Chief Constable of South Yorkshire Police v Jelic

In *Chief Constable of South Yorkshire Police v Jelic*, the EAT extended the scope of reasonable adjustments in disability discrimination to include a requirement to consider swapping job roles between employees. Matthew Snarr reports

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The facts

Mr Jelic, formerly a serving police officer, was medically retired by the police force on the basis that he suffered from a chronic anxiety syndrome and was unable to undertake normal policing duties. He worked successfully as a police officer in a non-confrontational role within a Safe Neighbourhood Unit for more than two and a half years.

In June 2007, the respondent's occupational health department confirmed that the claimant's condition was likely to be permanent. While he was fit to carry out his current duties, should the nature of his role change to require him to engage in face-to-face contact with members of the public he would not be able to carry out such duties. Changes within the claimant's role at the SNU meant that officers would be required to deal with members of the public and incidents.

The claimant was medically retired without proper consideration of the respondent's duty to make reasonable adjustments. The claimant argued at tribunal that his role ought to have been swapped with that of another police officer who was able to carry out confrontational duties but worked in a non-confrontational role. The tribunal agreed with the claimant. It found that there had been a 'spectacular failure to consult' and that the adjustment of the job swap contended for was reasonable. The claimant's alternative argument that he should have been deployed into a civilian staff, non-confrontational role was also accepted. The respondent appealed.

The appeal

The appeal concerned a broad range of issues relevant to disability discrimination law. The respondent argued that to find as a matter of law that swapping one employee's job with another's constituted a reasonable adjustment was to go beyond the wording of s.18B of the Disability Discrimination Act 1995. The respondent contended that parliament did not intend such a construction of the statute and that such an approach unnecessarily extended the requirement for employers to positively discriminate in the employee's favour, where appropriate, as established in *Archibald v Fife Council*.

The respondent further contended that it had not been given sufficient notice of the argument that a job swap was being contended for as an appropriate adjustment. On appeal, the EAT was invited to narrow the test of identification of reasonable adjustments sought as set out in *Project Management Institute v Latif*. Despite the fact that the claimant had identified within the pleadings the deployment into a role with 'non-public facing duties' and had referred to the specific post in his witness statement, the respondent argued that in the context of multiple allegations of discrimination in a complicated claim it was incumbent upon the claimant to identify the reasonable adjustment contended for in precise terms at an earlier stage.

The respondent also argued, notwithstanding its own failure to consult, that the tribunal ought to have constructed a hypothetical analysis of what would have happened if it had consulted properly. It submitted that even if it had consulted properly the claimant would not have accepted such a civilian staff role, that he would have been unsuited to the role, and that there was insufficient evidence to prove such a role would have been available or suitable.

The EAT decides

The EAT held that there was no basis to suggest that swapping job roles goes beyond the intention of parliament. Mrs Justice Cox held that the examples in s.18B(2) of the DDA were non-exhaustive and that the test of reasonableness was an objective one depending on the circumstances of the individual case. The EAT agreed with the authority of *Southampton City College v Randall* in which a differently constituted EAT held that s.18B(2) did not preclude the creation of a new post in substitution for an existing post as being a reasonable adjustment.

The EAT rejected the argument that the claimant was required to set out his case in any more specific detail than he had done. *Latif* was endorsed as the correct approach. The respondent ought to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable it to engage with the question of whether it could be reasonably achieved or not but the claimant was not necessarily required to spell out in precise detail the exact step contended for.

The EAT agreed with the claimant that it was not necessary for a tribunal to reconstruct a hypothetical analysis of what would have happened if consultation had occurred. Such an approach

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sought to add a further, unwarranted element into the task to be undertaken by tribunals in cases where employers have failed to carry out any consultation and are faced with reasonable adjustment claims. The argument ran contrary to the inverted burden of proof provided by s.17A of the DDA and the guidance in *Tarbuck v Sainsbury's Supermarkets Ltd*, that an employer cannot use a lack of knowledge as a shield to defend a reasonable adjustments claim.

The respondent succeeded in its criticism of the tribunal's reasoning on a separate point, regarding the economic viability of retiring Mr Jelic from his police role, with or without a medical pension, and redeploying him into a civilian role. The case has now been remitted for determination of remedy by the original tribunal to consider the ramifications for remedies that Mr Jelic's post ought to have been swapped with the post of another police officer.

Comment

This case is the first authority in employment law to confirm that the provisions of s.18B(2) of the DDA may require an employer to consider swapping roles between employees as a reasonable adjustment. It extends the ambit of the duty for employers to positively discriminate in the employee's favour, where appropriate, as established in *Archibald v Fife Council*.

Jelic widens the scope of reasonable adjustments, especially in the police force, and it remains to be seen as to the extent to which the tribunals and appellate courts will consider that an adjustment of swapping employees' roles is reasonable. One factor that is likely to be material is the consent of the other affected employee and the extent to which the organisation is governed by a command structure, ie can the employer simply order the change if the employee is working for the police or army as against a more consensual hierarchical management structure in the private sector.

The level of skill and experience required to undertake a particular job role is likely to be a relevant consideration, ie the more menial the job the easier it will be to contend for a swap. Legal advisers acting for employers ought to be aware that if their clients do not consider the potential for a job swap at the time, they leave themselves open at a later date to the contention that a job swap would have been reasonable. The larger the employer, the greater the risk that this argument will succeed. A supporting statement by an employee's former work colleague retrospectively agreeing to a job swap, post-dismissal, may also cause difficulties.

The EAT's rejection of the respondent's argument that a hypothetical test ought to be applied to what would have occurred if consultation had taken place continues the law's unsympathetic approach to employers who do not consult. This submission cleverly sought to deploy a 'second line' of defence beyond the simple consideration of whether the adjustment was reasonable into more complicated, factual considerations such as whether the employee would have engaged with the adjustments proposed.

The EAT's emphasis of the interplay of s.17A of the DDA and the guidance in *Tarbuck* that failure to consult cannot be relied on as a shield to reasonable adjustment claims will need to be considered carefully by legal advisers in cases where there has been a substantial failure to consult.

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Case referred to:

- *Chief Constable of SouthYorkshire Police v Jelic* [2010] IRLR 744
- *Archibald v Fife Council* [2004] IRLR 651
- *Project Management Institute v Latif* [2007] IRLR 579
- *Southampton City College v Randall* [2006] IRLR 18
- *Tarbuck v Sainsbury's Supermarkets Ltd* [2006] IRLR 664