

ARTICLE: Swapping employees' roles is a reasonable adjustment

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Introduction

Once an employee is found to have a disability, an employer has a duty to make reasonable adjustments to help the employee continue working. A recent case involving the police has found that swapping the role held by a disabled employee for a role held by another employee could be held to be a reasonable adjustment. This obviously expands the scope of options which an employer must consider when an employee is classed as disabled, and could cause resentment among other employees.

The facts

Mr Jelic joined the Police Force as constable in 1997. His service was uneventful until February 2002. Whilst seconded to the Traffic Department in Sheffield, he was diagnosed with chronic anxiety syndrome. He was off-work sick until July 2002 when he returned on reduced hours and recuperative duties.

Following various other periods of sick leave, the occupational health adviser Dr McAllister suggested that Mr Jelic should return to work on reduced hours in a "non-confrontational environment". For almost three years, he worked hard and conscientiously. In November 2004, Mr Jelic was assigned to the Community Service Desk in Stainforth where he had little face to face contact with the public.

In 2005, three units including the Community Service Desk were merged to form the Safe Neighbourhood Unit (SNU). Mr Jelic continued a similar role under the SNU, moving to the Doncaster Police HQ. In September of the same year, Dr McAllister's report on Mr Jelic stated that while he was doing well in his role, he would be unlikely to return to front-line duties before he completed his service in six years' time.

Mr Jelic continued to work at the SNU very successfully, finding his own niche in inputting data onto a database which required specialist knowledge and expertise. He worked to a consistently high standard and fitted in well with his colleagues who regularly asked him for advice.

In June 2007, Dr McAllister's latest report was sent to Karen Lilley, the District Disability Liaison Adviser, and Sergeant Gregory, Mr Jelic's supervisor. This report stated that Mr Jelic's condition was now a fixed feature unlikely to change. He was perfectly able to carry out his existing role, but would struggle if more public contact was required.

Ms Lilley wrote to the Senior Personnel Officer and Disability Liaison Adviser for the Force. She noted that the role of the SNU constable had evolved and such officers were now required to deal directly with members of the public with which Mr Jelic would struggle. Ms Lilley wanted advice on whether she should proceed with the Unsatisfactory Performance Procedure (UPP), whether Mr Jelic should be placed elsewhere or should be medically retired.

Following various letters, Chief Supt Redhall eventually asked the Absence Management Team to start the medical retirement process, having assumed that all reasonable

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adjustments had already been exhausted.

A meeting occurred on 9 July 2007 involving Mr Jelic, his supervisor Sergeant Shaw, Ms Lilley and Acting Inspector Gregory. Inspector Gregory told Mr Jelic that his career had to advance to the next level and he had to move out his comfort zone. There was no discussion of reasonable adjustments and the decision was made to refer him for the possibility of medical retirement.

On 6 August Mr Jelic went on sick-leave for an operation and did not return before his retirement in May 2008. Dr McAllister reported that the medical retirement issue had exacerbated Mr Jelic's condition and contributed to his absence.

In the meantime, in January 2008, Mr Jelic was sent to another doctor, Dr Hynes, who reported that he was permanently disabled from performing the duties of a police officer. A report was then prepared by Inspector Gregory and sent to the Chief Constable. On 7 April Mr Jelic received a letter stating that his retirement on medical grounds had been approved. Mr Jelic brought his case before the Employment Tribunal.

The Employment Tribunal ruling

There was no doubt that Mr Jelic was disabled within the meaning of the legislation. The Tribunal held that Mr Jelic had not made out a case for unjustified disability related discrimination, which left whether there had been a duty and a failure to make reasonable adjustments. Mr Jelic asserted that if the Force had made reasonable adjustments, he would not have needed to be retired.

Examining the issue, the Tribunal found that there was a provision, criteria or practice in place that all SNU officers carry out face to face duties, and Mr Jelic was at a substantial disadvantage because of it. As such, there was a duty on the Force to make reasonable adjustments. The question then became – had there been a breach of this duty? The Tribunal held that there had been.

Some criticism was levied by the Tribunal against the Force. In particular, it was noted that neither Ms Lilley nor Chief Supt Redhall had received training of how to handle disability issues and that there had been no consultation with Mr Jelic. However, the Tribunal attempted to put aside such subjective considerations, reiterating that what adjustments should be made is an objective assessment.

