Neutral Citation Number: [2022] EAT 191

Case No: EA-2021-000732-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 23 December 2022

Before :

HIS HONOUR JUDGE JAMES TAYLER

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Between :

Mrs J Davies	**Appellant**
- and -	
EE Limited	**Respondent**

- -
- -

Charlotte Mallin-Martin (instructed by GA Solicitors LLP) for the **Appellant**
James Boyd (instructed by DWF LLP) for the **Respondent**

Hearing date: 11 November 2022

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JUDGMENT

SUMMARY

DISABILITY DISCRIMINATION

The claimant was a full-time employee who had contractual hours of 40 per week. The employer has other staff who work part-time. The employment tribunal erred in law in concluding that this meant that a PCP of requiring the claimant to work her contracted hours of 40 per week was not applied to her. The fact that the claimant had a phased return to work with reduced hours also did not mean that the PCP was not applied to her – the phased return constituted the making of an adjustment before the claimant was required to return to her full-time hours. The fact that the respondent was prepared to give the claimant an opportunity to apply for a part-time role, should one become available, did not mean that the PCP was not applied to the claimant while she remained in the full-time role.

HIS HONOUR JUDGE JAMES TAYLER

1. This is an appeal against the judgment of Employment Judge Roper, after a hearing on 12 and 13 July 2021, dismissing claims of failure to make reasonable adjustments and constructive dismissal. A claim of discrimination because of something arising in consequence of disability succeeded to a limited extent. The parties agreed to EJ Roper sitting alone. The judgment and reasons were sent to the parties on 22 July 2021.

2. The claimant was employed as a Customer Service Representative at the respondent's call centre in Plymouth from May 2019 until her resignation on 27 February 2020. The claimant worked in the Consumer Operations Team dealing with customer queries.

3. The claimant's contract provided:

> Your average hours of work will be 40 hours per week. Your shift pattern will be confirmed to you by your manager but will be between the core hours of 7.45 am and 10.15pm, Monday to Sunday.

4. In early August 2019, the claimant was diagnosed with an impairment in her vocal chords; phonatory gap. The respondent conceded that the claimant was a disabled person at all material times.

5. On 24 September 2019, the claimant attended a quarterly attendance review meeting. The employment tribunal held that the respondent had constructive knowledge of the claimant's disability from the date of this meeting.

6. The claimant was absent from work for a period because of pain and discomfort in her throat. The claimant undertook a phased return to work from 11 January to 14 February 2020. The claimant was permitted to take breaks during the reduced hours but did not always do so.

7. During the phased return the claimant attended a Stage 1 Absence Procedure meeting on 24 January 2020. The claimant's then manager, Mrs Jackson, agreed to refer the claimant to occupational health. The claimant stated that she wanted to work part-time. The claimant stated that her husband and daughters wanted her to resign. The claimant was issued with a stage 1 warning under the sickness absence procedure after the meeting.

8. The claimant returned to her full time hours on 14 February 2022. The employment tribunal noted that:

> The respondent has full-time teams and part-time teams, and part-time roles were available for those working in the part-time teams. There were no immediate vacancies at the time of the request but the claimant's request for a move had been noted.

9. Occupational health produced a medical report on 10 February 2020. The employment tribunal recorded that:

> The report recommended that the claimant should undertake a Health and Well-being Passport with her line manager to record her health condition and to consider any workplace adjustments. It was noted that the claimant wished to reduce her hours on a permanent basis and the report suggested that this should be discussed with management who would then have to make the decision.

10. On 26 February 2020, the claimant informed Mrs Jackson that she had an appointment at hospital. Mrs Jackson told the claimant that she would either have to use annual leave, or she could make up the time. The claimant resigned the following day. The employment tribunal held:

> 35. I find that the claimant's resignation was in response to a combination of factors, including initially Mrs Jackson's refusal to allow the claimant to have paid leave for a hospital appointment; **the respondent having failed to find an alternative part-time position**; and the claimant's family wishing her to leave her employment so that she could spend more time with them. The claimant had not objected to the stage 1 absence warning, indeed she commented that she approved of the respondent's procedures in this respect and that she had been treated fairly. [emphasis added]

11. Mrs Jackson replied to the claimant's resignation, stating:

> You have been an absolute treasure on the team and I can honestly say I am sad to see you leave, I know how much you enjoyed it and the challenge, **I just wish there was a part time space for you** because you are an asset to the business as I've always told you. [emphasis added]
>
> Of course I won't forget you with regards to a part time space when one becomes available.

