Neutral Citation Number: [2024] EAT 10

Case No: EA-2021-001285-RN

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 23 January 2024

Before:

HIS HONOUR JUDGE JAMES TAYLER

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Between:

MR OMAR AYCHE **Appellant**

- and -

THE HOP BOX LIMITED (T/A PEDDLER MARKET) **Respondent**

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The Appellant appeared in person
Ben Smith in person for the **Respondent**

Hearing date: 23 January 2024

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JUDGMENT

SUMMARY

DISABILITY DISCRIMINATION

A claim of failure to make reasonable adjustments was based on a misunderstanding of undisputed facts. The appeal was allowed and the matter remitted to be determined again.

HIS HONOUR JUDGE JAMES TAYLER:

1. This is an appeal against a judgment of the Employment Tribunal, Employment Judge Brain, sitting with lay members on 9 August 2021. The reasons were sent to the parties on 22 September 2021.

2. The respondent organised an event on 2 and 3 October 2020 from warehouse premises where food was served by concessions to customers seated predominantly within the warehouse by serving staff who were directly employed by the concessions. The claimant was employed by Mr Wallace.

3. The Employment Tribunal held that the claimant was a contract worker for the respondent.

4. Mr Smith of the respondent saw the claimant on the first of the two day's that he worked serving customers without wearing a face covering. A risk assessment had been produced for the event that required the wearing of face masks.

5. The respondent accepts that no consideration was given to those with disabilities who might be exempt from the general requirement to wear face coverings. Mr Smith told the claimant that he was required to wear a mask. Initially, the claimant borrowed one, and then was provided with his own.

6. Mr Smith's evidence was that thereafter he saw the claimant serving with the mask and there was no further discussion about the issue. Mr Smith had initially suggested that the claimant might swap roles with Mr Wallace and prepare food rather than serve it, but that had been rejected, predominantly because the claimant would not have been able to cook the full range of offerings from the concession.

7. The Employment Tribunal held that the claimant was disabled by reason of asthma and a previous brain tumour. So far as is relevant to this appeal, the complaint considered by the Employment Tribunal was of failure to make a reasonable adjustment. The claimant contended that the reasonable adjustment would have been to have allowed him to undertake his role without wearing a face mask. The respondent contended that it had offered a reasonable adjustment by suggesting that the claimant swap roles with Mr Wallace.

8. The Employment Tribunal found that the claimant, after he had been required to wear a mask, adopted a practice whereby he would generally wear the mask below his nose and would only lift it above his nose when he anticipated encountering someone in authority (Paragraph 24) .

9. The Tribunal considered the issue of reasonable adjustments from paragraph 36 through to 46 of its judgment:

> "36. In the minute of the case management hearing held in February 2021, the Tribunal noted that the claimant was not pursuing a complaint of a failure to make reasonable adjustments. However, upon a fair reading of the claimant's claim form the Tribunal is satisfied that the claimant did in fact advance such a claim. Accordingly, the Tribunal shall now turn to a consideration of it.
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> 37. The first question that arises upon such a complaint is the identification of the relevant requirement placed upon the complainant. To use the statutory language, it is necessary to identify the disadvantaging '*provision, criterion, or practice*'. The disadvantage caused by the requirement must be attributable to the complainant's disability.
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> 38. The Tribunal is satisfied that in this case there was a disadvantaging provision, criterion, or practice. The relevant requirement was to wear a face covering or face mask when delivering food to the tables. The disadvantage to the claimant by so doing was clearly attributable to his disability. A non-disabled comparator would have no difficulty in wearing a face mask when waiting upon tables. The claimant has therefore demonstrated that the second respondent imposed upon him a disadvantaging requirement where the disadvantage is attributable to disability.

39. The question that arises therefore is whether there were any adjustments which may have been made which had a prospect of alleviating the disadvantage. The claimant has complained in his witness statement about the way in which Mr Smith dealt with matters. However, the claimant will appreciate that the question of whether there were any reasonable adjustments available to the respondents to the claim is an objective test and is one for the Tribunal to determine.

40. One adjustment suggested by Mr Smith was for the claimant to swap roles with Mr Wallace. However, in our judgment that was not a reasonable adjustment because the claimant was simply unable to undertake the cooking. That left the choice between the claimant persisting with work wearing a face covering of some kind or simply abandoning his role. We agree with the claimant that the latter would not have been a reasonable adjustment as it would have resulted in the loss to the claimant of two days of work particularly in circumstances where reasonable adjustments were available to the second respondent.

41. As has been said, the Tribunal's focus will be upon whether the outcome was one which was objectively reasonable. The focus will be less upon the process by which that decision was reached.

42. We hold that a reasonable adjustment was made by the second respondent. The solution that was arrived at was for the claimant to wear the mask but not to do so over his nose (except when he was concerned that persons of authority may be in the vicinity). This in fact alleviated the disadvantage to the claimant because he was able to work for the entirety of 2 and 3 October 2020. The claimant's complaint that he felt coerced by Mr Smith on 2 October 2020 to wear a mask is simply not credible in circumstances where the claimant was under no compulsion to work upon 3 October 2020.

43. We accept that an alternative would have been for the claimant to have worn a visor; Mr Smith accepted that he had a ready supply of visors available. The claimant reasonably objected to the wearing of a visor upon the same basis as the wearing of a cloth face covering. However, the fact remains that the claimant was, by virtue of the adjustment, able to successfully work upon 2 and 3 October 2020.

