

Salford NHS Primary Care Trust v Smith UKEAT/0005/11/JOJ

Keywords: *Reasonable Adjustments – Constructive Dismissal – Light Duties – Career Break*

C was a physiotherapist who suffered from chronic fatigue syndrome. She went on long term sick leave and was unable to return to her post or to perform any productive work. She claimed that R had failed to make adjustments to facilitate her return to work. The ET upheld her claim and R appealed.

FACTS

C went on sick leave on 29.03.07. She was certificated with a chest infection but did not return to work because of post viral fatigue syndrome and in fact she was never certified for work again in *any* capacity. R's OH physician advised that C was not fit for work but that R should do a number of things to prepare C for an eventual return to work such as carrying out a stress risk assessment or an optional career break. OH expected that in the long term C would make a good recovery. R explored with C other options for redeployment but C did not consider any of the options to be suitable. Eventually R wrote to C stating that it would have to consider whether or not to terminate her employment. When C received this letter she resigned and claimed that she had been unfairly dismissed and discriminated against.

HELD

The ET held that R had failed to make the reasonable adjustment of providing C with something to do by way of rehabilitation such as 2 or 3 hours work a week. C argued that this would have allowed her doctor to confirm that she was fit to work. The ET also held that this had led to C's resignation and that she therefore had been constructively unfairly dismissed. R appealed and argued that the adjustment referred to by the ET was not in law a reasonable adjustment (relying upon *Tarbuck v Sainsbury's Supermarkets Ltd* [2006] IRLR 664). The EAT upheld the appeal. It considered that the PCP was the expectation that C would perform her full role within the contracted hours and that C was placed at a substantial disadvantage by this as she was unable to work full time as a result of her disability. The EAT held that *"adjustments that do not have the effect of alleviating the disabled person's substantial disadvantage ..as we have set it out above are not reasonable adjustments within the meaning of the Act. Matters such as consultations and trials, exploratory investigations and the like do not qualify."* The proposed career break was not a reasonable adjustment because it did nothing to alleviate the substantial disadvantage. The EAT also rejected the notion that non-productive "light duties" was a reasonable adjustment although its reasons for doing so are unclear. There is a suggestion that the light duties would not have "mitigated" the effects of the PCP.

COMMENT

The EAT in this case appeared to require the PCP to actually "prevent" the disadvantage. There is a lack of clarity from the EAT over precisely how effective an adjustment must be before it is obligatory to make it (see the **2011 Q2 Newsletter**). The effectiveness of an adjustment may be better dealt with when considering whether the adjustment was reasonable rather than when considering whether the duty arises. For instance, in the above case it is unclear why allowing C to work for 2 hours a week for as long as it took for her to recover would not have done something to alleviate the disadvantage of not being able to work full time. The medical evidence indicated that she would eventually recover. Allowing her to work a few hours would have kept her in contact with the workforce, would have given her some income and would have allowed her to slip more easily back into full time work once she had recovered. The real question was whether or not it was reasonable for the employer to have been required to provide her with this sort of work in these circumstances.