Disability discrimination — reasonable adjustments

Charles Wynn-Evans, head of employment at Dechert LLP's London office, reports on two recent cases on the duty imposed by the Disability Discrimination Act 1995 (DDA) to make reasonable adjustments.

Introduction

The DDA imposes on employers a duty to make reasonable adjustments where either a physical feature of premises or a "provision, criterion or practice" causes a substantial disadvantage to a disabled person. DDA, s.4A states that, "where a provision, criterion or practice applied by or on behalf of an employer, or any physical feature of premises occupied by the employer, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the provision, criterion or practice, or feature, having that effect." This note summarises two recent decisions on the extent of the obligation to make reasonable adjustments in the context not of the physical features of employers' premises but rather their employment practices and policies.

Consultation before dismissal

In *Rothwell v Pelican Hardcopy Scotland Limited* [2006] IRLR 24, EAT, the employer sought a medical opinion from an occupational health physician and a consultant neurologist about the individual's health after a long period of absence. The occupational health physician was of the opinion that the employee would not be fit to return to work in the foreseeable future. It was apparent that the decision to dismiss had already been taken before the employer met the employee to discuss his position.

The tribunal found that an employer had not discriminated against an employee on grounds of disability when it did not consult him about his fitness for continued employment before deciding to dismiss on grounds of ill health. The tribunal held that the employee had been treated less favourably by reason of his disability but that this treatment was justified. There were no reasonable adjustments which the employer should have made and the employee was not fairly dismissed.

The EAT upheld an appeal. Following the guidance provided by the House of Lords in *Archibald v Fife Council* [2004] IRLR 651, it held that a tribunal cannot find that less favourable treatment of a disabled person is justified *unless* it is satisfied that any reasonable adjustments that an employer had a duty to make were carried out. In this case, a reasonable adjustment to take account of the individual's disability would have entailed the employer consulting with the claimant about his medical condition *prior* to taking the decision to dismiss. The tribunal was wrong to find that there had been consultation in the face of the fact that no one from the employer had discussed the occupational health physician's report with the employee prior to the decision to dismiss. There was no reason why the employer could not have deferred the decision about termination of employment to allow for consultation.

The finding that the employee was not unfairly dismissed was also overturned. The tribunal had overlooked the lack of consultation prior to the decision to dismiss and this was not one of the rare cases where an employer could show that dismissal without consultation was fair.

Comparators and adjustments

In *Smith v Churchills Stairlifts plc* [2006] IRLR 421, Mr Smith suffered from lumbar spondylosis which meant that he had difficulties in walking and could not lift or carry heavy objects. He was offered a place on a training course on the basis that he would be offered a job as a salesman if he

completed the course satisfactorily. Between the interview and the start of the training course, it was decided that salesmen would need to take with them particular equipment (a full size radiator cabinet). The employer believed that, because of his disability, the claimant would not be able to carry the equipment and withdrew the training course offer. The claimant suggested a trial period on a commission only basis for him to be allowed to follow an alternative sales method which would have avoided his having to carry around the relevant equipment but this was rejected.

The tribunal held that there had been no unlawful disability discrimination. It considered that the claimant was not placed at a substantial disadvantage to persons who are not disabled on the basis that the majority of the non-disabled population would also not be able to carry the cabinets. The duty to make reasonable adjustments therefore did not arise. The tribunal did, however, hold that, if the duty to make reasonable adjustments had applied, to allow a different arrangement on a trial basis would have been a reasonable adjustment. The tribunal concluded that the claimant was treated less favourably to a reason related to his disability by virtue of the training course offer being withdrawn. However, that action was justified because the claimant was not able to carry the relevant cabinet. The employer had a genuine commercial reason for wanting its sales people to use full size cabinets in demonstrations and this was material to the circumstances of the case and substantial (thereby establishing justification).

The Court of Appeal made a number of points in allowing an appeal against this decision. First, it was confirmed that the test of whether an employer has failed to make an adjustment is objective. The statutory requirement is that, in determining whether or not it is reasonable for an employer to take a particular step, regard is to be had, amongst other things, to the financial and other costs which could be incurred by the employer in taking the step and the extent to which it would disrupt any of his activities. The test is not of the employer's *belief* as to the disruption which an adjustment would make to its business but of the *actual effects* of the adjustment. By contrast, the assessment of whether less favourable treatment on grounds of disability is justified is of whether the employer's reason for its actions are material and substantial, which is a partly subjective test.

Had the tribunal considered the situation properly, it would inevitably have found that the claimant was at a substantial disadvantage in comparison to persons who were not disabled.

Accordingly, to allow a trial period in which the claimant would be allowed not to carry the cabinet was a reasonable adjustment.

Some useful guidance was given as to the comparison to be made to establish disability discrimination. The tribunal compared the claimant with the population at large who are not disabled to establish if the requirement to carry the cabinet put him at a substantial disadvantage. This was wrong — the proper comparator should be identified by reference to the disadvantage caused by the relevant arrangement. The proper comparators would have been the successful candidates for the training course who were subject to the requirement (that they carry the cabinet) but who were not disadvantaged by it because they were not rejected on the basis of their inability to comply.

Conclusions

These two cases are useful reminders of the importance of the duty to make reasonable adjustments. It is clear from *Rothwell* that an employer's ability to argue that dismissal of a disabled person is justified can be undermined by a failure to follow what would, in the unfair dismissal context, be a fair procedure in terms of consultation with the employee about the medical condition, prognosis etc. Smith makes clear that it cannot be assumed without good reason that an employer can insist on a particular way of working without considering whether and how the job can be changed to accommodate a disability and that trial periods may be appropriate and sensible. ❑