

British Midland Airways v Hamed UKEAT/0292/10/RN

Keywords: Reasonable Adjustments – Burden of Proof – Proof of Adjustment

C succeeded in a claim of disability discrimination in the ET. R appealed firstly on the basis that the ET had focused on what adjustments R had *considered* rather than what adjustments it should have *made*. Secondly R argued that the ET failed to set out the steps R should have taken to prevent the PCP causing the disadvantage.

FACTS

C was a flight supervisor who became disabled as a result of slipping on some stairs. R moved C into an administrative role but later, following a TUPE transfer, C was told that it was R's policy that flight staff were only placed in administrative roles if they were pregnant and C was placed on long term sick leave. After 7 meetings to discuss C's attendance R terminated C on the grounds of incapability. During this time a number of alternative roles arose but R did not think that they were suitable. However, R neither considered nor produced any evidence about what adjustments could have been made to those roles. Furthermore R did not consider or produce any evidence about whether C could be accommodated in any other way.

The ET held that the PCP was that, in order to remain in employment, C had to be physically able to do her work and that therefore her comparators were others who were able to do the work and were not liable to be dismissed. The ET was scathing about R's approach to dealing with C's disability and held that R had not even considered its duties under the DDA even though it ought to have known that C was disabled.

HELD

HHJ Birtles rejected the argument that the ET focused on what *effort* R had made rather than on what had actually been done. The ET had carefully considered all the evidence, including what had been done and what had not been done. HHJ Birtles held that the comments about R's failure to consider reasonable adjustments simply reflected the fact that it was surprising that an organization of R's size had simply shut its eyes to the possibility of C being disabled.

HHJ Birtles rejected R's defence that no specific post had been identified by the ET or C. His Honour stated at paragraph 27 *"It is not for the employee to suggest jobs. It is not for the employee to suggest what adjustments could be made. It is for the employer to do so. The duty is on the employer to make the investigation. That is for the very obvious and sensible reason that those are matters which are within the employer's knowledge."*

COMMENT

HHJ Birtles' comments in para.27 appear to contradict the numerous authorities which follow *Tarback v Sainsbury's Supermarket* [2006] IRLR 664. However the judgment might be explained by a proper application of the burden of proof (cf: *Project Management Institute v Latif* [2007] IRLR 579). When rejecting R's appeal His Honour relied upon the paucity of evidence produced by R. R had failed to explain why the vacancies (or other arrangements) that existed could not be modified to make them suitable. The requirement for R to explain its conduct is consistent with C having discharged the burden of proof and, seen in this context para. 27 is not as controversial as it seems (NB – there appears to be a mistaken reference to Claimant rather than Appellant in the last paragraph).