44. The question of the reasonableness of the adjustment is objective. A balance has to be struck between the reasonable needs of the disabled person for the making of an adjustment to alleviate the substantial disadvantage caused by the disability on the one hand, against the reasonable needs of the employer on the other. The Tribunal must consider whether the taking of any particular steps would be effective in preventing the substantial disadvantage, the cost to the employer and the extent of any disruption caused to the employer's operation.

45. The Tribunal accepts that the claimant is exempt from wearing a face covering. However, this cannot and does not give him an untrammelled right to work at an event such as the Peddler Market without a face covering as the reasonable needs of the employer have to be taken into account. Mr Smith gave

> compelling evidence that difficulties in ensuring that members of the public comply with the requirements to wear face coverings are frequently encountered and that such difficulties are likely to be increased if the public see members of staff not wearing face coverings. Further, the viability of the event will be ended in the event of revocation of the licence by the local authority.
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> 46. The second respondent has the right to run its business. In doing so, it does of course have to comply with the legal obligations placed upon them by the 2010 Act. Those legal obligations include the requirement to make reasonable adjustments. In the Tribunal's judgment, the right balance was struck between the needs of the claimant on the one hand and those of the second respondent on the other in the solution that was alighted upon for those two days – for the claimant to wear a face covering over his mouth and hitch it up over his nose from time-to-time. Allowing the claimant not to wear a face covering altogether may have given rise to public order issues and put the second respondent in jeopardy with Sheffield City Council. That would go beyond what is reasonable. However unsatisfactory the claimant may have found the process by which the solution was arrived at, on any objective assessment reasonable adjustments were made in this case."

10. The Employment Tribunal concluded that the respondent had made a reasonable adjustment for the claimant by permitting him to wear the covering below his nose other than when he saw a person in authority. The claimant appeals against that judgment on the basis that it was not the respondent that permitted the adjustment, the respondent was unaware of the adjustment, it was an adjustment made by the claimant without the permission of the respondent and therefore could not amount to the respondent complying with a duty to make an adjustment for the claimant.

11. The appeal was permitted to proceed by Michael Ford KC, Deputy Judge of the High Court at a Rule 3(10) hearing by an order sealed on 3 May 2023. Judge Ford suggested that the claimant and the respondent might seek to agree a note of evidence. That has not taken place. However, it became apparent at the hearing before me that there is no significant dispute as to the relevant evidence.

12. The respondent contends that after the claimant had been told that he should wear a mask he was seen serving at tables for the rest of 3 October 2020 wearing a mask and never raised any concerns. The adjustment that had been offered of working in the

kitchen of the concession, had been rejected. The respondent does not contend either that it was aware that the claimant adopted the process of wearing the mask below his nose, save when he thought he might encounter a person in authority, or that that was an adjustment it agreed with him. To that extent the respondent accepts that the decision of the Employment Tribunal is based on an incorrect view of what were undisputed facts.

13. The claimant's position is that he adopted the process of wearing the mask below his nose, save when he thought he might encounter a person in authority, that so doing he was able to work on 3 October and also chose to work another shift on 4 October 2020. He stated that he did not raise his adjustment as a possibility because he thought it would be rejected. He also states that the adjustment he contended would be appropriate was not having to wear a mask at all, albeit that possibility was one that was rejected by the Tribunal.

14. Section 41 of the **Equality Act 2010** ("**EQA**") provides by subsection (4):

> A duty to make reasonable adjustments applies to a principal (as well as to the employer of a contract worker)

15. Accordingly, the principal of a contract worker is under a duty to make reasonable adjustments.

16. The duty to make reasonable adjustments, so far as is relevant to this appeal, is provided by section 20(1), (2) and (3) **EQA**:

> "(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'.
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> (2) The duty comprises the following 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."

17. In analysing such a claim of failure to make reasonable adjustments an Employment Tribunal must identify a provision criterion or practice of the respondents. That PCP must place a disabled person at a substantial disadvantage in comparison to persons who are not disabled. In such circumstances the respondent must take such steps as it is reasonable to have to take to avoid that disadvantage.

18. The duty to make reasonable adjustments is that of the respondent. It is clear from the submissions of the parties that the decision of the Employment Tribunal was made on a misunderstanding of what were uncontested facts. The position was made more difficult for the Tribunal because the case was badly prepared, there being shortcomings in the claimant's witness statement in regard to the issue of disability and the respondent not having provided a witness statement.

19. It is clear from the decision of the Employment Tribunal that it concluded that the respondent was aware of the adjustment being made by the claimant and, at the very least, consented to it, which it considered was sufficient to constitute the making of a reasonable adjustment. That incorrect understanding of facts that were not in dispute, namely, that the respondent did not know of the adjustment and did not agree to it, necessarily means that the appeal must be permitted. However, as there appears to have been a fundamental misunderstanding as to what had occurred and as to the knowledge of the respondent as to any problems faced by the claimant once he started wearing a mask, the matter shall be remitted to the Employment Tribunal to re-determine the reasonable adjustments claim including determining again what, if any, relevant

provision criterion or practice was in fact applied, any disadvantage suffered by the claimant and any failure on the part of the respondent to make an adjustment that was reasonable.

20. The matter can be remitted to the same Employment Tribunal. Many of its findings of fact have been upheld. The Employment Tribunal can be trusted to comply with the requirement to revisit these matters. It will be a matter for the Employment Tribunal to decide whether any case management should be undertaken to ensure that the matter is fully prepared to be re-determined on remission.