

Neutral Citation Number: [2022] EAT 133

Case No: EA-2021-000783-AS

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 26 August 2022

**Before :**

**HIS HONOUR JUDGE JAMES TAYLER**

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**Between :**

**MS A GILLESPIE**

**Appellant**

**- v -**

**GUY'S & ST THOMAS' NHS FOUNDATION TRUST**

**Respondent**

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**Matt Jackson** (instructed by **DLG Legal Services**) for the **Appellant**  
**Yvette Genn** (instructed by **DAC Beachcroft LLP**) for the **Respondent**

Hearing date: 11 August 2022  
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**JUDGMENT**

## **SUMMARY**

### **DISABILITY DISCRIMINATION**

The employment tribunal failed to determine the reasonable adjustment claim as set out in the list of issues. The case is remitted to the same employment tribunal to determine that claim.

## **HIS HONOUR JUDGE JAMES TAYLER**

1. This is an appeal against the judgment of Employment Judge Truscott QC, sitting with members, after a hearing on 9, 10, 11, 12 and 15 February 2021, with submissions on 12 March 2021 and consideration in chambers on 8 April 2021. The employment tribunal upheld a complaint of constructive unfair dismissal and dismissed complaints of sexual harassment and failure to make reasonable adjustments. The Judgment was sent to the parties on 22 May 2021. The appeal is limited to the dismissal of the complaint of failure to make reasonable adjustments.

2. The claimant commenced employment with the respondent on 1 April 2011 as a Community Staff Nurse. The claimant was given an improvement notice on 20 October 2015. From November 2015 until February 2016 the claimant was absent on sick leave due to anxiety and stress. In May 2016 the claimant was diagnosed with a serious medical condition. She was then absent from 13 May 2016 until her resignation. On 19 January 2017 the claimant submitted a grievance regarding alleged lack of management support provided to her during her sickness absence and challenging the process concerning the improvement notice. On 2 January 2018 the claimant submitted a claim form to the employment tribunal alleging disability discrimination. On 1 February 2018 the claimant attended a first sickness absence meeting. The claimant attended an occupational health appointment by telephone on 12 June 2018. Occupational health produced a report on 18 June 2018 in which it was stated that the claimant was unfit to return to her substantive post but that she could work in a role that did not require walking or standing for more than 2-3 minutes or regular manual handling. On 29 August 2018 the claimant attended a sickness absence meeting. The claimant was sent a redeployment registration form. The employment tribunal held that the claimant failed to return the form to the respondent. On 22 November 2018 a sickness absence meeting was held in the absence of the claimant. On 22 November 2018 the claimant sent an email to the respondent complaining that there had been no contact about the possibility of redeployment. The claimant resigned on 12 December 2018.

3. On 10 January 2019 the claimant applied to amend the claim form she had submitted before her resignation to add claims of constructive unfair dismissal and of failure to make reasonable adjustments. The application in respect of the claim of failure to make reasonable adjustments was in the following terms:

The Claimant avers that the Respondent has failed to engage with her regarding redeployment from 29 August 2018 to the date of her resignation on 12 December 2018, which amounts to a failure to make reasonable adjustments under S20 Equality Act 2010.

The Respondent's provision, criterion or practice (PCP) of requiring the employee to be fit and well enough to perform the relevant duties puts her at a substantial disadvantage in comparison with those who are not disabled as had the Respondent actively engaged in the redeployment provision in the sickness absence policy, she may have been able to return to work given the content of the Occupational Health (OH) report which recommended a sedentary, alternative role should be considered. Due to the Respondent's failure to make reasonable adjustments the Claimant was liable to be dismissed on the grounds that she could not perform her role.

4. The application to amend was permitted at a telephone preliminary hearing for case management on 19 February 2019. The respondent was granted permission to request further information. In response to the request the claimant stated:

**1) Clarification of what is meant by "relevant duties" referred to in relation to the alleged PCP**

The relevant duties refer to the duties of the Claimant's role of staff nurse

**2) Details of the substantial disadvantage that the Claimant alleges she was placed at by application of the PCP due to her disability, when compared with employees who do not share her disability**

The Claimant was subject to a formal sickness absence procedure potentially resulting in termination of her employment. This was due to her inability to carry out her core role due to her disability. Employees who do not share her disability would be able to carry out their roles and would not be subject to the formal sickness absence procedure, the outcome of which may have been termination of employment. Therefore, the Claimant was placed at a substantial disadvantage.

