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Disability discrimination, reasonable adjustments and constructive unfair dismissal

By Nathan Combes

The recent EAT decision in Salford NHS Primary Care Trust v Mrs A F Smith[1] provides useful clarification of what will (and more importantly what will not) constitute a 'reasonable adjustment' for the purposes of sections 4A and 18B of the Disability Discrimination Act 1995 ('DDA'). The decision also examines the requirement for Employment Tribunal's to assess breach of trust and confidence arguments on an objective basis.

This case concerned a senior therapist (Mrs Smith) who was employment by Salford NHS Primary Care Trust (the 'Trust') in a predominately managerial role. Mrs Smith developed a chest infection in March 2007 and was signed off as being medically unfit for work. Unfortunately, Mrs Smith's health deteriorated following the initial infection with the result that a formal diagnosis of chronic fatigue syndrome (CFS) was made in September 2007. Mrs Smith never returned to work.

The Trust (in response to Mrs Smith's illness) set about obtaining medical reports concerning the nature of Mrs Smith's condition and its likely duration. The Trust was also pro-active in terms of trying to explore opportunities for redeployment. It was accepted by the Trust from the outset that Mrs Smith's condition constituted a disability and that that disability placed the Trust under a duty to consider whether any reasonable adjustments could be made in order to facilitate Mrs Smith's return to work. It is in context of this obligation that the relationship between the Trust and Mrs Smith began to deteriorate (ultimately leading to Mrs Smith's decision in June 2008 to resign her employment and pursue claims against the Trust for disability discrimination and constructive unfair dismissal).

Section 4A of the DDA confirms that employers will be placed under a duty to make reasonable adjustments where a provision, criterion or practice ('PCP') is applied by or on behalf of an employer which places a disabled employee at a substantial disadvantage in comparison with employees who are not disabled. Section 4A goes on to confirm that the purpose of requiring employers to make reasonable adjustments (wherever it is reasonable for them to do so) is to prevent the relevant PCP from placing a disabled employee at that disadvantage. In the present case the

tribunal found that the relevant PCP was the Trust's requirement that Mrs Smith would perform her full role within her contracted hours.

The position during 2007 and 2008 was that Mrs Smith was medically unfit to perform any kind of productive work and that that position was unlikely to alter for a considerable period of time (stretching into months and possibly even years, not weeks). In view of this the Trust moved on to considering possible redeployment opportunities. However these alternatives proved unworkable from Mrs Smith's view (either because they would require her to have regular face-to-face contact with members of the public or because they required Mrs Smith to have IT skills). The Trust offered Mrs Smith the opportunity to attend training in order to obtain IT skills but this offer was not taken up. Instead, Mrs Smith pressed for the Trust to take up the advice of one of the medical experts which suggested that the Trust should seek to rehabilitate her through the creation of a non productive therapeutic role and/or that it should consider the alternative of an unpaid career break. The Trust confirmed that it was unwilling to consider either of these options and continued to press for other solutions instead. Various formal meetings were held between the Trust and Mrs Smith during this period of time and the Trust was careful on more than one occasion to make Mrs Smith aware that one possible outcome would be a dismissal on the grounds of her continuing ill health.

As time went on the situation between the Trust and Mrs Smith did not improve and towards the end of her employment Mrs Smith refused to attend meetings with the Trust which had been set up with the intention of considering whether there were any other alternative measures that could be implemented in order to facilitate her return to work. On 18 June 2008 the Trust wrote to Mrs Smith to ask her to attend a further meeting. The Trust's letter made it clear that if Mrs Smith failed to attend the meeting then a decision to terminate her employment (on the grounds of her ill health) may be taken in her absence. On 23 June 2008, Mrs Smith resigned from her employment (effectively claiming that the Trust's most recent letter constituted the 'final straw' and that she regarded herself as being constructively unfairly dismissed).

At the first instance Mrs Smith's claims were successful. The Manchester Employment Tribunal found that the Trust's refusal to introduce a programme of therapeutic non-productive work for the claimant meant that it had failed in its duty to make reasonable adjustments and that consequently Mrs Smith had been discriminated against on the grounds of her disability. Additionally, the Tribunal found that the Trust's failure to make the desired reasonable adjustments had entitled Mrs Smith to conclude that there had been a breach of the implied term of mutual trust and confidence and consequently that she had been entitled to resign her employment and regard herself as having been constructively unfairly dismissed. The Trust appealed.

