

Marks & Spencer v Powell UKEAT/0258/10/LA

Keywords: Reasonable Adjustments – Comparator - Constructive Dismissal

ET held that the R had failed to make reasonable adjustments and that C had been constructively dismissed. Appeal allowed.

FACTS

C was an employee of Marks & Spencer who was disabled. She suffered from Tourette's syndrome and related OCD, stress and anxiety. R was aware that a few days before C went off sick she was caught shoplifting in another store on the same street as R's store. R told C that she would be subjected to disciplinary proceedings on her return to work. C stated that the shoplifting was a result of her Tourette's syndrome and asserted that "*it would help immensely if I could return to work without the fear of disciplinary proceedings*". R did not respond to this suggestion but focused on whether C could return to work. C resigned and claimed constructive dismissal and disability discrimination.

The ET held that the provision, criterion or practice applied by R was that C should return to work prior to any disciplinary proceedings being taken against her and that the comparator was a person who was on long term sick leave but who was not threatened with disciplinary proceedings immediately on her return to work. The ET held that it would have been a reasonable adjustment to have completed the disciplinary procedures to determine whether C would be able to return following her sick leave. The ET also held that this amounted to a constructive dismissal.

HELD

The EAT overturned the ET's findings on reasonable adjustments. HHJ Birtles held that the ET's comparator was incorrect. The proper comparator was identified by reference to the disadvantage caused by the relevant arrangements – in this case the suspension of all work related issues including disciplinary action while C was sick. HHJ Birtles identified the correct comparator as a non-disabled person on long term sickness absence who was threatened with disciplinary proceedings on his return to work. HHJ Birtles said that compared to that person C was not substantially disadvantaged. In finding that there was no substantial disadvantage HHJ Birtles also overturned the ET's finding that C was not capable of returning to work until disciplinary action was concluded. Neither C herself nor the medical evidence suggested that she was *incapable* of returning to work. Finally HHJ overturned the ET's finding that it was a reasonable adjustment to commence disciplinary proceedings during sickness absence. This finding was not supported by the evidence and it would have been unreasonable to commence the disciplinary proceedings before C had seen a psychologist and while she was on sick leave.

COMMENT

The most interesting aspect of this case is that the approach to the comparator does not appear to accord with the established authorities (although the reasoning is sparse). An application of the principles in *Smith v Churchills Stairlifts* [2006] IRLR 41, requires a comparison not only with a person subjected to the arrangement but also with someone who was *not* disadvantaged by that arrangement. HHJ Birtles does not seem to have applied the second part of this test. For more commentary on this issue see the article *Comparing Comparators* (NLJ March 2011) in the Articles Tab.