

## EAT rules DWP's disability discrimination is justified

*DWP v Boyers* UKEAT 0282\_19\_2406; June 24, 2020

### Implications for practitioners

When considering whether discrimination on the basis of disability is justified, the tribunal must properly balance the needs of the employer against the discriminatory effect of the decision. A flawed internal procedure and an accepted finding of unfair dismissal does not change the test which must be applied, and this must be the focus of the tribunal.

### Facts

Mrs Boyers (B) had been employed on a permanent basis by the Department of Work and Pensions (DWP) as an Administrative Officer since September 15, 2006. She suffered from migraines and following a referral to Occupational Health in September 2013, had been accepted as disabled under the meaning of s6 of the Equality Act 2010 (EA).

B's condition deteriorated; she developed anxiety and depression, and was on long-term sickness absence. She raised several grievances of bullying and harassment which the DWP investigated and dismissed. A trial period at another office was proposed which B accepted, but it was ultimately deemed unsuccessful and B was dismissed on January 9, 2018.

### Employment Tribunal

B brought claims of unfair dismissal and disability discrimination in the ET. She also brought claims of disability-related harassment, and a failure to make reasonable adjustments for a disability recognised under s6 EA.

The DWP accepted that B was disabled and that the dismissal was unfavourable treatment arising from her disability. The DWP confirmed that B was dismissed for reasons of capability and submitted that the discrimination was justified on the basis of legitimate aims: i.e. the protection of scant public resources and or/ the strain placed on B's colleagues by her continued absence.

The DWP submitted that it had expended huge resources in managing B during her illness and that her absence had impacted on her colleagues who were required to cover B's duties while still providing adequate customer service in their own work. As such, the decision to dismiss was justified.

The ET accepted that B had been dismissed for a potentially fair reason, namely her capability, and that the reasons for the dismissal were the aims identified by the DWP. It also accepted that the aims were legitimate ones.

However, the ET found that the decision to dismiss was not proportionate, and focused upon the process which led to the dismissal, highlighting the following:

- a. DWP's failure to seek up-to-date medical evidence which would confirm the reason for B's absence and her ability to return to work.
- b. DWP's failure to apply its own policies in respect of consultation and periods of review.
- c. The conclusion that B was deliberately not complying with absence procedures and was being intentionally obstructive was unreasonable.
- d. DWP's failure to give any serious thought to the alternatives to dismissal.

The ET considered that other steps could have been taken before dismissing B (such as the positive trial period at another site which was abandoned) and pointed to a lack of care and compassion by the decision-makers in B's case.

B's claims of unfair dismissal and discrimination arising from disability (s15 EA) were upheld. Her additional claims of harassment and a failure to make reasonable adjustments were dismissed.

### Employment Appeal Tribunal

The DWP appealed the findings of unfair dismissal and disability discrimination to the EAT.

At the sift stage, Judge Gullick considered that there was no merit in the grounds of appeal against the finding of unfair dismissal; but that there were reasonable prospects of success against the finding of unjustified discrimination.

The DWP submitted that the ET had focused on the process of the investigation, rather than the proportionality exercise: balancing the employer's legitimate aims against the discriminatory decision to dismiss. The DWP also highlighted that the ET had accepted the decision to dismiss was based on the legitimate aims identified, yet still found that the discrimination was not justified.

B submitted that the critical evaluation of the DWP's

dismissal process was essential in order to determine whether the outcome of dismissal was necessary to achieve the legitimate aims. However, she accepted that the ET had not addressed the impact of her continued employment on public resources or on her colleagues.

The appeal was upheld. The EAT agreed with the DWP and ruled that the ET did not address the issue from the correct perspective. In order to decide whether the discriminatory measure (in this case, dismissal) is proportionate in the context of the legitimate aim being pursued, a tribunal must weigh the real needs of the undertaking against the discriminatory effect of the proposal. An objective balance is required.

The EAT noted that the decision of the ET did not set out the evidence of justification provided by the DWP. The DWP claimed such evidence was produced in the hearing but was not acknowledged in the judgment. B submitted that it was never provided.

As the parties could not agree whether justification evidence had been produced, the EAT remitted the decision to the ET, in light of the judgment, to decide whether the dismissal was proportionate.

#### Comment

The ET's focus must now be whether the DWP can justify the decision to dismiss B, and substantiate its justifications of an excessive burden on B's colleagues, and the constraints of the public purse.

The EAT did not find that the dismissal was proportionate; rather it ruled that the ET must consider the issues from a different perspective. The issue of whether evidence for the justification of B's dismissal can be produced (and relied upon) will be crucial. The EAT did note in its decision that while the DWP claimed such evidence was submitted to the ET, it could not identify this evidence in the appeal.

If the DWP cannot provide satisfactory evidence to support their defence, B's claim of disability discrimination will again be upheld.

However, the EAT's decision is a reminder that a flawed investigation process (where the dismissal was accepted as unfair and based on the claimant's disability) does not negate the need for a proper balancing exercise of aims and proportionality.

In an era of economic recession and rising redundancies, the proposition that public bodies can use the limitations of the public purse, and the perceived burden on other employees, to justify dismissing disabled employees is a worrying one.

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## Recommendations in reasonable adjustment cases

*Hill v Lloyds Bank* [2020] UKEAT/0173/19/LA, UKEAT/0174/19/LA, UKEAT/0233/19/LA; March 6, 2020

#### Implications for practitioners

The EAT in this case found that giving an employee an undertaking can be a reasonable adjustment for an employer. The EAT also provided insight into what recommendations ETs can give pursuant to s124 Equality Act 2010, ruling that there is no valid objection to the making of recommendations with financial implications. The EAT also set out some guidance on how recommendations should be formulated.

#### Facts

The claimant (SH) was disabled suffering from reactive depression which she alleged arose from bullying she experienced at the hands of two line managers whilst

working for the respondent (R). After a period of sick leave it was agreed that SH would return to work in a separate office away from the managers. However, SH was anxious at the possibility of having to work with the managers again and the thought of this prospect caused her severe distress and physical sickness.

SH therefore requested an undertaking from R that at no point in the future would she be required to work with the managers. SH requested a further undertaking that, if there was no alternative, she would be offered a severance package equivalent to a redundancy payment to terminate her employment. R stated that it could not provide an absolute guarantee that she would not work with the managers in the future. Further, it would not