Disability discrimination: Employer who required an employee to attend an interview in a redeployment process failed to make a reasonable adjustment

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In this case the EAT considered whether an employer had failed to make reasonable adjustments for a disabled employee in a redundancy exercise. It also considered whether the employee had been subject to discrimination arising from disability.

Facts

Mr Charles was employed by London Borough of Southwark (Southwark) as an Environmental Enforcement Officer at grade 9. In March 2011, he was told that his position was to be deleted, but that he had been ringfenced for 3 redeployment opportunities. He interviewed for a role as a Noise Support Officer, a grade 7 post. He was one of 10 candidates for 6 posts and was unsuccessful. He asked to join the redeployment pool, which would give him three months to find an alternative post and was told that his employment would terminate on 3 August 2011. On 13 May 2011, his GP signed him off sick for three months due to sleep paralysis agitans and depression. The former is a condition which meant that Mr Charles woke up at night, paralysed, and so felt unable to go back to sleep. This was the first that Southwark knew of his disability and its cause. It referred him to its occupational health provider (OH). At this time the employees in the redeployment pool were invited to interview for further Noise Support Officer posts, but Mr Charles did not express an interest. On 25 May 2011, OH assessed Mr Charles by telephone and advised "no adjustment required at present". However, on 17 June 2011, OH advised that Mr Charles was not fit to attend administrative meetings. On 29 July 2011, Southwark confirmed Mr Charles's dismissal date of 3 August. Mr Charles appealed, following which he was sent an email asking whether he still wished to be considered for a Noise Support Officer post. Noting that he was signed off sick until 30 August 2011, he was asked to let Southwark know when he might be well enough to attend an interview.

On 4 August 2011, Mr Charles was told that his dismissal was being put back to 26 August 2011. The following day his GP issued a further sick note, expiring in November 2011. Mr Charles expressed an interest in the Noise Support Officer post, asked whether it involved shift work and unsocial hours and advised that he would confirm whether he was interested in the post once he had that information. On 9 August 2011, he was told that the post involved shift work, but if Mr Charles was successful at interview Southwark would consider reasonable adjustments. Mr Charles did not reply.

On 11 August 2011, Southwark asked OH if Mr Charles was well enough to attend an interview. OH made several attempts to contact Mr Charles but was unable to do so because he had switched off his mobile phone. Southwark emailed details of four vacancies to Mr Charles and asked him to let her know if he was interested. He did not reply. On 25 August 2011, Southwark confirmed that Mr Charles' employment would terminate the following day "in the absence of receiving an expression of interest from you regarding vacancies" and "no indication as to whether you are able to attend interviews". After his appeal against dismissal was unsuccessful, Mr Charles brought claims for unfair dismissal and disability discrimination (failure to make reasonable adjustments and discrimination arising from disability).

The tribunal held that Mr Charles had been dismissed for redundancy and that his dismissal had been fair (there had been adequate consultation and he had been offered the opportunity to apply for other jobs). However, he succeeded in his disability discrimination claims. From 17 June 2011 onwards Southwark had known that Mr Charles suffered from a disability which prevented him from attending administrative meetings, which included redeployment interviews. Southwark had failed to make reasonable adjustments by dispensing with the need for him to attend an interview. As a result he was placed at a substantial disadvantage by being dismissed. The tribunal noted the suggestions made by Mr Charles's trade union representative that an interview could have taken place at the Mr Charles' home, or information could have been required from him in advance, or a less formal interview process could have taken place. It also noted that, as Mr Charles had been an employee since May 2008, managers could have been consulted for an assessment of his abilities for a post which was two grades below his current post. Southwark appealed to the EAT who dismissed the appeal.

The EAT agreed that requiring those in the redeployment pool to attend an interview for potential redeployment posts was a practice. This practice put Mr Charles at a substantial disadvantage because he could not attend an administrative meeting, which sensibly included an interview, so he could not demonstrate that he was qualified for any of the jobs for which he might have applied. The EAT also found that the tribunal had been entitled to reach the conclusion that Mr Charles had also suffered discrimination arising from a disability: Southwark had imposed a requirement on Mr Charles that he attend for interviews and so treated him unfavourably because of something arising in consequence of his disability, which Southward

did not attempt to justify.

What this means for employers

This case would be easy to misunderstand. The EAT found that Mr Charles should not have been subjected to a formal interview process. They did not say that his suitability for the post could not be assessed in some other way or that it would have been a reasonable adjustment to give Mr Charles a role. The case still leaves scope for employers to make reasonable adjustments, which fall short of automatically appointing disabled employees to vacancies in redeployment exercises. It will be for each employer to consider in each case how it can make adjustments to assess any disabled employees alongside other candidates.

London Borough of Southwark v Charles