The Trust's appeal contended (inter-alia) that the reasonable adjustment found by the tribunal was not a reasonable adjustment since it ***"would neither prevent nor alleviate the substantial disadvantage of her*** **[Mrs Smith's]*inability to multi-task, deal with clients or set up emotional boundaries and work in a noisy or busy environment"[2].*** Additionally, the Trust also complained that the original Tribunal had been wrong to apply a subjective test (from Mrs Smith's standpoint) in connection with its finding that the Trust's failure

to make a reasonable adjustment had caused a breach of the implied term of mutual trust and confidence.

Dealing with the reasonable adjustment point first, the EAT took care to return to Section 4A of the DDA in order to clarify that the obligation to make reasonable adjustments is intended to remove the substantial disadvantage that the employer's PCP places them at. The EAT also referred to Section 18B of the DDA which sets out the test for determining whether or not a proposed adjustment is reasonable and also provides examples of the types of steps that might be taken (depending on the individual circumstances) in order to comply with the duty to make reasonable adjustments.

The decision of the EAT in relation to the aspect of the appeal came down wholly on the Trust's side. In a succinct and well reasoned decision, the EAT confirmed that ***"Reasonable adjustments are primarily concerned with enabling the disabled person to remain in or return to work with the employer"[3]*** and that ***"Adjustments that do not have the effect of alleviating the disabled person's substantial disadvantage as we have set it out are not reasonable adjustments within the meaning of the Act. Matters such as consultations and trials, exploratory investigations and the like do not qualify"***. In arriving at this conclusion the EAT expressly approved the earlier authorities **Tarbuck**[4] and **Rowan**[5]. In the circumstances of the present the EAT had no difficulty in concluding that the proposed adjustments put forward by Mrs Smith and accepted by the original Tribunal did not constitute reasonable adjustments, since neither a career break or programme of therapeutic rehabilitation would have prevented the disadvantage caused to Mrs Smith by the PCP (i.e. the requirement that she would perform her full role during her contracted hours). In short an adjustment which aids an employee's return to health but does not also serve to mitigate the effects of the relevant PCP will not constitute a reasonable adjustment for the purposes of the DDA.

Separately, the EAT also found in favour of the Trust in terms of its appeal against the original Tribunal's finding of constructive unfair dismissal. In reaching this decision, the EAT confirmed that the Tribunal's reasoning had been floored on three separate grounds:

1. **there was no 'last straw'** – the EAT found that the Trust's final letter to Mrs Smith had been wholly innocuous[6] and that the reference to the possibility of Mrs Smith's dismissal was one that was both appropriate and necessary given the circumstances and that the Trust's earlier behaviour had not been repudiatory. The EAT confirmed that the correct test to be applied in 'last straw' cased is the test laid down by Dyson LJ in **Omilaju**[7] (taking care to quote directly from the following passage);

   "19……The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase 'an act in a series of acts' in a precise technical sense. The act does not have to be of the same character as earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of

trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant."[8]

2. **the tribunal had wrongly applied a subjective test** – the decision in **Malik[9]** and **Omilaju** make it clear that the correct test to be applied in order to determine whether there has been a breach of the implied term is an objective one and that it will be necessary to examine whether the employee's belief that there had been a breach of the implied term is one that is reasonably held; and

3. **the tribunal's decision was not Meek[10] compliant** - on the present facts the EAT concluded that the original Tribunal had failed to give adequate reasons for its decision that the Trust's refusal to put forward proposals for non-productive work amounted to a repudiatory (i.e. a fundamental) breach of contract.

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[1] *Salford NHS Primary Care Trust v Smith (Disability Discrimination)* UKEAT 0507_10_2608

[2] *Salford NHS Primary Care Trust v Smith (Disability Discrimination)* UKEAT 0507_10_2608 [27]

[3] *Salford NHS Primary Care Trust v Smith (Disability Discrimination)* UKEAT 0507_10_2608 [47]

[4] *Tarbuck v Sainsbury's Supermarkets Ltd,* UKEAT/0136/06/LA; [2006] IRLR 716

[5] *Environment Agency v Rowan* UKEAT/0060/07

[6] *Salford NHS Primary Care Trust v Smith (Disability Discrimination)* UKEAT 0507_10_2608 [66]

[7] *London Borough of Waltham Forest v Omilaju* (2004/0815 11 2004)

[8] *Salford NHS Primary Care Trust v Smith (Disability Discrimination)* UKEAT 0507_10_2608 [58]

[9] *Malik & another v BCCI* [1998] AC21

[10] *Meek v City of Birmingham District Council* [1987] IRLR 250

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