to find another job until his retirement at age 66, his loss amounts to – roughly speaking – his last-earned salary (including benefits) minus unemployment benefits for a period of six years. Although awards of this size are rare, the point is that the loss an employee sustained as a result of resigning summarily for an 'urgent reason', such as having been discriminated against, can exceed by far the Article 677 damages to which Dutch law explicitly entitles him.

In my view, therefore, had Mr Carreras brought his case before a Dutch court, he might have been able to claim compensation for the entire loss of income resulting from his resignation.

Belgium (Peter Pecinovsky, Van Olmen & Wynant): In Belgium there is no concept of 'constructive dismissal', nor does Belgian discrimination law use terms like "provision, criterion or practice", but the refusal to make reasonable adjustments towards a disable employee could be regarded as indirect discrimination on grounds of disability. To justify measures which are claimed to be (indirectly) discriminatory, the employer must prove that it

made certain reasonable adjustments or that the necessary adjustments are not possible or reasonable. In this case, whereas it would suffice to limit the working hours to eight hours (which is a standard working day in Belgium), it would be very hard to justify the indirect discrimination, and the employer would most likely be order by the labour court to pay compensation.

Subject: disability discrimination

Parties: United First Partners Research – v – Nicolas Carreras

Court: Court of Appeal

Date: 28 February 2018

Case Number: A2/2016/1748

Internet Publication: http://www.bailii.org/ew/cases/EWCA/Civ/2018/323.html

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Creator: Court of Appeal
Verdict at: 2018-02-28
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