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When Making Reasonable Adjustments Is a Real Trial (UK)

Article By:

David Whincup

Everyone knows that if there is something about a job which causes a disabled employee particular difficulties with it, the employer is under an obligation to make reasonable adjustments to the role to reduce or remove that disadvantage.

But suppose that there are no adjustments to the role which can be made. Does that duty then extend to looking at other roles for the employee (yes, obviously) and then just how far do you have to go as employer to make that move work? Based on the EAT's recent decision in ***Miller – v – Rentokil***, perhaps very much further than you may have thought.

Mr Miller was engaged in a largely field-based role for Rentokil. He became ill and it was agreed by both sides that he could no longer safely do that job. He applied for a more junior administrative role as an alternative but scored poorly on a verbal test and even worse on a numerical assessment, so was unsuccessful. In the absence of any other alternative position he was then dismissed on capability grounds. That was disability discrimination, he said, and in particular a failure by Rentokil to make reasonable adjustments. It should as a minimum have offered him the admin role on a trial basis and seen how he got on before deciding to pull the trigger on his employment.

The Employment Tribunal agreed and Rentokil's appeal was given fairly short shrift by the EAT, creating some daunting but useful learning points for employers considering this question in future. In no particular order:

- There is no obligation on an employer to create a supernumerary job just to house a disabled employee;
- But if you have a vacancy which is even potentially suitable, you will need very good reason for not offering it to the employee, as a minimum on a trial basis;
- "Very good reason" for those purposes does not automatically include any number of normally entirely legitimate recruitment considerations, such as the employee being over-qualified, not the best candidate, not quite there technically or in terms of soft skills, or you're having substantial reservations on objective grounds as to whether he will make a success of it;
- Although the EAT did not say so in terms, we are effectively looking at a test akin to that under Regulation 10 of the Maternity & Parental Leave Regulations for employees under threat of redundancy while on maternity or other statutory leave entitlement. The EAT quoted with approval an earlier case saying that "*to the extent that the duty to make reasonable*

adjustments requires it, the employer is not only permitted but obliged to treat a disabled person more favourably than others" – in other words, that employee may well have to be given a role which in normal circumstances he/she would not get.

- In this case, Rentokil was unable to evidence that it had recognised that as a disabled person, Miller had that particular entitlement. There was no cogent evidence that it had given him any form of priority or preference in the recruitment process for the admin role. Instead, it appeared that it had applied relatively standard recruitment criteria to him, the same as to all the other candidates, and so had actually made no adjustment for him at all;

- Rentokil argued that Miller had performed really badly in the verbal and mathematical tests for the role, scoring scarcely 50% and less than 25% respectively. Surely it could not be expected to give him the role in those circumstances? What was the point of tests if people who failed them so comprehensively could still be deemed capable of doing the job? That would be the EAT deciding what level of achievement should be sufficient for the job, not something it was remotely qualified, let alone entitled, to do.

  The EAT disagreed – yes, ultimately the question of whether an adjustment was reasonable was an objective decision of fact for it to make and not an issue for the reasonable belief of the employer. In reaching its decision, an Employment Tribunal would of course take into the account the employer's evidence and views, but it was not bound by them if there was also evidence pointing the other way. Here, for example, there was testimony that Miller's former manual role and the new administrative position overlapped to an extent in terms of the generic skills required, that Miller had not struggled with the mathematical or verbal elements of the manual role and that because the admin role actually supported the previous manual job, he had greater knowledge of how it should work than any other candidate.

  It was also true that Miller wasn't brilliant at spreadsheets, acknowledged the EAT, but he could surely easily be trained in that. Here we must pause for a moment and bow our heads in memory of all the members of the Squires' IT and Training Teams who have gone away, broken, after trying to teach me to amend Word documents. There must be a right for the employer in such cases to adduce evidence of failed previous attempts to teach the Claimant something, anything, of benefit to his role. However, if it hasn't even tried, it will be very hard put to argue that the employee would be impervious to such training.

- Perhaps the most alarming part of the EAT's judgement is the placing of the burden so squarely upon the employer to show why giving the disabled employee the new role on a trial basis would be so bad. In effect, imposing an obligation to show the worst that could happen over the course of that trial, and then see if that would be so grim as to outweigh the potential benefit to the employee if the trial were a success. Of course, there are roles where not being at the top of one's game could have immediate and serious consequences – building bridges, wiring nuclear power stations, performing appendectomies, etc. – and in such cases, anything less could justifiably be rejected as an adjustment too far. However, in your average office admin function or low-level Accounts role or unskilled manual job, how easily could the employer point to any really serious adverse consequences from a short trial period not going well?
- There is no requirement that the employee will necessarily succeed in the new role so long as there is a realistic possibility that he might. The Employment Tribunal found that there was only a 50/50 chance that Miller would make a go of it, but that was enough to require Rentokil to have done so. There must presumably be a point where that likelihood gets so small that it

becomes reasonable not to do it, but it would be a mistake to assume that this was as much as 50% downwards.

- The ET here concluded that a four-week trial period would be sufficient. That was a measure of the relatively limited skill-sets at issue and of how quickly Rentokil could reasonably assess whether Miller had attained them. For more complex roles a longer period is likely to be appropriate. This would perhaps not be as long as the employee's original probationary period, but long enough to rebut the inevitable argument that it cannot be a reasonable adjustment to apply a trial period too short to allow any necessary familiarisation or training to take effect.
- The Employment Appeal Tribunal also supported the ET's unhappiness that the decision not to give Miller a crack at the admin job was not made by anyone who had worked with him previously or who therefore knew any more about him than of any other candidate. It was still more miffed that that manager had not been at the hearing to give evidence. Where a conclusion is reached that a disabled employee should not be offered even a trial in an alternative role, it should be on the basis of the widest possible feedback on that individual and direct evidence of the relevant thought-processes should be retained and presented.

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