Competitive interview processes have the potential to disadvantage disabled candidates

[et_pb_section fb_built="1" _builder_version="3.0.100" background_image="http://davidk423.sg-host.com/wp-content/uploads/2017/09/bdbf_final-stages-1-4-1.jpg" custom_padding="|||" global_module="2165" saved_tabs="all" global_colors_info="{}"][et_pb_row _builder_version="4.16" min_height="66.4px" custom_padding="50px|||false|false" global_colors_info="{}"][et_pb_column type="4_4" _builder_version="4.16" custom_padding="|||" global_colors_info="{}" custom_padding__hover="|||"][et_pb_text _builder_version="4.16" _dynamic_attributes="content" text_font="|700|||||||" text_font_size="27px" background_layout="dark" custom_margin="0px|||" custom_padding="0px|||" global_colors_info="{}"]@ET-DC@eyJkeW5hbWljIjp0cnVlLCJjb250ZW50IjoicG9zdF90aXRsZSIsInNldHRpbmdzIjp7ImJlZm9yZSI6IiIsImFmdGVyIjoiIn19@[/et_pb_text][et_pb_text _builder_version="4.16" _dynamic_attributes="content" _module_preset="default" text_text_color="#FFFFFF" global_colors_info="{}"]@ET-DC@eyJkeW5hbWljIjp0cnVlLCJjb250ZW50IjoicG9zdF9kYXRlIiwic2V0dGluZ3MiOnsiYmVmb3JlIjoiIiwiYWZ0ZXIiOiIiLCJkYXRlX2Zvcm1hdCI6ImRlZmF1bHQiLCJjdXN0b21fZGF0ZV9mb3JtYXQiOiIifX0=@[/et_pb_text][/et_pb_column][/et_pb_row][/et_pb_section][et_pb_section fb_built="1" admin_label="section" _builder_version="4.16" global_colors_info="{}"][et_pb_row admin_label="row" _builder_version="4.16" background_size="initial" background_position="top_left" background_repeat="repeat" global_colors_info="{}"][et_pb_column type="4_4"

_builder_version="4.16" custom_padding="|||" global_colors_info="{}" custom_padding__hover="|||"][et_pb_text _builder_version="4.19.1" text_orientation="justified" hover_enabled="0" use_border_color="off" global_colors_info="{}" sticky_enabled="0"]

In the recent case of Hilaire v Luton Borough Council, the EAT held that a competitive interview process could disadvantage someone suffering from depression, meaning the duty to make reasonable adjustments would be triggered. However, it was also held that it will not necessarily be reasonable to dispense with the interview process altogether.

What happened in this case?

The Claimant suffered from depression and arthritis which caused him to suffer from lethargy, lack of motivation, problems with memory and concentration, persistent low mood, social disengagement and difficulty with normal social interaction. The employer was aware of the Claimant's disability.

A redundancy situation arose, and the Claimant was invited to apply for a role within the new structure. The employer gave the Claimant extra time to prepare his application and offered him support in doing so. As part of the process, the Claimant was required to attend an interview. He said he could not attend the interview on the basis that he was unwell. The employer asked when he would be able to attend, and he did not reply.

The employer wished to resolve the recruitment process. It had already interviewed 13 candidates who were awaiting a response. The employer considered whether there was any other way of testing suitability other than an interview but decided there was not as it would mean treating candidates inconsistently. Therefore, it set a deadline for the

Claimant's interview to take place.

Three days before the new interview deadline, the Claimant said he would not attend as he was unwell. However, it is worth nothing that a few days later he was well enough to attend an internal appeal hearing regarding a warning he had received. He also wrote to the employer a few days later stating that even if he had not been unwell, he would not have attended the interview as he had lost confidence in his employer.

The Claimant was dismissed by reason of redundancy. He brought a claim alleging that the employer had failed to make a reasonable adjustment to the recruitment process. He argued that the requirement to attend an interview caused him a substantial disadvantage as a disabled person suffering with depression. In his view, postponing the interview was not sufficient to remove the disadvantage. Instead, the employer should have dispensed with the interview altogether and slotted him into the role.

The Employment Tribunal dismissed claim, finding that that the Claimant could have engaged in the interview process, but had chosen not to do so. This meant that the Claimant was not disadvantaged by his disability in the interview process. The Claimant appealed.

What was decided?

The EAT held that a competitive interview process (in terms of both attendance and performance) could clearly cause substantial disadvantage to a disabled person suffering with the problems that the Claimant had, thereby triggering the need to make reasonable adjustments.

However, in this case, the EAT agreed with the Tribunal that the Claimant's disability had not, in fact, caused him to suffer a disadvantage. The Claimant's non-attendance at the interview was nothing to do with his disability. Rather, he

did not attend out of personal choice (because he had lost confidence in his employer). The fact that he had been able to attend the disciplinary appeal meeting at around the same time underlined this point.

Although the claim failed on causation grounds, for completeness, the EAT went on to consider the issue of the reasonableness of adjustments. In the EAT's view, the only adjustment that could have alleviated the potential disadvantage in this case, was to have slotted the Claimant into the role without an interview. However, the EAT concluded that this would not have been reasonable as it would have disadvantaged other candidates. The EAT noted that "making an adjustment is not a vehicle for giving any advantage over and above removing the particular disadvantage". It may be a reasonable adjustment in certain circumstances, but not where 13 other candidates were vying for the role and had already been through a competitive interview. In fact, in this case, there were no reasonable adjustments that could have been made.

What are the learning points for employers?

Although the Claimant lost, the important takeaway for employers is that it was found that a competitive interview process could substantially disadvantage a person with depression. Equally, this could be the case for people with other disabilities which would affect the ability to attend and/or perform well in an interview, for example, chronic fatigue syndrome, Long Covid or severe menopausal symptoms.

Where a worker is disadvantaged in this way, the duty to make reasonable adjustments will be triggered and employers must be proactive in considering what adjustments might help. There are a range of possible adjustments that might be suitable depending on the case, for example, conducting a shorter interview and/or conducting the interview remotely.

In some cases, slotting into the role without an interview might be a reasonable adjustment, but this will not necessarily be the case. The wider impact of a proposed adjustment will be relevant to whether or not it is reasonable.

Hilaire v Luton Borough Council

Brahams Dutt Badrick French LLP are a leading specialist employment law firm based at Bank in the City. If you would like to discuss any issues relating to the content of this article, please contact Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.

[/et_pb_text][/et_pb_column][/et_pb_row][/et_pb_section][et_pb_section fb_built="1" _builder_version="4.16" global_colors_info="{}"][et_pb_row _builder_version="4.16" global_colors_info="{}"][et_pb_column type="4_4" _builder_version="4.16" global_colors_info="{}"][/et_pb_column][/et_pb_row][/et_pb_section]