12. The employment judge directed himself as to the law:

> 56. The constituent elements of claims in respect of an alleged failure to make reasonable adjustments are set out in Environment Agency v

> Rowan. Before considering whether any proposed adjustment is reasonable, the Tribunal must identify: (i) the provision, criterion or practice applied by or on behalf of the employer; (ii) the identity of the non-disabled comparators (where appropriate); and (iii) the nature and extent of the substantial disadvantage suffered by the claimant.
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> 57. Environment Agency v Rowan has been specifically approved by the Court of Appeal in Newham Sixth Form College v Sanders - the authorities make it clear that to find a breach of the duty to make reasonable adjustments, an employment tribunal had first to be satisfied that there was a PCP which placed the disabled person at a substantial disadvantage in comparison with persons who were not disabled. The tribunal had then to consider the nature and extent of the disadvantage which the PCP created by comparison with those who were not disabled, the employer's knowledge of the disadvantage, and the reasonableness of proposed adjustments.

13. The employment judge set out the asserted PCPs:

> 58. The case management order dated 21 January 21 confirms that the claimant relies upon two PCPs. The first is a requirement for employees including the claimant to complete a full-time working pattern of 40 hours per week with each shift approximately 9 ½ hours in length. The second PCP is requiring employees to complete the shifts without agreeing any reduction in hours. ..

14. The employment judge's conclusion on the reasonable adjustments claim was set out briefly:

> … In my judgment **neither PCP can be made out on the facts of this case**.
>
> 59. At the time of the claimant's resignation **the respondent employed some employees on a part-time basis in a part-time team**; the respondent **had accepted and acted on the recommendations of the claimant's GP to allow a phased return to work with reduced hours**; Mrs Jackson had authorised and encouraged the claimant to take occupational health breaks within those reduced hours; and **the respondent had made enquiries of a potential transfer of the claimant to a part-time shift if and when a vacancy arose**.
>
> 60. **It is simply not the case that the respondent required its employees to complete a full-time working pattern of 40 hours per week** (the first PCP). It also not the case that the respondent required employees to complete their shifts without agreeing any reduction in hours (the second PCP).
>
> 61. For these reasons I dismiss the claimant's claim that the respondent failed to make reasonable adjustments. Applying Environment Agency v Rowan and Newham Sixth Form College v Sanders **the PCPs relied upon to establish substantial disadvantage**

> **did not exist**. [emphasis added]

15. The claimant appeals on two grounds. The first challenges the finding in respect of the first PCP "a requirement for employees including the claimant to complete a full-time working pattern of 40 hours per week with each shift approximately 9 ½ hours in length". The claimant no longer seeks to rely on the second PCP. The first ground of appeal has three elements, it being asserted that the employment tribunal erred in law by: (1) holding it was relevant that the respondent employed some part-time employees; (2) concluding that because the respondent considered making adjustments for the claimant, this disproved the existence of the first PCP; and (3) considering the existence of the PCP by concentrating on the period of the claimant's phased return to work, rather than the whole period from when the respondent had constructive knowledge of the claimant's disability until her resignation – 24 September 2019 to 27 February 2020. The second ground is that if the employment tribunal erred in its approach to the reasonable adjustments claim this undermines the finding that the claimant was not constructively dismissed.

16. The respondent asserts that the employment judge properly directed himself as to the law and permissibly concluded that the respondent had not applied a PCP that placed the claimant at a substantial disadvantage in comparison with non-disabled comparators.

17. Section 20 the **Equality Act 2010** ("**EQA**") provides:

> 20 Duty to make adjustments
>
> (1) 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.
>
> (2) The duty comprises the following three requirements.
>
> (3) 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**. [emphasis added]

18. Paragraph 20 of Schedule 8 **EQA** provides:

> 20 Lack of knowledge of disability, etc.
>
> (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know— ..
>
> (b) in any case referred to in Part 2 of this Schedule , that an interested disabled person **has a disability** and is **likely to be placed at the disadvantage** referred to in the first, second or third requirement. [emphasis added]

19. The approach to PCP reasonable adjustment claims was considered by the EAT in **Environment Agency v Rowan [**2008] I.C.R. 218, HHJ Serota:

> 27. It is helpful, therefore, if we restate that guidance to have regard to the amendments to the Act. In our opinion an employment tribunal considering a claim that an employer has discriminated against an employee pursuant to section 3A(2) of the Act by failing to comply with the section 4A duty must identify: (a) the provision, criterion or practice applied by or on behalf of an employer, or (b) the physical feature of premises occupied by the employer, (c) the identity of non-disabled comparators (where appropriate) and (d) the nature and extent of the substantial disadvantage suffered by the claimant. It should be borne in mind that identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the "provision, criterion or practice applied by or on behalf of an employer" and the "physical feature of premises" so it would be necessary to look at the overall picture. In our opinion an employment tribunal cannot properly make findings of a failure to make reasonable adjustments under sections 3A(2) and 4A(1) without going through that process. Unless the employment tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage.