**3) Further details of what reasonable adjustments the Claimant alleges should have been made to avoid the disadvantage**

Moving the Claimant to a sedentary, alternative role as suggested by Occupational Health. The Claimant received no internal job vacancies,

support or contact regarding the redeployment process which she overs is a breach of the Respondent's Sickness Absence Policy.

5. In its amended response the respondent pleaded to the reasonable adjustment claim as follows:

58. The respondent does not admit that requiring the claimant to be fit and well enough to carry out the duties of her role of Staff Nurse amounts to a provision, criterion or practice ("PCP") for the purposes of this element of her claim.

59. If, which is not admitted, this requirement did amount to a PCP, the respondent denies that the claimant was put at a substantial disadvantage due to her disability when compared with employees who do not share her disability.

60. If which, is denied, the claimant was put at a substantial disadvantage, the respondent denies that it failed to make reasonable adjustments, namely moving the claimant to an alternative sedentary role, for the following reasons:

60.1 The claimant failed to respond to the respondent's letter dated 23 August 2018 asking whether she wished to engage in the redeployment process. It would not have been appropriate for the respondent to commence the redeployment process without first receiving the claimant's authority to do this.

60.2 The claimant resigned before the formal sickness absence hearing, at which options such as redeployment would be considered.

61. Had the claimant informed the respondent that she wished to engage in the redeployment process, or attended the formal sickness absence hearing, then the respondent would have explored the options for her accordingly.

6. A list of issues was set out in the judgment. It was not agreed in full. The disputed issues were underlined. There was no underlining in the section dealing with reasonable adjustments, which would appear, therefore, to have been agreed as follows:

### **Failure to make reasonable adjustments**

2. Was there a duty to make reasonable adjustments?

a. It is conceded that the Claimant has a disability;

b. The Claimant's case is that:

i. the Respondent had a PCP of requiring the Claimant to be fit and well enough to perform her contractual duties;

ii. that PCP placed the Claimant at a substantial disadvantage when

compared with non-disabled employee.

c. The Respondent does not accept that the matters relied on by the Claimant constitute a PCP

d. Or if the requirement relied upon (which is not admitted) is found to be a PCP, that the claimant was placed at a substantial disadvantage when compared with employees who did not share her disability

3. If there was a duty to make reasonable adjustments, did the Respondent take such steps as it was reasonable to take to avoid the disadvantage (namely being unable to be fit and well enough to perform her contractual duties)?

a. The Claimant asserts that the Respondent ought to have commenced the redeployment process and offered alternative roles as well as, or instead of, starting a final stage capability process.

7. What is clear from the pleadings and the list of issues is that the PCP the claimant relied upon was that of being “fit and well enough to perform her contractual duties”, those being the duties of a staff nurse. The disadvantage the application of the PCP was asserted to have placed the claimant at in comparison with non-disabled persons was less clear. In the list of issues at issue 2(b)(ii) the disadvantage was not set out, whereas at issue 3, when referring to any requirement to make adjustments, the disadvantage was referred to in parenthesis as “being unable to be fit and well enough to perform her contractual duties”, which appears circular. In the letter seeking the amendment and the further information it was suggested that the disadvantage was being subject to the formal sickness absence procedure with the risk of being dismissed.

8. The duty to make reasonable adjustments is set out in section 20 **Equality Act 2010** (“EQA”)

20 Duty to make adjustments

...

(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.

9. The section has three components:

9.1. The application of a PCP

9.2. The PCP must place the claimant at a substantial disadvantage in comparison with

persons who are not disabled

9.3. If so, the respondent must take such steps as it is reasonable to have to take to avoid the disadvantage

10. If a disabled person is unfit to carry out the duties of her role, but another role is available that she would be able to undertake, provision of that role is a paradigm example of a reasonable adjustment.