Mr Jelic had advanced three possible adjustments that might have been made. Firstly, that he maintain his current role. The Tribunal held that this was not reasonable – the role of the SNU officer was changing and Mr Jelic could not adapt due to his disability. A reasonable Chief Constable would need to balance his duty towards Mr Jelic with his duty to the public to provide efficient policing.

Secondly, that Mr Jelic should have been moved into a non-client-facing police officer role. The Tribunal noted that the Force was a large organisation and so any number of such positions might be available. In particular, there was the role of PC Franklin (National Crime Recording Standards officer) which would have ideally suited Mr Jelic. Although it was thought that PC Franklin might object to moving to having his position usurped by Mr Jelic, the Tribunal noted that PC Franklin was not on restricted duties and could carry out Mr Jelic's role without a problem. Furthermore, the Force was "a disciplined service", and so PC Franklin could simply be ordered to move.

Thirdly, the Tribunal agreed that Mr Jelic could also have medically retired but then offered fresh employment as a civilian. Whilst this would have involved a significant reduction in

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salary, the Tribunal thought that a reasonable Chief Constable would have considered such an alternative, as well as the second option of “swapping” roles.

The Employment Appeal Tribunal (EAT) ruling

The Force raised three grounds of appeal. Firstly, it advanced the argument that it was not open to the Tribunal to find that “swapping” was a reasonable adjustment. This went well beyond what was envisaged by the legislation and PC Franklin’s role was clearly not a vacant position in the strictest sense. It also emphasised the significant implications and uncertainty such an adjustment would have on other employees.

In response, the EAT noted that the disability legislation, unlike other discrimination legislation, enables a measure of positive discrimination. Employers must make reasonable adjustments to assist the integration of disabled employees into the workplace. What is a “reasonable” adjustment is an objective test and the list given in legislation is only illustrative and non-exhaustive. Case law had shown that transferring to a vacant job was a reasonable adjustment and the EAT saw no reason why it might not also include creating a new job for a disabled employee “if the particular facts of the case support such a finding”. However, they were clear to add that this would not include creating new posts which were otherwise unnecessary.

The second ground of appeal was that real unfairness was caused to the Force in the way in which the Tribunal dealt with the matter. In particular, that it had not been given notice that the “swapping roles” adjustment was going to take such a prominent role and so they had failed to prepare for it. The EAT rejected this, holding that Mr Jelic had complied with a claimant’s duty to provide details of the “broad nature” of the adjustments he proposed.

The EAT added that perhaps the reason the Force was not able to put forward evidence in relation to this adjustment was in fact because it had given no consideration to any adjustments at all. As such, any disadvantage to them was caused not by the Tribunal, but because they had not consulted and so had no evidence at all.

The EAT dismissed the third ground of appeal, stating that it arose from a misreading of the Tribunal’s decision.

Conclusion

This case reaches an interesting conclusion, but its effect may be limited. After all, the Tribunal noted that PC Franklin could simply be ordered to move because of the nature of the Force, which will not be common to many workplaces.

However, the Tribunal emphasised that “swapping” was not akin to “bumping”, since PC Franklin would not be left without a job – he would have Mr Jelic’s instead. This reasoning could mean that such an adjustment might be applicable to employers in general. In addition, there is always the possibility that a clause in an employee’s contract which allows the employer to move their location or to assign them new or different duties from time to time, could come into play. In such a scenario, if proper consultation were carried out (unlike it Jelic’s case), if the roles were similar and the proposal was reasonable, it could be possible that an employer could find themselves under pressure to carry out such “swapping” in their own workplace.

No more specific guidance can be given since the EAT commented “what is required of employers in relation to adjustments is, of course, limited to what is reasonable” and that all such considerations are fact-specific, so it is impossible to specifically define what a reasonable adjustment might be.



What is universal to all employers is that the Tribunal commented that any disadvantage for the Force “stems from their own spectacular failure to consult”. The failure to consult meant that they were not adequately prepared for the Tribunal case itself and so were not able to provide themselves with the most robust defence. The EAT gave a harsh reminder that “an employer cannot use lack of knowledge as a shield to defend a reasonable adjustments claim”. All employers should take this as a warning to ensure adequate consultation is undertaken when dealing with disabled employees.

If you would like further information on this case or the issues addressed within it, please contact David Hill at dhill@davidsonlarge.com or Lucy Bond at lbond@davidsonlarge.com.

Please note that this article is for guidance only and does not constitute legal advice.

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