20. In **Carreras v United First Partners Research** UKEAT/0266/15/RN HHJ Eady QC said:

> 31. The identification of the PCP was an important aspect of the ET's task; the starting point for its determination of a claim of disability discrimination by way of a failure to make reasonable adjustments (see Environment Agency v Rowan [2008] IRLR 20 EAT , paragraph 27). In approaching the statutory definition in this regard, the protective nature of the legislation means a liberal rather than an overly technical or narrow approach is to be adopted (Langstaff J, paragraph 18 of Harvey); that is consistent with the Code , which states (paragraph 6.10) that the phrase "provision, criterion or practice" is to be widely construed.
>
> 32. It is important to be clear, however, as to how the PCP is to be

> described in any particular case (and I note the observations of Lewison LJ and Underhill LJ on this issue in Paulley). And there has to be a causative link between the PCP and the disadvantage; it is this that will inform the determination of what adjustments a Respondent was obliged to make.

21. In **Ishola v Transport for London** [2020] EWCA Civ 112, [2020] I.C.R. 1204 Simler LJ considered the extent to which a PCP must be of some actual, or potential, general applicability:

> To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. I accept of course (as Mr Jones submits) that the comparator can be a hypothetical comparator to whom the alleged PCP could or would apply.
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> 37. In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability-related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.
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> 38. In context, and having regard to the function and purpose of the PCP in the Equality Act 2010 , all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one.
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> 39. In that sense, the one-off decision treated as a PCP in Starmer [2005] IRLR 863 is readily understandable as a decision that would have been applied in future to similarly situated employees. However, in the case of a one-off decision in an individual case where there is nothing to indicate that the decision would apply in future, it seems to me the position is different.

22. It is important to distinguish between the application of a PCP and any adjustment that may be in place to ameliorate the effect: **Finnigan v Chief Constable of Northumbria Police** [2013]

EWCA Civ 1191, [2014] 1 WLR [29]:

> It is important to distinguish between a PPP and the adjustments made to a PPP to alleviate the detrimental effects to which a disabled person may be subjected by it. The PPP represents the base position before adjustments are made to accommodate disabilities.

23. I have concluded that the employment tribunal erred in law as asserted by the claimant. I do not consider that the judgment can be read as holding that a PCP was not applied that placed the claimant at a substantial disadvantage in comparison with persons who are not disabled as asserted by the respondent. The respondent contends that the questions of the application of the PCPs and disadvantage were conflated. The employment tribunal held in terms that the PCPs had not been applied at all. The employment tribunal should have considered whether the respondent applied a PCP to the claimant requiring her to complete a full-time working pattern of 40 hours per week. While it is necessary that a PCP has a degree of actual, or potential, general applicability, it is not necessary that it be applied to the whole workforce. The respondent had full-time and part-time roles. The claimant remained in a full-time role with contractual working hours of 40 per week that represented the application of a PCP to her with the necessary degree of general applicability, because it would be applied to all those in full-time roles. The fact that there are part-time roles does not alter this analysis. The fact that an adjustment was made during the claimant's phased return to work does not mean that the PCP ceased to exist. The claimant remained in a full-time role, with contractual hours of 40 per week, while the adjustment of a phased return to work was in place. The claimant returned to full-time work once the phased return had been completed. Nor did the fact that the respondent was prepared to consider the claimant transferring to a part-time role mean that the PCP was not applied to her while she remained in the full-time role.

24. Provisions of contracts of employment providing for matters such as working hours or job duties will often have the necessary feature of actual, or potential, general applicability because the contract of employment will be applicable to a number of employees or represents the requirements that would be made of any person undertaking the job in question, even if the job is a one off.

25. I consider that there is only one possible correct answer to the question of whether the PCP of requiring a 40-hour week was applied to the claimant. That PCP was applied during the entirety of the period from when the respondent had constructive knowledge of the claimant's disability until her resignation, 24 September 2019 to 27 February 2020. That PCP was a term of her full-time contract. The question of whether the PCP included a requirement that each shift was approximately 9 ½ hours in length is not open only to one answer. It was not a term of the contract of employment. The question of whether that additional requirement was applied will be for consideration on remission. On remission the employment tribunal will also have to consider whether the PCP applied placed the claimant at a substantial disadvantage in comparison with persons who are not disabled, if so, whether the respondent had the necessary knowledge that the claimant was likely to be placed at the disadvantage and whether there were steps that the respondent could reasonably have been required to take to avoid the disadvantage. If the respondent failed to make reasonable adjustments that could affect whether the respondent was in fundamental breach of contract, so the constructive dismissal claim must also be remitted. The parties agreed that the remission should be to a newly constituted employment tribunal. The error was of fundamental significance to the judgment and it is better that the matter be heard by a full tribunal as is the normal case for discrimination claims.