11. There are two main ways in which such cases have been analysed in terms of the appropriate PCP. Firstly, a PCP of being fit to undertake the duties of the job may be identified: **Archibald v Fife Council** [2004] ICR 954. Secondly, a PCP may be identified that results from the application of an ill health management process: **Griffiths v Secretary of State for Work and Pensions** [2015] EWCA Civ 1265, [2017] ICR 160, in which Elias LJ described the PCP as “the employee must maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions”. I do not accept that these are just two different ways of asserting the same PCP – they are different PCPs - although they may often both be applied in the case of an employee whose disability prevents them from fulfilling the duties of their role and may, as a result, then be absent from work. I considered the two PCPs in **Yorke v Glaxosmithkline Services Unlimited** EA-2019-000962-BA. The PCPs might conveniently be referred to as the **Archibald** and **Griffiths** PCPs.

12. The reasonable adjustments claim was dealt with briefly in the judgment at paragraph 126:

126. The PCP proposed by the Claimant would apply to any employee. The redeployment policy would apply to, among others, disabled employees. The ordinary practice in cases such as that of the Claimant would have been to apply the redeployment policy. In this the Respondent failed for the reasons set out earlier. There was no discernible practice of not so doing which adversely affected disabled employees. The situation came about because of the individual circumstances of this case. The Tribunal applied **Nottingham City Transport Ltd v. Harvey** that the manner in which a disciplinary procedure was applied to an employee did not amount to a PCP, accordingly a contravention of section 20 did not occur.

13. The appeal is brought on two grounds. First, that the employment tribunal failed to determine the reasonable adjustment claim that was before it and, second, that the employment tribunal applied the wrong legal test.

14. I have been careful to read the judgment as a whole. There is an apparently correct direction as to the law. However, I have concluded that the only realistic reading of paragraph 126 is that the employment tribunal lost sight of the PCP relied upon by the claimant. The sentence “The PCP proposed by the Claimant would apply to any employee” is essentially neutral, although it is implicit that general application goes against there being an appropriate PCP, whereas it is generally the very nature of a PCP. The second and following sentences make it clear that the employment tribunal considered that the PCP relied upon related to the application of the redeployment policy. The employment tribunal concluded that because there was no general practice of applying the redeployment policy as it had been applied to the claimant, presumably by failing to contact her about redeployment, this meant that no relevant PCP had been applied to the claimant at all. The analysis was not of the PCP identified by the claimant, which was the asserted requirement to be fit to undertake the duties of her role as a staff nurse.

15. I consider that the first ground of appeal is clearly made out. The employment tribunal failed to determine the reasonable adjustments claim that was before it. Accordingly, the appeal must be allowed. I do not consider that the second ground of appeal adds anything.

16. Mr Jackson, for the claimant, realistically accepted that there was no good reason why this matter could not be remitted to the same employment tribunal. The employment tribunal made numerous findings of fact that were not challenged and found in favour of the claimant in her constructive dismissal claim, holding that the failure to contact the claimant about redeployment was a breach of the implied term of mutual trust and confidence.

17. Mr Jackson suggested that I should substitute determinations that the PCP of requiring the claimant to be fit for the duties of her role was applied and that it placed her at a substantial disadvantage by putting her at risk of dismissal. He contends that, for each of these questions, only one answer is possible. While I accept that the passages that he referred me to do support the suggestion that the employment tribunal had made findings of fact that determined these issues, I am



not fully persuaded that only one answer is possible, particularly as it is not clear to me quite how the issue of substantial disadvantage was put at the employment tribunal. I consider that it is better that all questions in relation to the reasonable adjustments claim be remitted for determination. Mr Jackson can put his arguments about the extent to which determinations have already been made to the employment tribunal.

18. There would be much to be said for some early case management before the remitted hearing. It may be sensible after appropriate case management and finalisation of the issues that there be one further hearing to deal with the outstanding reasonable adjustments claim and remedy. The employment tribunal will have to consider whether the PCP of “requiring the Claimant to be fit and well enough to perform her contractual duties” was applied to the claimant, whether it placed her at a substantial disadvantage in comparison with persons who are not disabled and, if so, whether it would have been reasonable to redeploy the claimant to some alternative role because there was a prospect that she would have been able to undertake it.

19. In considering remedy, both for unfair dismissal, and if the claim of failure to make reasonable adjustments is upheld, it is likely that the employment tribunal will have to consider the prospect of the claimant taking up and remaining in any alternative role that might have been found for her.